IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **CHARLES F. ROUNTREE,** **Defendant and Appellant.**	**No. S048543** **(Kern County Superior Court No. 57167-A)** **CAPITAL CASE**

Appeal From the Judgment of the Superior Court of the State of California for the County of Kern

The Honorable Lee P. Felice, Judge

APPELLANT'S OPENING BRIEF

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHARLES F. ROUNTREE, Defendant and Appellant.	No. S048543 (Kern County Superior Court No. 57167-A)

INTRODUCTION

Charles Rountree had driven across country to marry his girlfriend, Mary Elizabeth Stroder, and stay with his aunt in Ford's Mountain, California. Broke and out of gas in Bakersfield, California, the couple decided to try to get money from a passerby, Diana Contreras. Contreras ended up dead and the couple arrested as they fled back across the country.

Mr. Rountree, who suffered from a savior complex towards women, confessed twice to the killing and directed his trial attorney not to implicate Stroder in any way. This despite the fact that the physical evidence pointed to Stroder as the killer.

Despite a storm of negative publicity and a juror recognition rate of 85%, the trial court denied Mr. Rountree's repeated motions to change the trial's venue. It then empaneled jurors, over Mr. Rountree's objections,

who had followed the case in the media, who had already decided he was guilty, and who were *angry* about the case, while barring a potential juror who had religious scruples about the death penalty, but who would have followed the court's instructions. Mr. Rountree's fate was all but decided when the trial was kept in Bakersfield and a death-prone jury empaneled.

The trial court then allowed into evidence Mr. Rountree's confessions, but redacted them to erase Stroder and show Mr. Rountree as the sole planner and perpetrator of the crime. The court then failed to grant Mr. Rountree's repeated motions for severance of his penalty trial from Stroder's, for separate juries, or to allow the full confessions into evidence. The jury never heard Mr. Rountree's actual confessions.

The jury then evaluated the redacted confessions and other evidence in a trial process and web of jury instructions that denied Mr. Rountree his only defense - that the killing had been accidental - and guided the jury towards an inevitable death verdict. Reversal is required.

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code § 1239.)[1]

STATEMENT OF CASE

On March 10, 1994, the Kern County District Attorney filed a three-

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

count Information charging defendant and appellant Charles F. Rountree and his wife, co-defendant Mary Elizabeth Stroder, with the following offenses against Diana Contreras: count 1, premeditated murder (§ 187, subd. (a)); count 2, kidnaping to commit robbery (§ 209, subd. (b)); count 3, robbery (§ 221.5, subd. (b).) (2 CT 463-468.)[2]

Count 1 also alleged as special circumstances that the murder was committed while Mr. Rountree and Stroder were engaged in the commission of a kidnaping and robbery within the meaning of Penal Code section 190.2, subdivisions (a)(17)(1) and 17(2). (2 CT 464-465.)

Counts 1, 2, and 3 also alleged personal use of a firearm by Mr. Rountree in the commission or attempted commission of a felony within the meaning of Penal Code section 12022.5, subdivision (a), and that Stroder was not personally armed but knew that a principal was armed within the meaning of Penal Code section 12022, subdivision (d). (2 CT 463-465.)

Counts 2 and 3 also alleged that they were serious felonies within the meaning of Penal Code section 1192.7, subdivision (c)(19). (2 CT 465-466.)

Counts 1, 2, and 3 also alleged that Mr. Rountree had suffered prior

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[2] "CT" shall refer to the Clerk's Transcript, "RT" to the Reporter's transcript, "SCT" to the Supplemental Clerk's Transcript, "2SCT" to the Second Supplemental Clerk's Transcript, "ECT" to the Clerk's Transcript containing the Exhibits, and "JCT" to the Clerk's Transcript containing the Juror Questionnaires.

convictions. (2 CT 463-465.) Those allegations were stricken on January 20, 1995. (4 CT 989-1006.)

A motion for change of venue was heard on December 16, 1994. (3 CT 884-986.) The motion was denied by minute order on December 27, 1994. (4 CT 987-988.) On June 2, 1995, Mr. Rountree renewed the motion for change of venue. The motion was denied. (5 CT 1519-1524; 11 RT 2066-2071.) Mr. Rountree renewed the motion for change of venue a third time, and again the motion was denied. (11 RT 2092; 5 CT 1519-1524.)

On March 3, 1995, a motion was heard to sever the trials, or in the alternative, for separate guilt and penalty juries, or for separate juries for each defendant. (4 CT 1204-1205.) The motion to sever was denied by minute order on March 9, 1995. (4 CT 1242-1243.) Mr. Rountree renewed the motion to sever on June 12, 1995, and again the motion was denied. (5 CT 1544-1548.) On June 23, 1995 and again on June 26, 1995, Mr. Rountree's motion to sever the penalty trials was heard and denied. (6 CT 1785-1788, 1789-1793.)

Trial commenced with hearings on various *in limine* motions on May 10, 1995. (5 CT 1437-1440.) On June 14, 1995, Mr. Rountree's trial counsel, Michael Sprague, told the court that he was suffering from a recurrence of "valley fever" and asked that co-counsel be appointed. (5 CT 1553-1555.) Ralph McKnight, Jr. was appointed. (*Ibid.*) Neither Mr.

Rountree nor co-defendant Stroder presented any evidence at the guilt phase. (17 RT 3059.) Defense counsel informed the Court that he had been instructed by Mr. Rountree not to present any evidence, directly or through cross-examination, or make any argument to the jury, that might implicate his wife, co-defendant Mary Elizabeth Stroder. (17 RT 3125.)

On June 16, 1995, the jury returned guilty verdicts on all counts and true findings as to each of the special circumstance and firearm allegations. (6 CT 1723-1732.)

The penalty phase began on June 26, 1995. (6 CT 1789-1793.) On June 30, 1995, the jury returned a verdict of death for Mr. Rountree and life without possibility of parole for co-defendant Stroder. (7 CT 1987-1992.)

On August 11, 1995, the Court denied Mr. Rountree's motion for a new penalty phase and motion to reduce penalty due to intra-case disproportionality, and imposed a sentence of death. (7 CT 2141-2144, 2156-2162.) Co-defendant Stroder was subsequently sentenced to life without the possibility of parole. (7 CT 2185-2189.)

Mr. Rountree's appeal is automatic under section 1239.

