IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. **RICKY R. SANDERS**, Defendant and Appellant.	No. ____________ Court of Appeal No. A142875 Superior Court No. SC077150

After a Decision by the Court of Appeal,
First Appellate District, Division Five
affirming a judgment of the Superior Court
of the State of California for the County of San Mateo,
The Honorable Clifford V. Cretan, presiding

APPELLANT'S PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

APPELLANT'S PETITION FOR REVIEW. 1

TABLE OF CONTENTS. 2

TABLE OF AUTHORITIES. 5

PETITION.. 10

STATEMENT OF THE CASE. 10

NECESSITY FOR REVIEW. 20

ISSUES PRESENTED. 22

ARGUMENT. 23

I. THE COURT OF APPEAL DEPRIVED APPELLANT OF DUE PROCESS BY FAILING TO CONSIDER THE ENTIRE RECORD... 23

II. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL WHEN THE PROSECUTOR REPEATEDLY COACHED EYEWITNESSES ON THE FEATURES OF A REVOLVER TO ELICIT TESTIMONY THE "SIGNATURE" REVOLVER WAS USED IN EACH ROBBERY.. 29

A. The Prosecutor's Descriptions Of A Revolver Were Misconduct.. 29

B. The Misconduct Affected The Verdict.. 33

III. APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT TO THE PROSECUTOR'S MISCONDUCT... 38

A. Counsel's Decision To Forgo Objection To The Prosecutor's Misconduct Was Objectively Unreasonable.. 39

B. Counsel's Ineffective Representation Deprived Appellant Of A Core Right Protected By The Sixth Amendment.. 41

C. *Strickland*'s Prejudice Prong And Prejudice Under The California Constitution. 45

IV. APPELLANT'S 834-YEARS-TO-LIFE PRISON TERM IS CRUEL AND UNUSUAL UNDER THE EIGHTH AMENDMENT AS A SENTENCE THAT MAKES NO MEASURABLE CONTRIBUTION TO ACCEPTED GOALS OF PUNISHMENT.. 46

A. The Eighth Amendment Prohibits Sentences That Serve No Legitimate Penal Purpose.. 46

B. Equating Appellant's Sentence To An LWOP Does Not Solve The Problem... 49

C. Recent Opinions Demand Rationality In Punishment.. 52

D. Appellant's Irrational Sentence Dehumanizes The Defendant As Well As De-legitimizing The Law.. 53

V. APPELLANT WAS DEPRIVED OF A FAIR TRIAL DUE TO THE CUMULATIVE IMPACT OF THE FOREGOING ERRORS.. 55

CONCLUSION. 56

CERTIFICATION OF WORD COUNT. 56

COURT OF APPEAL'S OPINION. 57

ORDER DENYING REHEARING. 82

PROOF OF SERVICE. 85

TABLE OF AUTHORITIES

Page(s)

FEDERAL

United States Constitution

Amendment 6. . . . . 30, 38, 42

Amendment 8. 46

Amendment 14. . . . . 28, 31, 38, 55

United States Supreme Court

Atkins v. Virginia (2002) 536 U.S. 304. 52

Berger v. United States (1935) 295 U.S. 78. 31

Carella v. California (1989) 491 U.S. 263.. 33

Coker v. Georgia (1977) 433 U.S. 584.. 46

Crawford v. Washington (2004) 541 U.S. 36. . . . . 43, 44

Cuyler v. Sullivan (1980) 446 U.S. 335. 42

Darden v. Wainwright (1986) 477 U.S. 168.. 31

Donnelly v. DeChristoforo (1974) 416 U.S. 637.. 55

Evitts v. Lucey (1985) 469 U.S. 387. 28

Gideon v. Wainwright (1963) 372 U.S. 335. 42

Glasser v. United States (1942) 315 U.S. 60.. . . . . 24, 41, 42

Graham v. Florida (2010) 560 U.S. 48. 53

Griffin v. Illinois (1956) 351 U.S. 12. 28

Jackson v. Virginia (1979) 443 U.S. 307. 24

Lewis v. Jeffers (1990) 497 U.S. 764. 55

Miller v. Alabama (2012) ____ U.S. ____, 183 L.Ed.2d 407, 132 S.Ct. 2455. 52

Ohio v. Roberts (1980) 448 U.S. 56. 43

Pointer v. Texas (1965) 380 U.S. 400. 42

Pulley v. Harris (1984) 465 U.S. 37. 55

Strickland v. Washington (1984) 466 U.S. 668. . . . . 38, 39, 43-45

Sullivan v. Louisiana (1993) 508 U.S. 275. 33

Trop v. Dulles (1958) 356 U.S. 86. 52

United States v. Gonzalez-Lopez (2006) 548 U.S. 140. 44

United States Court of Appeals

Deck v. Jenkins (9th Cir., 2014) 768 F.3d 1015. 34

Parle v. Runnels (9th Cir. 2004) 387 F.3d 1030. 55

STATE

California Constitution

Article I, section 15. 38

Article I, section 28(a). 47

Article VI, section 13. 45

California statutes and rules

Penal Code section 1170. 47

Rules of Court, rule 8.500(b). 21

Rules of Court, rule 8.500(c)(2). 28

Rules of Court, rule 8.504(d). 56

California Supreme Court

College Hospital, Inc. v. Superior Court (1994) 8 Cal.4th 704. . . . . . 39, 45

In re Cordero (1988) 46 Cal.3d 161. 39

LeMons v. Regents of University of California (1978) 21 Cal.3d 869. . . . 38

People v. Caballero (2012) 55 Cal.4th 262. 52

People v. Cruz (1961) 61 Cal.2d 861. . . . . 38, 46

People v. Deloza (1998) 18 Cal.4th 585. . . . . 47, 53

People v. Hill (1998) 17 Cal.4th 800. 30-32, 41, 56

People v. Johnson (1980) 26 Cal.3d 557. 24

People v. Ledesma (1987) 43 Cal.3d 171. 38

People v. Matlock (1959) 51 Cal.2d 682. 26

People v. Medina (1995) 11 Cal.4th 694. 29

People v. Morales (2001) 25 Cal.4th 34. 31

People v. Nation (1980) 26 Cal.3d 169. 40

People v. Ochoa (2001) 26 Cal.4th 398. 47

People v. Powell (1967) 67 Cal.2d 32. 38

People v. Visciotti (1992) 2 Cal.4th 1. 29

People v. Warner (1970) 20 Cal.3d 678. 47

People v. Woodard (1979) 23 Cal.3d 329. . . . . 38, 46

California Court of Appeal

Dumas v. Cooney (1991) 235 Cal.App.3d 1593. 38

Lewis v. County of Sacramento (2001) 93 Cal.App.4th 107. 24

Marich v. MGM/UA Telecommunications, Inc. (2003) 113 Cal.App.4th 415. 25

Masterson v. Ward (1958) 157 Cal.App.2d 142. 25

People v. Byrd (2001) 89 Cal.App.4th 1373. 49, 51

People v. Corona (1978) 80 Cal.App.3d 684. 40

People v. Daggett (1990) 225 Cal.App.3d 751. 31

People v. Foster (1992) 6 Cal.App.4th 1. 26

People v. Gaines (1997) 54 Cal.App.4th 821.. 30

People v. Jandres (2014) 226 Cal.App.4th 340. 34

People v. Jones (2010) 186 Cal.App.4th 216. 39

People v. Morgan (1973) 36 Cal.App.3d 444. 48

People v. Woods (2006) 146 Cal.App.4th 106. 30

OTHER AUTHORITIES

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Buskey, *If the Convictions Don't Fit, You Must Acquit: Examining the Constitutional Limitations On the State's Pursuit of Inconsistent Criminal Prosecutions* (2012) 36 N.Y.U. Rev. L. & Soc. Change 311. 54

