SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

APR 18 2013

Frank A. McGuire Clerk

Deputy

PEOPLE OF THE STATE OF CALIFORNIA **Plaintiff and Respondent,** **v.** **JOSEPH ANTHONY BARRETT,** **Defendant and Appellant.**	**No. S124131** **Imperial County Superior Court No. CF5733**

APPELLANT'S OPENING BRIEF

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

Honorable Joseph w. Zimmerman, Judge

LISA M. ROMO
2342 Shattuck Avenue
P.M.B. 112
Berkeley, CA 94704
(510) 644-2621
email: lromo@comcast.net
CA State Bar No: 134850

Attorney for Appellant
JOSEPH ANTHONY BARRETT

DEATH PENALTY

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE 7

STATEMENT OF FACTS 11

ARGUMENT

JURY SELECTION ISSUES

I. THE TRIAL COURT'S REFUSAL TO EXCUSE ALL EMPLOYEES OF THE DEPARTMENT OF CORRECTIONS AS PROSPECTIVE JURORS DEPRIVED APPELLANT OF AN IMPARTIAL JURY AND DUE PROCESS 91

A. Introduction 91

B. Appellant Repeatedly Sought to Have CDC Employees Excluded From the Jury Pool 92

1. Preliminary Jury Selection Proceedings 92

2. *Hovey* Voir Dire 95

3. Appellant's Written Motion to Exclude CDC Personnel From the Jury Pool 99

C. Appellant's Sixth Amendment Right to an Impartial Jury Was Violated by the Trial Court's Refusal to Find That All CDC Personnel Were Impliedly Biased 102

1. The Presence of an Impliedly Biased Juror Deprives a Criminal Defendant of His Constitutional Rights to an Impartial Jury 102

2. In the Particular Circumstances of This Case, CDC Employees Were Impliedly Biased as a Matter

of Law 107

3. The Trial Court Erred in Denying Appellant's Motion to Exclude All CDC Personnel From the Pool of Prospective Jurors 113

4. As a CDC Correctional Officer, Juror No. 12 Was Impliedly Biased and Appellant Is Entitled to a New Trial 116

5. This Issue Is Preserved for Appeal 119

a. A Defendant Should Not Have to Use All of His Peremptory Challenges in Order to Raise a Sixth Amendment Claim on Appeal 120

b. Appellant's Case Is an Exception to the General Rule 125

D. The Trial Court's Refusal to Exclude All CDC Personnel Also Violated State Law 127

E. The Trial Court's Error Also Violated Appellant's Fourteenth Amendment Due Process Rights by Undermining His Ability to Intelligently Exercise Peremptory Challenges 132

1. A Repeated Misapplication of the Law Which Deprives a Defendant of Peremptory Challenges May Deny Him Due Process 132

2. Appellant Could Not Intelligently Exercise His Peremptory Challenges 134

II. THE TRIAL COURT'S ERRONEOUS DENIAL OF APPELLANT'S *WHEELER* MOTION DENIED HIM OF HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS 139

A. The Discriminatory Use of a Peremptory Challenge Violates the Federal and State Constitutions 138

B. The Prosecutor Struck the Only African-American in the Panel of Prospective Jurors 142

C. The Trial Court's Denial of Appellant's *Wheeler* Motion Was Erroneous 146

1. Only the Third *Batson* Step Is at Issue 146

2. The Prosecutor's Failure to Question Lisa B. Regarding Her Feelings About Judging Others During *Hovey* Voir Dire Is Indicative of a Pretext 147

a. The Trial Court Permitted Broad Voir Dire During the *Hovey* Proceedings 147

b. Other Prospective Jurors Were Asked About Their Views on Judging Others 150

3. Comparative Juror Analysis in This Case Provides Evidence of Intentional Discrimination 153

4. The Trial Court's Denial of the *Wheeler* Motion Was Not Supported by Substantial Evidence 158

GUILT PHASE ISSUES

III. THE PROSECUTOR'S ETHICAL MISCONDUCT DENIED APPELLANT OF A FAIR TRIAL AND OTHER CONSTITUTIONAL RIGHTS 160

A. The Media Coverage of Appellant's Trial and the Prosecutor's Communication With Him 160

1. Pretrial Publicity 160

2. The Prosecutor's Communication With

Appellant 162

3. Additional Publicity 165

4. The Defense Request for Sanctions 165

B. The Rules of Professional Conduct Prohibit Ex Parte Communication With a Represented Party and Making Extrajudicial Statements Which Might Cause Prejudice .. 168

C. The Prosecutor Committed Misconduct 171

D. The Trial Court's Failure to Impose a Sanction for the Misconduct Deprived Appellant of a Fair Trial 175

IV. THE TRIAL COURT'S ERRONEOUS APPLICATION OF EVIDENCE CODE SECTION 1103(B), WHICH PERMITTED THE PROSECUTION TO ADDUCE MULTIPLE INSTANCES OF WEAPONS POSSESSION AND ASSAULT TO PROVE APPELLANT HAD A VIOLENT CHARACTER, PREJUDICIALLY VIOLATED HIS STATUTORY AND CONSTITUTIONAL RIGHTS 178

A. Introduction 178

B. The Facts 181

1. The Trial Court Recognizes That Richmond's Prior Conduct Is Not Bad Character Evidence ... 181

2. Testimony Regarding Richmond's "Strikes" 183

3. Appellant's Testimony 184

4. The Written Pleadings 186

5. Appellant's Testimony, Continued 190

6. The Trial Court's Ruling 191

7. Defense Request for a 402 Hearing 192

8. Trial Court's Limiting Instruction 192

9. The Prosecutor Elicits Evidence of Appellant's Violent Character 193

10. Additional Defense Objections Denied 195

C. The Trial Court Erred in Permitting the Prosecutor to Adduce Evidence of Appellant's Prison Misconduct Pursuant to Evidence Code Section 1103, Subdivision (B) 196

1. Section 1103, Subdivision (B) Only Applies When a Defendant Has Adduced Evidence to Show the Victim's Propensity to Commit Violent Acts 196

2. The Trial Court Misapplied Section 1103 When It Permitted the Prosecutor to Elicit Evidence of Appellant's Violent Character 199

D. The Trial Court Erred in Failing to Conduct an Adequate Section 352 Analysis of the Section 1103(B) Evidence 205

E. The Trial Court's Erroneous Interpretation of Section 1103(B) Deprived Appellant of His Constitutional Rights 209

1. The Error Deprived Appellant of Due Process 210

2. Appellant's Privilege Against Self-Incrimination Was Violated 213

F. The Trial Court Erroneously Instructed the Jury on the Section 1103(B) Evidence 216

1. The Instructions Given 216

2. CALJIC 2.50 Is Not Applicable to Section 1103(B) Evidence 221

3. The Court Also Erred in Failing to Give CALJIC 2.50.1 and the Requested Defense Special Instruction 224

G. The Errors Were Not Harmless 227

V. THE TRIAL COURT ERRED WHEN IT REFUSED TO STRIKE TESTIMONY THAT RICHMOND TURNED IN WEAPONS AND THE DEFENSE EVIDENCE RESPONSIVE TO THAT EVIDENCE 236

A. Appellant's Motions to Strike 236

B. Where the Relevance of Evidence Depends on the Existence of a Preliminary Fact, There Must Be Sufficient Evidence of that Fact 238

C. Evidence That Richmond Gave Up Weapons Was Inadmissible Because the Prosecution Failed to Establish That Appellant Had Knowledge of This Fact .. 239

D. The Trial Court's Erroneous Rulings Were Prejudicial .. 242

VI. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO ACQUIT PURSUANT TO PENAL CODE SECTION 1118.1 243

A. The Defense Motion to Acquit 243

1. The Written Motion 243

2. The Hearing 244

B. Penal Code Section 1118.1 245

C. At the Close of the Prosecution's Case-In-Chief, the Evidence Was Insufficient to Support the Charges 247

1. The Evidence Was Insufficient to Support the Charge of First Degree Murder 247

a. Planning Activity 249

b. Motive Evidence 252

c. Manner of killing 255

2. The Evidence Was Insufficient to Support the Lying-In-Wait Special Circumstance Allegation . . 258

D. The Trial Court's Error Violated Appellant's Federal Constitutional Rights 263

VII. THE INTRODUCTION OF IMPROPER AND EXTREMELY PREJUDICIAL REBUTTAL EVIDENCE DEPRIVED APPELLANT OF A FUNDAMENTALLY FAIR TRIAL . . . . . .

A. The Defense Moved to Exclude Improper Rebuttal Evidence 266

B. The Prosecution May Not Present in Rebuttal Evidence Which Should Have Been Presented in the Case-In-Chief 267

C. The Prosecutor's Rebuttal Evidence Violated Section 1093 270

D. The Improper Rebuttal Violated Appellant's Constitutional Rights 274

E. This Court Should Reach the Issue on the Merits 275

F. Appellant Was Severely Prejudiced by the Improper Rebuttal Evidence 277

VIII. MULTIPLE EVIDENTIARY ERRORS DURING EXAMINATION OF THE THREE INMATE WITNESSES

PRESENTED BY THE PROSECUTION IN REBUTTAL DEPRIVED APPELLANT OF A FAIR TRIAL 280

A. Testimony by Inmates Wilson and Hill About Kites Allegedly Received From Appellant Violated the Secondary Evidence Rule 280

1. The Secondary Evidence Rule 280

2. The Writings Were Not Authenticated 281

3. The Testimony Also Violated Evidence Code Section 1521 283

B. The Testimony From All Three Informants Was Inadmissible Hearsay 284

1. The Informants' Testimony Was Inadmissible as Statements Against Appellant's Penal Interest 284

2. The Testimony of Each Was Demonstrably False 285

C. The Trial Court Erroneously Limited Cross-Examination of the Informants 290

D. The Errors Violated Appellant's Constitutional Rights . . . 292

E. The Errors Were Not Harmless 293

IX. MULTIPLE OTHER INSTANCES OF PROSECUTORIAL MISCONDUCT IN THE GUILT PHASE DEPRIVED APPELLANT OF A FAIR TRIAL 294

A. The Prosecutor Committed Misconduct During the Testimony of Several Witnesses 295

1. Informant Wilson 295

2. Correctional Officer Brumbaugh 297

3. Cross-Examination of Appellant 298

B. The Prosecutor Committed Misconduct During His Guilt Phase Argument 300

1. Improper Use of the Prestige of His Office 301

2. Misstatements of the Facts 303

C. The Prosecutor's Efforts to Provoke Appellant Constituted Misconduct 306

D. The Misconduct Was Not Harmless 309

X. A COMBINATION OF ERRORS IN THE GUILT PHASE JURY INSTRUCTIONS DEPRIVED APPELLANT OF A CONSTITUTIONALLY FAIR TRIAL 311

A. The Trial Court Has a Duty to Instruct Correctly on Issues Raised by the Evidence 312

B. Consideration of the Proposed Instructions Was Limited by the Trial Court's Schedule 313

C. The Trial Court Erroneously Instructed on Evidence Code Section 1103(B) 317

D. The Instructions Relating to Penal Code Section 4500 Were Erroneous 318

E. The Court Erroneously Gave CALJIC 2.62 and Denied the Special Instruction Proposed by the Defense 322

F. The Trial Court Unnecessarily Gave a Convoluted Instruction on Sudden Quarrel and Heat of Passion 330

G. The Court Gave Flawed Versions of CALJIC 8.71 and 8.72, While Rejecting a Correct Special Instruction Proposed by Appellant 332

H. The Lying-In-Wait Special Circumstance Instruction Was Erroneous 335

I. The Erroneous Jury Charge Violated Appellant's Due Process Rights 338

J. Erroneous Instructions Were Not Harmless Beyond a Reasonable Doubt 340

K. The Absence of So Many Proposed Instructions From the Record Infringe on Appellant's Rights to a Meaningful Appeal 342

XI. APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BY THE PREJUDICIAL AND UNJUSTIFIED DELAY IN CHARGING HIM WITH MURDER 347

A. Appellant's Motion to Dismiss Based on Pre-Charging Delay 347

1. The Written Pleadings 347

2. The Trial Court's Ruling 351

3. Appellant Renews His Due Process Claim 353

B. Pre-Charging Delay May Violate a Defendant's Constitutional Right to Due Process 354

C. The Trial Court Erred in Denying Appellant's Motion to Dismiss Because the Delay in Indicting Him Was Prejudicial and Unjustified 357

SPECIAL CIRCUMSTANCE ISSUES

XII. THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE VIOLATES THE EIGHTH AMENDMENT BECAUSE IT FAILS TO ADEQUATELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY 366

A. A Special Circumstance Must Genuinely Narrow the Class of Persons Eligible for the Death Penalty 366

B. The Constitutionality of California's Lying-in-Wait Special Circumstance Has Been Questioned for Over 20 Years 367

C. This Court's Recent Opinions Further Expand the Reach of the Already-Over-Broad Special Circumstance 371

XIII. THE PRIOR MURDER SPECIAL CIRCUMSTANCE MUST BE REVERSED BECAUSE APPELLANT'S MORAL CULPABILITY FOR THE JACKSON HOMICIDE WAS DIMINISHED DUE TO HIS AGE AT THE TIME IT OCCURRED 374

A. Juveniles as a Group Are Less Culpable Than Adults ... 374

B. Under the *Roper* Line of Cases, California May Not Treat a Juvenile's Prior Murder Conviction the Same as That of an Adult in Determining Death Eligibility 376

C. Appellant's Death Sentence Must Be Reversed 382

XIV. THE DEATH ELIGIBILITY PROVISION OF PENAL CODE SECTION 4500 IS UNCONSTITUTIONAL BECAUSE IT IS ARBITRARY AND IRRATIONAL 384

A. An Eligibility Factor Must Differentiate Among Defendants in an Objective, Even-Handed and Substantially Rational Way 384

B. Penal Code section 4500 385

C. Life Prisoner Status Fails to Rationally Identify Persons Deserving of the Death Penalty 389

1. Section 4500 Does Not Single Out the Most Deserving Offenders for Death Eligibility 389

2. Section 4500 Does Not Rationally Promote the Social Purposes of Capital Punishment 394

a. Retribution 394

b. Deterrence 396

D. Few States Have Statutes Similar to Penal Code Section 4500 398

PENALTY PHASE ISSUES

XV. THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO ELICIT TESTIMONY ABOUT APPELLANT'S RACIALLY INFLAMMATORY WORDS AND CONDUCT 400

A. The Trial Court Permitted the Prosecutor to Elicit Racially Inflammatory Testimony 400

B. The Incident Was Non-Statutory Aggravation and Therefore Inadmissible 402

C. Admission of the Racially Offensive Remarks Violated Appellant's Federal Constitutional Rights 404

D. The Error Was Prejudicial 406

XVI. APPELLANT'S 1986 CONFESSION WAS ERRONEOUSLY ADMITTED BECAUSE IT WAS UNRELIABLE AND OBTAINED IN VIOLATION OF HIS *MIRANDA* RIGHTS 407

A. The Trial Court's Ruling 407

B. Before a Juvenile's Confession May Be Admitted Into Evidence, the Prosecution Must Establish That His Waiver of *Miranda* Rights Was Knowing, Intelligent and Voluntary 409

C. The Prosecutor Failed to Establish That Appellant's *Miranda* Waiver Was Knowing and Intelligent 412

D. The Prosecutor Also Failed to Establish That Appellant Had Voluntarily Waived His Rights 415

E. The Confession Was Unreliable 421

F. The Erroneous Admission of the 1986 Confession Was Prejudicial 423

XVII. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO EVIDENCE THAT APPELLANT HAD OBTAINED A PROTECTIVE VEST AND BY ELICITING TESTIMONY THAT APPELLANT WAS ABLE TO GET OUT OF HIS CELL. 426

A. Testimony About the Protective Vest and Appellant's Ability to Get Out of His Cell 426

B. Appellant's Counsel Provided Ineffective Assistance 430

1. The Law 430

2. Counsel's Performance Was Deficient 431

a. The Vest 431

b. Appellant Out of His Cell 433

3. The Deficient Performance Was Prejudicial 435

XVIII. A COMBINATION OF ERRORS RESULTED IN THE ADMISSION OF EXTREMELY INFLAMMATORY EVIDENCE ABOUT THE ASSAULT OF AN ELDERLY MAN WHICH DEPRIVED APPELLANT OF A FAIR TRIAL 439

A. Evidence of the Assault 439

1. The Prosecutor's Penalty Phase Case-In-Chief ... 439

2. Probation Officer Rand's Testimony 440

3. Appellant's Testimony 441

4. The Prosecutor's Argument 443

B. Defense Counsel Provided Ineffective Assistance by Permitting Testimony Concerning the Assault 445

1. Counsel's Performance Was Deficient 445

2. Prejudice 448

C. Rand's Testimony Violated Appellant's Sixth Amendment Rights 452

D. The Prosecutor Committed Misconduct by Misstating the Evidence and Referring to Facts Not in Evidence Concerning the Assault 454

E. Appellant Was Prejudiced 457

XIX. THE PROSECUTOR'S PERVASIVE MISCONDUCT DURING THE PENALTY PHASE DEPRIVED APPELLANT OF A FAIR TRIAL 459

A. The Prosecutor Committed Misconduct When Questioning Witnesses by Insinuating Prejudicial Information and Seeking to Elicit Inadmissible Evidence 459

1. Correctional Consultant James Esten 461

a. The Prosecutor's Attempt to Elicit Hearsay Evidence About Prison Misconduct 461

b. The Prosecutor's Attempt to Portray Appellant as a "Shot Caller" 462

c. The Prosecutor's Questioning About the "Barrett Cell" 464

d. The Prosecutor Raised the Specter of Appellant Getting Out of Prison 466

2. Cross-Examination of Appellant 469

a. The Prosecutor Improperly Asked Argumentative Questions 469

b. The Prosecutor Improperly Sought to Elicit Inadmissible Aggravation Evidence 473

B. The Prosecutor Committed Misconduct During Argument by Misstating the Facts 477

1. The Prosecutor Distorted the Facts Surrounding the Death of James Jackson 477

2. The Prosecutor Made Unsupported Claims About the Chojnacki Assault 479

3. The Prosecutor Misled the Jury About the Spitting Incident 479

4. The Prosecutor Inaccurately Claimed That an Officer Had Lost a Promotion Because of Appellant 481

5. The Prosecutor Distorted the Evidence About Appellant's Transfer to Tehachapi Prison 481

C. The Prosecutor Misstated the Law 483

1. The Prosecutor Improperly Argued Lack of Remorse as Aggravation 483

2. The Prosecutor Erroneously Characterized the

Nature of Factor (A) 485

D. The Prosecutor Improperly Used the Prestige of His Office 486

E. The Misconduct Was Prejudicial and Requires Reversal 488

1. The Misconduct Undermined the Case for Life . . . 488

a. Circumstances of the Crimes 488

b. Pelican Bay Conditions 491

c. Appellant's Traumatic Childhood 493

2. Appellant Was Prejudiced in Other Ways as Well 493

F. Additional Objections and Admonitions Would Have Been Futile 496

XX. THE ELEVEN-DAY JURY SEPARATION DURING PENALTY PHASE DELIBERATIONS REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE 499

A. The Trial Court Permitted the Jury to Halt Deliberations for a Juror's Vacation 499

B. The Lengthy Separation Constituted an Abuse of Discretion 502

C. The Suspension in Deliberations Violated Appellant's Constitutional Rights 505

D. This Issue Is Preserved for Appeal 510

XXI. APPELLANT'S CONVICTIONS AND DEATH SENTENCE MUST BE REVERSED BECAUSE THE ERRORS AT HIS TRIAL WERE CUMULATIVELY PREJUDICIAL 513

XXII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE U.S. CONSTITUTION 516

A. Section 190.2 Is Impermissibly Broad 516

B. The Broad Application of Section 190.3's Factor (A) Violated Appellant's Constitutional Rights 517

C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof 518

1. Appellant's Death Sentence Is Unconstitutional Because It Is Not Premised on Findings Made Beyond a Reasonable Doubt 518

2. The Jury Should Have Been Instructed That The State Bore the Burden of Proof 520

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings 521

a. Aggravating Factors 521

b. Unadjudicated Criminal Activity 522

4. The Instructions Caused the Penalty Determination to Turn on an Impermissible Vague and Ambiguous Standard 523

5. The Instructions Failed to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment 524

6. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of

Parole 525

7. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof as to Mitigating Circumstances 526

8. The Penalty Jury Should Be Instructed on the Presumption of Life 526

D. Failing to Require That the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review 527

E. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights. 528

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors 528

2. The Failure to Delete Inapplicable Sentencing Factors 528

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators 529

F. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary and Disproportionate Imposition of the Death Penalty 530

G. California's Capital Sentencing Scheme Violates the Equal Protection Clause 530

H. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms 521

CONCLUSION 532

CERTIFICATE OF WORD COUNT 532

TABLE OF AUTHORITIES

CASES

Ali v. Hickman (9th Cir. 2009) 584 F.3d 1174 153

Apprendi v. New Jersey (2000) 530 U.S. 466 ..... 518, 523

Arave v. Creech (1993) 507 U.S. 463 366

Arizona v. Fulminante (1991) 499 U.S. 279 ..... 293, 423, 507, 514

Atkins v. Virginia (2002) 536 U.S. 304 ..... 374, 389, 394, 398

Attorney Grievance Commission of Maryland v. Gansler (Md. 2002) 835 A.2d 548 170

Ballew v. Georgia (1978) 435 U.S. 223 521

Barker v. Wingo (1972) 407 U.S. 514 358

Batson v. Kentucky (1986) 476 U.S. 79 ..... 133, 138, 159

Beck v. Alabama (1980) 447 U.S. 625 174

Berger v. United States (1935) 295 U.S. 78 297

Berghuis v. Thompkins (2010) 130 S.Ct. 2250 ..... 410, 415

Blakely v. Washington (2004) 542 U.S. 296 ..... 518, 523

Block v. The State (1885) 100 Ind. 357 129

Blystone v. Pennsylvania (1990) 494 U.S. 299 ..... 518, 524

Boyde v. California (1990) 494 U.S. 370 ..... 525, 526

Brewer v. Quarterman (2007) 550 U.S. 286 526

Brown v. Sanders (2006) 546 U.S. 212 ..... 382, 383, 385

Brown v. Smith (1997) 55 Cal.App.4th 767 205

Buchanan v. Angelone (1988) 522 U.S. 269 ..... 384, 385

Bullcoming v. New Mexico (2011) 131 S.Ct. 2705 453

Burks v. United States (1978) 437 U.S. 1 264

Burton v. Johnson (10th Cir. 1991) 948 F.2d 1150 ..... 104, 113

Caldwell v. Mississippi (1985) 472 U.S. 320 ..... 119, 454, 460, 468

California v. Velasquez (1980) 448 U.S. 903 256
Carter v. Kentucky (1981) 450 U.S. 288 519
Cephus v. United States (D.C. Cir. 1963) 324 F.2d 893 ..... 246, 264
Chapman v. California (1967) 386 U.S. 18 ..... *passim*
Coker v. Georgia (1977) 433 U.S. 584 398
Crane v. Kentucky (1986) 476 U.S. 683 293
Crawford v. United States (1909) 212 U.S. 183 ..... 105, 108, 118, 130
Crawford v. Washington (2004) 541 U.S. 36 ..... 452, 454
Crittenden v. Ayers (9th Cir. 2010) 624 F.3d 943 ..... 140, 141
Crotts v. Smith (9th Cir. 1996) 73 F.3d 861 ..... 431, 445
Cunningham v. California (2007) 549 U.S. 270 523
Darden v. Wainwright (1986) 477 U.S. 168 ..... 294, 454, 460
Davis v. Washington (2006) 547 U.S. 813 453
Delaware v. Dawson (1992) 503 U.S. 159 ..... 404, 406
Delaware v. Van Arsdall (1986) 475 U.S. 673 ..... 290, 293
Delo v. Lashley (1993) 507 U.S. 272 527
Dept. of Parks & Rec. v. State Personnel Bd. (1991) 233 Cal.App.3d 813 205
Detrich v. Ryan (9th Cir. 2012) 677 F.3d 958 ..... 449, 451
Dobbs v. Zant (1993) 506 U.S. 357 344
Doggett v. United States (1992) 505 U.S. 647 358
Donnelly v. DeChristoforo (1974) 416 U.S. 637 513
Doody v. Ryan (9th Cir. 2011) 649 F.3d 986 ..... 414, 422
Douglas v. Woodford (9th Cir. 2003) 316 F.3d 1079 451
Draper v. Washington (1963) 372 U.S. 487 343
Duckworth v. Eagan (1989) 492 U.S. 195 409
Dyer v. Calderon (9th Cir. 1998) 151 F.3d 970 ..... 103, 119

Enmund v. Florida (1982) 458 U.S. 782 . . . . . 379, 398
Entsminger v. Iowa (1967) 386 U.S. 748 343
Estelle v. McGuire (1991) 502 U.S. 62 . . . . . 210, 241
Estelle v. Williams (1976) 425 U.S. 501 527
Estes v. Texas (1965) 381 U.S. 532 . . . . . 505, 506
Fare v. Michael C. (1979) 442 U.S. 707 412
Fetterly v. Paskett (9th Cir. 1993) 997 F.2d 1295 . . . . . 210, 241
Fields v. Woodford (9th Cir. 2002) 309 F.3d 1095 . . . . . 102, 116
Florida v. Powell (2010) 130 S.Ct. 1195 . . . . . 409, 410, 412, 414
Ford v. Wainright (1986) 447 U.S. 399 . . . . . 177, 216, 274
Furman v. Georgia (1972) 408 U.S. 238 . . . . . 366, 387, 516
Gallegos v. Colorado (1962) 370 U.S. 49 . . . . . 416, 422
Garcia v. Superior Court (1984) 163 Cal.App.3d 148 355
Gardner v. Florida (1977) 430 U.S. 349 . . . . . 404, 432
George v. Almager (S.D.Cal. 2009) 674 F.Supp.2d 1160 210
Godfrey v. Georgia (1980) 446 U.S. 420 385
Graham v. Florida (2010) 130 S.Ct. 2011 . . . . . 375, 378, 411, 418
Graham v. Superior Court (1978) 98 Cal.App.3d 880 . . . . . 387, 388
Greene v. Massey (1978) 437 U.S. 19 264
Gregg v. Georgia (1976) 428 U.S. 153 . . . . . 366, 367, 528
Haley v. Ohio (1948) 332 U.S. 596 . . . . . 417, 422
Harmelin v. Michigan (1991) 501 U.S. 957 522
Harrington v. Richter (2011) 131 S.Ct. 770 449
Hendricks v. Calderon (9th Cir. 1995) 70 F.3d 1032 451
Henslee v. United States (5th Cir. 1957) 246 F.2d 190 175
Hernandez v. New York (1991) 500 U.S. 352 . . . . . 139, 141, 146
Hewitt v. Helms (1983) 459 U.S. 460 . . . . . 137, 275

Hicks v. Oklahoma (1980) 447 U.S. 343 ..... *passim*
Hollywood v. Superior Court (2008) 43 Cal.4th 721 171
Hovey v. Superior Court (1980) 28 Cal.3d 1 91
Hudson v. Louisiana (1981) 450 U.S. 40 264
Hughes v. United States (6th Cir. 2001) 258 F.3d 453 125
Hurd v. Terhune (9th Cir. 2010) 619 F.3d 1080 233
In re Anthony J. (1980) 107 Cal.App.3d 962 411
In re Aven S. (1991) 1 Cal.App.4th 69 415
In re Coley (2012) 55 Cal.4th 524 392
In re Cortez (1971) 6 Cal.3d 78 363
In re Finley (1905) 1 Cal.App. 198 394
In re Gault (1967) 387 U.S. 1 ..... 410, 422
In re Hitchings (1993) 6 Cal.4th 97 136
In re James R. (2007) 153 Cal.App.4th 413 505
In re Martin (1987) 44 Cal.3d 1 ..... 229, 234
In re Sakarias (2005) 35 Cal.4th 140 449
In re Sheena K. (2007) 40 Cal.4th 875 124
In re Winship (1970) 397 U.S. 358 ..... 263, 312
Irvin v. Dowd (1961) 366 U.S. 717 102
J.D.B. v. North Carolina (2011) 131 S.Ct. 2394 ..... 381, 410, 411, 422
Jackson v. Virginia (1979) 443 U.S. 307 263
Johnson v. California (2005) 545 U.S. 162 ..... 139, 140, 141,146
Johnson v. Mississippi (1988) 486 U.S. 578 ..... *passim*
Johnson v. Texas (1993) 509 U.S. 350 375
Kennedy v. Louisiana (2008) 128 S.Ct. 2641 398
Kiernan v. Van Schaik (3rd Cir. 1965) 347 F.2d 775 107
Kimbley v. Kaiser Foundation Hospitals (1985) 164 Cal.App.3d 1166 . 123

Lankford v. Idaho (1991) 500 U.S. 110 ..... 404, 432

Leonard v. United States (1964) 378 U.S. 544 103

Lockett v. Ohio (1978) 438 U.S. 586 ..... 119, 526, 528

Malloy v. Hogan (1964) 378 U.S. 1 213

Maxwell v. Roe (9th Cir. 2010) 628 F.3d 486 ..... 287, 288, 292, 293

Maynard v. Cartwright (1988) 486 U.S. 356 ..... 459, 518, 524

McClesky v. Kemp (1987) 481 U.S. 279 459

McDonough Power Equipment, Inc. v. Greenwood (1984) 464 U.S. 548 ..... 102, 103

McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378 ..... 208, 210

McKoy v. North Carolina (1990) 494 U.S. 433 521

Middleton v. McNeil (2004) 541 U.S. 433 ..... 313, 338

Miller v. Alabama (2012) 132 S.Ct. 2455 ..... 376, 378

Miller v. Lockhart (8th Cir. 1995) 65 F.3d 676 ..... 454, 460, 487

Miller-El v. Cockrell (2003) 537 U.S. 322 ..... 140, 141, 142, 146

Miller-El v. Dretke (2005) 545 U.S. 231 ..... 140, 153, 156

Miranda v. Arizona (1966) 384 U.S. 436 ..... 407, 410, 412

Monge v. California (1998) 524 U.S. 721 522

Morales v. Woodford (2003) 388 F.3d 1159 ..... 368, 369

Moran v. Burbine (1986) 475 U.S. 412 410

Morgan v. Illinois (1992) 504 U.S. 719 136

Morrow v. Superior Court (1994) 30 Cal.App.4th 1252 .... 170, 171, 173, 174, 175

Myers v. Ylst (9th Cir. 1990) 897 F.2d 417 522

Neder v. United States (1999) 527 U.S. 1 340

Newlon v. Armontrout (9th Cir. 1989) 885 F.2d 1328 ..... 302, 487

Ocampo v. Vail (9th Cir. 2011) 649 F.3d 1098 ..... 453, 457

Ohio v. Roberts (1980) 448 U.S. 56 452
Parker v. Dugger (1991) 498 U.S. 308 344
Parle v. Runnells (9th Cir. 2007) 505 F.3d 922 513
Penney v. Superior Court (1972) 28 Cal.App.3d 941 357
Penry v. Johnson (2001) 532 U.S. 782 489
People v. Alcala (1984) 36 Cal.3d 604 256
People v. Alexander (2010) 49 Cal.4th 846 287
People v. Allen (1978) 77 Cal.App.3d 924 . . . . . 229, 230
People v. Andersen (1994) 26 Cal.App.4th 1241 313
People v. Anderson (1968) 70 Cal.2d 15 . . . . . 247, 248, 252, 256, 257
People v. Anderson (1978) 20 Cal.3d 647 . . . . . 228, 229, 230
People v. Anderson (2001) 25 Cal.4th 543 . . . . . 518, 519, 523
People v. Arias (1996) 13 Cal.4th 92 . . . . . 521, 525, 527
People v. Avila (2006) 38 Cal.4th 491 528
People v. Bacigalupo (1993) 6 Cal.4th 457 524
People v. Bacon (2010) 50 Cal.4th 1082 238
People v. Bagwell (1974) 38 Cal.App.3d 127 . . . . . 211, 214
People v. Barnett (1998) 17 Cal.4th 1044 199
People v. Barnwell (2007) 41 Cal.4th 1038 503
People v. Barton (1978) 21 Cal.3d 513 343
People v. Beasley (2003) 105 Cal.App.4th 1078 458
People v. Beckley (2011) 185 Cal.App.4th 509 282
People v. Bell (1989) 49 Cal.3d 502 . . . . . 294, 300, 460, 468
People v. Belmontes (1988) 45 Cal.3d 744 402
People v. Belton (1979) 23 Cal.3d 516 246
People v. Benally (1989) 208 Cal.App.3d 900 175
People v. Bernhardt (1963) 222 Cal.App.2d 567 321

People v. Bestelmeyer (1985) 166 Cal.App.3d 520 391
People v. Bivert (2011) 52 Cal.4th 96 . . . . . 380, 405
People v. Blair (2005) 36 Cal.4th 686 . . . . . 517, 520
People v. Blanco (1992) 10 Cal.App.4th 1167 . . . . . 196, 197198, 199
People v. Box (1984) 152 Cal.App.3d 461 126
People v. Boyd (1985) 38 Cal.3d 762 . . . . . 402, 433, 465, 474
People v. Boysen (2007) 165 Cal.App.4th 761 . . . . 355, 356, 357, 358, 364
People v. Bradford (1997) 15 Cal.4th 1229 . . . . . 306, 469
People v. Bramitt (2009) 46 Cal.4th 1221 380
People v. Breaux (1991) 1 Cal.4th 281 524
People v. Breverman (1998) 19 Cal.4th 142 . . . . . 312, 322, 332
People v. Briggs (1962) 58 Cal.2d 385 276
People v. Brown (1988) 46 Cal.3d 432 . . . . . 406, 457, 488
People v. Burgener (2003) 29 Cal.4th 833 . . . . . 142, 493
People v. Caballero (2012) 55 Cal.4th 262 379
People v. Cage (2007) 40 Cal.4th 965 452
People v. Cahill (1993) 5 Cal.4th 478 . . . . . 277, 278, 293, 423, 424
People v. Campbell (1978) 87 Cal.App.3d 678 328
People v. Cardenas (1982) 31 Cal.3d 897 228
People v. Carrasco (1981) 118 Cal.App.3d 936 . . . . . 225, 226
People v. Carter (1957) 48 Cal.2d 737 . . . . . 240, 266, 267, 268, 273, 279
People v. Carter (2005) 36 Cal.4th 1215 . . . . . 203, 205, 262
People v. Casillas (1943) 60 Cal.App.2d 785 288
People v. Castaneda (2011) 51 Cal.4th 1292 . . . . . 434, 477
People v. Castro (1960) 182 Cal.App.2d 255 . . . . . 267, 268
People v. Catlin (2001) 26 Cal.4th 81 361
People v. Chadd (1981) 28 Cal.3d 739 343

People v. Chatman (2006) 38 Cal.4th 344 . . . . . 297, 469
People v. Clair (1992) 2 Cal.4th 629 169
People v. Cole (2004) 33 Cal.4th 1158 313
People v. Coleman (1988) 46 Cal.3d 749 . . . . . 122, 123
People v. Collins (2010) 49 Cal.4th 175 484
People v. Conrad (2006) 145 Cal.App.4th 1175 357
People v. Cook (1952) 39 Cal.2d 496 123
People v. Cook (2006) 39 Cal.4th 566 . . . . . 528, 529, 531
People v. Cooper (1991) 53 Cal.3d 771 290
People v. Cowan (2010) 50 Cal.4th 401 . . . . . 354, 355, 356, 357
People v. Daniels (1991) 52 Cal.3d 815 . . . . . 269, 272, 278
People v. Davenport (1985) 41 Cal.3d 247 . . . . . 484, 529
People v. Day (1992) 2 Cal.App.4th 405 228
People v. DeLarco (1983) 142 Cal.App.3d 294 329
People v. Dennis (1998) 17 Cal.4th 468 204
People v. Denton (1947) 78 Cal.App.2d 540 . . . . . 323, 325
People v. Doolin (2009) 45 Cal.4th 390 125
People v. Dorado (1965) 62 Cal.2d 338 387
People v. Duarte (2000) 24 Cal.4th 603 285
People v. Duncan (1991) 53 Cal.3d 955 525
People v. Dunn-Gonzalez (1996) 47 Cal.App.4th 899 . . . . . 355, 357
People v. Dyer (1988) 45 Cal.3d 26 402
People v. Eagles (1982) 133 Cal.App.3d 330 202
People v. Earp (1999) 20 Cal.4th 826 . . . . . 312, 325, 485
People v. Edelbacher (1989) 47 Cal.3d 983 . . . . . 366, 516
People v. Enraca (2012) 53 Cal.4th 735 484
People v. Evans (1952) 39 Cal.2d 242 . . . . . 298, 473

People v. Ewoldt (1994) 7 Cal.4th 380 207
People v. Fauber (1992) 2 Cal.4th 792 528
People v. Fierro (1991) 1 Cal.4th 173 530
People v. Finley (1908) 153 Cal. 59 . . . . . 386, 387
People v. Flood (1998) 18 Cal.4th 470 312
People v. Flores (1979) 92 Cal.App.3d 461 276
People v. Friend (2009) 47 Cal.4th 1 288
People v. Fudge (1994) 7 Cal.4th 1075 312
People v. Fuiava (2012) 53 Cal.4th 622 . . . . . *passim*
People v. Garewal (1985) 173 Cal.App.3d 285 175
People v. Gay (2008) 42 Cal.4th 1195 451
People v. Geier (2007) 41 Cal.4th 555 287
People v. Goldberg (1952) 110 Cal.App.2d 17 123
People v. Gomez (1963) 215 Cal.App.2d 314 269
People v. Gonzalez (2006) 38 Cal.4th 932 . . . . . 451, 457
People v. Gonzalez (1990) 51 Cal.3d 1179 485
People v. Griffin (2004) 33 Cal.4th 536 519
People v. Guerra (2006) 37 Cal.4th 1067 202
People v. Guizar (1986) 180 Cal.App.3d 487 . . . . . 431, 433, 434, 445, 448
People v. Gutierrez (2002) 28 Cal.4th 1083 . . . . . 511, 512
People v. Halvorsen (2007) 42 Cal.4th 379 252
People v. Hamilton (1963) 60 Cal.2d 105 514
People v. Hamilton (1989) 48 Cal.3d 1142 529
People v. Hartman (1985) 170 Cal.App.3d 572 . . . 355, 356, 358, 360, 361
People v. Hawthorne (1992) 4 Cal.4th 43 344
People v. Hayes (1990) 52 Cal.3d 577 514
People v. Haynes (1983) 148 Cal.App.3d 1117 328

People v. Herrera (2000) 83 Cal.App.4th 46 238
People v. Hill (1998) 17 Cal.4th 800 . . . . . *passim*
People v. Hillhouse (2002) 27 Cal.4th 469 . . . . . 121, 122, 370, 529
People v. Horton (1995) 11 Cal.4th 1068 . . . . . 421, 422
People v. Hovarter (2008) 44 Cal.4th 983 288
People v. Howard (1992) 1 Cal.4th 1132 344
People v. Hudson (2006) 38 Cal.4th 1002 340
People v. Humphrey (1996) 13 Cal.4th 1073 228
People v. Jackson (1996) 13 Cal.4th 1114 402
People v. Jackson (1991) 235 Cal.App.3d 1670 . . . . . 402, 435
People v. Jacobs (2007) 156 Cal.App.4th 728 205
People v. James (1987) 196 Cal.App.3d 272 329
People v. Jefferson (1956) 47 Cal.2d 438 387
People v. Jeter (2005) 125 Cal.App.4th 1212 320
People v. Johnson (1989) 47 Cal.3d 1194 251
People v. Johnson (1993) 19 Cal.App.4th 778 510
People v. Johnson (1978) 77 Cal.App.3d 866 . . . . . 298, 472, 473, 474
People v. Jones (2012) 54 Cal.4th 1 485
People v. Jurado (2006) 38 Cal.4th 72 370
People v. Katz (1962) 207 Cal.App.2d 739 . . . . . 268, 274
People v. Kaurish (1990) 52 Cal.3d 648 . . . . . 468, 492
People v. Kelly (1980) 113 Cal.App.3d 1005 525
People v. Kennedy (2005) 36 Cal.4th 595 518
People v. Kirkes (1952) 39 Cal.2d 719 455
People v. Kirkpatrick (1994) 7 Cal.4th 988 125
People v. Kondor (1988) 200 Cal.App.3d 52 329
People v. Lamer (2003) 110 Cal.App.4th 1463 . . . . . 328, 329

People v. Lancaster (2007) 41 Cal.4th 50 . . . . . 432, 434, 436
People v. Lang (1989) 49 Cal.3d 991 360
People v. Lavaie (1999) 70 Cal.App.4th 456 433
People v. Lawley (2002) 27 Cal.4th 102 282
People v. Ledesma (2006) 39 Cal.4th 641 430
People v. Lenart (2004) 32 Cal.4th 1107 520
People v. Lenix (2009) 51 Cal.4th 602 . . . . . 139, 141, 142, 146, 158
People v. Leonard (2007) 40 Cal.3d 1370 460
People v. Lessie (2010) 47 Cal.4th 1152 . . . . . 410, 411, 412
People v. Letner (2010) 50 Cal.4th 99 . . . . . 313, 338, 467
People v. Lewis (2001) 26 Cal.4th 334 411
People v. Lewis (2008) 43 Cal.4th 415 . . . . . 247, 258, 259, 260, 261, 262
People v. Livingston (2012) 53 Cal.4th 1145 . . . . . 366, 371, 372
People v. Lomax (2010) 49 Cal.4th 530 503
People v. Lopez (2008) 42 Cal.4th 960 . . . . . 294, 430, 445, 454, 460
People v. Louis (1986) 42 Cal.3d 969 . . . . . 113, 200
People v. Lucas (1995) 12 Cal.4th 415 . . . . . 238, 239, 240, 241
People v. Lucero (1988) 44 Cal.3d 1006 249
People v. Luparello (1986) 187 Cal.App.3d 410 . . . . . 461, 464
People v. Manriquez (2005) 37 Cal.4th 547 531
People v. Manson (1976) 61 Cal.App.3d 102 172
People v. Mar (2002) 28 Cal.4th 1201 505
People v. Marsh (1985) 175 Cal.App.3d 987 328
People v. Martinez (2010) 47 Cal.4th 911 486
People v. McKinnon (2011) 52 Cal.4th 610 287
People v. McKinzie (2012) 54 Cal.4th 1302 484
People v. McNabb (1935) 3 Cal.2d 441 . . . . . 321, 386

People v. Medina (1995) 11 Cal.4th 694 522
People v. Mendoza (2011) 52 Cal.4th 1056 . . . . . 366, 371, 372, 373
People v. Mendoza Tello (1997) 15 Cal.4th 264 430
People v. Merritt (1993) 19 Cal.App.4th 1573 171
People v. Mil (2012) 53 Cal.4th 400 . . . . . 338, 340
People v. Miller (1963) 211 Cal.App.2d 569 . . . . . 269, 272
People v. Millwee (1998) 18 Cal.4th 96 . . . . . 121, 122
People v. Milstein (2012) 211 Cal.App.4th 1158 199
People v. Milward (2011) 52 Cal.4th 580 322
People v. Mirenda (2009) 174 Cal.App.4th 1313 . . . . . *passim*
People v. Montiel (1993) 5 Cal.4th 877 468
People v. Moon (2005) 37 Cal.4th 1 485
People v. Moore (1954) 43 Cal.2d 517 525
People v. Moore (2011) 51 Cal.4th 386 334
People v. Morales (1989) 48 Cal.3d 527 . . . . . 258, 263, 336, 367
People v. Morris (1991) 53 Cal.3d 152 . . . . . 275, 276
People v. Mosher (1969) 1 Cal.3d 379 273
People v. Myers (2007) 148 Cal.App.4th 546 . . . . . 197, 198 199, 203
People v. Neal (2003) 31 Cal.4th 63 . . . . . 277, 278, 424
People v. Nelson (2011) 51 Cal.4th 198 402
People v. Nelson (2012) 53 Cal.4th 367 . . . . . 415, 420
People v. Nelson (2008) 43 Cal.4th 1242 . . . . . 356, 357, 361, 364
People v. Ochoa (2001) 26 Cal.4th 398 510
People v. Oppenheimer (1909) 156 Cal. 733 387
People v. Ozene (1972) 27 Cal.App.3d 905 289
People v. Page (2008) 44 Cal.4th 1 446
People v. Pearch (1991) 229 Cal.App.3d 1282 228

People v. Perez (1962) 58 Cal.2d 229 . . . . . 296, 496
People v. Phillips (1985) 41 Cal.3d 29 . . . . . 402, 465
People v. Pitts (1990) 223 Cal.App.3d 606 . . . . . *passim*
People v. Price (1991) 1 Cal.4th 324 282
People v. Prieto (2003) 30 Cal.4th 226 . . . . . 519, 521
People v. Quartermain (1997) 16 Cal.4th 600 . . . . . *passim*
People v. Ramos (1984) 37 Cal.3d 136 468
People v. Ramos (1997) 15 Cal.4th 1133 . . . . . 122, 188
People v. Reliford (2003) 29 Cal.4th 1007 227
People v. Retanan (2007) 154 Cal.App.4th 1219 391
People v. Rios (1985) 163 Cal.App.3d 852 456
People v. Robertson (1982) 33 Cal.3d 21 . . . . . 431, 445
People v. Robinson (1960) 179 Cal.App.2d 624 . . . . . 269, 272, 278
People v. Rodriguez (1943) 58 Cal.App.2d 415 . . . . . 269, 272
People v. Rowland (1992) 4 Cal.4th 238 207
People v. Rucker (1980) 26 Cal.3d 368 . . . . . 228, 230, 234
People v. Rundle (2008) 43 Cal.4th 76 240
People v. Saddler (1979) 24 Cal.3d 671 . . . . . 312, 327, 328
People v. Santamaria (1991) 229 Cal.App.3d 269 . . . . 503, 504, 506, 507, 508, 510
People v. Schmeck (2005) 37 Cal.4th 240 516
People v. Sedeno (1974) 10 Cal.3d 703 519
People v. Sengpadchith (2001) 26 Cal.4th 316 530
People v. Sharp (1983) 150 Cal.App.3d 13 . . . . . 169, 171
People v. Shipe (1975) 49 Cal.App.3d 343 461
People v. Sims (1958) 165 Cal.App.2d 108 . . . . . 214, 215
People v. Skiles (2011) 51 Cal.4th 1178 281

People v. Smith (1950) 36 Cal.2d 444 . . . . . 387, 396
People v. Snow (2003) 30 Cal.4th 43 531
People v. Stanley (1995) 10 Cal.4th 764 517
People v. Stansbury (1995) 9 Cal.4th 824 275
People v. Stevens (2007) 41 Cal.4th 182 . . . . . 246, 247, 335, 369, 370
People v. Sturm (2006) 37 Cl.4th 1218 . . . . . 451, 514
People v. Streeter (2012) 54 Cal.4th 205 . . . . . *passim*
People v. Superior Court (*Brim*) (2011)
193 Cal.App.4th 989 . . . . . 204, 205, 363
People v. Superior Court (*Gaulden*) (1977) 66 Cal.App.3d 773 . . . 392, 394
People v. Swearington (1977) 71 Cal.App.3d 935 . . . . . 223, 224
People v. Tackett (2006) 144 Cal.App.4th 445 196
People v. Tafoya (2007) 42 Cal.4th 147 . . . . . 239, 240
People v. Tate (2010) 49 Cal.4th 635 . . . . . 457, 474, 488
People v. Taylor (1990) 52 Cal.3d 719 521
People v. Tealer (1975) 48 Cal.App.3d 598 214
People v. Terry (1994) 30 Cal.App.4th 97 . . . . . 128, 129, 130, 131
People v. Thomas (2011) 51 Cal.4th 449 140
People v. Thompson (1980) 27 Cal.3d 303 . . . . . 207, 208
People v. Trevino (1985) 39 Cal.3d 667 251
People v. Tribble (1987) 191 Cal.App.3d 1108 171
People v. Triplett (1993) 16 Cal.App.4th 624 205
People v. Tully (2012) 54 Cal.4th 952 403
People v. Vaughn (1969) 71 Cal.2d 406 . . . . . 386, 387, 388
People v. Velasquez (1980) 26 Cal.3d 425 256
People v. Velazquez (2011) 201 Cal.app.4th 219 . . . . . 246, 248, 263
People v. Vera (1997) 15 Cal.4th 269 511

People v. Villa (1980) 109 Cal.App.3d 360 296
People v. Wagner (1975) 13 Cal.3d 612 . . . . . *passim*
People v. Wallace (1993) 14 Cal.App.4th 651 390
People v. Ward (2005) 36 Cl.4th 186 523
People v. Watson (1956) 46 Cal.2d 818 . . . . . 228, 277, 447, 461
People v. Webster (1991) 54 Cal.3d 411 . . . . . 137, 367, 368
People v. Wells (1949) 33 Cal.2d 330 387
People v. Wheeler (1978) 22 Cal.3d 258 . . . . . 8, 102, 124, 132, 138
People v. Wright (1988) 45 Cal.3d 1126 331
People v. Yearwood (2013) 213 Cal.App.4th 151 392
People v. Yeoman (2003) 31 Cal.4th 93 276
People v. Zapien (1993) 4 Cal.4th 929 . . . . . 171, 175
Perry v. New Hampshire (2012) 132 S.Ct. 716 . . . . . 210, 241, 293
Pointer v. Texas (1965) 380 U.S. 400 452
Porter v. McCollum (2009) 558 U.S. 30 451
Price v. Superior Court (2001) 25 Cal.4th 1046 468
Ring v. Arizona (2002) 536 U.S. 584 . . . . . 398, 518, 523
Rivera v. Illinois (2009) 556 U.S. 148 . . . . . 132, 133, 135
Rompilla v. Beard (2005) 545 U.S. 374 445
Roper v. Simmons (2005) 543 U.S. 551 . . . . . *passim*
Rosales-Lopez v. United States (1981) 451 U.S. 182 136
Ross v. Oklahoma (1988) 487 U.S. 81 . . . . . 102, 121, 123, 132, 133, 134
Schriro v. Summerlin (2004) 542 U.S. 348 452
Sechrest v. Ignacio (9th Cir. 2008) 549 F.3d 789 . . . . . 468, 496
Sheppard v. Maxwell (1966) 384 U.S. 333 506
Sheppard v. Rees (9th Cir. 1990) 909 F.32d 1234 211
Skilling v. United States (2010) 130 S.Ct. 2896 506

Smith v. Phillips (1982) 445 U.S. 209 .. 102, 103, 104, 105, 108, 129, 130

Smith v. Stewart (9th Cir. 1999) 189 F.3d 1004 451

Snyder v. Louisiana (2008) 552 U.S. 472 ..... 139, 140, 141, 146, 159

Strickland v. Washington (1984) 466 U.S. 668 ..... 430, 436, 445, 449

Stringer v. Black (1992) 503 U.S. 222 529

Sullivan v. Louisiana (1993) 508 U.S. 275 227

Sumner v. Shuman (1987) 483 U.S. 66 ..... 392, 393, 394, 396

Taylor v. Kentucky (1978) 436 U.S. 478 513

Thomas v. Chappell (9th Cir. 2012) 678 F.3d 1086 ..... 228, 449

Thompson v. Oklahoma (1998) 487 U.S. 815 375

Tinsley v. Borg (9th Cir. 1990) 895 F.2d 520 105

Trop v. Dulles (1958) 356 U.S. 86 ..... 388, 398, 531

Tuilaepa v. California (1994) 512 U.S. 967 518

Turner v. Louisiana (1965) 379 U.S. 466 506

United States v. Allsup (9th Cir. 1977) 566 F.2d 68 .... 106, 107, 109, 115

United States v. Cabrera (9th Cir. 2000) 222 F.3d 590 405

United States v. Coast of Maine Lobster Co., Inc.
(1st Cir. 1976) 538 F.2d 899 ..... 171, 173, 175

United States v. Collins (9th Cir. 2009) 551 F.3d 914 141

United States v. Doe (9th Cir. 2000) 219 F.3d 1009 420

United States v. Female Juvenile (RRA-A)
(9th Cir. 2000) 229 F.3d 737 420

United States v. Female Juvenile (Wendy G.)
(9th Cir. 2001) 255 F.3d 761 420

United States v. Gonzalez (9th Cir. 2000) 214 F.3d 1109 ..... *passim*

United States v. Hay (9th Cir. 1997) 122 F.3d 1233 ..... 506, 507

United States v. LeMay (9th Cir. 2001) 260 F.3d 1018 210

United States v. Lopez (9th Cir. 1993) 4 F.3d 1445 ..... 169, 172

United States v. Lovasco (1977) 431 U.S. 783 354
United States v. Marion (1971) 404 U.S. 307 354
United States v. Martinez-Salazar (2000) 528 U.S. 304 ..... 120, 121, 134
United States v. Molina (9th Cir. 1991) 934 F.2d 1440 297
United States v. Polichemi (7th Cir. 2000) 219 F.3d 698 105
United States v. Richter (2nd Cir. 1987) 826 F.2d 206 298
United States v. Sutton (D.C. Cir. 1969) 426 F.2d 1202 246
United States v. Talao (9th Cir. 2000) 222 F.3d 1133 169
United States v. Wood (1936) 299 U.S. 123 ..... 103, 104, 105, 106
United States v. Young (1985) 470 U.S. 1 496
Van Tran v. Lindsey (9th Cir. 2000) 212 F.3d 1143 431
Vasquez v. Hillery (1986) 474 U.S. 254 516
Wainwright v. Witt (1985) 469 U.S. 412 96
Walters v. Maass (9th Cir. 1995) 45 F.3d 1355 210
Wardius v. Oregon (1973) 412 U.S. 470 ..... 136, 526
Wiggins v. Smith (2003) 539 U.S. 510 ..... 449, 451
Witherspoon v. Illinois (1968) 391 U.S. 510 96
Woodson v. North Carolina (1976) 428 U.S. 280 ..... 343, 521, 524
Zant v. Stephens (1983) 462 U.S. 862 ..... 366, 385, 516, 524

STATUTES

Ala. Code, §§ 13A-5-40, subd. (6), 13A-6-2 399
Ark. Stat., § 5-10-101, subd. (a)(6) 399
Cal. Code Civ. Pro., § 225, subd. (b)(1)(B) 127
Cal. Code Civ. Pro., § 225, subd. (b)(1)(C) 127
Cal. Code Civ. Pro., § 229 ..... *passim*
Cal. Code Civ. Pro., § 229, subd. (b) 127, 128, 130, 131
Cal. Code Civ. Pro., § 229, subd. (d) 127, 130, 131

Cal. Code Civ. Pro., § 229, subd. (e) 127, 131
Cal. Code Civ. Pro., § 229, subd. (f) 127, 131
Cal. Const., Art. I, § 7 346
Cal. Const., Art. I, § 15 ..... *passim*
Cal. Const., Art. I, § 16 ..... *passim*
Cal. Const., Art. I, § 17 ..... *passim*
Cal. Evid. Code, § 350 238
Cal. Evid. Code, § 352 ..... *passim*
Cal. Evid. Code, § 355 204
Cal. Evid. Code, § 400 238
Cal. Evid. Code, § 402 192
Cal. Evid. Code, § 403 ..... 238, 240
Cal. Evid. Code, § 403, subd. (a)(1) 238
Cal. Evid. Code, § 403, subd. (c)(2) 239
Cal. Evid. Code, § 520 520
Cal. Evid. Code, § 770 286
Cal. Evid. Code, § 773 447
Cal. Evid. Code, § 1101, subd. (a) 178
Cal. Evid. Code, § 1101, subd. (b) 200, 221, 223
Cal. Evid. Code, § 1102 192
Cal. Evid. Code, § 1103 ..... *passim*
Cal. Evid. Code, § 1103, subd. (a) 178, 179
Cal. Evid. Code, § 1103, subd. (a)(1) 188, 189, 191, 196
Cal. Evid. Code, § 1103, subd. (a)(2) 178, 202
Cal. Evid. Code, § 1103, subd. (b) ..... *passim*
Cal. Evid. Code, § 1108 227
Cal. Evid. Code, § 1200 ..... 285, 453

Cal. Evid. Code, § 1230 ..... 285, 286, 287
Cal. Evid. Code, § 1235 286
Cal. Evid. Code, § 1401, subd. (b) 282
Cal. Evid. Code, § 1521 ..... 280, 281, 283
Cal. Evid. Code, § 1521, subd. (a) 284
Cal. Evid. Code, § 1521, subd. (a)(1) 283
Cal. Evid. Code, § 1521, subd. (a)(2) 283
Cal. Evid. Code, § 1523 282
Cal. Pen. Code, § 187 ..... 7, 318
Cal. Pen. Code, § 189 7
Cal. Pen. Code, § 190.1, subd. (a) 186
Cal. Pen. Code, § 190.2 ..... 384, 385, 516, 517
Cal. Pen. Code, § 190.2, subd. (a)(15) ..... *passim*
Cal. Pen. Code, § 190.2, subd. (a)(2) 7
Cal. Pen. Code, § 190.3 ..... 386, 387, 403, 484, 525
Cal. Pen. Code, § 190.3 (a) ..... *passim*
Cal. Pen. Code, § 190.3 (b) ..... *passim*
Cal. Pen. Code, § 190.3 (c) 402
Cal. Pen. Code, § 190.4 ..... 386, 387
Cal. Pen. Code, § 190.7 344
Cal. Pen. Code, § 190.9 344
Cal. Pen. Code, § 209, subd. (a) 390
Cal. Pen. Code, § 209, subd. (b)(1) 390
Cal. Pen. Code, § 209.5, subd. (a) 390
Cal. Pen. Code, § 218 390
Cal. Pen. Code, § 220, subd. (b) 390
Cal. Pen. Code, § 245, subd. (a)(1) 322

Cal. Pen. Code, § 246 (former) 386
Cal. Pen. Code, § 288.7 390
Cal. Pen. Code, § 667.75 390
Cal. Pen. Code, § 1053 504
Cal. Pen. Code, § 1093 . . . . . 266, 267, 274, 275, 276
Cal. Pen. Code, § 1093, subd. (d) 267, 268, 274
Cal. Pen. Code, § 1118 246
Cal. Pen. Code, § 1118.1 . . . . . 243, 245, 246, 260
Cal. Pen. Code, § 1121 . . . . . 503, 505
Cal. Pen. Code, § 1158a 522
Cal. Pen. Code, § 1381 348
Cal. Pen. Code, § 4500 . . . . . *passim*
Cal. Welf. & Inst. Code, § 627 . . . . . 419, 420, 421
Conn. Gen. Stat., § 53a-54b 399
Kan. Stat., § 21-2439, subd. 3 399
Miss. Code, §§ 97-3-19, subd. (2), 97-3-19, subd. (1) 399
N.H. Rev. Stat., § 630:1, subd. I.A(d) 399
Or. Rev. Stat., § 163.095, subd. (2)(b) 399
Tex. Pen. Code, § 19.03, subds. (a)(5)-(6) 399
U.S. Const., Amend. 1 . . . . . 404, 406
U.S. Const., Amend. 5 . . . . . *passim*
U.S. Const., Amend. 6 . . . . . *passim*
U.S. Const., Amend. 8 . . . . . *passim*
U.S. Const., Amend. 14 . . . . . *passim*
18 U.S.C 5033 . . . . . 419, 420
Utah Code, § 76-5-202, subd. (1)(a) 399
Va. Code, § 18.2-31, subd. 3 399

Wash. Rev. Code, § 10.95.020, subd. 2 399

OTHER AUTHORITIES

ABA, Model Rules of Prof. Conduct 168, 170
CALJIC No. 2.09 220
CALJIC No. 2.20 . . . . . 218, 219
CALJIC No. 2.40 216
CALJIC No. 2.50 . . . . . *passim*
CALJIC No. 2.50.1 . . . . . 216, 218, 221, 224, 225, 226
CALJIC No. 2.50.2 . . . . . 216, 220, 221, 225
CALJIC No. 2.62 . . . . . *passim*
CALJIC No. 3.31.5 319
CALJIC No. 3.40 . . . . . 321, 322
CALJIC No. 7.35 . . . . . 318, 319, 320, 322
CALJIC No. 8.42 . . . . . 331, 332
CALJIC No. 8.55 . . . . . 321, 322
CALJIC No. 8.71 . . . . . 332, 333, 334, 335, 339
CALJIC No. 8.72 . . . . . 332, 333, 334, 335, 339
CALJIC No. 8.81.15 . . . . . 261, 335, 336, 338
CALJIC No. 8.85 . . . . . 520, 528, 529
CALJIC No. 8.87 . . . . . 403, 522
CALJIC No. 8.88 . . . . . 520, 524
CALJIC No. 9.00 . . . . . 318, 319, 320, 322
Cal. Rules of Court, rule 34.1(a)(1)(C) 344
Cal. Rules of Prof. Conduct, rule 2-100 . . . . . 166, 168, 169, 171, 172, 174
Cal. Rules of Prof. Conduct, rule 5-120 . . . . . 169, 170, 171, 172, 173, 174
Fed. Rules of Crim. Proc., rule 24 121

Fed. Rules of Evid., rule 404(a)(1) 212

Fed. Rules of Evid., rule 404(b) .....

Title 15, section 3042, CDC Regulations 67

ARTICLES

ACLU, *The Case Against the Death Penalty* (Dec. 2012) 397

Baird & Fugelsang, *The Emergence of Consequential Thought: Evidence from Neuroscience* (2004) 359 Phil. Transactions Royal Soc'y B: Biological Scis. 1797 419

Blume, Johnson & Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation* (2008) 36 Hofstra L.Rev. 1035 494

Bonnie & Grisso, *Adjudicative Competence and Youthful Offenders in Youth on Trial* (2000). 418

CDC, Offender Information Services Branch, *Prison Census Data*, Feb. 2013 395

Ferguson & Douglas, *A Study of Juvenile Waiver* (1970) 39 San Diego L. Rev. 53 419

Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis* (1980) 68 Cal. L. Rev. 1134 414

Grisso & Pomicter, *Interrogation of Juveniles: An Empirical Study on Procedures, Safeguards, and Rights Waiver* (1977) 1 Law & Hum. Behav. 321 419

Gross, et. al., *Exonerations in the United States, 1989 Through 2003*, (2005) 95(2) J. Crim. L. & Criminology 523 423

Haney, Sontag & Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50 Journal of Social Sciences, No. 2 (Summer 1994) 492

Kassin, S., et al., *Police-Induced Confessions: Risk Factors and*

Recommendations (2010) 34 Law & Hum. Behav. 3 419

Lamperti, J., *Does Capital Punishment Deter Murder?* Dartmouth College 397

Northwestern Univ. School of Law, Center on Wrongful Convictions, *The Snitch System* (Winter 2004-2005) 287

Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351 527

Proposition 36, the Three Strikes Reform Act of 2012 392

Redlich & Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility* (2003) 27 Law & Hum. Behav. 141. 423

Rogers & Harrison et al., *An Analysis of Miranda Warnings and Waivers: Comprehension and Coverage* (2007) 31 Law Hum. Behav. 177 414

Singh & Gudjonsson, *Interrogative Suggestibility Among Adolescent Boys and Its Relationship with Intelligence, Memory, and Cognitive Set* (1992) 15 J. of Adolesc. 155. 423

Steinberg, *Juveniles on Trial* (2003) 18 Crime. Just. 20. 418

Steinberg & Schwartz, *"Developmental Psychology Goes to Court." Youth on Trial: A Developmental Perspective on Juvenile Justice* 1(2000): 9-10. 418

Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty* (1998) 83 Cornell L.Rev. 1557. 494

Trott, Stephen S., *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 Hastings L.J. 1381 (1996) 287

U.S. Dept. of Justice, Office of Justice Programs, *Mortality in Local Jails and States Prisons, 2000-2010 - Statistical Tables*, Dec. 2012 397

U.S. Dept. of Justice, Office of Justice Programs, *Suicide and Homicide in State Prisons and Local Jails*, Aug. 2005 . . . . . 397, 397

Vitiello, *California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?* (2004) 37 U.C. Davis L.Rev. 1025 392

Wolfson, W., *The Deterrent Effect of the Death Penalty Upon Prison Murder*, in *The Death Penalty in America*, H. Bedau (ed) 3rd Ed. 1982 397

INTRODUCTION

Appellant Joseph Anthony Barrett was born in 1970 in New Jersey. His earliest memory was of Canada, where his family fled after his father deserted the Marine Corps. His parents had a difficult relationship and separated before he was three years old. Appellant's mother "kidnapped" him and his younger sister, taking them back to the United States because their father could not follow them. They lived an unstable and impoverished existence and eventually ended up in a shelter in San Francisco. They landed in the Tenderloin, where they lived with his mother's female partner and her son. Hard times for the family continued, such that appellant's former juvenile probation officer would come to describe his childhood as "very deplorable [], very difficult, very tough." Appellant had a strong and loving attachment to his sister, however, although he frequently got beat up trying to protect her.

In response to the intolerable conditions at home, appellant often lived on the streets and was in and out of juvenile placements. He abused drugs and alcohol and survived as best he could. When appellant was 16 years old, he was befriended by James Jackson, a school teacher. Jackson seemed nice at first, and occasionally gave appellant food and a place to sleep. On October 11, 1986, Jackson brought appellant to his apartment, where he plied the homeless teenager with beer and marijuana in order to sexually abuse him. Appellant, who thought Jackson was a friend, resisted the advances. After hours of consuming drugs and alcohol, appellant hit Jackson over the head with a dumbbell and killed him. About a week later, after appellant was arrested for another matter, he told the authorities about Jackson's death, taking full responsibility.

Appellant was tried as an adult and sentenced to 26-years-to-life. He

was stunned, as he understood from his attorney that if he went to trial the most he would get was 7-10 years. Appellant was sent to the California Youth Authority and then moved into an adult prison at age 17, which he described as "hell on earth." Over the years he learned strategies to protect himself while incarcerated, such as to never display vulnerability. He did not join a prison gang, but identified with the other white inmates or "woods" as a means of survival.

In 1992, appellant was sent to Calipatria State Prison in Imperial County. Calipatria was an exceeding dangerous place, and in 1996 it virtually exploded with violence after the Department of Corrections (CDC) sought to racially integrate the prison yards. During this period, the white inmates were expected to go to yard and fight inmates of other races, and were routinely taking weapons with them. In fact, inmate-manufactured weapons were ubiquitous in the prison.

In March 1996, appellant, then 26 years old, was housed in Calipatria's disciplinary unit, called the "Ad Seg." There he met Thomas Richmond, who was assigned as his cellmate. Richmond had been moved to Ad Seg after he voluntarily gave up two knives to prison staff "on the sly." Appellant and Richmond got along well but appellant was moved to a different cell after a couple of weeks. Housed alone in cell 146, appellant started cutting a piece out of the steel desk to make a knife. On April 1, Richmond was also moved into cell 146. He began helping appellant make the knife. However shortly thereafter, Richmond began receiving "kites" or messages from other inmates that he was not showing appellant. Because it was customary to share all kites between cellmates, appellant became suspicious of him. He could not ask Richmond about them, however, because to do so would be an act of "disrespect" that could bring dangerous

consequences. The relationship between appellant and Richmond started to deteriorate and appellant grew paranoid.

On the night of April 8, 1996, Richmond received a knife from another inmate on a "fishing line." The weapon had a handle and was not wrapped, which all inmates knew meant that it was to be used immediately. Appellant was concerned that Richmond had been given the knife to attack him and he considered acting preemptively with his own knife. But since he could think of no reason why his cellmate would want to kill him, he decided to wait and give Richmond the benefit of the doubt. Appellant got on the lower bunk with his knife and waited to see what Richmond would do. Richmond got on the top bunk with his knife as if to go to sleep. An hour or two later, Richmond suddenly came down, stepping onto the desk, which was contrary to the normal way in which inmates get off the top bunk. He had the knife in his hand and appellant believed his life was at stake. He sprang at Richmond and stabbed him; a struggle ensued. Richmond went back onto his bunk and tried to use his mattress as a shield. He came back down with the mattress and appellant continued to stab him. Eventually Richmond ended up seated on appellant's bottom bunk, where he died. Panicked, appellant flushed Richmond's knife down the cell toilet. He flushed his own bloody clothes, and finally flushed his own weapon.

Richmond was found shortly before 5:00 a.m. on the morning of April 9 by correctional staff. Although trained forensic personnel at the Department of Justice were available, the investigation into Richmond's death was handled by CDC staff, headed by a correctional officer who had never conducted a homicide investigation. As a result, the scene was inadequately documented and evidence was poorly preserved.

The CDC's investigation was completed in a few months and the

matter was referred to the Imperial County District Attorney for possible prosecution. Since appellant was already incarcerated, the DA's Office felt no obligation to move quickly and ultimately took more than two years to indict appellant. During this period, appellant was without legal counsel or investigative resources. Appellant's ability to develop his defense was greatly hindered as memories faded and inmate witnesses died, paroled or were transferred to other institutions.

Appellant was indicted for first degree murder. Two special circumstances were alleged – lying in wait and a prior murder conviction. He was also charged pursuant to Penal Code section 4500, which makes an inmate serving a life sentence death eligible if he commits a fatal assault.

Because appellant was the first defendant to be charged capitally in many years in sparsely populated, rural Imperial County, his case attracted much media attention, not all of it accurate. Both Calipatria and Centinela prisons were located there and many county residents either worked for the CDC or knew someone who did. Because the CDC had investigated the case and initiated the prosecution and would supply most of the witnesses in both phases of trial, the defense sought to exclude all Department employees from the jury pool, as was customary there for trials involving in-prison offenses. The trial court refused, however, and a correctional officer served as one of appellant's jurors.

The state's theory at the guilt phase of trial was that appellant had murdered Richmond because he learned that his cellmate was a "snitch." The prosecutor presented only a bare-bones case-in-chief, notably failing to produce evidence showing appellant knew that Richmond had cooperated with prison staff by giving up the knives. His case was substantially bolstered, however, when he was permitted over vociferous objection to

cross-examine appellant about multiple other instances of weapons possession and assaults on other inmates with those weapons.

Appellant testified in his own defense. His testimony was supported by a forensic expert who opined, after diligent examination of the poorly preserved physical evidence, that Richmond had a knife during the struggle. The evidence strongly supported a conclusion that the knife got tangled up in the top sheet on the mattress Richmond was holding, which explained why his attack on appellant was unsuccessful. The defense was also supported by an inmate who saw a knife being passed to Richmond on the night of his death.

In rebuttal, the prosecutor was permitted to sandbag the defense by presenting three inmates informants who claimed that appellant had made incriminating statements to each of them. Because the state's case was legally insufficient otherwise, this testimony, which was demonstrably incredible and from biased and hostile witnesses who were looking to shave time of their sentences, should have been presented in the case-in-chief if at all. After lengthy deliberations, the jury returned guilty verdicts on all charges.

The prosecution's penalty phase case was filled with testimony about appellant's prior juvenile offenses and in-prison misconduct. Much of it related to incidents appellant had already admitted in his guilt phase testimony, although the jury may not have realized that.

In the defense case, the only witnesses called to testify about appellant's tragic life circumstances were his former probation officer and appellant himself. Although the testimony touched on serious drug and alcohol problems experienced by appellant and other family members, and hinted at physical and sexual abuse, these themes were not fleshed out. No

mental health evidence was presented, although prison records not introduced indicated that appellant had tried to kill himself at least once while incarcerated. A prison consultant was called to explain how appellant could safely be contained in Pelican Bay's SHU if his life was spared.

Throughout the trial, the prosecutor committed repeated misconduct which put facts not in evidence before the jury and distorted those which had been presented. The deputy district attorney constantly goaded appellant and often ignored the trial court's rulings on objections, knowing that appellant would answer all questions, whether legally objectionable or not, because he believed to do otherwise would be hiding behind "legal manipulations."

Apparently the penalty decision was also a difficult one for the jury, as deliberations again were lengthy. Significantly, the trial court permitted the jury to separate for 11 days during this critical stage to accommodate a juror's vacation plans. This halt in deliberations occurred at a time when media interest in the case was resurgent and passions were running high in the community about appellant. Immediately after the jurors recommenced deliberations, they returned a verdict of death.

//

//

STATEMENT OF THE CASE

Appellant Joseph Anthony Barrett was prosecuted by indictment returned in the Imperial County Superior Court on July 10, 1998. Each of the four counts in the indictment related to the killing of Thomas Richmond, an inmate in Calipatria State Prison, on April 9, 1996. Count 1 charged appellant with the premeditated and deliberate first-degree murder of Richmond. (Pen. Code, §§ 187, 189.) Count 2 charged an assault on Richmond by a life prisoner. (Pen. Code, § 4500.) Counts 3 and 4 charged appellant with possession of a deadly weapon by a prisoner in violation of Penal Code section 4502. (1 ACT 5-8.)[1]

A lying-in-wait special circumstance was alleged, pursuant to Penal Code section 190.2, subdivision (a)(15). A prior murder special circumstance was also alleged, pursuant to section 190.2, subdivision (a)(2). (1 ACT 6.)

Appellant was arraigned on July 14, 1998. Attorney Eric Beaudikofer was appointed as lead counsel to represent him. Attorney Edward Sada was appointed as second counsel. (1 CT 3-4.)

Over the next two years, the parties litigated various issues, including those relating to discovery, pretrial shackling, and attorney-client visiting conditions, which were ultimately resolved in writ proceedings. (See 2 CT 503-529, 538-562.) During this period, appellant was transferred from Calipatria to Tehachapi State Prison. (See 3 CT 625.)

On July 19, 2000, Judge Joseph W. Zimmerman was assigned to

---

[1] Appellant uses "CT" to refer to the 47 original volumes of clerk's transcript. He uses "ACT" to refer to the 9 volumes of augmented clerk's transcript. Further supplemental clerk's transcript volumes are referred to as "1st Supp. CT," "2nd Supp. CT," "3rd Supp. CT" and "4th Supp. CT."

preside over appellant's trial. (2 CT 534.) A number of prosecutors were involved pretrial, including attorneys from the Imperial County District Attorney's Office and the Attorney General's Office, but ultimately deputy district attorney Wayne Robinson prosecuted appellant. (See 9 RT 1532; 10 RT 1553.)[2]

The next three years included, inter alia, further litigation concerning counsel's pretrial access to appellant and his return to Calipatria. (See 4 CT 1-108.) Negotiations for a disposition of the case with both the Attorney General's Office and the District Attorney's Office continued until shortly before jury selection began. (See 2 CT 573, 10 RT 1538-1539; 10 RT 1561-1562; 5 CT 1257, 13 RT 2041-2042.)[3]

In limine motions were heard on various dates in August and September, 2003. (5 CT 1239-1241, 1260-1266, 1283, 1286-1293.)

Jury selection began on September 15, 2003. (5 CT 1295-1297.) A motion by appellant to exclude all employees of the Department of Corrections from the jury pool was denied on November 17. (44 CT 12546.) Appellant's motion pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258, was denied on November 18. The jury was sworn that same day. (44 CT 12548-12550.)

The prosecution began presenting its guilt phase case-in-chief on

---

2

Appellant uses "RT" to refer to the 90 original volumes of reporter's transcript. He uses "SRT" to refer to the one supplemental volume of reporter's transcript.

3

On August 15, 2003, Judge Zimmerman observed that for several years the parties believed that the Attorney General's Office would reach a disposition with appellant. However, the District Attorney's Office apparently objected to any settlement. (13 RT 2042.)

December 1 and rested on December 15. (45 CT 12564-12565, 12661.) On December 16, appellant moved for acquittal pursuant to Penal Code section 1118.1. (45 CT 12664-12670.) The motion was heard and denied that day. (45 CT 12680.)

Appellant began presenting evidence on December 18. (45 CT 12686.) He rested on December 30. (45 CT 12752.) The prosecution presented a rebuttal case December 30, 2003 and January 2, 2004. (45 CT 12752, 12761-12762.) Appellant presented surrebuttal witnesses on January 2, 5 and 6. (45 CT 12762, 12766-12767, 12823.) The prosecutor called a final rebuttal witness on January 6, 2004. (45 CT 12823.)

The jury was instructed, heard arguments from counsel, and began guilt phase deliberations on January 9, 2004. (46 CT 12917.) The jury continued deliberations on January 12 and 13, asking for various readbacks of testimony and to see a video exhibit. (46 CT 12922, 12926.) On January 14, the jury returned verdicts finding appellant guilty of each of the four counts charged in the indictment. It also found true the lying-in-wait special circumstance allegation. (46 CT 12945-12947.)

In a bifurcated proceeding on January 26, the jury found true the prior murder special circumstance allegation. (46 CT 12954-12955.)

On February 2, 2004, the trial court denied appellant's motion to dismiss the indictment because the delay in filing charges had deprived him of due process. (46 CT 13016.)[4]

The evidentiary portion of the penalty phase began on February 3,

---

4

This motion was originally filed on August 19, 2002 but the parties agreed that the court should defer ruling until the end of the guilt phase. (3 CT 585-605, 666.)

2004. (46 CT 13021.) On February 17, the prosecution rested and appellant began presenting evidence. (46 CT 13096.) On February 23, the jury was instructed and heard argument. (47 CT 13160-13161.) On February 24, after hearing additional argument, the jury began deliberations. (47 CT 13166-13167.) Deliberations continued on February 25 and 26, during which the jurors asked for a readback of appellant's statement to them. (47 CT 13171, 13175.) Deliberations then recessed until March 10, when the jury returned a verdict of death.[5] (47 CT 13175, 13182.)

On March 29, 2004, the trial court denied appellant's motion for new trial and modification of the verdict pursuant to Penal Code section 190.4. The court imposed a sentence of death on count 1. The court also imposed and stayed the following sentences: death on count 2; eight years consecutive on count 3, and eight years consecutive on count 4. (47 CT 13230.)

This appeal is automatic. (Pen. Code, § 1239.)

//

//

5

Deliberations were recessed for 11 days to accommodate a juror's vacation schedule. (See Arg. XX., *post.*)

STATEMENT OF FACTS

A. THE GUILT PHASE

1. The Prosecution's Case-In-Chief

The prosecution presented no eyewitnesses to the death of Thomas Richmond. In fact, the state's case-in-chief included no direct evidence to establish what actually occurred in cell 146 on the night of April 8, 1996. Instead, the state sought to persuade the jury of appellant's guilt with circumstantial evidence that he had murdered his cellmate because Richmond was a "snitch." However, although it presented evidence that Richmond had voluntarily provided prison staff with weapons and information, the prosecution failed to establish that appellant knew about Richmond's actions or had any other motive to kill him.

a. February 29, 1996 – Richmond Gives Up Weapons.

In February 1996, Thomas Richmond was an inmate housed in the general population of Calipatria State Prison. On February 29, Richmond walked into the office of correctional officer (CO) Jason Longcor and told him that he was holding weapons in his cell. (48 RT 5715-5716, 5724.) Longcor instructed Richmond to return to his cell. (48 RT 5722.) The officer did not search the cell immediately for fear that other inmates would suspect Richmond of being a "snitch." (48 RT 5723, 5780.) Later, Longcor took Richmond and his cellmate out of their cell and put them into separate showers. Longcor then confiscated two plexiglass inmate-manufactured knives which Richmond had hidden in his clothing. (48 RT 5727-5729.)

Longcor filled out a "115," which is a rules violation report, on Richmond. (48 RT 5739.) Because a copy of a 115 is given to the inmate, Longcor was careful to make it sound like another inmate had told prison

authorities that Richmond was holding the weapons. (48 RT 5740, 5753.) To document in the 115 the fact that Richmond had voluntarily given up the weapons might have put him at risk of being assaulted. (48 RT 5740-5723.)

Correctional Sergeant Timothy Borem then interviewed Richmond. (48 RT 5792.) Richmond told Sgt. Borem that another inmate had informed him that the weapons were in the mattress. The inmate, who Richmond identified to prison authorities, had instructed him to hold on to them. (48 RT 5796–5799.) Possession of weapons in prison is a criminal offense with potentially very serious consequences, including a life sentence for a "third strike." Richmond told prison staff about the weapons because he was afraid of getting caught with them. (48 RT 5811-5812.) Richmond said he had been "threatened by a few people about holding" the knives. (48 RT 5809.)

Richmond was then sent to the prison's Administrative Segregation Unit, or "Ad Seg," where a general population inmate is placed after committing a rules violation. (48 RT 5804, 5740-5741.) Such inmates are called "management cases." (48 RT 5842.) Ad Seg also houses inmates who are at risk from the other inmates, such as child molesters and informants. (48 RT 5814.) These inmates are placed in protective custody, or "PC." (48 RT 5746.) The prison should ensure that an informant is not celled with a potentially violent cellmate. (48 RT 5815.)

Longcor did not inform Ad Seg staff that Richmond had voluntarily given up the weapons. Longcor did not know whether Richmond was placed into protective custody in Ad Seg, although the officer thought he should have been. (48 RT 5741, 5746.) Sgt. Borem could not recall whether he believed Richmond needed protection, but he denied that it was his responsibility to decide whether Richmond should have been placed in

PC. (48 RT 5815-5816.)

Correctional Lieutenant Glenn Trujillo was in charge of Calipatria's Ad Seg on February 29 when Richmond arrived. It was Trujillo's responsibility to review all "lockup orders," which explain why an inmate is being moved from general population to Ad Seg. (48 RT 5839-5840.) Richmond had been presented to him as a management case, not an informant. (48 RT 5840-5841, 5850.) Lt. Trujillo understood that Richmond wanted to be treated as a management case, rather than a PC case. (48 RT 5871, 5824.) But if prison staff believe an inmate is in danger from other inmates, they can order him to be housed separately, even if the inmate does not want PC status. (48 RT 5863-5866.) No one told Trujillo that Richmond had provided confidential information or had voluntarily given up weapons. (48 RT 5841-5843, 5859-5860.) Otherwise, he would have considered Richmond for a PC placement. (48 RT 5883.)

Apparently CDC[6] staff did not conduct any investigation into who was responsible for the weapons Richmond had turned in. (48 RT 5823.)

b. The Night of April 8-9, 1996.

Calipatria's Ad Seg had 50 cells on the lower tier and 50 cells on the upper tier. (48 RT 5894-5895.) On April 8, Thomas Richmond and appellant were housed together in cell 146 on the lower tier. (48 RT 5894.) The floor, walls and ceiling of the cell were concrete. (53 RT 6804.) The door was perforated, with sand-type plexiglass. Glare from the glass could sometimes impede the ability to see inside. (49 RT 6158, 52 RT 6753.) Looking in through the door, cell 146 had bunk beds on the left and shelves

---

6

California Department of Corrections. The CDC is now called the CDCR (California Department of Corrections and Rehabilitation).

on the right. (48 RT 5906; exh. 204.) There was also a desk with a seat made of steel. (53 RT 6799, 6804.) A sink and toilet were on the left side of the cell, at the foot of the beds. (50 RT 6193.) Richmond was assigned to the upper bunk and appellant was assigned to the lower bunk. (48 RT 5901-5902.)[7]

At 10:00 p.m. every night, the Ad Seg cells were placed on "deadlock," which means their doors were rendered inoperable by an officer in the control booth. They could not be opened intentionally or accidentally until 6:00 a.m., unless emergency procedures were instituted. (48 RT 5942-5948, 49 RT 6131-6132.) Correctional officer Jeffrey Wysocki was working in Ad Seg on the evening of April 8, 1996. (48 RT 5888-5889.) It was his job to conduct three "counts" during his shift, which meant to check each cell to make sure all the inmates were accounted for. (48 RT 5891-5892.) Wysocki usually spent a second or two at each cell, checking inside with a flashlight. (49 RT 5981-5982.) It took him about ten minutes to check all 100 cells. (49 RT 5963-5964.)

That night, correctional officer Roberto Avila assisted Wysocki with the counts. (48 RT 5893.) They began the first count on April 8 at about 11:30 or 11:40 p.m. (48 RT 5895.) They started the second count at about 2:15 a.m., on April 9. (48 RT 5899.) Wysocki recalled that when he checked cell 146 during second count, the light was turned off. The security light, which the inmates cannot control, was on but it was covered

---

7

CDC staff variously estimated the size of the cell. (See, e.g., 48 RT 5907; 52 RT 6758.) Apparently they did not measure it. (See 60 RT 7747.) The defense expert later testified that cell 146 was six feet wide and eleven feet, four inches long. (60 RT 7800.)

with paper. (48 RT 5900-5901.)[8] Inside, he could see two persons lying on their bunks. (48 RT 5900.)

Wysocki indicated that it was generally pretty loud in Ad Seg, like a "circus." (49 RT 5976.) He recalled it was quiet that evening, however. (48 RT 5936.) He would have been able to hear loud voices, or banging on the desk or shelves, from practically anywhere in the building. (49 RT 5989-5990.) After second count he did not hear any screaming for help or banging, or see any lights flickering on and off, which inmates do to get staff's attention. (48 RT 5902-5903.)

CO's Wysocki and Avila began the third count at about 4:45 a.m. on April 9. (48 RT 5903.) Wysocki noticed that the light was on in cell 146, which he found to be out of the ordinary. Appellant was standing by the door of the cell, wearing his boxer shorts. The officer could not recall whether appellant was wearing anything else. (48 RT 5903-5904.) Thomas Richmond was in the back of the cell, sitting on the edge of the bottom bunk. He was a bit slumped over, with his head toward the desk. Richmond was wearing boxers and no shirt. Wysocki saw stab wounds to his chest. (48 RT 5905, 5907-5908.) The officer said, "Your celly doesn't look too fucking good." Appellant replied, "Well, he's not." (48 RT 5910.)[9]

According to CO Avila, he and Wysocki walked by cell 146 at about

---

8

Wysocki explained that inmates commonly put paper or cardboard over the security lights so that they could sleep better. (48 RT 5901.) It was technically a rules violation so do so, but was nonetheless "kind of acceptable." (49 RT 49 RT 5965-5966.)

9

Wysocki later acknowledged that before the grand jury, he had testified that it was appellant who said, "My celly isn't doing too good." (49 RT 6014.)

4:53 a.m. (49 RT 6056.) In contrast to Wysocki's testimony, Avila stated that it was dim inside, and that they needed a flashlight to see to the back of the cell. (49 RT 6059.) Appellant was standing by the door. He said nothing as Wysocki and Avila approached, but he moved away and leaned against the wall, so that their view was not obstructed. (49 RT 6056.) Avila recalled that Wysocki shined his light into the cell and said, "Oh Barrett, what did you do?" but that appellant did not respond. (49 RT 6058-6059.) According to Avila, appellant never said anything to either of the officers. (49 RT 6060-6061.) Avila then looked in and saw Richmond on the bed with his feet stretched out, his face resting on the desk. Avila could see three puncture wounds on Richmond's right side, but no blood coming out. (49 RT 6059-6060.)

Wysocki and Avila had differing recollections about which one of them went to summon help. (See 48 RT 5911-5912; 49 RT 6061-6062.) In any event, Sergeant Frederick Hazel came down from the control booth, to cell 146. Hazel could see four wounds on the right side of Richmond's chest with streaks of dried blood running downward. There was also blood on Richmond's thigh. Richmond's feet were on the floor in a pool of coagulated blood. Hazel walked back to the control booth to request an ambulance, the medical technical assistant (MTA), and the watch commander. (50 RT 6181-6182.) Central Control then initiated emergency procedures. (49 RT 6138.)

Sgt. Hazel thought it would be important to document the position of Richmond's body inside the cell. (50 RT 6250.) So while he waited for the watch commander and MTA to arrive, he tried to find a camera. (50 RT 6183.) He called three facilities inside the prison, but none had a camera with film. (50 RT 6226-6227, 6250.) Thus, Richmond's body was not

photographed until after it was removed from the cell. (50 RT 6227.)

CO Avila remained outside cell 146. Appellant continued to stand against the wall inside. Avila saw him pick up an apple and begin to eat it. (49 RT 6062-6063, 48 RT 5913.) Wysocki then had appellant put his hands through the food port in the cell door and handcuffed him. (48 RT 5914-5916.)

The watch commander reported to the Ad Seg building and ordered deadlock to be lifted. (50 RT 6183.) MTA Michael Greene arrived at about 5:05 a.m. (50 RT 6302, 6304.) The door to cell 146 was opened and Sgt. Hazel instructed Avila to escort appellant to a holding cell and stay with him. (49 RT 6064-6065, 50 RT 6249.) Appellant was cooperative in exiting the cell. (50 RT 6245.) Hazel told Avila not to say a word to appellant because he had not been *Mirandized.* (50 RT 6249-6250.) As Avila was walking appellant through the facility, an inmate called out, "Hey Axle, what is wrong with your celly?" Appellant did not respond, he just smiled and kept walking. (49 RT 6115.)[10]

Sgt. Hazel did not remember appellant wearing anything other than boxer shorts. However, when presented with his grand jury testimony, the sergeant acknowledged that appellant had been wearing a t-shirt. This was significant because it was not normal for an inmate who was planning on initiating a cell fight to be wearing a shirt, which gave his opponent something to grab on to. (50 RT 6244-6245.) None of the prison staff noticed any blood or injuries on appellant. (48 RT 5911, 49 RT 6064, 50 RT 6187.) Appellant seemed calm. (48 RT 5911, 50 RT 6259.) Sgt. Hazel acknowledged, however, that inmates tended to act with bravado and he

---

10

Appellant was nicknamed after musician Axl Rose. (48 RT 5937.)

could not say how appellant was actually feeling. (50 RT 6260.)

Accounts differed regarding the order of CDC personnel who entered the cell after appellant was removed. (See 50 RT 6191-6192; 50 RT 6207-6208; 48 RT 5920.) The officers agreed that it did not seem like there had been a fight in the cell. (48 RT 5924; 50 RT 6196.) But they inconsistently described the state of the cell in several particulars. Sgt. Hazel recalled there was a mattress on the top bunk but that the bottom bunk mattress was folded up in three sections and against the wall. Richmond was leaning on it. (50 RT 6195, 6253.) CO Wysocki reported no mattress on the top bunk. It was propped against the wall of the cell, with Richmond in front of it. Wysocki could not recall whether Richmond's body was actually touching the mattress. (48 RT 5917-5919 .) Sgt. Hazel saw Richmond's feet on the cell floor in a pool of blood, but Wysocki and Avila did not notice any blood in the cell. (48 RT 5923, 49 RT 6060.)

Inside cell 146, Wysocki handcuffed Richmond. (48 RT 5920-5921.) MTA Greene then checked him and found no signs of life. Richmond was not breathing, did not have a pulse and his eyes were dilated. (50 RT 6310-6311.) Richmond's skin was cold and his joints were stiff, which Greene said meant that rigor mortis had begun to set in. (50 RT 6316.) Greene noticed lividity in Richmond's heels, which were touching the floor and were bluish purple. (50 RT 6328, 6315.)

According to Sgt. Hazel, MTA Greene then climbed onto the bunk behind Richmond, with Wysocki at his feet. They moved Richmond onto the cell floor. (50 RT 6192.) Greene recalled, however, that he was standing when Richmond was moved. (50 RT 6312.) Once Richmond was on the floor, Greene attempted to administer CPR, which caused blood to

spurt from the stab wounds. Richmond did not respond. (50 RT 6313-6314.) They moved him to the floor outside the cell, where Greene continued CPR. (50 RT 6317-6318.) About 15 minutes after the MTA had arrived in Ad Seg, Richmond was put into an institutional ambulance and transported to the prison's emergency room. (50 RT 6318-6319.)

Richmond was brought into Calipatria's emergency room at about 5:15 a.m., and further lifesaving measures were initiated. (50 RT 6361-6365, 6370-6371.) CDC nurse Joann Huelsen observed no signs of life in him. (50 RT 6364-6365.) There was an unstated rule that no one died on the prison grounds, however. (50 RT 6367.) Thus, Richmond was sent by ambulance to Pioneers Memorial hospital. (50 RT 6369.) During the drive, the hospital physician was called and pronounced Richmond dead via radio at 5:59 a.m. (50 RT 6386-87.)

Shortly before 6:00 a.m., correctional officer William Brumbaugh walked by the holding cell in which appellant had been placed. (54 RT 7051-7052.) Appellant was "calm, cool, just like it was any other day." (54 RT 7053.) Brumbaugh acknowledged, however, that appellant's demeanor could have been due to the grave nature of the situation. (54 RT 7065.) The CO also admitted that inmates often masked their vulnerability and weaknesses, so that they won't be taken advantage of by others. (54 RT 7060, 7063-7064.)

Brumbaugh claimed that appellant was eating an apple in the holding cell. (54 RT 7068.) Brumbaugh admitted, however, that appellant would have been searched prior to being placed in the cell, and that it was unlikely that he would have been permitted to bring in fruit, because a weapon such as a razor blade could have been hidden inside. (54 RT 7069-7070, 7079.) In fact, CO Avila testified that appellant had taken nothing with him when

he left cell 146. (49 RT 6113.)

Brumbaugh also claimed that he had asked appellant how his cellie was doing. He replied that Richmond had "steel poisoning." (54 RT 7072.) Brumbaugh failed to include this noteworthy statement in the report he made in April 1996, however. Neither did he document appellant's calm demeanor or apple eating. (54 RT 7076-7077, 7079.)

c. The Investigation.

Correctional officer Robert Swetich was assigned to Calipatria prison's Security and Investigations (S&I) Unit. (52 RT 6749.)[11] To become an S&I investigator, Swetich had received two weeks of basic training and two weeks of advanced training. The advanced course included some narcotics and surveillance training. (53 RT 6812.) It was his responsibility to document the scene in cell 146 and preserve evidence. (53 RT 6862, 6749.) He used videotape, photographs and drawings. (53 RT 6852.)

Richmond's death was the first homicide officer Swetich had investigated. (53 RT 6894.) The Department of Corrections had jurisdiction over the scene; no other agencies participated in the initial investigation. (53 RT 6861-6862.) The CDC has an Operation Manual with written procedures on institutional homicide investigations, but Swetich did not recall if it was consulted before the investigation into Richmond's death began. (53 RT 6886.)

When Swetich arrived at cell 146 on April 9 at about 6:00 a.m., it was locked. (53 RT 6871-6872.) He did not know who had been in the cell before he arrived. (53 RT 6872.) The officer made a videotape of the cell,

---

11

Swetich had been promoted to sergeant by the time of trial. (53 RT 6785.)

which started at 5:55 a.m., although the camera's time marker was incorrect. (52 RT 6751, 6764.) The video, exhibit 341, was played for the jury while Swetich narrated. (52 RT 6750-6768.)

The video showed both mattresses and sets of linens on the bottom bunk, one of which was propped up against the back of the cell wall. (52 RT 6755.) There appeared to be blood on the floor, the desk, desk seat, and linens. (52 RT 6754-6755.) There was blood on the lower shelf. (52 RT 6760.) Most of the blood was in the left back corner of the cell, and in front of the desk on the floor. (52 RT 6755.) An apple core was in the toilet. (52 RT 6754.) A piece of the front of the desk was cut out, which Swetich characterized as "extremely unusual." (52 RT 6758.) The video showed Lieutenant Stanford, who was in charge of searching the cell, remove one of the mattresses and spread out the sheets. Both appeared to have blood on them. (52 RT 6760-6766.)

CO Swetich made a second video, a "reenactment" of what officers Wysocki and Avila saw when they approached cell 146 on April 9. (53 RT 6786-6787.) Swetich said he made it on April 9, but Wysocki believed that it was made on April 16. (53 RT 6786, 6953.) This video, marked as exhibit 342, was also shown to the jury. (53 RT 6953-6955.) Although it purported to depict what officer Wysocki saw in cell 146, Wysocki was not involved in determining how the "body" representing Richmond was placed; he merely observed Swetich make the video. Wysocki did not know who helped position the body for the video. (53 RT 6954-6956.)

CO Swetich also identified for the jury a series of photographs he had taken on April 9 of the blood evidence in cell 146. (53 RT 6795-6802.) Although his training included some instruction on blood spatter, which he called "splatters," Swetich was not an expert in the area. (53 RT 6819-

6820, 6825.) The Department of Justice had such experts, but one was not brought in by the prison to assess the blood evidence at the scene. (53 RT 6825.) Swetich failed to take close-up photos of each spatter. (53 RT 6826.) He made several drawings, which documented some of them. (53 RT 6802-6807.) One drawing depicted blood drops on the floor, but Swetich could not say whether they were supposed to represent the smear made when Richmond's body was pulled out. (53 RT 6876-6877.) He did not individually examine items in the cell for blood or document any blood found on them. (53 RT 6878-6879.)

The removal of all evidence from the cell was not videotaped. (53 RT 6869.) Swetich did not know whether each item removed from the cell was documented. (53 RT 68706871.) The video showed that during processing, evidence was placed on the floor outside of the cell and walked on. (53 RT 6874.) Lt. Stanford used the same pair of gloves when handling each item. (53 RT 6874.)

At about 8:45 a.m. CDC plumber Sam Tozer arrived at cell 146 to see if he could retrieve anything from the toilet. (53 RT 6900, 6904.) Tozer inserted an auger and pulled out a piece of metal and a "massive" amount of string. (53 RT 6905, 6938.) The metal was bent; it would not have flushed otherwise. (53 RT 6907-6908.) The string appeared to have been made from sheets. (53 RT 6936.) Tozer did not unravel the string but guessed it was at least four feet long. (53 RT 6938.) The plumber opined that the sheet was flushed before the piece of metal. (53 RT 6942.) The metal would have gone into the sewer but for the string, which stopped up the toilet. (53 RT 6910-11, 6939-6941.) Exhibit 202 looked like the metal Tozer retrieved from the toilet. (53 RT 6906.) He had no idea what had happened to the string, which was not part of the exhibit. (53 RT 6938.)

Correctional officer Raymond Leon was the S&I evidence officer. (53 RT 6995.) On April 9, he arrived in the Ad Seg building at 9:15 a.m., where he met Tozer to pick up the piece of metal. (53 RT 6959-60.) It was flat metal stock measuring about eight and one-half inches long, three-quarters of an inch wide, and one inch thick at its thickest part. One end was sharpened to a point. The other end had a white cloth wrapped around it for a handle. (53 RT 6962.) It was approximately the same size and color as the piece missing from the desk in cell 146. (53 RT 6994.) Leon explained that inmates are able to sharpen a weapon by riding it down on the concrete in the cells. (53 RT 6964-6965.)

Officer Leon put the metal into a lunch-type paper bag. (53 RT 6990; 54 RT 7017.) He then went to cell 146, carrying the bag with him. (53 RT 6989-6991.) Although a log documenting who had been inside the cell should have been maintained, Leon was unaware of any such log in this case. (RT 6993, 54 RT 7020-7021.) Inside, he took some photographs of the desk. (53 RT 6981, 6986.)

Leon later took the weapon recovered from the toilet to S&I to photograph and measure it. (54 RT 7017.) At some point, it apparently was transferred from the bag into an evidence envelope. Leon could not recall if he himself did so. (53 RT 6996-6997.) He acknowledged that the chain of custody for the item, which was documented on the envelope, was incomplete. (54 RT 7019.) He testified that the first entry was for April 26, 1996, when the weapon was given to Lieutenant J. Peck. (54 RT 7018, 53 RT 6996-6997.) However, Leon later stated that, according to the envelope, he had given the weapon to Peck on April 18, 1996. (54 RT 7025.) Lt. Peck returned it to him on April 18. (54 RT 7026.) The next and last entry indicated that Leon had received the weapon from the

evidence room on July 7, 1998. (53 RT 6997-6998.) The envelope did not indicate what happened to the weapon after July 7, 1998; Leon did not have it in his possession since then. (54 RT 7019-20.) He did not know where it had been for the last six to seven years. (53 RT 6998.)

At some point, officer Leon also took possession of Thomas Richmond's underwear and shower shoes. (54 RT 7034-7035, 7039-7040.) The evidence envelope containing the underwear erroneously identified Richmond as "Richard P." (54 RT 7036-7037.) Leon acknowledged that the chain of custody for these items was also deficient. (54 RT 7035, 7040-7041.)

At about 10:30 a.m., officer Leon reported to the Ad Seg committee room to photograph appellant. (53 RT 6983, 6965.) Appellant had refused to permit an MTA to conduct an unclothed body exam, but allowed prison staff to take pictures of him wearing only boxer shorts. (52 RT 6740, 6743.)[12] Leon photographed various parts of appellant's body to document any injuries or bloodstains. (53 RT 6965-6982 [exhibits nos. 264-270, 272-276, 278-279].) Appellant was cooperative, and he was not restrained during this process. (53 RT 6982, 52 RT 6745.) The photos showed that appellant had scrapes on his right chest area. (53 RT 6967-6968.) He also had some injuries to his right index finger, palm area and thumb. (53 RT 6972.) The injuries did not appear to Leon to be defensive wounds. (53 RT 6974-6975.) Appellant's left hand had a wound to the index finger. (53 RT 6975.) Although the MTA had observed a bruise and abrasion on

---

12

In fact, exhibits which were not shown to the jury demonstrate that appellant was photographed while completely naked. (Exh. 5, 7 [grand jury exhibits].)

appellant's lower leg, Leon acknowledged that the photographs he took did not clearly show it. (52 RT 6732-6733, 53 RT 6987-6988.)

d. Contraband Watch.

After the photographs were taken, appellant was apparently returned to the holding cell. (53 RT 6983.) There, officer Leon noticed that appellant was squatting down while looking around, which made the officer suspicious. (53 RT 6983.) Leon's supervisor instructed him to have appellant x-rayed to see if he was hiding contraband in his rectum. (53 RT 6984.) Leon escorted appellant to the infirmary. (53 RT 6984.)

There technologist Marco Pineda took an x-ray of appellant's pelvis and abdomen. (54 RT 7084-7086.) Pineda had taken thousand of such x-rays and it was not unusual for him to find foreign objects in an inmate's anal cavity. (54 RT 7086, 7090.) Appellant was cooperative with the procedure. (54 RT 7088.) Based on the x-ray, Pineda suspected appellant had secreted contraband. (54 RT 7087.) Appellant was placed on contraband watch, in a cell in the infirmary with a dry toilet that could not be flushed. (53 RT 6985-86, 54 RT 7088-7089.)

Correctional officer Robert Cannon was sent to the infirmary to try to obtain the suspected contraband from appellant. Cannon told appellant that the x-rays were positive for contraband and asked if he was ready to give it up. Appellant was not. (54 RT 7093.) He said, "It's nothing personal. I'm not giving them up. You've got your job to do. I've got my job to do." (54 RT 7094.)

Correctional officer William Wright was assigned to contraband watch on April 9, 1996. (54 RT 7112-7113.) He indicated that it was not uncommon to find weapons in prison. (54 RT 7122.) While Wright was there, appellant called to him and said, "Here is the weapon" and slid it

underneath the door. (54 RT 7113.) It was a razor blade with a little bit of tape for a handle. (54 RT 7114; exh. 335.) Wright placed the blade into a paper towel and an envelope, which he sealed. He placed the envelope into an evidence locker. (54 RT 7117, 7119.) Wright acknowledged that there was no way to determine the chain of custody for the blade based on the information contained on the envelope. (54 RT 7129-32.)

On April 10, correctional officer Kelly Esterberg searched the contraband watch cell appellant had been in. (54 RT 7139, 7143.) Esterberg found bits of paper and plastic strewn on the floor. (54 RT 7141.) The pieces of paper were a letter. (54 RT 7142-7143.)[13]

e. The Autopsy.

