IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff / Respondent, vs. LA TWON WEAVER, Defendant/Appellant.	California Supreme Court Case No. S033149 Superior Court Case No. CRN22688

APPELLANT'S OPENING BRIEF

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

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STATEMENT OF APPEALABILITY

Appellant, La Twon[1] R. Weaver, was convicted and sentenced to death in San Diego County, following an unconstitutional, non-jury guilt, special circumstance, and penalty trial. (1 CT 868-871.[2]) This automatic appeal is from the final judgment of conviction and sentence of death imposed by Superior Court Judge J. Morgan Lester. (5 CT 873.) This appeal is taken pursuant to California Penal Code section 1239, subdivision (b), and the United States and California Constitutions.

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[1] Mr. Weaver's first name is misspelled as "Latwon" throughout the record. Mr. Weaver utilizes the correct spelling ("La Twon") in this brief.

[2] The Clerk's Transcript and Supplemental Clerk's Transcript (collectively cited as "CT") consist of 44 volumes. The first 43 volumes are consecutively paginated, and comprise 7879 pages. Volume 44 begins at page 1.

The Reporter's Pretrial Transcript ("RPT") includes all pretrial proceedings. The RPT consists of 16 individually bound sections, most of which are separately paginated and begin at page 1. The coversheet of each bound section generally reflects one or more "volume" numbers assigned by the court clerk. Generally, the volume numbers assigned by the clerk logically track the chronological progression of case events. There are exceptions: (a) the proceedings in Volume 3a took place after the proceedings reported in Volume 4; (b) Volumes 5 and 6 are consecutively paginated and combined; (c) Volumes 11 and 12 are consecutively paginated and combined; and (d) the transcript of the preliminary hearing does not have a volume number. Citations to the RPT utilize the volume and page numbers assigned by the trial court's clerk. The preliminary hearing transcript is cited as "P RPT."

The Reporter's Trial Transcript ("RT") is comprised of 13 consecutively paginated volumes. The guilt phase is contained in Volumes 1 through 6, pages 1 through 720. The penalty phase and post-trial proceedings are recorded in Volumes 7 through 13, pages 721 through 1467.

STATEMENT OF THE CASE

In May 1992, a criminal complaint was filed in the San Diego County Municipal Court, North County Judicial District, charging Mr. Weaver with four felony counts. The crimes arose from a single robbery/burglary and fatal shooting on May 6, 1992. (1 CT 1-3.) Count I alleged murder. (Pen. Code, § 187, subd. (a).) Count II alleged kidnapping for purposes of robbery. (Pen. Code, § 209, subd. (b).) Count III alleged a robbery. (Pen. Code, § 211.) Count IV alleged a burglary. (Pen. Code, § 459.) (1 CT 1-2.)

Mr. Weaver appeared in municipal court on May 8, 1992, with counsel Jeffrey R. Martin of the San Diego County Public Defender's Office. (1 RPT 1.) Deputy District Attorney Michael K. Kirkman appeared for the prosecution. (1 RPT 1.) Mr. Martin entered a plea of not guilty on Mr. Weaver's behalf. (1 RPT 1.) Bail was denied, and the preliminary hearing was set for June 4, 1992. (1 RPT 3-4.)

At the preliminary hearing, the court found probable cause to hold Mr. Weaver to answer on Counts I, III and IV of the complaint. (P RPT 89.) Count II, the kidnapping charge, was dismissed. (P RPT 85-88, 90.)

On June 17, 1992, the prosecution filed an information in the San Diego Superior Court charging Mr. Weaver with three felony counts. (1 CT 34-35.) The information alleged violations of Penal Code sections 187, 211 and 459 (Counts I, II and III, respectively.) It also alleged that Mr.

Weaver had personally used a firearm in the commission of the offenses. (Pen. Code, § 12022.5, subd. (a); 1 CT 34-35.) Count I further alleged two special circumstances: (1) that the murder was committed during the course of a robbery; and (2) that the murder was committed during the course of a burglary. (Pen. Code, § 190.2, subds. (a)(17)(A), (a)(17)(G); 1 CT 34.)

Mr. Weaver was arraigned in the San Diego Superior Court on June 18, 1992. (3 RPT 2.) Through counsel, Mr. Weaver entered a plea of not guilty to all charges and denied the special circumstance and weapon enhancement allegations. (3 RPT 2.) At that time, the prosecution announced that it would seek the death penalty against Mr. Weaver. (3 RPT 5.)

On July 15, 1992, the case was assigned to Judge J. Morgan Lester for trial. (3a RPT 11.) The prosecution and defense agreed to a trial date in February 1993, and the court confirmed that date. (3a RPT 10-11.)

On July 29, 1992, the parties appeared before Judge Lester for the first time. (5 RPT 1.) Mr. Weaver appeared with deputy public defenders Jeffrey Martin and David Rawson as his counsel. (5 RPT 1.) The trial was set for February 2, 1993. (5 RPT 3.)

On November 4, 1992, the prosecutor lodged with the court an amended information, adding an allegation of great bodily injury to Counts II and III. (Pen. Code § 1022.7; 1 CT 94-96.) Judge Lester granted

permission to file the amended information. (6 RPT 89-90.) Counsel waived a formal reading of the amended information, entered a plea of not guilty on Mr. Weaver's behalf, and denied each affirmative allegation. (6 RPT 90-91.)

On February 16, 1993, the defense filed a Motion to Challenge the Composition of San Diego County Juries and to Quash All Current and Available Jury Panels. (4 CT 627-640.) The court set February 24, 1993 for a hearing on the motion. (12 RPT 114-115.) At the conclusion of the hearing, Judge Lester denied the motion to quash. (13 RPT 100.) Immediately after the motion was denied, counsel announced that Mr. Weaver "would like to waive jury in this case." (13 RPT 101.) Judge Lester replied, "Well, that is a bomb to be dropped." (Ibid.) He scheduled a hearing two days later to give the prosecutor time to decide whether to agree to a jury waiver. (13 RPT 101-102.)

At the subsequent hearing, the prosecution agreed to waive jury, but only on the condition that Mr. Weaver give up his right to appeal rulings on 19 pretrial motions. (14 RPT 5, 9-13.) Defense counsel agreed to this condition. (14 RPT 14.) The defense filed two jury waiver documents signed by Mr. Weaver and defense counsel. (4 CT 671-673.) Neither waiver document expressed Mr. Weaver's assent to the waiver of either his right to a jury trial on the special circumstances or his appeal rights. Judge Lester nevertheless accepted the jury waiver. (14 RPT 16-61.)

The guilt and special circumstance phases of the trial commenced on March 8, 1993. (1 RT 1.) The prosecution called 23 witnesses. (See "Master Index" [separately paginated], Alphabetical Index of Witnesses, 30-39.) The prosecution concluded its case on March 11, 1993. (4 RT 623.)

The defense did not call any witnesses or present any evidence other than by stipulation. (5 RT 626-630.) No rebuttal evidence was presented by the prosecution. (5 RT 635.) The court heard closing and rebuttal arguments by the prosecution (5 RT 636-665, 684-702), and closing argument by the defense. (5 RT 666-683.)

On March 17, 1993, Judge Lester found Mr. Weaver guilty of murder during the commission of a robbery and a burglary (felony murder). He found Mr. Weaver guilty of robbery and burglary. (6 RT 713-714.) For the robbery and burglary counts, Judge Lester found the use of a firearm and the infliction of great bodily injury enhancement allegations to be true. (6 RT 715.) He also found the robbery and burglary special circumstance allegations to be true. (6 RT 714-715.)

On March 19, 1993, the prosecutor gave his penalty phase opening statement. (7 RT 745-752.) The defense reserved its opening statement until the conclusion of the prosecution's case. (7 RT 754-755.) The prosecution's case in aggravation consisted of victim impact evidence under Penal Code section 190.3, subdivision (a). The prosecutor called five

witnesses and presented the testimony of a sixth witness by stipulation. (7 RT 757-853.) No prior felony convictions were introduced under Penal Code section 190.3, subdivision (c). No prior acts of violence were introduced under Penal Code section 190.3, subdivision (b).

After the defense gave its opening statement and the court accepted several stipulations (8 RT 854-864), the defense called sixteen penalty phase witnesses. (8 RT 864-1230.) The prosecution called two rebuttal witnesses. (10 RT 1232-1243.) On March 25, 1993, the penalty case was argued by the prosecution and defense. (11 RT 1249-1299; 11 RT 1300-1332, respectively.)

On March 31, 1993, Judge Lester entered a verdict of death. (12 RT 1370.)

On May 14, 1993, Mr. Weaver filed a motion for a new trial and also moved to modify the death verdict. (4 CT 788-833; 5 CT 851-864 [Motion for New Trial/Modification of Verdict; Reply to Opposition to Motion for New Trial/Modification of Verdict, respectively].) On May 28, 1994, Judge Lester denied the new trial motion (13 RT 1399), and the motion to modify the verdict. (13 RT 1453.) He then sentenced Mr. Weaver to death on Count I, plus four years for the use of a firearm enhancement. (5 CT 869-870; 13 RT 1466.) Judge Lester imposed a sentence of three years on Count II, the robbery, plus a sentence of three years for the great bodily injury enhancement. (5 CT 870; 13 RT 1462, 1465.) On Count III, the

burglary, Judge Lester imposed a sentence of two years. (5 CT 870; 13 RT 1463, 1465.) The sentences on Counts II and III were stayed. (5 CT 870; 13 RT 1463.)

The clerk of the San Diego Superior Court subsequently prepared and filed a notice of this automatic, non-waivable appeal. (5 CT 873.)

STATEMENT OF FACTS

On May 6, 1992, a young man entered Shadowridge Jewelers, located in a commercial shopping center in the town of Vista, in North San Diego County. (1 RT 18-20, 105.) During a robbery, he shot the owner of the jewelry store, Michael Broome. Mr. Broome died at the scene from a single gunshot wound to the chest. (1 RT 33; 3 RT 549-550.)

A. The Guilt And Special Circumstance Phases

The guilt and special circumstance phases of the trial lasted three days. The prosecution presented the testimony of two witnesses who identified Mr. Weaver as one of the two men they saw in a car in the vicinity of Shadowridge Jewelers prior to the shooting. (1 RT 182-183, 195.) The car was later identified by other witnesses as the one driven from the shopping center after the shooting. (See, e.g., 1 RT 153 [Timothy Waldon]; 1 RT 169-170 [Christopher Church].)

Two employees of Shadowridge Jewelers, Mary Deighton and Lisa Stamm, testified that, shortly before 5:15 p.m., a man walked into the store, put his right arm around the neck of the only customer present, Lisa Maples, and put a gun to her head. (1 RT 19, 30 [Deighton].) The man was nervous. (4 RT 611-612 [Stamm].) Ms. Stamm remembered thinking that a robber "would have been more controlled" than this man was at the time. (4 RT 613.) Ms. Stamm believed that the man had come into the store with the intent to rob, but not to shoot anyone. (Ibid.) He demanded

"a key," and Mr. Broome, the owner of the store, "told him to calm down, that he didn't have a key." (4 RT 610 [Stamm].) It was apparent that the man "wasn't going to calm down." (Ibid.) The man suddenly shot Mr. Broome, who fell to the floor. (1 RT 32-34 [Deighton]; 4 RT 571 [Stamm].)

After Mr. Broome was shot, the man was "really nervous." (4 RT 610 [Stamm].) It appeared that he did not know what to do. (4 RT 612 [Stamm].) Mr. Broome called out for help. (1 RT 36 [Deighton].) Ms. Stamm threw jewelry at the man, who was still waving the gun. (1 RT 35-36 [Deighton].) At that point, Martin You, the owner of an adjacent business, came to the front door of the jewelry store, which had been open, and shut the door. (1 RT 36-37, 78 [Deighton]; 4 RT 575 [Stamm].) Ms. Deighton ran out the back to call the police. (1 RT 37-39, 79 [Deighton].) The man let go of Ms. Maples and appeared to be grabbing at the ground. (4 RT 575 [Stamm].) Then, he "immediately" ran out the front door. (4 RT 576 [Stamm].) Fifty-seven seconds passed from the moment the man entered the store until he ran out. (1 RT 60-61, 68.[3])

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[3] Mary Deighton, one of the jewelry store employees and an eyewitness, described the two cameras that were set up in the store, along with the computer, video machine and monitor, and identified photographs depicting this equipment. (1 RT 57-59.) The video tape that was taken at the time of the robbery and shooting was played for the court as Ms. Deighton testified about what she observed on the video tape. (1 RT 60-69; People's Exhibit 29.) The machine kept time, although it was "somewhat off" as to the exact hour and minute. (1 RT 60.) The video tape shows the man "walk[ing] in"

Ms. Deighton, Ms. Stamm and Mr. You all identified Mr. Weaver as the man who had come into the store. (1 RT 45-50 [Deighton]; 4 RT 579-584 [Stamm]; 1 RT 108-110 [You].) Two other witnesses identified Mr. Weaver as the man they saw running from the jewelry store immediately following the shooting. (1 RT 126-132 [Kari Machado]; 1 RT 148-158 [Timothy Waldon].)

Joanne Stone, an off-duty San Diego County Deputy Sheriff, was driving by the shopping center at the time of the shooting. (2 RT 242, 245.) She noticed a blue sedan approaching her from behind at a rapid speed and decided to follow it. (2 RT 243, 271.) She followed the car into an apartment complex, where she watched a man get out of the car, appear to hide something, go into an apartment, and emerge wearing different clothes. (2 RT 247-59.) Ms. Stone later identified Mr. Weaver at a live lineup and then at trial as the man she had followed that day. (2 RT 259-263.)

Between 5:15 and 5:30 p.m., a resident of the apartment complex, Jeannine Angelo, saw a man, whose behavior she described as "suspicious," "bend down into the ivy," located on an embankment in front of her apartment. (2 RT 291-303.) Police later found three bracelets in the ivy. The jewelry had been taken from the Shadowridge Jewelers. (1 RT

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the store at 4:54:08 (1 RT 60-61), and shows him "running out of the store" at 4:55:05. (1 RT 68.)

54-56; 2 RT 353-354.) At a live lineup and at trial, Ms. Angelo identified Mr. Weaver as the man she saw in the ivy. (2 RT 298-300.)

Sheriff's Deputy Donald Phelps testified that Mr. Weaver was arrested without incident at the apartment complex within an hour of the shooting. (2 RT 345.)

In the days following Mr. Weaver's arrest, law enforcement officers searched the blue Oldsmobile in which witnesses had placed Mr. Weaver before and after the shooting. (4 RT 553.) Among the items seized from the car were a gold diamond bracelet that had been taken from the jewelry store, a .44 caliber Remington bullet that was found under the right front seat (4 RT 554-555), and registration papers listing Byron Summersville as the owner of the car. (4 RT 553-555.) The prosecution presented testimony from a ballistics expert that a copper jacket fragment and a projectile shell fragment found at the scene of the shooting were fired from a .44 caliber pistol and were similar to the .44 caliber Remington bullet recovered from the Oldsmobile. (4 RT 540.) The parties stipulated that Mr. Summersville owned the blue Oldsmobile. (2 RT 382-383.) Mr. Summersville was never charged in connection with the robbery and shooting.

The defense did not present any testimony. By stipulation, the defense tendered evidence regarding the identities, height, and weight of the participants of the two live lineups that were conducted. (5 RT 626-

628.) Another stipulation presented the fact that three of the witnesses who were in the store at the time of the shooting — Mary Deighton, Lisa Stamm, and Lisa Maples — were interviewed together following the shooting. (5 RT 629.)

B. The Penalty Phase

Victim impact evidence comprised the prosecution's entire case at the penalty phase, and it spanned nearly 100 transcript pages. (7 RT 756-850.) The prosecution called five witnesses: Annette Broome, Mary Broome, Joseph Broome, Lisa Maples, and Mary Deighton. The stipulated testimony of a sixth victim impact witness, Lisa Stamm, was read into the record. (8 RT 853.) The victim impact evidence is discussed in detail in Argument V.

Defense counsel only cross-examined Ms. Maples, the customer in the jewelry store at the time of the shooting. On cross-examination, Ms. Maples testified that the man holding her was nervous and she could feel him shaking. (7 RT 836-837.)

Prior to the defense opening statement, the parties stipulated that reports from two board-certified psychiatrists, Haig Koshkarian and Charles Rabiner, and a report from psychologist Wistar MacLaren could be admitted into evidence. (40 CT 7797-7816; 8 RT 854-855.) The parties also stipulated that Mr. Summersville, the owner of the car in which Mr. Weaver was seen riding the day of the robbery and shooting, was a violent

and vicious person; that he stabbed a man in the chest without provocation in December 1992; and that he raped a woman in September 1992. (8 RT 859.)

The defense called 15 witnesses who were relatives, family friends, and members of Mr. Weaver's church, where his father had been the Pastor for 20 years. (8 RT 864-917; 8 RT 940-9 RT 1123; 10 RT 1200-1230.) The family friends and church members had known Mr. Weaver for at least five years; many had known him for more than a decade. (See, e.g., 8 RT 940, 944, 956, 962, 996; 9 RT 1011, 1021, 1025, 1062.) These witnesses included individuals who had spent a good deal of time with Mr. Weaver in the family home, at church events and on vacations. (See, e.g., 8 RT 945, 962-963, 997; 9 RT 1007-1008, 1011-10145, 1021-1023, 1029, 1036, 1042, 1062-1064.) They testified that Mr. Weaver was a peaceful, church-going young man who respected his family and loved his two-year-old daughter very much. (See, e.g., 8 RT 884, 904-905, 941, 945-946, 958-959, 964, 973, 978, 995-1000.)

Two witnesses — one, a close family friend, church member and employee of Reverend Weaver, and the other, a county jail inmate — testified about Mr. Weaver's positive influence on San Diego County Jail inmates through a bible study class that he had been conducting. (9 RT 1025, 1030-1031, 1037, 1048-1049, 1058-1059; 10 RT 1228-1230.)

Mr. Weaver's mother, Catalina Weaver, described her son's upbringing with the family in Inglewood, California (8 RT 886), highlighting Mr. Weaver's lifelong church participation, including activities such as choir and bible study. (8 RT 867-868, 873-875, 879-880, 900-901.) Mrs. Weaver told the court that she never had problems with her son getting into fights or "running the streets." (8 RT 891.) She testified that Mr. Weaver helped with the family businesses. (8 RT 894, 901.) On cross-examination, Mrs. Weaver said that the family was close-knit, with a great deal of love and support in the household. (8 RT 911.) She also described Mr. Weaver as "a follower." (8 RT 913-914.)

Mr. Weaver's parents told the court that, when their son was in high school, they became aware that he was not attending class and was having academic problems. (8 RT 872-873; 9 RT 1082.) A "vocational orientation specialist" from Hillcrest Continuation High School testified that she believed Mr. Weaver "did not have many of the necessary skills to pass the courses," which contributed to his low self-esteem. (8 RT 974, 989.) This teacher had become a member of Reverend Weaver's church, where Mr. Weaver was a "regular attendee." (8 RT 977-978.)

Mr. Weaver's father, Reverend Ray La Vette Weaver, Sr., testified about how he raised his four children while managing two businesses and serving as the church Pastor. (RT 1074-1076.) Reverend Weaver told the court about a conversation with his son concerning the crime. (10 RT

1209, 1211.) Mr. Weaver told his father that he had done something "very wrong," and told his father about the shooting. (10 RT 1211.) He said that he and Byron Summersville had been drinking most of the day. Mr. Summersville said that they were going to "knock over" a jewelry store. Mr. Weaver and Mr. Summersville drove to a store where Mr. Summersville purchased tape, spray paint and bullets. Mr. Weaver was to go in and distract the people in the store. He did not intend to hurt anyone, and did not remember pulling the trigger. (10 RT 1212-1213.) Mr. Weaver expressed remorse to his father for what he had done, and wished to express that remorse to the Broome family. (10 RT 1214, 1218.) Reverend Weaver advised him not to write a letter to the victim's family. (10 RT 1219.)

The defense presented the testimony of Mary Buglio, a forensic alcohol supervisor at the San Diego County Sheriff's Crime Laboratory, who had analyzed Mr. Weaver's blood sample. She testified that Mr. Weaver had a .17 blood alcohol level at approximately the time of the shooting. (8 RT 924-925.) She said that while different people are affected differently by alcohol, and that a person accustomed to drinking alcohol might be able to mask some of his physical symptoms, they could not mask their mental impairments. (8 RT 929, 932.)

Dr. Charles J. Rabiner, a psychiatrist, testified that he had interviewed Mr. Weaver on two separate occasions. He had also reviewed the reports of Drs. MacLaren and Koshkarian. (9 RT 1123.) According to

tests administered by Dr. MacLaren, Mr. Weaver had a "verbal I.Q." of 76. (9 RT 1127.)

Dr. Rabiner diagnosed Mr. Weaver as having a "mixed personality disorder with dependent and histrionic features." (9 RT 1141.) He explained:

> [Mr. Weaver] frequently depended upon others to make up his mind for him, would look to others for direction, had a low sense of self confidence, self esteem, was not very good at initiating things on this own . . . .

(Ibid.)

When asked whether Mr. Weaver was a "leader or follower," Dr. Rabiner answered: "By all means, a follower." (9 RT 1141.) He also said that Mr. Weaver "deferred decisions to his father." (9 RT 1143.) Dr. Rabiner testified that, given Mr. Weaver's limited intelligence and dependence on others, he "doubted that he had the capacity to clearly plan a burglary, obtain a weapon and plan the escape route." (9 RT 1142.) Moreover, to the extent that Mr. Weaver fired a weapon during such an event, "it would be more likely out of fear and impulsiveness than out of a clear thought-out plan." (Ibid.)

The prosecutor called two witnesses in rebuttal, Mary Deighton (10 RT 1233) and San Diego Sheriff Detective Donald Phelps. (10 RT 1240.) Ms. Deighton testified that Mr. Weaver did not show any physical signs of intoxication when in the store. (10 RT 1233-1236.) Detective Phelps, who

saw Mr. Weaver in the apartment complex immediately prior to his arrest, gave similar testimony. (10 RT 1240-42.)

On March 31, 1994, Judge Lester announced his verdict of death. (12 RT 1370.) The aggravating factors in this case were limited to evidence under Penal Code section 190.3, subdivision (a). However, the the trial court gave aggravating weight to factor (d), (g), and (k) evidence offered by the defense. (Pen. Code, § 190.3, subds. (d), (g), (k); 12 RT 1350, 1356, 1358, 1367.)

Judge Lester announced that, were it not for the victim impact evidence presented by the prosecution, he would not have imposed a death sentence:

> The court proceeds and indicates as follows for purposes of review, and for any reviewing court looking at this case, I make the following statement: . . . .
>
> [¶] . . . [¶]
>
> [F]or purposes of review, newer changes in the law permit victim-impact evidence is not violative of the Eighth Amendment of the U.S. Constitution, Payne v. Tennessee, and the California Supreme Court case of People v. Edwards.
>
> These changes in the law gave this Court not only the ability, but the mandate to consider such evidence. It is this change in the law that would have caused this Court to make a different decision if it were not the law.
>
> If for some reason that law on victim-impact evidence is changed in the future, any reviewing court should know that absent the strength and force of the extremely high level of heavy weight of such evidence, this Court would have reached a different result.

(12 RT 1371.)

Judge Lester added, "that change in the law made a difference in this result." (12 RT 1372.) The court again emphasized the point:

> It is this change in the law that gives a different result today than would have been only a few years past. Any reviewing court should know that absent the strength and force of the extremely high level and heavy weight of such evidence, this court would have reached a different result.

(12 RT 1373.)

ARGUMENT

Factual and Procedural Background Relating to Jury Trial Waivers

During the hearing at which Mr. Weaver's jury and appeal rights were purportedly waived, Judge Lester noted that at "[n]o time in the history of [San Diego C]ounty has there ever been a jury waiver on a capital case." (14 RPT 64-65.) The waiver of Mr. Weaver's jury and appeal rights were not only highly unusual, however. They were also fraught with constitutional error that warrants a new trial.

The waiver of the right to a jury trial was first mentioned on February 24, 1993, immediately after Judge Lester denied the motion to quash the jury venire. Defense counsel Martin said that Mr. Weaver "would like to waive jury in this case." The trial judge replied: "Well, that is a bomb to be dropped." He called it "a shock to me." Judge Lester put the matter over for two days to allow the prosecutor to decide whether to agree to the jury trial waiver. (13 RPT 101-102.)

On February 26, 1993, the court convened, and Judge Lester asked the attorneys, "Now are either of you insisting on any condition as a result of your jury waiver or is it an unconditional waiver?" The prosecutor responded that there was a condition, which was "a waiver of appellate rights" regarding motions that had been litigated. (14 RPT 5.)

The prosecutor listed the motions that were included in his demand for an appeal waiver. (14 RPT 11-13.) Some of the motions related to jury

issues (such as the motion challenging the composition of the jury venire), and some did not (such as the motion to declare Penal Code section 190.3 unconstitutional). Both defense counsel acknowledged they were aware that the prosecutor was conditioning the jury trial waiver on the waiver of the right to appeal rulings on these motions. (14 RPT 9.)

Mr. Weaver, however, was not asked anything with respect to the waiver of his appellate rights, nor did Judge Lester ask defense counsel whether they had discussed the appeal waiver condition with Mr. Weaver. The trial judge did not advise Mr. Weaver about the automatic appeal that he was surrendering. The trial judge did not ask Mr. Weaver whether he agreed to surrender the right to appeal the court's rulings. The record of the hearing establishes that no one asked for, or obtained, Mr. Weaver's assent to this condition of the jury trial waiver. At one point, Judge Lester indicated that he would ask defense counsel whether they had had an opportunity to discuss the appeal waivers with Mr. Weaver, but the judge did not do so. (14 RPT 9-10.)

Judge Lester did discuss aspects of a jury trial and the consequences of a jury trial waiver with defense counsel and Mr. Weaver. (14 RPT 19-25, 31-60.) The trial judge failed to advise Mr. Weaver, however, of his right to a jury trial on the special circumstance allegations. Nor did he obtain a separate waiver from Mr. Weaver of his right to a jury trial on the special circumstance allegations. The court also did not advise Mr. Weaver

that he had a right to participate in the jury selection process or inquire whether he waived that right.

Defense counsel had prepared two jury waiver documents that were filed with the court. (4 CT 671-673; 14 RPT 15-16, 32; Attachments A, B.) The first document, which related to the guilt phase, was modified from a standard San Diego Superior Court jury waiver form used in non-capital cases. (4 CT 672-673; 14 RPT 15-16; Attachment A.) The second document, which related to the penalty phase, was drafted by counsel. (4 CT 671; 14 RPT 15-16, 32; Attachment B.)

Neither waiver document contains any advice of the right to appeal. Neither document refers to any waiver of the right to appeal. Neither document lists the pretrial and trial rulings that were part of the appeal waiver. Neither document specifically advises Mr. Weaver that he has the right to a jury trial on the alleged special circumstances. Neither document states that Mr. Weaver is entitled to participate in the jury selection process as part of the right to a jury trial.

Upon questioning by Judge Lester, Mr. Weaver responded that he would waive the right to a jury trial at the guilt and the penalty phases. (14 RPT 49, 59.) The court found that the waiver of the right to a jury trial at the guilt and penalty phases was knowing, intelligent and voluntary. (14 RPT 52-53, 61.) Judge Lester did not make any separate findings with respect to the waiver of the right to a jury trial on the special circumstance

allegations, nor was Mr. Weaver asked whether he waived the right to a jury trial on those allegations.

On March 19, 1993, twenty-one days after the jury waiver hearing and two days after finding Mr. Weaver guilty and finding the special circumstances to be true, the prosecution and defense gathered in the courtroom to begin penalty phase opening statements. Judge Lester announced that he would give the prosecution and the defense an opportunity to "reconsider" and "reaffirm" the penalty phase jury trial waiver. (7 RT 721-722, 725.) He discussed aspects of the jury trial waiver with Mr. Weaver and his counsel. (7 RT 722-732.) No one — not the judge, defense counsel or the prosecutor — referred to the appeal waiver condition of the jury trial waiver.

During the March 19 proceeding, Judge Lester acknowledged that he had earlier failed to obtain a separate waiver from Mr. Weaver of his right to a jury trial on the special circumstance allegations, and that he had instead "lumped together" the guilt phase and special circumstance phases of the trial. (7 RT 725.) Judge Lester handed Mr. Weaver and defense counsel a third waiver document, titled a "Reaffirmation of Penalty Phase and Special Circumstances Jury Waiver," which the court had prepared in advance of the hearing. (7 RT 722.) Mr. Weaver signed the judge's pleading, which was then filed with the court. (4 CT 690-691; Attachment C.) Like the earlier-filed waiver documents, this pleading does not refer to

Mr. Weaver's right to appeal, nor does it mention the waiver of any such right as condition of the waiver of the right to a jury trial. It was the first time any mention was made of waiving the right to a jury on the special circumstance allegations.

In Argument I below, Mr. Weaver contends that his jury trial waiver was not knowing, intelligent, and voluntary because he was never advised of two important constitutional rights that he was giving up by waiving a jury, namely his right to appeal the denial of the pretrial motions and his right to participate in the selection of his jury. As a result, he is entitled to a new trial. In Argument II below, Mr. Weaver contends that he is also entitled to a new trial because he never made a separate and express, nor knowing, intelligent, and voluntary waiver of his right to a jury trial on the special circumstance allegations.

I. MR. WEAVER'S CONVICTIONS AND SENTENCE MUST BE VACATED BECAUSE HE DID NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVE HIS RIGHT TO A JURY TRIAL

The waiver of Mr. Weaver's right to a trial by jury cannot stand. First, Mr. Weaver was neither advised of his right to appeal in this capital case, nor was he ever asked whether he understood that he was giving up this fundamental right by agreeing not to appeal from the court's denial of 19 motions. For that reason alone, the trial judge's colloquy with Mr. Weaver was constitutionally deficient and a new trial is required. But the colloquy was deficient in another respect as well. Mr. Weaver was not told that the right to a jury trial included the right to participate in selecting the jury. For these reasons, his jury trial waiver was not knowing, intelligent or voluntary, and it must be vacated.

"The right to a trial by jury is . . . a 'fundamental constitutional right.'" (*People v. Collins* (2001) 26 Cal.4th 297, 304, quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282.) The Sixth and Fourteenth Amendments to the United States Constitution guarantee this right. Article I of the California Constitution terms the jury trial "an inviolate right" that is "secured to all." The Supreme Court has declared that "[t]he guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered." (*Duncan v. Louisiana* (1968) 391 U.S. 145, 155.)

Because of the fundamental importance of a jury trial, any purported waiver of that right is subjected to strict examination to determine whether the trial court adhered to mandatory "procedural safeguards." (*People v. Collins*, *supra,* 26 Cal.4th at pp. 307-308.) This Court applies more exacting standards when evaluating the validity of a jury trial waiver than it does when measuring the adequacy of a guilty plea. (See *People v. Ernst* (1994) 8 Cal. 4th 441, 445-447 [waiver of the right to a jury trial must be made expressly by the defendant, but a guilty plea may be upheld by examining the totality of the circumstances]; see also *People v. Marlow* (2004) 34 Cal.4th 131, 148-149 [more stringent standards apply when "a defendant exercises the right to trial but waives the right to a jury"].)

The jury waiver colloquy in this case did not meet these standards. In Part A below, Mr. Weaver argues that the trial court's failure to advise him of his right to an automatic appeal and the consequences of waiving that right rendered the jury waiver invalid. In Part B, Mr. Weaver argues that the colloquy was also deficient in that it did not advise him of his right to participate in the selection of his jury. In Part C, Mr. Weaver explains why reversal is mandated by these trial court errors.

A. Mr. Weaver Was Neither Advised Of, Nor Agreed To, The Surrender Of His Constitutional Right To Appeal

1. Trial judges are constitutionally required to advise defendants of the constitutional rights they surrender when waiving a jury trial

When a defendant seeks to waive his constitutional right to a jury trial, judges have the "constitutional procedural duty to advise defendant of his right to jury trial, and to determine impartially whether defendant's waiver of jury trial was knowing, intelligent, and voluntary." (*People v. Collins*, *supra*, 26 Cal.4th at pp. 308-309.) A "knowing and intelligent" jury trial waiver is one that is "'made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.'" (*Id.* at p. 305, quoting *Colorado v. Spring* (1987) 479 U.S. 564, 573.) A "voluntary" waiver is one that is "'the product of a free and deliberate choice rather than intimidation, coercion, or deception.'" (*Ibid,* quoting *Colorado v. Spring*, *supra*, 479 U.S. at p. 573; see also *McCarthy v. United States* (1969) 394 U.S. 459, 465-466; *Johnson v. Zerbst* (1938) 304 U.S. 458, 464.)

The *sine qua non* of a valid waiver of rights is knowledge. In *Olano v. United States* (1993) 507 U.S. 725, the Supreme Court emphasized that "waiver is the 'intentional relinquishment or abandonment of a known right.'" (*Id.* at p. 733, quoting *Johnson* v. *Zerbst*, *supra,* 304 U.S. at p. 464.)

Because a jury waiver is an essential aspect of a guilty plea, cases involving guilty pleas provide guidance about the required waiver procedures. A guilty plea cannot be upheld unless a defendant is expressly advised of the constitutional rights that are being waived, including the right to a jury trial. (See *Boykin v. Alabama* (1969) 395 U.S. 238, 242-243.) This Court does not review such claims under a harmless error analysis. Instead, because the denial of a jury trial is structural error, "reversal of a judgment of conviction [is required] without the necessity of a determination of prejudice." (*People v. Collins*, *supra*, 26 Cal.4th at p. 311.)

2. Because the right to an automatic appeal is constitutionally protected, the trial court's failure to advise Mr. Weaver that he was giving up that right invalidates the jury waiver

The United States and California Constitutions protect the right to an automatic, non-waivable appeal to this Court, with meaningful review of all legal issues relating to the conviction and sentence. Thus, the trial court was required to advise Mr. Weaver that he was giving up that right by waiving a jury.

It is beyond dispute that meaningful appellate review is necessary to a constitutional death penalty statutory scheme. (See, e.g., *Gregg v. Georgia* (1976) 428 U.S. 153,195, 206, 211; *Jurek v. Texas* (1976) 428 U.S. 262, 276; *Proffitt v. Florida* (1976) 428 US. 242, 251; *Roberts v.*

Louisiana (1976) 428 U.S. 325, 335-336; *Woodson v. North Carolina* (1976) 428 U.S. 280, 303.) In 1976, the Supreme Court addressed the constitutionality of the death penalty statutes in five states.[4] Capital punishment statutes were upheld in three states.[5] Statutes were struck down in two others.[6]

In the statutes that were upheld, the availability of appellate review was considered a critical factor in the Supreme Court's determination that the statutes were "evenhanded, rational, and consistent." (*Jurek v. Texas*, *supra*, 428 U.S. at p. 276; accord, *Proffitt v. Florida*, *supra*, 428 U.S. at pp. 258-259; *Gregg v. Georgia*, *supra,* 428 U.S. at p. 206.) In *Gregg*, the Supreme Court announced that the automatic appeal of all death sentences to the Georgia Supreme Court was an "important additional safeguard against arbitrariness and caprice." (428 U.S. at pp. 206-207.) The Court reiterated the point several years later, stating that its holding that Georgia's death penalty statute is constitutional "depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each

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[4] (See *Gregg v. Georgia, supra,* 428 U.S. at pp. 206-207; *Jurek v. Texas, supra,* 428 U.S. at p. 276; *Proffitt v. Florida, supra,* 428 U.S. at pp. 259-260; *Roberts v. Louisiana, supra*, 428 U.S. at pp. 335-336; *Woodson v. North Carolina, supra,* 428 U.S. at p. 303.)

[5] (See *Jurek v. Texas*, *supra*, 428 U.S. at p. 276; *Proffitt v. Florida*, *supra*, 428 U.S. at p. 259; *Gregg v. Georgia*, *supra,* 428 U.S. at p. 207.)

[6] (See *Roberts v. Louisiana*, *supra*, 428 U.S. at p. 336; *Woodson v. North Carolina*, *supra,* 428 U.S. at p. 305.)

death sentence by the Georgia Supreme Court." (*Zant v. Stephens* (1983) 462 U.S. 862, 890.)

In striking down the capital punishment systems in two states, the Court pointed to the lack of meaningful appellate review. (See *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 303, citing *Gregg v. Georgia, supra*, 428 U.S. at pp. 204-206 ["There is no way under the North Carolina law for the judiciary to check the arbitrary and capricious exercise of that power through a review of death sentences"]; *Roberts v. Louisiana*, *supra*, 428 U.S. at pp. 335-336 ["The Louisiana statute thus suffers from constitutional deficiencies similar to those identified in the North Carolina statute . . . . [T]here is no meaningful appellate review of the jury's decision"].)

In 1984, the Supreme Court examined California's death penalty statute in *Pulley v. Harris* (1984) 465 U.S. 37. Upholding the statute, the Court again highlighted the critical feature of mandatory appellate review in assuring that capital judgments comport with the Eighth Amendment, noting that all of the new statutes drafted in response to *Furman v. Georgia* (1972) 408 U.S. 238, provided for automatic appeal of death sentences. (*Pulley v. Harris*, *supra,* 465 U.S. at p. 44.) The Supreme Court specifically observed that California's death penalty statute requires an automatic appeal. (*Id.* at p. 53.)

Seven years after *Harris*, Justice O'Connor, writing for the majority, stated that "[w]e have repeatedly emphasized 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.) In 2005, the U.S. Department of Justice reported: "Of the 38 States with capital statutes at yearend [*sic*], 37 provided for review of all death sentences regardless of the defendant's wishes." (U.S. Dep't of Justice, Bureau of Justice Statistics, Bulletin: Capital Punishment (2005), p. 3 <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp05.pdf> [as of Jan. 5, 2007].) The overwhelming majority of these 37 states require a full, non-waivable appeal of the conviction in addition to the sentence, as does California. (*Ibid.*)

With these principles in mind, and on the unique facts of this case, the failure of the trial court to advise Mr. Weaver of the consequences of his waiver of his right to a trial by jury, i.e., that he was also giving up his right to appeal the denial of 19 motions to this Court, rendered the jury waiver invalid. Accordingly, Mr. Weaver's jury trial waiver was not knowing, intelligent and voluntary because he was not advised of the essential elements of the rights that he surrendered or of the consequences of his waiver. Under *Collins*, the trial court does not discharge its "constitutional procedural duty" unless there is "evidence in the record" to show that the jury trial waiver — including the waiver of rights that are part of the jury trial waiver — was knowing, intelligent and voluntary. (26 Cal.4th at p. 305, fn. 2.) The record in this case demonstrates that Mr.

Weaver was neither aware of nor understood that he was surrendering his fundamental right to appeal the motions as an essential condition of the jury trial waiver. His jury waiver was not knowing, intelligent, and voluntary, and thus violated his rights under the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and article I of the California Constitution.

B. Mr. Weaver Was Neither Advised Of, Nor Agreed To, The Surrender Of His Right To Participate In The Selection Of The Jury

As argued above, Mr. Weaver's jury waiver was invalid because he was not advised of the consequences of the waiver. Moreover, his waiver was invalid because the trial court failed to advise Mr. Weaver during the waiver colloquy of his right to participate in the selection of his jury.

Mr. Weaver, an African-American and Latino man, was on trial for his life in a community in which he was an outsider. He was 23 years old at the time of the crime. Issues of race, the composition of the jury, and the method of selecting the jury were the central focus of much of the litigation up to the time of the trial.[7] It was only after all of these motions were

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[7] (See, e.g., 2 CT 137-148 [In Limine Motion for Use of Individual and Sequestered or in the Alternative Small Group Voir Dire]; 2 CT 149-159 [Motion for Access to Juror's Addresses]; 2 CT 291-295 [Motion for Disclosure of Prosecutor's Legal Theories]; 2 CT 263-265 [Motion To Transfer Trial to Downtown Court House]; 4 CT 627-640 [Motion to Challenge the Composition of San Diego County Juries and To Quash All Current and Available Jury Panels].)

denied that counsel announced that Mr. Weaver would waive his right to a jury trial. (13 RPT 100 [judge denies the final motion, challenging composition of the jury]; 13 RPT 101 [counsel announces that defense will waive jury].) Under these circumstances, having just learned that his counsel's efforts to ensure a representative jury were denied, it was essential that Mr. Weaver be told that he would have a role in helping to choose those who would judge him.

This Court has never addressed whether a trial judge must specifically inform a defendant who seeks to waive his jury trial right about his right to participate in the selection of the jury. The courts that have addressed this issue have identified four essential features of the right to a jury trial that a defendant must understand in order to make a valid jury trial waiver: his right to participate in the selection of jurors; to a twelve-member jury; to a unanimous jury verdict; and that a judge alone will decide guilt or innocence in a bench trial. (See, e.g., *United States v. Martin* (6th Cir. 1983) 704 F.2d 267, 274-275.) The United States Courts of Appeal for the Second, Sixth, Seventh, Ninth and Tenth Circuits have held that district courts should include advice of these four features of a jury trial in a colloquy with the defendant. (See *United States v. Gonzalez-Flores* (9th Cir. 2005) 418 F.3d 1093, 1102-1103; *Spytma v. Howes* (6th Cir. 2002) 313 F.3d 363, 370; *Marone v. United States* (2d Cir. 1993) 10 F.3d 65, 68 (*per curiam*); *United States v. Robertson* (10th Cir. 1993) 45

F.3d 1423, 1432; *United States v. Rodriguez* (7th Cir. 1989) 888 F.2d 519, 527.) Of the four essential components of the jury waiver colloquy, the trial court in Mr. Weaver's case failed to inform him of a key component, the right to participate in the selection of his jury.

Given the importance of the right involved, this Court should take the opportunity in this case to make clear that advice about a defendant's right to participate in jury selection is a constitutionally mandated part of any valid jury waiver colloquy. Unless a defendant is advised of this critical aspect of a jury trial, a waiver cannot be made with "'full awareness of the right being abandoned.'" (*People v. Collins*, *supra*, 26 Cal.4th at p. 305, quoting *Colorado v. Spring*, *supra*, 479 U.S. at 573.) This Court also has the power to require these advisements under the Court's supervisory authority. (See *People v. Howard* (1992) 1 Cal.4th 1132, 1175-1179 [requiring separate advice of the three rights set out in *Boykin* as part of guilty plea].)

The right of the defendant to participate in jury selection encompasses several elements. It includes the opportunity for the defendant to:

1. Listen as the judge conducts the initial examination of prospective jurors. (Code Civ. Proc., § 223);

2. Discuss with his lawyers possible questions for the examination of prospective jurors. (*Ibid.*);

3. Provide his views to his lawyers as to the selection of individual jurors; and

4. Confer with his lawyers to decide whether to challenge the jury panel or an individual juror for cause, and to decide how to exercise the 20 peremptory challenges available to a defendant in a capital case. (Code Civ. Proc., § 225 [challenges for cause]; Code Civ. Proc., § 231 [peremptory challenges].)

Over a century ago, the Supreme Court described the defendant's personal involvement in exercising peremptory challenges as "one of the most important rights secured to the accused." (*Pointer v. United States* (1894) 151 U.S. 396, 408.) In an early capital case, *Lewis v. United States*, (1892) 146 U.S. 370, the Supreme Court held:

> "The prisoner is entitled to an impartial jury composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers in the selection of jurors. The necessities of the defense may not be met by the presence of his counsel only."

(*Id.* at pp. 373-374, quoting *Hopt v. Utah* (1884) 11 U.S. 574, 578.) The Supreme Court determined that the defendant's active role in deciding on peremptory challenges must be safeguarded because of the "'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.'" (*Id.* at p. 376, quoting 4 William Blackstone, Commentaries, p. 353.) The defendant's personal participation in jury selection is therefore required, lest he "'be tried by any one man

against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike.'" (*Ibid.*)

In a later formulation of this right, the Eighth Circuit emphasized that "the trial court has a responsibility to make sure that defendants are given an ample opportunity to confer with their counsel during all phases of the jury selection process." (*United States v. Chrisco* (8th Cir. 1974) 493 F.2d 232, 237.) The court continued by observing that "'there is no way to assess the extent of the prejudice . . . a defendant might suffer by not being able to advise his attorney during the impaneling of the jury.'" (*Ibid.*, quoting *United States v. Crutcher* (2d Cir. 1968) 405 F.2d 239, 244.) The touchstone for courts is the participation of the defendant, regardless of the vigor of his counsel's advocacy, because the "sudden impressions and unaccountable prejudices" formed by the defendant "may have been different from those made by his attorneys." (*Cardinal v. Gorczyk* (D. Vermont 1995) 880 F.Supp. 261, 271, quoting *United States v. Crutcher*, *supra*, 405 F.2d at 244; see also *Pointer v. United States*, *supra*, 151 U.S. at p. 408 ["Any system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of [the jury selection] right must be condemned"].)

Judge Lester's failure to advise Mr. Weaver of his right to participate in the selection of the jury violated Mr. Weaver's rights under

the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, and article I of the California Constitution.

C. The Unconstitutional Waiver Proceedings Require A New Trial

The improper denial of the right to a trial by jury is a structural error. As such, the harmless error rule does not apply. (See *Sullivan v. Louisiana, supra*, 508 U.S. at pp. 281-282 ["The deprivation of [the right to a jury trial], with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error'"].) As this Court explained in *Collins*, "where a case improperly is tried to the court rather than to a jury, there is no opportunity meaningfully to assess the outcome that would have ensued in the absence of the error." (*People v. Collins*, *supra,* 26 Cal.4th at p. 313; see also *People v. Ernst*, *supra*, 8 Cal. 4th at pp. 448-449; *United States v. Duarte-Higareda* (9th Cir. 1997) 113 F.3d 1000, 1003.) Accordingly, under both the United States and California Constitutions, the error requires that the conviction and sentence be set aside.

II. MR. WEAVER'S SPECIAL CIRCUMSTANCE FINDINGS AND DEATH SENTENCE MUST BE VACATED BECAUSE HE DID NOT WAIVE HIS RIGHT TO A JURY TRIAL ON THE SPECIAL CIRCUMSTANCE ALLEGATIONS

A defendant is not eligible for a sentence of death unless the trier of fact finds the accused guilty of first degree murder and makes a special finding that one or more special circumstances is true by proof beyond a reasonable doubt. (Pen. Code, §§ 190.2, subd. (a), 190.4, subd. (a).) California law guarantees the right to a jury trial on the special circumstance allegations. This is true even if a defendant has waived a jury trial on the determination of guilt or innocence. (See Pen. Code, § 190.4, subd. (a); Cal. Const., art. I, §§ 16, 17)

The Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I of the California Constitution also guarantee the right to a jury trial on special circumstance allegations. The Supreme Court has held that a capital defendant has a constitutional right to a jury trial on any "aggravating circumstance necessary for imposition of the death penalty." (*Ring v. Arizona* (2002) 536 U.S. 584, 609; see also *People v. Stanley* (2006) 39 Cal.4th 913, 963-964 [discussing *Ring*].) Although the Supreme Court decided *Ring* under the Sixth and Fourteenth Amendments, Justice Breyer wrote in his concurrence that "jury sentencing in capital cases is mandated by the Eighth Amendment." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 614 (conc. opn. of Breyer, J.).) Mr. Weaver, therefore, also

makes his claim under the Eighth Amendment to the United States Constitution.

In its amended information, the prosecution charged Mr. Weaver with first degree murder, and two special circumstances: murder during the commission of a robbery and murder during the commission of a burglary. (1 CT 94-96.) The case went to a guilt and special circumstances trial. Judge Lester found both alleged circumstances true. (6 RT 714-715.) The findings made Mr. Weaver eligible for the death penalty. (Pen. Code, §§ 190.2, subd. (a), 190.4, subd. (a).)

The facts relating to the waiver of a jury trial on the special circumstances are set forth below in Part A of this argument. In Part B, Mr. Weaver shows that the state law and the United States and California Constitutions require the truth of the special circumstance allegations to be determined by a jury unless the defendant specifically waives that right. That part of the brief also shows how the waiver must be separate and personal, as well as knowing, intelligent, and voluntary. In Part C, Mr. Weaver explains that because the trial court failed to obtain a lawful waiver, the court acted in excess of its jurisdiction by rendering findings on the special circumstances. For all these reasons, the special circumstance findings cannot stand and the death sentence must be reversed.

A. Mr. Weaver Was Not Advised Of His Right To A Jury Trial On The Special Circumstance Allegations, And He Did Not Waive That Right

On February 26, 1993, before the trial was scheduled to begin, two jury waiver documents, which were signed by counsel, by Mr. Weaver and by the prosecutor, were submitted to the court. (4 CT 671-673; 14 RPT 15-16, 32; Attachments A, B.) Neither of the two documents advised Mr. Weaver that he had the right to a jury trial on the two alleged special circumstances. The trial judge did not orally advise Mr. Weaver of that right, and Mr. Weaver did not orally waive that right.

The first document is titled "Jury Waiver." (4 CT 672-673; Attachment A.) It states that Mr. Weaver desires to waive his right to a jury trial and have the court "determine whether he is guilty or not guilty of the offense(s) for which he is charged." (4 CT 672.) The document is a San Diego Superior Court form used for jury waivers in non-capital cases. (14 RPT 17.) The phrase "special circumstances" does not appear anywhere on the form.

The second document is titled "Jury Waiver (Penalty Phase)." (4 CT 671; Attachment B.) It provides that "[i]f, at the guilt phase, [Mr. Weaver] is found guilty of first degree murder and a special circumstance is found true," Mr. Weaver desires to waive his right to a jury trial and have the court decide "whether he will be sentenced to life without the possibility of parole or death." (Ibid.) The document further states that Mr. Weaver

understands he is entitled to have a jury determine whether he will be sentenced to life without parole or death. Although this document contains the phrase "special circumstances," it only advises Mr. Weaver of his right to a jury trial at the penalty phase, assuming that he has already been found guilty of murder and that a special circumstance has already been found to be true. The document nowhere informs Mr. Weaver that he has the right to a jury trial on the two special circumstance allegations. (Ibid.)

At the hearing on February 26, 1993, Judge Lester discussed the jury trial waiver. The trial transcript contains a 63-page colloquy regarding the jury waiver. Within this colloquy, there were three brief references to the special circumstances. None served to inform Mr. Weaver of his right to a jury trial on the special circumstance allegations.

The first reference to the special circumstances was made when Judge Lester described the guilt phase to Mr. Weaver:

> [The guilt phase] incorporates, of course, the court determining whether or not the people prove their case beyond a reasonable doubt during which the defendant has the presumption of innocence, a first degree murder charge along with the proof of a special circumstance, along with the other charges that the people have pled . . . .
>
> If you waive jury, the court will determine all legal findings required in that phase of the trial. There will be no phases left to a jury to determine.

(14 RPT 17.) The judge's admonition did not inform Mr. Weaver that he had a right to a jury trial on the special circumstance allegations. The trial

court never stated that a jury would make the special circumstance findings if Mr. Weaver had a jury trial on the determination of guilt, nor did the court tell Mr. Weaver that even if he waived a jury on the determination of guilt, the law nevertheless afforded him the right to a jury trial on the special circumstance allegations.

The judge referred to the special circumstance allegations a second time:

> This is in a case of whether, if the court were to determine in the guilt or innocence [phase] that the case should proceed to the penalty phase because of findings that would be required; namely, first degree murder and a special circumstance, both beyond a reasonable doubt.

(14 RPT 42.) As with the first comment, this statement merely informed Mr. Weaver that the finding of a special circumstance was required before there could be a penalty phase. The judge did not state that Mr. Weaver had a right to a jury trial on the special circumstance allegations.

The judge mentioned the special circumstances a third time in explaining the written penalty phase waiver form to Mr. Weaver:

> [The waiver form] says . . . that if at the guilt phase you are found guilty of first degree murder, and a special circumstance is found to be true, that you desire to waive and give up your right to trial by jury at the penalty phase.

(14 RPT 53-54.) The judge merely repeated the text of the form. He did not inform Mr. Weaver of the right to a jury trial on the special

circumstance allegations.

Nothing in the record shows, then, that Mr. Weaver was specifically advised of his right to a jury trial on the special circumstance allegations, and the record contains no express waiver of that right.

Nineteen days later, on March 17, 1993, Judge Lester found Mr. Weaver guilty of all charges. (6 RT 713-717.) He also found the burglary and robbery special circumstances to be true, along with the weapon and great bodily injury enhancements. (6 RT 714-717.)

B. The Court's Failure To Obtain A Separate, Personal Waiver Of The Right To A Jury Trial On The Alleged Special Circumstances Violated State Law And The United States And California Constitutions

The trial court erred in failing to obtain Mr. Weaver's separate, personal waiver of his right to a jury trial on the alleged special circumstances prior to the trial. California Penal Code section 190.4, subdivision (a), as interpreted by this Court in *People v. Memro* (1985) 38 Cal.3d 658, 704, demands a separate and personal waiver. It cannot be folded into the guilt phase jury waiver. Moreover, because Mr. Weaver never expressly waived his right to a jury trial on the special circumstances, no such waiver could be considered knowing, intelligent, and voluntary.

1. Under California law, an accused must make a separate and personal waiver of the right to a jury trial on the special circumstance allegations

Even if a defendant has waived the right to a jury for the guilt phase

of the trial, state law presumes that the trial on the special circumstances will be before a jury. Penal Code section 190.4, subdivision (a) provides in part: "If the defendant was convicted by the court sitting without a jury, the trier of fact [of the special circumstances allegations] shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court." Because this statute mandates that there be a jury trial on the special circumstance allegations, even where a defendant had a court trial at the guilt phase, this Court has held that "an accused whose special circumstance allegations are to be tried by a court must make a separate, personal waiver of the right to a jury trial" on those special circumstance allegations. (*People v. Memro*, *supra,* 38 Cal.3d at p. 704.)

The possibility of a bench trial on the charged crimes, followed by a jury trial on the special circumstances, underscores the need for a separate and distinct waiver with respect to special circumstances. In *Memro*, *supra*, this Court held that the requirement of a separate and personal waiver applies in all capital cases, whether or not the alleged special circumstances duplicate offenses that are alleged in the indictment or information. (38 Cal.3d at p. 704.)

The defendant in *Memro* waived his right to a jury trial at the guilt phase, but did not make a separate, personal waiver of the right to a jury trial on the special circumstances. (*People v. Memro*, *supra,* 38 Cal.3d at pp. 666, 704.) He was convicted in a court trial of two counts of first

degree murder and one count of second degree murder. (*Id.* at p. 666.) The court found a multiple-murder special circumstance to be true. (*Ibid.*) The prosecution contended that "a separate jury waiver is unnecessary and section 190.4, subdivision (a) should not be given mandatory effect where the proof of a special circumstance allegation rests on evidence presented at trial on the murder charge." (*Id.* at p. 702.) This Court rejected the prosecution's argument, finding it contrary to the language of the statute: "Had the Legislature intended to limit section 190.4, either to the prior murder conviction special circumstance or to any other special circumstance, it is likely that it would have done so." (*Id.* at p. 702.) Thus, the Court in *Memro* held that the right to a jury trial on special circumstance allegations must be safeguarded to the same extent as the right to a jury trial on substantive criminal charges. (*Id.* at pp. 703-704.)