Mosk, *Nothing Succeeds Like Excess* (1993) 26 Loy. L.A. L.Rev. 981. . 49

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. RICKY R. SANDERS, Defendant and Appellant.	No. ____________

PETITION

Ricky Sanders petitions this court for review of the Court of Appeal's September 29, 2016 opinion affirming his judgment as modified and the court's October 19, 2016 denial of rehearing.

STATEMENT OF THE CASE

Ricky Sanders was tried and convicted in San Mateo County Superior Court case number SC077150 for 44 felony counts, including twenty-one counts of robbery and/or attempted robbery, one count each of mayhem and making a criminal threat, five counts of assault with a firearm, seven counts of felony false imprisonment and nine counts of being a convicted felon in possession of a firearm. Multiple gun use enhancement allegations and one great bodily

injury enhancement allegation were also found true. Appellant was sentenced to state prison for 834 years to life on August 8, 2014.

The sole issue at trial was whether appellant was the person who perpetrated a string of eleven armed robberies in San Mateo County dubbed in the press the "chrome revolver bandit" robberies. As the name suggests, it was the prosecutor's theory that along with two uncharged robberies in San Jose and one in San Francisco admitted under subdivision (b) of Evidence Code section 1101, one person, i.e., appellant, robbed or attempted to rob thirteen different chain stores between February and October 2011 using the same large caliber, long-barreled, "Dirty Harry"-style revolver.

The Court of Appeal struck a number of counts of being a felon in possession of a firearm and one great bodily injury enhancement and remanded the matter for resentencing. The court's opinion omits many key conflicts in the prosecutor's eyewitnesses' testimony describing the perpetrators, and the court declined to modify its opinion to included them as requested in Appellant's Petition for Rehearing. In addition to the facts contained

in the Court of Appeal's opinion, the trial evidence established the following:

February 21, 2011 Daly City Party City (Counts 1-3)

When Romeline Encarnacion, the prosecutor's first eyewitness, described the robber to police, she said he was between 5'5" and 5'8" tall. (RT VI, p. 262.) At trial, she and her manager, Kimberly Byrne testified he was closer to 5'8" with a "medium" build. (RT VI, pp. 250-251, 256, 262, 291.) Encarnacion described the robber's skin as darker than her own Filipino complexion. (RT VI, pp. 257, 263-264.) Byrne testified he had "medium dark" skin. (RT VI, p. 290.)

The robber pushed a trash can toward Byrne as she removed money from the safe. (RT VI, p. 294.) Fingerprints found on the trash can and the trash bag it contained did not match appellant's. (RT XVIII, p. 1969.)

Encarnacion did not identify appellant either in court or in a line up. Byrne selected him in a videotape of a physical lineup after ruling out four subjects and choosing appellant as the "most similar"

of the remaining two. She could not identify appellant in court. (RT VI, pp. 327-329, 356-357.)

April 1, 2011 San Francisco Lane Bryant (uncharged)

Melody Williams-Daniels described the robber as having a medium brown complexion, about 5'9" and of medium build. (RT VII, p. 379.) Her manager, Janell Avila described him to be of similar height, but with skin "lighter than caramel." (RT VII, pp. 424-425.) Avila was never asked to identify the robber in a photographic lineup. (RT VII, p. 443.)

April 10, 2011 Colma BevMo (Counts 4-6)

Nicholas Ruperto described the robber as a heavy-set man at least 6'2" tall with medium slightly "yellow"-brown skin. (RT VII, pp. 480-482.) Ruperto could not identify appellant as having similar skin tone. (RT VII, pp. 481-482.) Co-worker Aaron McNab described the robber as stocky, about 5'10" tall with medium brown skin. (RT VII, pp. 497-499, 515.)

Neither witness identified appellant as the robber. McNab picked two different subjects in two different photographic lineups

(RT VII, pp. 507-511, 518-526), and of the two, he was most certain that subject Jerome Malone was the robber. (RT VII, pp. 509-510, 532; RT XVI, p. 1674.) Surveillance video showed Malone entering the store about three hours prior to the robbery. (RT XVI, p. 1673.)

April 17, 2011 Colma Petco (Counts 7-9)

Thomas Oetzel and co-worker Manuel Ocon described the robber as about 5'10" and 200 to 220 pounds. (RT VIII, pp. 543-544, 555, 567; RT IX, pp. 579, 583.) Oetzel testified his skin was "light brown," and he identified appellant in a photographic lineup and in court. (RT VIII, pp. 544, 554-555, 568.) Ocon testified the robber's skin was "medium" brown, "darker than" Ocon's own. (RT IX, pp. 582-583.) Though Oetzel opined appellant was the person whose photograph he selected from a lineup (RT VIII, pp. 554-555, 568), no officer authenticated the photograph as being of appellant or testified appellant's photograph was included in the lineup Oetzel viewed.

May 1, 2001 Redwood City BevMo (Counts 10, 11 and 18)

Employee Jonathan Jacobsen described the robber to

responding officers as standing between 5'2" and 5'6" tall. (RT IX, pp. 602-603.) At trial however, he testified the man may have been as tall as 5'8" and weighed about 220 pounds (RT IX, pp. 600-601), while fellow employee Stuart Smith testified the man was taller than 5'10" and weighed only 190 pounds. (RT IX, p. 616.)

Jacobsen described the man's skin tone as "light medium to dark . . . brown." (RT IX, pp. 614-615.) Smith described the man's skin tone as that of a "light complected Black man." (RT IX, p. 616.)

Jacobsen and Smith each very confidently selected an image of Malone from a lineup. (RT IX, pp. 605, 607, 626; RT XV, pp. 1453-1455; RT XVI, pp. 1672-1674.) Smith viewed another lineup in November and picked another suspect, but at trial he stood by his identification of Malone. (RT XV, pp. 1456-1457.)