STATEMENT OF FACTS

In December 1993, Mary Elizabeth Stroder and her boyfriend, appellant Charles Rountree, were living with Mary Elizabeth's father,

Daniel Stroder, in his home in Whitewater, Missouri. (13 RT 2485.)[3] On December 3, 1993, Daniel Stroder had arranged to meet his daughter Mary Elizabeth in Cape Girardeau, Missouri, 20 miles from their home in Whitewater, Missouri, but she failed to show up that day for the meeting. (13 RT 2485.) During this same time, Daniel Stroder owned a 1986 Volkswagen Golf that Mary Elizabeth drove. (13 RT 2483-2484.) The Volkswagen Golf had a broken bolt on the alternator and was scheduled for repairs later in December. (13 RT 2489.)

At this time in his life, Mr. Rountree was under a lot of family stress and pressure; he was having problems with his mother, stepfather, and his ex-girlfriend. He and Stroder just wanted to leave town to escape the stress and to get married. (4 CT 1046-1047.) They left Missouri with $130 and, unbeknownst to Daniel Stroder, they also took his rifle for protection. (4 CT 1113, 1133) They headed for Ford Mountain, California, where Mr. Rountree's aunt lived, but they ran out of money before arriving in Ford Mountain. (4 CT 1043.) Out of money and out of gas, they parked in the parking lot of a Von's grocery store in Bakersfield, California and spent a cold night in the Volkswagen Golf. (4 CT 1045.)

The next morning they talked about how to get money to continue their journey to Mr. Rountree's aunt's home. Eventually, they decided to

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[3] The following facts are drawn from Mr. Rountree's statements to police on 12-16-93 and 12-23-93. (4 CT 1040-1184.)

drive to a mall where they thought about robbing a couple of different people but got scared and did not go through with it. (4 CT 1050, 1053.) Then, Mr. Rountree and Stroder drove up and parked next to a woman's car; the woman had gotten out of her car and walked to the doors of the mall. (4 CT 1122.) Stroder then got out of her car, walked towards the mall and met the woman at the mall doors, which, because the mall had not yet opened for business, the doors were still locked. (4 CT 1124.) Stroder struck up a conversation with the woman asking her what time the mall opened. (4 CT 1054-1055, 1124-1125.) As they were standing there, the mall opened and both women went in. (*Ibid.*) When Stroder returned to the car, Mr. Rountree and Stroder sat in the Volkswagen Golf talking about what they were going to do about getting money. (*Ibid.*)

When the woman, later identified as Diana Contreras, came out of the mall, Stroder stopped her as she neared their car, chatting with her and asking her for directions. Finally, Stroder told her to "Please get in the car. My boyfriend's got a gun and we need some money." (4 CT 1059.) Stroder stood behind Contreras as Contreras, carrying her shopping bags, got into Stroder's car. (4 CT 1060.) Contreras got in the back seat and Stroder got in the front passenger seat. (4 CT 1061.) The rifle was sitting beside the gear shift and Contreras did not see it when she got in the car. (4 CT 1060.) Mr. Rountree told Contreras they would not hurt her, that they were from

St. Louis, ran out of money, and were trying to get to his aunt's home. (4 CT 1058.) Mr. Rountree never pointed the gun at Contreras. (4 CT 1130.) Contreras only had $7 and told them she would give them one hundred dollars from her bank. (*Ibid.*) They drove to Wells Fargo Bank and Mr. Rountree used Contreras's ATM card to withdraw $100 from her account, first, punching in the wrong numbers a couple times out of nervousness. (4 CT 1062-1063.) Mr. Rountree gave Contreras the receipt for the transaction. (4 CT 1131.) As Mr. Rountree and Stroder were taking Contreras back to her car, Mr. Rountree remembered that Contreras had a car phone and could immediately call the police. They decided to take her to a remote area with no phones around to give themselves a head start to get away. (4 CT 1064-1066.) It was not their plan to hurt her, and in fact they did not want to tie her up because of the danger of wild animals harming her, and also because if no one came through the area she would be left stranded and unable to help herself. (4 CT 1162.)

Contreras was nervous about being left in the remote area, but she never appeared scared of Mr. Rountree and Stroder. (4 CT 1139.) Mr. Rountree and Stroder only wanted money from Contreras, they did not want to hurt her. (4 CT 1139-1140.)

When they arrived in a desolate oilfield area, Contreras was told to get out of the car. Stroder also got out of the car, and after letting Contreras

with her shopping bags out of the backseat, the two women began to argue. Contreras did not want to be left behind in the desolate oilfield. (4 CT 1067-1068, 1081.) Mr. Rountree got out of the car with the rifle to scare Contreras so he and Stroder could leave the area, but somehow the rifle accidentally discharged, striking Contreras. (4 CT 1069-1070, 1073.) Either Contreras ran into the gun or Mr. Rountree twitched when she approached, causing the rifle to accidentally fire. (4 CT 1167, 1170-1171, 1173.) Contreras fell to the ground. Chaos ensued, Contreras was in visible pain, Stroder was screaming, Mr. Rountree panicked, and not knowing what to do, he fired twice more. (4 CT 1069-1070, 1073.) Contreras's shopping bags were then thrown back into the car and Mr. Rountree and Stroder drove away. (4 CT 1075.)

Mr. Rountree and Stroder drove back into town, parked at the mall again, and not knowing what to do, they sat there for hours and cried together. (4 CT 1082, 1100.) First, they decided that because the Volkswagen Golf was rattling badly because of the broken alternator bolt they would take Contreras's Eagle Talon. (4 CT 1082.) They abandoned the Volkswagen Golf by a Bakersfield carwash. (4 CT 1099.)[4] On their way out of town they drove past another bank and withdrew more money

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[4] On December 13, 1993, the Volkswagen Golf was towed as an abandoned vehicle from Ming Road and Real Street in Bakersfield, California. (14 RT 2510-2514.)

with the ATM card. (4 CT 1083.)

Mr. Rountree and Stroder left the Bakersfield area and drove to Las Vegas where they got married. (4 CT 1086.) They believed that getting married meant they could keep in contact with each other no matter what happened to them. (4 CT 1161.) They were upset at this time and could not sleep, cried a lot, and Stroder smoked two cartons of cigarettes. (4 CT 1106.) Still low on money, they used the ATM card two or three more times in Las Vegas, then Utah, and Denver as they drove back toward St. Louis, Missouri. (4 CT 1087-1089.) Mr. Rountree, wanting to protect Stroder, drove her home to Missouri. (4 CT 1161.)

Trial Evidence: Guilt Phase

Prosecution evidence:

On December 9, 1993, Diana Contreras drove her red Eagle Talon to the Valley Plaza Shopping Center in Bakersfield to do some Christmas shopping. On her way to the mall, she stopped and withdrew $20 from her Wells Fargo ATM account. (12 RT 2139-2143; 14 RT 2524.)