A separate waiver necessarily means an express waiver. This Court has long held that a waiver of the right to a jury trial must be express "and will not be implied from a defendant's conduct." (*People v. Holmes* (1960) 54 Cal.2d 442, 443-444; see also *People v. Ernst*, *supra,* 8 Cal.4th at p. 445 [following *Holmes*].) Furthermore, this Court mandates that the right to a jury be waived, if at all, "in open court by the defendant." (See *People v. Ernst, supra,* 8 Cal.4th at p. 445.)

Memro, decided before Mr. Weaver's trial, gave guidance to the trial bench: "Assuming an accused desires to waive his right to a jury as to both

the guilt and special circumstance determinations, the trial court could satisfy section 190.4, subdivision (a)'s requirement by taking *separate* waivers as to each before commencement of trial." (*People v. Memro, supra,* 38 Cal.3d at p. 704, italics added; see also George, ed., California Criminal Trial Judges' Benchbook (1988) p. 262.1 ["[A] separate jury waiver is required for the trial of death penalty special circumstance allegations in addition to the jury waiver on the issue of guilt," citing *People v. Memro*, *supra*, 38 Cal.3d at pp. 700-705.]; California Judges Benchbook: Criminal Trials (1991), § 2.3, p. 39 [same, citing *People v. Memro*, *supra*, 38 Cal.3d at p. 700].)

Following *Memro*, this Court applied its rule to two cases in which the record showed the defendant was aware that his jury waiver included a waiver of his right to a jury trial on the special circumstance allegations. In *People v. Diaz* (1992) 3 Cal.4th 495, this Court held that the defendant's waiver was valid when he had been advised that his waiver would apply to "both phases . . . of the special circumstances case." (*People v. Diaz, supra*, 3 Cal.4th at p. 564.) There, the defendant informed the trial court that he had discussed his waiver "quite thoroughly" with counsel. (*Id.* at 565.) For this reason, this Court determined that the defendant understood that his waiver applied to "*all* aspects of his special circumstances case, from beginning to end." (*Ibid.*, italics in original.)

Subsequently, in *People v. Wrest* (1992) 3 Cal.4th 1088, this Court

held the defendant's waiver valid where it had been made after the prosecutor's specific questioning and exposition of the rights to a jury trial to which the defendant was entitled. (3 Cal.4th at pp. 1101-1102.) There, the jury trial waiver was part of the defendant's guilty plea. (*Id.* at p. 1101.) Wrest and his counsel signed an eight-page written waiver form. (*Ibid.*) The form advised Wrest of his right to a jury trial, and affirmed that he had discussed his plea with counsel and had received advice about his rights. (*Id.* at pp. 1101-1102.) Wrest was advised on the record that he had the right to have a jury decide "the special allegations, or any other special allegations that are charged in this particular case." (*Id.* at p. 1103, italics omitted.) He was told that all 12 jurors "would have to agree [on] . . . the special circumstances." (*Id.* at p. 1104, italics omitted.) As he waived his right to a jury trial, Wrest was pointedly asked: "In other words, you don't want a jury trial on the issue of guilt or the special circumstances or the enhancements, right?" (*Ibid.*, italics omitted.) In upholding the plea and jury trial waiver, this Court stated that *Memro* "requires that a valid waiver of the jury-trial right on a special circumstance actually cover the special circumstance." (*Id.* at p. 1105.)

The decisions in *Diaz* and *Wrest* reiterate the requirement that the record demonstrate the defendant's awareness of the rights he is separately giving up when waiving a jury trial. Unless the record shows that "the defendant is aware that the waiver applies to each . . . aspect[] of trial," the

waiver is deficient under California law. (*People v. Diaz, supra,* 3 Cal.4th at p. 565; see also *People v. Wrest, supra*, 3 Cal.4th at p. 1105; Pen. Code § 190.4(a).)

The waiver of Mr. Weaver's jury trial on the special circumstance allegations does not satisfy the requirements of *Memro, Diaz,* or *Wrest.* The court's colloquy prior to the commencement of the guilt phase only informed Mr. Weaver about the structure of a capital trial. Neither it nor the signed waiver form "actually cover[ed]" the right to a jury trial on the special circumstances. (*People v. Wrest, supra,* 3 Cal.4th at p. 1105; see also *People v. Memro, supra*, 38 Cal.3d at p. 704; CT 671-673.)

The record does not show that Mr. Weaver was aware of and intended to relinquish his separate jury trial rights. Unlike the defendant in *Diaz*, Mr. Weaver did not inform the trial court that he had "quite thoroughly" discussed the meaning of his jury trial waiver with his attorneys. (*People v. Diaz, supra*, 3 Cal.4th at p. 565; 14 RPT 48-49.) The record does not show that Mr. Weaver was even aware of his right to a jury trial on the special circumstances, let alone that he separately and personally waived his right to a jury trial on those allegations.

The trial court acknowledged this deficiency at the conclusion of the guilt phase. Judge Lester admitted that he had "lumped together" the special circumstances and the guilt determinations when he attempted to take Mr. Weaver's jury waiver before commencing the guilt phase of the

trial. (7 RT 725.) As the trial court acknowledged, there had been no separate, personal waiver with respect to the right to a jury trial on the special circumstance allegations. Mr. Weaver's waiver did not therefore comport with the requirements of California law under Penal Code section 190.4(a), *Memro*, *Wrest*, and *Diaz*.

2. The United States and California Constitutions require a separate and personal waiver of the right to a jury trial on the special circumstance allegations

A separate and personal waiver of the right to a jury trial on the special circumstance allegations is required under California statutory law. This waiver is also required by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as article I of the California Constitution.

In *Ring v. Arizona*, *supra*, 536 U.S. at p. 609, the Supreme Court held that the United States Constitution ensures the right to have a jury decide "an aggravating circumstance necessary for imposition of the death penalty." Simply, "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to the imposition of the level of punishment that the defendant receives — whether the statute calls them elements of the offense, sentencing factors, or Mary Jane — must be found by a jury beyond a reasonable doubt." (*Id.* at p. 610 (conc. opn. of Scalia, J.).)

In California, the finding of a special circumstance "changes the crime from one punishable by imprisonment of 25 years to life to one which must be punished either by death or life imprisonment without possibility of parole." (*People v. Superior Court* (*Engert*) (1982) 31 Cal.3d 797, 803.) Thus, under *Ring*, a California capital defendant has a right under the Sixth and Fourteenth Amendments to have all of the elements of the special circumstance allegations determined by a jury. As noted above, in Justice Breyer's view this right is also guaranteed by the Eighth Amendment. (*Ring v. Arizona, supra*, 536 U.S. at p. 614 (conc. opn. of Breyer, J.).) Because the right to a jury trial on the special circumstances is a constitutional right, it may not be surrendered without the same protections given to the right to a jury trial on substantive charges. (*United States v. Booker* (2005) 543 U.S. 220, 231 [observing that "[a]s a matter of simple justice, it [is] obvious that the procedural safeguards designed to protect" defendants from punishment for a statutory offense "should apply equally" to violations of sentencing enhancements].)

The California Constitution similarly requires that a defendant's waiver of his right to a jury trial be personal and express. (*People v. Collins, supra*, 26 Cal.4th at pp. 307-308.) In *Collins*, this Court held the defendant's waiver of his right to a jury trial was invalid because the trial judge had offered the defendant an unspecified benefit for the waiver. (*Id.* at p. 309.) The Court identified the right to a jury trial as a fundamental

right under the United States and California Constitutions. (*Id.* at p. 304, citing *Sullivan v. Louisiana, supra*, 508 U.S. at pp. 281-282 and *People v. Ernst, supra,* 8 Cal.4th at pp. 444-445.) As a result, the waiver must be made personally and expressly by the defendant. (*People v. Collins*, *supra*, 26 Cal.4th at p. 308, citing Cal. Const., art. I, § 16.) The trial court's failure to adhere to these procedural requirements is structural error that mandates reversal. (*People v. Collins*, *supra*, 26 Cal.4th at p. 311.)

Following *Ring*, it is clear that the reading of Penal Code section 190.4, subdivision (a) announced in *Memro* is the approach demanded by both the United States and California Constitutions. (See *Ring v. Arizona, supra,* 536 U.S. at p. 609; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *United States v. Booker*, *supra,* 543 U.S. at p. 231; *People v. Collins, supra,* 26 Cal.4th at pp. 304-305.) *Memro* established that the right to a jury trial on the special circumstances cannot be waived without the same procedural protections afforded to the jury trial right on substantive charges. (*People v. Memro, supra,* 38 Cal.3d at p. 704.) These procedural requirements are that the defendant's waiver of his right to a jury trial be separate, personal, and express. (See *People v. Memro*, *supra*, 38 Cal.3d at p. 704.) In other words, the special circumstance jury trial waiver cannot be "lumped together" with the guilt phase jury waiver, as was done in this case. (7 RT 725.)

3. Mr. Weaver's jury trial waiver was not made knowingly, intelligently, and voluntarily

Mr. Weaver has shown that the trial court failed to obtain a separate, personal and express waiver of his right to a jury trial on the special circumstance allegations. That is an independent ground for relief, and it is sufficient to require this Court to reverse the special circumstance findings. This Court must also reverse the special circumstance findings because Mr. Weaver did not knowingly, intelligently, and voluntarily waive his right to a jury trial on the special circumstances.

As discussed in Argument I above, when a defendant has a constitutional right to a jury trial, judges have the "constitutional procedural duty to advise defendant of his right to jury trial, and to determine impartially whether defendant's waiver of jury trial was knowing, intelligent, and voluntary." (*People v. Collins, supra,* 26 Cal.4th at pp. 308-309.) Because the right to a jury trial is a fundamental right under the United States and California Constitutions (see *Ring v. Arizona*, *supra*, 536 U.S. at p. 609; *People v. Prieto* (2003) 30 Cal.4th 226, 256), it may only be waived with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it, and as a product of the defendant's free and deliberate choice. (*People v. Collins*, *supra*, 26 Cal.4th at p. 305.) Therefore, the waiver must be knowing, intelligent, and voluntary, as well as personal and express. (*Id.* at pp. 305,

308.) If the waiver fails to meet these requirements, the defendant's due process rights have been violated. (*Id.* at p. 306.)

Judge Lester did not advise Mr. Weaver that he had a right to a jury trial on the charged special circumstance allegations, nor did he ask him to waive that right. Mr. Weaver never made a separate, personal waiver of his right to a jury trial on the special circumstances. Thus, the purported waiver could not possibly have been knowing, intelligent and voluntary. The record does not show that the waiver was made with any awareness, much less a "full awareness" of "the right being abandoned." (*People v. Collins, supra,* 26 Cal.4th at p. 305, internal quotations omitted.)

4. Mr. Weaver's post-hoc "reaffirmation" of his waiver did not cure the trial court's error

As noted above, when the parties appeared for the commencement of the penalty phase, Judge Lester provided them with a document that he had prepared (7 RT 722), titled "Jury Waiver (Penalty Phase)." (4 CT 690-691; Attachment C.) The pleading contained three "reaffirmations." One pertained to a jury waiver on the "charges" at the guilt phase. The second concerned a waiver of the right to a jury trial on the special circumstance allegations. The third pertained to the penalty phase. (Ibid.) With respect to the waiver of a jury trial on the special circumstance allegations, Judge Lester had inserted the following language in the new waiver pleading:

> It is also the intention and reaffirmation that the defense and prosecution furthermore separately recognize their right to a

> jury trial on the special circumstances finding and also fully waive their right to jury trial on the special circumstances finding.

(4 CT 690; 7 RT 723; Attachment C.) Judge Lester read the document to Mr. Weaver. (7 RT 723-724.)

The judge acknowledged that he had earlier failed to obtain a separate waiver from Mr. Weaver of his right to a jury trial on the special circumstance allegations, and that he had instead "lumped together" the guilt phase and special circumstance phases of the trial. (7 RT 725.) After a brief recess, Mr. Weaver signed the form and acknowledged that his counsel had explained the form to him. (4 CT 691; 7 RT 728-729.)

The trial judge's efforts to secure a post-hoc "reaffirmation" could not salvage a constitutionally deficient waiver. First, there had been no earlier waiver of the right to a jury trial on the special circumstance allegations, so no "reaffirmation" could occur. The trial on the special circumstances had already taken place, and the judge had found the allegations true beyond a reasonable doubt. (6 RT 713-717.) By the time Judge Lester told Mr. Weaver that he had the right to a jury trial on the special circumstance allegations, that right was lost. Second, at the time of the "reaffirmation," Mr. Weaver had been convicted of charges that made him eligible for the death penalty. Mr. Weaver stood before a judge who was going to decide whether he would live or die. Under these circumstances, no new waiver could be considered voluntary.

In an opinion written by then-Judge Anthony Kennedy, the Ninth Circuit recognized the impossibility of questioning a defendant about his relinquishment of rights after he has already been convicted without benefit of those rights. (See *United States v. Reyes* (9th Cir. 1979) 603 F.2d 69, 71-72.) *Reyes* concerned a defendant's agreement to a jury composed of less than 12 members. Federal Rules of Criminal Procedure, Rule 23(b) provides that "at any time before verdict" the parties may stipulate to a jury of less than 12 members. An oral stipulation may satisfy the Rule 23(b) requirement, "'but it must appear from the record that the defendant personally gave express consent in open court, intelligently and knowingly, to the stipulation.'" (*United States v. Reyes, supra,* 603 F.2d at p. 71, quoting *United States v. Guerrero-Peralta* (9th Cir. 1971) 446 F.2d 876, 877.) In *Reyes*, the defendant's consent to a stipulation appeared on the record at the sentencing hearing when the judge questioned him, for the first time, about whether he had agreed during the trial to proceed with 11 jurors. (*Ibid.*) The Ninth Circuit reversed the conviction. (*Id.* at p. 72.)

The court of appeals found that Reyes's knowing and intelligent consent had to "appear [on the record] at the time the stipulation [was] made, and not at some subsequent point such as a sentencing hearing." (*United States v. Reyes*, *supra*, 603 F.2d at p. 71.) Questioning by the judge at the time the stipulation is presented "provid[es] reliable evidence that the defendant has in fact consented." (*Ibid.*) The circuit court reasoned that a

trial court's ability to determine whether a defendant's statements were in fact knowing and intelligent "are much diminished when the question of the defendant's informed consent is examined long after the fact." (*Id.* at p. 72.) Moreover, "the defendant's desire not to antagonize the judge who imposes sentence upon him may cause him to agree that he consented to a less than twelve person jury. This kind of subtle coercion is difficult to detect in an appellate record." (*Ibid.*)

Reyes was followed by *United States v. Saadya* (9th Cir. 1985) 750 F.2d 1419, where the defendants' jury trial waivers did not appear on the record. The government asked the Ninth Circuit to remand the case for a hearing on whether the defendants and their former lawyers had actually reached a decision to waive jury. (*Id.* at p. 1421.) The court of appeals rejected the suggestion, holding that the waiver must be made in writing or stated expressly in open court at the time of the alleged waiver. (*Ibid.*) The court in *Saadya* declared that "we fail to see what purpose could be served" by a post-hoc reconstruction of the events. (*Ibid.*)

These cases demonstrate that a post-hoc attempt to resurrect an unconstitutional waiver cannot stand. Just as in *Reyes*, the trial judge in Mr. Weaver's case tried to obtain a posttrial waiver of a right that can only be waived prior to trial. Indeed, Judge Lester's ability to assess the validity of a post-hoc waiver was necessarily compromised by his findings that the special circumstance allegations were true. As in *Reyes*, Mr. Weaver was

faced with the pressure not to "antagonize the judge who [would] impose . . . sentence upon him." (*United States v. Reyes*, *supra*, 603 F.2d at p. 72.) And, like *Reyes*, the reviewing court — this Court — cannot be assured that a waiver under these circumstances is anything other than the product of coercion, subtle or otherwise.

5. The denial of a jury trial on the special circumstance allegations is structural error that requires new special circumstance and penalty phase trials

Mr. Weaver was denied a jury trial on the special circumstance allegations, which he was guaranteed under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, article I of the California Constitution, as well as state law. There is only one remedy for the denial of the right to a jury trial on the special circumstance allegations. The trial judge's burglary and robbery special circumstance findings must be reversed, and the sentence set aside, because the denial of the right to a jury trial is structural error. As such, it is reversible per se. (See, e.g., *Sullivan v. Louisiana, supra,* 508 U.S. at pp. 281-282; *People v. Collins, supra,* 26 Cal.4th at pp. 311-313; *People v. Ernst, supra,* 8 Cal.4th at p. 449; *United States v. Duarte-Higareda*, *supra*, 113 F.3d at p. 1003.)

C. The Trial Court Acted In Excess Of Its Jurisdiction By Rendering Findings On The Special Circumstance Allegations And Proceeding To The Penalty Phase In The Absence Of A Valid Waiver

The trial court acted in excess of its jurisdiction by making findings on the special circumstances when Mr. Weaver had not knowingly, intelligently, and voluntarily, nor separately and personally waived his right to a jury on those findings. This jurisdictional error renders the special circumstance findings void.

A court acts in excess of its jurisdiction "'when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred . . . .'" (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 290, quoting *Rodman v. Superior Court* (1939) 13 Cal. 262, 269.) For instance, in *Schultz v. Superior Court of Los Angeles County* (1956) 143 Cal.App.2d 781, 786, the trial court was held to have acted in excess of its jurisdiction when it denied the petitioner's motion to have her probate case tried by a jury. Acknowledging that section 371 of the Probate Code granted the right to a jury trial, the appellate court determined that the petitioner had not lawfully waived this right. (*Id.* at pp. 785-786.) As a result, "the denial of that right by the [trial court] was an act in excess of its jurisdiction." (*Id.* at p. 786.) The court of appeal issued a writ of prohibition to prevent the trial court from hearing the case. (*Ibid.*)

This Court has similarly held that when a court acts beyond the

scope permitted by statute, that court exceeds its jurisdiction. (See, e.g., *People v. Am. Contractors Indem., Co.* (2004) 33 Cal.4th 653, 663 [trial court acted in excess of its jurisdiction by forfeiting bail on a date earlier than that required by statute]; *People v. Tindall* (2000) 24 Cal.4th 767, 776 [trial court acted in excess of its jurisdiction by allowing the indictment to be amended after the jury's discharge to include previously-unalleged prior convictions, where Penal Code section 1025 requires the same jury to determine guilt and the existence of prior convictions]; *Cowan v. Superior Court of Kern County* (1996) 14 Cal.4th 367, 374 [holding that, unless the defendant has waived the statute of limitations, a trial court acts in excess of its jurisdiction by accepting a guilty plea on a charge for which the statute of limitations has expired]; *People v. Superior Court of Los Angeles (Marks)* (1991) 1 Cal.4th 56, 66 [trial court's failure to hold a pretrial competency hearing, when required by statute to do so, rendered court in excess of jurisdiction]; see also *Abelleira v. District Court of Appeal, supra,* 17 Cal.2d at pp. 288-290 [collecting cases].)[8]

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[8] This Court has distinguished "excess of jurisdiction" from "lack of jurisdiction." (See, e.g., *Abelleira v. District Court of Appeal, supra,* 17 Cal.2d at pp. 289-290.) The latter refers to a court's absolute "absence of power to hear or determine the case, an absence of authority over the subject matter of the parties." (*Id.* at p. 288.) This includes, for example, a state court's lack of authority to quiet title for real property located outside the borders of the state. (*Ibid.*) Lack of jurisdiction implicates jurisdiction in a "fundamental" sense, and renders jurisdiction void. (*People v. Am. Contractors Indem., Co., supra,* 33 Cal.4th at p. 660.)

A statute need not make explicit mention of jurisdiction in order for a court to exceed its jurisdictional authority by failing to comply with the statute. For example, a statute that describes when a jury has the authority to make a factual finding and a statute that prescribes the procedure that must be followed in order to amend an indictment or information both create jurisdictional limitations on a court's power to act. (*People v. Tindall, supra,* 24 Cal.4th at pp. 771-773.)

In *Tindall*, the defendant was charged with possession of cocaine and the information alleged that he had two prior convictions for similar offenses. (*People v. Tindall, supra,* 24 Cal.4th at p. 770.) The defendant waived a jury trial on the finding of the prior convictions, but exercised his right to a jury trial on the charged offense. (*Ibid.*) The jury found him guilty and was discharged. (*Ibid.*) At the bench trial on the prior convictions, the prosecution moved to amend the information to allege additional prior convictions. (*Ibid.*) The court permitted the amendment and permitted the defendant to withdraw his jury waiver. (*Id.* at p. 771.) Another jury was empanelled and found the additional prior convictions to be true. (*Ibid.*)

This Court held that the trial court acted in excess of its jurisdiction by permitting the postverdict amendment of the information. (*People v. Tindall, supra,* 24 Cal.4th at p. 776.) It observed that Penal Code section 1025, subdivision (b) requires "'the question of whether or not the

defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty . . . .'" (*Id.* at pp. 771-772, quoting Pen. Code, § 1025, subd. (b).) Furthermore, Penal Code section 969, subdivision (a) permits prior conviction allegations to be added "[w]henever it shall be discovered that a pending indictment or information does not charge all the prior conduct." (*Id.* at p. 772.) This statute had been interpreted to allow amendments to the indictment until the court has discharged the jury. (*Ibid,* citing *People v. Valladoli* (1996) 13 Cal.4th 590, 608, fn. 4.) Given the clear directives of these statutes, the trial court acted in excess of jurisdiction by failing to follow them. (*Id.* at pp. 772, 776.)

In *People v. Serrato* (1973) 9 Cal.3d 753, this Court reversed the defendants' convictions because the trial court had acted in excess of its jurisdiction by convicting the defendants of uncharged conduct. (*Id.* at p. 758, revd. on other grounds in *People v. Fosselmen* (1983) 33 Cal.3d 572.) The defendants had been charged with possession of a fire bomb. (*People v. Serrato, supra,* 9 Cal.3d at p. 756.) They were found guilty by a jury and moved for a new trial. (*Id.* at p. 757.) In denying the motion, the trial court ruled that "in lieu of [the new trial], the defendants . . . will be found guilty of a violation of Section 415 of the Penal Code [disturbing the peace]." (*Ibid.*) This Court overturned the convictions, holding that disturbing the peace is not a lesser-included offense of possession of a firebomb. (*Id.* at pp. 758-759.) For this reason, "the trial court's action not only exceeded its

statutory authority, it also violated a constitutional principle" of due process. (*Ibid.*; see also *Abelleira v. District Court of Appeal, supra,* 17 Cal.2d at p. 291 [acts in excess of jurisdiction "may be restrained by prohibition or annulled on *certiorari*"].)

The trial court in Mr. Weaver's case acted in excess of its jurisdiction by making findings on the special circumstance allegations without having obtained a separate and personal waiver from him, and when Mr. Weaver had not knowingly, intelligently, and voluntarily waived his right to a jury trial on those findings. The trial court was constrained by Penal Code section 190.4, subdivision (a), which mandates that the special circumstance allegations be tried by a jury unless that right is waived both by the defendant and the prosecution. It was also constrained by the state and federal constitutional requirements imposed by *Ring*, *Memro*, and *Prieto*. Therefore, as in *Schultz*, the trial court acted in excess of its jurisdiction when it rendered a verdict on the special circumstances without the entry of a constitutionally valid waiver. (See *Schultz v. Superior Court of Los Angeles County, supra,* 143 Cal.App.2d at p. 786.) Simply put, the trial court had no "power to act . . . without the occurrence of certain procedural prerequisites," which did not occur here. (*Abelleira v. District Court of Appeal, supra,* 17 Cal.2d at p. 288.)

Because the trial court exceeded its statutory and constitutional authority in adjudicating the special circumstances, that judgment "cannot

stand." (See *People v. Serrato, supra,* 9 Cal.3d at p. 759.) In order to vindicate Mr. Weaver's statutory and constitutional rights to a jury determination, this Court must reverse the burglary and robbery special circumstance findings. (*Ibid.*)

Mr. Weaver must also be granted a new penalty trial because, by exceeding its jurisdiction in making the special circumstance findings, the trial court also exceeded its authority in proceeding to the penalty phase without a lawful verdict on the special circumstance allegations. Section 190.3 of the Penal Code permits a defendant's penalty to be determined only "if the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true." (Pen. Code, § 190.3.) Section 190.4, subdivision (a) also mandates that "[i]f the trier of fact finds that any one or more of the special circumstances in Section 190.2 as charged is true, there shall be a separate penalty hearing . . . ." Thus, a trial court acts in excess of jurisdiction if it holds a penalty trial without a lawful finding of a special circumstance. As in *Tindall*, the failure of the trial court here to comply with the clear procedural requirements of the statute and its constitutionally enforceable mandate renders the court's act in excess of its jurisdiction. (See *People v. Tindall, supra,* 24 Cal.4th at pp. 771-774.) Therefore, the special circumstance findings must be vacated, and his case must be remanded for a new trial on the special circumstance allegations and penalty.

III. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT DURING GUILT PHASE CLOSING ARGUMENTS BY SHIFTING THE BURDEN OF PROOF TO MR. WEAVER

In the guilt phase, the prosecutor's rebuttal closing argument improperly shifted the burden of proof to the defense, violating Mr. Weaver's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I of the California Constitution. The defense objected, as this argument was wholly impermissible. The prosecutor's argument rendered Mr. Weaver's trial fundamentally unfair, and the error cannot be shown to be harmless beyond a reasonable doubt.

Prior to trial, the prosecution moved the court to exclude third party culpability evidence. (1 CT 97-108; 8 RPT 82-86.) Although the trial court denied the prosecution's motion (8 RPT 88-89), Mr. Weaver did not introduce third party culpability evidence at trial and did not raise an alibi or other affirmative defense.

In its case in chief, the prosecution's witnesses identified Mr. Weaver as the man who killed Michael Broome. (See, e.g., 1 RT 45-50, 129-132, 186-188, 197-200; 2 RT 215-216, 233, 235, 259-262; 4 RT 579-584.) In his direct examination, the prosecutor attempted to rule out Byron Summersville as the person responsible for the shooting by showing several witnesses to the robbery and the shooting a photograph of him. The witnesses responded that they did not recognize Mr. Summersville. (See,

e.g., 1 RT 51 [Mary Deighton]; 1 RT 134 [Kari Machado]; 1 RT 154 [Tim Waldon]; 2 RT 217-18 [Stephanie Swihart].)

During cross-examination, defense counsel attempted to show inconsistencies between the witnesses' prior statements and their trial testimony to undermine the strength of each witness's recollection of events on the day of the shooting and during police line-ups. (See, e.g., 1 RT 89-90 [attempting to show inconsistencies in Mary Deighton's statements]; 1 RT 189-191 [noting Patricia Arlich's initial descriptions of what she claimed to observe]; 1 RT 204 [noting brief time period of Kim Decker's observation].) The defense rested without calling any witnesses. (5 RT 626-630.)

The prosecutor began his closing argument by addressing what he perceived to be the defense theory of the case: "It has been clear during the course of the cross-examination on the heels of the defense opening statement in this case that the defense has contended and will continue to contend that identity is the sole issue in this case." (5 RT 639.) The prosecutor's argument was based on the testimony of the eyewitnesses and the physical and testimonial evidence that corroborated the identifications. (5 RT 639-648, 651-660.) The prosecutor also told the court that the testimony of witnesses and a comparison of the jewelry store surveillance tapes with Mr. Summersville's appearance ruled him out as the person responsible for the shooting. (5 RT 649-650.)

Defense counsel argued that the prosecution had not met its burden of proof. (5 RT 683.) He urged the court to scrutinize the eyewitness identifications, the "lack of corroboration . . . in the evidence" and find "that all the pieces do not fit together . . . ." (5 RT 666-667.) Defense counsel referred briefly to Mr. Summersville in his closing argument in an effort to question the prosecution's failure to include Mr. Summersville in photo arrays, lineups, or tests of hair samples, despite the evidence connecting him with the getaway vehicle and the apartment. (5 RT 678-680.)

The prosecutor began his rebuttal argument with a question: "I kept waiting for the answer that I think the court was probably waiting for from the defense, and that was, well, if it wasn't [La Twon] Weaver, just who the heck was it? Who was it?" (5 RT 684.) Toward the end of his rebuttal, the prosecutor returned to this theme, stating, "I kept waiting for [defense counsel] to offer this court some alternative, some — I suppose we just have this some other third person who committed this crime. The court has been offered absolutely no alternative, nor could they offer — . . . ." (5 RT 701.) Defense counsel objected that the prosecution was "attempting to shift the burden of proof." (Ibid.) The trial judge overruled the objection, deeming the prosecutor's comments an "argument of fact" and stating that he was

"well aware all elements remain as to the burden of proof on the People." (Ibid.)[9]

The prosecutor pressed this line of argument, reiterating that "[a]t no point in time was [defense counsel] able to offer this court an alternative, an explanation of just who this other third person was." (5 RT 701.) He concluded, "No alternative was offered to this Court, and for good reason, because there is one and only one person who is responsible for the murder of Michael Broome . . . ." (5 RT 702.) These comments, individually and together, improperly shifted the burden of proof to Mr. Weaver in violation of the United States and California Constitutions.

A. The Prosecutor's Comments Erroneously Suggested That Mr. Weaver Bore A Burden Of Proof

Fundamental to our criminal justice system is the principle that "the *prosecution* must prove every element of a charged offense *beyond* a reasonable doubt. The accused has *no* burden of *proof* or *persuasion*, even

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[9] Judge Lester announced during the trial that he would be guided by the California pattern jury instructions then in use in criminal cases (hereafter CALJIC). (See e.g., 3 RT 457 [judge is following jury instructions that direct trier of fact not to discuss case with anyone or to read any media reports about case.]) At the conclusion of the penalty phase arguments, the judge announced that 1) he was "well aware of the entire scope of [the penalty phase CALJIC] . . . ," noting that "they begin with 8.55 and . . . . finish[] up at 8.88." (11 RT 1333); 2) he "will be considering those"; 3) "the fact of a jury waiver does not change the law . . . the court will follow that law; and 4) he had "tried to analogize [his] circumstance to that of a jury." (11 RT 1333.) All CALJIC citations are to the Fifth Edition (1988), in effect at the time of Mr. Weaver's trial, unless otherwise noted.

as to his defenses." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1214-15, italics in original). This core constitutional requirement includes the prosecutor's burden to establish the defendant's identity as the person who committed the crime. (See CALJIC No. 2.91 ["The burden is on the People to prove beyond a reasonable doubt that the defendant is the person who committed the crime . . . ."]; see also *People v. Wright* (1988) 45 Cal.3d 1126, 1134, citing CALJIC No. 2.91 (4th ed. 1979).)

The Due Process Clause of the Fourteenth Amendment and article I of the California Constitution require that prosecutors abide by this principle and do not misstate the law in an "'attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. [Citation.]'" (*People v. Hill* (1998) 17 Cal.4th 800, 829, quoting *People v. Marshall* (1996) 13 Cal.4th 799, 831; see also *In re Winship* (1970) 397 U.S. 358, 364 [holding that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"]; *United States v. Swanson* (9th Cir. 1991) 943 F.2d 1070, 1073 [finding "the Government has not been held to its burden of persuading the jury that the defendant is guilty," where defense counsel had conceded in closing argument the absence of reasonable doubt].)

Here, the prosecutor's comments regarding "some other third person" shifted the burden of proof to Mr. Weaver. The prosecutor's

argument suggested that Mr. Weaver must provide affirmative evidence of his innocence, not just raise a reasonable doubt. At trial, the defense put the prosecution to its proof, attempting to highlight the weaknesses of the prosecution's evidence, as it was entitled to do. (See CALJIC No. 2.61 (1990 rev.) (5th ed. 1988) [stating that in choosing whether or not to testify at trial, a defendant may "choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge . . . ."].) Nonetheless, the prosecution asserted four separate times during its rebuttal that Mr. Weaver had failed to provide an "alternative" or establish that "some other third person" was responsible for the crime. (5 RT 684, 701, 702.)

The trial court's comments in response to defense counsel's objection show a reasonable likelihood that the prosecutor's words were misconstrued or misapplied in violation of the United States and California Constitutions. (See *People v. Clair* (1992) 2 Cal.4th 629, 663.) Judge Lester overruled defense counsel's objection, calling the prosecutor's comments an "argument of fact." (5 RT 701.) To the contrary, the prosecution's argument implicitly suggested an unconstitutional burden of proof and not simply a misunderstanding of the state of the evidence presented at trial. The prosecutor was not merely describing the "factual" state of the evidence. Twice, the prosecutor argued that he "kept waiting for" the defense to offer an alternative explanation for the crime. (5 RT

684, 701.) The prosecutor also invoked the specter of "some other third person who committed this crime," whom the defense had failed to produce. (5 RT 701.)

The trial court's characterization of the prosecutor's comments as "an argument of fact" reveal its misunderstanding of the law and the issue at stake, and demonstrates that the error was not "cured" after defense counsel objected. Because the trial court acted as a jury in this case, this error demonstrates a reasonable likelihood that the prosecutor's comments were misconstrued in violation of Mr. Weaver's federal and state due process rights to have the prosecution prove every element of the charged offenses beyond a reasonable doubt. In sum, "the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process'" under the Fifth and Fourteenth Amendments to the United States Constitution and article I of the California Constitution. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181, quoting *Donnelly v. DeChristoforo* (1974) 416 U.S. 637.)

The improper burden shifting also violated the Eighth Amendment's requirement of reliability in capital judgments. (See *Beck v. Alabama* (1980) 447 U.S. 625, 638 [finding that procedural rules that "diminish the reliability of the guilt determination" in capital cases must be invalidated]; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342 [citing *Beck* for the proposition that "the Eighth Amendment requires a greater degree of accuracy and

factfinding than would be true in a noncapital case"]; *Herrera v. Collins* (1993) 506 U.S. 390, 398-399 [citing *Beck* for the proposition that "[i]n capital cases, we have required additional protections because of the nature of the penalty at stake"].)

In addition, a prosecutor's conduct involving the "'use of deceptive or reprehensible methods to attempt to persuade . . . the court'" violates California law. (*People v. Coffman* (2004) 34 Cal.4th 1, 92, quoting *People v. Farnam* (2002) 28 Cal.4th 107, 167.) Under California case law, a prosecutor's comments that are not found to be fundamentally unfair can constitute misconduct if they use "deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Coffman, supra,* 34 Cal.4th at p. 92, internal citations omitted.) In this case, the prosecutor's closing argument employed both deceptive and reprehensible methods.[10] The prosecutor's burden-shifting comments suggested that there was relevant evidence the defense was required to present. The prosecutor's argument required Mr. Weaver to have shown that a third party committed the crime, something the law does not require an accused to do.

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[10] Though the term "deceptive" may imply a scienter requirement, this Court has found that a prosecutor's bad faith is not required to find reversible misconduct. (See *People v. Hill*, *supra*, 17 Cal.4th at pp. 822-823, quoting *People v. Bolton* (1979) 23 Cal.3d 208, 214 ["'[T]o the extent that cases in this jurisdiction imply that misconduct must be intentional before it constitutes reversible error, they are disapproved'"].)

B. The Prosecutor's Misconduct Requires Reversal Of Mr. Weaver's Convictions And The Special Circumstance Findings

By suggesting that Mr. Weaver was required to present affirmative evidence of his innocence, the prosecution contravened the most basic principle of due process: that an accused has the right to have the case against him proved beyond a reasonable doubt. The error also violated Mr. Weaver's rights under the Eighth Amendment to the United States Constitution and article I of the California Constitution. The constitutional dimensions of the prosecutorial misconduct in this case therefore require reversal unless the prosecution can establish that the error is harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 25-26; see also *Bains v. Cambra* (9th Cir. 2000) 204 F.3d 964, 975-976 [finding state court erred by not using *Chapman* standard in evaluating prosecutor's constitutional error in closing argument].) It cannot do so, and Mr. Weaver's conviction, the burglary and robbery special circumstance findings, and his death sentence should be vacated.

Finally, reversal is also required under state law. Without the prosecutor's misconduct, there is a reasonable probability that the judge would have returned a more favorable verdict. (*People v. Wagner* (1975) 13 Cal.3d 612, 620, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

IV. THE CUMULATIVE EFFECT OF THE ERRORS IN THE GUILT AND SPECIAL CIRCUMSTANCE PHASES REQUIRES REVERSAL OF MR. WEAVER'S CONVICTIONS AND THE SPECIAL CIRCUMSTANCE FINDINGS

The cumulative effect of the errors that occurred during the guilt and special circumstance phases prejudiced Mr. Weaver and rendered his conviction and special circumstance findings unconstitutional. (See Arguments I, II, and III.) Although this Court may find that no single error may warrant reversal of his conviction and special circumctance findings, the cumulative effect of the errors deprived here Mr. Weaver of his rights to due process, to a fair trial, and to a reliable sentencing determination in violation of the Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and article I of the California Constitution.

The prejudicial impact of multiple errors may result in an unfair and unconstitutional trial. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487 & fn. 15.) "'[E]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.'" (*Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 883; *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211.) This Court must consider the prejudicial impact of the errors together, rather than individually. Viewed together, the errors in this case undermine all confidence in the conviction and special circumstance findings.

V. THE ADMISSION OF UNLIMITED, VOLUMINOUS AND HIGHLY EMOTIONAL VICTIM IMPACT EVIDENCE DURING THE PENALTY PHASE VIOLATED STATE LAW AND THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

A. Introduction

> Any reviewing court should know that absent the strength and force of the extremely high level and heavy weight of [the victim impact] evidence, this court would have reached a different result.
>
> — Judge J. Morgan Lester's Sentencing Verdict (12 RT 1373)

Almost two decades ago, the Supreme Court first grappled with the admissibility of victim impact testimony, and the factions on each side argued theoretically about problems with its admission. (See *Payne v. Tennessee* (1991) 501 U.S. 808, overruling in part *Booth v. Maryland* (1987) 482 U.S. 496 [Eighth Amendment forbids use of evidence of the personal characteristics of the victim, the effects of the murder on family members, and family members' opinions about the crime and its perpetrators] and *South Carolina v. Gathers* (1989) 490 U.S. 805 [extending *Booth* to prosecutorial argument].) It is by now well documented that extensive, unrestricted victim impact testimony — which was not presented in *Payne* — presents serious constitutional problems.

In-depth portrayals of the loss of a loved one, and of the person lost, are in part unreliable because of the human tendency to portray such devastating events in black-and-white terms, and, frequently, the defense's

tactical necessity to forgo meaningful cross-examination of victim impact witnesses. Moreover, the extensive use of victim impact evidence relies on a premise so illogical — that a person's culpability is closely tied to the unanticipated ripple effects of a crime on people other than the direct victims — that it is rejected in every other context where the law exacts punishment.

The sole judicial justification for the admission of victim impact evidence has been the goal of balancing the scales during the penalty trial lest the victim become an abstraction for a jury when it hears the case in mitigation. (See *Payne v. Tennessee, supra,* 501 U.S. at pp. 822, 825 [holding that the exclusion of victim impact evidence "unfairly weighted the scales in a capital trial" and deprived "the State of the full moral force of its evidence"].) As other jurisdictions have acknowledged, however, this concern can be addressed by means far less threatening to the reliability of a capital trial than the outpouring of the wrenching testimony presented during Mr. Weaver's trial.

Finally, extensive victim impact testimony ineluctably conveys the impression that the question before the sentencer is who deserves his sympathies more, the defendant or the family of the victim. As the prosecutor urged to Judge Lester: "The real question is this. What is an innocent man's life worth versus what is a guilty man's life worth?" (13 RT 1425-1426.) While the answer may be self-evident to most outside the

courtroom, this question is constitutionally impermissible when posed to a judge or jury charged with sentencing a defendant based on who he is and what he has done. (See *Payne v. Tennessee, supra*, 501 U.S. at p. 823 [holding that victim impact evidence is "designed to show each victim's 'uniqueness as an individual human being,' . . . ." italics omitted]; see also *id.* at p. 831 (conc. opn. of O'Connor, J.) [victim impact evidence is "relevant" only to the extent it demonstrates "the loss suffered by a victim's family" and allows that "a murder victim [does not] remain a faceless stranger at the penalty phase of a capital trial"]; *State v. Muhammad* (N.J. 1996) 678 A.2d 164, 179 [holding that New Jersey's statute prohibits the use of victim impact testimony "as a means of weighing the worth of the defendant against the worth of the victim"]; *State v. Koskovich* (N.J. 2001) 776 A.2d 144, 182 [noting that "weighing the worth of the victim against that of the defendant might prompt jurors to impose the death penalty arbitrarily," citing *State v. Muhammad, supra*, 678 A.2d at p. 179, and characterizing such comparisons as "inherently prejudicial"].)

Mr. Weaver had not suffered any felony convictions under Penal Code section 190.3, subdivision (b). The prosecutor did not introduce any acts of violence under Penal Code section 190.3, subdivision (c). The prosecution introduced no statutory aggravation other than evidence that the trial court deemed admissible under Penal Code section 190.3, subdivision (a), the circumstances of the crime. As to factor (a), the

prosecution's presentation consisted solely of highly emotional victim impact evidence that spanned nearly 100 pages of testimony. Judge Lester announced to the courtroom and explicitly alerted this Court that victim impact evidence was the single determining influence on his decision to sentence Mr. Weaver to death. (12 RT 1373.)

The door was opened to victim impact evidence when the Supreme Court held that such evidence is not per se banned by the Eighth Amendment, in a case in which the testimony was minimal. (*Payne v. Tennessee, supra,* 510 U.S. at pp. 814-815 [one question about impact of crime on a survivor who witnessed it; six-sentence answer].) The Court in *Payne* held that introduction of victim impact evidence was permissible to the extent that it provided the jury with a "'quick glimpse of the life' which [the] defendant 'chose to extinguish.'" (*Id.* at p. 822, quoting *Mills v. Maryland* (1988) 486 U.S. 367, 397 (dis. opn. of Rehnquist, C.J.).) This Court, following *Payne* in a case also involving minimal victim impact evidence, emphasized that it was only holding that the evidence was not per se inadmissible as irrelevant to any statutory aggravation. (*People v. Edwards* (1991) 54 Cal.3d 787, 832–833, 835–836 [three photographs of two victims while alive, relevant for other reasons as well], overruling *People v. Gordon* (1990) 50 Cal.3d 1223.)

Importantly, holding that victim impact evidence was not per se inadmissible under the Eighth Amendment, the Supreme Court noted that

cases may still arise in which its introduction would violate the United States Constitution. It ruled, "In the event that [victim impact] evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825; cf. *Estelle v. McGuire* (1991) 502 U.S. 62.) This Court has held that it would apply this limitation to the introduction of victim impact evidence. (See *People v. Edwards*, *supra*, 54 Cal.3d at p. 835.)

"*Payne* has produced considerable commentary, almost all critical. [Citations.]" (Vitiello, *Payne v. Tennessee: A "Stunning Ipse Dixit"* (1994) 8 Notre Dame J.L. Ethics & Pub. Policy 165, 167 & fn. 14; accord, Eisenberg, et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases* (2003) 88 Cornell L. Rev. 306, 307 ["Legal scholars have almost universally condemned the use of [victim impact evidence]"]; Greenberg, *Is Payne Defensible?: The Constitutionality of Admitting Victim-Impact Evidence at Capital Sentencing Hearings* (2000) 75 Ind. L.J. 1349 & fn. 3 [referring to "[a] flood of critics"].) The weaknesses of *Payne* do not make it any less the law of the land. They do, however, make it an unstable foundation for any attempt to extend its holding from its own de minimis facts to those of this case, in which the quantity of victim impact evidence was almost 200 times as great as the half-page of testimony in *Payne*.

The briefing that follows begins, in Part B, by outlining the procedural context in which Mr. Weaver's claim arises. Part C describes the victim impact evidence that was admitted at trial, without limitation and over Mr. Weaver's continuing objection. Part D summarizes the trial court's sentencing verdict, in which the court made clear that the victim impact evidence was the determining factor in its decision to condemn Mr. Weaver to death. Mr. Weaver argues in Part E that the trial court considered victim impact evidence under the erroneous impression that the law of the Supreme Court and the law of this Court "mandated" its admission. In Part F, Mr. Weaver argues that this Court has alluded to boundaries that were far surpassed in this case. In Part G, Mr. Weaver urges the Court to either bar the use of victim impact evidence entirely, or to adopt the careful restraints on its use that have been implemented in other jurisdictions and proposed by some members of this Court. Finally, Part H establishes that the errors in this case were not harmless, and indeed were responsible for Mr. Weaver's death sentence.

Overall, the argument shows that the admission of victim impact testimony at Mr. Weaver's trial rendered useless all the other safeguards that are put into place to protect the rationality, reliability, and fairness of the penalty determination. Since that result was a denial of Mr. Weaver's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I of the California Constitution, as

well as contrary to the state's own interest in a reliable penalty determination (*People v. Koontz* (2002) 27 Cal.4th 1041, 1074), the death judgment must be reversed.

B. Mr. Weaver Sought To Exclude Victim Impact Evidence

The prosecution initially filed a two-page notice of intention to introduce evidence in aggravation, indicating that it planned to call nine witnesses "regarding the impact of the crime." (2 CT 113-114.) In response, the defense filed a motion in which it acknowledged that *Payne*, *supra*, and *Edwards, supra*, were the law, but argued that the court should exclude victim impact evidence in any event, pursuant to both the United States and California Constitutions. (2 CT 296-304.) In addition to arguing that the presentation of victim impact evidence would unduly prejudice him and violate his constitutional rights, Mr. Weaver argued that the prosecution's notice of evidence in aggravation provided inadequate notice and discovery. (Ibid.) Without notice and discovery due under section 190.3, Mr. Weaver explained, he was not in a position to move in limine to limit the scope of the victim impact evidence. (Ibid.)

The prosecution filed a motion in support of the admission of victim impact evidence. (2 CT 310-316.) Mr. Weaver filed a reply to the prosecution's motion, arguing that testimony from Mr. Broome's family members would inflame the passions of the sentencer and prejudice Mr. Weaver. (3 CT 365-370.) Mr. Weaver reiterated that, without adequate

notice, he could not prepare to meet the victim impact evidence, nor could he competently challenge the parameters of the victim impact evidence before the court. (3 CT 369.) Again arguing that the prosecution's notice was too vague to satisfy its statutory obligations, Mr. Weaver filed a motion to strike the prosecution's notice of intent to introduce aggravating evidence. (3 CT 349-364.)

Subsequently, the prosecution filed an Amended Notice of Intention to Introduce Evidence in Aggravation (hereafter Amended Notice). (3 CT 495-503.) The Amended Notice listed 13 potential victim impact witnesses. It provided what the prosecution characterized as "the sum and substance of the testimony of the referenced witnesses." (3 CT 497.) In fact, the statement related almost exclusively to the effect of the killing on Annette Broome and her children. (3 CT 497-501.) The Amended Notice did not state who would testify to the specific facts in the narrative.

At the first of three hearings regarding the admissibility and scope of victim impact evidence, Mr. Weaver argued that the trial court had an obligation to exclude evidence that is unduly inflammatory, and that the type of victim impact evidence the prosecution sought to introduce at his trial was unauthorized under both the United States and California Constitutions. (7 RPT 34, 42.) The prosecutor responded that the law allowed testimony about the effect of the victim's death on his family and

community, and assured Judge Lester that it did not intend to put on a "dog and pony show." (7 RPT 45.)

The trial court delayed a final ruling on the permissible scope of victim impact evidence until the next hearing. (7 RPT 53.) The judge alluded to the fact that he had previously granted Mr. Weaver's Motion to Compel Disclosure of Evidence in Aggravation, and declared that he could not define the permissible contours of the victim impact evidence until he knew what the prosecution intended to introduce. (Ibid.)

At the second hearing addressing victim impact evidence, Mr. Weaver argued that the prosecution's Amended Notice failed to state which victim impact witness would testify to what evidence. (9 RPT 36-40.) Mr. Weaver sought notice to present "more intelligent[]" objections to the victim impact evidence, including testimony that might be cumulative. (9 RPT 37.)

The parties also presented argument on the issue of whether *Payne* or *Edwards* limited victim impact witnesses to those who were percipient to the crime. (9 RPT 38.) As to that point, Judge Lester found that *Payne* and *Edwards* did not require that the witnesses be percipient. (9 RPT 42.) Judge Lester reserved further rulings on the scope of admissible victim impact evidence until the next hearing. (9 RPT 43.)

At the third pretrial hearing, Mr. Weaver objected again to the prosecution's proposed victim impact evidence. (10 RPT 28-32.) The

prosecutor said that he expected to call three witnesses: Mr. Broome's wife, a parent, and a brother. (10 RPT 33.)

The trial court ruled that the witnesses would be allowed to testify, and that "certainly a spouse or a parent" fell within the *Edwards* framework. (10 RPT 34.) Judge Lester added that permissible victim impact evidence would be addressed on a "per witness" basis. (10 RPT 35.) No further discovery was granted by the trial court, nor was any clarification provided as to the testimony of each of the "potential witnesses." (10 RPT 33.)

At the outset of the penalty phase, Mr. Weaver renewed his objection to the introduction of victim impact testimony. (7 RT 734-735.) He argued that the proposed victim impact testimony provided in the Amended Notice exceeded the scope permitted by *Payne* and *Edwards*. (7 RT 735.) The trial court denied the motion, stating that *Payne* "eliminate[d] what had been the law under *Booth*." (7 RT 740, 742.) Defense counsel requested a continuing objection to the victim impact testimony, and the trial court authorized the continuing objection. (7 RT 742.)

C. The Victim Impact Evidence Introduced At Trial

Counsel acknowledges that it is excruciatingly painful to read about the suffering of the victim impact witnesses who testified for the prosecution at the penalty phase of Mr. Weaver's trial. The prosecution

presented the victim impact testimony of five witnesses: three family members of Mr. Broome, and two percipient witnesses. (7 RT 757-850.) The stipulated testimony of a third percipient witness was read into the record. (8 RT 853.) Defense counsel declined to cross-examine any of Mr. Broome's family members.

1. Annette Broome

The prosecutor first called Annette Broome, Mr. Broome's wife of almost thirteen years. (7 RT 757-759.) Her testimony alone spanned 56 transcript pages (7 RT 757-813), and provided far more than a "quick glimpse" into the life of her husband, and the effect that his death had on her family. (See *Payne v. Tennessee*, *supra*, 501 U.S. at p. 822, citations omitted.) In length alone, it was more than 100 times the amount admitted in *Payne*. (*Id.* at pp. 814-815.)

Annette Broome testified that she, her husband Michael, and their two children, Melissa, age 11, and Michael, age 8, had recently moved to California from New Jersey. (7 RT 764.) Mrs. Broome explained that their goal in doing so was to establish a small town jewelry store, one where they would know their customers. She testified that they had chosen San Diego because it was beautiful, had a wonderful community, and because they thought the area would be safer than New Jersey. "I just felt that this area would be safer for us," Mrs. Broome said. "You know, San Diego was a safer area. I just felt this would be better for us." (7 RT 764-766.)

Mr. and Mrs. Broome worked side-by-side in the jewelry store, especially in the beginning, before employees were hired. Once they had employees, the couple established rules in the event of a robbery. Mrs. Broome recalled her husband's advice to employees to "give [robbers] whatever they want" because "life is too important." (7 RT 766.) She identified a photograph of a bulletin from the Jeweler's Security Alliance, which stated in large, bold block letters: "HOMICIDES AT 10-YEAR HIGH. VIOLENCE IN 36% OF HOLDUPS." (7 RT 767, People's Exhibit 88-B.) The bulletin described "different homicides" taking place "in different areas," such as Texas, New York, and Connecticut, and was posted in the jewelry store. (7 RT 768.) Mrs. Broome made certain that the store employees read and initialed the postings to better prepare in the event of a robbery. (Ibid.)

Mrs. Broome described the day of the shooting, and how she learned that her husband had been killed. She testified that she was at home and her husband was at the jewelry store when she received a telephone call from the alarm company informing her the panic button in the store had been activated. (7 RT 768-770.) When Mrs. Broome hung up the phone, she "just had this terrible feeling." (7 RT 770.)

Mrs. Broome described driving to the store where she encountered a crowd in the parking lot. "I'm thinking, gee, this is really strange," she testified. "There [are] really a lot of people here. Then I saw the ropes

roping off the store when I pulled up. I thought, oh my God, what could this be?" (7 RT 770-771.) Mrs. Broome could not work her way through the crowd, and she described arguing with several people to be allowed into the store. She could not see her husband anywhere and had no idea what was going on. Desperate for information, Mrs. Broome finally asked a deputy sheriff to tell her husband to come out of the store. The deputy told her that her husband could not come out. She asked him if her husband was dead and he nodded. (Ibid.)

Even after she was told that her husband was dead, the police would not allow Mrs. Broome into the store. "It was a horrible feeling to want to be there and know that he is hurt and you can't be there," she said. (7 RT 772). She talked about the pain of never having the chance to say "good-bye or I'm sorry." (7 RT 773.)

At some point as she stood outside the jewelry store, Mrs. Broome realized that her children were home and they did not know what had happened. She did not "want them to find out the wrong way," so she called them on the telephone. (Ibid.) She did not want to tell them over the phone, however, and as it turned out, her son Mikey had a Cub Scout meeting that day. Mrs. Broome asked her friend to take her daughter Melissa to the Cub Scout meeting with Mikey. (7 RT 774-775.)

Mrs. Broome finally got home that evening at about 7:00 p.m., just as Melissa was being dropped off. Mrs. Broome described the scene

outside her house as she pulled into the driveway: "There were neighbors all outside. I was so afraid someone would say something to [Melissa.] Thank God, nobody did. They were all just outside looking and wondering what to say and crying. . . [¶] . . . [Melissa] must have realized something was going on, people were looking at her crying." (7 RT 776.)

Mrs. Broome brought her daughter into the den and struggled to find the words to tell her that her father had been killed. Finally she just said, "Someone shot dad." (7 RT 777-778.) Melissa started sobbing and said, "I didn't have a chance to tell him I loved him." (7 RT 778.)