May 1 Menlo Park BevMo (Counts 12, 13 and 18)

Witnesses testified the robber was 5'10" to 5'11" with a "medium" build. (RT IX, pp. 644-645, 676.) Employee Angelica Rodriguez described him as having skin darker than her own. (RT IX, pp. 645-646.) The store manager, James Higgins described the

robber as a “light-skinned . . . African-American.” (RT IX, pp. 676.)

Neither witness identified appellant.

May 1, 2011 Colma GameStop (Counts 14-18)

Andrew Ramos described the robber as “large” or “stocky,” standing about 5'9" tall, with “darker than dark brown” skin. (RT X, pp. 793-795, 813-814.) A customer in the store, Aimee Zapolya only looked at the robber briefly. She described him to police as 6' tall and 240 pounds. At trial, she testified he was only 5'5". (RT X, pp. 823-824.)

Neither witness identified appellant.

May 8, 2011 Pacifica Ross (Counts 19-23)

Nikki Gal and her co-worker Ruby Speros each viewed two photographic lineups and picked a different subject, and neither identified appellant. (RT X, pp. 742-743, 772-773, 780-781.)

According to ATT&T phone records, neither of appellant’s phones called the Ross store on May 5, on which date employee Nancy Fernandez testified she received a telephone call from someone who sounded like an “African-American” man asking her

what time she got off work. (RT X, pp. 786-788, 790.)

May 22, 2011 San Bruno Petco (Counts 24-26)

Petco employee Johnny Yap described the man who tried to rob his store as testified that a "stocky" and "light"-complected "African-American" man. (RT X, pp. 848-852.) Yap told police the man was between 5'8" and 5'11", weighing between 225 and 250 pounds. (RT X, p. 867.) He testified the man was about 5'8" tall. (RT X, p. 848.)

Jessica Russell saw a 5'10" to 5'11", "dark"-complected "African-American" man, between 225 and 250 pounds. (RT X, pp. 873-875, 878-879.) Felipe Flores, a security guard at the mall, saw an "African-American" man, between 5'9" and 6' tall and about 230 pounds. (RT X, pp. 834-840.) Flores was unable to select anyone from a photographic lineup. (RT XV, pp. 1446, 1451-1452.)

None of the Petco witnesses identified appellant.

June 12, 2011 San Jose BevMo (uncharged)

Adam Bishop testified the robber was a "short and stocky . . . African-American," 5'8" or 5'9" tall with "dark" skin. (RT XI, pp.

950-951.) Though co-worker Samuel Gulley agreed on the robber's height and build, he described the man as "light"-complected. (RT XI, pp. 969-971.)

Neither witness identified appellant.

August 7, 2011 San Mateo PetSmart (Counts 27-30)

Stephanie Chang, a PetSmart employee, described the man who tried to rob her store as a "dark"-complected "African-American" man, 5'10" and "fit" at about 145 pounds. (RT XII, pp. 1011-1012.) Chang later selected a suspect from a photographic a lineup because she thought he "looked like" but was not actually the robber. (RT XII, pp. 1022-1023, 1037-1038.) In court, she acknowledged that an exhibit showed an image of appellant, but she did not recall if that was the image she chose in the lineup. (RT XII, pp. 1037-1040.)

Store manager Daniel Hernandez did not identify appellant as the robber until November, after the October 8 shooting (see below). (RT XII, pp. 1109, 1123-1124; Peo. Ex. 41; Def. Ex. A.) However, neither Detective Riccardi nor Detective Williams, who showed

Hernandez the lineup in November, testified the photograph Hernandez selected was appellant's.

August 12, 2011 San Carlos GameStop (Counts 31-35)

Employee James Thivierge and his manager Christopher Peralta testified that they were confronted by a "medium dark brown" skinned man, about 5'8" or 5'9" tall and stocky. (RT XI, pp. 887-889, 913-914, 917-919, 930-931.)

Neither witness identified appellant.

October 8, 2011 San Mateo PetSmart (Counts 36-44)

Employee Lili Fan described the robber as about 5'10", 200 pounds a fit with medium-brown skin. (RT XII, pp. 1071-1072.) She told police he might have been part "Hispanic" and part "African-American." (RT XII, p. 1076.)

Employee Linqing Ni described the man as 5'7" or 5'8", and fit with medium brown skin. (RT XII, pp. 1089-1090.)

At the scene, Hernandez, again on duty as manager, described the man who shot him as "the same guy" who attempted to rob the store in August. He described the man as a "Black" man 5'10" or

5'11" tall and 180 pounds. (RT XII, pp. 1049-1050, 1054, 1149.) Hernandez testified he selected appellant from a photographic lineup. (RT XII, pp. 1136-1137.) However, as previously stated, the officers who showed Hernandez the lineup did not testify the photograph Hernandez selected was appellant's.

Though one cell phone or another associated with appellant was in proximity to several of the incidents, evidence showed appellant's phone was at his house at the time of the October 8 shooting. (RT V, pp. 1557-1559.)

October 30, 2011 San Jose Petco (uncharged)

Assistant manager, Jamie Jacobo testified that a "husky" "light complected . . . African-American" man, between 5'8" and 5'11" tall and 180 pounds robbed the store. (RT XIV, pp. 1360, 1362-1363.) Employee Carolyn Le described him as between 5'6" and 5'10", stocky and light-skinned. (RT XIV, pp. 1388-1389.) Neither witness identified appellant.

NECESSITY FOR REVIEW

Review is necessary to secure uniformity of decision or to

settle an important question of law. (Rule 8.500(b)[1].)

The Court of Appeal's erroneously deferential regard for the evidentiary record demands review by this court. Identity was the sole point of contention in the trial and the focus of appellant's defense. Most of the prosecutor's eyewitnesses could not identify appellant, and they provided widely varying descriptions of the perpetrators. Because of this, the prosecutor relied on the narrative of the "chrome revolver bandit" begun in the press, tying the robberies together by the similarity of the eyewitnesses' description of the gun used. In order to convict appellant of those counts where identity was weakest, the prosecutor needed to convince the jury the same person did *all* of the robberies, charged and uncharged, because the same gun was used. On appeal, appellant challenged the prosecutor's tactic of coaching eyewitnesses from five of the eleven stores robbed on the features of the gun they claimed to have seen after those witnesses testified they did not know if it was a revolver. In this context, the variability in eyewitness descriptions

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[1]All references to "rules" are to the California Rules of Court.

and weaknesses in the prosecutor's identity case are of paramount importance to properly reviewing the trial for reversible error.