A mall security officer saw the Talon parked at the mall between 9:40 a.m., and 11:00 a.m. (13 RT 2456-2459.) Contreras made several purchases at the mall. Her last purchase at the mall was made at the Wet Seal Company at 11:15 a.m. (13 RT 2463-2467, 2471-2472; 15 RT 2577.)

When Contreras failed to show up at her sister's residence at 1:30

p.m., the sister contacted family members who went to the mall to look for the red Talon. Unable to find the vehicle, the family contacted the police and filed a missing person's report. (12 RT 2140-2141.)

At 11:36 a.m., on December 9, 1993, $100 was withdrawn from Contreras's ATM account at the Stockdale Highway branch of the Wells Fargo Bank in Bakersfield. About one and one-half hours later, at 1:06 p.m., there was an unsuccessful attempt to withdraw $400 from the account at the Wells Fargo branch at White Lane and Stine Road in Bakersfield. After a few minutes, there was a successful withdrawal of $100 at that location. At about 1:49 p.m., there were two more unsuccessful attempts to withdraw $100 at the White Lane and Stine Road branch. However, at 1:53 p.m., $60 was withdrawn from the account at the same branch. (14 RT 2525-2528.)[5]

On December 10, 11, and 12, 1993, $300 withdrawals were made from the account at various locations in Las Vegas, Nevada. (14 RT 2529-2531.) On December 13th, $300 was withdrawn at a location on Interstate 70, and $300 from the Colorado National Bank in Denver on December 14th and 15th. (14 RT 2531-2532.)

At about 7:20 a.m. on December 10, 1993, oil field worker Howard

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[5] Linda Larrabee, a project manager for Wells Fargo Bank, testified to various ATM transactions involving Contreras's account. (14 RT 2532-2536.)

Smith and some of his co-workers discovered a body in a remote area of an oil field about two and one-half miles from Taft in Kern County, California. (12 RT 2157-2168.) The body was later identified as the body of Diana Contreras. (13 RT 2409.)

The forensic pathologist who performed the autopsy, Dr. Armand Dollinger, testified that Contreras had been shot three times, once in the upper left quadrant of the abdomen, once in the upper right quadrant of the abdomen and once in the lower abdomen. In his opinion, death was instantaneous. (13 RT 2409-2418.)

Evidence technician, Thomas R. Fugitt testified he booked into evidence four shell casings found at the scene some three to six feet in front of Contreras's body. (12 RT 2300-2301, 2309.) Kern County Criminalist Gregory Laskowski testified a forensic examination revealed that these four shell casings were fired by the .30-.30 rifle found in the Eagle Talon when Stroder and Mr. Rountree were arrested. (15 RT 2587; 17 RT 2882-2883.) The rifle's trigger pull, which is a measurement that determines how much force is necessary to pull the trigger, measured at six pounds. Laskowski testified this meant that the trigger pull was moderate thus requiring less force to pull the trigger than guns that measured in the harder trigger pull range of thirteen pounds or greater. (17 RT 2881.) Laskowski further testified that this particular rifle could be accidentally fired. (17 RT 2921.)

Evidence technician Fugitt, testified he processed the crime scene and found shoe and tire tracks located five to eleven feet away from the body. (12 RT 2309-2310.) Kern County Sheriff's Deputy Joseph Giuffre obtained a pair of shoes from Stroder's property at the Kern County jail. (15 RT 2689; People's Exhibit 76.) John Reischert, regional footwear manager for K-Mart, testified that Stroder's shoes were sold only by K-Mart, but were never carried by any K-Mart store in Kern County. During 1993, only 876 pairs of those same shoes were sold in the western United States, including California. (16 RT 2740-2741.)

Criminalist Laskowski testified that impressions from Stroder's shoes appeared similar to a shoe print discovered near the body. However, Laskowski was unable to positively identify Stroder's shoes as having made the impression in the dirt near the body. Laskowski did testify that Stroder's left shoe sole had an area at the very front portion of the central area of the tread that had been gouged out and this was consistent with the details of a shoe track found at the scene. (17 RT 2907-2913; See People's Exhibits 62, 76, and 82.)

Criminalist Laskowski was also provided a pair of Asics tennis shoes belonging to Mr. Rountree. Laskowsi testified he did not find any shoe tracks at the scene of the crime similar to Mr. Rountree's Asics tennis shoes. (17 RT 2913.)

Laskowski testified he compared tire track impressions taken from the Volkswagen Golf to photographs of tire tracks found at the crime scene. (17 RT 2901.) As a result of the impression-to-photograph-comparison, Laskowski concluded that the tread design of the Volkswagen Golf's front Mastercraft radial tires were similar in appearance to two tire track photographs taken at the scene. (17 RT 2903.) However, the most that could be said was that the tread design was similar and there were not enough apparent individual characteristics to distinguish between the left and right front tires. (17 RT 2930.) Laskowski also testified that he did not find any tire tracks photographed at the scene that were similar to the rear tires of the Volkswagen Golf. (17 RT 2904.)

Kern County Criminalist Brenda Smith testified that on December 15, 1993 she examined the interior of a Volkswagen Golf for possible biological and trace evidence. (16 RT 2759.) At a later date she examined Contreras, her clothing and other related items for trace evidence. Then, two weeks later and uncertain whether anyone had been in and out of the Volkswagen Golf during that time period, Criminalist Smith went back to the Volkswagen Golf to collect additional trace evidence. (16 RT 2825, 2833.) After collecting trace evidence twice from the Volkswagen Golf and once from Contreras, Criminalist Smith made a visual comparison to determine whether similarities existed. (16 RT 2824.) The visual

comparison included the use of a stereo microscope which is an instrument that uses lower magnification than other available high-powered microscopes. (16 RT 2822.) She testified her visual comparison led to her conclusion that fibers and other trace materials found on the front passenger seat area in the Volkswagen Golf were similar to materials and fibers discovered on Contreras's clothing and other areas related to Contreras. (15 RT 2757-2774; 16 RT 2777.)

On December 15, 1993, Kansas State Troopers stopped Contreras's red Eagle Talon near Wakeeney, Kansas. Stroder was driving the Talon and Mr. Rountree was riding in the passenger's seat. (15 RT 2563-2570, 2585-2594.)

Kansas State Trooper Terry Stithem testified that Stroder's purse was in the red Eagle Talon and inside her purse, under her photo identification, officers discovered Contreras's social security card. Other items, including a box containing sixteen .30-.30 shells, motel receipts from Harrah's in Las Vegas, Nevada, Contreras's checkbook, Wells Fargo card, and driver's license, and a Siamese kitten in a pet carrier were also found inside the red Eagle Talon (15 RT 2568-2570, 2617-2625, 2631.)