An autopsy was performed on Thomas Richmond's body on April 9, 1996. (51 RT 6524-6525.) Richmond was five feet, nine inches tall. He weighed approximately 160 pounds. (51 RT 6407-6408.) He was thin but muscular. (52 RT 6608.)

Christopher Swalwell, a deputy medical examiner for San Diego County, opined that the cause of Richmond's death was multiple stab wounds. (51 RT 6521, 6559.) Dr. Swalwell observed twelve such wounds, six of which hit internal organs and were potentially fatal. (51 RT 6540, 6559.) The doctor was unable to determine anything about the sequence in which the wounds were inflicted. (51 RT 6533, 6643.)

Dr. Swalwell described each of the stab wounds, starting from the head. (See RT 51 6533.) The first was to the back of the head. It went

---

13

This letter was marked as exhibit 214. The trial court ultimately ruled that it was irrelevant and so it was not admitted into evidence. (56 RT 7341-7342.)

through the scalp, so there was both an entrance and exit wound. (51 RT 6532.) It was "superficial," meaning not very deep. It did not hit the skull and was not life threatening. (51 RT 6646-6647.)

There were four wounds on the right side of the chest, each approximately half an inch wide. (51 RT 6535.) A wound in the middle of Richmond's chest was about three-quarters of an inch wide. (51 RT 6536.) The chest wounds were between four and five and one-half inches deep. (51 RT 6549-6551.) One went through the liver, diaphragm, and part of the right lung. Another hit part of the liver, and one nicked the stomach. The wound in the middle struck Richmond's heart. Another went into the left lung. (51 RT 6551-6556.)

Dr. Swalwell also observed a stab wound on Richmond's left upper arm near the shoulder. (51 RT 6536-6537.) It was not life threatening. (52 RT 6664.) There were two stab wounds on the back of Richmond's left side, each about half an inch wide. (51 RT 6537-6538.) There was also a wound on the left side of chest. It was about half an inch wide and four inches deep. (51 RT 6538, 6548.) Another wound on the left side of the chest, down lower, was about an inch deep and not potentially lethal. (51 RT 6539, 52 RT 6667-6668.) Finally, there was a stab wound on the left side of Richmond's hip, also not potentially lethal. (51 RT 6539-6540, 6668-6669.)

The medical examiner also documented a few other minor injuries to Richmond, including some small scrapes and three small cuts. (51 RT 6540-6541.) Two of these cuts were on Richmond's hands and were consistent with defensive wounds. (51 RT 6542-6543.)

In response to a hypothetical question posed by the prosecutor, Swalwell indicated that Richmond's wounds were consistent with a weapon

eight and one-half inches long, three-quarters inch wide and one inch thick, sharpened at one end, with a cloth handle at the other. (52 RT 6595.) He could not say that the wounds were actually caused by the weapon described by the prosecutor, however, since a stab wound cannot be matched to a particular weapon. Many knives of similar size can cause wounds that look similar. (52 RT 6616.)

Dr. Swalwell had no way of determining what Richmond had been doing before his injuries, such as whether he was sleeping. (52 RT 6664-6665.) His wounds and abrasions were consistent with a struggle having occurred before his death. The medical examiner could not exclude the possibility that Richmond had initiated the struggle or had a weapon at the time. (52 RT 6680.) Nothing about his injuries would have prevented Richmond from moving before his death. (52 RT 6669.) The doctor could not say whether Richmond was able to cry out or what kind of pain he felt. (52 RT 6652, 6631.) Dr. Swalwell estimated that it took several minutes between the injuries and Richmond's death. (52 RT 6606.)

When the autopsy began at 10:52 a.m., rigor mortis had fully occurred. (52 RT 6609.) Rigor mortis, which is a chemical reaction that causes muscles to stiffen and contract, is not apparent until one-half to one hour after death. (51 RT 6577, 6579.) It is usually fully developed within six to twelve hours after death. (51 RT 6580.) However, there is no generally acceptable formula for figuring a precise time of death from rigor mortis, which is very dependent upon temperature and other factors. Only a "ballpark" estimate could be made. (51 RT 6577-6578.) Nor is there a way to calculate an exact time of death by using livor mortis, which is generally perceptible in a body one to two hours after death. (51 RT 6572.)

f. Appellant's Life Sentence.

Appellant was born on March 15, 1970. He was arrested on October 11, 1986, for an offense that occurred when he was 16 years old. (56 RT 7330.) Appellant received a 26-years-to-life sentence in San Francisco County, with the possibility of parole. (56 RT 7301, 7305.) He entered the CDC on January 5, 1988. (56 RT 7328.)

This testimony was provided by Calipatria records analyst Ray Vialpando, who also indicated that Thomas Richmond was born on July 6, 1972. (56 RT 7331.) He was serving a sentence of 13 years. (56 RT 7302.) Richmond entered the CDC on August 31, 1995, and arrived at Calipatria prison on November 22. (56 RT 7328.)

2. The Defense Case.

In summary, the defense presented evidence that appellant killed Thomas Richmond but with a belief that he was acting in self-defense. When appellant was initially celled with Richmond in Ad Seg, he assumed his new cellmate was a "good wood," or a trustworthy white inmate. Some disciplinary violations committed by Richmond in Ad Seg bolstered this assumption. However, shortly before Richmond's death he began acting suspiciously and appellant grew paranoid. On the evening of April 8, Richmond received a knife from another inmate. The fact that it was not wrapped meant the knife was intended to be used immediately. Appellant's paranoia increased and he became hyper vigilant. That night he lay on his bunk with his own knife, waiting to see if Richmond would attack him. Sometime after midnight, Richmond came off his bunk in an unusual fashion, holding his knife. Believing his life was at stake, appellant sprang up and began stabbing his cellmate before Richmond could strike him.

The physical evidence, although it was poorly documented by CDC

investigators, corroborated appellant's account of events. It established that a fight had occurred inside cell 146, which did not begin on the top bunk, and also strongly tended to show that Richmond was armed at the time. This evidence was supported in turn by the testimony of an inmate who saw a knife being passed to Richmond on the evening of his death.

a. Appellant's Testimony.

Appellant Joseph Barrett was convicted of a crime as a teenager and sentenced to life in prison. (59 RT 7611.) He began his sentence in CYA and was moved to prison in January 1988, when he was 17 years old. (58 RT 7467-7468, 59 RT 7613.) He was sent to Calipatria in 1992. (59 RT 7614.) In April 1996, he had just turned 26 years old and had been in Ad Seg for about a year. (58 RT 7468; see 56 RT 7730.) He was 6'2" tall and weighed about 170-175 pounds. (58 RT 7506.)

The Ad Seg in Calipatria was reputed to be the most violent among California prisons. The yards there were called the "Thunder Dome" or "shark tanks" because so much violence occurred on them. (58 RT 7473-7474, 7492.) Part of this violence resulted from the "tier yard" policy the prison had enacted to racially desegregate the yard program. Previously, inmates were assigned to a yard according to their race. Under tier yard, inmates were released for yard time by tier, which resulted in inmates of different races being on the yards together. It created a great deal of racial unrest and riots frequently broke out. (58 RT 7499-7503.) Weapons were common in Ad Seg and inmates were frequently stabbed. (58 RT 7504.) Paranoia permeated the atmosphere. (58 RT 7478.)

Appellant was not in a gang and never had been. As a white inmate,

he did identify as a "wood."[14] A "good wood" was a white inmate in good standing with other white inmates. Child molesters, rapists and informants could not be good woods. (58 RT 7470-7476.) In April 1996, woods were expected to go to yard, even though they knew there would be violence. To refuse yard was viewed as cowardice. (58 RT 7499-7500.)

Appellant met Thomas Richmond in March 1996, when Richmond was assigned to be his cellmate. (58 RT 7506.) As was the custom, they exchanged basic information including their 114's, which explain why an inmate has been placed in "the hole." A 114 does not contain confidential information. (58 RT 7508.) In explaining why he was in Ad Seg, Richmond said that someone had told him there were knives hidden in his mattress. He was instructed to retrieve the weapons so that they could be picked up. After Richmond removed them from the mattress, he was "cuffed up" for a cell search. An officer found the knives in Richmond's pants. Appellant asked why Richmond's cellmate was not also in Ad Seg. Richmond said he told staff that he, and not his cellmate, was responsible for the knives. (58 RT 7511-7512.)

Appellant never heard any information to contradict Richmond's version of events. (58 RT 7512.) In fact, appellant had not heard any adverse information about his cellmate. (59 RT 7714-7715.) No one told him that Richmond had voluntarily relinquished knives before he moved to Ad Seg or informed on a fellow inmate by identifying the owner of the weapons. (59 RT 7715.)

14

"Wood" is short for "peckerwood," a term referring to "white trash." White inmates refer to themselves as woods to turn a term with a negative connotation into a positive one. (58 RT 7471.)

Appellant gave Richmond basic information about how Ad Seg worked and identified the "good woods." (58 RT 7509-7510.) Appellant told him that because of tier yard, white inmates were expected to fight the black inmates. He said: "I explained the situation that unfortunately we were having to go out and fight with these other inmates. That's just the way it is, one of those things." (58 RT 7510.) Appellant indicated he would be taking a weapon to the yard if necessary. Richmond said he was willing to do the same, although appellant explained that it was not wise to do so. (58 RT 7512.)

Initially, appellant and Richmond got along as cellmates, working out, playing cards and getting drunk together to pass the time. (58 RT 7514.) Sometime in March, the need arose for appellant to go to yard with a weapon. Richmond went too, also with a weapon. (58 RT 7513-7514.) However, they were caught with the weapons before they made it onto the yard. (58 RT 7514.)[15]

Appellant and Richmond also both received a 115 disciplinary write-up for flooding their cell. (58 RT 7514.) At appellant's hearing, he told Lieutenant Fast that the flooding was his responsibility and that he would admit guilt if the charge against Richmond was dropped. Appellant thought that they had an agreement, but then learned that Richmond had been found guilty too. When appellant asked Fast why he broke his word, the lieutenant gave him a "line of bullshit." Appellant became very upset and spit in Fast's face. (58 RT 7514-7515.)[16]

15

According to testimony later presented at the penalty phase, this incident occurred on March 16, 1996. (77 RT 9254-9255.)

16

According to a document not entered into evidence, the flooding incident

As a result of the spitting incident, appellant was moved out of the cell he and Richmond shared, and into cell 146. Another inmate was moved in with Richmond. After appellant was rehoused, there was an incident in which the cell extraction team came to remove Richmond and his new cellmate from their cell. Although appellant did not witness Richmond "gassing" an officer, he did see the officer coming from the cell, mopping his face. (58 RT 7515-7517.)[17]

While housed alone in cell 146, appellant started cutting a knife. When asked how, he responded: "Cutting a piece of steel from the desk top. I'm sorry I can't be any more specific than that." (58 RT 7517-7518.) After the cell extraction, Richmond was moved several times and then into cell 146 with appellant, possibly on April 1. Richmond told him that he had been caught with a weapon during the extraction. (58 RT 7516-7517; 59 RT 7625.) He began to help appellant with his knife and they both worked to sharpen it. It had a handle made of paper, thread and sheets torn into strips. (58 RT 7523-7526.) While they were making the weapon, Richmond tested it using his mattress. (59 RT 7579.) He was kneeling on his bed and lifted up the foot of the mattress. At trial, appellant identified some holes in Richmond's sheets and mattress which matched the location where Richmond had tested the knife. (59 RT 7600-7601.)

After Richmond moved into cell 146, he began receiving "kites" that

---

occurred on March 4. (3rd Supp. CT 417.) Evidence later introduced at the penalty phase established that the spitting incident happened on March 19. (78 RT 9273-9274.)

17

Appellant explained that "gassing" is when an inmate throws a substance, usually bodily fluids, at an officer. (58 RT 7517.)

he was not showing to appellant.[18] Because it was customary for an inmate to share all kites with his cellmate, appellant grew suspicious of him. Appellant became tense and nervous and stopped having Richmond help with the knife. Richmond also became tense and uptight. It seemed like something was on his mind. Appellant started to get hyper vigilant or paranoid. Appellant wondered what Richmond was up to, but to ask him could have been viewed as "disrespecting" him or accusatory. (58 RT 7527-7529.) Appellant explained that "respect" was a very important commodity in prison, and to disrespect another inmate was serious. (58 RT 7483-7484.)

Moreover, Richmond's earlier willingness to take a weapon out to the yard had suggested he was trustworthy. Appellant stated: "It told me a few things about Mr. Richmond. One being that, at least in some circumstances, he could be trusted. He won my trust, to an extent, by doing that. He's willing to take some risks other people weren't willing to take." (59 RT 7715.)[19] That Richmond possessed a weapon and gassed an officer while they were housed separately led appellant to believe Richmond was trying to ingratiate himself with his peers. It would not make any sense for an inmate who had given up weapons or "snitched" on other white inmates to engage in such behavior. (59 RT 7715-7716.) Richmond was entitled to the benefit of the doubt, and his failure to share kites was not enough to

---

18

A "kite" is a written note sent from an inmate to another inmate. (53 RT 6880.)

19

It had been established that Richmond had multiple convictions and by possessing a weapon he was risking prosecution as a "three-strikes" case. (See 58 RT 7449.)

erase it. (58 RT 7529.)

On the night of his death, Richmond received a "transporter" on a "fishing line."[20] From it, he took a knife which was not wrapped up and had a handle. These circumstances led appellant to believe that the knife was for Richmond's immediate use. Appellant, who was working on his weapon at the time, considered stabbing him then. But he did not, because he was not sure what Richmond's intentions were. Richmond had mentioned something about holding a knife for someone else. Since appellant knew of no reason why Richmond would want to attack him, he again gave his cellmate the benefit of the doubt. (58 RT 7530-7532; 59 RT 7563-7564, 7686.)

Although appellant's knife was not finished, he stopped sharpening it and laid on his bunk. (59 RT 7564, 7628.) He stayed on top of the covers so the blankets would not make him vulnerable, and put his knife under his pillow. Richmond got onto his bunk and took his knife with him. It was not unusual for an inmate to sleep with his weapon, so that it could be accessed in case of a cell search. But it nonetheless concerned appellant, who was feeling paranoid. He did not bathe or move around the cell, to minimize his exposure. (59 RT 7564-7566.) Appellant never turned his back to the far wall, so he could see if Richmond came off the top bunk. It was too touchy to ask him what he intended, because Richmond could have perceived it as disrespect, or it might make him think appellant was expecting an attack. (59 RT 7566-7567.)

20

Inmates transfer items from cell to cell by "fishing," or using some kind of line. Sometimes an item is packaged in a "transporter" to facilitate the exchange. (58 RT 7477; see also, 59 RT 7478-7481 [discussion of fishing].)

At first count, around midnight, Richmond was on his bunk. Appellant did not think he was asleep. (59 RT 7567-7568.) All of appellant's cellmates, including Richmond, had used the same method to get down from the top bunk – sit on the edge of the bunk, put one hand on the bunk, one hand on the shelves on the side wall, and kind of spring straight down to the floor, rather than step onto the desk. He had never seen Richmond do it differently. After first count, something unusual happened. Richmond slid his legs over the top bunk by the desk. Appellant could see the back of his legs come over and then Richmond stepped onto the desk. He began to step onto the stool. Appellant was sure Richmond was coming after him; there was no reason to think anything else. (59 RT 7571-7574.)

Appellant got his knife from under his pillow and jumped up. Richmond was coming down off the desk. He had a hand on the edge of the bunk and the knife in his left hand. (59 RT 7575.) Appellant thought Richmond was going to use his knife on him, so he rushed Richmond and started to strike with his knife. Appellant was scared and upset. He was afraid and just reacted. (59 RT 7577-7578.) When asked to elaborate on what he thought Richmond would do with his knife, appellant said:

> I imagine he was going to rip holes in me with it. It's not something that I sat there and analyzed, you understand. This is something that is going on. There is not much hesitation or it's happening right now. You don't analyze it. You just react.

(59 RT 7578.)

Appellant pushed Richmond back with his left hand and struck Richmond with the knife several times in his left side. Richmond went back and forth across the top of the desk, and then climbed back onto the

top bunk. Appellant continued to strike at him. (59 RT 7577-7579.)

On the top bunk, Richmond grabbed his mattress with his right hand and tried to put it between them. Richmond then came down off the bunk again and onto the desk, still holding his knife. Appellant continued to swing at Richmond, who was using the mattress as a shield. They struggled with the mattress between them. Appellant was trying to pull the mattress away from Richmond, while Richmond was trying to use it as leverage. (59 RT 7580-7581.) As Richmond came onto the floor, the mattress was shoved aside. Appellant lost his balance and fell backward onto the floor. The mattress ended up on the lower bunk. Richmond either fell or sat on the edge of the bunk. He still had his knife. Both of them were breathing hard. Appellant watched Richmond "like a hawk." Richmond was watching him, also. Appellant got into a squat so he could move if he had to. (59 RT 7582-7586.)

Neither appellant nor Richmond called for assistance. It was unacceptable for an inmate to ask prison staff for help. Appellant hoped that an officer would come by and see what had happened. After a minute or so, Richmond started to lean forward as if to get up. Appellant struck him with the knife, without thinking. Richmond fell backwards, with his shoulder hitting the back wall of the cell. Then he kind of rolled over onto the desk. Appellant felt that Richmond was still a danger to him and struck him several more times. He stopped when he felt that Richmond was no longer a threat. Richmond was not moving and appellant could not hear him breathing. He thought that Richmond was probably dead. (59 RT 7586-7588.)

A number of thoughts were going through appellant's head as he tried to figure out why Richmond would have attacked him. He was not

thinking very clearly. Appellant realized he had Richmond's blood on his t-shirt and boxers. He started cleaning up, and flushed his bloody clothing down the toilet. (59 RT 7588-7591.) Appellant found Richmond's knife under the bunk, snapped it in half, and flushed it as well. He realized that his knife was too long to flush so he bent it and broke the handle off. First he flushed the handle and then the knife. (59 RT 7591- 7592.) There were books and cups on the cell floor, some of which appellant picked up as he sought to recover some contraband in the cell. This was before the second count. (59 RT 7593-7595.)

Appellant waited for second count. Officers Wysocki and Avila came by, shined a light inside the cell, and kept going. Appellant was flabbergasted and could not understand why they did not stop. He felt paranoid and started getting crazy ideas that perhaps the officers were involved. He thought about sending a note to other inmates but did not know who he could trust. After the officers walked by, appellant turned on the cell light thinking it might catch their attention. He did not call out for help because he thought it would make his situation worse. He was nervous, scared and confused. (59 RT 7602-7605.) Appellant "keistered" a razor blade because he did not know if his life was still in danger. (59 RT 7719.)[21]

Between second and third count, appellant tried to figure out what was happening. At third count, appellant was standing at the cell door. When the officers stopped to look in the cell, he stepped back so they could see Richmond. (59 RT 7604-7606.) He waited in the cell while the officers

---

21

"Keistering" is to insert contraband into the rectal cavity. (58 RT 7489-7490.)

summoned help. Appellant eats when he is nervous; he ate an apple. He was not trying to be disrespectful. Appellant was taken to the holding cage. The officer who was assigned to watch appellant instructed him not to speak. He said nothing to officer Brumbaugh. He did not have an apple in the holding cage; he was not allowed to take anything out of his cell. Appellant never told anyone that Richmond died of steel poisoning. He did not recall smiling on the way to the holding cage. He did not find anything about the situation amusing. (59 RT 7607-7608.)

Appellant had been up all night. He sat in the holding cage for a long time. He refused a body exam by a female MTA both because of modesty and because he did not think he should do anything without a lawyer. He knew he needed an attorney. (59 RT 7808-7609.) Appellant was told he would be taken to the committee room to be photographed and examined. He said he wanted a lawyer first but was told it would be done by force if he failed to comply. Appellant acquiesced, as he saw no sense in making his situation worse than it already was. (59 RT 7609-7610.)

b. Violent Character Evidence.

During appellant's cross-examination, the prosecutor was permitted to question him about acts of violence unrelated to Richmond's death in an effort to demonstrate a violent character.

On February 20, 1995, appellant stabbed a child abuser several times in the back while he was reading Bible scriptures on the yard. It was this incident that got appellant placed in Ad Seg. (59 RT 7651-7653.) On May 31, 1995, appellant was caught with a small piece of metal in his anal cavity. It was unsharpened and wrapped. (59 RT 7653-7654.) On August 14, 1995, appellant slashed another inmate. (59 RT 7658-59.) On September 11, 1995, appellant was found going to the shower with a couple

of inmate-manufactured weapons. (59 RT 7659-7660.) On February 26, 1996, appellant may have assaulted an inmate on the yard with a weapon. (59 RT 7661-7662.) Appellant denied altering materials with intent to make a weapon on March 18, 1996. (59 RT 7662-7663.) On February 21, 1999, two weapons and various items of contraband including a piece of metal and a fence tie were found in appellant's cell wall. (59 RT 7663-7665.) On January 31, 2000, another weapon was found in his cell wall. (59 RT 7666-7667.) On February 2, 2000, appellant was in possession of razor blades. (59 RT 7667-7668.) On March 10, 2002, he assaulted an inmate on the yard with a slashing instrument. (59 RT 7668.) On July 15, 2003, he possessed razor blades but they had no handles so they were contraband but not weapons. (59 RT 7669-7670.)

Appellant indicated that many of these incidents occurred when tier yard was in effect. (59 RT 7712, 7717.) He was not criminally prosecuted for any of them. (59 RT 7717-7718.)

c. The Forensic Evidence.

Lisa DiMeo, a forensic specialist, testified for the defense. (60 RT 7738.) She was expert in several areas, including the analysis of bloodstain evidence and crime scene reconstruction. (60 RT 7740.) DiMeo had worked on over 300 murder cases and had processed over 2,500 crime scenes. (60 RT 7846-7847.) She had qualified as an expert in many courts, in various areas including crime scene investigation, photography, bloodstain pattern analysis, pattern wounds, tire prints, and foot and shoe prints. (60 RT 7741.)

Ms. DiMeo reviewed various documents relating to appellant's case, including reports by CDC personnel, the autopsy report, some trial testimony and a forensic report by the Department of Justice (DOJ). She

reviewed numerous photographs and a video of the scene provided by the prosecution. She had recently visited Calipatria prison, so that she could view cell 146 to take measurements and her own photographs. There, she examined and photographed physical evidence, including mattresses, sheets and blankets. (60 RT 7746-7747, 7749.) DiMeo briefly met appellant but she never discussed the case with him so that her review would be independent. (60 RT 7827-7828, 7852-7853.)

The expert explained that the CDC's processing of the scene was "less than perfect." (60 RT 7750.) For example, the diagram of cell 146 she was provided did not include measurements and was not to scale. (60 RT 7747.) The video, which DiMeo watched 25-30 times, demonstrated the numerous inadequacies of the CDC's work. (60 RT 7751.) A forensic specialist would have documented the scene with measuring devices, proper lighting and photographs before anything was disturbed. The bloodstain evidence was not photographed correctly. The bedding in particular should have been removed as a unit and methodically taken apart, so it would not have to be reconstructed later. Because the blood on it was still wet, the bedding should have been placed on white butcher paper to air dry. Instead, the video showed that Lt. Stanford began stripping the bed inside the cell. He took off the sheets and balled them up, without any concern for fibers, trace evidence or preserving the blood stains on them. That made it challenging to determine which stains were originals and which were imprints. (60 RT 7767-7770.) When Lt. Stanford removed Richmond's mattress from the cell, he dragged an edge of it through a bloodstain on one of the blankets, which contaminated the scene and made reconstruction more difficult. He leaned on surfaces inside the cell, which might have transferred blood from his hands. (60 RT 7771-7774.)

When DiMeo personally examined the sheets from the top mattress, she found that both had been thrown into a bag together, unlabeled. She also realized that the blankets had been labeled incorrectly, perhaps because CDC staff initially believed the bottom bunk was Richmond's and that he was killed there. (60 RT 7773-7775, 7779.)[22] By watching the video carefully, DiMeo realized that because inmates were not provided with fitted sheets, they tied knots on all four corners of the bottom sheet to keep it in place; they made knots only on the bottom of the top sheet. (60 RT 7759.) She was able to correctly identify the top and bottom sheets from Richmond's mattress by discerning where the sheets had been knotted. (60 RT 7759, 7774.)

Although better processing would have permitted DiMeo to answer more questions, the evidence provided enough information to draw some conclusions. (60 RT 7750.) DiMeo opined that Richmond was not on the upper bunk when he received his injuries. (60 RT 7833.) There was no evidence of bloodshed on the top bunk, other than on the mattress which ended up on the bottom bunk. DiMeo explained that if someone had been attacked on the top bunk in a vulnerable position, the attack would not have gone any farther than that. The main bloodletting occurred, however, between the bunk, desk and shelf area. (60 RT 7812-7813.) Moreover, she agreed with the DOJ forensic analyst who opined that the amount of blood on the upper mattress and sheets was inconsistent with Richmond incurring the majority of his wounds while in bed on the upper bunk. (60 RT 7833-7835.)

22

In the scene processing video, CO Swetich announces that Richmond was sleeping on the bottom bunk at the time of his death. (Exh. 341.)

It was obvious from the blood evidence and the items strewn all over that there had been a fight. (60 RT 7813.) DiMeo concluded that it began in the area of the desk, seat and edge of the bunk. (60 RT 7842, 7848-7849.) While the CDC scene processing video was shown, DiMeo explained her observations. (60 RT 7751-7780.) The top mattress was folded on the bottom bunk. (60 RT 7753.)[23] DiMeo observed half-moon-shaped rings of blood on the floor consistent with the heel of Richmond's foot. (60 RT 7755.) There was a large clot of blood on the seat of the desk. (60 RT 7756.) She saw transfer patterns on the sheets on the folded mattress, from the wounds on Richmond's back, made after he came to rest. (60 RT 7757.) On a wall was a flow pattern of blood consistent with the cuts on Richmond's arm. (60 RT 7757.) DiMeo found a blood transfer on the wall from his hair. (60 RT 7757.) She saw what were probably blood spatters on the wall by the shelves. (60 RT 7761.) There was blood on the floor behind the shelf with movement through it, which appeared to be caused by feet rather than shoes. (60 RT 7762.) She saw blood on the shelves. (60 RT 7763.) A blanket on the desk had blood drips on it. (60 RT 7763.) Dripped blood on the floor likely came from Richmond's head injury when he was seated. (60 RT 7770.) There was blood which had soaked through to the mattress on the bottom bunk where Richmond's body was found. (60 RT 7773.) DiMeo also noted blood consistent with having been dripped from a weapon. (60 RT 7791.)

Other blood traces were probably made after CDC personnel entered

---

23

Since it was reported that the MTA got on the bunk behind Richmond to move him, it was not known whether the mattress had been moved at all prior to filming. (60 RT 7771.)

the cell. There was a blood drag on the floor from where Richmond's body was removed from the cell. (60 RT 7752-7753.) DiMeo observed blood that may have come from CPR efforts. (60 RT 7791.) There were flakes of dried blood in many locations. The expert explained that these flakes came loose from Richmond's skin when medical treatment was administered to him. (60 RT 7756-7757.)

DiMeo noticed a light coating of dust or lint on the seat of the desk. Although she was unable to account for this coating precisely, she found that the prison linens shed significant lint when she examined them. (60 RT 7765.) She also realized that the vent in the cell was blowing, as the video showed that strips of cloth hanging from the ceiling were moving. (60 RT 7752.) Significantly, there was a "void" area on the seat, a spot where the dust or lint had been disturbed. (60 RT 7765.) There was a dry clot of blood on top of the void area. (60 RT 7792.) This told DiMeo that something had moved the dust before the blood was shed onto the stool, since the clot was not disturbed. (60 RT 7765-7766, 7793.) She could not say what made the void area other than some type of direct contact, possibly a foot. (60 RT 7793, 7797.) If DiMeo had processed the scene, she would have checked the top of the desk and seat for latent footprints. (60 RT 7765.)

The evidence also indicated that Richmond was using his mattress as a buffer between himself and appellant during the struggle. (60 RT 7814.) DiMeo explained that the mattresses are very flexible and readily fold. (60 RT 7759, 7779.) As the video demonstrated, they can easily be pulled off of the bunks. This is because the bunks are metal platforms which create

little friction with the mattresses. (60 RT 7780.)[24] Except for one drip stain, all of the blood stains were on the sheet-side of the mattress.[25] All of the blood was Richmond's, since appellant was not bleeding. Most of the blood stains on the sheet were transfer stains, which meant that Richmond was moving while he was bleeding. The sheets were still attached to the mattress after the struggle, which indicated that the mattress was moving as well. (60 RT 7807-7809, 7814.) Because there was no blood on the bottom side of the mattress, DiMeo concluded that side was facing appellant, while the sheet-side of the mattress was facing Richmond. (60 RT 7852.)

DiMeo also opined that Richmond had a weapon during the struggle. (60 RT 7848-7849, 7842.) This conclusion was based on two cuts found in the top sheet, attached to the side of the mattress facing Richmond. The size and cleanness of the cuts indicated that they were made by a sharp, narrow object. (60 RT 7810-7814, 7852.) The cuts bisected blood transfer stains on the sheets, which meant that Richmond was already bleeding when they were made. DiMeo explained that the two cuts could not have been made by appellant's weapon, because it would have left blood swiping stains. (60 RT 7849.) The size of appellant's weapon was also inconsistent with the cuts. The knife retrieved from the toilet in cell 146 was twelve millimeters wide. (60 RT 7838.) Based on the width of the cuts, DiMeo estimated that Richmond's weapon was no more than ten millimeters wide,

---

24

Although the mattress was described as being "heavy," evidence officer Hunt was able to lift it with his non-dominant hand. (64 RT 8201-8202; see also, 64 RT 7829.)

25

This drip stain likely came from Richmond's head after he came to rest on the bottom bunk, with his mattress behind him. (60 RT 7807.)

but she could not estimate its length. (60 RT 7842.)

Further, the evidence suggested that Richmond's weapon got tangled in the top sheet, which limited his ability to use it. (60 RT 7851, 7811.) DiMeo explained that the two cuts on the top sheet did not correspond with cuts on the bottom sheet. There were also blood stains on the top sheet that did not soak through to the bottom sheet. (60 RT 7808-7809.) The video showed that the top sheet, although still attached to the mattress by knots in the bottom, was otherwise loose and balled up under the mattress when it was removed from the cell. (60 RT 7814, 7851.) One of the two cuts was perforated and had a "bridge of fabric." (60 RT 7809.) All of this evidence suggested that when the mattress was held up, the top sheet came loose and started to fall forward. (60 RT 7809.) Richmond's weapon then got caught or tangled in the sheet. (60 RT 7809-7811.) This scenario would explain why appellant had no injuries. (60 RT 7854.) In sum, although DiMeo could not say for certain that Richmond had a weapon, the evidence indicated that it was very likely. (60 RT 7855-7856.)

Richmond came to rest in a sitting position on the bottom bunk. (60 RT 7848-7849.) This was indicated by the blood which had soaked through two blankets, two sheets, and into the mattress on the lower bunk. (60 RT 7773.) However, there was evidence to suggest that he moved after he sat down. DiMeo closely examined the blood on the floor which dripped from Richmond's wounds while he was seated. There were marks indicating that Richmond's heel passed through this blood, which could have been made by him moving from a sitting to a standing position. (60 RT 7788, 7813-7815.) These marks could not have resulted from the actions of CDC personnel, because this blood would have been dry by then. (60 RT 7790-7791.)

DiMeo also observed nine cuts at the foot area of Richmond's mattress. These cuts lined up with holes in the sheets when the bed was made, which led both her and the DOJ analyst to believe that they occurred when the bed was at least partially made and on the upper bunk. (60 RT 7801-7804, 7833.) Three of the cuts were on the top surface of the mattress, near where a swastika had been drawn. These cuts also corresponded with cuts in one of the blankets found in the cell. There were six other cuts on the edge of the mattress. (60 RT 7803, 7851-7852; exh. 514.) Because there was no evidence of blood in any of the nine cuts, DiMeo opined that they were made prior to Richmond's death. They were consistent with someone kneeling on top of the bed, pulling from the foot end and stabbing it with his left hand. (60 RT 7804-7805.)

On cross-examination, the prosecutor asked whether the incident could have started while Richmond was asleep on his bunk, facing the near wall with his left side exposed. The deputy district attorney suggested that after several wounds were inflicted, appellant then pulled Richmond down off the bunk and continued to assault him. DiMeo found that this hypothetical was not logical in light of the physical evidence. In particular, she doubted that Richmond could have engaged in the kind of struggle which must have occurred if he had sustained such severe wounds while asleep. (60 RT 7834-7837.)

d. A Knife Is Passed To Richmond.

Christopher Poore had been in the CDC off and on since 1989, and was on death row at the time of appellant's trial. (63 RT 7944.) Poore was in Calipatria's Ad Seg when Richmond died. (63 RT 7946-7947.) It was the most violent place in the California prison system, particularly after the yards were racially integrated. (63 RT 7947.) There were weapons on

every Ad Seg yard and every inmate there had one. (63 RT 7953.)

Poore became acquainted with Thomas Richmond, who at one point was housed in the cell above him. (63 RT 7949-7950.) Poore also knew appellant from Ad Seg, although they had never been housed together or been on the same yard. (63 RT 7951, 7966.) They were neither friends nor enemies. (63 RT 7951.)

About a week or two before Richmond died, he contacted Poore by kite. (63 RT 7950-7951, 7971.) He asked for a weapon. (63 RT 7950, 7954.) Poore only had his personal weapon, so he wrote back to ask Richmond why he wanted one. (63 RT 7961.) In another kite, Richmond said that he was trying to get moved back in with appellant to stab him. (63 RT 7961; 7954-7955.) Poore did not tell appellant that Richmond wanted to assault him. (63 RT 7970.) It was not an inmate's business to alert another inmate to a potential attack. (63 RT 7956.) Poore's cellmate then was Robert Wilson. (63 RT 7963, 7969.) Poore did not share Richmond's kites with his cellmate because Wilson was "just a kid. He hadn't been celled up that long." (63 RT 7964.)

Poore knew that a weapon was transferred to Richmond the night he died, because he saw it move on a fishing line. (63 RT 7956-7957.) A few knives were fished around that night, which was common. (63 RT 7965, 7975.) He saw a large "bone crusher" go into a cell near 146. A smaller knife went into cell 146, after deadlock but before midnight. (63 RT 7973-7974.) Poore could not see who fished the smaller weapon into cell 146, but he could see it was unpackaged and ready for use. (63 RT 7973-7974.) He explained: ". . . if a weapon comes without a – without a sheath or anything wrapped around it to hide it from the officers' view, it's automatically known that that is to be used immediately. And the person

who is fishing it that is on the line knows you're supposed to use it on whoever is not picking it up." (63 RT 7965.)

Poore explained that an inmate in the white community might be required to stab another inmate to get out of trouble. That was one way of "putting in work." (63 RT 7965.) He elaborated: "That means he's pretty much got to do what he's told until whoever is around decides he's done enough, whether it's assault or stab somebody or transport things for us or what have you." (63 RT 7966.) In Calipatria's Ad Seg, white inmates sometimes stabbed other white inmates. (63 RT 7958-7959.)

Later that night, Poore awoke to the sounds of a struggle in cell 146. (63 RT 7962.) He could not see a clock in Ad Seg but estimated that it was 11:00 p.m. or 12:00 a.m., or possibly later. (63 RT 7962.) Cell fights were common during that period. Calling out for staff help during a fight was not acceptable, however. Poore explained, "That's pretty much like telling. . . . So you're pretty much marked wherever you go from there on." (63 RT 7963.)

Poore never talked to appellant about the incident; an inmate does not talk about pending charges to another inmate. (63 RT 7957.) Not long after Richmond died, Poore was transferred out of Calipatria. He did not see appellant again. (63 RT 7966-67.)

When asked about an inmate named Hill, Poore said that appellant would not have been friends with him, since Hill was "on the shine" at that time. Poore explained: "He was under suspicion for already giving up information. So we were pretty much steering clear of him." (63 RT 7967.)

3. The Prosecution Rebuttal Case.

In rebuttal, the prosecution presented three inmate informants. Two of them claimed that appellant had announced his intention to kill

Richmond prior to April 8, 1996, both verbally and in writing. These inmates were hostile and evasive on the witness stand and their testimony was full of inconsistencies and implausible claims. A third inmate asserted that appellant had volunteered incriminating statements after Richmond's death. These inmates, who the prosecution curiously chose not to present as part of its case-in-chief, were all in protective custody and therefore dependent upon the CDC for their safety. They all stood to gain a reduction in their sentence as a result of their testimony against appellant.

The DOJ criminalist who reviewed some of the physical evidence in 1996 also testified. She opined that the CDC's processing of the scene was too poor to draw many conclusions. However, she agreed with the defense expert that Richmond was not killed on the upper bunk. Although the DOJ witness had not considered during her 1996 analysis whether a second weapon might have been involved, at trial she opined that the evidence did not support that conclusion.

a. Inmate Informant Testimony.

(i). Inmate Robert Wilson.

In April 1996, Robert Wilson was in Calipatria's Ad Seg. (63 RT 7989.) Although Wilson claimed that he did not keep weapons in his cell, he later admitted that he had been sent to Ad Seg for stabbing another inmate. (63 RT 7992, 8041.) The Ad Seg inmates then were "bloodthirsty" and were "whacking everything in sight." (63 RT 8008.) Wilson himself had been beaten up a couple of times. (63 RT 8009.)

In Ad Seg, Wilson was housed with Christopher Poore. (63 RT 7989-7890.) Wilson knew Thomas Richmond. (63 RT 7990.) Richmond was put in a cell above Wilson and Poore after he and his cellmate had been extracted from another cell. Richmond and Wilson talked through the vent

which their cells shared. (63 RT 8032.) Later, Richmond was moved in with appellant in cell 145 or 146. (63 RT 7990.) Wilson said he knew appellant, but admitted they had never been on the same yard or had a conversation with each other. (63 RT 7990, 8004-8005, 8034.) When asked how well he knew appellant, Wilson replied, "I don't." (63 RT 8005.)

Wilson claimed that prior to April 9, he and Poore received more than two kites from appellant about Richmond. (63 RT 7992-7993, 7999, 8025.) In the kites, appellant said he thought that Richmond was a rat and telling on him. Appellant was going to send a kite out to the yard to investigate Richmond. (63 RT 7994.) Later they received another kite from appellant, stating that he had received word that Richmond was a rat and had locked up off the yard. Appellant said he would "deal" with Richmond. According to Wilson, this meant "beat you up, stab you, kill you, whatever. You are going to get hurt." (63 RT 7995.)

Wilson also said that Richmond wrote little notes on the bottom of appellant's kites, including on a kite sent the night Richmond died. (63 RT 8010, 8034.) Richmond did not, however, write such notes on the kites appellant sent about him. (63 RT 8010.) Wilson acknowledged that a kite is supposed to be shared with a cellmate before it is sent. (63 RT 8010.) But then he claimed that "some big old dude" would have no problem getting a kite out of his cell without letting a "little old kid" cellmate read it. (63 RT 8010-8011.)[26]

26

Although Wilson said Richmond was "a 19-year-old kid," Richmond was almost 24 years old in April 1996, only slightly younger than appellant. (63 RT 8010, 8030; see 56 RT 7331.)

When asked whether Richmond had requested a "shank," Wilson replied, "Yeah – no." (63 RT 8032.) Wilson denied that Poore had received kites from Richmond asking for a weapon. (63 RT 8000.) Wilson claimed Poore always shared his kites with him, although Poore had far more "seniority" than Wilson. (63 RT 8028-8029.)

Wilson further claimed that after appellant told them he was going to investigate Richmond, he had Richmond moved back to his cell. (63 RT 8032-8033.) In his kites, appellant said that he told Richmond he had some "cleaning up" to do, and so they were going to stab some black inmates on the yard. Appellant said he was teaching his cellmate how to cut a knife from the metal desk, and thought it was funny that Richmond was making the knife with which appellant would stab him. (63 RT 8015-8016.)

Wilson did not know if a weapon was fished into cell 146 on the evening of April 8, 1996. He was not paying attention and it was too far away to tell whether a kite contained a weapon. (63 RT 7995.) Wilson could not see into cell 146 from his cell, but he heard what happened to Richmond that night. (63 RT 8017.) He claimed that everybody in the building heard it. Wilson did not know why staff did not respond. (63 RT 8017.)

Wilson had been convicted of numerous felonies and had been in continuous CDC custody since Richmond's death. (63 RT 8000-8001, 8020.) He admitted to participating in a lot of prison violence over the years, explaining "It's the only way to survive." (63 RT 8019.) Committing violent acts in prison was also how he became a member of the Nazi Lowriders, a white prison gang. (63 RT 8019.)[27] Wilson entered CDC

27

Appellant, Richmond and Poore were not affiliated with the Nazi

protective custody after Richmond's death, and was still in it by the time of trial. (63 RT 8004-8005.)[28] At Calipatria, he and inmate Hill went to the same PC yard. (63 RT 8005.) However, Wilson denied that he ever discussed Richmond's death with anyone on the yard. (63 RT 8006.)

Wilson dropped out of the Nazi Lowriders in 1996, by "debriefing" or telling the authorities what they wanted to know. He told them about Richmond's death. (63 RT 8000-8002.) Wilson denied that he was promised any benefit in exchange for his testimony against appellant. (63 RT 7996.) He denied that an inmate gets time off his sentence for debriefing. (63 RT 8006.) He had looked at Title 15, but saw nothing to indicate that he would get a year off his sentence for his testimony. (63 RT 8018.) Wilson claimed that his life was at risk because of his testimony against appellant, but that he came forward because Richmond did not deserve to die. (63 RT 7996-7997.) Yet Wilson admitted that he did not tell CDC staff when he allegedly received the kites from appellant indicating that an assault was imminent. (63 RT 8024-8025.)

(ii.) Inmate Michael Hill.

In 1996, Michael Hill had been in prison almost eight years. (63 RT 8081.) In April 1996, he was in Calipatria's Ad Seg serving a two-year SHU term for conspiracy to assault an inmate. (63 RT 8100, 8110.) Hill was in cell 245. His vent connected with the vents in cell 246 next to him, and cells 145 and 146 below. (63 RT 8047-8048.) Hill knew appellant, and he knew Richmond "somewhat." (63 RT 8048.)

Lowriders. (63 RT 8025, 8030.)

28

Christopher Poore testified that Wilson went into PC shortly after Richmond died. (63 RT 7963.)

Hill initially testified that he had received kites from appellant, but that they did not concern Richmond's death. (63 RT 8052-8053.) He also indicated he had never spoken directly with appellant about his cellmate. The prosecutor asked: "Did you have any conversations directly with Mr. Barrett through the vents either before or after Mr. Richmond was killed explaining – Mr. Barrett explaining why he killed Mr. Richmond?" Hill said no. (63 RT 8056.)

Hill then contradicted himself by claiming that appellant had told him – in a kite – that he was going to "hit" Richmond because Richmond had supposedly "locked up" off of C Yard, where he had incurred a debt to another inmate. Richmond gave up two weapons so that he would be moved to Ad Seg and not have to pay what he owed. (63 RT 8056-8057.) Hill further contradicted himself by saying that he got this information from appellant through the vent. (63 RT 8059.)

Hill claimed that he waited until Richmond was taken out of the cell for a 115 hearing, and asked appellant through the vent what was going on and why they were cutting a knife from the desk. (63 RT 8058.)[29] Appellant said that Richmond had locked up, which is a "no, no." (63 RT 8059.) Hill argued with appellant in the middle of the day through the vent over "the fact that [appellant] didn't have enough information to hit this kid or kill him." (63 RT 8059, 8057.) The white inmates were in a "race war" at the time. So Hill told appellant that instead of assaulting Richmond, he should send him to the yard with the knife to hit somebody as a "heart check," to show "if he's still down with the race." (63 RT 8059-8060.)

29

The prosecutor claimed that Richmond never had a 115 hearing while in Ad Seg. (See, e.g., 69 RT 8762-8763.)

The argument in the vent got "pretty vehement" but appellant said that he was killing Richmond. (63 RT 8060.) According to Hill, the argument occurred four or five days before Richmond's death. (63 RT 8057, 8085.)[30]

Everyone in the vent heard appellant say he was going to kill Richmond, including Hill's cellmate and the southern Mexican inmates in cells 145 and 246. (63 RT 8101-8102.) When asked why appellant would make his intentions public to everyone in the vent, Hill asserted that all of the inmates who could hear were either whites or allies. (63 RT 8101-8102.) Hill had earlier indicated, however, that the white and southern Mexican inmates were in a conflict at that time. (63 RT 8066-8068.) Hill denied that he was in trouble with other white inmates for refusing to retaliate against the Mexican inmates on the yard. (63 RT 8070-8071.)[31]

Regarding the supposed argument in the vent, Hill said, "I actually spoke to try to save the kid's life." (63 RT 8082.) Hill boasted that he had the ability to prevent Richmond's death, stating, ". . . I did have enough influence there where I could have told the cops to hit 146, and they would have did it. And I didn't do it." (63 RT 8123.) When asked why he did not warn Richmond, he stated, " I should have . . . I thought I had more time."

30

Evidence known to the prosecutor but not to the jury shows that Richmond did have a 115 hearing, on or before March 19, 1996. (See Arg. IX.B.2., *post*; exh. 503.) The argument Hill claims occurred in the vent would have happened at least 20 days before Richmond's death on April 9, and before he was even moved into cell 146 with appellant on or about April 1, 1996.

31

Christopher Poore also testified about this incident, in which some Mexican inmates assaulted some whites. Because the two groups had traditionally been allies, it created problems for the whites, dividing those inmates who wanted to retaliate immediately and those who did not want to start a "war." (63 RT 7951-7953.)

(63 RT 8123.)

Hill could hear everything that happened in cell 146. (63 RT 8052.) On April 9, 1996, he heard Richmond scream "why" two times. (63 RT 8048-49.) Hill was wearing ear plugs when he went to bed. Richmond screamed so loudly it woke him up. (63 RT 8079.) There was no fight or sounds of a struggle. Richmond simply "screamed 'why' twice and he was dead." (63 RT 8052.) Hill had no idea what time Richmond was killed. (63 RT 8079.) When asked whether it happened at midnight, Hill retorted, "We don't have a clock in there." (63 RT 8122.) Hill then admitted he had previously stated, "I looked at the clock. It was 12:00 p.m. damn near straight up." (63 RT 8122.)

After Richmond screamed, Hill heard appellant call his name in the vent, because he wanted to get the knife out of his cell and have Hill fish it over the tier. (63 RT 8048-49.) However, later in his testimony, Hill inexplicably claimed that appellant had asked him to remove the weapon during their argument in the vent (63 RT 8078), although the argument allegedly occurred days before Richmond was killed. Hill claimed that appellant had given him a drawing of the knife, which Hill assumed that appellant had traced after cutting it from the desk. (63 RT 8078-8079.)

On cross-examination, Hill was asked whether he had influenced Richmond to attack Barrett. Rather than answering straightforwardly, Hill lashed out at appellant's attorney, stating: "What? Do you want to come at this a little better? See, I heard about your guys little defense down here. Show me two knives. Come on. There was no struggle. . . . And if he was having a knife fight with [appellant], why was he screaming 'why' in the middle of the night?" (63 RT 8087.) Defense counsel then asked why Hill was the only witness who allegedly heard Richmond scream "why."

Implying that he knew how other witnesses would testify, Hill responded, "Well, you haven't heard all the witnesses yet, obviously. Why don't you wait until the testimony is done, and we can do a redirect and come back and talk about it then." (63 RT 8088.)

Hill said that appellant's claim that Richmond had given up weapons was a "obviously a story," a lie. (63 RT 8055.) Hill believed appellant killed Richmond for the "notoriety." (63 RT 8051.)

On April 9, 1996, Hill wrote to his prison counselor volunteering information about Richmond's death. (63 RT 8104, 8106.) In the letter, Hill offered to give a video or audio statement and to testify against appellant if it could possibly get him the death penalty. (63 RT 8107.) Hill told the authorities he had influence among the white inmates and was advised in advance about "political moves" in Ad Seg. He said that if he and his cellmate were taken out of Ad Seg, "we'll tell you what we know and give statements." (63 RT 8109-8110.) Hill claimed that when he was interviewed by prison authorities two days later, however, he refused to say anything. (63 RT 8080-8081, 8105.) Hill was moved into protective custody, where he shared a yard with Robert Wilson. (63 RT 8088-8090.)

Hill said that after he was moved to PC, he wrote a kite to the woods accusing them of being "all out of policy," which meant that they were not following the rules for white inmates. (63 RT 8090-8091, 8114.) Hill told the woods that he was talking to prison authorities and, he added: "I believe my words was I was going to try to get them all put in the hat." (63 RT 8088.) Hill explained that being "put in the hat" meant "you're on the wanted list." (63 RT 8088.) Hill told the Calipatria woods that he was going to write to the Aryan Brotherhood in Pelican Bay to get appellant put in the hat. (63 RT 8091, 8103-8014.)

At the time of Richmond's death, Hill had no parole date and expected to serve several more years. (63 RT 8104.) In early September 1996, Hill was told he would be paroling soon and he was indeed released from prison on September 29. (63 RT 8104-8105.)

In 1998, Hill told members of the district attorney's office that he would not talk without a grant of immunity. (63 RT 8063, 8076.) Defense counsel asked him, "Now the reason you would need immunity is because maybe you committed some crime, right?" Hill said yes. (63 R T 8063.) He denied, however, that it was because he had encouraged Richmond to take action relating to the white-Mexican inmate conflict. (63 RT 8075-8076.) Hill asserted that he had never really spoken to Richmond, who appellant kept "right next to him" at all times so no one else could talk to him. (63 RT 8070, 8058.) Later, however, Hill said he and Richmond had conversations about the knife that Richmond and appellant were cutting from the desk. (63 RT 8096.) Hill wanted immunity, he claimed, because he had prior knowledge that appellant would kill Richmond. (63 RT 8085.)

At the time of appellant's trial, Hill was back in prison. (63 RT 8046.) When defense counsel tried to elicit the reason for his incarceration, Hill was hostile, stating, "Say what the factual basis of the case was. You're a lawyer. You know how to talk. Say what the factual basis of the case was. Don't get up here and start clowning me." (63 RT 8061.)[32] Hill denied that the prosecutor had promised him anything for his testimony against appellant. (63 RT 8046.) In fact, he claimed that he would be "put

---

32

Because of Hill's belligerence, the record is somewhat unclear as to the length of his sentence, which was at least six years and may have included an additional 11-year term. (See 63 RT 8061-8062.)

in the hat big time for this right now." (63 RT 8088.)

(iii). Inmate James Magee.

James Magee was in Pelican Bay prison from 1995 until 2003. (64 RT 8138.) He was in the SHU there for stabbing another inmate. (64 RT 8138.) In 1995-1996, Magee was transferred to Calipatria for a time, but he was returned to Pelican Bay a few months before Richmond's death. (64 RT 8137-8139, 8146.)

Magee knew appellant in Calipatria. (64 RT 8137.) In 1997, Magee saw appellant again, in Pelican Bay. Appellant was housed two doors down from him, and later next door. (64 RT 8139.)[33] They talked because Magee was the Aryan Brotherhood "affiliate" who controlled things for the white inmates in his building. (64 RT 8139-8140.) Magee explained that the Aryan Brotherhood (AB) was the primary white prison gang in the state. (64 RT 8140.) The AB's stronghold was Pelican Bay, but they also controlled the entire program for white inmates in all maximum security facilities in California, including federal prisons. (64 RT 8140.) Magee was voted into the organization by the Aryan Brotherhood's commission after he won a knife fight with a Crip gang member and stabbed another inmate, on whom the AB had a contract. (64 RT 8147.) He had since been involved in AB violence on other inmates and CDC staff. (64 RT 8182.)

According to Magee, appellant heard that the Brotherhood was questioning the "validity" of Richmond's killing. (64 RT 8141.) Magee explained that the AB had not ordered the homicide, but there was a standing order to kill all informants. (64 RT 8142.) When a killing is not

---

33

Prison records indicate appellant was in Pelican Bay from May 1997 until February 1998. (64 RT 8271.)

sanctioned by the AB in advance, the killer must be able to prove that the person he killed was an informant and that the murder was therefore justified. (64 RT 8142.) The AB believed that appellant had failed to conduct a thorough investigation before he killed Richmond. So appellant sought to explain himself to Magee and prove that the hit was justified. (64 RT 8141-8142.) Appellant told Magee that he killed Richmond because he was informed by prisoners from mainline that Richmond was a rat. (64 RT 8142, 8146.) After he killed Richmond, appellant propped him up on the desk. The correctional officer who found Richmond's body exclaimed, "Oh, Jesus," which caused appellant to laugh hysterically. (64 RT 8144-8145.) Appellant said nothing to Magee about killing Richmond in self-defense, nor did he say that there were two weapons in the cell that night. (64 RT 8143, 8145.)

Although appellant was supposedly trying to prove that Richmond's killing was justified, Magee admitted that he did not provide a detailed account or say who told him that Richmond was a rat. (64 RT 8144, 8161, 8178-8179.) Moreover, appellant had not tried to explain his actions to the AB affiliate who ran the building in which he had previously been housed. (64 RT 8192-8193.) Magee denied that appellant told him that he expected to be charged with the death penalty and therefore would not discuss his case until it was over. (64 RT 8169.)

Magee testified that it became unnecessary to report what appellant had said to his superiors, because the AB had issued a contract on appellant's life for another reason. (64 RT 8153-8154.) Magee explained that the Aryan Brotherhood had ordered appellant to kill his cellmate "Rabbit" because Rabbit did not participate in a race riot. (64 RT 8154-8155.) Appellant was not in the AB, but any white inmate who tried to "run

their own program" was at risk of being killed. (64 RT 8154-8155.) Appellant failed to make a serious attempt to kill Rabbit during the three months they celled together, so the AB put appellant in the hat. (64 RT 8154-8155.)[34]

Magee testified that he had disassociated from the AB by cooperating with prison authorities. (64 RT 8140.) About a year before appellant's trial, CDC agents asked him for information on other inmates. Magee told them about his conversation with appellant. (64 RT 8165-8167.)

Magee denied that the prosecutor had promised him anything for his testimony against appellant. (64 RT 8142.) At the time of trial, Magee had been in prison for 12 years. (64 RT 8136.) He was then in a "dropout" program, in a protective housing unit for inmates who have left their gangs. (64 RT 8176, 8185.) Magee denied that he would be moved out of this unit if he failed to cooperate. (64 RT 8189.) Magee claimed that his testimony against appellant was in violation of Aryan Brotherhood laws and therefore put his life in danger. (64 RT 8142, 8196.) But he then admitted that he was already in the hat for dropping out of the AB. (64 RT 8190, 8198.)

b. Forensic Evidence.

The prosecution also called Elissa Mayo, who was employed by the Department of Justice (DOJ). At the time of trial, Mayo was a senior criminalist at DOJ. (64 RT 8207.) But when she was assigned to appellant's case in 1996, Mayo was a primarily a serologist, or someone who types blood. (60 RT 8226-8227, 8223.) Mayo was not requested by

---

34

Incredibly, the CDC failed to single-cell appellant in Pelican Bay, although he was believed to have murdered a cellmate. (64 RT 8283.)

the CDC to process the scene of Richmond's death, although the DOJ had a unit available to the prisons. (64 RT 8229.) She examined evidence that had been collected, but never personally examined cell 146. (64 RT 8215, 8229.)

Prior to her 2003 testimony at appellant's trial, Mayo read Lisa DiMeo's report and testimony. (64 RT 8217.) Mayo did not, however, reexamine the physical evidence collected from the scene or the video. (64 RT 8225-8226.) Thus, her only review of these items had occurred more than seven years earlier. (64 RT 8226.)

According to her 1996 report, the first significant conclusion Mayo made from reviewing the physical evidence was that the CDC had inadequately processed the scene. (64 RT 8220-8221.) She elaborated:

> From start to finish the scene would have been secured properly. Proper individuals would have been called. Those individuals would have had the training and expertise to do the job. And they would have also known that if they didn't have the expertise that they were to call somebody who did and not process that scene the way it was done.

(64 RT 8262-8263.)

Despite the poor processing, Mayo was able to make a few determinations from the evidence. (64 RT 8221, 8263.) She found stab marks in the foot area of the bedding in the upper bunk, in the mattress and sheets. (64 RT 8221.) She believed that the bed was made and assumed it was in place on the top bunk when the stab marks were inflicted. (64 RT 8221, 8235.) Mayo acknowledged that DiMeo also found cuts on a blanket from the cell which she opined lined up with three of the cuts on the mattress, but Mayo had not examined the blanket. (64 RT 8254-8255,

8242.)[35] Mayo concluded that the weapon from the toilet could have been used to make the stabs marks at the foot of the bed. (64 RT 8222-8223.) However, there was no blood on them so they were not made with a bloody object. (64 RT 8236.) Further, they could not have been inflicted while the mattress was in the folded position in which it was found. (64 RT 8223.)

Next, Mayo concluded the evidence did not indicate that Richmond was on the upper bunk when the majorities of his wounds were inflicted. (64 RT 8230-8231, 8221-8222.) In fact, she could not exclude the possibility that Richmond was off his bunk when the struggle began. (64 RT 8263.) She could not say where in the cell it started. (64 RT 8265.) Finally, Mayo opined that the position of Richmond's body in the CDC "reenactment" video was consistent with the blood evidence on the lower bunk. (64 RT 8223.)

Mayo acknowledged that she agreed with much of DiMeo's report. (64 RT 8217.) Although Mayo conceded that in 1996 she was not asked to evaluate whether a second weapon was used, she testified there was no indication that more than one type of weapon was involved. (64 RT 8255-8256, 8218.) Mayo also agreed with DiMeo that there were two cuts on one of the sheets that did not correspond with cuts in the mattress. (64 RT 8243.) Although Mayo made blue and red markings around the cuts during her 1996 examination, she failed to include any discussion of them in her report. (64 RT 8232-8233.) She had assumed at that time that these cuts were on the bottom sheet. (64 RT 8243, 8247.)

Regarding the identification of the top and bottom sheets, Mayo

---

35

And although Mayo was provided with the bottom mattress, she did not examine that either. (64 RT 8255.)

noted that CDC investigators had packaged both together and had not labeled them. (64 RT 8246.) During a recess in the proceedings, Mayo watched the scene processing video. (64 RT 8246.) She agreed that one of Richmond's sheets was tied at both ends, while the other was tied at only one end. (64 RT 8247.) Nonetheless, Mayo assumed that the sheet with two cuts was the bottom because it had an oily stain where one would expect Richmond's head to have been. (64 RT 8248.) It got very hot in Calipatria, however, and the stain would have been left on the upper sheet if Richmond was sleeping on top of both sheets rather than in between them. (64 RT 8249.) After defense counsel replayed the video for the witness two more times, Mayo reluctantly acknowledged that it showed the top sheet with knots only in one end, although she stated: "And if I may add, this is why I don't use poor quality video to do my work." (64 RT 8250.) In any event, Mayo agreed that the blood transfer stains on what DiMeo opined was the top sheet did not soak through to the other sheet, which indicated that they were apart at the time they were made. (64 RT 8253.)

Mayo did not include in her report any conclusions about the other blood evidence in the cell. She believed that the quality of the photographs and video was too poor to evaluate. For this same reason, Mayo was unwilling to make any observations based on the enlargements DiMeo had created of the CDC photographs. (64 RT 8257-8262.) The DOJ analyst stated that the charts made by CDC personnel purporting to document blood spatters and smears were also insufficient for her use. (64 RT 8266.)

4. The Defense Surrebuttal Case.

a. Appellant's Testimony.

Appellant became acquainted with James Magee in Calipatria's Ad Seg. In Pelican Bay they exchanged paperwork, as was customary among

inmates, but appellant never told Magee that he killed Richmond because he was an informant. (64 RT 8280-8282.) Appellant did tell Magee that he thought he would be charged with the death penalty. (64 RT 8282.) Appellant explained that someone who is trying to justify his actions to the AB would have to provide detailed information, including how he learned that the inmate targeted was an informant. (64 RT 8282.) Appellant called Magee's testimony "ridiculous." (64 RT 8281.)

Appellant said that Magee and Michael Hill knew each other, as they were "homeboys" from the same town. (64 RT 8283.) In 1996, the Ad Seg inmates suspected that Hill may have been giving up information; as a result, appellant did not ever discuss anything of significance with him. (64 RT 8284.) Appellant did not engineer Richmond's move into cell 146. He did not tell Hill he was going to stab Richmond. (64 RT 8284-8285.) He added: "And to be frank, if that was my intention, I wouldn't advertise it to anybody." (64 RT 8286.)

Appellant also testified that he never discussed assaulting Richmond in a kite to Christopher Poore. (64 RT 8286.)

b. Inmate Edward Vargas.

On April 9, 1996, Edward Vargas was housed in cell 145, next to appellant and Richmond. (65 RT 8311-8312.) Vargas claimed to recall nothing about Richmond's death, however. (65 RT 8312-8316.) Specifically, Vargas professed not to remember telling an officer he that he knew everything about the killing, including that a knife came from an inmate upstairs named "Shorty" that night. (65 RT 8312, 8314.) Vargas did not remember telling an investigator to inform the district attorney that he would refuse to testify and that "I'll say I never said nothin'." (65 RT 8316.)

Michael Capeci, an investigator for the Imperial County District Attorney's Office, interviewed Vargas about Richmond's death in 2003 by telephone. (66 RT 8470-8472.) Vargas said he knew that the knife that killed Richmond came from "Shorty," an inmate upstairs. (66 RT 8474, 8475.) Vargas described Shorty as "a little short white dude" from Stockton. (66 RT 8479.) Vargas told the investigator that he could see into cell 146 through a hole in the wall. (66 RT 8473.) Vargas saw Richmond sharpening the knife that night. (66 RT 8473, 8476.)

Vargas also said that he heard the assault. He heard Richmond screaming and pleading, "Stop. Why are you doing that?" (66 RT 8475.) It would get quiet for ten or fifteen minutes and then the assault would start up again. (66 RT 8475.) Richmond was banging on the door, yelling words like "Get me out of here" but the assault continued. (66 RT 8476-8477.) Vargas claimed that appellant yelled at Richmond, "Stop screaming . . . like a little bitch." (66 RT 8476-78.)

Vargas told Capeci to tell the district attorney that he would not testify at appellant's trial. (66 RT 8480.)

5. Further Prosecution Rebuttal.

Investigator Capeci testified that Vargas had described only one weapon. (66 RT 8491-8492.) He did not say that both Richmond and appellant had weapons at the time of the homicide. (66 RT 8491-8492.) Vargas said he was shown the knife by someone he identified as "homeboy." (66 RT 8498-8499.) He actually saw the knife come down from the upper tier and go into cell 146. (66 RT 8493, 8497.) At first, Vargas thought the knife was for him because he was in trouble with other Mexican inmates. (66 RT 8495.) Vargas indicated that Shorty was housed in either cell 245, 246 or 247. (66 RT 8525-8526.) Capeci did not know

whether there was a short white inmate in one of these cells other than Michael Hill. (66 RT 8494.)[36]

Vargas claimed that he heard appellant choking Richmond during the night. (66 RT 8494-95.) Vargas wanted to bang on the door and tell appellant to stop, or get staff's attention, but did not. (66 RT 8493.) Vargas said nothing about appellant trying to fish a weapon out of his cell after Richmond was killed. (66 RT 8497.)

6. The Trial Court's Instruction.

At the request of the defense, the trial court informed the jury that it had reviewed records provided by the CDC but could find no documentation of any interviews with inmates Hill or Wilson. (66 RT 8520-8522, 8526.)

Also at the request of the defense, the trial court to took notice of section 3042 of Title 15 of the CDC's regulations. Section 3042 stated that an inmate could receive up to twelve months reduction of his sentence for providing sworn testimony in judicial proceedings involving prosecution of a felony offense which occurred within a prison. (63 RT 8046.)[37]

36

Appellant knew Hill as "Midget." (64 RT 8183-8184.) Vargas testified that there was no inmate named "Shorty" but that he could not remember whether someone named "Midget" was celled upstairs from him. (65 RT 8315.) The defense theory was that "Shorty" was Hill, and had provided the knife to Richmond. (See 65 RT 8318.)

37

When the court later instructed the jury, it repeated this portion of section 3042, and added that the prison required every inmate to receive a copy of CDC regulations. (69 RT 8714.) The court also instructed the jury that inmates did not lose work credits while they were on "out-to-court status." (63 RT 8714-8715.)

B. PRIOR MURDER SPECIAL CIRCUMSTANCE.

In a bifurcated proceeding, the trial court told the jury the parties had stipulated that in 1987 appellant was convicted of first degree murder in San Francisco. (73 RT 8896-8897.)

C. THE PENALTY PHASE.

1. Prosecution Case.

The prosecution presented evidence about violent conduct by appellant as a juvenile. These acts included two robberies on the same day in 1982 when appellant was twelve years old, and a homicide and an assault in 1986, when appellant was sixteen. The prosecution also presented evidence of numerous incidents of appellant's misconduct while in prison, which in large part repeated what the jury had heard in the guilt phase. Finally, the prosecutor presented three members of Thomas Richmond's family to testify to the impact of his death on them.

a. Appellant's Juvenile Offenses.

On April 19, 1982, Andrew Dimitriou, then 11 years old, was walking home from school with a friend in San Francisco. (75 RT 8965-8966.) They were approached by appellant and his African American companion, who Dimitriou identified as "Mr. LaMar".[38] Appellant and LaMar showed Dimitriou and his friend a brick and a knife and asked for money. Dimitriou gave them less than a dollar and his friend gave them about six dollars. After also taking a backpack and jacket from Dimitriou's friend, appellant and LaMar ran off. (75 RT 8965-68.)

38

The state's notice of evidence in aggravation identified the boy as Stephen LaMell. (3 CT 681.) Appellant does not know which is correct.

On the same day, Kenneth Condencia was followed by a black male he did not recognize after he got off a bus. (75 RT 8958-8960, 8963.)[39] Appellant came from across the street, brandished a knife and asked Condencia for money. (75 RT 8960-8961.) Condencia, then 14 years old, gave him less than 50 cents. Appellant and the other boy told Condencia to take off his clothes, which he did except for his pants. The two then left. (75 RT 8961-8962.) Appellant, who had recently turned 12 years old, did not attempt to physically harm Condencia. (75 RT 8963-8964.)

On October 11, 1986, Christopher Spychala was walking down Market Street in San Francisco with a girl he had met on the street a few months earlier. (76 RT 9011–9012, 9041-9042.) Spychala was then 22 or 23 years old. (76 RT 9025.) Appellant, who was 16 years old, came up and started talking to the girl. Although Spychala did not know appellant, the three of them began walking together. (76 RT 9011-9012; see 56 RT 7330.) Spychala could tell that appellant had been drinking. (76 RT 9028.) While walking, they encountered three black males standing in a doorway. Appellant engaged in a conversation with the men which was not friendly on either side. Appellant was arguing with them, using derogatory names. He was holding a knife behind his back, but he did not brandish it. Spychala and his female friend walked off, and appellant followed. (76 RT 9014-9016.)

Appellant then asked the girl to buy him some beer, but she refused. Appellant said, "Well, fuck you. What is your boyfriend going to do?" (76 RT 9016-9017.) As they walked, appellant attacked Spychala with a knife. (76 RT 9018.) Spychala ran away and shortly thereafter had the wound

---

39

Presumably this person was LaMar or LaMell.

cleaned by paramedics in an ambulance that was usually parked in the area. (76 RT 9021-9023.) Spychala denied that he and appellant had argued because he left appellant alone to face the three men. (76 RT 9040-9041.) In fact, Spychala denied that he had said anything at all to appellant during the 45-90 minutes he estimated they were together. (76 RT 9029, 9035.)

After the assault, the police arrived. While they were questioning Spychala, appellant walked by and Spychala identified him as the assailant. (76 RT 9023.) The police found appellant with a folding buck-type knife that had blood on it. (75 RT 8990.) Spychala testified against appellant in juvenile court. He was not aware the charges were ultimately dropped. (76 RT 9042-9043.)

When he was interviewed by police, appellant explained that he had slashed at Spychala with his knife because the latter had "struck at [appellant] with his fist." (3rd Supp. CT 447.) The altercation was "over a lady." (3rd Supp. CT 447.)

At the time of appellant's penalty trial in 2004, Spychala had recently been released from prison, where he had been since 1990 for a drug offense. He admitted that he had a "drug problem." (76 RT 9010.) In fact, he had been convicted of at least five felony drug offenses, including possession of methamphetamine, possession for sale of marijuana and transportation of drugs, as well as a theft-related offense. (76 RT 9026.)

b. James Jackson's Homicide.

When appellant spoke to police on October 11, 1986 after the Spychala incident, he told them that he was wanted for a murder. (75 RT 8991.) As a result, appellant was interviewed by San Francisco homicide investigator Frank McCoy, who was investigating the death of James Jackson. (75 RT 8991.) Jackson had been found dead in his apartment on

October 6, 1986. (75 RT 8973, 8977.) The apartment had been "ransacked." (75 RT 8976-77.) Jackson, a high school teacher, had been hit in the head with a ten-pound dumbbell. (76 RT 9072, 9050.) During the interview with inspector McCoy, appellant was cooperative and seemed slightly nervous. (76 RT 9070.) Appellant waived his *Miranda* rights and took total responsibility for the killing. The physical evidence was consistent with his version of events. (76 RT 9052, 9072.)

A redacted audio recording of the interview was played for the jury during the penalty phase. (76 RT 9052-9053, 9056, 9068-69.)[40] Therein, appellant told inspector McCoy that he was carrying fake identification "to cover my tracks on a warrant in case I ever got pulled over." (3rd Supp. CT 447.) The warrant was for being absent without leave from Log Cabin Ranch, a juvenile facility. (3rd Supp. CT 447, 428.) Appellant had left Log Cabin on a home pass but did not return. Since then, he had been living on his own. (3rd Supp. CT 428.)

Appellant told the inspector that he had met Jackson a few weeks before his death, when Jackson approached him in front of an ice cream store. Appellant stayed at Jackson's apartment that night because he did not have a place to stay. (3rd Supp. CT 427-429.) Appellant went to Jackson's apartment a few other times, too. Jackson gave him food and was "a nice guy at first." (3rd Supp. CT 445.) They met again the previous Saturday night. (3rd Supp. CT 430.) Appellant had been drinking beer and Jack Daniel's, and smoking marijuana. (3rd Supp. CT 441.) He again went to Jackson's apartment because he thought Jackson was a friend; he did not plan on spending the night there. (3rd Supp. CT 460.)

40

A transcript of the recording, as redacted, is at 3rd Supp. CT 426-467.

They watched television in Jackson's living room, while drinking beer. Jackson offered marijuana and appellant smoked three "joints." (3rd Supp. CT 460, 444.) After several hours, Jackson tried repeatedly to undo the fly of appellant's jeans. When appellant indicated that he would not have sex with Jackson, the latter became upset. (3rd Supp. CT 442-443.) They went into Jackson's bedroom. Jackson was naked but appellant kept his clothes on. Jackson began playing very explicit pornographic videos on the VCR in his bedroom. (3rd Supp. CT 431-432.) Jackson made strong sexual advances and "tried to force his self upon [appellant]." He tried to place his mouth on appellant's penis. (3rd Supp. CT 431.) Appellant, who estimated he drank eight to twelve beers in Jackson's apartment, was "very highly intoxicated." (3rd Supp. CT 441.) Jackson kept trying to force himself on appellant. Finally, around 2:30 or 3:00 a.m., appellant picked up a dumbbell and hit Jackson in the head several times. (3rd Supp. CT 433, 435.)

Appellant had not been thinking of taking any of Jackson's property until after he struck him. He explained to the detective: "I was really scared and what I was really looking for was just some quick cash right then, you know. I was hoping for enough to get out of town but I didn't get enough." (3rd Supp. CT 450.) He found only fifteen dollars. (3rd Supp. CT 450.) When appellant went to retrieve his own jacket from Jackson's closet, he saw a leather jacket and took it. He also took two VCR's and some spiked wrist bands. (3rd Supp. CT 439-440.) He took a pair of handcuffs and assorted bondage equipment. (3rd Supp. CT 454.) Appellant thought Jackson was still alive when he left the apartment. A few days later he saw a newspaper article claiming that Jackson had been stabbed. (3rd Supp. CT 458.) Appellant did not know why he struck Jackson, perhaps

because Jackson had tried to orally copulate him although he knew that appellant was sixteen years old. (3rd Supp. CT 442.)

c. Appellant's Prison Misconduct.

The prosecution presented evidence pertaining to several instances of misconduct by appellant over the sixteen years he had been in the California Department of Corrections. Almost all of these incidents occurred at Calipatria State Prison, most while tier yard was in place and the institution was, as a result, at its most violent. Evidence regarding eleven of these incidents had already been presented about a month and a half earlier, in the guilt phase of trial.

On August 21, 1991, three pieces of "weapons stock" were found inside appellant's cell in the California Medical Facility at Vacaville, including a bone, a piece of metal rod and a shard of glass. (76 RT 9077-9078, 9092-3.) Weapons stock is an item that can be made into a weapon. (76 RT 9096-97.) The metal was not sharpened and did not have a handle. (76 RT 9094-9095.) The glass did not have a handle, either. (76 RT 9097-98.)

After more than a year in Calipatria prison, on February 6, 1994, appellant fought with another inmate on the yard. (76 RT 9102-9103.) The two of them were punching each other. (76 RT 9104.) An officer who observed the incident could not hear what they were saying and did not know if anything was said which provoked the incident. (76 RT 9106-07.) In a 115 hearing, appellant pleaded guilty to a charge of fist-fighting. (76 RT 9112.)

On June 1, 1994, CDC officer Randall Davis confiscated appellant's television because it had another inmate's name on it, a violation of CDC rules. (76 RT 9114-9116.) Appellant called the officer a "punk ass little

bitch." (76 RT 9117.) He became agitated and started toward Davis with his fists clenched. When Davis and his partner tried to restrain appellant, he resisted. (76 RT 9118-9119.) Appellant later admitted to having a verbal exchange with staff. It was not a serious rules violation. (76 RT 9131, 9120.)

On February 20, 1995, appellant assaulted another inmate on the yard by hitting him on the back a couple of times. (76 RT 9136-9137.) The inmate had puncture wounds on his back and a weapon was recovered. (76 RT 9140- 9143.)

On May 31, 1995, an x-ray of appellant's abdomen showed the presence of a foreign body. (76 RT 9154-9156.) A piece of metal weapons stock two and a half inches long was recovered from appellant on contraband watch. (76 RT 9149-9150.) An officer from Calipatria's Security Investigations Unit acknowledged that there were "tons" of weapons stock in prison, which the inmates might possess for either offensive or defensive purposes. (76 RT 9163.) Appellant was charged with conspiracy to manufacture a weapon. He admitted to possession of the weapons stock but denied that he had engaged in a conspiracy with other inmates. He was found guilty as charged in the 115 hearing. (76 RT 9165-9168.) Appellant was not disrespectful during the hearing. (76 RT 9169.) In fact, the associate warden who adjudicated the 115 indicated that he had an amicable relationship with appellant and that the two of them had had no problems for years. (76 RT 9165, 9169.)

On June 7, 1995, appellant and his white cellmate were on the yard when two black inmates came out and walked toward them. The four engaged in a physical altercation. (77 RT 9179-9181, 9187-9188.) The officer who observed the incident did not know who initiated it. (77 RT

9188.) Appellant and his cellmate each had a weapon. (77 RT 9182, 9185.) The incident occurred when tier yard was in place, which meant that inmates did not know who would be placed on the yard with them. (77 RT 9187-9188.)

On August 14, 1995, appellant and another white inmate fought with two black inmates on the yard. (77 RT 9192-9194.) The officer who reported the fight did not see the initiation of the incident and had no idea how it started. (77 RT 9195, 9198.) The officer saw something in appellant's hand, which appellant then flushed down the toilet. One of the inmates involved in the fight had a couple of slash cuts. (77 RT 9195-9197.) In a 115 hearing, appellant was found guilty of slashing an inmate. (77 RT 9200-9201.)

On September 11, 1995, appellant was in possession of a weapon in the shower. (77 RT 9203-9206.) It was a razor blade melted inside a piece of plastic. (77 RT 9207.) Appellant was placed on contraband watch and later relinquished a second weapon that he had inserted in his rectum. (77 RT 9209-9211.) The officer who recovered these items acknowledged that an inmate might take a weapon out of his cell for reasons other than assaulting someone. For example, when an inmate showers, leaving a weapon behind in his cell would subject his cellmate to risk of being found with a weapon if the cell is searched. (77 RT 9215-9216.) Another officer acknowledged that quite a few inmates hide weapons in many locations. (77 RT 9223.)

On February 26, 1996, appellant and another inmate went to yard together. When two other inmates entered the yard, a fight ensued. (77 RT 9226.) The officer who reported the incident believed it was mutually initiated. (77 RT 9231, 9233.) He saw that appellant, who had started out

punching, was making a slashing motion and had a weapon in his hand. (77 RT 9227-9228, 9233.) It was a razor blade melted into a toothbrush with string for a handle, a weapon commonly manufactured by inmates. (77 RT 9239.) The inmate appellant was fighting with had slash marks on his body. (77 RT 9230.)

On March 16, 1996, appellant and Thomas Richmond tried to enter the yard with weapons. (77 RT 9254-9255.) Richmond's weapon was a razor blade melted into a comb with string for a handle. (77 RT 9256.) Appellant's weapon was similar. (See 77 RT 9246-9247.) Two black inmates were already out on the yard. (77 RT 9252.) After officers founds the weapons, appellant said "Now you guys have the weapons, let us go out and box." (77 RT 9251.)

On March 19, 1996, appellant was discussing with Lt. Fast the results of a 115 hearing the officer had conducted. Appellant was dissatisfied with Fast's explanation of the situation and spat on him. (78 RT 9273-9275.)

On February 9, 1997, correctional officer Pedro Ramos was preparing to remove an inmate from his cell when the tower officer mistakenly opened the door to appellant's cell instead. Appellant left his cell. When Ramos told him to get back inside, appellant rushed towards him and began punching. (78 RT 9283-9285.) No weapon was used and the officer received only minor injuries. Ramos was not aware that appellant had recently been punched while shackled by other officers. (78 RT 9288.)

On March 6, 1997, appellant refused to come out of his cell so that it could be searched for contraband. The cell extraction team was called to physically remove him. (78 RT 9291-9293.) Before an extraction occurred,

appellant agreed to come out. A sharpened piece of plexiglass with a sheet handle was on his bed. (78 RT 9294-9295.) The weapon was not hidden. (78 RT 9298.) Also in the cell was an Ad Seg vest, which staff wear for protection. It had been taken apart and the metal inside removed. (78 RT 9305-9306.)

At that time, Lindsey Hunt was a watch commander at Calipatria. (78 RT 9310-9311.) Hunt had received confidential information that appellant had gotten out of his cell, although no staff had seen him out. (78 RT 9322-9323.) Hunt then spoke to appellant, who said he got out so he could get food from the CO's office, but would not tell Hunt exactly how he did it. (78 RT 9312-9313, 9327.)

On January 6, 1999, Hunt was interviewing inmate Foster in the Ad Seg counselor's office. (78 RT 9339.) Appellant, who was in handcuffs and being escorted by Sergeant Stanley Whiting, got away and rushed at Foster. Appellant knocked Foster into the wall and was getting ready to strike him when staff intervened. (78 RT 9341-9342.) Foster was a "thorn in everyone's side" because he was constantly "mouthing off." (78 RT 9342, see also 78 RT 9343.) Whiting, who stepped in between appellant and Foster, was not attacked by appellant or injured. (78 RT 9351, 9354.) In fact, Whiting had transported appellant frequently but had never been assaulted by him. Appellant had always been respectful and the officer did not recall him ever trying to assault staff. After this incident, appellant apologized for causing him problems, and was concerned that Whiting's transfer might be delayed because of the incident. (78 RT 9354-9355.) Sgt. Whiting knew appellant to be an inmate who did not tell on staff. (78 RT 9356.)

On February 21, 1999, CDC staff found a hole in the wall of

appellant's cell wall that had a false cover. (78 RT 9358-9361.) Inside were a cigarette lighter, a piece of striker from a match book, sewing needles, an altered pair of tweezers, two razor blades fashioned into weapon and a sharpened nail. (78 RT 9362, 9365-9366.) A second hole was found with a piece of metal missing from the cell desk and another piece of metal that had been made into a weapon. (78 RT 9366.)

On July 26, 1999, the water in appellant's cell had been turned off because he had flooded his cell. Appellant asked correctional officer Jim Martin to turn on the water so he could flush his toilet. Martin refused because appellant would not turn on his cell light. While Martin reached inside the plumbing chase near appellant's cell to check the water valve to another cell, appellant threw feces and other material on him. (78 RT 9379-9382.) Appellant said, "I have AIDS and Hepatitis. Think about that on your way home." (78 RT 9382.) Martin denied that he had taunted appellant by stating, "They're going to gas you." (78 RT 9383.)

On January 31, 2000, a piece of metal covered with paint and soap was found attached to the wall of appellant's cell. (78 RT 9372-9374.)

On February 2, 2000, appellant was transferred to Tehachapi state prison. (78 RT 9390-9391.) When he arrived, appellant set off the metal detector and then acknowledged that he had something secreted in his rectum. He agreed to defecate into a bucket, where pieces of razor blade were found. (78 RT 9391-9394.)

On March 10, 2002, inmates Rosner and Jackson were on the yard in Tehachapi. (78 RT 9402-9403.) Appellant entered the yard and attacked Rosner. Jackson stepped in and appellant began fighting with him. (78 RT 9404.) After the incident, an MTA observed a laceration to appellant's right thumb which he opined was consistent with someone who had used a

razor blade as a weapon. (78 RT 9409-9412.) There were no lacerations on Jackson but Rosner had one to the back of his head and jaw which could have been caused by a razor blade. (78 RT 9412-9413.) Rosner told the MTA that he did not know what had happened. (78 RT 9415.)

On July 15, 2003, one institutional razor and three razor blades were found in appellant's cell in Calipatria. Inmates in Ad Seg were not permitted to have razors in the cells because they were considered dangerous contraband. (78 RT 9417-9418.) The blades in appellant's cell were not weapons because they did not have handles. (78 RT 9420-9421.) An inmate-manufactured syringe and a lighter were found in appellant's mattress. (78 RT 9426-9427.)

d. Victim Impact Evidence.

Carolyn Cox, the mother of Thomas Richmond, testified that her "whole heart just sank" when she learned that her only son had died. (79 RT 9449.) Cox was under a doctor's care for "nerves" and had developed a heart problem because of his death. (RT 9450.) Cox and her son were very close and her family was not the same. He got involved in drugs and made mistakes but was not, she said, a hurtful person. (79 RT 9450-9451.) Cox was "lost" without him. (79 RT 9452.)

Kimberly Colangelo, Richmond's older sister, "just broke" when she learned of his death. (79 RT 9454.) He was the only male role model in her family that her children had to look up to. (79 RT 9454.) He was the family's "center" and kept them strong. (79 RT 9454.) His death weakened them as a family. (79 RT 9455.) Their mother used to be young and vibrant but after Richmond's death, she was in and out of the hospital and on lots of medication. (79 RT 9456.)

Christina Richmond, Richmond's younger sister, "went blank" when

she heard that her brother had been killed. (79 RT 9458.) She felt like she lost not just her brother, but also her mother, who some days had a hard time getting out of bed. She felt alone and confused, and missed her brother very much. (79 RT 9459.)

2. The Defense Case.

The defense presented appellant's former juvenile probation officer to describe his family dysfunction and the other challenges he experienced while growing up. A prison expert testified about the living conditions appellant would likely face if sentenced to life in prison without the possibility of parole. Finally, appellant himself testified, both in a question-and-answer format and in a statement to the jury.

a. Appellant's Social History.

Charles Rand was a juvenile probation officer from 1977-1997 in San Francisco. (81 RT 9628, 9630.) He had also worked as a correctional officer in San Quentin, in CYA,[41] and in San Francisco's juvenile hall. (81 RT 9631.) Appellant first came to Rand's attention in 1984. Rand then continued to work with him for as long as appellant was in the juvenile system. (81 RT 9633.)

Rand spent a lot of time working up appellant's case. He talked to appellant, his mother and younger sister Lisa, school principal, and others. (81 RT 9634.) Rand learned that appellant lived with Lisa, their mother and her female partner and the partner's son. (81 RT 9640-9641.) Appellant's mother was most often out of work and supporting the family with welfare. She occasionally had odd jobs, but the family struggled financially. (81 RT

41

California Youth Authority. CYA is now known as DJF (Division of Juvenile Facilities).

9642.) Appellant and Lisa often went without eating and sometimes the school lunch they were provided was their only meal of the day. (81 RT 9642-9643.) According to Rand, appellant spent his childhood in a "very deplorable situation, very difficult, very tough." (81 RT 9643.)

In San Francisco, appellant lived near the Tenderloin, an area with rundown buildings. (81 RT 9636-9637.) A lot of violence and crime occurred there, along with drugs, alcohol and prostitution. (81 RT 9639.) When appellant lived in the Tenderloin, it was primarily populated with African-Americans. It would have been difficult for appellant living there as a white child. (81 RT 9638.) Appellant and his sister had difficulties at school and were victimized by other kids. Appellant had a strong, loving attachment to Lisa and was very loyal to her. At school he tried to protect her, often getting beaten up for his efforts. (81 RT 9641.)

Appellant's family had a history of drug and alcohol abuse. Because of his mother's substance abuse and other problems, appellant's household was unstable and often intolerable. (81 RT 9640.) His home had almost no structure and appellant lacked adult supervision. (81 RT 9641-9642.) As a result, appellant often left and lived on the streets of San Francisco or Seattle. (81 RT 9640, 9642.) He was repeatedly in juvenile court due to a lack of parental supervision. (81 RT 9641.) Appellant had been arrested many times inebriated or under the influence of drugs. (81 RT 9640.)

Appellant was in the juvenile system because, at age twelve, he had been involved in three offenses during a 90-minute period, including an assault on an elderly man. (81 RT 9649.)[42] Rand, who became appellant's probation officer about two years later, had appellant sent to Florida, where

---

42

The other two offenses were the Condencia and Dimitriou robberies.

his mother had moved and where other relatives were living. (81 RT 9650.) Appellant had trouble there, however, and returned in a year. (81 RT 9650.) Rand concluded, "I knew that the home was detrimental for Joseph. I knew that if he remained there, that he wasn't going to get the help that he wanted." (81 RT 9644.) He then referred appellant to Log Cabin, a county residential facility that was a step below CYA. (81 RT 9650-9651.) While at Log Cabin, appellant earned a home pass. He was released for a weekend but failed to return. He was subsequently arrested for killing James Jackson. (81 RT 9651-9652.)

Rand had read the reports relating to Jackson's death and talked to the probation officer involved. (81 RT 9656.) Rand knew that Jackson was often on the streets and had met appellant several times on street corners. (81 RT 9656-57.) Jackson had furnished alcohol to appellant, then 16 years old, more than once. (81 RT 9656-57.) There was marijuana and pornography as well. (81 RT 9658.) On the day he was killed, Jackson had tried to orally copulate appellant. (81 RT 9656.) When asked whether there were any circumstances mitigating Jackson's homicide, Rand responded, "Well, there's a repetition of the same kind of incident that Joseph has been repeatedly involved in previously. Sexual and physical abuse." (81 RT 9656.)

Rand himself came from a dysfunctional home and identified strongly with appellant's background. (81 RT 9630, 9634.) He explained that no child in appellant's situation would ultimately succeed without the support of at least one person, to teach and guide him. Rand's mother was that person in his life, but Rand did not know appellant to have the support of such an individual. Although Lisa had appellant to protect her, appellant had no one to protect him. (81 RT 9645.)

Before his testimony, Rand spoke to appellant for the first time in almost 20 years. Rand was amazed at how far appellant had come and hardly recognized him as the same person. Rand had known that appellant was very bright and had potential, but he could see a true transformation. Appellant was now able to be objective and admit his faults. Appellant could see his strengths and weaknesses in a way he could not before. Rand had thought that appellant would go on fooling himself for the rest of his life. But now, Rand thought the insights appellant demonstrated were brilliant for a person who seemed as a youth to have no chance or future. (81 RT 9645-9647.)

b. Prison Conditions Evidence.

Correctional consultant James Esten, who had 20 years of experience working at the CDC, reviewed appellant's disciplinary history. (82 RT 9700, 9702, 9709.) Esten then inquired of CDC classifications staff whether an inmate involved in the homicide of a cellmate, with multiple weapons possession and rules violations, and minor assaults on staff would be placed in SHU. Staff responded, "You must be talking about Barrett at Calipatria." (82 RT 9720.) Classifications told Esten that appellant's placement would be governed by a memorandum dated November 3, 2000, providing for an indeterminate SHU term at Pelican Bay for inmates committing repeated acts of violence. (82 RT 9720-9722.)

Esten explained that Pelican Bay was designed differently than California's other prisons and contained the state's only "pure SHU," or security housing unit. (82 RT 9713-9714.) The Pelican Bay SHU was specifically designed to thwart future dangerousness and continuing violence, and to break up prison gangs. (82 RT 9722, 9715.) Appellant fit all the criteria for a non-gang related indeterminate SHU term. (82 RT

9729, 9757.) Esten believed that if appellant was not sentenced to death, he would be sent to Pelican Bay's SHU and be celled alone. (82 RT 9726.)

Esten presented a video, which was played for the jury, to illustrate the security of Pelican Bay's SHU. (82 RT 9721-22.) The video showed the concrete housing units with no windows, surrounded by a double fence with an electrified fence in between. (82 RT 9722-23.) The expert explained that in the Pelican Bay SHU, inmates are always in full waist restraints and leg irons, and are chained together. (82 RT 9723.) Inside and outside of the cells are painted white to hamper an inmate's depth perception and to create sensory deprivation. (82 RT 9724.) An inmate goes to yard alone and eats all meals inside his cell. (82 RT 9725.) There is no program in Pelican Bay's SHU. Inmates are in their cells more than 23 hours a day, allowed out only for 45 minutes to exercise and shower. (82 RT 9744.) Pelican Bay is more secure than death row. (82 RT 9756.) Esten presumed that appellant could only get out of SHU if he remained "absolutely disciplinary free" for at least five years. (82 RT 9760-9761.)

c. Appellant's Testimony.

Joseph Barrett was born in New Jersey. His earliest memory was of Canada, where his mother and father took him after his father deserted the Marine Corps. Being a Marine like his father was appellant's childhood aspiration. (82 RT 9790.)

Appellant remembered a lot of "fussing and fighting" in his home when he was young. His parents separated before appellant turned three. (82 RT 9791.) His mother was hospitalized at some point, and he lived with his father. Appellant's mother regained custody of him and his sister Lisa, who is a year younger than him, by kidnaping them in Canada and returning to the United States, where his father could not follow them. (82

RT 9791-92.) Appellant believed they went to live with his maternal grandmother, for a time in a basement. It was not a good situation and they were not allowed outside. (82 RT 9792.)

When appellant was about eight years old, he moved with his mother and sister to Pennsylvania and then back to New Jersey. They later moved to San Francisco, living in a shelter when they first arrived. (82 RT 9794-9795.) His mother had a female lover. She and her son, Samuel, who was of mixed race, lived with them. Appellant's mother occasionally had a job and her girlfriend provided some support. (82 RT 9795.) There was not always food in the house. (82 RT 9801.) They ate lots of ramen and sometimes "tomato soup" made from ketchup and water. But appellant believed that his mother was doing the best she knew how. (82 RT 9801-9802.)

In San Francisco, they lived in various places, none in "the greatest surroundings." (82 RT 9796.) Appellant remembered living in a predominantly black neighborhood when he was eight or nine years old. As a "skinny white kid," he stood out and encountered a lot of hostility. When he went out, appellant had to move as fast as his feet could carry him. (82 RT 9797, 9799.) He got "jumped" on a regular basis. (82 RT 9798.) The next home he remembered was even worse, and it was located a half block from a housing project. (82 RT 9798-9799.) Appellant recalled, "So pretty much every time I stepped outdoors, I had something going on." (82 RT 9799.)

Appellant took the bus to school, which was "pretty chaotic." (82 RT 9800.) There were only a handful of white kids at the school. Appellant and Lisa were the only whites on the bus, and "it was always an issue." (82 RT 9800.) He ended up fighting with somebody every couple

of days, "[o]n the bus, at the bus stop, getting off the bus, in school, going home, to and from school." (82 RT 9800.)

Appellant described the assault on an elderly man he committed at age twelve as "the single-most shameful thing I've ever done." (82 RT 9799-9800.) After the incident, appellant was placed into a group home. (82 RT 9799, 9801.) Appellant was subjected to a series of placements, where he did not adjust well. He was lied to and did not trust the people who were supervising him. (82 RT 9803.) He had no one to give him advice. (82 RT 9784-9785.) Appellant was sent to Florida. There, he chased his uncle out of the house with a knife after his uncle punched him in the eye. (82 RT 9848.) The juvenile system learned that appellant had returned to San Francisco after police found him in the hospital unconscious due to an alcohol overdose; after his release appellant was put into juvenile hall. (82 RT 9849-50.)

Appellant was sent to Log Cabin. There, he earned several furloughs and returned from each except the last. (82 RT 9803.) In July 1986, appellant did not return to Log Cabin due to a matter involving his family, which he would not discuss further. (82 RT 9857, 9803-9804.) Appellant, then 16 years old, lived on the streets until his arrest in October. He sometimes stayed with others, his sister, or in a hotel. He occasionally had a job. (82 RT 9804, 9859.)

Appellant averred that, for the most part, he admitted his wrongdoing. (82 RT 9806.) When he was stopped by police as a juvenile, he volunteered his involvement in the Jackson homicide. (82 RT 9806.) Appellant's attorney at the time told him he would be released in seven to ten years. He was sentenced, however, to 26 years to life. (82 RT 9806-9807.)

Appellant was sent from CYA to an adult prison in January 1988, when he was 17 years old. (82 RT 9812, 9779.) Appellant first went to Vacaville, which was filled with "every kind of sickness that you can imagine," including cannibals, psychopaths, and deviants. (82 RT 9807-9808.) He described it as "hell on earth." (82 RT 9807.) He also went to Mule Creek, Soledad and Folsom. (82 RT 9809.) Appellant recalled how he was affected when he first saw inmates shot on the yard for fighting and a man on his tier who was murdered. (82 RT 9812.) He grew a mustache to look older and was advised by a cellmate not to use table manners when he ate. He was skinny and concerned for his safety all the time. (82 RT 9812-9813.) When appellant got to prison, he began associating with inmates of his own race. (82 RT 9818.) He did not join a prison gang, however. He did not agree with much of their politics and refused to let others make decisions for him. (82 RT 9788.)

In 1996, Calipatria prison was an exceedingly violent place. Appellant heard that it had the highest per capita assault rate of any prison in California. (82 RT 9816.) Appellant could have gone into a PC yard but chose not to because he would be celled with a child molester or rapist. (82 RT 9876-9787.) He had never asked correctional staff to protect him in prison, believing that he needed to bear the consequences of his own actions. (82 RT 9781-9782.) When asked why none of his in-prison misconduct involved female CDC staff, he responded "It's just not appropriate." (82 RT 9787.)

Appellant explained that there was a "whole lot of manipulation" in prison. (82 RT 9782.) Everyone acts with "an ulterior motive" and has "their own agenda." (82 RT 9817.) It was therefore unwise, he explained, to show feelings in prison, and added, "the ones you do show are rarely the

ones you feel . . . ." (82 RT 9782.) In prison, one has "to stifle everything that makes you valuable as a human being . . . ." (82 RT 9782.) An act of kindness was a rare thing. (82 RT 9817.) Appellant missed being able to show his feelings. (82 RT 9782.) He missed simply "being able to sit down and have a conversation with someone and share on a basic level as a human being without wondering what they're up to." (82 RT 9784.) It was also difficult for appellant to be powerless and unable to "be there" for his loved ones. (82 RT 9783.)

At the time of trial, appellant was 33 years old and had spent almost half his life in prison. (82 RT 9779.) During these years, appellant had grown. His views had evolved and broadened. (82 RT 9826.) He accepted the fact that he would never be released. Yet even incarcerated, appellant explained, "there's a whole lot I want to do." (82 RT 9821, 9822.) Reading was one of the few pleasures he had left and he wanted to educate himself further. (82 RT 9824-9825, 9785.) He was hoping to achieve "[m]aybe a sense of fulfillment, a sense of purpose." (82 RT 9785.) Appellant believed that something positive could come out of his experience, stating "I'm not going to waste what I've learned about it. I'm going to put it to use somehow." (82 RT 9822.) He thought others might benefit from it and stated: "I would hope that maybe I can be a cautionary tale on what not to do." (82 RT 9784.)

Appellant testified that he did not believe in the legal system, because lawyers hide behind "technicalities" and the jurors do not get to ask questions. (82 RT 9778.) He was surprised during jury voir dire at the honesty of most prospective jurors. The experience taught him that not everyone has an ulterior motive. (82 RT 9778-9779.) He explained that he had avoided looking at the jurors during trial because he was unable to

completely control the muscles on his face, due to Bell's Palsy. As a result of this illness, which he developed in his youth, appellant frequently "stared" in a manner which made others uncomfortable. (82 RT 9776-9777.)

Defense counsel asked appellant why he had been a "model citizen" during trial. (82 RT 9785.) He explained that it was because the court and its staff had treated him with humanity and dignity. (82 RT 9785.) Also, appellant had given his word to the transportation team that he would not cause them problems. (82 RT 9785.)

Appellant believed that Richmond's family members had a right to testify. In fact, he saw a lot of similarities between them and his own family. (82 RT 9780-9781.) Appellant did not want his mother and sister to be put on the witness stand, however. (82 RT 9774-76.) He loved them very much and did not want them "crying and pleading" for his life or to "humiliate" themselves in an attempt to save him. He added, "the sole responsibility for where I'm at lies with me." (82 RT 9776.)

In the last eight years, appellant had experienced the sensory deprivation described by prison expert Esten. (82 RT 9825.) Appellant would like to live in "peace and quiet," but that was not possible in prison. Neither was it possible to be safe. (82 RT 9789.) He had gained perspective and stated: "I realize every year that goes by exactly what a life sentence is and how long a life can be. [¶] When you're 16 they tell you, '26 to life,' you know, seems like an eternity. When you're 33 you realize just what an eternity it is." (82 RT 9869.)

d. Appellant's Statement to the Jury.

Speaking directly to the jurors, appellant thanked them for their patience and expressed his respect for them. (82 RT 9827.) He told the

jurors he disagreed with much of what his attorneys did during trial but understood they meant well and were trying to save his life. (82 RT 9828.) He knew that many of the jurors were looking for him to express remorse about Richmond's death, but he could not. Appellant did, however, regret the pain he caused to Richmond's family members, who were blameless. (82 RT 9828-9829.) He regretted the pain he had caused his own loved ones and the potential in himself he had wasted. (82 RT 9831.)

Appellant realized that the he could not adequately express what his prison experience had done to him: "There are certain things about prison that you can't understand unless you live there. . . . Why it is that things that seem trivial take on such significance to me." (82 RT 9828.) He reiterated his hope that his experience could somehow benefit others. (82 RT 9830-32.)

Appellant explained that he had not responded to the prosecutor's provocations during trial "because I'm returning the dignity and respect the court and its staff have afforded me. Excuse me. They've treated me as a human being. Something I'm not normally accustomed to in my world. Respect is one thing. Humanity is quite another." (82 RT 9832.) Appellant said that he was no danger to anyone who was not a danger to him. (82 RT 9833.) He explained that the racial violence presented at trial had occurred in the context of riots and assaults taking place in Calipatria at that time. The inmates he fought with during tier yard understood the situation, and the fights were mutual. (82 RT 9833.)

Appellant closed by stating, "I will not ask you for mercy. I will not ask you for sympathy. I will not ask you for pity. I will ask you to do what you feel is just, and nothing more and nothing less." (82 RT 9834.)

I.
THE TRIAL COURT'S REFUSAL TO EXCUSE ALL EMPLOYEES OF THE DEPARTMENT OF CORRECTIONS AS PROSPECTIVE JURORS DEPRIVED APPELLANT OF AN IMPARTIAL JURY AND DUE PROCESS

A. Introduction.

Prior to the start of *Hovey* voir dire,[43] appellant sought to excuse all prospective jurors who worked for the Department of Corrections by stipulation. The trial court refused, however, believing that to find CDC staff biased as a consequence of their employment would be unfair. During individual questioning, many then-current and former Department employees revealed strong beliefs about appellant, the charged offense, inmates in general, and other relevant topics. As a result, over 40 such jurors were dismissed for cause.

At the start of general voir dire, at least 17 CDC employees remained in the jury pool. Appellant formally moved to have them dismissed as a group, asserting they were impliedly biased by virtue of their employment, and should not serve in a case involving an in-prison homicide. Appellant emphasized that the CDC had investigated Thomas Richmond's death and initiated his prosecution. Department employees would be familiar with various issues likely to arise during trial including the manufacture and use of weapons by inmates, gangs and debriefing, tier yard, etc. If selected as jurors, they could be exposed to extraneous information when they reported to work on days when court was not in session. And they would have to pass judgment on the credibility of their colleagues.[44] The trial court denied

---

43

Hovey v. Superior Court (1980) 28 Cal.3d 1.

44

The prosecution's Sixth Amended Witness List named approximately 120

the motion.

When the jury was sworn, appellant had expended seven of the fourteen peremptory challenges he ultimately used to remove CDC employees. After he exercised his fourteenth peremptory, appellant had only six challenges left but was faced with a pool in which seven Department staff remained – including Juror No. 12 who was then seated on the jury. Given this untenable situation, he utilized no additional challenges.

As shown below, the average person employed by the CDC would be economically, socially, and emotionally identified with the Department and therefore not impartial in appellant's case. Accordingly, the trial court erred in finding that all such jurors were not impliedly biased. Because Juror No. 12 served on the jury, appellant was denied his federal and state constitutional rights to an impartial tribunal. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) The erroneous ruling also violated California statutory law. (Code Civ. Proc., § 229.) Finally, appellant was denied his federal and state constitutional rights to due process because the trial court's error fundamentally interfered with his ability to meaningfully exercise the peremptory challenges to which state law entitled him. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 15.)

B. Appellant Repeatedly Sought to Have CDC Employees Excluded From the Jury Pool.

1. Preliminary Jury Selection Proceedings.

Whether Department of Corrections personnel should be excluded as a group from the jury pool in appellant's case was first discussed during a

---

CDC witnesses. (See 44 CT 12532-12545.)

hearing on pretrial motions on August 20, 2003. The trial judge expected that there would a significant number of CDC employees called for jury duty, but stated: "I don't know of any law that says that they can't sit on a case like this." (14 RT 2158.) Defense counsel indicated that in his experience, there was always an agreement that such persons were removed from the pool. (14 RT 2158-2159.) The court noted that the CDC was one of the few employers in the county that paid employees for jury service. (14 RT 2160.) The court emphasized that sometimes retired peace officers were critical of law enforcement witnesses and indicated that it would not exclude CDC personnel as a group. (14 RT 2159, 2161.)