This case from the First Appellate District is just one example, illustrating the proverbial tip of the iceberg. Recent published and unpublished opinions demonstrate that appellate districts from across the state expressly adopt an inappropriately deferential view of the record as a general rule of appellate review. (See, e.g., *Goldstein v. Barak Construction* (2008) 164 Cal.App.4th 845, 849, fn.1 [Second Appellate District]; *People v. Bogle* (1995) 41 Cal.App.4th 770, 775 [Third Appellate District]; *Green v. County of Riverside* (2015) 238 Cal.App.4th 1363, 1366 [Fourth Appellate District]; *In re Ricardo V.* (Aug. 13, 2002, F038013) 2002 Cal.App.Unpub. LEXIS 7648, at *2 [Fifth Appellate District].)

ISSUES PRESENTED

1. Has the Court of Appeal deprived appellant of due process by failing to consider the entire record?

2. Was appellant deprived of due process and a fair trial when the prosecutor repeatedly coached eyewitnesses on the

features of a revolver to elicit testimony the "signature" revolver was used in each robbery?

3. Was appellant deprived of effective assistance of counsel when counsel failed to object to the prosecutor's misconduct?

4. Is appellant's 834-years-to-life prison term cruel and unusual under the Eighth Amendment as a sentence that makes no measurable contribution to accepted goals of punishment?

5. Was appellant deprived of a fair trial due to the cumulative impact of the foregoing errors?

ARGUMENT

I. THE COURT OF APPEAL DEPRIVED APPELLANT OF DUE PROCESS BY FAILING TO CONSIDER THE ENTIRE RECORD.

As set forth in the Statement of the Case above, the Court of Appeal's factual Background omits fact relevant to the single contested issue at trial and the issues raised on appeal. The Court of Appeal denied appellant's Petition for Rehearing brought in part on this ground.

The factual summary in the court's opinion should, like those

contained in the parties' briefs, "summariz[e] all of the operative facts that affect the resolution of issues tendered on appeal." (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 113.) Only by doing so can the issues raised on appeal, which depend on evaluation of evidence favorable to each side, be properly resolved.

Deferential regard for the evidence as supporting the verdict is only appropriate when undertaking review for substantial evidence of each element of the verdict. (*People v. Johnson* (1980) 26 Cal.3d 557, 576, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.)

> This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.

(*Jackson, supra*, 443 U.S., p. 319. See also, *Id.*, p. 319, fn. 12, citing, *Glasser v. United States* (1942) 315 U.S. 60, 80 ["The verdict of a jury must be sustained [against a challenge to the sufficiency of the

evidence] if there is substantial evidence, taking the view most favorable to the Government, to support it"].)

The deferential standard may be useful and rational in the context of review for substantial evidence. It is not and cannot be applicable to appellate review generally if appellate review of trial errors is to be anything but an empty formality. Other errors that affect the jury's consideration of the evidence and whether the prosecution has met its burden may require reversal of the judgment, regardless of whether substantial evidence supports the verdict. For example, jury instructions, evidentiary rulings and assistance of counsel all require review of the record without deference to the factfinder both to determine if error occurred and whether such error affected the jury's verdict. (*Masterson v. Ward* (1958) 157 Cal.App.2d 142, 147 ["In determining whether . . . instruction should have been given the evidence should be considered in the light most favorable to appellant"]; *Marich v. MGM/UA Telecommunications, Inc*. (2003) 113 Cal.App.4th 415, 427 ["the evidence must be viewed in a light most favorable to

appellants, not respondents, for purposes of gauging the effect of an erroneous instruction"]; *People v. Matlock* (1959) 51 Cal.2d 682, 688 ["For the purposes of this opinion, . . . in order that we can properly appraise the effect of the exclusion of admissible evidence favorable to appellant, it is necessary to set forth in some detail his version of the killing and the circumstances which led up to it"]; *People v. Foster* (1992) 6 Cal.App.4th 1, 3 ["Only by considering appellant's version of events in detail can we assess the effect of claimed trial counsel incompetence"].)

Appellant raised no claim of insufficient evidence to support the finding he committed any of the robberies. Rather, he challenged the impact of misconduct by the prosecutor and trial counsel's failure to object to it on the jury's consideration of the evidence of identity – the sole contest at trial. Therefore, as in *Matlock, supra*, "for purposes of this opinion, it is unnecessary to state the evidence in the light most favorable to respondent."

As will be discussed with respect to the errors raised on appeal, a more balanced and complete summary of the record facts

are necessary to evaluate appellant's claims of prosecutorial misconduct and ineffective assistance of counsel in failing to object to the misconduct. The prosecutor's theory was that appellant was guilty of each robbery because despite the disparity in identity evidence and eyewitness descriptions, the same person using the same gun perpetrated each robbery. Whether or not the prosecutor's guidance of several witnesses in their testimony about the description of the gun affected the jury's verdict must take into account all discrepancies in eyewitness description, prior identification and any forensic evidence of the identity of the robber. The Court of Appeal held the prosecutor's misconduct and the defense counsel's failure to object to it harmless without taking these record facts into account. (Opinion, pp. 18-19; Order Denying Rehearing.)

Further, it is judicial "policy" in California that the Court of Appeal opinion include a balanced factual summary. "[A]s a policy matter the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called

the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing." (Rule 8.500(c)(2).) Not only does this policy demonstrates the importance of the general principle articulated in *Lewis, supra*, to adequate appellate review, but as a practical matter, a balanced and complete factual summary has the immediate benefit of obviating the need for a rehearing petition solely for the purpose of exhaustion under Rule 8.500(c)(2).

Therefore, the opinion's one-sided factual summary reflecting consideration of the record in the light most favorable to the verdict, regardless of the issues raised, contravenes judicial policy and a general rule of appellate review. As it affirms the judgment against trial errors that do not depend on the sufficiency of the evidence, it deprives appellant of constitutionally adequate appellate review and correspondingly of due process as well. (U.S. Const., Amend. 14; *Evitts v. Lucey* (1985) 469 U.S. 387, 393; *Griffin v. Illinois* (1956) 351 U.S. 12, 20.)

II. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL WHEN THE PROSECUTOR REPEATEDLY COACHED EYEWITNESSES ON THE FEATURES OF A REVOLVER TO ELICIT TESTIMONY THE "SIGNATURE" REVOLVER WAS USED IN EACH ROBBERY.

A. The Prosecutor's Descriptions Of A Revolver Were Misconduct.

The prosecutor coached six eyewitnesses from five of the eleven charged robbery and attempted robbery incidents regarding the features of a revolver without which the witnesses were unable to testify that the gun used was a revolver. (Opinion, pp. 13-16.) This was clearly improper.

The prosecutor "may not by [his] questions testify" regarding the facts which he is attempting to elicit. (*People v. Visciotti* (1992) 2 Cal.4th 1, 81 [misconduct forfeited by defense counsel's silence]. See also, *People v. Medina* (1995) 11 Cal.4th 694, 729, citing *Visciotti*.) "Statements of supposed facts not in evidence . . . are a highly prejudicial form of misconduct, and a frequent basis for reversal." (5 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Criminal Trial, § 763, p. 1187.) It is "clearly . . . misconduct" for the prosecutor to refer to facts not introduce through competent evidence, "because such

statements ‘tend[] to make the prosecutor his own witness – offering unsworn testimony not subject to cross-examination.’” (*People v. Hill* (1998) 17 Cal.4th 800, 828.)