Defense evidence:

Neither Mr. Rountree nor Stroder presented any evidence in the guilt phase of the trial. (17 RT 3059.)

Penalty Phase:

Prosecution evidence:

Contreras's sister, Annette Perales, testified that Contreras was good with children and wanted to be a pediatrician. She was very close to their mother, who would still sometimes call out Contreras's nickname, "Luli." Their mother was in an accident in 1986, and Contreras helped her take baths and took her shopping. Perales gave the prosecutor a group of photos of Contreras at various stages of her life which were received in evidence. (22 RT 3483-3488.)

Valerie Lovett testified that she was Contreras's best friend at Arvin High School, from which they both graduated in 1993. Lovett was hurt badly by her death because she believed Contreras would have done a lot to help people in this world. Lovett showed the jury three pictures of Contreras with high school friends at the senior picnic, senior breakfast, and golf club. (People's Exhibits 83, 84, and 85.) The pictures were received into evidence. (22 RT 3488-3491.)

Contreras's father, Raymond Soto Contreras, testified that Contreras had a heart of gold and was the kind of person who wanted to help people. She took psychology classes to help him cope with his wife's accident. After his wife's car accident, Contreras took care of her, bathed her, combed her hair, did her nails, and took her to dinner. She also worked

with disabled people like his wife. She went to college and inspired his 14 grandchildren to think that they could also go. (22 RT 3491-3494.)

The prosecutor offered into evidence the dockets of Mr. Rountree's four prior felonies. (People's Exhibits 79, 80, 81, and 82; 22 RT 3494; ECT 430-526.)

Defense evidence:

At the outset and before the jury was present, trial counsel informed the Court that Mr. Rountree instructed him to not present evidence that would create problems for his wife, co-defendant Mary Elizabeth Stroder, and trial counsel stated that he intended to follow Mr. Rountree's instructions. (22 RT 3498.) Trial counsel did present evidence showing a brief picture of Mr. Rountree's upbringing, religious convictions and remorse.

Carmen Hobson, Mr. Rountree's mother, testified that Mr. Rountree's father was a glue-sniffing, self-destructive veteran who attempted suicide a number of times. When Mr. Rountree was almost two years old his father died when he ran out into traffic. (23 RT 3581-3583.) Mr. Rountree's mother was an alcoholic who had been in a drug treatment program but was only able to quit drinking for a very short time. She married John Hobson when Mr. Rountree was six years old and had three children with him. (23 RT 3584-3585.) She testified that Mr. Rountree was

wonderful with his brothers and sisters, loved them, took care of them, and played with them. As the eldest, Mr. Rountree was required to handle a lot of the household chores and was looked up to as the responsible child. He did all the laundry and helped clean up. He was a good boy, behaved himself, got good grades and was never violent. (23 RT 3584-3585.)

Mr. Rountree's mother testified that when Mr. Rountree started seeing women, she told him that he had to protect women because she had run away from home at 15 and been raped by three black men while Mr. Rountree's father was with her, but unable to help. She was sure it affected him. Her husband was a hunter and had guns in the house, but she never saw Mr. Rountree with one. He'd been hunting with his stepfather once, but showed no interest, could not sit still, and never went again. (23 RT 3586-3589.)

John Hobson, Mr. Rountree's stepfather, has known Mr. Rountree since Rountree was six years old. Mr. Rountree was a good child, was never disrespectful, and did what he was told. He babysat and took care of his brothers and sisters. (23 RT 3590.) Hobson showed the jury Mr. Rountree's awards and titles from track and field, basketball, and soccer. Mr. Rountree was involved in sports all through school until he was injured in a serious car accident in 1992. He broke his back and knee and had metal rods and a steel plate put in. After that, he could not participate

anymore. Hobson told the jury that Mr. Rountree's family loves him very much. (23 RT 3592-3595.)

Ruth Ann Evers testified that she first met Mr. Rountree when he was 8 to 10 years old and she was his Sunday School teacher at St. John's Lutheran Church in St. Louis, Missouri. Mr. Rountree was active in the youth group when she was youth director at the Church. Ms. Evers knew Mr. Rountree's family and kept in contact with Mr. Rountree after he graduated from high school. (22 RT 3533-3535.) She remembered Mr. Rountree as warm, polite, and caring. He was not violent and got along well with the other kids. He participated in Bible class, youth activities, and religious services. He believed in God. (22 RT 3536.) He also participated in Scouting through the Church. (22 RT 3543.) He was gentle and protective of girls, never aggressive. He was loving and took care of his younger sister. (22 RT 3537.)

Johnny Ray Marcrum, Stacy Walker, Susan Walker, Joan Thompson, and Jacqualen Messenger were friends of Mr. Rountree's, and previously worked with him at the "Steak and Shake" restaurant in St. Louis. They testified that Mr. Rountree was friendly, considerate, and very supportive and protective of females. He never got upset or violent - he was just a sweet kid. (22 RT 3543-3561.)

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Stipulations:

The defense and prosecution stipulated to the following facts illustrating Mr. Rountree's religious convictions and remorse:

(1) When arrested in Kansas, Mr. Rountree told Kansas State Trooper Wanamaker that what happened went against his religion and everything he believes in.

(2) While under arrest in Kansas, Mr. Rountree wrote several letters and those letters contained the following statements –

- " I took another person's life whether I wanted to or not I still did it. I wish I could reverse time but I can't do it."
- "I just pray I don't go to hell, God forgives all sins"
- "My mom and I prayed together for forgiveness. I want to go to heaven, I believe in God and that Jesus died on the cross."
- "I pray for the girl's parents too, I couldn't imagine how they feel. If someone killed my daughter I would kill them. I wish I could give her life back."
- "I failed my family and friends, I failed God. I know God is forgiving but he keeps giving me a chance, I blew it. I should have died last year but I'm still alive. I wish I would have died last year, then that little girl would be alive." (22 RT 3562-3563.)

(3) Carolyn Voight-Seamen, a psychiatric technician at the Lerdo pre-trial facility saw Mr. Rountree on April 26, 1994 because he was having problems sleeping. Her report states: "Rountree complained that he has

trouble sleeping, he's getting about one hour of sleep a night. He has nightmares and in the nightmares he keeps seeing her face. He also made the statement that he had ruined the victim's family's lives." (22 RT 3563.)

(4) During the statement taken by Deputy Giuffre on Dec. 16th, 1993, Mr. Rountree told him he thought about calling Diana Contreras's parents, her dad, but was afraid he would get caught. Mr. Rountree told him after the offense he could not sleep, he was crying all the time, was a nervous wreck. In the interview on the 16th, Mr. Rountree was asked if Contreras deserved to die and he replied "no, she was a sweet little girl." In the interview of the 23rd, when asked "what happened after Diana Contreras was shot?" Mr. Rountree answered, "I stood there for a minute crying. I did not know what to do." Mr. Rountree also stated in that interview "I saw Diana Contreras lying there, I guess God just wanted me to see her face, I guess. I saw her face, she was looking up so I started crying, went to the car and drove off." (22 RT 3566-3567.)