The issue arose again on October 2, 2003. The defense asked the court for a stipulation to relieve all CDC personnel, noting that such a stipulation had been entered in *Gomez*.[45] Defense counsel emphasized that many of the witnesses would be correctional officers and inmates. (26 RT 2961, 2062.) The court denied the request, however, stating that excusal as a group was not "legally required." (26 RT 2961.) The court presumably believed that such jurors might aid the defense, as it emphasized that the first *Gomez* jury was unable to reach a verdict because a CDC employee

---

45

Gomez was another Imperial County Superior Court case, which was originally tried as a capital case, prior to appellant's. (See 10 RT 1614.) According to the unpublished opinion therein, Mr. Gomez was acquitted of first degree murder in his first trial but the jury deadlocked between second degree murder and manslaughter. Upon retrial, Gomez was convicted of second degree murder and assault by a life prisoner with a deadly weapon. (*People v. Gomez* (2005) 2005 Cal. App. Unpub. Lexis 9416.) In appellant's case, the court and attorneys frequently referred to *Gomez* when discussing procedural and substantive issues. (See, e.g., 11 RT 1627; 13 RT 2043; 14 RT 2058, 2136-2142; 15 RT 2212-2213; 18 RT 2387.)

had voted for acquittal. (26 RT 2961-2962.)[46] The court again opined that sometimes peace officers were critical of their colleagues and not afraid to find that another officer made a mistake. (26 RT 2962.)

The court indicated it would consider each prospective juror individually rather than "exclude any cognizable segment of the population of Imperial County." (26 RT 2963.) The prosecutor suggested that the instant inmate-on-inmate offense alleged was significantly different than an inmate-on-officer offense. Defense counsel reminded the court, however, that the People's proposed aggravation evidence included alleged assaults against correctional staff. (26 RT 2963; see also, 14 RT 2158.) Again the court refused to make any blanket excusals. (26 RT 2963.)

Finally, defense counsel pointed out that any CDC personnel who served on the jury would know that appellant was shackled in the courtroom. (26 RT 2964.) The court responded that there was "nothing we can do about that" and suggested that efforts to hide a defendant's shackles from the jury did not actually "fool[] anybody." (26 RT 2964, 2965; see also, 45 RT 5443.)

Hovey voir dire began on October 9, 2003. (8 CT 2252.) As it progressed, the trial court several times worried aloud that appellant's jury would largely come from the CDC and the Imperial Irrigation District (IID) since those agencies paid employees for jury duty. (34 RT 3946 [Oct. 21]; 36 RT 4284 [Oct. 24], 40 RT 4661 [Nov. 4].)

On October 23, after the court expressed concern about finding

---

46

Counsel was under the impression that the *Gomez* juror was actually a *retired* CDC employee. The fact that a stipulation was entered to excuse all CDC employees in *Gomez* suggests that counsel was correct.

enough prospective jurors from which to select a jury, defense counsel indicated that they would be making a general motion for cause to excuse correctional officers. (35 RT 4135.) Counsel emphasized that the parties had made extensive efforts to ensure that the jurors not know appellant was anchored to the floor by chains and that a CO would know that he was. (35 RT 4135-4136.) The trial court said, however, that it would not excuse prospective jurors simply because they were correctional officers. (35 RT 4136.)

2. *Hovey* Voir Dire.

During *Hovey* voir dire, at least 40 then-current or former CDC employees were excused as potential jurors. Most were excused for cause after acknowledging that they could not give appellant a fair trial.

Prospective jurors working for the CDC at the time of appellant's trial who were excused included Allen A., an engineer at Calipatria, who was not sure he could be fair. (28 RT 3065-3069, 7 CT 1718.) Tina C., a dental assistant at Calipatria, had heard about appellant. (39 RT 4584-4585, 30 CT 8585.) Ms. C. further indicated that appellant was scheduled for a dental appointment and that she "may at any given time have to work on him." (30 CT 8599.) Yvette C., a correctional officer at Centinela, had heard things about appellant and could probably not give him a fair trial. (43 RT 5083-5086, 39 CT 10946.) Charlotte D., a correctional officer at Calipatria, knew many of the potential witnesses. (43 RT 5104, 39 CT 11054.) Jesse F., a correctional officer at Centinela, did not believe he could be fair and impartial. (31 RT 3534-3536, 15 CT 4101.) Maurice G., a correctional officer at Centinela, would likely automatically believe his colleagues as witnesses. (44 RT 5386-5398, 42 CT 11954.) Michael G., a correctional officer at Centinela, acknowledged that his background as a

CO might interfere with his decision making in the case. (32 RT 3687-3699, 17 CT 4823.) Luis G., a correctional officer at Calipatria, felt he would not do a good job for appellant in light of the stories he had heard about him. (39 RT 4611-4612, 31 CT 8657.) Kenneth H., a correctional officer at Calipatria, knew about the case and had formed an opinion. (33 RT 3819-3821, 19 CT 5367, 5376.) John H., a correctional officer at Calipatria, knew about the case. (44 RT 5308, 43 CT 12062.) Henry H., a correctional officer at Calipatria, was familiar with appellant's case and believed he was guilty. (33 RT 3853-3855, 20 CT 5547.) Francisco H., a correctional officer at Centinela, would automatically believe the testimony of a fellow CO. (39 RT 4605-4608, 31 CT 8686.) Jorge J., a plant supervisor at Calipatria, was familiar with inmate assaults and could not be fair. (34 RT 3920-3926.) Jorge L., a correctional officer at Centinela, had been assaulted by an inmate and could not be fair. (35 RT 4086, 24 CT 6773.) Patty M., a secretary at Centinela, had heard about the case and was not sure if she could be fair. (44 RT 5419-5421, 43 CT 12204.) Bruce M., a correctional officer at Calipatria, knew many of the potential witnesses. (43 RT 5178-5179, 40 CT 11410, 11432.) Yvonne M., an office assistant at Centinela, said her employment with the CDC had left her feeling that inmates were guilty. (35 RT 4189-4190, 25 CT 7133.) Moises M., a correctional officer at Centinela, would find it hard to believe an inmate's testimony. (33 RT 3852-3853, 20 CT 5655-5670.) Loreto O-J., a correctional officer at Centinela, had negative feelings towards inmates and was excused on *Witherspoon-Witt* grounds.[47] (36 RT 4305-4316, 28 CT

47

Witherspoon v. Illinois (1968) 391 U.S. 510; *Wainwright v. Witt* (1985) 469 U.S. 412.

7821.) Daniel P., a classifications and parole representative at Calipatria, had an opinion about appellant's guilt and knew more than 60 potential witnesses. (36 RT 4351-4353, 28 CT 7965-7983.) Maria P., an accounting clerk at Calipatria, had heard about the case at work and was excused on *Witherspoon-Witt* grounds. (36 RT 4353-4368, 28 CT 8001.) Jose P., a correctional officer at Calipatria, would automatically believe the testimony of CO's because they swear to uphold the law. (40 RT 4669-4670, 34 CT 9668, 9674.) George R., a correctional officer at Calipatria, would tend to believe the testimony of his fellow officers. (40 RT 4718-4727, 35 CT 9812, 9821.) Christopher R., a correctional officer at Calipatria, would tend to believe the testimony of CO's, was familiar with appellant and his case, and knew more than 85 of the potential witnesses. He was excused on *Witherspoon-Witt* grounds. (40 RT 4783-4785, 35 CT 10028, 10034, 10043, 10046.) Ronald R., a correctional counselor at Centinela, said that he might not be fair due to his loyalty toward the CDC. (41 RT 4807-4808, 36 CT 10151, 10165-10166.) Frank R., a correctional sergeant at Calipatria, had heard about the case from others and knew some of the potential witnesses, and acknowledged he might find those he knew more credible. (41 RT 4835-4839; 36 CT 10223, 10232.) Jennifer R., a correctional officer at Centinela, would believe the testimony of a CO she knew. (41 RT 4839-4840, 36 CT 10295, 10304, 10310.) Michael S., a captain at Calipatria, worked in investigations at the prison for several years and knew all about the case. (41 RT 4924-4925, 38 CT 10689, 10705, 10709.) Paula K-R., a correctional lieutenant at Calipatria, had heard rumors about the case and knew more than 75 witnesses. She was excused for hardship because she was moving out of the country. (28 RT 3009; 8

CT 2079-2080, 2093.)[48]

Several former CDC employees were also excused during *Hovey* voir dire, belying the trial court's belief that former employees were likely to be critical of current employees. Clinton J., a deportation officer for U.S. Immigration who used to be a correctional officer, said he would not believe an inmate. He was excused on *Witherspoon-Witt* grounds. (28 RT 3115-3124, 8 CT 2042, 2048, 2056.) Monica D., a former correctional officer who had been assaulted three times by inmates, was excused for hardship. (42 RT 4966.) Tonette J., a correctional sergeant who had to medically retire after she was assaulted by an inmate, said she knew too much about the case and hated inmates. (34 RT 3988-3989, 22 CT 6088, 6091.) Abraham R., a former correctional officer, was excused on *Witherspoon-Witt* grounds. (40 RT 4775-4776, 35 CT 9916.)

Despite the large number of CDC employees who were excused for cause, at the end of individual voir dire at least 17 others remained in the pool of prospective jurors, including the woman who would eventually be

---

48

Several other CDC employees were excused on *Witherspoon-Witt* grounds for their pro-death penalty views, including Saul A., a correctional officer at Calipatria (28 RT 3070-3077; 6 CT 1682), Larry D., a telecommunications technician at Centinela (31 RT 3430-3437, 13 CT 3596), Gary J., a correctional officer at Centinela (34 RT 3926-3942, 21 CT 5908), and Ramon R., a correctional counselor at Centinela (40 RT 4747-4760, 35 CT 9956, 9965). Two who were opposed to the death penalty were also excused, including Oscar G., a correctional officer in Centinela, who was engaged to an investigator involved in appellant's case (43 RT 5139-5141, 40 CT 11198, 11207), and Frank R., a materials supervisor at Calipatria (41 RT 4823-4834, 36 CT 10259). Marco A. was reporting to the CDC academy and therefore excused for hardship. (28 RT 3036-3041, 6 CT 1475.)

seated as Juror No. 12.[49]

When the parties discussed the logistics of picking the jury, defense counsel remarked that the large number of CDC employees still in the pool left him feeling somewhat constrained. (44 RT 5245.) The trial court dismissed counsel's concern, responding: "Well, you can get that on the record. If there's a law that says they can't serve, I'll boot them for cause. Otherwise, we'll keep them." (44 RT 5245.)

3. Appellant's Written Motion to Exclude CDC Personnel From the Jury Pool.

Faced with the very real possibility of being unable to pick a fair jury, appellant filed a written motion to exclude the CDC personnel who remained in the jury panel. (44 CT 12523-12531.) In response to the court's belief there was no law which permitted it to exclude all CDC

49

These prospective jurors included: Jeffrey A-H., a correctional lieutenant at Centinela (33 RT 3806, 18 CT 4969); Claudia A., an office assistant at Centinela who had been a correctional officer (28 RT 3017, 5 CT 1358, 1364); Alberto A., a CDC parole agent (28 RT 3025, 5 CT 1394); Marcos A., a correctional officer at Calipatria (28 RT 3051, 6 CT 1538); John B., a correctional officer at Centinela (29 RT 3151, 9 CT 2510); Ignacio C., a correctional officer at Centinela (40 RT 4700, 33 CT 9307); Juanita C., an office assistant at Centinela (31 RT 3406, 12 CT 3416); Blanca G., a correctional officer at Calipatria (32 RT 3572, 17 CT 4859); Raquel G., who worked in accounting in a CDC regional office but used to work at Calipatria (44 RT 5307, 43 CT 12026, 12032, 12035); Jesus J., a correctional officer at Calipatria (34 RT 3975, 21 CT 5980); Ray L., a correctional officer at Centinela (35 RT 4065, 23 CT 6593); Javier L., a correctional officer at Calipatria (35 RT 4099, 24 CT 6701); Alicia N., a case records analyst at Calipatria (36 RT 4301, 27 CT 7677); Frances O., who worked in the accounting office (36 RT 4327, 28 CT 7785); Robert R., a correctional officer at Centinela (40 RT 4746, 35 CT 9884); Enrique V., Jr., a correctional officer at Centinela (39 RT 4532, 31 CT 8879); and Juror No.12, a correctional officer at Centinela (38 RT 4406, 29 CT 8042).

employees, the motion explicitly cited section 229 of the Code of Civil Procedure, which included several bases for finding implied bias. (44 CT 1524.) The motion asserted that under the circumstances of appellant's case, such prospective jurors were impliedly biased and permitting them to sit in judgment of him would violate his constitutional rights to a fair and impartial jury, as well as section 229. (44 CT 12524, 12526.)

In the written motion, appellant reiterated points already made in court. He further emphasized that the warden of Calipatria was a party in two published opinions in his case. In fact, the CDC was the investigating agency in this case and its employees had gathered, processed and secured the evidence against appellant. It was CDC personnel who had decided to refer the matter to the district attorney's office for possible prosecution. (44 CT 12524.)

Given the danger inherent in their jobs, officers would be likely to feel a strong bond with their colleagues, whom they depend upon for their own safety, and would therefore have difficulty rejecting their testimony at trial. (44 CT 12523-12526.) They would also see their co-workers bring appellant to court each day. (44 CT 12523-12524.)

Appellant pointed out that CDC personnel would have personal knowledge of – and undoubtedly opinions on – a wide variety of issues about which the parties would be presenting evidence and asking the jurors to consider, including, inter alia, the unwritten code of conduct by which inmates live, prison gangs and racial groups, tier yard, inmate-on-inmate assaults, inmate-on-staff assaults, the 115 rules violation process, Ad Seg housing units and rules, prison investigation and medical units, the debriefing of inmates, and inmates' ability to manufacture, hide and use weapons. (44 CT 12525-12526.)

Finally, appellant asserted that having CDC personnel on the jury would risk exposure to information not presented in court. (44 CT 12526.) CDC personnel would work with the files of appellant and other inmate witnesses and thereby have access to information possibly not before the jury. (44 CT 12525.) Jurors employed by the corrections department would likely report to work on the three days per week when the court was dark and potentially be exposed to information and influences from colleagues and inmates. (44 CT 12523-12524.)[50]

In support of the motion, defense counsel declared that in his experience correctional officers were typically excused by stipulation of both parties in Imperial County Superior Court in cases arising in a prison setting. (44 CT 12528-12529.)[51] Counsel referred to the widespread, negative rumors CDC employees had heard about appellant, as juror questionnaires and voir dire had demonstrated. (44 CT 12524, 12529.)

The motion was heard on November 27, 2003. (45 RT 5446-5446; 44 CT 12546.) The court acknowledged that in the *Gomez* case, there was an agreement to keep prison employees off of the jury. (45 RT 5440.) But it believed that other small counties with state prisons did not follow a similar practice. (45 RT 5440-5441, 5445-5446.) Defense counsel

---

50

Appellant also noted that many corrections staff were members of the CCPOA, a corrections union, which at least according to one prospective juror's questionnaire, supported the death penalty. Thus a death penalty recommendation could be perceived as furthering union aims and employee interests. (44 CT 12325.)

51

Counsel's experience seemed to be validated by that of prospective juror Enrique V., who when asked about his feeling regarding jury service replied, "I would like to be selected. Just because I'm a CDC employee I've always been dismissed." (31 CT 8880.)

emphasized it was not just the *Gomez* case; CDC personnel had been kept off other Imperial County prosecutions involving in-prison offenses. (45 RT 5441.) The trial court stated, however, that it could not treat prison employees as "a separate part of society" and preclude them from jury service. (45 RT 5442.) The court believed that it had to assume the honesty of prospective jurors who were employed by the CDC when they affirmed they could be fair. (45 RT 5445.) Finally, the trial court noted that most of those still in the jury pool were employed at Centinela state prison, rather than at Calipatria. (45 RT 5443-5444.) The motion was denied. (45 RT 5446; 44 CT 12546.)

C. Appellant's Sixth Amendment Right to an Impartial Jury Was Violated by the Trial Court's Refusal to Find That All CDC Personnel Were Impliedly Biased.

1. The Presence of an Impliedly Biased Juror Deprives a Criminal Defendant of His Constitutional Rights to an Impartial Jury.

The Sixth and Fourteenth Amendments guarantee a criminal defendant the right to an impartial jury. (*Ross v. Oklahoma* (1988) 487 U.S. 81, 85; *Irvin v. Dowd* (1961) 366 U.S. 717, 722.) A defendant is entitled to "'a jury capable and willing to decide the case solely on the evidence before it.'" (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 554, quoting *Smith v. Phillips* (1982) 445 U.S. 209, 217.)[52] The right to an impartial jury is denied even if only one juror is biased or prejudiced. (*Fields v. Woodford* (9th Cir. 2002) 309 F.3d 1095, 1103.) The presence of a biased juror is a structural defect which is not subject to harmless error

---

52

The right to an impartial jury is also guaranteed by Article I, section 16, of the California Constitution. (*People v. Wheeler* (1978) 22 Cal.3d 258, 265.)

analysis. (*Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 973, n. 2.) Reversal is required without a showing of actual prejudice. (*United States v. Gonzalez* (9th Cir. 2000) 214 F.3d 1109, 1111.)

The United States Supreme Court has long identified two types of juror bias. "The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as a matter of law." (*United States v. Wood* (1936) 299 U.S. 123, 133.) The Court in *Wood* went on to explain that implied bias is "a bias attributable in law to the prospective juror regardless of actual partiality." (*Id.* at p. 134; see also, *McDonough*, *supra*, 464 U.S. 548, 556-559 (conc. opns. of Blackmun and Brennan, JJ.) [five concurring justices recognize the doctrine of implied bias]; *Smith v. Phillips*, *supra*, 455 U.S. 209, 222 (conc. opn. of O'Connor, J.) [recognizing that extreme or exceptional situations would justify a finding of implied bias]; *Leonard v. United States* (1964) 378 U.S. 544 [prospective jurors who heard previous jury find defendant guilty should have been automatically disqualified].)[53]

The test for implied bias is an objective one, and not dependent upon a juror's admission of prejudice. In *U.S. v. Gonzalez*, *supra*, 214 F.3d 1009, 1112, the Ninth Circuit explained:

> Unlike the inquiry for actual bias, in which we examine the juror's answers on voir dire for evidence that she was in fact partial, the issue for implied bias is whether *an average person in the position of the juror in controversy* would be prejudiced. [Citations and internal quotation marks omitted.]

53

See also, *Dyer v. Calderon*, *supra*, 151 F.3d 970, 984-985, tracing the earliest history of the doctrine of implied bias.

> Accordingly, we have held that prejudice is to be presumed where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances. [Citations and internal quotation marks omitted.]

Whether a juror's bias may be implied from the circumstances of a particular case is a question of law. (*Burton v. Johnson* (10th Cir. 1991) 948 F.2d 1150, 1158, citing *Smith v. Phillips*, *supra*, 455 U.S. 209, 222, (conc. opn. of O'Connor, J.).) Looking to its previous opinions, the Ninth Circuit stated that "the relevant question is whether the case presents a relationship in which the potential for substantial emotional involvement, adversely affecting impartiality, is inherent." (*U.S. v. Gonzalez*, *supra*, 214 F.3d at p. 1112 [Citations and internal quotation marks omitted].) "'Doubts regarding bias must be resolved against the juror.'" (*U.S. v. Gonzalez*, *supra*, 214 F.3d at p. 1114, quoting *Burton v. Johnson*, *supra*, 948 F.2d at p. 1158.)

If the kind of relationship from which implied bias arises is present, it does not matter that the juror affirmed her lack of prejudice on the record: "Because the implied bias standard is essentially an objective one, a court will, where the objective facts require a determination of such bias, hold that a juror must be recused even where the juror affirmatively asserts (or even believes) that he or she can and will be impartial." (*U.S. v. Gonzalez*, *supra*, 214 F.3d at p. 1113.)

The U.S. Supreme Court has held that government employment, without more, does not create the kind of relationship which inherently creates impartiality. (*U.S. v. Wood*, *supra*, 299 U.S. 123, 137.) In *Wood*, the Court stated: "[T]he mere fact of a governmental employment,

unrelated to the particular issues or circumstances of a criminal prosecution, [does not create] an absolute disqualification to serve as a juror in a criminal case" under the Sixth Amendment. (*Id.* at p. 141.) In so holding, the high court emphasized that a government employee has no more interest in the enforcement of penal laws for the protection of society than any other citizen. (*Id.* at p. 149; see also, *Tinsley v. Borg* (9th Cir. 1990) 895 F.2d 520, 529 [court will not presume bias merely because a juror works in law enforcement or is a federal government employee].)

The Court in *Wood* recognized, however, that in exceptional situations implied bias might exist in employees of particular governmental departments: "It is said that particular crimes might be of special interest to employees in certain governmental departments, as, for example, the crime of counterfeiting, to employees of the treasury." (299 U.S. 123, 149-150; see also, *Smith v. Phillips*, *supra*, 455 U.S. 209, 222 (conc. opn. of O'Connor, J.) [an extreme situation that would justify a finding of implied bias might include a juror who is an actual employee of the prosecuting agency]; *United States v. Polichemi* (7th Cir. 2000) 219 F.3d 698, 703-705 [trial court erred in failing to excuse for cause an employee of the same U.S. Attorney's Office as the prosecutors trying the case].

In fact, the courts have, at times, presumed bias from a juror's employment relationship with one of the parties. In *Crawford v. United States* (1909) 212 U.S. 183, the high court held that a juror who was in charge of a postal station should have been disqualified from hearing a case alleging that the defendant had entered into a conspiracy to defraud the United States involving a contract with the U.S. Postal Service. Although the juror was not technically subject to disqualification as a "salaried officer" under the relevant federal statute, the defendant's challenge for

cause should have been granted. (*Id.* at pp. 193-197.) The Court explained:

> Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible to always recognize its existence, and it might exist in the mind of one (on account with his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence. The law therefore most wisely says that, with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given.

(212 U.S. at p. 196; see also, *U.S. v. Wood*, *supra*, 299 U.S. at p. 140 [court observed that in *Crawford*, the juror at issue was employed "in the very department to the affairs of which the alleged conspiracy related."].)

In *United States v. Allsup* (9th Cir. 1977) 566 F.2d 68, the Ninth Circuit Court of Appeals reached a similar result in a case involving private, rather than government, employees. Therein, the defendant was charged with robbing two banks, including the First National Bank. Two prospective jurors indicated during voir dire that they worked for First National, but at a different branch than the one robbed. Both claimed they would be able to decide the case fairly despite their employment. Defense counsel moved to excuse the two for cause, but the trial court denied the motion. (566 F.2d 68, 71.) The Ninth Circuit held that the lower court erred, as it should have presumed bias under the circumstances. (*Id.* at p. 72.) The appellate court began by observing: "'That men will be prone to favor that side of a cause with which they identify themselves either economically, socially, or emotionally is a fundamental fact of human

character.'" (*Id.* at p. 71, quoting *Kiernan v. Van Schaik* (3rd Cir. 1965) 347 F.2d 775, 781.) The circuit court emphasized that the bank employees could not be expected to maintain their impartiality under the circumstances:

> The potential for substantial emotional involvement, adversely affecting impartiality, is evident when the prospective jurors work for the bank that has been robbed. Persons who work in banks have good reason to fear bank robbery because violence, or the threat of violence, is a frequent concomitant of the offense. . . . The employment relationship coupled with a reasonable apprehension of violence by bank robbers leads us to believe that bias of those who work for the bank robbed should be presumed.

(*U.S. v. Allsup*, *supra*, 566 F.2d 68, 71-72.)

As appellant demonstrates below, his case presents an extraordinary situation where bias should have been presumed.

2. In the Particular Circumstances of This Case, CDC Employees Were Impliedly Biased as a Matter of Law.

Appellant's case presents an extraordinary situation where the trial court should have presumed, as a matter of law, that all employees of the Department of Corrections were impliedly biased.

Although the prospective jurors at issue were not employees of the agency which employed the prosecuting attorney, the CDC was a critical participant in appellant's prosecution. The Department was the agency that had gathered the evidence against him and had decided to present the case to the district attorney's office for prosecution. The CDC was the petitioner

in litigation regarding discovery, appellant's access to counsel and legal materials, and the use of restraints in the courtroom. (See, e.g., 2 CT 503-539, 538-562.) Most of the state's witnesses at both the guilt and penalty phases were CDC employees.[54] Under the circumstances of this case, the prospective jurors' employment relationship with the CDC was of the kind that justified a finding of implied bias. (See *Smith v. Phillips*, *supra*, 455 U.S. 209, 222 (conc. opn. of O'Connor, J.; *Crawford v. U.S.*, *supra*, 212 U.S. 183; *U.S. v. Allsup*, *supra*, 566 F.2d 68.)

As set forth above, the standard for determining whether implied bias exists in a particular case is an objective one. (*U.S. v. Gonzalez*, *supra*, 214 F.3d 1109, 1113.) However, a court may consider statement from a

---

54

Twenty-one of the 26 witnesses presented in the state's case-in-chief during the guilt phase were CDC employees, including: Longcor (48 RT 5714-5715); Borem (48 RT 5789); Trujillo (48 RT 5837); Wysocki (48 RT 5887); Avila (48 RT 6054); Frazier (49 RT 6127); Hazel (50 RT 6175); Greene (50 RT 6302); Huelsen (50 RT 6360); Sweet (52 RT 6693); Victa (52 RT 6700); Swetich (52 RT 6748-6749); Tozer (53 RT 6900); Leon (53 RT 6958); Brumbaugh (54 RT 7049-7050); Pineda (54 RT 7084-7085); Cannon (54 RT 7091-7092); Wright (54 RT 7112); Esterberg (54 RT 7138); Hunt (54 RT 7160-7161); and Vialpando (56 RT 7293-7294).

Thirty-one of the state's penalty phase witnesses were CDC employees, including: McBride (76 RT 9077); Ellis (76 RT 9102); Dymond (76 RT 9110); Davis (76 RT 9113); Stuckey (76 RT 9135-9136); Hill (76 RT 9138-9139); Spock (76 RT 9145-9146); Pineda (76 RT 9153); Cortez (76 RT 9159); Janda (76 RT 9164-9165); Crum (77 RT 9179); Bentley (77 RT 9192); Brumbaugh (77 RT 9202); Price (77 RT 9218) Bender (77 RT 9225) Bell (77 RT 9235-9236); Rosas (77 RT 9254); Hopper (78 RT 9271-9272); Ramos (78 RT 9282-9283); Martinez (78 RT 9191); Richards (78 RT 9304); Hunt (78 RT 9310); Whiting (78 RT 9348); Nelson (78 RT 9358); Landin (78 RT 9372); Martin (78 RT 9378-9379); Navarro (78 RT 9387-9388); Knoll (78 RT 9399); Deperio (78 RT 9409); Dominguez (78 RT 9416-9417); and Crittendon (78 RT 9422-9423).

juror which raises questions about his ability to serve impartially. (*Ibid.*) In this case, statements by many of the prospective jurors add support to appellant's claim that CDC employees as a group were impliedly biased, because they show that such jurors were economically, socially and emotionally identified with the department, and therefore unlikely to be impartial in this particular case. (See *U.S. v. Allsup*, *supra*, 566 F.2d 68, 71.)

For example, some prospective jurors acknowledged that their loyalty to the CDC might impede their ability to be fair and impartial in a case such as appellant's. Ronald R. stated in his questionnaire that he would find it hard if the Department "started getting slammed," as the CDC had "helped him a lot." (36 CT 10165.) Charlotte D. stated in hers that she would "feel a tug of loyalty to my fellow correctional staff." (39 CT 11063.) This loyalty to colleagues apparently led numerous prospective jurors to admit they would very likely or automatically believe their fellow officers as witnesses.[55]

In fact, the trial court recognized that asking a CDC employee to judge the credibility of his or her co-workers might put such a juror in a very difficult position. When Charlotte D. indicated that she would prefer not to serve on appellant's trial because she knew many of the correctional staff on the witness list, the court responded: "That is going to make it too tough for you, I think. You have to judge their credibility. Be awful to go back to work if you found that they weren't telling the truth." (43 RT

55

See, e.g., 44 RT 5398 [Maurice G.]; 40 RT 4670 [Jose P.]; 24 CT 6779-6780 [Jorge L.]; 39 RT 4607 [Francisco H.]; 40 RT 4726 [George R.]; 35 CT 10034 [Christopher R.]; 41 RT 4838 [Frank R.]; 41 RT 4840 [Jennifer R.]; 20 CT 5661 [Moises M.]; and 46 RT 5600 [John B.].

5104.) In this case, many of the prospective jurors knew not just one or two potential witnesses but a large number of them.[56]

The potential for substantial emotional involvement in the average CDC employee was evident in remarks by prospective jurors who recognized that working in prisons created a certain mind set or perspective that made it difficult to be fair and impartial in a case like appellant's. For example, Yvonne M., a secretary, admitted that in general being a CDC employee would make it difficult to be fair, stating, "I guess I've been institutionalized for so long – " (35 RT 4190.) Allen A., an engineer, could not swear that he could be 100 percent fair, stating "You do kind of develop a certain mind-set working in the prison. [¶] . . . I might have a tendency to – to think of the Defendant as somebody who was in the prison." (28 RT 3067.) In fact, Mr. A wondered why the parties would want a juror such as him, stating: "I am not a lawyer, but I don't understand why someone who was involved in the instances would be part of a jury. I mean, I work at

---

56

See, e.g., 39 CT 11072 [Charlotte D. knew more than 55 potential witnesses]; 40 CT 11432 [Bruce M. knew more than 45 witnesses]; 28 CT 7983 [Daniel P. knew 64 witnesses]; 35 CT 10046 [Christopher R. knew 88 witnesses]; 36 CT 10241[Frank R. knew 24 witnesses]; 8 CT 2093 [Paula K-R. knew more than 75 witnesses]; 7 CT 1738 [Allen A. knew over 50 witnesses]; 17 CT 4877 [Blanca G. knew more than 45 witnesses]; 19 CT 5385 [Kenneth H. knew 80 witnesses]; 20 CT 5565 [Henry H. knew more than 65 witnesses]; 21 CT 5998 [Jesus J. knew 20 witnesses]; 22 CT 6103 [Tonette J. knew 13 witnesses]; 24 CT 6719 [Javier L. knew 47 witnesses]; 24 CT 6788 [Jorge L. knew 22 witnesses]; 27 CT 7695 [Alicia N. knew more than 50 witnesses]; 28 CT 8019 [Maria P. knew 52 witnesses]; 30 CT 8603 [Tina C. knew more than 60 witnesses]; 31 CT 8675 [Luis G. knew 56 witnesses]; 34 CT 9686 [Jose P. knew 12 witnesses]; 36 CT 10277 [Frank R. knew 10 witnesses]; 38 CT 10709 [Michael S. knew 40 witnesses]; and 43 CT 12080 [John H. knew more than 90 witnesses].

[Calipatria]." (28 RT 3067-3068.) Michael G., who worked at Centinela and acknowledged that his background as a correctional officer might interfere with his decision making in appellant's case, did not think that a correctional officer should be a juror on a case involving an alleged crime inside of a prison. (32 RT 3698; 17 CT 4837.)

In this case, bias should have also been implied because it is highly unlikely that an average prison employee could have remained impartial towards inmates such as appellant and any incarcerated witnesses called in his defense. (See *U.S. v. Gonzalez*, *supra*, 124 F.3d 1009, 1112 ["prejudice is to be presumed where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances."].) In fact, the voir dire demonstrated that working at a prison understandably left prospective jurors with negative views about, and most likely in fear of, inmates. Many acknowledged that, as a result of their experience working for the CDC, they harbored prejudice against inmates.[57] Their employment led them to believe that inmates lie.[58] Moises M. candidly acknowledged his belief that an inmate like appellant would not be on trial unless he was guilty. (20 CT 5664; see also, 13 CT 3608 [Larry D. expressed similar belief].)[59]

57

See 20 CT 5651-5658 [Moises M.]; 24 CT 6770 [Jorge L.]; 34 RT 3989 [Tonette J.]; and 36 RT 4312-4313 [Loreto O-J.].

58

See, e.g., 20 CT 5667, 5670 [Moises M.]; 8 CT 2054 [Clinton J.]; and 39 CT 11063 [Charlotte D.].

59

Prospective juror Jorge J. thought that his experience with inmate-on-inmate assaults would make it hard to be impartial. (34 RT 3923.) The

Several prospective jurors had been assaulted by inmates.[60] In *U.S. v. Allsup*, *supra*, 566 F.2d 68, 72, the Ninth Circuit emphasized that bank employees' "reasonable apprehension of violence by bank robbers" created a situation where "bias of those who work for the bank robbed should be presumed." Here, the reasonable apprehension of violence by inmates towards corrections staff, and the distrust such employees held against them as a result, was yet another reason that implied bias of CDC personnel should have been presumed.

Another circumstance that should have led the trial court to find implied bias in this case was the volume and intensity of attention that appellant's case had garnered inside the CDC. The voir dire demonstrates that numerous department employees had heard about appellant, including many who admitted that they could not give him a fair trial as a result.[61] Demonstrating appellant's notoriety among CDC employees, Luis G. stated: "I feel I wouldn't do a good job for Mr. Barrett knowing all the stories I've heard about him at Calipatria State Prison. *He's pretty famous*." (39 RT

---

court agreed, stating: "I think it would be . . . very difficult for him because he has to work with the inmates. And now he has to make a decision about something that happens between two inmates. I think that puts him in a real tough spot." (34 RT 3924.)

60

See, e.g., 34 RT 3988-3989 [T. Johnson]; 31 CT 8696 [Huerta]; 43 CT 12066 [Holder]; 35 RT 4086 [Lucero]; and 20 CT 5658 [Moya].

61

See, e.g., 43 RT 5085-5086 [Yvette C.]; 39 RT 4611 [Luis G.]; 33 RT 3821 [Kenneth H.]; 44 RT 5307-5308 [John H.]; 33 RT 3854 [Henry H.]; 36 RT 4352-4353 [Daniel P.]; 35 CT 10043 [Christopher R.]; 41 RT 4835-4837 [Frank R.]; 41 RT 4925 [Michael S.]; 34 RT 3989 [Tonette J.]; 8 CT 2080 [Paula K-R.]; 24 CT 6775 [Jorge L.]; 21 CT 5982 [Jesus J.]; 24 CT 6703 Javier L].

4611, italics added.) This notoriety was not limited to correctional officers. Accounting clerk Maria P. had heard many negative things about appellant, including that he could get out of his cell at night and roam the Ad Seg. She said the case was a big topic a few years ago and was resurfacing at the time of trial. (36 RT 4361-4368.) Dental assistant Tina C. had heard that appellant was "a master mind" who was able to get out of his cell to steal protective vests, weapons stock and food. She had heard many demonstrably false rumors, including that appellant had propped Richmond's body on the toilet, that appellant had to be "extracted" from his cell afterwards, and that he had threatened to kill anyone who entered his cell. (39 RT 4584-4585; 30 CT 8585.)

In sum, the prospect of having a CDC employee serve on appellant's jury presented a "relationship in which the potential for substantial emotional involvement, adversely affecting impartiality, [was] inherent." (*U.S. v. Gonzalez*, *supra*, 214 F.3d at p. 1114.) The particular circumstances of this case thus compelled a finding of implied bias among all of the prospective jurors who worked at the Department, as a matter of law.

3. The Trial Court Erred in Denying Appellant's Motion to Exclude All CDC Personnel From The Pool of Prospective Jurors.

"'Questions of law are reviewed under the non-deferential, de novo standard. []'" (*People v. Louis* (1986) 42 Cal.3d 969, 986.) As previously stated, whether a juror's bias should be presumed in a particular case is a question of law. (*Burton v. Johnson*, *supra*, 948 F.2d at p. 1158.) Thus, appellant is entitled to de novo review of the trial court's denial of his motion.

However, even if the existence of implied bias is characterized as a mixed question of law and fact, review here should be de novo. In *People v. Louis*, *supra*, this Court indicated that the legal question in a mixed question of law and fact is reviewed independently. The appellate court must give deference, however, to the trial court's resolution of factual disputes. (42 Cal.3d at p. 984-988.) Here, there are no factual disputes at issue and therefore no deference is due to the trial court's ruling.

Regardless of the standard of review, it is apparent that the trial court herein fundamentally misunderstood the law of implied bias. The court erroneously believed that it had to presume the honesty of prospective jurors who declared they could be fair. (See 45 RT 5445.) The jurors who stated that their positions in the CDC would not impact their ability to be impartial in appellant's case may well have been sincere. However, because the average person who is employed by the CDC would inherently be biased under these circumstances, the trial court was not at all bound by declarations of impartiality from the prospective jurors. (See, e.g., *U.S. v. Gonzalez*, *supra*, 214 F.3d at p. 1113 [a juror who is impliedly biased must be excused despite affirmations of impartiality].)

Moreover, because implied bias is assessed objectively as a matter of law (*U.S. v. Gonzalez, supra,* 214 F.3d at p. 1112), the trial court's assumption that it could not exclude CDC employees from appellant's case as a group but had to consider them individually was also erroneous. (See, e.g., 14 RT 2159, 45 RT 5442.)

The court's belief that Centinela employees were on a different legal footing than Calipatria employees also demonstrates a misunderstanding of the law at issue. In denying the motion, the trial court observed that most of the Department employees still in the pool were from Centinela. (45 RT

5443-5444.) However, under the relevant legal principles, CDC staff at Centinela were as likely to be impliedly biased as Calipatria staff. (See, e.g., *U.S. v. Allsup*, *supra*, 566 F.2d 68 [tellers working at different branch of the bank that was robbed were impliedly biased].)[62] In fact, the record in this case reveals that persons who worked at nearby Centinela were as likely to automatically believe the testimony of their colleagues, harbor negative feelings about inmates, express loyalty to the CDC and in general be unable to give appellant a fair trial. (See subsecs. B.2., C.2., *ante*.)

Also, the trial court's reliance on a belief that some retired peace officers could be favorable jurors for a criminal defendant displayed a misconception of the legal basis of appellant's motion. (See, e.g., 14 RT 2159, 26 RT 2961-2962.) Appellant had asserted only that *current* CDC employees were impliedly biased under the law. (See 44 CT 12527.)[63]

The trial court's denial of the motion was also erroneous to the extent it factored in the need to find enough jurors who were available to serve in a lengthy trial. The court repeatedly stated that not many venirepersons would get paid by their employers for extended jury service,

---

62

It appears that the court also had an incorrect understanding of the facts. The prosecutor had stated that four Centinela employees and four Calipatria employees remained in the panel of prospective jurors. (45 RT 5444.) This tally was incorrect. Seventeen CDC employees remained in the pool, including five from Calipatria, nine from Centinela, a CDC parole agent, and two accounting staff who apparently worked in a regional office (one of whom used to work at Calipatria). (See subsec. B.2., *ante*.)

63

The trial court's observation about retired officers may have been factually incorrect, as well. Voir dire of former CDC employees strongly suggested that they were as, or even more, predisposed against appellant than their counterparts still working for the department. (See, e.g., 28 RT 3115-3124 [Clinton J.]; 34 RT 3988-3989 [Tonette J.].)

other than those working for the CDC and the Imperial Irrigation District. (14 RT 2160, 34 RT 3946, 36 RT 4248, 40 RT 4661.) A dearth of potential jurors, however, is not relevant to the doctrine of implied bias.

In sum, the trial court's denial of the motion demonstrates a fundamental misunderstanding and misapplication of the doctrine of implied bias.[64]

4. As a CDC Correctional Officer, Juror No. 12 Was Impliedly Biased and Appellant Is Entitled to a New Trial.

As appellant has established above, all prospective jurors who were employed by the CDC should have been found to be impliedly biased as a matter of law. The presence of even one biased juror entitles a defendant to a new trial, without a showing of actual prejudice. (*Fields v. Woodford*, *supra*, 309 F.3d at p. 1103; *U.S. v. Gonzalez*, *supra*, 214 F.3d at p. 1111.)

In this case, one of the Department employees the trial court refused to dismiss from the panel of prospective jurors – a correctional officer identified in the record as Juror No. 12 – actually sat on appellant's jury. The record, including both her written questionnaire and *Hovey* voir dire, conclusively shows that this juror was impliedly biased by virtue of her

---

64

The trial court further demonstrated that it misunderstood the relevant legal principles when it later declined to excuse correctional officer Ignacio C. because an inmate, rather than a prison employee, was the alleged victim. (See 45 RT 5515 ["He wasn't a victim and none of his colleagues were victims."].) This argument had previously been made by the prosecutor. (14 RT 2158, 26 RT 2963.) As appellant has established herein, the law of implied bias is not limited to cases in which the prospective juror is similarly situated to the victim. Moreover, the court's observation was factually incorrect. As the defense emphasized, the prosecutor would seek to establish that appellant had committed staff assaults while in prison. (14 RT 2158-2159, 26 RT 2963.)

employment.

According to her questionnaire, Juror No. 12 had been employed by the CDC for 10 years. At the time of appellant's trial, she was a correctional officer at Centinela, responsible for the custody of inmates. (29 CT 8042, 8042, 8051.)[65] Several of her family members were also employed by the CDC. Her father had worked in corrections for the CDC for 16 years. (29 CT 8051.) Her sister had worked for the CDC, both in corrections and with parolees, for nine years. (29 CT 8051.) In fact, Juror No. 12's sister had been assaulted by a parolee while conducting a home visit about a year and a half earlier. (29 CT 8045, 8046.) A cousin had worked for the CDC for eight years. (29 CT 8051.)

Juror No. 12 expressed positive feelings toward her employer in her questionnaire. When asked how she felt upon learning that the CDC would build prisons in Imperial County, Juror No. 12 stated: "I had a good opinion of the prison, the Imperial Valley has a need for work, I feel this helped employ a lot of people in our Valley." (29 CT 8051.)

In her *Hovey* voir dire, Juror No. 12 indicated that she had worked at all of the prison's facilities including the yard, and was then assigned to work with level four inmates, including some serving life terms for murder. (38 RT 4400-4401.) She acknowledged that she might have to work Wednesdays, Saturdays or Sundays when court was not in session, and thus see her co-workers. (38 RT 4405.) Juror No. 12 revealed that she knew the prosecutor on a professional level, from having transported inmates to and

---

65

In the reporter's transcript of Juror No. 12's *Hovey* voir dire, the name of the prison in which she worked was obscured. (See, e.g., 38 RT 4400.) Her questionnaire, however, indicates that she worked at Centinela.

from court. (38 RT 4399, 4402; see also 29 CT 8044.)

In short, the record discloses no reason not to presume that Juror No. 12 was biased as a matter of law. She was a long-time prison employee with knowledge of many aspects of the CDC system. Her family owed their jobs to the Department as well, and she clearly had a favorable view of the institution. Her employment with, and experience in, the CDC created the kind of relationship which would leave the average person in her situation highly unlikely to be impartial in appellant's case. (See *U.S. v. Gonzalez*, *supra*, 214 F.3d at p. 1112.)

It is true that Juror No. 12 stated that she did not feel any conflict existed in her sitting as a juror on a case involving an incident at a prison. (38 RT 4404-4405.) She denied having heard anything about appellant's case (38 RT 4403; see also, 29 CT 8044), or that she would be affected by what her co-workers thought (38 RT 4406). Juror No. 12 further averred that her previous interaction with the prosecuting attorney would not interfere with her decision making if selected as a juror. (38 RT 4399.)

However, the fact that Juror No. 12 professed to be impartial despite her deep connection to the CDC is of no import. (See, e.g., *U.S. v. Gonzalez*, *supra*, 214 F.3d at p. 1113.) As the United States Supreme Court has recognized, bias might exist in a juror "who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence." (*Crawford v. U.S.*, *supra*, 212 U.S. at p. 196.)

The Ninth Circuit has explained why a juror's declaration of impartiality should not be accepted when the circumstances are such that bias is presumed as a matter of law:

Even if the putative juror swears up and down that it will not

> affect his judgment, we presume conclusively that he will not leave his kinship at the jury room door. The effect of this factor would be impossible to predict: Would the juror yield to his sympathies, or fight them and lean the other way? There is no way to know, but permitting such a juror to serve would introduce into the jury room an extraneous influence that could materially color the deliberations. The juror in question would be lacking the quality of indifference which, along with impartiality, is the hallmark of an unbiased juror.

(*Dyer v. Calderon*, *supra*, 151 F.3d at p. 982.)

In sum, the presence of Juror No. 12 on appellant's jury deprived him of his right to an impartial jury under the Sixth and Fourteenth Amendments. It further violated his Eighth Amendment right to a reliable death verdict. (See e.g., *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Accordingly, his conviction and sentence must be reversed.

5. This Issue Is Preserved for Appeal.

Although appellant vigorously litigated the issue of implied bias below, he did not ultimately exercise all peremptory challenges before the jury was sworn. Appellant recognizes that this Court has stated that the exhaustion of such challenges is a prerequisite to raising on appeal the trial court's erroneous denial of a for-cause challenge. For the reasons which follow, appellant asserts that this "rule" actually arose as a factor in prejudice assessment, rather than as a rule of issue preservation. Appellant believes that because the exhaustion requirement does not further the purpose served by the forfeiture rule, it should not be applied to cases such as his. In any event, appellant contends that the circumstances of his case

excuse any inadequacy and that he is entitled to a ruling on the merits.

a. A Defendant Should Not Have to Use All of His Peremptory Challenges in Order to Raise a Sixth Amendment Claim on Appeal.

In *United States v. Martinez-Salazar* (2000) 528 U.S. 304, the high court held that a defendant's Sixth Amendment right to an impartial jury was not violated where the trial court erroneously failed to excuse a prospective juror for cause, because the defendant used a peremptory challenge to dismiss him. The Court emphasized that Martinez-Salazar was convicted by a jury on which no biased juror sat.

The high court stated, however, that the defendant would have been able to raise a Sixth Amendment claim had he not removed the venireman from his jury:

> After objecting to the District Court's denial of his for-cause challenge, Martinez-Salazar had the option of letting [prospective juror] Gilbert sit on the petit jury and, upon conviction, pursuing a Sixth Amendment challenge on appeal. Instead, Martinez-Salazar elected to use a challenge to remove Gilbert because he did not want Gilbert to sit on his jury. This was Martinez-Salazar's choice.

(528 U.S. at p. 315.)

Unlike the defendant in *Martinez-Salazar*, appellant *was* convicted by a jury on which an impliedly biased juror sat, and his counsel's decision to leave Juror No. 12 on the jury should not prevent him from raising a Sixth Amendment claim on appeal.

Appellant recognizes that this Court has determined the above-quoted language of *Martinez-Salazar* is not applicable to state court trials.

In *People v. Hillhouse* (2002) 27 Cal.4th 469, the Court observed that *Martinez-Salazar*, which involved a federal court trial, was predicated on the fact that rule 24 of the Federal Rules of Criminal Procedure does not require a defendant to use a peremptory challenge to remove a juror before raising on appeal the trial court's denial of a challenge for cause. (27 Cal.4th at p. 487.)

In *Hillhouse*, the Court held that a defendant forfeits his ability to raise on appeal the trial court's denial of a for-cause challenge if he has not used all of his peremptory challenges. Setting forth the general rule, it explained: "'To preserve a claim of error in the denial of a challenge for cause, the defense must exhaust its peremptory challenges and object to the jury as finally constituted.' (*People v. Millwee* (1998) 18 Cal.4th 96, 146 []." (27 Cal.4th at p. 487.)[66]

The Court in *Hillhouse* relied on *Ross v. Oklahoma*, *supra*, 487 U.S. 81, a case involving a state court trial in Oklahoma which, like California, requires a defendant to use his peremptory challenges to remove prospective jurors the trial court will not. (27 Cal.4th at p. 487.) However, the language in *Ross v. Oklahoma* upon which the Court relied was dicta. Therein, the challenged prospective juror *was* removed by the defendant's peremptory challenge. Because there was no Sixth Amendment violation, the U.S. Supreme Court's musing on what would have been required by the defendant to preserve the issue was not before the court. Significantly, appellant is unaware of any capital case in which a reviewing court found an actual juror to be biased but nonetheless affirmed the judgment because,

---

66

In *Hillhouse*, this Court went on to find that the challenged juror who actually served in that case was not biased. (27 Cal.4th at pp. 487-488.)

it found, the defendant had failed to sufficiently preserve the issue on appeal.

Moreover, after reviewing the history of the exhaustion rule cited in *Hillhouse*, appellant contends that it has been inappropriately converted from its original use as a factor in assessing prejudice into a rule of forfeiture, and should therefore be disavowed by this Court.

Hillhouse cites *Millwee* as support for finding that the defendant forfeited his ability to claim on appeal that he was denied an impartial jury as guaranteed by the Sixth Amendment. (27 Cal.4th 469, 486-487.) But *Millwee* did not present a Sixth Amendment issue, as none of the prospective jurors challenged for cause therein were selected as jurors. (18 Cal.4th 96, 146.) *Millwee* in turn cited *People v. Ramos* (1997) 15 Cal.4th 133, and *People v. Coleman* (1988) 46 Cal.3d 749. (18 Cal.4th a p. 146.) In *Ramos*, again, none of the prospective jurors challenged for cause by the defendant at trial actually served on the jury (15 Cal.4th at p. 1159), thus there was no Sixth Amendment issue to preserve.[67]

Similarly in *People v. Coleman*, *supra*, there was no Sixth Amendment issue presented. Therein, the trial court erred in denying defendant's challenge for cause to a prospective juror who unequivocally indicated he would always vote for death. (46 Cal.3d at pp. 767-768.) But because the defendant used a peremptory challenge to remove him, no partial juror actually served. Emphasizing that there was "no indication that the jury before which defendant was tried was anything other than fair and impartial," this Court found that the trial court's error was harmless. (46

67

A juror who Ramos claimed on appeal should have been removed for bias was not challenged for cause during trial. (15 Cal.4th at p. 1159-1160.)

Cal.3d at pp. 768.)

The Court in *Coleman* then went on to consider whether the erroneous denial of the challenge for cause nonetheless required reversal because it in effect deprived the defendant of a peremptory challenge – an issue separate from the Sixth Amendment claim appellant raises herein. (46 Cal.3d at p. 769.) After emphasizing that similar facts were present in *Ross v. Oklahoma*, *supra*, the Court in *Coleman* set forth California's general rule that "the defendant must exercise his peremptory challenges to remove prospective jurors who should have been excluded for cause, and that to complain on appeal of the composition of the jury, the defendant must have exhausted those challenges." (46 Cal.3d at p. 770.) However, this rule was invoked by the Court in *Coleman* not to determine whether a Sixth Amendment violation was preserved for appeal but rather to determine whether the defendant, who had not exhausted his available peremptory challenges, was *prejudiced* by the trial court's erroneous ruling. (46 Cal.3d at pp. 769-71.)

That the exhaustion of peremptories was originally related to prejudice, rather than issue preservation, is further demonstrated by the *Coleman* opinion's citation of *Kimbley v. Kaiser Foundation Hospitals* (1985) 164 Cal.App.3d 1166, which in turn relied upon *People v. Cook* (1952) 39 Cal.2d 496, and *People v. Goldberg* (1952) 110 Cal.App.2d 17. (164 Cal.App.3d at p. 1169.) In both *Cook* and *Goldberg*, it is clear that the courts invoked the defendants' failure to exercise all peremptory challenges to find a lack of *prejudice* from the trial court's assertedly erroneous ruling.[68]

68

In *People v. Cook*, *supra*, this Court held that the defendant was not

In sum, one can see that what was originally employed as a factor in the analysis of prejudice has, over the years, been inaccurately cited for the proposition that a criminal defendant forfeits his ability to claim on appeal that he was denied an impartial jury under the Sixth Amendment because he failed to exercise all of his peremptory challenges.[69]

Appellant contends that requiring exhaustion of peremptory challenges to preserve a Sixth Amendment violation for appeal does not serve the purpose the forfeiture rule is designed to promote. This Court has explained the rule: "Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal. . . . . The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected." (*In re Sheena K.* (2007) 40 Cal.4th 875, 880-881 [citations and internal quotation marks omitted].)

Certainly requiring a defendant to bring an error to the trial court's attention at a time when it can be rectified is fair. However, further requiring the defendant to himself *correct the trial court's error* – or in this case multiple errors – is not. Here, appellant fully brought the issue of the

---

prejudiced by speeches made by the prosecuting attorney in the community prior to trial because he had not shown that any of the actual jurors heard the remarks or that he was dissatisfied with the jury selected. (39 Cal.2d at p. 499-500.)

69

In appellant's case, of course, prejudice is not an issue. If this Court finds that trial court erred in ruling that CDC employees were not impliedly biased, then appellant's conviction and sentence must be reversed automatically, without any application of a harmless-error test, because a biased juror *actually* sat on his jury. (See, e.g., *U.S. v. Gonzalez*, *supra*, 214 F.3d at p. 1111; see also, *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 274, 283.)

implied bias by CDC employees to the trial court's attention when it would have been relatively easy to dismiss them. Further demanding that he use as many as 17 of his 20 peremptory challenges to rid his jury of biased jurors in order to raise on appeal the violation of his Sixth Amendment right to an impartial jury is simply unfair, and would violate his constitutional rights to due process and a fair appeal.

Moreover, it would be unfair for this Court to hold that the failure of appellant's attorney to remove Juror No. 12 forfeits his ability to raise a Sixth Amendment violation, since trial counsel cannot waive a defendant's right to an unbiased jury without express consent. (*Hughes v. United States* (6th Cir. 2001) 258 F.3d 453, 463.)

b. Appellant's Case Is an Exception to the General Rule.

Even if this Courts reject the preceding argument, it should reach appellant's Sixth Amendment claim on the merits. This Court has stated: "To preserve a claim of error in the denial of a challenge for cause, the defense must either exhaust its peremptory challenges and object to the jury as finally constituted *or justify the failure to do so.*" (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005 [italics added], overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 4221, fn. 22.) The unique facts of appellant's case excuse any inadequacy in preserving the claim.

As established earlier in this argument, when the trial court denied appellant's written motion to dismiss all CDC personnel for implied bias, at least 17 such prospective jurors remained in the panel. (See subsec. B.2., *ante*.) By the time defense counsel indicated he would not use any additional peremptory challenges, he had removed 14 prospective jurors, *half* of whom worked for the CDC. One Department employee, Juror No.

12, was on the jury. Waiting in the wings was Alicia N., a records analyst at Calipatria, who would be followed by an unknown group of 12 prospective jurors. The pool from which they would be drawn included at least six additional CDC employees. (See subsec. E.2., *post.*) Thus, when appellant's attorney passed the opportunity to use a fifteenth peremptory challenge, he had a total of six challenges remaining but seven impliedly biased prospective jurors left in the pool.

Defense counsel was left with a Hobson's choice. He may well have decided, given the makeup of the remaining pool, that he could not risk going forward with so much uncertainty. Under these circumstances, the failure to remove Juror No. 12 should not be interpreted as satisfaction with her but rather a hope that she might be *less* impliedly biased than the other remaining CDC employees. Accordingly, this Court should not penalize appellant for failing to exhaust all 20 challenges.

It is also understandable that defense counsel did not express dissatisfaction with the jury as seated. He had failed to persuade the trial court that CDC employees were impliedly biased. At that point, nothing could have been gained by re-raising the issue. There was no reason to believe the trial court would reverse its ruling at that point.

People v. Box (1984) 152 Cal.App.3d 461, is instructive. Therein, the trial court erroneously granted each party ten peremptory challenges rather than the 26 challenges to which they were then statutorily entitled. Although Box used only nine of the ten challenges granted, the court of appeal reversed, explaining:

> In the present case, [Box]'s trial counsel accepted the jury on the record. In fact, he stated "we would accept the jury." [Fn. omitted.] But defense counsel did raise the issue. Moreover,

> both counsel and the trial court were fully aware that [Box] wanted and demanded 26 peremptories. There was no question of miscounting or of counsel agreeing to accept only 10 peremptory challenges.

(152 Cal.App.3d at p. 464.)

In this case, appellant vigorously litigated the issue of implied bias. Thus, the trial court and the parties knew that he believed all CDC employees should have excused. Any failure to declare dissatisfaction when jury selection was completed could not fairly be construed as a reversal of this position.

In sum, this Court should address appellant's claim on the merits.

D. The Trial Court's Refusal to Exclude All CDC Personnel Also Violated State Law.

Like federal law, California law recognizes both actual and implied bias. (Code Civ. Proc., § 225, subd. (b)(1)(B) & (C).) Implied bias is present "when the existence of the facts as ascertained, in judgment of law disqualifies the juror." (Code Civ. Proc., § 225, subd. (b)(1)(B).)

Section 229 sets forth the bases upon which implied bias may be found. (Code Civ. Proc., § 229, subds. (a)-(h).) For the reasons which follow, appellant asserts that CDC employees were impliedly biased under subdivisions (b), (d), (e), and/or (f). (See 44 CT 12524.)

In somewhat convoluted fashion, subdivision (b) of section 229 indicates that an employment relationship may be the basis for finding implied bias. It states that a challenge for implied bias may be taken when:

> Standing in the relation of, or being the parent, spouse, or child of one who stands in the relation of, guardian and ward, conservator and convservatee, *master and servant*, *employer*

> *and clerk*, landlord and tenant, principal and agent, or debtor and creditor, to either party or to an officer of a corporation which is a party, or being a member of the family of either party; or a partner in business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares of capital stock of a corporation which is a party; or having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party. A depositor of a bank or a holder of a savings account in a savings and loan association shall not be deemed a creditor of that bank or savings and loan association for the purpose of this paragraph solely by reason of his or her being a depositor or account holder.

(Code Civ. Proc., § 229, subd. (b); italics added.)

Appellant has found few criminal cases interpreting section 229 as it relates to a juror's employment. *People v. Terry* (1994) 30 Cal.App.4th 97, appears to be the leading case. Therein, the trial court had refused to excuse prospective juror Arstill, who was a lawyer working at the district attorney's office which was prosecuting the defendant. The appellate court concluded that Arstill's employment by the prosecuting agency created implied bias:

> One's immediate reaction to the situation is to think that Mr. Arstill should be precluded from sitting as a juror on the case, not, as previously argued, because he has represented similar cases on behalf of the state, but because this very case is being prosecuted by his boss. From a commonsense approach

> one would think that Mr. Arstill might have some reluctance to vote against a case brought by a fellow attorney from his own office, supervised by his own superior. It would seem that bias should be implied in this situation.

(30 Cal.App.4th at p. 101.)

The court in *People v. Terry* found support for a finding of implied bias in the language of section 229, which it acknowledged was rather confusing. (30 Cal.App.4th at p. 102.) Nonetheless, the court looked to "the thrust and purpose of section 229, if not perhaps its specific wording" to find that the trial court should have excused Arstill, despite his assurances that he could be impartial. (30 Cal.App.4th at p. 103, 100.) The court indicated that this result was consistent with Justice O'Connor's concurrence in *Smith v. Phillips*, *supra*, 455 U.S. 209, 222, in which she stated that implied bias might be found where a juror is an employee of the prosecuting agency. (*People v. Terry*, *supra*, 30 Cal.App.4th at pp. 102-103.)

Quoting an early Indiana case, the court in *Terry* recognized the strong, dependent relationship which exists between an employer and employee:

> "It is almost impossible, however incorruptible one may be, not to bend before the weight of interest; and the power of employer over employee is that of him who clothes and feeds over him who is fed and clothed. Hence the common law excluded all servants, and our statutes have nowhere altered the rule, and it should not be altered."

(*People v. Terry*, *supra*, 30 Cal.App.4th at p. 103, quoting *Block v. The*

State (1885) 100 Ind. 357, 363.)[70]

The court in *Terry* also found that subdivision (d) of section 229 would provide a basis for excluding Arstill. (30 Cal.App.4th at p. 103.) Under this subdivision implied bias is found when there is an "[i]nterest on the part of the juror in the event of the action, or in the main question involved in the action . . . ." (Code Civ. Proc., § 229, subd. (d).) *Terry* recognized that a deputy district attorney has an interest in the outcome of cases tried by his colleagues. (30 Cal.App.4th at p. 103.) The appellate court concluded: "It is imperative . . . for jurors in a criminal case to have no relationship to the office which is prosecuting the defendant. In our view the interest of a deputy district attorney in a successful prosecution by another member of his office is a sufficient challenge for cause." (*Id.* at p. 103.)

In appellant's case, implied bias existed under both subdivisions (b) and (d) for the same reasons as it did in *People v. Terry*. Although the CDC personnel in appellant's jury pool were not employed by the prosecuting agency in a legal sense, they owed their livelihoods to the entity that investigated the death of Thomas Richmond. Moreover, the CDC's decision to refer the matter to the district attorney for possible prosecution reflects that agency's determination that appellant had committed a crime. As explained above, even after the case was referred the CDC was intimately involved in many aspects of appellant's prosecution. "From a commonsense approach one would think that [CDC staff] might have some

---

70

Terry also referred to, without specifically citing, *Crawford v. U.S.*, *supra*, 212 U.S. 183, a 1909 case relied upon by Justice O'Connor in *Smith*, which appellant has discussed *ante*. (30 Cal.App.4th at pp. 102-103.)

reluctance to vote against a case" which in effect was brought by the department. (*People v. Terry*, *supra*, 30 Cal.App.4th at p. 101.) This is particularly true when the majority of witnesses presented were also CDC employees. Thus, they should have been excused pursuant to subdivision (b).

For similar reasons, CDC staff would share their employer's interest in the successful prosecution of appellant. (30 Cal.App.4th at p. 103; Code Civ. Proc., § 229, subd. (d).) Subdivision (d) should have led the trial court in appellant's case to excuse all CDC personnel, notwithstanding assurances by any particular juror that he or she could be impartial. (*People v. Terry*, *supra*, 30 Cal.App.4th at p. 103.)

Finally, implied bias existed pursuant to subdivisions (e) and (f) of section 229 in this case, as well. Subdivision (e) states that implied bias is found when a juror has "an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or some of them." In this case, whether or not an individual prospective juror had specific information about appellant's case, all CDC personnel had knowledge of the prison system and issues which would be litigated by the parties.

Subdivision (f) finds implied bias in "the existence of a state of mind in the juror evincing enmity against, or bias towards, either party." As appellant has demonstrated, the average CDC employee had negative views towards inmates such as appellant that was likely to affect his or her partiality.

For all these reasons, CDC employees were impliedly biased as that concept is defined in section 229.[71] As such, the trial court was wrong

---

71

Appellant asserts that this state law claim is preserved for appeal for the

when it insisted that "there was no law" which required the exclusion of this class of prospective jurors (14 RT 2158), especially when the defense had cited section 229 in its moving papers (44 CT 1524).

Finally, under state law, when implied bias is present, a defendant need not establish prejudice. "[I]n such circumstances no proof of prejudice is required[;] it is inferred as a matter of law." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 274.) Appellant's conviction and sentence must thus be reversed.

E. The Trial Court's Error Also Violated Appellant's Fourteenth Amendment Due Process Rights by Undermining His Ability to Intelligently Exercise Peremptory Challenges.

Because of the unusual circumstances of this case, the trial court's failure to recognize that all Department personnel were impliedly biased subverted appellant's ability to intelligently exercise his peremptory challenges, thereby denying him due process and a fair trial. (U.S. Const., 14th Amend., Cal. Const., art. I, § 15.)

1. A Repeated Misapplication of the Law Which Deprives a Defendant of Peremptory Challenges May Deny Him Due Process.

The United States Supreme Court has declared that peremptory challenges are "not of constitutional dimension." (*Ross v. Oklahoma*, *supra*, 487 U.S. 81, 88; see also, *Rivera v. Illinois* (2009) 556 U.S. 148, 157.) Because such challenges are conferred by state law only, a defendant's due process "'right'" to peremptory challenges is denied or impaired "only if the defendant does not receive that which state law

---

same reasons that the Sixth Amendment issue is preserved. (See subsec. C.5., *ante*.)

provides." (*Ross v. Oklahoma*, *supra*, 487 U.S. 81, 89.) Thus, in *Ross* the high court held that the defendant was not deprived of due process under the Fourteenth Amendment where he used a peremptory challenge to remove a prospective juror who the trial court had erroneously refused to excuse for cause. (*Id.* at pp. 88-91.)

In *Rivera*, the high court held that the trial court's erroneous denial of the defendant's peremptory challenge of a juror pursuant to *Batson v. Kentucky* (1986) 476 U.S. 79 was not of constitutional magnitude. (556 U.S. 148.) Therein the court stated:

> Because peremptory challenges are within the States' province to grant or withhold, the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution. "[A] mere error of state law," we have noted, "is not a denial of due process." [Citations omitted.] The Due Process Clause, our decisions instruct, safeguards not the meticulous observance of state procedural prescriptions, but "the fundamental elements of fairness in a criminal trial." [Citation omitted.]

(556 U.S. at p. 158.)

In both *Ross* and *Rivera*, however, the United States Supreme Court recognized the possibility that a defendant who has erroneously been deprived of peremptory challenges multiple times may be denied a fair trial under the federal constitution. In *Rivera*, the court found that the trial court's one-time, good-faith misapplication of *Batson* to reject the defendant's peremptory challenge of a juror who was competent and unbiased did not violate due process. But it qualified this finding by stating: "As in *Ross* and *Martinez-Salazar*, there is no suggestion here that

the trial judge repeatedly or deliberately misapplied the law or acted in an arbitrary or irrational manner. [*Ross, supra*, 487 U.S. at p. 91; *United States v. Martinez-Salazar* (2000) 528 U.S. 304, 316.]" (556 U.S. at p. 160.)

In appellant's case, by contrast, the trial court did repeatedly misapply the law. Because the court refused to excuse all CDC employees, at least 17 prospective jurors who were biased as a matter of law remained in the jury pool after *Hovey* voir dire had concluded. As shown below, this left appellant at a grave disadvantage in exercising the peremptory challenges provided by California law.

2. Appellant Could Not Intelligently Exercise His Peremptory Challenges.

To begin selection of the actual jury, the court called the names of 24 prospective jurors, with the first twelve of them seated in the jury box. In this group of 24 were six CDC employees, including Claudia A., Enrique V., Juror No.12, Javier L., Jeffrey A-H. and Alberto A. (46 RT 5466-5469.) After general voir dire, a juror was excused for cause and CDC employee Ignacio C. was seated. (46 RT 5479-5480.)

The parties began to exercise their peremptory challenges. As to the first group of 24 prospective jurors, appellant removed five of the six CDC employees who were seated in the jury box. (46 RT 5578 [Ignacio C.]; 46 RT 5579 [Javier L.]; 46 RT 5579 [Enrique V.]; 46 RT 5580 [Jeffrey A-H.]; 46 RT 5581 [Claudia A.].)

The court called the names of twelve additional prospective jurors, including CDC employees Juanita C. and John B. (46 RT 5582-5583.) During the general voir dire of this new group, John B., a fire captain at CDC who supervised inmates at Centinela, was excused after acknowledging that he believed peace officers tell the truth and that he

would credit their testimony over that of other witnesses. (46 RT 5595-5600.) Alicia N., a records analyst at Calipatria, was selected to replace him. (46 RT 5601.)

Appellant then used peremptory challenges to remove Alberto A. and Juanita C. (46 RT 5620-5621). When the jury was sworn, appellant had exercised fourteen peremptory challenges. (See 46 RT 5628.) At this time, Juror No. 12 was still seated in the box. Alicia N. was the last remaining prospective juror outside of the box.[72] In sum, although appellant had six remaining peremptory challenges to exercise, he had seven CDC employees still in the pool: Alicia N., Marco A., Blanca G., Raquel G., Jesus J., Frances O., and Robert R.[73]

These circumstances show that the trial court's erroneous refusal to excuse all CDC personnel for implied bias as a matter of law was no "mere error of state law." (*Rivera v. Illinois*, *supra*, 556 U.S. at p. 158.) As a result of the trial court's error, appellant was forced to use seven peremptory challenges to remove prospective jurors who should have been excused for cause. Further, appellant had no way of predicting how many prospective jurors who were CDC employees would be called to the jury box. The fact that he might have had to use up to 17 of his 20 challenges simply to rid the panel of impliedly biased jurors unfairly skewed the jury selection process and prevented him from intelligently deciding who among those prospective jurors not employed by the Department to challenge.

72

Defense counsel used a peremptory challenge to remove Alicia N. when alternate jurors were selected. (4 RT 5688.)

73

Prospective juror Ray L., a correctional officer, had been excused during general voir dire because of vacation plans. (46 RT 5518-5519.)

In contrast, the prosecutor in this case did not need to waste even one of his peremptory challenges as a result of the trial court's error. (See generally, 46 RT 5578-5582, 5620-5628.) This inequity further put appellant at a disadvantage. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 474 [the Due Process Clause speaks to the balance of forces between the accused and his accuser].)

Moreover, the nature of implied bias itself added to appellant's difficulty in exercising his peremptory challenges. Part of the guarantee of a defendant's right to an impartial jury is a voir dire which is adequate to identify unqualified jurors. (*Morgan v. Illinois* (1992) 504 U.S. 719, 729.) "'The process of voir dire is designed to cull from the venire persons who demonstrate they cannot be fair to *either* side of the case. . . . .' [Citation omitted]." (*Id.* at p. 734, n. 7.) The lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges. (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188; *In re Hitchings* (1993) 6 Cal.4th 97, 110.)

As previously explained, when a juror is impliedly biased, he or she may not even realize it, and may sincerely profess to be unbiased. In this case, voir dire was thus inherently of diminished value in determining which prospective jurors to remove by peremptory challenge. Appellant was faced with a large number of CDC employees who stated, and quite likely believed, they were unbiased. Yet the law tells us they were not. Because there were so many such jurors in the pool, appellant was unable to intelligently exercise his peremptory challenges and was left to guess which jurors were the *least* biased.

In conclusion, although appellant was not technically denied the full complement of 20 peremptory challenges which California law allowed

him, in actuality the gravity and magnitude of the lower court's error arbitrarily deprived him of a fair opportunity to exercise his state law right to such challenges and thereby denied him of due process. *(Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Hewitt v. Helms* (1983) 459 U.S. 460, 469; *People v. Webster* (1991) 54 Cal.3d 411, 439 [due process concerns may arise when state arbitrarily withholds a nonconstitutional right provided by its laws.].) His conviction and sentence must be reversed.

//

//

II.
THE TRIAL COURT'S ERRONEOUS DENIAL OF APPELLANT'S *WHEELER* MOTION DENIED HIM OF HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS

In this case, the prosecuting attorney used a peremptory challenge to remove prospective juror Lisa B., the only African-American in the jury panel. The prosecutor claimed that he struck Ms. B. from the jury because her written questionnaire reflected some ambivalence about judging others. However, the prosecutor's failure to explore this alleged concern during *Hovey* voir dire strongly suggests his justification was pretextual. A comparative juror analysis confirms this conclusion. As a result, the removal of Ms. B. from appellant's jury violated his rights under both the federal and state constitutions and requires reversal of his conviction and sentence.

A. The Discriminatory Use of a Peremptory Challenge Violates the Federal and State Constitutions.

The discriminatory use of peremptory challenges to remove African-American and other minority groups from a jury violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (*Batson v. Kentucky* (1986) 476 U.S. 79.) It also violates article I, section 16 of the California Constitution, as it denies a defendant the right to trial by a jury drawn from a representative cross-section of the community. (*People v. Wheeler* (1978) 22 Cal.3d 258.)

The United States Supreme Court has explained the important purposes *Batson* furthers:

> The constitutional interests *Batson* sought to vindicate are not limited to the rights possessed by the defendant on trial, nor to those citizens who desire to participate in the administration

> of the law, as jurors. Undoubtedly, the overriding interest in eradicating discrimination from our civic institutions suffers whenever an individual is excluded from making a significant contribution to governance on account of his race. Yet the harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.

(*Johnson v. California* (2005) 545 U.S. 162, 171-172 [internal citations and quotation marks omitted].)

A three-step test is employed under both the federal and state constitutions when a defendant alleges that the prosecutor has inappropriately removed a prospective juror. (*People v. Lenix* (2009) 51 Cal.4th 602, 613.) First, a defendant must make a prima facie showing that the prosecutor has exercised a peremptory challenge on the basis of race. Second, the burden shifts to the prosecutor to offer a race-neutral explanation for the strike. Third, the trial court must determine whether the defendant has shown purposeful discrimination. (*Synder v. Louisiana* (2008) 552 U.S. 472, 476-477; *People v. Lenix*, *supra*, 44 Cal.4th at p. 612.)

If the prosecutor has proffered a race-neutral explanation for the challenged strike and the trial court has ruled on the ultimate issue of intentional discrimination, the question of whether a prima facie case has been established becomes moot. In such a case, the reviewing court only considers whether the trial court's ruling on the third *Batson* step was erroneous. (*Hernandez v. New York* (1991) 500 U.S. 352, 359; *People v. Lenix*, *supra*, 44 Cal.4th at p. 613, fn. 8.)

The "critical" question in determining whether a defendant has proved purposeful discrimination at *Batson's* third step "is the persuasiveness of the prosecutor's justification for his peremptory strike." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 338-339 [*Miller-El I*].) The plausibility of the prosecutor's alleged race-neutral reason for the challenged strike must be assessed "in light of all evidence with a bearing on it." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 251-252 [*Miller-El II*].) As this Court has stated, "the pertinent question is not whether, in the abstract, there were valid reasons the prosecutor might have relied upon in exercising the peremptory challenge, but whether the prosecutor actually relied upon a nondiscriminatory reason." *(People v. Thomas* (2011) 51 Cal.4th 449, 474.) If the prosecutor acted with discriminatory intent, it does not matter that a race-neutral justification for striking a prospective juror existed:

> A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

(Miller-El II, supra, 545 U.S. at p. 252; see also, *Johnson v. California, supra*, 545 U.S. at p. 172.)

In the third step of *Batson*, the defendant bears the ultimate burden of proving the existence of purposeful discrimination by a preponderance of the evidence. (*Johnson v. California, supra*, 545 U.S. at pp. 170-171; *Crittenden v. Ayers* (9th Cir. 2010) 624 F.3d 943, 954-955.) In determining whether a defendant has met this burden, "all of the circumstances that bear upon the issue of racial animosity must be consulted." *(Snyder v.*

Louisiana, *supra* 552 U.S. at p. 478.) This includes comparative juror analysis, "an established tool at step three of the *Batson* analysis for determining whether facially race-neutral reasons are a pretext for discrimination." (*Crittenden v. Ayers*, *supra*, 624 F.3d at p. 956.) A comparative juror analysis must be conducted on appeal if the defendant relies upon such evidence and the record is sufficiently developed, regardless of whether the trial court engaged in such analysis below. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 622.)

A defendant has met his burden under *Batson* if he has shown that the peremptory strike was motivated in substantial part by discriminatory intent. (*Snyder v. Louisiana*, *supra*, 552 U.S. at p. 485.) If so, the *Batson* claim must prevail "regardless of whether the strike would have issued if race had played no role." (*Crittenden v. Ayers*, *supra*, 624 F.3d at p. 958.)

Batson does not require a defendant to show that the prosecutor engaged in a pattern of striking prospective jurors based on race. *(Johnson v. California*, *supra*, 545 U.S. at p. 169; *United States v. Collins* (9th Cir. 2009) 551 F.3d 914, 919.) "The Constitution forbids striking even a single prospective juror for a discriminatory purpose." (*Snyder v. Louisiana*, *supra*, 552 U.S. at p. 478 [citation and internal quotation marks omitted].)

A trial court's determination that the questioned peremptory strike was not motivated in substantial part by discriminatory intent is entitled to deference on appeal, and should be upheld if it is supported by substantial evidence. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 613; see also *Hernandez v. New York*, *supra*, 500 U.S. at p. 364.) However, deference "does not imply abandonment or abdication of judicial review." (*Miller-El I*, *supra*, 537 U.S. at p. 340.) The trial court must make "'a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered,'" and

appellate review of this evaluation must be meaningful. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 614, quoting *People v. Burgener* (2003) 29 Cal.4th 833, 864.) "Deference does not by definition preclude relief." (*Miller-El I*, *supra*, 537 U.S. at p. 340; see also, *People v. Lenix*, *supra*, 44 Cal.4th at p. 621.)

As appellant will demonstrate, in this case the trial court's determination that the deputy district attorney's peremptory excusal of prospective juror Lisa B. was not racially motivated is not supported by substantial evidence.

B. The Prosecutor Struck the Only African-American in the Panel of Prospective Jurors.

Prospective juror Lisa B., an African-American, was called for *Hovey* voir dire on October 9, 2003. (28 RT 3087; 46 RT 5625.) Therein, Ms. B. told the trial court that she had no religious or conscientious beliefs that would prevent or interfere with her ability to make an impartial decision whether appellant was guilty or with her ability to impose the death penalty. (28 RT 3088-3090.) The court turned to the prosecutor, who stated he had only one question for Ms. B. He said:

> . . . it was a response to a question that you wrote in Question Number 4. The question was: "What purpose, if any, do you feel the death penalty serves?" [¶] Your response was: "The death penalty does not serve any purpose. The majority of felons on death row are not put to death. They are just imprisoned for life."

(28 RT 3090.)

Lisa B. explained that her answer did not relate to any religious or conscientious belief about the death penalty, but just the fact that "There are

so many people sitting on death row that are still sitting there. So it doesn't serve a purpose, in general." (28 RT 3990-3091.) She assured the prosecutor that she would not automatically vote for life without parole if selected as a juror and that her verdict would be based on the "full circumstances" in the case. (28 RT 3091.)

Defense counsel then asked Ms. B. if she understood that she had to assume, based on the court's instructions, that appellant would indeed be executed if sentenced to death. She understood. Neither side asked any further questions and Ms. B. was ordered to return for general jury selection. (28 RT 3091-3092.)

General voir dire began on November 19, 2003. Twenty-four prospective jurors were randomly selected, twelve of whom were seated in the jury box. Lisa B. was not among them. (46 RT 5466-5469.) These prospective jurors were questioned by both sides. (46 RT 5473-5576.) After twelve were excused by peremptory challenges, another twelve prospective jurors from those remaining in the venire were selected. (See 46 RT 5577-5583.) Ms. B. was one of those called. (46 RT 5583.)

The court then individually asked each of these new prospective jurors if he or she had anything to tell the court in light of the questions previously posed to the others. (46 RT 5583-5585.) Ms. B. did not. (46 RT 5584.) Defense counsel questioned the new group, but did not ask any questions of Ms. B. (46 RT 5588-5604.) Voir dire was then conducted by the deputy district attorney. (46 RT 5604-5620.) When the prosecutor learned that Lisa B. was not a math teacher, it became apparent that the parties had mistakenly believed that she was Robin B., another prospective juror with the same last name. After the confusion was resolved, the court granted the prosecutor some extra time to question Lisa B. (46 RT 5616-

5617.) He asked about her response on the written questionnaire relating to her views on self-defense:

> There was a question on the questionnaire. Question was, "Do you have any problem with the concept that right of self-defense exists only as long as real or apparent danger – threatened danger . . . continues to exist. And when danger ceases to appear to exist the right to self-defense ends." [¶] You responded first "Yes," and then you responded "No." Do you recall that?

(46 RT 5617.)

Ms. B. indicated that she did recall this question. The prosecutor continued:

> Then you went on to write a really good response, "Once a person is not in any danger any longer and the assailant cannot continue to threaten you you are no longer trying to defend yourself against them." . . . Why did you cross it out?

(46 RT 5617-5618.)

Lisa B. did not remember but assured the prosecutor that the answer expressed her true feeling on the topic. The prosecutor responded, "So we are on the same track." (46 RT 5618.)[74]

The exercise of peremptory challenges continued. (46 RT 5620.) After the parties excused ten additional prospective jurors, Ms. B. was called into the jury box. (See RT 5620-5624.) The deputy district attorney

---

74

Since defense counsel had also mistakenly believed, during his earlier voir dire, that Lisa B. was Robin B. the court offered him an opportunity to question her but he declined. (46 RT 5620.)

immediately used a peremptory challenge to remove her from the jury. (46 RT 5624.) Appellant's counsel immediately objected that the prosecutor had violated *People v. Wheeler*. (46 RT 5624-5625.) Counsel stated:

> There's only one Black American in the jury panel, and she was kicked seemingly with no cause. There's nothing to distinguish that juror from other jurors and, I think, to exclude that juror would deprive my client of a fair defense.

(46 RT 5625.)

The trial court responded, "Depends on what his reason was, I guess" and asked the prosecutor to explain why he had excused Ms. B. (46 RT 5625.) The deputy district attorney indicated that it was because two responses on her questionnaire expressed some ambivalence about judging others. He quoted her response to question no. 59, asking how she felt about being on jury service: "Jury service imposes the right of one person to pass judgment on another person. I would not like . . . the responsibility to have to do that to another person." (46 RT 5262.) The prosecuting attorney asserted that he had planned to challenge Lisa B. for cause but was not able to ask about her response to question 59 because he ran out of time. (46 RT 5626.)

The prosecutor also noted Ms. B.'s response to question no. 68, asking about religious or moral feelings that would make it difficult or impossible for a juror to sit in judgment of another person. He stated: "She doesn't respond. She does in writing, 'Not quite sure. Have not been able to define my thoughts regarding being able to pass judgment. I know that I wouldn't like to be responsible in that position.'" (46 RT 5626.)

He then added: "That's my position." (46 RT 5626.)

Defense counsel rejoined that the prosecutor had passed for cause

during *Hovey* voir dire and "Now we are talking about a *Hovey* challenge here." (46 RT 5627.) The trial court disagreed that the prosecutor's articulated reason was related to the death penalty and stated, "I think that's a valid, non-racial reason. So I'll deny the *Wheeler*." (46 RT 5627.)

C. The Trial Court's Denial of Appellant's *Wheeler* Motion Was Erroneous.[75]

1. Only the Third *Batson* Step Is at Issue.

As set forth above, once a prosecutor has offered a race-neutral explanation for the challenged strike, and the trial court has ruled on the ultimate issue of intentional discrimination, the question of whether the defendant originally established a prima facie case is moot. *(Hernandez v. New York, supra,* 500 U.S. at p. 359; *People v. Lenix, supra,* 44 Cal.4th at p. 613, fn. 8.) Thus, the trial court's determination in appellants's case that the deputy district attorney's race-neutral explanation for his peremptory excusal of Lisa B. was valid renders the first *Batson* step irrelevant on appeal. The question for this Court is whether appellant has proved, by a preponderance of the evidence, that the removal of Ms. B. was substantially motivated by discriminatory intent. (See *Johnson v. California, supra,* 545 U.S. at pp. 170-171; *Snyder v. Louisiana, supra,* 552 U.S. at p. 485.)

In the third step of the *Batson* analysis, the critical question is the persuasiveness of the prosecutor's justification for the peremptory removal of a minority juror. (*Miller-El I, supra,* 537 U.S. at pp. 338-339.) The evidence in this case, including the *Hovey* voir dire and a comparative juror analysis, shows that the prosecutor's asserted reason for striking Ms. B. was

---

75

This Court has stated that a defendant's objection based on *Wheeler* preserves a *Batson* claim on appeal. (*People v. Lenix, supra,* 44 Cal.4th at p. 610, fn. 5.)

a pretext for discrimination.

2. The Prosecutor's Failure to Question Lisa B. Regarding Her Feelings About Judging Others During *Hovey* Voir Dire Is Indicative of a Pretext.

As set forth above, the deputy district attorney claimed that he struck Lisa B., the only African-American in the jury panel, because of her written replies to questions concerning the duty of a juror to judge others. He asserted that he had planned to challenge Ms. B. for cause but ran out of time to ask about her questionnaire answers during general voir dire. (46 RT 5626.)

The record below indicates that this claim was a pretext. It demonstrates that the scope of examination during *Hovey* voir dire was broad and that the deputy district attorney asked prospective jurors about their views on a variety of subjects. It further shows that several prospective jurors were indeed asked to explain any reluctance to pass judgment on others and/or serve in appellant's case. The prosecutor's failure to question Lisa B. about her allegedly concerning statements on the same topics during her individual examination strongly suggests that his reason for dismissing her was not race-neutral.

a. The Trial Court Permitted Broad Voir Dire During the *Hovey* Proceedings.

In appellant's case, the trial court did not strictly limit *Hovey* voir dire to the prospective jurors' views on capital punishment. Many prospective jurors were asked about answers on their questionnaires suggesting they could not be fair for a variety of reasons or already believed appellant was guilty.[76] Others were questioned about whether they had

---

[76] See, e.g., Floyd A. (28 RT 3065-3069); Brian M. (35 RT 4162); Ana M. (35

knowledge of appellant's case.[77] Several were asked about knowing many potential witnesses or about whether they would give more credence to the testimony of a law enforcement or correctional officer witness.[78] Still others were questioned about hardship.[79]

Moreover, the prosecutor himself frequently asked many

RT 4204-4205); Thomas M. (36 RT 4286-4289); Gloria N. (36 RT 4303-4304); Nancy O. (36 RT 4317-4318); Edith G. (44 RT 5400-5401); Steven O. (36 RT 4327-4328); Raul P. (36 RT 4329-4331); Nichole W. (39 RT 4557-4559); John W. (39 RT 4563-4564); James Z. (39 RT 4602-4604); Tommy P. (40 RT 4672-4673); Jose I. (43 RT 5157); Virginia R. (41 RT 4847-4848); Stephen B. (44 RT 5332-5333); Anita J. (34 RT 3995-3996); Yvonne M. (35 RT 4189-4190); Ynes M. (36 RT 4230-4234); Julie M. (36 RT 4239-4240); Linda J. (34 RT 3976-3978); Ronald R. (41 RT 4807-4808); Patty M. (44 RT 5419-5420).

77

See, e.g., Carmen P. (40 RT 4646-4648); Henry H. (33 RT 3853-3855); Jesus J. (34 RT 3966); Blanca G. (32 RT 3570-3571); Tonette J. (34 RT 3987-3989); Daniel P. (36 RT 4351-4353); Maria P. (36 RT 4361-4368); Tina C. (39 RT 4583-4585); Luis G. (39 RT 4611-4612); Yvette C. (43 RT 5085-5086); Dorina G. (43 RT 5142); John H. (44 RT 5307-5308).

78

See, e.g., Francisco H. (39 RT 4608); Jose P. (40 RT 4669-4670); Frank R. (41 RT 4835-4839); Jennifer R. (41 RT 4839-4840); Charlotte D. (43 RT 5104); Bruce M. (43 RT 5178-5179); Maurice G. (44 RT 5398); Ernest L. (43 RT 5166-5168); George R. (40 RT 4725-4727).

79

See e.g., Marco A. (28 RT 3040); Maghen B. (28 RT 3093); Marcela B. (28 RT 3113); Ralph G. (32 RT 3589); Consuelo G. (32 RT 3619); Francisco V. (34 RT 4034-4035); Armando M. (35 RT 4135); Diana T. (38 RT 4432-4434); Marshall W. (39 RT 4560-4562); Ruben P. (40 RT 4634-4635); Eva V. (40 RT 4648-4649); Lawrence P. (40 RT 4666-4667); Nancy P. (40 RT 4668); Ana Z. (40 RT 4674-4675); William R. (41 RT 4847); Reba C. (41 RT 4852); Alma S. (41 RT 4920); Jeffrey E. (43 RT 5105); Alejandro M. (44 RT 5319); Pearl S. (44 RT 5326); Peggy W. (44 RT 5329); Jimmie W. (39 RT 4565-4566).

prospective jurors about a variety of issues. He questioned several about their ability to accept the proof beyond a reasonable doubt standard in the guilt phase.[80] He asked others whether their military, law enforcement or prison experience would affect their ability to be fair or impact their decision-making in appellant's case.[81] The prosecutor asked Javier L. whether being a correctional officer at Calipatria State Prison would cause him to feel uncomfortable about being a juror on appellant's case. (35 RT 4092-93.) He asked Juror No.12, another correctional officer, whether the fact that she knew the prosecutor in a professional capacity would interfere with her decision-making in the case. (38 RT 4399.) He asked Carl P. and Juanita C. whether their service as jurors in other cases he prosecuted would affect their decisions. (43 RT 5195; 31 RT 3396-97.) The prosecutor inquired whether Amelia F., whose husband was also a prospective juror, could make an independent decision in appellant's case if both spouses ended up on the jury. (31 RT 3492-93.) He questioned Raquel C., a teacher who wanted to be excused due to the hardship her students would face if she served, about whether her concern for them would take her focus away

---

80

See, e.g., Arthur G. (32 RT 3604-3607); Jeffrey A-H. (33 RT 3793-3795; Gary H. (33 RT 3810-3811); Joseph H. (33 RT 3838-3840); Roxanne S. (33 RT 3873-3878); Alternate Juror No. 3 (34 RT 3896-3899); Charles S. (38 RT 4388-4389).

81

See, e.g., Michael M. (36 RT 4246); Alicia N. (36 RT 4294); John W. (39 RT 4537); Ernest P. (40 RT 4628); Rodolfo L. (35 RT 4073-4074); Veronica L. (35 RT 4104-4105); Ignacio C. (40 RT 4694); Robert R. (40 RT 4732); Ramon R. (40 RT 4751-4752); Ruben R. (40 RT 4781-4782); Charles S. (41 RT 4929).

from the evidence presented. (43 RT 5089, 5092-5093.)[82]

In sum, if the prosecuting attorney had legitimate concerns about Lisa B.'s answers to questions nos. 59 and 68, he had ample opportunity to have her clarify her views during individual voir dire.

b. Other Prospective Jurors Were Asked About Their Views on Judging Others.

The record further shows that several prospective jurors were individually questioned about their expressed reticence to sit in judgment of others. For example, prospective jurors Irma M., Tonya T., and Anabel T. were asked about written responses in their questionnaires which raised qualms about sitting in judgment of others, either by the prosecutor or at his request.

The prosecutor asked Irma M. to explain her answer to question no. 68, the same question which allegedly gave him pause concerning Lisa B. It asked, "Do you have any religious or moral feelings that would make it difficult or impossible for you to sit in judgment of others?" (35 RT 4139-4140, 4141-4142.) Irma M. had checked "yes." In her *Hovey* voir dire, she explained her answer as follows: "That I don't believe people should judge others unless they've been in their situation." (35 RT 4142.) Irma M. indicated, however, that although she would be uncomfortable sitting in a death penalty case, she could be fair, and was asked to return for general jury selection. (35 RT 4142-4143, 4145.)

The prosecutor also prompted the trial court to ask Tonya T. about her "yes" response to question no. 68, to which she had added, "If it didn't

---

82

The defense objected that this question was improper. The trial court indicated that both parties had been given latitude in their questioning and permitted Ms. C. to answer. (43 RT 5092-5093.)

happen directly to me, who am I judge a person?" (38 RT 4441.) Tonya T. confirmed that this belief would prevent her from sitting in judgment of appellant and she was excused without objection. (38 RT 4441.)

The prosecutor further prompted the court to ask Anabel T. about her response to question no. 87, which asked, "Is there any reason why you would prefer not to serve as a juror in this case?" Anabel T. had checked "yes" and added, "I am biased. And my religious beliefs make it difficult for me to judge others." (38 RT 4498-4499.) After she indicated that her difficulty making judgments would interfere with her ability to act as a juror, Anabel T. was excused. (38 RT 4499.)

Many other prospective jurors were also questioned during *Hovey* voir dire about their potential reluctance or discomfort in passing judgment on another.[83]

---

[83] See 31 RT 3411 [prosecutor asks Alternate Juror No. 4 whether she could vote for death in an appropriate case, despite her feeling that "I'm not God or any judge to take somebody's life away]; 38 RT 4464 [prosecutor asks Juror No. 2, who says she is neutral on the death penalty, whether there is anything about her beliefs that would make her feel uncomfortable sitting in a case like appellant's]; 44 RT 5334-5335 [prosecutor prompts court to ask Sylvia C. about her questionnaire response stating "I don't feel comfortable having to pass judgment on another person."]; 30 RT 3385-3387 [court and prosecutor question Jody C., who favored the death penalty, about her preference that someone else impose it]; 44 RT 5248-5249 [court questions Angela A., who strongly supported the death penalty, about her response to question no. 87 indicating that she felt unqualified to decide whether someone should be executed]; 33 RT 3757-3758 [defense counsel asks Christina H. about her response to question no. 68 that it would be difficult to judge the fate of another]; 33 RT 3726-3728 [prosecutor questions Frances B., who was neutral on the death penalty, about her written responses indicating she did not know whether she could personally impose it]; 35 RT 4188 [defense counsel asks whether Juror No. 6 would have any discomfort sitting on a case such as appellant's].

To the extent the prosecutor may have been concerned more generally about Lisa B.'s willingness to serve as a juror in appellant's case, he could have explored that issue during her individual examination. He did so with others. For example, he asked Erika G. about her answer to question no. 59, one of the two questions he had cited in his effort to justify the peremptory strike of Lisa B. It asked, "How do you feel about being on jury service?" (33 RT 3742-3743.) In response to this question, Erika G. had written that her father's murder might influence her decision in this case. (33 RT 3743; 18 CT 5084 [no. 59], 5091 [no. 87].) In voir dire, she reiterated this concern and was excused for cause. (33 RT 3743-3744.) The deputy district attorney asked Scott F. to explain his response to question no. 59 indicating there were circumstances which might preclude him from serving. (32 RT 3592-3593 see also, 16 CT 4505.) Other prospective jurors were similarly questioned.[84]

In short, if the deputy district attorney had genuinely believed that Ms. B. might be excused for cause based on her questionnaire responses, he would have asked about her views during *Hovey* voir dire. His failure to do

---

84

See 44 RT 5343 [court asks Lynda D. about her response to question no. 87, stating "I could serve but I don't prefer to."]; 33 RT 3859-3860 [prosecutor prompts court to ask Shirley H., who was moderately in favor of the death penalty, about her preference not to serve as a juror]; 28 RT 3068-3069 [prosecutor asks Allen A. whether, as a correctional officer, he would prefer not to sit as a juror in appellant's case]; 44 RT 5327-5328 [defense prompts court to ask Daniela T. about her reluctance to serve in a case involving graphic and bloody photographs]; 35 RT 4163-4164 [court asks Maria M. about her preference not to serve in a case involving racial issues and graphic photos]; 34 RT 3922-3923 [defense prompts court to ask Jorge J. about his preference not to serve in appellant's case because he worked at Calipatria State Prison].

so when he had the opportunity indicates that his purported race-neutral justification for the strike was a pretext. (See, e.g., *Ali v. Hickman* (9th Cir. 2009) 584 F.3d 1174, 1188, 1192 [prosecutor's failure to clear up any doubts about prospective juror's alleged lack of objectivity and reluctance to judge others by asking follow-up questions suggests these reasons for peremptory strike were pretextual]; see also, *Miller-El II*, *supra*, 545 U.S. at p. 244 [in light of prospective juror's support for the death penalty, court would expect prosecutor to clear up any misunderstanding about his views with further questioning before exercising a strike against him].)

3. Comparative Juror Analysis in This Case Provides Evidence of Intentional Discrimination.

Side-by-side comparisons of a minority prospective juror who was struck and white panelists who were permitted to serve may provide "powerful" evidence of discrimination. (*Miller-El II*, *supra*, 545 U.S. at p. 241.) The United States Supreme Court has explained the importance of such evidence: "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 to be considered at *Batson's* third step." (*Ibid.*)

In appellant's case, the prosecutor's proffered reason for striking Ms. B. applied to similar non-black jurors he did not peremptorily excuse. Jurors Nos. 8 and 12 expressed qualms about rendering judgment in appellant's case and others jurors expressed a reluctance to serve, yet the prosecutor did not strike them.

In *Hovey* voir dire, Juror No. 8 almost immediately disclosed that she did not know if she could actually bring herself to decide a person's life or death. (28 RT 3030.) When the court followed up about whether she could

impose the death penalty, she stated, "Well, if the evidence sways in that direction, and there's absolutely enough evidence to determine that decision, I don't think I would have a problem with that." (28 RT 3031.) The prosecutor then asked about her questionnaire response indicating that although she did not actively participate in her religion, she was aware of the commandment, "Thou shall not kill." Juror No. 8 said that the commandment would not impact her penalty decision and that she could decide based on the evidence. (28 RT 3032.) Juror No. 8 then told defense counsel that although she had stated on her questionnaire that she was strongly in favor of the death penalty, she had since re-thought her position. She said, "I was really confused at the time . . . but I had second thoughts about the death penalty. It may be a problem for me." (28 RT 3033.) She ultimately indicated, however, that she could make up her mind based on all of the evidence. (28 RT 3035.) Neither party challenged her for cause or asked to question her further. (See, e.g., 28 RT 3036.) During general voir dire, the prosecutor did not follow up to see if she had any further doubts about her ability to make a penalty decision. (See 46 RT 5616.)

Juror No. 12 also expressed reservations about rendering judgment in appellant's case. In her questionnaire she stated that she was neutral on the death penalty but added in her answer to question no. 6, "I always wondered if this was my place to make such a permanent decision." (29 CT 8037, 8038.) In response to the prosecutor's questioning during *Hovey* voir dire, Juror No. 12 affirmed that she was neutral on the death penalty but the prosecutor did not inquire about her answer to question no. 6. (38 RT 4398-4399.) He asked if she could be fair and impartial to both sides and wait to hear all the evidence before making a decision; she said that she could. (38

RT 4399.)[85] During general voir dire, the deputy district attorney asked Juror No. 12 only one question: whether she could set aside her duties as a correctional officer and accept those of a juror. (46 RT 5543.)

There was no significant difference between Lisa B. and Jurors Nos. 8 and 12. All three were female. Ms. B. and Juror No. 12 were 36 years old, while Juror No. 8 was older. (29 CT 8040; 5 CT 1320; 7 CT 1824.) Each had children. (29 CT 8041; 5 CT 1321; 7 CT 1825.) Ms. B. was employed by Imperial County as an office assistant. She had applied for a job as a correctional officer three years earlier and her mother worked as a medical technician for the CDC. (7 CT 1326, 1385.) Juror No. 8 was employed by Imperial County as a social worker for child protective services. (5 CT 1322.) She had a niece who was a correctional officer at Centinela and her husband was employed by Donovan Prison. (5 CT 1321, 1328, 1331.)[86] Juror No. 12 was a correctional officer employed by the CDC. (29 CT 8042.) None of the three women had ever served on a criminal jury before. (29 CT 8049; 5 CT 1330; 7 CT 1834.) Ms. B. and Juror No. 12 were neutral on the death penalty. (7 CT 1821; 29 CT 8037.) As explained above, although Juror No. 8 stated on her questionnaire that she was strongly in favor of the death penalty, in oral questioning she indicated that she had reconsidered this position and had doubts about

---

85

As noted above, the prosecutor also asked Juror No. 12 whether their professional relationship would interfere with her decision-making in appellant's case. (38 RT 4399.)

86

When asked about family members serving as correctional officers or law enforcement, she listed only her niece which suggests that her husband was employed by Donovan Prison in some other capacity. (See 5 CT 1321, 1328, 1331.)

whether she could impose it.

As the United States Supreme Court has explained, comparative juror analysis may provide persuasive evidence of discrimination even if the characteristics of the persons compared do not match completely:

> None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. . . . A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.

(*Miller-El II*, *supra*, 545 U.S. at p. 247, fn. 6.)

In appellant's case, Lisa B. was materially similar to Juror Nos. 8 and 12. The fact that the prosecutor permitted the latter two to serve on appellant's jury but struck Ms. B. is evidence of purposeful discrimination.[87]

Further, although several prospective and actual jurors expressed a

---

87

A comparison of Ms. B. with Alternate Juror No. 4 also indicates that the prosecutor's reason for removing her from the jury was a pretext. In her questionnaire, Alternate Juror No. 4 indicated that she was "somehow against" the death penalty and "strongly in favor" of life without parole. (12 CT 3375.) In her *Hovey* voir dire, she stated a reluctance to impose capital punishment "because I feel I'm not God or any judge to take somebody's life away." (31 RT 3411.) Alternate Juror No. 4 was 41 years old, had three children, was employed by the Imperial Irrigation District and had a nephew who was an Imperial County sheriff's deputy. (12 CT 3378-3380, 3383.) If anything, Alternate Juror No. 4 was a *less* desirable juror for the state, by virtue of her general opposition to the death penalty. Although she was otherwise similar to Ms. B., the prosecutor did not use a peremptory challenge to remove her.

desire not to serve, the prosecutor did not excuse them. Juror No. 3 did not want to be there, he said, "Because I'm kind of nervous about the process; that I can follow it." (46 RT 5508.) After he affirmed that he was open-minded and would listen to all of the evidence before making a decision, the deputy district attorney assured him that being nervous was natural. (46 RT 5508-5509; see also, 46 RT 5528-5529.) Claudia A. did not want to be there because, she said, "I guess, it interferes a little bit with my everyday life, things that I have going on." (46 RT 5529.) But she said that she could put the inconvenience aside and would keep an open mind. (46 RT 5530.) Juror No. 6 also indicated that although she would prefer not be tied up during November and December, she would give her full attention to the case. (46 RT 5543.) Prospective juror Rafael C. also expressed a preference not to be there because of the length of the trial, but was willing to do his duty. (46 RT 5535-5536.) A similar feeling was expressed by prospective juror Roy B. (46 RT 5553-5554.) Juror No. 4 wrote in response to question no. 59, "I am not too happy. Hopefully I will get discharged . . . ." (8 CT 2267.) The prosecutor did not even question her about this response. (29 RT 3194-3198; 46 RT 5604-5606.)[88]

None of these individuals were struck by the prosecutor.[89] Yet he used Lisa B.'s response to question no. 59, indicating that she would not

---

88

Defense counsel objected that whether a prospective juror preferred not to serve in appellant's trial had been covered during *Hovey* voir dire. The court responded, ". . . I am not going to excuse people because they prefer not to be here. That's probably not a good question." (46 RT 5554.)

89

Prospective jurors Claudia A., Rafael C. and Roy B. were all excused by defense peremptory challenges, after the prosecutor passed on each. (See 46 RT 5578-5582; 5620-5623.)

like to have the responsibility of judging others, as a reason for striking her. The likelihood that this justification was pretextual is strengthened by the fact that Ms. B's reluctance to serve was mitigated when she wrote: "I have never had to serve on a jury before so this is my unbiased opinion as I see it now." (7 CT 1833.) This qualification of her views, which the prosecutor did not bother to explore, made her no less desirable than many other non-black jurors who expressed similar misgivings about jury service.

In sum, a comparative juror analysis in appellant's case provides evidence of discrimination in the prosecutor's use of a peremptory to remove Ms. B. from the jury.

4. The Trial Court's Denial of the *Wheeler* Motion Was Not Supported by Substantial Evidence.

As noted previously, a trial court's determination that a peremptory strike was not motived by race is entitled to deference on appeal, but review of the ruling must be meaningful. The lower court should make a sincere and reasoned evaluation of the prosecutor's race-neutral justification for the challenged strike. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 613-614; see subsec. A, *ante*.) In appellant's case, the record does not reveal a sincere and reasoned determination by the trial court. Rather, the court's summary acceptance of the prosecutor's explanation for the strike involved little if any analysis.

The court erroneously rejected defense counsel's assertion that the prosecutor could have questioned Lisa B. about her allegedly problematic questionnaire responses during *Hovey* voir dire but failed to do so. (46 RT 5627.) As established above, counsel was correct. (See subsec. C.2., *ante*.)

The trial court further failed to consider defense counsel's claim that Ms. B. was not distinguishable from other jurors the prosecutor chose not to

remove. (46 RT 5625.) As appellant has demonstrated, a comparative juror analysis provides support for this observation. (See subsec. C.3., *ante*.)