Here, the prosecutor’s attempt to “explain” what a revolver looked like impermissibly put before the jury his own “version” of facts that were not provided by witness testimony. This tactic has been described by this court as “‘dynamite’ to the jury because of the special regard the jury has for the prosecutor.” (*Hill, supra*, 17 Cal.4th, p. 828.) The prosecutor’s description of the features of a revolver were “‘worthless [as evidence] as a matter of law.’” (*Ibid*.) Yet, it permitted him to put before the jury the fact his eyewitnesses saw the “signature” revolver on which his case depended. Further, because the prosecutor was not a sworn witness, it did so in a manner that deprived appellant of his “Sixth Amendment rights to confrontation and cross-examination.” (See, *People v. Gaines* (1997) 54 Cal.App.4th 821, 824-825 [stating to the jury facts purporting to explain defense witness testimony — or lack thereof – that were not introduced through competent evidence was misconduct]; *People v.*

Woods (2006) 146 Cal.App.4th 106, 115 [prosecutor's statements that anyone can drive up to any curb and buy drugs in Los Angeles County unsupported by competent testimony was misconduct].)

The state's prosecutor is not merely an adversarial advocate. It is his duty to assure that the accused receives a fair trial. (*Hill, supra,* 17 Cal.4th, pp. 820-821; *People v. Daggett* (1990) 225 Cal.App.3d 751, 758-759.) This duty transcends the objective of obtaining a high conviction percentage. (*Ibid*.; *Berger v. United States* (1935) 295 U.S. 78, 88.) Thus, conduct by the prosecutor which "involves the use of deceptive or reprehensible methods to attempt to persuade" the factfinder is misconduct. (*People v. Morales* (2001) 25 Cal.4th 34, 44.) If that misconduct "infects" the trial with sufficient indicia of unfairness, it will be deemed a "denial of due process." (*Ibid*.; *Darden v. Wainwright* (1986) 477 U.S. 168, 181; Amend. 14, *supra*.)

In the context of holding trial counsel may have had a conceivable tactical reason for not objecting to the prosecutor's tactic, the Court of Appeal reasoned, "Assuming the prosecutor's statements . . . did not concern a matter of common knowledge

[citation], and were susceptible to an objection as being outside the evidence . . ., they do not amount to a pattern of deceptive or reprehensible actions constituting misconduct. [Citation].” (Opinion, p. 18.) In this, the court is clearly mistaken. It is indisputable that stating matters “outside the evidence” is misconduct. (*Hill, supra*, 17 Cal.4th, p. 828.) Repeatedly resorting to this misconduct to elicit key testimony essential to the prosecutor’s case is definitively a “pattern of reprehensible action.” Use of legally “worthless” information in lieu of evidence and systematically depriving the defendant of the opportunity to confront the source of the asserted fact and cross-examine him on its accuracy “infects the trial with such unfairness as to make the conviction a denial of due process.”

The Court of Appeal opines the prosecutor’s description of the features of a revolver “were accurate.” (Opinion, p. 18.) First, this reasoning belies the earnestness of the court’s “assumption” that such information is beyond common knowledge. Second, it is the jury’s province to decide in the first instance what is accurate, not

the reviewing court's. (See, *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281; *Carella v. California* (1989) 491 U.S. 263, 269.)

The Court of Appeal's opinion the prosecutor did not "lead the witnesses" (Opinion, p. 18), is irrelevant to a determination whether he put before the jury facts outside the testimony of competent witnesses. Finally, the court's opinion (*ibid*.), that the same testimony that the gun was a revolver in the five instances of coaching could have been obtained without the prosecutor's assistance is patently refuted by the record. It is exactly the inability to describe the gun as a metallic revolver that lead the prosecutor to embark on his coaching, a tactic to which he returned again and again because his eyewitnesses without his guidance could not make his case for him.

B. The Misconduct Affected The Verdict.

Finally, the court's "confidence" the prosecutor's coaching did not effect the verdict is necessarily influenced by the court's failure to acknowledge the weakness of the prosecutor's identity case as discussed previously. The prosecutor's case depended on

convincing the jury appellant was the notorious "chrome revolver bandit." This theory depended on the identity of the gun in each robbery. The prosecutor regarded the identity of the gun "in itself . . . so distinctive," it should establish the identity of the perpetrator. (RT III, pp. 129, 141, 145.)

The prosecutor's case depended on proving that the gun used in each offense was the same gun. Misconduct that bolstered evidence of this key fact is not only reasonably likely to have affected the jury but is almost certain to have done so. (*People v. Jandres* (2014) 226 Cal.App.4th 340, 360 ["any substantial error which tends to discredit the defense, or to corroborate the prosecution" is prejudicial under California's miscarriage of justice standard]; *Deck v. Jenkins* (9th Cir., 2014) 768 F.3d 1015, 1025-1026 [where prosecutor's misconduct "went to the heart of the defense" and was more than a "few stray words," it had a "substantial . . . injurious affect on the . . . verdict"].)

Descriptions of the perpetrators varied widely from 5'2" to 6'2" and from 160 pounds to 250 pounds, with "light" to "darker than

dark brown" skin. Though appellant's description corresponded to some of the eyewitnesses', it did not correspond to many of them. Appellant was about 5'9". (RT XVI, pp. 1597-1598.) It is unclear how his skin tone was perceived in court. The line up photograph showed him to have a light-medium tone (Petitioner's Ex. F, p. 129), while his more recent newspaper photograph depicts him with an undeniably light complexion (Petitioner's Ex. E, p. 127).

Encarnacion and Byrne described a "medium dark" skin tone and Encarnacion thought the robber of the Party City might have been as short as 5'5". (RT VI, pp. 257, 262-264, 290.)

Witnesses at Lane Bryant differed on whether the robber was "medium" brown or "lighter than caramel." (RT VII, pp. 379, 424-425.)

Ruperto and McNab described a tall man – 5'10" or at least 6'2". (RT VII, pp. 480-482, 497-499.) Ruperto described the Colma BevMo's robber's skin tone as "yellowish," and specifically disagreed that appellant's skin tone was similar based on seeing him in open court. (RT VII, pp. 481-482.) McNab identified Malone in a

photographic lineup. (RT VII, pp. 509-510.)

At the Redwood City BevMo robbery on May 1, Jacobsen gave the shortest estimate of the robber: 5'2" to 5'6". (RT IX, pp. 602-603.) His co-worker described the man as taller than 5'10". (RT IX, p. 616.) Jacobsen's skin tone description was all over the map: "light medium dark . . . brown." (RT IX, pp. 614-615.) Both men identified Malone as the robber. (RT IX, pp. 605-607, 626; RT XV, pp. 1453-1457; RT XVI, p. 1674.)