(5) The defense and prosecution also stipulated Brenda Rountree was Mr. Rountree's aunt, lived in Ford Mountain in Northern California, and wrote letters to Mr. Rountree's family inviting them to come stay with her. (24 RT 3675.)

Dr. John Byrom, a clinical psychologist who evaluated Mr. Rountree before trial, diagnosed Mr. Rountree as having no history of violence, a low

propensity for violence, and further found that Mr. Rountree was neither psychotic nor sociopathic. (23 RT 3600, 3602-3063.) He also found that based upon Mr. Rountree's admissions of guilt, consistent statements and emotional reaction, as shown by his recurrent incident-related nightmares, and his recognition of the effect of the crime on the victim's family, as shown by his statements that he had ruined the victim's family's lives, Mr. Rountree exhibited true remorse. (23 RT 3603-3605.)

Dr. Byrom further found that Mr. Rountree would adapt well to prison and his propensity for violence in prison would be very low. (23 RT 3605-3609.)

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I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING MR. ROUNTREE'S REPEATED MOTIONS TO CHANGE VENUE.

A criminal defendant facing trial by jury is entitled to be tried by "a panel of impartial 'indifferent' jurors." (*Irvin v. Dowd* (1961) 366 U.S. 717, 722; *Gallego v. McDaniel* (9th Cir. 1997) 124 F.3d 1065, 1070.) The presence of even a single biased juror violates a defendant's constitutional rights under the Sixth and Fourteenth Amendments and article I, section 16, of the California Constitution. (*Irvin v. Dowd, supra*, 366 U.S. at p. 722; *In re Hitchings* (1993) 6 Cal.4th 97, 110-111.)[6] Thus, a defendant who demonstrates that "there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial" is constitutionally entitled to a change of venue. (*Sheppard v. Maxwell* (1966) 384 U.S. 333, 362.)

In Mr. Rountree's case, the trial court empaneled a jury - over Mr. Rountree's repeated objections -that had been saturated in media reports about the case, that contained jurors angry at Mr. Rountree and others ready to impose the death penalty before the guilt phase had even begun. This was a far cry from the "panel of impartial 'indifferent' jurors" required by the

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[6] It is settled law that article I, section 16, of the California Constitution guarantees the right to a unanimous verdict by an impartial and unprejudiced jury. "Section 16 of article I does not explicitly guarantee trial by an 'impartial' jury, as does the Sixth Amendment to the federal Constitution; but that right is no less implicitly guaranteed by our charter, as the courts have long recognized." (*People v. Wheeler* (1978) 22 Cal.3d 258, 265.)

U.S. Constitution.

The trial court's failure to grant any of Mr. Rountree's repeated motions for a change of venue deprived Mr. Rountree of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances, and penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7,15,16, & 17.) Accordingly, reversal of the convictions, the special circumstance findings, and the death judgment is required.

A. Procedural Background.

1. The pre-voir dire challenge.

On December 7, 1994, co-defendant Stroder and Mr. Rountree filed a motion for a change of venue, alleging that there was a reasonable likelihood they could not receive a fair trial in Kern County. (3 CT 884-948.) Appended to the motion were copies of newspaper reports (Exhibit A, 3 CT 903-930), a public opinion survey by Dr. Terry Newell, Ph.D., (Exhibit B, 3 CT 931-944), and a flyer for a rally and march on the Kern County Courthouse to be held May 14, 1994 where the victim's family was to speak. (Exhibit C, 3 CT 945.)

The hearing on the motion was held on December 16, 1994. (4 CT 981-986OOO.) At the hearing, Mr. Rountree introduced into evidence another collection of newspaper articles, as well as a videotape, flyer, and

photos of a second march on the courthouse, christened "Love for Life," which took place on July 9, 1994, and where the grandfather of Polly Klass and various politicians spoke before the marchers, TV cameras and other people from the media. (4 CT 986, 986PP-986UU.)

Dr. Terry Newell, Ph.D., a professor of psychology at California State University, Fresno, testified at the hearing regarding a public opinion survey he had done on Mr. Rountree's case. (4 CT 986E-986F.) Newell had previously done at least 30 such surveys over the preceding 20 years. (*Ibid.*) The prosecution did not challenge or dispute the results of the survey. (4 CT 986Z-986II.) The survey involved a sample of 263 people from an expired jury list. Samples of this composition and size are accurate to within 3%. (4 CT 986H, 986M-986N.) Of those surveyed, 81.4% recognized the case. (3 CT 933; 4 CT 986N.) When given additional facts about the case, 85% recognized the case, a very high recognition rate in a case that was a year old at the time of the survey. (3 CT 934; 4 CT 986O, 986S.) Of those who recognized the case, over 46% felt Mr. Rountree was definitely or probably guilty (3 CT 937; 4 CT 986Q) and 54.8% would give Mr. Rountree the death penalty. (4 CT 978, 986V.) Newell reviewed the recognition rates for other cases he had worked upon in Kern County and concluded that 85% was a very high level of recognition for a case in Kern County. (4 CT 986MM.)

Melvin Khachigian, a local realtor and long-time Bakersfield resident, testified that, based upon the local TV and newspaper coverage, it was his opinion that Mr. Rountree was guilty, that the situation outraged him, and that Mr. Rountree "should be hanged for what he did." (4 CT 986VV-XX.)

At the end of the hearing, the trial court took the matter under submission, but ruled that any denial would be without prejudice. (4 CT 986KKK.) On December 27, 1994, the trial court denied the motion in a minute order. The order did not include any findings of fact or state the basis for the denial. (4 CT 987-988.)

2. Voir dire and the renewed motion for change of venue.

As jury voir dire commenced, trial counsel made a blanket objection to every potential juror who had formed an opinion about guilt based upon pre-trial publicity. (4 RT 703-705.) All subsequent challenges based upon pre-trial publicity were denied.