Finally, this is not a case where the trial court's ruling is entitled to deference because it was based on a finding relating to the struck juror's demeanor. Race-neutral justifications for peremptory strikes "often involve a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations" of great importance. (*Synder v. Louisiana*, *supra*, 552 U.S. at p. 477.) Here, however, the court made no such findings regarding Ms. B.'s demeanor. (See, *id.* at p. 479 [where record does not show that trial court made a determination regarding the challenged juror's demeanor, high court will not presume that it credited the prosecutor's assertion that the prospective juror was nervous].)

In sum, the trial court's determination that the prosecutor had presented a valid race-neutral reason for striking Ms. B. is not supported by substantial evidence. Accordingly, appellant's conviction and sentence must be reversed. (See *Batson v. Kentucky*, *supra*, 476 U.S. at p. 100.)

//

//

III.
THE PROSECUTOR'S ETHICAL MISCONDUCT DENIED APPELLANT OF A FAIR TRIAL AND OTHER CONSTITUTIONAL RIGHTS

Appellant was the first person to be capitally charged in Imperial County in at least a decade, and as a result, his case garnered much attention from the media. Defense counsel and the trial court endeavored to keep the jurors shielded from this press, to the extent reasonably possible, to protect the integrity of the proceedings and provide appellant with a fair trial. Of particular concern was reporting on appellant's prior murder conviction, which the jury was not to know about during the guilt phase. Despite these efforts, the deputy district attorney chose to engage with appellant during a break in the trial, knowing that a reporter covering the case was present. The conversation occurred inside the courtroom, when defense counsel were absent. The prosecutor's comment to appellant elicited an admission from him about the prior murder, and the exchange was reported in the local newspaper.

The prosecutor's conduct violated ethical prohibitions against ex parte communication with a represented party and making extrajudicial statements which might cause prejudice. The misconduct violated not only ethical rules but also the constitutional rights these rules were enacted to protect, and requires reversal.

A. The Media Coverage of Appellant's Trial and the Prosecutor's Communication With Him.

As set forth below, defense counsel took great pains to see that the jury was not exposed to prejudicial, inaccurate media reports about appellant's case.

1. Pretrial Publicity.

Two weeks after appellant was indicted, defense counsel moved to seal the grand jury transcripts and exhibits. (1 CT 7-15; see also 1 CT 30-36 [second brief re sealing of grand jury transcript].) The defense asserted that sealing was required to protect appellant's rights to due process, a fair trial by an impartial jury, and to a penalty determination that is not arbitrary pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments. (1 CT 8.) The motion emphasized the risk of contamination given the relatively small jury pool available in Imperial County and the inflammatory nature of the case, as the first seeking the death penalty in over ten years. (1 CT 12-13, 34.) The defense also emphasized that the testimony presented to the grand jury was one-sided and had been sensationalized by the prosecutor. (1 CT 30-36.)

In September 1998, the court ordered the transcripts of the grand jury proceedings to be sealed and also issued a protective or "gag" order against publicity. (1 CT 74-76.)[90] Expressing doubt about whether appellant could get a fair trial in light of the pretrial publicity, the court noted that the serious nature of the charges against him would "stir[] the community interest and tend[] to inflame the passions of many people . . . ." (2 RT 75, 77-78.)

Despite this effort to minimize pretrial publicity and protect the integrity of the jury pool, several articles about the case were published in the Imperial Valley Press (IVP), El Centro's local newspaper. On September 15, 2003, the day on which the first panel of prospective jurors were called to court, defense counsel brought to the trial court's attention an

---

90

See also, 2 ACT 407 (press release announcing that grand jury transcripts had been sealed and gag order issued).

article printed in the IVP the previous week. Counsel observed that there was a gag order in appellant's case and was concerned because the article was damaging for the defense. (20 RT 2625-2626.)[91]

On September 18, the trial court noted that another article had been published. The court was concerned that it might not get a prospective juror's "most honest impression" concerning the death penalty if he or she had learned through the media that appellant's was a capital case. (22 RT 2705-2706.)

The prosecution gave an opening statement on November 20, 2003 and began presenting guilt phase evidence on December 1. (1 CT 12558, 12564.) On December 2, IVP reporter Mike Salorio requested permission to report the trial and take photographs. (44 CT 12586; 12588.) The defense objected, stating: "there have been articles . . . very prejudicial articles right on the eve of trial talking about Mr. Barrett's prior case in which he allegedly used a dumbbell to hit a sleeping man like he supposedly did in this case. And that kind of stuff is so inflammatory and prejudicial. And we will show it not to be the case, if given the opportunity." (49 RT 5956.) The court granted Salario's request, however. (44 CT 12587.)

2. The Prosecutor's Communication With Appellant.

On December 4, the fourth day of the guilt phase, defense counsel asked to lodge an IVP article published on December 3. (50 RT 6164.)[92] In

---

91

At defense request, the article was lodged in the record. (20 RT 2625-2626; 9 ACT 2472-2473.)

92

Court was not in session on December 3, the day the article was published. (See 44 CT 12589.)

the article, Mr. Salorio reported that there had been a verbal exchange between deputy district attorney Robinson and appellant during a break in the proceedings on December 2. Therein, Mr. Robinson had referred to one of the special circumstance allegations in the case, stating "You're forgetting about your past, Mr. Barrett. You were a 17-year-old who killed someone with a dumbbell." (50 RT 6165; 9 ACT 2476.) Appellant responded, "I don't dispute that." (9 ACT 2476.)[93] Defense counsel informed the court that the exchange had occurred in the courtroom while they were not present. (50 RT 6165.)

Appellant's attorneys asked the court to cite the prosecutor for misconduct for communicating with appellant while they were not present and without their consent. (50 RT 6166.) Counsel suggested possible

---

93

The December 3 article stated, in part: "At the time of the *murder*, Barrett was serving a 26-years-to-life sentence on a previous first-degree murder conviction. In 1987, a then 17-year-old Barrett beat a man to death in San Francisco with a dumbbell and stole his leather jacket." (9 ACT 2475, italics added.) After recounting testimony of some witnesses, the article said, "Barrett exchanged remarks during a break in the proceedings with Imperial County Deputy District Attorney Wayne Robinson, who is prosecuting the case. Barrett asked Robinson if he was attempting to get a death penalty conviction so he could run for political office. [¶] 'Do you have any political aspirations?' asked Barrett. [¶] 'No comment,' said Robinson. [¶] Barrett then criticized the DA's Office for taking nearly eight years before finally bringing a trial against him. [¶] 'Hey, how long did it take the Board of Supervisors to realize the state would give them money for this murder trial?' asked Barrett. [¶] Barrett then criticized the DA's Office for not being able to get a first-degree murder conviction in the recent trial of Pedro Archuleta for the murder of 15-year-old Jovita Becerra. [¶] 'How is that justice?' asked Barrett. [¶] 'You're forgetting about your past, Mr. Barrett. You were a 17-year-old who killed someone with a dumbbell,' said Robinson. [¶] 'I don't dispute that,' responded Barrett. . . ." (9 ACT 2476.)

remedies for the misconduct, including dismissing the charges or striking the prior murder allegation. Defense counsel did not request a mistrial, however. The court had firmly stated it would not again grant *Hovey* voir dire, and counsel believed it would be detrimental to appellant if he were retried without the opportunity to individually question prospective jurors. (50 RT 6166.)

Defense counsel asked the court to inquire of Mr. Salorio, who was present, but the court demurred. (50 RT 6168.) Judge Zimmerman noted that although many persons in the area read both the Imperial Valley Press and the San Diego Union, he had instructed the jurors on numerous occasions not to read or listen to any media accounts of the case. (50 RT 6168-6169.) When pressed to declare whether the prosecutor had committed misconduct, the court indicated it would defer ruling and give Mr. Robinson some time to consider the issue. (50 RT 6170.) The judge did rule, however, that anything appellant said outside of counsel's presence would not be admitted into evidence. (50 RT 6168.)

Defense counsel requested the court to ask the jurors whether any of them had seen the article. (50 RT 6166.) When the jury returned to the courtroom, Judge Zimmerman said, "Now, last night in the Imperial Valley Press the case was the headline item . . . ." He then asked each juror whether he or she had read the article; each responded negatively. (50 RT 6166, 6170-6172.) The jurors were ordered not to read the IVP for the duration of the trial. (50 RT 6173.) At counsel's urging, the court also asked the jurors as a group whether anyone had tried to discuss the article with them. After the court indicated that no one had affirmatively responded, Juror No. 6 stated, "Well, my husband told me there was an article. We didn't discuss it." (50 RT 6174.)

3. Additional Publicity.

The publicity relating to appellant's case continued. An article was printed in the IVP on Sunday, December 7. The next day in court the jurors collectively indicated that they had not read it. Juror No. 9 then acknowledged, "I seen it, but I gave it to somebody else." (52 RT 6593.)[94] Also on December 8, the court granted permission to a television reporter to cover the trial, over defense objection. (52 RT 6635-6639.) On December 15, defense counsel indicated that additional articles had been printed in the IVP, including one or two that purported to relate testimony taken outside the jury's presence regarding inmate Keith Barnard's letter of March 16, 1996, which the court ultimately excluded. (See 56 RT 7280-7281.) Defense counsel noted that the articles, which contained inaccuracies, were potentially damaging and requested that they be obtained for the record. (56 RT 7379-7381.) The court suggested counsel could talk to the reporter, but counsel reminded the court there was a gag order in place. (56 RT 7379-7380.)[95]

On Monday December 22, 2003, the trial court referred to two additional articles, which had been published on Friday and Sunday. The jurors collectively indicated they had not read them. When defense counsel urged the court to inquire further, Juror No. 9 said, "Somebody said something. But I said, 'I can't discuss anything.'" (60 RT 7736.)

4. The Defense Request for Sanctions.

94

The December 7, 2003 article was not made part of the record. (See 9 ACT 2697 [declaration of clerk].)

95

The articles were not made part of the record. (See 9 ACT 2698.)

On December 16, after the state's case-in-chief had been presented, defense counsel again raised the unresolved issue of the prosecutor's misconduct, as part of a written motion for acquittal. (45 CT 12664-12669.) The motion asserted that Mr. Robinson's communication with appellant during trial and in front of a reporter was misconduct. It emphasized that the communication had occurred outside the presence of counsel and was related to one of the special circumstances alleged and to evidence which might be presented at the penalty phase. (45 CT 12667.) The defense cited California Rules of Professional Conduct, rule 2-100, which prohibits an attorney from communicating with an adverse party directly without the consent of that party's counsel. The motion further alleged that the prosecutor's conduct violated appellant's constitutional rights under the Fifth Amendment, to a fair trial, to have counsel present during questioning, and to have a lawful order enforced. The defense proposed a range of possible sanctions, including dismissing the case; striking the death penalty allegations; striking the prior murder special circumstance allegation; citing the prosecution for misconduct; disqualifying prosecutor Robinson; and disqualifying the Imperial County District Attorney's Office. (45 CT 12668-12669.)

The motion was heard that same day. (57 RT 7392-7401.) Prosecutor Robinson denied he had violated appellant's *Miranda* rights, asserting that he did not question appellant but only responded. He averred that according to the article, appellant had asked him questions. He also denied he had intentionally made a statement to the press. (57 RT 7396.)

Judge Zimmerman indicated he was unaware of any case in which the misconduct had occurred outside the presence of the trier of fact. (57 RT 7393.) Noting that the record indicated none of the jurors had read the

December 3 article, the court found no actual harm from the prosecutor's actions. (57 RT 7397.) The judge also asserted that the communication was instigated by appellant. He refused to impose any sanctions except to admonish Mr. Robinson. (57 RT 7398.)

After the court implored the prosecutor not to "do that again," Mr. Robinson again tried to shift the focus to appellant, stating: ". . . He was talking to the reporter about how unfair it was that it took us eight years to get to trial." (57 RT 7398, 7399.) The judge rejoined, "But then you knew the reporter was there." (57 RT 7399.) The prosecutor admitted that he did, but claimed that appellant directed questions toward him about his political ambitions. He continued:

> I bit my tongue. I didn't say anything. I walked to the back of the room where I was sitting, waiting patiently, to this desk, sat down. And then he went on about – against about how it's taking so long to get this trial to trial, about how unfair it is, is that justice. And then he goes on. He talks about another murder case I had nothing to do with and wanted to know whether or not the failure to get a conviction in that case was justice.

(57 RT 7399.)

The trial judge reminded the prosecutor that he, unlike appellant, was an officer of the court held to certain ethical cannons. (57 RT 7399.) Still the prosecutor sought to deflect attention from his own conduct. Referring to the gag order, Mr. Robinson complained "What about Mr. Barrett's conversations with the reporter . . . . ?" (57 RT 7400.) Judge Zimmerman reiterated his determination that no harm had occurred because the jury did not know about the article. (57 RT 7400.)

Prior to the penalty phase, appellant renewed his request to exclude any information about the prior murder, as well as the special circumstance allegation itself, due to the prosecutor's misconduct in an in limine motion. (46 CT 12962.) Appellant also raised the misconduct as one of several grounds for granting a new trial. (47 CT 13201-13203.) In a written response, the prosecutor again blamed appellant for his misconduct, and also alleged that "defense counsel's own conduct certainly was ethically 'suspect' . . . ." (47 CT 13207.) Appellant's motion for a new trial was denied. (47 CT 13230.)

B. The Rules of Professional Conduct Prohibit Ex Parte Communication With a Represented Party and Making Extrajudicial Statements Which Might Cause Prejudice.

Of course a reviewing court must reverse a conviction where the prosecutor has deprived a defendant of a fair trial by committing prejudicial misconduct in the presence of the jury. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 819-820.) However, misconduct may also occur when the jurors are not present. As set forth below, a prosecutor may commit reversible misconduct by violating the California Rules of Professional Conduct.

Rule 2-100 prohibits ex parte contacts with represented parties.[96] This rule, which was based on the American Bar Association's Model Rules of Professional Conduct, is designed to safeguard the attorney-client relationship and to foster the proper functioning of the criminal justice

---

96

Subsection (A) of rule 2-100 states: "While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer."

system. (*United States v. Lopez* (9th Cir. 1993) 4 F.3d 1455, 1459-1459; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133, 1138; see also, *People v. Sharp* (1983) 150 Cal.App.3d 13, 18-19, overruled on another point in *People v. Clair* (1992) 2 Cal.4th 629, 658 [predecessor to rule 2-100 was "'designed to permit an attorney to function adequately in his proper role and to prevent the opposing attorney from impeding his performance in such role.'"].)

Rule 5-120 circumscribes what counsel may say outside of court. It prevents an attorney from making an extrajudicial statement if he reasonably should know that the statement will have a substantial likelihood of prejudicing a proceeding.[97] The comment to rule 5-120 indicates that whether a statement violates the rule depends on many factors, including:

> (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (2) whether the extrajudicial statement presents information the member knows is false, deceptive, or the use of which would violate Business and Professions Code section 6068(d); (3) whether the extrajudicial statement violates a lawful "gag" order . . .; and (4) the timing of the statement.

The Court of Appeals of Maryland has eloquently explained the

---

97

Subsection (A) of rule 5-120 states: "A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

dangers of extrajudicial statements by counsel and how the rule limiting them protects a defendant's Sixth and Fourteenth Amendment rights:

> One outside circumstance that may affect a defendant's right to a fair trial and, specifically, his right to an impartial jury, occurs when an attorney makes a publicized, out-of-court statement about the defendant's case. This is particularly true because attorneys occupy a special role as participants in the criminal justice system, and, as a result, the public may view their speech as authoritative and reliable. . . . Their unique role and extensive access to information lends a degree of credibility to their speech that an ordinary citizen's speech may not usually possess. Comments by prosecuting attorneys, in particular, have the inherent authority of the government and are more likely to influence the public. . . .

(*Attorney Grievance Commission of Maryland v. Gansler* (Md. 2002) 835 A.2d 548, 559.)[98]

California courts have also emphasized the special role of a prosecuting attorney. The prosecutor is guardian of a criminal defendant's constitutional rights, as well his adversary. (*Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1254.) "Courts expect even higher ethical standards from prosecutors. [Citations.] This is '. . . because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the State. [Citation.].'" (30 Cal.App.4th at p. 1262.)

98

The Maryland rule governing trial publicity is based on the ABA Model rule (835 A.2d at pp. 562-563), as is California's rule 5-120.

When a prosecutor violates his ethical duties, it is the state's burden to prove that "sanctions are not warranted because the defendant was not prejudiced by the misconduct." (*People v. Zapien* (1993) 4 Cal.4th 929, 967; see also, *Morrow v. Superior Court*, *supra*, 30 Cal.App.4th at p. 1258; *People v. Merritt* (1993) 19 Cal.App.4th 1573, 1579.) The state must demonstrate that there "was no substantial threat of demonstrable prejudice." (*Morrow v. Superior Court*, *supra*, 30 Cal.App.4th at p. 1258.)

Courts have applied various sanctions in cases of such misconduct. As stated in *Morrow*, " Cases of outrageous conduct and the appropriate sanctions therefore are sui generis. Each case must be decided on its own facts." (30 Cal.App.4th at p. 1263, fn. 4.) For example, in *Morrow*, the appropriate remedy was dismissal of the charges. (*Id.* at p. 1255; see also, *People v. Tribble* (1987) 191 Cal.App.3d 1108, 1116 [dismissal may be used by courts to discourage flagrant and shocking misconduct by governmental officers].) This Court has recognized that a violation of rule 5-120 might warrant recusal of a prosecutor or district attorney's office. (*Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 732.) A violation of rule 2-100 may result in the exclusion of any evidence obtained via an ex parte contact. (See, e.g., *People v. Sharp*, *supra*, 150 Cal.App.3d at pp. 18-19.) Courts have also used their supervisory powers to fashion appropriate remedies, in light of the circumstances presented in a particular case. (See, e.g., *United States v. Coast of Maine Lobster Co., Inc.* (1st Cir. 1976) 538 F.2d 899, 902-903 [exercising supervisory power to vacate judgment and order a new trial for prosecutor's violation of trial publicity rule].)

C. The Prosecutor Committed Misconduct.

The deputy district attorney in appellant's case violated his ethical duties by communicating with appellant and by doing so in front of a

reporter.

First, the prosecutor violated rule 2-100 when he communicated with appellant in the courtroom, outside the presence of defense counsel. This rule against ex parte contacts applies to prosecuting attorneys. (*People v. Manson* (1976) 61 Cal.App.3d 102, 164-165; *U.S. v. Lopez*, *supra*, 4 F.3d at p. 1459.) Mr. Robinson attempted to shift the blame for his ethical breach to appellant, asserting that his statement was in response to a question from appellant. (57 RT 7396.) The trial court apparently accepted this representation. (57 RT 7398.) The record, however, does not support such a finding. The facts as to how the communication came about are not entirely clear, as the court did not permit defense counsel to call the reporter as a witness. (50 RT 6168.) The article said that appellant exchanged remarks with Robinson, but did not specifically identify who had initiated the conversation. The prosecutor did not seek to make any record about how the incident unfolded.

Moreover, Mr. Robinson's assertion that he could no longer resist appellant's remarks rings hollow. Appellant was shackled to the floor and had no choice but to sit in the courtroom throughout the break in proceedings. (See 44 CT 12558.) The prosecutor, in contrast, was free to leave the courtroom, if he found himself unable to remain silent.

In any event, a represented party may not "waive" the application of rule 2-100. "The rule against communicating with represented parties is fundamentally concerned with the *duties* of attorneys, not with the *rights* of parties. . . . [E]thical obligations are personal, and may not be vicariously waived." (*U.S. v. Lopez*, *supra*, 4 F.3d at p. 1462 [finding violation of rule 2-100 despite waiver signed by defendant].)

Prosecuting attorney Robinson also violated rule 5-120. The factors

identified in the comment to the rule, set forth above, compel this finding. The information contained in the prosecutor's extrajudicial statement, that appellant had killed a person with a dumbbell at age 17, was not evidence admissible in the guilt phase. Nor was the admission the prosecutor's remark elicited from appellant. Significantly, Mr. Robinson violated the gag order imposed by the court on the parties by speaking about the case in front of a reporter. And, the timing could not have been more inopportune, coming shortly after the beginning of trial. As one court has recognized, statements made by a prosecutor during trial "stand on a different footing" than those made at other times. (*Maine Lobster*, *supra*, 538 F.2d at p. 902.) Further, because Mr. Robinson knew that Mr. Salorio was present for the purpose of reporting on the trial, he had reason to believe his remarks, as well as any response elicited from appellant, would be published. In sum, under the circumstances a reasonable person would have expected such an extrajudicial statement to create a substantial likelihood of materially prejudicing appellant's trial. (See rule 5-120.)

The prosecutor's misconduct was particularly egregious because it occurred inside the courtroom and as noted above, at a time when appellant was not at liberty to absent himself. In *Morrow*, *supra*, the prosecutor instructed her investigator to listen to a conversation between the defendant, who was in a holding cell during a break in the proceedings, and his counsel. The reviewing court found these circumstances to be especially disturbing, stating: "Unlike prior cases, here the misconduct took place within the hallowed confines of the courtroom where the rule of law and fairness should be revered." (30 Cal.App.3d at p. 1261.) Likening the prosecutor to "a minister in temple of justice," the court observed:

Our justice system will crumble should those, in whose hands

are entrusted its preservation and sanctity, betray its fundamental values and principles. Attorneys are obligated by oath to give due respect to the court and to its officers.

(30 Cal.App.4th at p. 1261.)

Here the prosecutor did not provide the requisite respect. Defense counsel should not have had to worry that exiting the courtroom during breaks would leave their client vulnerable and might result in the invasion of his rights and the elicitation of damaging information.

The misconduct violated not only the ethical rules cited but the constitutional rights they were adopted to protect, including appellant's Fifth Amendment protection against self-incrimination, Sixth Amendment rights to counsel and an impartial jury, and Fourteenth Amendment right to due process, as well as their analogs in the California Constitution. (See *Morrow v. Superior Court*, *supra*, 30 Cal.App.4th at p. 1259.) The misconduct also violated appellant's Eighth Amendment right to heightened reliability in a capital case. (*Beck v. Alabama* (1980) 447 U.S. 625.)

The deputy district attorney's efforts to blame others for his ethical lapse is particularly unsavory. As set forth above, he in essence asserted that appellant compelled him to violate rules 5-120 and 2-100 and the gag order. But, as the trial court emphasized, appellant was not an officer of the court bound by ethical precepts. (57 RT 7399.) Mr. Robinson further insinuated that defense counsel was at fault, asserting without any elaboration that their conduct was ethically suspect. (See 47 CT 13207.) Not surprisingly, courts have looked askance at such efforts to deflect blame. (See *People v. Pitts* (1990) 223 Cal.App.3d 606, 794, [disapproving of the "prosecutors' ability to turn attention from their own possible wrongdoing to defense counsels' conduct"].)

D. The Trial Court's Failure to Impose a Sanction for the Misconduct Deprived Appellant of a Fair Trial.

As set forth above, when a prosecutor violates his ethical duties, the state bears the burden of proving that the misconduct was not prejudicial. (*People v. Zapien*, *supra*, 4 Cal.4th at p. 967.) It must show that there was no substantial threat of demonstrable prejudice. (*Morrow v. Superior Court*, *supra*, 30 Cal.App.4th at p. 1258; see also, *Chapman v. California*, *supra*, 386 U.S. 18, 24 [constitutional error "casts on someone other than the person prejudiced by it a burden to show that it was harmless"].) However, under certain circumstances, prejudice need not be shown. (*Morrow*, *supra*, 30 Cal.App.4th at p. 1263; *People v. Benally* (1989) 208 Cal.App.3d 900, 910.) This is particularly true when prejudice cannot be reasonably measured. (*People v. Garewal* (1985) 173 Cal.App.3d 285, 292.)

In this case, appellant's conviction should be reversed because the trial court erred in finding the deputy district attorney's ethical transgression harmless. The state has failed to demonstrate that there was no substantial threat of demonstrable prejudice. In declining to impose any sanctions, the trial court relied upon representations by the jurors that none had read the December 3 article. In fact, Judge Zimmerman presumed that they had not read any of the numerous articles published about appellant's case or any part of the Imperial Valley Press during a trial that lasted more than four months, stating: "I have to assume they're keeping their promise." (56 RT 7380.) However, a court need not always credit disclaimers from jurors in such situations. (See, e.g., *Maine Lobster*, *supra*, 538 F.2d at p. 901; *Henslee v. United States* (5th Cir. 1957) 246 F.2d 190, 913.) In this case, given the length of time and the continuing nature of the media coverage of

appellant's case, it was not reasonable to expect that the jurors had no exposure to the many articles concerning the trial and, specifically, the prosecutor's improper remarks.

The likelihood of prejudice is enhanced by the fact that the article reported statements by Mr. Robinson relating information the parties were trying to keep from the jury during the guilt phase. Subsequent articles reported on the very prejudicial testimony of inmate Barnard and his March 16 letter, which were not presented to the jury. (See 56 RT 7380-7381.) During deliberations, the jury asked whether the torn-up letter found in the contraband watch cell had been admitted into evidence (46 CT 12921), possibly indicating that one or more jurors had read about Barnard's letter in the IVP.[99]

Further, the trial court's belief that the prosecutor's actions were harmless because they did not occur in front of the jury was misguided. Misconduct outside the jury's presence is not necessarily inconsequential, as it may have a chilling effect on counsels' efforts to vigorously represent their client. (See, e.g., *People v. Pitts* (1990) 223 Cal.App.3d 606, 782.) The prejudicial nature of the type of misconduct which occurred herein is hard to measure. Knowing that the prosecutor had engaged in such activity may have made counsel less willing to have frank conversations with their client in the courthouse, or impeded their ability to prepare as a result of a reluctance to leave him unattended during breaks in the proceedings. Further, jurors may have inaccurately denied exposure to prejudicial media

---

99

The requested letter was not actually Barnard's March 16 letter, but the jury would not have known that since neither letter was admitted into evidence. The trial court instructed the jury, in response to its inquiry, that exhibit 214 was not admitted into evidence. (70 RT 8853-8854.)

accounts of the trial because they subjectively believed that they had not been improperly influenced.

In sum, this is the kind of case in which a court should find prejudice unless the state has affirmatively proven harmlessness. Because it has not, appellant's conviction should be reserved. At a minimum, his death sentence should not stand, as the misconduct has undermined the heightened need for reliability constitutionally required in a capital case. (See *Ford v. Wainright* (1986) 477 U.S. 399, 411-412.)

//

//

IV.
THE TRIAL COURT'S ERRONEOUS APPLICATION OF EVIDENCE CODE SECTION 1103(B), WHICH PERMITTED THE PROSECUTION TO ADDUCE MULTIPLE INSTANCES OF WEAPONS POSSESSION AND ASSAULT TO PROVE APPELLANT HAD A VIOLENT CHARACTER, PREJUDICIALLY VIOLATED HIS STATUTORY AND CONSTITUTIONAL RIGHTS.

A. Introduction.

In general, evidence of an individual's character is "inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) Evidence Code section 1103 contains an exception to the general rule that character evidence is not admissible. It permits a defendant to adduce evidence of the victim's character if offered to prove that the victim acted in conformity with this character. (Evid. Code, § 1103, subd. (a).)

However, once the defendant offers evidence of the victim's character, the prosecutor may introduce evidence to rebut the defense evidence. (Evid. Code, § 1103, subd. (a)(2).) Further, if the defendant offers evidence of the victim's *violent* character to prove that the victim acted in conformity with this character, the prosecutor may then introduce evidence of the defendant's violent character. (Evid. Code, § 1103, subd. (b).)[100]

100

Evidence Code section 1103, states in part: "(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character. [¶] (2) Offered by the prosecution to rebut evidence

In this case, the trial court determined that Evidence Code section 1103, subdivision (b) applied, after appellant testified about his cellmate's violation of prison rules in Calipatria's Ad Seg. As demonstrated below, this ruling constituted a misconstruction of section 1103, which permits evidence of the defendant's violent character to be adduced *only if* the defendant has sought to prove that the victim had a violent character and was acting in conformity with that character when the charged offense occurred. (See subsec. C., *post.*)

In this case, appellant did not offer evidence of Richmond's misconduct to show that he had a violent character and therefore was the aggressor on the night he died. Instead, it was offered to illuminate appellant's state of mind and to counter the prosecution's theory of motive, which was a critical issue in this case. The defense sought to disprove the state's claim that appellant murdered Richmond because he was a "snitch" who had given up weapons and information to staff. Thus, appellant's testimony recounted only what he personally knew about Richmond's misbehavior in Ad Seg and how it led him to believe that his cellmate was a trustworthy "wood" who was not interested in currying favor with prison

---

adduced by the defendant under paragraph (1).

(b) In a criminal action, evidence of the defendant's character for violence or trait of violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant under paragraph (1) of subdivision (a). . . ." (Evid. Code, § 1103, subds. (a) & (b).)

authorities.

As a result of the lower court's erroneous interpretation of Evidence Code section 1103, the prosecution was permitted to cross-examine appellant about eleven incidents, all involving the possession of one or more inmate-manufactured weapons while incarcerated. In four of them, appellant used a weapon to assault another inmate. The incidents began in 1995 and continued until shortly before appellant's capital trial began in 2003.

The erroneous admission of this evidence violated not only section 1103 but also appellant's federal constitutional rights. (See subsec. E., *post.*) Moreover, this error was compounded by others. As shown below, the court failed to conduct an adequate analysis of the probative value and prejudicial nature of the eleven incidents pursuant to Evidence Code section 352. Of course the section 1103(b) evidence was extremely prejudicial. In contrast, it was of marginal probative value, since appellant made no effort to portray himself as a nonviolent person. (See subsec. D., *post.*)

Further, the jury instructions relating to the section 1103(b) evidence were riddled with errors. (See subsec. F., *post.*) In particular, the faulty instructions permitted the jury to use the evidence of appellant's other crimes against him, but did not allow it to use Richmond's misconduct as evidence of his violent character and conduct on the night of his death.

These errors were prejudicial under any standard because they permitted the prosecution to portray appellant as incorrigibly violent and as an incredible witness in a case in which his own testimony was critical. (See subsec. G., *post.*)

B. The Facts.

1. The Trial Court Recognizes That Richmond's Prior Conduct Is Not Bad Character Evidence.

Before appellant began the presentation of his defense, the trial court demonstrated an understanding that limited evidence relating to Richmond's prior crimes was relevant for a purpose other than proving he had a violent character.

On December 18, 2003, after the state had presented its guilt phase case-in-chief and before defense counsel made an opening statement, the deputy district attorney asked the trial court for permission to call Calipatria records analyst Ray Vialpando as a rebuttal witness out of order. Vialpando was in court to testify for the defense and would then be going on vacation. (58 RT 7405.) Defense counsel objected, stating his belief that the prosecutor was planning on eliciting incidents of appellant's prison misconduct from the witness. (58 RT 7405-7406.) Defense counsel asked for a ruling from the trial court as to whether appellant's misconduct was admissible. (58 RT 7406.) The prosecutor asserted that if the defense used Vialpando to introduce Richmond's prison disciplinary record as an attack on his character, then the People could introduce similar evidence relating to appellant pursuant to Evidence Code section 1103. (58 RT 7407.)

Defense counsel stated that Vialpando would testify that Richmond was in prison on a 13-year sentence, for robbery and burglary. (58 RT 7408-7409.) The prosecutor objected to the proposed testimony, arguing that Richmond's criminal history was not relevant. (58 RT 7410-7411.) The defense explained that because Richmond had at least two "strikes," he was risking a life sentence every time he took a weapon out to the yard. Taking such a risk for the benefit of the white inmates proved Richmond

was a good wood and therefore undermined the People's theory that appellant killed him because he was an informant. (58 RT 7409-7411.)

When the prosecutor asserted that counsel's explanation did not make sense, the trial court disagreed, stating:

> It counters your theory of the motive for this homicide. That's what I'm hearing here. So it would have some relevance from the defense point of view that Mr. Richmond was not somebody that the other people in this particular gang or culture would want to have taken out.

(58 RT 7411-7412.)

The court concluded that the evidence about Richmond's prior convictions was relevant and not prejudicial, although it indicated that the defense need not elicit what Richmond's convictions were for. (58 RT 7414.)[101]

The prosecutor again claimed that the defense was attacking Richmond's character with Vialpando's testimony and that under Evidence Code section 1103, subdivision (b), he should be able to attack appellant's character with evidence of his 115's. (58 RT 7414-7415.) The defense made very clear, however, that it was not using the evidence to attack Richmond's character. Defense counsel explained:

> [W]e're not introducing the evidence to show he's a bad character in the sense that he acted in conformity with his bad character. We're just showing that in the prison environment

---

101

As the trial court recognized, the prosecutor had already called Vialpando in his case-in-chief and elicited that Richmond was serving a determinate sentence of 13 years. (58 RT 7413; see also, 56 RT 7302.)

that he was a respected person and was not a child molester, was not a rapist, or . . . convicted . . . of the crimes which would cause problems . . . in the white community.

(58 RT 7415.)

The defense sought clarification regarding the court's ruling on the section 1103(b) issue, but the court demurred. (58 RT 7415.) The defense reiterated that it was not introducing the evidence to prove Richmond had a violent character and therefore acted violently on the night he was killed, but rather to prove he had the respect of the white inmates and therefore to disprove the prosecutor's theory that appellant killed Richmond because he was an informant. (58 RT 7416.)

The defense then made an opening statement. Therein, counsel referred to a few acts of misconduct by Richmond while in Ad Seg, but he did not claim this misbehavior established that Richmond had a violent character and that he acted in conformity with this character on April 8-9. Rather, counsel told the jury that the evidence would show that appellant believed Richmond was a good wood and therefore gave him the benefit of the doubt when Richmond started acting in a way appellant found suspicious. (See generally, 58 RT 7417-7446.)

2. Testimony Regarding Richmond's "Strikes".

The defense called Vialpando as its first witness and asked how many felony convictions Richmond had. Vialpando responded, ". . . the term of incarceration was three counts of second degree robbery for a total of 13 years of – " (58 RT 7448.) Defense counsel interrupted the witness, stating, "I don't think you need to tell us what it is." (58 RT 7449.) Vialpando testified that Richmond had four felony convictions, each constituting a "strike." (58 RT 7448-7449.)

On cross-examination, the prosecutor elicited that Richmond was also convicted of burglary. (58 RT 7450.) He then stated, "Your Honor, in light of Mr. Beaudikofer's opening statement, I would like the opportunity to go and call this witness as my own at this time." (58 RT 7450.) The trial court denied the request after ascertaining that returning to testify would not interfere with Vialpando's vacation. (58 RT 7450-7451.)

3. Appellant's Testimony.

Appellant also testified on December 18. He explained that in April 1996, the prison had implemented "tier yard" in an effort to racially integrate the yards in Calipatria's Ad Seg, which created a lot of tension. (58 RT 7499-7501.) There was an expectation that there would be violence on the yard among the racial groups. (58 RT 7500, 7503.) A white inmate who refused to go to the yard at this time would be viewed as a coward, and would "lose face" or respect from the other whites. (58 RT 7499-7500.)

When appellant and Richmond became cellmates, they exchanged basic information, including why they were in prison and why they were sent to Ad Seg. (58 RT 7508.) When trial counsel asked appellant what Richmond had told him, the prosecutor objected on hearsay grounds. Defense counsel made clear he was not offering to show the truth of what Richmond said, but rather "to explain Mr. Barrett's conduct afterwards." (58 RT 7511.) The trial court indicated that the testimony would be accepted not for its truth but "to show how Mr. Barrett's mental state was affected by the receipt of the information." (58 RT 7511.) Appellant then testified Richmond had explained he was in Ad Seg because the prison authorities had found some knives on his person during a search. The knives had been placed in his mattress by another inmate and Richmond had retrieved them in order to pass them to their owner. (58 RT 7511-7512.)

Appellant and Richmond talked about the tier yard policy, and appellant explained that "unfortunately we were having to go out and fight with these other inmates." (58 RT 7510.) Appellant told Richmond he would be taking a weapon to yard if needed; Richmond said he would do the same, although appellant told him it "wouldn't be wise." (58 RT 7512.) The prosecutor again objected on hearsay grounds. (58 RT 7512.) Trial counsel again stated it was not offered for the truth of what Richmond had said but to show appellant's state of mind. (58 RT 7513.) The trial court again agreed, but also expressed concern: "It isn't really used for the truth in a lot of ways. But when you get a whole bunch of stuff out there that you're not using it for the truth, it's hard to unring the bell. The jury is going to remember that." (58 RT 7513.) Trial counsel emphasized that it was important the defense establish that appellant trusted Richmond. (58 RT 7513.)

Appellant testified that in March, he and Richmond were discovered trying to enter the yard with weapons. (58 RT 7513-7514.) Later, they both received a 115 for flooding their cell. (58 RT 7514.) Appellant was moved to cell 146 after the spitting incident with Lt. Fast, where he was housed alone. Richmond remained where he was and got a new cellmate. (58 RT 7515-7516.)

Appellant testified that while they were separated, Richmond was involved in a cell extraction, gassing of a couple of correctional officers, and got caught with a weapon during the extraction. (58 RT 7516.) After the prosecutor objected, the trial court struck this testimony as hearsay, because appellant had not witnessed these events personally. (58 RT 7516.) The court then agreed that Richmond's discussion with appellant of the weapon incident was an admission against interest and allowed it. (58 RT

7517.) Appellant went on to testify that he saw the cell extraction team place Richmond in the shower after removing him from the cell. And although he did not witness the gassing, appellant saw the correctional officer coming away from Richmond's cell, wiping his face off. (58 RT 7517.)

In cell 146, appellant began cutting a piece of steel from the desk to make a knife. (58 RT 7518.) Richmond was moved a few times after the cell extraction and then into cell 146 with appellant. (58 RT 7523.) There, Richmond began to help appellant make the knife. (58 RT 7525.)

4. The Written Pleadings.

During a break in appellant's testimony, the trial court signaled a major shift in position when it stated: "If you look at 1103-B, you've gotten into a situation now, I believe, where Mr. Robinson can introduce evidence of Mr. Barrett's violent past activities, including the murder in San Francisco." (58 RT 7534.) After reading section 1103 thoroughly, the trial court saw "a real problem" in that Penal Code section 190.1(a) did not specify that evidence of a prior murder was inadmissible in the guilt phase pursuant to Evidence Code section 1103, subdivision (b).[102] (58 RT 7535.) The judge asked the parties to prepare briefing on the section 1103(b) issue, especially in light of section 190.1(a).

The defense averred that the only assaultive behavior discussed was the gassing. (58 RT 7535.) The court responded, "That's enough. That is assaultive behavior." (58 RT 7535.) The prosecutor asserted that appellant's testimony about the two of them taking weapons to the yard "to

---

102

Penal Code section 190.1, subdivision (a) requires a prior murder special circumstance to be adjudicated separately from the defendant's guilt.

do harm to other people" was also violent conduct. (58 RT 7535-7536.) The prosecutor further contended that evidence that Richmond possessed a weapon was an attack on his character that opened the door to evidence about appellant's character. (58 RT 7536.) The court and counsel agreed that it was a "very important" issue in the case and recessed early so that the parties could brief it. (58 RT 7536-7537.)

The next day, both parties filed pleadings on the issue. (45 CT 12695-12700 [defense]; 45 CT 12693-12694 [prosecution].) The defense pleading asserted that Evidence Code section 1103 was inapplicable because the defense had never offered the evidence of Richmond's prison misconduct to show his propensity for violence against appellant. (45 CT 12696.) The motion reiterated several points made in court. It further emphasized that defense evidence about Richmond's prison misconduct was introduced only because the prosecution had been permitted, over defense objection, to adduce evidence that Richmond had given up weapons and information to prison authorities. The deputy district attorney had made clear in his opening statement (and in pretrial pleadings) his theory that appellant killed Richmond because he had learned of his cellmate's actions, which violated the informal prison code and made him a snitch. (45 CT 12697.) The defense introduced evidence of Richmond's Ad Seg misconduct to counter the state's case, as it corroborated appellant's testimony that he did not know Richmond was an informant and thus had no motive to kill him. (45 CT 12696.) The motion also indicated that a limiting instruction would resolve the issue and cited Evidence section 352 concerns. (45 CT 12698-12699.)

In its written pleading, the prosecution summarily stated that in light of appellant's testimony about Richmond's possession of weapons, gassing

officers and a forced cell extraction, the prosecution "should now be allowed to introduce character evidence of defendant's violent propensities." (45 RT 12694-12694.) The prosecutor quoted *People v. Ramos* (1997) 15 Cal.4th 1133, 1173, stating that "the court held that 'evidence of weapons possession, particularly in a prison environment, would reasonably implicate a violent character whether defendant intended to use [them] offensively or defensively.'" (45 CT 12694.)

In court on December 19, the trial judge asked if the parties had found a case that discussed how Penal Code section 190.1(a) interacted with Evidence Code section 1103, subdivision (b). (59 RT 7545-7546.) The defense urged the court to re-read section 1103, and emphasized that subdivision (b) referred back to subdivision (a)(1), which required that the evidence at issue was "Offered by the defendant *to prove* conduct of the victim in conformity with the character or trait of character." (Evid. Code, § 1103, subd. (a)(1) [italics supplied]; 59 RT 7546-7547.) After re-reading the statute, the trial court agreed, stating "that is correct. That is the proper context. You're right." (59 RT 7547.)

Defense counsel again told the court that "the defense has never offered evidence of Richmond's bad acts to show his propensity for violence against Barrett." (59 RT 7547.) Rather, the evidence was relevant for other purposes. (59 RT 7547-7548.) The trial court stated, however, that the defense had not limited the evidence when it was admitted. (59 RT 7550; see also, 7546.) Defense counsel emphasized that they did not tell the jury in the opening statement that they would present evidence of Richmond's prison misconduct to prove he attacked appellant on April 9. Instead, the defense theory was that Richmond assaulted appellant that evening because he had received a mysterious kite and a weapon, the

implication being that he was ordered by someone to attack appellant. (59 RT 7550-7551.)

Only a day earlier the trial court had well understood the relevance of Richmond's prior felony convictions. (See 58 RT 7411-7412, quoted above.) Now, however, the court failed to grasp that evidence of Richmond's conduct in Ad Seg was relevant for the same reasons, stating: "[I]f it wasn't offered to prove that he had a violent propensity, it doesn't really have any relevance." (59 RT 7551.) Again, defense counsel explained that the evidence was relevant to appellant's knowledge and tended to rebut the prosecution's theory of motive. (59 RT 7551-7552.)

The prosecutor averred that the defense had brought in the evidence for a "multiple number of reasons," including to attack Richmond's character. (59 RT 7552.) He indicated he would not seek to use the prior murder but asserted that he could introduce appellant's other acts of violence pursuant to Evidence Code section 1103. (59 RT 7553.) The trial court agreed, stating: "This evidence comes in for multiple reasons. You can't sanitize it. You just can't do it, not this type of evidence." (59 RT 7553.)

Trial counsel reminded the court that it had previously acknowledged, when the defense made an offer of proof, that the evidence was for the purpose of establishing appellant's mental state. It reiterated that appellant had never offered character evidence under section 1103, subdivision (a)(1). (59 RT 7553-7554.) When trial counsel asked the court if it was finding that they had offered it to prove conduct, the court responded, "I'm saying it had that effect." (59 RT 7554.) The court added that it would be probably be "malpractice" for a defense attorney to specify that the evidence was offered for the purpose of proving that the victim

acted in conformity with his violent character. (59 RT 7555.)

Defense counsel suggested that a limiting instruction would resolve the issue: "I believe that you can cure this very simply by telling the jury that this was not offered for that purpose. And you did so one time already." (59 RT 7555; see also, 59 RT 7556.) If the court was unwilling to give such an instruction, then the defense asked that it either strike the testimony, or have appellant admit that he was sometimes a violent and dangerous person. (59 RT 7556.) The deputy district attorney argued that the defense could not "close the door." (59 RT 7556.)

The trial court agreed to consider the issue further. (59 RT 7557.) Trial counsel asked the court to read the transcript from the preceding day, indicating that the defense argument was based upon the court's previous ruling on the issue. (59 RT 7557, 7560.)

5. Appellant's Testimony, Continued.

Appellant's direct testimony resumed. He testified that he had considered stabbing Richmond when he saw that his cellmate had received an unwrapped knife. (59 RT 7563-7564.) Appellant did not, he said, "Because I wasn't sure what his intentions were. There was no way to know what his intentions were. It may have been an overreaction." (59 RT 7564.) Appellant could not think of any reason why Richmond would want to attack him, so appellant gave him the benefit of the doubt. (59 RT 7564.) When later that night Richmond came off his bunk in an unusual manner with the knife in his hand, appellant thought Richmond was going to use it on him, and struck him first. (59 RT 7574-7578.)

However, nowhere in appellant's direct examination did he claim that he believed Richmond had a violent character in light of his past misconduct in Ad Seg, or that he believed Richmond was acting in

conformity with that character when he came down off his bunk with a knife on April 9. (See generally, 59 RT 7563-7611.)

6. The Trial Court's Ruling.

During appellant's cross-examination, his attorney objected when the prosecutor asked about the content of the 114 documenting why he was in Ad Seg, asserting it was irrelevant and more prejudicial than probative under Evidence Code section 352. (59 RT 7635.) At that point, the trial court excused the jurors for lunch recess, in order to make a final decision on the section 1103 issue. (59 RT 7635-7636.)

After the recess, the court indicated it had read the previous day's transcript: "Okay, I've looked at the pages [trial counsel] wanted me to look at from yesterday's transcript. That's where we limited the hearsay testimony not for the truth of the matter, but to show the mental state." (59 RT 7638.)

Defense counsel reminded the court that whether appellant believed Richmond was trustworthy was at issue only to disprove the state's theory of motive. The trial court agreed, stating: "It has that purpose. I can see that, too." (59 RT 7638-7639.)

Appellant's attorney again contended that Evidence Code section 1103, subdivision (b) applied only if, under subdivision (a)(1), the defendant had offered character evidence to prove that the purported victim had acted in conformance with that character trait. (59 RT 7639-7640.) Counsel further argued that the defense had not portrayed appellant as a nonviolent, peaceful person and that the prosecution had not objected to the relevance of the defense evidence concerning Richmond's conduct. (59 RT 7640.) It urged the court to either give a limiting instruction or strike the testimony. (59 RT 7641.)

The deputy district attorney indicated that whether appellant denied he was dangerous was relevant to Evidence Code section 1102 but not section 1103. (59 RT 7641.) The court stated that the evidence was not limited when admitted and concluded, "It would be too late to do it now." (59 RT 7642; see also, 59 RT 7637.) The trial court also refused to strike the testimony. (59 RT 7642.)[103] Ultimately, it concluded that the prosecution could present evidence under section 1103(b). (59 RT 7644.)[104]

7. Defense Request for a 402 Hearing.

The defense then asked for a hearing pursuant to Evidence Code section 402 on each incident the prosecutor planned on introducing, so that the court could decide whether the probative value outweighed the prejudice created under Evidence Code section 352. (59 RT 7645-7646.) Instead, the court said that it would make 352 determinations as they proceeded. (59 RT 7646-7647.) The defense asked for an offer of proof. (59 RT 7647.) The prosecutor stated that they had previously been over a number of the incidents, in relation to Evidence Code section 1101, subdivision (b). (59 RT 7647-7648.)

8. Trial Court's Limiting Instruction.

When the jury returned to the courtroom, the trial court instructed, at the request of the defense, that the testimony to be elicited from the prosecutor could only be used to show whether appellant has a character for

---

103

Appellant later renewed the motion to strike. The trial court's denial of these motions is raised separately in Argument V., *post.*

104

In a motion for new trial, the defense again raised this issue. (47 CT 13194-13197; see also, 47 CT 13208 [prosecutor's response].) The trial court denied the motion. (89 RT 10236.)

violence, but not to show he had a propensity to commit violent crimes. (59 RT 7648, 7650.) The trial court refused, however, defense counsel's request to instruct the jury that appellant's testimony concerning Richmond's conduct was not introduced for the purpose of showing that he had a violent character. (59 RT 7650-7651.)

9. The Prosecutor Elicits Evidence of Appellant's Violent Character.

The trial court allowed the prosecutor to elicit evidence regarding eleven incidents of appellant's prison misconduct via cross-examination. This highly prejudicial testimony related to four assaults on other inmates with a weapon, the same offense for which appellant was on trial. It also established an additional seven occasions on which appellant possessed one or more weapons. These incidents included the following:

1) On February 20, 1995, appellant stabbed another inmate several times in the back while he was reading a Bible. It was this incident that got appellant placed in Calipatria's Ad Seg. (59 RT 7651-7653.)

2) On May 31, 1995, appellant was x-rayed after a hand-held detector indicated that he was concealing metal. He was put on contraband watch, where he sat shackled and naked for several hours. He eventually removed the waist chains and while still handcuffed, removed a small piece of metal from his anal cavity and "dry flushed" it down the cell toilet. (59 RT 7653-7658.)

3) On August 14, 1995, appellant slashed another inmate. (59 RT 7658-7659.)

4) On September 11, 1995, appellant was in possession of a couple of inmate-manufactured weapons wrapped in a towel as he was escorted to the shower. (59 RT 7659-7661.)

5) On February 26, 1996, appellant may have assaulted an African America inmate with a weapon on the yard, but he could not specifically recall the incident. (59 RT 7661-7662.)

6) The prosecutor asked appellant if on March 18, 1996, he altered materials with the intent to manufacture a weapon. (59 RT 7662.) Appellant replied, "that's subject to interpretation," and when pressed for a yes or no answer, he denied it. (59 RT 7663.)

7) Appellant denied that he possessed seven weapons on February 21, 1999. He admitted that he had two weapons, plus an assortment of contraband including razorblades, cigarette lighters, and pieces of metal. Four of the blades were lashed together in pairs, although appellant denied they were "slashing instruments." He had a piece of fence tie that looked like a nail. The items were discovered in the walls of his cell. (59 RT 7663-7666.)

8) On January 31, 2000, appellant was probably in possession of a weapon, although he could not specifically recall the incident. (59 RT 7666-7667.)

9) On February 2, 2000, appellant was in possession of a razorblade, which he denied was a weapon under the Penal Code. (59 RT 7667-7668.)

10) On March 10, 2002, appellant assaulted an inmate on the yard with a weapon, although he could not recall what kind of weapon it was. (59 RT 7668-69.)

After facts relating to these ten incidents were admitted, the trial court finally indicated the evidence was getting to the point of being cumulative. (59 RT 7669.)[105] The defense indicated it was still willing to

---

105

The trial court sustained a defense objection to the prosecutor's attempt to

stipulate that appellant had a character trait of violence. The trial court permitted the prosecutor to elicit testimony regarding one additional incident of appellant's misconduct:

11) Appellant admitted possessing razorblades on July 15, 2003, but explained that they were not weapons because they did not have handles on them. He agreed they might have been taped inside of magazines with a stamp. Appellant also had a syringe. (59 RT 7669-7671.)

The prosecutor then continued his cross-examination of appellant. Therein, appellant did not claim that Richmond had a violent character or imply that Richmond initiated the attack on him in conformity with this character. (See generally, 59 RT 7671-7712.) Nor did appellant do so in his redirect or recross examinations. (See generally, 59 RT 7712-7719, 7724 [redirect]; 7720-7724 [recross].)

10. Additional Defense Objections Denied.

Prior to appellant's testimony regarding these eleven incidents, defense counsel asserted that the prosecutor should be required to establish the misconduct through third party witnesses, arguing that it would violate appellant's Fifth Amendment rights to question him about these incidents. Counsel also objected that the details of the rules violations were not admissible. These objections were overruled. (59 RT 7651-7652.)

During appellant's cross-examination, trial counsel further objected based on lack of relevancy, Evidence Code section 352, and other grounds. The trial court overruled these objections. (59 RT 7651 [relevancy, § 352 and 5th Amend. objections]; 59 RT 7653 [a continuing objection on

---

elicit information about a charge of conspiracy to manufacture weapons. (59 RT 7653.)

constitutional grounds, § 352, relevancy, and 5th Amend.]; 59 RT 7656 [relevance]; 59 RT 7660; 59 RT 7663 [cumulative and § 352]; 59 RT 7668 [relevance]; 59 RT 7670-7671 [relevance].)

C. The Trial Court Erred in Permitting the Prosecutor to Adduce Evidence of Appellant's Prison Misconduct Pursuant to Evidence Code Section 1103, Subdivision (B).

1. Section 1103, Subdivision (B) Only Applies When a Defendant Has Adduced Evidence to Show the Victim's Propensity to Commit Violent Acts.

Under common law, when a defendant charged with a crime of violence claimed that he acted in self-defense, evidence of the alleged victim's violent and aggressive character could be presented in support of the defense. (*People v. Tackett* (2006) 144 Cal.App.4th 445, 453.) Evidence Code section 1103, which was originally adopted in 1965, codified this principle. (*Id.* at p. 454.)

What is currently subdivision (b) of section 1103 was enacted in 1991. (*People v. Fuiava* (2012) 53 Cal.4th 622, 696.) It permits the prosecution to introduce evidence of a defendant's character for violence *if* the defense has adduced under subdivision (a)(1) evidence that the victim had a character for violence. (*People v. Blanco* (1992) 10 Cal.App.4th 1167, 1173; Evid. Code, § 1103, subd. (b).) This Court recently summarized section 1103 (b) as follows:

> In other words, if, as in the present case, a defendant offers evidence to establish that the victim was a violent person, thereby inviting the jury to infer that the victim acted violently during the events in question, then the prosecution is permitted to introduce evidence demonstrating that . . . the defendant was a violent person, from which the jury might

infer it was the defendant who acted violently.

(*People v. Fuiava*, *supra*, 53 Cal.4th at p. 696.)

The plain language of section 1103(b) thus makes clear that the prosecution may offer evidence of a criminal defendant's violent character only if the defendant has presented evidence of his alleged victim's violent character in hopes of proving that the victim was the aggressor during the charged offense because he was acting in conformity with his violent character.

Although there are not a great number of published cases construing section 1103, a review of a few of them demonstrates that presentation by the defense of evidence that the alleged victim acted violently does not always trigger application of that section's subdivision (b). Compare, for example, *People v. Fuiava*, *supra*, 53 Cal.4th at pp. 694-700, and *People v. Blanco*, *supra*, 10 Cal.App.4th 1167, with *People v. Myers* (2007) 148 Cal.App.4th 546.

In *People v. Fuiava*, *supra*, the prosecutor presented evidence of the defendant's violent character after the defense adduced evidence that the victim, a deputy sheriff, had a reputation and character for violence in support of Fuiava's defense that the deputy had unjustifiably initiated the fatal gun battle. This Court determined that the evidence of Fuiava's violent character was properly adduced and rejected his claim that he had been denied due process by the introduction of the propensity evidence. (53 Cal.4th at pp. 694-700.)

In *People v. Blanco*, *supra*, it was undisputed that the defendant shot the victim shortly after an argument. Blanco claimed that he fired in self-defense. (10 Cal.App.4th at p. 1169.) In support of this defense, Blanco presented evidence that "the victim was a violent man who had a history of

accosting people and demanding money, and that he tried to rob [Blanco]." The prosecution was then permitted, pursuant to section 1103(b), to adduce evidence to rebut the claim of self-defense by showing that the defendant was also a violent person. (*Id.* at p. 1170.) The court of appeal found that it was not fundamentally unfair to allow on rebuttal certain kinds of character evidence where a defendant has first raised the issue by presenting evidence of the victim's character to prove that he acted reasonably to provocation or attack. (10 Cal.App.4th at p. 1174.)

However, section 1103(b) is not applicable any time a criminal defendant attempts to establish violent conduct by the alleged victim. For example, in contrast to *Fuiava* and *Blanco* is *People v. Myers, supra*, 148 Cal.App.4th 546. Therein, the reviewing court found that the lower court erred in permitting the People to adduce evidence of the defendant's violent background under section 1103(b). In *Myers*, the defendant was found guilty of resisting arrest and battery on an officer. At trial, he testified that his behavior was a reaction to overly aggressive conduct by the officer during the arrest. The prosecution asserted that the testimony opened the door to presentation of Myers's violent character pursuant to section 1103(b). On appeal, defendant argued that his testimony about the officer's aggressive conduct at the time of the charged incident did not constitute character evidence for the purposes of section 1103(b).[106] The appellate court agreed, stating:

If evidence of a victim's conduct at the time of the charged

106

The claim was raised as ineffective assistance of counsel because defendant's attorney had failed to object to the evidence on this ground. (148 Cal.App.4th at pp. 551-552.)

> offense constitutes character evidence under Evidence code section 1103, then every criminal defendant claiming self-defense would open the door for evidence of his own violent character. Evidence Code section 1103 cannot be read so broadly.

(148 Cal.App.4th at p. 553.)

Fuiava, *Blanco* and *Myers* demonstrate that the trial court must carefully consider *why* a defendant has put forward evidence of the alleged victim's violent conduct. They further show that subdivision (b) of Evidence Code section 1103 comes into play only if the defense offers such testimony for the purpose of proving that the victim had a violent character so that the jury might find that he acted, at the time of the charged offense, in conformity with that character.

As explained below, the trial court in appellant's case failed to understand that not *any* evidence pertaining to violence by an alleged victim constitutes character evidence which triggers the applicability of section 1103(b). Consequently, it made several erroneous rulings which gravely impacted appellant's defense.

2. The Trial Court Misapplied Section 1103 When It Permitted the Prosecutor to Elicit Evidence of Appellant's Violent Character.

A trial court's decision to admit character evidence is usually reviewed for abuse of discretion. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1118.) However, the issue presented here is whether the court correctly interpreted Evidence Code section 1103. "The proper interpretation of a statute presents a question of law that is subject to de novo review." (*People v. Milstein* (2012) 211 Cal.App.4th 1158, 1164.)

Appellant thus believes that this Court should independently review the lower court's ruling.

Even if this is issue is viewed as a mixed question of law and fact, independent review here is appropriate. (See *People v. Louis*, *supra*, 42 Cal.3d 969, 984-988.) The relevant facts are not in dispute and witness credibility is not a concern. The question is whether appellant's testimony constituted evidence of Richmond's bad character as contemplated by section 1103, subdivision (b). This Court is in a better position than the trial court to resolve the important legal question this case presents.

Under either standard of review, the trial court failed to properly apply section 1103(b). Trial counsel made very clear that it was introducing evidence of Richmond's conduct in Ad Seg not to show that he had a violent character and then acted in conformity with such character on April 9, 1996, but only to disprove the prosecutor's theory of motive.[107] As the facts set forth above demonstrate, the defense never asserted that Richmond's prior acts of misconduct caused appellant to fear his cellmate and believe that his life was in danger when Richmond came off the top bunk in the middle of the night. In fact, the defense argued the opposite – that appellant *trusted* Richmond because of the rules violations. As a result, appellant gave Richmond the benefit of the doubt and did not stab him as soon as his cellmate received an unwrapped weapon on the evening of the incident.

Indeed, appellant explained in his testimony that Richmond's

107

Evidence that a person committed a crime or some other act is admissible when relevant to prove a fact other than his disposition to commit such an act, such as motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. (Evid. Code, § 1101, subd. (b).)

willingness to carry a weapon when they went to yard together gained his confidence. He stated: "He won my trust, to an extent, by doing that. He's willing to take some risks other people weren't willing to take." (59 RT 7715.) Richmond's gassing of an officer and weapon possession while he was housed with a different cellmate also resonated with appellant. This behavior was inconsistent with an inmate who was cooperating with authorities and it suggested Richmond's desire to win the respect of his peers. (59 RT 7715-7716.)

This limited theory of relevance was further supported by the fact that the evidence of Richmond's prior convictions as "strikes" was not even admitted for its truth, and thus could not have supported an argument that it evidenced a violent character. Although evidence of Richmond's Ad Seg misconduct was not specifically so limited, it was confined to what appellant personally knew, and thus relevant to his state of mind, rather than what had actually happened, which would have been relevant to Richmond's character. In short, the evidence was not presented in a manner which would have led the jury believe that appellant feared Thomas Richmond because he had violated prison rules.[108] Appellant's case is thus distinguishable from cases like *Fuiava* and *Blanco*, *supra*, where the

---

108

The prosecutor's assertion that the defense sought to prove Richmond's bad character is further undermined by the fact that appellant's testimony actually mitigated his cellmate's misconduct and emphasized his own. Appellant testified that he, rather than Richmond, was responsible for flooding their cell, an incident for which they were both disciplined. Appellant further volunteered that he spit at a lieutenant because the correctional officer unjustly found Richmond guilty of the charge. Further, appellant admitted it was he who began cutting a weapon out of the desk in cell 146 and he who initiated the incident in which he and Richmond tried to take weapons out to the yard. (58 RT 7512, 7515, 7518.)

defendants sought to prove that the victim therein acted violently at the time of the charged offense because he was acting in conformity with his violent character.

Initially, the trial court acknowledged this distinction, and permitted appellant to establish that Richmond had prior strikes and was therefore risking serious consequences when he brought a weapon to the yard, which in turn established his bona fides in appellant's mind. This ruling was correct, since evidence may be relevant and admitted for a limited purpose. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1117; *People v. Eagles* (1982) 133 Cal.App.3d 330, 340; Evid. Code, § 355.)

When the defense then elicited testimony from appellant about Richmond's Ad Seg misconduct, the trial court again recognized the limited purpose for which the evidence was offered. It concluded, however, that although the evidence was not offered as evidence of Richmond's violent character, "it had that effect." (59 RT 7554.) The trial court believed that the evidence of prior violent acts by an alleged victim could not be "sanitized" and thus was necessarily admitted for "multiple reasons." (59 RT 7553.)

The trial court was misconstruing the law, as courts have found that evidence which might otherwise constitute character can be admitted *only* for a specific, limited purpose. For example, in *People v. Guerra*, *supra*, this Court found that evidence of the victim's interest in Guatamalan people and culture was admissible to explain her motive in interacting with the defendant and his co-workers, but did not constitute character evidence for purposes of section 1103, subdivision (a)(2.) (37 Cal.4th at pp. 1117-118.)

People v. Fuiava, *supra*, is also instructive on this point. Therein, the prosecutor was permitted to introduce evidence that the defendant was a

convicted felon and carrying two guns in violation of his parole pursuant to Evidence Code section 1101, subdivision (b), rather than as evidence of his violent character, because it supported the state's theory of motive – that Fuiava shot at the officers to avoid arrest and prison. (53 Cal.4th at pp. 666-670; see also, *People v. Carter* (2005) 36 Cal.4th 1215, 1256-1257 [evidence that Carter was aggressive and harassing was not character evidence because the prosecutor did not offer it to prove defendant's conduct on a specific occasion; rather it was admitted to bolster the prosecution's theory of the case that Carter embarked upon a murderous crime spree in the aftermath of being spurned by a number of women].) Applying *Fuiava* to the instant case, the evidence pertaining to Richmond's misconduct was properly admissible for the limited purpose of proving appellant's state of mind and thereby rebut the prosecution's theory of motive.

Moreover, the trial court's analysis of section 1103 would lead to absurd results. Under the court's interpretation of the law, evidence of a victim's violent conduct admitted to establish motive, intent, or some other appropriate fact pursuant to section 1101(b) would always open the door to evidence of the defendant's violent character. The impeachment of a surviving victim's credibility with a prior felony conviction would necessarily trigger section 1103, subdivision (b). The trial court's application of section 1103 was simply too broad. (See *People v. Myers*, *supra*, 148 Cal.App.4th at p. 553.)

The trial court's belief that it was the responsibility of appellant's attorney to request a limiting instruction was also misplaced. (See 59 RT 7550, 7546, 7637.) When evidence is admissible for a limited purpose, it is incumbent upon the party who could be adversely affected to request a

limiting instruction. *(People v. Eagles, supra,* 133 Cal.App.3d at pp. 340-341; Evid. Code, § 355.) In this case, the prosecutor was obviously on notice that the defense was introducing evidence of Richmond's misconduct while incarcerated as relevant to appellant's state of mind and not to establish Richmond's propensity to commit violent acts. If the deputy district attorney believed that the jury might not understand the limited purpose for which the evidence was adduced – despite the fact trial counsel *never* asserted that it showed Richmond had a proclivity to act violently – he should have requested a limiting instruction. He did not, however, so he could urge that appellant had "opened the door" to evidence of his own violent character. The prosecutor's sandbagging should not inure to the state's benefit.

Similarly erroneous was the trial court's belief that when defense counsel did ask for a limiting instruction so that the jury could not possibly be confused, it was too late. (See RT 59 RT 7637, 7642.) The timing of a limiting instruction is within the trial court's discretion. (*People v. Dennis* (1998) 17 Cal.4th 468, 533-534.) "Thus, the trial court is not obliged to give limiting instructions the moment they are requested or when the limited evidence is presented . . . ." (*Id.* at p. 534.) In this case, trial counsel asked for the limiting instruction as soon as the court revealed its belief that the evidence had the "effect" of tending to show that Richmond was the aggressor on April 9 because he had a violent character. (59 RT 7555-7556.) Appellant was in the midst of his direct testimony and there is no reason why a limiting instruction at that point would not have been sufficient. The trial court's failure to understand that it had the discretion to give a limiting instruction when it was requested was itself an abuse of discretion. (See, e.g., *People v. Superior Court (Brim)* (2011) 193

Cal.App.4th 989, 991.)

In sum, the trial court misunderstood and misapplied Evidence Code section 1103 when it concluded that appellant's testimony about Richmond's Ad Seg misconduct opened the door to a torrent of prejudicial other crimes evidence.[109]

D. The Trial Court Erred in Failing to Conduct an Adequate Section 352 Analysis of the Section 1103(B) Evidence.

This Court has indicated that "'the better practice'" is for a trial court, prior to admitting other crimes evidence, to "set forth on the record its balancing of the probative value of the evidence against its prejudicial effect . . . ." (*People v. Carter* (2005) 36 Cal.4th 1114, 1151, citing *Brown v. Smith* (1997) 55 Cal.App.4th 767, 793.) Although the trial court "need not expressly state that its ruling is based on a weighing of prejudice against probative value," the record must show that it "'understood and undertook its obligation to perform the weighing function prescribed by Evidence Code section 352.' []" (*People v. Triplett* (1993) 16 Cal.App.4th 624, 627, cited with approval in *People v. Carter*, *supra*, 36 Cal.4th at p. 1152.)

In appellant's case, the record does not affirmatively show that the trial court weighed the probative value against the prejudicial effect of the section 1103(b) evidence. Moreover, to the extent that the trial court did so,

---

109

Even if the lower court's ruling is reviewed for abuse of discretion, it was erroneous. The scope of a court's discretion is governed by the particular law at issue. The trial court abuses its discretion when it fails to follow the applicable law. (*People v. Brim*, *supra*, 193 Cal.App.4th at p. 991; see also, *Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App.3d 813, 831 ["Action that transgresses the confines of the applicable principles of law" is an abuse of discretion]; *People v. Jacobs* (2007) 156 Cal.App.4th 728, 737.)

its analysis was inadequate and therefore an abuse of discretion.

As set forth previously, trial counsel requested a hearing so that the court could conduct an analysis, pursuant to section 352, of the probative value versus prejudicial nature of each incident the prosecutor intended to present. The court refused, stating that it would make section 352 determinations as they proceeded. (59 RT 7645-7647.)

The prosecutor began by asking appellant about an incident on February 20, 1995, in which appellant stabbed another inmate on the yard. Appellant's counsel objected on several grounds, including section 352. Without any analysis of the probative value or prejudicial nature of the evidence, the trial court overruled the objection. (59 RT 7651.) Trial counsel again objected on several grounds, including section 352, when the prosecutor next sought to elicit evidence of an alleged conspiracy to manufacture a weapon. The trial court sustained the objection because it was not sure that conspiracy was admissible under relevant case law. (59 RT 7653.) As the prosecutor moved to the next incident, defense counsel again objected and was given a continuing objection based on, inter alia, section 352. Again, the objection was overruled, with no analysis of the probative value versus prejudicial nature of the incident. (59 RT 7653-7654.) The prosecutor was permitted to elicit evidence on eight additional incidents. The trial court failed to make any specific findings about the probative value or prejudicial nature of any of them. (See 59 RT 7658-7669.)

After appellant had been cross-examined on ten separate incidents involving assault or weapons possession, the court suggested the evidence was reaching the point of being cumulative. (59 RT 7669.) The court then permitted the prosecutor to examine appellant about one additional weapons

possession incident, without any specific discussion of the prejudicial nature or probative value of the evidence. (59 RT 7669-7671.)

Because of the highly prejudicial nature of other crimes evidence, it must be "'scrutinized with great care.' []" (*People v. Thompson* (1980) 27 Cal.3d 303, 314, overruled on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260.) In *Thompson*, this Court explained that "'[A] closely reasoned analysis' of the pertinent factors must be undertaken before a determination can be made of its admissibility." (*Ibid.*, fn. omitted; see also, *People v. Ewoldt* (1994) 7 Cal.4th 380, 404 [evidence of uncharged offenses requires extremely careful analysis].) Because of the substantial prejudicial effect inherent in other crimes evidence, it is admissible only if it has *substantial* probative value. "If there is any doubt, the evidence should be excluded." (*People v. Thompson*, *supra*, 27 Cal.3d at p. 318.)

In this case, there is no indication that the trial court actually engaged in a reasoned analysis of the prejudicial effect and probative value of the section 1103(b) evidence. In fact, the record demonstrates that once it concluded that section 1103(b) applied, it conducted virtually no further analysis of other objections raised by the defense, including section 352.

First, the court did not scrutinize the probative value of the section 1103(b) evidence, which in actuality was minimal. In *People v. Ewoldt*, *supra*, this Court explained that "it is imperative that the trial court determine specifically what the proffered evidence is offered to prove, so that the probative value of the evidence can be evaluated for that purpose." (7 Cal.4th at p. 406.) *People v. Thompson* recognized that such evidence is probative if it is material, relevant and necessary. (27 Cal.3d at p. 318, fn. 20.) Expanding on this idea, the Court therein stated:

"[H]ow much 'probative value' proffered evidence has

depends upon the extent to which it tends to prove an issue by logic and reasonable inference (degree of relevancy), the importance of the issue to the case (degree of materiality), and the necessity of proving the issue by means of this particular piece of evidence (degree of necessity)." []

(27 Cal.3d at p. 318, fn. 20.)

In this case, even if one presumes that appellant's weapons possession and assaults on other inmates tended to prove his violent character (degree of relevancy), such character was not a particularly important issue in this case (degree of materiality), as it was obvious that everyone involved had character traits for violence. Most importantly, the necessity of proving appellant's violent character by this section 1103(b) evidence (degree of necessity) was non-existent. Appellant had been completely forthcoming about his violent history and made no effort to portray himself as a peaceful person. He readily admitted that he had possessed weapons in prison and was prepared to assault other inmates on the yard. He admitted spitting at a lieutenant. (58 RT 7512, 7515.) There simply was no need to admit the section 1103(b) evidence to prove his violent character. Instead, the evidence was pure prejudice.

Second, the trial court failed to adequately consider the prejudice the evidence would create. This Court has acknowledged the "grave danger of prejudice" created by other crimes evidence. (*People v. Thompson*, *supra*, 27 Cal.3d at p. 317.) It "produces an 'over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts.' []" (*Ibid.*) Further, "'the jury might be unable to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor.' []" (*Ibid.*; see also, *McKinney v. Rees* (9th Cir. 1993) 993 F.2d

1378, 1384 [other crimes evidence "is said to weigh too much with the jury and so to overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."].)

In a different context, the trial court noted how prejudicial the evidence that appellant had assaulted other inmates with a weapon would be in this case. (16 RT 2258.) It made a similar observation regarding the weapons possession evidence. (18 RT 2384.) However, when allowing the prosecutor to cross-examine appellant about seven weapons possession incidents and four assaults with weapons for the purposes of Evidence Code section 1103(b), the court said nothing about the effect such evidence might have on the jury or whether the probative value outweighed it. In fact, the only ruling the court made was to find that it would be cumulative to present other crimes evidence *in addition to* the eleven acts the prosecution was permitted to adduce. (See 59 RT 7669.) Finding evidence to be cumulative is not, however, the same as finding that it is more prejudicial than probative.

In sum, to the extent it can be said that the court did weigh the evidence pursuant to section 352, it abused its discretion by failing to conduct the kind of closely reasoned analysis mandated by this Court.

E. The Trial Court's Erroneous Interpretation of Section 1103(B) Deprived Appellant of His Constitutional Rights.

The trial court's allowance of the section 1103(b) evidence and the prosecutor's cross-examination of appellant about his in-prison misconduct violated his federal and state constitutional rights to due process and a fundamentally fair trial, to exercise his privilege against self-incrimination, to fair notice, and to a reliable capital proceeding. (U.S. Const., 5th, 6th, 8th & 14th Amends; Cal. Const., art. I, §§ 15-17.)

1. The Error Deprived Appellant of Due Process.

A state court's evidentiary ruling violates a criminal defendant's right to due process if it deprives him of a fundamentally fair trial. (*Perry v. New Hampshire* (2012) 565 U.S. __,__ 132 S.Ct. 716, 723; *Estelle v. McGuire* (1991) 502 U.S. 62, 67.) Also, a trial court's failure to follow state statutory dictates may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by the state. *(Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.) Thus, a trial court's decision to admit bad acts evidence violates due process if it was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. (*Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357; *McKinney v. Rees*, *supra*, 993 F.2d at p. 1384; *George v. Almager* (S.D.Cal. 2009) 674 F.Supp.2d 1160, 1167.) Such propensity evidence may violate a defendant's right to due process if it is not otherwise relevant or if its potential for prejudice far outweighs any slight relevance it may have. (*United States v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1027; *George v. Almager*, *supra*, 674 F.Supp.2d at p. 1167.)

In *People v. Fuiava*, *supra*, 53 Cal.4th 622, 694-700, this Court concluded that Evidence Code section 1103(b) does not on its face violate principles of due process. In doing so, however, this Court emphasized that under section 1103, evidence establishing a defendant's propensity for violence to prove his conduct is admissible only after the defendant elicits evidence of the victim's violent propensity. This Court explained:

> [T]he operation of section 1103(b) is dependent upon a choice made by the defendant, in much the same way that other strategic choices made by the defense during a trial will make admissible evidence that otherwise would have been

excluded. . . . It is not fundamentally unfair to require the defendant to make that choice . . . .

(53 Cal.4th at p. 698.)

While section 1103(b) may not on its face violate principles of due process, the trial court's application of the statute in the instant case did. Appellant did not know that he was making a "choice" because he did not know that the trial court would misinterpret section 1103(b) to find that he had opened the door to evidence of his propensity for violence by adducing evidence of Richmond's Ad Seg misconduct for a purpose unrelated to Richmond's propensity for violence. In fact, the trial court's earlier ruling that Vialpando's testimony about Richmond's strikes would not trigger application of section 1103(b) led appellant to believe that he would similarly not be opening the door with his testimony that he had reason to believe Richmond could be trusted by other white inmates.

Given the language of the statute and the trial court's ruling vis-a-vis Vialpando, appellant reasonably believed that section 1103(b) would not apply if he did not introduce evidence of Richmond's propensity for violence in order to prove that he was the aggressor inside cell 146 on April 9. (See, e.g., *People v. Bagwell* (1974) 38 Cal.App.3d 127, [trial court's remarks may have led defendant to believe that if she did not testify on direct examination regarding a prior uncharged assault cross-examination about it would not be permitted].) Without notice that section 1103(b) would apply in this circumstance, he was deprived of the ability to make a strategic choice as contemplated by this Court in *Fuiava*. (See *Sheppard v. Rees* (9th Cir. 1990) 909 F.2d 1234, 1236 [6th Amendment guarantees defendant a fundamental right to notice of the charges against him].)

In *Fuiava*, this Court also emphasized that section 1103 permits a

jury to get a balanced view of both the alleged victim and the defendant. (53 Cal.4th at p. 698.) It extensively quoted explanatory material regarding the adoption of rule 404(a)(1) of the Federal Rules of Evidence, a provision similar to section 1103(b):

> The rationale for the amendment to the federal rule is essentially the same as that articulated for section 1103(b). According to the federal Advisory Committee Notes for rule 404 (2000 amend.): "The amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused. For example, in a murder case with a claim of self-defense, the accused, to bolster this defense, might offer evidence of the alleged victim's violent disposition. If the government has evidence that the accused has a violent character, but is not allowed to offer this evidence as part of its rebuttal, the jury has only a part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. . . . Thus, the amendment is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim."

(53 Cal.4th at p. 699.)

In appellant's case, however, the trial court's application of section 1103(b) did not result in a balanced presentation, in fact quite the opposite. Even if it is assumed that one or more of appellant's jurors might have believed that the evidence about Richmond's Ad Seg conduct was relevant

to his character, the testimony presented by the defense was not particularly probative of a violent character. As explained above, the defense evidence was limited to what appellant himself knew of Richmond's behavior (and how that affected appellant's state of mind), rather than any expansive presentation of Richmond's actual character for violence.

Moreover, there was no attempt by the defense to portray appellant as a nonviolent person. Appellant was forthcoming about his character. Of course the jury knew he had committed violent acts in the past, as he was in prison under a life sentence. The fact that he had been moved from Calipatria's general population to Ad Seg gave the jury further reason to believe he had a history of violence. Yet the prosecution was permitted to present extensive and specific evidence about acts occurring both before and after Richmond's death. This evidence was extremely prejudicial and dwarfed that presented by the defense about Richmond's prior misconduct.

2. Appellant's Privilege Against Self-Incrimination Was Violated.

As previously noted, appellant's counsel also asserted that the prosecutor should be made to adduce any section 1103(b) evidence from third party witnesses rather than appellant himself. (59 RT 7651-7652.) Counsel repeatedly objected that to permit the People to elicit the evidence through cross-examination of appellant would violate his Fifth Amendment right against self-incrimination. (59 RT 7651, 7653 [lodging a continuing objection on constitutional grounds].) The trial court erred in rejecting appellant's claim.

The state must "establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against the accused out of his own mouth." (*Malloy v. Hogan* (1964) 378 U.S. 1, 7-8.) Even when a

criminal defendant takes the witness stand, his privilege against self-incrimination prevents the People from turning him into its own witness by questioning him upon the case generally. (*People v. Tealer* (1975) 48 Cal.App.3d 598, 604 [defendant's limited testimony denying that he had made an admission to police officer did not permit the state to question him about the case generally].) The court in *Tealer* explained: "A defendant who elects to testify does not give up his Fifth Amendment rights nor his corresponding California privilege against self-incrimination (Cal. Const., art. I, § 15) *except as to matters within the scope of relevant cross-examination.*" (*People v. Tealer*, *supra*, 48 Cal.App.3d at p. 604 [italics in original].)

People v. Sims (1958) 165 Cal.App.2d 108, illustrates how a defendant's Fifth Amendment right is violated in a situation similar to appellant's case. In *Sims*, the defendant took the witness stand in his own behalf and asserted that he killed his alleged victim in self-defense. Over objection, the prosecutor was permitted to cross-examine him about his prior violent conduct, although no evidence of such conduct was presented in the People's case-in-chief. On redirect, defendant Sims addressed these incidents. On recross, the prosecutor elicited further details and then called witnesses to the incidents in rebuttal to impeach the defendant's redirect testimony.

The appellate court in *Sims* found that the cross-examination had gone "far beyond the testimony given by the defendant" and thus forced Sims to be a witness against himself. (165 Cal.App.2d at p. 114.) It explained:

> We are not deciding the question whether the incidences and events about which the defendant was questioned on his

> cross-examination and recross-examination could have been proved in [the] prosecution's case in chief under the heading of similar offenses or as tending to show intent, plan or design. We are deciding that it was error to compel the defendant to be a witness for the state and against himself . . .
>
> .

(165 Cal.App.2d at p. 115.)

The court in *Sims* further indicated that the prosecutor's actions were misconduct. (165 Cal.App.2d at p. 115.) Finally, the court found that the errors by the court and the prosecution prejudiced Sims' substantial rights, concluding that the jury might have otherwise returned a verdict of manslaughter instead of murder. (*Id.* at p. 116; see also, *People v. Bagwell*, *supra*, 38 Cal.App.3d 127, 140 [forcing defendant to testify on cross-examination about a prior assault which was not referred to during direct examination violated her 5th and 14th Amendment rights].)

As in *Sims*, the trial court's erroneous ruling in the instant case and the deputy district attorney's improper cross-examination forced appellant to become a witness against himself. By testifying on his own behalf, appellant waived his privilege against self-incrimination only as to matters within the scope of relevant cross-examination. His direct examination did not put into issue his character or the violent acts about which he was cross-examined. Thus, the questioning which elicited the section 1103(b) evidence far exceeded anything fairly within the scope of appropriate cross-examination. Moreover, it was only through his testimony (at least during the guilt phase) that the prior violent conduct was established.

In sum, the errors deprived appellant of his privilege against self-incrimination and constituted prosecutorial misconduct. It denied him due

process and a fair trial, and fair notice. It further undermined the heightened need for reliability constitutionally required in a capital case. (*Ford v. Wainwright*, *supra*, 477 U.S. at pp. 411-412.)

F. The Trial Court Erroneously Instructed the Jury on the Section 1103(B) Evidence.

Compounding the erroneous admission of the section 1103(b) evidence was the trial court's failure to correctly instruct on how the jury could use that evidence. The instructions unfairly permitted the jury to consider other crimes evidence in determining whether appellant – but not Richmond – had a violent character. Further, they allowed the jury to consider the evidence of appellant's violent behavior for issues in addition to his character. And, they failed to correctly explain the applicable standard of proof or to caution the jury not to apply a constitutionally inadequate burden of proof in determining appellant's guilt.

1. The Instructions Given.

As demonstrated herein, the trial court and the parties were challenged by the question of how to correctly instruct the jury regarding the section 1103(b) evidence.

The instructional issue first arose on December 23, 3003. After the parties agreed that CALJIC 2.40 (Traits of Character of Defendant) was not applicable because the defense had not adduced evidence of appellant's good character, the trial court wondered if CALJIC 2.50 (Evidence of Other Crimes) should be given. (61 RT 7883.) The prosecutor argued that it was appropriate in light of the bad acts evidence the People had adduced, and indicated 2.50.1 (Evidence of Other Crimes by the Defendant Proved by a Preponderance of the Evidence) and 2.50.2 (Definition of Preponderance of the Evidence) should also be given. (61 RT 7883-7884.) Defense counsel

asked that a decision be deferred since 2.50 would have to be modified. (61 RT 7884.)

On January 6, 2004, defense counsel indicated that the parties needed additional time to figure out the instructions relating to section 1103(b), "because we have character evidence. And I don't think we've ever puzzled through the way we need to limit the instruction, if at all." (66 RT 8454.) After the court opined that there were instructions "on that," counsel responded: "But they're not clear, judge. They need a heck of a lot of work. You'll see when you look at them. They're talking about limited as to purpose. And then we have to decide what purpose it was limited to and so on." (66 RT 8454-8455.) Counsel added that the limiting instruction given when the evidence of appellant's violent conduct was admitted was "a little bit confusing. I think we need to clear it up with instructions." (66 RT 8455.)

The trial court noted that the defense had submitted a special instruction relating to "other crimes" which stated: "It is not sufficient to sustain a conviction on a particular charge to prove that the defendant is guilty of some other charge or of generally bad and criminal conduct. But the proof must establish his guilt of the particular charge in the indictment." (66 RT 8455.)[110] The deputy district attorney asserted that the special

---

110

As is fully explained in Argument X, the record on appeal does not include a complete set of all the instructions requested. During record completion proceedings, the parties were unable to reconstruct the content of the missing instructions. (See 4th Supp. CT 151-155 [Stipulated Settled Statement Re Jury Instructions].) In some instances, the content of a proposed instruction is known, because it was read into the record. (See, e.g., 66 RT 8455 [defense special instruction on "other crimes"].) The record indicates that appellant submitted one or two additional special

instruction was cumulative to CALJIC 2.50. (66 RT 8456.) Defense counsel emphasized, however, that 2.50 addressed other crimes evidence admitted under Evidence Code section 1101, subdivision (b), to show method, plan, or scheme. In appellant's case, the court had admitted the "other crimes" evidence under section 1103(b). (66 RT 8456-8457.)

The court began to review CALJIC 2.50 as proposed by the prosecutor. (66 RT 8457-8459.) Ultimately, the court determined that it was "incomprehensible." Judge Zimmerman stated that he would take out 2.50 and given the defense special instruction instead, which was "comparably easy to understand." (66 RT 8461, see also, 66 RT 8462 [court opined that CALJIC 2.50 was "impossibly hard to understand."].) The prosecutor noted, however, that CALJIC 2.50.1, which instructed on the burden of proof for other crimes evidence, was needed. (66 RT 8462.) The court then reversed course, stating: "We're going to have to clean up 2.50 so it makes sense." (66 RT 8463.) Trial counsel reminded the court that the violent character evidence pertained to both appellant and Richmond. (66 RT 8463.)[111] He suggested that they "struggle with that and come back to it . . . ." (66 RT 8464.) The court agreed and directed the prosecutor to modify 2.50. (66 RT 8464; see also, 66 RT 8530-8531.)

The next day, while discussing CALJIC 2.20, relating to the

---

instructions relating to the section 1103(b) evidence, but their content is not known. (See 66 RT 8456, 68 RT 8659-8660.)

111

Appellant's counsel made clear during the instruction colloquy that they continued to believe the trial court's ruling was erroneous, as they did not offer evidence of Richmond's prior misconduct for the purpose of establishing a violent character or conduct in conformity with such character. (66 RT 8457.)

believability of witnesses, the court asked whether there had been any character testimony. The parties noted the section 1103(b) evidence relating to violent character. The court indicated that such evidence was not relevant to "the character of the witness for honesty or truthfulness or their opposites," so that phrase should be taken out of 2.20. (67 RT 8540.) The court then turned to CALJIC 2.50, stating, "You did a good job of changing those. That's great." (67 RT 8543.)[112] Trial counsel emphasized, however, that the "other crimes" evidence had not been admitted on appellant's intent, asserting: ". . . we'll reserve the right to consider that further because I think it was admitted solely on the issue of violent character traits." (67 RT 8543-8543.)

Later, the parties returned to the defense special instruction concerning other crimes evidence. Although Judge Zimmerman had previously indicated he would give it, he now found it cumulative to CALJIC 2.50. (67 RT 8577-8578.) After defense counsel asserted that it was not, the court apparently agreed to give it in addition to 2.50. (67 RT 8579.) After the parties argued some more, the trial judge decided to postpone a decision until the next day so that he could think about it further. (67 RT 8581-8582.)

On January 8, 2004, it appears as though defense counsel offered a further-modified CALJIC 2.50. (68 RT 8611-8612, 8643.) The trial court

---

112

Presumably the court was speaking to the deputy district attorney, who he had directed to modify 2.50. Because the record does not contain copies of the instructions offered by the prosecutor, it is not clear whether the edited version of 2.50 upon which the court was remarking during this colloquy differed from the instruction ultimately given to the jury. (See 46 CT 12846 [CALJIC 2.50].)

then reviewed a packet of other special instructions which had previously been submitted by appellant. One or two of the instructions in this packet related to "other crimes" evidence; they were rejected by the trial court as cumulative. (68 RT 8659-8660.)[113]

Judge Zimmerman ultimately instructed the jury pursuant to CALJIC 2.09, 2.50, and 2.50.2. CALJIC 2.50 (Evidence of Other Crimes) as modified read:

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial. [¶] Except as you will otherwise be instructed, this evidence, if believed, may be considered by you for the limited purpose of determining if it tends to show: [¶] The existence of the intent which is a necessary element of the crime charged; [¶] The defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged; [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purpose.

(46 CT 12846.)[114]

113

This instruction(s) was apparently entitled "Other Crimes Were Admitted for a Limited Purpose" and/or "Other Crimes, Risk of Prejudice." (68 RT 8659.)

114

CALJIC 2.09 (Evidence Limited As To Purpose) read: "Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted you were instructed that it could not be considered by you for any

The judge did not give CALJIC 2.50.1 or any of the special instructions relating to section 1103(b) evidence requested by appellant.

2. CALJIC 2.50 Is Not Applicable to Section 1103(b) Evidence.

As demonstrated herein, the trial court erred in giving CALJIC 2.50 in this case. The instruction addresses the use of other crimes evidence admitted pursuant to Evidence Code section 1101(b), not section 1103(b). As modified in appellant's case, 2.50 erroneously allowed the jury to use violent character evidence against appellant for multiple reasons, yet it failed to inform the jury that it could use Richmond's acts of violence to find that he initiated the struggle in cell 146 because he had a violent character.

To appellant's knowledge, neither CALJIC nor CALCRIM include standard jury instructions relating to Evidence Code section 1103. In *People v. Fuiava*, *supra*, 53 Cal.4th 622, the trial court apparently improvised and instructed the jury as follows:

> A person's character for violence may be shown by evidence of reputation, opinion, or specific acts of violence. Evidence of a person's character for violence may tend to show the

---

purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted." (46 CT 12844.)

CALJIC 2.50.2 (Definition Of Preponderance Of The Evidence) read: "Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it. [¶] You should consider all of the evidence bearing upon every issue regardless of who produced it." (46 CT 12859.)

> person acted in conformity with such character. [¶] Whether a person had a character for violence and whether he acted in conformity with such character are matters for the jury to decide.

(53 Cal.4th at pp. 694-695.)

In *Fuiava*, the defendant argued that this instruction, as well as the admission of violent character evidence pursuant to section 1103(b) as propensity evidence, was fundamentally unfair. (53 Cal.4th at p. 695.) This Court determined that Fuiava's claim "in essence, raises a legal challenge to section 1103(b) . . . ." (*Ibid.*) And, as discussed above, this Court ruled that section 1103(b) was not unconstitutional. (*Id.* at p. 700.)

Although this Court in *People v. Fuiava* did not explicitly rule on the appropriateness of the language contained in the instruction given therein, it demonstrates that CALJIC 2.50 does not correctly instruct a jury on the proper use of section 1103(b) evidence. In *Fuiava*, the instruction did not single out the defendant, and it applied equally to the alleged victim. (See 53 Cal.4th at pp. 694-695.) However, as explained herein, the instructions in this case permitted the jury to consider the other crimes evidence *only* as it related to appellant's character, but not Richmond's. Further, the instructions permitted the jury to consider the evidence for issues *in addition to* character.

First, the modified version of CALJIC 2.50 given here was completely one-sided against appellant. As set forth above, in upholding section 1103(b) this Court has emphasized the importance of giving the jury a balanced view of both the defendant and the alleged victim. (*People v. Fuiava, supra*, 53 Cal.4th at p. 698.) Here, that balance did not exist. CALJIC 2.50 spoke only to appellant's commission of other crimes. The

jury was not instructed that it could consider evidence of Richmond's violent character to conclude that he acted in conformity with such character on the night of April 8, 1996, in order to find reasonable doubt that appellant was guilty of the charged crimes. Pursuant to the erroneous instruction in the instant case, the jury could use the section 1103(b) evidence only to find appellant's guilt, not his innocence.

Second, CALJIC 2.50 as modified permitted the jury to consider the other crimes evidence as relevant not only to appellant's character but also his intent and knowledge. This standard instruction is designed to instruct on evidence adduced pursuant to Evidence Code section 1101, subdivision (b), that is other crimes evidence which has been admitted for a specific purpose *other* than the defendant's character. (See *People v. Swearington* (1977) 71 Cal.App.3d 935, 946-947.) The pattern instruction then contains a list of issues to which the other crimes evidence may be relevant, including characteristic method, plan or scheme, intent, identity, motive and knowledge. (*Id.* at p. 947.) When instructing pursuant to 2.50, "the trial court should be careful to limit the issues upon which such evidence is relevant and admissible by striking from the instruction those issues upon which the evidence is not admissible." (*Id.* at p. 949.)

CALJIC 2.50 as modified herein instructed the jury that it could consider evidence of appellant's other crimes as relevant to his intent in stabbing Richmond, as well as his knowledge. (46 RT 12846.) This was error because the evidence of appellant's prison misconduct was not admitted under section 1101 or specifically for these issues. (See, e.g., 59 RT 7644, 7651, 7660 [trial court indicates evidence is admitted pursuant to section 1103(b)].)

Adding to the prejudice, the instruction also did not preclude the jury

from considering the other crimes evidence as to appellant's character. CALJIC 2.50 includes a cautionary paragraph which warns the jury that other crimes evidence may not be considered to prove that the defendant is a person of bad character or has a disposition to commit crimes. (*People v. Swearington*, *supra*, 71 Cal.App.3d at p. 947; CALJIC 2.50.) This paragraph was removed in appellant's case, since the other crimes evidence was introduced to prove his violent character.

In addition, 2.50 told appellant's jurors that consideration of the other crimes evidence was limited to the issues of his intent and knowledge, *except as they were otherwise instructed.* (46 CT 12846; see also, CALJIC 2.09.) When the other crimes evidence was elicited during appellant's cross-examination, the jury was instructed by the trial court that it was relevant to whether appellant had a character for violence. (59 RT 7650.) Thus, the jury was able to consider the evidence of appellant's violent acts as relevant to his character, as well as to his intent and knowledge. In sum, the instruction gave appellant the worst of both worlds.

3. The Court Also Erred in Failing to Give CALJIC 2.50.1 and the Requested Defense Special Instruction.

Although the trial court defined the preponderance standard, it failed to give CALJIC 2.50.1, which states that the prosecution bears the burden of proving the other crimes evidence. Significantly, 2.50.1 also reminds the jury that a defendant's guilt of the *charged* crime must be proven beyond a reasonable doubt, thereby differentiating it from the preponderance standard applicable to the other crimes evidence. A special instruction requested by appellant would have remedied some of prejudice caused by the absence of 2.50.1, but the trial court neglected to give it.

As set forth above, the prosecutor informed the trial court that if it

instructed pursuant to CALJIC 2.50, it also needed to give 2.50.1 and 2.50.2. The court seemed to agree. (61 RT 7883-7884.) Judge Zimmerman did give 2.50.2, but did not give 2.50.1. As a result, "preponderance of the evidence" was defined for the jury but it was not told, at least in the written instructions, what that evidentiary standard was relevant to. To confuse matters further, the definition of "preponderance" was not given immediately after 2.50, but instead after twelve other instructions had been given. (See 46 CT 12846 [2.50], 12859 [2.50.2].) Thus, the written instructions left the jury clueless as to how the preponderance standard applied. (See, e.g., *People v. Carrasco* (1981) 118 Cal.App.3d 936, 943 [court recognizes that "the sequence of instructions can, in some instances, result in confusion"].)

While reading CALJIC 2.50.2 aloud, Judge Zimmerman apparently realized that the charge was lacking, as he added: "And I don't want to confuse you with this too much. But the main burden here is beyond a reasonable doubt, not preponderance. There's one issue that has to be proved by a preponderance. And at this moment it escapes me." (69 RT 8716.) After defense counsel interjected, "Other crimes," the trial court stated:

> The other crimes that were alleged that you heard about that these people may have committed. Those only have to be proved by a preponderance, which is the definition used in civil cases. More likely than not. 51/49 is a preponderance. [¶] The issue of guilt here and the finding of special circumstances is governed by the reasonable doubt standard, not by – beyond a reasonable doubt standard, not by preponderance of the evidence.

(69 RT 8716.) The judge then continued reading the remainder of the instructions.

The untethered preponderance instruction was inadequate. The court's oral instructions partially addressed the absence of 2.50.1, by at least linking the preponderance standard to the other crimes evidence. But it is unlikely that after hearing Judge Zimmerman read so many instructions the jurors would have been able to recall this brief and isolated deviation from the written instructions. (See *People v. Carrasco*, *supra*, 118 Cal.App.3d at p. 944 [instructions would have tried "the reasoning ability and memory of the most intelligent juror"].) In any event, the judge's verbal addendum failed to inform the jury that it was the *People* who bore the burden of proving that appellant had committed the other violent crimes. (See CALJIC 2.50.1.)

Moreover, the jury did not hear the critical last paragraph of 2.50.1, which highlights the difference between the preponderance and reasonable doubt standards. The paragraph states: "If you find other crimes were committed by a preponderance of the evidence, you are nevertheless cautioned and reminded that before a defendant can be found guilty of any crime charged . . . in this trial, the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime." (CALJIC 2.50.1.) In sum, without CALJIC 2.50.1, the jury may well have been confused about how it was to use the preponderance standard and how it related to the reasonable doubt standard.

The court also erred when it failed to give appellant's special instruction on the other crimes evidence. It was not cumulative to the instructions given. In fact, the proposed instruction would have mitigated some of the damage done from failing to give 2.50.1, as it at least told the

jury that other crimes evidence was insufficient to sustain a conviction of the charged offenses. (See, e.g., *People v. Reliford* (2003) 29 Cal.4th 1007, 1014 [jury properly told that evidence of uncharged sex offense admitted pursuant to Evidence Code section 1108 was "not sufficient by itself to prove beyond a reasonable doubt that [defendant] committed the charged crime."].)[115]

Finally, these instructional errors, particularly when considered in conjunction with the many other erroneous instructions given in this case, rendered the jury charge as a whole so defective that it deprived appellant of his constitutional right to due process. (See Arg. X.J., *post*.)

G. The Errors Were Not Harmless.

Because the erroneous admission of the section 1103(b) evidence and the related instructional errors violated appellant's federal constitutional rights, the state must demonstrate that they were harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) "Under this test, the appropriate inquiry is 'not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.'" (*People v. Quartermain* (1997) 16 Cal.4th 600, 621, quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

As appellant demonstrates, the People cannot show that the guilty verdict in *this* trial was surely unattributable to the errors committed here. Moreover, even if this Court determines that only state law was violated, it

---

115

Because of the inadequate record on appeal, appellant is unable to say whether the trial court also erred in failing to instruct on the other instruction(s) he proposed on the section 1103(b) issue.

is reasonably probable that a result more favorable to appellant would have been reached in absence of these errors. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

First, this was a close case. The length of the jury deliberations, which lasted 14-15 hours over four days,[116] tells us as much. (*People v. Cardenas* (1982) 31 Cal.3d 897, 907 [deliberations of 12 hours present "a graphic demonstration of the closeness of this case"]; *People v. Rucker* (1980) 26 Cal.3d 368, 391 [deliberations of nine hours underscore fact that defendant's criminal liability was not clear-cut]; *People v. Anderson* (1978) 20 Cal.3d 647, 651 [several days of deliberations suggest a close case]; see also, *Thomas v. Chappell* (9th Cir. 2012) 678 F.3d 1086, 1103, and cases cited therein.)

The jury's questions and requests for testimony readbacks were also significant. "Juror questions and requests to have testimony reread are indications the deliberations were close." (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295, and cases cited therein; see also, *People v. Day* (1992) 2 Cal.App.4th 405, 420, overruled on other grounds by *People v. Humphrey* (1996) 13 Cal.4th 1073; *Thomas v. Chappell*, *supra*, 678 F.3d at p. 1103, and cases cited therein.) In the instant case, the jury asked to rehear the testimony of appellant, inmate Vargas and investigator Capeci. It also asked to review the video of cell 146, and inquired about the letter found in the contraband watch cell.[117]

116

See 46 CT 12918 [Jan. 9, 2004], 46 CT 12922 [Jan. 12], 46 CT 12926-12927 [Jan. 13], and 46 CT 12945 [Jan. 14].

117

See 46 CT 12921-12922 [re readback of appellant's testimony on Jan. 12]; 46 CT 1295-1296 [re viewing of video on Jan. 13]; and 46 CT 12924,

Together, the lengthy deliberations and inquiries by the jury demonstrate that appellant's guilt was far from a foregone conclusion. The main issue presented was whether appellant acted with the belief, either reasonable or unreasonable, that he needed to defend himself from his cellmate. If the jury had no doubts about his mens rea, it would have reached a verdict quickly, as there was little else to resolve. The particular testimony and real evidence requested suggest that the jurors may have been scrutinizing the evidence relating to whether Richmond had a knife with especial closeness.

Second, the credibility of appellant vis-a-vis that of the inmates who testified against him was critical to the jury's determination of the mental state issue. An error is more likely to be prejudicial when the guilt or innocence of the defendant is largely dependent on the credibility of the defense witnesses as compared to those of the state. (See, e.g., *People v. Quartermain*, *supra*, 16 Cal.4th at p. 621 [jury's assessment of defendant's credibility was "crucial" where only direct evidence of his guilt came from a prosecution witness whose version of events was contradicted by defendant]; *In re Martin* (1987) 44 Cal.3d 1, 52 [verdict plainly turned on whether or not testimony of actual killer, who testified he was acting as defendant's agent, was believed]; *People v. Anderson*, *supra*, 20 Cal.3d at p. 651 ["record reveals a close and difficult credibility determination"]; *People v. Allen* (1978) 77 Cal.App.3d 924, 935 ["An examination of the record reveals an extremely close case in which the jury had to make its fact determination based upon the credibility of the [defendant] and his witnesses and of the credibility of the prosecution's witnesses."]; *People v.*

12926-12927 [re readback of Vargas and Capeci testimony on Jan. 13].

Wagner (1975) 13 Cal.3d 612, 621 ["resolution of defendant's guilt or innocence turned on his credibility *vis-a-vis* that of the prosecution witnesses"].)

Third, appellant's credibility, which was crucial to his defense, was severely undermined by the errors committed here. Evidence that appellant had possessed a variety of weapons on eleven separate occasions and had assaulted four fellow inmates with them undoubtedly affected the jury's consideration of his veracity when he testified that he believed he was in imminent danger when he stabbed Richmond. (See, e.g., *People v. Quartermain*, *supra*, 16 Cal.4th at pp. 621-623 [not clear beyond a reasonable doubt that erroneous admission of defendant's out-of-court statement was harmless where it undermined his credibility and therefore "struck at the heart of his defense"]; *People v. Rucker*, *supra*, 26 Cal.3d at p. 391 [erroneous admission of defendant's out-of-court statements was prejudicial where they intimated he had fabricated his defense of diminished capacity]; *People v. Anderson*, *supra*, 20 Cal.3d at p. 651 [reasonably probable that jury would have believed defendants' version of events but for error in admitting evidence of co-defendant's prior arrests]; *People v. Wagner*, *supra*, 13 Cal.3d at p. 621 [miscarriage of justice where prosecutor's improper questioning of defendant impaired his credibility and "present[ed] him to the jury as a person of criminal tendencies"]; *People v. Allen*, *supra*, 77 Cal.App.3d at p. 936 [reasonably probable that more favorable result would have been reached but for erroneous admission of defendant's parole status, where jury's fact determination was based on his credibility].)

The violent character evidence erroneously admitted in this case was particularly damaging, as its prejudicial nature went beyond undermining

appellant's credibility. Four of the incidents involved assault with a deadly weapon, the same type of crime appellant was charged with in this case. Many very prejudicial details were elicited from appellant, including that he stabbed a man reading a Bible, that he managed to remove waist chains, that he could hide weapons in the walls of his cell, that he routinely hid weapons in his anal cavity, and that he could not even specifically recall all of the assaults and weapons violations he had committed. Finally, appellant continued this behavior until shortly before his capital trial began; four of the eleven incidents, including one assault, occurred *after* Richmond was killed. This inflammatory evidence may have convinced the jury that appellant needed to be found guilty and punished, notwithstanding what happened in cell 146.

Fourth, the prosecutor used the erroneously admitted evidence to the People's advantage. (See, e.g., *People v. Quartermain*, *supra*, 16 Cal.4th at p. 622 ["A major theme of the prosecution's guilt phase closing argument to the jury was that defendant was a chronic liar whose testimony was completely untrustworthy"].) After telling the jury that Richmond had committed no misconduct before he arrived in Calipatria's Ad Seg, the prosecutor stated that appellant "other the other hand, can't stop getting into trouble." (69 RT 8761.) He continued this theme:

> Both before and all the way up to July of last year, he has committed crimes. He has possessed weapons. He has manufactured weapons. He has cut metal – steel metal out of desks in cells both before and after April the 9th of 1996 when Tommy [Richmond] died. You know this for a fact because again, Mr. Barrett's "C" file information was brought to your attention from this witness stand.