At the Menlo Park BevMo robbery the same night, witnesses testified the robber was 5'10" to 5'11". (RT IX, pp. 644-645, 676.)

At the Colma GameStop, the third robbery that night, Ramos described their robber as having "darker than dark brown" skin. (RT X, p. 813.)

Russell testified the San Bruno Petco robber that sent Yap running out of the store was 5'10" to 5'11" and "dark"-complected. (RT X, p. 875.)

Bishop also testified the San Jose BevMo robber was "dark"-complected. (RT XI, p. 950-951.)

As did Chang, describing the first San Mateo PetSmart attempted robbery in August. Like Russell, Chang estimated her offender to be 5'10". (RT XII, pp. 1011-1012.)

The witnesses in the San Carlos GameStop robbery described their robber as having “medium dark brown” skin. (RT XI, pp. 909, 919.)

The disparity between many of the descriptions and appellant’s appearance is why the prosecutor argued to the jury the chrome revolver was a “signature feature” of the robberies. “The same type of gun, a very unique gun was used in each and every instance in this case. . . . Mr. Sanders’s signature is that chrome revolver.” (RT XIX, pp. 2021-2022.) The prosecutor exploited the testimony he elicited through his unfair and frequently employed tactic an error to obtain a conviction. Had the jury heard from several witnesses they honestly could not identify the gun used as the “signature” chrome revolver, it is reasonably probable the jurors may have remained unconvinced the same person committed all the robberies. Therefore, the omission was not harmless under any

standard. (*People v. Woodard* (1979) 23 Cal.3d 329, 341; *People v. Powell* (1967) 67 Cal.2d 32, 57; *People v. Cruz* (1961) 61 Cal.2d 861, 868. Cf., *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 876-877 [exploitation of erroneous instruction requires reversal]; *Dumas v. Cooney* (1991) 235 Cal.App.3d 1593, 1611-1613 [same].)

III. APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT TO THE PROSECUTOR'S MISCONDUCT.

It is well settled that criminal defendants have the right to the effective assistance of defense counsel. (Amends. 6 and 14, *supra*; *Strickland v. Washington* (1984) 466 U.S. 668, 688; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218. Accord, Cal. Const., art. I, § 15.) To establish ineffective assistance of counsel, a defendant must demonstrate that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation undermined the fairness of the defendant's trial. (*Strickland, supra*, 466 U.S., p. 687.) The second prong of *Strickland* is met where there is a reasonable probability, i.e. "merely a reasonable chance, [or] more than an abstract possibility"

that the result would have been more favorable. (*Ibid*.; *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) "'[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact'" that are reviewed independently. (*People v. Jones* (2010) 186 Cal.App.4th 216, 235-236, quoting *Strickland, supra*, 466 U.S., p. 698; *In re Cordero* (1988) 46 Cal.3d 161, 181.)

A. Counsel's Decision To Forgo Objection To The Prosecutor's Misconduct Was Objectively Unreasonable.

The Court of Appeal opines counsel was not ineffective because he had a conceivable defense tactical basis for forgoing objection to the above-described misconduct. (Opinion, p. 18.) For purposes of this conclusion, the court assumes the prosecutor's actions were objectionable. (*Ibid*.) The court reasons that defense counsel "may have believed any objection would not have prevented the jury from hearing the information ultimately provided by the witnesses." (*Ibid*.) The problem with this is it is entirely without support in the record or any articulation of sound defense

practice.

Any conceivable "tactical and strategic determinations of trial counsel must have some rational support founded on reasonable, sound, legal principles and fully developed facts." (*People v. Corona* (1978) 80 Cal.App.3d 684, 706; P*eople v. Nation* (1980) 26 Cal.3d 169, 179.) Description of the gun was a crucial part of the only contested question: identity of the perpetrator in each robbery. If the prosecutor could put on competent evidence that a revolver was used in these five instances, it was not sound defense tactic to absolve him of the duty to do so. At least then defense counsel could cross-examine such witnesses or test such evidence, if any, the prosecutor put before the jury. It is not a sound tactical choice to permit the prosecutor to simply state, without objection, every fact counsel may believe he is otherwise able to prove. It is defense counsel's duty at a minimum to make the state carry its burden to convince the jury of the veracity and accuracy of its evidence. Permitting the prosecutor to substitute his own unsworn assertions, immune from cross-examination, for competent evidence of a fact so

distinctive it was the prosecutor's theory that practically determined the outcome is an abdication of counsel's duty to be appellant's zealous advocate. As noted by this court, the jurors likely accepted the prosecutor's unchallenged factual assertions as true. (*Hill, supra*, 17 Cal.4th, p. 828.)

B. Counsel's Ineffective Representation Deprived Appellant Of A Core Right Protected By The Sixth Amendment.

The United States Supreme Court recognized the Sixth Amendment's right to "assistance of counsel" included a right to effective assistance of counsel in federal prosecutions in *Glasser, supra,* 315 U.S., p. 75 ["the . . . burden of representing another party may conceivably impair counsel's effectiveness"].) Because of the fundamental nature of the right-to-counsel safeguard expressly guaranteed by the Sixth Amendment, it was "unnecessary" to determine the "precise degree" of prejudice suffered through representation by counsel presumptively ineffective due to representing multiple defendants. "The [Sixth Amendment] right to have the assistance of counsel is too fundamental and absolute to

allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." (*Glasser, supra*, 315 U.S., pp. 75-76.)

The Sixth Amendment, including the right to counsel became enforceable against the states in 1963. (See, *Pointer v. Texas* (1965) 380 U.S. 400, 403, citing *Gideon v. Wainwright* (1963) 372 U.S. 335, 342.) However, as an artifact of the decades during which federal defendants had a Sixth Amendment right to effective assistance of counsel, while state defendants had to rely on the Due Process Clause of the Fourteenth Amendment, the Court continued to treat an ineffective assistance of counsel claim in state court proceedings as a mere deprivation of due process, rather than a deprivation of a fundamental Sixth Amendment guarantee until *Cuyler v. Sullivan* (1980) 446 U.S. 335, 344 [expressly recognizing the right to effective assistance of counsel in state court prosecutions is grounded, like the right held by federal defendants, in "the Sixth Amendment right to counsel"].)

Four years later, despite *Sullivan*'s Sixth Amendment holding,

the court fashioned a due process harmless error standard for ineffectiveness of defense counsel in a state prosecution, rather than the *Chapman* harmless error standard generally applicable to Sixth Amendment violations. (*Strickland, supra*, 466 U.S., p. 686.) *Strickland* was decided during the same period and by nearly the same majority as *Ohio v. Roberts* (1980) 448 U.S. 56, which made the same mistake with respect to another core Sixth Amendment right: the right to confrontation. The court has since corrected the erroneous detour taken by *Roberts*: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." (*Crawford v. Washington* (2004) 541 U.S. 36, 62.)