Mrs. Broome testified that Melissa loved her daddy a great deal, and that after he was killed, she made a mural in her bedroom of photographs of her father. (7 RT 779-780.) "That was her way, I guess, of sharing some time with him because she couldn't have any more time with him." (7 RT 780.) Mrs. Broome explained that Melissa had been in therapy since the killing because she had trouble accepting what had happened: "She still talks like he is going to come home, like he is on vacation or something." (Ibid.) Annette Broome gave specific examples such as "'Daddy has this in his wallet,' like his wallet is in his room or something." (Ibid.) Mrs. Broome testified that she tries to correct her daughter, by responding, "'Melissa, you mean he had one?'" (Ibid.) And she is worried because Melissa refuses to talk about her father's death, even with the therapist: "It

is very dangerous at this age. At eleven it is a very dangerous time because it is just a hard time of a little girl's life." (7 RT 781.)[11]

Mrs. Broome then testified about breaking the news to Mikey, their eight-year-old son. He came home just as Mrs. Broome had finished telling Melissa. Mrs. Broome did not want to tell Mikey while Melissa was crying downstairs, so she asked Melissa to go upstairs to her room and lie down for awhile to calm down. Mikey asked what was going on, and why his daddy had not come to pick him up as usual. (7 RT 778.) Mrs. Broome did not know what to say. Mr. Broome was Mikey's "favorite person in the whole world. Daddy. Daddy came in, everything stopped. He had to go talk to Daddy. He was so important to him." (7 RT 781.) Finally, Mrs. Broome told Mikey what had happened: "I said, 'A bad man shot daddy.'" (7 RT 779.) Mikey cried and cried. (Ibid.)

Mrs. Broome testified at length about Mikey's extraordinary difficulty coping with his father's death. She described Mikey's and Mr. Broome's ritual at bedtime; Mr. Broome was the only one who could put Mikey to bed. Sometimes he would lay in Mikey's bed for as much as an hour, until his son went to sleep. Mrs. Broome told her husband that Mikey was big enough not to need his daddy to help him go to bed, but Mr.

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[11] In order to accurately convey the tenor of the testimony, the present tense is used, as it was by the victim impact witnesses, to describe their emotional state at the time of trial.

Broome relished the quiet time he got to spend with his son as he drifted off to sleep. "'He tells me all his thoughts,'" Mr. Broome told his wife. "'He just opens up and tells me things he never says. . . . I learn a lot about his feelings at that time. He really opens up and tells me all his secret things.'" (7 RT 783.) After Mr. Broome's death, Mikey refused to sleep in his bed, and insisted on sleeping on the floor of Mrs. Broome's bedroom. "I think the memory of his daddy laying on the floor, sitting on the floor in the room with him was overwhelming for him." (7 RT 790-791.)

Every night at dinner, Mikey prayed, "Please bring Daddy back like Lazarus." (7 RT 784.) He continued offering that prayer even after his mother explained to him that it could not happen, that "God won't do that now." (Ibid.) Months after his father was killed, Mikey blurted out one day that he worried his father had died because he had been a bad boy. Mrs. Broome was upset that Mikey "had lived with this in [his] heart" for so many months. (7 RT 785.) At other times, Mikey blamed his father. Mrs. Broome testified that Mikey said at one point that he believed Mr. Broome could have ducked the bullet, and was upset and angry that he had not tried to do that. She tried to tell him that "it doesn't take that long" and that "Daddy didn't even know it was going to happen." (7 RT 792.)

Mrs. Broome explained that the last year had been a "horrible year" for Mikey. (7 RT 786.) He was still receiving counseling. (7 RT 785.) On top of everything else, it was a new school for him. At a school dance,

he just sat by himself. He stopped wanting to go to Cub Scouts because "'all the [other] boys have a daddy. I don't have a daddy. I don't want to go.'" (7 RT 786.) "He just was totally depressed. Very depressed." (Ibid.)

Mikey also developed a paralyzing fear that something was going to happen to his mother. At soccer practice he did not want to get out of the car, and did not want his mother to leave, even to go shopping for an hour, because he worried that something bad would happen to her. Mikey begged her to stay home from work, and Mrs. Broome had to distract him in order to leave the house. Sometimes, she would just bring him to work with her. He would play at the back of the store, in his pajamas, just waiting for the day to be over. When she did not bring him to work, he would call her, and just listen to her breathe while she worked at the store. He would stay on the phone for hours, just listening to her breathe, listening to her work, and making sure that she was all right. (7 RT 787-789.)

Mrs. Broome described framed photographs of Mr. Broome that Mikey had in his room. Every time she would go into his room, the frames would be face down, and she would stand them up. Finally, one night she asked Mikey why he kept putting the photographs face down:

> He said it makes him very sad. It makes him too sad to see them. He says, 'I look at them. Then I put them down.' After that, I stopping putting them up. One morning I did go in there. He was holding it, looking at it, talking to it. Then he put it down. I didn't go in the room. I just kept walking.

(7 RT 792-793.)

Mrs. Broome talked about how she tried to deal with Mikey's depression:

> There is no one else there. I called a psychologist a couple of times and tried to get some guidance, but it's hard. He just misses him, and there's nothing that's going to stop him. He's got to work it out. All I can do is be there and try to help him, but he has to be his own little self.

(7 RT 810.)

Mrs. Broome went on to describe her husband's funeral. Mr. Broome was buried on what would have been his 35th birthday. (7 RT 797) At the funeral, Mikey was going to bring the Eucharistic gifts up to the altar, but he started sobbing and could not continue. Mikey told his mother, "'I can't do that. My heart is breaking. I'm too sad.'" (7 RT 793-794.) Mrs. Broome explained that she understood what her son meant about having a broken heart: "You have never felt that until your heart really broke. . . . [Wh]en it really breaks, it is a horrible feeling. It's — it's — you can't even move, it is so heavy." (7 RT 794.)

Mrs. Broome testified about how difficult it was to make the funeral arrangements because she had never expected to have that responsibility at her age. The funeral was crowded; the line of cars following them to the cemetery stretched so far down the highway that she could not see its end. The church was packed with people, including her children's entire school:

"Everyone was devastated." (7 RT 797-798.) Mr. Broome was a popular and engaging member of the community. "Everyone was just so overwhelmed," Mrs. Broome said. "After this happened people even came that I never knew . . . . [¶] . . . Just said, I heard he was so nice, or you know I waved to him, or he fixed my watch for me . . . Just people just wanted to come in and just say he was a nice guy." (7 RT 777.)

Mrs. Broome also testified about telling her husband's three brothers that Mr. Broome was dead. "It's hard to tell a brother that his brother has been shot." (7 RT 799-800.) Mr. Broome's brothers broke the news to Mr. Broome's father, and then, together, they told his mother, Mary Broome. They all came out to California for the funeral. One brother, Billy, had been promising to come visit them in California. He had planned to come over the summer, but he, instead, "had to come to see his brother dead instead of alive and happy." (7 RT 800-801.)

Mrs. Broome tried to maintain the jewelry store after her husband's death because she felt she owed it to her community after how supportive they had been. But she was not a jeweler, and did not really know enough to run the business by herself. Worse, she and the employees in the store were terrified of being victimized again. They kept the door of the store locked and only opened it for familiar or friendly-looking faces. If they saw anyone suspicious, they would pack up all the jewelry and close the store. They called security a number of times when they thought they saw

someone suspicious lingering near the store. "It was nerve-wracking," Mrs. Broome repeated several times. (7 RT 801-803.)

Fear consumed Mrs. Broome, even when she was not at the jewelry store. She was afraid to go shopping at night or go anywhere by herself. She constantly looked over her shoulder, and made certain that she was in a public place with other people around. She mentioned a bomb scare that had occurred in the courthouse during Mr. Weaver's trial: "I felt like saying, why are you all sitting here? What's wrong with you? Life is [too] fragile; you can't take a chance. And my kids only have one person to take care of them now and I can't take a chance." (7 RT 803-804.)

Mrs. Broome testified that she does not like to show emotion in front of people. But she does show her pain when she is alone:

> [I]t does still hurt. I mean, when I think about how Mike was crying for help, you know, and nobody was there to help him. You know, what he must have thought, My God, I'm dying. Even a dog stops what they're doing and comes over to lick your wounds if you are crying. It was so cruel and so cold, and I think about that, and how I couldn't be there.
>
> He was so sensitive and he liked me there, you know. He was so caring. And when I could have cared for him, and been there and made him feel better or tried to help or just held him. He was all by himself. It's so cruel.

(7 RT 805-806.)

Mrs. Broome told Judge Lester that her grief is especially overwhelming during the holidays. On Mother's Day, which fell the day before Mr. Broome was buried, the family spent the day at the funeral

parlor. A week later, in the psychologist's office, Melissa gave her mother a card with a broken heart on it for Mother's Day. Father's Day was even worse. They visited the cemetery because Annette Broome thought she would "go nuts" if she went with the children to church on Father's Day, where she knew they would be talking all day about dads. So they went to the cemetery, and Mikey brought a trophy, which was inscribed, "World's Greatest Dad," to his father's grave along with flowers and the Bible. Mrs. Broome often returned to her husband's grave, where she would play his favorite song for him. (7 RT 806-808.)

Mrs. Broome described Thanksgiving as a very difficult day on which she tried to smile and laugh but, while the children were playing with their grandfather, she spent most of the afternoon crying upstairs where they would not see her. "I don't want them to see me cry uncontrollably because I want them to have control, too. I don't want them to see me fall apart because then they'll fall apart." (7 RT 810.) On Christmas, the family went to the cemetery, so the children could have Christmas with their father. (7 RT 811.)

Mrs. Broome concluded her testimony by talking about what it was like for her to sit through Mr. Weaver's trial:

> Words are said that just break your heart . . . . It's like a dream . . . then you realize it's not a dream, it happened to you . . . Why me? . . . This whole world, why do I have to be that person? What did I do?

> You just can't believe that the words you hear in the courtroom, those horrible things happened to someone you love until your husband . . . you just don't want to believe it's real. And when you hear it, it just breaks your heart all over again and rips you apart all over again.
>
> You walk in the courtroom – as soon as I walk in the doors it [feels] like that night all over again, you could just feel your energy just draining as you walk in every time . . . . It's very depressing. You know, a part of you wants to be yourself, and then you just see this all over and you think, 'Oh, my God, this really happened to him. Someone really did this to him.'

(7 RT 812-813.)

2. Mary Broome

It is unmistakable that Mary Broome, Michael Broome's mother, had great difficulty composing herself when called to testify in the penalty phase. The prosecutor's first question to Mary Broome was, "Are you okay?" (7 RT 813.) She responded that she was "okay" and her testimony began. (Ibid.) Mrs. Broome struggled repeatedly to answer the prosecutor's questions without breaking down or discussing an aspect of her grief unrelated to the prosecutor's questions. Several times the prosecutor told her to just take her time. (7 RT 814-815.)

Michael was the oldest of Mary Broome's children, and was a good son, a good brother, and a good father. (7 RT 814.) After he died, Mary Broome became profoundly depressed. Just the day before her testimony, Mrs. Broome told a priest that she did not think she could go on with her life. She testified that she needed tranquilizers to help her sleep; she is

seeing a psychiatrist; and she has a constant pain in her heart. (7 RT 815-816.)

> I look at my grandchildren and my daughter-in-law and I get sick. [Mikey] looks just like my son. I see him running around. It looks just like my Michael. . . . I pray to God every day, please, let me get by this, let me stop thinking about this every day. And at night I go to sleep with it, I wake up with it. I can't stop. I try and I can't. I try. I just can't do it.

(Ibid.)

Mrs. Broome learned about Michael Broome's death from her other sons. At first when she saw two of her sons at the front door, she thought they had come to surprise her for lunch. When she noticed that another son and her ex-husband were also there, she knew something bad had happened. "I just flipped out," she said. "And they called an ambulance, and they wanted to take me to the hospital." (7 RT 816-817.)

Mary Broome's son was buried on his 35th birthday: "What a nice birthday present that was for him." (7 RT 817.) "[T]he funeral was horrible," she said. "I just cannot get these things out of my mind. And I don't know how I'm going to be able to live with it. It's horrible. I wouldn't wish it on a dog." (7 RT 817-818.) When Mikey saw her at the funeral, he came up to her and said, "'Hi Grandma. Somebody killed your son, my daddy.'" (Ibid.) She responded by saying, "'That's okay, Mike, the law will take care of him for what he did to Daddy, don't worry about it.'" (Ibid.)

Mrs. Broome went on to describe how much Mikey loved his father: "I [have] never seen a child love his father like he loved his father. He wouldn't let him go. And even now he misses him terrible. He can't go to sleep because he misses his father. He put him to sleep. He misses him. We all miss him. He was the greatest thing on earth." (7 RT 818.)

Mrs. Broome concluded her testimony by describing the fear and grief that have consumed her since her son's death. She is afraid to go out alone, or at night. She does not watch television anymore because it is too violent. She cannot concentrate at her job. She cannot look at pictures of her son without breaking down. The holidays are terrible. "I dream," Mrs. Broome said. "I dream that he's alive. I wake up at 4:00 in the morning and I realize it's true, he's dead. I thought it wasn't true, but he is dead, and I can't sleep the rest of the night." (7 RT 820.)

3. Joseph Broome

Joseph Broome, Michael Broome's younger brother, testified that he was very close to Michael, who was a very outgoing, kind, considerate and compassionate person. (7 RT 822.) When they were growing up, Michael always looked out and cared for his brothers, like a "Mr. Mom or Mr. Dad." (Ibid.) When Joseph dropped out of school, it was Michael and his wife who guided him back on track. (7 RT 823.) Joseph described his brother to Judge Lester. "He had happiness oozing out of him. I still feel the day

we buried him he had a smile on his face; carried that smile throughout his life. Always had a smile on his face." (Ibid.)

Joseph and Michael worked closely together in the jewelry business before Michael moved to California. In New Jersey, Michael was the president of the local Chamber of Commerce, and was active in community affairs. When the business community in New Jersey learned of his death, there was an outpouring of support and concern. Several hundred people from the community attended a memorial service in New Jersey, including customers, friends, and cousins. (7 RT 823-825.)

Joseph Broome described how he learned that his older brother had been killed. Annette Broome telephoned and woke him up at 5:30 in the morning to tell him. Upon hearing the news, he threw the phone on the bed and cried so hard he woke up the neighbors. He went for a walk to try to clear his head . He was unable to do so: "My head is still not clear. It's hard. He was just such a good human being. How someone could take his life, I just don't know." (7 RT 824.)

Mr. Broome described his disbelief at seeing his brother in the funeral parlor and thinking that he was really gone. He wished he could trade places with him. "It's very hard to bury a brother, especially one that was so full of life and happiness." (7 RT 825.) It was also very difficult for him to see his brother's children at the funeral. Joseph remembered that Mikey told him he was not going to school the next day. When he asked

him why not, Mikey said, "I'm not going to school until my daddy comes back to put me to bed. If my daddy loves me, he will come home and put me to sleep." (7 RT 827.) Joseph did not know how to respond: "You can't tell him that some day he is going to see him in heaven because you don't know what the kid will do. It's just hard." (Ibid.)

Mr. Broome talked about the effect his brother's death had on their mother: "[S]he cries when she goes to bed, she cries when she wakes up. . . . She will never be one-tenth of the person she was." (7 RT 826.) Breaking the news of Michael's death to their mother "was the hardest thing I've had to do in my life . . . . We had to physically pin my mother down and just hold her down on the bed for hours." (Ibid.) Joseph also described his younger brother Billy's devastation: "He didn't sleep at night, he had to take on a second job, full time job because he just couldn't sleep. He didn't want to go on; couldn't believe that his big brother was gone . . . . [It was] probably six months before he was able to put some sense back in his life." (7 RT 829.)

Joseph Broome testified that the holidays were "very hard" because he felt unhappy and had no reason to celebrate. (7 RT 827.) He explained that the way Michael died was particularly difficult to accept, saying, "If he got killed in a car accident, it would be easier; if he had cancer and he was terminally ill I could accept it, but not for such a callous reason." (7 RT 828.)

4. Lisa Maples

The prosecution called Lisa Maples, who, on the evening of the crime, was a customer at Shadowridge Jewelers. Ms. Maples described being grabbed by a man who put a gun to her head and forced to the back of the store. (7 RT 832). She was afraid and in shock; it was "like a dream." (7 RT 832, 836.) Ms. Maples was frightened by the man's shouting and the fact that the other women were "just standing there," not giving him any jewelry. The man seemed nervous and she could feel him shaking. (7 RT 836.) He was "constantly" moving the gun "all over." (7 RT 837.)

Ms. Maples told the court that she had given birth the week prior to her testimony. During her pregnancy, she had nightmares about "guns or violence or killing, death, dying . . . ." (7 RT 834.) She had to take prescription medication to help her sleep. Even now, she still has nightmares, usually about someone with a gun. (7 RT 835.) She is also afraid to go out at night and had to give up running in the evenings with her husband. (7 RT 834-835.) She cannot go back into the jewelry store. (7 RT 835.) Ms. Maples described herself as "very jumpy around people" and "very nervous." (Ibid.) She told the court that she is always looking over her shoulder in public places. (Ibid.)

5. Mary Deighton

Mary Deighton was an employee who was working at the store at the time of the shooting. (7 RT 838.) Ms. Deighton had testified during the guilt phase of the trial, and she repeated her testimony about the robbery and shooting, but in terms that were significantly more graphic and emotional. (7 RT 839-844.) For example, she testified that, as Mr. Broome was shot, she was thinking, "I knew I was going to die . . . . It wasn't like I thought I was going to die; I knew it was over. I was just praying to God that it wouldn't hurt like it was hurting Mike." (7 RT 845.)

Moving to how she was affected by Mr. Broome's killing, Ms. Deighton said that Michael Broome was "more than a boss" to her. He was a friend, mentor and role model as well. He helped her with school projects, and took a real interest in supporting her. (7 RT 844-845.) She has not been able to put Mr. Broome's death behind her. (7 RT 845.)

Until she became pregnant, Ms. Deighton took the anti-anxiety medication Xanax because she has anxiety attacks as often as once or twice a week. Once she got pregnant, she had to stop taking the Xanax. During the attacks, "[i]t's just a feeling of terror, of just reliving the whole thing . . . . It feels like your heart stops, you start to sweat and get the chills and you're hot and cold and feel like you're going to throw up and pass out. It's just terror." (7 RT 845.) The anxiety attacks can strike at any time, but usually occur when she is around other people she doesn't know, like at a

bank or waiting in line at a store. (7 RT 846.) Ms. Deighton testified that she had been seeing a psychiatrist once a week, and had great difficulty sleeping after the robbery and shooting. Every night she has vivid nightmares involving guns and violence, and she wakes up screaming. (7 RT 846-847.)

After the shooting, Ms. Deighton continued to work at the jewelry store because she was the only one who knew how to use the computer, and she felt that she could not "desert Mike's family." (7 RT 848.) She said: "It was very hard. We kept the doors locked. We were always scared to death when people would come up to the door wondering, what kind of person is this? What do they want? Are they going to rob us? It was – you felt like you were trapped in the store." (Ibid.)

Ms. Deighton described how difficult it is to look at Mikey because he so closely resembles his father, and because he has so much pain and anger in him for a little boy. She never knows what to say to Melissa, Mr. Broome's daughter, although there are many things she wants to say to her: "It's just really, really hard to see her go through this pain." (7 RT 848-849.) Ms. Deighton testified that it is difficult to watch Annette Broome struggle: "It's just really hard to have to see them go through this when it was so needless." (7 RT 849.)

Ms. Deighton testified that she still feels the pain of missing Mr. Broome because "we were like a family." (7 RT 850.) She told the court

that she will not forget what happened that day until the day she dies. "And that in itself is just so much pain to just have to live with." (Ibid.) She continues to suffer frequent depression. Ms. Deighton concluded her testimony by saying that it broke her heart to see the family's pain at Mr. Broome's funeral. She has never seen as much anguish as she saw that day. (Ibid.)

6. Lisa Stamm

Defense counsel and the prosecution stipulated to the testimony of Lisa Stamm, another jewelry store employee who was working on the day of the robbery and shooting. The parties stipulated that Ms. Stamm would testify that as a result of this incident she has suffered psychological difficulties; has undergone psychological counseling; is afraid to go out at night; has ongoing nightmares involving guns and violence; and frequently has difficulty sleeping. (8 RT 853.)

D. The Trial Court's Sentencing Verdict

The effect that the victim impact evidence had on Judge Lester is crystal clear. As he delivered his sentencing verdict, Judge Lester stated explicitly that the victim impact evidence had been dispositive in his sentencing determination. (12 RT 1371.) Judge Lester emphasized that, but for the prosecution's presentation of victim impact evidence, he would have sentenced Mr. Weaver to life in prison:

> [F]or purposes of review, newer changes in the law permit victim-impact evidence[,] [as it no longer violates] the Eighth Amendment of the U.S. Constitution, Payne versus Tennessee, and the California Supreme Court case of People versus Edwards. These changes in the law, which are recent, gave this court not only the ability, but also the mandate to consider [victim impact] evidence. It is this change in the law that would have caused this court to make a different decision if it were not the law. If for some reason that law on victim-impact evidence is changed in the future, any reviewing court should know that absent the strength and force of the extremely high level and heavy weight of such evidence, this court would have reached a different result.

(12 RT 1371.)

This statement also shows that Judge Lester wrongly believed he was under an *obligation*, pursuant to the law of the Supreme Court and this Court, to admit and consider victim impact evidence. Confirming his mistaken understanding of the law, Judge Lester repeated the point moments later: "[T]he Court reiterates for purposes of review [that] the newer changes in this law permitting victim-impact evidence permitted this court, and *mandated* this court, to give full consideration to such evidence." (12 RT 1373, italics added.)

E. Mr. Weaver Is Entitled To A New Penalty Phase Because The Trial Court Imposed Death Under The Mistaken Belief That Admission And Consideration Of Victim Impact Evidence Was Mandatory

Judge Lester committed reversible error when he applied the incorrect legal standard in determining the admissibility and weight of the victim impact evidence by treating its introduction as mandatory.

The Supreme Court in *Payne* held only that victim impact evidence was not per se inadmissible, and that states could therefore *choose* to allow it during the sentencing phase of capital trials. (*Payne v. Tennessee, supra,* 501 U.S. at p. 825 [noting that "a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant"].) Justice O'Connor's concurring opinion in *Payne* emphasizes that the ruling did not mandate its admission: "We do not hold today that victim impact evidence must be admitted, or even that it should be admitted." (*Id.* at p. 831 (conc. opn. of O'Connor, J.).)

Prior to the Supreme Court's ruling in *Payne*, this Court, following *Booth*, had ordered the exclusion of victim impact evidence from the penalty phase of a capital trial. (See *People v. Gordon*, *supra*, 50 Cal.3d at pp. 1266-1267). In *Gordon*, this Court correctly held that victim impact evidence, in addition to violating the defendant's Eighth Amendment rights, did not fall within any statutory aggravating factor defined in Penal Code section 190.3. (*Ibid.* "[T]he effect of the crime on the victim's family is not relevant to any material circumstance [of the crime]"].)

After *Payne*, this Court overruled *Gordon* in *People v. Edwards*, *supra*, 54 Cal.3d at p. 835. Purportedly following *Payne's* interpretation of victim impact testimony as "evidence of the specific harm caused by the

defendant" (see *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825), this Court held that victim impact evidence may be admitted as a "circumstance of the crime" under Penal Code section 190.3, subdivision(a). (*People v. Edwards*, *supra*, 54 Cal.3d at p 835.) Importantly, in *Edwards*, this Court went only so far as to rule that "factor (a) of section 190.3 *allows* evidence and argument on the specific harm caused by the defendant." (*Ibid.*, italics added.) Contrary to Judge Lester's understanding of the law, neither this Court nor the Supreme Court has ever mandated the admission or consideration of victim impact evidence in any capital case.

Where, as here, a trial court fails to exercise discretion because it does not understand that it has discretion, its failure is an abuse of discretion. (See, e.g., *People v. Bigelow* (1984) 37 Cal.3d 731, 743 [court's failure to exercise discretion because it erroneously believed it had no discretion was "itself serious error"]; *In re Carmaleta B.* (1978) 21 Cal.3d 482, 496 ["where fundamental rights are affected by the exercise of discretion of the trial court . . . such discretion can only truly be exercised if there is no misconception by the trial court as to the legal bases for its action"]; *People v. Davis* (1984) 161 Cal.App.3d 796, 802 [court abused its discretion where it was "misguided as to the appropriate legal standard to guide the exercise of discretion"].)

Moreover, the trial court's error has prejudiced Mr. Weaver. Because the judge was under the mistaken belief that he was required to

admit victim impact evidence, this Court cannot say with confidence that Judge Lester would have admitted as much – or any – victim impact evidence had he realized that he had discretion not to do so. Reversal of Mr. Weaver's death sentence is required because this was error of constitutional dimension and cannot be considered harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

F. The Admission Of Victim Impact Evidence In This Case Far Exceeded Constitutional And Statutory Limits

1. The victim impact testimony in this case far exceeded the limits imposed by *People v. Edwards* and its progeny

As discussed above, the Supreme Court in *Payne v. Tennessee*, *supra*, 501 U.S. at 822, held that the prosecution may present a "quick glimpse" of the life of the victim during the penalty phase of a capital trial without running afoul of the Eighth Amendment. The Court cautioned that the introduction of such evidence may violate the Due Process Clause if it becomes unduly prejudicial. (*Id.* at p. 825.) Several of the concurring opinions emphasized the role that the Due Process Clause plays in limiting victim impact evidence. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 831 (conc. opn. of O'Connor, J.) [noting that, where "a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment"]; *id.* at p. 836 (conc.

opn. of Souter, J.) ["Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation"].)

This Court has also recognized that the Due Process Clause places limits on the admissibility of victim impact evidence. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 835.) It explained that finders of fact considering victim impact evidence "'must face [their] obligation soberly and rationally, and should not be given the impression that emotion may reign over reason.'" (*Id.* at p. 836, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 864.) The Court cautioned that "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." (*Ibid.*) Subsequent cases have reaffirmed this general principle. For example, this Court has advised trial courts that "'*victim impact and character evidence may become unfairly prejudicial through sheer volume.*'" (*People v. Robinson* (2005) 37 Cal.4th 592, 652, quoting *Salazar v. State* (Tex. Crim. App. 2002) 90 S.W.3d 330, 336, italics in original; see also *id.* at 651 [noting that "allowing [victim impact] evidence . . . 'does not mean that there are no limits on emotional evidence and argument'"], quoting *People v. Edwards, supra*, 54 Cal.3d at p. 836.)

A review of the Court's post-*Edwards* decisions reveals that the Court typically examines one or more of three specific factors in order to

determine whether the admission of victim impact evidence was unduly prejudicial. The Court examines the length of the victim impact testimony, the emotional tenor of the testimony, and the contested victim impact evidence in relation to the gravity of the capital crime and other aggravating evidence adduced at the penalty phase. As discussed below, the victim impact evidence presented in Mr. Weaver's case was impermissible under each of these factors, rendering his trial fundamentally unfair. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 68.)

a. The victim impact testimony was unfairly prejudicial through sheer volume

This Court evaluates victim impact evidence to determine whether it is "so voluminous or inflammatory as to divert the jury's attention from its proper role or invite an irrational response." (*People v. Taylor* (2002) 26 Cal.4th 1155, 1172.) This Court often determines what constitutes "voluminous" victim impact evidence by reference to the length of the testimony in transcript pages. For example, in *People v. Benavides* (2005) 35 Cal.4th 69, 105, the prosecution presented three victim impact witnesses: an aunt of the victim and two of the victim's cousins. Two of the witnesses testified about their personal grief, while the third witness read a prepared statement describing the victim and the witness' sorrow about the victim's death at such an early age. (*Ibid.*) In concluding that the testimony was constitutionally permissible, this Court observed that it

was "short" and "not unduly inflammatory." (*Id.* at p. 105.) It noted that the prosecution's entire penalty phase evidence consumed only seven transcript pages. (*Id.* at p. 105; see also *People v. Jurado* (2006) 38 Cal. 4th 72, 132 [rejecting a challenge to victim impact evidence where the total testimony, spanning 25 pages, was "relatively brief"]; *People v. Thomas* (1992) 2 Cal.4th 489, 536 [victim's parents' "brief, spontaneous remarks" were not so inflammatory to invite an irrational response from the jury]; *People v. Gordon*, *supra,* 50 Cal.3d at p. 1267 [the error was harmless because testimony was "relatively brief and unemphatic"].) This Court recently described 37 pages of victim impact as "extensive[]." (*People v. Robinson* (2005) 37 Cal.4th 592, 644.)[12]

The nearly 100 pages of victim impact testimony presented at Mr. Weaver's trial far exceeded the "quick glimpse" authorized by *Payne,* and the length and repetitiveness of the testimony violate the restrictions imposed by this Court. Annette Broome's testimony alone, for example, covers 56 transcript pages. (7 RT 757-813.) Her testimony about breaking

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[12] Other courts have described as lengthy victim impact presentations significantly shorter than that presented here. For example, a prosecutor's victim impact argument that was reproduced in just two pages of the United States Reports was considered "extensive" by both the United States Supreme Court and the Supreme Court of South Carolina. (*South Carolina v. Gathers*, *supra*, 490 U.S. 805 at pp. 808-810; *State v. Gathers* (S.C. 1988) 369 S.E.2d 140, 144.) In Texas, recently, victim impact testimony that covered less than two pages in the case reporter was characterized as a witness's testifying "at length." (*Haley v. State* (Tex. App. 2003) 113 S.W.3d 801, 816-817, aff'd (Tex.Crim.App. 2005) 173 S.W.3d 510.)

the news to her two children covers six transcript pages (7 RT 773-79), and that does not include the lengthy testimony about the devastating impact that their father's death had on the children. Mrs. Broome's testimony about notifying her children and her relatives of the shooting (approximately nine pages) lasted longer than the prosecution's *entire* victim impact presentation in *Benavides*. (*People v. Benavides*, *supra*, 35 Cal.4th at p.105 [three family members' testimony totaled only seven transcript pages].)

This Court approved the testimony in *Benavides* in part because it was "short." (*Id.* at 106.) Annette Broome's lengthy narrative does not fit this description. Her extensive testimony, on such an emotionally wrenching subject, is the very type of inflammatory evidence that this Court has cautioned would "divert[] the [sentencer's] attention from its proper role or invite[] an irrational, purely subjective response.'" (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836, quoting *People v. Haskett*, *supra*, 30 Cal.3d at p. 864.) And, significantly, she was but one of five victim impact witnesses who testified.

b. The victim impact testimony was unfairly prejudicial through its emotionally charged tenor and substance

In addition to the sheer length of the testimony, both the Supreme Court and this Court have held that the Due Process Clause imposes restrictions on the content of victim impact evidence, forbidding the

introduction of victim impact testimony that consists of irrelevant or inflammatory matters. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836; *People v. Stanley* (1995) 10 Cal.4th 764, 832; see also *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.) In *Edwards*, for example, the Court affirmed the admission of the victim impact testimony because it was "factual" and "unemotional." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 837.)

No one reading even the cold record of Mr. Weaver's penalty phase trial could conclude that the prosecution's evidence was "unemotional." To the contrary, it was wrenching. While reviewing courts often must speculate as to a jury's motivations and influences, it is undisputed in this case that the force of the victim impact evidence singularly affected Judge Lester's decision to impose death. Thus, this is indeed the "extreme case" contemplated by this Court in *People v. Smith*. ((2005) 35 Cal.4th 334, 365 [suggesting that the type of inflammatory victim impact evidence that will violate the defendant's due process rights "contemplates an extreme case"].)

Parsing the testimony of the bereaved members of the Broome family does not do justice to the extent of the suffering apparent during their testimony. Purely by way of example, this Court should consider the testimony of Mary Broome, who was in great psychological distress as she took the stand. (7 RT 813.) Before posing his first question, the prosecutor asked whether the witness was "okay." (Ibid.) During the

course of the direct examination, Mrs. Broome broke down repeatedly as she described the overwhelming pain she felt and her enduring depression. (7 RT 814-820.)

The prosecutor asked Mary Broome if Michael Broome performed "a particular role" in the Broome family. (7 RT 814.) Mary Broome testified that he "kept the other boys in control," but her testimony quickly turned to the devastation she was experiencing:

> He was just - I just feel like I can't go on with my life. I'm just very depressed all the time. Just think about reading that article in the paper. "Michael: Oh, My God, I've been shot. Please, somebody help me. It hurts."

(7 RT 814-815.) When the prosecutor told her to take her time, Mary Broome was still emotionally unable to answer his question, and instead returned to a description of her anguish: "I tried every day. I spoke to a priest yesterday. I said to him I feel like I can't go on with my life. I'm too depressed." (Ibid.)

Mary Broome's eight transcript pages of testimony highlight the particular pitfalls of victim impact evidence. Because the grief and loss are so overhwleming, it is virtually impossible for witnesses to answer precise questions without testifying instead about a range of emotions that are not capable of being constrained by the rules of evidence and other legal constraints. For example:

- When asked to describe the pain she feels, Mary Broome initially responded to the question posed, but then talked about the fact that looking at her daughter-in-law and grandchildren causes her to feel "sick," especially her grandson, who looks "just like my Michael." (7 RT 815.)

- When asked how she learned about Michael Broome's killing, Mrs. Broome initially answered the question, but then moved to a description of the grief she experiences when she sees people who are enjoying themselves, concluding with comments that she cannot stop thinking about the loss, that she cannot sleep because of it, and that she prays for the pain to end, but she cannot make it end. (7 RT 816.)

- When asked what her son's funeral "was like," Mary Broome first gave a responsive answer, but then returned to the impossibility of getting the thoughts of her son's killing out of her mind and of living with the loss, concluding with the statement, "I wouldn't wish it on a dog." (7 RT 817-818.)

- When asked whether she saw her grandchildren following the funeral — a question that called for a "yes" or "no" answer — Mary Broome not only testified about her grandson's reaction to the funeral, she continued with a description of his on-going grief, his inability to sleep, his unique love for his father, and the entire family's suffering. (7 RT 818.)

- When asked how the holidays had been following her son's death, Mary Broome initially gave a responsive answer, and then testified,

"The week before he died I called him up, I said, 'Mike, are you going to be okay with the riots going on in L.A.?' He said, 'Ma, I'm going to be fine.' A week later, he was gone, dead. I couldn't believe it." (7 RT 818-819.)

- When asked whether she goes out at night – another question that called for a "yes" or "no" response – Mary Broome first explained that she does not go out at night alone because she is too fearful. She continued by testifying about the emotional difficulty of going to her job everyday. She then spoke of the many photographs of her son that she has, and the fact that she cannot look at a photograph of her son without "breaking down" and has to turn the pictures away when she cleans them. (7 RT 819.)

- When asked how frequently her son called her before his death, Mary Broome initially gave a responsive answer, but continued with a description of her last visit with her son and the bad dreams she has "all the time." (7 RT 820.)

Mary Broome's profound distress leaps from the pages of this transcript, as does that of the other witnesses who testified on behalf of the prosecution. In sum, the victim impact testimony in this case was so inflammatory that "emotion . . . reign[ed] over reason." (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836.)

c. The victim impact testimony was unfairly prejudicial because of the absence of any aggravating evidence other than the circumstances of the crime

In addition to considering the length and emotional quality of the victim impact testimony, this Court also looks to the specific facts of the crime and other aggravating evidence concerning the defendant, particularly his criminal history, to determine whether victim impact evidence has resulted in undue prejudice. In cases where the facts of the crime are unusually aggravating, or where the prosecution has introduced other statutory aggravation, this Court is more likely to conclude that even highly emotional victim impact evidence did not prejudice the defendant.

For example, in *People v. Roldan* (2005) 35 Cal.4th 646, 731, the prosecution introduced the victim impact testimony of only one witness, the victim's wife. She described her life with her husband and the effect of his death on her and her children. (*Ibid.*) In ruling that the wife's testimony did not violate the defendant's due process rights, the Court weighed this evidence against the other aggravating evidence presented to the jury (that the defendant had threatened to kill the prosecutor and had stabbed another inmate), concluding that the victim impact evidence was "not overly inflammatory," even though it "no doubt possess[ed] a strong emotional impact." (*Id.* at pp. 732-733).

In *People v. Harris* (2005) 37 Cal.4th 310, 352, the appellant challenged testimony describing how the victim's casket was mistakenly opened at the funeral, which had caused great distress to those present. The Court found that the trial judge had erred in admitting this testimony, but deemed it harmless. (*Ibid.*) In reaching its result, the Court balanced the prejudicial nature of the testimony about the funeral scene against the facts of the shooting. (*Ibid.*) Harris was convicted of shooting a pregnant woman twice in the head as she lay face down on a bed, her hands tied behind her back. He killed her and her fetus and then ransacked her apartment. Harris went outside and, while laughing, shot her boyfriend multiple times. (*Id.* at pp. 321-323.) The Court concluded therefore that "[t]he testimony [about the funeral] was very brief, consuming no more than 16 lines of transcript, and was not significant in light of the emphasis placed in the penalty phase on the effect of the crime itself on the victim's family, the brutality of the murders, and the paucity of significant mitigating circumstances." (*Id.* at p. 352.)

This Court's method of analysis in this regard is supported by *Payne v. Tennessee, supra,* 501 U.S. at p. 832 (conc. opn. of O'Connor, J.). In *Payne*, the defendant stabbed one of his victims 41 times, and repeatedly stabbed her three-year-old son and two-year-old daughter. (*Ibid.*) The mother and daughter died because of blood loss, while the three-year-old boy survived despite stab wounds that penetrated through his body. (*Ibid.*)

At the penalty phase, the boy's grandmother testified "brief[ly]" about her grandson's confusion and sadness over his mother and sister's absence. (*Id.* at pp. 831-832.) Justice O'Connor, in her concurring opinion, concluded that the grandmother's testimony could not possibly have prejudiced the defendant. (*Id.* at p. 832.) Considering "the jury's unavoidable familiarity with the facts of Payne's vicious attack," the grandmother's victim impact testimony could not have deprived the defendant of his due process rights. (*Ibid.*)

As noted above, Mr. Weaver had no felony convictions. He had no history of prior acts of violence. (11 RT 1265; 12 RT 1339-1340.) The prosecution's case consisted solely of victim impact evidence. Importantly, the defense presented a lengthy and extensive case in mitigation, calling some 16 witnesses in its case-in-chief.

Moreover, unlike other cases in which the Court has compared the victim impact evidence to other aggravating factors, the specific circumstances of this crime do not dilute the prejudicial effect of the victim impact testimony. As irrevocably tragic as the killing of Mr. Broome was, it was the result of a single shot fired during the course of a robbery. Although testimony conflicted on this point, the defense presented evidence at the penalty phase that Mr. Weaver was extremely nervous and under the influence of alcohol during the robbery.

During the guilt phase, Lisa Stamm testified that Mr. Weaver appeared nervous and unsure of what to do. (4 RT 612.) She further testified that after the shooting, he appeared to be even more nervous. (4 RT 613.) In her penalty phase testimony, Lisa Maples, the person physically closest to Mr. Weaver during the robbery, agreed that Mr. Weaver was nervous and that she could feel him shaking as his arm was around her. (7 RT 836.) At the penalty phase, the defense presented testimony that Mr. Weaver's blood alcohol level at the time of the crime was about .17 and that this level of intoxication would have impaired his thinking and impulse control. (8 RT 924, 926.)

In sum, nothing presented or considered in aggravation in Mr. Weaver's case could possibly render insignificant the effect of the crime on the family of Mr. Broome. With nothing to blunt the expansiveness and power of the victim impact witnesses, this Court should have no confidence that "emotion [did not] reign over reason" during Mr. Weaver's penalty phase. (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836.)

2. The trial court improperly admitted testimony that characterized both the crime and Mr. Weaver in violation of *Booth v. Maryland*

Victim impact evidence that a) characterizes or offers an opinion about the crime; b) characterizes or offers an opinion about the defendant; or c) offers an opinion as to the appropriate sentence "creates a constitutionally unacceptable risk" that the death sentence will be imposed

in an arbitrary and capricious manner and is therefore inadmissible. (*Booth v. Maryland, supra,* 482 U.S at pp. 502-503.) The Supreme Court in *Payne* left intact *Booth*'s bar on this type of victim impact evidence. (*Payne v. Tennessee, supra*, 501 U.S. at p. 830, fn. 2; see also *People v. Pollock* (2004) 32 Cal.4th 1153, 1180.)

Following *Booth*, this Court has reiterated on several occasions that it is improper for victim impact witnesses to offer an opinion as to the appropriate sentence. (See, e.g., *People v. Smith* (2003) 30 Cal.4th 581, 622 ["It is clear that the *prosecution* may not elicit the views of a victim or victim's family as to the proper punishment," italics in original].) This Court has not yet defined the other categories of evidence inadmissible under *Booth*: improper characterizations and opinions of the crime and the defendant.

One Justice recently addressed the issue in *People v. Robinson*, *supra*, 37 Cal.4th at pp. 656-658, a case in which the defendant argued that the trial court had erred in admitting victim impact testimony consisting of witnesses' imagined reenactments of the crime. (*Id.* at p. 650.) A majority of the Court denied the claim without addressing the merits because Robinson had waived the issue by failing to object at trial. (*Id.* at p. 652.) Justice Moreno, however, joined by Justice Kennarrd, filed a concurring opinion stating his support for a general rule prohibiting this testimony. (*Id.* at pp. 656-658) (conc. opn. of Moreno, J.). Justice Moreno reasoned

that when relatives of the victim invoke an imagined version of the crime, the sentencer hears "the version that was most horrific," and the version most compatible with the prosecution's theory of the case. (*Id.* at p. 657.) These imagined reenactments impermissibly characterize, and offer an opinion on, the crime and the defendant, and their primary effect is to "'inflame the [sentencer]'" to secure the maximum penalty. (*Ibid.*, quoting *Booth v. Maryland*, *supra*, 482 U.S. at p. 508.) Accordingly, Justices Moreno and Kennard would "hold as a general rule that testimony of victims' friends and family regarding their imagined reenactments of the crime be excluded." (*Ibid.*)

Following *Booth*, other jurisdictions have addressed the issue and squarely rejected victim impact evidence that characterizes the crime or the defendant. For example, in *Hain v. Gibson* (10th Cir. 2002) 287 F.3d 1224, 1227, petitioner locked two people in the trunk of a car and set the car on fire, burning the two victims to death. In seeking federal habeas corpus relief, Hain claimed that the trial court had improperly admitted victim impact testimony characterizing the crime and him, in violation of his Eighth Amendment rights. (*Id.* at pp. 1236-1240.) One victim's brother testified that the violent nature of the crime and lack of human respect shocked him. (*Id.* at p. 1234.) The wife of another victim testified that she could not watch television or a movie that had fire scenes because they reminded her of her husband struggling to escape the locked trunk. (*Id.* at

p. 1235.) The mother of one of the victims testified that she found it difficult to imagine that Hain could have "that much hate and meanness" in him. (*Id.* at pp. 1234-1235.) The Tenth Circuit held that these were comments about the petitioner and the crime. (*Id.* at p. 1239.) The testimony was "clearly contrary to *Payne* and *Booth*" and violated the Eighth Amendment. (*Ibid.*)[13]

Similarly, in *United States v. Bernard* (5th Cir. 2002) 299 F.3d 467, 480, the Fifth Circuit held that two victim impact witnesses had characterized the crime and the defendants in violation of *Booth*. During the penalty phase, the mother of one of the victims described the defendants' hearts as "hard," while the father of the same victim testified that the victims were "tragically and recklessly stolen from us," and that "[t]here was no profit to be gained, no angry exchange, it was just a useless act of violence and a total disregard of life." (*Ibid.*) The Fifth Circuit agreed that these were improper comments about the defendants and the nature of the crime. (*Ibid.*) Accordingly, the court of appeals recognized that it was "bound by *Booth* to find such evidence inadmissible." (*Ibid.*)[14]

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[13] The Tenth Circuit declined to grant relief, holding that the state appellate court's conclusion that the improper admission of the victim impact evidence was harmless was reasonable in light of the other evidence presented in that case. (*Hain v. Gibson, supra*, 287 F.3d at pp.1239-1240.)

[14] Although it deemed the error "plain," the Fifth Circuit declined to grant relief on this ground, holding instead the appellants had not established that

In Mr. Weaver's case, the court admitted testimony that included three of the victim's family members' characterizations and opinions about both the crime and Mr. Weaver. This testimony violated Mr. Weaver's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, article I of the California Constitution, and Penal Code section 190.3, subdivision (a).

a. Characterizations of the crime

Three of the five victim impact witnesses at Mr. Weaver's trial characterized the crime in a manner that has been rejected by *Booth* and other controlling cases. In particular, Annette, Mary and Joseph Broome were led by the prosecutor through their re-imagining of the crime so that the sentencer heard "the version that was the most horrific" and the version most aligned with the prosecution's theory of the case. (See *People v. Robinson*, *supra*, 37 Cal.4th at p. 657 (conc. opn. of Moreno, J.).) Importantly, these witnesses were not at the crime scene.

In fact, the victim impact witnesses testified to substantially similar imagined reenactments of the crime as did the witnesses in *Robinson*. There, a victim impact witness testified that she could envision "hear[ing] [the victim] moaning as he lay on the ground." (*People v. Robinson*, *supra*, 37 Cal.4th at p. 649.) In Mr. Weaver's case, Annette Broome testified that

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the error affected their substantial rights. (*United States v. Bernard*, *supra*, 299 F.3d at pp. 480-481.)

she thought of "how Mike was crying for help." (7 RT 805.) In *Robinson*, the victim's mother testified that she pictured her son lying on the ground as he "bled from his wound." (37 Cal.4th at p. 649.) At Mr. Weaver's trial, Mary Broome testified that she thought of her son "laying there in a pool of blood." (7 RT 819.)

In *Robinson*, *supra,* the victim's mother testified that she could "see" the victim in her imagination and "what his terror must have been like . . . . [h]ow afraid he must have been on his knees asking for his life," while the father of one of the victims testified about the "image of [the victim's] terror." (37 Cal.4th at pp. 649, 646.) At Mr. Weaver's trial, Annette Broome imagined "what [Mr. Broome] must have thought, my God, I'm dying." (7 RT 805.)

Finally, the witnesses in *Robinson* and the witnesses in Mr. Weaver's case similarly characterized the crime by discussing how no one helped the victims after the shootings and how the shootings happened for no reason. In *Robinson*, the victim's mother testified how she imagined her son after the shooting and how "there wasn't anybody there to help him." (37 Cal.4th at p. 649.) At Mr. Weaver's trial, Annette Broome testified that "nobody was there to help [Mr. Broome]" and that, if she had been present at the shooting, she could have "made [him] feel better or tried to help or just held him." (7 RT 805-806; see also 7 RT 772 ["It was a horrible feeling to want to be there and know that he is hurt and you can't

be there"].) Similarly, Mary Broome testified about how she thinks of Mr. Broome, and "how he laid there dying for no reason at all." (7 RT 815.)

These instances of victim impact testimony invoking imagined reenactments of the crime, like their counterparts in *Robinson*, "only minimally related to the valid purpose of reminding the jury 'that the victim is an individual whose death represents a unique loss to society and in particular to his family.'" (*People v. Robinson*, *supra*, 37 Cal.4th at p. 657, quoting *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825 (conc. opn. of Moreno, J.).) Accordingly, these characterizations of the crime by the victim impact witnesses violated Mr. Weaver's constitutional rights.

A comparison of the facts of this case to those in *Booth* and the relevant cases from other jurisdictions compels the same conclusion. The characterizations of the crime in Mr. Weaver's case were far more emotional and prejudicial than the testimony held unconstitutional in *Booth*. Although the jury in *Booth* heard the statement of the victim's son that his parents were "butchered like animals" (*Booth v. Maryland*, *supra*, 482 U.S. at p. 508), neither he nor any other victim impact witness described or characterized the crime in detail. For example, in contrast to the highly emotional characterizations in this case, the victim's son in *Booth* said merely that he did not believe that anyone should be able to do "something like this," and the victim's daughter testified that she could not forgive or

forget that her parents died "that way" or that the defendant could "do that" to someone. (*Ibid.*)

The opinions offered by members of the Broome family about the crime mirrored those held to be improper in the cases from other jurisdictions cited above. For example, in *United States v. Bernard*, *supra*, the father of the victim testified that victims were "tragically and recklessly stolen from us" and described the crime as "just a useless act of violence and a total disregard for life." (299 F.3d at p. 480.) The Broome family's opinions were also similar to those offered by the victim's father in *People v. Robinson*, which Justice Moreno determined "crossed the [constitutional] line." 37 Cal.4th 656-657 (conc. opn. of Moreno, J.) [where one victim's father had testified, characterizing the crime as having occurred "'not by accident, not in fear, but for a few hundred dollars'"].) Joseph Broome testified that "it would be easier" if his brother "got killed in a car accident," and that he "could accept it" if his brother had "had cancer and was terminally ill." (7 RT 828.) But he could not accept his brother's death for "such a callous reason." (Ibid.) Mary Broome offered a similar opinion when she testified that her son died "for no reason at all." (7 RT 815.)

b. Characterizations of Mr. Weaver

While the Court has not yet addressed what constitutes improper comments about the defendant, Justice Moreno in his concurring opinion in

People v. Robinson, offered examples of impermissible characterizations. (37 Cal. 4th at p. 657 (conc. opn. of Moreno, J.).) The father of one of the victims in *Robinson* testified that he could not understand how the defendant could "look my son in the eye, and without feeling or mercy" and shoot him. (*Ibid.*) The mother of one of the victims testified that she could not understand "anybody being able to do that." (*Ibid.*) Justice Moreno found that these opinions were "essentially characterizations of . . . the defendant" whose primary effect would be to "'inflame the [sentencer]'." (*Id.*, quoting *Booth v. Maryland*, *supra,* 482 U.S. at p. 508.)

As noted above, both the Fifth and Tenth Circuits identified improper characterizations of the defendant. In *Hain v. Gibson*, *supra*, it was the testimony of the mother of one of the victims who said, "It is hard for us to imagine that anyone could have that much hate and meanness in them." (287 F.3d at pp. 1234-1235, 1239 [holding this opinion barred by the Eighth Amendment].) In *United States v. Bernard*, *supra*, it was testimony of the mother of one of the victims who said that she was sorry for the defendants' "heart to be so hard." (299 F.3d at p. 480.) In the present case, after imagining what Mr. Broome was feeling at the time of the shooting, Annette Broome testified that the crime was "so cruel and cold" and that "[e]ven a dog stops what they're doing and comes over to lick your wounds if you're crying." (7 RT 805.) This description was almost identical to the impermissible opinion of the defendant offered by

the witnesses in *Booth v. Maryland*. (482 U.S. at p. 508 [victim's daughter stating that "animals wouldn't do this"].)

Annette Broome characterized Mr. Weaver when she testified about her son's reaction to news of the shooting. (7 RT 779.) She explained to her son, Mikey, that "'[a] bad man shot daddy.'" (Ibid.) When Mikey could not understand, Ms. Broome repeated that "'[t]he bad man killed daddy.'" (Ibid.) Mrs. Broome's opinion of Mr. Weaver as a "bad man" was an impermissible comment on his lack of worth as a human being, and pitched the ultimate question of whether the court should kill the bad man because he killed a good man. (See also 13 RT 1425-26 [prosecutor arguing at the motion for new trial hearing that "[t]he real question is . . . . [w]hat is an innocent man's life worth versus what is a guilty man's life worth?"].)

Furthermore, Joseph Broome told the court that he could not understand "[h]ow someone could take [Michael Broome]'s life." (7 RT 824.) Mr. Broome recalled how he and his brothers had to pin their mother down on her bed after they had told her about the shooting. He described how she cried, "'Why? Why? Why? Why would someone do this to such a beautiful person.'" (7 RT 826.) These statements were even more extensive and emotionally-charged than the victim's family members' comments in *People v. Robinson*. (37 Cal.4th at p. 657 (conc. opn. of

Moreno, J.) [witness' testimony that she could not "understand anybody being able to do that"].)

In sum, testimony by the victim's family members that repeatedly characterized both the crime and Mr. Weaver created "a constitutionally unacceptable risk" that the judge imposed Mr. Weaver's death sentence "in an arbitrary and capricious manner." (*Booth v. Maryland*, *supra,* 482 U.S. at p. 503.) Accordingly, Mr. Weaver's death sentence must be vacated, and a new sentencing trial ordered.

3. The admission of victim impact testimony that was not materially, morally, or logically related to the crime exceeded statutory limits

Because this Court has held that victim impact evidence is admissible in California pursuant to Penal Code section 190.3, subdivision (a), there are statutory boundaries to its introduction in addition to those imposed by the United States and California Constitutions. This Court in *Edwards* noted that it was not "explor[ing] the outer reaches of evidence admissible as a circumstance of the crime," and that section 190, subdivision (a) may not "necessarily include[] all forms of victim impact evidence and argument allowed by *Payne.*" (*People v. Edwards*, *supra*, 54 Cal.3d at pp. 835-836.) Specifically, the evidence considered by this Court as a "circumstance of the crime" pursuant to Penal Code section 190.3, subdivision (a) is admissible only to the extent that it describes the specific harm caused by the defendant. (*Id.* at p. 835.) The word "circumstances"

as used in section 190.3, subdivision (a) does not merely refer to the temporal and spatial circumstances of the crime. Thus, when applied to victim impact evidence, the statute requires that the evidence relate "materially, morally, or logically" to the specific harm caused by the defendant. (*Id.* at p. 833.)

In *People v. Harris*, the Court concluded that the testimony concerning an incident at the victim's funeral "was too remote from any act by defendant to be relevant to his moral culpability." (*People v. Harris*, *supra*, 37 Cal.4th at p. 352.) Here, the prosecution introduced victim impact testimony concerning three events that were too remote from any act by Mr. Weaver to be relevant to his moral culpability.

First, a substantial portion of the testimony detailed the reasons the victim and his family moved from New Jersey to Vista, California, which occurred long before the shooting. Second, the prosecution introduced testimony about the New Jersey business community's response to the shooting. Finally, the prosecution asked the victim's wife about the trauma she experienced as a result of a bomb scare that took place during Mr. Weaver's trial. All three subjects were irrelevant to the specific harm caused by Mr. Weaver's actions, and violated the restrictions imposed by Penal Code section 190.3, subdivision (a).

a. Testimony about the Broome family's move to California

In his opening statement, the prosecutor told the court about Michael and Annette Broome's decision to move from New Jersey to California:

> Michael Broome had come out from New Jersey to make a better life for his family, a safer life for he [*sic*] and his family, a better environment. [¶] Lo and behold Michael Broome, I suppose if you were to ask him today, would tell this court that he [made] a mistake, that better life, that safer life that was to be found in Vista, California, was not to be. Apparently, he had been much [better] off in New Jersey where he probably would be alive today.

(7 RT 746-747.)

The prosecutor questioned Annette Broome about the family's decision to move in July 1991, nearly a year before the shooting. Her testimony on this point spans four pages, and emphasizes the family's concerns about their safety in New Jersey. (7 RT 762-766.) Mrs. Broome testified that New Jersey was close to New York and becoming dangerous. (7 RT 765.) They had heard about "a lot of terrible things" occurring in New York City, and she felt that Vista would be safer for her family. (Ibid.)