(69 RT 8761.)

Later, while suggesting that appellant was dangerous and devious, the prosecutor turned to one of the erroneously admitted assaults. He said:

> When [appellant] walked up to him, sitting on a bench, reading a Bible . . . [¶] Well, there was evidence that the defendant did stab an individual in the back a number of times while he was sitting on the bench, reading a Bible, scriptures. He said he was a child abuser in his opinion or he thought he was. But we didn't hear any evidence of that but through the defendant . . . .

(69 RT 8767.)[118]

The prosecutor's argument highlighting appellant's dangerousness, supported by the section 1103(b) evidence, further compels a finding that the errors were not harmless.

In fact, the prosecutor had the best of both worlds. While emphasizing appellant's other violent acts, which appellant had readily admitted, he was able to minimize Richmond's misconduct. Appellant had only touched on the topic to demonstrate his own state of mind; he did not present any independent evidence of Richmond's misconduct because it was not relevant to his mens rea. As a result, the prosecutor was able to argue that the evidence failed to establish that Richmond, who he said should be presumed innocent, had actually committed acts of violence.

118

The trial court sustained a defense objection that this argument violated CALJIC 2.50, noting that the evidence had been admitted for a "limited purpose." The court did not, however, indicate what that purpose was. And, the objection did not stop the prosecutor from continuing in this argument. (69 RT 8767.)

(See 69 RT 8763-8764.)[119]

In summary, this was a close case in which resolution of the key issue – appellant's mental state – was dependent upon his credibility. The prosecution evidence was not strong. In fact, the case-in-chief was so weak it failed to establish that appellant was guilty of a capital crime. (See Arg. VI., *post.*) Although the deputy district attorney managed to supplement this weak showing in his rebuttal case with evidence from three inmate informants, their testimony was contradictory and their veracity highly questionable. (See Arg. VIII., *post.*)

In contrast, the defense case was compelling. Appellant's testimony was supported by evidence that two other inmates saw a weapon going into the cell for Richmond that night. (63 RT 7956-7957, 7973-7974 [Poore]; 66 RT 8493, 8497 [Vargas].) Poore also testified that Richmond had previously asked him for a knife, disclosing his intention to assault appellant. (63 RT 63 RT 7950-7955.) The defense case was further supported by the expert forensic testimony of Lisa DiMeo, who analyzed the physical evidence and opined that Richmond had a weapon during the fatal struggle. (See, e.g., *Hurd v. Terhune* (9th Cir. 2010) 619 F.3d 1080, 1091 [prosecutor's improper comment on defendant's post-*Miranda* silence not harmless were evidence of his guilt consisted entirely of testimonial evidence and expert testimony indicated that the physical evidence was not inconsistent with defendant's version of events].)

The defense was also buttressed by evidence which tended to show

---

119

See also, Argument IX.B.2., *post* (prosecutor misstated the record when he argued that none of Richmond's 115's had been adjudicated before his death).

that inmate Michael Hill may have been the person who sent down the knife to Richmond and ordered him to assault appellant. Hill had the means, as he was housed right above cell 146. (63 RT 8047-8048.) He also had a motive. Hill was out of favor with other white inmates including appellant for several reasons, and may have decided to send a message by engineering an assault.[120] Richmond may have been receptive to Hill's plan for various reasons. As prison staff explained, younger inmates sometimes sought to make a name for themselves. (48 RT 5766.) They could gain "respect" by assaulting other inmates. (48 RT 5777, 5737.) Alternatively, they could get out of trouble by putting in "work," which could include carrying out orders to commit assault. (63 RT 7965.)

In conclusion, it cannot be said that the guilty verdict rendered in this trial was surely unattributable to the improper admission of appellant's testimony that he had repeatedly possessed weapons and assaulted inmates with them, and the erroneous instructions which permitted the jury to use it against him for virtually any purpose. It is also reasonably probable that a more favorable result would have been reached in absence of these errors. (See, e.g., *In re Martin*, *supra*, 44 Cal.3d at p. 51 [finding error under both *Chapman* and *Watson* standard]; *People v. Rucker*, *supra*, 26 Cal.3d at p.

120

Hill was suspected by other white inmates of having giving up information. (63 RT 7967; 64 RT 8284.) He may have also been viewed unfavorably as a result of his position in the rift between white and Hispanic inmates. (See, e.g., 63 RT 8064-8075, 8083-8085.) In fact, immediately after Richmond's death he offered to give a statement against appellant, in hopes of getting him the death penalty, and in exchange for being moved into protective custody. Hill later told authorities he did not want to talk to them unless granted immunity, suggesting he believed he was vulnerable to prosecution. (See Stmt. of Facts, A.3.a.ii., *ante*.)

391 [finding prejudice under *Watson* standard].) Accordingly, appellant's convictions and sentence must be reversed.

//

//

V.
THE TRIAL COURT ERRED WHEN IT REFUSED TO STRIKE TESTIMONY THAT RICHMOND TURNED IN WEAPONS AND THE DEFENSE TESTIMONY RESPONSIVE TO THAT EVIDENCE

As fully explained *post*, the state's theory of motive was dependent upon establishing that appellant knew Richmond was an informant. In it's case-in-chief, the state presented testimony indicating that Richmond had given up weapons, but did not establish that appellant knew he had done so. (See Arg. VI.C.1.b.) Because the prosecutor failed to prove this critical foundational fact, testimony from correctional officers concerning the relinquished weapons had no relevance to the charges against appellant. He therefore twice moved to strike the testimony, and that which flowed from its erroneous admission. As set forth below, the trial court erred in failing to grant these motions to strike, depriving appellant of his statutory and federal constitutional rights.

A. Appellant's Motions to Strike.

To establish that Richmond had turned in the weapons and identified the inmate who owned them, the state presented testimony from correctional staff Longcor and Borem. (See Stmt. of Facts, A.1.a., *ante*.) The prosecutor attempted to present a letter allegedly written by inmate Barnard, which it asserted established that appellant knew what Richmond had done. The trial court ruled that the letter, whose authenticity was disputed by the defense, was inadmissible since the prosecution could not show that appellant had ever seen it. (See Arg. VI.C.1.b., *post*.)

In the defense case, appellant testified about his knowledge of certain misconduct by Richmond in Ad Seg. This evidence was offered not to show that Richmond was of violent character but to disprove the

prosecution's theory of motive. It tended to establish that appellant had reason to believe Richmond was not the kind of inmate who cooperated with prison authorities but was loyal to white inmates, or a "good wood." Thus, appellant had reason to trust him rather than believe he was an informant. (See Arg. IV.B.3-4., *ante*.)

As fully explained in the preceding argument, the trial court ruled over defense objection that appellant's testimony about Richmond's prison misconduct opened the door to evidence of appellant's violent character, pursuant to Evidence Code section 1103(b). (See Arg. IV., *ante*.) While litigating the application of section 1103, defense counsel moved to strike the evidence that Richmond had given up weapons, arguing it was irrelevant because the prosecutor had not established that appellant had knowledge of Richmond's conduct. The trial court refused to strike it, however. (59 RT 7642-7643.) The prosecutor was permitted to cross-examine appellant about numerous instances of weapons possession and assaults on other inmates. (See Arg. IV.B.9., *ante*.)

After the defense case was presented, trial counsel renewed the motion to strike the testimony of officers Longcor and Borem that Richmond had given up weapons. Appellant's attorney explained that the testimony was irrelevant since the prosecution had failed to adduce any competent evidence that appellant knew of Richmond's actions. Counsel further asserted that if the evidence was stricken, then appellant's testimony about Richmond's Ad Seg misconduct, which had only been offered to rebut the prosecution's motive evidence, was also irrelevant, as was the testimony about appellant's acts of violence. (63 RT 7980-7981.)

The trial court declined to rule, however, stating: "Well, that motion might be premature. You know, all the evidence isn't in, apparently.

Maybe it is, but there's more witnesses. So I have to assume there's more evidence." (63 RT 7981.) Trial counsel emphasized that only rebuttal witnesses remained, but the court nonetheless deferred a ruling. (63 RT 7981.)

B. Where the Relevance of Evidence Depends on the Existence of a Preliminary Fact, There Must Be Sufficient Evidence of That Fact.

Only relevant evidence is admissible. (Evid. Code, § 350; *People v. Lucas* (1995) 12 Cal.4th 415, 466.) The relevance of evidence may be dependent upon the existence of a preliminary fact. (Evid. Code, § 400; *People v. Herrera* (2000) 83 Cal.App.4th 46, 60.) Under Evidence Code section 403, it is the obligation of the party seeking to introduce such evidence to establish the requisite preliminary facts.[121] If the proponent fails to produce sufficient evidence to sustain a finding of the preliminary fact, the evidence dependent upon it is inadmissible. (*People v. Bacon* (2010) 50 Cal.4th 1082, 1102-1103.) The trial court should exclude the proffered evidence if "the 'showing of preliminary facts is too weak to support a favorable determination by the jury.' [Citation.]" (*People v. Lucas*, *supra*, 12 Cal.4th at p. 466.) If the proponent of the proffered evidence is unable to establish the requisite foundational fact after it has been presented to the jury, the trial court must instruct the jury to disregard

---

121

Section 403 states, in part: "(a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: [¶] (1) The relevance of the proffered evidence depends on the existence of the preliminary fact; . . . ." (Evid. Code, § 403, subd. (a)(1).)

it. (Evid. Code, § 403, subd. (c)(2); see also, *People v. Lucas*, *supra*, 12 Cal.4th at pp. 467-468.)[122]

An appellate court reviews the trial court's decision as to whether the foundational evidence was sufficient for abuse of discretion. (*People v. Tafoya* (2007) 42 Cal.4th 147, 165; *People v. Lucas*, *supra*, 12 Cal.4th at p. 466.)

C. Evidence That Richmond Gave Up Weapons Was Inadmissible Because the Prosecution Failed to Establish That Appellant Had Knowledge of This Fact.

In the instant case, evidence that Richmond had voluntarily handed over two knives hidden in his mattress to prison staff was only relevant if the prosecution could establish the preliminary fact that appellant knew he had done so. The trial court's ruling on the Barnard letter was a recognition of this. When the prosecutor failed to adduce competent evidence of this preliminary fact, the testimony of Longcor and Borem concerning the weapons was no longer relevant and therefore should have been stricken.

Appellant's case bears a similarity to *People v. Lucas*, *supra*. Therein, the prosecutor sought to prove the defendant's guilty knowledge of the charged homicide by establishing that he had arranged to have his car moved and cleaned of blood evidence before police could inspect it. On cross-examination, the prosecutor was permitted to elicit testimony from defendant Lucas that his car had been moved and cleaned after the victim's death. Lucas denied, however, that he was responsible for the car's

---

122

Section 403, subdivision (c) states: "If the court admits the proffered evidence under this section, the court . . . (2) Shall instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists."

condition. This Court held that because the prosecution was unable to establish this foundational fact, the trial court should have instructed the jury to disregard the proffered evidence concerning the vehicle. (*Id.* at pp. 465-468.)

In *Lucas*, the Court reached this issue on the merits despite the defendant's failure to "move to strike the evidence of the condition of the car once the prosecutor failed to establish the preliminary fact through defendant's testimony." (12 Cal.4th at p. 467, fn. 10.) In the instant case, appellant *twice* moved to strike the evidence that Richmond had turned in weapons after the state failed to establish the foundational fact that appellant knew what had happened. The trial court erred in not granting the motions. (See, *People v. Lucas*, *supra*, 12 Cal.4th at pp. 465-468; see also, *People v. Tafoya*, *supra*, 42 Cal.4th at pp. 164- 166 [trial court properly excluded evidence of witness's reputation for being dangerous pursuant to section 403 where defense did not prove the preliminary fact that defendant knew of this reputation].)

Moreover, the trial court's belief that it did not need to rule on appellant's motion to strike until after the prosecutor had presented its rebuttal evidence was also erroneous. The court's decision as to whether to exclude proffered evidence, pursuant to section 403, must be assessed at the time the decision is made. (*People v. Rundle* (2008) 43 Cal.4th 76, 132.) As discussed more fully *post*, the prosecution may not withhold a material part of the evidence tending to establish a defendant's guilt in order to present it on rebuttal. (*People v. Carter* (1957) 48 Cal.2d 737, 753; see also, Arg. VII., *post*.) In this case, it was the prosecutor's burden to establish the preliminary fact of whether appellant knew that Richmond had given up knives. This material fact should have been adduced during the

state's case-in-chief, or in the defense case by an admission from appellant. (See, e.g., *People v. Lucas*, *supra*, 12 Cal.4th at p. 467 [prosecutor was unable to establish the foundational fact that Lucas was responsible for his car's condition through an admission from the defendant, but he was entitled to try].) The trial court therefore erred in refusing to rule on appellant's renewed motion to strike at the close of the defense case.

Because the trial court should have stricken the testimony of officers Longcor and Borem about receiving weapons from Richmond, it should have also stricken appellant's testimony concerning his cellmate's misconduct in Ad Seg. This testimony was offered in response to admission of the weapons evidence and was only relevant to whether appellant was motivated to kill Richmond because he knew that the latter was an informant. Without the officers' testimony, appellant's testimony on this point became irrelevant. So too did the evidence of violent character the prosecutor was permitted to elicit from appellant pursuant to Evidence Code section 1103, subdivision (b).[123]

The trial court's error also violated appellant's right to due process. A state court's evidentiary ruling violates a criminal defendant's federal constitutional right to due process if it deprives him of a fundamentally fair trial. *(Perry v. New Hampshire* (2012) 565 U.S. __, __; 132 S.Ct. 716, 723; *Estelle v. McGuire* (1991) 502 U.S. 62, 67.) Also, a trial court's failure to follow state statutory dictates may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by the state. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir.

123

Appellant has argued that the trial court erroneously applied section 1103(b). (See Arg. IV., *ante*.)

1993) 997 F.2d 1295, 1300.) In this case, the trial court's failure to rule on the motion to strike was arbitrary. The erroneous admission of the irrelevant evidence appellant sought to strike was highly prejudicial, as set forth below, and therefore deprived him of a fundamentally fair trial.

D. The Trial Court's Erroneous Rulings Were Prejudicial.

The errors described above were not harmless, under either the *Chapman* or *Watson* standards. This was a close case. The other crimes evidence was extremely prejudicial. (See Arg. IV.G., *ante*.)

It is reasonably probable that the jury would not have returned a verdict of first degree murder, special circumstance of lying in wait or Penal Code section 4500 if the motions to strike had been granted. Accordingly, appellant respectfully asks this Court to reverse his convictions and sentence of death.

//

//

VI.
THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO ACQUIT PURSUANT TO PENAL CODE SECTION 1118.1

After the prosecution presented its case-in-chief, appellant moved for a judgment of acquittal, asserting that the state had failed to present sufficient evidence to establish first degree murder and the lying-in-wait special circumstance. As demonstrated herein, the trial court's denial of the motion was erroneous. The People's scant evidence as to what occurred prior to Richmond's death failed to establish that the homicide was premeditated and deliberate, or that appellant committed it while lying in wait. The trial court's error violated California state law, as well as state and federal constitutional law.

A. The Defense Motion to Acquit.

The prosecution rested its guilt phase case-in-chief on December 15, 2003. (56 RT 7331.) After the trial court ruled on the admissibility of the state's exhibits, trial counsel indicated that the defense would be making a motion pursuant to Penal Code section 1118.1. (56 RT 7377.) The court agreed to put the matter over one day, so that counsel could prepare. (56 RT 7378.)

1. The Written Motion.

On December 16, appellant filed a written motion for acquittal, asserting that the evidence was insufficient to sustain, inter alia, a conviction of first degree murder and the lying-in-wait special circumstance. (45 CT 12664-12670.) The motion summarized the evidence presented in the prosecution's case-in-chief, which essentially established that Richmond was stabbed to death while he and appellant were locked in their cell. It was emphasized that the prosecution had

provided no eyewitness testimony, nor any forensic evidence reconstructing how the homicide occurred. (45 CT 12664-12665.)

Specifically to first degree murder, the defense argued that the prosecution had failed to present substantial evidence that the killing was a premeditated, willful, deliberate murder. Highlighting the lack of motive evidence, the motion stated:

> The theory of the prosecution that Richmond was killed because he was an informant cannot be sustained. Absolutely no evidence shows that Barrett had such information. The March 16, 1996 letter from Barnard was excluded. None of Richmond's paperwork was found at the scene. The only evidence concerning Richmond's giving up weapons or "snitching" was [the] testimony of officers of what Richmond told them on the "sly." [¶] Without the evidence of the so called motive, the record is naked concerning the question of what prompted the violence. Without identifiable evidence on which an inference of premeditation can be made, the motion must be granted.

(45 CT 12666.)

As to the lying-in-wait special circumstance, the defense asserted that the record failed to establish a substantial waiting period had occurred before the confrontation between appellant and Richmond, asserting: "To come to the conclusion that Barrett was lying in wait on the state of the record one would have to speculate." (45 CT 12667.)

2. The Hearing.

The trial court heard the acquittal motion that same day. (57 RT 7388-7392.) Defense counsel argued that the prosecution's evidence

established only an "eruption of violence that is unaccounted for," which was insufficient to prove premeditation. (57 RT 7388-7389.) As to the lying-in-wait special circumstance, appellant's attorneys again emphasized that the prosecution failed to prove what had occurred. (57 RT 7389-7390.)

The deputy district attorney asserted his evidence established that appellant and Richmond were on their bunks, either sleeping or resting, when second count was conducted. Thus, the jury could infer that appellant was lying in wait when he attacked Richmond. (57 RT 7391.)

The trial court agreed, stating: "Well, it certainly could be found to be lying in wait. It depends. If they accept that interpretation of the facts, they could find that he was lying in wait." (57 RT 7391.) The court went on to address the issue of premeditation, finding that it took substantial time to cut the weapon out of the desk. It concluded, "And the jury could, based on that, find that this murder was premeditated." (57 RT 7391.) The court denied the motion for acquittal. (See 57 RT 7392.)

As appellant demonstrates below, the trial court's ruling was erroneous.

B. Penal Code Section 1118.1.

Penal Code section 1118.1 permits a criminal defendant to move for acquittal when the prosecution has failed to meet its burden of proof in the case-in-chief. It states:

> In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to

sustain a conviction of such offense or offenses on appeal. If such a motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without first having reserved that right.

In *People v. Belton* (1979) 23 Cal.3d 516, this Court explained that section 1118 vindicates fundamental, due process rights accorded to the criminally accused.[124] "Two of the most basic premises of our criminal justice system [are] the presumption of innocence and the duty of the prosecution to prove guilt beyond a reasonable doubt . . . ." (23 Cal.3d at p. 520.) One of the greatest safeguards of these principles "'is the requirement that the prosecution must establish a prima facie case by its own evidence before the defendant may be put to his defense.' (*Cephus v. United States* (D.C. Cir. 1963) 324 F.2d 893, 895 []; see also *United States v. Sutton* (D.C. Cir. 1969) 426 F.2d 1202, 1210-1211.)" (23 Cal.3d at p. 520.)

The standard a trial court applies in ruling on a section 1118.1 motion is the same as that used by an appellate court in reviewing the sufficiency of the evidence to support a conviction. It is "'whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.' [Citation omitted]." (*People v. Stevens* (2008) 41 Cal.4th 182, 200; see also, *People v. Velazquez* (2011) 201 Cal.App.4th 219, 229.) The question is whether the record, when viewed in the light most favorable to the state, "contains evidence that is reasonable, credible, and of solid value,

---

124

Penal Code section 1118, which applies in a case tried by the court without a jury, is similar to section 1118.1.

from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Lewis* (2008) 43 Cal.4th 415, 507, internal quotation marks and citations omitted.) It is "functionally identical" to the standard under the Fourteenth Amendment's due process clause. (*Ibid.*) And it applies to special circumstance allegations. (*Ibid.*)

The sufficiency of the prosecution's evidence is tested at the point the defendant moves for a judgment of acquittal. (*People v. Stevens*, *supra*, 41 Cal.4th at p. 200.) Whether the state's evidence was sufficient at the time the motion was made is a question of law, which this Court must independently review on appeal. (*Ibid.*)

C. At the Close of the Prosecution's Case-In-Chief, the Evidence Was Insufficient to Support the Charges.

The prosecution's case-in-chief was severely lacking. Little if any evidence was presented as to what occurred in cell 146 in the hours before Thomas Richmond's death. There was no eyewitness and little forensic evidence to help the jury understand how events unfolded. The state's motive evidence came up significantly short. Ultimately, the case-in-chief established an unexplained homicide, but failed to demonstrate that appellant had premeditated and deliberated the killing or killed while lying in wait.

1. The Evidence Was Insufficient to Support the Charge of First Degree Murder.

There is a presumption that the unjustified killing of a human being constitutes murder of the second degree. To overcome that presumption and establish first degree murder, the prosecution must prove premeditation and deliberation. (*People v. Anderson* (1968) 70 Cal.2d 15, 25.) Premeditation and deliberation require more reflection than that involved in

the formation of a specific intent to kill. If that were not so, the legislative classification of murder into two degrees would be meaningless. (*Id.* at p. 26.) Accordingly, to establish premeditation and deliberation the state must show that the defendant's intent to kill was formed upon a pre-existing reflection and as a result of actual deliberation or forethought. It must be proven that "the slayer killed as a result of careful thought and weighing of considerations; as a deliberate judgment or plan; carried on cooly and steadily, especially according to a preconceived design." (*Ibid*, internal quotation marks, emphasis and citations omitted.)

Premeditation and deliberation may be established by circumstantial evidence, but it must be supported by "a *reasonable foundation* for an inference of premeditation and deliberation." (*People v. Anderson*, *supra*, 70 Cal.2d at p. 25, italics in original.) "A reasonable inference may not be based on suspicion, surmise, conjecture, or guess work. It must logically flow from other facts established in the action." (*People v. Velazquez*, *supra*, 201 Cal.App.4th at p. 231 [internal quotation marks and citation omitted].)

In *People v. Anderson*, this Court set out three categories of evidence properly used to sustain a finding of premeditation and deliberation: evidence of planning activity, motive, and the manner of killing. Since *Anderson* was decided, the Court has concluded that these categories of evidence "'are not exclusive, nor are they invariably determinative.' []" (*People v. Streeter* (2012) 54 Cal.4th 205, 242.) Rather, the *Anderson* factors should be used by an appellate court as a guide to assess whether "the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse." (*Ibid*, internal quotation marks and citations omitted.)

In this case, the prosecution's case-in-chief failed to present substantial evidence of planning activity, motive or manner of killing from which the jury could have reasonably inferred that appellant killed Richmond with premeditation and deliberation. Nor did the prosecution introduce any other relevant evidence, such as evidence to indicate appellant was the aggressor.

a. Planning Activity.

The most important prong of the *Anderson* guidelines is the evidence relating to planning activity. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1018.) *Anderson* describes such evidence as "facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing . . . ." (70 Cal.2d at p. 27, italics in original.)

In the instant case, there was virtually no evidence presented in the case-in-chief to establish what appellant did *prior* to Richmond's death. At best, the evidence indicated that both appellant and Richmond were lying on their respective bunks at about 2:15 a.m. on April 9, 1996, and that the stabbing had occurred by the time of third count, at about 4:45 a.m.[125] The state did not present any evidence tending to establish what had occurred during this two and a half hour period, however. Thus, nothing is known about how long appellant stayed on his bunk, whether he was asleep or awake at 2:15 a.m., or whether he engaged in any conduct directed toward, and intended to result in, Richmond's death during these hours.

In finding sufficient evidence of premeditation and deliberation, the

---

125

The defense case would later dispute this time frame and assert that Richmond died between the first and second count.

trial court relied upon an inference that it would have taken a substantial time to cut the weapon retrieved from the toilet out of the steel desk in cell 146. (57 RT 7391.) The prosecution's evidence did not, however, establish *who* made the instrument. The trial court's assumption that it was appellant, rather than Richmond or a joint effort, was based on conjecture.

Moreover, even if the case-in-chief reasonably supported an inference that appellant was involved in the manufacture of the weapon, it did not support a reasonable inference that he did so for the purpose of killing Richmond. The testimony from various witnesses called by the prosecution demonstrated that the manufacture and possession of weapons was exceedingly common in Calipatria.[126] Without more, it was not reasonable to presume that appellant made the knife with the intent to use it on his cellmate.

Significantly, appellant could not have kept the cutting of the desk a secret from Richmond. If the fabrication of the knife by itself could reasonably be viewed as activity directed toward, and intended to, result in Richmond's death, then Richmond would have alerted prison staff or taken some other action to thwart appellant's plans. In sum, the trial court's belief that cutting the desk constituted evidence of premeditation and

---

126

For example, CO Wright testified that weapons in prison were common, and he had seen them in all shapes and sizes. (54 RT 7122, 7114.) Plumber Tozer had seen a hundred different kinds of weapons manufactured by inmates. (53 RT 6917.) Technologist Pineda had taken hundreds of x-rays looking for secreted contraband; it was not unusual to find foreign objects inside an inmate's anal cavity. (54 RT 7090.) Sgt. Borem found it was commonplace for inmates to hide weapons. (48 RT 5799.) Michael Greene, who was one of more than 20 MTA's at Calipatria, had himself treated 40-50 inmates for stab wounds in his three years at the prison. (50 RT 6340-6341.)

deliberation was nothing more than speculation, in light of the evidence then presented.

The danger of such speculation is illustrated by this Court's analysis in *People v. Trevino* (1985) 39 Cal.3d 667, disapproved on another ground in *People v. Johnson* (1989) 47 Cal.3d 1194, 1220-1221. In *Trevino*, the Court found that the trial court erred in denying a motion for judgment of acquittal of the murder charge as to Rivas, one of the two defendants therein. The evidence against him consisted of equivocal eyewitness identification testimony, his fingerprint found in the victim's bedroom, and testimony that placed him together with the other defendant on the day of the crime. As to the fingerprint, the Court concluded the jury could only speculate as to when it was made:

> The fact that Rivas' thumbprint was found on one of the unopened dresser drawers . . . in the victim's bedroom is susceptible of various interpretations . . . . The expert witness could not determine the age of the print, hence there is no reason to presume the print was made on the day of the murder as opposed to some previous occasion. [Rivas had been a guest in (the victim's) home.] The evidence as to how or when the print came to be placed on the dresser is fraught with uncertainty, leaving the triers of fact to speculate as to how and when the print was made. This kind of guesswork as to the facts does not elevate speculation to the level of reasonable inference.

(39 Cal.3d at p. 696-697.)

Similarly in appellant's case, the jury could only speculate, in light of the evidence presented in the state's case-in-chief, that appellant had

manufactured a knife from the desk for the purpose of murdering Richmond.

b. Motive Evidence.

The second *Anderson* category is motive evidence. Although the prosecution need not prove a specific motive to establish first degree murder (see *People v. Halvorsen* (2007) 42 Cal.4th 379, 421), evidence that the defendant had a motive to kill the victim, in conjunction with either planning activity or a particular and exacting manner of killing, strongly supports a finding of premeditation and deliberation. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 27.) In this case, the prosecution failed to sufficiently establish that appellant had a reason to stab Richmond. Without such evidence, a finding of premeditation and deliberation could only have been based on guesswork.

The prosecutor made it abundantly clear that he intended to prove that appellant killed Richmond because he believed that the latter was a "snitch" who had given up weapons to prison staff. In a pretrial brief, the prosecutor stated: "The evidence will show that defendant Barrett decided to murder Mr. Richmond for voluntarily turning in two inmate manufactured weapons to a correctional officer." (4 CT 1026.) In this brief, the prosecutor devoted pages to detailing the evidence he believed would demonstrate appellant's motive for the killing. This would include evidence that Richmond had turned in weapons, that appellant had sent notes or "kites" to other inmates to inquire about his cellmate, and that appellant had received in response a kite from inmate Keith Barnard, telling him about Richmond's actions and giving appellant the "green light" to assault him. (4 CT 1017-1020.)

In fact, it was clear that this motive evidence was the heart of the

state's case. In his opening statement to the jury, the deputy district attorney focused almost exclusively on evidence which he asserted would establish a motive for the killing – that appellant had learned Richmond was an informant who had given up weapons and incriminated another inmate. (See 47 RT 5702-5707.) Accordingly, the state's first witnesses were called for the purpose of proving that Richmond had indeed given up two knives – a fact relevant only to appellant's purported motive for killing him.[127] The prosecution's own witness, however, acknowledged that Richmond gave up the weapons "on the sly." (48 RT 5825.) Without any evidence to prove that appellant knew of his cellmate's conduct, the state's theory of motive collapses. As set forth below, it did indeed collapse.

In an effort to prove that appellant knew Richmond had informed, the prosecutor sought to introduce into evidence the letter purportedly written by Barnard and dated March 16, 1996. The defense objected, contending that the letter did not come from appellant's cell and that the state could not produce the original. (53 RT 6832.)[128] Defense counsel also cited to a memo by Calipatria's assistant warden expressing doubt that appellant had received the letter. (53 RT 6834, see also, 53 RT 6851.)[129]

The trial court determined that the People would have to prove that the writing had been in appellant's cell or control at some point. It

---

127

See 48 RT 5715 [CO Longcor]; and 48 RT 5789 [Sgt. Borem].

128

The copy of the letter was marked as People's exhibit 338 and is sealed.

129

The memo, marked as defense exhibit 503, was not moved into evidence. (53 RT 6853, 55 RT 7199.) The trial court ordered it to be sealed, at defense request. Appellant has moved this Court to unseal it.

permitted the prosecutor to examine CO Swetich, who had been in charge of the investigation, out of the jury's presence. (53 RT 6835.) Swetich testified that he had seen the original March 16 letter in the evidence room, but did not know where it came from or what had happened to it. There was no report indicating it had been found in appellant's possession, or chain of custody documentation for it. (53 RT 6836-6839.)

In arguing that the letter was admissible, the deputy district attorney repeatedly asserted it was evidence of appellant's motive for killing Richmond. (53 RT 6851, 6852.) However, the trial court refused to admit the letter unless the prosecution could establish that appellant had actually received it. (53 RT 6852.)

The prosecutor sought to have Barnard testify, but the inmate refused. (55 RT 7192-7194.) He then called correctional officer Michael Fisher, who had investigated the origin of the March 16 letter, as well as that of one dated March 18.[130] The defense continued to strenuously dispute the authenticity of the March 16 document. Fisher, who was examined outside the jury's presence, opined that both letters had been written by Barnard. (55 RT 7207-7209.) Fisher "interpreted" the March 16 letter to say that appellant had inquired about his cellmate, and was told that Richmond had turned in two weapons because he wanted to get off C Yard, away from inmates to whom he owed money. According to Fisher, appellant was given permission to assault him. (55 RT 7212-7214, 7227, 7236-7237.)

Fisher received a copy of the March 16 letter from the prison

---

130

The March 18 letter said nothing about Richmond. (56 RT 7274-7275.) It was not, therefore, admitted into evidence. (56 RT 7341-7342 [exh. 214].)

investigations unit. (55 RT 7208.) He never saw the original, however. (55 RT 7226.) While he believed it had been found in appellant's property, Fisher admitted he could not say who told him that. (55 RT 7232.) In fact Fisher did not know whether appellant had received the March 16 letter. (55 RT 7231-7232.)

The prosecuting attorney eventually conceded he could not produce the original letter or prove whether appellant had received it. (53 RT 6833; 45 CT 12641.) The trial court expressed concern, emphasizing that the prison itself doubted that appellant had received it. (56 RT 7275-7276.) The court added: "And it showed up under such mysterious circumstances we don't know where the original is. This is just real strange." (56 RT 7276.) The prosecutor insisted that the letter demonstrated a motive for appellant to kill Richmond, irrespective of whether he had received it. (56 RT 7276.) However, the trial court ruled the letter inadmissible. (56 RT 7281.)

The intensity of litigation over the admissibility of the March 16 letter demonstrates the significance both parties attached to motive evidence in this case. Ultimately, the prosecution failed to present evidence in its case-in-chief to prove that appellant knew Richmond had informed or which established any other reason appellant would have killed him.

Without evidence of motive or planning activity, the trial court's denial of the motion for judgment of acquittal could only be supported by extremely strong evidence that the manner of killing evinced a preconceived design to kill. However, as set forth below, it did not.

c. Manner of Killing.

The third *Anderson* category includes "facts about the nature of the killing from which the jury could infer that the *manner* of killing was so

particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' . . . ." (*People v. Anderson, supra*, 70 Cal.2d at p. 27.) The brutality of a killing cannot in itself support a finding of premeditation and deliberation. "'If the evidence showed no more than the infliction of multiple acts of violence on the victim, it would not be sufficient to show that the killing was the result of careful thought and weighing of considerations.' [Citations omitted]." (*Id.* at pp. 24-25.) A brutal manner of killing, without more, "is as consistent with a sudden, random 'explosion' of violence as calculated murder." (*People v. Alcala* (1984) 36 Cal.3d 604, 626.) Similarly, "proof of a sudden killing in the course of an argument and struggle . . . would not prove a deliberate and premeditated murder." (*People v. Velasquez* (1980) 26 Cal.3d 425, 435, vacated on other grounds by *California v. Velasquez* (1980) 448 U.S. 903.)

In this case, the manner of killing evidence presented in the People's case-in-chief does not support a finding of premeditation and deliberation. The relevant evidence came from Dr. Swalwell, the medical examiner who conducted the autopsy, and CO Swetich. While their testimony supported the occurrence of a struggle and an explosion of violence, it did not tend to establish that appellant killed Richmond pursuant to preconceived design.

Dr. Swalwell testified that Richmond sustained twelve stab wounds, some scrapes and a few small cuts, including what might have been two defensive wounds to his hands. (51 RT RT 6531-6543.) The expert could not determine the sequence in which the wounds were inflicted, however. (51 RT 6533.) The injuries were consistent with a struggle having occurred before Richmond's death. The examiner could not say whether Richmond had been the aggressor or whether he had a weapon at the time. (52 RT 6680.) Dr. Swalwell had no way of determining what Richmond had been

doing before he was stabbed. (52 RT 6664-6665.) Nothing about his injuries would have prevented Richmond from moving prior to death. (52 RT 6669.) The doctor could not opine as to where in the cell Richmond was when his wounds were inflicted, nor could he draw any conclusions about the relative positions of the individuals involved. (52 RT 6647-6648, 6665.) He did, however, testify that the direction of the blood flow from the wounds indicated that Richmond was not supine when the injuries were inflicted. (51 RT 6409.)

The physical evidence presented in the case-in-chief did little to illuminate the circumstances of the stabbing. CO Swetich found blood on the lower bunk where Richmond's body was found and on the floor where his feet were. (52 RT 6754; exh. 205.) There was blood on the right cell wall and on the back wall. (53 RT 6806, 6830; exh. 205.) There was also blood underneath the desk and on the desk seat. (52 RT 6755; exh. 205.) He documented blood on the lower shelf and on items underneath it. (52 RT 6760, 6855-6856; exh. 205.) Richmond slept on the top bunk. (48 RT 5901.) But Swetich did not see any blood on the cell's upper left wall, upper bunk or ceiling. (53 RT 6829-6830.)

In sum, the location of Richmond's wounds and the blood evidence in the cell strongly indicated that Richmond was not stationary when his injuries were inflicted and that he was not lying on his bunk at the time. In short, this evidence suggests an "explosion of violence" during a struggle, but does not support an inference that Richmond's death resulted from careful thought and deliberation. (See, e.g., *People v. Anderson*, *supra*, 70 Cal.2d at pp. 21-22, 33 [where victim sustained over 60 stab wounds, both severe and superficial, the manner of killing evidence pointed to a violent, brutal attack but did support a finding of premeditation and deliberation].)

2. The Evidence Was Insufficient to Support the Lying-In-Wait Special Circumstance Allegation.

The prosecution alleged that appellant killed Thomas Richmond while lying in wait, within the meaning of Penal Code section 190.2, former subdivision (a)(15). (1 ACT 6.)[131] The jury found this allegation to be true. (46 CT 12931.)

This Court has construed the lying-in-wait special circumstance set forth by former subdivision (a)(15) to require proof of an intentional killing, committed while each of the following three circumstances is present:

> (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage . . . .

(*People v. Morales* (1989) 48 Cal.3d 527, 557.) In appellant's case, the evidence presented by the prosecutor in the case-in-chief was insufficient to support *any* of these three elements.

First, the evidence was insufficient to establish concealment. This Court has determined that a defendant need not be physically hidden to be lying in wait. It is sufficient if his purpose is concealed by his actions or conduct. (*People v. Streeter*, *supra*, 54 Cal.4th at p. 247.) Of course, appellant's actual presence in the cell was not concealed from Richmond on April 9, 1996. Moreover, there was insufficient evidence presented in the

---

131

At the time of Richmond's death, subdivision (a)(15) applied to a murder committed *while* lying in wait. In 2000, the language of subdivision (a)(15) was changed by ballot initiative, to apply to a murder committed *by means of* lying in wait. *(People v. Lewis* (2008) 43 Cal.4th 415, 511-512, fn. 25.) Because Richmond was killed prior to this change in the law, it does not apply to appellant's case. (See, *id.* at p. 512, fn. 25; see also, 57 RT 7389.)

case-in-chief to show that appellant concealed his purpose from Richmond. As previously stated, the jury did not know what appellant did after he was observed on his bunk and before Richmond was stabbed, or whether the two engaged in any conversation. Thus, a rational trier of fact could not conclude beyond a reasonable doubt that appellant's words or actions concealed his purpose.

Second, the evidence was insufficient to establish a substantial period of watchful waiting. As construed by this Court, "watchful" does not require actual watching. A defendant who is "'alert and vigilant' in anticipation of the victim's arrival to take him or her by surprise" may suffice. (*People v. Streeter*, *supra*, 54 Cal.4th at p. 247.) To conclude that appellant lay on his bunk alert and vigilant in order to take Richmond by surprise is mere surmise.

Appellant's case is similar to *People v. Lewis*, *supra*, in which the Court found that the evidence did not support a finding of watchful waiting prior to the killing of victim Avina. (43 Cal.4th at pp. 507-509.) In *Lewis*, the defendant was riding with Huber, who was his codefendant and girlfriend, in her car. They were following their companions, Colbert and Lane, in Lane's car. Lane's car bumped Avina's truck. When Avina stopped, defendant Lewis got out of Huber's car and confronted him. Lewis shot Avina and took his truck. (*Id.* at p. 433.) Evidence admissible against Lewis consisted of eyewitness accounts of what occurred *after* Avina was shot, Lewis's statements, evidence that Lewis was found with Avina's possessions and the physical evidence of the manner of killing. (*Id.* at p. 508.) Codefendant Huber's statement admitting they had followed Avina for a substantial time and intentionally ran into his truck in order to execute a plan to steal a vehicle was admitted against her only. (*Id.* at pp.

508-509.)

In reversing the special circumstance allegation, the Court found that the evidence against Lewis "showed at most that Lane's car collided with Avina's truck, that defendant decided to take the truck, and that defendant approached Avina and shot him in order to take the truck." (43 Cal.4th at p. 508.) Although the Court determined that there were facts to support the watching and waiting element if considered in conjunction *with* Huber's statement, it concluded that "no inference of watchful waiting arises from these facts without codefendant Huber's statement to supply meaning to them." (*Id.* at p. 509.) In sum, it found that there was no direct evidence admissible against Lewis to establish what had occurred before the collision. (*Id.* at p. 508.)

In appellant's case, the case-in-chief failed to establish what had occurred in the hours between second count and Richmond's death. To assume that there was a substantial period of watching and waiting would be mere guess work. Even if it is assumed for the sake argument that the prosecution's rebuttal evidence supplied adequate meaning to the facts adduced in the case-in-chief to support a finding of watchful waiting, that evidence could not properly be considered by the trial court when the section 1118.1 motion was made. For the same reason, the evidence failed to sufficiently establish that appellant launched a surprise attack on Richmond immediately after watchful waiting, if such waiting even occurred.

Finally, this Court has indicated that committing a murder *while* lying in wait requires a continuous flow of events following the concealment, watchful waiting and surprise attack. In *Lewis*, *supra*, the Court quoted the CALJIC instruction defining this element:

"for a killing to be perpetrated while lying in wait, both the concealment and watchful waiting as well as the killing must occur during the same time period, or in an uninterrupted attack commencing no later than the moment concealment ends. [¶] If there is a clear interruption separating the period of lying in wait from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the uninterrupted lethal events, the special circumstance is not proved."

(43 Cal.4th at p. 512, quoting CALJIC No. 8.81.15 (1989 rev.).)

In appellant's case, even if it assumed arguendo that there was concealment, watchful waiting, and a surprise attack, the evidence did not prove that the flow of events in cell 146 was uninterrupted. Again, *People v. Lewis* is instructive. Therein, three victims were kidnapped in separate incidents. Each was killed after having been driven around for one to three hours, while Lewis and his cohorts withdrew money from his or her bank account. (43 Cal.4th at p. 514.) This Court reversed the lying-in-wait special circumstances attached to all three murders, finding that the record did not show the victims were killed in the course of lying in wait. It stated:

In sum, in each of the cases at issue here, there was a period of watchful waiting culminating in surprise kidnapping, a series of nonlethal events, and then a cold, calculated, inevitable, and unsurprising dispatch of each victim. We have never held the lying-in-wait special circumstance to have been established on similar facts. Were we to hold that sufficient evidence supports the lying-in-wait special-circumstance allegations the jury found true here, it would be difficult to

> say that there is any distinction between a murder committed "by means of" lying in wait and a murder committed "while" lying in wait. Such a construction of the lying-in-wait special circumstance would read the word "while" out of the statute. Although we do not "minimize the heinousness of defendant's deeds" [citation], we are compelled to conclude that on these facts "the circumstances calling for the ultimate penalty [on the basis of lying in wait] do not exist." [Citation.]

(*People v. Lewis*, *supra*, 43 Cal.4th at p. 515.)

In the instant case, the prosecutor failed to present enough evidence from which a rational trier of fact could find, beyond a reasonable doubt, that Richmond's killing was preceded by a continuous flow of lethal events that began with concealment of purpose, included a substantial period of watching and waiting, and culminated with a surprise attack. To find otherwise on the limited evidentiary record before the trial court at the time appellant moved for acquittal would read the "while" out of subdivision (a)(15).

The deputy district attorney argued that the jury could infer appellant was lying in wait for Richmond from testimony by correctional officers that both were on their bunks at second count, and appeared to be either resting or sleeping. (57 RT 7391.) However, the lacuna of evidence regarding the hours between the count and the discovery of Richmond's body does not *reasonably* support such an inference. (See, e.g., *People v. Carter* (2005) 36 Cal.4th 1215, 1261-1262 [evidence of forced entry into victim's home did not support an inference that defendant arrived there first and waited for her; evidence that a car was idling near the home does not support an inference that defendant was waiting therein to attack the victim].)

This Court has recognized that "The question whether a lying-in-wait murder has occurred is often a difficult one which must be made on a case-by-case basis, scrutinizing all of the surrounding circumstances." (*People v. Morales*, *supra*, 48 Cal.3d at pp. 557-558.) In appellant's case, there were few circumstances to scrutinize. While one might infer that appellant killed Richmond while lying in wait, such an inference does not logically flow from the record evidence, and would be based on mere speculation and conjecture. (See *People v. Velazquez*, *supra*, 201 Cal.App.4th at p. 231.)

D. The Trial Court's Error Violated Appellant's Federal Constitutional Rights.

The trial court's error violated appellant's federal constitutional rights under the Sixth and Fourteenth Amendments, as well the state constitutional analogs.

The Due Process Clause of the Fourteenth Amendment protects a criminal defendant against conviction "'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" (*Jackson v. Virginia* (1979) 443 U.S. 307, 315, quoting *In re Winship* (1970) 397 U.S. 358, 364.) The application of this standard to the evidence is not, however, "irretrievably committed to jury discretion." (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 317, fn. 10.) This right is also ensured by "the settled practice of testing evidentiary sufficiency through a motion for judgment of acquittal and a postverdict appeal from the denial of such a motion." (*Ibid.*)

In fact, in *Jackson* the Supreme Court recognized that a motion for judgment of acquittal vindicates several fundamental constitutional rights when it stated: "A meaningful opportunity to defend, if not the right to a trial itself, presumes . . . that a total want of evidence to support a charge

will conclude the case in favor of the accused." (443 U.S. at p. 314; see also, U.S. Const., 6th & 14th Amends.) Accordingly, as previously stated above, "One of the greatest safeguards for the individual under our system of criminal justice is the requirement that the prosecution must establish a prima facie case by its own evidence before the defendant may be put to his defense." (*Cephus v. United States*, *supra*, 324 F.2d 893, 895.)

Because appellant was denied this safeguard when the trial court erroneously denied his motion for judgment of acquittal, he was deprived of his rights to due process, to a meaningful opportunity to defend, and to a trial itself. His conviction for first degree murder must be reduced to second degree murder and the lying-in-wait special circumstance must be reversed.[132]

In addition, his death sentence must be reversed. Without a valid first degree murder conviction, the remaining special circumstance of prior murder cannot support a death sentence. (See Pen. Code, § 190.2, subd. (a).) And although appellant was also convicted pursuant to Penal Code section 4500, he has argued that this statute is unconstitutional. (See Arg. XIV., *post*.)

Finally, even if this Court does not invalidate section 4500, appellant's death sentence is unreliable under the Eighth Amendment. If the trial court had granted the motion, there is simply no way to know how the remainder of the trial would have unfolded. Further, it is highly likely

---

132

Because the prosecution's case-in-chief does not support first degree murder and the lying-in-wait special circumstance, appellant cannot be retried on these charges. (*Burks v. United States* (1978) 437 U.S. 1; *Greene v. Massey* (1978) 437 U.S. 19; see also, *Hudson v. Louisiana* (1981) 450 U.S. 40.)

that at least one juror would have refused to vote for death if the trial court had instructed that appellant was not guilty of first-degree murder or murder while lying in wait as a matter of law.

//

//

VII.
THE INTRODUCTION OF IMPROPER AND EXTREMELY PREJUDICIAL REBUTTAL EVIDENCE DEPRIVED APPELLANT OF A FUNDAMENTALLY FAIR TRIAL.

As appellant has demonstrated, the prosecution's case-in-chief was insufficient to support critical elements of the charged offenses. (See Arg. VI., *ante*.) Wary of being sandbagged in the state's rebuttal case, defense counsel moved the court to prevent the state from introducing evidence not constituting proper rebuttal within the meaning of Penal Code section 1093. Nonetheless, the prosecution did exactly that. It withheld until rebuttal three inmate informants who testified that appellant had made incriminating statements to them. This testimony should have been adduced in the case-in-chief if the prosecutor wished to rely upon it, because it was a material part of the state's case, offered to prove appellant's mental state at the time he stabbed Richmond. Moreover, the testimony was relevant irrespective of the evidence presented by appellant in his defense.

The admission of this improper rebuttal testimony not only violated section 1093 but also deprived appellant of a fair trial. This extremely prejudicial testimony was prejudicial under any standard.

A. The Defense Moved to Exclude Improper Rebuttal Evidence.

On April 24, 2003, defense counsel filed a written motion to preclude the prosecution from presenting in rebuttal any evidence which could be presented in the state's case-in-chief. (4 CT 971-976.) Therein, the defense relied on *People v. Carter* (1957) 48 Cal.2d 737, in which this Court held that the prosecution may not withhold a material part of the evidence tending to establish a defendant's guilt in order to present it on rebuttal. (48 Cal.2d at p. 753; see also, 4 CT 974-975, citing *People v.*

Castro (1960) 182 Cal.App.2d 255.) The motion stated in part:

> The Defendant respectfully submits that the People should not be allowed to introduce into evidence during the rebuttal phase of their case evidence of the Defendant's guilt that could certainly have been introduced during the prosecution's case in chief. The prosecution should not be permitted to put on a "bare bones" case in chief against the Defendant, wait to hear the defenses in evidence in this case, then introduce evidence of the Defendant's guilt that could have been presented during the initial phase of the prosecution's case.

(4 CT 975-976.) To appellant's knowledge, the trial court never ruled on the motion.

As demonstrated herein, trial counsel correctly predicted that the prosecutor would seek advantage by withholding for rebuttal the only arguably substantial evidence of appellant's guilt of a capital crime. The prosecutor's conduct, and the trial court's failure to prevent it, deprived appellant of a fundamentally fair trial.

B. The Prosecution May Not Present in Rebuttal Evidence Which Should Have Been Presented in the Case-In-Chief.

Penal Code section 1093 sets forth the order of procedure to be followed during a jury trial. Subdivision (d) of section 1093 governs the introduction of rebuttal evidence. After each side has presented evidence, "The parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit[s] them to offer evidence upon their original case." (Pen. Code, § 1093, subd. (d).)

In *People v. Carter*, *supra*, this Court recognized that "[i]n a sense all evidence that tends to establish the defendant's guilt over his

protestations of innocence rebuts that defendant's case . . . ." (48 Cal.2d at p. 753.) However, all such evidence does not constitute rebuttal within the meaning of section 1093, subdivision (d). In *Carter*, the Court explained that "proper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime." (48 Cal.2d at p. 753.) The Court added:

> It is restricted to evidence made necessary by the defendant's case in the sense that he introduced new evidence or made assertions that were not implicit in his denial of guilt. [Cites.] A defendant's reiterated denial of guilt and the principle facts that purportedly establish it does not justify the prosecution's introduction of new evidence to establish that which defendant would clearly have denied from the start.

(48 Cal.2d at pp. 753-754.)

Section 1093's restriction on rebuttal evidence serves several purposes. It minimizes confusion by the trier of fact by ensuring an orderly presentation of evidence. It also prevents a party "from unduly magnifying certain evidence by dramatically introducing it late in trial." Finally, it prevents unfair surprise. (*People v. Carter*, *supra*, 48 Cal.2d at p. 753.)

For a prosecutor to flout the restriction of section 1093, subdivision (d), is "unfair and cannot be condoned." (*People v. Castro*, *supra*, 182 Cal.App.2d at p. 264.) Thus, a trial court abuses its discretion by permitting a district attorney to introduce in rebuttal evidence which could have been presented in the case-in-chief. (*Ibid.*)

In sum, the prosecutor has a duty to introduce all evidence which tends to prove any element of the charged offense as part of its case-in-chief. (*People v. Katz* (1962) 207 Cal.App.2d 739, 749.) "The People have

no right to withhold a material part of their evidence which could as well be used in their case in chief, for the sole purpose of using it in rebuttal." (*People v. Robinson* (1960) 179 Cal.App.2d 624, 631, quoting *People v. Rodriguez* (1943) 58 Cal.App.2d 415, 419; see also, *People v. Gomez* (1963) 215 Cal.App.2d 314, 317 [eyewitnesses who can identify the defendant should be called in the state's case-in-chief; the prosecution has no right to hold them back for use in rebuttal].)

Courts have found it particularly egregious when the prosecution has withheld a confession or admission by the defendant until rebuttal, as was the case here. (See, e.g., *People v. Daniels* (1991) 52 Cal.3d 815; *People v. Miller* (1963) 211 Cal.App.2d 569; *People v. Robinson*, *supra*, 179 Cal.App.2d 624; *People v. Rodriguez*, *supra*, 58 Cal.App.2d 415.)

In *People v. Daniels*, *supra*, this Court found that the prosecutor improperly presented on rebuttal the testimony of a nurse regarding post-offense statements Daniels had made to her which implied that he had killed the victims. (52 Cal.3d at pp. 839-840, 859.) This Court stated: "The fact which the rebuttal evidence tended to prove – that defendant killed the [victims] – is obviously central to the criminal prosecution, and something which should be proved as part of the prosecution case-in-chief. (*Id.* at p. 860.)

In *People v. Robinson*, *supra*, the reviewing court found that incriminating statements allegedly made by the defendant to a police officer should have been presented in the People's case-in-chief, not on rebuttal. (179 Cal.App.2d at p. 630; see also, *People v. Rodriguez*, *supra*, 58 Cal.App.2d at p. 418 [prosecutor should not have withheld evidence concerning an alleged confession by the defendant for rebuttal under the guise of impeachment]; *People v. Miller*, *supra*, 211 Cal.App.2d at pp. 574-

575 [error to present as rebuttal testimony from officer that he had overheard defendant making incriminating statements to inmate in jail].)

As set forth below, the prosecution in this case presented in rebuttal testimony from three inmate informants who claimed that appellant had either declared his intention to kill Richmond before the homicide or confessed afterward to having murdered him. According to each of them, appellant had stated that he was motivated by a belief that Richmond was a "rat." Because this evidence was central to the issue of appellant's guilt, it should have been presented in the People's case-in-chief.

C. The Prosecution's Rebuttal Evidence Violated Section 1093.

As previously explained, well before trial started the deputy district attorney made clear that the state's case was based on a theory that appellant decided to kill Richmond because he had voluntarily turned in two weapons to prison staff. Although the case-in-chief included evidence concerning Richmond's relinquishment of weapons, it did not show that appellant knew of his cellmate's conduct. (See Arg. VI.C.1.b., *ante*.) Without this motive evidence, there was a gaping hole in the state's case, as it failed to put forward any other evidence to establish that appellant acted with the mental state necessary to prove first degree murder and the lying-in-wait special circumstance. (See Arg. VI., *ante*.)

It was equally clear from the beginning that appellant would not deny that he killed Richmond. Rather, the issue would be his intent at the time of the act. That the defense would assert self-defense, either actual or imperfect, became apparent well before trial began. (See, e.g., 14 RT 2137-2138; 16 RT 2287, 16 RT 2290-2291; 17 RT 2361, 2384.) The defense made sure several questions relating to self-defense were included in the

juror questionnaire. (17 RT 2345; 25 RT 2925; 26 RT 2949.)

And in fact, appellant did present a self-defense case. Appellant testified that Richmond had been acting suspiciously and on April 8, he received an unpackaged knife ready for immediate use. Later that evening, Richmond came off the top bunk in an unusual manner with the knife in his hand. Appellant believed Richmond intended to assault him with it, so he struck first. (See Stmt. of Facts, A.2.a., *ante*.) Forensic expert Lisa DiMeo opined that the physical evidence tended to prove Richmond was wielding a weapon. It also indicated that a struggle had occurred and that Richmond was not on the upper bunk when he was stabbed. (See Stmt. of Facts, A.2.c., *ante*.) Inmate Poore's testimony that Richmond had been looking for a knife and had received one just before his death further supported the defense. (See Stmt. of Facts, A.2.d., *ante*.)

In rebuttal, the prosecutor presented inmate Robert Wilson, who testified that he and his then-cellmate Poore had received kites from appellant prior to Richmond's death. Therein, appellant allegedly told them he had received word that Richmond was a rat and would assault him. Appellant further declared that he had Richmond moved back to his cell so he could carry out his assault. Wilson claimed that appellant thought it was funny that Richmond was making the knife with which appellant would stab him. (See Stmt of Facts, A.3.a.i., *ante*.)

The rebuttal case also featured inmate Michael Hill, who testified that appellant allegedly told him he was going to "hit" Richmond because the latter had given up two weapons to get moved off of C Yard, to avoid a debt. Appellant purported to have used his "influence" to get Richmond put back into his cell so he could kill him. Hill also claimed that on the night of April 8 he was awakened by Richmond screaming "why" twice. Afterward,

appellant allegedly asked Hill to fish the knife out of his cell. (See Stmt of Facts, A.3.a.ii., *ante*.)

The third informant was James Magee, an inmate who had been in Pelican Bay Prison in 1997 at the same time as appellant. There, appellant allegedly told Magee that he killed Richmond because he learned Richmond was a rat. Magee claimed that appellant laughed about Richmond's death. He did not say there were two weapons in cell or that he acted in self-defense. (See Stmt of Facts, A.3.a.iii., *ante*.)

As previously set forth, admissions and confessions must be presented in the case-in-chief if at all. (See *People v. Daniels*, *supra*, 52 Cal.3d 815; *People v. Miller*, *supra*, 211 Cal.App.2d 569; *People v. Robinson*, *supra*, 179 Cal.App.2d 624; *People v. Rodriguez*, *supra*, 58 Cal.App.2d 415.) The appellate court in *People v. Robinson* declared that the prosecutor may not hold back such damaging, material evidence:

> "If the defendant had confessed, proof of the confession was a part of the case of the People and it was the duty of the district attorney to offer it before resting his case, when the testimony was then available and there was no reason for not offering it in chief."

(179 Cal.App.2d at p. 630, quoting *People v. Rodriguez*, *supra*, 58 Cal.App.2d at p. 419.)

In the instant case, the testimony from the informants claiming that appellant made highly inculpatory statements was offered to prove that he had acted with the mental state required for first degree capital murder. It was "obviously central" to appellant's prosecution. (*People v. Daniels*, *supra*, 52 Cal. at p. 860.) It should have been presented in the case-in-chief, if the prosecutor wished to rely on it.

Moreover, the record demonstrates that the prosecutor knew of these inmate witnesses well before trial began, and that their testimony was available for the case-in-chief. All three were identified in the People's witness list filed on February 4, 2003, almost a year before the first guilt phase witness was called. (4 CT 865, 869.)[133] Significantly, on December 1, 2003, the prosecutor obtained orders to have a number of inmate informants transported to court on December 15 (44 CT 12568-12584), which indicates he contemplated calling them in his case-in-chief. These facts make clear there was no reason why Wilson, Hill and Magee could not have been presented in the case-in-chief. (See, e.g., *People v. Mosher* (1969) 1 Cal.3d 379, 399 [doctor presented in rebuttal was known to prosecutor well before trial].)

Finally, the testimony by the three inmate informants did not constitute rebuttal within the meaning of Penal Code section 1093. As set forth above, "A defendant's reiterated denial of guilt and the principal facts that purportedly establish it does not justify the prosecution's introduction of new evidence to establish that which defendant would clearly have denied from the start." (*People v. Carter*, *supra*, 48 Cal.2d at pp. 753-754.) In this case, appellant's evidence merely presented facts to support his denial of guilt and his claim of self-defense. The informant testimony did not specifically rebut defense evidence that Richmond had a knife and initiated the struggle. Rather, it was evidence appellant "would clearly have denied from the start" (*ibid*) and was relevant irrespective of the particular

---

133

Presentation of the guilt phase evidence began on December 1, 2003. (44 CT 12564.) The prosecution rested its case-in-chief on December 15. (44 CT 12661.)

defense evidence presented.

D. The Improper Rebuttal Violated Appellant's Constitutional Rights.

The prosecutor's blatant violation of the limits on rebuttal contained in section 1093, subdivision (d), as well as the trial court's failure to appropriately rein him in, violated appellant's due process rights to a fair trial.

People v. Quartermain (1997) 16 Cal.4th 600 is instructive. Therein, this Court held that a prosecutor's violation of an agreement not to use the defendant's statement against him deprived Quartermain of his Fourteenth Amendment right to due process. (16 Cal.4th at pp. 617-621.) In the instant case, the prosecutor's violation of his duty to comply with section 1093 violated appellant's right to due process. (See *People v. Katz*, *supra*, 207 Cal.App.2d at p. 749 ["In the orderly course of a trial it is the duty of the prosecution to introduce, as part of its case in chief, all its evidence which tends to prove any element of the offense charged."].) The deputy district attorney's circumvention of section 1093 in order to gain advantage over appellant in this case is no less egregious than the conduct of the *Quartermain* prosecutor, and thus equally denied appellant of a fundamentally fair trial.

Further, the trial court's failure to exclude the improper rebuttal violated appellant's expectation that section 1093, subdivision (d) would be properly enforced. "Where a statute indicates 'with language of unmistakable mandatory character' [e.g., by the use of the word 'shall'] that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause." (*Ford v. Wainright* (1986) 447 U.S. 399, 428 [conc.

opn. of O'Connoer, J.]; see also *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Hewitt v. Helms* (1983) 459 U.S. 460, 466 [the arbitrary deprivation of a state law entitlement may violate the Due Process Clause].)

Here, Penal Code section 1093 states that the trial judge "shall" proceed in the order set forth therein, unless otherwise directed by the court. There was, however, no finding made by the trial court that good cause existed in the instant case to deviate from the prescribed procedure. Thus appellant was deprived of his expectation that the prosecutor would not be permitted to introduce rebuttal evidence which should have been part of the case-in-chief.

E. This Court Should Reach the Issue on the Merits.

As set forth above, appellant's counsel filed a motion prior to the start of trial asking the court to prevent the prosecution from presenting improper rebuttal evidence in violation of section 1093. Appellant finds no indication in the record that the trial court ruled on the in limine motion, however. When the prosecution actually presented the improper rebuttal, defense counsel did not reobject.

Appellant believes this Court should reach the improper rebuttal issue on the merits. An in limine motion may preserve an issue for appeal, if it advances a specific legal ground for excluding evidence, is directed to a particular, identifiable body of evidence, and is made when the trial court can determine the evidentiary question in an appropriate context. (*People v. Morris* (1991) 53 Cal.3d 152, 190, overruled on another point in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

In this case, the legal basis for excluding the evidence was specifically stated. (4 CT 974-975.) However, the particular evidence to be excluded could not have been identified at the time the in limine motion

was made, as appellant did not know then who the prosecutor would produce as rebuttal witnesses. Even when he called Wilson, Hill and Magee, appellant did not know that their testimony would contravene section 1093 until he heard what each said. Because of the extremely prejudicial nature of the testimony, an after-the-fact objection and motion to strike would have been a "'futile attempt to "unring the bell" . . . .'" (*People v. Morris*, *supra*, 53 Cal.3d at p. 188.) More important in this particular case, appellant contends, is that the motion put the prosecutor on notice but he nonetheless chose to violate the statute.

Moreover, the absence of a ruling on the in limine motion should not weigh against appellant. A court's failure to rule on a motion does not always prevent a defendant from raising an issue on appeal. (See, e.g., *People v. Briggs* (1962) 58 Cal.2d 385, 410; *People v. Flores* (1979) 92 Cal.App.3d 461, 466-467.) Again, in the particular circumstances presented here, appellant could not have reobjected until after he had heard the testimony of each witness, when it would have been too late to matter. Further, the issue is properly considered on appeal because it presents a pure question of law on undisputed facts. (*People v. Yeoman* (2003) 31 Cal.4th 93, 118.) Whether the testimony of Wilson, Hill and Magee constituted impermissible rebuttal evidence pursuant to Penal Code section 1093 can as easily be determined by this Court as the lower court.

Finally, should this Court deem that appellant's ability to challenge the improper rebuttal evidence has been forfeited by his attorneys' failure to more fully object, he has received ineffective assistance of counsel. Appellant has set out the law relevant to ineffective assistance elsewhere in this brief. (See Arg. XVII.B1., *post*.) In this case, the record on appeal establishes that defense counsel's failure to sufficiently object constituted

deficient performance. As demonstrated above, counsel had ample legal basis upon which to do so. Their deficient performance severely prejudiced appellant. (See subsec. F., *post.*) Finally, there can be no satisfactory explanation for counsel's error. It was not tactical, as counsel's filing of the pretrial motion demonstrated their desire to prevent the introduction of improper rebuttal. And, counsel did object to the testimony, albeit on hearsay and other grounds, which demonstrates they had no strategic purpose in permitting the admission of the evidence. (See, e.g., 63 RT 7993, 7998, 7999, 8055-8057.)

F. Appellant Was Severely Prejudiced by the Improper Rebuttal Evidence.

The admission of the improper rebuttal evidence was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) It was also reasonably probable that a result more favorable to appellant would have been reached had this rebuttal evidence not been presented. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

The incriminating statements allegedly made by appellant were undoubtedly prejudicial. This Court has recognized that confessions, "as a class, almost invariably will provide persuasive evidence of a defendant's guilt" and "often operate as a kind of evidentiary bombshell which shatters the defense." (*People v. Cahill* (1993) 5 Cal.4th 478, 503 [internal quotation marks and citations omitted]; see also, *People v. Neal* (2003) 31 Cal.4th 63, 86.) The improper admission of a confession is therefore much more likely to be prejudicial than of other kinds of evidence. (*Cahill*, *supra*, 5 Cal.4th at p. 503; *Neal*, *supra*, 31 Cal.4th at p. 86.) This Court in *Cahill* supposed that it might be harmless only in a few cases, such as:

> (1) when the defendant was apprehended by the police in the course of committing the crime, (2) when there are numerous,

> disinterested reliable eyewitnesses to the crime whose testimony is confirmed by a wealth of uncontroverted physical evidence, or (3) in a case in which the prosecution introduced, in addition to the confession, a videotape of the commission of the crime [].

(5 Cal.4th at p. 505; see also, *People v. Neal*, *supra*, 31 Cal.4th at p. 86.)

In appellant's case, none of the circumstances identified in *Cahill* were present. Instead, the erroneously admitted admissions were critical to the state's case, supplying the only arguably substantial evidence that appellant had acted with the mental states necessary for first degree murder, Penal Code section 4500, and the lying-in-wait special circumstance.

This was a close case, as demonstrated by the length of deliberations and the jury's questions and requests for the readback of testimony. (See Arg. IV.G., *ante*.) The jury's desire to rehear the testimony of appellant, inmate Vargas, and the investigator who had interviewed him suggests that jurors were particularly interested in whether there was a second knife in the cell. It is likely that the jury was also particularly interested in whether the physical evidence supported the testimony of defense expert DiMeo, as it wanted to review the cell 146 video.

A comparison of *People v. Daniels*, *supra*, 52 Cal.3d 815, with *People v. Robinson*, *supra*, 179 Cal.App.2d 624, is illuminating. In *Daniels*, the erroneous admission of a nurse's testimony about the defendant's inculpatory statements was not prejudicial, because the People had properly introduced evidence that Daniels had made similar admissions to several other persons. (52 Cal.3d at p. 860.) In contrast, the improper rebuttal in *Robinson* deprived the defendant of a fair trial, because the testimony regarding Robinson's incriminating statements was not cumulative and could have been deemed by the jurors to be "the most

discreditable of all." (179 Cal.App.2d at pp. 638-639.)

In appellant's case, the improper rebuttal testimony from inmates Hill, Wilson and Magee was not cumulative of any evidence properly presented in the People's case-in-chief. In fact, if believed by the jury, the improper rebuttal was by far the most damaging evidence presented by the state. Not surprisingly, the deputy district attorney relied on it during argument. (See 69 8757-8759, 8766, 8775, 8836, 8837.) Moreover, the prosecution's end run around section 1093 permitted it to "unduly magnify" this dramatic testimony by presenting it at the end of trial. (*People v. Carter*, *supra*, 48 Cal.2d at p. 753.) Such gamesmanship is inconsistent with due process.

As a result, appellant was denied of a fair trial and his convictions and sentence should be reversed.

//

//

VIII.
MULTIPLE EVIDENTIARY ERRORS DURING EXAMINATION OF THE THREE INMATE WITNESSES PRESENTED BY THE PROSECUTION IN REBUTTAL DEPRIVED APPELLANT OF A FAIR TRIAL

As explained in the previous argument, the prosecution called three inmate informant witnesses in rebuttal, who each testified that appellant had made inculpatory statements. (See Arg. VII., *ante*.) Appellant objected that this testimony violated the Secondary Evidence Rule and constituted inadmissible hearsay. As set forth below, the trial court erroneously denied these objections and also inappropriately limited the cross-examination of two of the informants. Together, these evidentiary errors combined to deprive appellant of a fundamentally fair trial.

A. Testimony by Inmates Wilson and Hill About Kites Allegedly Received From Appellant Violated the Secondary Evidence Rule.

1. The Secondary Evidence Rule.

The Secondary Evidence Rule is set forth in Evidence Code section 1521. It makes secondary evidence generally admissible to prove the content of a writing but contains important exceptions to protect against the introduction of unreliable evidence. This Court has recently explained the rule:

> In 1998, the Legislature repealed the best evidence rule and enacted the Secondary Evidence Rule (§§ 1520-1523). (Stats. 1998, ch. 100, §§ 1, 2, p. 633) Under the Secondary Evidence Rule, "[t]he content of a writing may be proved by *otherwise admissible* secondary evidence." (§ 1521, subd. (a), italics added.) The Secondary Evidence Rule does not "excuse[] compliance with Section 1401 (authentication)." [Fn.] (§

1521, subd. (c).) Thus, to be "otherwise admissible," secondary evidence must be authenticated.

(*People v. Skiles* (2011) 51 Cal.4th 1178, 1187.)

However, even if a writing is authenticated, it may still be inadmissible under section 1521 if content of the writing is genuinely disputed or if admission of secondary evidence to prove the content would be unfair. This Court in *Skiles* stated:

> Once the proponent of the evidence establishes its authenticity, section 1521 requires exclusion of secondary evidence only if the court determines: (1) "[a] genuine dispute exists concerning material terms of the writing and justice requires the exclusion" or (2) "[a]dmission of the secondary evidence would be unfair." (§ 1521, subd. (a)(1) & (2)."

(*People v. Skiles*, *supra*, 51 Cal.4th at p. 1188.)

As demonstrated below, testimony from informants Robert Wilson and Michael Hill about kites they claimed appellant sent them containing inculpatory statements violated the Secondary Evidence Rule, because the kites were not authenticated. Further, justice required the exclusion of the informants' untrustworthy testimony as secondary evidence to prove the content of the alleged writings.

2. The Writings Were Not Authenticated.

In Wilson's direct examination, he claimed to have received kites from appellant prior to Richmond's death. (63 RT 7992.) When the prosecutor asked about the content of the kites, defense counsel objected on hearsay grounds and pursuant to the Secondary Evidence Rule. The trial judge overruled the objections, and Wilson was permitted to testify to the content of the alleged writings. (63 RT 7993-7994.)

As shown herein, Wilson's testimony about the content of the writings should not have been admitted by the trial court because they were not authenticated. (See Evid. Code, § 1401, subd. (b); *People v. Lawley* (2002) 27 Cal.4th 102, 154 [proffered testimony regarding unauthenticated letter was not shown to be sufficiently reliable for admission]; *People v. Price* (1991) 1 Cal.4th 324, 413 [exclusion of a typewritten document was correct because the defense did not authenticate it as a document written by witness Petry]; *People v. Beckley* (2011) 185 Cal.App.4th 509, 517-518 [roster of gang's members should have been excluded because there was insufficient evidence to show it was what it purported to be]; see also, Evid. Code, § 1523.)

In this case, although Wilson claimed that the kites were written by appellant, the informant's testimony made clear that he had no personal knowledge to this effect. Wilson admitted he had never been assigned to the same yard as appellant and had never had a real conversation with him. (63 RT 8004-8005.) When asked how well he knew appellant, Wilson replied, "I don't." (63 RT 8005; see also, 63 RT 8034 [cross-exam].) In fact, the inmate acknowledged that the kites had not been not sent to him, but "[m]ore or less" to Wilson's cellmate, Christopher Poore. (63 RT 8007-8008; see also, 8014.) Wilson did not see appellant write the kites and he was not familiar with appellant's handwriting. (63 RT 8008.) He acknowledged that he could not recall how appellant signed his name. (63 RT 8036.) Although Wilson admitted he had reason to save the kites, he claimed they were flushed down the toilet as soon as they were received. (63 RT 8023, 7995.) In short, nothing in Wilson's testimony even minimally supported a finding that appellant was the author of these conveniently unproduceable writings.

Similarly with Michael Hill, the prosecutor failed to authenticate the kites he claimed to have received from appellant or to establish that they could not be produced. Although Hill claimed he knew appellant's signature, he also testified that the notes appellant sent to him were not about Richmond. (63 RT 8053.) Hill otherwise gave no details about the writings, such as when they were sent, what he did with them, etc., which sufficed to prove that appellant had written the alleged kites.

3. The Testimony Also Violated Evidence Code Section 1521.

As stated above, even if a writing is authenticated, it may still be inadmissible pursuant to the Secondary Evidentiary Rule. (Evid. Code, § 1521.) Section 1521 requires exclusion of secondary evidence if a "genuine dispute exists concerning material terms of the writing and justice requires the exclusion" or the "[a]dmission of the secondary evidence would be unfair." (Evid. Code, § 1521, subdivs. (a)(1) & (2).)

In appellant's case, Wilson's testimony about the contents of the alleged kites should have been excluded under both subdivisions of section 1521. The prosecution cross-examined Christopher Poore, but failed to establish his receipt of the kites Wilson claimed appellant had sent to him (Poore). (See generally, 63 RT 7968-7975 [Poore's cross-exam].) Further, Poore testified that he did not share information with Wilson. (63 RT 7963-7964.) This evidence thus demonstrated a genuine dispute about not only the contents of the kites but whether they ever existed. (See Evid. Code, § 1521, subd. (a)(1).) Moreover, as demonstrated in subsection E., *post*, the admission of Wilson's testimony was extremely unfair, and justice required its exclusion. (See Evid. Code, § 1521, subd. (a)(2).)

For similar reasons, the testimony from informant Hill should have

been excluded. When Hill began to testify to hearsay statements allegedly made by appellant, defense counsel objected. (63 RT 8056-8057.) After Hill interjected that appellant had communicated the statements via written notes, the court allowed the hearsay as an admission against interest. (63 RT 8057.) However, shortly before Hill asserted the existence of the kites, he admitted that he had *never* received a kite from appellant concerning Richmond's death. The prosecutor had asked Hill, "Did Mr. Barrett ever send you any kites?" When Hill said yes, the prosecutor continued, "And were any of those kites in reference to the killing of Thomas Kent Richmond?" Hill responded: "*No, they were not.*" (63 RT 8052-8053, italics added.) In light of Hill's admission that he had never received a kite from appellant concerning Richmond's death, his subsequent assertion to the contrary should have been excluded pursuant to Evidence Code section 1521, subdivision (a).

In sum, the trial court erred in failing to exclude this testimony by informants Wilson and Hill because it violated the Secondary Evidence Rule.

B. The Testimony From All Three Informants Was Inadmissible Hearsay.

Whether or not this Court determines that the testimony concerning the purported kites violated the Secondary Evidence Rule, it as well as testimony about appellant's supposed oral admissions was inadmissible hearsay. The trial court erred in admitting the testimony as declarations against penal interest, because appellant was not an "unavailable" declarant. The lower court further erred in not excluding the testimony as demonstrably false and untrustworthy.

1. The Informants' Testimony Was Inadmissible as

Statements Against Appellant's Penal Interest.

Hearsay evidence is generally inadmissible. (Evid. Code, § 1200.) Under Evidence Code section 1230, a hearsay statement which is against the declarant's penal interest may be admissible. This Court has set forth what a party seeking to introduce such hearsay must establish:

> The proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.

(*People v. Duarte* (2000) 24 Cal.4th 603, 610-611.)

Before section 1230 was enacted, a declaration against interest was admissible under California law whether or not the declarant testified in court. (Comment – Assem. Comm. on Judiciary, Stats. 1965, c. 299, § 2.) Under section 1230, however, the declarant must be unavailable before a hearsay statement may be admitted as a declaration against penal interest. When the declarant is available, the proponent of the hearsay may seek its admission as a prior inconsistent statement:

> Section 1230 . . . conditions admissibility upon the unavailability of the declarant in order to require the proponent of the evidence to use the in-court testimony of the declarant if it is possible to do so. If the declarant disappoints the proponent and testifies inconsistently, the proponent may then show the prior inconsistent statement as substantive evidence of the facts stated. See Evidence Code § 1235 and the Comment thereto.

(Comment, *supra*.)

In this case, appellant was not unavailable for purposes of section 1230; he testified in his own defense. Accordingly, the trial court erred in finding that the hearsay testimony from the informants was admissible as declarations against appellant's penal interest.[134]

Further, the People should not be able on appeal to retrospectively assert that the evidence was admissible as prior inconsistent statements. In appellant's case, the prosecutor made a series of strategic decisions in presenting his case and should be made to bear the consequences of his choices as a matter of basic fairness. Wilson, Hill and Magee were known to the state well before trial and could have been presented in its case-in-chief. Indeed, these witnesses *should* have been called during the case-in-chief, if at all. Instead, the prosecuting attorney withheld their testimony until his rebuttal case, in an effort to gain a tactical advantage over appellant. (See Arg. VII.C., *ante*.) By that point, however, the prosecutor had failed to lay the necessary foundation for their testimony. Before a hearsay statement may be admitted as a prior inconsistent statement, the declarant must be given an opportunity to explain or deny the statement. (Evid. Code, §§ 1235, 770.) In this case, the prosecutor neglected to ask appellant during cross-examination about the alleged statements to Wilson, Hill or Magee.[135] Thus, he could not rely on section 1235 as an exception to

---

134

Defense hearsay objections to the testimony of Wilson and Hill were overruled. (63 RT 7993-7994; 63 RT 8056-8057.) Although defense counsel did not object to Magee's testimony on hearsay grounds, any such objection would have been futile, in light of the trial court's previous rulings. (See *People v. Hill*, *supra*, 17 Cal.4th. at p. 820.)

135

See generally, 59 RT 7611-7635, 7651-7711 [appellant's cross-examination].

the hearsay rule. (*People v. McKinnon* (2011) 52 Cal.4th 610, 671-673; *People v. Alexander* (2010) 49 Cal.4th 846, 908-910.)

2. The Testimony of Each Was Demonstrably False.

"[T]rustworthiness is a threshold requirement for admission of a statement" admitted pursuant to Evidence Code section 1230. *(People v. Geier* (2007) 41 Cal.4th 555, 583.) As set forth below, the testimony of Wilson, Hill and Magee should not have been admitted as declarations against appellant's penal interest because they were untrustworthy.

The perils of informant testimony can no longer be minimized. (See, e.g., *Maxwell v. Roe* (9th Cir. 2010) 628 F.3d 486, [discussing notorious jailhouse informant Sidney Storch and the Los Angeles County informant scandal].) Indeed, "snitchs [are] are the leading cause of wrongful convictions in U.S. capital cases . . . ." (Northwestern Univ. School of Law, Center on Wrongful Convictions, *The Snitch System* (Winter 2004-2005, p. 3.)[136] The Center on Wrongful Convictions found that 45% of the exoneration cases studied involved informant testimony. (*Ibid.*) Not surprisingly, the Ninth Circuit Court of Appeals has warned that "'informants are cut from untrustworthy cloth and must be managed and carefully watched.' [Citation.]" (*Maxwell v. Roe*, *supra*, 628 F.3d at p. 505.) Judge Trott of that court has explained:

> The most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him. The snitch now stands ready to testify in return for some consideration in his own case. Sometimes these snitches tell the truth, but more often they invent testimony and stray details out of the

---

136 Available at www.law.northwestern.edu/wrongfulconvictions.

air.

(*Maxwell v. Roe*, *supra*, 628 F.3d at p. 505, quoting Trott, Stephen S., *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 Hastings L.J. 1381, 1394 (1996).)

This Court has declined to categorically exclude informant testimony as inherently unreliable. (*People v. Hovarter* (2008) 44 Cal.4th 983, 997.) It has acknowledged, however, that statements by such witnesses should be excluded if there "exist[s] either a physical impossibility that they are true, or their falsity [is] apparent without resorting to inferences or deductions." (*People v. Friend* (2009) 47 Cal.4th 1, 41, internal quotation marks and citation omitted.) As shown herein, the falsity of the testimony of the informants in this case was readily apparent from the record.

As previously stated, Michael Hill claimed that appellant had related in kites his intention to kill Richmond because the latter had given up weapons. (63 RT 8054-8057.) Hill had previously admitted, however, that appellant had *never* sent him kites about Richmond's killing. (63 RT 8052-8053.) The testimony of a witness who materially contradicts himself or herself may be discounted as false. (*People v. Casillas* (1943) 60 Cal.App.2d 785, 794-795 [victim's contradictory versions as to whether her father had intercourse with her was so lacking in substantiality as to truth or credibility it did not constitute sufficient evidence to support charges].) In this case, the unreliability of Hill's contradictory and perjurous testimony was apparent on its face, and therefore should have been excluded.

The same is true of Hill's testimony concerning verbal statements allegedly made by appellant. Hill testified that he and appellant argued in the cell vent about whether it was appropriate for appellant to kill Richmond. (See 63 RT 8057-8060.) However, Hill had already admitted

that no such conversation had *ever* occurred. The prosecutor asked him: "Did you have any conversations directly with Mr. Barrett through the vents either before or after Mr. Richmond was killed explaining – Mr. Barrett explaining why he killed Mr. Richmond?" (63 RT 8056.) Hill replied, "No." (63 RT 8056.) Further, Hill's claim that appellant could speak freely in the vent because all of the inmates who could hear him were other whites or Southern Mexican "allies" was proven false by his own testimony. Hill had previously testified that the white inmates were in a dispute with the Hispanic inmates at the time appellant allegedly made these highly incriminating statements. (63 RT 8066-8068, 8101-8102.) Thus the falsity of Hill's testimony was laid bare, without resort to inferences or deductions. It should have been excluded.

Robert Wilson's testimony about the kites appellant allegedly sent him should have also been excluded, as the inherent improbability of it was plain. (See *People v. Ozene* (1972) 27 Cal.App.3d 905, 910.) As set forth above, Wilson admitted that he did not know appellant, that the alleged kites were not sent to him, that he did not see appellant write or send the notes, that he did not know appellant's handwriting and that he failed to save the writings although he recognized their value in supporting his negotiations with the prison for benefits in exchange for informing on appellant. The inherent unreliability of this testimony given these circumstances is manifest.

Finally, the testimony from James Magee, then a member of the Aryan Brotherhood, that appellant had admitted murdering Richmond was inherently improbable and false on its face. Magee explained that the AB had a standing order to kill all informants. When a white inmate who was not a member of the AB killed a fellow white, he had to thereafter prove to

the AB that the person he killed was an informant and that the murder was therefore justified. (64 RT 8142.) Although Magee claimed that appellant told him that he had killed Richmond because the latter was a rat, Magee was unable to provide many specifics about Richmond's death. Magee improbably claimed that although appellant was seeking to justify his conduct by proving Richmond was a rat, he did not give a detailed account of the killing or even identify who allegedly told him that Richmond was an informant. (64 RT 8144, 8161, 8178-8179.) The unreliability of this hearsay was apparent and it should have been excluded.

In sum, all of this testimony was demonstrably untrustworthy, and the trial court erred in overruling the hearsay objections to it.

C. The Trial Court Erroneously Limited Cross-Examination of the Informants.

"[W]ide latitude should be given to cross-examination designed to test the credibility of a prosecution witness in a criminal case." (*People v. Cooper* (1991) 53 Cal.3d 771, 816.) In fact, infringement of a defendant's ability to cross-examine the witnesses against him implicates the Sixth Amendment's Confrontation Clause. "'[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." [].'[]." (*People v. Cooper*, *supra*, quoting *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680.) As set forth below, in appellant's case the trial court inappropriately constricted cross-examination of informants Wilson and Magee, thus hindering the jury's ability to judge their credibility.

On direct examination, Wilson claimed that he did not keep weapons in his cell. (63 RT 7992; see also, 63 RT 8030-8031 [cross-exam].) On cross-examination, Wilson admitted he had used violence in the past but asserted "Nowadays I don't even like it." (63 RT 8019.) On recross, however, he admitted that he had been sent to Ad Seg because he stabbed someone. (63 RT 8041.) When trial counsel tried to bring out the details of this incident, the trial court sustained the prosecution's objection that it was beyond the scope of direct. (63 RT 8041-8042.) This ruling was erroneous, and the defense should have been permitted to fully impeach Wilson's alleged disdain of violence by eliciting information about his violent acts, as it spoke directly to the credibility of his direct testimony.

During cross-examination of informant Magee, defense counsel tried to elicit information about who was running Calipatria for the Aryan Brotherhood during the time period in which Richmond died. The court sustained a series of relevance objections by the prosecutor. (64 RT 8170-8172.) When defense counsel asked to make a record, the court responded, "You tried to ask the question. I sustained the objection. That's all I need." (64 RT 8172.) Again, this ruling was erroneous. This witness claimed that appellant told him about Richmond's death because Magee was the AB affiliate in charge of the cellblock in which they were housed in Pelican Bay. If the defense had been able to establish that appellant previously had access to other AB members but had not sought to "justify" his actions to them, it would have seriously undercut the reliability of Magee's claim.

Finally, appellant's attorney sought to question Magee about his debriefing from the Aryan Brotherhood and consequent motivation for currying favor with the authorities. As part of this questioning, counsel asked, "Have you been testifying in A.B. cases?" (64 RT 8173.) The

prosecution objected that such information was irrelevant. Defense counsel countered: "Your Honor, I want to show that he's, in effect, an informant that gets benefits by giving testimony." (64 RT 8173.) The trial court determined, however, that only benefits Magee might be getting for testifying in appellant's case were relevant, and sustained the objection. Defense counsel framed his inquiry in a somewhat different manner, asking: "Isn't it true that you volunteered yourself to be a witness in matters touching on A.B. anywhere in the state and federal system?" (64 RT 8174.) Without any prosecution objection, the trial court admonished counsel:

> Didn't you hear what I had just said? Now, wait a minute. Come on. I don't want to be in conflict with you here, but I asked you to limit it to this case. And then you just immediately start talking about the whole state system.

(64 RT 8174.)

Counsel assured the court he did not want to be disrespectful but asserted that "I should be entitled to cross-examine an adverse witness on a full panoply of things that might motivate him to be biased." (64 RT 8175.) The court nonetheless ruled that only benefits for testifying in appellant's case were relevant. (64 RT 8175.) This ruling was erroneous, as appellant was entitled to cross-examine Magee fully on his motives for testifying. (See, e.g., *Maxwell v. Roe*, *supra*, 628 F.3d at pp. 501-504 [evidence that Storch had informed on cases before and after Maxwell's contradicted trial record suggesting he was an unsophisticated informant who was testifying for moral reasons].)

D. The Errors Violated Appellant's Constitutional Rights.

A state court's evidentiary ruling violates a defendant's due process

right if it deprives him of a fundamentally fair trial. (*Perry v. New Hampshire, supra*, 565 U.S. _.) In this case, the trial court's failure to properly apply several sections of the Evidence Code deprived appellant of due process because these errors resulted in the admission of extremely prejudicial testimony from witnesses who claimed that he had made inculpatory statements. Further, the trial court's limitations on cross-examination of informants Magee and Wilson deprived appellant of his rights to confrontation and to present a defense. (*Delaware v. Van Arsdall, supra*, 475 U.S. 673; *Crane v. Kentucky* (1986) 476 U.S. 683.)

E. The Errors Were Not Harmless.

The errors described above were not harmless, under either the *Chapman* or *Watson* standards. This was a close case. (See Arg. IV.G., *ante*.) The informants' testimony was extremely prejudicial. (See Arg. VII.F., *ante*.) In fact, without it there was insufficient evidence to support the capital charges. (See Arg. VI.C., *ante*.) Courts at every level have recognized that a defendant's confession ""is probably the most probative and damaging evidence that can be admitted against him."" (*Maxwell v. Roe*, *supra*, 628 F.3d at p. 508, quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 296; see also, *People v. Cahill*, *supra*, 5 Cal.4th at p. 503.) In this case, the state was erroneously able to introduce such evidence from *three* witnesses. Not surprisingly, the prosecuting attorney substantially relied upon this testimony in his arguments. (See 69 RT 8757-8759, 8766, 8775, 8836-8837.) In conclusion, the trial court's errors were not harmless.

//

//

IX.
MULTIPLE OTHER INSTANCES OF PROSECUTORIAL MISCONDUCT IN THE GUILT PHASE DEPRIVED APPELLANT OF A FAIR TRIAL

As set forth in a previous argument, the prosecuting attorney committed misconduct outside the jury's presence. (See Arg. III., *ante*.) As described below, he committed additional acts of misconduct in front of the jury during the guilt phase, both in the examination of witnesses and in argument.

Under the federal constitution, a prosecutor commits misconduct when he infects the trial with such unfairness that the defendant is denied due process. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; *People v. Lopez* (2008) 42 Cal.4th 960, 965.) Under state law standards, a prosecutor commits misconduct when he uses deceptive or reprehensible methods to persuade the jury, "even when those actions do not result in a fundamentally unfair trial." (*People v. Lopez*, *supra*, 42 Cal.4th at p. 965 [internal quotation marks and citations omitted].)

A prosecutor commits error when he misstates the evidence. (*People v. Hill* (1998) 17 Cal.4th 800, 823.) The same is true when a prosecutor refers to facts not in evidence. (*Id.* at p. 828.) "'Statements of supposed facts not in evidence . . . are a highly prejudicial form of misconduct, and a frequent basis for reversal'." (*Ibid.*, quoting 5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Trial, § 2901, p. 3550.)

A prosecutor commits misconduct when he asks questions designed to elicit inadmissible answers. (*People v. Bell* (1989) 49 Cal.3d 502, 532; *People v. Pitts* (1990) 223 Cal.App.3d 606, 734.) It is also misconduct for a prosecutor to ask questions "solely 'for the purpose of getting before the jury the fact inferred therein, together with the insinuations and suggestions

they inevitably contain[], rather than for the answers which might be given.' [Citation.]" (*People v. Wagner* (1975) 13 Cal.3d 612, 619; see also, *People v. Pitts*, *supra*, 223 Cal.App.3d at p. 734, and cases cited therein.)

In this case, the prosecutor committed numerous acts of misconduct during the guilt phase of appellant's trial. This misconduct violated both the federal and state constitutions, and deprived appellant of a fair trial.

A. The Prosecutor Committed Misconduct During the Testimony of Several Witnesses.

1. Informant Wilson.

During the testimony of inmate Robert Wilson, the prosecutor made an improper "speaking objection" which intimated (1) that there was evidence which the jurors had not heard about threats appellant made to witnesses against him and (2) made himself an unsworn witness conveying his personal opinion as to the danger appellant would pose to these witnesses if appellant knew where they were housed.

As part of its case in rebuttal, the prosecution called Wilson to testify that appellant had made incriminating statements to him. Through cross-examination, appellant sought to undermine Wilson's credibility. As part of this effort, defense counsel asked the inmate, who was incarcerated in Calipatria for appellant's trial, where in the prison he was housed. The prosecutor objected that the information was not relevant. Defense counsel made an offer of proof that Wilson had been in contact with other prosecution witnesses there and that they were coordinating their testimony in order to gain favor with the District Attorney's Office and the Department of Corrections. (63 RT 8002-8003.) The deputy district attorney became incensed, stating: "Your Honor, I'm objecting to his statements. They're totally unfounded, uncalled for, and inappropriate."

(63 RT 8003.) The trial court urged both sides to calm down and instructed the jury that what the attorneys say in court is not evidence. (63 RT 9003-8004.)

The trial court overruled the objection, stating: "Now, if you're trying to show that he was talking with the other witnesses, I'll allow it for that purpose only." (63 RT 8004.) The prosecutor then intimated, without any substantiation, that appellant would harm Wilson if he knew where the informant was housed:

> Excuse me, Your Honor, can't he just ask if he talked to the other witnesses? Why should he have to disclose where he is in Calipatria? *With Mr. Barrett being in Calipatria, we're asking for bigger problems than we can even imagine.*

(63 RT 8004, italics supplied.)

Defense counsel objected to the prosecutor's remark. Instead of ruling on the objection or admonishing the prosecutor for this obviously improper and prejudicial statement, the trial court said: "I object to both of the statements you guys are making lately." (63 RT 8004.)

This speaking objection by the prosecutor was misconduct, as it suggested that the prosecutor had information not presented at trial that witnesses like Wilson would be in danger if appellant had access to them. (See, e.g., *People v. Villa* (1980) 109 Cal.App.3d 360, 363-364 [misconduct where prosecutor's objections insinuated he had damaging evidence regarding defendant's prior sexual behavior]; see also, *People v. Pitts*, *supra*, 223 CalApp.3d at p. 722 [improper for a prosecutor to present potentially prejudicial "evidence" in the form of argument]; *People v. Perez* (1962) 58 Cal.2d 229, 240-241 [seriously prejudicial to ask defense witness if he had been threatened by defendant where there was no evidence or

offer of proof regarding any threat].)

It also improperly conveyed the prosecutor's personal opinion as to appellant's dangerousness to such witness, in effect making the prosecutor an unsworn witness against appellant. (See *United States v. Molina* (9th Cir. 1991) 934 F.2d 1440, 1444-1445 [prosecutors may not express personal opinions concerning a defendant's guilt or witness credibility]; *Berger v. United States* (1935) 295 U.S. 78, 88 [a prosecutor's "improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none"].)

2. Correctional Officer Brumbaugh.

The prosecutor improperly invoked the status of correctional officer William Brumbaugh to convince the jury the witness would not lie in court.

Through cross-examination, appellant sought to demonstrate the unlikelihood that in 2003 Brumbaugh remembered that appellant had told him Richmond had "steel poisoning" or that he saw appellant eating an apple in a holding cell after Richmond's body was discovered. Defense counsel established that Brumbaugh had not included either of these noteworthy events in his report in 1996. (54 RT 7073-7080.)

Immediately after this questioning ended, the prosecutor asked Brumbaugh on redirect examination: "Sir, you are a sworn peace officer?" When he said he was, the prosecutor continued: "Is there any reason to come into this courtroom and lie?" (54 RT 7081.) Defense counsel objected and asked the court to cite the prosecutor for misconduct. Before the court could rule, the prosecutor withdrew the question. (54 RT 7081.)

The questioning was "a speech to the jury masquerading as a question." (*People v. Chatman* (2006) 38 Cal.4th 344, 384.) The

prosecutor was trying to bolster the testimony of Brumbaugh by invoking his status as a sworn officer, implying he had an obligation to tell the truth which the lay witnesses did not. "[P]rosecutors have been admonished time and again to avoid statements to the effect that, if the defendant is innocent, government agents must be lying." (*United States v. Richter* (2nd Cir. 1987) 826 F.2d 206, 209.) The deputy district attorney's conduct herein should be condemned.

3. Cross-Examination of Appellant.

A prosecuting attorney "who improperly cross-examines a defendant in order to place inadmissible prejudicial evidence before the jury is guilty of misconduct." (*People v. Evans* (1952) 39 Cal.2d 242, 248-249; see also *People v. Johnson* (1978) 77 Cal.App.3d 866, 873.) In this case, the prosecutor improperly cross-examined appellant concerning the circumstances under which he was moved from CYA to the CDC in an effort to elicit inadmissible evidence of an alleged non-violent escape attempt. He also improperly sought to elicit evidence of past violent acts appellant had committed while in prison.

Shortly after appellant's cross-examination began, the deputy district attorney sought to establish that appellant was serving a life sentence. However, he quickly brought up appellant's removal from CYA:

Q. You were convicted of a crime in San Francisco at the age of 17?

A. I was convicted at 17.

Q. Sentenced to life?

A. Yes, I was.

Q. And your life sentence was to begin in C.Y.A.?

A. Yes.

Q. And how long were you supposed to be in C.Y.A.?

(59 RT 7611-7612.) Defense counsel objected based on relevancy. After the prosecutor promised to "tie it in," the objection was overruled. (59 RT 7612.) He continued:

Q. . . . The judge sentenced you to life.

A. He did.

Q. You began your life sentence in C.Y.A. How long were you supposed to be in C.Y.A.? To what age?

(59 RT 7612.)

Defense counsel renewed the objection, which was overruled. Appellant then responded that he was there until either age 25 or until CYA chose not to house him. The prosecutor shot back: "Right. In fact, they brought you back to court the following year saying that you're a washout; you can't handle it there, right?" (59 RT 7612.)

As appellant disagreed, his attorney again objected. The objection was overruled and the prosecutor continued:

Q. C.Y.A. – when you were in C.Y.A., you were supposed to be there at 25. At the age of 18, you were brought back to court.

A. That is incorrect, sir. I'm not following your line of questioning. I think I know what you're getting at, but you're starting to confuse me.

(59 RT 7613.)

The trial court finally stopped the prosecutor, stating: "It's getting awfully close to the things that we're talking about. So I would like to avoid that for now." (59 RT 7613.)

As fully explained later in this brief, the prosecutor was seeking to elicit evidence of a non-violent escape attempt by appellant from CYA.

(See Arg. XIX.A.2.b., *post.*) As appellant demonstrates therein, evidence of the purported escape attempt was inadmissible at the penalty phase of trial. It certainly was inadmissible in the guilt phase of trial. These questions were therefore misconduct. (See, e.g., *People v. Bell*, *supra*, 49 Cal.3d at p. 532; *People v. Pitts*, *supra*, 223 Cal.App.3d at p. 734.)

The prosecutor also improperly tried to elicit admissions from appellant that he had committed other violent acts. Over objection, the deputy district attorney asked appellant how many times he had been housed in Ad Seg prior to 1996. When appellant acknowledged he had been there "several times," the prosecutor asked:

Q. And none of those times were for protective custody, was it?

A. No, they weren't.

Q. Violent acts?

(59 RT 7615.) Defense counsel's objection was sustained. (59 RT 7615.)

Since evidence of any prior acts of violence was not admissible at that point, the questioning was misconduct.[137]

B. The Prosecutor Committed Misconduct During His Guilt Phase Argument.

The deputy district attorney also engaged in several instances of misconduct during argument to the jury. He improperly invoked his status as a representative for the People in urging the jury to find appellant guilty and he misstated the facts.

137

The trial court would later rule that evidence concerning appellant's prior violence was admissible in the guilt phase, pursuant to Evidence Code section 1103, subdivision (b). Appellant has argued that this ruling was erroneous. (See Arg. IV., *ante*.) In any event, the prosecutor should not have been trying to elicit such evidence prior to the trial court's ruling, especially when he knew that the court was contemplating the issue.

1. Improper Use of the Prestige of His Office.

This particular strain of misconduct actually began during general voir dire. Before questioning the prospective jurors, defense counsel introduced himself and told the panel of his fear of handling such a big responsibility. He stated: "Mostly I want to talk to you about my fears and your feelings about the issues in this case of which I'm afraid." (46 RT 5474-5475.) When the prosecutor had the opportunity to introduce himself, he made sure that each juror understood he was a representative of the People of California who believed in truth and justice. He stated:

> . . . I represent the People of the State of California in this case. I want everybody to be sure that you understand that I don't represent the victim Thomas Kent Richmond in this case, [or] the victim's family, Thomas Kent Richmond's family in this case. And I don't represent the C.D.C. or the California Department of Corrections in this case.
>
> Does anybody have a problem with that? Does everybody understand that I represent the People of the State of California?

(46 RT 5505-5506.)

Recognizing the improper nature of these remarks, defense counsel stated: "Your Honor, I have a problem with it. I think he's a deputy District Attorney employed by this county." (46 RT 5506.) The trial court's response to this objection, however, condoned the prosecutor's remarks. It told the jurors: "Well, but technically, the case is captioned the People of the State of California. And he is a deputy District Attorney employed by this county, but he represents the People of the State of California." (46 RT 5506.)

The prosecutor thus continued: "And that's exactly what I've said. I represent the People of the State of California." (46 RT 5506.) He then emphasized that unlike defense counsel he harbored no fears: "Since counsel has said 'Issues of which I am afraid of,' I want to tell you something right now. I'm not afraid of any issues in this case. The reason is because I believe in truth and justice." (46 RT 5507.)

In his guilt phase argument, the prosecutor returned to this theme. In discussing the section 4500 charge, he stated: "The People of the State of California contend that the defendant committed an assault while he was a life prisoner with malice aforethought that resulted in the death of Thomas Kent Richmond." (69 RT 8754.) Turning to the murder offense, he stated:

> Now, let's talk about murder. The People of the State of California contend that this is a murder case. When I say the People of the State of California, I want to reiterate what I said to you at the beginning of this trial. I do not represent the California Department of Corrections. I do not represent Thomas Kent Richmond, the victim in this case. I represent the People of the State of California. [¶] Now –

(69 RT 8755-8756.) Defense counsel interrupted, noting that there was a "continuing objection to that representation." (69 RT 8756.) The objection was overruled. (69 RT 8756.)

It is improper for a prosecutor to emphasize his position of authority during argument to the jury. (See, e.g., *Newlon v. Armontrout* (9th Cir. 1989) 885 F.2d 1328, 1335-1337.) In this case, the deputy district attorney did so in both phases of trial. (See Arg. XIX.D., *post.*) In this instance, he was seeking to use the prestige of his position as the representative of the People of the State of California in an effort to bolster his own credibility

and sway the jury on the murder charge. This behavior should not be condoned.

2. Misstatements of the Facts.

During his guilt phase argument, the prosecutor committed misconduct when he misstated the facts regarding Thomas Richmond's prison disciplinary history, in order to make it appear as though appellant was lying.

The prosecutor argued that Richmond only began getting in trouble in prison after he was celled with appellant. (69 RT 8761.) He claimed that testimony from records analyst Vialpando established that *none* of Richmond's 115 disciplinary writeups had ever been adjudicated, stating: "There was no determination on any of Tommy's 115's while he was in administrative segregation because he died within five weeks after getting there. Five weeks." (69 RT 8762.) After emphasizing that appellant was presumed innocent until proven guilty in a court of law, the deputy district attorney added, "Tommy never had his hearings. Shouldn't he receive that same respect? Shouldn't he receive that same right?" (69 RT 8763.)

The prosecutor then suggested that the jury should disbelieve appellant's testimony that Richmond, when he was celled with inmate Tripp, had been involved in a cell extraction and the "gassing" of an officer, and that a weapon was found in their cell, since Richmond's 115's for these incidents had not been adjudicated prior to his death. (69 RT 8764-8765.)

Further, the prosecutor argued that because none of Richmond's 115's had been adjudicated, appellant was not telling the truth when he testified that he spit at Lt. Fast because the officer found Richmond guilty of a rule violation for flooding their cell, which appellant claimed was his doing. He stated:

> The defendant insisted that the lieutenant found them both guilty. So what did the defendant do in response to that? He spit in the lieutenant's face. I had no doubt that he spit in the lieutenant's face. Clearly, it wasn't for finding Tommy guilty because Tommy never was found guilty. He was not telling you the truth, ladies and gentlemen.

(69 RT 8763.) Asserting that appellant's lack of truth on this point was not "incidental," the prosecutor strongly implied that the jury should therefore reject all of appellant's testimony. (69 RT 8762-8763.)[138]

The prosecutor's claims were inaccurate. In fact, although Vialpando testified that Richmond had 115's pending at his death, he did not specify the nature of these unresolved charges. (64 RT 8272-8273.) The prosecutor knew, however, that the flooding 115 was *not* one of them. A memorandum from Calipatria's Warden's Office stated that on March 19, 1996, Richmond had been found guilty as to the flooding incident. This document was marked for identification but not admitted into evidence. (3rd Supp. CT 417 [defense exh. 503]; 1 RT 106.) Thus, the jury had no way of knowing that the prosecutor was misstating the facts.

Further, the prosecutor mischaracterized the facts when he claimed that Richmond was not in Calipatria's Ad Seg long enough to have had his 115's heard. The memo indicates, and thus the prosecutor knew, that the delay in adjudicating a weapons possession 115 was caused by the fact that the prison had referred the matter to the district attorney's office for

---

138

In fact, the prosecutor made this same improper argument about the spitting incident during his penalty phase argument. (See Arg. XIX.,B.3.)

possible prosecution. (3rd Supp. CT 417.)[139]

The prosecutor further misled the jury when he claimed that Richmond's prison file demonstrated that he had not engaged in any misconduct prior to his transfer to Ad Seg. He said that from August 1995 to February 29, 1996, Richmond "was doing nothing but what was expected of an inmate to do. That was confirmed in the 'C' files." (69 RT 8761.) Until Richmond was celled with appellant, the deputy district attorney claimed:

> Tommy never had any razor blades on him. Tommy never had any weapons on him. Tommy never had any drugs on him, nothing that you can say that has been presented in this court of law. He in fact, didn't have any of those things, nothing.