Strickland's error did not go unnoticed at the time. Foreshadowing Justice Scalia's critique of *Roberts*, Justice Marshall argued in his *Strickland* dissent that dispensing with effective defense counsel merely because the reviewing court regards the verdict as accurate, is not what the Sixth Amendment right to

counsel demands:

> [T]he assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures. . . . Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not, in my opinion, constitute due process.

(*Strickland, supra*, 466 U.S., p. 711, dissent. opin. of Marshall, J.)

The court has since adopted similar reasoning in other Sixth Amendment cases. (See, *Crawford, supra*, 541 U.S., p. 61 [the Confrontation "[C]lause commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination"]; *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 146 ["the Sixth Amendment right to counsel . . . commands, not that a trial be fair, but that a particular guarantee of fairness be provided"].) Justice Marshall advocated application of *Chapman* to the deprivation of effective assistance of counsel. (*Strickland*, *supra*, 466 U.S., p. 711, dissent. opin. of Marshall, J.) If the

current majority view of the importance of assistance of counsel prevailed in *Strickland*, the *Chapman* standard may be the law today as Justice Marshall advocated in his dissenting opinion. Therefore, it is time to subject the *Strickland* deviation to the same scrutiny the court gave *Roberts*. The weak prejudice prong from *Strickland* must be replaced with the more vigorous view of the core rights guaranteed by the Sixth Amendment represented by *Crawford* and *Gonzalez-Lopez*.

C. ***Strickland*'s Prejudice Prong And Prejudice Under The California Constitution**

The question under Article VI, section 13 of the California Constitution or under *Strickland* is whether there is something more than a mere abstract possibility the jury may have arrived at some result more favorable than conviction on all 44 counts. (*Strickland, supra*, 466 U.S., p. 687; *College Hospital, Inc., supra*, 8 Cal.4th, p. 715.) There is no doubt that *someone* robbed the 13 stores in the charged and uncharged offenses. Counsel's failure to object contributed to the verdict as much as the prosecutor's misconduct. For the reasons previously discussed in the context of the prosecutor's misconduct,

counsel's representation was constitutionally inadequate under *Strickland*. (*Woodard, supra,* 23 Cal.3d, p. 341; *Cruz, supra,* 61 Cal.2d, p. 868.)

IV. APPELLANT'S 834-YEARS-TO-LIFE PRISON TERM IS CRUEL AND UNUSUAL UNDER THE EIGHTH AMENDMENT AS A SENTENCE THAT MAKES NO MEASURABLE CONTRIBUTION TO ACCEPTED GOALS OF PUNISHMENT.

A. The Eighth Amendment Prohibits Sentences That Serve No Legitimate Penal Purpose.

The government "shall not [inflict] cruel and unusual punishments." (U.S. Const., Amend. 8.)

> [T]he Eighth Amendment bars not only those punishments that are "barbaric" but also those that are "excessive" in relation to the crime committed. . . . [A] punishment is "excessive" and unconstitutional if it . . . makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering.

(*Coker v. Georgia* (1977) 433 U.S. 584, 592.)

The goals of California's penal system are retribution for the harm caused, deterrence generally, and protection of society from the particular defendant whose behavior has demonstrated he is a

danger to it. (Cal. Const., art. I, § 28(a) [public safety is a "goal of highest importance"]; Pen. Code § 1170, subd. (a) ["the purpose of imprisonment . . . is punishment"]; *People v. Ochoa* (2001) 26 Cal.4th 398, 463 ["Both deterrence and retribution are legitimate purposes of punishment"]; *People v. Warner* (1970) 20 Cal.3d 678, 689 ["The paramount concern in sentencing must be the protection of society"].)

However, a sentence that no human could conceivably complete serves no rational legislative purpose, under either a retributive or a utilitarian theory of punishment. (*People v. Deloza* (1998) 18 Cal.4th 585, 600, concur. opin. of Mosk, J.) It cannot reasonably be argued that a defendant continues to pay back the community, or feel the community's disapproval from beyond the grave. Nor can it reasonably be argued that the convicted individual remains incapacitated by the prison sentence or that he remains a danger to society after his death. Therefore a prison term that exceeds the life span of any human being does not serve a retributive purpose or protect society through incapacitation. Finally, in the

absence of any retributive or incapacitation that survives the defendant, it cannot reasonably be argued that an individual will fear such posthumous burdens. Since the deterrent value of a punishment lies in the defendant's fear of it, exposure to a prison term longer than life is wholly ineffective as a deterrent. A sentence such as appellant's fails the Eighth Amendment under *Coker* because it is an absurdity that serves no legitimate penal purpose.

"The question must always be whether the sentence imposed is viable - i.e., whether it is possible for a defendant to serve that precise sentence." (Mosk, *State's Rights — and Wrongs* (1997) 72 N.Y.U. L.Rev. 552, 557-558. See also, *People v. Morgan* (1973) 36 Cal.App.3d 444, 447 ["since the maximum sentence a defendant could possibly serve is one life sentence, the punishment [in excess of that] must be examined in that light"].) Therefore, "a sentence that on its face is impossible for a human being to serve is per se 'cruel or unusual' punishment under our state constitution and 'cruel and unusual' punishment under the Eighth Amendment to the United States Constitution." (Mosk, *supra*, 72 N.Y.U. L.Rev. at p. 558.

See also, Mosk, *Nothing Succeeds Like Excess* (1993) 26 Loy. L.A. L.Rev. 981, 983 ["Can it be doubted that a 200-, 300- or 400-year term is at least unusual?"].)

B. Equating Appellant's Sentence To An LWOP Does Not Solve The Problem.

It is not sufficient to dismiss appellant's argument on the ground the defendant is in the same situation as a defendant serving life without possibility of parole. (See, *People v. Byrd* (2001) 89 Cal.App.4th 1373 [adopting this reasoning].) Clearly, the sentence facially exceeds life. The parole eligibility term imposed here — 834 years — not only dwarfs an indeterminate life term, it exceeds the length of the modern period in human history. 834 years ago, Medieval Europe struggle with the fall of the Roman Empire, still in the darkness that preceded the Renaissance. If a young Genghis Khan were imprisoned under the Three Strikes law to the same term as appellant here would just come eligible for parole this year.

The parole eligibility term imposed on appellant is the equivalent of 10 human lifetimes, and though it is practically impossible to serve now, if it were ever to become physiologically

servable, it would still be absurd. Consider that it is not inconceivable that medical science will develop the technology to prolong human life past natural death, though it be in a state of unconsciousness, indefinitely. If that technology were to exist today, under the sentence imposed, the state could be required to warehouse appellant's unconscious body for the better part of a millennium. Multiply this by the hundreds of such sentences imposed in this state every year, and the absurdity becomes palpably insupportable.