On June 1st and 2nd, 1995, both during the jury selection process and after the jury was empaneled, Mr. Rountree thrice renewed the motion for change of venue. (5 CT 1516-1524; 11 RT 2056-2059, 2066-2071, 2092-94.) All challenges were denied. (*Ibid.*)

On June 1, 1995, trial counsel asked that the record reflect that he was making a motion under Penal Code section 1033, subsection (b), but

would like to argue the matter further after the final jury panel had been chosen. (11 RT 2056-2057.) The trial court agreed and attempted to summarize the motion - that despite a panel of 81 prospective jurors,

> "a substantial number of those are tainted by the pre-trial publicity, and that, in fact, the Court denying your motion to basically excuse those, some of those jurors, the record will reflect when you made those motions, it was erroneous, that, in fact, the Court should have granted your challenges, and that if that had been done, we would not be with a sufficient number in the panel...." (11 RT 2057-2058.)

Trial counsel agreed with the summary, stating that, "despite *Hovey* voir dire, we're still in the position where publicity has contaminated this panel...." (11 RT 2058.) The trial court then denied the motion as to the general panel under section 1033(b), but stated there would be no final ruling on the motion for change of venue until the jury was empaneled. (*Ibid.*) The long juror questionnaires were then marked as Court's 24 and the hardship questionnaires, where pre-trial publicity was the second question, were marked as Court's 25 and made part of the record for the motion. (11 RT 2058-2059.)

On June 2, 1995, trial counsel filed with the court an update of the media reports about the case since the hearing on the motion in December of 1994, then renewed the change of venue motion based upon the contamination of the jury panel by pre-trial publicity. (11 RT 2066.) Of the panel of 82 prospective jurors, 61 had heard something about the case.

(*Ibid.*) Of those, 26 had formed the opinion that the defendants were either guilty or guilty of something. (*Ibid.*) Counsel for co-defendant noted that, among others, a long article appeared one month before the start of trial on the front page of the local section of the newspaper with a color photo of the family and a raft of victim impact evidence: the family's grief, their dread of trial, the mother naming a doll for her daughter, as well as the facts of the crime, all spread over three pages of the paper. (11 RT 2068.)

The trial court then stated that "[t]here isn't a juror remaining who indicates they could not set aside whatever it was that he read or heard, whatever opinions they may have formed. I think they will judge this case solely, exclusively on the evidence presented to them in this courtroom." (11 RT 2070.) The court then denied the motion. (11 RT 2071.)

As voir dire continued, Mr. Rountree exhausted his peremptory challenges and the jury and alternates were sworn. (11 RT 2084, 2086, 2089-2090.) Trial counsel then renewed the motion for change of venue, arguing that juror number 048108 had been exposed to the pre-trial publicity and felt that the defendants were guilty of something. Mr. Rountree would have challenged him, but could not because he had no peremptories left, and Mr. Rountree therefore asked for a change of venue in the alternative. (11 RT 2092-2094.) In fact, juror 048108 had both read about the case in the newspaper and heard about it on TV. He recalled that

the victim was found murdered in Taft, the defendants were captured driving her car somewhere in the Midwest, and that the rifle used to kill her was found in the vehicle. (6 RT 1153.) He asserted that he could set that aside. (*Ibid.*) He had also formed the opinion that Stroder and Rountree were guilty of something, but insisted that he could also set that aside. (6 RT 1153-1154.)

The trial court repeated that all of the jurors and alternates had indicated they could set aside anything they had read and the opinions they had formed and base their decisions solely upon the evidence, and again denied the motion. (11 RT 2093-94.)

B. The U.S. And California Constitutions Require A Change of Venue When There Is A Reasonable Likelihood That Pre-Trial Publicity Will Prevent a Fair Trial.

A criminal defendant in a capital case is entitled to due process, a fair and impartial jury, and the guarantee that the death penalty will not be imposed arbitrarily or irrationally. (U.S. Const., Amend. 5th, 6th, 8th, 14th; Calif. Const. art. I, §§ 7, 15, 16, 17.) To help achieve this, a jury in a criminal case is supposed to make a decision exclusively on the basis of evidence received in the courtroom. "'The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by outside influence, whether of private talk or public print.'" (*Patterson v. Colorado* (1907) 205 U.S. 454, 462.)

The principle that a jury should receive information about a case only from the witness stand and the judge is implicit in the Sixth Amendment guarantee that an accused shall receive a trial by an impartial jury, with an opportunity to confront and cross-examine his accusers. (*Parker v. Gladden* (1966) 385 U.S. 363, 364.) The Fourteenth Amendment guarantee of due process requires a change of venue where an impartial jury cannot be seated due to pervasive pre-trial publicity. (*Rideau v. Louisiana* (1963) 373 U.S. 723.)

1. The California standards for motions to change venue were meant to codify the requirements of the U.S. Constitution.

In *Maine v. Superior Court* (1968) 68 Cal.2d 375, this Court established the standard of review for change of venue motions made in the trial court.

> "A motion for change of venue or continuance shall be granted whenever it is determined that because of the dissemination of potentially prejudicial material, there is a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. This determination may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the material involved. A showing of actual prejudice shall not be required." (*Maine v. Superior Court, supra,* 68 Cal.2d at p. 383.)[7]

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[7] The *Maine* standard was then codified in Penal Code section 1033, which provides, in pertinent part: "In a criminal action pending in the superior court, the court shall order a change of venue: (a) On motion of the defendant, to another county when it appears that there is a reasonable

The *Maine* standard is the implementation of Sixth and Fourteenth Amendment safeguards of the right of a criminal defendant to receive a fair trial before an impartial trier of fact (*Id.* at pp. 381-384), and is fashioned as suggested by the U.S. Supreme Court in *Sheppard v. Maxwell, supra,* 384 U.S. at p. 363, where the U.S. Supreme Court held that "[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." (See also *Maine v. Superior Court,, supra,* 68 Cal.2d at pp. 383-384.) The reasonable likelihood standard denotes a lesser standard of proof than "more probable than not" (*People v. Williams* (1989) 48 Cal.3d 1112, 1126), but something more than "merely possible." (*People v. Proctor* (1992) 4 Cal.4th 499, 523.)

2. Because the jury in a capital case is vested with absolute discretion in determining penalty, a fair and impartial jury is critical.

Where a state provides for jury determination of penalty in capital cases as California does, the Due Process Clause of the Fourteenth Amendment requires the sentencing jury to be impartial to the same extent that the Sixth Amendment requires jury impartiality at the guilt phase of the trial. (*People v. Williams* (1997) 16 Cal.4th 635, 666, citing *Morgan v. Illinois* (1992) 504 U.S. 719.) The California Constitution provides the

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likelihood that a fair and impartial trial cannot be had in the county. . . ." (*People v. Bonin* (1988) 46 Cal.3d 659, 672.)

same guarantee. (*Id.* at 666-67 [citations omitted]; Cal. Const. Art. 1, § 16.) Mr. Rountree also has a liberty interest against the arbitrary deprivation of state law rights guaranteed by federal due process. (*Hicks v. Oklahoma* (1980) 447 U.S. 343.)