(69 RT 8764-8765.)

Vialpando testified only that, as a records analyst, he had seen no documentation of misconduct by Richmond. (64 RT 8272-8273.) He admitted, however, that he did not know whether Richmond was involved in any criminal activity prior to his placement in Ad Seg. (64 RT 8273.) The lack of disciplinary write-ups did not affirmatively establish that Richmond had not engaged in any misconduct during his time in Calipatria's general population. The prosecutor's contrary assertion was

---

139

The memo stated: "Initial case for Possession of Weapon was referred to the D.A. for possible prosecution; CDC-115 had been issued but the hearing was being postponed pending the outcome of the referral to the D.A." (3rd Supp. CT 417.)

misconduct. (See, e.g., *People v. Hill*, *supra*, 17 Cal.4th at p. 823.)[140]

C. The Prosecutor's Efforts to Provoke Appellant Constituted Misconduct.

A prosecutor's actions designed to provoke a defendant may be misconduct. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1337-1339.) In this case, the prosecutor engaged in petty behavior throughout both phases of trial in an effort to produce a negative reaction from appellant.

During appellant's guilt phase cross-examination, the deputy district attorney asked argumentative, inflammatory questions. For example, he tried to goad appellant into making racially offense remarks. He asked appellant about whether the inmate with more "juice" slept on the bottom bunk. Appellant explained that it varied but that white inmates, in his personal experience, "treat each other as equals rather than superior and inferior." (59 RT 7619.) The prosecutor retorted, "Well, according to you, the white race is the supreme race, correct?" (59 RT 7619.) An objection that this was argumentative was sustained. (59 RT 7619-7620.) The deputy district attorney nonetheless continued the improper inquiry, asking if appellant had ever sent an inmate named "Snake" a kite "[r]eferring to how

---

140

Although defense counsel did not object to these particular misstatements of the facts, to do so would have been futile. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820 [defense will be excused for failure to make a timely objection if it would be futile].) It was clear that Judge Zimmerman would not sustain such objections because he believed it was the jury's duty to decide what the evidence established. (See, e.g., 69 RT 8792, 8838.) In fact, during the penalty phase argument, defense counsel specifically objected that the prosecutor was misstating the evidence by arguing that appellant was lying because Richmond's 115 for flooding had never been adjudicated. The trial court interrupted him mid-sentence, stating that the jury would decide what the facts were. (84 RT 10079; see also, 83 RT 9938; 84 RT 10066.)

supreme the white people are[.]" (59 RT 7620.) Defense counsel objected again, averring that the prosecutor was getting into an area that was inflammatory. (59 RT 7620.) The court foreclosed further inquiry on the subject, concluding that appellant's racial beliefs were not relevant. (59 RT 7620.)

In another instance, the prosecutor needled appellant about his candid unwillingness to testify in detail about certain conduct commonly engaged in by inmates. During cross-examination, appellant declined to explain how inmates make holes in their cell walls, stating he could not "remember." (59 RT 7665.) The prosecutor continued, "Like you couldn't recall how you sharpened the weapon?" (59 RT 7666.) Implying that appellant was lying, the prosecutor said: "And you are here to tell the truth today, aren't you sir?" (59 RT 7666.) Defense counsel objected that this questioning was argumentative and improper. Instead of ruling on the objection, the trial judge offered his recollection that appellant had previously testified he could not recall how he had cut the weapon out of the desk, not that he did not remember how he had sharpened it. Appellant responded, "Right, my mistake." (59 RT 7666.)[141]

The prosecutor also pressed appellant to repeatedly state that he had killed Richmond. This fact was unquestionably demonstrated in appellant's direct testimony. Although there was no doubt, the deputy district attorney started cross-examination by having appellant reacknowledge that he killed Richmond. His second question was: "On April the 9th of 1996, you killed

---

141

On direct examination, appellant had stated that he began "cutting a knife" after he was celled by himself. (58 RT 7518.) When his attorney asked him what he meant, appellant replied: "Cutting a piece of steel from the desk top. I'm sorry that I can't be any more specific than that." (58 RT 7518.)

Thomas Kent Richmond, the 2d, didn't you?" (59 RT 7611.) Appellant said he did. (59 RT 7611.) The prosecutor did not leave it there, however. Later in his examination, he implied that appellant had lied about whether he and Richmond had rotated bunks. (50 RT 7677-7678.) Appellant sought to clarify his testimony by explaining that the second time he and Richmond were cellmates, they were not together long enough to rotate. (59 RT 7678.) The prosecuting attorney shot back: ". . . more than a week later he was dead, correct?" (59 RT 7678.) Appellant said yes. The prosecutor continued: "And his death was a result of you; is that correct?" (59 RT 7678.) Second counsel objected that the question was asked and answered. (59 RT 7678.) The trial court admonished him that only lead counsel should be objecting. Lead counsel then stated: "I apologize. We are all getting a little excited, yes. I think this is starting to get in the area of argument." (59 RT 7679.) This provocative exchange was completely unnecessary.

Further harassment occurred when the prosecutor questioned appellant about the razor blade marked as exhibit 336. After appellant acknowledged that the blade might have a handle on it, the prosecutor said, "Want me to get a little closer?" (59 RT 7711.) He then approached appellant with it and stated, "Don't touch. Look." (59 RT 7711.) Defense counsel objected that the prosecutor was bullying appellant. The court responded, "Yeah, let's not engage in that type of stuff." (59 RT 7711.)

But the petty behavior continued, when the prosecutor directed provocative argument directly at appellant during the guilt phase closing argument. In urging that Richmond's killing be deemed unlawful, the prosecutor stated: "The defendant Joseph Anthony Barrett murdered Thomas Kent Richmond by plunging a piece of steel into his body 13

times." (69 RT 8756.) Defense counsel immediately interjected, "Your Honor, I think this is getting at the point of misconduct." (69 RT 8756.) The court agreed, stating: "Yeah. Make your comments to the jury, please." (69 RT 8756-8757.)

During a break in the proceedings later that day, appellant's attorney made a record of what had occurred. He said:

> There is one thing we need to put on the record outside the presence of the jury. [¶] I don't know if it was correctly stated, but I think it was prosecutorial misconduct to get in the face of Mr. Barrett and attempt to provoke him. [¶] You did caution him not to do that. He did move away, I will concede that. However, I don't think the record clearly reflected what we were objecting to, and I'm making that note for now.

(69 RT 8800.)

This Court has frowned upon such antics. In *People v. Hill*, *supra*, it explained:

> [The prosecutor's] tactics were petty and childish, heightening the acrimonious atmosphere in the courtroom and threatening the ability of defendant to receive a fair trial. It takes no citation to authority for us to conclude such juvenile courtroom behavior by a public prosecutor demeans the office, distracts the jury, prejudices the defense, and demands censure.

(17 Cal.4th at p. 834.)

In appellant's case the prosecutor's petty behavior occurred during both the guilt and penalty phases of appellant's trial. (See Arg. XIX., *post.*)

D. The Misconduct Was Not Harmless.

The cumulative effect of multiple acts of misconduct may deprive appellant of a fair trial. (*People v. Hill*, *supra*, 17 Cal.4th 845-845, and cases cited therein; *People v. Pitts*, *supra*, 223 Cal.App.3d at p. 815.) In this case, the cumulative effect of the prosecutor's misconduct was not harmless beyond a reasonable doubt. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 844, citing *Chapman v. California*, *supra*, 386 U.S at p. 24.) And, even if this Court finds that the prosecutor's behavior violated only state law, it was not harmless under the less rigorous *Watson* standard.

As fully explained previously, this was close case. Because the key issue was appellant's mens rea, his credibility was of great importance. (See Arg. IV.G., *ante*.) The misconduct described above enabled the prosecutor to portray appellant as a dangerous liar whose claim that he was acting with the belief that he needed to defend himself was a sham. It was, therefore, not harmless under any standard.

//

//

X.
A COMBINATION OF ERRORS IN THE GUILT PHASE JURY INSTRUCTIONS DEPRIVED APPELLANT OF A CONSTITUTIONALLY FAIR TRIAL

In this case, formulating the jury charge during appellant's guilt phase was complicated by two relatively novel questions: 1) how to properly instruct on the issues presented by Penal Code section 4500 and 2) how to instruct on the violent character evidence admitted pursuant to Evidence Code section 1103. In an attempt to address these issues and others, the defense submitted a large number of proposed special instructions. Efforts to sort through the instructions proposed by both sides were pressured by the impending the departure of Judge Zimmerman on a trip outside the country.

Perhaps as a result of the time limitations, the complexity of the legal issues involved, or both, the charge ultimately given to the jury was riddled with errors. It included instructions which should not have been given, incorrectly or inconsistently described the elements at issue or omitted them altogether, and were incomprehensible. The charge also failed to instruct on all lesser included offenses supported by the evidence and to include special instructions proposed by the defense which were correct statements of the law and important to the jurors' proper resolution of the issues entrusted to them.

There was a reasonable likelihood that the jury applied the charge as a whole in a way that prejudicially violated the constitution. Appellant was further prejudiced by the trial court's failure to preserve all proposed instructions as part of the record, thus infringing upon his right to a meaningful appeal.

A. The Trial Court Has a Duty to Instruct Correctly on Issues Raised by the Evidence.

It is the trial court's duty to instruct on general principles of law relevant to the issues raised by the evidence. This is true even absent a request for an instruction by the defendant. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) "'The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' []" (*Ibid.*) The court has a corresponding duty, however, "'to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.' []" (*People v. Saddler* (1979) 24 Cal.3d 671.)

The defendant is generally entitled upon request to a "pinpoint" instruction, which charges the jury on how to relate the evidence supporting a particular defense to the prosecution's general burden of proving guilt beyond a reasonable doubt. (*People v. Earp* (1999) 20 Cal.4th 826, 886.) Although the trial court need not give an argumentative or confusing pinpoint instruction, it should modify an otherwise correct one rather than deny it outright. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1110.)

A defendant has a constitutional right to have the jury "'determine every material issue presented by the evidence.' []" (*People v. Flood* (1998) 18 Cal.4th 470, 480.) "Under established law, instructional error relieving the prosecution of the burden of proving beyond a reasonable doubt every element of the charged offense violates the defendant's rights under both the United States and California Constitutions." (*Id.* at pp. 479-480; see also, *In re Winship* (1970) 397 U.S. 358, 364.)

Incorrect jury instructions may deprive a defendant of his right to due process. However, "not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." (*Middleton v. McNeil* (2004) 541 U.S. 433, 437.) Individual instructions may not be assessed in isolation, "but must be viewed in the context of the overall charge." (*Ibid.*, internal quotation marks and citations omitted; see also, *People v. Letner* (2010) 50 Cal.4th 99, 182.) The high court explains that "If the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." (*Middleton v. McNeil*, *supra*, 541 U.S. at p.437, internal quotation marks and citations omitted; *People v. Letner*, *supra*, 50 Cal.4th at p. 182.)

On appeal, this Court reviews a claim of instructional error de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.) Even absent an objection below, the Court may reverse a conviction if instructional error has adversely affected a defendant's substantial rights. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.)

B. Consideration of the Proposed Instructions Was Limited by the Trial Court's Schedule.

On September 8, 2003, some months before the People began presenting its case-in-chief at the guilt phase, the prosecutor submitted to the court a packet of proposed jury instructions with use notes. (18 RT 2410; see also, 5 CT 1290, 61 RT 7862.)

The discussion of jury instructions began on December 23, 2003. (61 RT 7861-7911.) On the same day, defense counsel submitted a first packet of proposed instructions and indicated he would be offering others.

(61 RT 7861, 7910-7911.)[142] The trial court indicated it would first rule on those requested by the People, and take up the defense special instructions afterward. (61 RT 7861-7863.)

The next instruction colloquy was on Monday, January 5, 2004. (65 RT 8325- 8379.) Therein the court reviewed some of the proposed instructions included in a second packet submitted by the defense, including special and modified CALJIC instructions. (65 RT 8325.)

On Tuesday morning, January 6, defense counsel suggested that they take an extra day to assemble a complete, accurate packet of instructions. Judge Zimmerman was resistant, stating he wanted to charge the jury on Thursday, January 8. (66 RT 8384-8385.) Defense counsel emphasized the need to have enough time to carefully review the final instructions. (66 RT 8401.) The judge indicated that they would have to work fast because he was going out of the country soon. (66 RT 8402.)[143] Appellant's attorney indicated he had submitted two sets of instructions and would soon be submitting a third. (66 RT 8411.)

That afternoon, other matters were addressed and then both sides rested. (66 RT 8467-8526.) In the presence of the jury, the trial court asked how long it would take to finalize the instructions. (66 RT 8527.) Defense

---

142

See also, 45 CT 12727-12739 [Defendant's Request For Special Jury Instructions (First Request)].

143

The judge also made comments which suggested that the exact language of the instructions was not of the utmost importance. During the January 5 discussion of instructions he stated: "You guys act like the jury really listens to these things." (65 RT 8339.) The next day he remarked, "Reading all this stuff to them is just like giving them a sleeping pill. It's just a fact." (66 RT 8405.)

counsel offered to limit his argument so that the parties could spend additional time on the instructions. (66 RT 8527.)[144] The court explained to the jury the time pressure he was facing:

> And you know, I'll fess up for the reason that we're sort of in a time crunch. And that is, I've got plane tickets, and I'm out of here on Tuesday night. I'm gone. But I'll be back in a week or so. [¶] And what can happen is if the jury is still deliberating – it's permissible and it happens frequently – another judge could take any verdict. That wouldn't be critical that I do that. But I don't want to dump this on another judge if I can help it. And I would like to see it right through to the end just like you. [¶] So the little problem we're having with time here is really my fault. It's caused by me at least. . . .

(66 RT 8528.)

On Wednesday afternoon, January 7, the court indicated that the prosecutor had provided a set of instructions for the parties to review once more. (67 RT 8537.) As they began, defense counsel alerted the court that he anticipated meeting on Thursday, and noted that some instructions still needed refining. (67 RT 8538.) Counsel also indicated he would submit one more set of proposed instructions. (67 RT 8563.)

On Thursday, January 8, the parties convened in the late morning. (68 RT 8602.) Appellant's attorneys indicated they were "plugging away"

144

Appellant's attorney offered to limit his argument to 1.5 hours if they could take some extra time to finish the instructions. (66 RT 8527.) This concession was significant, as counsel was unable to cover all of the topics he hoped to address during this abbreviated argument. (69 RT 8829.)

but would need another meeting to finalize instructions. The court was willing to meet in the afternoon, but added "it's got to be done by the end of the day." (68 RT 8602.) Instructions that the prosecutor had revised based on the previous day's discussions were reviewed. (68 RT 8603.) Defense counsel then asked if the court had received his packet of additional proposed instructions. (68 RT 8611.) The court said: "Just understand we are not going – we are going to have this done by 4:00 o'clock. . . . I am worried about these new pinpoints." (68 RT 8632.) Defense indicated that some were duplicative and added: "I am not going to – or I will just make a short record and you can make a ruling, how is that?" (68 RT 8632.)

After the court ruled on a number of proposed defense instructions, trial counsel asked the court to review the first packet of instructions he had submitted. Expressing displeasure, the trial court stated: "Well, wait a minute. It's almost noon on the day before we argue." (68 RT 8663.) Appellant's attorney explained that the instructions had been pending for "quite some time." (68 RT 8663) The parties then rapidly reviewed the packet. The trial court recessed, however, before special instructions numbers 10 and 11 were considered. (See 68 RT 8664-8669; 45 CT 12738-12739.) After lunch, the parties reviewed the instructions for a final time. (68 RT 8670-8696.)

In the rush to get the instructions finalized, the parties failed to notice numerous typographical errors.[145] Other more significant clerical

---

145

See, e.g., 46 CT 12863 [missing commas from "intent plan motive design"]; 46 CT 12848 [errors in sentence beginning with "A statement previously made . . . ."]; 46 CT 12873 [references to "mental sate"]; 46 CT 12880 [". . . must so appear at he time . . ."]; 46 CT 12897 [". . . because his her passions . . ."]; 46 CT 12907 ["Murrder of Manslaughter"].

errors were not corrected. For example, it had been agreed that all references to "counts" should be deleted, since the jury was not being given a copy of the indictment identifying the charged offenses by count. (68 RT 8613-8614.) Although some instructions were appropriately modified, others were not and continued to refer to the charges by count number.[146] Also, the instructions (and verdict forms) referred to and described the Penal Code section 4500 offense in a variety of ways.[147]

More importantly, however, the instructions in this case suffered from multiple substantive shortcomings, which are set forth below.

C. The Trial Court Erroneously Instructed on Evidence Code Section 1103(B).

As appellant has previously established, the trial court gave the jury seriously flawed instructions relating to how it could consider the evidence adduced pursuant to Evidence Code section 1103, subdivision (b). As instructed, the jury was unfairly able to consider other crimes evidence in determining whether appellant – but not Richmond – had a violent character. Further, the instructions erroneously allowed the jurors to consider this evidence as to issues of appellant's intent and knowledge, as

---

146

See 46 CT 12871, 12872, 12886, 12888, 12890.

147

See, e.g., 46 CT 12872 ["assault with a deadly weapon by a life prisoner causing death"]; 46 CT 12873, 12880 ["assault by a life prisoner with great bodily injury resulting in death"]; 46 CT 12874 ["assault with great bodily injury by a life prisoner"]; 46 CT 12878 ["assault with a deadly weapon by a life prisoner resulting in death"]; 46 CT 12886 ["Assault By Life Prisoner With A Deadly Weapon Or By Means Of Force Likely To Produce Great Bodily Injury With Malice Aforethought"]; 46 CT 12909 ["assault by a life prisoner with malice aforethought causing great bodily injury resulting in death"]; see also, 46 CT 12932, 12942 [verdict forms].

well as his character. And, the court erred in rejecting one or more special instructions on the issue and in defining the "preponderance of the evidence" standard without indicating that it pertained only to deciding whether appellant had committed these other violent acts or that it was the prosecutor's burden to prove them. (See Arg. IV.F., *ante*.)

D. The Instructions Relating to Penal Code Section 4500 Were Erroneous.

Appellant's attorney had represented many inmates from Calipatria and other prisons charged with crimes. (6 RT 859.) He indicated that in his experience, such inmates were either tried for murder or Penal Code section 4500 – but not both – when a fatality was involved. (14 RT 2141-2144.) Perhaps because the prosecutor's decision to try appellant pursuant to both sections 187 and 4500 was unusual, the court and the parties had difficulty adapting the charge appropriately.

The jury was given CALJIC 7.35, entitled "Assault By Life Prisoner With A Deadly Weapon Or By Means Of Force Likely To Produce Great Bodily Injury With Malice Aforethought." It read, in part:

> In order to prove this crime, each of the following elements must be proved: [¶] 1. A person was assaulted; [¶] 2. The assault was committed with a deadly weapon or instrument or by means of force likely to produce great bodily injury; [¶] 3. The assault was committed by a person while undergoing a sentence of life imprisonment, having been sentenced to life imprisonment within this state; and [¶] 4. The assault was committed with malice aforethought.

(46 CT 12886.) "Assault" was defined pursuant to CALJIC 9.00. (46 CT

12915.)[148] These instructions were flawed in several respects.

First, 7.35 and 9.00 provided conflicting descriptions regarding the mental state necessary to sustain the offense. On the one hand, CALJIC 7.35 correctly told the jury that the necessary mental state for the crime was malice aforethought. (46 CT 12886.)[149] On the other hand, 9.00

148

CALJIC 9.00 as presented to the jury read as follows: "In order to prove an assault, each of the following elements must be proved: [¶] 1. A person willfully and unlawfully committed an act which by its nature would probably and directly result in the application of physical force on another person; [¶] 2. The person committing the act was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that physical force would be applied to another person; and [¶] 3. At the time the act was committed, the person committing the act had the present ability to apply physical force to the person of another. [¶] The word 'willfully' means that the person committing the act did so intentionally. However, an assault does not require an intent to cause injury to another person, or an actual awareness of the risk that injury might occur to another person. [¶] To constitute assault, it is not necessary that any actual injury be inflicted. However, if an injury is inflicted it may be considered in connection with other evidence in determining whether an assault was committed [and, if so, the nature of the assault. [¶] A willful application of physical force upon the person of another is not unlawful when done in lawful self-defense. The People have the burden to prove that the application of physical force was not in lawful self-defense[.] If you have a reasonable doubt that the application of physical force was unlawful, you must find the defendant not guilty." (46 CT 12915.)

Nothing in either 7.35 or 9.00 linked that instruction to the other and they appeared in the written instructions almost 30 pages apart. (See 46 CT 12886, 12915.)

149

See also 46 CT 12873 (CALJIC 3.31.5, instructing that the necessary mental state for assault by a life prisoner is malice aforethought); 46 CT 12874 (special instruction 18.00-3.31.5, instructing that malice aforethought for assault by a life prisoner and murder is the same).

erroneously informed the jury that "an assault does not require an intent to cause injury to another person, or an actual awareness of the risk that injury might occur to another person." (46 CT 12915.) This part of 9.00 "directly contradicts the requirement of malice aforethought" and should have been removed from the charge. (*People v. Jeter* (2005) 125 Cal.App.4th 1212, 1217 [reversing § 4500 conviction because of trial court's instructing jury with CALJIC 9.00].)

Second, the trial court failed to instruct on the element of causation. Penal Code section 4500 applies to assaults committed by a life prisoner with a deadly weapon or by means of force likely to produce great bodily injury. If the victim survives, the punishment is life without the possibility of parole for nine years. If the victims dies "within a year and a day after such assault as a proximate result thereof," the punishment is either death or life imprisonment without possibility of parole. (Pen. Code, § 4500.) Thus, an assault which proximately causes the victim's death within a year and a day is an element of the crime. (See 3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Crimes Against the Person, § 100 [setting forth elements of the crime of "Murder by Life Prisoner."].)[150]

CALJIC 7.35 is not specific to a *fatal* assault and therefore does not address causation. It is nonetheless clear that the trial court in this case had a sua sponte duty to instruct on the element of causation. (See *People v. Mil* (2012) 53 Cal.4th 400, 409 [trial court has sua sponte duty to instruct on the elements of a charged offense].) It failed, however, to instruct the jury to determine whether the alleged assault on Richmond proximately caused his

---

150

Curiously, the indictment itself failed to claim that the alleged assault on Richmond proximately caused his death. (1 ACT 6.)

death.

The court did instruct pursuant to CALJIC 8.55, which stated: "To constitute murder or manslaughter, there must be, in addition to the death of a human being, an unlawful act which was a cause of that death." (46 CT 12902.) But section 4500 is an assault statute, not a murder statute. (*People v. McNabb* (1935) 3 Cal.2d 441, 458.) Thus this instruction did not tell the jury that it needed to determine, for the purposes of section 4500, whether an assault proximately caused Richmond's death.

More importantly, the trial court did not give CALJIC 3.40, which sets forth the legal test for determining proximate cause.[151] The use note for 3.40 makes clear that it must be given sua sponte "[i]f the jury must determine the issue of whether the defendant's act was the cause of the crime . . . ." (CALJIC 3.40 use note, citing *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 591.) During a discussion of jury instructions, the prosecutor referred to the use note indicating 3.40 needed to be given in conjunction with 8.55. (61 RT 7904-7906.) Judge Zimmerman then proposed giving the second paragraph of 3.40 after 8.55. The prosecutor disagreed with this idea, however, stating, "I don't think that the jury has to determine whether the Defendant's act was the cause of the crime." (61 RT 7906.)

151

CALJIC 3.40 (Cause - "But For" Test) states: "To constitute the crime of ___ there must be in addition to the (result of the crime) an unlawful [act] [or] [omission] which was a cause of that (result of the crime). ¶ The criminal law has its own particular way of defining cause. A cause of the (result of the crime) is an [act] [or] [omission] that sets in motion a chain of events that produces as a direct, natural and probable consequence of the [act] [or] [omission] the (result of the crime) and without which the (result of the crime) would not occur."

In a later discussion, defense counsel opined that 8.55 should be revised to include reference to section 4500, but the court disagreed. (68 RT 8633-8634; see also, 68 RT 8688.) Ultimately, 8.55 was not revised to relate to the section 4500 charge, 3.40 was not given, and the jury was never instructed on causation as an element of the section 4500 offense or as to the legal meaning of causation.[152]

Third, the trial court failed to instruct on assault with a deadly weapon as a lesser included offense of section 4500. There is a sua sponte duty to instruct on a lesser included offense supported by the evidence. (*People v. Breverman, supra*, 19 Cal.4th at p. 161.) This Court has held that assault with a deadly weapon as defined in Penal Code section 245, subdivision (a)(1) is "necessarily included within the greater crime of aggravated assault by a life prisoner (§ 4500)." (*People v. Milward* (2011) 52 Cal.4th 580, 586.) In appellant's case, there was of course substantial evidence upon which the jury could have concluded appellant acted without malice aforethought. When the question came up, however, the deputy district attorney indicated that assault with a deadly weapon was not a lesser included offense to section 4500. The court and defense counsel seemed to disagree. (61 RT 7899-7900.) However, the jury was not instructed on assault with a deadly weapon as a lesser offense and the only verdict forms they were provided on the section 4500 offense were guilty and not guilty. (46 CT 12932, 12942.)

E. The Court Erroneously Gave CALJIC 2.62 and Denied

152

Further, both 9.00 and 7.35 instructed the jury that actual bodily injury was not necessary. (46 CT 12886, 12915.) Such instruction is inconsistent with the jury having to find that any assault by appellant proximately caused Richmond's death.

the Special Instruction Proposed by the Defense.

As demonstrated herein, the trial court erred in instructing the jury pursuant to CALJIC No. 2.62, which permits the jury to draw an adverse inference from a defendant's testimony, as it was not supported by the evidence. Further, the court erred in denying a special instruction proposed by the defense which contained a correct statement of law as to how appellant's testimony should be considered.

During the discussion of jury instructions on January 6, 2004, the trial court read the text of a special instruction the defense was requesting relating to appellant's testimony.[153] It was entitled, "Defendant's Testimony (Jury Must Consider.)" (66 RT 8430.) It read:

> The Court instructs you that you are not to disregard the testimony of the Defendant because he is charged with a crime, but you are to consider his testimony giving it the same weight and credibility as though he were not charged with an offense. You must consider his testimony along with that of other witnesses, and facts, and circumstances which have been adduced in this case. And if his testimony is such that it creates a reasonable doubt in your mind, then, you must find the Defendant not guilty.

(66 RT 8430.)

Defense counsel indicated the proposed instruction was taken from a 1947 case, *People v. Denton.* (66 RT 8430, 8433; see *People v. Denton*

153

This instruction was in the second packet of proposed defense instructions, which, except insofar as a proposed instruction was quoted or discussed during an instruction colloquy, were not adequately preserved as part of the record. (See, subsec. K, *post.*)

(1947) 78 Cal.App.2d 540.) Counsel explained its importance: "The thrust of it is we want his testimony to be considered by the same standards as you would judge any witness' testimony." (66 RT 8430.)

The trial court then wondered whether they were "missing" CALJIC 2.62. (66 RT 8430.) Defense counsel described the standard instruction as "kind of the negative corollary of the positive statement" he had proposed in the special instruction. (66 RT 8432.) After the court realized that CALJIC 2.62 was in the packet of already-approved instructions,[154] defense counsel asked for the special instruction as well, stating: "And I would ask that this be included, too, rather than just the negative, because I believe it is a correct statement of the law and it goes beyond 2.62." The court agreed, indicating that the proposed instruction was a correct statement of law and directed the defense to "Shepardize" *People v. Denton.* (66 RT 8432-8433.)

The court then returned to CALJIC 2.62, observing that the use notes expressed caution: "[T]he use notes to 2.62 . . . [say] 'This instruction should not even be requested by either side unless there's some specific and significant defense omission that the prosecution wishes to stress or the defense wishes to mitigate.'" (66 RT 8433.) The prosecution asserted that appellant said he could not recall how he cut the weapon out of the desk in his cell. (66 RT 8433.) The court said, "I guess that's enough" but indicated that it would probably give the defense special instruction as well. (66 RT 8433.) Appellant's attorney wanted it known for the record that the defense disagreed that *how* appellant cut the weapon from the desk was a material issue, "since he's admitted that he cut it from the desk, which is the

---

154

See 61 RT 7885 (discussion of jury instructions on December 23, 2003).

issue." (66 RT 8433.) The court ruled that 2.62 would be given but that the special instruction was tentatively approved, subject to "Shepardizing." (66 RT 8434-8435.) Ultimately, the jury was instructed pursuant to CALJIC 2.62.[155] It was not, however, given the proposed special instruction, which apparently was not further discussed by the parties.

The trial court's instruction on 2.62, and the concomitant failure to give the proposed special instruction, was error. A trial court must give a pinpoint instruction when requested by a defendant if it is a correct statement of law and not otherwise argumentative or cumulative. (*People v. Earp*, *supra*, 20 Cal.4th at p. 886.) Here, as the trial court recognized, the proposed instruction was a correct statement of the law. *People v. Denton*, *supra*, 78 Cal.App.2d 540, 551, which to appellant's knowledge has never been disapproved of by any court, is instructive. Therein, the defendant requested an instruction using language identical to that in appellant's proposed instruction. The reviewing court found no prejudice from the trial

---

155

CALJIC 2.62 (Defendant Testifying – When Adverse Inference May Be Drawn) stated: "In this case defendant has testified to certain matters. [¶] If you find that the defendant failed to explain or deny any evidence against him introduced by the prosecution which he can reasonably be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable. [¶] The failure of a defendant to deny or explain evidence against him does not, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. [¶] If a defendant does not have the knowledge that he would need to deny or to explain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain this evidence." (46 CT 12861.)

court's refusal in *Denton* to instruct as requested, but only because the lower court had given instructions similar to those requested.[156] The appellate court concluded that the instructions fully and fairly instructed on the issue of Denton's testimony. (*Id.* at p. 552.)

In contrast, the trial court in the instant case did not fully and fairly instruct on the issue of appellant's testimony. Nothing in the court's charge told the jury that appellant's testimony was to be judged upon the same grounds as any other witness. In fact, as is further discussed below, CALJIC 2.62 singled appellant's testimony out for special scrutiny. In sum, the proposed instruction which was superfluous in *Denton* was vital in appellant's case.

In addition, the giving of CALJIC 2.62 was itself error. The trial court must refrain from instructing on principles of law which are irrelevant to the issues raised by the evidence and which may confuse the jury or relieve it from making findings on relevant issues. And, "'[i]t is an

---

156

The instruction given in *Denton* stated: "The jury has no right to disregard the testimony of the defendant on the ground alone that he is defendant and stands charged with the commission of a crime. The law presumes the defendant to be innocent until he is proven guilty, and the law allows him to testify in his own behalf and the jury should fairly and impartially consider his testimony together with all the other evidence in the case. [¶] A defendant in a criminal action is not compelled to testify, but he has the right to voluntarily testify in his own behalf, and his testimony is entitled to the same weight and credit as that of any other witnesses, and the jury should fairly and impartially consider his testimony, together with all other evidence in the case. A defendant having so offered himself as a witness becomes subject to the same rules for testing his credibility before the jury by impeachment or otherwise, as any other witness. [¶] The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact in this case." (78 Cal.App.2d at pp. 551-552.)

elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference [Citations].'" (*People v. Saddler*, *supra*, 24 Cal.3d at p. 681.)

Although the constitutionality of 2.62 was upheld by this Court in *People v. Saddler*, the instruction has been repeatedly criticized. In a concurring opinion former Chief Justice Bird agreed with the *Saddler* majority that the instruction did not therein violate due process or the defendant's privilege against self-incrimination. (24 Cal.3d at p. 684 [conc. opn. of Bird, C.J].) However, she emphasized that the instruction has "serious defects in both form and content." (*Ibid.*) She described two flaws in the standard instruction as follows:

> First, CALJIC No. 2.62 focuses jury attention solely upon the negative, potentially inculpatory aspects of an accused's testimony; i.e., it only informs the jurors they may draw inferences "unfavorable to the defendant" from his failure to explain or deny any evidence against him. The instruction omits to point out the reverse side of that coin, i.e., that inferences favorable to the accused may reasonably be drawn if there are no such gaps in his testimony.

(24 Cal.3d at p. 684.) Second,

> the challenged portion of CALJIC No. 2.62 singles out the *accused's* testimony for its special negative scrutiny. Neither this instruction nor any other in the CALJIC repertoire authorizes the jury to draw similar inferences from a comparable failure to explain or deny on the part of other witnesses in a trial. . . .

(24 Cal.3d at p. 685.)

The chief justice advised trial courts to use "extreme restraint" in instructing pursuant to 2.62 unless it was revised "with a more comprehensive, informative, and balanced instruction." (24 Cal.3d at p. 685; see also, *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1469 ["Appellate courts have frequently warned that trial courts should carefully consider whether CALJIC No. 2.62 should be given."].)

Further, the instruction has often been given improperly. (*People v. Lamer*, *supra*, 110 Cal.App.4th at p. 1470, fn. 4, and cases cited therein.) Thus, it should not even be requested unless there is "some specific and significant defense omission that the prosecution wishes to stress or the defense wishes to mitigate." (*Id.* at p. 1470, quoting *People v. Haynes* (1983) 148 Cal.App.3d 1117, 1120.) In sum, it is error to give CALJIC 2.62 unless the trial court first determines that the defendant has failed to deny or explain some incriminating evidence presented by the prosecution. (*People v. Campbell* (1978) 87 Cal.App.3d 678, 685; see also, *People v. Marsh* (1985) 175 Cal.App.3d 987, 994.)

On appeal, it is the reviewing court's duty to determine whether the defendant "failed to explain or deny any fact of evidence that was within the scope of relevant cross-examination." (*People v. Saddler*, *supra*, 24 Cal.3d at p. 682.) A contradiction between the defendant's testimony and that of the prosecution witnesses is not sufficient to support the instruction. (*Ibid.*; see also, *People v. Lamer*, *supra*, 110 CalApp.4th at p. 1469.) The instruction should not be given simply because the defendant's denial or explanation is questioned. "'[T]he test for giving the instruction is not whether the defendant's testimony is believable. CALJIC No. 2.62 is unwarranted when a defendant explains or denies matters within his or her

knowledge, no matter how improbable that explanation may appear.'[]" (*People v. Lamer*, *supra*, 110 Cal.App.4th at p. 1469, quoting *People v. Kondor* (1988) 200 Cal.App.3d 52, 57.)

In this case, the prosecution's assertion that appellant's failure to recall how he cut the weapon out of the desk did not support giving the instruction. Failure to recall a fact is not the same as failing to deny or explain it. (See, e.g., *People v. DeLarco* (1983) 142 Cal.App.3d 294, 309 [error to give 2.62 where defendant explained his earlier presence at the crime scene but could not recall whether he touched a flashlight with his fingerprints found there]; *People v. James* (1987) 196 Cal.App.3d 272, 296 [error to give 2.62 where defendant explained virtually all of the evidence against him but failed to recall making two statements attributed to him].) Moreover, as defense counsel pointed out, how appellant cut the desk was not a material issue in light of his admission that he did, in fact, cut out the metal piece which was used to kill Richmond. Appellant's failure to explain how he cut the weapon from the desk did not tend to indicate the truth of any evidence against him introduced by the prosecution.[157] CALJIC 2.62 had no logical relevance and served only to separate out appellant's testimony for special suspicion.

In sum, the trial court erred in failing to give the defense proposal and then compounded this erred by giving the one-sided 2.62 which was not supported by the evidence. These errors were particularly important because appellant's testimony and credibility were central to the defense.

157

The prosecutor introduced no evidence as to how appellant cut the weapon out of the desk top, and there was no dispute that appellant made a knife from the desk and used it in killing Richmond.

F. The Trial Court Unnecessarily Gave a Convoluted Instruction on Sudden Quarrel and Heat of Passion.

As demonstrated herein, the trial court erred in failing to give the jury readily understandable instruction on the issues of sudden quarrel and heat of passion.

Included in the initial packet of proposed jury instructions submitted by appellant was Special Defense Jury Instruction No. 11, entitled "Voluntary Manslaughter; Heat of Passion." It read as follows:

> A killing is voluntary manslaughter if the Defendant killed a person because of a sudden quarrel or in the [heat] of passion.
>
> The Defendant killed a person because of a sudden quarrel or in the heat of passion if:
>
> 1. The Defendant killed rashly and under the influence of a strong emotion, and without reasoning of judgment; and
>
> 2. He was provoked to kill by the other person's behavior; and
>
> 3. The other person's behavior was provocative enough to make an ordinary person of average disposition [] act rashly and without judgment.
>
> The prosecutor has the burden [of] proving beyond a reasonable doubt that the killing was not in the heat of passion.

(45 CT 12739.)

Although the first packet of defense instructions was submitted on December 23, 2003, the trial court did not consider these proposed instructions until January 8, 2004, the day before the jury was instructed in the guilt phase. Perhaps because of the time pressure Judge Zimmerman

felt to get deliberations underway before he left for his trip, he failed to make a ruling on Special Defense Jury Instruction No. 11. (See 68 RT 8663-8669.) Instead, he instructed the jury pursuant to CALJIC 8.42, the pattern instruction on sudden quarrel or heat of passion. (46 CT 12897.)[158]

An instruction should state a principle of law applicable to the case, expressed in "plain language." (*People v. Wright* (1988) 45 Cal.3d 1126, 1135.) "'It cannot be overemphasized that instructions should be clear and

---

158

CALJIC No. 8.42 as given read:

"To reduce an unlawful killing from murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arouse the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion.

"The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his her [sic] passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted him were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. Legally adequate provocation may occur in a short, or over a considerable, period of time.

"The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than from judgment.

"If there was provocation, whether of short or long duration, but of a nature not normally sufficient to arouse passion, or if sufficient time elapsed between the provocation and the fatal blow for passion to subside and reason to return, and if an unlawful killing of a human being followed the provocation and had all the elements of murder, as I have defined it, the mere fact of slight or remote provocation will not reduce the offense to manslaughter." (46 CT 12897.)

simple in order to avoid misleading a jury.' []" (*People v. Carrasco* (1981) 118 Cal.App.3d 936, 944.) CALJIC 8.42 is anything but clear and simple. In fact, the convoluted language of this pattern instruction is close to incomprehensible, particularly to a person unschooled in the law.[159] (See *People v. Carrasco*, *supra*, 118 Cal.App.3d at p. 944 [recognizing that lengthy form instructions can be confusing].)

In contrast, Special Defense Jury Instruction No. 11 was plainly much easier to understand than CALJIC 8.42.[160] Because it was a correct statement of the law,[161] the trial court erred in giving CALJIC 8.42 instead of the requested instruction.

G. The Court Gave Flawed Versions of CALJIC 8.71 and 8.72, While Rejecting a Correct Special Instruction Proposed by Appellant.

The trial court gave CALJIC No. 8.71, which instructed the jurors as to what they should do if they agreed appellant had committed murder but

---

159

This readily observable fact is confirmed through the application of several reading algorithms. The language of the instruction earns a "Flesch Reading Ease" score of 30.83 which indicates college graduate level; a "Fog Scale Level" of 24.12, with a score of 20 or higher being "very difficult"; and a "Flesch-Kincaid Grade Level" of 21.05, which indicates that the reader would need a post-graduate level of reading. (See Writing Sample Analyzer at http://sarahktyler.com/code/sample.php.)

160

It rates a "Flesch Reading Ease" score of 66.07, which corresponds to an 8th or 9th grade English level; a "Fog Scale Level" of 8.92, between "readable" and "hard"; and a "Flesch-Kincaid Grade Level" of 7.16. (See Writing Sample Analyzer at http://sarahktyler.com/code/sample.php.)

161

See 46 CT 12739 (points & authorities including *People v. Breverman*, *supra*, 19 Cal.4th at p. 163.) In fact, the language of the proposed instruction is somewhat similar to that contained in CALCRIM 570.

had doubts about whether it was in the first or second degree. The version of CALJIC 8.71 given in appellant's trial stated:

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, *but you unanimously agree* that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree as well as a verdict of not guilty of murder in the first degree.

(46 CT 12904, italics supplied.) The jury was given a similar instruction for resolving any doubts it had between murder and manslaughter.[162]

This version of 8.71 is flawed, since it suggested that a juror was to give the defendant the benefit of the doubt as to the degree of the offense only if all jurors *unanimously* had a reasonable doubt as to the degree, thereby making first degree murder the de facto default finding, depriving appellant of the benefit of the judgment of individual jurors, and diminishing the prosecutor's burden of proof. The same flaw is apparent in 8.72, which in effect required a murder verdict unless all jurors unanimously agreed that there was reasonable doubt as to whether appellant had committed murder or manslaughter.

162

CALJIC 8.72 stated: "If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, *but you unanimously agree* that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder." (46 CT 12905, italics supplied.)

This Court recognized the confusion these instructions could engender in *People v. Moore* (2011) 51 Cal.4th 386, 409-411. Therein, the Court stated:

> We conclude the better practice is not to use the 1996 revised versions of CALJIC Nos. 8.71 and 8.72, as the instructions carry at least some potential for confusing the jurors about the role of their individual judgments in deciding between first and second degree murder, and between murder and manslaughter.

(51 Cal.4th at p 411.)

Thus, the standard instructions were recently revised. As now written, CALJIC 8.71 cannot lead to a first degree murder verdict if *any* individual juror has a reasonable doubt as to the degree of murder. It currently states:

> *If any juror* is convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but has a reasonable doubt whether the murder was of the first or of the second degree, that juror must give defendant the benefit of that doubt and find that the murder is of the second degree.

(CALJIC 8.71 (Fall 2011 Revision), italics supplied.)

Instruction 8.72 was similarly amended. Thus, it cannot result in a finding of murder if *any* individual juror has a reasonable doubt as to whether the offense is murder or manslaughter.

In appellant's case, these confusing instructions could have been avoided altogether if the special instruction proposed by the defense had been given instead. The instruction, entitled "Lesser Included Offense, Duty of the Jury," stated: "If you entertain a reasonable doubt as to which

of two offenses was committed, it is your duty to convict [of] the lesser offense only." (66 RT 8440.) The trial court denied the instruction as cumulative to CALJIC 8.71 and 8.72. (66 RT 8440-8441.) The rejection of the proposed instruction was error, since it did not contain the confusing unanimity requirement and it was a correct statement of the law. It was not cumulative to 8.71 and 8.72, since those instructions were incorrect and dangerously misleading statements of the law.

H. The Lying-In-Wait Special Circumstance Instruction Was Erroneous.

The jury was instructed on the lying-in-wait special circumstance pursuant to CALJIC 8.81.15. Appellant contends that it was erroneous for several reasons. As explained below, the instruction does not require a substantial period of watchful waiting or require that the purpose concealed must be a deadly one. Further, it doe not make clear how murder while lying in wait is distinguished from premeditated and deliberate murder that is not committed while lying in wait.

CALJIC 8.81.15 told the jury, inter alia, that "The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation." (46 CT 12912.) Justices Kennard and Moreno, in their separate concurring and dissenting opinions in *People v. Stevens* (2007) 41 Cal.4th 182, 214, 216, both concluded that CALJIC 8.81.15 is flawed. Therein, both justices determined that it is error to instruct a jury that the lying in wait necessary to establish the special circumstance pursuant to former Penal Code section 190.2, subdivision (a)(15) need not last any longer than that required for the premeditation and deliberation necessary for first degree murder. (41 Cal.4th at pp. 219-220 [Moreno, J.]; pp. 215-216 [Kennard, J.].) To do so

reads out the requirement of a *substantial* period of watchful waiting, an element which this Court has found essential to the special circumstance. (See *People v. Morales*, *supra*, 48 Cal.3d at p. 557.)

Appellant recognizes that the *Stevens* majority did not agree with this reasoning. (41 Cal.4th at pp. 203-204.) He nonetheless urges this Court to revisit the issue. As Justice Moreno emphasized, instructing the jury that the lying in wait need not continue for any particular period but must be substantial (see 46 CT 12912) is contradictory. (41 Cal.4th at pp. 219-220.)

CALJIC 8.81.5 was further confusing in this case because it did not explain that the required concealment of purpose must be an intent to kill and that the act which appellant was watching and waiting for an opportune time to commit must have been the lethal attack. The instruction does not explain that the "act" is one designed to kill the alleged victim, that the concealed purpose is to kill, or that it is a lethal attack which must take the person by surprise by secret design. (But see *People v. Streeter* (2012) 54 Cal.4th 205, 251 [rejecting this argument].)

In this case, appellant's own testimony supplied the watchful waiting and concealment of purpose, but he testified that he was waiting to see if Richmond would attack him. (59 RT 7564-7568.) The jury could reasonably have found that appellant did not intend to kill Richmond during that period, and that he began stabbing Richmond with an actual belief (either reasonable or unreasonable) in the need to defend himself. It could have further determined, however, that appellant became aware, after the stabbing began, that his cellmate was not truly a threat, either because he did not in fact have a weapon or because he became disabled by the first set of wounds, but that appellant *then* formed an intent to kill and with such intent inflicted additional wounds. Under 8.81.15, this scenario would have

led the jury to find true the lying-in-wait special circumstance even though appellant had engaged in the watchful waiting and concealment of purpose for the lawful purpose of defending against possible attack.

This erroneous construction of the lying-in-wait special circumstance was not corrected by the requirement of a continuous flow of events. In this case, the jury was told that:

> Thus, for a killing to be perpetrated while lying in wait, both the concealment and the watchful waiting as well as the killing must occur during the same time period, *or* in an uninterrupted attack commencing no later than the moment concealment ends. [¶] If there is a clear interruption separating the period of lying in wait from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the uninterrupted lethal events, the special circumstance is not proved.

(46 CT 12912, italics supplied.)

In *People v. Streeter*, *supra*, 54 Cal.4th 205, 252, this Court found that the jury therein was adequately instructed on the lying-in-wait special circumstance in part because of supplemental instructions given at the prosecutor's request which told the jury that it must find "a continuous flow in the culpable state of mind between the period of watchful waiting and the homicide." Here, no such supplemental instruction was given. In light of the unique facts presented, the jury could have found a continuous flow of events but not a continuous culpable state of mind. Appellant's jury could have believed that the concealment and waiting and the killing occurred in the same time period, without a clear interruption, although finding that his intent to kill was not formed until after the stabbing had begun.

Finally, appellant's jury would have been hard pressed to understand how the concept of murder while lying in wait actually differed from first degree premeditated and deliberate murder, in light of the language in 8.81.15. Both required intent to kill. Both required a state of mind equivalent to premeditation and deliberation. Although the special circumstance purported to require the additional elements of concealment of purpose and surprise attack, a reasonable juror would wonder how a defendant could commit first degree premeditated and deliberate murder without these factors.

I. The Erroneous Jury Charge Violated Appellant's Due Process Rights.

"In a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement." (*Middleton v. McNeil*, *supra*, 541 U.S. at p. 437; see also, *People v. Mil*, *supra*, 53 Cal.4th at p. 417.) Ambiguous or inconsistent instructions violate due process if there is a reasonable likelihood that the jury has misunderstood or misapplied them. (*People v. Letner*, *supra*, 50 Cal.4th at p. 182.)

In this case, errors affected virtually every aspect of the guilt phase charge. These errors, considered individually or in combination, violated appellant's right to due process.

It is reasonably likely that the trial court's error in giving CAJLIC 2.62, as well as its erroneous rejection of the related proposed special instruction, led the jury to misunderstand how to weigh appellant's testimony, particularly in relation to that of other witnesses presented. The instructions pertaining to Evidence Code section 1103(b) likely led the jury to erroneously believe it could consider the other violent crimes evidence in

determining the intent and knowledge with which appellant acted when he stabbed Thomas Richmond. These instructions further relieved the People of its burden of proving that these violent episodes actually occurred. And, it is likely that one or more jurors used the preponderance of the evidence standard for an impermissible purpose, since the written instructions did not tell them to what issues that evidentiary standard related.

It is also reasonably likely that one or more jurors misunderstood what constitutes heat of passion or sudden quarrel, a misunderstanding which would not have occurred if the trial court had given the instruction proposed by the defense. Further, one or more jurors reasonably might have believed, pursuant to CALJIC 8.71 and 8.72 as given, that he or she could only vote for second degree murder rather than first degree, or manslaughter rather than murder, if all jurors unanimously agreed that there was reasonable doubt as to which had been committed. Again, no such misunderstanding could have occurred if the defense proposed instruction had been given.

In addition, the conflicting instructions as to the mental state required for the section 4500 charge might reasonably have led a juror to believe that he or she need only find the intent required to commit assault. The erroneously incomplete instructions omitted the element of causation from the charge, and failed to give the jury an option of finding appellant guilty of only a lesser included offense.

Finally, the lying-in-wait special circumstance instruction, which misdescribed several elements, was likely to mislead a juror to believe that the intent required was no greater than, or different from, that for premeditation and deliberation, that a continuous state of mind was not required, that the purpose concealed did not have to be an intent to kill and

that the watchful waiting did not have to be for the purpose of launching a lethal attack.

J. The Erroneous Instructions Were Not Harmless Beyond a Reasonable Doubt.

Instructional error that omits an element or otherwise violates due process is reviewed under the *Chapman* harmless error standard. (*People v. Mil*, *supra*, 53 Cal.4th at p. 409; *People v. Hudson* (2006) 38 Cal.4th 1002, 1013; *Neder v. United States* (1999) 527 U.S. 1, 4.) This Court does not "'become in effect a second jury to determine whether the defendant is guilty.' []" (*Neder*, *supra*, 527 U.S. at p. 19.) Rather, this Court must conduct a thorough review of the record and then determine whether it demonstrates beyond a reasonable doubt that the jury's verdict would have been the same absent the erroneous instructions. (*People v. Mil*, *supra*, 53 Cal.4th at p. 417.) The omission of an element, for example, is not harmless "'where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding . . . .'" (*Ibid.*, quoting *Neder*, *supra*, 527 U.S. at p. 19.) To say that an instructional error did not contribute to the verdict is "to find that error unimportant *in relation to everything else the jury considered on the issue in question, as revealed by the record.*" (*People v. Hudson*, *supra*, 38 Cal.4th at p. 1013, internal quotation marks and citation omitted, italics in original.)

In appellant's case, correct instructions could have led a rational jury to a different verdict. The key contested issue in this case was the mens rea with which appellant stabbed his cellmate, and it was vigorously disputed. The defense presented substantial evidence that appellant did not act with the mental state necessary to establish capital murder. The success of the defense was dependent upon appellant's testimony that he believed he

needed to defend himself. Appellant's testimony was supported by that of a forensic expert and by two other inmates who saw a weapon being passed into cell 146 on the night Richmond died. (See Stmt. of Facts, A.2.c-d., *ante*.)

As previously established, this was a close case, as demonstrated by the length of deliberations and the jury's readback requests and questions. (See Arg. IV.G., *ante*.) If jurors had found the question of appellant's mens rea to be clear cut, they presumably would have returned a verdict in short order. The fact that they did not, and that they wanted to hear appellant's testimony again, as well as other testimony relating to whether a second knife went into the cell, indicates they struggled with this issue.

Most if not all of the instructional errors detailed above negatively affected the jury's consideration of appellant's mental state. Several undermined his credibility. The incorrect instructions relating to the proper assessment of appellant's testimony prejudicially singled him out for special negative scrutiny. The erroneous instructions on the use of the other violent crimes evidence also prejudicially affected the jury's assessment of whether appellant was telling the truth on the witness stand concerning his state of mind at the time he struck Richmond.

Other errors could have led the jury to misunderstand the legal concepts upon which it might have found that appellant acted with a mental state insufficient for capital murder. The jury's failure to quickly return a verdict strongly suggests it was indeed sorting through questions such as whether appellant acted under an actual belief in the need to defend himself, whether such belief was reasonable or unreasonable, whether he acted in the heat of passion or upon sudden quarrel, etc. Thus, the need for correct and clear instruction on these critical concepts was manifest. It cannot be

said beyond a reasonable doubt that the flawed and confusing explanations of what constituted heat of passion and sudden quarrel and when it was appropriate to find a lesser offense, which undermined appellant's defense, did not contribute to the verdict.

The instructions on Penal Code section 4500 and the lying-in-wait special circumstance created additional challenges for a jury struggling to sort through the 80-plus pages of poorly drafted instructions. They both contained erroneous and inconsistent instruction relating to the mens rea the jury needed to find appellant harbored in order return a guilty verdict on the section 4500 charge and a true finding on the special circumstance, and therefore could only have contributed to the likelihood of prejudice.

In sum, given the evidence presented in appellant's case, this Court cannot find beyond a reasonable doubt that the jury's verdict would have been the same absent the erroneous instructions. Had the jury been instructed correctly on issues relating to appellant's credibility and the applicable legal principles regarding mens rea, it might have determined that Richmond's homicide was something less that a capital offense. Thus, the instructional errors were not harmless.[163]

K. The Absence of So Many Proposed Instructions From the Record Infringe on Appellant's Rights to a Meaningful Appeal.

Finally, should this Court not find prejudicial instructional error, appellant is still entitled to relief due to the state's failure to preserve all written requested instructions.

Appellant's attorney reasonably believed that all proposed

163

Appellant asserts that even if the *Watson* standard is applied, the errors were prejudicial.

instructions would be included in the record. During an instructional colloquy he stated, "Your Honor, they will be put in the file, right, and you can indicate 'denied' or 'admitted'?" (66 RT 8423.) Judge Zimmerman indicated he was trying to read each proposal into the record[164] and agreed that "There should be a sufficient record." (66 RT 8425.)

Despite this assurance, only one of the three sets of special instructions submitted by appellant was included in the record on appeal. None of the instructions proffered by the prosecutor were saved. The missing instructions could not be located or reconstructed during record completion proceedings. (4th Supp. CT 151-153 [Stipulated Settled Statement Re Jury Instructions].)

Under the Due Process Clause of the Fourteenth Amendment, the state has the duty to provide every defendant an adequate, complete and effective appellate review of his conviction. (*Entsminger v. Iowa* (1967) 386 U.S. 748, 752; *Draper v. Washington* (1963) 372 U.S. 487, 496; *People v. Barton* (1978) 21 Cal.3d 513, 518.) Critical to a complete and adequate appeal is "an appellate record that will permit a meaningful, effective presentation of the [defendant's] claims." (*People v. Barton*, *supra*, at p. 518, and cases cited therein.)

The right to a complete and accurate record is of particular importance in capital appeals, because of the Eighth Amendment requirement of heightened reliability in such cases (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305), the constitutional function of appellate review in death penalty cases, and California's independent interest in the reliability of its death judgments (see *People v. Chadd* (1981) 28 Cal.3d

---

164

As explained below, he did not succeed in doing so.

739, 751-753). Thus, the United States Supreme Court has "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally" (*Parker v. Dugger* (1991) 498 U.S. 308, 321), and has stressed "the importance of reviewing capital sentences on a complete record" (*Dobbs v. Zant* (1993) 506 U.S. 357, 358).

This Court has likewise reaffirmed, in the capital context, "the critical role of a proper and complete record in facilitating meaningful appellate review." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 63.) In *Hawthorne*, this Court stated: "We cannot urge too strongly that trial judges assiduously preserve a detailed account of all proceedings regardless of their perceived significance, particularly in capital cases, to minimize the need to reconstruct events." (*Ibid.*)

These constitutional rights to a complete and accurate record in capital cases have also been codified in section 190.7 and 190.9. Section 190.7 defines the "entire record" in such cases to include a copy of "any other paper or record filed or lodged with the superior or municipal court . . . ." (See also, Cal. Rules of Ct., rule 34.1(a)(1)(C) and former rule 39.5.)

In short, as this Court has summarized the constitutional requirements of a complete and adequate record on appeal: "Under the Fourteenth Amendment, the record of the proceedings must be sufficient to permit adequate and effective appellate review. [Citations.] Under the Eighth Amendment, the record must be sufficient to ensure that there is no substantial risk the death sentence has been arbitrarily imposed." (*People v. Howard* (1992) 1 Cal.4th 1132, 1166.)

The record in appellant's case is inadequate because it is missing most of the special instructions proffered by him but denied by the trial

court. The second packet of special instructions submitted by the defense included between nineteen and twenty-four instructions. The text of some was read into the record, but the content of 10-15 of the proffered instructions was not documented. These missing instructions covered a variety of issues.[165] The third packet submitted apparently included six instructions. The text of two is not known.[166]

The titles of these missing instructions indicate that many spoke to the critical issue of mens rea. Thus, the state cannot show that they were harmless beyond a reasonable doubt.

165

They included: Assault by a Prisoner - Elements [denied as cumulative, 66 RT 8425]; Credibility of Witnesses [denied as cumulative to CALJIC Nos. 2.20, 2.21.1, 2.21.2, and 2.22, 66 RT 8426-8427]; Defendant in Restraints (Jury Not to Consider) [denied as cumulative to CALJIC No. 1.04, 66 RT 8427-8430, 8439]; Jury (Duty Not to Surrender Honest Convictions and Duty Not to Vote for Guilty Verdict if Reasonable Doubt Is Entertained) [denied as cumulative, 66 RT 8435-8437]; Justifiable Homicide in Self-Defense, Right to Act Upon Reasonable Circumstances [denied as cumulative to CALJIC Nos. 5.13 and 5.30, 66 RT 8440]; Malice (Honest Belief and Imminent Threat to Self or Others Negates Malice) [denied as cumulative, 68 RT 8657-8658]; Motive (Lack of Motive Is Proof of Innocence [denied as cumulative to CALJIC No. 2.51, 66 RT 8443, 68 RT 8658]; Lack of Motive [denied as cumulative, 66 RT 8445-8446]; Murder – Malice Element and Reasonable Doubt [denied as cumulative, 68 RT 8659]; Other Crimes, Risk of Prejudice [denied as argumentative, 68 RT 8659-8660]; Other Crimes Were Admitted for a Limited Purpose [denied as cumulative, 69 RT 8659-8660]; Quantum of Proof [denied as cumulative, 68 RT 8660-8661]; Honest But Unreasonable Belief Can Reduce a Murder to Manslaughter [68 RT 8661]; and Imminent Danger Turns on the Totality of the Circumstances [denied as cumulative, 68 RT 8661-8663].

166

They include: Reasonable Doubt as to Self-Defense [denied as cumulative, 68 RT 8650-8651]; and a self-defense instruction based on the one used with battered wife syndrome [denied as confusing, 68 RT 8653].

In conclusion, this Court should reverse appellant's convictions and sentence because there was a reasonable likelihood that the erroneous instructions were applied in a way that prejudicially violated the constitution. Alternatively, because the certified record is inadequate to provide appellant with a full and fair review of the proceedings below to which he is constitutionally entitled, the entire judgment must be reversed. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15.)

//

//

XI.
APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BY THE PREJUDICIAL AND UNJUSTIFIED DELAY IN CHARGING HIM WITH MURDER

Prior to trial, appellant moved to dismiss the charges against him, asserting that he had been deprived of due process under both the federal and state constitutions by the two-year delay between the date of Richmond's death and his indictment. Most significantly, two witnesses who could have provided exculpatory evidence had died. In denying the motion, the trial court failed to apply the three-step balancing test required by California law. Had the court properly balanced the prejudice to appellant's defense with the prosecution's failure to present any justification for the delay, it would have granted the motion.

A. Appellant's Motion to Dismiss Based on Pre-Charging Delay.

1. The Written Pleadings.

On August 19, 2002, appellant filed a motion to dismiss the accusatory pleading, asserting that the delay in filing charges against him for Richmond's death deprived him of due process. (3 CT 585-605.) Appellant contended that his prosecution had been unreasonably delayed, thereby violating his right to due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution. (3 CT 585.) Alternatively, appellant requested the dismissal of the special circumstance allegations and the Penal Code section 4500 allegation. (3 CT 585.)

The motion, which was supported by a declaration from appellant, asserted that the Department of Corrections had transferred him from Calipatria to Pelican Bay State Prison approximately one year after

Richmond's death. There, appellant made three separate requests for a speedy trial.[167] The Imperial County District Attorney's Office denied the first request and ignored the other two. (3 CT 588, 599.) In February 1998, appellant was returned to Calipatria at the district attorney's request. (3 CT 588.) On July 10, 1998, 27 months after Richmond's death, the grand jury returned an indictment against appellant, charging him with four felony violations, including first degree murder. (3 CT 588.)

Appellant claimed that the pre-charging delay of more than two years had compromised his ability to secure the testimony of witnesses. (3 CT 585, 599.) Two material witnesses had died. (3 CT 587, 591.) Inmate Cruz was strangled to death in prison in approximately October 1997. Cruz would have testified for the defense that Richmond was given an order to kill appellant, that there were two weapons in cell 146 on April 9, 1996, and that Richmond was armed at the time of the incident, corroborating appellant's assertion of self-defense. (3 CT 588-589, 599-600.) Appellant stated: "In short, Mr. Cruz's death has compromised my ability to present an effective defense. But for the long delay in this case, I would have availed myself of Mr. Cruz's testimony which would have corroborated my self-defense claim[.]" (3 CT 600.)

Inmate Hogan had also died after the commission of the alleged criminal offenses. Hogan would have testified to his personal knowledge that Richmond was given an order to kill appellant, was armed and planned to kill appellant on the night in question. (3 CT 589, 600.)

Further, appellant asserted that the preaccusation delay compromised

---

167

See Penal Code section 1381 [Right to speedy trial of person incarcerated for another offense].

his ability to pursue adequate investigation. By the time appellant was indicted, the memories of numerous witnesses present in Ad Seg on April 9, 1996 had faded. Many inmates who had been housed in this unit at the time of the alleged offense had been transferred elsewhere. These witnesses, whose full names were not known to appellant, would be difficult, if not impossible, to locate. Prompt initiation of formal proceedings would have afforded appellant the opportunity to secure the names of these witnesses, however. (3 CT 588, 600.)

Finally, appellant asserted that his own fading memory substantially prejudiced his ability to prepare an adequate defense. (3 CT 587, 591.) Appellant was no longer able to recall who was awake and heard the events that occurred in his cell that night. He was unable to recall the names of inmates who had personal knowledge that Richmond was armed and had been given an order to kill him. (3 CT 600-601.)

In contrast to this prejudice, the motion asserted, was the lack of justification for the state's delay. The witnesses, including correctional staff and inmates, were all readily available to the state. (3 CT 588.) In fact, the People's disregard for appellant's due process rights was made clear in a statement made to the press by deputy district attorney Gale Filter, the prosecutor who was handling the case at that time. Mr. Filter told the Imperial Valley Press that appellant "was quickly fingered by investigators as the culprit." (3 CT 596.) Filter acknowledged, however, that the DA's office did not feel any obligation to move expeditiously when he stated, "'By that I mean [appellant] is an inmate who is not going anywhere.'" (3 CT 588, 596.)[168]

---

168 The article, published on February 8, 1998, was attached as an exhibit to

The motion, which thoroughly set out the applicable law, explained that because appellant had made an initial showing of prejudice, the burden then shifted to the prosecution to offer a justification for the delay. Appellant contended that the state's justification – that appellant was not going anywhere – did not outweigh the prejudice created from the delay. (3 CT 589-594.)

Wayne Robinson, the deputy district attorney who ultimately prosecuted appellant, filed a written response opposing appellant's motion to dismiss. (3 CT 606-614.) The prosecutor argued that pursuant to the Sixth Amendment right to a speedy trial, prejudice from preaccusation delay can only be presumed where the delay exceeds the statute of limitations for the charged offense. Since there is no statute of limitations for murder, the prosecutor argued, appellant's "federal speedy trial claim should be summarily denied . . . ." (3 CT 608-609.) Appellant had not asserted, however, that he was denied his right to a speedy trial under the Sixth Amendment.

The deputy district attorney also asserted that appellant had not been denied due process by the delay between April 8, 1996 and July 10, 1998, the date of indictment. (3 CT 610, 607.) Stating that the People are not required to offer any justification for the delay until a defendant demonstrates actual prejudice, Mr. Robinson averred, "Thus, until defendant Barrett is able to present competent evidence to prove actual prejudice this court should not even explore the justification for the pre indictment delay in this case." (3 CT 611.)

Finally, the prosecutor argued that actual prejudice could only be

---

appellant's motion to dismiss. (3 CT 595-597.)

fully assessed after evidence was presented, and that it was therefore proper to defer resolution of the defense motion to dismiss until after trial. (3 CT 611-612.)

2. The Trial Court's Ruling.

Appellant's motion to dismiss for lack of due process was initially heard on September 3, 2002. (3 CT 615; 10 RT 1565.) It was continued several times, however, because defense counsel had inadequate access to appellant, who was being housed in Tehachapi State Prison, almost 300 miles away from El Centro.[169] On December 17, the parties agreed that it would be appropriate to defer the motion to dismiss until after the end of the guilt phase, so that the court would be in a position to better determine if the delay in charging appellant had actually prejudiced him. The motion was therefore taken off calender without prejudice. (3 CT 666; 10 RT 1615-1616.)

After the guilt phase concluded, appellant requested a ruling on the motion to dismiss. (74 RT 8934, 8940.) He reiterated his claim that he was prejudiced by the delay, during which material witnesses Cruz and Hogan had died. (74 RT 8941-8942.) Appellant asserted that he had made a prima facie showing of prejudice and that the burden therefore shifted to the People to establish good cause for the delay. Appellant contended that deputy district attorney Filter's statement to the press that appellant was not "going anywhere" tended to prove good cause did not exist. (74 RT 8943.) Appellant also asked the trial court to take judicial notice of *People v. Cole*

169

See 10 RT 1565-1567 [continued to September 10]; 3 CT 617; 10 RT 1571-1574 [continued to October 1]; 3 CT 628; 10 RT 1576-1584 [continued to October 15]; 3 CT 630; 10 RT 1587-1588, 1594 [continued to December 17).

and *People v. Gomez*, two other Imperial County in-prison homicide cases in which complaints were filed against the defendants almost immediately. (74 RT 8943.) Appellant alternatively requested the court to strike the death penalty allegations, arguing that the delay in charging appellant ran counter to the "heightened certainty and scrutiny" required in such cases. (74 RT 8943.)

The prosecutor submitted the issue with no argument at all. (74 RT 8943.) The trial court then summarily denied the motion, without asking the deputy district attorney to explain the delay and without weighing the prejudice to appellant against any justification for the delay. In ruling, the court stated:

> Well, I wish it had been filed sooner. But under the circumstances, I'm going to deny the motion. So it's all done within the statute of limitations. There is no statute of limitations for this offense. It's not that uncommon to see them brought to trial years after the event. [¶] For the record, you made the motion. And I understand why. [¶] And I'm going to deny it.

(74 RT 8943-8944.)

Appellant reminded the court that the motion had been made earlier, but that the parties had agreed it was appropriate to defer a ruling until the close of evidence, so that the impact and extent of the prejudice could be fully assessed. (74 RT 8944.)

The trial court then added that "Some of these things you're alleging that Mr. Cruz would have said would have been cumulative even if that were true. . . . We had other testimony of the same effect as I recall." The court said nothing about inmate Hogan. It then reiterated the denial of the

motion. (74 RT 8944.)

Wanting to be "fair" on the issue, defense counsel emphasized his position that the law shifts the burden to the prosecution to justify the delay after a defendant has made a prima facie showing of prejudice. He said, ". . . what happens in this is the prosecution now has the burden to justify [the delay]. I just want to make sure that's clear for the record. Maybe he disagrees with that, but that's my understanding of the case." (74 RT 8945.) The court asked Mr. Robinson, "What is your understanding on that?" (74 RT 8945.) The deputy district attorney stated, "My understanding is it went by way of an indictment. And it took them approximately two years to get him indicted. That's all I know." (74 RT 8945.) Robinson added that he had never seen a murder case come to trial within two years of the alleged offense. (74 RT 8945.) Defense counsel clarified, however, that the issue was not when the case came to trial but when appellant was charged. (74 RT 8945-8946.)

3. Appellant Renews His Due Process Claim.

At the end of trial, appellant filed a motion for new trial. Therein, he renewed his claim that he had been denied due process by the prosecutor's delay in indicting him. (47 CT 13187, 13190-13194.) The new trial motion asserted that the trial had established that the prejudice to appellant from the pre-trial delay in charging him was compounded by the prison's poorly conducted investigation. It emphasized that appellant's showing of prejudice was unrebutted. (47 CT 13190.) This showing shifted the burden to the prosecution to justify the delay. (47 CT 13193.) Yet the prosecutor had offered no explanation for the delay. (47 CT 13190.) In fact, at the hearing on the motion to dismiss, the prosecutor merely "submitted" the issue. (47 CT 13190, 13191.) The trial court, appellant pointed out, had

not performed the required balancing test before denying the motion. (47 CT 13191.)

In his written opposition to appellant's new trial motion, the deputy district attorney simply referred to his written opposition to the motion to dismiss. (47 CT 13206, 13208.) The trial court denied appellant's motion for new trial, without any discussion of the individual issues raised therein. (47 CT 13230-13231; 89 RT 10236.)

B. Pre-Charging Delay May Violate a Defendant's Constitutional Right to Due Process.

A criminal defendant's speedy trial rights under the federal and state constitutions do not attach until he has been arrested or charged. (*People v. Cowan* (2010) 50 Cal.4th 401, 430.) However, a delay in prosecution may nonetheless deprive a defendant of a fair trial. A lengthy, unjustified delay between the commission of an alleged crime and the filing of an indictment or information may, if prejudicial, violate a defendant's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15, of the California Constitution. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 430; see also, *United States v. Lovasco* (1977) 431 U.S. 783, 789-792; *United States v. Marion* (1971) 404 U.S. 307, 324-325.) This Court has recognized the important interests at stake:

> The right of due process protects a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence.

(*People v. Cowan*, *supra*, 50 Cal.4th at p. 430 [internal quotation marks

omitted].)

Under California law, the trial court must apply a three-step test in assessing whether a defendant has been denied due process by pre-charging delay. First, the defendant must make a showing that he has been prejudiced by the delay. If so, the burden shifts to the prosecution to offer a justification for the delay. Finally, the trial court must balance the harm to the defendant against the justification for delay. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 430; *People v. Mirenda* (2009) 174 Cal.App.4th 1313, 1329; *People v. Boysen* (2007) 165 Cal.App.4th 761, 771-772.)

In determining whether the defendant has been prejudiced, the length of time between the commission of the alleged offense and the filing of charges is not the critical issue. (*People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 914; *People v. Hartman* (1985) 170 Cal.App.3d 572, 579.) As one court has explained, "Prejudice sufficient to sustain dismissal has resulted after a delay of five months, while charges filed after ten years have been upheld." (*People v. Dunn-Gonzalez*, *supra*, 47 Cal.App.4th at p. 914; see also, *People v. Hartman*, *supra*, 170 Cal.App.3d at p. 579.) The question is whether the defendant has shown actual prejudice under the facts of his case. (*People v. Hartman*, *supra*, 170 Cal.App.3d at p. 579.)

Once the defendant has made a prima facie showing of harm, the trial court must consider whether the delay was justified. (*Garcia v. Superior Court* (1984) 163 Cal.App.3d 148, 151; *People v. Hartman*, *supra*, 170 Cal.App.3d at p. 579.) Delay resulting from good faith efforts to timely investigate an offense may be reasonable. Not all investigative delay will suffice however:

> The requirement of a legitimate reason for the prosecutorial delay cannot be met simply by showing an absence of

> deliberate, purposeful or oppressive police conduct. A "legitimate reason" logically requires something more than the absence of governmental bad faith. Negligence on the part of police officers in gathering evidence or in putting the case together for presentation to the district attorney, or incompetency on the part of the district attorney in evaluating a case for possible prosecution can hardly be considered a valid police purpose justifying a lengthy delay which results in the deprivation of a right to a fair trial.

(*Penney v. Superior Court* (1972) 28 Cal.App.3d 941, 953.)

Further, while either negligent or deliberate delay may deprive a defendant of due process, the character of the delay affects the balancing process:

> "Purposeful delay to gain an advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation."

(*People v. Cowan*, *supra*, 50 Cal.4th at p. 431, quoting *People v. Nelson* (2008) 43 Cal.4th 1242, 1256.)

After the state has offered a justification for the delay at issue, the trial court must balance it against the prejudice. California courts have repeatedly stated that even a minimal showing of prejudice will warrant dismissal of the action if the reason offered for the delay is unsubstantial. (See, e.g., *People v. Mirenda*, *supra*, 174 Cal.App.4th at p. 1330; *People v. Boysen*, *supra*, 165 Cal.App.4th at p. 777; *People v. Hartman*, *supra*, 170 Cal.App.3d at p. 582.) The reviewing court in *Boysen* summed up the

inquiry as follows: "In a broad sense the trial court's task 'is to determine whether pre-charging delay violates the fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency.'" (*People v. Boysen*, *supra*, 165 Cal.App.4th at p. 777, quoting *People v. Dunn-Gonzalez*, *supra*, 47 Cal.App.4th at p. 914.)

The standard for determining what constitutes sufficient justification for delay under the federal constitution is less clear. Certainly delay for the purpose of gaining a tactical advantage over the defendant is not justified. Whether negligence may justify delay apparently has not been decided. (*People v. Cowan*, *supra*, 50 Cal.4th at pp. 430-431; *People v. Nelson*, *supra*, 43 Cal.4th at pp. 1251-1254.)

Finally, a trial court has discretion to fashion a remedy less severe than dismissal of the entire action, if the prejudice to the defendant can be sufficiently ameliorated by such remedy. (*People v. Mirenda*, *supra*, 174 Cal.App.4th at p. 1330, 1333-1334; *People v. Conrad* (2006) 145 Cal.App.4th 1175, 1185-1186.)

A trial court's denial of a motion to dismiss based on pre-charging delay is reviewed for abuse of discretion. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 431.) Whether pre-charging delay is unjustified and prejudicial are questions of fact. The trial court's rulings on these questions must be upheld on appeal if supported by substantial evidence. (*People v. Mirenda*, *supra*, 174 Cal.App.4th at p. 1330.)

C. The Trial Court Erred in Denying Appellant's Motion to Dismiss Because the Delay in Indicting Him Was Prejudicial and Unjustified.

As appellant demonstrates herein, the trial court erred when it denied

his motion to dismiss the charges, or alternatively to dismiss the special circumstance allegations and Penal Code 4500 charge. The prejudice in this case from the delay was significant. The delay in bringing the indictment was not only unjustified but very likely for the purpose of gaining a tactical advantage over appellant. Moreover, the trial court's denial resulted from a failure to understand and apply the relevant law.

First, appellant met his burden of making a prima facie showing of prejudice. Courts have recognized that impairment of an accused's defense is the most difficult form of prejudice to prove "because time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" (*Doggett v. United States* (1992) 505 U.S. 645, 654; *People v. Mirenda*, *supra*, 174 Cal.App.4th at p. 1329.) This is especially true when law enforcement has conducted a poor-quality investigation, as it did here. (See, e.g., *People v. Boysen*, *supra*, 165 Cal.App.4th at p. 780.) However, "'[if] witnesses die or disappear during a delay, the prejudice is obvious.'" (*People v. Hartman*, *supra*, 170 Cal.App.3d at p. 579, citing *Barker v. Wingo* (1972) 407 U.S. 514, 532.)

In this case, appellant contended that two material witnesses, inmates Cruz and Hogan, had died. His defense was severely prejudiced by his inability to call the inmates because they would have supported his claim of either true or imperfect self-defense. Cruz and Hogan would have testified that Richmond had received an order to kill appellant and was armed at the time of his death. (See 3 CT 588-591, 599-600.) Appellant also proffered that the delay had impaired his ability to recall who else was awake at the time of Richmond's death and therefore might be able to provide exculpatory testimony, as well as his ability to locate material inmate witnesses in the prison system. (3 CT 588, 600.)

The prosecutor did not speak to this showing of prejudice or assert that Cruz and Hogan would not have been able to provide exculpatory evidence on appellant's behalf. In the written opposition filed prior to trial, the deputy district attorney simply claimed that appellant had not proved actual prejudice. (3 CT 611.) In the hearing, he made no argument whatsoever. (74 RT 8943.)

The trial court denied the motion without making any finding as to prejudice. (74 RT 8943-8944.) It was not until further prompting by defense counsel that the court added: "Some of these things you're alleging that Mr. Cruz would have said would have been cumulative even if that were true. . . . We had other testimony of the same effect as I recall. . . . In any event, I'm denying the motion." (74 RT 8944.) To the extent that the court's post hoc remark can be construed as a finding that appellant failed to establish any prejudice from the pre-charging delay, it is not supported by substantial evidence. The trial court said nothing about inmate Hogan or appellant's claim that his own failing memory had prevented him from developing exculpatory evidence.

Moreover, the court's assertion that inmate Cruz's testimony would have been cumulative must be rejected. The trial court did not identify the witness or witnesses to whom Cruz's testimony would have been cumulative. Assuming, however, that it had Christopher Poore in mind, the finding cannot be sustained. Poore testified that Richmond had asked him for a weapon and had expressed his intention to assault appellant with it. Further, Poore testified that he had seen a weapon fished into cell 146 on the evening of April 8. (See Stmt. of Facts, A.2.d., *ante*.) But appellant had proffered that Cruz (and Hogan) would have further testified that Richmond had been given an order to kill appellant, a critical fact not provided by

Poore. (See 3 CT 588-589, 599-600.)

In addition, testimony from Cruz and Hogan that Richmond had a weapon at the time of his death would have been extremely important to appellant's defense even if it was similar to Poore's testimony. Whether the jury accepted appellant's defense largely boiled down to a credibility contest. Either the jury believed appellant and Poore, or it believed the inmate informants presented by the prosecution. Yet the state was permitted to present *three* witnesses who all provided similar testimony. "[I]f evidence has substantial relevance to prove material facts which are hotly contested and central to the case, it is not 'merely cumulative.'" (*People v. Lang* (1989) 49 Cal.3d 991, 1016.) Here, the testimony Cruz and Hogan could have provided was substantially relevant to prove a material fact which was hotly contested and central to appellant's case – whether he had acted in self-defense. In sum, the prejudice from not having the testimony of these witnesses, as well as that of any other exculpatory witnesses the defense might have identified if appellant had promptly been provided with counsel, was manifest.

Second, there was no justification for the delay in indicting appellant. As set forth above, if a defendant makes even a minimal showing of prejudice, the burden shifts to the People to justify the delay. (See, e.g., *People v. Hartman*, *supra*, 170 Cal.App.3d at p. 579.) Although appellant met that burden here, the deputy district attorney offered no explanation or justification for the delay. (See 3 CT 611; 74 RT 8943.)

In fact, the People could not have justified the delay between Richmond's death and appellant's indictment. A review of the trial record demonstrates that the investigation into the homicide was complete shortly after it occurred. The autopsy was conducted on April 9, 1996. (51 RT

6524-6525.) The scene was processed and all the physical evidence was gathered within days. (See Stmt. of Facts, A.1.c., *ante*.) The forensic evidence was submitted to the DOJ for analysis in May, 1996 and analyzed in August. (2 ACT 317-318; 64 RT 8223.) A final report was submitted in November, 1996. (3 CT 587-588.) All the witnesses presented to the grand jury were known and available to the People immediately after the homicide.[170] The same is true of the witnesses presented in the prosecution's case-in-chief at the guilt phase.[171]

Courts have found pre-charging delay to be unjustified where the investigation had been completed but the prosecution nonetheless neglected to proceed. (See, e.g., *People v. Mirenda*, *supra*, 174 Cal.App.4th at pp. 1318, 1333 [delay was not justified where all the evidence had been collected and the identity of the shooter was known to police within a month of the offense]; *People v. Hartman*, *supra*, 170 Cal.App.3d at p. 577, 582-583 [by late 1977, all evidence used against defendant had been obtained but prosecution was not initiated until 1983].) In contrast, delay has been found justified where it resulted from efforts to develop enough evidence against a defendant to proceed. (See, e.g., *People v. Nelson*, *supra*, 43 Cal.4th at p. 1256 [delay justified where case not fully solved until DNA cold hit comparison made]; *People v. Catlin* (2001) 26 Cal.4th

---

170

See grand jury testimony of witnesses Wysocki, Hazel, Greene, Swalwell, Tozer, Swetich, Wright, Fisher, Leon, Smith, Victa, Avila, Mayo and Peck. (1 ACT 76-2 ACT 333.)

171

See guilt phase testimony of witnesses Longcor, Borem, Trujillo, Wysocki, Avila, Frazier, Hazel, Greene, Huelsen, Pearson, Smith, Willard, Swalwell, Sweet, Victa, Swetich, Tozer, Leon, Brumbaugh, Pineda, Cannon, Wright, Esterberg, Hunt and Vialpando. (48 RT 5714-56 RT 7331.)

81, 109 [delay justified by limitations in forensic science available at the time of the offense].)

In this case, there was never a question as to who killed Thomas Richmond. The issue was the mental state with which appellant did so. As fully explained elsewhere in this brief, to establish appellant's mental state the prosecution had planned to rely on inmate Keith Barnard and a letter he purportedly wrote. (See Arg. VI.C.1.b., *ante*.)[172] Significantly, the record demonstrates that Barnard and the very questionable letter were known to the state shortly after Richmond's death. The letter was obtained in April, 1996, and Barnard was charged by the prison with conspiracy to commit murder. (See 55 RT 7221, 7228.) The conspiracy charge was adjudicated, and sustained, in a hearing held in August, 1996. (55 RT 7209, 7215.) This indicates that the state's theory of the case had been fully developed with a few months of Richmond's death.

And, although prosecutor Robinson declined to offer any explanation for the two-year delay, the deputy district attorney who preceded him was more forthcoming. As demonstrated in appellant's pleading, Mr. Filter candidly acknowledged that appellant was "quickly fingered" as the perpetrator but was not promptly charged because he was an inmate "who [was] not going anywhere." (3 CT 596.)

Third, the prejudice appellant suffered to his defense considerably outweighed the unjustified delay in bringing the indictment. As this Court has acknowledged, where the delay was purposeful, a relatively weaker showing of prejudice tips the balance toward dismissal. (*People v. Cowan*,

---

172

Barnard refused to testify at trial, however, and the trial court ruled the letter inadmissible. (See Arg. VI.C.1.b., *ante*.)

supra, 50 Cal.4th at p. 431.) In appellant's case, Mr. Filter's comments, in combination with the lack of any legitimate explanation for the delay, strongly supports a finding that the delay was deliberate rather than simply negligent.[173] The prejudice appellant has demonstrated is more than sufficient to establish a violation of his due process rights.

Moreover, the trial court in this case appears to have had little understanding of the relevant law, which was thoroughly set forth in appellant's motion to dismiss filed prior to trial. In fact, at the time it denied the motion, the judge did not recall that a written motion had previously been filed. (74 RT 8943.) As previously explained Judge Zimmerman failed to make any finding regarding whether appellant had been prejudiced by the delay or whether the prosecution could justify it. (74 RT 8943-8944.) Instead, the court relied on the fact that no statute of limitations existed for murder, and observed that such cases are commonly tried years after the offense. (74 RT 8944.) After prompting by defense counsel, the judge suggested that some of inmate Cruz's testimony would have been cumulative. (74 RT 8944.)

A trial court abuses its discretion when it fails to follow the applicable law. (*People v. Brim*, *supra*, 193 Cal.App.4th at p. 991.) "'To exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision.'" *(In re Cortez* (1971) 6 Cal.3d 78, 85-86.)

173

Thus, to the extent that a violation of the federal due process clause requires purposeful delay to gain a tactical advantage, the record demonstrates such delay occurred herein.

In this case the record indicates that Judge Zimmerman did not apply the law relevant to pre-charging delay and failed to conduct the requisite balancing. His reliance on the statute of limitations was misplaced. As observed in *People v. Boysen*, *supra*, 165 Cal.App.4th at p. 778, "It is certainly the case that there is no statute of limitations on murder. (Pen. Code, § 799.) This alone, however, has no effect on the issue of a denial of due process arising from prejudicial delay in bringing accusations." Rather, because there is no statute of limitations on murder, prejudice will not be presumed. (*People v. Nelson*, *supra*, 43 Cal.4th at p. 1250.) The trial court's belief that when appellant's case actually came to trial was relevant was similarly misplaced, as he did not raise a speedy trial claim. The time period relevant to a due process claim is from the time of the alleged offense until an information or indictment is filed. (*Id.* at p. 1250.) And, as explained above, the evidence appellant was unable to present was not merely cumulative. In sum, the trial court should have granted appellant's motion to dismiss the charges against him.

Alternatively, the court should have dismissed the special circumstance allegations and the Penal Code section 4500 charge, which made appellant death-eligible. As noted above, a trial court has the discretion to fashion a remedy appropriate to alleviate the harm caused by pre-charging delay. (*People v. Mirenda*, *supra*, 174 Cal.App.4th at p. 1333-1334.) In this case, defense counsel asserted that striking these allegations was appropriate, in light of the heightened scrutiny and reliability necessary in capital cases. (See 3 CT 585, 594; 74 RT 8943; see also, *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-587 [Eighth Amendment imposes a special need for reliability in the determination whether death is the appropriate punishment].) If this Court determines that the prejudice

appellant suffered from the delay in indicting him is insufficient to warrant dismissal of all of the charges against him, it should nonetheless find that it was substantial enough to free him from a sentence of death.

Accordingly, appellant respectfully requests this Court to reverse his convictions and dismiss all charges against him. Alternatively, he asks the Court to reverse and dismiss the special circumstance allegations and Penal Code 4500 charge.

//

//

XII.
THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE VIOLATES THE EIGHTH AMENDMENT BECAUSE IT FAILS TO ADEQUATELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY

In recent cases, this Court has continued to reject without further analysis a claim that California's lying-in-wait special circumstance violates the Eighth Amendment because it fails to adequately narrow the class of persons eligible for the death penalty. (See, e.g., *People v. Streeter* (2012) 54 Cal.4th 205, 252-253; *People v. Livingston* (2012) 53 Cal.4th 1145, 1174; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1095.)

Appellant asserts that the opinions in these cases actually provide further proof that the lying-in-wait special circumstance, as charged by prosecutors and construed by this Court, applies to virtually any first degree murder.

A. A Special Circumstance Must Genuinely Narrow the Class of Persons Eligible for the Death Penalty.

Pursuant to the Eighth Amendment, a state's capital sentencing scheme "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens* (1983) 462 U.S. 862, 876; see also *Arave v. Creech* (1993) 507 U.S. 463, 471 [state court's limiting construction to statute satisfied constitutional concerns].) It "must provide a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, quoting *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn., White, J.].) Further, the death penalty should be reserved for only the most extreme cases. (*Gregg v. Georgia* (1976) 428 U.S. 153, 182.) Thus, the

federal constitution requires that a capital sentencing statute provide the sentencer with identifiable criteria to separate a capitally-eligible crime from other first degree murders. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 199; see also, Cal. Const., art. I, § 17.)

B. The Constitutionality of California's Lying-in-Wait Special Circumstances Has Been Questioned For Over 20 Years.

Over the years, several jurists have opined that California's lying-in-wait special circumstance is unconstitutional.

Former Penal Code section 190.2, subdivision (a)(15) was first found to be constitutionally invalid by Justice Mosk in his concurring and dissenting opinion in *People v. Morales* (1989) 48 Cal.3d 527, 574.[174] Justice Mosk concluded that the circumstance was so broad that it incorporated virtually every intentional killing, and therefore did not distinguish the few cases in which capital punishment is imposed from the many in which it is not. He explained: "Almost always the perpetrator waits, watches, and conceals his true purpose and intent before attacking his victim; almost never does he happen on his victim and immediately mount his attack with a declaration of his bloody aim." (48 Cal.3d at p. 575.) Justice Mosk also determined that the circumstance does not provide a *meaningful* basis for distinguishing those eligible for execution, stating: "To my mind, the killer who waits, watches, and conceals is no more worthy of blame or sensitive to deterrence than the killer who attacks immediately and openly." (*Ibid*; see also, *People v. Webster* (1991) 54 Cal.3d 411, 461-462 [dis. & conc. opn. of Mosk, J.].)

174

The majority of this Court in *Morales* found the lying-in-wait special circumstance to be constitutional. (48 Cal.3d at pp. 557-558.)

In *People v. Webster*, *supra*, Justice Broussard filed a concurring and dissenting opinion in which he concluded that the special circumstance is unconstitutional. Historically, lying in wait was intended to be "simply one kind of premeditated murder," he said. (54 Cal.3d at p. 465.) To function as a special circumstance, however, it must provide "a qualitative moral difference" between ordinary first degree murders and capital murders, "one of such significance that a person who kills by lying in wait should be executed, or at least imprisoned for life without possibility of parole, while one who kills without lying in wait (or any other special circumstance) deserves at most life imprisonment with possibility of parole." (*Id.*, at p. 465-466.) However, as it has been construed by the majority, it does not: "Lying in wait proves premeditation, and thus proves that a murder is of the first degree. But those first degree murderers who lie in wait are no more deserving of death than those who act with dispatch." (*Id.* at p. 468.)

In *Morales v. Woodford* (2003) 388 F.3d 1159, 1180, Circuit Judge McKeown, dissenting in part, determined that California's lying-in-wait special circumstance had been expanded "to such a degree that the line between premeditated murder and capital murder is but an illusory veil." Judge McKeown explained that this Court had construed the element of concealment in a manner which made it essentially meaningless. (*Id.* at pp. 1185-1186.) Although concealment of purpose rather than actual physical concealment was found to be sufficient, sometimes not even that was demanded:

> In *People v. Hillhouse*, the California Supreme Court held that a defendant could be death eligible under the lying-in-wait special circumstance despite the fact that he announced his purpose to his victim, stating "I ought to kill you" prior to

committing the murder. [27 Cal.4th at p. 501.] Under this recent iteration of the rule, criminal defendants meet the concealment test regardless of whether they are hidden or seen, and even whether they conceal their intentions or reveal them.

(388 F.3d at p. 1187.)

Justice McKeown found the second element of lying in wait – a substantial period of watching and waiting for an opportune time to act – to be even less limiting, because this Court has construed it to be the equivalent of an ordinary premeditated or deliberate murder. (388 F.3d at p. 1187-1188.)

The circuit judge then concluded that "the question of surprise is all that remains as a truly narrowing factor." (388 F.3d at p. 1188.) But this too failed to adequately limit those defendants eligible for the ultimate punishment: " . . . taking a page from the California courts' book on concealment, surprise apparently can mean nothing more than concealment of purpose. Standing alone, I fail to see how this singular factor significantly narrows the pool of defendants eligible for the death penalty . . . ." (*Ibid.*)

Finally, in a concurring and dissenting opinion in *People v. Stevens* (2007) 41 Cal.4th 182, 216, Justice Moreno concluded that the lying-in-wait special circumstance, as interpreted by this Court, violates the Eighth Amendment. After reviewing the history of the circumstance and the way in which its three elements have been construed, the justice concluded that: "According to this court's jurisprudence, then, the lying-in-wait special circumstance, which requires neither lying nor waiting, is nothing more than *murder by surprise* . . . ." (217-220, 220.) Such murder, however,

fails to constitutionally narrow:

> Most of California's many special circumstances fulfill the function of identifying the subclass of murderers more deserving of death. . . . Not so with murder by surprise. The lying-in-wait special circumstance as interpreted by this court declares in effect: "The defendant deserves a greater punishment than the ordinary first degree murderer because not only did he commit first degree murder, but he failed to let the person know he was going to murder him before he did." How can we make sense of this kind of special circumstance? Not only is surprise a common feature of murder – since murderers usually want their killings to succeed, and victims usually don't want to be murdered – but it is not at all obvious that a murderer who does not conceal his purpose before murdering the victim is less culpable than one who does.

(41 Cal.4th at p. 223.)

In sum, these well-reasoned and thorough opinions set out a compelling argument that the special circumstance is constitutionally invalid.[175]

175

Justice Kennard has also expressed concern with the constitutionality of the lying-in-wait special circumstance but ultimately concluded it is valid. (See *People v. Hillhouse*, *supra*, 27 Cal.4th at pp. 512-513 (conc. opn. of Kennard, J.); *People v. Jurado* (2006) 38 Cal.4th 72, 145-147 (conc. opn. of Kennard, J.); *People v. Stevens*, *supra*, 41 Cal.4th 182, 214-216 (conc. & dis. opn. of Kennard, J.).) Justice Werdegar has determined that the circumstance is appropriately limited by requiring a defendant to actively conceal his purpose by deceitful behavior. (*People v. Stevens*, *supra*, 41 Cal.4th at pp. 213-214 (conc. opn. of Werdegar, J.).)

C. This Court's Recent Opinions Further Expand the Reach of the Already-Over-Broad Special Circumstance.

As set forth above, a majority of this Court continues to hold that the lying-in-wait special circumstance does not unconstitutionally fail to narrow the class of persons eligible for the death penalty. (*People v. Streeter*, *supra*, 54 Cal.4th at pp. 252-253; *People v. Livingston*, *supra*, 53 Cal.4th at p. 1174; *People v. Mendoza*, *supra*, 52 Cal.4th at p. 1095.) However, an examination of the disparate facts in these cases actually strengthens the claim that the special circumstance encompasses virtually any first degree premeditated murder.

In *People v. Streeter*, *supra*, 54 Cal.4th 205, the Court upheld the lying-in-wait special circumstance even though a series of discrete events occurred between the alleged lying in wait and the victim's death, including an apparent effort by the defendant to leave the scene. Therein, defendant Streeter asked Buttler, the mother of his son, to meet him at a restaurant so he could visit with their child. When Buttler arrived, Streeter took their son and started to walk toward his own car. Buttler followed and they began to argue. After Buttler tried to get their son out of Streeter's car, a struggle ensued, during which Streeter struck and kicked Buttler. Streeter then went to his trunk and got out a container. Buttler ran, but Streeter chased her and poured gasoline on her. Streeter returned to his car, and Buttler again ran. As Streeter approached her holding a lighter, a bystander intervened and tried unsuccessfully to grab it from his hand. Streeter managed to get close enough to ignite the gas and set Buttler on fire. (54 Cal.4th at pp. 211-214.)

On appeal, defendant Streeter argued, inter alia, that he did not kill Buttler *while* lying in wait because there was a cognizable interruption between his waiting for her to arrive and the fatal attack. This Court

rejected the claim, finding that his attempt to take their son away from the scene was a "preparatory step" in the assault. (54 Cal.4th at pp. 248-249.)

In People v. Livingston, *supra*, 53 Cal.4th 1145, this Court found all elements of the lying-in-wait special circumstance present although the defendant apparently told his victims he would return to kill them. Therein, defendant Livingston and others with him got into an argument with one of the security guards at an apartment complex. Witnesses heard the group tell the guards they would "get them" later. Later that evening, Livingston approached the guard shack where four men, wearing bulletproof vests, were inside with guns. Livington stood in the doorway and fired an assault rifle, killing two of the guards and injuring the other two. (53 Cal.4th at pp. 1145, 1152-1153.)

This Court found that defendant had concealed his purpose, and his physical presence until he suddenly appeared at the door of the shack. (53 Cal.4th at p. 1172.) It also found a substantial waiting and watching for an opportune time to act, since Livingston left after the argument and returned later. Despite the fact that the victims were armed, wearing protective vests and forewarned that defendant would return, the Court characterized the shooting as a surprise attack on unsuspecting victims from a position of advantage. (*Id.* at p. 1173.)

Finally, in *People v. Mendoza*, *supra*, 52 Cal.4th 1056, the Court sustained the special circumstance where the victim approached the defendant, even though the latter did not know the encounter would occur. Therein, defendant Mendoza was walking along the street with others. A police officer drove up behind them and stopped. The officer ordered one of the young men in the group to put his hands on the hood of the police car and began to pat him down. Mendoza pulled out a gun and shot the officer

once, killing him. (52 Cal.4th at pp. 1064-1065.)

At the close of Mendoza's trial, the trial court agreed that the evidence was insufficient to support the lying-in-wait special circumstance and dismissed it. (52 Cal.4th at p. 1072.) This Court reversed the trial court's ruling and reinstated the special circumstance, finding that although the officer was aware of Mendoza's physical presence, the defendant had concealed his murderous purpose and taken the officer by surprise when he fired his weapon. (*Id.* at p. 1074.)

If the facts in each of these cases can support the lying-in-wait special circumstance, it is hard to imagine *any* first degree murder that would not qualify. These radically different situations provide yet more proof that California's lying-in-wait special circumstance pursuant to Penal Code section 190.2(a)(15) has become so all-inclusive it provides no meaningful basis for distinguishing capital from non-capital murder. Accordingly, appellant urges the Court to revisit the issue, declare the special circumstance unconstitutional, and strike it in this case.

//

//

XIII.
THE PRIOR MURDER SPECIAL CIRCUMSTANCE MUST BE REVERSED BECAUSE APPELLANT'S MORAL CULPABILITY FOR THE JACKSON HOMICIDE WAS DIMINISHED DUE TO HIS AGE AT THE TIME IT OCCURRED.

One of the special circumstances found true by the jury was that appellant had been previously convicted of first degree murder within the meaning of Penal Code section 190.2(a)(2). (46 CT 12953.) This conviction occurred in the San Francisco County Superior Court pursuant to a jury trial. (3rd Supp. CT 410-413.) It arose from the killing of James Jackson in October 1986, when appellant was 16 years old. (See 75 RT 8973-8977; 56 RT 7330.)

As set forth below, the United States Supreme Court and this Court have recognized that juveniles as a group are less culpable than adults and are therefore constitutionally different from adults for sentencing purposes. In light of this jurisprudence, appellant asserts his prior murder conviction special circumstance is invalid and that his death sentence must be reversed.

A. Juveniles as a Group Are Less Culpable Than Adults.

In *Roper v. Simmons* (2005) 543 U.S. 551, the United States Supreme Court held that executing a person who was under the age of 18 years when he committed a capital crime is cruel and unusual punishment which violates the Eighth and Fourteenth Amendments. Recognizing that the Eighth Amendment applies to the death penalty "with special force," the high court stated: "Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (543 U.S. at p. 568, quoting *Atkins v. Virginia* (2002) 536 U.S. 304, 319.)

In *Roper*, referring to scientific and sociological evidence, the high

court found that three general differences between juveniles and adults "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." (543 U.S. at p. 569.) First, juveniles display a "'lack of maturity and an underdeveloped sense of responsibility" more frequently than adults, which "often result[s] in impetuous and ill-considered actions and decisions." (543 U.S. at p. 569, quoting *Johnson v. Texas* (1993) 509 U.S. 350, 367.) Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," at least in part because "juveniles have less control, or less experience with control, over their own environment." (543 U.S. at p. 569.) Third, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed . . . ." (*Id.* at p. 570.)

In light of these differences, in *Roper* the U.S. Supreme Court declared that juveniles as a group have diminished culpability for their acts when compared to adults: "These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" (543 U.S. at p. 570, quoting *Thompson v. Oklahoma* (1988) 487 U.S. 815, 835.)

Five years later, the high court again declared that juveniles as a group are less culpable than adults, and therefore are "less deserving of the most severe punishments." (*Graham v. Florida* (2010) 130 S.Ct. 2011, 2026.) In *Graham*, the court held that sentencing a juvenile offender to life in prison for a nonhomicide offense in a state that does not permit parole violates the Eighth Amendment. Again relying on psychology and brain

science which demonstrate that the minds of children are fundamentally different than those of adults, the U.S. Supreme Court stated: "It remains true that '[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult . . . .'" (*Id.* at p. 2026, quoting *Roper*, *supra*, 543 U.S. at p. 570.)

Most recently, in *Miller v. Alabama* (2012) 132 S.Ct. 2455, 2464, the court reconfirmed that juveniles must be treated differently than adults. Noting that the science supporting *Roper* and *Graham* had become even more conclusive since those cases were decided, the court in *Miller* again recognized that the diminished culpability of juveniles renders them less deserving of the most severe punishments. (*Id.* at p. 2464, fn. 5.) Thus, it held that the Eighth Amendment prohibits mandatory life without parole sentences for juveniles who commit homicide, stating: " . . . *Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing." (*Ibid.*)

B. Under the *Roper* Line of Cases, California May Not Treat a Juvenile's Prior Murder Conviction the Same as That of an Adult in Determining Death Eligibility.

Under California's capital punishment scheme, a defendant who sustained a prior murder conviction as a juvenile is dealt with no differently than someone who was an adult when the prior murder occurred – both become eligible for the ultimate sanction by virtue of the prior conviction. Although the jury can consider the defendant's youth at the time of the prior murder during the penalty phase, *Roper* and its progeny demonstrate that this is not enough to ensure that the death penalty is appropriately narrowed to the most culpable.

In *Roper*, the State of Missouri asserted that it was arbitrary and unnecessary to categorically exempt juvenile offenders from capital

punishment and that instead, claims about their diminished culpability should be presented to jurors for case-by-case consideration. The Supreme Court rejected this argument, however. (543 U.S. at pp. 572-573.) It emphasized that capital punishment could not be constitutionally imposed on certain categories of offenders, such as mentally retarded or insane persons, "no matter how heinous the crime." (*Id.* at p. 568.) Such absolute prohibitions "vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders." (*Id.* at pp. 568-569.) The court determined that persons under the age of 18, as a group, are undeserving of the ultimate sanction:

> The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases, a defendant's youth may even be counted against him. . . .

(543 U.S. at pp. 572-573.)

In fact, *Roper v. Simmons* itself involved the kind of cold-blooded crime that would likely overpower any mitigating arguments based on the defendant's youth. Defendant Simmons was 17 years old when decided he wanted to murder someone and broke into the home of his victim, Shirley Crook. Simmons and a companion bound Mrs. Crook, drove her to a park and threw her from a bridge, drowning her in the water below. Simmons

later confessed, was tried as an adult, and sentenced to death. (543 U.S. 556-558.) Despite the horrific nature of the offense, the Supreme Court stated: "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult . . . ." (*Id.* at p. 570.) It therefore held that Simmons' death sentence was forbidden by the Eighth and Fourteenth Amendments. (*Id.* at pp. 578-579.)

In *Graham*, the high court acknowledged that "[c]atergorical rules tend to be imperfect" but nonetheless imposed one in holding that juveniles could not be constitutionally sentenced to life without parole for nonhomicide crimes. (130 S.Ct. at p. 2030.) It explained: "This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment." (*Ibid.*) The court rejected the state's argument that permitting the sentencer to consider the defendant's youth was sufficient, explaining that

> existing state laws, allowing the imposition of these sentences based only on a discretionary, subjective judgment by a judge or jury that the offender is irredeemably depraved, are insufficient to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability.

(*Id.* at p. 2031.)

Miller further extended *Roper* and *Graham*, emphasizing that "none of what [they] said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific." (132 S.Ct. at p. 2465.) These cases, the high court said in *Miller*, "teach that in imposing a State's harshest penalties, a sentencer misses too much if he

treats every child as an adult." (*Id.* at p. 2468.)

This Court has also been willing to create a categorical rule in light of the diminished culpability of juveniles as a class. The Court applied the *Roper* line of cases in *People v. Caballero* (2012) 55 Cal.4th 262, to find that a 16 year old's sentence of 110 years to life for a nonhomicide offense violated the Eighth Amendment. Noting the high court's reliance on psychology and brain science documenting fundamental differences between juveniles and adults, this Court agreed that what these cases said about children was not crime-specific and therefore applicable to a term-of-years sentence that amounted to the functional equivalent of life without parole. (*Id.* at pp. 267-268.)