> Unquestionably, sex offenses are serious and often have a long-term residual effect on the victim. But it cannot be said that they are more serious, in permanent effect, than murder, mayhem, or manslaughter, all of which result in more rational penalties. Unfortunately, there appears to be an emotional aspect to sentencing for sex offenses, whether committed on an adult or a juvenile. . . . The judge imposing such a ["monstrous"] sentence may believe he is dramatically demonstrating society's contempt for the defendant[.]

(Mosk, *supra*, 72 N.Y.U. L.Rev. at p. 557.)

The Court of Appeal stated in *Byrd* it "disagree[d] with Justice Mosk" and moralized it is a legitimate penological goal to "unmistakably reflect society's condemnation" of the defendant.

(*Byrd, supra*, 89 Cal.App.4th, p. 1383.) What the *Byrd* panel actually does in sanctioning "condemnation" is substantiate Justice Mosk's analysis. "Reflecting condemnation" may have been a legitimate policy in puritanical Massachusetts, but it is not one of California's modern penological goals, and adopting such a moralistic justification for punishment opens the door to a parade of horribles that would lead to the unraveling of our democracy.

Further, even if it were accurate that, as *Byrd* opines, appellant is in the same position as a defendant who received an LWOP sentence, no statute specifically authorizes life without possibility of parole for any of appellant's offenses or for their sum total. Even the Three Strikes Law, California's flagship statute to combat recidivism demonstrates a legislative intent that an offender have the opportunity to reenter society. Though it mandates consecutive life terms, it does not expressly or directly require or authorize a sentencing choice that one who commits two third strike robberies deserves the possibility of parole (two consecutive 25-to-life terms), but one who commits three or more does not.

C. Recent Opinions Demand Rationality In Punishment.

It has long been accepted that the scope of the Eighth Amendment confines the government's "power [to punish, such that it] be exercised within the limits of civilized standards." (*Trop v. Dulles* (1958) 356 U.S. 86, 100, plur. opin. of Warren, C.J.) The "civilized standards" that delimit legitimate punishment "evolve," "mark[ing] the progress of a maturing society." (*Atkins v. Virginia* (2002) 536 U.S. 304, 311–312.) Thus, we no longer subject criminals to public humiliation in the stockade. Neither do we put the mentally ill to death, nor imprison child offenders for life without possibility of parole — all judgments that at one time were deemed acceptable, but which no longer are.

Recent opinions regarding constitutionally permissible sentences for defendants who were juveniles when they committed their offense indicate an effort to rationally align permissible judgments with the penological goals to be achieved in light of scientific evidence bearing on the characteristics of the offender. (See, *People v. Caballero* (2012) 55 Cal.4th 262, 268. See also, *Miller v.*

Alabama (2012) ____ U.S. ____, 183 L.Ed.2d 407, 132 S.Ct. 2455; *Graham v. Florida* (2010) 560 U.S. 48, 74.) The sentences in these cases were vacated because they were irrational; they failed to comport with scientifically-based understanding of the nature of the offender and penological goals to be served by the criminal justice system. Though our context is different in that it does not involve a juvenile offender, the scientific approach taken in *Graham*, *Miller* and *Caballero* demonstrates a general demand for rationality in criminal judgments that should apply regardless of the age of the offender and it honors the construction of the Eighth Amendment articulated by Chief Justice Warren in his *Trop* plurality opinion and cases such as *Coker* and *Atkins* that came after.

D. Appellant's Irrational Sentence Dehumanizes The Defendant As Well As De-legitimizing The Law.

Irrational judgments "shock the conscience" and undermine the public's confidence the penal system is founded upon reasoned principles. (*Deloza, supra*, 18 Cal.4th, p. 600, concur. opin. of Mosk, J.) They effectively reduce the accused and convicted to mere means to the government's own ends of expressing its condemnation of

certain conduct as the *Byrd* court so unabashedly declared.

> To treat an individual as a means in the criminal justice system is to expose her to whatever arbitrary whim the State deems fit to achieve its goal of obtaining a conviction. By contrast, treating individuals as ends in the criminal justice system requires the State to recognize that individual liberty has value equal, if not superior, to the State's interest in conviction.

(Buskey, *If the Convictions Don't Fit, You Must Acquit: Examining the Constitutional Limitations On the State's Pursuit of Inconsistent Criminal Prosecutions* (2012) 36 N.Y.U. Rev. L. & Soc. Change 311, 341 [discussion presumption of innocence and post-judgment presumption of guilt]. Accord, Saif-Alden Wattad, *The Meaning of Guilt: Rethinking* Apprendi (2007) 33 New Eng. J. on Crim. & Civ. Confinement 501, 530-533 ["no criminal punishment may be imposed arbitrarily, if criminals are to be treated as ends and not as means to the end"].)

The absurdity of the irrational sentence imposed on appellant demeans the judiciary, the executive and the state, as well as the individual defendant. It serves no legitimate governmental interest. There is an easy fix: like the United States Supreme Court in *Graham,*

supra, and this court in *Caballero, supra*, simply hold that unless death or LWOP is statutorily authorized for an offense, the aggregate sentence imposed must permit for eventual parole consideration in the offender's life time. Such a holding will achieve all legitimate penological goals, including keeping society safe from violent offenders, and it will take the irrational vindictiveness out of California sentences.

V. APPELLANT WAS DEPRIVED OF A FAIR TRIAL DUE TO THE CUMULATIVE IMPACT OF THE FOREGOING ERRORS.

"'[E]ven if no single error were prejudicial, where there are several substantial errors, "their cumulative effect may nevertheless be so prejudicial as to require reversal."'" (*Parle v. Runnels* (9th Cir. 2004) 387 F.3d 1030, 1045, interpreting *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643, *Lewis v. Jeffers* (1990) 497 U.S. 764, 780 and *Pulley v. Harris* (1984) 465 U.S. 37, 41 as recognizing that errors may cumulatively render a trial unconstitutionally unfair; Amend. 14, *supra*.) Here, the "series of trial errors" discussed, even if "independently harmless," in these "circumstances [rose] by

accretion to the level of reversible and prejudicial error." (*Hill, supra*, 17 Cal.4th, p. 844 ["truism" that defendant was entitled to a "fair" trial, not a "perfect" one should not mask review of the cumulative impact of multiple errors rendering a trial fundamentally unfair].)

CONCLUSION

For the foregoing reasons, appellant requests this court to grant review.

CERTIFICATION OF WORD COUNT

I, Alan Siraco, appellate counsel of record for Ricky Sanders in this matter, do hereby certify under rule 8.504(d) that according to the software used to prepare it, this brief contains 8,097 words.

DATED: October 28, 2016 Respectfully submitted,

By: __________________________
ALAN SIRACO
Attorney for Appellant