Similarly, Joseph Broome, the victim's brother, testified about the family's move to California. (7 RT 828-829.) Mr. Broome testified that his brother had moved his family "mostly [because] he loved California." (7 RT 828.) He also told the trial court that his brother loved the Los Angeles Rams, the beach, and the climate. (Ibid.) When asked whether his

brother was also concerned about the crime in New Jersey, Mr. Broome replied, "I guess in a sense . . . . Mostly [it was] just the climate . . . and his love for the Rams that made him move out here." (Ibid.) When he did not receive the expected response, the prosecutor directed the witness to the answer he was seeking by asking whether Michael Broome had thought Vista was safe. Joseph Broome responded that his brother "thought he was safe." (7 RT 829.)

The testimony of Annette and Joseph Broome allowed the sentencer to consider evidence that did not relate to Mr. Weaver's individual culpability and exacerbated other inflammatory victim impact testimony. Evidence concerning the Broome family's desire for safety in Vista contextualized the shooting in an emotional-laden setting, but one wholly irrelevant to the circumstances of the crime under the parameters of *Payne* or *Edwards*.

The prejudicial impact of this evidence was exacerbated first by Annette Broome's detailed explanation of the precautions she and her husband took to ensure their employees' safety in the event of a robbery. (7 RT 766-768.) Indeed, the prosecutor structured his examination of Mrs. Broome so that her testimony about the move from New Jersey was followed immediately by her description of her husband's advice to employees and of the bulletin posted in the store warning about recent robbery-homicides. (7 RT 764-768.)

Particularly in the context of testimony about the Broome family's shattered dream of the move from New Jersey to California, Mary Broome's testimony about the Los Angeles riots was also constitutionally impermissible. The shooting occurred on May 6, 1992, in Vista, California, only one week following the riots in Los Angeles precipitated by the beating of Rodney King. (See 2 CT 280-283.) Mr. Weaver, an African-American and Latino man, faced the death penalty for the shooting of Michael Broome, a white man. Mary Broome testified that she telephoned Michael Broome the preceding week and asked whether he was going to be "okay with the riots in L.A." (7 RT 819.) Mrs. Broome then stated, "A week later, he was gone, dead. I couldn't believe it." (Ibid.) Already identified as the man who destroyed the Broome family's desire for safety in Vista, Mr. Weaver, an outsider from Los Angeles, then became the perpetrator of the racial violence described in Mary Broome's testimony. Testimony about these irrelevant and politically charged events "was too remote from any act by [the] defendant to be relevant to his moral culpability." (*People v. Harris*, *supra*, 37 Cal.4th at p. 352.)

b. Testimony about the New Jersey business community's reaction to the shooting

The prosecution's stated objective in offering testimony about Michael Broome's civic activities in New Jersey several years before the crime was to convince the sentencer that that the "execution of Michael

Broome was felt coast to coast." (7 RT 746.) Through the testimony of his family, the prosecution sought to enlarge the shooting to the status of a national event, expanding Mr. Weaver's culpability well beyond consequences that could be specifically attributable to him.

At the outset of her testimony, the prosecutor asked Annette Broome to identify a photograph of the victim. (7 RT 759-760.) She identified a photograph taken in 1989 of her husband at a Chamber of Commerce meeting in Washington, D.C. (People's Exhibit 87-B.) She testified that Michael Broome was once the president of the Chamber of Commerce in Middletown, New Jersey. (Ibid.)

Joseph Broome's testimony revisited the victim's role in the New Jersey business community. (7 RT 824-825.) Mr. Broome reiterated that his brother had been the president of the Chamber of Commerce, and that he "did a lot for his community, to make his community a better place." (Ibid.) According to Mr. Broome, the family received "cards and people concerned wanting to know how the family was doing," and "several hundred people from the community" turned out for a memorial service in New Jersey held months after the shooting. (Ibid.)

While the victim's participation in the Middletown, New Jersey Chamber of Commerce is descriptive of his positive character, Michael Broome's involvement in activities in New Jersey three years before the

shooting are too far attenuated to be relevant to the specific harm caused by Mr. Weaver. (*People v. Harris*, *supra*, 37 Cal.4th at p. 352.)

c. Testimony about a bomb scare during the trial

Near the conclusion of Annette Broome's testimony, the prosecutor asked, "The other day as we proceeded through the guilt phase of this trial, in fact, there was a bomb scare; do you remember that?" (7 RT 804.) Mrs. Broome responded affirmatively, and then drew a connection between this event and Mr. Weaver's responsibility for the death of her husband:

> I couldn't believe it – I felt like saying, why are you sitting here? What's wrong with you? Life is [too] fragile; you can't take a chance. And my kids only have one person to take care of them now and I can't take a chance, anything. You know, they don't have [anyone] to turn to.
>
> And they've had their fear, too. Like my son, 'Where you going, Ma?' The other day I was going to a school meeting, and it was just the parents' meeting, normal procedure, and I thought I'd go. I hadn't gone to many. I had my shoes on walking out the door, 'Where ya going, ma?'
>
> 'I have a school meeting.'
>
> 'I'll walk you to the car.'
>
> Here we go again. Sure enough, we get out to the car he hops right in. He wouldn't let me go. He says, 'You don't have to go.'
>
> 'Well, I want to go.'
>
> And, 'Well, come back in the house, don't go.'
>
> He started crying again. He didn't want me to leave.

> 'Well, stay home, it's dark out.' 'Don't go.' It's just constant.
>
> I never know the way something is going to trigger me, the way something is going to happen, I'm going to get scared.

(7 RT 804-805.)

Nothing in the prosecution's question about a bomb scare related to Mr. Weaver's culpability. The suspected bomb threat, which was reported to the trial court by the supervising judge during the guilt phase, was mentioned and quickly dismissed by the trial court as a matter of no concern. (2 RT 319-320.) There was no evidence, no suggestion nor intimation that Mr. Weaver had any involvement in the incident nor could the bomb scare be said to relate to any harm caused by the shooting. Nonetheless, the prosecution used this opportunity to elicit a painful narrative from Annette Broome about the degree to which her family's daily life is governed by fear.

The facts in *Harris* are on point. Like the mishap at the funeral in which the victim's casket opened unexpectedly, a random bomb scare at the Vista courthouse during Mr. Weaver's trial had no relation to his culpability. As this Court stated in *People v. Harris*, Annette Broome's testimony about her response to the bomb threat "was too remote from any act by [the] defendant to be relevant to his moral culpability." (37 Cal.4th at p. 352.)

G. To The Extent That Precedent Permitted The Introduction Of Victim Impact Evidence At Mr. Weaver's Trial, That Precedent Should Be Overruled

Reversal in this case is required for the reasons stated above, without calling into question the continued validity of *Payne* and *Edwards*. Nevertheless, it is also true that those cases were wrongly decided and should be rejected by this Court, as a matter of evolving Eighth Amendment law, and on independent state grounds under article I of the California Constitution. In the alternative, this Court should follow the lead of several other jurisdictions and establish clear and narrow boundaries for the admission of victim impact evidence. Under any of these scenarios, Mr. Weaver is entitled to a new penalty phase trial.

1. This Court should acknowledge that *Payne v. Tennessee* was wrongly decided and hold that victim impact evidence is barred by the United States and California Constitutions

A state court operating in the Eighth Amendment arena, which is based on society's evolving standards of decency, is required to look both at those standards and the knowledge and experience existing today. A state court is not tethered to the United States Supreme Court's last pronouncement on the subject. (*State ex rel. Simmons v. Roper* (Mo. 2003) 112 S.W.3d 397, 413 [extending Eighth Amendment protections beyond those of 14-year-old U.S. Supreme Court precedent]; see also *Roper v. Simmons* (2005) 543 U.S. 551 [accepting without comment Missouri

court's anticipating overruling of high court precedent].) This Court should acknowledge that *Payne v. Tennessee* was wrongly decided, and hold that both the Eighth Amendment and article I of the California Constitution bar the admission of victim impact evidence.

First, individual blameworthiness should be the proper focus of the sentencing phase of a capital trial. Barring victim impact evidence was proper, reasoned the Supreme Court in *Booth v. Maryland*, *supra*, 482 U.S. 496, because to the extent that victim impact evidence presented "factors about which the defendant was unaware, and that were irrelevant to the decision to kill," it had nothing to do with the "blameworthiness of a particular defendant." (*Id.* at pp. 504-505.) This position was echoed by Justice Marshall in his dissent in *Payne*:

> Where, as is ordinarily the case, the defendant was unaware of the personal circumstances of his victim, admitting evidence of the victim's character and the impact of the murder upon the victim's family predicates the sentencing determination on "factors . . . wholly unrelated to the blameworthiness of [the] particular defendant."

(501 U.S. at pp. 845-846, quoting *Booth v. Maryland*, *supra,* 482 U.S. at p. 504, ellipsis in *Payne* (dis. opn. of Marshall, J.); see also *Payne v. Tennessee, supra,* 501 U.S. at p. 864 (dis. opn. of Stevens, J.) [noting that the introduction of victim impact evidence "allows a jury to hold a defendant responsible for a whole array of harms that he could not foresee and for which he is therefore not blameworthy"]; Bandes, *Empathy,*

Narrative, and Victim Impact Statements (1996) 63 U. Chi. L.Rev. 361, 409 [noting that *Booth* "recognized that victim impact statements would not merely expand the number of stories available to the trier of fact, but, rather, would divert and detract from [its] constitutionally required focus"].)

Second, the introduction of victim impact evidence poses an unacceptable risk of verdicts based on passion and prejudice rather than reason. (See *State v. Muhammad*, *supra*, 678 A.2d at pp. 179-180 [discussing potential for undue prejudice where inflammatory testimony or testimony from multiple victim impact witnesses is admitted].) In *Booth v. Maryland*, *supra*, the Supreme Court recognized this danger and concluded that the introduction of victim impact evidence increased the possibility that the sentencer would render an arbitrary decision in a capital trial. (482 U.S. at p. 505.) The Court cited this possibility as an independent basis for excluding all victim impact evidence under the Eighth Amendment. (*Ibid.*; see also *Payne v. Tennessee, supra,* 501 U.S. at p. 846 (dis. opn. of Marshall, J.) ["[T]he probative value of [victim impact] evidence is always outweighed by its prejudicial effect because of its inherent capacity to draw the jury's attention away from the character of the defendant and the circumstances of the crime to such illicit considerations as the eloquence with which family members express their grief and the status of the victim in the community"].)

Concern that decisions will be based on emotion rather than reason have led to the exclusion of other types of evidence. Evidence of a defendant's prior bad acts, for example, are generally excluded because of the fear that the fact finder will base its decision on the defendant's presumed propensity to commit some criminal act, rather than the facts before it. (See Evid. Code, §§ 1101-1103; Fed. Rules Evid., rule 404(b); see also Law Revision Commission Comment to Cal. Evid. Code, § 1102 (1965) ["Evidence of specific acts of the accused is excluded as a general rule in order to avoid the possibility of prejudice [and] undue confusion of the issues with collateral matters . . . ."]; Advisory Committee's Note to Fed. Rules Evid., rule 404 (1972) [stating that "evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it" because of the danger of unfair prejudice].)

Wigmore describes the dangers of generally allowing evidence of prior bad acts in the following way:

> The natural and inevitable tendency of the tribunal – whether judge or jury – is to give excessive weight to the vicious record of crime . . . and either allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge.

(1A Wigmore, Evidence (Tillers rev. 1983), § 58.2, p. 1212.) Thus, to protect a defendant's right to a dependable sentencing determination, such

evidence is generally excluded. Because death is different than other punishment and death sentences thus require heightened reliability (see *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305), this Court should impose similar protections under the Eighth Amendment of the United States Constitution and establish a per se bar on the introduction of victim impact evidence.

Even if the Court feels bound to follow *Payne*, it can certainly recognize that the case should not be extended beyond its limited facts. "In the absence of a decision by the high court directly on point," wrote former Chief Justice Lucas for this Court, "we must fulfill our independent constitutional obligation to interpret the federal constitutional guarantee . . . (see Cal. Const., art. XX, § 3 [judicial officers swear an oath to support the Constitution]) . . . ." (*In re Tyrell J.* (1994) 8 Cal.4th 68, 79, overruled on other grounds by *In re. Jaime P.* (2006) 40 Cal.4th 128.) There has been no decision by the high court on the use of testimony beyond the limited evidence in *Payne*. This Court's independent obligation applies, and it should hold that any broader uses of victim impact evidence are unconstitutional.

This Court must also independently examine whether a death verdict violates the California Constitution. (See, e.g., *People v. Berryman* (1993) 6 Cal.4th 1048, 1110 [considering the disproportionality of the sentence under Cal. Const., art. I, § 17], overruled on another ground by *People v.*

Hill (1998) 17 Cal.4th 800; *People v. Anderson* (1972) 6 Cal.3d. 628 [considering cruel or unusual punishment in general under Cal. Const., art. I, § 6], overruled on another ground by *People v. Hill*, *supra*, 17 Cal.4th at 1014-1015.) And, while the Court has not explicitly held that article I, section 17 shares with its Eighth Amendment analog the requirement of reliability in a death verdict, it has considered claims of violations of such a requirement without questioning its existence. (*People v. Koontz*, *supra*, 27 Cal.4th at pp. 1074, 1085; *People v. Pinholster* (1992) 1 Cal.4th 865, 914, 927-928.)

Moreover, the Court has repeatedly referred to the state's own interest in the reliability of death verdicts without locating them in a particular constitutional provision. (See, e.g., *People v. Massie* (1998) 19 Cal.4th 550, 570, and cases cited.) Given the weaknesses of the reasoning in *Payne* and subsequent experience with how powerful, misleading, and unreliable victim impact testimony is likely to be, this Court should terminate its experiment with victim impact evidence and exclude such testimony under the state prohibition on cruel or unusual punishment. (See *People v. Cahill* (1993) 5 Cal.4th 478, 557-558 (dis. opn. of Kennard, J.) ["in matters of constitutional law and criminal procedure we [need not] always play Ginger Rogers to the high court's Fred Astaire"]; *Griset v. Fair Political Practices Com.* (1994) 8 Cal.4th 851, 866, fn. 5 [California free-

speech clause is more protective than its federal counterpart].)

2. *People v. Edwards* should be overruled

If the United States and California Constitutions do not ban or limit victim impact evidence, California's death penalty statute does.

During the penalty phase of a capital trial, the prosecution may only present evidence of statutorily listed factors and a finder of fact may consider only evidence that falls within the ambit of one of the listed factors. (See *People v. Boyd* (1985) 38 Cal.3d 762, 775 [concluding that "evidence irrelevant to a listed factor [in § 190.3] is inadmissible"].) As Justice Kennard has noted, section 190.3, subdivision (a) "does not expressly list the specific harm caused by the crime, the victim's personal characteristics, or the emotional impact of the capital crimes on the victim's family." (*People v. Fierro* (1991) 1 Cal.4th 173, 259 (conc. & dis. opn. of Kennard, J.).)

Accordingly, Mr. Weaver respectfully requests that this Court revisit the meaning of the term "circumstances of the crime," as used in Penal Code section 190.3, subdivision (a), and conclude that victim impact evidence is a "circumstance of the crime" only when it relates to characteristics of the victim that the defendant knew or reasonably should have known prior to committing the offense.

As discussed above, the Court in *People v. Edwards*, *supra*, concluded that victim impact evidence is admissible under Penal Code

section 190.3, subdivision (a), as one of the "circumstances of the crime." (54 Cal.3d at p. 835.) In arriving at the interpretation of the "ordinary import of the language used" in the statute, the Court looked to the dictionary definition of "circumstances" found in the Oxford English Dictionary: "'That which surrounds materially, morally, or logically.'" (*Id.* at 833.) Mr. Weaver contends that this definition (1) conflicts with that of the more specific statutory factors, (2) renders other statutory factors superfluous and (3) is inconsistent with the Supreme Court's definition of the term "circumstances of the crime."

When interpreting a statute, courts generally look first to the plain meaning of the statute's terms. Where no plain meaning exists because there are multiple possible interpretations, courts may apply established canons of statutory interpretation to determine the statute's meaning. (See *Mejia v. Reed* (2003) 31 Cal.4th 657, 663 [holding that where "the plain meaning of the statutory text is insufficient to resolve the question of its interpretation, the courts may turn to rules or maxims of construction"]; see also 2A Sutherland, Statutes And Statutory Construction (Singer 6th ed. 2000 rev.) § 45.13 (hereafter Sutherland).) Because several divergent definitions of "circumstances" exist, this Court should have concluded that the phrase has no plain meaning. (See *People v. Fierro*, 1 Cal.4th at p. 262 (conc. & dis. opn. of Kennard, J.) [noting, inter alia, that Black's Law

Dictionary (6th ed. 1990) and the Fourth Circuit Court of Appeals give more narrow definitions of the term "circumstances"].)

In the absence of a plain meaning, the Court should have applied established rules to determine which of the competing definitions was correct. The rule of *noscitur a sociis* instructs that terms grouped together should be given meaning similar in nature and scope. (See Sutherland, § 47.16; see also *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1160 [noting that the rationale behind the related *ejusdem generis* canon is that "'if the [writer] had intended the general words to be used in their unrestricted sense, [he or she] would not have mentioned the particular things or classes of things which would in that event become mere surplusage,'" quoting *Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501, 1506].)

As Justice Kennard stated in *People v. Fierro, supra*:

> To say that the "circumstances of the crime" includes everything that surrounds the crime "materially, morally or logically," is to say that this one factor includes everything that is morally or logically relevant to an assessment of the crime, or, in other words, every fact or circumstance having any legitimate relevance to the penalty determination.

(1 Cal.4th at p. 263 (conc. & dis. opn. of Kennard, J.).) Because this broad definition encompasses other separately enumerated factors in section 190.3, such as the presence or absence of prior felony convictions and whether the defendant acted under the substantial domination of another

person, it should not have been adopted. (See Pen. Code, §§ 190.3, subds. (c), (g).)

The broad interpretation accepted in *Edwards* should be abandoned for the additional reason that it is in conflict with the Supreme Court's interpretation of the term "circumstances of the crime." In *Booth*, the Supreme Court rejected the argument that the "emotional trauma suffered by the family and personal characteristics of the victims . . . should be considered a 'circumstance' of the crime." (*Booth v. Maryland, supra,* 482 U.S. at p. 503-504.) The Supreme Court left open the possibility that victim impact testimony could be admissible if it "relate[d] directly to the circumstances of the crime." (*Id.* at 507, fn. 10.)

In *Gathers*, the Court concluded that a fact not known to the defendant "[could] not be said to relate directly to the circumstances of the crime." (*South Carolina v. Gathers, supra*, 490 U.S. at p. 812.) Inasmuch as *Payne* did not provide an alternative definition of "circumstances of the crime," the definitions used in both *Booth* and *Gathers* were not overruled. In both opinions, the Supreme Court held that victim impact evidence was usually *not* a circumstance of the crime. This Court should have adopted a similar definition. (See *People v. Fierro*, *supra,* 1 Cal.4th at p. 259 (conc. & dis. opn. of Kennard, J.) [noting that the Supreme Court's definition of a term "is persuasive on what the words are commonly understood to mean in the context of a capital sentencing scheme"].)

Because the definition of "circumstances of the crime" adopted by this Court is overbroad, inconsistent with the other provisions of Penal Code section 190.3, and in conflict with the Supreme Court's construction of that term, Mr. Weaver requests that this Court adopt a definition that encompasses only "those facts or circumstances either known to the defendant when he or she committed the capital crime or properly adduced . . . at the guilt phase." (*People v. Fierro*, *supra,* 1 Cal.4th at p. 264 (conc. & dis. opn. of Kennard, J.).)

3. Alternatively, this Court should, like the courts of many other jurisdictions, carefully limit victim impact testimony

As discussed above, a survey of this Court's post-*Edwards* decisions reveals the various factors it considers when analyzing contested victim impact evidence. These factors – the length of the victim impact evidence testimony, its emotional tenor, its inflammatory potential relative to other properly admitted evidence in aggravation, and whether it is materially, morally, or logically related to the crime – guide the Court in determining whether there has been a constitutional violation. Nevertheless, in the 15 years since *Edwards*, the Court has not explicitly adopted these, or any, factors as determinative.

The introduction of victim impact evidence is now commonplace at the penalty phase of capital trials in California. The Court has addressed its admissibility in dozens of cases. (See, e.g., *People v. Brown* (2004) 33

Cal.4th 382, 397 [listing recent cases].) However, the Court has offered only one concrete example of the type of victim impact evidence that would violate *Edwards*. (See *People v. Harris*, *supra*, 37 Cal.4th at p. 352 [holding that trial court erred in allowing victim impact testimony describing an incident during the victim's funeral attributable to an intervening actor].) As a result, trial courts lack guidance in determining the permissible quantity, scope and content of this evidence. The extent of victim impact testimony admitted in Mr. Weaver's case – nearly 100 transcript pages – demonstrates precisely how, without direction from this Court, sentencers, whether juries or judges, are driven by passion, not reason, to conclude that death is the only option.

Courts in other jurisdictions have imposed restrictions on the introduction of victim impact evidence in order to ensure that a capital defendant's trial is fundamentally fair. This Court has endorsed the approach taken by some of those courts. In *People v. Robinson*, *supra*, 37 Cal.4th 592 at p. 652, the Court repeated a warning about the length of victim impact evidence that had been issued by the Texas Court of Criminal Appeals: "'[*W*]*e caution that victim impact and character evidence may become unfairly prejudicial through sheer volume.*'" (*Id.*, quoting *Salazar v. State*, *supra,* 90 S.W.3d at p. 336, italics in original.) The Court also observed that an undue amount of victim impact evidence "'[e]ven if not technically cumulative . . . can result in unfair prejudice.'" (*Ibid.*, quoting

Salazar v. State, supra, 90 S.W.3d at p. 363.) In *Robinson*, the Court also cited the Oklahoma Court of Criminal Appeals' discussion of the risk that the disquieting nature of victim impact evidence will undermine the fairness of the penalty verdict. (*People v. Robinson*, *supra,* 37 Cal.4th at p. 652.) The Oklahoma appellate court observed that the more the sentencer "'is exposed to the emotional aspects of a victim's death, the less likely [its] verdict will be a 'reasoned moral response' to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process.'" (*Ibid.,* quoting *Cargle v. State* (Okla. Crim. App. 1996) 909 P.2d 806, 830, revd. on other grounds in *Coddington v. State* (Okla. Crim. App. 2006) 142 P.3d 437, 542.)

The New Jersey Supreme Court, following *Payne*, held that "the State can offer the jury a quick glimpse of the victim's life and the impact of the loss on the victim's surviving family members." (*State v. Muhammad*, *supra*, 678 A.2d at p.175 [construing N.J. Stat. Ann., § 2C:11-3c(6) (1995)].) This limitation, the court explained, would prevent the sentencer from "becom[ing] overwhelmed and confused by [the amount of] victim impact evidence." (*Ibid.*) It cautioned that even allowing more than one witness to testify ordinarily posed an unacceptable risk:

> The greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for the victim impact evidence to unduly prejudice the [sentencer] against the defendant. Thus, absent special circumstances, we expect that the victim impact testimony of

> one survivor will be adequate to provide the [sentencer] with a glimpse of each victim's uniqueness as a human being and to help the [sentencer] make an informed assessment of the defendant's moral culpability and blameworthiness.

(*Id.* at p. 180.)

In describing the proper boundaries for the content of the testimony, the New Jersey Supreme Court concluded that victim impact evidence "can provide a general factual profile of the victim, including information about the victim's family, employment, education, and interests." (*State v. Muhammad*, *supra*, 678 A.2d at p. 180.) The court directed, however, that "testimony should be factual, not emotional, and should be free of inflammatory comments or references." (*Ibid.*) As a final safeguard to ensure a fair trial when the prosecution seeks to introduce victim impact evidence, the court ruled that its admission "requires a balancing of the probative value of the proffered evidence against the risk that its admission may pose the danger of undue prejudice or confusion to the jury." (*Id.* at p. 176.)

Other state and federal courts have joined Texas, Oklahoma, and New Jersey in limiting the amount and type of victim impact evidence that may be admitted under *Payne*. These states share the view that victim impact evidence must be brief and narrowly focused. (See, e.g., *State v. Taylor* (La. 1996) 669 So. 2d 364, 370 [allowing prosecutor to introduce some evidence regarding the individuality of the victim and the effect of the

crime on the victim's survivors, but warning that extensive victim impact evidence can violate the defendant's Due Process rights]; *State v. Clark* (N.M. 1999) 990 P.2d 793, 808 [holding that "victim impact evidence, brief and narrowly presented, is admissible" in capital cases, construing N.M. Stat. Ann., §§ 31-20A-1(c), 31-20A-2(b) (Michie 1979)].) The Louisiana court explained:

> "[S]ome evidence of the murder victim's character and of the impact of the murder on the victim's survivors is admissible as relevant to the circumstances of the offense or to the character and propensities of the offender. To the extent that such evidence reasonably shows that the murderer knew or should have known that the victim, like himself, was a unique person and that the victim had or probably had survivors, and the murderer nevertheless proceeded to commit the crime, the evidence bears on the murderer's character traits and moral culpability . . . ."

(*State v. Taylor*, *supra*, 669 So.2d at p. 370, quoting *State v. Bernard* (La. 1992) 608 So. 2d 966, 972.) The court continued:

> "[I]ntroduction of detailed descriptions of the good qualities of the victim or particularized narrations of the emotional, psychological and economic sufferings of the victim's survivors, which go beyond the purpose of showing the victim's individual identity and verifying the existence of survivors reasonably expected to grieve and suffer because of the murder, treads dangerously on the possibility of reversal because of the arbitrary influence of factors on the . . . sentencing decision."

(*Ibid.*)

Florida flatly excludes testimony about bereavement trauma, limiting evidence to "'the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's

death.'" (*Windom v. State* (Fla. 1995) 656 So.2d 432, 438, quoting Fla. Stat. ch. 921.141 (1993).) Tennessee, while permitting some testimony about the survivors' loss, instructs trial courts that "evidence regarding the emotional impact of the murder on the victim's family should be most closely scrutinized because it poses the greatest threat to due process and risk of undue prejudice . . . ." (*State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 891 [construing Tenn. Code. Ann., § 39-13-2-4(c) (1997)]; see also *State v. McKinney* (Tenn. 2002) 74 S.W.3d 291, 309 [same].) Georgia maintains similar limitations. (See *Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842 [Georgia court approves statements that did not "provide[] a 'detailed narration of . . . emotional and economic sufferings of the victim's family,'" quoting *Livingston v. State* (Ga. 1994) 444 S.E.2d 748, 759 (dis. opn. of Benham, J.)], construing Ga. Code Ann., § 17-10-1.2 (1993) [specifying six topics of testimony that can be admitted as victim impact evidence].) The defendant's knowledge of the victim's family circumstances is pertinent in evaluating the probative value of the testimony. (*State v. Nesbit*, *supra*, 978 S.W.2d at pp. 892-893.) Similarly, the trial court must take care to prevent prosecutorial argument that invites an emotional response to the evidence. (*Id.* at pp. 891-892; see also *State v. McKinney*, *supra*, 74 S.W.3d at p. 309; *State v. Muhammad*, *supra*, 678 A.2d at p. 180 [argument should be "strictly limited" to contents of testimony].)

Another option for a bright-line rule to avoid the problems that rendered the verdict in this case unlawful would be the one proposed by Justice Kennard in her separate opinion in *People v. Fierro*:

> As used in section 190.3, "circumstances of the crime" should be understood to mean those facts or circumstances either known to the defendant when he or she committed the capital crime or properly adduced in proof of the charges adjudicated at the guilt phase.

(*People v. Fierro*, *supra*, 1 Cal.4th 173, 264 (conc. & dis. opn. of Kennard, J.) Such facts would relate directly to the defendant's culpability, and they would be true circumstances of the offense, i.e., of the defendant's actual conduct. (Cf. *State v. Nesbit*, *supra*, 978 S.W.2d 872, 892-893 [defendant's knowledge of victim's family circumstances is pertinent in weighing probative value of testimony about effect on family].)

This Court should take this opportunity to impose concrete limitations on its victim impact jurisprudence. Under the Eighth Amendment, "the severity of [a death] sentence mandates careful scrutiny in the [post trial] review of any colorable claim of error." (*Zant v. Stephens*, *supra*, 462 U.S. 862 at p. 885; see also *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Payne v. Tennessee*, *supra*, 501 U.S. at p. 837 (conc. opn. of Souter, J.) [when victim impact evidence is introduced, "this Court and the other courts of the state and federal systems will perform the 'duty to search for constitutional error with painstaking care,'

an obligation 'never more exacting than it is in a capital case,'" quoting *Burger v. Kemp* (1987) 483 U.S. 776, 785].)

H. The Improper Admission Of Victim Impact Evidence Was Not Harmless Beyond A Reasonable Doubt

The prosecution's victim impact presentation at Mr. Weaver's sentencing hearing defied every limitation placed on victim impact evidence by the Supreme Court and by this Court. This case is not one in which the Court must parse the evidence and the arguments of counsel to determine the effect of the trial court's erroneous admission of this inflammatory evidence. The trial judge announced that Mr. Weaver's death verdict was the direct result of the victim impact testimony: "Any reviewing court should know that absent the strength and force of the extremely high level and heavy weight of such evidence, this court would have reached a different result." (RT 1371-1374.)

Constitutional errors that infringe fundamental rights but are not viewed as affecting the structural integrity of the trial are subject to the stringent harmless error standard of *Chapman v. California, supra,* 386 U.S. at p. 24. (See also *Arizona v. Fulminante* (1991) 499 U.S. 279, 308-310.) Given clear constitutional error, and the declaration by the trial court that this error was dispositive, the error cannot not be deemed harmless beyond a reasonable doubt. This Court must vacate Mr. Weaver's death sentence and remand for a new sentencing hearing.

VI. THE TRIAL COURT IMPROPERLY CONSIDERED MITIGATING EVIDENCE AS AGGRAVATING EVIDENCE

At the conclusion of the penalty phase, Judge Lester provided a "detailed statement of the factors in mitigation and the factors in aggravation that [he] considered" in reaching his penalty verdict. (12 RT 1338.) As discussed below, the trial judge gave aggravating weight to evidence offered by Mr. Weaver under factor (k) of Penal Code section 190.3 and to evidence introduced under factors (d) and (h), which the court announced it would consider under factor (k). The verdict was, therefore, contrary to this Court's well-established precedent that evidence offered under these statutory factors may be considered only in mitigation. (See, e.g., *People v. Hillhouse* (2002) 27 Cal.4th 496, 508 ["'[A] majority of the 11 statutory factors can only be mitigating'"], quoting *People v. Wader* (1993) 5 Cal.4th 610, 658; see also *People v. Whitt* (1990) 51 Cal.3d 620, 655 ["[F]actors (d), (e), (f), (h), and (k) can only mitigate"]; *People v. Montiel* (1993) 5 Cal.4th 877, 937-938, 944 [evidence offered under factors (d), (e), (f), (g), (h), and (k) can only be mitigating]; *People v. Edelbacher* (1989) 47 Cal.3d 983,1033 [factor (k) evidence "may not be used affirmatively as a circumstance in aggravation"].)[15] The judge's penalty

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[15] In *People v. Williams* (1997) 16 Cal.4th 153, 271-272, the prosecution argued that the Supreme Court, in *Tuilaepa v. California* (1994) 512 U.S 967, had endorsed the view that California's "listed sentencing factors were properly considered as either aggravating or mitigating." This Court rejected the argument that *Tuilaepa* undermined the prohibition against

verdict also violated Mr. Weaver's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I of the California Constitution.

A. The Trial Court Violated State Law And Mr. Weaver's Constitutional Rights By Giving Aggravating Weight To Evidence Of Mr. Weaver's Family Background Offered Under Factor (k)

California's death penalty scheme "requir[es] the [judge or] jury to decide the appropriateness of the death penalty by a process of weighing the specific factors listed in [California's death penalty] statute." (*People v. Boyd* (1985) 38 Cal.3d 762, 773 [referring to Penal Code section 190.3].) Among the factors enumerated, factor (k) allows a judge or jury to consider "[a]ny . . . circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," including evidence of the defendant's character and background. (Pen. Code, § 190.3, subd. (k); see also *People v. Edelbacher, supra,* 47 Cal.3d at p. 1033.)

Evidence about a defendant's background offered under factor (k) must be considered exclusively in mitigation and cannot be considered as

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labeling as "'aggravating' factors 'that actually should militate in favor of a lesser penalty . . . .'" (*People v. Williams, supra*, 16 Cal.4th at p. 272, quoting *Zant v. Stephens*, *supra*, 462 U.S. at p. 885.) The issue here is not, as it was in *Williams*, whether the trial court erred in failing to explicitly label the statutory facts "as either aggravating or mitigating." (16 Cal 4th at p. 272.) It is whether the trial court improperly relied upon evidence presented in support of statutory factors that this Court has held cannot be considered on death's side of the scale.

aggravation. (*People v. Young* (2005) 34 Cal.4th 1149, 1219 ["Evidence of a defendant's background and character is admissible only to mitigate the gravity of the crime . . . ."]; see also *People v. Hillhouse, supra,* 27 Cal.4th at p. 508; *People v. Lucas* (1995) 12 Cal.4th 415, 495; *People v. Whitt, supra,* 51 Cal.3d at p. 654; *People v. Edelbacher, supra,* 47 Cal.3d at p. 1033; *People v. Boyd, supra,* 38 Cal.3d at p. 775 ["The language of factor (k) refers to circumstances which extenuate the gravity of the crime, not to circumstances which enhance it"].)

Here, the prosecutor argued that Mr. Weaver's family background made him more deserving of death. Indeed, the prosecutor urged — at great length — that Mr. Weaver's family background was an aggravating circumstance:

> He doesn't have an excuse. This is not an individual with a background which allows him, which provides him the excuse that we so frequently hear in a case such as this. This is a person who had, in fact, every opportunity in life. Every opportunity. Time and again people in his community, his family, his friends[,] members of the church, everyone extended their hands to the defendant. He didn't take advantage of all those opportunities that he had.
>
> What a lucky individual[.] [H]e was growing up to be part of such a fine nurturing family. He didn't take advantage of that, however. He took advantage of those around him, but he didn't take advantage of those opportunities that he had growing up in that fine household.
>
> He comes from a tremendous family. We learned that during the course of the penalty phase of this case. Despite that background, though the defendant made several bad choices on May the 6th, 1992. And he had the background

upon which to make all the right choices. If anybody was in a position to make the right choices under the circumstances of this case, it was [La Twon] Weaver.

He had been brought up in the church. He had been brought up with every imaginable, positive influence. His father had taught him the difference between right and wrong, not just in the relationship of father son, but also in the relationship of minister penitent. They had those relationships going through his life.

[¶]. . .[¶]

If anybody knew on May the 6th 1992, what the ramifications might possibly be of the choices that the defendant made, it was the defendant. He has no excuses. So what does that make him? That makes had [*sic*] him a bad person . . . .

. . . Someone with the background of [La Twon] Weaver should not have found themselves in the position the defendant found himself on May the 6th 1992.

He must indeed have a malignant heart. He must indeed be inside, regardless of what we see on the surface, a very bad person. How else do you explain despite that upbringing, that nurturing, what he did to Michael Broome on May the 6th, 1992. That's what we learned during the course of this trial, your Honor. This is a person who has no excuses.

(11 RT 1251-1254.)

Judge Lester's verdict demonstrates that the prosecutor's argument had its intended effect. After enumerating the circumstances that he considered in mitigation, Judge Lester "turn[ed] to aggravating factors." (12 RT 1357.) Listing the evidence that he considered aggravating, the judge stated that Mr. Weaver was "given the benefit of a loving, caring,

religious family, but turned his back on that wonderful supportive background." (12 RT 1358.)

The trial court could have rejected this factor (k) evidence entirely, or chosen to give it little mitigating weight had it made that determination. (Cf. *People v. Robertson* (1989) 48 Cal.3d 18, 55 [noting that, after due consideration, the sentencer is permitted to conclude that specific evidence offered in mitigation should be given little or no weight].) Instead, contrary to clearly established law, Judge Lester explicitly considered Mr. Weaver's background as an aggravating factor. The trial court's consideration of evidence in aggravation that could only be mitigating under factor (k) equated to consideration of an invalid sentencing factor and was a violation of Mr. Weaver's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I of the California Constitution.

Last year, in *Brown v. Sanders* (2006) 546 U.S. 212 [126 S.Ct. 884], the Supreme Court held that "[a]n 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." (126 S.Ct. at p. 892, italics in original.) Two of the four special circumstances found true by the jury in *Sanders* had been invalidated by this Court on automatic

appeal. (See *People v. Sanders* (1990) 51 Cal.3d 471, 520-521.) However, the Supreme Court ruled that because the evidence before the jury was otherwise admissible under factor (a) (circumstances of the crime), "[t]he jury's consideration of the invalid 'special circumstances' gave rise to no constitutional violation." (*Brown v. Sanders*, *supra*, 126 S.Ct. at p. 894.)

Highlighting its ruling in *Zant v. Stephens,* the Supreme Court in *Sanders* anticipated a situation like the one that occurred in Mr. Weaver's case where an aggravating circumstance is invalid because it covers evidence that should have "'actually . . . militate[d] in favor of a lesser penalty.'" (546 U.S. at p. 892, fn. 6, quoting *Zant v. Stephens, supra,* 462 U.S. at p. 885, ellipsis in *Sanders*.) The trial court's error here falls squarely within *Sanders*'s definition of a federal constitutional violation. Consideration of evidence of Mr. Weaver's family background was "admissible under factor (k) only to *extenuate* the gravity of the crime; it [could not have been] used as a factor in aggravation." (*People v. Edelbacher*, *supra,* 47 Cal.3d at p. 1033, italics in original.)

The trial court also violated Mr. Weaver's right to due process on a separate ground. A state's failure to impose the death penalty in accordance with its own capital sentencing scheme violates a defendant's rights under the Fourteenth Amendment's Due Process Clause. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Murtishaw v. Woodford* (9th Cir.

2001) 255 F.3d 926, 969-70; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.)

As the Supreme Court held in *Hicks,* a state creates a liberty interest when it provides a criminal defendant with a "substantial and legitimate expectation" of certain procedural protections and "that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." (447 U.S. at p. 346.) In *Hicks*, the defendant was arbitrarily denied his statutory right to have a jury determine his punishment in the first instance. (*Id.* at p. 347.) In finding that this right "substantially affect[ed] the punishment imposed," the Court held that the State "deprived [the defendant] of his liberty without due process of law." (*Ibid.*)

Consistent with *Hicks*, the Ninth Circuit has emphasized that "where a state has provided a specific method for the determination of whether the death penalty shall be imposed, 'it is not correct to say that the defendant's interest' in having that method adhered to 'is merely a matter of state procedural law.'" (*Fetterly v. Paskett, supra,* 997 F.2d at p. 1300, quoting *Hicks v. Oklahoma*, *supra,* 447 U.S. at p. 346.) In other words, a capital defendant's interest in a statutorily prescribed sentencing procedure amounts to more than a matter of state procedural law, it is a matter of federal constitutional law.[16]

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[16] The Supreme Court has also held that state administrative causes of action are a species of property protected by the Fourteenth Amendment.

In *Fetterly*, the Ninth Circuit found that the sentencing judge had not complied with the Idaho death penalty statute's requirements with regard to the weighing of aggravating and mitigating factors. (997 F.2d at p. 1299.) Specifically, Idaho Code section 19-2515(c) required that the sentencing judge weigh mitigating circumstances collectively against *each* of the aggravating circumstances separately. The sentencing judge instead improperly weighed all the mitigating circumstances against all the aggravating circumstances. (*Id.* at p. 1297.) The Ninth Circuit held that "the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state." (*Id.* at p.1300.) The court further noted that "[i]f the sentencing judge did not follow Idaho's statutory procedures in Fetterly's case, others similarly sentenced in Idaho have been and will necessarily be treated differently." (*Id.* at p. 1299.) Such disparate treatment of similarly situated defendants would not comport with the Supreme Court's mandate "that States may impose this ultimate sentence *only if they follow procedures* that are designed to assure reliability in

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(*Logan v. Zimmerman Brush Co.* (1982) 455 U.S. 422, 428-429, citing *Bodie v. Connecticut* (1971) 401 U.S. 371, 380 [Due Process Clause prevents states from denying potential litigants the use of established adjudicatory procedures, absent a countervailing state interest of overriding significance]; see also *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306.)

sentencing determinations." (*Ibid.*, italics in original, citing *Barclay v. Florida* (1983) 463 U.S. 939, 958-959 (conc. opn. of Stevens, J.).)

B. The Trial Court Violated State Law And Mr. Weaver's Constitutional Rights By Giving Aggravating Weight To Evidence Of Mr. Weaver's Intellectual And Psychological Deficits Offered Under Factors (d) And (k)

At the penalty phase, Mr. Weaver presented the testimony of a psychiatrist, Dr. Charles Rabiner. (9 RT 1123- 10 RT 1199.) Dr. Rabiner's report was admitted in evidence by stipulation. (40 CT 7805-7811.) The reports of another psychiatrist, Dr. Haig Koshkarian, and a psychologist, Dr. Wistar MacLaren, were admitted as well. (40 CT 7812-7816, 7797-7804, respectively; 8 RT 854.) All three mental health professionals examined Mr. Weaver. (40 CT 7797, 7805, 7812; 9 RT 1125.)

In preparing to testify, Dr. Rabiner reviewed and considered his own examination of Mr. Weaver and the reports of Drs. MacLaren and Koshkarian. (9 RT 1125-1126, 1144.) All three mental health professionals agreed that Mr. Weaver has dependent, passive, immature personality traits, and low intellectual functioning, and that he is a follower who is easily influenced by others and feels a strong need to please the people around him. (40 CT 7801-7802, 7810-7811, 7815-7816; 9 RT 1127, 1141.) Dr. MacLaren determined that Mr. Weaver's verbal I.Q. is 76. (40 CT 7801.) The prosecution did not offer any testimony in rebuttal to these opinions.

The trial court concluded that the evidence concerning Mr. Weaver's intellectual and psychological limitations did not merit consideration under factor (d), but stated that it would consider the evidence under factor (k). (12 RT 1340-1342.) However, Judge Lester's repeated use of this evidence to describe Mr. Weaver's character in pejorative terms shows otherwise. When Judge Lester recited his consideration of the mental health evidence, he rejected the conclusions of the psychiatrists and psychologist because they relied on information provided by Mr. Weaver, which the judge disbelieved. (12 RT 1352.) The court, however, did not limit itself to a determination that the evidence was entitled to little or no mitigating weight. (See *People v. Robertson*, *supra*, 48 Cal.3d at p. 55.) Rather, the judge gave the evidence aggravating weight.

Judge Lester announced that he regarded statements made by Mr. Weaver to the mental health professionals as attempts by Mr. Weaver to "minimize" his role in the crime. (See, e.g., 12 RT 1352-1354.) For example, both Drs. Rabiner and Koshkarian reported that Mr. Weaver described the shooting as an accident and said that the "gun went off." (40 CT 7809, 7814.) The trial judge recast Mr. Weaver's accounts and the mental health professionals' assessments as evidence that Mr. Weaver was, in the prosecutor's words, "a bad person" with "a malignant heart." (11 RT 1253.) The court said: "[T]here is no greater minimization of the shooting than the defendant saying, 'the gun went off.' The defendant fabricates his

need to turn to see a new entrant into the store as a reason for the gun, quote, unquote, 'going off.'" (12 RT 1355.)

Dr. Rabiner's report concluded that Mr. Weaver has "limited intelligence," a "limited capacity for abstract thinking and is unlikely to be able to plan ahead in an intelligent fashion." (40 CT 7808.) As a result of this limited intelligence, he "is more likely to seek immediate gratification then [*sic*] postpone small gratifications for larger ones at a later date." (Ibid.) Dr. Rabiner also testified that "one of the characteristics of maturation is ability to delay gratification; to accept the inconvenience of the [moment] for the greater good later on; [Mr. Weaver] did not live his life that way." (9 RT 1132.)

Whereas the mental health professionals explained Mr. Weaver's conduct as a product of his limited intelligence and limited capacity for abstract thinking, Judge Lester reframed the testimony as bad character evidence, explicitly using it to aggravate Mr. Weaver's role in the crime:

> One personal trait that has come clear through the evidence is that the defendant is a person of immediate gratification. He does not wait if something can be achieved sooner. The defendant acted alone, used the cloth bag, took the loaded pistol, gave loud, clear orders to store employees, took an innocent hostage, and shot and killed an innocent, cooperative person.

(12 RT 1354.)

Defense counsel also presented evidence that Mr. Weaver struggled in school (see, e.g., 8 RT 970), and that he was unable to maintain steady

employment. (See, e.g., 8 RT 908.) Dr. Rabiner explained that these experiences, along with other aspects of Mr. Weaver's psychological composition, reflected Mr. Weaver's "low frustration tolerance." (9 RT 1132.) Defense counsel argued that these problems were illustrative of Mr. Weaver's "intellectual and psychological deficiencies." (8 RT 861.) However, the trial judge stated that "the defendant's financial needs referred by Dr. MacLaren was [*sic*] mostly caused by the defendant's own misdeeds . . . ." (12 RT 1358.) He concluded that Mr. Weaver's employment record "was plagued by his own *voluntary* absences from these jobs, which, as the defendant told one of the [doctors], that he missed work when he wanted to." (12 RT 1352, italics added.)

When reviewing the evidence of Mr. Weaver's educational background under factor (k), the trial court observed that "[t]he defendant was slow in school." (12 RT 1350.) It did not assign this factor (k) evidence any mitigating weight. On the contrary, and in opposition to the testimony of the mitigation witnesses, Judge Lester concluded that Mr. Weaver's problems with school were his own fault, and were caused by his laziness. (Ibid.) In his next and final sentence regarding Mr. Weaver's educational difficulties, the judge stated, "[H]e had a school history plagued by *voluntary* truancy." (Ibid., italics added).

The words that the trial court chose to describe the mental health professionals' explanations of Mr. Weaver's struggles in school and his

inability to hold a steady job demonstrate that the court did not simply reject this factor (k) evidence or accord it little mitigating weight. Instead, Judge Lester relied upon the evidence as further proof of Mr. Weaver's bad character and used it as a factor in aggravation. The death verdict violated the rule that evidence offered under factors (d) and (k) cannot be used "affirmatively as a circumstance in aggravation." (*People v. Edelbacher, supra,* 47 Cal. 3d at p. 1033; see also *People v. Montiel, supra,* 5 Cal.4th at p. 944.) For the reasons set forth in Argument VI.A, *supra*, the trial court's conduct also deprived Mr. Weaver of his federal constitutional rights by causing the "skewing" that occurs when the sentencer considers "*as aggravation* properly admitted evidence that should not have weighed in favor of the death penalty." (*Brown v. Sanders, supra*, 126 S.Ct. at p. 892, italics in original, citing *Stringer v. Black* (1992) 503 U.S. 222, 232.)

C. The Trial Court Violated State Law And Mr. Weaver's Constitutional Rights By Giving Aggravating Weight To Evidence Offered Under Factor (g) That Mr. Weaver Acted Under Extreme Duress Or Substantial Domination Of Another Person

Defense counsel presented evidence under factor (g) showing that Byron Summersville planned the robbery, and, taking advantage of Mr. Weaver's intellectual and emotional deficits, coupled with the consumption of alcohol, manipulated him to carry it out. Regarding Mr. Summersville's violent history, the prosecution and defense stipulated that (1) "Byron Summersville is a violent and vicious person;" (2) Alberto Fox would

testify that Summersville stabbed him in the chest and arm without provocation; (3) Tracy Witt would testify that Mr. Summersville raped her; and (4) Detective John Cherry of the San Diego County Sheriff's Department would testify that Mr. Summersville has a "reputation for viciousness." (8 RT 859.)[17]

Concerning Mr. Summersville's involvement in the robbery, Drs. Rabiner and Koshkarian stated in their reports that Mr. Weaver told them he had been drinking with Mr. Summersville on the day of the robbery; that Mr. Summersville came up with the idea to rob the store; and that Mr. Summersville was involved in planning the robbery. (40 CT 7809, 7814.) Both psychiatrists also reported statements by Mr. Weaver that he felt pressured to commit the robbery. (*Ibid.*) This evidence, along with the opinions of the three mental health professionals that Mr. Weaver is dependent, has low intellectual functioning (and a verbal I.Q. of 76), and is a follower who is easily influenced by others was presented under factor (g) to extenuate Mr. Weaver's culpability for the crime. (See 40 CT 7801-7802, 7810-7811, 7815-7816; 9 RT 1127, 1141.)

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[17] Tellingly, Mr. Summersville was convicted of second degree murder in case number CRN25195 and is presently serving a sentence of sixteen years to life in state prison. (*People v. Summersville* (Super. Ct. San Diego County, 1993, No. CRN25195) (pronouncement of the judgment issued Dec. 7, 1993).)

Defense counsel argued that Mr. Weaver was especially susceptible to the influence of others when he moved to Vista just prior to the crime because, suddenly, his need to be provided with direction by others was not being met. (11 RT 1312-1313.) He explained that Mr. Weaver's psychological make-up was such that he looked to Mr. Summersville for direction in Vista as he had done with his family and church in Los Angeles. (Ibid.) Defense counsel urged the trial court:

> This was the young man that was so ill prepared to make that trip to Vista in April of 1992; a young man who came and there was no church, there were no parishioners giving him that love, that affection, that positive feedback. There was his girlfriend who I'm sure did that, there was his daughter, and there was this fellow who floated around by the name of Byron Summersville.

(Ibid.)

Though Judge Lester did not find "extreme duress or substantial domination" under factor (g), he announced that he would consider evidence of Mr. Summersville's involvement in the crime in terms of "co-planning" and "joint criminality" under factor (k) (12 RT 1342), and later noted that the evidence was "worthy of consideration" under factor (k). (12 RT 1349.)

These statements notwithstanding, the trial court gave aggravating weight to the evidence offered by the defense to extenuate Mr. Weaver's culpability for the crime. Judge Lester repeatedly described the introduction of this evidence as an attempt by Mr. Weaver to "minimize"

his role in the crime. He stated that Mr. Weaver "over-emphasized the influence and impact of Byron Summersville on his own individual behavior." (12 RT 1352.) The trial court characterized Mr. Weaver as "anxious to shift responsibility on [*sic*] the robbery more toward Byron Summersville . . . ." (12 RT 1353-1354.) It found that "[Mr. Weaver] was not some overly compliant helpless soul or robot under Byron Summersville." (12 RT 1356.) Judge Lester reached this conclusion despite the fact that the defense's mental health professionals were unrebutted by the prosecution.

The trial court's reliance on evidence of Mr. Summersville's involvement in the crime as a circumstance in aggravation violated the clearly established rule that evidence offered under factors (g) and (k) cannot be used "affirmatively as a circumstance in aggravation." (*People v. Edelbacher, supra,* 47 Cal. 3d at p. 1033; see also *People v. Montiel*, *supra,* 5 Cal.4th at p. 944.) For the reasons set forth in Argument VI.A, *supra*, the trial court's verdict also deprived Mr. Weaver of his federal constitutional rights.

D. The Improper Consideration Of Mitigating Evidence As Aggravating Evidence Requires Reversal Of Mr. Weaver's Death Sentence

As discussed above, the trial court repeatedly gave aggravating weight to evidence that under federal and state constitutional law was admissible only in mitigation of the death sentence. Because constitutional

error occurred, pursuant to *Chapman v. California, supra*, 386 U.S. at p. 23, the prosecution must prove that these errors, considered individually and cumulatively, were not harmless beyond a reasonable doubt. (See *Taylor v. Kentucky*, *supra*, 436 U.S. at 487 & fn. 15.) It cannot do so here.

The trial judge announced that he viewed this as an exceedingly close case with regard to whether death was the appropriate penalty. He stated that he had "spent several days deliberating on this penalty" (12 RT 1361), and after weighing the evidence once, he "took another day, and reanalyzed the entire balance." (12 RT 1370.) In other words, as the judge weighed the evidence in mitigation and in aggravation, the scale tipped slightly toward death *only* by virtue of the victim impact evidence. Accordingly, it cannot be said that the judge's erroneous consideration of Mr. Weaver's family background, his intellectual and psychological deficits, and the role of Mr. Summersville in the offense as aggravating factors were harmless beyond a reasonable doubt.

Even applying the standard of prejudice for penalty phase errors announced in *People v. Brown* (1988) 46 Cal.3d 432, 448, there is a reasonable possibility that the trial court would not have sentenced Mr. Weaver to death if it had not given each of these mitigating factors aggravating weight. (*Ibid.* [noting that the heightened standard of review for penalty phase error is necessary because in capital cases the Eighth Amendment demands "'reliability in the determination that death is the

appropriate punishment in a specific case,'" quoting *Woodson v. North Carolina, supra,* 428 U.S. at p. 305]; see also *Zant v. Stephens, supra,* 462 U.S. at pp. 884-885.) Applying the *Brown* test, if the judge had properly considered evidence of Mr. Weaver's family background, his intellectual and psychological deficits or Mr. Summersville's role in the robbery in mitigation - moving any item of evidence from the aggravation side of the scale to the mitigation side - it is reasonably possible that this fine balance would have tipped toward life rather than death. Even if any of these factors were merely removed from the aggravation side of the scale, it is reasonably possible that the outcome would have been different. Accordingly, Mr. Weaver's death sentence must be reversed.

VII. THE TRIAL COURT IMPROPERLY ADMITTED, AND THEN CONSIDERED, INADMISSIBLE TESTIMONY THAT MR. WEAVER ALLEGEDLY DISPLAYED "HATRED" TOWARD THE VICTIM

A. Ms. Deighton's Speculation And The Death Verdict

Mary Deighton, an employee of the jewelry store who was present during the robbery and shooting, testified at both the guilt and penalty phases of the trial. (1 RT 18-103; 7 RT 838-850.) During her penalty phase testimony, the prosecutor asked Ms. Deighton whether the man with the gun displayed "any sort of different attitude" towards Mr. Broome as compared to the other people in the store. (7 RT 839-840.) Defense counsel objected on the grounds that the question called for speculation and a conclusion on the part of the witness. (7 RT 840.) The court sustained the objection, but said it would permit the question if the prosecutor could lay the foundation that Ms. Deighton "was able to notice a difference." (Ibid.) The prosecutor continued:

[Prosecutor]:	Did you notice a difference in attitude displayed toward Michael Broome as opposed to the three females in the store before Michael was shot and killed?
[Ms. Deighton]:	Yes, I did.
[Prosecutor]:	What was that different attitude that you noted that was displayed toward Michael?
[Ms. Deighton]:	He was more hostile towards Mike.
[Prosecutor]:	In what sense?

[Ms. Deighton]: He left the rest of us pretty much alone, but he was really angry -- his whole attitude towards Mike was just really kind of cocky and angry towards him. It was just so much hatred.

[Prosecutor]: He displayed hatred?

[Ms. Deighton]: Yes. With the rest of us, he didn't act that way; he wasn't concerned with us the way he was with Mike.

(7 RT 840-841.)