Contrary to *Roper*, *Graham, Miller*, and *Caballero*, California's death penalty scheme treats a defendant previously convicted of a prior murder as a juvenile the same as an adult. However, such a defendant is simply not as culpable as one who committed a prior murder as an adult. "[F]or purposes of imposing the death penalty . . . punishment must be tailored to [a defendant's] personal responsibility and moral guilt." *(Enmund v. Florida* (1982) 458 U.S. 782, 801.) Permitting a special circumstance to be based on the conviction of a prior murder committed as a less culpable minor does not limit the death penalty to "those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 568 [internal quotation marks and citation omitted].)

Appellant recognizes that this Court has held that *Roper v. Simmons* "says nothing about the propriety of permitting a capital sentencing jury, trying an adult defendant, to consider the defendant's prior violent conduct

committed as a juvenile." (*People v. Bivert* (2011) 52 Cal.4th 96, 122.) In rejecting Bivert's claim, this Court noted it has long permitted the admission of evidence in the penalty phase of violent conduct committed as a juvenile. (*Ibid.*) In distinguishing *Roper v. Simmons*, this Court explained that *Roper* "spoke only to the question of punishment for juvenile offenses, while defendant's challenge 'is to the admissibility of evidence, not the imposition of punishment.'" (*Ibid.*, quoting *People v. Bramit* (2009) 46 Cal.4th 1221, 1239.)

In the instant argument, appellant is not challenging the *admissibility* of evidence of the Jackson homicide in the penalty phase as aggravation but rather the use of his conviction for that offense as a special circumstance to make him death eligible.[176] During the special circumstance proceeding, the jury was asked only to determine whether appellant had suffered a prior conviction for murder. (See 46 CT 12953 [special finding]; 73 RT 8895-8904.) It was not permitted to reject the special circumstance allegation in light of appellant's youth at the time of the Jackson killing, and his concomitant diminished responsibility for the offense. As *Roper*, *Graham* and *Miller* teach, appellant as a juvenile offender was categorically less culpable that a capital defendant whose prior murder conviction occurred when he was an adult, and should not, therefore, be viewed as equally eligible for a death sentence.

176

In Argument XVI., *post*, appellant asserts that his confession to the Jackson killing should not have been admitted during the penalty phase because it was obtained in violation of his constitutional rights and unreliable, in part because of his youth at the time it was made. Argument XVI. also relies, inter alia, on the *Roper* line of cases but is independent of the challenge to the validity of the prior murder special circumstance made herein.

Moreover, this line of cases was also concerned with the "special difficulties" a juvenile defendant faces in criminal proceedings, which may render the outcome less reliable:

> [T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. [] Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense. [] These factors are likely to impair the quality of a juvenile defendant's representation. . . .

(130 S.Ct. at p. 2032; see also *J.D.B. v. North Carolina* (2011) 131 S.Ct. 2394, 2468.)

Indeed, these concerns appeared to have been at play in the proceedings in which appellant was found guilty of Mr. Jackson's murder. During the penalty phase of his capital trial, appellant indicated that he did not understand he was actually facing a sentence of 26 years to life when he decided, as a teenager, to go to trial. He believed his attorney, who apparently told him that he would be released in seven to ten years if convicted of murder. (72 RT 9806-9807.)

It is true that in this case the jury was allowed to consider appellant's age at the time of the prior homicide during the penalty phase in determining whether to actually sentence him to death. However, as the

Roper line of cases demonstrates, that was insufficient to ensure that "the death penalty is reserved for a narrow category of crimes and offenders." (543 U.S. 551, 568-569.) Using appellant's prior murder conviction as a special circumstance further violated the Eighth Amendment because the prior conviction itself – which the jury had no meaningful opportunity to question – was less reliable by virtue of appellant's youth at the time it was imposed. (*Johnson v. Mississippi, supra*, 486 U.S. at pp. 584-587.) Finally, the use of the prior murder conviction violated appellant's rights to due process and equal protection, since appellant was unfairly placed on the same footing as an adult offender for purposes of death eligibility.

In sum, this Court should invalidate appellant's prior murder special circumstance.

C. Appellant's Death Sentence Must Be Reversed.

Appellant has demonstrated that the lying-in-wait special circumstance should be reversed. (Args. VI., XII., *ante*.) The Penal Code section 4500 conviction should also be invalidated. (Arg. XIV., *post*.) If the prior murder special circumstance is also vacated for the reasons set forth above, appellant would no longer be death-eligible.

However, even if this Court does not reverse the lying-in-wait special circumstance and/or the Penal Code section 4500 conviction, appellant's death sentence should still be vacated. In *Brown v. Sanders* (2006) 546 U.S. 212, the high court set forth the test for when an invalidated special circumstance requires reversal of a death sentence. It stated:

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the

> weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

(546 U.S. at p. 220, fn. omitted.)

In this case, the jury was permitted to consider evidence relating to Mr. Jackson's death, but it was limited to appellant's taped confession and some brief testimony from the detective who extracted it. It undoubtedly did not hear the full array of evidence presented at appellant's 1987 trial, however. Under these circumstances, the fact of appellant's prior conviction for first degree murder constituted additional evidence about Mr. Jackson's death that should not have been considered by the jury in the penalty phase. Knowing that a previous jury had heard all of the evidence relevant to the prior offense and determined that it supported a first degree murder conviction, and being able to use the fact of conviction, added "an improper element to the aggravation scale in the weighing process." (*Brown v. Sanders*, *supra*, 546 U.S. at p. 22.) Thus appellant's death sentence should be reversed.

//

//

XIV.
THE DEATH ELIGIBILITY PROVISION OF PENAL CODE SECTION 4500 IS UNCONSTITUTIONAL BECAUSE IT IS ARBITRARY AND IRRATIONAL

Although death eligibility is primarily determined by the special circumstances set forth in Penal Code section 190.2, section 4500 is a notable exception. It makes an inmate who is serving a life sentence eligible for capital punishment if he commits an assault which results in death, irrespective of the offense for which that life sentence was imposed. As shown below, the death-eligibility provision of section 4500 is irrational and arbitrary because it excludes inmates who are serving determinate sentences which are the functional equivalent of life for heinous, violent crimes while including inmates who have committed comparatively minor crimes and are serving much less severe indeterminate sentences. Further, it fails to promote the constitutionally legitimate purposes served by the death penalty, including retribution and deterrence. For these reasons, it violates the Eighth Amendment.

A. An Eligibility Factor Must Differentiate Among Defendants in an Objective, Even-Handed and Substantially Rational Way.

The U.S. Supreme Court has recognized two distinct phases of the capital sentencing process. In the eligibility phase, "the jury narrows the class of defendants eligible for the death penalty . . . ." (*Buchanan v. Angelone* (1998) 522 U.S. 269, 275.) In the selection phase, "the jury determines whether to impose a death sentence on an eligible defendant." (*Ibid.*) The high court has emphasized the importance of the eligibility phase:

It is in regard to the eligibility phase that we have stressed the

need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition.

(*Buchanan v. Angelone*, *supra*, 522 U.S. at pp. 276-276.)

To fulfill their constitutional function, eligibility factors must "adequately differentiate . . . in an objective, evenhanded, and substantially rational way" the many murder defendants for whom the jury may consider a death sentence from those for whom it may not. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; see also, *Godfrey v. Georgia* (1980) 446 U.S. 420, 433 (unconstitutionally vague eligibility factor did not provide a principled way to distinguish Godfrey's case from others in which death was not imposed].)

In California, eligibility for the ultimate punishment is primarily based on "special circumstances." (See *Brown v. Sanders*, *supra*, 546 U.S. at p. 214, citing Pen. Code, § 190.2.) However, a conviction pursuant to Penal Code section 4500 also renders a defendant eligible for a death sentence. As set forth below, section 4500 fails to constitutionally narrow the class of defendants eligible for death because it irrationally premises such eligibility on the type of sentence an inmate is serving rather than on the offense underlying that sentence.

B. Penal Code Section 4500.

Pursuant to Penal Code section 4500, an inmate who is serving a life sentence may be sentenced to death if he commits an assault which results in the victim's death. It provides in relevant part:

Every person while undergoing a life sentence, who is sentenced to state prison within this state, and who, with malice aforethought, commits an assault upon the person of

> another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.

(Pen. Code, § 4500.)

Section 4500 is an assault statute, not a murder statute. (*People v. McNabb*, *supra*, 3 Cal.2d at p. 458.) The offense of assault by a life prisoner was first codified in 1901 as former section 246. As originally enacted, a death sentence was mandatory, whether or not the victim of the assault died. (See *People v. Finley* (1908) 153 Cal. 59, 60-61.) The statutory language has been amended several times.[177] Most notably, the statute was amended in 1959 so that a death sentence was mandatory only if the assault victim died. If he survived, the jury had discretion to sentence the life inmate to either death or life without parole for nine years. (See *People v. Vaughn* (1969) 71 Cal.2d 406, 411, fn. 1.) In 1977, it was amended to eliminate the mandatory death penalty provision altogether and

---

177

See Penal Code section 4500 (added by Stats. 1973, ch. 719, § 13, p. 1301, amended by Stats. 1977, ch. 316, § 21, p. 1264); former section 4500 (added by Stat. 1941, ch. 106, § 15, p. 1124, amended by Stat. 1959, ch. 529, § 1, p. 2497, Stats. 1965, ch. 1904, § 1, p. 4412); former section 246 (added by Stat. 1901, ch. 12, § 1, p. 6, repealed by Stats. 1941, ch. 106, § 16, p. 1132, reenacted as section 4500 by Stats. 1941, ch. 106, § 15, p. 1124.)

to provide for an alternative punishment of life without possibility of parole in cases of fatal assaults. (*Graham v. Superior Court* (1978) 98 Cal.App.3d 880, 888.) The latter amendment also added language instructing the sentencing authority to choose between life without parole and death by referring to Penal Code section 190.3 and 190.4. (*Ibid.*)

Between 1908 to 1969, this Court rejected a variety of challenges under the state and federal constitutions to earlier versions of section 4500 and its predecessor statute. (See, e.g., *People v. Finley*, *supra*, 153 Cal. 59 [mandatory death sentence affirmed for a non-fatal assault on two correctional officers committed by a group of inmates]; *People v. Oppenheimer* (1909) 156 Cal. 733 [mandatory death sentence affirmed for non-fatal stabbing of another inmate]; *People v. Wells* (1949) 33 Cal.2d 330 [mandatory death sentence affirmed for defendant who was serving an indeterminate sentence of five years to life for possession of a weapon by an inmate for a non-fatal assault on a prison guard]; *People v. Smith* (1950) 36 Cal.2d 444 [mandatory death sentence affirmed for defendant serving sentence of five years to life for burglary who aided and abetted fatal stabbing on an inmate]; *People v. Jefferson* (1956) 47 Cal.2d 438, 442 [mandatory death sentence affirmed for non-fatal assault]; *People v. Dorado* (1965) 62 Cal.2d 338 [death sentence affirmed for fatal stabbing by inmate serving five years to life for sale of marijuana]; *People v. Vaughn* (1969) 71 Cal.2d 406 [death sentence for a non-fatal assault with a sharpened stick on a correctional officer reversed on other grounds].)

The opinions cited above all preceded the United States Supreme Court's modern capital jurisprudence which began with *Furman v. Georgia* (1972) 408 U.S. 238. However, in *People v. Vaughn*, 71 Cal.2d 406, this Court recognized that its view of the constitutional validity of section 4500

might change over time. It stated:

> Defendant contends that to subject him to the death penalty for an assault which did not result in the death of the victim is to inflict cruel and unusual punishment upon him. We have long upheld section 4500 against this and related challenges to the penalty which it imposes. . . . These decisions do not necessarily settle the question for all time, however, since in applying the Eighth Amendment's ban on cruel and unusual punishment we must reflect "the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101 . . . .

(*People v. Vaughn*, *supra*, 71 Cal.2d at p. 418.)

In *Graham v. Superior Court*, *supra*, 98 Cal.App.3d 880, the court of appeal went further to find that a mandatory death sentence for a fatal assault was unconstitutional. When *Graham* was decided, Penal Code section 4500 had already been amended in light of *Furman* and its progeny to eliminate a mandatory sentence. However, the *Graham* court was reviewing a conviction which had been obtained under the old scheme. (98 Cal.App.3d at p. 888.) The appellate court rejected the state's argument that the statute was narrowly drawn. Instead, it found that section 4500 encompassed "a wide range of personal culpability," including that akin to both first and second degree murder. (*Id.* at p. 886.) Further, noting that 57 percent of prison inmates were serving life sentences when defendant Graham was convicted, it stated that "[t]he classification of life prisoner covers an even broader range of culpability . . . ." (*Ibid.*) Emphasizing that a life inmate could be serving his sentence for first degree murder or second degree robbery, the reviewing court stated: "Section 4500, therefore, could

apply to a person who might hope to be released from prison in months as well as to one who might expect to remain there for many years." (*Ibid.*)

To appellant's knowledge, this Court has not ruled on a challenge to the constitutionality of the current version of section 4500 in a capital case. For the reasons which follow, he contends it is unconstitutional.

C. Life Prisoner Status Fails to Rationally Identify Persons Deserving of the Death Penalty.

Section 4500 violates the Eighth Amendment because it fails to provide a principled or substantially rational way for determining who should be eligible for a death sentence. Making death eligibility contingent upon the type of sentence an inmate is serving when he commits a fatal assault rather than on the type of crime he has committed is irrational and arbitrary. Further, it fails to promote the state's interest in retribution or deterrence, which have been recognized as the social goals served by capital punishment.

1. Section 4500 Does Not Single Out the Most Deserving Offenders for Death Eligibility.

Conditioning death eligibility on the fact that a defendant is serving a life sentence is irrational, and provides no meaningful basis for distinguishing the few who are sentenced to death from the many who commit murder. The death penalty is only appropriate for those defendants who can "with reliability be classified among the worst offenders." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 569.) It must be limited to those offenders "whose extreme culpability makes them 'the most deserving of execution.'" (*Id.* at p. 568, quoting *Atkins v. Virginia* (2002) 536 U.S. 304, 319.)

In light of the way California sentences criminal defendants, those

serving a life sentence are not necessarily more culpable than those who are serving a determinate sentence and are therefore not necessarily more deserving of execution when they commit fatal assaults while incarcerated. In fact, those inmates with a life sentence may be relatively non-violent offenders while other inmates who have committed far more serious and violent offenses may be serving a term of years. Yet the commission of a lethal assault renders only the life inmate death eligible.

Under California law, a life term may be imposed for a wide variety of offenses. These include murder, of course, but also, for example, kidnapping for ransom (Pen. Code, § 209, subd. (a)), kidnapping a person for oral copulation (Pen. Code, § 209, subd. (b)(1)), kidnapping in the commission of a carjacking (Pen. Code, § 209.5, subd. (a)), derailing a train without causing personal injury (Pen. Code, § 218), burglary with the intent to commit rape, sodomy, or oral copulation (Pen. Code, § 220, subd. (b)), sexual intercourse with a child under the age of ten (Pen. Code, § 288.7), and using a minor to sell a controlled substance with two prior convictions for the same offense (Pen. Code, § 667.75).

Moreover, under California law an inmate who is *not* serving a life sentence may be as or more culpable than someone else who *is* a life inmate, and thus be more deserving of the death penalty for killing while incarcerated. A comparison of sentences imposed for multiple violent sex offenses is illustrative. In *People v. Wallace* (1993) 14 Cal.App.4th 651, the defendant was convicted of a series of violent sexual attacks and was sentenced to a determinate term of more than 280 years. (*Id.* at p. 657.) In holding that the term was not disproportionate to the offenses committed, the appellate court found that the lengthy sentence "had a rational basis – *to ensure that Wallace would be imprisoned for life* and would never be

released on parole." (*Id.* at p. 666, italics added; see also, *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 522 [defendant sentenced to 129 years for a variety of sex crimes].) In *People v. Retanan* (2007) 154 Cal.App.4th 1219, the defendant also committed a series of sexual offenses, but was sentenced to an indeterminate term of 135 years to life. (*Id.* at p. 1222.) It is clear from the length of the terms for defendants Wallace, Bestelmeyer and Retanan that the courts which sentenced them found that they all deserved to spend the rest of their natural lives incarcerated. Nonetheless, pursuant to section 4500 only Retanan would be death-eligible for committing a fatal assault while in prison. This makes no sense.

Another example of the irrationality and arbitrariness of section 4500 as a death-eligibility factor is found in the sentences meted out in gang-related offenses. In *People v. Johnson* (2001 WL 1635586), the defendant was sentenced to 25 years to life for discharging a firearm into an occupied vehicle for the purpose of promoting a criminal street gang, with an enhancement for personal use of a firearm causing great bodily injury. By contrast in *People v. Pena* (2006 WL 1102684), the defendants committed many more violent offenses, including armed robberies, carjacking, assault with a deadly weapon and possession of a firearm by a felon, also for the benefit of a street gang. Two of the three *Pena* defendants received determinate sentences of 158 and 118 years, the functional equivalent of life sentences. Yet while Johnson, who presumably will be eligible for parole during his lifetime, would be death-eligible under Penal Code section 4500 if he commits a fatal assault in prison, the defendants in *Pena*, who will never be released from prison, would not.

Perhaps the most glaring disparity in the relative culpabilities of inmates serving life sentences is found in "Three Strike" cases. Until very

recently, a defendant could receive a 25-years-to-life sentence if he had previously been convicted of two serious or violent felonies and was then prosecuted for a third felony, even if the third strike involved a trivial offense "'such as theft of a bicycle, a slice of pizza, cookies or a bottle of vitamins . . . .'" (*In re Coley* (2012) 55 Cal.4th 524, 529, quoting Vitiello, *California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?* (2004) 37 U.C. Davis L.Rev. 1025, 1026.)[178] Under section 4500, these inmates would be as eligible for a death sentence if they killed in prison as someone who received a Three Strikes life sentence for the commission of multiple, extremely violent crimes.

Further, section 4500 is irrational and arbitrary because it makes no distinction as to whether an inmate was a juvenile when he committed the offense for which he was given a life sentence, such as appellant. As explained in Argument XIII., *ante*, the United States Supreme Court and this Court have recognized the diminished culpability of juveniles relative to adult offenders, yet section 4500 does not. In fact, it does not even matter if the conviction for which the life sentence was imposed was unconstitutionally obtained. (*People v. Superior Court* (*Gaulden*) (1977) 66 Cal.App.3d 773, 778.)

The constitutional weakness of conditioning death eligibility on a life sentence label is demonstrated by *Sumner v. Shuman* (1987) 483 U.S. 66, although a mandatory statute was at issue therein. In *Shuman*, the U.S. Supreme Court held that a Nevada statute imposing a mandatory death

---

178

Pursuant to recently enacted Proposition 36, the Three Strikes Reform Act of 2012, a defendant may now only receive a life sentence if the third strike is another serious or violent felony. (*People v. Yearwood* (2013) 213 Cal.App.4th 151, 167-168.)

penalty on a prison inmate who was convicted of murder while serving a life sentence without possibility of parole violated the Eighth Amendment. Importantly, the high court recognized that being sentenced to life (even life without parole) failed to identify those persons most deserving of death:

> The simple fact that a particular inmate is serving a sentence of life imprisonment without possibility of parole does not contribute significantly to the profile of that person for the purposes of determining whether he should be sentenced to death. It does not specify for what offense the inmate received a life sentence nor does it permit consideration of the circumstances surrounding that offense or the degree of the inmate's participation.

(483 U.S. at p. 80.) It continued:

> Without consideration of the nature of the predicate life-term offense and the circumstances surrounding the commission of that offense, the label "life-term inmate" reveals little about the inmate's record or character. . . . Yet under the mandatory statute, all predicate life-term offenses are given the same weight – a weight that is deemed to outweigh any possible combination of mitigating circumstances.

(483 U.S. at p. 81.)

In California the death penalty is no longer mandatory under section 4500 and a jury must consider any mitigating circumstances in deciding whether to return a death verdict. However, deficiencies still exist. First, as recognized by the U.S. Supreme Court in *Roper v. Simmons*, *supra*, 543 U.S. at pp. 572-573, a defendant's youth may be inadequately considered in mitigation or even used against him. (See Arg. XIII.B., *ante*.) Thus it is

not enough that a jury can theoretically give mitigating effect to the fact that a capital defendant, such as appellant, was serving a life term for an offense committed while he was a juvenile and was therefore less culpable than an inmate who was an adult when his prior offense occurred.

Second, section 4500 is still arbitrary because offenders who may be equally or more deserving of death for the commission of an in-prison killing are not eligible under the statute simply because they were sentenced to a term of years rather than to an indeterminate life sentence. The fact that death is not mandatory for life inmates does not save this irrational scheme.

2. Section 4500 Does Not Rationally Promote the Social Purposes of Capital Punishment.

The United States Supreme Court has identified retribution and deterrence as the "two distinct social purposes served by the death penalty . . ." *(Roper v. Simmons, supra,* 543 U.S. at p. 571, citing *Atkins v. Virginia, supra,* 536 U.S. at p. 319.) Indeed, the same purposes motivated the California Legislature to enact Penal Code section 4500. (See, e.g., *In re Finley* (1905) 1 Cal.App. 198, 202 [because no other punishment can be inflicted, such inmate would otherwise "stand immune from further human retribution"]; *People v. Gaulden, supra,* 66 Cal.App.3d at p. 778 ["Section 4500 was enacted for the purpose of promoting prison safety by discouraging assaults by prison inmates"].)

However as demonstrated below, neither deterrence nor retribution is rationally served by premising death eligibility on the label given to an inmate's sentence rather than the nature of such sentence.

a. Retribution.

In *Shuman,* the high court recognized that a state's interest in

retribution could be achieved with a sentence less than death, even if the killer was already serving a sentence of life without parole. (483 U.S. at p. 83.) The court stated: "there are other sanctions less severe than execution that can be imposed even on a life-term inmate. An inmate's terms of confinement can be limited further, such as through a transfer to a more restrictive custody or correctional facility or deprivation of privileges of work or socialization." (*Id.* at p. 84.)

In California, like Nevada, there are ways to punish a life inmate who commits a fatal assault while incarcerated. Most obvious is to take away parole eligibility for those inmates not already sentenced to life without the possibility of parole (LWOP). Further, the evidence in appellant's case shows that for both LWOP and non-LWOP inmates, custody restrictions such as placement in Pelican Bay's SHU provide significant punishment. Prison consultant Esten's description of the extreme conditions there leaves no doubt on that score. (Stmt. of Facts, C.2.b., *ante.*)

Moreover, using the label of life inmate is not a rational way to identify those inmates who can be meaningfully punished for committing an in-prison homicide with a sentence less than death from those who cannot. CDC statistics show that at the end of 2012, just over 40,000 offenders housed in California's prisons were sentenced to life terms. Almost 35,000 of these inmates had life terms with the possibility of parole.[179] Thus for

---

179

See *Prison Census Data*, published by the Department of Corrections and Rehabilitation, Offender Information Services Branch, Feb. 2013 (available at www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/Census/CENSUSd1212.pdf). The report indicates that as of December 31, 2012, approximately 70 percent of California inmates did not

this group, taking away parole eligibility, or extending the term of years to be served to become parole eligible, constitute meaningful options to satisfy the state's interest in retribution.

b. Deterrence.

Neither is the goal of deterrence rationally served by the death-eligibility provision in section 4500. In *Shuman*, the high court held that a "mandatory capital-sentencing procedure for life-term inmates is not necessary as a deterrent." (483 U.S. at p. 82.) The court found, inter alia, that "there is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy." (*Id.* at p. 83.)

The same is true under California's non-mandatory section 4500, but even more so. California's Penal Code section 4500 applies to all life inmates, whether or not their terms includes the possibility of parole. (See, e.g., *People v. Smith*, *supra*, 36 Cal.2d at p. 445 [former section 4500 was applicable to inmate serving an indeterminate sentence of 5 years to life for burglary].) As set forth above, the terms of most life inmates in California do include the possibility of parole. Because these inmates have much more to lose than an inmate with LWOP or death, making all life inmates death eligible for an in-prison homicide is not necessary as a deterrent.

In fact, the statistical evidence suggests that capital punishment does not actually deter in-prison homicide. For example, a study of data from

---

have life sentences (including determinate sentence and second strike cases). The other 30 percent, totaling 40,138 inmates, included 34,803 who had life terms with the possibility of parole and 5,335 with no possibility of parole (4,610 LWOP and 725 death penalty cases).

1973 determined that the rate of imprisoned murderers committing murder in states with the death penalty was statistically equivalent to the rates in states without the death penalty. (*The Deterrent Effect of the Death Penalty Upon Prison Murder*, W. Wolfson, in *The Death Penalty in America*, H. Bedau (ed) 3rd Ed. 1982, at p. 168, table 4-43.) The study's author thus concluded, "The threat of the death penalty . . . does not even exert an *incremental* deterrent effect over the threat of a lesser punishment in the abolitionist states." (*Id.* at p. 167.) Other sources confirm that prison staff and inmates are not killed or assaulted more frequently in states without the death penalty as compared to states with capital punishment.[180]

Further evidence of the inefficacy of capital punishment as a deterrent to in-prison homicide is the fact that the number of such crimes has declined precipitously over the years although few states have a death-eligibility statute similar to section 4500. (See subsec. D., *post.*) The national rate of in-prison homicide has dropped from 54 per 100,000 inmates in 1980 to 5 per 100,000 in 2010.[181] It is now dramatically lower than the rate of homicide in the general U.S. population, which in 2002 was 35 per 100,000 when standardized to match the county's prison

---

180

See, e.g., *Does Capital Punishment Deter Murder?*, J. Lamperti, Dartmouth College, at p. 5 (available at www.dartmouth.edu/~chance/teaching_aids/books_articles/JLpaper.pdf); *The Case Against the Death Penalty*, ACLU (Dec. 2012) at p. 6 (available at www.aclu.org/captial-punishment/case-against-the-death-penalty).

181

Suicide and Homicide in State Prisons and Local Jails, U.S. Dept. of Justice, Office of Justice Programs, Aug. 2005, p. 1; *Mortality in Local Jails and States Prisons, 2000-2010 - Statistical Tables*, U.S. Dept. of Justice, Office of Justice Programs, Dec. 2012 (both available at www.ojp.usjod.gov/bjs).

population.[182] That LWOP is generally a sufficient deterrent was recognized by Justice Breyer when he observed that few offenders sentenced to life without parole instead of death commit further crimes either inside prison or out. (*Ring v. Arizona* (2002) 536 U.S. 584, 615 [conc. opn. of Breyer, J.].)

Perhaps more important for Eighth Amendment jurisprudence, however, is that using the life sentence label to define death eligibility irrationally distinguishes among such inmates. For the purposes of deterring in-prison crimes, inmates serving LWOP or death sentences are more rationally categorized with inmates like defendant Wallace who, as described above, will never finish his 283-year sentence than with life inmates who will become parole eligible.

D. Few States Have Statutes Similar to Penal Code Section 4500.

As noted above, the U.S. Supreme Court will look to "'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual. *Trop v. Dulles* [*supra*, 356 U.S. at pp. 100-101]." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 561.) Thus, an additional consideration for evaluating whether a statute defining a capital offense passes constitutional scrutiny is an interjurisdictional comparison. (See, e.g., *Kennedy v. Louisiana* (2008) 128 S.Ct. 2641; *Roper v. Simmons*, *supra*, 543 U.S. at p. 563; *Atkins v. Virginia*, *supra*, 536 U.S. 304; *Enmund v. Florida* (1982) 458 U.S. 782; *Coker v. Georgia* (1977) 433 U.S. 584.)

Very few states appear to have statutes similar to Penal Code section

---

182

Suicide and Homicide in State Prisons, *supra*, at p. 11.

4500, that is, a statute which makes an inmate who commits the equivalent of second degree murder while incarcerated death eligible if he is serving a life sentence. To appellant's knowledge, these states include only Alabama, Mississippi, and New Hampshire.[183] Other states which use inmate status as a death eligibility factor either require a first degree murder (Arkansas, Kansas, Virginia, Washington) or do not limit eligibility to those serving a life sentence (Texas, Utah, Oregon).[184] The fact that so few states have a statute similar to section 4500 provides further reason to question whether it is constitutionally sound.

In conclusion, this Court should declare Penal Code section 4500 invalid as a death-eligibility factor because it violates the Eighth Amendment.

//

//

183

(Ala. Code, §§ 13A-5-40, subd. (6), 13A-6-2; Miss. Code, §§ 97-3-19, subd. (2), 97-3-19, subd. (1); N.H. Rev. Stat., § 630:1, subd. I.A(d).) Connecticut has a similar statute. (Conn. Gen. Stat., § 53a-54b.) In April 2012, it abolished the death penalty for future cases but not retrospectively, leaving 11 inmates on death row in that state.

184

(Ark. Stat., § 5-10-101, subd. (a)(6); Kan. Stat., § 21-2439, subd. 3; Va. Code, § 18.2-31, subd. 3; Wash. Rev. Code, § 10.95.020, subd. 2; Tex. Pen. Code, § 19.03, subds. (a)(5)-(6); Utah Code, § 76-5-202, subd. (1)(a); Or. Rev. Stat., § 163.095, subd. (2)(b).) The governor of Oregon recently announced a moratorium on executions in that state, however.

XV.
THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO ELICIT TESTIMONY ABOUT APPELLANT'S RACIALLY INFLAMMATORY WORDS AND CONDUCT

During the penalty phase, the prosecutor presented the testimony of Christopher Spychala, who claimed that appellant had slashed him with a knife without any provocation. The prosecutor was further permitted, over objection, to elicit testimony about highly inflammatory words appellant allegedly used when he encountered three African American men prior to the Spychala assault. The trial court erred in overruling multiple defense objections because the testimony was irrelevant, non-statutory aggravation and extremely prejudicial. The error violated appellant's state statutory rights and his rights under both the state and federal constitutions to free speech, due process, notice, a fair trial and a reliable penalty verdict. (Cal. Const., art. I, §§ 15, 16, 17; U.S. Const., 1st, 5th, 6th, 8th, and 14th Amends.)

A. The Trial Court Permitted the Prosecutor to Elicit Racially Inflammatory Testimony.

At the penalty phase, the prosecutor called Spychala to testify about a 1986 incident in which appellant assaulted him with a knife. Spychala explained that he and a female friend were walking on Market Street in San Francisco when appellant approached them. Appellant knew the woman and all three began walking together. (See Stmt. of Facts, C.1.a., *ante*.)

During Spychala's direct examination, the deputy district attorney asked him, "Did you encounter any African/Americans on the street?" (76 RT 9012.) Defense counsel objected, asserting the question was not relevant. (76 RT 9012-9013.) The trial court permitted the question after the prosecutor assured the court that it was relevant. (76 RT 9013.)

Spychala indicated that they had encountered three African American men. (76 RT 9013, 9030.) When the prosecutor asked, "How did Mr. Barrett react to them," defense counsel objected again and asked for an offer of proof outside the presence of the jury. (76 RT 9013.) The prosecutor responded, "Your Honor, I assure you that it's going to be tied in and show an act of violence by the defendant." (76 RT 9013-9014.) The trial court permitted the question without requiring an offer of proof.

Spychala stated that he did not know exactly what was said but that appellant "was confronting them." (76 RT 9014.) Another defense objection was overruled. Spychala elaborated: "He was confronting them with somewhat of an offensive attitude. And he was using derogatory names toward them." (76 RT 9014.) When asked what he meant, Spychala added, "Standing there, calling them niggers." (76 RT 9014.)

Defense counsel objected again, stating "This doesn't go to violence. This is improper." (76 RT 9014.) The court overruled the objection and Spychala testified that appellant had a knife in his hand behind his back at the time. (76 RT 9015.) Spychala acknowledged, however, that appellant did not display the knife to the men nor did he threaten them. (76 RT 9015.) Spychala and the woman walked away and appellant followed. (76 RT 9016-9017.) Appellant's conversation with the three men lasted no more than a minute. (76 RT 9030.)[185]

185

According to Spychala, thereafter appellant suddenly cut him with the knife without provocation. (76 RT 9020, 9022, 9035.) Spychala denied that he and appellant had argued about the encounter with the African American men. (76 RT 9040-9041.) However, appellant told police that he had slashed Spychala because he had struck at appellant with his fist. (3rd Supp. CT 447.)

As appellant sets forth below, the trial court erred in permitting the prosecutor to elicit this testimony from Spychala.

B. The Incident Was Non-Statutory Aggravation and Therefore Inadmissible.

"Evidence of a defendant's background, character or conduct that is not probative of any specific sentencing factor is irrelevant to the prosecution's case in aggravation and therefore inadmissible." (*People v. Nelson* (2011) 51 Cal.4th 198, 222, citing inter alia, *People v. Boyd* (1985) 38 Cal.3d 762, 773-774.) Aggravating sentencing factors are limited solely to the circumstances of the capital offense, other violent criminal conduct by the defendant and prior felony convictions. (*People v. Nelson*, *supra*, 51 Cal.4th at p. 222; § 190.3, factors (a), (b) and (c).)

In this case, the prosecutor asserted that appellant's conduct towards the African American men was admissible as a threat of violence. (76 RT 9014.) Spychala's testimony established that appellant did not threaten the men with his knife, however, or even display it to them. Evidence of criminal activity under section 190.3, factor (b) must be limited to conduct that demonstrates the violation of a penal statute, and must involve violence or the threat of violence. *(People v. Phillips* (1985) 41 Cal.3d 29, 72 [construing 1977 death penalty statute]; *People v. Boyd*, *supra*, 38 Cal.3d at pp. 776-778; *People v. Belmontes* (1988) 45 Cal.3d 744, 808.) Simple possession of a weapon is not inherently violent. (*People v. Belmontes*, *supra*, 45 Cal.3d at p. 809 [defendant had handgun in waistband while stating he had all the protection he needed]; *People v. Dyer* (1988) 45 Cal.3d 26, 76 [ex-felon in possession of a gun is a non-violent crime]; see also, *People v. Jackson* (1996) 13 Cal.4th 1114, 1235 [ex-felon in possession of a gun is not in every circumstance an act committed with

actual or implied violence].)

Here, appellant's conduct towards these men was neither a criminal act nor a threat to do violence. In fact, despite the prosecutor's assertion during Spychala's testimony that the incident involved the threat of violence, he did not cite it as factor (b) aggravation evidence during argument. (See generally, 84 RT 10026-10091; 85 RT 10142-10154 [prosecution's penalty phase arguments].) Moreover, the jury was not instructed on the incident, either as to the elements of the "crime" or that it could only weigh the incident as factor (b) evidence if proven beyond a reasonable doubt. (47 CT 13149 [CALJIC 8.87]; see generally, 47 CT 13107-13159 [penalty phase instructions].) The deputy district attorney's effective abandonment of his claim that the evidence was admissible aggravation under section 190.3, factor (b), strongly supports a finding that the trial court erred in denying defense counsel's objection to it.[186]

This evidence was also inappropriately admitted because the prosecutor did not provide any notice of it to the defense prior to trial. Pursuant to section 190.3, "no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time . . . ." (Cal. Penal Code, § 190.3.) "To be sufficient as to content, the notice must afford the defendant a reasonable opportunity to prepare a defense to the allegation." (*People v. Tully* (2012) 54 Cal.4th 952, 1033 [internal quotation marks and citations omitted].) As an element of due process,

---

186

Alternatively, should this Court find that the evidence was properly admitted, then the trial court erred by failing to instruct the jury on the elements of the crime and that it must find beyond a reasonable doubt that appellant committed it.

notice is also required by the federal constitution. (*Lankford v. Idaho* (1991) 500 U.S. 110, 122-127; see *Gardner v. Florida* (1977) 430 U.S. 349.)

In this case, the prosecuting attorney gave notice of the Spychala assault, but said nothing about these purported three additional victims. (3 CT 683.) As there was no reference whatsoever to the African American men, including their identities, appellant had no ability to prepare a defense to this allegation.

C. Admission of the Racially Offensive Remarks Violated Appellant's Federal Constitutional Rights.

In *Delaware v. Dawson* (1992) 503 U.S. 159, 160, the United States Supreme Court held that the First and Fourteenth Amendments prohibited the introduction in a capital penalty hearing of evidence that the defendant was a member of a white supremacist organization, where that evidence had no relevance to the jury's penalty determination. The high court determined that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." (*Id.* at p. 165.) However, it does prevent a state "from employing evidence of a defendant's abstract beliefs at a sentencing hearing when those beliefs have no bearing on the issue being tried." (*Id.* at p. 168.)

In this case, testimony that appellant had called three African Americans "niggers" and other derogatory names was not relevant to any issue before his penalty phase jury. As set forth above, the evidence was non-statutory aggravation, and therefore inadmissible. The prosecutor did not assert that the testimony was relevant for any purpose other than as factor (b) evidence. In fact, the only value of this testimony was to

convince the jury that appellant was a racist and therefore deserving of a death sentence.

"Appeals to racial, ethnic, or religious prejudice during the course of a trial" violate a criminal defendant's due process and equal protection rights. (*United States v. Cabrera* (9th Cir. 2000) 222 F.3d 590, 594 [officer's improper references to defendants' national origin required reversal].) This Court has stated: "Irrelevant 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. Bivert* (2011) 52 Cal.4th 96, 118 [internal quotation marks and citation omitted].) A defendant's Fourteenth Amendment due process rights are violated when such evidence is so unduly prejudicial that it deprives him of a fundamentally fair trial. (*Ibid.*)

Here, appellant was deprived of a fundamentally fair trial due to the extremely inflammatory nature of the derogatory term Spychala claimed that appellant had used. In fact, according to Wiktionary, "it arguably ranks as the most insulting racial epithet in the English language, with strong connotations of cultural and intellectual inferiority or deficiency."[187]

The erroneous admission of evidence concerning appellant's encounter with the African American men also violated the Eighth Amendment's requirements of heightened reliability and relevance of evidence for determination of penalty in a capital trial. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584.) And the error violated his "substantial and legitimate expectation" that he would not be deprived of

---

187

<http://en.wiktionary.org/wiki/nigger>

his life or liberty in violation of California's state evidentiary rules. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

D. The Error Was Prejudicial.

The United States Supreme Court has not definitively ruled whether a violation of the First Amendment in such circumstances may be harmless error or is prejudicial per se. (See *Dawson v. Delaware*, *supra*, 503 U.S. at p. 169 [conc. opn. of Blackmun, J.].) However, even if prejudice is required, under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, the prosecution cannot show beyond a reasonable doubt that the federal constitutional error did not contribute to the verdict. The same is true under the reasonable possibility test of *People v. Brown* (1988) 46 Cal.3d 432, 447.

As demonstrated previously, the jury struggled with choosing the penalty. (See Arg. XVIII.B.2., *post.*) A vital part of the case for life hinged on convincing the jury that appellant would not be a danger to others if given life without parole. In making this case, the defense presented, inter alia, evidence tending to show that appellant's previous in-prison conduct was a reaction to being incarcerated in an ultra-violent environment, which manifested along racial lines. Evidence that appellant, at age sixteen, was confronting African Americans with incendiary language outside the confines of prison tended to undercut the defense mitigation case, as it might have led one or more jurors to conclude that appellant was simply a racist who would incite violence in any environment. Had the jury not heard this inflammatory, non-statutory aggravation evidence, there is a reasonable possibility that it would have returned a life verdict instead of death. Appellant's death sentence must therefore be reversed.

XVI.
APPELLANT'S 1986 CONFESSION WAS ERRONEOUSLY ADMITTED BECAUSE IT WAS UNRELIABLE AND OBTAINED IN VIOLATION OF HIS *MIRANDA* RIGHTS

Appellant's death sentence was predicated in part upon penalty phase evidence consisting of his confession in 1986 to the Jackson homicide. As established below, the confession was fundamentally flawed, and therefore unreliable, because appellant's waiver of his constitutional rights was not knowing, intelligent and voluntary as required by *Miranda v. Arizona* (1966) 384 U.S. 436. The use of this defective evidence violated his rights under the federal and state constitutions. (U.S. Const., 5th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 15-17.)

A. The Trial Court's Ruling.

In a separate proceeding held after appellant's guilt phase concluded, the jury found that he had been convicted in 1987 of murdering James Jackson. (See Stmt. of Facts, B., *ante*.) During the penalty phase, the prosecutor proposed to play an audio recording of the interrogation by San Francisco police in which appellant, then 16 years old, confessed to killing Jackson and stealing some of his belongings afterward. (74 RT 8936.)

Defense counsel filed a motion asserting that the admission of the recording would violate appellant's constitutional rights in several ways. The defense claimed, inter alia, that the recording did not establish that appellant had been adequately advised of his *Miranda* rights before waiving them. The defense further argued that the confession had been obtained in violation of appellant's rights as a juvenile when the detectives failed to contact his mother or advise him of his right to speak to her. (46 CT 12959-12964.) In a hearing on the motion, the prosecutor indicated he would present the testimony of an inspector who conducted the interrogation "to

lay the foundation for the admissibility of the defendant's confession." (74 RT 8936.)

In the presence of the jury, the prosecutor called retired San Francisco police inspector Frank McCoy to testify. (76 RT 9048.) McCoy was assigned to the homicide division in 1986 and investigated Jackson's death. (76 RT 9049-9050.) The inspector testified that he had interrogated appellant regarding the Jackson case in the early morning hours of October 11, 1986. (76 RT 9051-9052.)[188] The prosecutor then elicited the following testimony regarding appellant's waiver of his constitutional rights:

Q. Did you advise him of his constitutional rights?

A. Yes, sir.

Q. And why did you do that?

A. Any time a police officer speaks to a person for the purposes of interrogation regarding a specific crime and he's a suspect, we're required to do so.

Q. And you did that in this instance?

A. Yes, sir.

188

It appears that the interrogation actually occurred on October 12. Christopher Spychala testified that he had been assaulted by appellant on October 11, 1986, at about 8:30 or 9:00 p.m. (76 RT 9028.) Later that evening, Spychala pointed out appellant to police officers and saw them stop and handcuff him. (76 RT 9023-9024, 9038.) One of the police officers who took appellant into custody summoned homicide inspectors and turned appellant over to McCoy and his partner when they arrived. (75 RT 8990-8992.) Appellant's interrogation ended at 5:16 a.m. (46 CT 13069.) During the questioning, McCoy stated, "Tonight you were - ah - arrested." (46 CT 13043.) The inspector was obviously referring to the prior evening. Assuming the Spychala incident occurred on October 11, the interrogation must have taken place on October 12.

Q. And did he say that he understood each of those constitutional rights that you gave him?

A. He did.

Q. Did he say that he was willing to give those up and speak to you about this freely and voluntarily?

A. He did.

Q. And did he speak to you?

A. Yes, sir.

Q. And did you tape record it?

A. Yes, I did.

(76 RT 9052.)

The recording was played for the jury. (76 RT 9056, 9068; see also, 3rd Supp. CT 425 [exh. 361-A].)[189]

B. Before a Juvenile's Confession May Be Admitted Into Evidence, the Prosecution Must Establish That His Waiver of *Miranda* Rights Was Knowing, Intelligent and Voluntary.

"To give force to the Constitution's protection against compelled self-incrimination, the Court established in *Miranda* 'certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation.'" (*Florida v. Powell* (2010) 559 U.S. 50, __, 130 S.Ct. 1195, 1203, quoting *Duckworth v. Eagan* (1989) 492 U.S. 195, 201.) The police

---

189

There was an interruption during the playing of the tape when it became apparent that the prosecutor had insufficiently redacted the recording pursuant to the trial court's ruling that reference to unadjudicated conduct which did not satisfy the corpus delicti rule must be excised. (76 RT 9056-9067; 74 RT 8936-8939.)

must inform a suspect, prior to questioning

> that he has the right to remain silent, [] that anything he says can be used against him in a court of law, [] that he has the right to the presence of an attorney, and [] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

(*Florida v. Powell*, *supra*, 130 S.Ct. at p. 1203 [internal quotation marks and citation omitted].) The high court has not dictated the precise wording of the four *Miranda* warnings. Rather, the question is whether they reasonably conveyed to a suspect his rights. (*Id.* at p. 1204.)

Before a statement made during custodial interrogation may be admitted as evidence, the prosecution must establish that the defendant "'voluntarily, knowingly and intelligently' waived his rights." (*J.D.B. v. North Carolina* (2011) 131 S.Ct. 2394, 2401, quoting *Miranda*, *supra*, 384 U.S. at pp. 444, 475-476.) The state must satisfy this "heavy burden" by a preponderance of the evidence. (*Berghuis v. Thompkins* (2010) 130 S.Ct. 2250, 2261.)

The waiver inquiry has "'two distinct dimensions." (*Berghuis v. Thompkins, supra*, 130 S.Ct. at p. 2260, quoting *Moran v. Burbine* (1986) 475 U.S. 412, 421.) First, the waiver must be "'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" Second, it must also be voluntary, meaning that it "'was the product of a free and deliberate choice rather than intimidation, coercion, or deception.'" (*Berghuis v. Thompkins*, *supra*, 130 S.Ct. at p. 2260, quoting *Burbine*, *supra*, 475 U.S. at p. 421.)

Admissions and confessions by juveniles demand "special caution." (*In re Gault* (1967) 387 U.S. 1, 45; *People v. Lessie* (2010) 47 Cal.4th 1152,

1166.)[190] As the high court has recently affirmed, "'[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.'" (*J.D.B. v. North Carolina*, *supra*, 131 S.Ct. at p. 2403, fn. 5, quoting *Graham v. Florida*, *supra*, 130 S.Ct. at p. 2026.) The United States Supreme Court has thus recognized that children "cannot be viewed simply as miniature adults." (*J.B.D.*, *supra*, 131 S.Ct. at p. 2404.) The Court explains:

> The law has historically reflected the [] assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. . . . [T]he legal disqualifications placed on children as a class – e.g., limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent – exhibit the settled understanding that the differentiating characteristics of youth are universal.

(*J.D.B.*, *supra*, 131 S.Ct. at pp. 2403-2404.)

Indeed this Court has acknowledged that a court "faces special problems in determining whether a minor who purports to waive the Fifth Amendment rights to silence and the assistance of counsel in the context of custodial interrogation does so knowingly and voluntarily." (*People v. Lessie*, *supra*, 47 Cal.4th at p. 1166.) To determine whether a defendant – minor or adult – has waived his *Miranda* rights, a court must look at the

---

190

This Court has suggested that the burden of establishing that a waiver is voluntary, knowing and intelligent is greater if the defendant is a juvenile. (See *People v. Lewis* (2001) 26 Cal.4th 334, 383, citing *In re Anthony J.* (1980) 107 Cal.App.3d 962, 971.)

totality of the circumstances surrounding the interrogation. (*Lessie*, *supra*, 47 Cal.4th at pp. 1157, 1165-1166, citing *Fare v. Michael C.* (1979) 442 U.S. 707, 724-725.) This test mandates "'evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.'" (*Lessie*, *supra*, 47 Cal.4th at p. 1167, quoting *Fare*, *supra*, 442 U.S. at p. 725.)

As established below, the prosecution failed, at appellant's capital trial, to meet its burden of proving that he had knowingly, intelligently and voluntarily waived his Fifth Amendments rights almost 20 years earlier.

C. The Prosecutor Failed to Establish That Appellant's *Miranda* Waiver Was Knowing and Intelligent.

In this case, the trial court erred in finding that the state had met its burden of proving that appellant's *Miranda* waiver was knowing and intelligent, because the record failed to establish that the police adequately informed the then-teenager of his constitutional rights before he waived them.

The U.S. Supreme Court has stated that "'no amount of circumstantial evidence'" that a defendant may have been aware of his rights "'will suffice to stand' in the stead of an adequate warning." (*Florida v. Powell*, *supra*, 130 S.Ct. at p. 1212, fn. 10 [dis. opn. of Stevens, J.], quoting *Miranda v. Arizona*, *supra*, 384 U.S. at pp. 471-472.)

The evidence relied upon by the prosecutor in the instant case that appellant had been adequately advised of his constitutional rights was entirely circumstantial, and therefore inadequate. A transcript of the redacted recording begins as follows:

McCoy: Joe, do you understand each of these rights that I have explained to you:

Barrett: Yes, I do.

McCoy: Okay. As you can see -ah - we're tape recording this interview and if you would just help us by raising your voice.

Joe: No problem.

McCoy: Okay. Ah - do you understand each of these rights that I have explained to you?

Barrett: Yes.

McCoy: And having these rights in mind do you wish to talk to us now?

Barrett: Yes.

(3rd Supp. CT 426.)

Although the recording shows that appellant claimed to understand his rights, it does not establish what the teenager had been told before he purported to waive them. As defense counsel stated: "Although the transcription makes reference to whether or not 'Joe' understood these rights that were explained to him, i.e., presumably Miranda rights, there was no transcription of the advisement or assurance that it actually occurred." (46 CT 12961.)

This failure of proof that appellant was adequately advised of his *Miranda* rights before he waived them was not rectified by the testimony of inspector McCoy. As set out above, McCoy simply answered affirmatively when the deputy district attorney asked him if he had advised appellant of his constitutional rights. (76 RT 9052.) This testimony tells us nothing about what the inspector actually said to appellant when informing him of his rights.

In Fifth Amendment jurisprudence, courts have spent a great deal of effort analyzing whether the particular language of warnings actually given to a criminal defendant complied with the *Miranda* requirements. (See, e.g., *Florida v. Powell*, *supra*, 130 S.Ct. 1195 [issue presented was whether the warning that defendant had the right to talk to a lawyer before answering any questions and that he could invoke that right at any time during the interview satisfied *Miranda*]; see also, *Doody v. Ryan* (9th Cir. 2011) 649 F.3d 986, 1002 [detective's administering of the *Miranda* warnings, which included significant deviations from the printed form, was far from clear and understandable].) In appellant's case, however, it impossible to assess whether the advisements given were adequate, since the record did not establish what inspector McCoy actually said to appellant in order to inform him of his rights.

The need to know precisely how a suspect was advised of his rights is particularly acute when that suspect is a juvenile. Not surprisingly, juveniles have a more difficult time than adults in grasping the import of the *Miranda* warnings.[191] Also, research has demonstrated that the reading comprehension needed to understand *Miranda* warnings varies greatly depending upon the language employed.[192]

191

One study found that 55% of juveniles, compared to 23% of adults, did not understand at least one component of *Miranda* warnings. Overall, only 21% of all children comprehend the meaning and significance of the warnings, compared to approximately 42% of adults. (Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis* (1980) 68 Cal. L. Rev. 1134, 1153.)

192

An analysis of various versions of *Miranda* warnings found that the reading comprehension level needed to understand them ranged from approximately the third grade level to requiring postgraduate education. (Rogers &

In sum, the prosecution must establish that the accused's waiver was made with full awareness of both the nature of his rights and the consequences of abandoning them. (See *Berghuis v. Thompkins*, *supra*, 130 S.Ct. at pp. 2260, 2261.) The prosecuting attorney failed to meet that burden in this case. As a result, the recording was erroneously admitted.

D. The Prosecution Also Failed to Establish That Appellant Had Voluntarily Waived His Rights.

The prosecutor further failed to establish, under the totality of the circumstances, that appellant's waiver of his Fifth Amendment rights was voluntary.

A factor relevant to the totality of the circumstances inquiry includes the defendant's state of mind. (*People v. Nelson* (2012) 53 Cal.4th 367, 375.) In this case, the evidence suggests that appellant's state of mind was likely impaired due to several circumstances, including a lack of sleep, the influence of drugs and/or alcohol, and the absence of parental support.

The evidence suggests that appellant may have been sleep deprived when he waived his rights. As set forth above, the interrogation of appellant began early in the morning and ended at 5:16 a.m. (76 RT 9051-9052; 3rd Supp. CT 467.) There is no evidence which indicates, however, that appellant was given an opportunity to sleep during the night of his arrest. The interrogation recording reveals that appellant requested "another cup of coffee" shortly before 5:00 a.m. (46 CT 13057), which raises the possibility he was tired and having difficulty staying awake. Lack of sleep or food are likely to have a more coercive effect on a child than on an adult. (*In re Aven S.* (1991) 1 Cal.App.4th 69, 75; see also, *Doody v. Ryan*, *supra*,

---

Harrison et al., *An Analysis of Miranda Warnings and Waivers: Comprehension and Coverage* (2007) 31 Law Hum. Behav. 177.)

649 F.3d at p. 1009 [sleep deprivation was a factor in determining that teenage defendant's confession was not voluntary].)[193]

Also, appellant reported that he was "highly intoxicated" when he was arrested. (3rd Supp. RT 446.)[194] Although in 2004 McCoy testified at the penalty phase that appellant had not appeared to be under the influence of drugs or alcohol during the 1986 interrogation (76 RT 9051), the confession transcript reveals that appellant more than once stated he could not recall what he had told the arresting officers because he was "pretty loaded" (3rd Supp. CT 448, 449). This suggests he was substantially intoxicated at least at the time he initially waived his *Miranda* rights while in the custody of two uniformed police officers. (See 75 RT 8986, 8990-8991.)

Further, appellant was without parental support when he waived his rights to silence and counsel. The United States Supreme Court has recognized the critical need a minor has for the advice and support of a parent. In finding the confession of a 14-year-old boy to be involuntary, the high court in *Gallegos v. Colorado* (1962) 370 U.S. 49, 54, explained that a defendant of that age was unlikely to have "any conception of what will

---

193

Although the record shows that appellant was provided coffee, there is no evidence that he was given any food during his hours in custody.

194

Spychala testified that he could tell appellant had been drinking. (76 RT 9028, 9039.) Although Spychala opined that appellant was not drunk, because he was "talking [and] walking" (76 RT 9028), neither talking nor walking establishes an absence of intoxication.

When asked by inspectors what kinds of drugs he used, appellant told them that he snorted crystal methamphetamine and used LSD, marijuana and alcohol. (46 CT 13060.)

confront him when he is made accessible only to the police" or have an understanding of the consequences of waiving his rights "without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself." (370 U.S. at p. 54.)

In *Haley v. Ohio* (1948) 332 U.S. 596, the Court reversed the conviction of a 15-year-old boy for murder, stating:

> What transpired would make us pause for careful inquiry if a mature man were involved. And where, as here, a mere child – an easy victim of the law – is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him. . . . .

(332 U.S. at pp. 599-600.)

The immaturity which undermines the decision-making of a fourteen- or fifteen-year-old does not disappear for a sixteen-year-old boy, such as appellant was in 1986. (See, e.g., *Roper v. Simmons*, *supra*, 543

U.S. 551 [defendant was 17 years old]; *Graham v. Florida, supra*, 130 S.Ct. 2011 [defendant was 16 years old].) The period between ages twelve and seventeen is a crucial time of human development during which there are rapid and dramatic changes to a young person's physical, intellectual, emotional, and social capabilities.[195] Brain development is not complete until the mid-twenties, with the frontal lobes, the parietal lobes and the temporal lobes, all of which are required for abstract reasoning, maturing last.[196] Thus, even when adolescents seem to have an adequate factual understanding of *Miranda* warnings, they do not grasp the relevance of those warnings to the situation they are in.[197] Their developmentally appropriate focus on the short-term consequences of their actions can lead to rash decision making, such as waiving their rights.[198] In sum, "[d]uring the time these processes are developing, it doesn't make sense to ask the average adolescent to think or act like the average adult, because he or she can't – any more than a six-year-old child can learn calculus."[199] This

---

195

See Steinberg & Schwartz, "*Developmental Psychology Goes to Court" Youth on Trial: A Developmental Perspective on Juvenile Justice* 1(2000): 9-10, at p. 24.

196

See Baird & Fugelsang, *The Emergence of Consequential Thought: Evidence from Neuroscience* (2004) 359 Phil. Transactions Royal Soc'y B: Biological Scis. 1797, 1798.

197

Saul Kassin, et al., *Police-Induced Confessions: Risk Factors and Recommendations* (2010) 34 Law & Hum. Behav. 3, 8.

198

Bonnie & Grisso, *Adjudicative Competence and Youthful Offenders in Youth on Trial* (2000) at p. 88.

199

Steinberg, *Juveniles on Trial* (2003) 18 Crime. Just. 20, 22.

timeline of brain development likely explains why so many minors waive their *Miranda* rights– one study found that about 90% of youth suspected of felonies waive their rights to silence and counsel.[200]

Further evidence that the 1986 confession was not voluntary is the investigators' failure to notify appellant's mother of his arrest or to inform him of his right to contact her. Recognizing that children and adult defendants are not similarly situated, both state and federal law include parental-notification safeguards for juvenile suspects. California's Welfare and Institutions Code mandates that when an officer takes a minor to a place of confinement, the officer "shall take immediate steps to notify the minor's parent, guardian, or a responsible relative that such minor is in custody and the place where he is being held." (Welf. & Inst. Code, § 627, subd. (a).) Section 627 further provides that "no later than one hour after he has been taken into custody, the minor shall be advised and has the right to make at least two telephone calls from the place where he is being held, one call completed to his parent or guardian, a responsible relative, or his employer, and another call completed to an attorney." (Welf. & Inst. Code, § 627, subd. (b).)

Federal law also seeks to protect juveniles with certain safeguards. 18 U.S.C. 5033 provides:

> Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall

---

200

Grisso & Pomicter, *Interrogation of Juveniles: An Empirical Study on Procedures, Safeguards, and Rights Waiver* (1977) 1 Law & Hum. Behav. 321; see also, Ferguson & Douglas, *A Study of Juvenile Waiver* (1970) 39 San Diego L. Rev. 53 (study found that 90% of the youth waive their rights and the same number did not understand those rights.)

> immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile, and shall immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of such custody. The arresting officer shall also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.

The Ninth Circuit has held that parental notification pursuant to section 5033 must occur prior to interrogation, "when notification of the juvenile's *Miranda* rights has purpose." (*United States v. Female Juvenile (Wendy G.)* (9th Cir. 2001) 255 F.3d 761, 762.) Failure to do so may deprive a child of due process. (*United States v. Doe* (9th Cir. 2000) 219 F.3d 1009, 1016.) The lack of parental notice is one factor to consider when a court evaluates whether a minor's waiver of his *Miranda* rights is voluntary under the totality of the circumstances. (*Ibid.*)[201]

In this case, the recorded portion of appellant's interrogation suggests that he was not informed of his right to call a parent. The transcript indicates that McCoy asked appellant if he knew the whereabouts of his parents but nowhere therein did the inspector inform appellant of his right to call them pursuant to Welfare and Institutions Code section 627,

---

201

Under Ninth Circuit jurisprudence, a violation of section 5033 may require suppression of a minor's confession, even where it does not rise to the level of a denial of due process. (See, e.g., *U.S. v. Wendy G.*, *supra*, 255 F.3d at pp. 767-768; *United States v. Juvenile (RRA-A)* (9th Cir. 2000) 229 F.3d 737, 746–747; *U.S. v. Doe*, *supra*, 219 F.3d at p. 1016–1018.) This Court has recently stated that "it appears that the exclusionary rule does not require suppression of a minor's in-custody statements" when Welfare and Institutions Code section 627 has been violated. (*People v. Nelson*, *supra*, 53 Cal.4th at p. 379, fn. 4.)

subdivision (b). (3rd Supp. CT 427-428.)[202] Neither does the transcript show that McCoy complied with his duty to immediately notify either of appellant's parents that he was in custody (Welf. & Inst. Code, § 627, subd. (a)), although appellant's juvenile records presumably could have provided his mother's address and phone number. Thus appellant was left without any adult counsel when he made the severely detrimental decision to speak to the inspectors about the Jackson homicide, without an attorney present.

In sum, the prosecutor did not meet his burden of proving by a preponderance of the evidence that appellant's waiver was voluntary, given the circumstances under which it was obtained.

E. The Confession Was Unreliable.

The United States Supreme Court has clearly stated the need for a heightened reliability in capital sentencing proceedings. In *Johnson v. Mississippi* (1988) 486 U.S. 578, it declared:

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in determination that death is the appropriate punishment in any capital case.

(486 U.S. at p. 584, internal quotation marks and citations omitted; see also, *People v. Horton* (1995) 11 Cal.4th 1068, 1134.)

In light of *Johnson v. Mississippi*, this Court has recognized that the special need for reliability is undermined when a death judgment is

---

202

The unedited audio recording was marked as exhibit 361. Transcripts of both exhibits 361 and 361-A were prepared by the prosecution and are part of the record on appeal. (3rd Supp. CT 426-467 [transcript of exh. 361-A]; 46 CT 13023-13070 [transcript of exh. 361].)

predicated in part upon fundamentally flawed evidence because it "does not constitute reliable evidence that properly may support a sentence of death." (*People v. Horton*, *supra*, 11 Cal.4th at p. 1135 [special circumstance erroneously based on fundamentally flawed prior conviction].)

In this case, the same factors that compel a conclusion that appellant's waiver of his *Miranda* rights was not knowing, intelligent and voluntary should lead this Court to find that the resulting confession was not sufficiently reliable to meet the requirements of the Eighth Amendment.

The United States Supreme Court has consistently stated that "'admissions and confessions of juveniles require special caution.'" *(Doody v. Ryan*, *supra*, 649 F.3d at p. 1009, quoting *In re Gault*, *supra*, 387 U.S. at p. 45; also citing *Haley v. Ohio*, *supra*, 332 U.S. at pp. 599-600; *Gallegos v. Colorado*, *supra*, 370 U.S. at p. 53.) In fact, the high court has recently reacknowledged this concern in *J.D.B. v. North Carolina*, *supra*, 131 S.Ct. 2394. Therein, the court recognized the vulnerability of youth during police interrogations:

> [T]he pressure of custodial interrogation is so immense that it "can induce a frighteningly high percentage of people to confess to crimes they never committed." [Citation.] That risk is all the more troubling – and recent studies suggest, all the more acute – when the subject of custodial interrogation is a juvenile.

(131 S.Ct. at p. 2401.)

Quoting *Gallegos v. Colorado*, *supra*, 370 U.S. 49, 54, the court in *J.D.B.* stated: "'No matter how sophisticated,' a juvenile subject of police interrogation 'cannot be compared' to an adult subject." (131 S.Ct. at p. 2403.) The evidence confirms this conclusion. Adolescents are more

suggestible in custodial interrogations.[203] Moreover, studies of cases involving false confessions show that more juveniles than adults falsely confess.[204] One study of 340 exoneration cases found that 42% of juvenile exonerees had falsely confessed compared with 13% of the adults.[205] This same study found that suspects under the age of 18 were three times as likely to confess as adults.[206]

In sum, the heightened reliability required in death penalty cases by the Eighth Amendment is not satisfied here, where appellant's confession was made at age 16, while sleep-deprived, under the influence of drugs and alcohol and without any parental or other adult counsel.

F. The Erroneous Admission of the 1986 Confession Was Prejudicial.

The erroneous admission of a confession is not prejudicial per se but rather subject to a harmless error analysis. (*Arizona v. Fulminante*, *supra*, 499 U.S. 279, 306-312; see also, *People v. Cahill*, *supra*, 5 Cal.4th 478.) Under the harmless error standard of *Chapman v. California*, *supra*, 386 U.S. 18, the beneficiary of the error must prove beyond a reasonable doubt

---

203

Singh & Gudjonsson, *Interrogative Suggestibility Among Adolescent Boys and Its Relationship with Intelligence, Memory, and Cognitive Set* (1992) 15 J. of Adolesc. 155, 155.

204

Redlich & Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility* (2003) 27 Law & Hum. Behav. 141, 151-152.

205

Gross, et. al., *Exonerations in the United States, 1989 Through 2003*, (2005) 95(2) J. Crim. L. & Criminology 523, 523-553.

206

Ibid.

that it did not contribute to the verdict. (See also, *People v. Neal*, *supra*, 31 Cal.4th 63, 86.)

This Court has recognized that confessions, "as a class, almost invariably will provide persuasive evidence of a defendant's guilt" and "often operate as a kind of evidentiary bombshell which shatters the defense." (*People v. Cahill*, *supra*, 5 Cal.4th at p. 503 [internal quotation marks and citations omitted]; see also, *People v. Neal*, *supra*, 31 Cal.4th at p. 86.) The improper admission of a confession is therefore much more likely to be prejudicial than of other kinds of evidence. (*Cahill*, *supra*, 5 Cal.4th at p. 503; *Neal*, *supra*, 31 Cal.4th at p. 86.)

In this case, if the Court accepts appellant's argument that the prior murder special circumstance is invalid (see Arg. XIV., *ante*), then there is no question that the 1986 confession to Jackson's homicide was prejudicial. Aside from the evidence of conviction admitted at the special circumstance phase of trial and appellant's confession, there was no other evidence presented which established that appellant was responsible for the death of James Jackson.

However, even if this Court rejects Argument XIV., the admission of the confession was not harmless beyond a reasonable doubt. It was indeed an evidentiary bombshell, one defense counsel endeavored to keep from being admitted into evidence at the penalty phase. It provided the kind of graphic detail about Jackson's death which the bare record of conviction did not. As appellant has established elsewhere in this brief, the length of deliberations and the request for a readback of his statement to the jury indicates the penalty decision was not an easy one. In addition, the jury was presented with reasons to spare appellant's life, including his extremely disadvantaged background. (See Arg. XVIII.B.2., *post.*) In sum, the

prosecution cannot show beyond a reasonable doubt that the recording of appellant himself describing how he bashed the skull of a sleeping man did not contribute to the death verdict. The death sentence must be reversed.

//

//

XVII.
TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO EVIDENCE THAT APPELLANT HAD OBTAINED A PROTECTIVE VEST AND BY ELICITING TESTIMONY THAT APPELLANT WAS ABLE TO GET OUT OF HIS CELL

As set forth below, trial counsel prejudicially failed to object to the admission of testimony that appellant had managed to obtain a protective vest worn by correctional officers, although his possession of this item was non-statutory, inadmissible aggravation evidence. Defense counsel exponentially compounded this prejudice by eliciting testimony that appellant was able to get out of his cell at night and had obtained the vest by entering an office belonging to prison staff. These actions deprived appellant of his Sixth Amendment right to the effective assistance of counsel.

A. Testimony About the Protective Vest and Appellant's Ability to Get Out of His Cell.

The notice of evidence in aggravation stated that the prosecution intended to introduce, pursuant to Penal Code section 190.3, evidence relating to appellant "being in possession of an inmate manufactured weapon and/or sharp instrument while being an inmate at Calipatria State Prison on March 6, 1997 . . . ." (3 CT 687.)

Accordingly, the state called correctional lieutenant Roger Martinez as a witness, who testified on direct examination that he was present on March 6 when appellant, suspected of possessing contraband, refused to come out of his cell. (78 RT 9291-9293.) As a cell extraction team was being assembled, appellant voluntarily left the cell and it was searched. Martinez saw an inmate-manufactured weapon made of plexiglass in plain view on appellant's bunk. (78 RT 9293-9295.)

On cross-examination, defense counsel asked Lt. Martinez why prison authorities wanted appellant out of the cell for a search. The officer responded, "I wasn't sure of the reason." (78 RT 9296.) Despite this answer, defense counsel persisted and later asked, "Is it true that the extraction team was formed because Mr. Barrett had allegedly come out of his cell during first watch?" (78 RT 9301.) Martinez answered, "No, I don't recall the reasons why they were forming the team. They were just trying to get him out of the cell." (78 RT 9301.)

The state's next witness was correctional sergeant Basil Richards. (78 RT 9304.) In his direct examination, Richards testified that on March 6 he searched appellant's cell and found several items, including "an inmate-manufactured weapon, Ad. Seg. vest, and some other items in the trash can." (78 RT 9305.) The prosecutor asked what an Ad Seg vest was. Richards responded, "That's a vest that used for protection for the staff." (78 RT 9305-9306.) Richards explained that it was made from metal plates and possibly covered with Kevlar. The vest in appellant's cell had been taken apart and the metal had been removed. The deputy district attorney asked, "And based on your training and experience, why would an inmate want metal?" Richards replied, "Based on my experience, in the hands of an inmate would be to manufacture some type of a weapon." (78 RT 9306.)

On cross-examination, Richards agreed with defense counsel that appellant would have had to have gotten the vest somewhere. (78 RT 9306.) Counsel continued: "And you were informed at the time you went there that Mr. Barrett had been out of his cell and there was an Ad. Seg. vest missing, correct?" (78 RT 9307.) The officer responded affirmatively. Defense counsel asked, "So during first watch Mr. Barrett had been out of his cell?" Richards said, "That I don't know." (78 RT 9307.) Richards

believed that the metal from the vest was also found on appellant's bed. (78 RT 9307.) Richards indicated that an inmate's possession of a vest is a rules violation, as it is unauthorized property. (78 RT 9308.) Upon further cross-examination, he stated it would not, however, be weapon stock. (78 RT 9309.)

The prosecution then called Lt. Lindsey Hunt to the stand. (78 RT 9310.) Hunt heard that appellant had gotten out his cell. (78 RT 9317.) Since Hunt was the watch commander, it was his responsibility to investigate the incident. (78 RT 9317.) On the night of March 6, 1997, appellant was in a cell in the infirmary. As Hunt walked by, appellant asked to talk to him. Hunt explained that appellant "just kind of wanted to chitchat with me about what happened, and clear some things up for me." (78 RT 9317.) Appellant admitted to Hunt that he got out of his cell in Ad Seg, although he would not tell the lieutenant how he did it. (78 RT 9317-93718.)

As Hunt began to recount what else appellant had told him, defense counsel interposed a hearsay objection, which the trial court sustained. (78 RT 9313.) When the prosecutor asserted that appellant's statements to Hunt were an admission, defense counsel said, "there's been no *Miranda* at this point in time." (78 RT 9314.) The trial court sent the jurors on a break and then told counsel, "Let's find out if it is an admission." (78 RT 9314-9315.)

Outside the jury's presence, Hunt stated that appellant told him he had previously been *Mirandized* but had refused to talk. Appellant was speaking to Hunt "off the record." (78 RT 9315.) Appellant explained that the predictable procedure prison authorities followed during cell fights in Ad Seg gave him time to get out of his cell and "get his grub on," which was an inmate euphemism for getting food. (78 RT 9315-9316.) Appellant

would not admit he had arranged a cell fight but stated, "that sounds about right. You have to admit that that was a pretty good plan." (78 RT 9316.) Hunt asked appellant why he picked up a protective vest. Appellant replied, "Why do you think?" and winked. (78 RT 9316.) Appellant also told Hunt that he could have "taken [a] cop out at any time if he wanted to . . . ." (78 RT 9316.) Defense counsel made no further objection and did not assert that appellant's possession of the vest and his claim he had gotten out of his cell were inadmissible, non-statutory aggravation evidence. (See 78 RT 9317.) Lt. Hunt was thus allowed to continue his testimony.

In front of the jury, Hunt recounted his conversation with appellant. Appellant told Hunt that if he had come to Ad Seg five minutes earlier the previous night, he would have caught appellant out of his cell. (78 RT 9318.) Appellant would not tell Hunt how he did it, and called himself "the mystery man." (78 RT 9319.) Hunt then essentially repeated what he had told the trial court outside of the jury's presence, adding a few details. (78 RT 9319-9322.)

On cross-examination, Hunt stated that he had received confidential information that appellant had been out of his cell. (78 RT 9322-9323.) He then interviewed staff but no prison personnel had seen appellant out of his cell. (78 RT 9324, 9322.) None had inadvertently opened the cell. (78 RT 9325.) The witness did not know how the cell door was opened. (78 RT 9333.) The officer did not speak to other inmates to see if appellant had indeed set up a diversion. (78 RT 9327.) Appellant had told Hunt he got food from the CO's office, but the officer did not know if any items were actually missing from the office. (78 RT 9327, 9323.) Hunt was aware that food and a weapon had been found in appellant's cell in the resulting search but was not present when the search occurred. (78 RT 9327, 9329.) When

pressed for details, Lt. Hunt admitted, "All I know is what Mr. Barrett told me." (78 RT 9331.)

B. Appellant's Counsel Provided Ineffective Assistance.

1. The Law.

A criminal defendant is entitled to the effective assistance of counsel by both the federal and state constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) A defendant is denied of this constitutional right when: 1) his attorney's performance falls below an objective standard of reasonableness under prevailing professional norms; and 2) counsel's deficient performance prejudices him. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Lopez* (2008) 42 Cal.4th 960, 966.)

To establish the first prong of an ineffective assistance of counsel claim, a defendant must overcome the presumption that his attorney's performance "'fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.'" (*People v. Lopez*, *supra*, 42 Cal.4th 960, 966, quoting *People v. Ledesma* (2006) 39 Cal.4th 641, 745-746.) This Court has observed that the appellate record "rarely shows that the failure to object was the result of counsel's incompetence . . . ." (*People v. Lopez, supra,* 42 Cal.4th at p. 966, citing *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) Thus, a claim that defense counsel has rendered ineffective assistance by failing to object is generally best litigated on habeas corpus, where the reasons for counsel's inaction can be explored. (*Ibid.*) However, ineffective assistance may be established on appeal if "'there simply could be no satisfactory explanation'" for counsel's conduct. (*People v. Lopez*, *supra*, 42 Cal.4th at p. 966, quoting *People v. Ledesma*, *supra*, 39 Cal.4th at pp. 745-746.)

2. Counsel's Performance Was Deficient.

Defense counsel's performance fell below an objective standard of reasonableness, when he failed to object to evidence that appellant had a protective vest in his possession and when he elicited evidence that appellant had been out of his cell.

a. The Vest.

The failure by trial counsel to object to the admission of highly prejudicial evidence against the defendant may constitute ineffective assistance. (See, e.g., *People v. Robertson* (1982) 33 Cal.3d 21, 40-42; *People v. Guizar* (1986) 180 Cal.App.3d 487; *Crotts v. Smith* (9th Cir. 1996) 73 F.3d 861, 865-867, superseded by statute on other grounds, *Van Tran v. Lindsey* (9th Cir. 2000) 212 F.3d 1143, 1149.) In this case, appellant's counsel unreasonably failed to object to testimony from Sgt. Richards that an Ad Seg vest was found in appellant's cell. (See 78 RT 9304-9306.)

Although Richards indicated that inmates in general procured metal to make weapons, he testified that the vest was not weapon stock. (78 RT 9306, 9309.) There was no testimony indicating that the metal from the vest had been altered for use as a weapon (e.g., was sharpened or had a handle). In fact, there was no evidence establishing that the metal – which was not produced at the penalty phase – could have served to create a weapon.[207] Thus evidence of appellant's possession of the vest, which was a rules violation but not a criminal offense, was not admissible under factor (b) as it did not constitute criminal activity which involved the use or

---

207

The Index of Exhibits shows that the last item marked for identification during the penalty phase by the prosecutor was exhibit 380, a photograph of the plexiglass weapon found on appellant's bed. (See 1 RT 105; 78 RT 9295.)

attempted use of force or violence, or the threat to use force or violence. (See, e.g., *People v. Lancaster* (2007) 41 Cal.4th 50, 93-94 [possession of makeshift handcuff key is not conduct "criminal in fact" as required by factor (b)].) Appellant's attorney was ineffective in failing to object on this ground.

Defense counsel should have also objected to Sgt. Richards' testimony about the vest on the ground that the prosecutor had not provided notice that he intended to produce such evidence in the penalty phase. Penal Code section 190.3 requires the prosecution to give notice of the evidence to be introduced in aggravation. The federal constitution also requires notice, as an element of due process. (*Lankford v. Idaho* (1991) 500 U.S. 110, 122-127; see *Gardner v. Florida* (1977) 430 U.S. 349.)

In this case, the notice of aggravation stated that appellant had possessed an inmate-manufactured weapon and/or sharp instrument" on March 6, 1997. (3 CT 687.) It did not, however, allege that appellant possessed weapon stock. (Compare 3 CT 684 [alleging that on August 21, 1991, appellant possess three pieces of weapon stock].) The weapon or sharp instrument alleged in appellant's possession on March 6, 1997 obviously referred to the plexiglass instrument, which had been sharpened and had a handle. This allegation could not have referred to the metal in the vest, as there was no attempt by the prosecutor to establish that it had been made into a weapon or was even sharp. Thus, an objection based on lack of notice would have been meritorious.

While the record does not affirmatively indicate why counsel failed to prevent evidence about appellant's possession of the vest from being admitted, it is clear on appeal that there is no satisfactory explanation for this deficiency. There could have been no strategic reason for counsel's

conduct. To keep such prejudicial evidence from being admitted could have only helped the defense; there was no downside to objecting to it and no potential benefit to appellant in failing to object. (See, e..g., *People v. Guizar*, *supra*, 180 Cal.App.3d at p. 492, fn. 3 [it is inconceivable that counsel would make a tactical decision to admit evidence that defendant had committed previous murders].)

b. Appellant Out of His Cell.

Counsel also performed deficiently when he sought to elicit highly prejudicial and inadmissible evidence that appellant had gotten out of his cell the night before the March 6 cell search. The issue first came up during the cross-examination of Lt. Martinez, when defense counsel asked the officer whether a cell extraction team had been formed because appellant had been out of his cell earlier. (78 RT 9301.) Martinez, however, did not have any knowledge of this alleged event. (78 RT 9296, 9301.) Defense counsel then asked similar questions of Sgt. Richards. (See 78 RT 9307.) Richards had heard that appellant was out of his cell but had no personal knowledge. (78 RT 9307.)

Evidence that appellant had managed to get out of his cell one night – if it was indeed true – was non-statutory aggravation inadmissible under factor (b), as it did not constitute criminal activity involving the use or attempted use of force or violence, or the threat to use force or violence. (See *People v. Boyd* (1985) 38 Cal.3d 762,776-777.) At most, the incident qualified as a rules violation. (See *People v. Lavaie* (1999) 70 Cal.App.4th 456, 461-462 [evidence which proved only that defendant was in an area of prison camp facility where he was not authorized to be but not outside of the camp may have established a rule violation but was insufficient to support escape conviction].) Even if appellant's conduct could be

characterized as an "escape," it was not admissible as aggravation evidence, because there was no violence involved. Escape is not an inherently dangerous crime. (*People v. Lancaster*, *supra*, 41 Cal.4th at p. 93.) Thus, evidence of a defendant's nonviolent escape is inadmissible under factor (b). (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1334.) As a result, defense counsel's effort to elicit testimony about the incident from Martinez and Hunt was unreasonable and inexplicable.

As set forth above, after Martinez and Richards testified about the events on March 6, Lt. Hunt testified at length on direct examination about appellant's claims to him that he had been out of his cell the previous night, at which time he obtained the Ad Seg vest and some food from the CO's office. (See 78 RT 9310-9322.) Hunt's testimony could have been successfully been excluded pursuant to *People v. Boyd*, *supra*, 38 Cal.3d 762. 776-777. But of course by the time Hunt took the witness stand, defense counsel had already opened the door to the admission of evidence that appellant had been out of his cell.

Although the record does not expressly reveal why appellant's attorney failed to prevent the introduction of such harmful evidence and even attempted himself to present it, there could have been no strategic reason for counsel's conduct. The evidence was devastating and could not have benefitted the defense in any way. (See, e.g., *People v. Guizar*, *supra*, 180 Cal.App.3d at p. 492, fn. 3.)

In fact, appellant's attorney did object to Hunt's testimony, which indicates that his failings were not motivated by strategic concerns. But counsel's conduct in this regard was itself deficient. After Hunt gave very damaging testimony about his conversation with appellant, defense counsel belatedly objected on the grounds that appellant's statements to the officer

were hearsay and possibly obtained in violation of *Miranda*. Appellant's attorney did not assert, however, that the testimony was inadmissible under factor (b), although as explained herein, such an objection would have been meritorious. After hearing from Hunt outside of the jury's presence, the trial court did not explicitly rule on defense counsel's objections and counsel did not press for a ruling. When proceedings resumed before the jury, appellant's attorney made no further objection. (See 78 RT 9318.)

Trial counsel performed deficiently by failing to make the trial court expressly decide whether appellant's statements to Hunt were an admission. In fact, they were not and were thus excludable. Under Evidence Code section 1230, a declaration against penal interest is admissible as an exception to the hearsay rule. Such a declaration must be "'distinctly' against the declarant's penal interest and must be 'clothed with indicia of reliability.' []" (*People v. Jackson* (1991) 235 Cal.App.3d 1670, 1677-1678.) The statement must "subject its declarant to criminal liability such that a reasonable person would not have made the statement without believing it true." (*Id.* at p. 1678.) As explained above, if appellant got out of his cell, this conduct was at most a rules violation and did not subject him to criminal liability. It was not, therefore, admissible as a declaration against interest.

In sum, trial counsel performed deficiently by failing to keep evidence of appellant's purported ability to get out of his cell from being introduced.

3. The Deficient Performance Was Prejudicial.

There is a reasonable probability that at least one of the jurors would have voted for life without parole if trial counsel had not permitted the prosecution to present evidence that appellant had obtained a protective vest

or elicited evidence that appellant had succeeded in getting out of his cell. (See *Strickland v. Washington*, *supra*, 466 U.S. 668.)

As demonstrated in the next argument, the penalty decision appears to have been a close one. (See Arg. XVIII.B.2., *post.*) The jury undoubtedly considered whether appellant would present a risk to others if his life was spared. The defense evidence that appellant would be safely contained in Pelican Bay prison might well have convinced at least one juror that a death verdict was not necessary, if not for the highly prejudicial testimony suggesting that appellant could leave his cell at will. This Court has recognized "that escape evidence may be particularly prejudicial if used to suggest to the jury that the death penalty is the only means of protecting the public from a defendant who poses a significant escape risk." (*People v. Lancaster* (2007) 41 Cal.4th 50, 95.) Although appellant's conduct was not truly an escape, surely hearing about the incident would have undermined the jury's confidence that the public and prison staff were safe from appellant if he was given life without parole.

A key theme of the prosecutor's argument was that appellant would continue to be violent while incarcerated, thereby putting the lives of prison personnel at risk. He discussed the March 6, 1997 incident, reminding the jury that appellant had a protective vest in his cell. (84 RT 10081.) Referring to the testimony about appellant getting out of his cell, the deputy district attorney added:

> Defendant later that day informed Lieutenant Lindsey Hunt, these are all the people who have testified during – for this incident, that he had gotten out of his cell and returned to his cell before anyone caught him. [¶] During this conversation with Lieutenant Hunt, Mr. Barrett referred to himself as the

"magic man." [¶] Now, think about this. The Defendant is in Ad. Seg. I mean, we're talking about the highest form of security you can have in that institution. He tells the lieutenant he gets out of his cell. . . . .

(84 RT 10081.)

Shortly thereafter, the prosecutor reminded the jury that appellant had testified that he was "not a threat to your society." (84 RT 10083.) The prosecutor disagreed, indicating that prison staff was at risk. He stated: "There are people inside that prison who are working, who are useful, productive members of society [who] are subject to the abuse by Mr. Barrett and others in there. Yeah, he does pose a threat to society." (84 RT 10083.)

In rebuttal argument, the prosecutor told the jury to consider in aggravation that appellant would be a future danger if permitted to live. He stated that "future dangerousness" was "not an aggravating factor that you can put down as an aggravating factor. However, the law does allow you to consider it, and you should consider it. The law allows me to argue about it, and I plan to do that with you right now." (85 RT 10148.) The prosecutor argued that appellant had been violent and dangerous since at least the age of twelve and that his violent conduct had continued after Richmond's death. He told the jury that appellant would "be a future danger to anybody that has to deal with him, whether in prison, on the streets, it doesn't matter, he will be a danger." (85 RT 10149.) Regarding appellant's violent behavior, the prosecutor concluded, "He's never going to stop." (85 RT 10150.)

The erroneously admitted evidence of appellant's ability to exit his cell and procure an Ad Seg vest undoubtedly made the prosecutor's future

dangerousness argument far more persuasive than it otherwise would have been.[208] The likelihood of prejudice was exacerbated by the absence of any instruction to the jury to assume that appellant would die in prison if sentenced to life without parole. (See generally, 47 RT 13107-13159 [penalty phase instructions given].) In sum, trial counsel's deficient performance prejudiced appellant.

//

//

208

As demonstrated in Argument XIX, *post*, the prosecutor committed misconduct by raising the possibility appellant could get out of prison by escape or appeal, if his life was spared by the jury. He also improperly elicited evidence that appellant had attempted to escape from CYA. The prosecutor's misconduct and the ineffective assistance by trial counsel combined undoubtedly had a strong impact in the jury's choice of a death sentence.

XVIII.
A COMBINATION OF ERRORS RESULTED IN THE ADMISSION OF EXTREMELY INFLAMMATORY EVIDENCE ABOUT THE ASSAULT OF AN ELDERLY MAN, WHICH DEPRIVED APPELLANT OF A FAIR TRIAL

Prior to trial, the prosecutor gave notice that he would present evidence concerning a 1982 assault on Lloyd Young, then in his eighties, which appellant allegedly committed when he was twelve years old. However, in the state's penalty phase case-in-chief, no evidence about the incident was adduced. During the defense penalty presentation, appellant called his former probation officer, Charles Rand, to testify about the difficult circumstances of his childhood. On cross-examination, the prosecutor elicited from Rand a hearsay account about the Young assault. When appellant took the stand, the deputy district attorney succeeded in directly questioning him about the incident, as well. And, in argument the prosecutor repeatedly emphasized the assault, adding inflammatory details that were not supported by the record.

Evidence of the incident was presented to the jury as the result of a combination of errors, which deprived appellant of a fair penalty trial, in violation of the Sixth, Eighth and Fourteenth Amendments and their California counterparts. First, appellant's counsel provided ineffective assistance when he failed to object to the prosecution's cross-examination of Rand. Second, the probation officer's hearsay account violated appellant's right to confront witnesses against him. And third, the prosecutor committed misconduct when he embellished the circumstances of the already very egregious assault.

A. Evidence of the Assault.

1. The Prosecutor's Penalty Phase Case-In-Chief.

In the state's notice of evidence in aggravation, the deputy district attorney indicated that he intended to introduce in the penalty phase evidence regarding various acts of violence by appellant. (3 CT 680-688.) One of these incidents involved an assault on Lloyd Young in San Francisco. The notice averred that on April 19, 1982, appellant and Stephen LaMell approached Young, then 81 years old, and demanded money. When Mr. Young refused this demand, appellant allegedly took Young's cane and struck him with it, knocking him to the ground. According to the notice, Mr. Young was hospitalized for a day as a result of the assault. He received stitches in his forehead and had swelling and bruising around his eyes and legs. (3 CT 681.)

At the penalty phase, the prosecutor called various witnesses regarding appellant's prior violent conduct. He did not, however, present any evidence relating to the Young assault. (See, generally, 75 RT 8958-9459 [prosecution's penalty phase witnesses].)[209]

2. Probation Officer Rand's Testimony.

In its penalty case, the defense called appellant's former juvenile probation officer Charles Rand as the first witness. Appellant came to Officer Rand's attention in 1984. (81 RT 9633.) In his capacity as appellant's probation officer, Rand learned about appellant's home life. Rand related to the penalty jury some of the obstacles appellant had faced growing up, including poverty, abuse, neglect and a family history of substance abuse. (See generally, 81 RT 9632-9645.)

On cross-examination, the prosecutor asked Rand what laws

209

The record does not indicate why no evidence regarding this incident was presented.

appellant had violated to bring him into the juvenile delinquency system. Rand indicated that when appellant was twelve years old, he had committed two robberies and one assault within a 90-minute period. Rand was not appellant's probation officer at that time, however. (81 RT 9649.)[210] The prosecutor then elicited information about the Young assault:

Q. Let's talk about the assault. Who was that assault on?

A. An elderly gentleman.

Q. In fact, the elderly gentleman was what? 82?

A. He was in his eighties, yes.

Q. And he ended up in the hospital because of the assault by Mr. Barrett; is that correct?

A. As far as I know, he was given medical attention, yes.

(81 RT 9649.) There was no defense objection to this questioning.

3. Appellant's Testimony.

The defense next called appellant as a witness. During direct examination, appellant testified that he had moved into a group home in his youth, "because ultimately I was convicted of the crimes that have been discussed earlier." (82 RT 9799.) Defense counsel asked, "Those are the 90-minute period in 1982?" (82 RT 9799.) Appellant said that they were. (82 RT 9799.) Defense counsel then asked appellant how he felt about the incident involving the elderly man. Appellant responded, "It's the single-most shameful thing I've ever done." (82 RT 9800.)

As cross-examination began, the prosecutor immediately questioned appellant about the Young assault:

210

The two robberies were those of Kenneth Condencia and Andrew Dimitrious, both of whom had previously testified at the penalty phase.

Q. It was mean what you did to that elderly gentleman, didn't you (sic)?

A. Undisputably.

Q. He was how old?

A. I believe, he was 80, 81.

Q. He walked with a cane?

A. Yes, he did.

Q. You attempted to rob him?

A. Not only did I attempt to rob him, I beat him with the cane.

Q. You beat him to where he was on all fours on the ground?

A. Undisputed.

(82 RT 9835-9836.)

Defense counsel objected that there had been "no testimony to that." (82 RT 9836.) The prosecutor claimed that the defense had "brought up a 90 minute crime spree back in 1982, and this is part of it." (82 RT 9836.) When defense counsel asserted that it was already in evidence, the trial court ruled that it would allow cross-examination on the issue since the defense had asked about it. (82 RT 9836.) The prosecutor continued:

Q. You put him in the hospital, didn't you?

A. I think he was hospitalized overnight. But, yes, I put him in the hospital.

Q. In fact, you beat him so badly that his eyes were swollen shut, weren't they?

A. I didn't see him, but if that's what the report said, that's what happened.

(82 RT 9836-9837.)

The prosecutor then referred to appellant's direct testimony that the

court and transportation staff had treated him with respect and dignity, asking if he treated people like that. Appellant responded, "Those that treat me with respect, I treat with respect." (82 RT 9837.) The prosecutor shot back, "Did you treat that old man like that?" Appellant admitted that he had not. (82 RT 9837.)

Later in cross-examination, the prosecutor returned to the Young assault:

> Q. You say that the single-most shameful thing you have ever done was in regards to assaulting the older gentleman?
>
> A. An unprovoked assault on a defenseless elderly man, absolutely.
>
> Q. Well, Mr. Jackson, he was sleeping in his bed when you smashed his skull in?

(82 RT 9843.)

A defense objection to the question about Jackson was sustained by the court as beyond the scope of direct examination. (82 RT 9843.)[211]

4. The Prosecutor's Argument.

In argument, the prosecutor repeatedly emphasized the Young assault. He stated:

> In 1982 the Defendant, at the age of twelve years old, walked up to an elderly gentleman on the streets of San Francisco. The elderly gentleman was walking down the street with a cane. He had to walk with a cane. [¶] The Defendant and his friend walked up to this gentleman and attempted to hold him up by knife-point. The gentleman resisted. And through the

---

211

Appellant answered the question despite the successful objection by his counsel (82 RT 9843), as he often did.

> Defendant's own statement, that gentleman was – the cane was taken away from him, and then beaten to the ground with the cane to the point that, when finally someone came to his assistance, the elderly gentleman went to the hospital. He was beaten so bad he had to stay there overnight. He was beaten so bad that his eyes were swollen shut. He was beaten so bad that he was on all fours on the ground at the time of the assault.

(84 RT 10036.)

Asserting that the assault was an aggravating factor, the deputy district attorney added: "I would submit to you that that is a very extremely aggravating factor when something like that happens on the streets of any city or town." (84 RT 10037.)

In his rebuttal penalty argument, the prosecutor returned to the topic of the Young assault. He stated that he had erroneously told the jury that the incident was applicable under factor (a) but that it was actually relevant as factor (b), and as a result he was required to prove it beyond a reasonable doubt. (84 RT 10059-10060.) He added:

> Again, I would reiterate, that any time somebody beats down an 81-year-old man who's walking down the street with a cane to the point where the man is on all fours on the ground, and after the assault ends the gentleman is taken to the hospital and kept overnight for the injuries he suffered, which include his eyes were swollen shut is very very aggravating in anybody's mind. It's only reasonable to assume that.

(84 RT 10060.)

As explained herein, the extremely aggravating circumstances of the

Young assault, in addition to "facts" not actually in the record, were put before the jury only as a result of the combination of trial counsel's ineffective assistance and the prosecutor's misconduct.

B. Defense Counsel Provided Ineffective Assistance by Permitting Testimony Concerning the Assault.

Appellant's attorney performed deficiently by inexplicably failing to object on multiple grounds specified below when the prosecutor asked probation officer Rand about the Young assault. Counsel compounded this error by questioning appellant about the incident, which "opened the door" for the prosecutor to elicit direct evidence about it.

The law relevant to an ineffective assistance of counsel claim was set forth in the preceding argument. (See Arg. XVII.B.1., *ante*.) In sum, the defendant must show deficient performance by his attorney which prejudiced his defense. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 687; *People v. Lopez*, *supra*, 42 Cal.4th at p. 966.) Such is the case here.

1. Counsel's Performance Was Deficient.

In the instant case, the record on appeal shows that the challenged performance by defense counsel was neither within the range of professional competence nor motivated by any reasonable strategy. The failure by trial counsel to object to the admission of highly prejudicial evidence against the defendant may constitute ineffective assistance. (See, e.g., *People v. Robertson*, *supra*, 33 Cal.3d at pp. 40-42; *People v. Guizar*, *supra*, 180 Cal.App.3d at p. 492, fn. 3; *Crotts v. Smith*, *supra*, 73 F.3d at pp. 865-867.)[212] As set forth herein, appellant's counsel had multiple grounds

---

212

In fact, "[c]ounsel's obligation to rebut aggravating evidence extend[s] beyond arguing it ought to be kept out." (*Rompilla v. Beard* (2005) 545 U.S. 374, 386, fn. 5.) Counsel must prepare to respond to such evidence by

for objecting to the prosecutor's questioning of Rand and thereby could have successfully prevented any evidence of this inflammatory incident from reaching the jury.

First, the prosecutor's questions to probation officer Rand about the assault on Mr. Young called for inadmissible hearsay. Rand had no direct knowledge of the incident; indeed he did not even meet appellant until two years after it had occurred. (See 81 RT 9633, 9649.)[213] Appellant asserts that there was no applicable hearsay exception under state law which would have permitted the prosecutor to adduce this testimony if defense counsel had objected to it. (See, e.g., *People v. Page* (2008) 44 Cal.4th 1, 47-49 [state law error occurred where testimony about statements defendant made to witness's coworkers did not come within a hearsay exception and was not offered for a nonhearsay purpose]. Thus, a timely hearsay objection would have kept any information about the Young incident out of the penalty phase, since the prosecution's case had concluded.

Second, appellant's attorney should have objected that the questioning of Rand constituted prosecutorial misconduct. A prosecutor commits misconduct when he tries to elicit inadmissible hearsay from a witness. (See, e.g., *People v. Wagner* (1975) 13 Cal.3d 612, 619.) The deputy district attorney knew that the probation officer had no direct knowledge of the event and could only offer a hearsay account based on what he had read in reports. After the prosecutor failed to present evidence

---

making reasonable efforts to learn about any aggravating offenses. (*Id.* at p. 385.)

213

In fact, it is likely that Rand obtained what he believed to be the facts of the Young assault from a probation report that he did not prepare. Thus, Rand's testimony involved multiple levels of hearsay.

of the Young assault in his penalty case-in-chief, he then exploited the opportunity to get this highly aggravating incident before the jury via inadmissible hearsay.

Third, defense counsel should have objected on the grounds that the questioning of Rand about the assault was beyond the scope of direct examination. In his direct exam, the probation officer spoke primarily about the difficult circumstances of appellant's childhood, and not about any of the offenses which brought him into the juvenile justice system. (See generally, 81 RT 9628-9647 [direct examination of Charles Rand].) Objecting that the prosecutor's questioning was beyond the scope of direct would have also kept any evidence of the Young assault from being presented. (See Evid. Code, § 773; *People v. Watson*, *supra*, 46 Cal.2d at p. 826 [cross-examination should be limited to matters which have been elicited from a witness in direct exam].)

Counsel compounded the failure to object to the inappropriate examination of Rand when he had appellant explain, in direct examination, how ashamed he was at having beaten an elderly man. (See 82 RT 9800.) As set forth above, the prosecutor used this questioning as an opening through which to elicit testimony from appellant himself on cross-examination about his conduct toward Mr. Young. When defense counsel objected to this questioning, the trial court ruled that the defense had brought it up during direct examination and permitted the prosecutor to continue. (82 RT 9836.) What was presumably an attempt at damage control by appellant's attorney might have been within the range of competent tactical decision-making *if* the state had legitimately introduced evidence of the Young assault. However, it was counsel's fault that there

was damage to mitigate.[214]

While the record does not affirmatively tell us why counsel failed to keep testimony about the Young assault from being admitted, it is clear on appeal that there can be no satisfactory explanation for this deficiency. Once the prosecutor's opportunity to present the incident as part of the state's penalty case had passed, defense counsel should have endeavored to prevent him from circumventing the rules of evidence and the federal constitution to get this harmful testimony before the jury. There could have been *no* strategic reason for counsel's conduct. To keep such devastating evidence from being admitted could have only helped the defense; there was no downside to objecting to it and no potential benefit to appellant in failing to object. (See, e..g., *People v. Guizar*, *supra*, 180 Cal.App.3d at p. 492, fn. 3.)

2. Prejudice.

As set forth above, to establish the second prong of an ineffective assistance of counsel claim, the defendant must show he was prejudiced by his attorney's deficient conduct. To obtain a penalty reversal in a capital case, "the question is whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the

---

214

If trial counsel had objected to the prosecutor's questioning of Charles Rand, there would have been no need for appellant to address the incident in his direct testimony. Any attempt by the prosecutor to examine appellant about the Young assault could then have been prevented with an objection that such questioning was beyond the scope of appellant's direct examination. In fact, defense counsel made such an objection when the prosecutor tried to question appellant about James Jackson's death. The objection was sustained by the trial court. (82 RT 9843.)

balance of aggravating and mitigating circumstances did not warrant death." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 695; see also, *Detrich v. Ryan* (9th Cir. 2012) 677 F.3d 958, 979.)

A defendant need not demonstrate "that counsel's deficient conduct more likely than not altered the outcome in the case." (*Id.* at p. 693; see also, *Harrington v. Richter* (2011) 131 S.Ct. 770, 792.) A reasonable probability "that at least one juror would have struck a different balance" is enough. (*Wiggins v. Smith* (2003) 539 U.S. 510, 537.) The reviewing court must consider the totality of the evidence. (*Id.* at p. 695.) A verdict "only weakly supported by the record is more likely to have been affected . . . than one with overwhelming record support." (*Id.* at p. 696.)

The prejudice prong is met here. Absent defense counsel's error in permitting the presentation of evidence about the assault on Lloyd Young, it is reasonably probable that at least one juror would have refused to return a death verdict. Penalty phase deliberations were lengthy, lasting approximately fifteen hours over four days.[215] After two days of deliberations, the jurors asked to hear a readback of the statement appellant had made to them. (47 CT 13175; 87 RT 10213-10216.) Lengthy deliberations and requests for readbacks of testimony suggest a difficult case. (*Thomas v. Chappell* (9th Cir. 2012) 678 F.3d 1086, 1103, and cases cited therein; see also, *In re Sakarias* (2005) 35 Cal.4th 140, 167 ["Some aspect or aspects of the case evidently gave one or more jurors considerable pause in the sentencing decision" as jury deliberated for more than ten hours over three days before reaching death verdict and declared itself

---

215

See 47 CT 13167 [Feb. 24, 2004]; 47 CT 13171 [Feb. 25, 2004]; 47 CT 13175 [Feb. 27, 2004]; and 47 CT 13182 [Mar. 10, 2004].

deadlocked at one point].) In appellant's case, it appears that the penalty decision was not an easy one.

That appellant's jury had difficulty in reaching a penalty verdict is not surprising, since the state's case for death was not strong. As demonstrated previously, the jury appears to have struggled with the question of whether appellant was acting in self-defense when he killed Thomas Richmond. (See Arg. IV.G., *ante*.) Any lingering doubt about the killing may well have been a factor in the jury's penalty deliberations. And although appellant had been convicted of a prior murder, this offense was significantly mitigated by the fact that the victim therein was an adult pedophile seeking to sexually abuse a homeless teenager by supplying him with drugs and alcohol. (See Stmt. of Facts, C.1.b., *ante*.)

Although the state presented other instances of appellant's prior violent conduct pursuant to factor (b), little of it involved any serious harm to the victim. (See Stmt. of Facts, C.1.a. & c., *ante*.) In fact, of the factor (b) evidence put before the jury, the assault on Mr. Young was by far the most aggravating, as it was the only one that involved significant injury to a sympathetic victim.[216] Hearing that appellant had, without any provocation, hurt an elderly man when he was only twelve years of age likely had a strong impact on the jury. The prosecutor's choice to emphasize this particular offense during his arguments tells us as much.

Further, the jury was presented with reasons to spare appellant's life. Evidence was presented about the abuse, neglect and poverty appellant had

---

216

The harm to Christopher Spychala was arguably significant, however the jury may well have believed that the appellant's conduct was provoked by the older man, an admitted drug addict. (See Stmt. of Facts, C.1.a., *ante*.)

suffered while growing up, as well as of the substance abuse he and his family had experienced. (See Stmt. of Facts, C.2.a. & c., *ante*.) Our society has long recognized that a defendant with a disadvantaged background may be less culpable than those who have not faced such hardships. (*Wiggins v. Smith*, *supra*, 539 U.S. at p. 534.) Credible evidence that appellant, if sentenced to life in prison, would be sent to Pelican Bay and have an extremely limited opportunity to engage in any further misconduct there also supported a life verdict. (See Stmt. of Facts, C.2.b., *ante*.)

"[E]ven for very gruesome crimes, the death penalty is not necessarily unavoidable." (*Detrich v. Ryan*, *supra*, 677 F.3d at p. 990.) Prejudice may exist even when there is substantial evidence in aggravation or more than one murder involved. (See, e.g., *Porter v. McCollum* (2009) 558 U.S. 30 [counsel's failure to present mitigation evidence was prejudicial in case with two murders]; *Douglas v. Woodford* (9th Cir. 2003) 316 F.3d 1079, 1091 [mitigation evidence could have evoked sympathy from at least one juror where defendant murdered two teenage girls]; *Smith v. Stewart* (9th Cir. 1999) 189 F.3d 1004, 1013 [same]; *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1044 [failure to present additional mitigation evidence in multiple murder case prejudicial]; *People v. Gay* (2008) 42 Cal.4th 1195, 1227 [exclusion of lingering doubt evidence and erroneous instruction was prejudicial despite significant and unusually brutal aggravating evidence and scant mitigation]; *People v. Sturm* (2006) 37 Cal.4th 1218, 1244, 1247 [judicial misconduct prejudicial where defendant murdered three of his friends, while they were bound and begging for mercy]; *People v. Gonzalez* (2006) 38 Cal.4th 932, 962 [discovery violation prejudicial at penalty phase involving egregious multiple murder and serious aggravating evidence].)

In sum, it is reasonably probable that the highly prejudicial evidence of the assault on Mr. Young might have tipped one or more jurors towards a death verdict. Reversal of the death sentence is required.

C. Rand's Testimony Violated Appellant's Sixth Amendment Rights.

Alternatively, appellant contends that the prosecutor's questioning of probation officer Rand about the Young incident violated his Sixth Amendment confrontation right pursuant to *Crawford v. Washington* (2004) 541 U.S. 36.