As this Court noted in *Fain v. Superior Court* (1970) Cal.3d 46, 52,

> "...the issue of whether defendant lives or dies is manifestly no less critical than the issue of his guilt; and precisely because of the broader rules of admissibility and the absence of standards to guide the jury in choosing the appropriate punishment, a fair and impartial jury is no less essential at the penalty phase than at the guilt phase."

In fact, it is even more critical because of the jury's absolute discretion at penalty phase. In *Fain*, this Court underscored the difference between guilt phase, where there are objective standards of proof to guide the jury, and the penalty phase, where the decision is subjective:

> "...in the penalty phase of a capital case, as noted above, the jury are vested with absolute discretion to determine which penalty to impose [Citation.] Thus jurors who may have read the press accounts of Fain's conduct and perhaps formed opinions on the murder charge could, under proper instructions, objectively decide whether he was guilty of the crime of escape; but such jurors are not reasonably likely to act with total impartiality when called upon to make the essentially subjective determination in weighing the penalties for first degree murder. The test enunciated in *Maine*, it must be remembered, is not a showing of actual prejudice, but whether there is a *reasonable likelihood* that a fair trial cannot be had in the present forum." (*Id.* at p. 54.)

Thus, the question of whether there is a reasonable likelihood that Mr. Rountree did not receive a fair trial must be decided in light of the jury's

normative and subjective death penalty verdict, not simply the guilt verdict.

3. This Court must make an independent determination of whether a fair trial was obtainable.

On review of the denial of a motion for change of venue the appellate court does not ask whether the trial court's ruling was an abuse of discretion. (*Steffan v. Municipal Court* (1978) 80 Cal.App.3d 623, 625; *Griffin v. Superior Court* (1972) 26 Cal.App.3d 672, 680.) Instead,

> "'[W]e make an independent determination of whether a fair trial was obtainable.' [Citations.] To make that decision, we examine five factors: the nature and gravity of the offense, the nature and extent of the news coverage, the size of the community, the status of the defendant in the community, and the popularity and prominence of the victim. [Citation.]" (*People v. Weaver* (2001) 26 Cal.4th 876, 905.)

On post-conviction review, the appellate court "must also examine the voir dire of prospective and actual jurors to determine whether pretrial publicity did in fact have a prejudicial effect." (*People v. Balderas* (1985) 41 Cal.3d 144, 177.) The appellate court makes an independent appraisal of this factor (*People v. Price* (1991) 1 Cal.4th 324, 390), and also independently reviews the trial court's ultimate determination as to the reasonable likelihood of a fair trial. (*People v. Webb* (1993) 6 Cal.4th 494, 514.) The appellate court sustains any purely factual determinations supported by substantial evidence. (*Ibid.*) Here, however, the trial court made no factual determinations.

On appeal, in order to show error, the defendant must show that at the time of the change of venue motion it was reasonable likely that a fair trial could not be had, and that it is reasonably likely a fair trial was not in fact had. (*Ibid.*) However, on direct appeal a showing of "actual prejudice" is not required. (*People v. Williams, supra*, 48 Cal.3d at p. 1126.)

C. Because All Five of the Controlling Factors Indicated A Change of Venue Was Necessary, The Trial Court Reversibly Erred In Denying The Motion.

Review of the five controlling factors shows that the nature and gravity of the offense, the nature and extent of the news coverage, the size of the community, the status of the defendants in the community, and the posthumous popularity and prominence of the victim all indicated that a change of venue should be granted, most of them quite strongly. The trial court's failure to do so was reversible error.

1. The nature and gravity of the offense.

The gravity of a crime and the crime's nature are distinct factors. As this Court has explained:

> "The peculiar facts or aspects of a crime which make it sensational, or otherwise bring it to the consciousness of the community, define its 'nature'; the term 'gravity' of a crime refers to its seriousness in the law and to the possible consequences to an accused in the event of a guilty verdict." (*Martinez v. Superior Court* (1981) 29 Cal.3d 574, 582.)

"It is well settled that in capital cases 'the factor of gravity must weigh heavily in a determination regarding the change of venue.' [Citations.]"

(*People v. Williams, supra,* 48 Cal.3d at p. 1131.)

This was clearly a grave offense, and its nature also weighed heavily in favor of a change of venue. It involved the brazen kidnaping of a 19-year old girl of diminutive size (4-foot, 10-inches, 85 pounds) from the parking lot of a mall in broad daylight, her robbery and subsequent murder in a deserted area. This was not a garden variety murder case such as the shooting death of a convenience store cashier or of a bartender during the robbery of a commercial establishment. (See *Martinez v. Superior Court, supra,* 29 Cal.3d at p. 582 [Attorney General characterized a shooting during a bar holdup as "nondescript"].) As described in greater detail below, the media coverage of the case was personal and emotional, putting every listener or reader, their daughter or wife, in the shoes of the victim:

> "This crime has hit home. It's not a drug deal gone bad or gang warfare but random violence that slices through our safety net.
>
> Imagine. You're at the grocery store, or the bank, when you're plucked up by a person with a gun. You're driven around town, past familiar landmarks by strangers who you're unable to escape.
>
> The young woman's murder is the reason people walk cautiously through parking lots. It's why we automatically snap the locks when we hop inside our cars and why we don't go to automated teller machines after dark...." (3 CT 920.)

Murders which are cold blooded or committed execution-style reflect a high degree of sensationalism. (*Williams v. Superior Court, supra,* 34 Cal.3d at p. 593; *Martinez v. Superior Court, supra,* 29 Cal.3d at p. 582.)

Here, the victim was taken to a remote oilfield and shot three times at close range with a high-powered rifle.

In addition to the sensationalistic media coverage described below, the "Love for Life" foundation was set up in memory of the victim to lobby for tougher laws and longer sentences for criminals. At least two rallies/marches were held by the foundation before Mr. Rountree's trial, one of which featured as speakers Joe Klass, the grandfather of Polly Klass, State Senator Phil Wyman, and a spokesperson for Governor Pete Wilson. (3 CT 930.)

The average homicide - even the average capital case - does not result in marches, rallies, and speeches by state senators and representatives of the governor. In this case, both the gravity of the offense and its sensational nature weighed heavily in favor of a change of venue.