Judge Lester credited and relied upon Ms. Deighton's testimony that Mr. Weaver displayed "hatred" for Mr. Broome as evidence in aggravation. In reaching his penalty verdict, Judge Lester found:

> While the victim lay begging for help, according to Ms. Deighton, the defendant continued the robbery . . . as if nothing happened. During the time the defendant was dealing directly with Michael Broome, he showed hatred. He showed anger toward Michael Broome.

(12 RT 1359-1360.)

The trial court's improper admission, over defense objection, of this evidence, and the court's subsequent finding of fact that Mr. Weaver "hated" Mr. Broome, violated Mr. Weaver's rights to confrontation, due process, equal protection, and a reliable sentencing determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and article I of the California Constitution.

B. The Trial Court Erred In Admitting Ms. Deighton's Speculation About Mr. Weaver's "Hatred" Toward The Victim And Relying On Her Opinion As A Factor In Aggravation

Evidence Code section 800 permits lay opinion testimony only when it is "rationally based on the perception of the witness" and "helpful to a clear understanding of his testimony." (Evid. Code, § 800.) In *U. S. ex rel. Williams v. Twomey* (7th Cir. 1975) 510 F.2d 634, 640-641, the Seventh Circuit warned that it is "dangerous" to infer a person's mental state from his demeanor or facial expressions. (*Ibid.* ["[A] cautious judge may . . . recall that the first Queen Elizabeth declared that we have no window into other men's souls"].) Ms. Deighton's opinion that Mr. Weaver acted out of "hatred" in those few moments was pure speculation. It was inadmissible and highly prejudicial. "[S]peculation is not evidence, less still substantial evidence." (*People v. Waidla* (2000) 22 Cal.4th 690, 735, quoting *People v. Berryman*, *supra*, 6 Cal.4th at 1081.)

Nothing in Ms. Deighton's testimony demonstrated a proper foundation for her opinion testimony. The man who entered the store on May 6, 1993, was a stranger to Ms. Deighton. (1 RT 91.) It was a mere 57 seconds from the moment the man walked into the store until he ran out. (1 RT 60-61, 68; see fn. 3, *supra*.) Ms. Deighton acknowledged that the entire incident was "brief." (1 RT 91.) In addition to the speed with which the offense occurred and the fact that Ms. Deighton had never seen the man

before, other facts and the balance of Ms. Deighton's testimony at both phases of the trial demonstrate that, whatever she may have believed, there was no foundation for an opinion that Mr. Weaver "hated" Mr. Broome.

Ms. Deighton testified that during the "first five seconds," she did not know what was happening. (1 RT 91.) She initially reported that the man held the gun in his right hand, but she "changed it [to left hand] in a later statement." (1 RT 72-73.) On direct examination during the guilt phase, Ms. Deighton first testified that the man was not wearing anything on his face. (1 RT 54.) When shown a pair of sunglasses that had been seized from the blue Oldsmobile, Ms. Deighton said that she did not remember whether the man was wearing sunglasses. (Ibid.; People's Exhibit 22.) The prosecutor asked Ms. Deighton several more questions and the court recessed for 10 minutes. (1 RT 54-56.)

Immediately after she resumed the witness stand, the prosecutor returned to the subject of the sunglasses by asking Ms. Deighton a leading question:

> [Prosecutor]: When I asked about anything on the defendant's face. What did you think I meant by that when I said that?
>
> [Ms. Deighton]: A mask.

(1 RT 57.) Ms. Deighton then testified that the man was wearing sunglasses, but that she had forgotten this fact until "this summer," an

explanation she reiterated on cross-examination. (1 RT 57, 90.)[18] Finally, for some portion of the seconds before Mr. Broome was shot, Ms. Deighton's eyes were not focused on Mr. Weaver. (See, e.g., 1 RT 30-34, 73 [observations of Michael Broome and Lisa Stamm].)

Moreover, Ms. Deighton's testimony about Mr. Weaver's "attitude" and mental state was contradicted by that of another employee, Lisa Stamm. Ms. Stamm testified that it was her impression that the man came into the store without any intent to kill:

[Defense counsel]:	You don't think he went in there to shoot anybody, do you?
[Ms. Stamm]:	I think he went in there to rob us.
[Defense counsel]:	And it was your impression at the time that you didn't think he went in there to shoot anybody, correct?
[Ms. Stamm]:	Correct.

[18] Of note, during the penalty phase, the prosecutor asked Ms. Stamm if, "today," she remembered whether Ms. Weaver "had anything on his face" when he entered the store. (4 RT 589.) She responded that he was wearing "dark sunglasses," and that she "could never see his eyes." (Ibid.) Ms. Stamm explained that it was only as a result of therapy, and "all [her] dreams and nightmares" that she was able to picture what was "missing, [] it was the sunglasses that were covering his eyes." (4 RT 589, 601.) Ms. Stamm then identified a pair of sunglasses as similar to the ones Mr. Weaver had been wearing. (4 RT 589-590; People's Exhibit 22.) (People's Exhibit 22 was mistakenly identified in the Reporter's Transcript as People's Exhibit 72. (4 RT 589.))

(4 RT 614.) Ms. Stamm described the man as very nervous. (4 RT 613.) Lisa Maples also testified that the man holding her was nervous and she could feel him shaking. (7 RT 836-837.)

The trial court erred in allowing the opinion testimony, compounded the error by finding *as a matter of fact* that Mr. Weaver was motivated by hatred, and then completed the prejudice to Mr. Weaver by considering his alleged hatred as a factor in aggravation. Here, Ms. Deighton offered no testimony that, prior to the shooting, Mr. Weaver made statements to or about Mr. Broome that conveyed hatred toward him. Nor did she describe any conduct by Mr. Weaver during the seconds before the shooting that demonstrated hatred. She offered only her speculation. (7 RT 840-841.) The admission of her testimony, and, particularly, the trial court's adoption and consideration of it in aggravation was error.

C. The Trial Court's Erroneous Consideration Of Mr. Weaver's Alleged "Hatred" Of The Victim Requires Reversal Of His Death Sentence

Ms. Deighton's improper opinion was not merely harmless speculation. "Hate" is defined as "intense hostility and aversion usually deriving from fear, anger, or sense of injury." (Merriam-Webster Online <http://m-w.com/dictionary/hate> [as of Jan. 11, 2007].) While hate may be "derived" from emotions such as anger or fear, it is a distinct state of mind. Hatred has a particularly loaded and prejudicial meaning in the criminal law context, where "hate crimes" are punished with greater

severity than other crimes due to the particularly offensive nature of a violent act driven by antipathy and prejudice. (See, e.g., Kim, *Hate Crime Law and the Limits of Inculpation* (2006) 84 Neb. L. Rev. 846, 848 [describing increased punishment for hate crimes as, in part, a recognition that "a hate crime harms not only its immediate victim (as all crimes do), but also causes greater injury to the victim's community and society at large"].)

Mr. Weaver was sentenced to death based on a sentencing factor that was patently unsupported by the evidence. In *Johnson v. Mississippi* (1988) 486 U.S. 578, 590, the Supreme Court held that the Eighth Amendment is violated when "the [sentencer] was allowed to consider evidence that has been revealed to be materially inaccurate." The "hatred" evidence here, like the invalid prior conviction in *Johnson*, "provided no legitimate support for the death sentence imposed on" Mr. Weaver by the trial court. (*Id.* at p. 586.)

The Eighth Amendment's requirement of reliability in the determination that death is the appropriate punishment in a specific case cannot be met where, as here, the sentencer's consideration was not limited to matters properly introduced in evidence before it. (See *California v. Brown* (1987) 479 U.S. 538, 543, citing *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) The Supreme Court has observed that, without this limitation, there is no assurance that the sentencer did not rely on

extraneous emotional factors, which are "far more likely to turn the [sentencer] against a capital defendant than for him." (*Ibid.*) Indeed, Judge Lester's verdict left no doubt that he gave aggravating weight to Ms. Deighton's highly charged and wholly impermissible opinion. (RT 1360.) The trial court's failure to limit its deliberations to admissible evidence also hampers meaningful judicial review, another safeguard that improves the reliability of the sentencing process. (See *California v. Brown, supra*, 479 U.S. at p. 543, citing *Roberts v. Louisiana*, *supra*, 428 U.S. at p. 335 & fn. 11.)

The trial court also violated Mr. Weaver's federal right to due process. As discussed in Argument VI.A, *supra*, the failure to impose the death penalty in accordance with the state's own capital sentencing scheme violates a defendant's rights under the Fourteenth Amendment's Due Process Clause. (See *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Murtishaw v. Woodford, supra,* 255 F.3d at pp. 969-970; *Fetterly v. Paskett, supra,* 997 F.2d at p. 1300.)

Reversal of Mr. Weaver's death sentence is required because this was error of constitutional dimension and cannot be considered harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) This is a case in which the defendant had no prior crimes of violence and had no prior felony convictions. The crime, while undeniably tragic and devastating, was a single gunshot felony murder committed during the

course of a robbery and burglary. As explained in Argument VI.D, *supra*, the judge acknowledged in announcing his penalty verdict that the scale tipped slightly toward death only by virtue of the victim impact evidence. (12 RT 1371-1374.) If the judge had properly declined to consider Ms. Deighton's opinion — merely removing this evidence from the aggravation side of the scale – the State cannot establish beyond a reasonable doubt that this fine balance would not have tipped toward life rather than death. Mr. Weaver's death sentence must be reversed.

VIII. THE CUMULATIVE EFFECT OF ERRORS IN THE PENALTY PHASE REQUIRES REVERSAL OF MR. WEAVER'S DEATH SENTENCE

The cumulative effect of the numerous errors that occurred during the penalty phase prejudiced Mr. Weaver and rendered his death sentence unconstitutional. (See Arguments V, VI and VII.) Although this Court may find that no single error may warrant reversal of his sentence, the cumulative effect of the errors deprived here Mr. Weaver of his rights to due process, to a fair trial, to present a defense, and to a reliable sentencing determination, in violation of the United States and California Constitutions.

The prejudicial impact of multiple errors may result in an unfair and unconstitutional trial. (*Taylor v. Kentucky*, *supra*, 436 U.S. at 487 & n. 15.) "'[E]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.'" (*Alcala v. Woodford*, *supra*, 334 F.3d at 883; *Killian v. Poole*, *supra*, 282 F.3d at 1211.) This Court must consider the prejudicial impact of the errors together, rather than individually. Viewed together, the errors in this case undermine all confidence in the death sentence.

IX. MR. WEAVER WAS DENIED A PROPER HEARING ON HIS MOTION FOR MODIFICATION OF THE DEATH VERDICT

A. Mr. Weaver Is One Of A Handful Of Death-Sentenced Defendants Denied An Independent Review Of His Death Verdict

The vast majority of death-sentenced defendants in California receive an independent review of their death verdicts. Mr. Weaver did not receive one.

California Penal Code sections 190.4, subdivision (e) and 1181, subdivision (7) provide for an automatic motion for modification of the verdict for all defendants sentenced to death in California. When a verdict of death has been rendered, California law requires that the trial court conduct an independent review of the verdict to determine whether it was contrary to the law or the evidence, and requires the court to state on the record the reason for its ruling. (See Pen. Code, § 190.4, subd. (e).) The trial court must exercise its independent judgment in reexamining the aggravating and mitigating evidence and, if it determines that the verdict was contrary to the law or the evidence, it must modify the verdict. (*Ibid.*) The trial judge's responsibility in weighing the evidence includes a requirement that he or she "assess the credibility of the witnesses, [and] determine the probative force of the testimony." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 793.)

This Court has recognized and reaffirmed the independent review requirement of section 190.4, subdivision (e). (See, e.g., *People v. Rodriguez, supra,* 42 Cal.3d at pp. 793-794 ["By providing for automatic review of a death verdict under section 1181, subdivision 7, section 190.4, subdivision (e), [the Legislature] must have intended that the trial judge exercise the responsibilities for independent review imposed by subdivision 7"]; *People v. Allison* (1989) 48 Cal.3d 879, 914 ["In accordance with the plain meaning of the 1977 language, the court was required in ruling on the automatic motion to make an 'independent determination' of the 'weight of the evidence,'" quoting *People v. Frierson* (1979) 25 Cal.3d 142, 193, fn. 7 (conc. opn. of Mosk, J.)].)

With respect to judge-sentenced capital defendants like Mr. Weaver, however, California's death penalty statute is unconstitutional in that it fails to provide a mechanism for an independent review of a trial court's penalty phase verdict. Obviously, a trial court cannot "independently" review its own verdict. Black's Law Dictionary (8th ed. 2004) at p. 785 defines "independent" as "1) not subject to the control or influence of another; 2) not associated with another (often larger) entity; 3) not dependent or contingent on something else." California courts have held that an "independent" judicial determination implies a separateness and autonomy from an earlier decision. (See, e.g., *Green v. Board of Dental Examiners* (1996) 47 Cal.App.4th 786, 796 [concluding that under the "independent

judgment rule," a trial court must weigh the evidence and make its own determination as to whether administrative findings should be sustained].) Accordingly, for a trial court to conduct an "independent" review of its own verdict, the court would have to disengage intellectually from its own rulings.

Absent a feat of mental gymnastics that defies human nature and common sense, a trial judge cannot conduct an independent review of the death verdict that he or she delivered. Yet California's death penalty statute affords no mechanism for allowing independent review in a case in which a jury trial has been waived, such as, for example, providing for another trial judge to review the sentencing judge's verdict. (Cf. *People v. Bergener* (2003) 29 Cal.4th 833, 892, fn. 9 [concluding that where the original judge is not available, another judge of same court may preside over rehearing of a motion to modify the verdict under section 190.4(e)].) Absent a reading of the statute that allows for this review by an independent judge, the statute deprives judge-sentenced defendants of a critical constitutional safeguard.

Here, defense counsel raised this issue in their motion for modification, and argued that Mr. Weaver was entitled to an independent review of the verdict. (CT 798.) Judge Lester acknowledged several times that he could not independently review his own verdict. For example, Judge Lester stated that "it is impossible for the court to conduct an

independent review of the evidence which is done in a jury trial." (RT 1338; see also RT 1373.) Nonetheless, the court announced that it would attempt to conduct "something akin to [a 190.4, subdivision (e) hearing] or a de facto version" for Mr. Weaver. (RT 1378-1379.) When the time came to entertain the motion for modification of the verdict, the trial judge stated that he would "hold a hearing under 190.4 as best as any individual human being can ever be expected to do when the very same person is asked to independently weigh and consider such factors." (RT 1402.) The hearing that Judge Lester conducted, however, was simply a reaffirmation of his own penalty phase verdict. (RT 1435-1453.)

At no time did Mr. Weaver receive the independent review of the penalty phase evidence to which he was constitutionally entitled. This deprivation amounted to a denial of due process, equal protection, and a reliable sentencing determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and article I of the California Constitution. Accordingly, this Court must either read into the California statute a mechanism for independent review of a trial court's penalty verdict and remand this case so that the review can take place, or the Court must declare the California statute unconstitutional as applied to cases in which a jury trial has been waived. By either avenue, this Court should vacate Mr. Weaver's death sentence.

B. All Defendants Sentenced To Death In California, Whether By Judge Or By Jury, Are Entitled To A Trial-Level, Independent Review Of The Sentencing Verdict

Precedent from the Supreme Court and this Court establish that the independent review provided for by section 190.4, subdivision (e) is a constitutionally mandated aspect of the California death penalty scheme. The California Legislature intended the trial-level independent review process to apply to all defendants, whether they are tried by judge or jury. Although the Legislature failed to provide a precise mechanism for the independent review of a trial judge's death verdict, the universal right to an independent review of the verdict at the trial level is both constitutionally mandated and embedded in the California statute.

1. Independent review of the sentencing verdict at the trial court level provides a critical safety valve necessary to ensure the reliability and fairness required by the United States and California Constitutions in all death penalty cases

The trial court's independent review of the death verdict is a central and constitutionally required element of California's death penalty scheme. In upholding California's death penalty statute, the Supreme Court recognized that this stage of review serves as a critical check on the danger of unconstitutionally arbitrary death sentences. (See *Pulley v. Harris*, *supra,* 465 U.S. at pp. 51-53.) Similarly, this Court cited the independent review of each death judgment by the trial judge as a key element of

California's death penalty statute, one that ensures both adequate safeguards against arbitrary death judgments and the "guided" sentencing discretion required by the Eighth Amendment. (*People v. Rodriguez, supra,* 42 Cal.3d at pp. 777-778.)

Both "this court and the United States Supreme Court have cited the provisions of section 190.4, subdivision (e), as a[] . . . safeguard against arbitrary and capricious imposition of the death penalty in California." (*People v. Lewis* (2004) 33 Cal.4th 214, 226, citing *People v. Frierson, supra,* 25 Cal.3d at p. 179; *Pulley v. Harris, supra,* 465 U.S. at pp. 51-53.) This Court declared that section 190.4(e) "is a unique and integral part" of the California death penalty scheme. (*People v. Lewis*, *supra,* 33 Cal.4th at p. 231.) And, it has stated that the automatic motion for modification of the verdict is an important "'safeguard[] for assuring careful appellate review.'" (*People v. Diaz*, *supra*, 3 Cal.4th at p. 571, quoting *People v. Frierson*, *supra,* 25 Cal.3d at p. 179.)

Indeed, this Court has acknowledged that independent review of each death verdict at the trial level is integral to the constitutionality of the state's capital punishment scheme. For example, in *People v. Rodriguez*, the trial court declined to perform an independent review of the jury's verdict because the word "independent" had been removed from the statute as a result of the 1978 Briggs Initiative. (42 Cal.3d at pp. 792-794.) The Court vacated the death judgment, holding that "if subdivision (e) were

construed as precluding independent review of the death verdict by the trial judge, questions of federal constitutionality might arise." (*Id.* at p. 794.) The Court cited its earlier decision in *Frierson*, which held that the independent review requirement of section 190.4, subdivision (e) was an "adequate alternative safeguard[]" that allowed the statute to pass constitutional muster despite the lack of proportionality review. (*Ibid.*, citing *People v. Frierson*, *supra,* 25 Cal.3d at p. 179.)

Because Mr. Weaver was denied the important safeguard of an independent review of his verdict at the trial level, he was deprived of a protection that both this Court and the Supreme Court have recognized is a key element of a constitutional, non-arbitrary capital sentencing scheme.

2. The legislature intended to provide independent review at the trial level for judge-sentenced defendants

Although the language of 190.4, subdivision (e) is ambiguous, the legislative history of California's current death penalty scheme suggests that the objective of the provision was to provide a constitutionally required safety valve at the trial level to ensure the reliability and fairness of all death verdicts.[19] To that end, the trial court is charged with the important

[19] See generally, "Amendment Analysis of Senate Bill 155: Introduced Version through Eighth Version," which is the legislative history of Senate Bill 155 as compiled by the California Appellate Project (hereafter CAP). In a separate pleading, Mr. Weaver respectfully requests that the Court take judicial notice of the legislative history cited herein. Counsel has attached

tasks of independently weighing the evidence and providing a record for adequate appellate review.

The legislative history of Senate Bill No. 155, which became the 1978 death penalty statute and includes Penal Code section 190.4, reveals that among the lawmakers' primary concerns was the inclusion of a sufficient substitute for proportionality review, which would guard against arbitrariness and pass constitutional muster. The Senate Committee on the Judiciary recognized that proportionality review is an "important guarantee of fairness," and questioned the constitutionality of a statute that did not provide for such review. (Sen. Com. on Judiciary, Death Penalty, Sen. Bill No. 155 (1977-1978 Reg. Sess.) (as amended February 17, 1977), pp. 7-8 [SB 155 Leg. Hist., at pp. 253-254].) Notably, the absence of state-wide proportionality review was the subject of debate in the Assembly just before the independent review requirement was added.[20] (Assem. Com. on Criminal Justice, Analysis of Sen. Bill No. 155 (1977-1978 Reg. Sess.) (as amended March 26, 1977), p. 7 [SB 155 Leg. Hist., at p. 272].)

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to that pleading a copy of the legislative history, which was downloaded from CAP's password-protected website. Citations are, when possible, to both the pagination of the individual documents contained in the legislative history compiled by CAP, and to the pagination of the compilation itself, hereafter referred to as "SB 155 Leg. Hist."

[20] Subsection (e) first appears in Senate Bill No. 155, Fifth Amended Version, April 13, 1977; it was introduced in its entirety in Senate Bill No. 155, Sixth Amended Version, April 28, 1977. (See SB 155 Leg. Hist., at pp. 84-119.)

Despite broad agreement about the need to incorporate this type of constitutional safeguard, some legislators opposed proportionality review at the appellate level based on a perceived danger of judicial activism in the California Supreme Court. (Sen. Com. on Judiciary, Death Penalty, Sen. Bill No. 155 (1977-1978 Reg. Sess.) (as amended February 17, 1977), pp. 6-8 [SB 155 Leg. Hist., at pp. 227-229].) The Legislature ultimately entrusted this additional level of review to the trial courts, a move that indicates that the protections afforded by section 190.4, subdivision (e) were created as a substitute for appellate-level proportionality review.

This Court has recognized that the language of section 190.4, subdivision (e) is ambiguous and internally inconsistent with respect to whether the provision applies to judge-sentenced capital defendants as well as jury-sentenced defendants. (*People v. Diaz*, *supra,* 3 Cal.4th at p. 575, fn. 34.) Penal Code section 190.4, subdivision (e) reads, in pertinent part:

> In every case in which the *trier of fact* has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11[81]. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the *jury's* findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law of the evidence presented.

(Italics added). The first sentence of the subsection confers the right inclusively, on "every case in which a trier of fact has returned a death

verdict," but the subsequent sentence refers to the trial judge's duty to review the "jury's findings." (Pen. Code §, 190.4, subd. (e).)

This Court has declined on several occasions to resolve this ambiguity and has never decided whether judge-sentenced defendants are excluded from the subsection's coverage. Thus, this Court has never had to reach the question of whether a denial of a motion for modification amounted to a constitutional violation. (See, e.g., *People v. Diaz, supra,* 3 Cal.4th at pp. 575-576 [acknowledging the ambiguity of the statutory language, assuming judge-sentenced defendants are entitled to a modification hearing under 190.4, subdivision (e), but declining to reach the constitutional question]; *People v. Horning* (2004) 34 Cal.4th 871, 912 [stating that Court had never determined whether judge-sentenced defendant is entitled to a motion for modification under the statute].)[21]

Despite the statutory ambiguity, Mr. Weaver contends that the Legislature intended that section 190.4, subdivision (e) would require an

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[21] The Court in *Horning* suggested in dicta that the primary purpose of a section 190.4, subdivision (e) hearing is to ensure that a statement of the evidence supporting the death verdict is in the record. (*People v. Horning, supra*, 34 Cal.4th at p. 912.) However, as the opinions of this Court and the United States Supreme Court discussed above indicate, the constitutional imperative in the section 190.4, subdivision (e) process lies in the independent review of the sentencer's verdict. Also, as discussed above, the intent of the legislature was to provide for independent review, not merely to ensure that a statement justifying the verdict was in the record. To the extent that *Horning* suggests otherwise, Mr. Weaver asks this Court to reject the dicta in that case.

independent review of a judge-imposed death verdict. There are several means by which the legislative intent can be ascertained. (See, e.g., *Comr. of Internal Revenue v. Engle* (1984) 464 U.S. 206, 214-223 & fns. 15, 16 [discerning legislative intent via the language of the statute, the policy purpose of the statute, remarks in the House and Senate debates, and floor amendments made to the statute].) First, the statute does not create an explicit exception for judge-sentenced defendants. Second, there is nothing in the legislative history of section 190.4 indicating an intent to exclude judge-sentenced defendants from the protections afforded by independent review at the trial level. (See generally SB 155 Leg. Hist., pp. 1-275.) Third, section 190.4(e) is itself rooted in another California statute, section 1181(7), which provides for independent review for *all* defendants.

With respect to this last point, this Court has, on many occasions, referred to the 190.4, subdivision (e) hearing as "automatic" for defendants sentenced to death. It has never qualified that right. (See, e.g., *People v. Frierson*, *supra,* 25 Cal.3d at p. 179 [referring to defendant's "automatic" motion for modification of the verdict provided by section 190.4, subdivision (e)]; *People v. Rodriguez*, *supra,* 42 Cal.3d at p. 792 [same], *People v. Diaz*, *supra,* 3 Cal.4th at p. 571 [same].) Penal Code section 190.4(e) states, in pertinent part:

> [T]he defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision (7) of Section 11[81] . . . The denial of the

> modification of the death penalty verdict pursuant to Subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal . . . .

A defendant's entitlement to this hearing flows from the unambiguously inclusive section 1181, subdivision (7) which reads, in pertinent part:

> [I]n *any case* wherein authority is vested by statute in the *trial court or jury* to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding . . . .

(Italics added). Section 1181, subdivision (7) thus makes no exception for judge-sentenced defendants. The statute's explicit language ("any case" where verdict is imposed by the "trial court or jury") is consistent only with the legislative intention that the elements of the modification hearing it later elaborated in section 190.4, subdivision (e) should apply to all defendants.

Although the language of section 1181 is precatory, this Court has interpreted section 1181, subdivision (7) as imposing on the trial judge in a capital case "the duty to review the evidence," exercising his "independent judgment." (*In re Anderson* (1968) 69 Cal.2d 613, 623.) In *People v. Rodriguez, supra,* this Court concluded that "[b]y providing for automatic review of a death verdict under section 1181, subdivision 7, section 190.4, subdivision (e), [the Legislature] must have intended that the trial judge exercise the responsibilities for independent review imposed by subdivision 7 . . . ." (*People v. Rodriquez, supra,* 42 Cal.3d at pp. 793-794.) In sum, the independent review requirement of 190.4, subdivision (e) has its

statutory foundation in section 1181, subdivision (7), which this Court has interpreted as imposing a duty on the trial court to conduct an independent review of the trial verdict. The inclusive language of section 1181, subdivision (7) reflects a legislative intent that judge-sentenced capital defendants such as Mr. Weaver are entitled to that review.

C. The Denial Of An Independent, Trial-Level Review Of Mr. Weaver's Death Verdict Deprived Him Of His Rights Under The United States And California Constitutions

As noted above, this Court has never decided whether section 190.4, subdivision (e) applies to judge-sentenced defendants, and has therefore not had occasion to discuss how an independent review of a judge-imposed death verdict would operate in practice. If the Court determines that section 190.4, subdivision (e) does apply to judge-sentenced defendants and means to provide for independent review of those verdicts at the trial court level, it should remand this case for such a review. However, if this Court determines that, contrary to the mandate of the United States and California constitutions and the apparent will of the Legislature, the California death penalty statute does *not* provide judge-sentenced defendants with a right to independent review of the penalty phase verdict, then the statute is constitutionally infirm in several ways.

1. Mr. Weaver was denied his constitutional rights to due process and a reliable sentencing proceeding

The sentencing phase of a capital trial must satisfy the requirements of the due process clause. (*Murtishaw v. Woodford*, *supra*, 255 F.3d at p. 969, citing *Gardner v. Florida* (1977) 430 U.S. 349, 358.) As discussed above, section 190.4, subdivision (e) adds a constitutionally required layer of review to California's statutory scheme, without which capital defendants in this state would be deprived of the right to be sentenced with adequate protections against the arbitrary imposition of the death penalty in violation of the Eighth and Fourteenth Amendments and article I of the California Constitution. (See *Pulley v. Harris*, *supra,* 465 U.S. at pp. 52-54; *People v. Rodriguez*, *supra,* 42 Cal.3d at pp. 793-794; *People v. Frierson*, *supra,* 25 Cal.3d at pp. 178-179.)

The Supreme Court has held that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604; see also *Woodson v. North Carolina*, *supra,* 428 U.S. at p. 305.) Depriving judge-sentenced capital defendants of the independent review mandated by section 190.4, subdivision (e) creates the very risk of arbitrariness and unreliability that the Supreme Court has deemed unacceptable in capital cases. Accordingly, the failure to provide Mr. Weaver with an independent review of the death verdict at the trial court level denied him the reliable

capital sentencing determination required by the Eighth and Fourteenth Amendments, as well as article I of the California Constitution.

2. Even if trial court review is not otherwise constitutionally required, the denial of that review to Mr. Weaver violated his federal due process rights because the state cannot create a right and then arbitrarily take it away

As discussed in Argument VI.A, the Supreme Court has held that a state creates a liberty interest when it provides a criminal defendant with a "substantial and legitimate expectation" of certain procedural protections, and "that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; see also *Fetterly v. Paskett*, *supra*, 997 F.2d at p. 1300, quoting *Hicks v. Oklahoma*, *supra,* 447 U.S. at p. 346.)

Mr. Weaver's due process rights were violated when the trial court denied him the independent review of the evidence supporting the trial judge's verdict required by section 190.4, subdivision (e). As noted above, both this Court and the Supreme Court have held that the independent review requirement is an important safeguard in California's death penalty sentencing procedures. Here, the State failed to follow its own statutory command that all capital defendants receive this review. Because Mr. Weaver was arbitrarily denied the right to this independent review, and because this denial "substantially affect[ed] the punishment imposed"

(*Hicks v. Oklahoma*, *supra,* 447 U.S. at p. 347), Mr. Weaver's due process rights were violated.

Particularly in light of the heightened scrutiny that the Supreme Court applies to capital sentencing schemes (see *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305), Section 190.4, subdivision (e) is unconstitutional if it does not apply to all capital defendants. By depriving Mr. Weaver and other judge-sentenced defendants in California an important state-created cause of action that substantially affects their life and liberty interests, the current death penalty scheme unconstitutionally denies them their rights guaranteed by the Fourteenth Amendment and article I of the California Constitution.

3. Depriving Mr. Weaver and other judge-sentenced defendants the independent review statutorily guaranteed to all capital defendants denies these defendants equal protection under the law

The Equal Protection Clause of the Fourteenth Amendment prohibits arbitrary and disparate treatment of citizens where fundamental rights are at stake. (*Bush v. Gore* (2000) 531 U.S. 98, 109.) The Supreme Court has recognized that when any statewide scheme affecting a fundamental right is in effect, there must be sufficient assurance "that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." (*Ibid.*) As there can be no right at stake more fundamental than life, where a state's death penalty scheme provides an automatic independent review at

the trial level to some capital defendants and not others, the Fourteenth Amendment right to equal protection under the law is violated with respect to those defendants not afforded this additional level of review.

Equal protection analysis begins with identifying the interest at stake. As this Court has noted, "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) Where the interest identified is "fundamental," courts have must "'give[] [the legislation] the most exacting scrutiny'" and apply a strict scrutiny standard. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 837, quoting *Clark v. Jeter* (1988) 486 U.S. 456, 461.) A state may not create a classification scheme that affects a fundamental right without showing that it has a compelling interest justifying the classification and that the distinctions drawn are necessary to further that purpose. (See *People v. Olivas*, *supra,* 17 Cal.3d at p. 251; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

Here, the prosecution cannot meet this burden. If this Court reads California's death penalty statute as creating separate classifications for judge-sentenced and jury-sentenced defendants, this disparate treatment is arbitrary. There is no compelling interest that would justify withholding from judge-sentenced defendants a procedural protection that this Court

and the Supreme Court have recognized as constitutionally vital, and which the Legislature intended for all capital defendants.

Both the California Legislature and this Court have had ample opportunity to justify a distinction between these two categories of defendants with respect to motions to modify the verdict, yet neither has done so. The legislative history of Senate Bill No. 155 contains no indication that the Legislature intended to single out judge-sentenced defendants or exempt them from the protections provided by an independent review of the penalty verdict. (See SB 155 Leg. Hist., at pp. 1-275.) Indeed, as discussed above, while the wording of section 190.4, subdivision (e) may be ambiguous, the drafters of that subsection did not expressly exclude judge-sentenced defendants from the protections conferred by the statute. Since then, this Court twice passed over the opportunity to definitively resolve the ambiguities in the language of section 190.4, subdivision (e). (*People v. Diaz*, *supra,* 3 Cal.4th at 576, fn. 34.; *People v. Horning*, *supra,* 34 Cal.4th at p. 912.) The State has no compelling interest in depriving judge-sentenced capital defendants of this important procedural safeguard, and therefore it cannot claim that distinguishing this class of defendants is necessary.

In addition to protecting federal constitutional rights, the Equal Protection Clause also prevents arbitrary deprivation of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th.

Cir. 2001) 249 F.3d 941, 951.) Thus, even if the independent review process of section 190.4, subdivision (e) was not required under the United States Constitution, the granting of that process to some capital defendants but not others deprives defendants of their right to equal protection under the law.[22] For these judge-sentenced defendants, an independent review may well mean the difference between life and death.

D. The Denial Of Independent Review In This Case Was Prejudicial

Because Mr. Weaver's federal constitutional rights were violated, reversal is required unless the violation of his rights was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Indeed, even if the failure to provide Mr. Weaver with an independent reweighing of his penalty evidence was a matter of state law only, reversal would be required, because there is "a *reasonable possibility* such an error affected a verdict." (*People v. Jones* (2003) 29 Cal.4th 1229, 1265, fn.11, italics in original; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1232; *People v. Brown*, *supra*, 46 Cal.3d at p. 448.)

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[22] It is noteworthy that at Mr. Weaver's trial, Judge Lester explicitly recognized the equal protection concerns that would result from denying Mr. Weaver a modification hearing. He cited these concerns as the reason he attempted to conduct a "de facto" hearing: "Under the pure language of 190.4 it simply clearly does not apply to a jury waiver. Nonetheless, under Equal Protection grounds, since that does exist, it is the Court's view that probably something akin to it or a de facto version should at least be addressed or considered." (13 RT 1378-1379.)

In Mr. Weaver's case, there is at least a reasonable possibility that an independent review of the penalty phase evidence would have revealed that the judge's verdict "that the aggravating circumstances outweigh[ed] the mitigating circumstances [was] contrary to the law [and] the evidence presented." (Pen. Code, § 190.4, subd.(e).) At the conclusion of Mr. Weaver's penalty phase, the trial judge conducted "something akin to [a section 190.4, subdivision (e) hearing] or a de facto version" for Mr. Weaver (13 RT 1378-1379), at which he purported to review the aggravating and mitigating evidence that had been the basis of his death verdict. (13 RT 1435-1453.) As Judge Lester observed, however, this review amounted to nothing more than "the court's reconsideration and determination as to whether there was sufficient evidence and a correct weighing process exercised by the court." (13 RT 1436.) Not surprisingly, the trial judge reviewed the evidence in precisely the same manner in which he had weighed it during the penalty phase (see 12 RT 1339-1371), and concluded that his original weighing process had yielded the proper verdict. (13 RT 1438-1452.) Nothing else could be expected of him. This would be tantamount to asking a capital jury that had just voted to impose the death penalty to conduct a section 190.4 hearing.

Mr. Weaver was unduly prejudiced by the fact that the trial court was incapable of conducting an independent review of its own verdict and likewise incapable of finding that it had misinterpreted the law with regard

to the admissibility of victim impact evidence, relied upon impermissible victim impact testimony, and improperly treated mitigating evidence as aggravating. If Mr. Weaver had received the independent review to which he was statutorily and constitutionally entitled, there is at least a reasonable possibility that the judge would have modified his verdict and not sentenced Mr. Weaver to death.

PREFACE TO CONSTITUTIONAL CHALLENGES TO CALIFORNIA'S DEATH PENALTY SCHEME

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States and California Constitutions. Because challenges to most of these features have been rejected by this Court,[23] Mr. Weaver presents these arguments here in sufficient detail to alert the Court to the nature of each claim and its state and federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.[24]

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[23] (See, e.g., *People v. Williams* (Dec. 28, 2006, S056391)___ Cal.4th ___ [2006 WL 3802620]; *People v. Stanley* (2006) 39 Cal.4th 913, 962-968; *People v. Lewis* (2006) 39 Cal.4th 970, 1066-1068; *People v. Rogers* (2006) 39 Cal.4th 826, 892-900; *People v. Ramirez* (2006) 39 Cal.4th 398, 476-479; *People v. Hillhouse* (2002) 27 Cal.4th 469, 510-511; *People v. Kipp* (2001) 26 Cal.4th 1100, 1136-1141; *People v. Lucero* (2000) 23 Cal.4th 692, 739-741.)

[24] Counsel acknowledges this Court's statement in *People v. Schmeck* (2005) 37 Cal.4th 240, 304 that it will deem challenges to the constitutionality of California's death penalty scheme "fairly presented" even if the appellant merely identifies the claim, notes that this Court has previously rejected it, and asks for reconsideration. Some of the claims raised herein have been rejected previously by this Court. However, this Court has not had occasion to address some of the other arguments that Mr. Weaver raises here, either because they have not been raised by other appellants, are framed differently than in the cases this Court has decided, or because the arguments are based on recent and evolving case law. As this Court acknowledged in *Schmeck*, *supra*, 37 Cal.4th at 303, it is necessary for appellants to fully exhaust any federal claims in the event their cases proceed to federal court. (See *O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 845 [holding that habeas petitioner failed to exhaust federal claim that was not raised on review to the state supreme court, despite state

To the extent the defects identified below have been considered by this Court, they have been considered in isolation, without addressing their cumulative impact or the functioning of California's capital sentencing scheme as a whole. This approach is constitutionally defective. As the Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 126 S.Ct. 2516, 2527, fn. 6.)[25] See also *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be "so lacking in other checks on arbitrariness that it would not pass constitutional muster without" such review].)

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court rule that made raising such claims discretionary]; *id.* at 847 [acknowledging that its ruling may result in an "unwelcome [burden] in some state courts because the courts do not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court"]; *id.* at 859 (dis. opn. of Stevens, J.) [noting that the majority's ruling "undermine[s] federalism by thwarting the interests of . . . state supreme courts"].) For all these reasons, Mr. Weaver here briefs his claims challenging the constitutionality of the state's capital punishment scheme.

[25] In *Marsh*, the high court considered Kansas' requirement that death be imposed if a jury found the aggravating and mitigating circumstances to be in equipoise, and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (126 S.Ct. at p. 2527.)

When viewed as a whole, California's sentencing scheme is so broad in its definition of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders who should be subject to capital punishment. This constitutional failing has prejudiced Mr. Weaver. He was "eligible" for death only because of the unconstitutional breadth of the felony-murder special circumstances in his case – murder during the course of a robbery and burglary. (Pen. Code, §§ 190.2, subds. (a)17(A), (a)17(G).) The prosecution's theory of death-eligibility in this case was based only on the alleged special circumstances. (See 8 RPT 93-94, 133.)[26]

California's death penalty statute sweeps virtually every person convicted of murder into its grasp. As discussed below, the statute then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old) – to justify the imposition of the

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[26] At a hearing on various motions, Judge Lester stated that "it appears clear," based upon the two special circumstances alleged, that the prosecution is "proceeding with a felony murder theory." (8 RPT 94.) The court noted that the prosecution could "alter that theory and proceed under premeditation and deliberation. But that by itself does not qualify a case for a penalty hearing." (Ibid.) The prosecutor offered no response. Later in the hearing, the prosecutor argued, "This is a felony murder case. I think that's pretty clear. . . [¶] . . . [T]he legal issues, the factual issues that exist in the case are all pretty obvious, pretty basic, and all pertain to the charges . . . as the People proceed against the defendant on the felony murder theory . . . . [Nothing] that we've given the defense or anything in the previous motions indicates otherwise." (8 RPT 133-134.)

death penalty. Judicial interpretations have placed the entire burden of narrowing the class of those convicted of first degree murder to those most deserving of death on the "special circumstances" section of the statute. (Pen. Code, § 190.2.) However, as set forth below, section 190.2 was enacted by the voters with the specific objective of making every person convicted of murder eligible for the death penalty.

During the penalty phase, there are no safeguards in California that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by a sentencer who is not instructed on any burden of proof. Paradoxically, the fact that "death is a punishment different from all other sanctions" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 303-304 (plur. opn. of Stewart, J.).) The result is truly a system in which "this unique penalty" is imposed "wantonly and freakishly" among the thousands of people convicted of murder in California. (See *Furman v. Georgia* (1972) 408 U.S. 238, 310 (conc. opn. of Stewart, J.).) The lack of safeguards needed to ensure reliable, fair determinations by judges, juries and reviewing courts means that arbitrariness in selecting who the State will execute dominates the entire administration of the death penalty.

X. CALIFORNIA'S DEATH PENALTY SCHEME IS UNCONSTITUTIONAL BECAUSE THE SPECIAL CIRCUMSTANCES ARE IMPERMISSIBLY BROAD

A. Introduction

The California death penalty scheme, in particular Penal Code section 190.2, fails to properly narrow the class of offenders who are "eligible" for the death penalty. As a result, the scheme permits the arbitrary selection of offenses and offenders for capital prosecution in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as article I of the California Constitution. Since Mr. Weaver was sentenced to death under this impermissible death penalty scheme, his death sentence is unconstitutional and must be vacated.

The Supreme Court has held that the United States Constitution requires that legislatures enact statutes that quantitatively and qualitatively narrow the class of death-eligible defendants in a genuine and rational manner. (*Gregg v. Georgia* (1976) 428 U.S. 153,192-194.) The special circumstances set forth in section 190.2 purportedly narrow the class of persons convicted of first degree murder subject to the death penalty in California. However, section 190.2 actually enlarges, rather than narrows, the class of offenses and offenders who are subject to the death penalty. This Court's interpretation of the statute and its failure to curb the

prosecutor's charging decisions under section 190.2 in specific cases has further expanded its reach.

An analysis of section 190.2 and the empirical data now available demonstrates that the special circumstances fail to narrow the class of death-eligible offenders in any constitutionally permissible manner. The result is a system plagued by arbitrary, random, and capricious imposition of the death penalty.

B. *Furman v. Georgia* Mandates That State Legislatures Genuinely And Rationally Narrow The Class Of Death-Eligible Murders

In *Furman,* the Supreme Court found existing death penalty statutes in the United States unconstitutional. (*Furman v. Georgia, supra*, 408 U.S. at p. 239.) Four years later, in *Gregg,* a plurality of the Supreme Court explained: "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia, supra*, 428 U.S. at p. 189.) *Furman*'s central holding is that when a death penalty scheme allows unlimited discretion in the process of selecting who should be subject to the death penalty, it creates an unconstitutional risk of arbitrariness. The conclusion in *Furman* that the death penalty was being applied in an arbitrary and capricious manner was "grounded in empirical data

concerning death sentence ratios at the time." (Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283, 1287 (hereafter Shatz & Rivkind).)

In *Gregg,* the Supreme Court explained how death penalty states could meet the requirements of *Furman*:

> As the types of murders for which the death penalty may be imposed become *more narrowly defined and are limited* to those which are particularly serious or for which the death penalty is peculiarly appropriate as they are in Georgia by reason of the aggravating-circumstance requirement, it becomes reasonable to expect that juries even given discretion not to impose the death penalty will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device.

(*Gregg v. Georgia*, *supra*, 428 U.S. at p. 222, italics added (conc. opn. of White, J.).) Georgia responded to *Furman* by narrowing the number of circumstances where death can be imposed and limiting the death penalty to particular murders. Other states responded to *Furman* with mandatory capital punishment statutes, which the Supreme Court subsequently held unconstitutional. The Court determined that the only constitutional route to address the problem identified in *Furman* was to require state legislatures to narrow the number and limit the class of those who are eligible to receive the death penalty. (*Woodson v. North Carolina, supra,* 428 U.S. at pp. 286, 301, 303.) In *Zant v. Stephens, supra*, 462 U.S. at pp. 874-877, the Supreme Court summarized the "mandate of *Furman*" and reiterated: "To

avoid this constitutional flaw, an aggravating circumstance 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."

In *Tuilaepa v. California* (1994) 512 U.S. 967, 971-972, the Supreme Court explained that, in California, "[t]o render a defendant eligible for the death penalty in a homicide case . . . the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent)."[27] The Court added that these narrowing circumstances "must apply only to a subclass of defendants convicted of murder." (*Id.* at p. 972.) In short, "a State's capital sentencing scheme . . . must 'genuinely narrow the class of persons eligible for the death penalty [citation],'" and the narrowing circumstances must provide a "principled basis" to "distinguish those who deserve capital punishment from those who do not . . ." (*Arave v. Creech* (1993) 507 U.S. 463, 474, quoting *Zant v. Stephens*, *supra*, 462 U.S. at p. 877.) This constitutional rule requires that the death-eligible class of people convicted of murder be narrowed in both a

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[27] In the California death penalty scheme, "special circumstances" are meant to achieve the purpose of what the Supreme Court refers to as "aggravating circumstances" in other state schemes. (*People v. Bacigalupo* (1993) 6 Cal. 4th 457, 467-468.)

quantitative[28] and a qualitative[29] manner. (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p. 1294.)

This Court has acknowledged the importance of the *Furman* mandate. In *People v. Edlebacher* (1989) 47 Cal.3d 983, this Court held that to avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must 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, quoting *Furman v. Georgia, supra*, 408 U.S. at p. 313, bracketed insertion added by this Court.) Later, this Court held:

> The high court has drawn a distinction between two aspects of capital sentencing: "narrowing and "selection." "Narrowing" pertains to a state's "legislative definition" of the circumstances that place a defendant within the class of persons eligible for the death penalty. [Citations.] To comport with the requirements of the Eighth Amendment, the legislative definition of a state's capital punishment scheme that serves the requisite "narrowing" function must

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[28] The quantitative requirement is indicated by language such as: "more narrowly define[]," "genuinely narrow," "circumscribe," and "only to a subclass of defendants." (See, e.g., *Zant v. Stephens*, *supra*, 462 U.S. at p. 877 ["genuinely narrow"].)

[29] The qualitative requirement is indicated by language such as: "meaningful basis," "limited to those which are particularly serious," "peculiarly appropriate," "reasonably justify," "rationally distinguish," "valid penological reason," "threshold," "rational criteria," and "principled basis." (See, e.g., *Spaziano v. Florida* (1984) 468 U.S. 447, 4460, fn. 7 ["There must be a valid penological reason for choosing among the many criminal defendants the few who are sentenced to death"].)

> "circumscribe the class of persons eligible for the death penalty."

(*People v. Bacigalupo*, *supra*, 6 Cal.4th at p. 465, quoting *Zant v. Stephens*, *supra*, 462 U.S. at p. 878.)

In sum, the *Furman* mandate has three requirements for a valid death penalty scheme. First, the legislature must genuinely narrow the class of death-eligible offenders in a quantitative sense by limiting the number of death-eligible offenders to a small subclass of all people convicted of first degree murders. Second, it must rationally narrow the class of death-eligible offenders in a qualitative sense, i.e., there must be some valid reason why the small subclass of death-eligible murders are distinguished from and deemed worse than the vast majority of first degree murders. Third, the narrowing must be accomplished by the legislature itself. California's scheme fails all three of these requirements, resulting in the arbitrary death penalty scheme condemned by *Furman*.

C. The Expansion Of California's Death Penalty Scheme

In a capital trial in California, the trier of fact decides whether the defendant is guilty or not guilty of first degree murder. If the defendant is found guilty, a determination must be made as to the existence of any special circumstances. (Pen. Code, § 190.2, see *People v. Bacigalupo, supra,* 6 Cal.4th at p. 467.) This Court explained that the purpose of the special circumstances is to "'guide'" and "'channel'" jury discretion "by

strictly confining the class of offenders eligible for the death penalty." (*People v. Brown* (1985) 40 Cal.3d 512, 539-540, revd. on other grounds *sub nom. California v. Brown* (1987) 479 U.S. 538.) It has held that the special circumstances perform the same constitutionally required narrowing function as the "aggravating circumstances" or "aggravating factors" that some of other states use in their capital sentencing statutes. (*People v. Bacigalupo*, *supra*, 6 Cal.4th at pp. 467-468.)

If a jury finds an alleged special circumstance to be true, the case proceeds to the penalty phase. (Pen. Code, § 190.2, *People v. Bacigalupo*, *supra*, 6 Cal.4th at p. 467.) At the penalty phase, "'[a]dditional evidence may be offered and the jury is given a list of relevant factors' from section 190.3 to guide it in deciding whether to impose a sentence of life without the possibility of parole or a sentence of death." (*Id.* at p. 468, quoting *Pulley v. Harris, supra,* 465 U.S. at p. 51.) This Court announced that "[t]he sole purpose of the penalty phase is to select the punishment for a defendant who has been found to be within the narrowed class of murderers for whom death would be an appropriate penalty." (*People v. Bacigalupo*, *supra*, 6 Cal.4th at p. 468, citing *People v. Brown*, *supra*, 40 Cal.3d at pp. 539-540.)

In California, then, the special circumstances are meant to limit the class of defendants who are "eligible" to receive the death penalty. However, section 190.2 now lists 22 separate special circumstances, with

one special circumstance containing 13 separate crimes. California thus has a total of 33 distinct circumstances that render the offender eligible for the death penalty.[30] The inclusion of aiders and abetters in those eligible for the death penalty and this Court's removal of the intent to kill requirement have further increased the breadth of the special circumstances. The evolution and expansion of California's death penalty scheme is described below.

1. California death penalty scheme (1872-1977)

In 1972, this Court declared the 1957 California death penalty scheme to be invalid under the cruel or unusual punishment clause of article I of the California Constitution. (*People v. Anderson* (1972) 6 Cal. 3d 628; see *People v. Ray* (1993) 13 Cal.4th 313, 371 (conc. opn. of Mosk, J.).) On November 7, 1972, by initiative, Proposition 17 superseded *Anderson, supra*, and section 17 was added to article I of the California Constitution. (*People v. Ray, supra* 13 Cal.4th at p. 372 (conc. opn. of Mosk, J.).) It provided that "the 1957 law was in 'full force and effect' and did not authorize a punishment that was 'cruel or unusual . . . within the meaning

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[30] This total does not include the "heinous, atrocious or cruel" special circumstance (Pen. Code, § 190.2, subdivision (a)(14), which this Court held unconstitutional on vagueness grounds. (See *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 802-803; accord *People v. Wade* (1988) 44 Cal.3d 905, 993.

of' the state charter." (*Ibid*, quoting Cal. Const., art. I, § 27.) Later that year, the Supreme Court decided *Furman*.

In 1973, in response to *Furman*, the California Legislature replaced the 1957 death penalty statute with a new death penalty scheme that provided for a mandatory death penalty without the benefit of a penalty phase. Under the 1973 statute, every person convicted of first degree murder would be sentenced to death if one special circumstance was found to be true. (See *People v. Ray, supra,* 13 Cal.4th at p. 372, citing relevant statutory provisions (conc. opn. of Mosk, J.).) In July 1976, the Supreme Court held that mandatory death penalty schemes such as the one enacted in California were unconstitutional under *Furman*. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280; *Roberts v. Louisiana*, *supra*, 428 U.S. 325.) In December 1976, this Court declared the 1973 mandatory scheme unconstitutional in light of *Woodson* and *Roberts*. (*Rockwell v. Superior Court* (1976) 18 Cal.3d 420.)

The Legislature responded in 1977 by replacing the 1973 death penalty scheme. (See *People v. Ray, supra*, 13 Cal.4th at p. 366 (conc. opn. of George, C.J.); *id.* at 373-375, citing statutory provisions (conc. opn. of Mosk, J.).) The 1977 death penalty statute was the Legislature's attempt to comply with the *Furman* mandate to genuinely narrow death-eligible offenses to a small subset of extraordinary cases. (See *People v. Green* (1980) 27 Cal.3d 1, 49, superseded by Proposition 18 (March 7, 2000),

amending Pen. Code, § 190.2, subdivision (a)(17)(M), & revd. on another ground in *People v. Hall* (1986) 41 Cal.3d 826, 833.)

2. The Briggs Initiative (1978)

On November 7, 1978, the 1977 death penalty scheme was replaced by the Briggs Initiative. (See, e.g., *People v. Ray*, *supra,* 13 Cal. 4th at p. 375 (conc. opn. of Mosk, J.); *People v. Rodriguez* (1986) 42 Cal.3d 703, 777.) The express purpose of the 1978 initiative was to broaden, rather than narrow, the class of death-eligible offenders. The initiative stated that it "*expands* categories of first degree murder for which penalties of death or confinement without possibility of parole may be imposed." (Cal. Voter's Pamp., Gen. Elec. (Nov. 7, 1978) Analysis by Legislative Analyist, p. 32. italics added.)

The Legislative Analyst wrote that "[t]he proposition would also expand and modify the list of special circumstances which require either the death penalty or life without the possibility of parole." (Cal. Voter's Pamp., Gen. Elec. (Nov. 7, 1978) Analysis by Legislative Analyist, p. 32.) It was noted that this proposition would specifically broaden the liability of persons subject to the death penalty or life imprisonment without possibility of parole under specified circumstances. (*Ibid.*)

According to its author, Senator John V. Briggs, the initiative was specifically created to "give every Californian the nation's toughest and most effective death penalty law." (Cal. Voter's Pamp., Gen. Elec. (Nov. 7,

1978) Argument in Favor of Proposition 7, p. 34.) As expressed in the ballot arguments, the purpose was to make the death penalty applicable to "*every murderer*," not just extraordinary cases. (*Ibid.*, italics added.) The ballot argument stated:

> Since 1972, the people have been demanding a tough, effective death penalty law to protect our families from ruthless killers. But, every effort to enact such a law has been thwarted by powerful anti-death penalty politicians in the State Legislature.
>
> In August of 1977, when the public outcry for a capital punishment law became too loud to ignore, the anti-death penalty politicians used their influence to make sure that the death penalty law passed by the State Legislature was as weak and ineffective as possible.
>
> That is why 470,000 concerned citizens signed petitions to give you the opportunity to vote on this new, tough death penalty law.
>
> Even if the President of the United States were assassinated in California, his killer would not receive the death penalty in some circumstances. Why? Because the Legislature's weak death penalty law does not apply. Proposition 7 would.
>
> If Charles Manson were to order his family of drug-crazed killers to slaughter your family, Manson would not receive the death penalty. Why? Because the Legislature's death penalty law does not apply to the master mind of a murder such as Manson. Proposition 7 would.
>
> And, if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, that criminal would not receive the death penalty. Why? Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.

> Proposition 7 would also apply to the killer of a judge, a prosecutor, or a fireman. It would apply to a killer who murders a citizen in cold blood because of his race or religion or nationality. And, it would apply to all situations which are covered by our current death penalty law.
>
> In short, your YES vote on Proposition 7 will give every Californian the protection of the nation's toughest, most effective death penalty law.

(*Ibid.*)

Thus, the objective of the 1978 Initiative was to overcome the Legislature's narrowing of the death-eligible class mandated by *Furman*. Indeed, the Attorney General and this Court have long acknowledged the expansive goal of the 1978 Initiative. Citing the ballot argument's language that the initiative would give every Californian the protection of the nation's toughest death penalty law, the Attorney General has argued to this Court that "the enactment of the initiative shows the voters wanted a 'tough' law, and, in essence, that the 'toughest' death penalty law is the one which threatens to inflict that penalty on the maximum number of defendants." (*Carlos v. Superior Court* (1983) 35 Cal.3d 131, 145, fn.13, overruled by *People v. Anderson* (1987) 43 Cal.3d 1104; see also *People v. Davenport* (1985) 41 Cal.3d 247, 266 [describing "purpose and effect" of 1978 initiative, according to legislative analysis].) Under California law, ballot arguments constitute the legislative history used to interpret initiative measures. (See, e.g., *Long Beach v. City Employee's Assn v. City of Long Beach* (1986) 41 Cal.3d 937, 943, fn.5.)