The Sixth and Fourteenth Amendments to the federal constitution guarantee an accused the right to be confronted with the witnesses against him. (U.S. Const., 6th & 14th Amends.; *Pointer v. Texas* (1965) 380 US. 400, 401.) The U.S. Supreme Court decided *Crawford* while appellant's jury was engaged in penalty phase deliberations.[217] Prior to *Crawford*, hearsay was admissible if it fell under a "firmly rooted exception" or bore "particularized guarantees of trustworthiness." (*Ohio v. Roberts* (1980) 448 U.S. 56, 66.) The *Crawford* decision rejected the *Roberts* doctrine and held that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (*Crawford, supra*, 541 U.S. at p. 68.) *Crawford* is applicable to all criminal cases still pending on appeal, including the instant case. (See *Schriro v. Summerlin* (2004) 542 U.S. 348, 351; *People v. Cage* (2007) 40 Cal.4th 965, 974, fn. 4.)

In this case, probation officer Rand's testimony about the Young

---

217

Crawford was decided on March 8, 2004. Penalty phase deliberations in appellant's case began on February 24, 2004 (47 CT 13166) and ended on March 10, 2004 (47 CT 13182).

assault was undoubtedly based on testimonial evidence. In his direct testimony, Rand explained that his job was to "learn as much as I could about the youngster, where he had been born, what the conditions of home were, what his positive and negative life experiences were in school, growing up, how he got involved in what he was charged with." (81 RT 9632.) To do this, Rand would interview the minor as well as his parents, siblings, other relatives, teachers, employers, etc. He would also read police reports and probation documents. Rand used these types of sources to work up appellant's case. (81 RT 9633-9634.) Given his practice, the probation officer presumably obtained the information he had concerning the Young assault from police or probation records rather than personal investigation, as he did not become appellant's probation officer until two years after it occurred. (See 81 RT 9649.)

Both police and probation reports are testimonial documents. The high court has explained that "To rank as 'testimonial,' a statement must have a 'primary purpose' of 'establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.'" *(Bullcoming v. New Mexico* (2011) 131 S.Ct. 2705, 2714, fn. 6, quoting *Davis v. Washington* (2006) 547 U.S. 813, 822.) Police reports, as well as probation reports, are both created precisely for proving past events in the courtroom.

Moreover, it does not matter that the testimonial documents themselves were not admitted into evidence against appellant because they formed the basis of Rand's knowledge of the Young assault. (Evid. Code, § 1200, subd. (a); see also, *Ocampo v. Vail* (9th Cir. 2011) 649 F.3d 1098, 1108-1112 [Sixth Amendment violation found where detective's testimony conveyed to the jury critical substance of statements made by potential witness to police officers].) In appellant's case, the prosecutor elicited

information about the Young assault for the truth of the matter. Because appellant had no opportunity to cross-examine the declarant or declarants of the reports which Rand had read concerning the assault, his Sixth Amendment right to confrontation of adverse witnesses was violated. (*Crawford, supra*, 541 U.S. 36.)

D. The Prosecutor Committed Misconduct by Misstating the Evidence and Referring to Facts Not in Evidence Concerning the Assault.

The deputy district attorney managed to get the very aggravating assault of Mr. Young before the jury by capitalizing on defense counsel's deficient conduct and violating appellant's constitutional right to confrontation. He did not stop there, however. In argument, the prosecutor succeeded in characterizing the incident as even more egregious than the evidence indicated.

Under the federal constitution, a prosecutor commits misconduct when he infects the trial with such unfairness that the defendant is denied of due process under the Fourteenth Amendment. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; *People v. Lopez, supra*, 42 Cal.4th at p. 965.) Under state law standards, a prosecutor commits misconduct when he uses deceptive or reprehensible methods to persuade the jury, "even when those actions do not result in a fundamentally unfair trial." (*People v. Lopez, supra*, 42 Cal.4th at p. 965 [internal quotation marks and citations omitted].) Prosecutorial misconduct which "negatively impacts 'the need for reliable sentencing in capital cases' [citation]" violates the Eighth Amendment as well. (*Miller v. Lockhart* (8th Cir. 1995) 65 F.3d 676, 683, citing *Caldwell v. Mississippi* (1985) 472 U.S. 320.) Under both the state and federal standards, the prosecutor committed misconduct in the instant

case.

A prosecutor commits error when he misstates the evidence. (*People v. Hill*, *supra*, 17 Cal.4th at p. 823.) The same is true when a prosecutor refers to facts not in evidence. (*Id.* at p. 828.) In appellant's case, the prosecutor committed misconduct during argument by doing both.

First, the prosecutor referred to a supposed fact not in evidence when he told the jury that appellant had attempted to rob Lloyd Young at knife-point. (84 RT 10036.) However, nothing in the testimony of Charles Rand or appellant himself indicated the use or display of a knife.[218] The argument was thus misconduct. (See, e.g., *People v. Kirkes* (1952) 39 Cal.2d 719, 724 [misconduct where prosecutor's claim that witness feared the defendant was not established by the evidence].)

The deputy district attorney also mischaracterized the evidence when he repeatedly emphasized to the jury that Mr. Young was beaten so badly his eyes were swollen shut, as established "through the Defendant's own statement." (84 RT 10036, see also, 84 RT 10060.) In fact, appellant indicated that he did not personally know the extent of Young's injuries. When the prosecutor asked him if he had beaten the man so badly that his eyes were swollen shut, appellant had replied: "I didn't see him, but if that's what the report said, that's what happened. (82 RT 9836-9837.)[219] The prosecutor's assertion that appellant's testimony established that Mr. Young's eyes were swollen shut as a result of the incident was misconduct.

218

The notice of aggravating evidence did not allege use of a knife during the incident. (3 CT 681.)

219

No report or other testimony was introduced to document the extent of Mr. Young's injuries.

(See, e.g., *People v. Hill*, *supra*, 17 Cal.4th at p. 837 [misconduct when prosecutor claimed that defendant had called his knives "Uzis" although witness did not know whether he had]; *People v. Rios* (1985) 163 Cal.App.3d 852, 868-869 [misconduct when prosecutor sought to have his unanswered questions considered as substantive evidence].)

As a general rule, a defendant must object to prosecutorial misconduct and request that the jury be admonished to disregard it in order to raise the issue on appeal. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.) But the lack of an objection and request for admonition does not forfeit the issue on appeal if either would have been futile. (*Ibid.*)

In appellant's case, defense counsel did not object when the prosecutor committed the misconduct described above, or request that the jury be admonished. Either act would have been pointless, however. Prior to penalty phase argument, the trial court made clear it would not rule on the merits of such an objection. It told the parties that if either side objected that the other was misstating the evidence,

> You are going to hear from me, "The jury will decide what the facts are." I'm not going to say, "That's right," or "That's wrong." That's their bailiwick. That's their duty, and I'm not going to jump in and say, "Yeah, you're getting the facts wrong." Because I am not the decider of facts.

(83 RT 9938.)

Given the trial court's pronouncement, there simply was no reason for defense counsel to object to the prosecutor's misconduct, as it would not have resulted in a substantive ruling. And of course any request for an admonition would have been equally futile: if the court was unwilling to decide whether a party had misstated the evidence, it could not have then

admonished the jury to disregard such misstatement.

E. Appellant Was Prejudiced.

A Confrontation Clause violation justifies relief on direct appeal if it is not harmless under *Chapman v. California* (1967) 386 U.S. 18. (See *Ocampo v. Vail*, *supra*, 649 F.3d at p. 1114.) Prosecutorial misconduct in the penalty phase requires reversal where there is a reasonable possibility that it affected the penalty outcome. (See *People v. Tate* (2010) 49 Cal.4th 635, 704, citing *People v. Brown* (1988) 46 Cal.3d 432, 448.) The *Chapman* reasonable doubt test and the reasonable possibility test "'are the same in substance and effect.' [Citation.]" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 961.)

Appellant has already demonstrated that it was reasonably probable that at least one juror might have voted for life, but for the deficient performance of his trial counsel. (See Arg. XVIII.B.2., *ante*.) The Sixth Amendment error was prejudicial for the same reasons, as no evidence of the assault would have come in had appellant's confrontation rights not been violated. And, the prosecutor's misconduct only added to the harm caused by the erroneous admission of the assault evidence, as he emphasized inflammatory "facts" that were not supported by the evidence.

However, even if the deputy district attorney's misconduct is considered in isolation, it was prejudicial. Pursuant to CALJIC 8.87, appellant's jury was instructed that it had to be satisfied that an aggravating circumstance had been proven beyond a reasonable doubt. This standard applied to evidence that appellant had committed, inter alia, "robbery and assault with a deadly weapon as a juvenile . . . which allegedly involve[d] the express or implied use of force or violence or the threat of force or

violence." (47 CT 13149.)[220] The prosecutor's unsupported argument that appellant was armed with a knife when he encountered Mr. Young may well have supplied crucial yet missing evidence and convinced one or more jurors that the assault was committed with a deadly weapon, and could therefore be considered as factor (b) evidence.

Had the prosecutor not misstated the facts, the question of whether appellant had used a deadly weapon would have been a much more difficult one, as the jurors had little basis upon which to agree that the cane qualified as a deadly weapon. (See, e.g., *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086 [in determining whether a defendant has used a deadly weapon, the trier of fact may look to the nature of the object, the manner of its use, and the extent of any injuries caused by it].) In light of the instructions given and the facts adduced, it is reasonably possible that one or more jurors would have concluded that the assault was not committed with a deadly weapon and, hence, not an aggravating factor. For the reasons set forth above, it is then reasonably possible that a juror who determined that the assault could not be considered as an aggravating factor would have voted for life without parole. (See Arg. XVIII.B.2., *ante*.)

Accordingly, appellant's death sentence should be reversed.

//

//

220

"Deadly weapon" was not defined by the trial court in relation to the crime of assault with a deadly weapon, but it was defined vis-a-vis Penal Code section 4500. (47 CT 13133.)

XIX.
THE PROSECUTOR'S PERVASIVE MISCONDUCT DURING THE PENALTY PHASE DEPRIVED APPELLANT OF A FAIR TRIAL

As demonstrated in the previous argument, the deputy district attorney committed prejudicial misconduct when he elicited inadmissible evidence about the assault on Lloyd Young and then argued inflammatory "facts" not supported by the evidence. (See Arg. XVII.D., *ante*.) Compounding this misconduct, the prosecutor engaged in numerous other inappropriate acts during the course of the penalty phase. While questioning defense witnesses, he repeatedly sought to elicit inadmissible evidence and insinuate the existence of prejudicial facts. During argument to the jury, the prosecutor misstated both the facts and the law.

This misconduct deprived appellant of a fair penalty trial and violated his rights under both the state and federal constitutions, including his rights to confrontation, counsel, due process of law, and a fair jury trial. (U.S. Const., 6th & 14th Amends; Cal. Const., art. I, §§ 15-17.) The prosecutor's actions also violated the federal constitutional requirements that objective criteria guide the imposition of the death penalty. (*Maynard v. Cartwright* (1988) 486 U.S. 356; *McClesky v. Kemp* (1987) 481 U.S. 279, 299-206), and the heightened need for reliability in capital trial and sentencing procedures under the Eighth Amendment (*Johnson v. Mississippi*, *supra*, 486 U.S. 578, 584-585). To the extent any of the errors are only state law issues, they also deprived appellant of a state-created liberty interest and thereby violated his federal due process rights. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

A. The Prosecutor Committed Misconduct When Questioning Witnesses by Insinuating Prejudicial Information and Seeking to Elicit Inadmissible Evidence.

As previously stated, the federal constitution is violated when a prosecuting attorney "infects the trial with such unfairness that the defendant is denied of due process." (*Darden v. Wainwright*, *supra*, 477 U.S. 168, 181; *People v. Lopez*, *supra*, 42 Cal.4th at p. 965; see Arg. IX., *ante*.) A prosecutor who uses "deceptive or reprehensible methods to persuade the jury" commits misconduct in violation of state law, "even when those actions do not result in a fundamentally unfair trial." (*People v. Lopez*, *supra*, 42 Cal.4th at p. 965 [internal quotation marks and citations omitted].) Prosecutorial misconduct which "negatively impacts 'the need for reliable sentencing in capital cases' [citation]" violates the Eighth Amendment as well. (*Miller v. Lockhart* (8th Cir. 1995 65 F.3d 676, 683, citing *Caldwell v. Mississippi* (1985) 472 U.S. 320.)

A prosecutor commits misconduct when he asks questions designed to elicit inadmissible answers. (*People v. Bell* (1989) 49 Cal.3d 502, 532; *People v. Pitts* (1990) 223 Cal.App.3d 606, 734.) It is also misconduct for a prosecutor to ask questions "solely 'for the purpose of getting before the jury the fact inferred therein, together with the insinuations and suggestions they inevitably contain[], rather than for the answers which might be given.' [Citation.]" (*People v. Wagner* (1975) 13 Cal.3d 612, 619; see also, *People v. Pitts*, *supra*, 223 Cal.App.3d at p. 734, and cases cited therein.)

If the prosecutor asks a question likely to elicit a reference to inadmissible evidence, he commits misconduct regardless of whether he intended to elicit such a reference. If the question is not inherently likely to elicit inadmissible matters, the prosecutor commits misconducts if he asks for the purpose of eliciting such matters. (*People v. Leonard* (2007) 40 Cal.3d 1370, 1405.)

As set forth below, the deputy district attorney in this case committed

misconduct by improperly cross-examining correctional consultant James Esten and appellant in a variety of ways.

1. Correctional Consultant James Esten.

Cross-examination should be limited to matters which have been elicited from a witness in direct examination. (*People v. Watson*, *supra*, 46 Cal.2d at p. 826.) A prosecutor may not use cross-examination as a vehicle to get what is, in effect, damaging direct testimony before the jury. (*People v. Shipe* (1975) 49 Cal.App.3d 343, 349.) "'The fact that a topic is raised on direct examination and may therefore appropriately be tested on cross-examination . . . does not amount to a license to introduce irrelevant and prejudicial evidence merely because it can be tied to a phrase uttered on direct examination.'" (*People v. Pitts*, *supra*, 223 Cal.App.3d at p. 771, quoting *People v. Luparello* (1986) 187 Cal.App.3d 410, 426.) In appellant's case, the prosecutor repeatedly tried to elicit inadmissible evidence from Esten on cross-examination and to insinuate the existence of damaging evidence.

a. The Prosecutor's Attempt to Elicit Hearsay Evidence About Prison Misconduct.

The prosecuting attorney inappropriately sought to elicit a hearsay account of a violent act appellant purportedly committed a couple of weeks earlier. After James Esten indicated that he had reviewed appellant's prison disciplinary history, the prosecutor asked, "Did you look at the incident involving February the 8th of this year?" (82 RT 9740.) The question referred to an alleged attempt by appellant to pull a correctional officer's arm through the food port in his cell. (See 79 RT 9437.) The prosecutor had previously declined to present evidence of this incident in his penalty case-in-chief, after defense counsel indicated that they would rebut any such

evidence with witnesses of their own. (79 RT 9460-9466; 81 RT 9610-9611.) Defense counsel successfully objected to the prosecutor's question to Esten, who did not answer it. (82 RT 9740.)

The questioning was misconduct. When the state has failed to present evidence of a particular event in its case-in-chief but seeks to adduce it through cross-examination of a defense witness, the issue becomes whether such evidence is properly elicited as rebuttal. (See *People v. Tate* (2010) 49 Cal.4th 635, 703.) In appellant's case, what occurred on February 8 was not proper rebuttal evidence. Esten's direct testimony addressed how the SHU in Pelican Bay was an extremely secure environment that could minimize any danger appellant might pose to others if not sentenced to death. The prosecutor could not have thought that asking the expert about the alleged assault, which had occurred in Calipatria prison, would tend to undermine this testimony. Rather, the deputy district attorney inappropriately tried to use Esten to put additional aggravation evidence before the jury. (See, e.g., *People v. Pitts*, *supra*, 223 Cal.App.3d at pp. 773-734 [misconduct where cross-examination is used to get inadmissible evidence and improper innuendo before the jury].)

b. The Prosecutor's Attempt to Portray Appellant as a "Shot Caller."

The prosecutor also committed misconduct when, by the use of questions with little or no relevance to the case, he sought to create the impression that appellant had killed Richmond to become a "shot caller" among white inmates.

On direct exam, Esten rated appellant's dangerousness as "probably about an eight" on a scale of one to ten. (82 RT 9729.) When defense counsel asked who would be more dangerous, the expert replied:

> Above him would be the gang member who is a shot caller, who directs homicides from one prison to another, who has ties to the street and is involved in the movement of contraband into the prison, involved in killings on the street.

(82 RT 9729.)

During cross-examination, the deputy district attorney asked Esten what a shot caller is and how an inmate becomes one. (82 RT 9747.) Defense counsel objected that these questions were beyond the scope of direct examination. The trial court overruled the objection, since Esten had referred to shot callers in his testimony. (82 RT 9747-9748.) The expert then explained that a shot caller "is a member of a particular ethnic group who has leadership of that group and directs other inmates to perform specific acts on his behest." (82 RT 9748.) An inmate typically would commit a homicide in order to be elevated to a shot caller position. (82 RT 9748.) An inmate who is involved in a gang would consider being a shot caller to be very important. (82 RT 9750.)

The prosecutor pursued this topic, asking how old an inmate must be to become a shot caller. Defense counsel objected that the question was vague and beyond the scope of direct, but the objection was overruled. Esten replied that it depended on the ethnic group. (82 RT 9751.) When the prosecutor asked about the "woods," Esten explained that there was no prison gang by that name. The main white prison gangs were the Aryan Brotherhood and Nazi Lowriders. A shot caller in those groups would have to be in "his mid to late 40's, if not older." (82 RT 9752.) During redirect, Esten clarified that the concept of shot caller had no relevance to appellant's case because he was not gang-involved. (82 RT 9757.)

The deputy district attorney's questioning was misconduct, as it was

not relevant to appellant's case and clearly designed to make the jury believe that appellant may have killed Richmond because he wanted to become a shot caller. When Esten first referred to shot callers in his direct testimony, he explained that such an individual was a gang member. The evidence was clear in this case that appellant did not belong to a prison gang. (See, e.g., 58 RT 7475; 63 RT 8025; 64 RT 8154; 53 RT 6815.) The prosecutor's questions on the subject thus were not relevant and the trial court erred in permitting them. The fact that the phrase "shot caller" was uttered on direct examination did not open cross-examination to the kinds of questions the prosecutor asked herein. (See *People v. Pitts*, *supra*, 223 Cal.App.3d at p. 771; *People v. Luparello*, *supra*, 187 Cal.App.3d at p. 426.)

c. The Prosecutor's Questioning About the "Barrett Cell."

The prosecutor also inappropriately sought to elicit evidence that Calipatria State Prison had purportedly designed a cell specially for appellant. This particular strain of misconduct actually began before James Esten was called to testify. In the People's penalty case-in-chief, correctional officer Jess Landin recounted finding a weapon in appellant's cell on January 31, 2000. (78 RT 9372-9374.) The prosecutor asked Landin if he found the weapon in the "Barrett cell." Although the defense objected, the trial court permitted the question, after the prosecutor promised to "tie it in." (78 RT 9373.) The prosecutor then asked, "Why is it referred to as the Barrett cell, sir?" (78 RT 9373.) The officer responded, "It was specially made for him." (78 RT 9374.)

This follow-up question did not tie in the reference to the Barrett cell, however, and was itself misconduct because the existence of a special

cell did not amount to any statutory aggravator. (*People v. Phillips* (1985) 41 Cal.3d 29, 72; *People v. Boyd*, *supra*, 38 Cal.3d at pp. 776-778.) Moreover, the prosecutor failed to lay any foundation that Landin actually knew how, or even if, the cell had been modified. His testimony did not provide the jury with any information relevant to assessing the aggravating evidence, but rather invited them to speculate about what the Barrett cell actually was and that appellant was such a dangerous inmate he had to have a cell designed just for him. The prosecutor's questioning about it was nothing more than an inappropriate attempt to insinuate that even a specially-designed prison cell could not contain appellant. (See, e.g., *People v. Wagner*, *supra*, 13 Cal.3d at p 619; *People v. Pitts*, *supra*, 223 Cal.App.3d at p. 734, and cases cited therein.)

During the cross examination of defense witness Esten, the prosecutor returned to this improper line of questioning. The deputy district attorney established that the expert had never worked at Calipatria but had visited the institution. (82 RT 9754.) When the prosecutor asked about the Ad Seg in Calipatria, defense counsel objected that such questions were beyond the scope of the expert's direct examination, which had focused on conditions in Pelican Bay's SHU. After the trial court overruled the objection, the prosecutor asked, "Have you seen the Barrett cell?" (82 RT 9755.) As Esten answered no, defense counsel objected again. The court sustained the objection and instructed the jury to disregard the question, stating "A question isn't evidence." (82 RT 9755.) Defense counsel added, "We'd ask that counsel be instructed not to take these cheap shots." (82 RT 9755.) The court replied, "Okay, I don't want either one of you to take these cheap shots, too." (82 RT 9755.)

As stated above, the prosecutor had no legitimate reason to ask about

the "Barrett cell." The existence of such a cell was not admissible as aggravating evidence. Moreover, because Esten did not offer any opinions about Calipatria prison in his direct testimony, questioning about it was not a proper rebuttal topic. The prosecutor's use of irrelevant questions to get prejudicial and non-statutory aggravating evidence about the cell in front of the jury was misconduct.

d. The Prosecutor Raised the Specter of Appellant Getting Out of Prison.

Finally as to prison consultant Esten, the prosecutor committed misconduct when he sought to elicit "evidence" that appellant could get out of prison, either by escape or appeal, if the jury returned a verdict of life in prison without the possibility of parole.

On recross examination, the deputy district attorney asked the expert if appellant, as an "intellectual manipulator," could get out of an indeterminate SHU term by behaving well for years. Over defense objection, Esten indicated that he could. (82 RT 9764-9765.) On further redirect, the expert testified that there were inmates who had been in Pelican Bay's SHU since it opened in 1989. (82 RT 9766-9767.) Yet if an inmate with an LWOP sentence got out of SHU, he would nonetheless die in prison. (82 RT 9767.)

On further recross, the prosecutor immediately asked Esten, "Sir, aren't there LWOP's who have their convictions overturned on appeal and get out of prison?" (82 RT 9767.) As Esten started to respond, the defense objected, but the trial court permitted the inquiry. (82 RT 9767.) Esten said he had not seen LWOP sentences overturned outright, but had seen them reduced so that an inmate could become eligible for parole. He had, however, seen death cases overturned. (82 RT 9768.) On further redirect,

defense counsel asked, "Is Joe ever going to get out of prison?" The trial court sustained the prosecutor's objection that the question called for speculation. (82 RT 9768.)

The prosecutor then asked, "What if he escaped?" (82 RT 9769.) Defense counsel immediately objected. The objection was sustained. (82 RT 9769.) Outside the presence of the jury, defense counsel moved for a mistrial based on the prosecutor's misconduct:

> Your Honor, it's totally improper to bring up the possible specter of an escape in prison. It's prosecutorial misconduct. It's not admissible for any purpose in trial. It is reversible error, and we are asking for a mistrial at this point.

(82 RT 9770.)

The trial court denied the mistrial motion but indicated it would instruct the jury to disregard the question, stating:

> . . . I will instruct the jury, if you want me to, not to consider the remark about an escape. [¶] Although I've already instructed them, at least twice, at least once today that questions aren't evidence. And the question was never answered, so there is no evidence on the issue. [¶] But if you want me to, I will instruct the jury to totally disregard the question.

(82 RT 9771.) Defense counsel declined this offer. (82 RT 9771.)

The prosecutor's questions about escape, as well as about release after appeal, were indeed misconduct. Speculation whether the punishment a jury selects will or will not actually be carried out "is improper and should not play any part in the jury's deliberations regarding the appropriate penalty." *(People v. Letner* (2010) 50 Cal.4th 99, 206, citing *People v.*

Ramos (1984) 37 Cal.3d 136.) An implication by the prosecutor that unless the jury imposes a death sentence, the defendant might somehow be released from prison by pardon, parole or other means, violates *Ramos* because it invites the jury to consider speculative matters and diminishes the jury's sense of responsibility for its action. (*People v. Hill* (1992) 3 Cal.4th 959, 1008-1009, overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th, 1046, 1069, fn. 13; see also, *Sechrest v. Ignacio* (9th Cir. 2008) 549 F.3d 789, 808 [prosecutor's statements about the likelihood defendant would be released on parole violated his due process right to a fair trial]; *People v. Montiel* (1993) 5 Cal.4th 877, 931-932 [prosecutor's questions to defense witness on cross-examination about inmates getting "work time" or "good time" credits leading to early release were probably improper under *Ramos*].) When the jury is led to believe that the appropriateness of a death sentence ultimately rests elsewhere, such as with an appellate court, the Eighth Amendment is also violated. (*Caldwell v. Mississippi* (1985) 472 U.S. 320.)

Testimony about the possibility of escape from prison is similarly "inherently speculative, and may be highly prejudicial in undermining juror confidence in the sentence of life imprisonment without parole as an alternative to death." (*People v. Kaurish* (1990) 52 Cal.3d 648, 710.)

In appellant's case, the prosecutor's questions to Esten encouraged the jury to speculate that appellant, if sentenced to life without possibility of parole, might escape or be released from prison after a reversal on appeal. These questions, which called for inadmissible evidence, were misconduct. (See, e.g., *People v. Bell*, *supra*, 49 Cal.3d at 532; *People v. Wagner*, *supra*, 13 Cal.3d at p. 619; *People v. Pitts*, *supra*, 223 Cal.App.3d at p. 734.) Because the prosecutor's misconduct also diminished the jurors' sense of

responsibility, it violated *Ramos* and the Eighth Amendment, as well.

2. Cross-Examination of Appellant.

The misconduct did not end with James Esten. During cross-examination of appellant, the deputy district attorney repeatedly asked argumentative questions. He also sought to elicit inadmissible, non-statutory aggravation evidence.

a. The Prosecutor Improperly Asked Argumentative Questions.

This Court has explained why argumentative questions are inappropriate:

> An argumentative question is a speech to the jury masquerading as a question. The questioner is not seeking to elicit relevant testimony. Often it is apparent that the questioner does not even expect an answer. The question may, indeed, be unanswerable. . . . An argumentative question that essentially talks past the witness, and makes an argument to the jury, is improper . . . ."

(*People v. Chatman* (2006) 38 Cal.4th 344, 384.) Conduct designed to provoke a defendant may also be misconduct. (See, e.g., *People v. Bradford*, *supra*, 15 Cal.4th at pp. 1337-1339.)

As demonstrated below, the prosecutor routinely posed questions to appellant which were not designed to elicit relevant testimony from him but rather to provoke him and to argue the state's case to the jury.

After appellant's direct examination, he was permitted to make a statement to the jury. (82 RT 9826-9827.) Therein, he indicated how frustrated he had become with the proceedings and, in particular, the prosecutor. He explained it had been difficult hearing his attorneys say

things he personally objected to, and added "A dozen times I wanted to tell my lawyer or the D.A. to shut up, 'You have no idea what you're talking about.'" (82 RT 9831.) Appellant also told the jury that he had dealt with the prosecutor's provocations because he promised the security detail he would not cause them trouble. (82 RT 9832.)

As cross-examination began, the prosecutor immediately began goading appellant by asking argumentative questions about the 1982 beating of Lloyd Young, including whether he had treated the man with dignity and respect. (82 RT 9835-9837.)[221] The deputy district attorney continued baiting appellant, asking snide questions about appellant's prior violent conduct. Appellant responded, "You don't need to dramatize it. Ask me the question." The prosecutor retorted, "Would you like me to shut up?" (82 RT 9838.)

The prosecutor continued in this vein, asking appellant whether he had respected his mother. The following exchange ensued:

A. Mr. Robinson, you're treading on thin ice.

Q. That's the story of my whole life.

A. Mine, too.

(82 RT 9839.)

221

As set forth in the previous argument, the prosecutor was only able to question appellant about this incident because of defense counsel's deficient performance. (See Arg. XVIII., *ante*.) However, the failings of trial counsel did not give the prosecutor license to elicit inadmissible evidence from appellant. In *People v. Pitts*, *supra*, the court of appeal explained: "'Legitimate cross-examination does not extend to matters improperly admitted on direct examination. Failure to object to improper questions on direct examination may not be taken advantage of on cross-examination to elicit immaterial or irrelevant testimony . . . .'" (223 Cal.App.3d at p. 771, quoting *Dastagir v. Dastagir* (1952) 109 Cal.App.2d 809, 815.)

Calling the prosecutor to task for his conduct, defense counsel stated: "Your Honor, then he ought to go for a swim and get off of it. My client is trying to treat him with dignity, and he's trying to be a jerk." (82 RT 9839.) After appellant stated that he wanted to answer the question, the trial court directed everyone to calm down. (82 RT 9839.) The court cautioned both counsel, instructing defense counsel to object properly and telling the prosecutor, "And I'd like this done in a matter of fact way with the cross-examination also." (82 RT 9840.)

The prosecutor did not proceed in a matter of fact manner, however. After appellant repeated that the Young assault was the most shameful thing he had done, the deputy district attorney inappropriately stated, "Well, Mr. Jackson, he was sleeping in his bed when you smashed his skull in?" (82 RT 9843.) Although a defense objection to this question was sustained, appellant responded, "Yes." (82 RT 9843.)[222] The prosecutor said, "Excuse me?" and appellant added, "I said, 'Yes,' over objection." The prosecutor shot back, "You don't listen to people, do you?" (82 RT 9843.) Another defense objection was sustained, but appellant nonetheless answered. (82 RT 9843.)

The prosecutor continued with argumentative questions. When appellant said he went to Florida because his only other choice was to go to CYA, the prosecutor retorted, "But to avoid being locked up all you had to do was obey the laws?" (82 RT 9850.) Defense counsel's objection that the question was argumentative was sustained; appellant answered anyway.

222

During the 1986 interrogation by San Francisco detectives, appellant indicated he did not know whether Jackson was actually asleep at the time, but he was in bed under the covers. (3rd Supp. CT 434, 461.)

(82 RT 9850.)

The prosecutor later turned to the issue of remorse. When appellant reiterated that he felt sorry for Thomas Richmond's family, the prosecutor said, "You didn't feel sorry for them on the day that you punched a steel weapon into his heart – " (82 RT 9871.) The trial court sustained a defense objection. (82 RT 9871.)

Clearly these questions were not asked for the purpose of eliciting relevant testimony but to provoke appellant and inflame the passions of the jurors. The deputy district attorney compounded this misconduct by failing to heed rulings by the trial court. (See *People v. Johnson* (1978) 77 Cal.App.3d 866, 873-874 [improper questions that violate a trial court's ruling are particularly inexcusable].) In this case, the prosecutor repeatedly ignored defense objections and trial court rulings, knowing that appellant would insist on answering whatever was asked of him. The prosecutor took advantage of appellant's strong desire to avoid what he believed to be hiding behind "legal manipulations," by answering every question posed by the prosecutor, whether legally objectionable or not.[223]

Perversely, the prosecutor's improper question to appellant – "you don't listen to people, do you?" – was better directed to the prosecutor himself. For example, after the deputy district attorney asked appellant whether he was an "intellectual manipulator," the trial court sustained a defense objection. When appellant indicated he wanted to answer, the prosecutor pursued the questioning, despite the court's ruling, and

---

223

Appellant did not believe in the legal system because, inter alia, "the people making the decisions don't ask the questions. Everyone hides behind lawyers and legal manipulations, technicalities." (82 RT 97789.) He thought that the jury should ask the questions. (82 RT 9778.)

insinuated that appellant was trying to manipulate the jurors by his testimony. (82 RT 9841-9842.)[224]

b. The Prosecutor Improperly Sought to Elicit Inadmissible Aggravation Evidence.

A prosecuting attorney "who improperly cross-examines a defendant in order to place inadmissible prejudicial evidence before the jury is guilty of misconduct." (*People v. Evans* (1952) 39 Cal.2d 242, 248-249; see also *People v. Johnson*, *supra*, 77 Cal.App.3d 866, 873.) As set forth herein, the deputy district attorney in this case repeatedly cross-examined appellant improperly, to put otherwise inadmissible aggravation evidence before the jury.

The prosecutor improperly elicited testimony about violent and disobedient conduct by appellant as a teenager. The state presented no evidence about any violent conduct by appellant toward family members in his case-in-chief. However, on cross-examination the deputy district attorney stated: "Committed assaults on your relatives in Florida?" (82 RT 9848.) Defense counsel successfully objected, but appellant answered anyway, telling the jury he chased his uncle with a knife after he had punched appellant in the eye. (82 RT 9848.) The prosecutor also got appellant to admit he had disobeyed court orders and his mother, although again, defense successfully objected to this questioning as argumentative

---

224

The prosecutor was aided in this behavior by the trial court's failure to rein in appellant. For example, defense counsel objected as argumentative when the prosecutor asked appellant if Calipatria was a violent place because of him. When appellant answered the question before the court ruled on the objection, the court stated: "And I was trying to figure out a ruling on that, but Mr. Barrett answered the question making the point moot." (82 RT 9866-9867.)

and beyond the scope of direct. (82 RT 9849.)

Testimony that appellant had disobeyed his mother and failed to follow court orders was elicited in violation of *People v. Boyd*, *supra*, 38 Cal.3d 762, 776-777, as the prosecution did not establish that any of this conduct constituted criminal activity involving the use or attempted use of force or violence. Evidence that appellant had chased his uncle with a knife was well beyond the scope of direct examination and did not rebut any evidence presented by the defense. (See *People v. Tate, supra,* 49 Cal.4th 635, 703.)

The prosecutor improperly tried to bring out evidence that appellant targeted homosexuals. After establishing that appellant did not return to Log Cabin from a weekend furlough in July 1986, the prosecutor asked appellant how he had survived on his own. Defense counsel asked to approach the bench and explained to the court in chambers that if the prosecutor was trying to elicit additional incidents in aggravation, such an effort was improper. (82 RT 9859.) Appellant's attorney reminded the court that they had redacted the audio recording of his confession to the Jackson homicide because there was no corpus to support appellant's claims that he had supported himself by robbing people, including homosexuals. (82 RT 9860-9861.) After the court warned the prosecutor not to go into it unless he could prove that crimes had occurred, the prosecutor dropped this line of questioning. (82 RT 9861.)

Even though the question was not answered, it was particularly egregious because the deputy district attorney was well aware of the trial court's previous ruling on this issue, yet sought to elicit this harmful "fact" nonetheless. (See *People v. Johnson*, *supra*, 77 Cal.App.3d 866, 873-874 [improper questions that violate a trial court's ruling are particularly

inexcusable].) And, the prosecutor knew that even without hearing an answer, the jurors would likely speculate that appellant had supported himself by committing crimes.

The prosecutor also improperly sought to create the impression that appellant had escaped from the California Youth Authority (CYA). When asking about appellant's placement in Log Cabin, and without any evidence to support the question, the deputy district attorney added, "By the way, up to this point had you escaped from any of these institutions?" (82 RT 9852.) The trial court sustained defense counsel's objection to this question. The prosecutor then convinced the court that the defense had "opened the door" to the question by asking appellant about his various placements. (82 RT 9852.) Appellant stated that he had not attempted to escape from these institutions. (82 RT 9853.)

The prosecutor returned to this subject when he later asked appellant why he had been sent from CYA to adult prison at age 17. Defense counsel immediately objected and requested a sidebar. In chambers, appellant's attorney indicated that the prosecutor was improperly trying to elicit evidence of a non-violent attempted escape from CYA as further aggravation evidence. (82 RT 9862-9863.) Counsel also averred that the prosecutor was "sandbagging" the defense by trying to bring this out on cross-examination rather than in the state's case-in-chief. When the trial court indicated the deputy district attorney would have to establish a corpus first, the prosecutor claimed he had no intention of eliciting testimony about the alleged escape attempt. (82 RT 9863.)

When the parties returned to the courtroom, the prosecutor asked the reporter to reread the last question, which was why appellant had entered adult prison when he was 17 years old. (82 RT 9864; see also, 82 RT

9862.) Appellant, who had not been in chambers when defense counsel explicated his concerns, responded: "Attempted escape." (82 RT 9864.) Defense counsel objected and requested that the answer be stricken. Despite the in-chambers sidebar, the prosecutor unconvincingly professed he had no idea appellant would so respond. (82 RT 9864.) Appellant's attorney did not believe this claim, however. (82 RT 9864, 9865.) The trial court told the jurors about the corpus rule and added:

> We have no independent evidence of this supposed escape. We just have Mr. Barrett's admission or confession to this event. I can't let it into evidence. I'm going to have to instruct you not to consider it for any purposes in your deliberations. There's a good reason for that rule.

(82 RT 9865.)

After the court admonished the jury, appellant stated, "You know, I have a question, too. If I'm expected to be truthful, I don't know about these rules of evidence. If he is going to ask a question, I'm going to answer it." (82 RT 9865.) The trial court sympathized with appellant, stating:

> I know. Sometimes people don't understand the reasons for these rules, but there are very good reasons for them. [¶] In other countries this rule gets abused terribly, and that's why confessions are always admitted to crimes that nobody could ever prove even happened. So our rule makes a lot more sense. [¶] And don't consider that statement for any reason at all. Don't discuss it, don't consider it in your deliberations.

(82 RT 9866.)

The prosecutor's questioning on this subject was blatant misconduct.

Evidence of a non-violent escape attempt is inadmissible aggravation evidence. (See, e.g., *People v. Castaneda* (2011) 51 Cal.4th 1292, 1334.) Of course the deputy district attorney knew why appellant had been moved from CYA to prison at age 17. His request for a readback of the objectionable question was in bad faith, as he knew that appellant would candidly answer it. Moreover, the prosecutor compounded this misconduct when he deliberately ignored the trial court's ruling in chambers by continuing this line of questioning in the jury's presence.

B. The Prosecutor Committed Misconduct During Argument by Misstating the Facts.

A prosecutor commits error when he misstates the evidence. (*People v. Hill*, *supra*, 17 Cal.4th at p. 823.) The same is true when a prosecutor refers to facts not in evidence. (*Id.* at p. 828.) As set forth below, in this case the prosecutor routinely misstated facts or referred to facts not in evidence.

1. The Prosecutor Distorted the Facts Surrounding the Death of James Jackson.

The deputy district attorney misstated the evidence in an effort to convince the jury that appellant's asserted motivation for killing James Jackson was fabricated. Discussing the taped confession appellant made, the prosecutor noted that when asked why he struck Jackson with a dumbbell, appellant claimed he did not know and added, "'Probably his homosexuality and the fact that he knew that I was 16 years old and that he tried to engage in oral copulation with me.'" (84 RT 10044.) The prosecutor then argued: "That's his reason for killing Mr. Jackson. ¶ You can't assume the fact that Mr. Jackson really knew his age. Because as you recall, the defendant had a fake I.D. on him when he was picked up six days

later with the age of at least 18 on it." (84 RT 10045.)

The prosecutor's insinuation that Jackson had seen appellant's fake identification and therefore believed he was over 18 was a blatant misstatement of the evidence. In the taped statement, appellant told the inspectors that he had purchased the identification earlier that day. (3rd Supp. CT 447.) Of course Jackson could not have seen it, as appellant's confession was made approximately a week after his death.

The prosecutor also misstated the evidence when he urged the jury to conclude that appellant had been lying about the fact that Jackson tried to force appellant into sex. The deputy district attorney stated that appellant first told his interrogators that Jackson's sexual advances occurred in the bedroom, but about an hour later appellant "changes the story" and claimed they occurred in the living room. (84 RT 10048-10049.) The prosecutor then argued: "Well, if, in fact, it really did happen, why did it supposedly happen in two different places?" (84 RT 10049; see also, 84 RT 10051-10052.)

The prosecutor mischaracterized the tape. Appellant explained to the inspectors that Jackson's advances were numerous. (3rd Supp. CT 442.) He said, "[Jackson] kept trying to force his self on me and I kept drinking beers and getting more and more drunk you know." (3rd Supp. CT 433.) Appellant indicated that they spent time in both the living room and bedroom. (3rd CT 443, 444.) Thus, the logical meaning of appellant's statement is that Jackson's efforts to sexually abuse him occurred in both locations. Even the prosecutor's insinuation that appellant could not keep his fabricated story straight for an hour was incorrect, as appellant's discussion of what occurred in the bedroom and living room was separated

only by about 15 minutes. (3rd Supp. CT 431, 442.)[225]

2. The Prosecutor Made Unsupported Claims About the Chojnacki Assault.

The prosecutor also made claims not established by the evidence when he argued that on February 20, 1995, appellant stabbed inmate Chojnacki six times in the back. He elaborated:

> And according to Mr. Barrett, and we haven't heard anything other than Mr. Barrett's testimony, [Chojnacki] was a child abuser. Be that as it may, whatever he was, he . . . was reading Bible Scriptures. What does that tell you about the victim? Whatever he was in prison for, he was trying to make a change in his life.

(84 RT 10065.) As defense counsel tried to interject, the trial court cut him off stating, "That's argument." (84 RT 10065.)

In fact, the correctional officer who witnessed the incident saw appellant hit the inmate in the back "a couple of times," not six. (76 RT 91237.) Moreover, although the inmate may have had a Bible in his hand (see 59 RT 7653), there was certainly no evidence on the record that Chojnacki, whom appellant believed to be a child molester, was seeking "to make a change in his life."

3. The Prosecutor Misled the Jury About the Spitting Incident.

In the guilt phase, appellant testified that when he and Richmond

---

225

The prosecutor's assertion that inconsistencies in appellant's statement proved he was lying is curious, since in his rebuttal argument he claimed that appellant's ability to describe the events in Jackson's apartment with specificity undermined the mitigating factor that he was under the influence of drugs and alcohol at the time. (See 85 RT 10144-10145.)

were housed together, they both received 115's for flooding their cell. During the adjudication of appellant's 115, he told Lieutenant Fast that Richmond had nothing to do with it and that he (appellant) would plead guilty if the charges against Richmond were dropped. Appellant thought they had an agreement, but he later found out that Fast found Richmond guilty in his 115 hearing. Appellant became angry because the officer had given appellant his word and spat at him. (58 RT 7514-7515; see also, 59 RT 7621-7622.) This incident occurred on March 19, 1996. (78 RT 9273-9275.) Appellant testified that he and Richmond were moved into separate cells because of the spitting incident. (58 RT 7515.)

In penalty phase argument, the prosecutor effectively told the jury that appellant was lying about the encounter with Lt. Fast, by stating: "In fact, you heard testimony that Mr. Richmond's 115 hearing was never heard because he died shortly later." (84 RT 10079.) Defense counsel objected, stating "that's a misstatement. We never heard – " (84 RT 10079.) The trial court did not let counsel finish his objection, stating: "The jury decides what the facts are. You can argue that in your argument if that's not correct." (84 RT 10079.) The prosecutor then encouraged the jurors to request a readback of testimony if they had any doubt. (84 RT 10079.)

In fact, the prosecutor knew that the flooding 115 was *not* one of those pending at Richmond's death. In the guilt phase, Calipatria records analyst Vialpando testified that Richmond had 115's which he had received in Ad Seg pending at his death. Although Vialpando did not specify the nature of the unresolved charges (64 RT 8272-8273), a memorandum from the Calipatria warden's office, which was provided to the defense in discovery, demonstrated that the flooding 115 had been adjudicated. The document, which was marked as a defense exhibit but not admitted into

evidence, indicated that Richmond was found guilty of the flooding violation on March 19. (3rd Supp. CT 417; 1 RT 106.) The prosecutor's argument was thus erroneous. Moreover, it was particularly egregious because the evidence which had been presented about Richmond's unadjudicated 115's was vague, and the jury had no way of knowing that the prosecutor's assertion of fact was not true.

4. The Prosecutor Inaccurately Claimed That an Officer Had Lost a Promotion Because of Appellant.

Again the prosecutor misstated the evidence when he implied that appellant's actions caused a correctional officer to lose a promotion.

On January 6, 1996, appellant was being escorted by correctional officer Stanley Whiting, who failed to follow procedure in cuffing him. Appellant was able to break away and tried to assault another inmate who was nearby. (78 RT 9339-9356.) The deputy district attorney told the jury: "Officer Whiting testified first concerning this incident. And through cross-examination it was determined that Officer Whiting lost a promotion to become a sergeant because of this incident." (84 RT 10082.)

The prosecutor's version of the facts was not supported by the record evidence. In Whiting's cross-examination (which took place eight years after the 1996 incident), defense counsel congratulated him for being promoted from a correctional officer to sergeant. (78 RT 9352.) Later in the examination, Whiting indicated that appellant had shown concern because Whiting's *transfer* had been held up due to the incident. (78 RT 9355.) However, the evidence did not show that Whiting had lost a promotion, as the prosecutor claimed.

5. The Prosecutor Distorted the Evidence About Appellant's Transfer to Tehachapi Prison.

In discussing appellant's possession of some pieces of razor blades on February 2, 2000, the prosecutor told the jury: "Now, he's in Tehachapi or being brought into Tehachapi to do a SHU term for some incident." (84 RT 10085.) Earlier in the penalty phase, a correctional officer at Techachapi had testified that the SHU unit was "our highest form of security," even more secure than Ad Seg. (78 RT 9391.) In light of this testimony, the prosecutor's argument created the impression that in 2000, appellant had committed an *additional* serious act which made him too dangerous to remain in Calipatria's Ad Seg.

In fact, the record of pretrial proceedings establishes that appellant had *requested* the transfer to Tehachapi. Appellant had been housed in Calipatria's Ad Seg unit since approximately February 1998, even though he was serving a SHU term, because he was awaiting trial. (2nd Supp. CT 1-20.)[226] In Ad Seg, appellant was not being given the privileges available to SHU inmates in other institutions. Accordingly, on January 6, 2000, while proceedings were stayed pending the resolution of a writ filed in the court of appeal, appellant's attorney asked the trial court to lift the order preventing appellant's removal from Calipatria, in hopes he would be transferred to the SHU unit in Tehachapi. (8 RT 1412-1418.)[227] Thus, the

---

226

It appears that appellant's SHU term was originally imposed as a result of an incident which occurred on the Ad Seg yard in Calipatria on June 7, 1995. (See 3rd Supp. CT 415.) The jury heard evidence about this incident, but was not told that appellant had received a SHU term as a consequence. (77 RT 9179-9191.)

227

Appellant's desire to be transferred also related to a belief that then on-going plea negotiations would result in an end to the capital prosecution. (4th Supp. CT 10-11.)

deputy district attorney's insinuation that appellant had been moved because he had committed additional in-prison misconduct was unfair.

C. The Prosecutor Misstated The Law.

It is improper for a prosecutor to misstate the law. (*People v. Hill*, *supra*, 17 Cal.4th 800, 829.) Here, the prosecutor made erroneous assertions about how the jury was to consider both lack of remorse and factor (a).

1. The Prosecutor Improperly Argued Lack of Remorse as Aggravation.

The deputy district attorney committed misconduct when he urged the jury to consider appellant's lack of remorse for killing both James Jackson and Thomas Richmond as aggravating factors supporting a death verdict.

In discussing factor (a), the prosecutor asked the jury to listen to the tape of appellant's confession to the Jackson homicide. (84 RT 10048.) The prosecutor averred that the tape, made six days after Jackson's death, failed to demonstrate any remorse by appellant:

> Obviously, he wasn't sorry for what he did. [¶] You consider all the circumstances behind that killing, including how Mr. Barrett got picked up. Did he go down to the police station and turn himself in after six days and say[], "Here I am. I'm sorry I did it"? [¶] No. . . .

(84 RT 10049.)

The prosecutor then expressly told the jury that while remorse could be mitigating, lack of remorse was an aggravating factor:

> I submit to you, ladies and gentleman, under CALJIC 8.85, Subsection "A," we're talking about the

> circumstances of the crime. You can consider remorse or lack of remorse as either a mitigating or an aggravating factor. [¶] Again, if there was remorse, it's mitigating. Put it on your mitigation list and put whatever weight you want on it. [¶] If it's aggravating, which I submit it is, lack of remorse is something that you should, in fact, put weight on and place on your aggravating factor list.

(84 RT 10053.)

Later, the deputy district attorney returned to the theme of lack of remorse. He stated, "We talked about lack of remorse with Mr. Jackson. I'd like to switch gears and talk about lack of remorse in regards to Mr. Richmond." (84 RT 10054.) He quoted appellant's statement to the jury that he "'shed no tears for Thomas Richmond.'" (84 RT 10055.) The prosecutor then told the jury: "Lack of remorse is an aggravating circumstance that you can apply under the 'A' section of CALJIC 8.85." (84 RT 10055.)

Lack of remorse is not a statutory aggravating factor. (See Pen. Code, § 190.3.) The prosecution cannot properly argue that the absence of a particular mitigating factor constitutes the presence of an aggravating factor. *(People v. Davenport* (1985) 41 Cal.3d 247, 288-290.) It is therefore error for the prosecutor to argue that a defendant's lack of remorse is an aggravating circumstance. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1358; *People v. Enraca* (2012) 53 Cal.4th 735, 766-767.) "'[P]ostcrime evidence of remorselessness does not fit within any statutory sentencing factor, and thus should not be urged as aggravating.'" (*People v. Collins* (2010) 49 Cal.4th 175, 227 [italics omitted], quoting *People v.*

Gonzalez (1990) 51 Cal.3d 1179, 1232.)

The record in the instant case leaves no doubt – the deputy district attorney urged the jurors to consider what he believed was appellant's postcrime lack of remorse for both homicides as aggravating factors. This was clear misconduct.

2. The Prosecutor Erroneously Characterized the Nature of Factor (A).

The deputy district attorney significantly distorted the jury's understanding of how it could consider the circumstances of the crimes under factor (a), in more than one way.

First, the prosecutor erroneously told the jury that factor (a) could *only* be aggravating. He stated:

> So this Subsection A is strictly for aggravating circumstances only. There's nothing mitigating under the "A" section that applies in this case or any other case. Strictly for aggravating circumstances only.

(84 RT 10057.)

Clearly the prosecutor was not arguing that the circumstances of the crimes in *appellant's* case were not mitigating, but that factor (a) evidence could *never* be mitigation. This is not correct. Penal Code section 190.3(a) is a factor in either mitigation or aggravation. (*People v. Jones* (2012) 54 Cal.4th 1, 76, citing *People v. Earp* (1999) 20 Cal.4th 826, 900-901; *People v. Moon* (2005) 37 Cal.4th 1, 40.)

Second, the prosecutor made confusing and contradictory statements about which prior violent incidents could be considered under factor (a), in effect telling the jury it had discretion to consider the incidents under either factor (a) or factor (b). Initially, the prosecutor indicated that the assault on

Lloyd Young should be considered under factor (a). (84 RT 10036.) He later told the jury that the incident was actually applicable under factor (b), which unlike factor (a), had to be proven beyond a reasonable doubt. (84 RT 10059-10060.) The prosecutor then went on to contradict himself again regarding the Spychala assault on October 11, 1986, telling the jury it could be considered under *either* factor (a) or (b). He stated:

> . . . Go up to October the 11th. And, again, actually this one you should just go ahead and apply it as a circumstance of the crime of murder under the "A" section rather than put it under the "B" section. But you can do it either way. Back under the "B" section you probably should because the burden of proof, once again, is beyond a reasonable doubt.

(84 RT 10062.)

The Spychala assault, which occurred almost a week after the Jackson homicide, was not a circumstance of the prior murder special circumstance. (See, e.g., *People v. Martinez* (2010) 47 Cal.4th 911, 961 [assaults occurring a week before and a week after the capital crime were not relevant to factor (a)].) Therefore, the jury was not free to consider it under factor (a). The prosecutor erred when he told the jury otherwise. Moreover, even though the deputy district attorney ultimately told the jury that the Young assault should be considered under factor (b), his assertion that the jury had discretion to weigh the Spychala assault as either factor (a) or (b) evidence might have led a reasonable juror to believe that he or she had the same discretion in considering the former incident.

D. The Prosecutor Improperly Used the Prestige of His Office.

Finally, the prosecutor committed misconduct when he indirectly

invoked the authority of his office in asking the jury to return a death verdict. As previously set forth, the deputy district attorney first invoked his position as the People's representative during voir dire, and he did so again during his guilt phase argument. (See Arg. IX.B.1., *ante*.)

The prosecuting attorney returned to this improper theme in his penalty phase argument. Therein, he told the jury that the aggravating factors were so substantial in comparison to the mitigating factors that "justice demands the penalty of death." (84 RT 10154.) He continued:

> And I don't say that lightly. I'm not up here to – it's difficult for me, too. It's no fun for me as well. I don't get any enjoyment out of this. I believe in justice, as I've told you from the beginning, and that's all I'm requesting you to do in this case.

(84 RT 10154.)

When the prosecutor told the jurors he got no personal satisfaction in asking for a death verdict and reminded them of his earlier remarks, he was invoking his position as a representative of the People of the State of California. By averring that he was only seeking justice, he was telling the jurors that, as the People's representative, he believed a life verdict would be an injustice.

A prosecutor should not express his personal belief in the propriety of a death sentence, and he should not invoke the authority of his office to persuade the jury. (*Miller v. Lockhart*, *supra*, 65 F.3d 676, 684; *Newlon v. Armontrout* (8th Cir. 1989) 885 F.2d 1328, 1335-1137.) Here, the deputy district attorney did both. His personal motivation for prosecuting appellant was not relevant and his claim that it was difficult for him was not appropriate for the jury to consider in making a penalty determination.

E. The Misconduct Was Prejudicial and Requires Reversal.

Reversal is required where there is a reasonable possibility that prosecutorial misconduct in the penalty phase affected the penalty outcome. (See *People v. Tate*, *supra*, 49 Cal.4th at p. 704, citing *People v. Brown*, *supra*, 46 Cal.3d at p. 448.) Acts of misconduct that do not individually create prejudice may combine to deprive a defendant of a fair trial. *(People v. Hill*, *supra*, 17 Cal.4th 800, 844-845, and cases cited therein; *People v. Pitts*, *supra*, 223 Cal.App.3d 606, 815.)

In this case, the record indicates that the jury struggled with reaching a penalty verdict. (See Arg. XVIII.B.2., *ante*.) As demonstrated below, the prosecutor's pervasive misconduct prejudiced appellant in varied and substantial ways. The reversal of appellant's death sentence is required because there is a reasonable possibility that the misconduct, whether considered singly or together, affected the jury's penalty verdict.

1. The Misconduct Undermined the Case for Life.

Appellant's penalty phase case included three main strands: that the facts of the capital crime and prior murder special circumstance were not so egregious that death was warranted; that appellant could be safely contained in Pelican Bay Prison; and that he deserved mercy in light of his incredibly difficult childhood. The prosecutor's many acts of misconduct served unfairly to undermine each of these themes.

a. Circumstances of the Crimes.

Relevant to factor (a), the defense argued that appellant's moral culpability for the Jackson homicide was lessened by the fact that he was only 16 years old at the time, not even legally eligible for the death penalty. The killing was further mitigated by the fact that Jackson, an adult pedophile, had befriended appellant, a homeless teenager, and then plied

him with drugs and alcohol in order to sexually abuse him. As to the capital crime, the defense urged the jury to consider any lingering doubt it had that appellant had acted in actual or imperfect self-defense. (84 RT 10114-10119.) As described below, the prosecutor's misconduct undermined this mitigation in several ways.

The deputy district attorney's erroneous statement that factor (a) could *only* be aggravating (see subsec. C.2., *ante*) essentially rendered nugatory this part of appellant's case for life. If any juror accepted this incorrect statement of law, then he or she had no way of giving effect to an important part of the defense mitigation case. (*Penry v. Johnson* (2001) 532 U.S. 782, 796 et seq. [jury must be able to give effect to defendant's mitigation evidence].)

This harm was compounded when the deputy district attorney, by mischaracterizing the record, argued that Jackson had reason to believe appellant was of consenting age and that appellant had fabricated the account of Jackson's sexual victimization of him (see subsec. B.1., *ante*).

In addition, the prosecutor's blatant attempt to make the jury believe that appellant was a "shot caller" in prison (see subsec. A.1.b., *ante*) provided a motive for Richmond's killing. As appellant has demonstrated, the theory of motive advanced by the prosecutor was dependent upon the jury believing the testimony of three incredible and biased inmate informants. (See Arg. VIII., *ante*.) The prosecutor's insinuation during argument that appellant sought to become a shot caller would have tended to minimize any lingering doubt in the minds of the jurors about his guilt because it suggested, without evidentiary support, that appellant killed Richmond as a result of prison gang politics.

Finally as to the circumstances of the crimes, the prosecutor's

erroneous argument that the jury had the choice of considering the Spychala assault, and maybe the Young assault as well, pursuant to factor (a) (see subsec. C.2., *ante*) added to the prejudice. If any juror assessed either or both incidents as factor (a) evidence, then he or she was free to find them aggravating even if not proven beyond a reasonable doubt. Given the facts adduced concerning these incidents, it is likely that a juror might have found either or both aggravating under factor (a) but not under factor (b).

A juror may well have determined that the assault on Christopher Spychala had not been proved beyond a reasonable doubt. Spychala, who admittedly had a drug problem, improbably claimed that he walked with appellant, whom he did not know, for up to an hour and a half without ever speaking to him and that appellant suddenly slashed him with a knife for no reason. (See Stmt. of Facts, C.1.a., *ante*.) Contrary to this account, in 1986 appellant told investigator McCoy that he and Spychala had argued and that he slashed at Spychala only after the latter had struck at him with his fist. (3rd Supp. CT 447.) It is reasonably possible that the jury would not have believed Spychala's version of events beyond a reasonable doubt, had it properly considered the evidence pursuant to factor (b).

And although appellant admitted assaulting Mr. Young, as previously explained, some of the most inflammatory assertions about the incident came not from any witness but from the prosecutor's improper questioning and argument, and thus were not established beyond a reasonable doubt. (See Arg. XVIII.D., *ante*.)

Significantly, the jury instructions given did not ameliorate the harm caused when the prosecutor misstated the law during argument. Although the prosecutor erroneously stated that factor (a) could only be aggravating, nothing in the court's instructions told them that the circumstances of the

crime could in fact be mitigating. The instructions also failed to correct the prosecutor's erroneous claim that lack of remorse could be an aggravating factor. Nor was the prosecutor's assertion that the jury could consider some of the state's aggravation evidence under either factor (a) or (b) corrected. (See generally, 47 CT 13107-13159 [penalty phase instructions given].)

In sum, the prosecutor's misconduct enhanced the state's factor (a) evidence while it diminished appellant's evidence.

b. Pelican Bay Conditions.

Appellant's mitigation case also hinged upon evidence that the austere conditions of Pelican Bay Prison would virtually ensure that he could not harm correctional staff or fellow inmates in the future if his life was spared. This evidence was unfairly weakened by the prosecutor's improper references to the "Barrett cell" (see subsec. A.1.c., *ante*). In fact, the prosecuting attorney presented no evidence as to how this cell was modified for housing appellant, and failed to prove that hiding weapons in it was any more challenging than doing so in an unmodified cell. Yet he made the most of it during argument stating, "They couldn't even make a cell in which he didn't have a weapon in. If you believe it happened, you must write it down as an aggravating factor." (84 RT 10085.) The improper references to the cell would likely have led one or more jurors to believe, without foundation, that the CDC had apparently already tried but failed to curb appellant's behavior in custody. Similarly prejudicial was the deputy district attorney's distortion of the facts during argument relating to appellant's transfer from Calipatria's Ad Seg to Tehachapi's SHU (see subsec. B.5., *ante*), which unfairly implied he was so dangerous the CDC did not know where to house him. In sum, this misconduct would likely have led one or more jurors to reject defense evidence about Pelican Bay.

Particularly damaging to the mitigation case in this regard was the prosecutor's unsavory efforts to make the jury believe that appellant could get out of prison if sentenced to life without parole. The prosecutor managed to insinuate during Esten's testimony that unless sentenced to death, appellant could get out of prison by escape or appeal (see subsec. A.1.d, *ante*). The deputy district attorney pursed this theme by eliciting from appellant himself that he had tried to escape from CYA, although this line of questioning squarely violated the trial court's ruling that such evidence was not admissible (see subsec. A.2.b., *ante*).

Studies have established that over 75 percent of capital jurors disbelieve the literal language of life without parole. (See CACJ Forum (1994) Vol. 21, No. 2, pp. 42-45; see also, Haney, Sontag & Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50 Journal of Social Sciences, No. 2 (Summer 1994). And, testimony about the possibility of escape "may be highly prejudicial in undermining juror confidence in the sentence of life imprisonment without parole as an alternative to death." (*People v. Kaurish*, *supra*, 52 Cal.3d 648, 710.)

In this case, the jury was not instructed to assume that an LWOP verdict meant that appellant would be imprisoned for the rest of his life. (See generally, 47 CT 13107-13159 [penalty instructions given].) As a result, the prosecutor's improper references to escape and appeal would have exacerbated the likelihood that one or more jurors returned a death verdict because he or she believed that appellant would otherwise be released from prison. This is particularly true when the prejudice created by the erroneous introduction of evidence that appellant was able to get out of his cell is added to the mix. (See Arg. XVII., *ante.*)

Moreover, given the extreme prejudice caused by the inappropriate references to escape, the trial court abused its discretion in denying the defense motion for mistrial, as this misconduct irreparably damaged appellant's chance of receiving a fair trial. (*People v. Burgener* (2003) 29 Cal.4th 833, 873.)

c. Appellant's Traumatic Childhood.

Not even the facts of appellant's extremely troubled childhood were off limits from the prosecutor's distortion, as he improperly elicited testimony from appellant that he had disobeyed his mother and chased his uncle with a knife (see subsec. A.2.b., *ante*). Such testimony may well have caused a juror to feel less sympathy than he or she otherwise might have after hearing about appellant's dysfunctional and impoverished upbringing.

2. Appellant Was Prejudiced in Other Ways as Well.

In addition to undermining the defense mitigation themes, the prosecutor's misconduct prejudiced appellant in significant ways.

First, the prosecutor's improper use of lack of remorse as an aggravating factor (see subsec. C.1., *ante*) likely skewed the verdict toward death.[228] The prosecuting attorney's closing argument "is an especially critical period of trial. Since it comes from an official representative of the People, it carries great weight and must therefore be reasonably objective." *(People v. Pitts*, *supra*, 223 Cal.App.3d at p. 694 [citations omitted].)

Moreover, the issue of remorse – or lack thereof – is a critical one in a penalty phase. Empirical studies of decision-making in capital cases show that whether a defendant expresses remorse is one of the primary

---

228

See also subsection A.2.a., *ante* (prosecutor's argumentative question about regret appellant felt for Richmond's family).

considerations that drive jurors in choosing between life and death sentences. (Blume, Johnson & Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation* (2008) 36 Hofstra L.Rev. 1035, 1037.) When jurors believe the defendant is not remorseful, they are angry and see little of value in him that is worth saving. (*Id.*, at p. 1049.) In California capital cases, a defendant's degree of remorse is a frequently-discussed issue in the jury room and a factor that a majority of jurors have cited as the most compelling reason for their decision. (Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty* (1998) 83 Cornell L.Rev. 1557, 1560.) Not surprisingly then, in appellant's case several jurors expressed the importance of remorse in their questionnaires or voir dire.[229] Appellant was undoubtedly harmed by the deputy district attorney's erroneous claim that bare lack of remorse was an aggravating factor.

Second, by repeatedly asking argumentative questions and mischaracterizing the evidence (see subsecs. A.2.a., B.2. & 3., *ante*) the prosecutor was able to erode appellant's credibility in the eyes of the jurors. For example, the prosecutor's inaccurate statements about the spitting incident involving Lt. Fast were designed to make the jurors believe

---

229

Juror No. 4 opined that serial killers and persons who kill without remorse were generally deserving of the death penalty. (8 CT 2257.) Juror No. 5 indicated the death penalty was appropriate for a person who has no conscience or did not feel bad for what they had done. (29 RT 3178.) Juror No. 6 indicated that repentance was important. (23 CT 6517.) Juror No. 8 wrote that whether a person felt remorseful was relevant to the penalty decision. (5 CT 1318.) Alternate Juror No. 3 thought capital punishment was warranted for those who showed no remorse. (21 CT 5761; 34 RT 3901.)

appellant was a liar. In argument, the prosecutor suggested that appellant had falsely claimed during his testimony that he was not trying to manipulate the jury. (85 RT 10146-10147.) The credibility of appellant, who testified in both the guilt and penalty phases of trial, was extremely important. The deputy district attorney's efforts to undermine it, through innuendo and misstatements, was surely damaging.

Third, the prosecutor's misconduct likely led the jury to believe it had not heard about all of appellant's prior violent acts or the full circumstances of those presented. Asserting facts not in evidence is a highly prejudicial form of misconduct, "and a frequent basis for reversal." (*People v. Hill*, *supra*, 17 Cal.4th 800, 828.) The assault on inmate Chojnacki seemed more inflammatory than it otherwise was when the prosecutor told the jury, without support in the record, that the inmate was trying to change his life (see subsec. B.2., *ante*). The deputy district attorney's unsupported assertion that appellant caused CO Whiting to lose a promotion (subsec. B.4., *ante*) probably also influenced the jurors. The insinuation that there had been additional in-prison violence which the jury had not even heard about (see subsecs. A.1.a., B.5., *ante*) likely affected the penalty decision-making. And the untrue suggestion that appellant was a leader or shot caller in a white supremacist prison gang (see subsec. A.1.b., *ante*) was particularly inflammatory.

Finally, when the prosecutor told the jurors that he received no personal enjoyment in asking for appellant's death (see subsec. D., *ante*), he may well have pushed one or more of them away from a life vote. This argument served to emphasize the fact that he was acting on behalf of the People of California and that, as a representative of the state, he believed justice required a death verdict. "[A] 'prosecutor's opinion carries with it

the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.' *United States v. Young*, 470 U.S. 1, 18-19 [] (1985)." (*Sechrest v. Ignacio*, *supra*, 549 F.3d at pp. 810-811.) "[J]uries very properly regard the prosecuting attorney as unprejudiced, impartial and nonpartisan, and statements made by him are apt to have great influence." (*People v. Perez* (1962) 58 Cal.2d 229, 247.) Here, this improper argument helped to tip the scales towards death.

As this Court has recognized, it is very difficult for a jury to remain impartial when confronted with repeated misconduct. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 845-846.) In this case, the relentless prosecutorial misconduct undoubtedly deprived appellant of a fair trial.

F. Additional Objections and Admonitions Would Have Been Futile.

This Court has stated that as a general rule, a defendant must object to a prosecutor's misconduct and request that the jury be admonished in order to preserve the issue for appeal. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.) However, "[a] defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile." (*Ibid.*) In this case, appellant objected to many, if not most, of the prosecutor's acts of misconduct, often asked for an admonition, and even moved for a mistrial. As set forth below, any additional objections and/or requests for admonitions would have been futile. Accordingly, he is entitled to a ruling on the merits of all the misconduct raised herein.

Many of appellant's objections were overruled. (82 RT 9747-9748, 9751, 9767, 9852.) Thus, a request for admonishment would have been of no use. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.) Additional objections

during argument would have been futile. The trial made it clear that it would not entertain any objections to a misstatement of the evidence, because it believed that deciding whether a party was getting the facts wrong was within the jury's purview. (83 RT 9938.) True to its word, the court refused to rule on defense objections during argument. (84 RT 10065, 10079.)

Additional requests for admonitions would have also been futile, for several reasons. First, several admonishments were issued, but did little to ameliorate the prejudice flowing from the pervasive misconduct. Although the trial court admonished or offered to admonish the jury that questions were not evidence (82 RT 9755, 9771), this instruction did not cure the prejudicial effect of repeated misconduct. (See, e.g., *People v. Wagner*, *supra*, 13 Cal.3d at p. 621 [admonition and instruction not to speculate after objections sustained did not cure prejudice].) Further, although the trial court directed the prosecutor to "calm down" during his cross-examination of appellant, he ignored this admonishment and continued goading appellant with argumentative questions. (82 RT 9839, 9843, 9871.) And although the trial court instructed the jury to disregard appellant's admission that he had tried to escape from CYA (82 RT 9865-9866), it is unlikely that the jury could have set aside such testimony.

In other instances, even though the objections were sustained, the trial court either permitted the prosecutor to ignore them or allowed appellant to answer. (See, e.g., 82 RT 9843, 9850, 9841-9842, 9848, 9864, 9866-9867.)[230] Given this scenario, additional requests for admonitions

---

230

As explained previously, the prosecutor took advantage of appellant's desire not to engage in "legal manipulations," which resulted in him

would have been pointless.

In sum, the prosecutor's pervasive misconduct was prejudicial and appellant's death sentence should be reversed.

//

//

---

answering even those questions to which his counsel had successfully objected. (See, e.g., 82 RT 9843, 9849, 9850, 9870.)

XX.
THE ELEVEN-DAY JURY SEPARATION DURING PENALTY PHASE DELIBERATIONS REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE

In this case, the trial court permitted the jury to take an eleven-day break in penalty phase deliberations so that one of the jurors could go on a vacation, although several alternate jurors were available to serve in her stead. Upon the jury's return, it reached a death verdict in less than an hour. The court's decision to halt deliberations for so long, which put the jurors out into a community that was ready to see appellant "hang," was an abuse of discretion. The separation also violated appellant's state and federal constitutional rights and requires the reversal of his death sentence.

A. The Trial Court Permitted the Jury to Halt Deliberations for a Juror's Vacation.

On Monday, February 24, 2004, the jury was pre-instructed and heard argument from both sides. (47 CT 13162.) At the beginning of proceedings on Tuesday, February 25, the parties and all jurors were present when the trial judge indicated that Juror No. 6 needed to take her husband to see a surgeon in San Diego regarding a hip replacement. The judge expressed his belief that appellant's case would be submitted to the jury later that day and that, under his general practice, the jury could set its own schedule. (85 RT 10141.) Counsel then presented rebuttal arguments and the jury received concluding instructions from the trial court. (47 CT 13166.)

The court asked both sides to stipulate that the jury could take breaks by notifying the bailiff, rather than reconvening the court. (85 RT 10178.) The court then told the jurors: "And this means you're, essentially, your own bosses now. You can decide when you are going to come and when

you are going to go. And we'll be here or I'll be here during all regular court hours. So you can manage your own schedule from this point on." (85 RT 10179.) At 10:55 a.m., the jury retired to begin penalty deliberations. (85 RT 10179; see also, 47 CT 13168-13169.)

At 11:20 a.m., the court convened outside of the jury's presence. The court stated: "The bailiff has handed me a note from the foreperson Juror No. 7 that says, '[Juror No. 1] will be going to Hawaii Monday, March 1st to March 9th. If we do not come to a decision before then, will it be okay to take that week off?'" (85 RT 10183; see also, 47 CT 13164.)[231] The court was inclined to allow the break. Defense counsel stated, "Yes, I agree." Appellant expressed hesitation, however, stating "Encourage them to make a decision before then, but – " Before he could finish, his attorney stated, "Don't do that." The trial court then told appellant, "The longer it lasts, the better off it generally is for your side." (85 RT 10183.)

At 11:31 a.m., the court convened again, with a note from the foreperson regarding the jury's schedule. The jury proposed to deliberate on Wednesday, take Thursday off so that Juror No. 6 could go with her husband for his medical appointment, deliberate on Friday, break from March 1 through March 9, and return on March 10. (85 RT 10185-10186; see also, 47 CT 13165.) The jury ended deliberations for the day at 4:00 p.m. (47 CT 13169.)

The jury deliberated on Wednesday, February 25, from 9:40 a.m. until 4:00 p.m. (47 CT 13173.) That morning, the court informed counsel that the foreperson had sent another note, which stated, "[Juror No. 4]

231

In fact the trial court had earlier been informed about Juror No. 1's vacation plans. (75 RT 8952.)

would like to speak to the judge outside the presence of the jury." (86 RT 10193; see also, 47 CT 13170.) Juror No. 4 was brought into the courtroom. She told the court that while she was at work the previous day, one of her co-workers blurted out that the newspaper had reported that appellant got in trouble with a "C.O." (86 RT 10197-10199.) Juror No. 4 said she did not hear the details. When the court asked her whether it would affect her ability to be fair, she responded, "I don't know. I mean, I didn't hear much. But I just wanted to be honest with you guys." (86 RT 10199.) She then added, "Your Honor, I don't think it's a problem at all." (86 RT 10199-10200.)

At the request of defense counsel, the court asked whether Juror No. 4 was feeling pressure to decide the case in a particular manner because of the incident. She replied that she thought her co-worker's remark was inadvertent but added,

> I've been hearing a lot of comments throughout. I work at Behavioral Health. And everybody is talking about it. And they're saying things that just . . . "Have you hung him?" things like that, you know. . . . .

(86 RT 10201.)

Ultimately, Juror No. 4 stated that she did not think the incident put pressure on her to decide the case one way or the other. (86 RT 10201-10202.) Again at defense request, the court advised Juror No. 4 that the reporting regarding appellant's case had not been very accurate and admonished her to disregard anything she had heard outside of court. (86 RT 10202-10203.)

The jury was in recess on Thursday to accommodate Juror No. 6. (47 CT 13173.) It reconvened on Friday, February 27 at 9:30 a.m. (47 CT

13175.) At 9:48 a.m., the court received a note from the foreperson requesting a readback of appellant's "last statement." (87 RT 10213; 47 CT 13174, 13176.) After it was clarified that the jury wanted his allocution rather than his testimony, the court ordered the reporter to read it back to the jury. (87 RT 10213-10214, 10216; 47 CT 13176.)[232] At 3:00 p.m., jury deliberations recessed until March 10, 2004. (47 CT 13176.)

On Wednesday, March 10, at 9:30 a.m. the jury resumed deliberations. (47 RT 13185.) One hour later, the court informed counsel that it had received a note from the foreperson which stated: "We are about to make a decision. Some of the alternates wanted to be present during the reading of the verdict. Could we contact them and give them the choice?" (88 RT 10220; see also, 47 CT 13177.) The court said that the bailiff had been attempting to contact the alternates for the last half hour. (88 RT 10220.)[233] At 10:38 a.m., the jury was brought into the courtroom and informed of the court's efforts to reach the alternate jurors. (88 RT 10222.) At that time, the foreperson told the court that the jury had reached a penalty verdict and provided the verdict form to the bailiff. (88 RT 10223.) The verdict was death. (88 RT 10223; 47 CT 13179.)

B. The Lengthy Separation Constituted an Abuse of Discretion.

As demonstrated herein, the trial court in appellant's case erred in permitting the jury to halt penalty phase deliberations for eleven days so

---

232

The record indicates that the readback did not occur in open court. (87 RT 10215-10216.)

233

Although the time at which the bailiff received this note from the jury is not noted in the record, the court's comment indicates that it must have been before 10:00 a.m.

that a juror could go on vacation.

Penal Code section 1121 gives a trial court the discretion to permit jurors to separate after they are sworn to try a criminal action. (See *People v. Santamaria* (1991) 229 Cal.App.3d 269, 276.) This discretion is not limitless, however. It must be "grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue." (*Id.* [citation and internal quotation marks omitted].)

Although the court of appeal in *Santamaria* reviewed the trial court's decision to allow the jury to separate under an abuse of discretion standard, subsequent cases by this Court suggest that a less deferential standard may be applicable. In *People v. Lomax* (2010) 49 Cal.4th 530, the trial court exercised its discretion to discharge a juror for misconduct. This Court determined that "'a somewhat stronger showing' than is typical for abuse of discretion review must be made to support such decisions on appeal. []" (49 Cal.4th at p. 589.) It instead applied the "demonstrable reality" test, which is less deferential. This "heightened standard more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) Since the jury separation issue appellant raises implicates these same rights (see Arg. XX.C, *post*), he asserts it is appropriate to apply the demonstrable reality standard herein.

Whether this Court reviews the lower court's conduct for abuse of discretion or applies the less deferential demonstrable reality test, the analysis applied in *People v. Santamaria* is instructive. Therein, the trial court suspended jury deliberations for eleven days in a special-circumstances murder case while it was away. The reviewing court found that the record failed to establish that the delay was necessary. (229

Cal.App.3d at p. 277.) It further found both the timing and extent of the halt in proceedings to be "particularly troublesome," explaining:

> A long adjournment of deliberations risks prejudice to the defendant both from the possibility that jurors might discuss the case with outsiders at this critical point in the proceedings, and from the possibility that their recollections of the evidence, the arguments, and the court's instructions may become dulled or confused. [Citations.] Obviously, the longer the separation, the greater the risk. A long adjournment of deliberations also disrupts the very process and pattern of the jury's orderly examination of the evidence.

(229 Cal.App.3d at pp. 277-278.)

The appellate court in *Santamaria* also emphasized that an alternative to suspending deliberations was available, in that Penal Code section 1053 provided for a substitution of judges in certain circumstances. (229 Cal.App.3d at p. 278.) In sum, the reviewing court found that the lower court had abused its discretion "with this inordinate interruption in deliberations" in light of the serious nature of the offenses charged, the risk of prejudice inherent in the lengthy delay, the lack of good cause, and the availability of an alternative to suspending deliberations. (229 Cal.App.3d at p. 279.)

In appellant's case, consideration of these same factors leads to a conclusion that the trial court erred in allowing the jurors to separate during penalty phase deliberations because of Juror No. 1's vacation plans. The determination of whether appellant would be executed or spend his life in prison was, of course, quite serious. The eleven-day interruption of deliberations was the same length as that in *Santamaria* and similarly raised

an inherent risk of prejudice. Finally, there was no good cause to suspend deliberations for such a long period in light of the availability of four alternate jurors who could have replaced Juror No. 1 if she went on her vacation as planned. The court erred in permitting the eleven-day break.[234]

As explained below, the lengthy and unnecessary separation of the jury also violated appellant's state and federal constitutional rights to due process, a fair trial by an impartial jury, and a reliable sentencing proceeding.

C. The Suspension in Deliberations Violated Appellant's Constitutional Rights.

The suspension of penalty phase deliberations also violated appellant's constitutional rights under the Sixth, Eighth and Fourteenth Amendments and their California analogs.

"[A]t times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process" as guaranteed by the Fourteenth Amendment of the United States Constitution. (*Estes v. Texas* (1965) 381 U.S. 532, 542-543; see also, Cal. Const., art. I, § 15.) Such a procedure may also implicate a criminal defendant's Sixth Amendment right to a fair trial by an impartial jury. (See

---

234

Moreover, the trial court erred in allowing the jury to separate at will. A trial court may not abdicate its responsibility to exercise discretion by delegating that responsibility to others. (See, e.g., *People v. Mar* (2002) 28 Cal.4th 1201, 1221-1223 [court may not delegate decision whether to shackle defendant during trial to sheriff]; *In re James R.* (2007) 153 Cal.App.4th 413, 436 [juvenile court may not delegate decision whether to grant or deny visitation to third parties].) In appellant's case, the trial court inappropriately delegated its authority under Penal Code section 1121 to permit the jurors to separate when it told them they could "decide when you are going to come and when you are going to go. . . ." (85 RT 10179.)

Skilling v. United States (2010) 130 S.Ct. 2896, 2912-2913; see also, Cal. Const., art. I, § 16.) Further it may deprive a defendant of the heightened need for reliability the Eighth Amendment requires in capital sentencing. (See *Johnson v. Mississippi*, *supra*, 486 U.S. 578.)

"Due process implies an adherence by the trial court to the established mode of trial. Extreme variations from that practice, especially without established necessity, subvert the integrity of the legal process." (*People v. Santamaria*, *supra*, 229 Cal.App.3d at p. 283.) Thus the inappropriate separation of a jury may not only constitute an abuse of discretion but also violate a defendant's constitutional rights. (229 Cal.App.3d at pp. 280-283; see also, *United States v. Hay* (9th Cir. 1997) 122 F.3d 1233, 1236.) As the reviewing court in *Santamaria* recognized, due process demands a trial "'by an impartial jury free from outside influences.'" (*Id.* at p. 281, quoting *Sheppard v. Maxwell* (1966) 384 U.S. 333, 362.) It explained: "We believe that at no time is it more essential that the jury should be immunized from such influences than when it is deliberating on its verdict." (229 Cal.App.3d at p. 281.)

When an unwarranted jury separation results in a due process violation, the prejudice is inherent. (*People v. Santamaria*, *supra*, 229 Cal.App.3d at p. 281, citing *Estes v. Texas*, *supra*, 381 U.S. 532; *Sheppard v. Maxwell* (1966) 384 U.S. 333; and *Turner v. Louisiana* (1965) 379 U.S. 466.) In *Santamaria*, the court of appeal acknowledged that it would be "virtually impossible" for the defendant therein to demonstrate actual prejudice. (229 Cal.App.3d at p. 280, 282.) Instead, common sense and experience told the court that the long separation would have exposed the jurors to contact with many others and negatively impacted their ability to recall evidence and understand instructions. (*Ibid.*) Elaborating on this

point, the court stated:

> [T]he error in this case does not consist of the admission or exclusion of bits of evidence; rather, it affects the dynamics of the legal process itself. Jury deliberations are a unique exercise in decisionmaking, in which a collective exchange among virtual strangers produces individual decisions which coalesce into a verdict. The dynamics of deliberation are complex and delicate. Jurors are expected to engage in a thoughtful, meticulous, and systematic examination of the evidence; they should not be asked to accomplish this serious task hindered by unnecessary interruption. The deleterious effects of an undue and prolonged gap in deliberations may be difficult to quantify, but their existence cannot be doubted. When issues of liberty are at stake, all sides are entitled as far as practicable to the undisturbed focused attention of the jury.

(229 Cal.App.3d at p. 282; see also, *U.S. v. Hay*, *supra*, 122 F.3d at p. 1236 [district court's abuse of discretion in ordering 48-day recess warrants reversal regardless of a showing of actual prejudice], citing *Arizona v. Fulminante*, *supra*, 499 U.S. at p. 310.)

The reviewing court in *Santamaria* acknowledged that it is appropriate for a trial court to allow routine adjournments of a jury, such as those for weekends, holidays or illness. However, a "prolonged and unwarranted interruption" of deliberations may deprive the defendant of a fair trial. (229 Cal.App.3d at p. 281.) In appellant's case, the eleven-day suspension of jury deliberations violated his rights to due process and an impartial jury. The risk of prejudice from this lengthy and unnecessary separation during such a critical point in the penalty phase was inherent. As

noted above, four alternates had been selected and were available to replace Juror No. 1. Although the replacement of a juror would have required deliberations to start anew and thus have caused some disruption to the decisionmaking process, it would have been far less prejudicial than "releasing the jurors into the community for 11 days." (*People v. Santamaria*, *supra*, 229 Cal.App.3d at p. 281.)

In fact, the record in this case demonstrates that appellant's jurors were particularly likely to face improper influences during the long hiatus, due to media attention the trial received and the nature of the community in which they lived. Before trial began, in ruling on a defense motion to seal the grand jury transcripts, the court expressed "some real doubts" about whether appellant could get a fair trial in light of the pretrial publicity the case had garnered. (2 RT 75.) The court explained that death penalty cases were rare in the small, rural county of Imperial. (2 RT 75-77.) As a result, it stated, "we are the kind of community where we tend to consider this kind of news as somewhat sensational. Perhaps, up in the big cities it happens so often . . . that it just becomes somewhat commonplace." (2 RT 77.) The judge added that the serious nature of the instant charges would "stir[] the community interest and tend[] to inflame the passions of many people . . ." thereby infringing upon appellant's right to a fair trial. (2 RT 77-78.)

The record shows that the media attention continued during trial, and it at times included information not presented to the jury. (See Arg. III.A.1. & 3., *ante*.) Moreover, it appears that neither the media nor community interest in the case had abated by the time the penalty deliberations were suspended. As set forth above, after the start of deliberations Juror No. 4 told the court that a co-worker had discussed a newspaper article reporting that appellant had been in trouble with a correctional officer. (See subsec.

A., *ante*; 86 RT 10197-10203.) Juror No. 4 admitted that "everybody" was talking about appellant's case and that she had been hearing comments about it from others throughout the trial, including inquiries as to whether the jury had "hung" him yet. (86 RT 10201.) Two days earlier, the prosecutor informed the court that a newspaper article concerning inmates and violence had been published, which discussed appellant's alleged assault of a correctional officer on February 8. (84 RT 9997; see also, 79 RT 9437-9438.)[235]

The circumstances under which the penalty verdict was returned also support a conclusion that the separation was prejudicial. On the morning of Friday February 27, the jury asked for a readback of appellant's statement. Although the jury continued deliberations that afternoon and knew that an extended break was looming, it did not return a verdict before separating. This suggests that a penalty decision was not imminent. Yet, when the jurors reconvened on March 10, they took no more than half an hour to reach a unanimous verdict, although they had not communicated with each other for the past eleven days. (See subsec. A., *ante*.) These facts strongly indicate that something occurred during the break which caused one or more jurors to change his or her position on penalty.

In sum, the lengthy and unnecessary halt to penalty deliberations deprived appellant of his federal constitutional rights to due process, a fair trial by an impartial jury, and to a reliable sentencing determination.

235

The prosecutor did not present evidence regarding this incident in the penalty phase. (81 RT 9610, 9616-9619.) The article he referred to was not made part of the record. (See 9 ACT 2698.) Thus it is not clear whether the article Juror No. 4's co-worker referred to was the same or different as the one noted by the prosecutor.

Moreover, to the extent that the trial court's error is only a state law issue, it deprived appellant of a state-created liberty interest and thereby violated his federal due process rights. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

D. This Issue Is Preserved for Appeal.

In *People v. Santamaria*, *supra*, the appellate court rejected the People's forfeiture argument, explaining that the trial "court's abuse of discretion here was of such magnitude that whether or not appellant objected is irrelevant." (229 Cal.App.3d at p. 279, fn. 7.) This language by Division Three of the First District Court of Appeal in *Santamaria* was rejected by another division of the First District in *People v. Johnson* (1993) 19 Cal.App.4th 778, 791-793.)[236] However, in *People v. Ochoa* (2001) 26 Cal.4th 398, this Court chose not to repudiate this portion of *Santamaria* but rather to distinguish it on the facts. It stated: "The *Santamaria* opinion . . . did not purport to abrogate the duty to object generally. On its facts, it found the court's abuse was so great as to warrant appellate relief notwithstanding the absence of objection." (26 Cal.4th at p. 440-441.)

In *Ochoa*, there was a one-week break which did not occur during deliberations but rather in the middle of the trial and was arranged in advance due to the prosecutor's vacation plans. (*Id.* at p. 440.) Comparing what had occurred there with the circumstances of *Santamaria*, this Court in *Ochoa* stated: "The facts in *Santamaria* differ markedly from those here, and it therefore does not govern our analysis." (26 Cal.4th at p. 440-441.)

236

Yet another division of the First District distinguished *Johnson's* repudiation of *Santamaria*, in an unpublished opinion. (*People v. Alexander* (2010) 2010 WL 4461784.) Although *Alexander* carries no precedential value, it tells us that the First District Court of Appeals views *Santamaria* as good law.

This Court's decision to distinguish rather than disavow *Santamaria* indicates that the latter case continues to stand for the proposition that an appellate court may address a claim of improper jury separation, despite the lack of an objection below, when faced with sufficiently egregious circumstances. This conclusion comports with cases which hold that appellate courts generally have the discretion to consider claims of significant constitutional error, even in the absence of a specific, timely objection below. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277.) In appellant's case, as established in subsection C., *ante*, the circumstances of his case were sufficiently egregious that no objection was necessary to preserve the issue for appeal.

Moreover, the record shows a lack of acquiescence by appellant to the proposed eleven-day suspension in penalty deliberations. As set forth above in subsection A., appellant's attorney agreed to the break, after the trial court indicated its willingness to allow it. Appellant, however, voiced concern about the proposed procedure and suggested that the jury be encouraged to reach a decision before then. (See subsec. A., *ante*, citing 85 RT 10183.) Before he could finish his remarks, his counsel disagreed with this suggestion and the court assured appellant that he would be better off if the deliberations took longer. (85 RT 10183.) Significantly, this Court has found a jury separation issue to be forfeited where the defendant personally and expressly agreed to a suspension in proceedings. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1162 ["*Critically, defendant and his counsel expressly agreed to the arrangement.*"], italics in original.) Here, appellant himself did not expressly agree to the suspension of deliberations. Under these circumstances, it would be unfair to penalize appellant by refusing to review this claim, when he personally voiced doubt about the

procedure but was essentially overruled by his counsel and dissuaded by the trial court from expressly objecting.

In determining whether a defendant's ability to challenge the suspension of proceedings has been forfeited, this Court has also looked to whether he was offered but rejected an alternative to the delay. For example, in *People v. Gutierrez*, *supra*, defendant was advised in advance that the trial court would be unavailable during a particular week and was offered a substitute judge. The defendant and his counsel expressly declined that option. (28 Cal.4th at p. 1161-1162.) In appellant's case, the trial court failed to ask him if he would have preferred to have Juror No. 1 replaced by an alternate juror, either at the start of deliberations or at the time she left for her vacation, had the jury not reached a penalty verdict by that point. Instead, it appears that his attorney made an instantaneous decision to agree with the possible separation without any consultation with his client, even though appellant then expressed some misgiving about it. In light of these facts, appellant respectfully asserts that he has not forfeited this claim and that his penalty verdict should be reversed.

//

//

XXI.
APPELLANT'S CONVICTIONS AND DEATH SENTENCE MUST BE REVERSED BECAUSE THE ERRORS AT HIS TRIAL WERE CUMULATIVELY PREJUDICIAL

If this Court does not agree that any of the errors set forth in this brief require reversal of either the convictions or sentence in this case, then it must consider the cumulative impact of such errors.

Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may so infect the trial with unfairness as to violate due process and require reversal. (See, e.g., *Taylor v. Kentucky* (1978) 436 U.S. 478, 487 and fn. 15; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643; *Parle v. Runnells* (9th Cir. 2007) 505 F.3d 922, 927-928 [principle that cumulative errors may violate due process is clearly established by Supreme Court precedent].)

As this Court recognized in *People v. Hill*, *supra*, "the aggregate prejudicial effect" of a series of errors "may be greater than the sum of the prejudice of each error standing alone." (17 Cal.4th at p. 845.) This is because multiple errors, when considered together, may create "a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual error." (*Id.* at p. 847.)

The errors in appellant's guilt phase were numerous and prejudicial. The prejudice began accumulating well before appellant's trial even began, with the more-than-two-year delay in indicting him, which left him without counsel or any investigative resources. (Arg. XI., *ante*.) During jury selection, he was deprived of an impartial jury by virtue of the trial court's erroneous refusal to excuse all employees of the Department of Corrections, the agency responsible for investigating Richmond's death and initiating

appellant's prosecution. (Arg. I., see also, Arg. II., *ante*.) The evidentiary portion of the guilt phase was rife with error. Particularly devastating was the trial court's misapplication of Evidence Code section 1103, subdivision (b), which permitted to prosecutor to elicit numerous and highly prejudicial admissions from appellant that he had repeatedly possessed weapons in prison and had used them to commit multiple assaults. (Arg. IV., see also, Arg. V., *ante*.) A theme that ran throughout the guilt phase, indeed the entire trial, was the prosecutor's provocative, improper behavior. (Args. III. & IX., *ante*.) The prosecutor also flouted the rules of procedure to gain tactical advantage over appellant by unfairly withholding extremely prejudicial testimony from three inmate informants until rebuttal. (Arg. VII., *ante*.) The trial court erroneously permitted these highly incredible witnesses to give very damaging testimony over many well-founded defense objections. (Arg. VII., *ante*.) Finally, the guilt phase instructions as a whole were virtually incomprehensible and full of errors. (Arg. X., *ante*.)

The death judgment must also be evaluated in light of the cumulative error. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1243-1244.) That evaluation includes errors that occurred at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644.) This is so because under California law, the penalty determination takes into account evidence presented in the guilt phase, including the "circumstances of the crime" and "the existence of any special circumstances found to be true." (Pen. Code, § 190.3, subd. (a).) Moreover, evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (See *Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 301-302; *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137.) As a result of the errors in both phases of appellant's trial, the sentence of death returned in

this case cannot be accepted as reliable. (See, e.g., *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 584-587.)

In appellant's penalty phase, the jury was permitted to consider multiple unconstitutional special circumstances. (Args. XII-XIV., *ante*.) The penalty errors resulted in the admission of inflammatory non-statutory aggravating evidence (Arg. XV., XVII., *ante*) as well as aggravation which was unreliable and unfairly elicited (Args. XVI., XVIII., *ante*). Again, pervasive prosecutorial misconduct affected the trial. (Arg. XIX., *ante*.) And finally, the trial court's erroneous decision to allow the jury to separate during the delicate and critical stage of penalty deliberations renders the resulting death sentence unreliable. (Arg. XX., *ante*.)

In sum, appellant's convictions and death sentence must be reversed.

//

//

XXII.
CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE U.S. CONSTITUTION

Many features of California's capital-sentencing scheme violate the United States Constitution. This Court has consistently rejected cogent 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 death penalty scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than 1) identify the claim in the context of the facts, 2) note that we have previously rejected the same or a similar claim in a prior decision, and 3) ask us to reconsider that decision. (37 Cal.4th 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 urge their reconsideration and to preserve these claims for federal review.

A. Section 190.2 Is Impermissibly Broad.

To meet constitutional muster, a death penalty law much provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1023, citing *Furman v. Georgia*, *supra*, 408 U.S. at p. 313 (conc. opn. of White, J).) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens*, *supra*, 462 U.S. at p. 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 contained 21 special

circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court has routinely rejected challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down section 190.2 because it guarantees 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 Section 190.3's Factor (A) Violated Appellant's Constitutional Rights.

Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." Prosecutors throughout the state have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide, including facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

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 spacial or temporal connection to the crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." Thus, California's

capital sentencing scheme violates the Fifth, Sixth, Eighth and Fourteenth Amendments because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant 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 that this Court has repeatedly rejected this claim. (See, e.g., *People v. Kennedy* (2005) 36 Cal.4th 595, 641.) He urges the Court to reconsider this holding.

C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof.

1. Appellant's Death Sentence Is Unconstitutional Because It Is Not Premised on Findings Made Beyond a Reasonable Doubt.

California law does not require that a reasonable doubt standard be used during any part of the penalty phase except as to proof of prior criminality. (*People v. Anderson* (2001) 25 Cal.4th 543, 590.) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (47 CT 13150 [CALJIC 8.88].)

Blakely v. Washington (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478, require that any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this

case, appellant's jury had to first make several factual findings: 1) that aggravating factors were present; 2) that the aggravating factors outweighed the mitigating factors; and 3) that the aggravating factors were so substantial as to make death an appropriate punishment. (47 CT 13150.) Because these additional findings were required before the jury could impose the death sentence, *Blakely*, *Ring* and *Apprendi* require that each of these findings be made beyond a reasonable doubt. The trial court failed to so instruct the jury 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; 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. 140) and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has rejected the argument that *Apprendi*, *Blakely* and *Ring* impose a reasonable doubt standard on California's penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges this Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring* and *Blakely*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously

rejected the claim that either the Fourteenth Amendment Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36 Cal.4th at p. 753.) Appellant requests that the Court reconsider this holding.

2. The Jury Should Have Been Instructed That The State Bore the Burden of Proof.

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and therefore appellant is constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Accordingly, appellant's jury should have been instructed that the state had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC 8.85 and 8.88, the instructions given here, failed to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth and Fourteenth Amendments. (See 47 CT 13143-13145, 13150.) This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the task is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court also has 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 thus urges the Court to reconsider its decisions in *Lenart* and *Arias*.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings.

a. Aggravating Factors.

It violates that Sixth, Eighth and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223; 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 290, 305.) Nonetheless, this Court has "held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." *(People v. Taylor* (1990) 52 Cal.3d 719, 749.) 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.) In fact, in appellant's case the prosecutor emphasized that unanimity was not required. (84 RT 10057, 10058.)

Appellant asserts that *Prieto* was incorrectly decided, and that the application of *Ring's* 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 that the jury unanimously find the aggravating factors true also violates the Equal Protection Clause of the federal constitution. In California, when a criminal defendant has been charged

with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded to 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 a capital defendant violates the equal protection clause (see *Myers v. Ylst* (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), would by its inequity deprive a defendant of equal protection and by its irrationality violate both due process and the prohibition against cruel and unusual punishment, as well as the Sixth Amendment's guarantee of a trial by jury. Appellant therefore asks the Court to reconsider *Taylor* and *Prieto*.

b. Unadjudicated Criminal Activity.

Appellant's jury was not instructed that alleged acts of prior criminality had to be found true by a unanimous jury, nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (47 CT 13149 [CALJIC 8.87].) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth and

Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi*, *supra*, 486 U.S. 578.) This Court has routinely rejected this claim. (*People v. Anderson*, *supra*, 25 Cal.4th at pp. 584-585.) Here, the prosecutor presented extensive evidence regarding factor (b) criminal activity allegedly committed by appellant. (See Smt. of Facts, C.1.a. & c., *ante*.) He heavily relied on this evidence in urging the jury to return a sentence of death. (84 RT 10028-10029, 10036-10037, 10057-10090.)

The United States Supreme Court's decisions in *Cunningham v. California* (2007) 549 U.S. 270; *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) Appellant asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard.

The question of whether to sentence appellant to death hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (47 CT 13150; CALJIC

8.88.) The phrase "so substantial" is an impermissibly broad term 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 instructions violates 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 that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Appellant asks the Court to reconsider that opinion.

5. The Instructions Failed to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment.

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 8.88 does 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. These determinations are not the same.

To satisfy the Eighth Amendment's "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 violate the Eighth and Fourteenth Amendments to the federal constitution. Appellant requested a special

instruction which would have told the jury they must decide whether death was the appropriate penalty but the trial rejected it as duplicative. (46 CT 12979 [19.08]; 80 RT 9575-9576.)

This Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges it to reconsider that ruling.

6. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole.

Section 190.3 directs a jury to impose a sentence of life imprisonment without parole when 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 under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet CALJIC 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the return of a death verdict. (47 CT 13150.) By failing to conform to the mandate of section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014.) It also conflicts with due process principles in that the nonreciprocity involved in explaining how

a death verdict may be warranted, but failing to explain when a life-without-parole verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon*, *supra*, 412 U.S. at pp. 473-474.)

7. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof as to Mitigating Circumstances.

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 293-296; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California*, *supra*, 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that appellant bore some particular burden in proving facts in mitigation. Appellant requested that the court instruct the jury that a mitigating factor does not have to be proved beyond a reasonable doubt (46 CT 12996 [19.25]) but the instruction was not given.

The failure to provide the jury with appropriate guidance was prejudicial, and requires reversal of appellant's death sentence, since he was deprived of his rights to due process, equal protection and a reliable capital sentencing determination.

8. The Penalty Jury Should Be Instructed on the Presumption of Life.

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.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1993) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process, to be free from cruel and unusual punishment, to have his sentence determined in a reliable manner, and his right to equal protection of the laws. (U.S. Const., 8th & 14th Amends.)

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. (13 Cal.4th at p. 190.) However, as the other sections of this brief demonstrate, California's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing to Require That the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review.

Consistent with state law, appellant's jury was not required to make

any written findings during the penalty phase of trial. (See *People v. Fauber* (1992) 2 Cal.4th 792, 859.) 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 that the death penalty was not capriciously imposed. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the Court to reconsider its decisions on the necessity of written findings.

E. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights.

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (47 CT 13143 [CALJIC 8.85 (d) & (g)]) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.)

Appellant is aware that this Court has rejected this argument (*People v. Avila* (2006) 38 Cal.4th 491, 614) but urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors.

Many of the sentencing factors set forth in CALJIC 8.85 were inapplicable to appellant's case. Appellant requested that inapplicable factors be omitted. (80 RT 9560-9563.) The trial court's failure to omit inapplicable factors likely confused the jurors and prevented them from making a reliable determination of the appropriate penalty, in violation of

appellant's constitutional rights.

Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (47 CT 13143-13144.) The 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 8.85 – factors (d), (e), (f), (g), (h) and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289.)

Although appellant's jury was instructed that "The absence of mitigation does not amount to the presence of aggravation" (47 CT 13145), the jury was not instructed as to which factors could only be mitigating. Consequently, the jury was invited to aggravate appellant's sentence based on nonexistent or irrational aggravating factors 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.) Appellant asks the Court to reconsider its holding that the trial court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

F. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary and Disproportionate Imposition of the Death Penalty.

The capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the Court to reconsider its failure to require inter-case proportionality review in capital cases.

G. California's Capital Sentencing Scheme Violates the Equal Protection Clause.

The California death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with noncapital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital and noncapital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a noncapital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, and aggravating and mitigating factors must be established by a preponderance of the evidence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325.) In 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 that the Court has

previously rejected these equal protection arguments. (*People v. Manriquez* (2005) 37 Cal.4th 547, 590) but asks the Court to reconsider.

H. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms.

Appellant asserts that the United States is unique, given its status in the international community and as an industrialized nation, in that it still uses the arbitrary and capricious sentence of death as a means to punish its citizens. This Court has rejected the claim that the use of the death penalty at all, or alternatively that the regular use of capital punishment, violates international law, the Eighth and Fourteenth Amendments or "evolving standards of decency." (*Trop v. Dulles*, *supra*, 356 U.S. at p. 101; *People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127.)

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 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*, *supra*, 543 U.S. at p. 554), appellant urges this Court to reconsider its previous decisions.

//

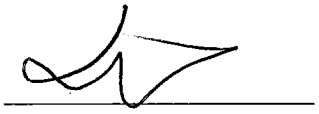
//

CONCLUSION

For the reasons set forth above, appellant respectfully requests this Court to reverse his convictions and sentence.

Dated: April 18, 2013

Respectfully submitted,



LISA ROMO
Attorney for Appellant

Certificate of Word Count

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that Appellant's Opening Brief in *People v. Barrett.* contains 150,082 words, according to the computer program I used to prepare the brief.

LISA ROMO
Attorney for Appellant

DECLARATION OF SERVICE

Re: ***People v. Joseph Anthony Barrett***, CSC No. S124131; Imperial County Superior Court No. CF-5733

I, LISA M. ROMO, declare that I am over 18 years of age, and not a party to the within cause; my business address is 2342 Shattuck Avenue, PMB 112, Berkeley, California 94704. I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope addressed (respectively) as follows:

Imperial County Superior Court
939 West Main Street
El Centro, CA 92243

California Appellate Project
101 Second Street, 6th Floor
San Francisco, CA 94105

Office of the Attorney General
110 W. A Street, Suite 1100
San Diego, CA 92101

Eric Beaudikofer, Esq.
414 Vine Street
El Centro, CA 92243

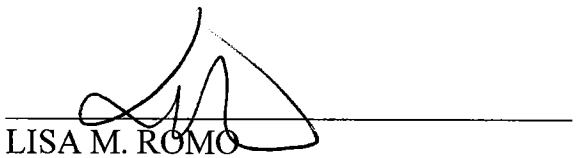
Imperial County District Attorney's Office
Courthouse, 2nd Floor
939 West Main Street
El Centro, CA 92243

Edward Sada, Esq.
836 State Street
El Centro, CA 92243

Each said envelope was then, on April 18, 2013, sealed and deposited in the United States Mail at Berkeley, California, Alameda County, the county in which I am employed, with the postage thereon fully prepaid.

Appellant Joseph Barrett will be personally served on or before May 17, 2013 pursuant to California Supreme Court Policy 4.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 18, 2013, at Berkeley, California.



LISA M. ROMO