The 1978 initiative reached its goal of enacting the "nation's toughest" death penalty scheme by adding to and expanding the special circumstances. (See, e.g., *People v. Ray, supra,* 13 Cal 4th at p. 375 (conc. opn. of Mosk, J.).) It more than doubled the number of enumerated special circumstances. There were only 12 special circumstances in the law in 1977, whereas there were 27 special circumstances in the 1978 law. (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p.1313 & fns. 156-160.) The initiative also broadened the death-eligible class by expanding the definitions of the special circumstances, at times replacing the precise language of the 1977 act with vague and broad generalities. (*People v. Bigelow* (1984) 37 Cal.3d 731, 750.) The 1978 scheme drastically expanded the felony-murder special circumstances. It also added an "accomplice" provision to the various felony-murder special circumstances. (Compare Pen. Code, § 190.2, subd. (c)(3) [1977] with § 190.2, subd.(a)(17) [1978].)

3. The expansion has continued (1978 to present)

Since the 1978 initiative, death eligibility in California has continued to expand. In 1981, the Legislature eliminated two mental state defenses for first degree murder, thus broadening the class of first degree murder offenders. (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p.1314 & fns. 172-176.) In 1982, the Legislature added murder by the "knowing use of ammunition designed primarily to penetrate metal or armor" to the

enumerated list of first degree murders. (See 1982 Cal. Stat. 950, 1 (codified as amended at Pen. Code, § 189 (1988).)

Ten new types of first degree murder have been added since the 1978 initiative. In 1990, the voters approved Proposition 115, adding five more felony murders (kidnapping, trainwrecking, sodomy, oral copulation, and rape by instrument) to the list of first degree murders. (State of California, Crime Victims Justice Reform Act, Initiative Measure Proposition 115 (approved June 5, 1990), p. 9.) Propositions 114 (also enacted in 1990)[31] and 115 added two new felony-murder special circumstances, mayhem and rape by instrument, and other special circumstances, including murder of witnesses, felony-murder-robbery and torture-murder special circumstances, and altered the phrasing of the "heinous, atrocious, and cruel" special circumstance. (Pen. Code, §§ 190.2, subd. (a)(10), 190.2, subd. (a)(17)(A), 190.2, subd. (a)(18), 190.2, subd. (a)(14).)

Moreover, Proposition 115 expanded the scope of section 190.2, subdivision (b), and added sections 190.2, subdivisions (c) and (d). (See Prop. 115, § 10, adopted by voters, effective June 6, 1990.) These changes broadened the class of death-eligible offenders to include those who killed

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[31] (See *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 982-984 [explaining the history of Proposition 114 and the 1989 amendment to Penal Code section 190.2].)

regardless of intent to kill, various accomplices who had the intent to kill and various felony-murder accomplices who did not have the intent to kill, but merely had the constitutionally minimum mens rea of "reckless indifference." (Shatz & Rivkind, *supra*, 72 N.Y.U. L.Rev. at p. 1315, citing *Enmund v. Florida* (1982) 458 U.S. 782 and *Tison v. Arizona* (1987) 481 U.S. 137.)

In 1993, the Legislature added carjacking to the list of first degree felony murders and added non-felony murder perpetrated by means of discharging a firearm from a motor vehicle. (1993 Cal. Stat. 611, § 4.)

In 1996, Proposition 196 was enacted. (See Stats 1995 ch. 478 § 2, approved by the voters, at the March 26, 1996, primary election (Prop. 196), effective March 27, 1996.) This proposition added three more special circumstances to the statute. (Ballot Pamp., Primary Elec. (March 26, 1996) Analysis by the Legislative Analyst, p. 25.) Proposition 21 added a criminal-street-gang special circumstance. (See Prop. 21, § 11, adopted by voters effective March 7, 1996; see also Pen. Code, § 190.2, subd. (a)(22).)

In 1999, the Legislature added torture murder, as defined in Penal Code section 206, to the list of first degree felony murders. (Pen. Code, § 189 (Stat. 1999, ch. 694).) In 2002, the Legislature added murder by "a weapon of mass destruction." (See Pen. Code, § 189 (Stat. 2002, ch. 606).)

In 2000, two more initiatives, Proposition 18 and Proposition 21, were passed, amending the enumerated list of special circumstances. (See

Editor's Notes, Pen. Code, § 190.2 (Thomson/West 2006) ["(. . .Stats. 1998, c. 629 § 2 (Prop. 18, approved March 7, 2000, eff. March 8, 2000); Initiative Measure (Prop. 21, § 11, approved March 7, 2000, eff. March 8, 2000.).)"].) Proposition 18 greatly expanded the "lying in wait" special circumstance and lessened the intent requirement of the arson and kidnapping special circumstance. (Stats. 1998, ch. 629, § 2, approved by voters (Prop. 18, § 2) at the March 7, 2000 primary election.)

After the 2000 initiatives passed, California's death penalty scheme encompassed 33 broad special circumstances. The list of special circumstances was increased, both in number and in scope, by the initiative process. Whereas the 1977 death penalty scheme was an attempt by the legislature to comply with the *Furman* mandate to quantitatively and qualitatively narrow the class of death-eligible offenders (see *People v. Green, supra*, 27 Cal.3d at p. 49), the 1978 Briggs Initiative and amendments since that time have had the opposite result.

4. This Court's decisions have further expanded the breadth of the special circumstances

In the first years after the enactment of the 1978 initiative, this Court made a conscientious effort to assure the death penalty scheme met constitutional standards. For example, in 1982, this Court held that the catchall "heinous, atrocious or cruel" special circumstance was

unconstitutional. (*People v. Superior Court (Engert)*, *supra*, 31 Cal.3d at p. 806.)

In 1983, this Court held that the 1978 initiative "should be construed to require an intent to kill or to aid in a killing as an element of the felony murder special circumstance." (*Carlos v. Superior Court*, *supra*, 35 Cal.3d at p. 135.) It explained that the initiative "completely rewrote the special circumstance provision of the 1977 law" by omitting the requirements that the murder be "willful, deliberate, and premeditated," that there be physical presence, and that there be intention to cause death. (*Id.* at pp.139-140.) Among the reasons given by the Court for its decision was that "[t]he 1978 initiative, if construed to eliminate any intent to kill requirement for the felony murder special circumstance, would encounter substantial constitutional problems" (*id.* at p. 148), including the absence of "'a principled way' [citation] to distinguish capital from noncapital murders." (*Id.* at 151, quoting *Godfrey v. Georgia* (1980) 446 U.S. 420, 433.)

However, many of the decisions limiting the special circumstances by this Court were altered by later voter initiatives. Moreover, after this initial period of constitutionally proper review, this Court not only ceased limiting the special circumstances, but began to expand them. This sea change in jurisprudence coincided with the 1986 recall of then-Chief Justice Bird and Justices Grodin and Reynoso. (See Shatz & Rivkind, *supra*, 72 N.Y.U. L.Rev. at p. 1316 [noting that "[i]n the ten years since

[the recall], the California Supreme Court has imposed no significant limits on the scope of section 190.2."].)

For example, in 1987, this Court overruled the intent to kill requirement for actual killers. (*People v. Anderson, supra,* 43 Cal.3d at pp. 1139-1147; *People v. Bolden* (2002) 29 Cal.4th 515, 560 [explaining the effect of *Anderson* on *Carlos v. Superior Court, supra*].) After again analyzing the language of the 1978 initiative, this Court held that *Carlos* was incorrect, that "on further reflection . . . section 190.2(a)(17) provides that intent is not an element of the felony-murder special circumstance," (*People v. Anderson, supra,* 43 Cal.3d at p.1143), and that such a "reading of the statutory provision raises grave and doubtful constitutional questions." (*Id.* at p. 1146.) Without ever fully addressing this concern, the Court simply ruled that intent to kill is not required for the actual killer. (*Ibid.*) The same year, this Court similarly held that intent to kill was no longer an element of the prior-murder-conviction special circumstance. (*People v. Hendricks* (1987) 43 Cal.3d 584, 596.)

Past and present justices of this Court have voiced their concerns that these expansions were improper. For instance, as then-Chief Justice Bird explained, this Court's expansive interpretation of the kidnapping felony-murder circumstance was "questionable." (*People v. Bigelow* (1984) 37 Cal.3d 731, 757 (dis. opn. of Bird, C.J.).) In *People v. Webster* (1991) 54 Cal.3d 411, Justice Mosk concluded that the "majority's analysis

expand[ed] the crime of robbery in an altogether novel fashion and beyond any reasonable limit marked by the Legislature's definition," and thus he would have set aside the felony-murder-robbery special circumstance because it "of course, requires a robbery." (*Id.* at pp. 460-461 (conc. & dis. opn. of Mosk, J.).) Justice Broussard joined Justice Mosk's view that "the special circumstance of felony murder based upon a robbery cannot stand," and wrote separately that the "special circumstance of lying in wait, as construed in *Morales* [(1989) 48 Cal.3d 527], does not meet minimum constitutional criteria." (*Id.* at p. 468 (conc. & dis. opn. of Broussard, J.).) Justice Kennard agreed that the majority had improperly expanded the definition of robbery. (*Id.* at pp. 469-470 (con. & dis. opn. of Kennard, J.).)

In *People v. Martinez*, Justice Kennard found that this Court had improperly expanded the prior-murder special circumstance by allowing it to include murder convictions from other states even if their definitions of murder did not encompass "'all the elements of the offense of murder in California.'" (*People v. Martinez* (2003) 31 Cal. 4th 673, 686 (conc. & dis. opn. of Kennard, J.), quoting *People v. Andrews* (1989) 49 Cal.3d 200, 223.)

In *People v. Crew*, Justice Moreno "urge[d] this court to reconsider its holding in [*People v. Howard* (1988) 44 Cal.3d 375] that the limiting construction placed on the financial-gain special circumstance in *People v. Bigelow* (1984) 37 Cal.3d 731, 751, applies only when necessary to avoid

overlap of multiple special circumstance allegations." (*People v. Crew* (2003) 31 Cal.4th 822, 861 (conc. opn. of Moreno, J.).) He concluded that "the financial-gain special circumstance, as applied today, is too broad" since it "fails to narrowly define a set of cases to differentiate the special situation in which death is warranted." (*Id.* at pp. 862-863, citing *Zant v. Stephens, supra*, 462 U.S. at p. 877.)

In fact, this Court has expanded the special circumstances to such a degree that there is now an entire body of jurisprudence governing whether capital defendants' "due process rights were denied by a judicial expansion of California's definition of death-qualifying special circumstances in violation of *Bouie v. City of Columbia* (1964) 378 U.S. 347." (*Webster v. Woodford* (9th Cir. 2004) 369 F.3d 1062, 1065, cert. den. *Webster v. Brown* (2004) 543 U.S. 1007; see also *People v. Wharton* (1991) 53 Cal.3d 522, 586 [noting that "'unexpected'" or "'unforeseeable *judicial enlargement* of a criminal statute'" is prohibited under California law, quoting *Bouie v. City of Columbia, supra*, 378 U.S. at pp. 353-354, italics added]; *People v. Webster, supra,* 54 Cal.3d at p. 448, fn. 21; *People v. Poggi* (1988) 45 Cal.3d 306, 326-327.)

D. The California Death Penalty Scheme Violates All Three Requirements Of The *Furman* Mandate

The California death penalty scheme does not meaningfully, rationally, or genuinely narrow the class of death-eligible offenders. It does

not narrow in a quantitative manner. It does not narrow in a qualitative manner. It was not carefully crafted by the Legislature, but instead was enacted through a constitutionally flawed initiative process. As a result, California's death penalty scheme fails all three aspects of the *Furman* mandate.

1. The special circumstances fail to quantitatively narrow the class of death-eligible offenders

"Special" is defined as "distinguished by some unusual quality"; "readily distinguishable from others of the same category"; "unique"; and "being other than the usual." (Merriam-Webster Online <http://m-w.com/dictionary/special> [as of Jan. 12, 2007].) Unquestionably, when the list of special circumstances is tripled, the special circumstances inevitably lose their "special" or "unique" nature. This is especially so when the circumstances have been written and interpreted in an expansive manner. The term "special circumstances" has become an oxymoron.

A comparison between California's special circumstances and other death penalty states' eligibility schemes demonstrates the unconstitutional breadth of California's statute. (See, e.g., *State v. Young* (Utah 1993) 853 P.2d 327, 396-411 (dis. opn. of Durham, J.).) In *Young*, Utah Supreme Court Justice Durham analyzed the then-current schemes in all the death penalty states. (*Id.* at p. 399.) He concluded that "Utah's statutory definition of capital homicide excludes so few categories and so few actual

murders that it has in effect returned the state to where it was before *Furman* was decided; there is no meaningful narrowing of the class of death-eligible murders pursuant to objective, rational standards." (*Ibid.*) This same conclusion must be reached concerning the California death penalty scheme.

In California, the breadth of the special circumstances has been expanded in two ways. First, California has made felony murder *simpliciter* a special circumstance. (*People v. Anderson, supra,* 43 Cal.3d at pp. 1145-1146 & fn. 8.) Any person who kills "in the commission of, or attempted commission of, or the immediate flight after committing, or attempting to commit" any of the enumerated felonies is not only guilty of first degree murder, but is also automatically death-eligible regardless of his or her mental state. (Pen. Code, § 190.2, subd. (a)(17).) Second, California has made "lying in wait" a special circumstance. (Pen. Code, §190.2, subd. (a)(15).)

a. The felony-murder special circumstances

In California, virtually all first degree felony murders involve special circumstances.[32] In addition, the felony-murder rule is exceedingly broad.

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[32] The only persons convicted of felony murder who are not part of the death-eligible class are accomplices who did not have at least a mens rea of "reckless indifference." (See Pen. Code, § 190.2, subd. (d).) This provision merely excludes the same defendants who cannot constitutionally be executed under the *Enmund/Tison* line of decisions. (See *Enmund v. Florida, supra,* 458 U.S. 782 and *Tison v. Arizona, supra,* 481 U.S. 137.)

First, the felony-murder rule applies to the most common felonies resulting in death, particularly robbery and burglary. Second, the felony-murder rule applies to killings even if they occur during the escape from the commission of the felony. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1166-1167.) Third, the felony-murder rule is not limited in its application by typical rules of causation, and thus it applies to altogether accidental and unforeseeable deaths. (See, e.g., *People v. Dillon* (1983) 34 Cal.3d 441, 476-477; *People v. Johnson* (1992) 5 Cal.App.4th 552, 562.)

Despite the breadth of the felony-murder rule, California's felony-murder special circumstances are even broader. The felony-murder special circumstances are so numerous that they include situations such as where the defendant grabbed a purse from a victim who then gave chase and died of a heart attack, triggering the robbery-murder special circumstance, and where the defendant stole clothes from a department store and while fleeing, ran a red light, hit another car, and killed the passenger, triggering the burglary-murder special circumstance. (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at pp. 1321-1322 & citations within.) A capital punishment scheme that renders these persons death-eligible cannot be said to

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The fact that the California death penalty scheme excludes this class of offenders is meaningless since they could never be eligible for death under the United States Constitution. (*Ibid.*)

genuinely narrow the class of death-eligible offenders to a small subclass of defendants most deserving of death.

It is not surprising that other state courts have found that broad felony-murder provisions violate the *Furman* narrowing requirement. As the Tennessee Supreme Court held in *State v. Middlebrooks* (Tenn. 1992) 840 S.W.2d 317, 346:

> We have determined that in light of the broad definition of felony murder and the duplicating language of the felony murder aggravating circumstance, *no narrowing occurs* under Tennessee's first-degree murder statute. We hold that, when the defendant is convicted of first degree murder solely on the basis of felony murder, the [felony-murder] aggravating circumstance . . . *does not narrow the class of death-eligible murderers sufficiently under the Eighth Amendment to the U.S. Constitution*, and Article I, § 16 of the Tennessee Constitution . . . .

(italics added.) Similarly, in *Engberg v. Meyer* (Wyo. 1991) 820 P.2d 70, 89, the Wyoming Supreme Court held:

> The constitutional difficulty with [the Wyoming death penalty statute] . . . was that it allowed Engberg's felony murder to both convict him and, without more, sentence him to death . . . . This statute provided no requirements beyond the crime of felony murder itself to narrow and appropriately select those to be sentenced to death and therefore, on its face, permitted arbitrary imposition of the death penalty. This statutory scheme of death sentencing preserved in felony murder the very evil condemned and held unconstitutional in *Furman* [citation]. It permitted in felony murder cases a sentence to death without applying any standards that generally narrowed the class of crimes and persons who were given the death penalty. The statute recreated a sentencing scheme that the United States Supreme Court found resulted in death sentences being imposed unevenly, unfairly, arbitrarily and capriciously.

The California death penalty scheme is similarly unconstitutional since its seemingly endless felony-murder special circumstances fail to properly narrow the death-eligible class of offenders.

b. The lying-in-wait special circumstance

The lying-in-wait special circumstance is so all-encompassing that it includes nearly every premeditated murder. (Pen.Code, § 190.2, subd. (a)(15).) The term "lying in wait" on its face carries with it some connotation of an ambush from a hiding position. However, this Court has given this special circumstance a far more expansive interpretation.

Neither the 1973 nor the 1977 death penalty schemes included lying in wait as a special circumstance. The first degree murder statute read: "All murder which is perpetrated by means of . . . lying in wait . . . ." (Pen. Code, § 189.) However, the 1978 Initiative added a lying-in-wait special circumstance where "[t]he defendant intentionally killed the victim *while* lying in wait." (Cal. Voter's Pamp., Gen. Elec. (Nov. 7, 1978) Text of Proposed Law, p. 43.)

This Court has expanded the lying-in-wait special circumstance so that it is now virtually identical to the lying-in-wait definition of first degree murder. The special circumstance covers nearly all premeditated first degree murders. (See, e.g., *People v. Edelbacher, supra,* 47 Cal.3d at p. 1023; *People v. Morales* (1986) 48 Cal.3d 527, 554-557.) Justice Mosk strenuously disagreed with this Court's holding in *Morales*. He wrote:

> First, this special circumstance does not distinguish the few cases in which the death penalty is imposed from the many in which it is not. Indeed, it is so broad in scope as to embrace virtually all intentional killings. 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. Second, the lying-in-wait special circumstance does not provide a meaningful basis for distinguishing between murderers who may be subjected to the death penalty and those who may not. 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.

(*Id.* at p. 575 (conc. & dis. opn. of Mosk, J.); see also *People v. Webster, supra,* 54 Cal.3d at pp. 461-462 (conc. & dis. opn of Mosk, J.); *id.* at p. 463 (conc. & dis. opn. of Broussard, J.).)

Despite these concerns, this Court continued to enlarge the lying-in-wait special circumstance. In *People v. Edwards* (1991) 54 Cal.3d 787, 822-823, this Court expanded the definition of the lying–in-wait special circumstance to include a murder that occurred immediately *after* the period of lying in wait. Justice Mosk again dissented. (*Id.* at pp. 850-856 (conc. & dis. opn. of Mosk, J.).)

In 1993, in *People v. Sims* (1993) 5 Cal.4th 405, 433, the Court re-interpreted and expanded the language of the element from "watching and waiting" to "watchful waiting." It held that the defendant need not "watch" the victim immediately prior to the killing; he need only wait for the victim with "alert and vigilant . . . anticipation." (*Ibid.*) Later that year, in *People*

v. Ceja (1993) 4 Cal.4th 1134, this Court again addressed the lying-in-wait special circumstance. In her concurring opinion, Justice Kennard explained that "[r]ecent decisions of this court have given expansive definitions to the term 'lying in wait,' while drawing little distinction between 'lying in wait' as a form of first degree murder and the lying-in-wait special circumstance, which subjects a defendant to the death penalty. [Citations.]" (*Id.* at p. 1147 (conc. opn. of Kennard, J.).) Justice Kennard expressed a "growing concern . . . that these decisions may have undermined the critical narrowing function of the lying-in-wait special circumstance: to separate defendants whose acts warrant the death penalty from those defendants who are 'merely' guilty of first degree murder." (*Ibid.*)

Under this Court's interpretation, lying in wait can apply and has been applied to virtually any premeditated murder case. Legal commentators have observed that California's lying-in-wait special circumstance "has been expanded to the point that it is in great danger of becoming a 'general circumstance' rather than a 'special circumstance,' one which is present in most premeditated murders not just a narrow category of those killings. [Citations.]." (Osterman & Heidenreich, *Lying in Wait: A General Circumstance* (Summer 1996) 30 U.S.F. L. Rev. 1249, 1279, quoting *Iniguez v. Superior Court* (Ct. App. 1993) 19 Cal. Rptr. 2d 66, 71 (conc. opn. of Johnson, J.).) Ten years later, lying in wait has indeed become a general circumstance. This Court has abandoned a strict

adherence to the language of "while" lying in wait. Now, the special circumstance does not require physical concealment, does not require that the period of lying in wait include "watching," nor does it require that the killing occur simultaneously with the waiting. (*Id.* at pp. 1272-1273.) Even if the lying-in-wait special circumstance did in some manner narrow the number of death-eligible murders, it does nothing to "distinguish those murders which are particularly heinous and warrant death." (*Id.* at p. 1274.) It therefore violates both the quantitative and qualitative prongs of the *Furman* mandate.

The combination of broad special circumstances, along with the existence of the felony-murder special circumstances and the lying-in-wait special circumstance, encompass virtually all first degree murders. In fact, the class of special circumstance murders is broader than the class of non-special circumstance murders. A comparison of the categories of special circumstance murders under section 190.2 with the number of non-special circumstance first degree murders under section 189 reveals that, at the most, there are seven theoretical categories of first degree murders excluded from death eligibility. Thus, there are more special circumstance categories than "excluded" categories numerically, and the special circumstance categories are far broader than the "excluded" categories.

As opposed to "the broad sweep of the special circumstance categories," the seven "excluded" categories of first degree murder are

particularly circumscribed. (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p. 1324.) Five of these "excluded" categories involve first degree murders where the killer employed an unusual method. (Shatz & Rivkind, *supra*, 72 N.Y.U. L.Rev. at p. 1324.) Between 1972, when *Furman* was decided, and 1997, there were "only a handful of published murder cases fitting any of these five categories." (*Ibid.*) In contrast to the number and breadth of the special circumstance categories, these seven "excluded" categories are so narrow that these rare noncapital murder cases represent a small subset of all individuals convicted of first degree murder who could possibly be punished by death. (*Id.* at pp. 1324-1326.)

In sum, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is allowed under the law, the special circumstances achieve the opposite result.

2. Empirical data shows that the California death penalty scheme violates *Furman*

Empirical data confirms that the very defect condemned as unconstitutional by the Supreme Court in *Furman* is still present in the California death penalty scheme.[33] Professors Shatz and Rivkind initially

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[33] The empirical data is taken from the research reported in detail in Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. 1283.

analyzed 404 direct appeals of first degree murder convictions in California. (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p. 1326.) This study covered all 253 of the published decisions of this Court and the Courts of Appeal, as well as unpublished decisions of the Court of Appeal for the First Appellate District in 151 cases, during the period of 1988-1992.[34] (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p. 1326 & fn. 252.)

During this five year period, an average of 346 people were convicted of first degree murder and an average of 33.2 people were sentenced to death in California per year. (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p. 1327.) Only 9.6 percent of those convicted of first degree murder were sentenced to death. (*Id.* at p. 1328.) Since the death-eligible class in California includes those offenders whose crime would meet the special circumstances in section 190.2, Professors Shatz and Rivkind analyzed the pool of 404 appellate cases to determine whether, based on the facts, a reasonable juror could have found a special circumstance true beyond a reasonable doubt.[35] (*Id.* at p. 1328 & fn. 256.)

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[34] Shatz and Rivkind's "study relied on appellate opinions because they provide the most accessible descriptions of the facts supporting such convictions." (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p. 1328.)

[35] This test for special circumstances was based on the Supreme Court's holdings in *Maynard v. Cartwright* (1988) 486 U.S. 356, 364 and *Godfrey v. Georgia*, *supra*, 446 U.S. at pp. 428-429. (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p.1328, fn. 256.)

a. The published first degree murder cases

The Shatz and Rivkkind study found that of the 253 published decisions of this Court and the Court of Appeal, there were 159 death judgments, 41 first degree murder cases with special circumstance findings but no death judgment, and 53 first degree murder cases without special circumstance findings. (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p. 1328.) Adding the 159 death judgment cases with the 41 cases where special circumstances were found by the fact finder shows that 79 percent of the published decisions involved special circumstance findings.

The study concluded that 242 of the published first degree murder cases, based on the facts, could have involved special circumstances, while a mere eight cases could not have been charged as special circumstance murder. (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p. 1329, Table 1.) Of the 250 published first degree murder cases, 96.8 percent involved special circumstances and only 3.2 percent did not factually involve special circumstances. (*Ibid.*) The empirical data confirms that the special circumstances do not genuinely narrow the class of death-eligible murders to a small subclass of offenders. Instead, the special circumstances perform the opposite function. Only a small subclass of offenders, 3.2 percent, are not eligible for death. The remaining offenders, 96.8 percent, are death-

eligible. A class that includes 96 percent of the entire pool is not narrow in any sense.

The authors found that the felony-murder special circumstances "play the predominant role in defining death-eligibility" in California. (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p. 1329.) The broad felony-murder special circumstances alone guarantee that more than two-thirds of all first degree murders are eligible for the death penalty in California. There were *almost 21 times* as many felony-murder special circumstances cases than there were non-special circumstance "excluded" cases. (See *id.* at pp. 1328-1329.) This data demonstrates the truly upside-down nature of California's narrowing system. (See *id.* at p. 1332.)

b. The unpublished first degree murder cases

The Shatz and Rivkind study found that the "data for the unpublished cases generally confirm[ed] the data for the published cases." (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p. 1330.) It found that 121 of the 142 total unpublished first degree murder cases, or 85.2 percent, actually involved special circumstances. (*Id.* at p.1330 & p. 1331, Table 2.) Only 21 of the 142 cases, or 14.8 percent, did not involve special circumstances. (*Id.* at p. 1331, Table 2.) The study of the unpublished

cases confirms that the California death penalty scheme fails to properly narrow the class of death-eligible offenders.[36]

c. The combined first degree murder case samples

The results of the study showed that 363 of the 392 total cases, or 92.6 percent, based on the facts, involved special circumstances. (Shatz & Rivkind, *supra*, 72 N.Y.U. L. Rev. at p. 1330.) The total included published death judgment cases (157 of 158, or 99 percent), the published non-death judgment cases (85 of 92, or 92 percent), and the unpublished non-death judgment cases (121 of 142, or 85 percent). (*Id.* at pp. 1329, Table 1 & 1331, Table 2.) The "excluded" class of first degree murderers is only 7.3 percent in California. Thus, in California, more than *12 out of every 13* individuals convicted of first-degree murder are death-eligible. (See *id.* at pp. 1330-1331.)

d. California's death sentence ratio

In addition to showing that California fails to genuinely narrow the class of death-eligible offenders, the Shatz and Rivkind study examined the death penalty scheme to determine the ratio of death-eligible offenders who actually received death sentences. The death sentence ratio found to be

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[36] Again, the majority of the unpublished factual special circumstance cases, namely 58.7 percent or 71 of 121 cases, involved the felony-murder special circumstances. (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p. 1331, Table 2.) The study also found that 71 of the 142 total unpublished first degree murder cases, or 50 percent, involved the felony-murder special circumstances. (See *ibid.*)

unconstitutional in *Furman* was 15 to 20 percent. (*Furman v. Georgia, supra,* 408 U.S. at p. 367, fn. 11 (dis. opn. of Burger, C.J.); *id.* at p. 435, fn. 19 (dis. opn. of Powell, J.).)

Eighty-four percent of individuals convicted of first degree murder were considered death-eligible, yet only 9.6 percent of that group are in fact sentenced to death in California. (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p. 1332.) The death sentence ratio of these two figures (9.6 percent and 84 percent) was 11.4 percent. (*Ibid.*) The study concluded that "[t]his 11.4 percent death sentence ratio is significantly lower than Georgia's death sentence ratio at the time of *Furman*." (*Ibid.*) As such, the California death penalty scheme is actually far more arbitrary, capricious, wanton, freakish, and random than the death penalty schemes deemed unconstitutional in *Furman*.

d. Summary of the study's findings

The findings in the Shatz and Rivkind study establish that California's special circumstances fail to genuinely narrow the class of death-eligible offenders. When all the findings are combined, the study shows that 90 percent of all persons convicted of first degree murder in California are death-eligible. Only 10 percent of those individuals are in fact excluded by the special circumstances. This figure is not sufficient for purposes of the *Furman* mandate.

Based on their empirical data, Professors Shatz and Rivkind reached the following conclusions:

> The California death penalty scheme . . . cannot be reconciled with any reasonable interpretation of the Furman principle. (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p. 1339.)
>
> California now has a death penalty scheme with a higher risk of arbitrary and discriminatory death sentences than the McGautha-era California scheme. (*Id.* at pp. 1339-1340.)
>
> Simply stated, a significant percentage of those now on death row would not be there but for the overbreadth of the California scheme. (*Id.* at p. 1340.)
>
> Either the Court will have to enforce the Furman principle by holding California's scheme unconstitutional, or it will have to abandon that principle and, with it, any pretense that the Constitution requires the death penalty to be administered in an evenhanded and nonarbitrary manner. (*Id.* at p. 1343.)

Accordingly, this Court should find California's death penalty scheme unconstitutional because the special circumstances fail to genuinely narrow the class of death-eligible offenders in a quantitative manner as required by the *Furman* mandate.

3. The special circumstances fail to narrow the class of death-eligible offenders in a qualitative manner

The empirical data shows that the special circumstances fail to properly narrow the class of death-eligible offenders in a *qualitative* sense as well. The special circumstances must not only narrow the class of death-eligible offenders to a numerically smaller subclass of offenders, but also to a more blameworthy class of offenders. Since 90 percent of all first degree

murder offenders are eligible for death in California, there is simply no way to ensure that only the "most blameworthy" and the "worst of the worst" are included within this group.

The few categories of persons convicted of "excluded" first degree murders are no more blameworthy than the many categories of death-eligible offenders. For instance, there is no discernable basis for punishing the "excluded" offenders who maliciously and intentionally kill by use of armor-piercing ammunition or destructive devices (Pen. Code, § 189), less severely than those who have committed death-eligible *unintentional* felony murder. It also is irrational to punish those convicted of unintentional felony murder more severely than the "excluded" class of individuals convicted of "simple" premeditated murder. (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p. 1324, fn. 238.) Thus, California's felony-murder special circumstances fail to properly narrow in a qualitative sense as required under the *Furman* mandate. (See *State v. Middlebrooks, supra,* 840 S.W.2d at pp. 344-346; *Engberg v. Meyer, supra,* 820 P.2d at p. 89.)

As discussed above, Justice Mosk explained that the lying-in-wait special circumstance fails "to provide a meaningful basis for distinguishing between murderers who may be subjected to the death penalty and those who may not." (*People v. Morales, supra*, 48 Cal.3d at p. 575 (conc. & dis. opn. of Mosk, J.).) Justice Broussard eloquently detailed the numerous reasons why "those first degree murderers who lie in wait are no more

deserving of death than those who act with dispatch." (*People v. Webster, supra,* 54 Cal. 3d at pp. 464-468 (conc. & dis. opn. of Broussard, J.).) Justice Kennard expressed her "concern" that the lying-in-wait special circumstance does not adequately narrow in a qualitative sense and no longer performs its "critical narrowing function" in California, which is "to separate defendants whose acts warrant the death penalty from those defendants who are 'merely' guilty of first degree murder." (*People v. Ceja*, *supra*, 4 Cal.4th at p. 1147 (conc. opn. of Kennard, J.); see also *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 512 (conc. opn. of Kennard, J.).) Justice Moreno voiced a similar concern about this special circumstance. (See *id.* at pp. 513-515 (conc. & dis. opn. of Moreno, J.).)

The data leads to only one conclusion: California's death penalty scheme *as a whole* does not adequately narrow the death-eligible class in a qualitative manner. (See, e.g., *People v. Adcox* (1988) 47 Cal.3d 207, 275 (conc. opn. of Broussard, J.).) Persons who have been convicted of death-eligible first degree murder are no more blameworthy than those convicted of the "excluded" categories of first degree murder. The California death penalty scheme does not meet the qualitative narrowing prong of the *Furman* mandate and is unconstitutional for this reason as well.

4. California's death penalty is unconstitutional because the special circumstances were not enacted by the legislature

The Supreme Court specifically directed that legislatures devise the narrowing circumstances. Yet, California's special circumstances were enacted by a series of voter initiatives, each increasing the number of special circumstances. Some of these initiatives overturned earlier decisions by this Court limiting the scope of the special circumstances. In short, California violates this third prong of the *Furman* mandate.

In *Zant v. Stephens, supra*, 462 U.S. at p. 878, the Supreme Court stated that its "cases indicate . . . that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." In *Lowenfield v. Phelps* (1998) 484 U.S. 231, 244, the Supreme Court, citing *Zant*, emphasized that narrowing for purposes of death-eligibility is accomplished based upon an "objective legislative definition." This Court has acknowledged that *Furman* provides a mandate directed to the state legislatures. (*People v. Bacigalupo, supra*, 6 Cal.4th at p. 465.)

The plurality in *Gregg* held that the post-*Furman* Georgia death penalty scheme was constitutional because "[n]o longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines." (*Gregg v. Georgia, supra*, 428 U.S. at pp. 206-207 (plur. opn.).) And, it observed that the specifications of punishments for

crimes are "peculiarly questions of legislative policy." (*Id.* at p. 176.) "The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." (*Id.* at p. 186.) The plurality in *Gregg* made reference to the "the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction." (*Id.* at pp. 186-187.) The Ninth Circuit has observed that "*Gregg* is replete with references to the peculiarly legislative character of sentencing determinations." (*United States v. Harper* (9th Cir. 1984) 729 F.2d 1216, 1225.)

Although the principles enunciated in *Gregg* were discussed in the context of deferring to legislative judgments as to punishment, they are "just as germane to the question of *where* the required guidelines must come from" since "[i]f the 'will and . . . moral values of the people,' [*Gregg v. Georgia*, *supra*, 428 U.S. at p. 175] are particularly important in sentencing decisions, and if specification of punishments is therefore peculiarly a legislative function, then specifying the circumstances under which someone may be put to death must also be a function of the elected representatives of the people." (*United States v. Harper*, *supra*, 729 F.2d at p. 1225, italics in original.) It is for these reasons that "[t]he Court has thus

plainly required that guidelines be expressly articulated *by the legislature* in the statute authorizing the death penalty. [*Gregg v. Georgia*, *supra*, 428 U.S. at p. 192]." (*Ibid.*, italics in original.) As the federal Government conceded in *Harper*: "The conclusion that the Constitution requires legislative guidelines in death penalty cases is thus inescapable." (*Id.* at pp. 1225-1226.)

In accord with the *Gregg* directive, the California Legislature created the 1977 death penalty scheme. (See *People v. Green, supra,* 27 Cal.3d at p. 49.) As discussed in Argument X.C.2, *supra*, because the 1977 death penalty scheme was deemed not "tough" enough by certain legislators, in 1978, they turned to the electorate to accomplish what the legislative process did not acheive. As discussed below, legislation typically undergoes hearings, data-gathering and constitutional analysis prior to enactment, while voter initiatives do not involve such processes. Through 2000, the initiative process has been used to increase the number and broaden the scope of the special circumstances in California. The scheme under which Mr. Weaver was sentenced the death was not created and defined by the legislature as constitutionally required by the *Furman* mandate, but instead by the political initiative process. Such a capital punishment scheme is unconstitutional.

The legislative power of the State of California is vested by the California Constitution in the California Legislature. (Cal. Const., art. 4,

§1.) The California Constitution reserves the power of initiative to the people. (*Ibid.*) "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." (Cal. Const., art. 2, § 8(a).) The California Legislature can amend or repeal a statute enacted by initiative, but only if it is approved by the electors. (Cal. Const., art. 2, § 10(c).)

With the enactment of the 1978 Briggs Initiative, the Legislature's power to define the parameters of California's death penalty scheme was stripped away. The Legislature has no independent means of assuring that California's death penalty scheme satisfies the narrowing function without obtaining voter approval. Nevertheless, although the California Constitution authorizes the use of voter initiatives to enact statutes, the process cannot be used to evade constitutional mandates. (See, e.g., *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 622 [holding that the judiciary has limited power to revise or reform voter initiative statutes to assure constitutionality].)

California's initiative process has been subject to considerable abuse, and that abuse has been the subject of considerable criticism by legal scholars and some members of this Court. Among the vices of state-wide initiatives, commentators have highlighted a number of features that are antithetical to the legislative process. One is the lack of structural safeguards that are indispensable to responsible law-making.

> In the initiative process, the voter is only partially legislator. Voters generally are not permitted to participate in the drafting of initiatives, nor may they amend the measure, as legislators can. There are no hearings, markup, floor debate, or conference between the two houses to work out technical issues or modify the bill to make it more acceptable. Sponsors of initiatives rarely circulate their proposals before the petition phase, and once this phase begins, the language of the measure cannot change. Voters instead face an initiative crafted entirely by the sponsors on which they may only cast a "yes" or "no" vote. They may in fact favor the concept behind the initiative but object to some specific parts of the proposition.

(Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process* (1995) 66 U. Colo. L.Rev. 13, 43-44 (hereafter Magleby); see also Fountaine, *Lousy Lawmaking: Questioning the Desireability and Constitutionality of Legislating By Initiative* (1988) 61 S. Cal. L.Rev. 733, 743-44 (hereafter Fountaine); Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere* (1998) 34 Willamette L.Rev. 421, 435-37 (hereafter Frickey); Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy* (2003) 56 Vand. L.Rev. 395, 437-38, 447-49 (hereafter Staszewski).)

Legal scholars point out that voter confusion is endemic to the initiative process. It is caused both by the complexity of the initiatives, which frequently cover multiple subjects, and the growing number of propositions on state-wide ballots. One commentator observed:

> [T]he text of many ballot pamphlets . . . is written at a level of difficulty beyond most voters' level of education. Ballot pamphlets have been described as "50 or 60 pages of absolutely impenetrable prose." One study of California ballot pamphlets between 1974 and 1980 found that the level of education that was required to understand the pamphlets varied from two years of college to two years of graduate school, while the average voter had completed only thirteen years of school. In addition, the length of ballot measures is often very unwieldy. Two California ballot initiatives provide examples. Proposition 18, the 1972 anti-obscenity initiative, contained a total of 104 sections and subsections. Proposition 9, the Political Reform Act of 1974, contained 11 chapters and 215 sections.

(Fountaine, *supra*, 61 S. Cal. L. Rev. at p. 740; see also Eule, *Judicial Review of Direct Democracy* (1990) Yale L.J. 1503, 1516-17 [observing the large number of initiatives that are typically placed on a single ballot].)

This confusion is a structural flaw in the initiative process:

> First, although ballot measures may be approved or rejected by the electorate, the initiative proponents are the driving force behind drafting their specific text, qualifying them for the ballot, and lobbying the electorate to vote in their favor. Second, the initiative proponents are typically precluded from amending the text of a measure once their petitions have been circulated, even if potential errors, ambiguities, or "collateral consequences" are brought to their attention prior to the election. Finally, there are few procedures in place to require structured deliberation about the meaning or advisability of a proposed measure and virtually no formal mechanisms for binding the initiative proponents to what they say. Even when the initiative proponents do not overtly mislead the electorate about the intended consequences of their measure, the same structural features increase the risk

> that successful ballot measures will have collateral consequences that were never anticipated or approved by the voters.

(Staszewski, *The Bait-and-Switch In Direct Democracy* (2006) 2006 Wisc. L.Rev. 17, 32-33; see also Fountaine, *supra*, 61 S. Cal. L.Rev. at pp. 739-740, 744; Goldberg, *Facing the Challenges: A Lawyer's Response to Anti-Gay Initiatives* (1994) 55 Ohio St. L.J. 665, 670-72; Magleby, *supra*, 66 U. Colo. L.Rev. at pp. 39-40; Schacter, *The Pursuit of 'Popular Intent:' Interpretive Dilemmas in Direct Democracy* (1995) 105 Yale L.J. 107, 129, 136-137, 157-158 (hereafter Schacter); see generally Lowenstein, *California Initiatives and the Single-Subject Rule* (1983) 30 UCLA L.Rev. 936 [arguing that California's "single-subject" rule for ballot initiatives nonetheless permits passage of initiatives with multiple purposes and effects]).

Twenty-two years ago, Justice Mosk warned of these very dangers:

> "There are two factors which greatly inhibit [the electorate's] thoughtful consideration of the issues presented by all but the most simple initiative: the complexity of the ballot measure and the nature of the political campaign waged in its behalf." [Citation.] When a ballot proposal is lengthy "only the most diligent voter [will] wade through [it]," [citation], the result being a "superficial intellectual exercise that leaves voters vulnerable to emotional – and perhaps misleading – advertising." [Citation.]

(*In re Lance W.* (1985) 37 Cal.3d 873, 910 (dis. opn. Mosk, J.), quoting *Note, The California Initiative Process: A Suggestion for Reform* (1975) 48 So. Cal. L.Rev. 922, 934, 936.)

Furthermore, the reliability of outcomes in the initiative process is plagued by voter ignorance and apathy, which is, in no small degree, a function of the complexity of the ballot proposals.

> The comprehensive study of the California initiative process performed by the California Commission on Campaign Financing concluded flatly that "[v]ery few people actually read initiative texts, and their legalese constitutes an intimidating part of the [[[ballot] pamphlet." [Citation.] A separate study by the California Policy Seminar reported a voter survey reflecting that less than seventeen percent of voters said that they "'usually' read the legal text." [Citation.] [¶] . . . [¶] [T]here are substantial questions about the usage and value of ballot pamphlets. Ballot pamphlets clearly command more readers than does statutory language. However, estimates of the extent to which voters read these pamphlets vary greatly. Both Magleby and the recent California Policy Seminar study concluded that most voters do not use ballot pamphlets. [Citation.] Some studies are more optimistic, placing the percentage between thirty percent and sixty percent of those who vote. [Citation.] In either event, it would appear that some substantial percentage of voters do not read the material. [Citation.]
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(Schacter, *supra*, 105 Yale L.J. at pp. 139, 142-143, alterations in original; see also Fountaine, *supra*, 61 S. Cal. L.Rev. at pp. 740-742.) In *Lance W., supra*, Justice Mosk voiced his objection to aspects of the initiative process that resulted in an ill-informed, confused and politically vulnerable electorate. (37 Cal.3d at p. 910 (dis. opn. of Mosk, J.).) He also pointed out that similar flaws had been identified nearly 30 years earlier:

> "[A] proposition may contain 20 good features, but have one bad one secreted among the 20 good ones. The busy voter does not have the time to devote to the study of long, wordy, propositions and must rely upon such sketchy information as may be received through the press, radio or picked up in

> general conversation. If improper emphasis is placed upon one feature and the remaining features ignored, or if there is a failure to study the entire proposed amendment, the voter may be misled as to the over-all effect of the proposed amendment."

(*Ibid.*, quoting Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 2, 1948), argument in favor of Prop. 10, p. 8 [also quoted in *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 267] (dis. opn. of Mosk, J.).)

Typically, highly-charged issues are the subject of state-wide propositions. As a result of the campaign process, passage or defeat cannot necessarily be read as an informed electoral endorsement of the initiative or its myriad provisions:

> Broad, visceral appeals like those deployed in political advertisements [for ballot proposals] forcefully distract the electorate from the arcane, albeit potent, details of laws . . . . The combined force of visceral imagery and language [of the proposal] that is both complex and ambiguous . . . militates in favor of a narrow construction of the law, one that declines to permit ambiguous language to work major changes in the law when there are strong reasons to doubt that voters considered and approved specific changes.

(Schacter, *supra*, 105 Yale L.J. at p. 158.) The 1978 death penalty initiative process was fraught with such abuses. This Court has acknowledged that the voters were misled by the "political rhetoric" of the ballot initiative that created the current death penalty scheme:

> [T]he proponents of the 1978 initiative asserted that "[if] you were killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, that criminal would not receive the death penalty. Why? Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would." [¶] The statement is doubly misleading. Proposition 7 did not and could not constitutionally render every murderer subject to the death penalty.

(*Carlos v. Superior Court*, *supra*, 35 Cal.3d at p. 143, fn. 11.)

The vulnerability of the electorate is exacerbated by the degree to which powerful financial interests, whose stake in the outcome is often unknown to voters, dominate the initiative process:

> The "initiative industry" has become more sophisticated, [citation] and well-financed, concentrated interests have begun to play a dominant role in the initiative arena. One recent study, for example, reflects that business interests made two-thirds of all contributions to initiative campaigns in California in 1990 and eighty-three percent of all contributions to the eighteen most expensive initiative campaigns in that state between 1952 and 1990.

(Schacter, *supra*, 105 Yale L.J. at p. 128, citing Magleby, *Direct Legislation in the American States*, in Referendums Around the World: The Growing Use of Direct Democracy (1994) pp. 218, 243, 244; see also Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy* (1996) 1996 Ann. Surv. Am. L. 477, 519; Staszewski, *Rejecting the Myth*, *supra*, 56 Vand. L.Rev. at pp. 420-428.)

The frequent reliance on the initiative process to resolve vexing political questions diminishes legislative responsibility and undermines the integrity of our representative form of government.

> [D]irect democracy goes too far in checking the legislature's power by providing a means for the public to sidestep the legislature and enact its own laws. The knowledge that any decision may be overturned by the voters will not encourage responsible behavior on the part of legislators. They may be discouraged from seeking optimal solutions when they foresee that their efforts will be disregarded. The legislators are not likely to spend the amount of time and effort necessary to fully research, discuss, and evaluate issues when they perceive that their efforts will be disregarded and their decisions overturned at the next popular election.
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> This negative effect on the legislature is exemplified in California, which has been dominated by initiative lawmaking in the last generation. Indeed, one California legislator has stated that "when [an initiative process] exists, legislators sometimes abdicate their responsibilities by relying on a public vote to do their work. [L]egislative initiatives are sometimes passed as a way to get off the hook and pass the ultimate responsibility on to the grater forum." The California legislature "has become a reactor rather than an innovator — dealing with the aftereffects of initiatives already enacted or trying to anticipate those in the pipeline."

(Fountaine, *supra*, 61 S. Cal. L.Rev. at p. 755, citing League of Women Voters of California, Initiative and Referendum in California: A Legacy Lost? (1984), pp. 119-120, quoting then-Senator Bill Lockyer (D. Hayward).)

Individually and collectively, these flaws lead to the conclusion that the California initiative process as it affects California's death penalty scheme is unconstitutional under a republican government.

> [A] court faced with interpreting the republican government guarantee should consider two factors: the definition of 'republican' and the policies underlying the Guaranty Clause. Applying these factors to the question of whether direct democracy violates the guarantee, it is clear that direct democracy does not possess the characteristics which republican government requires. Direct democracy lacks the representative character that is crucial to the definition of "republican," and it undermines the policies of the guarantee to provide for the uniformity of state governments and to protect against those that are oppressive. Thus, direct democracy as a way of adopting laws and constitutional amendments should be declared unconstitutional.

Fountaine, *supra*, 61 S. Cal. L.Rev. at p. 776.

"The point of *Furman* was to require the legislatures to take responsibility for defining, for the community, who are the worst murderers." (Shatz & Rivkind, *supra,* 72 N.Y.U. L.Rev. at p. 1340.) Ever since the 1977 law was replaced by the 1978 initiative, the California Legislature has not exercised this responsibility. The initiative process prohibits legislators from directly narrowing the death penalty statute.

As a result, California is saddled with a scheme that renders 9 out of 10 individuals convicted of first degree murder death-eligible under criteria that have no relation to the circumstances of the crime. The decision as to which of these death-eligible offenders will actually face the death penalty is left to the local prosecutor, who has unlimited discretion. (See *People v.*

Adcox, supra, 47 Cal.3d at pp. 275-276 (conc. opn. of Broussard, J.).) Thus, California's scheme is characterized by the same arbitrariness and capriciousness as found unconstitutional in *Furman*.

E. This Court Has Not Properly And Fully Addressed These Grave Constitutional Issues

This Court has routinely rejected challenges arguing that the California death penalty fails to genuinely narrow the class of death-eligible offenders in violation of the United States and California Constitutions. (See, e.g., *People v. Jones* (2003) 30 Cal.4th 1084, 1127-1128; *People v. Michaels* (2002) 28 Cal.4th 486, 541; *People v. Arias* (1996) 13 Cal.4th 92, 186-187; *People v. Stanley* (1995) 10 Cal.4th 764, 842-843; *People v. Crittenden* (1994) 9 Cal.4th 83, 154-156; *People v. Wader* (1993) 5 Cal.4th 610, 669-670.) However, this Court has never addressed the empirical data, which demonstrates the death sentence ratios in California are equivalent to, or more arbitrary than, the death sentence ratios found unconstitutional in *Furman*. This Court has never appropriately addressed the other requirement that death penalty schemes qualitatively narrow the class of death-eligible offenders. Moreover, beyond acknowledging that the 1978 initiative was "doubly misleading" (*Carlos v. Superior Court, supra*, 35 Cal.3d at p.143, fn. 11), this Court has never addressed the fact that the *Furman* mandate requires the narrowing circumstances be created

and defined by the Legislature, not by voter initiative. Accordingly, this Court's prior decisions do not foreclose the claims raised here.

The constitutional deficiencies described above had a very real effect on Mr. Weaver's case. He was "eligible" for death because of the breadth of the felony-murder special circumstances. Under this scheme, where so many individuals facing murder charges are death-eligible, it is the prosecutor who ultimately decides whether the crime is appropriate to charge as a capital case. (See *People v. Adcox*, *supra,* 47 Cal.3d at pp. 275-276 (conc. opn. of Broussard, J.).) Because there are no uniform guidelines channeling prosecutorial discretion, the system has become as "arbitrary and capricious" as the pre-*Furman* death penalty schemes. Indeed, the prosecutor in Mr. Weaver's case improperly exercised that discretion in seeking the death penalty for a felony murder, against a defendant with no prior history of serious violence, no juvenile offenses and no prior felony convictions. The Supreme Court recognized long ago that if the administration of the death penalty is to be even minimally rational, assuring that the death-eligible class is properly limited is a necessary first step.

California's death penalty scheme constitutes a profound undermining of the *Furman* mandate. As Shatz and Rivkind concluded, this Court will either "have to enforce the *Furman* principle by holding California's scheme unconstitutional, or it will have to abandon that

principle and, with it, any pretense that the Constitution requires the death penalty to be administered in an evenhanded and nonarbitrary manner." (Shatz & Rivkind, *supra*, 72 N.Y.U. L.Rev. at p. 1343.) The former option is compelled by the empirical data, the Supreme Court's jurisprudence, this Court's holdings, fundamental fairness, justice, and the United States and California Constitutions.

For all of these reasons, individually and collectively, Penal Code section 190.2 is unconstitutional. Because Mr. Weaver was sentenced to death under this unconstitutional death penalty scheme, his death sentence must be reversed.

XI. MR. WEAVER'S DEATH SENTENCE IS INVALID BECAUSE, AS APPLIED, PENAL CODE SECTION 190.3, SUBDIVISION (a) ALLOWS FOR THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY

As applied, Penal Code section 190.3, subdivision (a) (hereafter factor (a)) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I of the California Constitution. It has been employed in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with those deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a) directs the jury to consider in aggravation the "circumstances of the crime." CALJIC No. 8.85 (5th ed. 1988), which was followed by the trial court in this case (12 RT 1333), instructs that, at the penalty phase, the sentencer "shall consider, take into account and be guided by . . . [t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself. (*People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88, par. 3 (1989 Rev.) (5th ed. 1988).)

The Court has allowed an extraordinary expansion of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[37] or having had a "hatred of religion,"[38] or threatened witnesses after his arrest,[39] or disposed of the victim's body in a manner that precluded its recovery.[40] As Mr. Weaver explains in Argument V above, it also is the basis for admitting evidence under the rubric of "victim impact," which results in a penalty trial dominated by an overwhelming sense of the tragedy of the victims' deaths and the trauma and suffering of the survivors, and, therefore, "risk[s] a verdict impermissibly based on passion, not deliberation." (See *Payne v. Tennessee, supra*, 501 U.S. at p. 836 (conc. opn. of Souter, J.).)

The purpose of section 190.3, as a whole, is to inform the sentencer of the factors to be considered in assessing the appropriate penalty. Although factor (a) survived an earlier *facial* Eighth Amendment challenge in *Tuilaepa v. California, supra,* 512 U.S. at pp. 978-980, factor (a), *as applied*, is arbitrary and contradictory in violation of the guarantee of due

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[37] (*People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10.)

[38] (*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582.)

[39] (*People v. Hardy* (1992) 2 Cal.4th 86, 204.)

[40] (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35.)

process of law and the Eighth Amendment's requirement for heightened reliability in capital cases.

The prosecution routinely uses, as did the prosecutor in Mr. Weaver's case, "facts and circumstances of the crime" as the primary, and in Mr. Weaver's case, the only aggravating factor. Factor (a) has been applied in such a "wanton and freakish" manner that almost every circumstance attending any murder can be, and has been, characterized by a prosecutor as "aggravating." Thus, prosecutors have been permitted to argue as a "circumstance of the crime" aggravating factor:

a. That the defendant struck many blows and inflicted multiple wounds[41] or that the defendant killed with a single execution-style wound.[42]

b. That the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest,

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[41] (See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-3095 [defendant inflicted many blows]; *People v. Zapien*, No. S004762, RT 36-38 [same]; *People v. Lucas*, No. S004788, RT 2997-2998 [same]; *People v. Carrera*, No. S004569, RT 160-161 [same].)

[42] (See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 [defendant killed with single wound]; *People v. Frierson*, No. S004761, RT 3026-3027 [same].)

sexual gratification)[43] or that the defendant killed the victim without any motive at all.[44]

c. That the defendant killed the victim in cold blood[45] or that the defendant killed the victim during a savage frenzy.[46]

d. That the defendant engaged in a cover-up to conceal his crime[47] or that the defendant did not engage in a cover-up.[48]

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[43] (See, e.g., *People v. Howard,* No. S004452, RT 6772 [money]; *People v. Allison*, No. S004649, RT 968-969 [same]; *People v. Belmontes*, No. S004467, RT 2466 [eliminate a witness]; *People v. Coddington*, No. S008840, RT 6759-6760 [sexual gratification]; *People v. Ghent*, No. S004309, RT 2553-2555 [same]; *People v. Brown*, No. S004451, RT 3543-3544 [avoid arrest]; *People v. McLain*, No. S004370, RT 31 [revenge].)

[44] (See, e.g., *People v. Edwards*, No. S004755, RT 10544 [defendant killed for no reason]; *People v. Osband*, No. S005233, RT 3650 [same]; *People v. Hawkins*, No. S014199, RT 6801 [same].)

[45] (See, e.g., *People v. Visciotti*, No. S004597, RT 3296-3297 [defendant killed in cold blood].)

[46] (See, e.g., *People v. Jennings*, No. S004754, RT 6755 [defendant killed victim in savage frenzy (trial court finding)].)

[47] (See, e.g., *People v. Stewart*, No. S020803, RT 1741-1742 [defendant attempted to influence witnesses]; *People v. Benson*, No. S004763, RT 1141 [defendant lied to police]; *People v. Miranda*, No. S004464, RT 4192 [defendant did not seek aid for victim].)

[48] (See, e.g., *People v. Adcox*, No. S004558, RT 4607 [defendant freely informed others about crime]; *People v. Williams*, No. S004365, RT 3030-3031 [same]; *People v. Morales*, No. S004552, RT 3093 [defendant failed to engage in a cover-up].)

e. That the defendant made the victim endure the terror of anticipating a violent death[49] or that the defendant killed instantly without any warning.[50]

f. That the victim had children[51] or that the victim had not yet had a chance to have children.[52]

g. That the victim struggled prior to death[53] or that the victim did not struggle.[54]

h. That the defendant had a prior relationship with the victim[55] or that the victim was a complete stranger to the defendant.[56]

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[49] (See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11125; *People v. Hamilton*, No. S004363, RT 4623.)

[50] (See, e.g., *People v. Freeman*, No. S004787, RT 3674 [defendant killed victim instantly]; *People v. Livaditis*, No. S004767, RT 2959 [same].)

[51] (See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) [victim had children].)

[52] (See, e.g., *People v. Carpenter*, No. S004654, RT 16752 [victim had not yet had children].)

[53] (See, e.g., *People v. Dunkle*, No. S014200, RT 3812 [victim struggled]; *People v. Webb*, No. S006938, RT 5302 [same]; *People v. Lucas*, No. S004788, RT 2998 [same].)

[54] (See, e.g., *People v. Fauber*, No. S005868, RT 5546-5547 [no evidence of a struggle]; *People v. Carrera*, No. S004569, RT 160 [same].)

[55] (See, e.g., *People v. Padilla*, No. S014496, RT 4604 [prior relationship]; *People v. Waidla*, No. S020161, RT 3066-3067 [same]; *People v. Kaurish* (1990) 52 Cal.3d 648, 717 [same].)

These examples show that absent any limitation on factor (a), different prosecutors have urged juries to find aggravating factors and place them on death's side of the scale based on squarely conflicting circumstances.

The use of factor (a) to embrace facts that are inevitably present in every homicide, but employed indiscriminately and often in a contradictory fashion, also contributes to the arbitrary and capricious imposition of the death penalty in this state. For example:

a. *The age of the victim.* Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[57]

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[56] (See, e.g., *People v. Anderson*, No. S004385, RT 3168-3169 [no prior relationship]; *People v. McPeters*, No. S004712, RT 4264 [same].)

[57] (See, e.g., *People v. Deere*, No. S004722, RT 155-156 [victims were young, ages 2 and 6]; *People v. Bonin*, No. S004565, RT 10075 [victims were adolescents, ages 14, 15, and 17]; *People v. Kipp*, No. S009169, RT 5164 [victim was a young adult, age 18]; *People v. Carpenter*, No. S004654, RT 16752 [victim was 20], *People v. Phillips*, (1985) 41 Cal.3d 29, 63 [26-year-old victim was "in the prime of his life"]; *People v. Samayoa*, No. S006284, XL RT 49 [victim was an adult "in her prime"]; *People v. Kimble*, No. S004364, RT 3345 [61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"]; *People v. Melton*, No. S004518, RT 4376 [victim was 77]; *People v. Bean*, No. S004387, RT 4715-4716 [victim was "elderly"].)

b. *The method of killing.* Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[58]

c. *The motive of the killing.* Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[59]

d. *The time of the killing.* Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[60]

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[58] (See, e.g., *People v. Clair*, No. S004789, RT 2474-2475 [strangulation]; *People v. Kipp*, No. S004784, RT 2246 [same]; *People v. Fauber*, No. S005868, RT 5546 [use of an ax]; *People v. Benson*, No. S004763, RT 1149 [use of a hammer]; *People v. Cain*, No. S006544, RT 6786-6787 [use of a club]; *People v. Jackson*, No. S010723, RT 8075-8076 [use of a gun]; *People v. Reilly*, No. S004607, RT 14040 [stabbing]; *People v. Scott*, No. S010334, RT 847 [fire].)

[59] (See, e.g., *People v. Howard*, No. S004452, RT 6772 [money]; *People v. Allison*, No. S004649, RT 969-970 [same]; *People v. Belmontes*, No. S004467, RT 2466 [eliminate a witness]; *People v. Coddington*, No. S008840, RT 6759-6761 [sexual gratification]; *People v. Ghent*, No. S004309, RT 2553-2555 [same]; *People v. Brown*, No. S004451, RT 3544 [avoid arrest]; *People v. McLain*, No. S004370, RT 31 [revenge]; *People v. Edwards*, No. S004755, RT 10544 [no motive at all].)

[60] (See, e.g., *People v. Fauber*, No. S005868, RT 5777 [early morning]; *People v. Bean*, No. S004387, RT 4715 [middle of the night]; *People v. Avena*, No. S004422, RT 2603-2604 [late at night]; *People v. Lucero*, No. S012568, RT 4125-4126 [middle of the day].)

e. *The location of the killing.* Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed in her own home, in a public bar, in a city park or in a remote location.[61]

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 362-363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) As the Wyoming Supreme Court has explained, an "aggravating" factor is "meaningless" if it is merely part and parcel of the crime itself since, by definition, an "aggravating" factor must be a "'circumstance attending the commission of a crime . . . which increases its guilt or enormity or adds to its injurious consequences, *but which is above and beyond the essential constituents of*

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[61] (See, e.g., *People v. Anderson*, No. S004385, RT 3167-3168 [victim's home]; *People v. Cain*, No. S006544, RT 6787 [same]; *People v. Freeman*, No. S004787, RT 3674, 3710-3711 [public bar]; *People v. Ashmus*, No. S004723, RT 7340-7341 [city park]; *People v. Carpenter*, No. S004654, RT 16749-16750 [forested area]; *People v. Comtois*, No. S017116, RT 2970 [remote, isolated location].)

the crime . . . itself.'" (*Engberg v. Meyer, supra,* 820 P.2d at p. 90, quoting Black's Law Dictionary (5th ed. 1979) p. 60, italics in original.)

This Court has routinely denied all challenges to the constitutionality of factor (a), citing the Supreme Court's decision in *Tuilaepa.* (See, e.g., *People v. Ray, supra,* 13 Cal.4th at p. 358; *People v. Lucero* (2000) 23 Cal.4th 692, 726-727.) Importantly, *Tuilaepa* does not control the outcome here. As Justice Blackmun noted, the Supreme Court's decision in *Tuilaepa* did not "give[] the California [death penalty] system a clean bill of health." (*Tuilaepa v. California, supra,* 512 U.S. at p. 993 (dis. opn. of Blackmun, J.).)

In *Tuilaepa*, the Supreme Court addressed whether three of the section 190.3 sentencing factors, including factor (a), were "unconstitutionally vague" under the Eighth Amendment. The Supreme Court explained that its capital jurisprudence "under the Eighth Amendment address[es] two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision." (*Tuilaepa v. California, supra,* 512 U.S at p. 975.) It acknowledged that section 190.3 contains the selection factors in the California death penalty scheme. (*Id.* at pp. 975-976.) The Court then held that factor (a) was not unconstitutional *on its face* because its "capital jurisprudence has established that the sentencer should consider the circumstances of the crime in deciding

whether to impose the death penalty." (*Id.* at p. 976, citing *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.)

This holding does not address the issues raised here as to whether factor (a) is constitutional when applied in a manner that allows the prosecutor to argue the facts of every murder are aggravating. As Justice Blackmun pointed out in his dissent, the majority in *Tuilaepa* "leaves the door open to a challenge to the application of one of these factors in such a way that the risk of arbitrariness is realized." (*Id.* at pp. 993-994 (dis. opn. of Blackmun, J.).) Mr. Weaver has shown that factor (a) creates "the risk of arbitrariness" as it is used by California prosecutors.

In *Woodson v. North Carolina, supra*, the Supreme Court held that death penalty schemes that require the death penalty in all first degree murder cases are unconstitutional. (See *Woodson v. North Carolina, supra,* 428 U.S. at pp.303-305, citing *Tuilaepa, supra,* 512 U.S. at p. 972.) Factor (a) as applied allows the prosecution to argue that the facts of every first degree murder case require the death penalty. The result in California is similar to the result condemned in *Woodson.*

Thus, the question left open in *Tuilaepa* can now be answered. A capital sentencing scheme is invalid if the state fails "to tailor and apply its laws in a manner that avoids the arbitrary and capricious infliction of the death penalty." (*Godfrey v. Georgia, supra*, 446 U.S. at p. 428.) Not only has this Court declined to enforce this constitutional mandate, its expansion

of the meaning of factor (a) leaves sentencers "with the kind of open-ended discretion which was held invalid in *Furman*." (*Maynard v. Cartwright, supra,* 486 U.S. at pp. 361-362.)

The vagueness and overbreadth of factor (a) as applied results in death sentences that are arbitrary and capricious in violation of the Eighth and Fourteenth Amendments, as well as article I of the California Constitution. Factor (a) played the defining role at Mr. Weaver's penalty phase. This Court must now reverse his death sentence.

XII. CALIFORNIA'S DEATH PENALTY SCHEME HAS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING

As shown above, California's death penalty statute does nothing to narrow the pool of persons convicted of murder to those most deserving of death in either its "special circumstances" provision (Pen. Code § 190.2) or in its sentencing guidelines (Pen. Code § 190.3).

In this Argument, Mr. Weaver contends that California's statute contains none of the safeguards common to other capital punishment sentencing schemes to guard against the arbitrary imposition of death. Sentencers do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions (neither of which was admitted in this case), sentencers are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required, it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of arriving at the most consequential decision a sentencer can render – whether or not to condemn a fellow human being to death.

A. Mr. Weaver's Death Sentence Must Be Reversed Because All Essential Sentencing Factors Were Not Properly Charged And Were Not Found Beyond A Reasonable Doubt By The Sentencer

Mr. Weaver was sentenced to death under an unconstitutional death penalty scheme, which failed to require that all essential sentencing factors be charged and found by a grand jury or magistrate, and found beyond a reasonable doubt by the sentencer. Specifically, the sentencer was not required to find beyond a reasonable doubt that any aggravating circumstance existed, that any proven aggravating circumstances substantially outweighed the mitigating circumstances, or that death was the appropriate penalty. The death sentence in this case must be reversed because it offends the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as article I of the California Constitution.

1. All essential sentencing facts must be pled in a charging document and found unanimously beyond a reasonable doubt

Mr. Weaver was found guilty of murder during the commission of a robbery and a burglary (felony murder). (6 RT 713-714.) Judge Lester also found the robbery- and burglary-murder special circumstances true. (6 RT 714-715.) At the penalty phase, the prosecutor argued one statutory aggravating factor: the facts and circumstances of the crime. (See, e.g., 11 RT 1251, 1254-1263, 1276, 1287-1299.) In addition to this sole statutory factor, the prosecutor urged the court to impose the death penalty based

upon non-statutory aggravating factors, some of which the trial court relied upon in reaching its death verdict. (See, e.g., 11 RT 1251-1252 [prosecutor's argument that Mr. Weaver's had "every opportunity in life," and "didn't take advantage of all those opportunities"]; 11 RT 1266 [same]; 11 RT 1252 [prosecutor's argument that Mr. Weaver was "lucky" to come from "a fine nurturing family," but turned his back on them]; 11 RT 1253 [prosecutor's argument that Mr. Weaver committed the crime because he was "very bad person" with "a malignant heart"]; 11 RT 1266, 1272-1273 [same]; 11 RT 1276-1278 [prosecutor's argument that Mr. Weaver's low intelligence, dependent personality and struggles with school and work were not reasons for mercy].

As Mr. Weaver asserts in Argument VI, *supra*, the trial judge, consistent with the prosecutor's argument, gave aggravating weight to the mitigating circumstances of Mr. Weaver's background. (See, e.g., 12 RT 1358 [Mr. Weaver "turned his back" on his "loving, caring religious family"]; 12 RT 1354 [reframing evidence of Mr. Weaver's limited intelligence and limited capacity for thinking to conclude that Mr. Weaver "is a person of immediate gratification"]; 12 RT 1350, 1352 [framing evidence of Mr. Weaver's intellectual and psychological difficulties to conclude that Mr. Weaver was a "voluntary" truant and "voluntary[ily]" absent from work]; 12 RT 1352-1354, 1356 [reframing evidence of Mr.

Weaver's dependent personality to conclude that Mr. Weaver was attempting to "minimize" his role in the crime].)

Other than the special circumstances, none of the statutory aggravators, such as victim impact evidence, or non-statutory aggravators (listed above) were alleged in a charging document or found by a grand jury or the magistrate at a preliminary hearing.

The Supreme Court has held that a State may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence, i.e., essential facts, are pled in a charging document, submitted to the jury, and proved unanimously beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466.) The Court announced:

> "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties, [citation], trial by jury has been understood to require that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . ."

(*Id.*, at pp. 477-478, quoting 2 J. Story, Commentaries on the Constitution of the United States (4th ed. 1873), at pp. 540-541, italics and brackets in original.) The Court also stated that the requirement of a verdict "based upon proof beyond a reasonable doubt" is "the companion right." (*Id.* at p. 478.)

These constitutional protections extend to sentencing factors. Any "sentencing factor" (except for those involving prior convictions) that increases the penalty for a crime "must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey, supra,* 530 U.S. at p. 490.) These requirements apply to the factors found by a penalty phase sentencer in California. In a capital case, too much is at stake for the State to be able to dispense with the exacting burden of proof beyond a reasonable doubt, which represent our society's "profound" beliefs about the manner in which "justice [should be] administered." (*Id.* at pp. 477-478.)

The Supreme Court has held that *Apprendi* applies to sentencing determinations in death penalty cases. "Capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 589.) Recent Supreme Court decisions continue to confirm and expand application of these constitutional principles.

In *Blakely v. Washington*, the Supreme Court reiterated that "'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Blakely v. Washington* (2004) 542 U.S. 296, 301, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490.) The Court in *Blakely* confirmed "that 'an accusation which lacks any particular fact which the

law makes essential to the punishment . . . is no accusation within the requirements of the common law, and it is no accusation in reason.'" (*Id.* at pp. 301-302, quoting Bishop, Criminal Procedure (2d ed. 1987) § 87, p. 55, ellipsis in original.) The Supreme Court also held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Id.* at p. 303, italics omitted.) The Court explained:

> In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," [citation], and the judge exceeds his proper authority.

(*Id.* at pp. 303-304, quoting Bishop, *supra,* § 87, at p. 55, italics in original.)

More recently, in *United States v. Booker* (2005) 543 U.S. 220, 226-227, the Supreme Court held that the Sixth Amendment as construed in *Blakely* rendered portions of the Federal Sentencing Guidelines unconstitutional. It concluded that the right to a jury finding beyond a reasonable doubt as to the "truth of every accusation" was "equally applicable" to the Guidelines since this right had its "genesis in the ideals of our constitutional tradition." (*Id.* at pp. 238-239, quoting *Apprendi v.*

New Jersey, supra, 530 U.S. at p. 477, italics and other internal citations omitted.) The same may be said for determinations made by a penalty phase sentencer in California.

The Fifth, Sixth, and Fourteenth Amendments, and article I of the California Constitution require that the sentencer find beyond a reasonable doubt that aggravating circumstances exist, that the aggravating circumstances so substantially outweigh mitigating circumstances, and that the death penalty is appropriate. California does not require that the sentencer make any of these findings beyond a reasonable doubt. Thus, the California death penalty system is unconstitutional.

Moreover, the Supreme Court has held that the findings necessary to increase a sentence to the death penalty be alleged in an indictment or properly pled in charging documents and properly found by a grand jury or a court during a preliminary hearing. (*Jones v. United States* (1999) 526 U.S. 227, 243, fn. 6.) This charging is not required under California's death penalty scheme, rendering it unconstitutional. (See, e.g., *State v. Fortin* (N.J. 2004) 843 A..2d 974, 1027-1028 [holding that aggravating factors in a capital case must be submitted to a grand jury].) Here, none of the aggravating factors relied on by the prosecutor, other than the special circumstances, were properly pled in charging documents or found by a grand jury or magistrate during a preliminary hearing.

Finally, while the Fifth Amendment's indictment and grand jury requirements for the federal government do not apply to the states, the due process principles incorporated in the Fifth Amendment are binding on the states through the Fourteenth Amendment's Due Process Clause. (*Hurtado v. California* (1884) 110 U.S. 516.) The principles underlying the Indictment Clause of the Fifth Amendment are two-fold: the charging requirement provides notice to the defendant and the grand jury requirement interposes the public into the charging decision so that a defendant is not subject to jeopardy for a crime alleged only by the prosecution. (*United States v. Cotton* (2002) 535 U.S. 625, 634; *Stirone v. United States* (1960) 361 U.S. 212, 217 [finding "[d]eprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error"].) In California, these due process guarantees are met through either the process of preliminary hearing and information or by grand jury hearing and indictment. (*Hurtado v. California*, *supra*, 110 U.S. at p. 538.)

Because the aggravating factors used against Mr. Weaver were not presented to a magistrate at the preliminary hearing or otherwise found to have sufficient evidentiary support to bring him to trial, Mr. Weaver's due process rights were violated. Similarly, because the non-statutory aggravators were not alleged in a charging document, Mr. Weaver was

deprived of his constitutionally mandated right to notice. These failures render Mr. Weaver's death sentence unconstitutional.

2. The lack of a penalty phase burden of proof violated Mr. Weaver's constitutional right

Mr. Weaver's death sentence was imposed pursuant to a statutory scheme that does not require (except as to prior criminality) that aggravating circumstances be proved beyond a reasonable doubt, or that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt, or that death is the appropriate sentence beyond a reasonable doubt, or that the sentencer be instructed on any burden of proof when deciding the appropriate penalty. (See *Santosky v. Kramer* (1982) 455 U.S. 745, 754-767; *In re Winship* (1970) 397 U.S. 358.) Under Supreme Court precedent, the prosecutor bears the burden of proving beyond a reasonable doubt the requisite findings that one or more aggravating factors are present, that such factors outweigh the mitigating factors, and that death is the appropriate penalty. California sentencers are not required to adhere to this constitutional requirement.

a. A burden of proof is required to provide the sentencer with the guidance necessary to apply the death penalty evenhandedly

Constitutionally, some burden of proof must be articulated to ensure that sentencers faced with similar evidence will return similar verdicts so that the death penalty is applied evenhandedly. "[C]apital punishment

[must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) The burden of proof is one of the most fundamental concepts in our system of justice, and any error in articulating it is reversible error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-281.)

This is no less true when the life or death decision is made by a judge instead of a jury. Here, the trial court stated that it would review and be guided by those instructions pertaining to the sentencing phase of the trial. (11 RT 1333, referring specifically to CALJIC Nos. 8.55 through 8.88.) Additionally, the prosecutor misstated the burden of proof, arguing that "each side [has] the equal burden of proving their case by essentially a preponderance of the evidence." (11 RT 1250.)

Instructions given without a burden of proof fail to provide the sentencer with the guidance legally required for administration of the death penalty. Without an instruction on the burden of proof, the sentencer may not use the correct standard, and may instead apply the standard he or she believes appropriate in any given case. The same is true where there is no burden of proof, but nothing informs the sentencer of this fact. Sentencers who believe the burden should be on the defendant to prove mitigation in the penalty phase will continue to abide by that belief if not instructed to do otherwise. The constitutionally unacceptable possibility that a fact finder would vote for the death penalty because of a misallocation of a nonexistent

burden of proof violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I of the California Constitution.

Even assuming the "normative" nature of penalty phase determinations, (*People v. Hayes* (1990) 52 Cal.3d 577, 643), it is inevitable that some sentencers will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that sentencers respond uniformly. The result is truly a system in which "this unique penalty" is imposed "wantonly and . . . freakishly" (see *Furman v. Georgia, supra,* 408 U.S. at p. 310 (conc. opn. of Stewart, J.)), and the "height of arbitrariness," (*Mills v. Maryland* (1988) 486 U.S. 367, 374), that one defendant should live and another die simply because one juror can break a tie in favor of a defendant and another can do so in favor of the prosecution on the same facts, or that judges can tip the scales in favor of life or death with no uniformly applicable standards to guide them. (See *Eddings v. Oklahoma, supra,* 455 U.S. at p. 112.)

In cases in which the aggravating evidence and the mitigating evidence are balanced, it is unacceptable under the Eighth and Fourteenth Amendments, as well as article I of the California Constitution, that one man should live and another die simply because one fact finder assigns the burden of proof to the prosecution, and another assigns it to the defendant.

(See *O'Neal v. McAninch* (1995) 513 U.S. 432, 435-436 [when the court is in "equipoise as to the harmlessness of error" the defendant "must win"].)

The Supreme Court, in *Kansas v. Marsh*, *supra*, held that the Kansas statute, which requires a death verdict when the jury determines the aggravating and mitigating evidence "are in equipoise" does not offend the Constitution. (126 S.Ct. at p. 2520.) However, the Kansas capital punishment statute contains procedural safeguards, which are not part of the California scheme, including requirements that, before the sentencer may impose death, it must find unanimously and beyond a reasonable doubt the existence of any aggravating factors and that such factors are not outweighed by any mitigating factors. (*Ibid.*, citing Kan. Stat. Ann., § 21-4625.) Moreover, in *Marsh*, the question was the constitutionality of a statute that directed a death verdict in the event of a balance between aggravators and mitigators. The problem with California's statute is that it provides the sentencer with no direction regarding the burden of proof as to any of the statutory factors except for (b) and (c), and none with regard to the findings necessary before death may be imposed, which is a constitutional violation of an altogether different dimension.

The error in failing to provide instructions on the constitutionally proper burden of proof is reversible per se. (*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 279-281.) Accordingly, Mr. Weaver's sentence must be reversed.

b. The requirement of proof beyond a reasonable doubt applies to all essential findings

The Supreme Court's decisions in *Apprendi*, *Ring*, and *Blakely* hold that when a State bases an increased statutory punishment upon additional findings, the findings must be made beyond a reasonable doubt. Notwithstanding Supreme Court law holding this true, this Court has ruled that the penalty sentencer does not need to be instructed that any of its findings have to be made beyond a reasonable doubt. (See, e.g., *People v. Martinez* (2003) 31 Cal.4th 673, 700; *People v. Prieto* (2003) 30 Cal.4th 226, 262-264; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32.) These opinions are based on a misapplication of federal constitutional requirements to California's penalty scheme and thus should be reconsidered and overruled by this Court.

This Court has held that "once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense." (*People v. Anderson* (2001) 25 Cal.4th 543, 589-590, fn. 14, italics omitted.) Because any finding of aggravating factors during the penalty phase does not increase the penalty for a crime beyond the prescribed "statutory maximum," this Court has found that neither *Apprendi* nor *Ring* impose new constitutional requirements, and/or have any bearing on the penalty phase. (*People v.*

Prieto, *supra*, 30 Cal.4th at pp. 262-263.) This determination is based on a faulty analysis of California's death penalty scheme.

Under *Apprendi* and *Blakely*, any fact that increases the penalty for a crime must be submitted to the sentencer, and proved beyond a reasonable doubt. "[T]he relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) In analyzing California's death penalty scheme, this Court has improperly elevated form over effect.

California's death penalty scheme is not a two-step process, as described by this Court, where the only facts that increase the penalty are determined prior to the penalty phase. Instead, a California penalty determination involves several distinct steps, all of which require essential fact findings, before the "statutory maximum" of death is a possible punishment. The jury trial and due process protections set forth in *Apprendi* and *Ring* – notice, indictment or information, unanimity and proof beyond a reasonable doubt – must be applied to all penalty findings in order to satisfy the Constitutions.

This Court has improperly focused its *Ring* analyses solely on one statute, Penal Code section 190.2. This statute establishes the punishments for special circumstance murders in California. In *People v. Anderson*, *supra*, 25 Cal.4th at p. 589, this Court found that section 190.2, subdivision

(a) establishes death as the statutory maximum penalty for first degree murder with a special circumstance, and thus held that *Apprendi* only applies to the special circumstance finding. This is incorrect because California's death penalty scheme is set out in a series of statutes, not just in section 190.2. (See Pen. Code, §§ 190, 190.1, 190.2, 190.3, 190.4, and 190.5.) Section 190, subdivision (a) provides: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life." Relying solely on the statutory language, the "statutory maximum" penalty for any first degree murder conviction is death. However, not all first degree murders in California are punishable by death.

Section 190.2 establishes that additional facts, beyond mere conviction for first degree murder, must be found before the death penalty can be imposed. Pursuant to that section, a defendant convicted of first degree murder is subject to the death penalty or life in prison without parole only if one or more special circumstances are found true. *Apprendi* and *Ring* apply to the special circumstance finding. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 589 & fn. 14.) However, not all first degree special circumstance murders are punishable by death in California. The death penalty scheme requires "further" additional findings before a jury can choose between life and death. Those findings are set forth in the list of

sentencing factors contained in section 190.3, the judicial interpretation of that section and the penalty phase jury instructions.

Despite this scheme, this Court has improperly held that the "eligibility" determination ends with the special circumstance finding, and that all findings made at the penalty phase merely go to the individualized "selection" determination of whether an "eligible" defendant should actually be sentenced to death. (*People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263.) This interpretation fails to take into account that the death penalty becomes a possible maximum sentence only after a series of factual findings by the sentencer.

Under California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 192), "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its severity or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88 (Rev. 1989) (5th ed. 1988).) Although the penalty phase instructions direct the sentencer to consider "the circumstances of the crime . . . and the existence of any special circumstance[s]," the sentencer must still determine whether the circumstances of the crime or the special circumstances already

established actually amount to factors in aggravation. (CALJIC No. 8.85, subd. (a).) [62]

The sentencer might decide that the circumstances of the crime are not an aggravating factor, even if the defendant had been found guilty of special circumstance murder. In that case, the defendant would not be subject to a possible death sentence, but would have to be sentenced to life without parole. Thus, "[a]t the penalty phase, the class of defendants eligible for death is again narrowed by the jury's application of a series of statutorily enumerated aggravating or mitigating factors." (*Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 924 (en banc).) The existence of one or more aggravating factors, beyond the fact of a special circumstance finding, is required before the defendant will be exposed to a greater punishment than that authorized by the guilty verdict and special circumstance finding.

In California, the only aggravating factors that may be considered by a penalty sentencer are narrowly defined by statute. (*People v. Boyd*, *supra*, 38 Cal.3d at pp. 772-774.) The prosecution may not present any

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[62] While the Legislature could have mandated that the finding of a special circumstance automatically counts as an aggravating factor to be weighed by the jury in every case, it has not done so. Instead, the sentencer is instructed to take the existence of the special circumstance "into account," together with the specific circumstances of the crime itself, before it performs its task of weighing the aggravators against the mitigators. (CALJIC No. 8.85.)

evidence to establish any factor that is not expressly listed in the statute and the jury is instructed as to each of these factors. This Court has found *Blakely* does not apply to judicial factfinding made under California's determinate sentencing law because, unlike the Washington scheme at issue in *Blakely*, the California Legislature had not limited by statute the aggravating factors that could be considered by a judge to impose an increased sentence. (*People v. Black* (2005) 35 Cal.4th 1238, 1264.) This Court found it significant that:

> The Legislature did not identify all of the particular facts that could justify the upper term. Instead, it afforded the sentencing judge the discretion to decide, with the guidance of rules and statutes, whether the facts of the case and the history of the defendant justify the higher sentence. Such a system does not diminish the traditional power of the jury.

(*Id.* at p. 1256.)

However, even under this reasoning, California's penalty scheme is deficient. Unlike the determinate sentencing law, in California's death penalty statutes, the Legislature has identified all the particular aggravating factors that justify the imposition of capital punishment. The findings made by a penalty phase jury are more like those made by a sentencing judge under Washington's unconstitutional determinate sentencing law than those made under California's law, and are entitled to the protections established in *Apprendi* and its progeny. Therefore, the existence of any aggravating

factors must be pled in charging documents, found by a grand jury or magistrate, and determined by the sentencer beyond a reasonable doubt.

Although this Court recognized that the sentencer must make factual findings in order to consider circumstances as aggravating, it has nonetheless labeled the entire penalty phase determination as "'inherently moral and normative, not factual. . . .'" (*People v. Prieto*, *supra*, 30 Cal.4th at p. 264, quoting *People v. Rodriguez, supra,* 42 Cal.3d at p. 779.) Because of this classification, this Court has held that penalty factors are not "susceptible to a burden of proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) This Court's description of the sentencer's penalty findings as "moral" and "normative" rather than "factual" is not determinative of whether *Ring* applies. Instead, it is the effect of the sentencer's findings on the potential range of punishment that is determinative.

As Justice Scalia stated in *Ring, supra*: "[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt." (*Ring v. Arizona, supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) The findings made by the sentencer at the penalty phase certainly are essential

to impose the death penalty. Thus – no matter what this Court chooses to call such findings – they must be found beyond a reasonable doubt.

Numerous states allocate a specific burden of proof to the penalty determination.[63] Three states require that the sentencer must base any death sentence on a finding beyond a reasonable doubt that death is the

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[63] Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution. Three additional states have related provisions. (See Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 16-11-103(d) (West 1992); Del. Code Ann., tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(g) (1993); 38 Ill. Ann. Stat., 9-1(f) (1992); Ind. Code Ann., § 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann., art. 905.3 (West 1984); Md. Ann. Code art. 27, § 413(d), (f), (g) (1957); Miss. Code Ann., § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-890; Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.J. Stat. Ann., 2C:11-3c(2)(a) (West 1978); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Ohio Rev. Code Ann., § 2929.04 (Anderson 1993); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iii) (West 1982); S.C. Code Ann., §§ 16-3-20(A), (C) (Law. Co-op. 1992); S.D. Codified Laws Ann., § 23A-27A-5 (Michie 1988); Tenn. Code Ann., § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann., § 37.071(c) (Vernon 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann., § 19.2-264.4(C) (Michie 1990); Wyo. Stat. Ann., § 6-2-102(d)(i)(A), (e)(i) (Michie 1992).)

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann., § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann., § 13-703(c) (West 1989); Conn. Gen. Stat. Ann., § 53a-46a(c) (West 1985).)

Only California and four other states, Florida, Missouri, Montana, and New Hampshire, do not have similar statutory provisions.

appropriate punishment. (See Ark. Code Ann., § 5-4-603(a)(3) (Michie 1991); Wash. Rev. Code Ann., § 10.95.060(4) (West 1990); *State v. Goodman* (1979) 257 S.E.2d 569, 577.) A fourth state, Utah, has reversed a death judgment because that judgment was based on a standard of proof that was less than proof beyond a reasonable doubt. (*State v. Wood* (Utah 1982) 648 P.2d 71, 83-84.) As the experience of other states shows, the addition of a moral or normative aspect to the factfinding process does not preclude application of a burden of proof. Indeed, included in the statutory aggravating factors in Arizona are several based more on moral or normative considerations than "hard facts," yet the Supreme Court in *Ring* still found they had to be established beyond a reasonable doubt. (See, e.g., Ariz. Rev. Stat. Ann., § 13-703(F)(6) (1973) [offense committed in an especially heinous, cruel or depraved manner]; *id.* at § 13-703(G)(1) [defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired]; *id.* at § 13-703(G)(2) [defendant under unusual and substantial duress].) If findings of this nature must be found "beyond a reasonable doubt," despite their normative nature, then so must the aggravating factors listed in California's statute.

After making the distinctly factual findings as to the existence of aggravating factors and mitigating factors, the sentencer is instructed to weigh those factors. This weighing is another fact-finding task that must be

completed before a defendant is subject to the death penalty. If, and only if, the aggravating factors are "so substantial" in comparison to the mitigating factors, may the sentencer consider whether to impose the death penalty. (CALJIC No. 8.88.) If the sentencer finds that the aggravating factors do not substantially outweigh the mitigating factors, it never reaches the last step, but must impose a life sentence. (*People v. Brown, supra,* 40 Cal.3d at p. 538; CALJIC No. 8.88.) Conversely, if the sentencer finds that the aggravating factors substantially outweigh the mitigators, the defendant is then, and only then, "eligible" for the death penalty. (*People v. Brown, supra*, 40 Cal.3d at 541, fn. 13.)

If the aggravating factors substantially outweigh the mitigating factors, the sentencer must then decide whether death is "warranted" or "appropriate." As this Court has stated, "[T]he statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances." (*People v. Brown, supra,* 40 Cal.3d at p. 541.) The finding that the aggravating factors substantially outweigh the mitigating factors subjects a defendant to the possibility of a higher penalty, because it is only after this finding is made that the sentencer decides whether death is warranted or appropriate.[64]

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[64] This Court has held that despite the "shall impose" language of section 190.3, even if the sentencer determines that aggravating factors outweigh

Thus, whether the aggravating factors "substantially outweigh" the mitigating factors also must be proved beyond a reasonable doubt. *Ring* describes a substantive element of a capital offense as one that makes an increase in authorized punishment contingent on a finding of fact. In California, it is the finding that the aggravators substantially outweigh the mitigators that ultimately authorizes the sentencer to move to the final step, whether death is an appropriate penalty.

Although this Court has found that the weighing task is not purely mechanical, it still requires a factual determination. This is evidenced by the legislatively mandated automatic review by the trial court of the sentencer's weighing decision. Penal Code section 190.4, subdivision (e) requires the trial court to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented." The Legislature could not have considered the weighing of aggravators against mitigators as an inherently moral or normative process if it provided for judicial review of that process to make sure it is not contrary to the evidence presented.

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mitigating factors, it may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown*, *supra*, 40 Cal.3d at p. 541.)

Other states have concluded that *Ring* applies to the weighing of aggravating factors against mitigating factors. The Colorado Supreme Court has concluded that the "eligibility" stage continues through the first three steps of its sentencing process, including the weighing of the mitigators against the aggravators. (*Woldt v. People* (Colo. 2003) 64 P.3d 256, 264.) Only the fourth, and final step, determining whether under all the circumstances, death should be imposed, constitutes the "selection" stage. (*Ibid.*) The Colorado Supreme Court found the weighing stage to be a fact-finding stage that is required to be determined by a jury beyond a reasonable doubt. (*Id.* at p. 265.) There are no material differences between the third and fourth stages of a Colorado penalty determination and the weighing and imposition stages of a California penalty determination. Similarly, the Missouri Supreme Court has found that the weighing stage goes to "eligibility" for the death penalty and results in factual prerequisites to imposition of a death sentence. (*State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 261.)

California's death penalty scheme requires additional factual findings above and beyond those made during the guilt phase before the death penalty is an available punishment. Because these additional factual decisions are required for the increased punishment of death, they constitute findings that must be proved beyond a reasonable doubt. Before a death verdict can be returned, the sentencer is required to find that any

aggravating factors upon which it relied are true beyond a reasonable doubt, that the aggravating factor or factors outweigh the mitigating factors beyond a reasonable doubt and that death is the appropriate penalty beyond a reasonable doubt.

c. At a minimum, each sentencing finding must be proved by a preponderance of the evidence

At a minimum, if the Court finds that the neither the United States or California Constitutions demand proof beyond a reasonable doubt in the penalty phase, the federal and state constitutional guarantees of due process, equal protection, and the mandate of heightened reliability in capital cases require the prosecutor to prove that the death penalty is appropriate and to prove each subsidiary finding, by at least a preponderance of evidence. A preponderance standard is the minimum burden historically permitted in any sentencing proceeding. Judges have never had the power to impose a sentence unless whatever considerations underlie their sentencing decisions have, at least, been proved by a preponderance of the evidence.

Judges in non-capital cases have never had the power that a California capital sentencer has been accorded, which is to impose a death sentence without the requirement that aggravating factors supporting the verdict be established by a specified quantum of proof. The absence of any authority for a sentencer to impose a sentence based on aggravating

circumstances found with proof less than 51 percent demonstrates the unconstitutionality of failing to assign a burden of proof for penalty determinations. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.* (1856) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].)

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., Pen. Code, §§ 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.420, subdivision (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence." To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments, and the Sixth Amendment's guarantee to a

trial by jury, and article I the California Constitution. (*Ring v. Arizona, supra*, 536 U.S. at p. 609; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.)

Moreover, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In a capital case, any aggravating factor relates to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Evidence Code section 520 creates a reasonable interest in adjudication with a properly allocated burden of proof, and is thus constitutionally protected under the due process clause of the Fourteenth Amendment (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346), and article I of the California Constituion.

The trial court in Mr. Weaver's case, at a minimum, should have been guided by instructions that the prosecution had to prove by a preponderance of the evidence the existence of any factor in aggravation, and the propriety of the death penalty. Sentencing Mr. Weaver to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.) The failure to articulate a proper burden of proof is constitutional error under the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as article I of the California Constitution, and is reversible per se.

B. California's Death Penalty Scheme Fails To Provide The Inter-Case Proportionality Review Required To Prevent Arbitrary, Discriminatory, Or Disproportionate Impositions Of Capital Punishment

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. Article I of the California Constitution prohibits "cruel or unusual punishment." In a capital case, the Eighth Amendment requires that death judgments be proportionate, and reliable. (See, e.g., *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *Coker v. Georgia* (1977) 433 U.S. 584, 592.) The notions of reliability and proportionality are closely related. Part of the requirement of reliability is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1983) 463 U.S. 939, 954 (plur. opn.), alterations in original, quoting *Proffitt v. Florida*, *supra*, 428 U.S. at p. 251 (plur. opn. of Stewart, Powell, & Stevens, J.J.).)

One mechanism to ensure reliability and proportionality in capital sentencing is comparative proportionality review. In *Pulley v. Harris*, *supra*, the high court reviewed the constitutionality of the 1977 California death penalty statute. (465 U.S. at p. 39 & fn. 1.) While declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, the Court noted the possibility that "there could be a capital sentencing scheme so lacking in other checks

on arbitrariness that it would not pass constitutional muster without comparative proportionality review. . . ." (*Id.* at p. 51.) California's 1978 death penalty statute, as drafted, as construed by this Court, and as applied, has become such a sentencing scheme.

As discussed in Argument X, *supra*, California's expanded list of "special" circumstances fails to meaningfully narrow the pool of death-eligible defendants and permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman*. And, as discussed in Arguments XI and XII.A, *supra*, the statute's principal penalty phase sentencing factor, factor (a), has proved to be an invitation to arbitrary and capricious sentencing and the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions. Comparative proportionality review is the only mechanism under this scheme that might enable it to pass constitutional muster.

The death penalty may not be imposed when actual practice demonstrates that the commission of a particular crime or a particular offender rarely leads to execution. In that case, no such crimes warrant execution, and no such offenders may be executed. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or

class of persons is disproportionate, including developments that have occurred in other nations. (See, e.g., *Roper v. Simmons* (2005) 543 U.S. 551, 568; *Atkins v. Virginia* (2002) 536 U.S. 304, 318-321; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830-831; *Enmund v. Florida, supra,* 458 U.S. at p. 796, fn. 22; *Coker v. Georgia, supra*, 433 U.S. at p. 596.)

Twenty-eight of the thirty-eight states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute, Georgia requires that its supreme court determine whether "the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 17-10-35(c)(3).) The provision was approved by the Supreme Court, holding that it guards "further against a situation comparable to that presented in *Furman* . . . ." (*Gregg v. Georgia, supra,* 428 U.S. at p. 198.) Toward the same end, Florida has judicially "adopted the type of proportionality review mandated by the Georgia statute." (*Profitt v. Florida, supra,* 428 U.S. at p. 259.) Twenty-one states have statutes similar to that of Georgia,[65] and seven have judicially instituted similar review.[66]

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[65] (See Ala. Code, § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann., § 53a-46b(b)(3) (West 1993); Del. Code Ann., tit. 11, § 4209(g)(2) (1992); Ga. Code Ann., § 17-10-35(c)(3) (Harrison 1990); Idaho Code, § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann., § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann., art. 905.9.1(1)(c) (West 1984); Miss. Code Ann., § 99-19-105(3)(c) (1993); Mont. Code Ann., § 46-18-310(3) (1993); Neb. Rev. Stat., §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann., § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann., § 630:5(XI)(c) (1992);

Section 190.3 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*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.)

This Court has rejected the argument that the lack of inter-case proportionality review renders California's scheme unconstitutional. (See, e.g., *People v. Hayes, supra,* 52 Cal.3d at p. 645; *People v. Howard*, *supra,* 44 Cal.3d at pp. 444-446.) It has held that such review is not required "[u]nless the state's capital punishment system is shown by the defendant to

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N.M. Stat. Ann., § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat., § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann., § 2929.05(A) (Anderson 1992); 42 Pa. Cons. Stat. Ann., § 9711(h)(3)(iii) (West 1993); S.C. Code Ann., § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann., § 23A-27A-12(3) (Michie 1988); Tenn. Code Ann., § 39-13-206(c)(1)(D) (1993); Va. Code Ann., § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann., § 10.95.130(2)(b) (West 1990); Wyo. Stat. Ann., § 6-2-103(d)(iii) (Michie 1988).)

[66] (See *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433, 444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,198; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.)

operate in an arbitrary and capricious manner." (*People v. McLain* (1988) 46 Cal.3d 97, 121.) That showing has been made here.

The special circumstances that make a defendant eligible for death as set out in section 190.2 are now, and were at the time of Mr. Weaver's trial, so extensive that a significantly higher percentage of individuals convicted of murder are eligible for death than were under the 1977 statute considered in *Pulley v. Harris, supra.* Likewise, this Court has declined to impose any rational limitation on factor (a). The statutory scheme lacks other procedural safeguards to ensure a reliable and proportionate sentence. As a result, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment and article I of the California Constitution.

Judge Alex Kozinski of the Ninth Circuit has written that an effective death penalty statute must be limited in scope to:

> ensure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more that we can possibly execute, and then pick those who will actually die essentially at random.

(Kozinski & Gallagher, *Death: The Ultimate Run-On Sentence* (1995) 46 Case W. Res. L.Rev.1, 31.) California's 1978 death penalty scheme suffers from the same arbitrariness and discrimination condemned in *Furman*. (See *Gregg v. Georgia, supra,* 428 U.S. at p. 188, citing *Furman v. Georgia,*

supra, 408 U.S. at p. 313 (conc. opn. of White, J.).) 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 which are skewed in favor of execution, as well as the provisions of article I of the California Constitution.

C. The Use Of Restrictive Adjectives In The List Of Potential Mitigating Factors Impermissibly Acted As Barriers To Consideration Of Mitigation By The Trial Court

Section 190.3 uses limiting language to qualify the potential mitigating factors. The use of adjectives "extreme" in factor (d); "reasonably" in factor (f); "substantial" in factor (g); "impaired" in factor (h); and "time frame" in factor (h) improperly restricts the sentencer from considering relevant mitigation evidence. This restriction on considering mitigating evidence violates the Fifth, Sixth, Eighth and Fourteenth Amendments and article I of the California Constitution. (See *Mills v. Maryland*, *supra*, 486 U.S. 367; *Lockett v. Ohio (*1978) 438 U.S. 586, 604 (plur opn. of Burger, J.).)

Section 190.3, subdivision (h), in its limitation to the time of the offense, also impermissibly restricts the sentencer's consideration of relevant mitigating circumstances and makes the factors impermissibly vague. The inclusion of temporal language precludes the sentencer from considering mitigating evidence merely because it did not relate specifically

to a defendant's culpability for the crimes committed. The jury instruction based on factor (h) can be improperly interpreted by the sentencer as excluding consideration of this evidence as mitigating if it did not influence the commission of the crime. (See CALJIC 8.85.) It is unconstitutional in its formulation and application since it uses the term "impaired," which improperly suggests that the illness caused the crime. This Court's holdings to the contrary are incorrect. (See, e.g., *People v. Boyette*, (2002) 29 Cal.4th 381, 465, 467; *People v. Koontz*, (2002) 27 Cal.4th 1041, 1094-1095; *People v. Hughes* (2002) 27 Cal.4th 287, 404-405; *People v. Kipp* (2001) 26 Cal.4th 1100, 1137–1138; *People v. Taylor* (2001) 26 Cal.4th 1155, 1179.)

D. Factor (k) Is Unconstitutionally Vague

Section 190.3, subdivision (k) is unconstitutionally vague because it fails to provide guidance to the sentencer on how to distinguish a death-worthy case from one that is not, and fails to guide the jury's discretion in deciding the appropriate penalty. In addition, empirical research demonstrates that there is no instruction about factor (k) that is sufficient to properly guide a sentencer's discretion. Accordingly this Court's opinion in *People v. Mendoza* (2000) 24 Cal.4th 130, 192, was incorrectly decided.

E. The Failure To Provide Instructions That Statutory Mitigating Factors Are Relevant Solely As Potential Mitigators And That The Absence Of Mitigating Evidence Cannot Be Considered Aggravating Rendered Mr. Weaver's Death Sentence Unconstitutional

In accordance with customary state court practice, the trial judge relied on the CALJIC pattern jury instructions. These instructions did not direct which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon his appraisal of the evidence. (See RT 457, 1333 [trial judge is relying on CALJIC].) The version of CALJIC Number 8.85 followed by Judge Lester provided that the sentencer should "take into account . . . whether or not" factors (d), (e), (f), (g), (h), and (j) existed. (CALJIC No. 8.85 (5th ed. 1988).) These factors are relevant only as possible mitigators. (See *People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Lucero, supra,* 44 Cal.3d at p.1031, fn.15; *People v. Davenport, supra,* 41 Cal.3d at pp. 288-289.) The judge, however, was left free to conclude that a negative answer could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, or by assigning aggravating weight to evidence offered in mitigation, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments to the United States Constitution and article I of the California Constitution. (*Woodson v. North Carolina, supra,* 428 U.S. at p.

304; *Zant v. Stephens, supra,* 462 U.S. at p. 879; *Johnson v. Mississippi, supra,* 486 U.S. at pp. 584-585.) And, as Mr. Weaver shows in Argument VI, the trial court gave aggravating weight to evidence offered under factors (d), (g) and (k). Absent instructions informing the judge or jury that certain sentencing factors are relevant only in mitigation and that only three factors can be aggravating, California's death penalty scheme is unconstitutional.

This Court has held that "the absence of evidence of a statutory mitigating factor is [not] aggravating on the issue of penalty." (*People v. Rodriguez, supra*, 42 Cal.3d at p. 788, citing *People v. Davenport, supra*, 41 Cal.3d at p. 289.) The instructions relied upon by the trial judge in Mr. Weaver's case did not provide that direction. (11 RT 1333, referring specifically to CALJIC Nos. 8.55 through 8.88.) The language in Penal Code section 190.3, subdivisions (d), (e), (f), (g), (h) and (j), providing that the sentencer shall consider "whether or not" certain mitigating factors are present leads the sentencer to believe that the absence of such factors amount to aggravation. The California death penalty scheme is unconstitutional because it permits the sentencer generally to treat the absence of a mitigating factor as an aggravating factor. This Court's opinions to the contrary are incorrect. (See, e.g., *People v. Boyette, supra,* 29 Cal.4th at pp. 465-466; *People v. Weaver* (2001) 26 Cal.4th 876, 991, 993; *People v. Anderson, supra,* 25 Cal. 4th at pp. 600-601; *People v.*

Cunningham (2001) 25 Cal.4th 926, 1040-1041; *People v. Box* (2000) 23 Cal.4th 1153, 1217.)

The impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencer interprets the "law" conveyed by the CALJIC pattern instructions. In some cases the judge or jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of sentencing calculus. In other cases, they may construe the "whether or not" language of CALJIC Number 8.85 as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencers will likely count and weigh different numbers of aggravating circumstances based on their individual, differing construction of the instructions. Different defendants, appearing before different judges and juries, will be sentenced on the basis of different legal standards. Capital sentencing procedures must "'minimize the risk of a wholly arbitrary and capricious action'" (*Tuilaepa v. California, supra*, 512 U.S. at p. 995, quoting *Gregg v. Georgia, supra*, 428 U. S. at p. 189), and ensure

that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma, supra*, 455 U.S. at p.112.) The instructions relied upon by the trial court in this case did not meet that requirement.

F. The Denial Of Safeguards To Capital Defendants Violates The Equal Protection Guarantees Of The United States And California Constitutions

The Supreme Court recently affirmed the principle that "[b]ecause the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force." *Roper v. Simmons, supra*, 543 U.S. at p. 568 (citing *Thompson v. Oklahoma, supra,* 487 U.S at p. 856 (conc. opn. of O'Connor, J.).) Consistent with this principle, the Supreme Court has demanded "'a greater degree of reliability'" when death is to be imposed, and insisted that "'capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and the accuracy of factfinding.'" (*Monge v. California* (1998) 524 U.S. 721,. 731-732, quoting *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604 (plur. opn. of Burger, C.J.) and *Strickland v. Washington* (1984) 466 U.S. 668, 704 (conc. & dis. opn. of Brennan, J.), respectively.) As discussed in Argument XII.A, *supra*, California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons sentenced for non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Here, where the interest identified is "fundamental," courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.)[67] A state may not create a classification scheme that affects a fundamental interest without showing that it has a compelling interest justifying the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas* (1976) 17 Cal.3d 236, 251; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The prosecution cannot meet this burden. Equal protection guarantees of the United States and California Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by a state of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

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[67] In 1975, this court held that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) "Aside from its prominent place in the due process clause itself, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles* (1958) 356 U.S. 86, 102." (*Commonwealth v. O'Neal* (Mass. 1975) 327 N.E.2d 662, 668.)

In *Prieto*,[68] as in *Snow*,[69] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also *People v. Demetrulias* (2006) 39 Cal.4th 1, 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for non-violent felony offenses.

California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments (see, e.g., *Ring v. Arizona*, *supra,* 536 U.S. at p. 609; *Myers v. Ylst, supra,* 897 F.2d 417, 421) and article I of the California Constitution.

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[68] "[T]he penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (*People v. Prieto*, *supra*, 30 Cal.4th at p. 275, italics added.)

[69] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32, italics added.)

The Equal Protection Clause of the Fourteenth Amendment, as well as article I of the California Constitution, guarantee each and every person that they will not be denied their fundamental rights and prohibit arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore, supra,* 531 U.S. at pp. 104-105.) The Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California, supra,* 524 U.S. at pp. 731-732.) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented, and does not withstand the strict scrutiny that should be applied by this Court when a fundamental interest is at stake.

G. The Trial Court Erred In Relying On Unconstitutional Instructions

In addition to constitutional infirmities identified above, the standard penalty phase jury instructions, CALJIC Numbers 8.85 and 8.88, fail to guide the sentencer in accordance with constitutional principles. The use of these penalty phase instructions by the trial judge (11 RT 1333), in this case deprived Mr. Weaver of his rights to a fair trial, due process and a reliable

penalty determination under the Fifth, Eighth, and Fourteenth Amendments and article I of the California Constitution.[70]

The constitutional deficiencies in the California death penalty scheme are not cured by the standard instructions. They include factors inapplicable and irrelevant in particular cases. (CALJIC No. 8.85.) The instructions do require deletion of irrelevant factors, which lead the factfinder to believe that the absence of mitigating factors is itself aggravating. Instructions should omit inapplicable factors. (*Ibid.*) The instructions also fail to define the terms "aggravating" and "mitigating." (CALJIC No. 8.88 (5th ed. 1988).)

The trial judge here had no instruction limiting the "circumstances of the crime" aggravating factor. (CALJIC No. 8.85.) As a result, he assigned aggravating weight to whatever aspects of Mr. Weaver's crime he chose, including those common to many homicides: for example, the fact that Mr.

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[70] To the extent this Court's holdings have rejected the challenges herein, they are incorrect. (See, e.g., *People v. Boyette, supra,* 29 Cal.4th at pp. 464-465; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1150-1151; *People v. Bolden, supra,* 29 Cal.4th at p. 566; *People v. Hughes, supra,* 27 Cal.4th at pp. 404-405; *People v. Michaels, supra,* 28 Cal.4th at pp. 541-542; *People v. Taylor, supra,* 26 Cal.4th at pp. 1177-1178, 1181; *People v. Anderson, supra,* 25 Cal.4th at p. 600; *People v. Cunningham, supra,* 25 Cal.4th at pp. 1040-1042; *People v. Kipp, supra,* 26 Cal.4th at pp. 1137-1138; *People v. Ochoa, supra,* 26 Cal.4th at p. 452; *People v. Seaton* (2001) 26 Cal.4th 598, 688; *People v. Catlin* (2001) 26 Cal.4th 81, 174; *People v. Box, supra,* 23 Cal.4th at p. 1217; *People v. Ayala* (2000) 23 Cal.4th 225, 303 *People v. Mendoza, supra,* 24 Cal.4th at pp. 190-191; *People v. Brown, supra,* 46 Cal.3d at pp. 450-454.)

Weaver used a pistol (12 RT 1358); the fact that the victim and other witnesses were subjected to fear for their lives (12 RT 1360); and the fact that the victim was undeserving of death and did not provoke the shooting. (12 RT 1358.)

The trial court in Mr. Weaver's case followed CALJIC Number 8.88 (Rev. 1989) (5th ed. 1988). (11 RT 1333.) This instruction was deficient in numerous respects. It was vague and misleading. It failed to inform the court that if aggravation did not outweigh mitigation a verdict of life without the possibility of parole was mandatory, that a verdict of life without the possibility of parole could be returned even if aggravation outweighed mitigation, or that a death verdict required findings beyond a reasonable doubt that aggravation outweighed mitigation and that death was the appropriate penalty. It also failed to inform the court which party, if any, bore a burden of proof to the appropriate penalty and what that burden was. Indeed, here the prosecutor argued that "each side [has] the equal burden of proving their case by essentially a preponderance of the evidence." (11 RT 1250.) These failures are especially problematic, since, as Mr. Weaver explains in Argument XII.A, after *Ring*, *supra*, the prosecutor bears the burden of proving aggravators, that aggravators substantially outweigh mitigators, and that death is appropriate, beyond a reasonable doubt. This standard instruction guided the trial court sentencing process.

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are *so substantial* in comparison with the mitigating circumstances that it *warrants* death instead of life without parole.

(CALJIC No. 8.88 (Rev. 1989) (5th ed. 1988), italics added.) Its numerous flaws deprived Mr. Weaver of his rights to due process, equal protection, a fair jury trial, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments, and article I of the California Constitution.

First, the phrase "so substantial" called for an impermissibly subjective treatment of the evidence in favor of a death sentence and failed to instruct that such a sentence requires that aggravation *outweigh* mitigation. Second, the use of the term "warrants" misled the sentencer with respect to the requirement that death may only be imposed if it is the appropriate penalty in a given case. The words "so substantial" and "warrants" provide no inherent restraint on the arbitrary and capricious infliction of the death sentence. The death verdict here that followed this instruction does not meet the reliability requirements of the Eighth Amendment scrutiny (*Maynard v. Cartwright, supra,* 486 U.S. 356, 363, citing *Godfrey v. Georgia, supra,* 446 U.S. at pp. 428-429), or the California Constitution's protection under article I.

A capital sentencing scheme must adequately inform the sentencer of "what they must find to impose the death penalty . . . ." (*Maynard v.*

Cartwright, supra, 486 U.S. at pp. 361-362.) The words "so substantial" did not inform the trial judge of what he had to find in order to impose the death penalty. The language is so varied in meaning, so broad in usage, that it is incapable of comprehension in the context of deciding between life and death. It conveys a purely subjective standard. (See *ibid.*)

Moreover, CALJIC No. 8.88 failed to inform the trial court that to return a judgment of death it must find not just that death was "warranted" but that it was *appropriate*. Webster's Dictionary defines the verb "warrant" as "to give (someone) sanction" or to "authorize" (Merriam-Webster Online <http://m-w.com/dictionary/warrant> [as of Jan. 13, 2007].) Death is thus "warranted" in the sense that it is an authorized punishment, in all cases where a special circumstance has been found true. By contrast, "appropriate" is defined as "especially suitable or compatible." (Merriam-Webster Online <http://m-w.com/dictionary/appropriatet> [as of Jan. 13, 2007].) The Eighth Amendment demands that the decision to impose death be an *appropriate* one, rather than one that is merely warranted. Because death may be warranted or authorized does not mean it is appropriate, the instruction as worded was misleading.

The instruction told the trial court that the deliberative process amounts to no more than simply weighing the factors without regard to the appropriateness of the punishment selected. It was thus misled in its understanding of the sentencing function. Rather than countering the

harmful implications of the flawed sentencing instruction, the prosecutor's argument only reinforced them.

If the sentencer, in weighing the factors in aggravation and mitigation, finds that the former do not outweigh the latter, it is required to return a life verdict. (Pen. Code, § 190.3) CALJIC Number 8.88, followed here, did not include this clear directive, and was thus flawed for this reason as well. (CALJIC No. 8.88 (1989 Rev.) (5th ed. 1988).)

This instruction was also defective because it implied that if the trial court found the aggravating evidence "so substantial in comparison with the mitigating circumstances," death was the permissible and proper verdict. It told the judge that if aggravation was found to outweigh mitigation, a death sentence was compelled. Under California law, the sentencer may return a verdict of life without parole even if the circumstances in aggravation outweigh those in mitigation. (*People v. Brown, supra,* 40 Cal.3d at p. 544.) The CALJIC instruction had the effect of an improper directed verdict should the judge find that mitigation was outweighed by aggravation. (CALJIC No. 8.88 (1989 Rev.) (5th ed. 1988).)

For these reasons, the standard penalty phase instructions in general, and as applied in this case, deprived Mr. Weaver of his rights to due process, equal protection, a fair jury trial, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments, and article I of the California Constitution.

XIII. CALIFORNIA'S CAPITAL PUNISHMENT SCHEME VIOLATES CONSTITUTIONAL AND INTERNATIONAL LAW BY ALLOWING THE DEATH PENALTY FOR FELONY MURDER SIMPLICITER

Mr. Weaver was subject to the death penalty solely because of the robbery-murder and burglary-murder special circumstances. Under California law, a defendant convicted of a murder during the commission or attempted commission of a felony may be executed even if the killing was unintentional or accidental. Because our state's capital punishment scheme lacks any requirement that the prosecution prove that an actual killer had a culpable state of mind with regard to the murder before a death sentence may be imposed, it violates the proportionality requirement of the Eighth Amendment and article 1 of the California Constitution, as well as international human rights law governing use of the death penalty.

A. California Authorizes The Imposition Of The Death Penalty Upon A Person Who Kills During A Felony Without Regard To His Or Her State Of Mind At The Time Of The Killing

Mr. Weaver was found to be death-eligible solely because he was convicted of killing the victim during the course of a burglary/robbery. (6 RT 713-714.) It is undisputed that the prosecution's only theory of criminal culpability in this case was felony murder.[71] In urging the judge to convict Mr. Weaver of first degree murder under the felony-murder rule, the prosecutor argued:

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[71] See fn. 26, *supra*.

> Do we think he entered the store with the express intent, the primary intent of killing Michael Broome? Indeed not. His express, primary purpose upon entry into the store that day was to rob that store, was to take jewelry by force away from the store, and along the way during the execution of that crime, during the execution of those crimes, the crimes of burglary and robbery, the defendant brutally gunned down Michael Broome.

(5 RT 638-639.) The judge's guilt phase verdict reiterated that Mr. Weaver's guilt on the murder count was predicated solely on the underlying felonies:

> The Court finds beyond a reasonable doubt that the victim, Michael Broome, was murdered during the commission of both the crimes of robbery and burglary; and, hence, by observation of the felony murder rule the defendant is guilty of first degree murder pursuant to Penal Code 189 for the murder of Michael Broome on May 6th, 1992.

(6 RT 714.)

While normally, the prosecution, to obtain a murder conviction, must prove that the defendant had the subjective mental state of malice (either express or implied), in the case of a killing committed during a robbery or burglary, the prosecution, in California, can convict a defendant of first degree felony murder without proof of any mens rea with regard to the murder.

> [F]irst degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it

> condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.

(*People v. Dillon* (1983) 34 Cal.3d 441, 477.) This rule is reflected in the jury instruction for felony murder followed by the court in Mr. Weaver's trial:

> The unlawful killing of a human being, *whether intentional, unintentional or accidental*, which occurs [during the commission or attempted commission of the crime] [as a direct causal result of [___(felony)___] is murder of the first degree when the perpetrator had the specific intent to commit such crime.
>
> The specific intent to commit _____ and the commission or attempted commission of such crime must be proved beyond a reasonable doubt.

(CALJIC No. 8.21 (5th ed. 1988), italics added.)

Except in one rarely-occurring situation, under this Court's interpretation of section 190.2, subdivision (a)(17), if the defendant is the actual killer in a robbery felony murder, the defendant also is death-eligible under the robbery-murder special circumstance. (See *People v. Hayes, supra,* 52 Cal.3d at pp. 631-632 [reach of the felony-murder special circumstances is as broad as the reach of felony murder and both apply to a killing "committed in the perpetration of an enumerated felony if the killing and the felony 'are parts of one continuous transaction,'" quoting *People v. Ainsworth* (1988) 45 Cal.3d 984, 1016].)

The key case on the issue is *People v. Anderson* (1987) 43 Cal.3d 1104, 1147, where the Court held that under section 190.2, "intent to kill is

not an element of the felony-murder special circumstance; but when the defendant is an aider and abetter rather than the actual killer, intent must be proved." The *Anderson* majority did not disagree with Justice Broussard's summary of the holding: "Now the majority . . . declare that in California a person can be executed for an accidental or negligent killing." (*Id.* at p. 1152 (dis. opn. of Broussard, J.).)

Since *Anderson*, in rejecting challenges to the various felony-murder special circumstances, this Court repeatedly has held that to seek the death penalty for a felony murder, the prosecution need not prove that the defendant had any mens rea as to the killing. For example, in *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1264-1265, this Court rejected the defendant's argument that, to prove a felony-murder special circumstance, the prosecution was required to prove malice. In *People v. Earp* (1999) 20 Cal.4th 826, the defendant argued that the felony-murder special circumstance required proof that the defendant acted with "reckless disregard" and could not be applied to one who killed accidentally. This Court held that the defendant's argument was foreclosed by *Anderson*. (*Id.* at p. 905, fn.15.) In *People v. Smithey* (1999) 20 Cal.4th 936, 1016, this Court rejected the defendant's argument that there had to be a finding that he intended to kill the victim or, at a minimum, acted with reckless indifference to human life.

B. The Robbery-Murder and Burglary-Murder Special Circumstances Violate Constitutionally-Mandated Proportionality Requirements And International Law Because They Permit Imposition Of The Death Penalty Without Proof That The Defendant Had A Culpable Mens Rea As To The Killing

The Eighth Amendment prohibits the imposition of "cruel and unusual punishment" (U.S. Const., 8th Amend.), and is applicable to the States through the Fourteenth Amendment. (See, e.g., *Roper v. Simmons*, *supra*, 543 U.S. at p. 560.) In a series of cases beginning with *Gregg v. Georgia*, *supra,* 428 U.S. 153, the Supreme Court has recognized that the Eighth Amendment embodies a proportionality principle, and it has applied that principle to hold the death penalty unconstitutional in a variety of circumstances. (See *Coker v. Georgia, supra,* 433 U.S. 584 [death penalty for rape of an adult woman]; *Enmund v. Florida, supra,* 458 U.S. 782 [death penalty for getaway driver to a robbery felony murder]; *Thompson v. Oklahoma, supra,* 487 U.S. 815 [death penalty for murder committed by defendant under 16-years old]; *Atkins v. Virginia, supra,* 536 U.S. 304 [death penalty for mentally retarded defendant]; *Roper v. Simmons*, *supra*, 543 U.S. 551 [death penalty for defendant under 18 years old].) In evaluating whether the death penalty is disproportionate for a particular crime or criminal, the Supreme Court has applied a two-part test, asking (1) whether the death penalty comports with contemporary values and (2) whether it can be said to serve one or both of two penological purposes,

retribution or deterrence of capital crimes by prospective offenders. (*Gregg v. Georgia*, *supra*, 428 U.S. at pp. 182-183.)

The Supreme Court addressed the proportionality of the death penalty for unintended felony murders in *Enmund v. Florida*, 458 U.S. 782 and in *Tison v. Arizona, supra,* 481 U.S. 137. In *Enmund*, the Court held that the Eighth Amendment barred the imposition of the death penalty on the "getaway driver" to an armed robbery murder because he did not take a life, attempt to take a life, or intend to take a life. (*Enmund v. Florida*, *supra*, 458 U.S. at p. 801.) In *Tison*, the Court addressed whether proof of "intent to kill" was an Eighth Amendment prerequisite for imposition of the death penalty. (*Tison v. Arizona*, *supra*, 481 U.S. at pp. 156-157.) Justice O'Connor, writing for the majority, held that it was not, and that the Eighth Amendment would be satisfied by proof that the defendant had acted with "reckless indifference to human life" and as a "major" participant in the underlying felony. (*Id.* at p. 158.) Justice O'Connor explained the rationale of the holding as follows:

> [S]ome nonintentional murderers may be among the most dangerous and inhumane or all–the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." Indeed it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with

> intentional murderers. [Citations.] *Enmund* held that when "intent to kill" results in its logical though not inevitable consequence – the taking of human life – the Eighth Amendment permits the State to exact the death penalty after a careful weighing of the aggravating and mitigating circumstances. Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

(*Id.* at pp. 157-158.)

In choosing actual killers as examples of "reckless indifference," murderers whose culpability would satisfy the Eighth Amendment standard, Justice O'Connor eschewed any distinction between actual killers and accomplices. In his dissenting opinion, Justice Brennan argued that there should be a distinction for Eighth Amendment purposes between actual killers and accomplices and that the state should have to prove intent to kill in the case of accomplices (*Tison v. Arizona, supra*, 481 U.S.. at pp. 168-179 (dis. opn. of Brennan, J.), but that argument was rejected by the majority.

That *Tison* established a minimum mens rea for actual killers as well as accomplices was confirmed in *Hopkins v. Reeves* (1998) 524 U.S. 88. In *Reeves*, a case involving an actual killer, the Court reversed the Eighth Circuit's ruling that the jury should have been instructed to determine whether the defendant satisfied the minimum mens rea required under

Enmund/Tison, but held that such a finding had to be made at some point in the case:

> The Court of Appeals also erroneously relied upon our decisions in *Tison v. Arizona*, 481 U.S. 137 (1987) and *Enmund v. Florida*, 458 U.S. 782 (1982) to support its holding. It reasoned that because *those cases require proof of a culpable mental state with respect to the killing before the death penalty may be imposed for felony murder*, Nebraska could not refuse lesser included offense instructions on the ground that the only intent required for a felony-murder conviction is the intent to commit the underlying felony. [Citation.] In so doing, the Court of Appeals read *Tison* and *Enmund* as essentially requiring the States to alter their definitions of felony murder to include a *mens rea* requirement with respect to the killing. In *Cabana v. Bullock*, 474 U.S. 376 (1986), however, we rejected precisely such a reading and stated that "our ruling in *Enmund* does not concern the guilt or innocence of the defendant – it establishes no new elements of the crime of murder that must be found by the jury" and "does not affect the state's definition of any substantive offense." [Citation.] For this reason, we held that a State could comply with *Enmund*'s requirement at sentencing or even on appeal. [Citation.] Accordingly *Tison* and *Enmund* do not affect the showing that a State must make at a defendant's *trial* for felony murder, *so long as their requirement is satisfied at some point thereafter.*

(*Hopkins v. Reeves*, *supra*, 524 U.S. at 99, fns. omitted, italics added.)

Every lower federal court to consider the issue – both before and after *Reeves* – has read *Tison* to establish a minimum mens rea applicable to all defendants. (See *Lear v. Cowan* (7th Cir. 2000) 220 F.3d 825, 828; *Pruett v. Norris* (8th Cir. 1998) 153 F.3d 579, 591; *Reeves v. Hopkins* (8th Cir. 1996) 102 F.3d 977, 984-985, revd. on other grounds (1998) 524 U.S. 88; *Loving v. Hart* (C.A.A.F. 1998) 47 M.J. 438, 443; *Woratzeck v. Stewart* (9th Cir.

1996) 97 F.3d 329, 335; *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1443, fn.9. The court in *Loving* explained its rationale as follows:

> As highlighted by Justice Scalia in the *Loving* oral argument, the phrase "actually killed" could include an accused who accidentally killed someone during commission of a felony, unless the term is limited to situations where the accused intended to kill or acted with reckless indifference to human life. We note that Justice White, who wrote the majority opinion in *Enmund* and joined the majority opinion in *Tison*, had earlier written separately in *Lockett v. Ohio*, 438 U.S. 586 (1978), expressing his view that "it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim." [Citation.] Without speculating on the views of the current membership of the Supreme Court, we conclude that when *Enmund* and *Tison* were decided, a majority of the Supreme Court was unwilling to affirm a death sentence for felony murder unless it was supported by a finding of culpability based on an intentional killing or substantial participation in a felony combined with reckless indifference to human life. Thus, we conclude that the phrase, "actually killed," as used in *Enmund* and *Tison*, must be construed to mean a person who intentionally kills, or substantially participates in a felony and exhibits reckless indifference to human life.

(*Loving v. Hart, supra*, 47 M.J. at p. 443.)

Moreover, as the majority in *Roper v. Simmons* notes, the death penalty 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.'" (*Roper v. Simmons, supra*, 543 U.S. at p. 568, quoting *Atkins v. Virginia, supra*, at 536 U.S. at p. 319.). Like children and individuals with mental retardation, persons who commit unaggravated, unplanned murders do not fall into this category.

Even were it not abundantly clear from the Supreme Court and lower federal court decisions that the Eighth Amendment requires a finding of intent to kill or reckless indifference to human life in order to impose the death penalty, the Supreme Court's two-part test for proportionality would dictate such a conclusion.

Applying the first part of the test, "contemporary values," the Supreme Court has emphasized that "'the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 312, quoting *Penry v. Lynaugh* (1989) 492 U.S. 302, 331.) There is presently a national consensus against the execution of an offender whose crime was not intentional and was aggravated only by the felony underlying the death sentence. Of the 38 death penalty states, there are at most four states other than California – Florida, Georgia, Maryland, and Mississippi – where a defendant may be death-eligible for felony murder *simpliciter*. The position of Mississippi is not altogether clear because its supreme court recently stated:

> [T]o the extent that the capital murder statute allows the execution of felony murderers, they must be found to have intended that the killing take place or that lethal force be employed before they can become eligible for the death penalty, pursuant to *Enmund*. [Citation.]

(*West v. State* (Miss. 1998) 725 So.2d 872, 895.) That at least 45 states (33 death penalty states and 12 non-death penalty states) and the federal

government reject felony murder *simpliciter* as a basis for death eligibility reflects an even stronger "current legislative judgment" than the Court found sufficient in *Enmund* (41 states and the federal government) and *Atkins* (30 states and the federal government).

Although such legislative judgments constitute "'the clearest and most reliable objective evidence of contemporary values'" (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 312, quoting *Penry v. Lynaugh, supra,* 492 U.S. at p. 331), professional opinion as reflected in the Report of the Governor's Commission on Capital Punishment (Illinois) and international opinion also weigh against finding felony murder *simpliciter* a sufficient basis for death-eligibility. One of the most comprehensive recent studies of a state's death penalty was conducted by the Governor's Commission on Capital Punishment in Illinois, and its conclusions reflect the current professional opinion about the administration of the death penalty. Even though Illinois's "course of a felony" eligibility factor is far narrower than California's special circumstance, requiring actual participation in the killing and intent to kill on the part of the defendant or knowledge that his acts created a strong probability of death or great bodily harm (720 Ill. Comp. Stat. 5/9-1(b)(6)(b) (1991)), the Commission recommended eliminating this factor. (Report of the Former Governor Ryan's Commission on Capital Punishment (April 15, 2002) at pp. 72-73 <http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_04.

pdf> (as of Jan. 10, 2007).) The Commission stated, in words which certainly apply to the California statute:

> Since so many first degree murders are potentially death eligible under this factor, it lends itself to disparate application throughout the state. This eligibility factor is the one most likely subject to interpretation and discretionary decision-making. On balance, it was the view of Commission members supporting this recommendation that this eligibility factor swept too broadly and included too many different types of murders within its scope to serve the interests capital punishment is thought best to serve.
>
> A second reason for excluding the "course of a felony" eligibility factor is that it is the eligibility factor which has the greatest potential for disparities in sentencing dispositions. If the goal of the death penalty system is to reserve the most serious punishment for the most heinous of murders, this eligibility factor does not advance that goal.

(*Ibid.*)

In addition to the national consensus, international norms are persuasive authority in interpreting the Eighth Amendment's ban on cruel and unusual punishment. (*Roper v. Simmons*, *supra*, 543 U.S. at 575; see also *id.* at 604 (dis. opn. of O'Connor, J.).) With regard to international opinion, the Court observed in *Enmund*:

> "[T]he climate of international opinion concerning the acceptability of a particular punishment" is an additional consideration which is "not irrelevant." *Coker v. Georgia*, 433 U.S. 584, 596, n. 10. It is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.

(*Enmund v. Florida*, *supra*, 458 U.S. at p. 796, fn. 22.) In fact, the United States is "virtually the only western country still recognizing a rule which makes it possible 'that the most serious sanctions known to law might be imposed for accidental homicide.'" (Roth & Sundby, *The Felony Murder Rule: A Doctrine at Constitutional Crossroads* (1985) 70 Cornell L.Rev. 446, 447-448, quoting Jeffrie & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law* (1979) 88 Yale L.J. 1325, 1383.)

Article 6 (2) of the International Covenant on Civil and Political Rights (hereafter, ICCPR), to which the United States is a party, provides that the death penalty may only be imposed for the "most serious crimes." (ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at p. 52, U.N. Doc, A/6316 (1966), 999 U.N.T.S. 171, entered into force on March 23, 1976 and ratified by the United States on June 8, 1992.) The Human Rights Committee, the expert body created to interpret and apply the ICCPR, has observed that this phrase must be "read restrictively" because death is a "quite exceptional measure." (Human Rights Committee, General Comment 6(16), 7; see also American Convention on Human Rights, art. 4(2), Nov. 22, 1969, OAS/Ser.L.V/11.92, doc. 31 rev. 3 (May 3, 1996) ["In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes . . . ."].)

In 1984, the Economic and Social Council of the United Nations further defined the "most serious crime" restriction in its Safeguards

Guaranteeing Protection of the Rights of Those Facing the Death Penalty. (E.S.C. res. 1984/50; GA Res. 39/118.) The Safeguards, which were endorsed by the General Assembly, instruct that the death penalty may only be imposed for intentional crimes. (*Ibid.*) Moreover, the United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions concludes that the term "intentional" should be "equated to premeditation and should be understood as deliberate intention to kill." (Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, U.N. Doc. CCPR/C/79/Add.85 (Nov. 19, 1997) ¶ 13.)

For these reasons, the imposition of the death penalty on a person who has not been found to have acted with the specific intent to kill fails the first prong of the proportionality test, because it is contrary to the evolving standards of decency and does not comport with contemporary values.

The imposition of the death penalty on such a person also fails to serve either of the penological purposes – retribution and deterrence of capital crimes by prospective offenders – identified by the Supreme Court. With regard to these purposes, "[u]nless the death penalty . . . measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." (*Enmund v. Florida*, *supra*, 458 U.S. at pp. 798-799, quoting *Coker v. Georgia*, *supra*, 433 U.S. at p. 592). The Supreme Court has made clear that retribution must be calibrated to the

defendant's culpability which, in turn, depends on his mental state with regard to the crime. In *Enmund*, the Court said: "It is fundamental 'that causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" (*Enmund v. Florida*, *supra*, 458 U.S. at p. 798, quoting Hart, *Punishment and Responsibility* (1968) p. 162.) In *Tison*, the Supreme Court further explained:

> A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished. The ancient concept of malice aforethought was an early attempt to focus on mental state in order to distinguish those who deserved death from those who through "Benefit of . . . Clergy" would be spared.

(*Tison v. Arizona*, *supra*, 481 U.S. at p. 156, ellipsis in original.) Plainly, treating negligent and accidental killers on a par with intentional and reckless-indifference killers ignores the wide difference in their level of culpability.

Nor does the death penalty for such killings serve any deterrent purpose. As the Court said in *Enmund*:

> [I]t seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting), for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not "enter

> into the cold calculus that precedes the decision to act."
> *Gregg v. Georgia*, *supra*, 428 U.S., at 186.

(*Enmund v. Florida*, *supra*, 458 U.S. at pp. 798-799; accord, *Atkins v. Virginia*, *supra*, 536 U.S. at p. 319.) The law simply cannot deter a person from causing a result he never intended and never foresaw.

Since imposition of the death penalty for robbery murder *simpliciter* clearly is contrary to the judgment of the overwhelming majority of the states, recent professional opinion and international norms, it does not comport with contemporary values. Moreover, because imposition of the death penalty for robbery murder *simpliciter* serves no penological purpose, it "is nothing more than the purposeless and needless imposition of pain and suffering." (*Enmund v. Florida*, *supra*, 458 U.S. at pp. 798-799, quoting *Coker v. Georgia*, *supra*, 433 U.S. at p. 592). As interpreted and applied by this Court, the robbery-murder special circumstance is unconstitutional under the Eighth Amendment, and article 1 of the California Constitution, and Mr. Weaver's death sentence must be set aside.

Finally, California law making a defendant death-eligible for felony murder *simpliciter* violates international law. Article 6(2) of the ICCPR restricts the death penalty to only the "most serious crimes," and the Safeguards, adopted by the United Nations General Assembly, restrict the death penalty to intentional crimes. This international law limitation applies domestically under the Supremacy Clause of the United States Constitution.

(U.S. Const., art. VI, § 1, cl. 2.) In light of the international law principles discussed previously, Mr. Weaver's death sentence violates both the ICCPR and customary international law and, therefore, must be reversed.

XIV. THE DEATH PENALTY IS UNCONSTITUTIONAL BECAUSE IT OFFENDS EVOLVING STANDARDS OF DECENCY

Although the Supreme Court in *Gregg* held that the death penalty was not per se "cruel and unusual," it also acknowledged that the Eighth Amendment is "not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." (*Gregg v. Georgia*, *supra,* 428 U.S. at p. 171 (plur. opn. of Stewart, J.); internal citations and quotations omitted.) "'[T]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" (*Id.* at p. 173, quoting *Trop v. Dulles, supra,* 356 U.S. at p. 101.) Recent events and shifting public opinion prove that modern standards of decency have evolved to the point where the death penalty is now viewed as inhumane.

In January of this year, the New Jersey Death Penalty Study Commission, created by the state legislature in 2005, issued its findings and recommendations. (New Jersey Death Penalty Study Commission Report (Jan. 2007) (hereafter New Jersey Report).) The Commission included a retired state supreme court justice, a state legislator, a prosecutor, a defense attorney, a law enforcement officer, religious leaders, and murder victim family representatives. (New Jersey Report, *supra*, p. 3.) It was charged to study and report on all aspects of New Jersey's death penalty. (*Ibid.*)

The Commission was also directed to evaluate seven specific issues, including what may fairly be characterized as the ultimate question: "whether the death penalty is consistent with evolving standards of decency." (*Id.* at p. 4.) The Commission recommended "that the death penalty in New Jersey be abolished and replaced with life imprisonment without the possibility of parole, to be served in a maximum security facility." (*Id.* at p. 2.) Among the findings that supported its recommendation were the following, which have particular relevance to the claims Mr. Weaver raises here:

> There is no compelling evidence that in New Jersey the death penalty rationally serves a legitimate penological intent. [¶] . . . [¶] There is increasing evidence that the death penalty is inconsistent with evolving standards of decency. [¶] . . . [¶] Abolition . . . will eliminate the risk of disproportionality in capital sentencing.

(*Id.* at p. 1.)

This evolution of standards is also demonstrated by the growing movement across the country calling for moratoria on the death penalty. Illinois began the trend and other states have followed suit. Cities across the nation have also called for moratoria, including many in California. It appears that, as Justice Marshall predicted, the American people are finally becoming "fully informed as to the purposes of the death penalty and its liabilities" and have concluded that as such it is "morally unacceptable." (*Gregg v. Georgia*, *supra,* 428 U.S. at p. 232 (dis. opn of Marshall, J.)

Further, California's use of the death penalty as a regular form of punishment violates international norms of humanity and decency. "The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment . . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former apartheid regime] as one of the few nations which has executed a large number of persons . . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (Comment, *Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 New Eng. J. on Crim. & Civ. Confinement 339, 366; see also *People v. Bull* (Ill. 1998) 705 N.E.2d 824, 846-847 [dis. opn. of Harrison, J.].)[72]

The abolition of the death penalty, or its limitation to "exceptional crimes such as treason," is particularly uniform in the nations of Western Europe. (*Stanford v. Kentucky* (1989) 492 U.S. 361, 389 (dis. opn. of Brennan, J.); see also *Thompson v. Oklahoma, supra,* 487 U.S. at p. 830 (plur. opn. of Stevens, J.).) All nations of Western Europe have abolished

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[72] In 1995, South Africa abandoned the death penalty, making only nine nations that still have a high killing rate. (See Amnesty International, *The Death Penalty: Abolitionist and Retentionist Countries* (hereafter, Amnesty), at <http://web.amnesty.org/pages/deathpenalty-countries-eng > [as of Jan. 12, 2007].)

the death penalty. (Amnesty, *supra*, at <http://web.amnesty.org/pages/deathpenalty-countries-eng > [as of Jan. 12, 2007].)

Although this country is not bound by the laws of any other sovereignty in its administration of criminal justice, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. (*Roper v. Simmons*, *supra*, 543 U.S. at 575.) "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (*Miller v. United States* (1870) 78 U.S. (11 Wall.) 268, 315 (dis. opn. of Field, J.), quoting 1 Kent's Commentaries, p. 1; *Hilton v. Guyot* (1894) 159 U.S. 113, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292; *Martin v. Waddell's Lessee* (1842) 41 U.S. (16 Pet.) 367, 409.)

California's broad penalty scheme, and the use of the death penalty as arbitrarily but routinely imposed punishment, offends evolving standards of decency under the Eighth and Fourteenth Amendments, as well as article I of the California Constitution and International Law.

XV. MR. WEAVER'S CONVICTIONS AND SENTENCE WERE OBTAINED IN VIOLATION OF INTERNATIONAL LAW

In the previous portions of the Opening Brief, Mr. Weaver has stated the arguments warranting relief based on domestic law. Many of the arguments are supported by instruments and customs of international law as well. International law is fully applicable and binding upon domestic courts. Mr. Weaver's convictions and sentence were obtained in violation of his rights to due process, a fair trial, equal protection of the law, to be free from cruel and/or unusual punishment and to a reliable, individualized, and non-arbitrary penalty determination in violation of international treaties and customary international law.

The International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 175 (hereafter ICCPR) was adopted by the U.N. General Assembly on December 16, 1966 and entered into force on March 23, 1976. Article 2(1) of the ICCPR provides that a state that becomes party to the treaty "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind . . . ." Among those rights a state "undertakes to respect and ensure" are the right to life (art. 6); freedom from torture (art. 7); the right to a fair trial (art. 14); freedom of opinion and expression (art. 19); and freedom of association (art. 22). On September 8, 1992, the United States, following the advice and consent of the Senate,

became a party to the ICCPR, at which time the treaty became, coexistent with the United States Constitution and federal statues, the "Supreme Law of the Land." (U.S. Const. art. VI.) The obligations imposed by the ICCPR and the other treaties mentioned here, and the attendant rights granted thereby, are owed separately and independently to Mr. Weaver.

Customary international law refers to a set of principles that are so widely accepted by members of the international community that they have evolved into binding rules of law. United States courts may not ignore the precepts of customary international law. (*Murray v. Schooner Charming Betsy* (1804) 6 U.S. (2 Cranch) 64, 70-71; *The Paquete Habana* (1900) 175 U.S. 677, 694-700; *The Nereide* (1815) 13 U.S. (9 Cranch) 388, 423.) In general, customary international law has the same status as domestic legislation. (Restatement (Third) of Foreign Relations Law § 701, Comment e.) The obligations imposed by international common law and the attendant rights granted thereby are owed separately and independently to Mr. Weaver.

Mr. Weaver was convicted and sentenced in violation of his due process rights. Article 14 of the ICCPR enumerates due process rights relating to criminal proceedings. Article 14 provides for rights including equality before the courts and tribunals, a fair and public hearing by a competent, independent and impartial tribunal, a presumption of innocence;

and the rights to obtain the attendance of his own witnesses and to confront witnesses against him.

Article 6 of the ICCPR provides that the death penalty may be imposed only where these standards are observed. The United Nations Human Rights Committee has held that when a State violates an individual's due process rights under the ICCPR, it may not carry out his execution. (See, e.g., *Johnson v. Jamaica* (1966) No. 588/1994, H.R. Comm. para. 8.9 [reiterating that imposition of a death sentence is prohibited where the provisions of the ICCPR have not been observed].) The State's failure to abide by international law in this regard renders Mr. Weaver's convictions and death sentence void.

In addition, articles 6 and 14 of the ICCPR guarantee the right to a fair trial at all stages of the proceedings. International common law requires that capital defendants be granted special protection above and beyond the protection afforded in non-capital cases. The United Nations' "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty" (hereafter Safeguards) mandate that "[c]apital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights." (United Nations, Economic and Social Council Resolution (May 25, 1984) para. 5.)

Further, article 7 of the ICCPR provides that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment." Because of the long delay between arrest and trial and between sentencing and execution, and the conditions in which Mr. Weaver is kept, execution of the death penalty in this case violates this provision of the ICCPR. The norm against cruel, inhuman, or degrading treatment is universally recognized as a violation of international law distinguishable from torture.

The Universal Declaration of Human Rights, article 5, provides: "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment." (Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948); see also Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 16, adopted Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doe. A/39/51 (1984) (entered into force June 26, 1987); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, opened for signature Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953); the American Convention on Human Rights, art. 5, opened for signature Nov. 22, 1969, O.A.S. T.S. No. 36, at 1, O.A.S. Doc. OEA/Ser. L/V/II.50, doc. 6 at 27 (1980) (entered into force July 18, 1978).) International law bars execution when delay in carrying out the penalty is

particularly protracted, a practice referred to as the "death row phenomenon." (*Pratt and Morgan v. The Attorney General of Jamaica* (Privy Council 1993) 3 SLR 995 2 AC 1, 4 All ER 769 (en banc); *Soering v. United Kingdom* (1989) 161 Eur. Ct. H.R. (Ser. A); see *Knight v. Florida* (1999) 528 U.S. 990 (Breyer, J., dissenting from denial of certiorari); *Ellidge v. Florida* (1998) 525 U.S. 944 (Breyer, J., dissenting from denial of certiorari); *Lackey v. Texas* (1995) 514 U.S. 1045 (Stevens, J., respecting denial of certiorari); *Lewis v. Attorney General of Jamaica* (P.C. 12 September 2000) 3 WLR 1785.) Because of the long delay in capital cases and the conditions in which Mr. Weaver is kept confined, execution of the death penalty in this case violates international law.

The right to life is the most fundamental of the human rights contained in the International Bill of Rights. (See, e.g., Universal Declaration on Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. art. 3, U.S. Doc. A/810 (1948) ["Everyone has the right to life, liberty, and security of the person"]; ICCPR, art. 6 ["Every human being has the inherent right to life"].). A number of human rights instruments also provide that a state may not take a person's life "arbitrarily." (See, e.g., ICCPR, art 6; American Convention on Human Rights, art. 4, 1144 U.N.T.S. 123.) The imposition of the death penalty in this case constitutes the arbitrary deprivation of life in violation of international law.

Mr. Weaver's trial was the product of arbitrariness and discrimination in violation of the ICCPR and the International Convention for the Elimination of All Forms of Racial Discrimination (hereafter ICEAFRD). The State's failure to abide by international law in this regard renders the convictions and death sentence void.

The ICCPR and the ICEAFRD serve to protect defendants in criminal cases from discriminatory application of the laws. Article 26 of the ICCPR specifically guarantees that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law." Moreover, article 14 states that all persons "shall be equal before the courts and tribunals." (See also art. 2.1 of the ICCPR.) The ICEAFRD was signed by the United States September 28, 1966, 600 U.N.T.S. 195, and was subsequently ratified. The ICEAFRD obligates member states to "prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law." (*Id* at art. 5(a).) Article 6 of the ICEAFRD provides that parties "shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention." The failure of the state to prohibit discrimination by law and to "guarantee to all persons equal and effective

protection against discrimination" on the basis of identifiable group violates the mandates of the ICCPR and the ICEAFRD.

In 1998, the United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions concluded that the application of the death penalty in the United States was both "discriminatory and arbitrary." He concluded that "race, ethnic origin, and economic status appear to be key determinants of who will, and who will not, receive a death sentence." (Report of United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Mission to the United States of America, U.N. Doc. E/CN.4/1998/68/Add.3, para. 2, para. 148 (1998).)

Violations of these rights afforded Mr. Weaver by international law warrant the granting of relief without any determination of prejudice. In any event, the errors alleged in the Opening Brief so infected the integrity of the proceeding against Mr. Weaver that the errors cannot be deemed harmless and the State will be unable to meet its burden of showing this error harmless. Additionally, the violations of Mr. Weaver's rights rendered the judgments fundamentally unfair, and resulted in a miscarriage of law. Accordingly, Mr. Weaver's death sentence must be reversed.

XVI. MR. WEAVER'S DEATH SENTENCE WAS IMPOSED THROUGH THE ARBITRARY AND DISPARATE APPLICATION OF CALIFORNIA'S DEATH PENALTY LAWS

In addition to the failure of California's death penalty statute to sufficiently narrow the class of persons eligible for the death penalty by limiting it to a few specific special circumstances, actual application of the statute is arbitrary and standardless. The decision whether to actually seek the death penalty in a special circumstance murder case is left up to the individual district attorney in each county. Because of the prosecutorial discretion, some offenders will be chosen as candidates for the death penalty by one prosecutor, while others with similar characteristics in different counties will not be singled out for the ultimate penalty.

Moreover, county-by-county disparities are not due solely to homicide rates, but to arbitrary factors, including the personal ideology of the prosecutor, political pressures from constituents, the budgetary constraints of the county, as well as race, politics, and poorly performing law enforcement systems. Personal opinions, political concerns, and/or fiscal restraints have no factual nexus to the crime or the defendant. These considerations should have no bearing on the death eligibility decision making process and further increase the substantial risk of arbitrariness in violation of the Eighth Amendment, violate principles of due process and

equal protection as guaranteed by the Fourteenth Amendment, and violate article I of the California Constitution.

The circumstances under which a defendant may be deemed eligible for the death penalty must be narrowly drawn and "fit the crime within a defined classification." (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 973.) Where the eligibility decision is based, in part, on the subjective and changing views of individual prosecutors, there is no "defined classification," "so as to 'make rationally reviewable the process for imposing a sentence of death.'" (*Ibid.*, quoting *Arave v. Creech* (1993) 507 U.S. 463, 471.) Due to the unchecked discretion of the prosecutor in determining actual eligibility, California's system is not "rationally reviewable" and thus violates the Eighth Amendment and article I of the California Constitution.

Implementation of the death penalty in an arbitrary manner violates principles of substantive due process as well. The Due Process Clause protects both liberty interests that are created by state law (see, e.g., *Evitts v. Lucey* (1985) 469 U.S. 387, 399-400 [due process protections attach to state created right to appeal criminal appeals]), as well as those "fundamental rights and liberties," which are "objectively deeply rooted in this Nation's history and tradition" (*City of Washington v. Glucksberg* (1997) 521 U.S. 702, 703), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."

(*Palko v. Connecticut* (1937) 302 U.S. 319, 326, overruled on another ground by *Benton v. Maryland* (1969) 395 U.S. 784.) "The touchstone of due process is protection of the individual against arbitrary action of government" (*Wolff v. McDonnell* (1974) 418 U.S. 539, 558), whether that action manifests as a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification. (*County of Lewis v. Sacramento* (1998) 523 U.S. 833, 845-46.) Punishment for crimes, and certainly, imposition of the gravest punishment of all, must be based on reviewable, articulable and evenly applied criteria.

Arbitrary implementation of the death penalty violates the Equal Protection Clause where, as here, it fails to provide assurances that the rudimentary requirements of equal treatment and fundamental fairness are satisfied. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution by its duly constituted agents. [Citation.]" (*Sioux City Bridge Co. v. Dakota County* (1923) 260 U.S. 441, 445.)

In *Bush v. Gore*, *supra*, 531 U.S. at p. 110, the Supreme Court applied this principle and recognized that fundamental rights cannot be denied based upon arbitrary and disparate "statewide standards." The Court held that, where a single state entity has the power to assure uniformity in

implementing a fundamental right, there must be at least *some* assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied. (*Ibid.*)

In *Bush*, the fundamental right at issue was the right to vote, and the state entity was the Florida Supreme Court. The Supreme Court found that the state court's authorization of standardless manual recounts of challenged votes, with standards differing from county to county, violated the Equal Protection Clause. Even in the absence of discriminatory intent, equal protection of the laws is denied when the discriminatory impact of having no statewide uniformity was shown. (*Bush v. Gore*, *supra*, 531 U.S. at p. 109.) Because the recount procedures authorized by the Florida Supreme Court did not guarantee statewide uniformity, the recount itself was prohibited in order to protect the fundamental rights of voters. The Court applied principles of equal protection to protect the state created right to vote in presidential elections, even though that right is not specifically identified in the United States Constitution.

Implementation of the death penalty plainly involves fundamental rights, including the most fundamental right of all: the right to life. (*Ford v. Wainwright* (1986) 477 U.S. 399, 409.) The fundamental rights of liberty and due process are also implicated when the state imposes its authority to execute one of its citizens, as well as the right to be free from the arbitrary and capricious imposition of the death penalty and the

constitutionally express right to be free from cruel and unusual punishment. Equal protection precludes the state from engaging in arbitrary and disparate treatment that would deprive one person of his or her fundamental rights, and requires implementation of adequate statewide standards to prevent such disparate treatment. (*Bush v. Gore, supra,* 531 U.S. at p. 109.) California lacks such statewide standards to prevent disparate treatment in implementation of the death penalty.

The California Attorney General is the chief law officer of the state, with supervisory power over "every district attorney." California has 58 counties with 58 District Attorneys. "It [is] the duty of the Attorney General to see that the laws of the State are *uniformly* and adequately enforced." (Cal. Const., art. 5, § 13, italics added.) The California Constitution thus also creates a liberty interest, protected by the Due Process and Equal Protection Clauses, that criminal laws be uniformly applied to all citizens of the state. (See *Evitts v. Lucey*, *supra*, 469 U.S. 387, 400-401.)

Despite the authority and duty of the state Attorney General to guarantee equal and uniform enforcement of the law of the state, discretion is vested in each District Attorney in each county to make death eligibility and charging decisions. Each District Attorney is solely responsible for decisions respecting the prosecution of defendants within their county, including the decisions when to file special circumstance charges against

persons accused of first degree murder, and when to seek the death penalty against those charged with special circumstances first degree murder. (Gov. Code, § 26501; *People v. Lucas* (1995) 12 Cal.4th 415, 477.)

In the absence of any statewide standards to determine which of those defendants who meet the special circumstance criteria will actually be deemed death-eligible and charged with death by the prosecutor, whether one's life will be put at risk, a death penalty trial turns more on the county in which the killing occurred than it does on the facts and circumstances of the killing or the individual characteristics of the defendant. Since *Gregg v. Georgia, supra,* 428 U.S. 153, was decided, 17 of California's 58 counties have not imposed a single death sentence.[73] Twelve of California's 58 counties have each imposed only a single death sentence.[74] (California Department of Corrections and Rehabilitation, Condemned Inmate List, at <http://www.cdc.state.ca.us/ReportsResearch/docs/InmateSecured.pdf> [as of Jan. 12, 2007].)

The remaining counties produce death sentences at a disproportionate rate to their homicide or population numbers. For example, in the 1990s, Orange County sent more people to death row than

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[73] These counties are: Alpine, Del Norte, El Dorado, Inyo, Lassen, Mariposa, Mendocino, Modoc, Mono, Nevada, Plumas, San Benito, Sierra, Siskiyou, Tehama, Trinity, and Yolo.

[74] These counties are: Amador, Calaveras, Colusa, Glenn, Imperial, Marin, Merced, Napa, Santa Cruz, Sutter, Tuolumne and Yuba.

did Alameda and San Francisco Counties combined, though those counties combined had the same population as Orange County and 50 percent more homicides. (Willing & Fields, *The Geography of the Death Penalty*, USA Today (Dec. 20, 1999) p. 1A.) During the same time period, San Mateo County sentenced more than four times the number of people to death than did San Francisco county, despite the fact that San Francisco County is 20 percent larger and had twice the number of murders. (*Ibid.*)

A Columbia University study of how the death penalty has been applied in the United States from 1973 through 1995 finds that relatively "[h]eavy and indiscriminate use of the death penalty creates a high risk that mistakes will occur." (J. Liebman, et al., *A Broken System, Part II: Why There is So Much Error in Capital Cases, and What Can be Done About It,* Executive Summary, at http://www2.law.columbia.edu/instructionalservices/liebman/liebman/Liebman%20Study/docs/1/executivesummary [as of Jan. 12, 2007] (hereafter Liebman).) The Columbia University study compiled data on the death-sentencing rate of counties that imposed five or more death sentences between 1973-1995. (*Ibid.*) The study provided the number of death verdicts and the number of homicides and calculated the death verdicts per 1000 homicides. (*Id.* at p. 301.) The results show startling county-by-county disparities.

Counties with vastly different homicide rates returned the same number of death sentences. Shasta County and San Joaquin County each imposed nine death sentences, although San Joaquin County (with 769 homicides) had five times the number of homicides as Shasta County (with 145 homicides). (Liebman, *supra*, at p. B1.)

Counties with roughly the same number of homicides produced wildly divergent death sentencing rates. Kern County had 961 homicides during the study period and Contra Costa County had slightly more, 1015 homicides; however, Kern County returned more than twice the number of death sentences (22) as Contra Costa County (9). Urban Los Angeles County, the most populous county, had the second lowest ratio of death verdicts per homicides (8.33 percent), while rural Shasta County, a much less populous county, had the highest ratio of death verdicts per homicides (62.07 percent). (Liebman, *supra*, at p. B1.) These numbers are, in the words of the Supreme Court describing the divergent election recount results from Broward and Palm Beach Counties, "markedly disproportionate to the difference in population between the counties." (*Bush v. Gore, supra,* 531 U.S. at p. 107.)

While the criteria for death-eligibility set forth in Penal Code section 190.2 are applicable in all counties, and California places on the Attorney General the responsibility for overseeing the uniform enforcement of state law, California's death-eligibility criteria are not applied uniformly, or

anywhere near uniformly, in the different counties. There are no statewide standards in California to guide the District Attorneys of each county in the state in determining whether to seek the death penalty against a potentially death eligible defendant, i.e., where special circumstances are charged. This decision is left solely to the discretion of the prosecutor in the county where the crime was committed and each county may and does, in fact impose its own standards (or none at all), for deciding who will face death. Even within a given county, the choice as to who might receive a death sentence is the product of an arbitrary and standardless process.

Just as in *Bush,* there is a single state entity (the Office of the California Attorney General) that has the power, as well as the duty, to assure uniformity in implementing the fundamental right to life, and liberty, as well as the rights to due process and freedom from cruel and unusual punishment, but has instead allowed charging decisions to be made without any rules, in a standardless and inconsistent fashion from county to county, and within each county, without any assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied. Just as in *Bush,* "the want of those rules here has led to unequal evaluation" of who should live and who should be subject to death, and the standards for deciding who should be charged with the death penalty "might vary not only from county to county but indeed within a single county. . . ." (*Bush v. Gore, supra,* 531 U.S. at p. 106.)

The discriminatory impact from the lack of uniform standards is apparent in this case where the San Diego County District Attorney chose to seek the death penalty against a man who was charged with a single-victim felony murder, had no record of crimes of violence and had no felony convictions. Similarly situated defendants in many other counties, or even in San Diego County, would not have been subjected to the death penalty, despite the fact that under state law, they were charged with a capital-eligible offense and thus death could have been sought by the local district attorney.

The imposition of the death penalty on Mr. Weaver violated the cruel and unusual punishment clause of the Eighth Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, article I of the California Constitution, article 14 of the International Covenant on Civil and Political Rights, and article 24 of the American Convention on Human Rights and his death sentence must be set aside.

XVII. THE CUMULATIVE EFFECT OF CONSTUTITONAL AND INTERNATIONAL LAW INFIRMITIES IN THE CALIFORNIA DEATH PENALTY SCHEME REQUIRES REVERSAL OF MR. WEAVER'S CONVICTIONS AND DEATH SENTENCE

The cumulative effect of the constitutional and international law infirmities in the California death penalty scheme rendered Mr. Weaver's convictions and death sentence unconstitutional. Although this Court may find that no single error warrants reversal of his convictions and death sentence, the cumulative effect of the errors deprived Mr. Weaver of his rights to due process, to a fair trial, and to a reliable sentence under state law, the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, article I of the California Constitution and international law.

The prejudicial impact of multiple errors may result in an unconstitutional trial. (*Taylor v. Kentucky*, *supra*, 436 U.S. at p. 487 & fn. 15.) "'[E]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.'" (*Alcala v. Woodford*, *supra,* 334 F.3d at p. 883, quoting *Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1180; *Killian v. Poole*, *supra*, 282 F.3d at p. 1211.) This Court must consider the prejudicial impact of the errors together, rather than individually. Viewed together, the constitutional infirmities in the California death penalty scheme undermine all confidence in Mr. Weaver's conviction and death sentence.

CONCLUSION

For the reasons discussed, appellant requests that this Court reverse the convictions, the special circumstance findings, and the sentence of death.

DATED: January 17, 2007

Respectfully submitted,

ELISABETH SEMEL

TY ALPER

JAMES S. THOMSON

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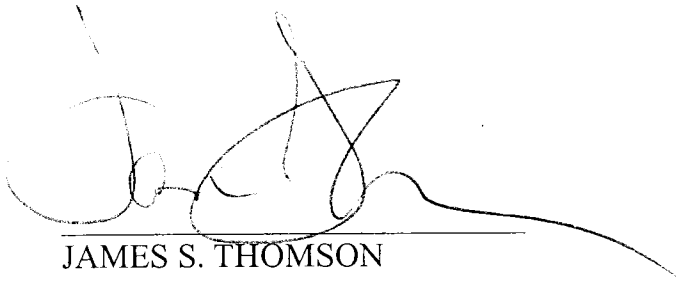
LA TWON R. WEAVER

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 36(b)(2), I hereby certify that, according to our word processing software, this brief contains 85,968 words.

DATED: January 17, 2007



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People v. Weaver; California
Supreme Court Case No. S033149

PROOF OF SERVICE BY MAIL

I, Elisabeth Semel, declare:

I am employed in the County of Alameda, State of California. I am over the age of eighteen years and am not a party to the within-entitled action. My business address is Boalt Hall School of Law, Berkeley, California, 94720. On January 17, 2007, I served the within **APPELLANT'S OPENING BRIEF** on the below-listed parties, by depositing a true copy thereof in a United States mailbox regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on January 17, 2007, at Berkeley, California.

Elisabeth Semel

ELISABETH SEMEL

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

LA TWON WEAVER,
Defendant.

No. CRN22688

JURY WAIVER
(PENALTY PHASE)

Comes now LATWON WEAVER,

defendant in the above-entitled criminal action, and, in support of his waiver of his right to a trial by jury to be made in open court personally and by his attorney, does declare:

1. That his attorneys in the above-entitled criminal action are Jeffrey R. Martin and David A. Rawson.

2. If, at the guilt phase, he is found guilty of first degree murder and a special circumstance is found true:

   (a) That he does desire to waive and give up his right to a trial by jury and that he does desire to have this court sitting without a jury determine whether he will be sentenced to life without the possibility of parole or death;

   (b) That he does understand that he is entitled to a trial by jury, that is, he does understand that he is entitled to have twelve citizens of this community impaneled and sworn to try his case and to determine by their verdict whether he will be sentenced to life without the possibility of parole or death;

3. That his attorneys have fully explained to him the term "jury trial";

4. That his attorneys have fully explained to him the term "court trial";

5. That his attorneys have fully explained to him the difference between a "jury trial" and a "court trial";

and

6. That he does personally waive his right to a "jury trial".

Executed this 26th day of February, 1993 in the County of San Diego, State of California.

Latwon Weaver
(Defendant's signature)

Deputy Public Defender

Jeffrey R. Martin
Deputy Public Defender

K. Michael Kohler
Deputy District Attorney

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

0672

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

LA TWON WEAVER

Defendant(s).

No. CR-N 22688

JURY WAIVER

FILED
KENNETH E. MARTONE
Clerk of the Superior Court
FEB 26 1993
By: J. BARNES, Deputy
VISTA BRANCH

Comes now LA TWON WEAVER defendant in the above-entitled criminal action, and, in support of his waiver of his right to a trial by jury to be made in open court personally and by his attorney, does declare:

1. That his attorney in the above-entitled criminal action is JEFFREY R. MARTIN & DAVID A. RAWSON

2. That he (does XXXXXXX) desire to waive and give up his right to a trial by jury and that he (does XXXXXXX) desire to have this court sitting without a jury determine whether he is guilty or not guilty of the offense(s) for which he is charged in the above-entitled criminal action;

3. That he (does XXXXXXX) understand that he is entitled to a trial by jury, that is, he (does XXXXXXX) understand that he is entitled to have twelve citizens of this community impaneled and sworn to try his case and to determine by their verdict whether he is guilty or not guilty of the offense(s) or crime(s) for which he is charged in the above-entitled action;

4. That his attorney (has XXXXXXX) fully explained to him the term "jury trial";

5. That his attorney (has XXXXXXX) fully explained to him the term "court trial";

6. That his attorney (has XXXXXXX) fully explained to him the difference between a "jury trial" and a "court trial"; and

7. That he (does XXXXXXX) personally waive his right to a "jury trial".

Executed this 25th day of February, 1993 in the County of San Diego, State of California.

La Twon Weaver

(Defendant's signature)

SUP CT CR-11 (REV. 9-88)

Jeffrey R. Martin states that he is the above-named defendant's 0673
attorney in the above-entitled criminal action; that he personally read and explained the contents of the above declaration to the defendant; that he personally observed the defendant fill in, date and sign said declaration; and that he joins in the defendant's waiver of a trial by jury in the above-entitled criminal action.

Dated this 25TH day of February, 1993

Jeffrey R. Martin
(Attorney's signature)

The People of the State of California, plaintiff in the above-entitled criminal action, by and through its attorney, EDWIN L. MILLER, JR., District Attorney, waive its right to a trial by jury in the above-entitled matter.

Dated this 26TH day of February, 1993

EDWIN L. MILLER, JR.
District Attorney
By:

K. Michael Kuhns
Deputy District Attorney.

Defendant personally and by and through his attorney having in open court knowingly and intelligently waived the right to a trial by jury and the People of the State of California by and through its attorneys having in open court waived right to a trial by jury, this court hereby accepts the above waivers of rights to a trial by jury and sets the above-entitled criminal action for trial by the court.

Dated: 26 Feb. 1993

J. Higgerson Jr.
Judge of the Superior Court.

SUP CT R-11 (REV. 9-88)

Original

0690

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. LA TWON WEAVER, Defendant.	Case No. CRN 22688 JURY WAIVER (PENALTY PHASE)

REAFFIRMATION OF PENALTY PHASE AND SPECIAL CIRCUMSTANCES JURY WAIVER

(1) The Defendant, and his attorneys, Jeffrey R. Martin and David A. Rawson, hereby incorporate all terms, conditions and statements in the prior Jury Waiver executed in this Court on February 26, 1993. It was, at the time of that Jury Waiver, and still is, the intention of the defense and prosecution to waive jury on the issue of guilt as to the charges in the guilt phase.

(2) It is also the intention and reaffirmation that the defense and prosecution furthermore separately recognize their right to a jury trial on the special circumstances finding and also fully waive their right to jury trial on the special circumstances finding.

PENALTY PHASE JURY WAIVER
OPPORTUNITY FOR RECONSIDERATION

The defense and prosecution hereby incorporate all terms, conditions and statements in the prior Jury Waiver-[Penalty Phase] filed in this Court February 26, 1993. The defense and prosecution are aware of their rights to move for a withdrawal of the Jury Wavier on the penalty phase.

(3) The defense and prosecution having had a full opportunity to reconsider a Jury Waiver on the penalty phase, reaffirm the decision for have a Jury Wavier and proceed without a jury on the penalty phase.

This reaffirmation and reconsideration is in agreement with the parties:

Executed this 19th day of March, 1993, in the County of San Diego, State of California.

LA TWON WEAVER, Defendant

David A. Rawson
Deputy Public Defender

Jeffrey C. Martin
Deputy Public Defender

K. Michael Kirkman
Deputy District Attorney

JUDGE OF THE SUPERIOR COURT