2. The nature and extent of the news coverage.

A reasonable likelihood of unfairness may exist even though the news coverage is neither inflammatory nor productive of overt hostility and does not mention the defendant by name. (*Martinez v. Superior Court, supra*, 29 Cal.3d at p. 580.) However, media accounts which are inflammatory weigh more heavily in favor of a change of venue. (*Williams v. Superior Court, supra,* 34 Cal.3d at pp. 590-592.) In post-conviction review, courts examine the voir dire to see if jurors were actually exposed

to media coverage. (*People v. Fauber* (1992) 2 Cal.4th 792, 819.) The pervasiveness of news coverage can be corroborated in cases where a majority of prospective jurors and selected jurors indicate they had read or heard about the case. (*People v. Williams, supra*, 48 Cal.3d at p. 1128.) Here, the pervasiveness of the coverage is corroborated by the fact that 75% of the jury panel and 8 out of the 12 jurors had read or heard about the case. (11 RT 2066; *People v. Williams, supra*, 48 Cal.3d at p. 1128.) It is also telling that one of the prospective jurors was dismissed because she could not get the image she had seen on TV of the victim's body out at the scene out of her mind. (4 RT 849-854.) Another who was dismissed could not put aside a picture of the victim standing in front of her car that she had seen several times on TV. (9 RT 1749-1752.)

Predators and prey:

The media portrayed Mr. Rountree and Stroder as predators and the victim as prey: "Diana Vara Contreras 'was the perfect victim' ... 'She looked easy to control,' said Kern County Sheriff's Detective Joe Giuffre." (3 CT 914.) "Stroder approached Contreras and asked for directions, luring the trusting young prey closer to the Volkswagen. Rountree sat inside the Volkswagen, a stolen 30/30 rifle within reach...." (3 CT 915.)

The news coverage also repeatedly emphasized the victim's diminutive size (4-foot, 10-inches, 85 pounds), the fact that she worked

with the developmentally disabled, and that her last known act had been to make a payment on a necklace that was to be a Christmas present for her mother. (3 CT 903-930.) A newspaper article also made reference to Mr. Rountree and Stroder's "cross-country crime spree" (3 CT 928), apparently a hyperbolic reference to their use of the victim's ATM card in various locations on their way home to Missouri, and focused on the smallest details of their wedding in Las Vegas: "Donna Donwoodie remembers Charles Rountree. For her, the thought of helping the confessed killer marry his alleged partner-in-crime gives Donwoodie the creeps...." (3 CT 917.) "The couple returned to the wedding chapel and paid $94 for a cheap pair of gold electroplated rings, the $30 service and a $10 tip for the pastor. They decided against purchasing a wedding photo." (3 CT 917.)

Calls for the Death Penalty:

The news media also repeatedly cited public entreaties by the victim's family that the defendants receive the death penalty, at least two of them in the newspaper's headline story: "'Now let justice take place,' said Diana's older brother, Orlando Contreras. For him, justice can only happen if the killers receive the death penalty." (3 CT 908.) "Diana Vara Contreras' family pledged to witness her admitted murder-kidnapper and his wife through the court system, and one day, they hope, to the gas chamber." (3 CT 919.) "The family of Diana Contreras will not rest until

her killers are put to death, the slain woman's father declared Wednesday." (3 CT 927.) The media also reported that many in Kern County felt the same way: "...The Contreras family hopes the pair [Mr. Rountree and co-defendant Stroder] get the death penalty. And if you talk to people around town, you know the feeling is the same." (3 CT 920.) Even the pastor who had married Mr. Rountree and Stroder in Las Vegas was reported as supporting imposition of the death penalty on the couple: "I don't oppose the death penalty," he said, "and I don't see where the Bible opposes it. They should pay the price for what they've done." (3 CT 918.)

The "Love for Life" Foundation:

In addition to traditional media coverage, the "Love for Life" foundation was set up in memory of the victim to lobby for tougher laws and longer sentences for criminals. At least two rallies/marches were held in Bakersfield by the foundation before Mr. Rountree's trial, one of which featured as speakers Joe Klass, the grandfather of Polly Klass, State Senator Phil Wyman, and a spokesperson for Governor Pete Wilson. (3 CT 930.)

Editorials:

In addition to the more factual articles, the case was the subject of emotional editorializing by various columnists and letter-writers. Columnist Herb Benham of *The Bakersfield Californian* was typical:

> "...The Contreras family hopes the pair [Mr. Rountree and co-defendant Stroder] get the death penalty. And if you

talk to people around town, you know the feeling is the same.

This crime has hit home. It's not a drug deal gone bad or gang warfare but random violence that slices through our safety net.

Imagine. You're at the grocery store, or the bank, when you're plucked up by a person with a gun. You're driven around town, past familiar landmarks by strangers who you're unable to escape.

The young woman's murder is the reason people walk cautiously through parking lots. It's why we automatically snap the locks when we hop inside our cars and why we don't go to automated teller machines after dark...." (3 CT 920.)

Another columnist, Rick Heredia, in writing of how the case troubled him, described how it had affected the local law enforcement community:

"You didn't know it, but as we shopped and traveled the city, an anonymous cadre of police officers, sheriff's deputies, correctional officers and others in law enforcement in the county were responding in their own way to Diana's death.

They had banded together to fight crime on their own time.

Working in shifts, they drove around in their personal cars, keeping their ears and eyes open, hoping to keep the predators at bay, if only for a little while....

We are more than random targets for the predators among us.

And Diana Contreras was one of us, in a communal sense, belonged to us.

We've lost her. She would have done a lot of good in a world that sorely needs it...." (3 CT 921.)

Public Opinion Survey:

As can be seen, the media coverage in this case was highly personal and highly emotional. The citizens of Kern County found this crime far from "nondescript," and they remembered it well, as shown by the public

opinion survey done a year after the crime and a few months before trial, which found a staggering 85% recognition rate among the jury pool. (3 CT 934; 4 CT 986O, 986S.) Of those who recognized the case, over 46% felt Mr. Rountree was definitely or probably guilty (3 CT 937; 4 CT 986Q) and 54.8% would give Mr. Rountree the death penalty. (4 CT 978, 986V.) The actual jury panel showed a recognition rate of 75%. (11 RT 2066.) Eight of the twelve jurors and three of the four alternates already knew about the case from the media.[8]

In *People v. Williams, supra*, 48 Cal.3d 1112, this Court reversed a conviction for error in the denial of a change of venue motion. (*Id.* at pp. 1131-1132.) This Court found that the crime "had obviously become deeply embedded in the public consciousness (half of the jurors questioned knew something about the case). Thus it is more than reasonable probability that the case could not be viewed with the requisite impartiality." (*Id.* at p. 1129.) Here, not just half, but *over 75%* of the prospective jurors questioned knew something about the case. (11 RT 2066.) The sensational nature of the case and the extensive media coverage "deeply embedded"

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[8] In a May 12, 1994 hearing, the trial court commented that the trial date was not until January of 1995, "not because it was anticipated that there was going to be a great deal of need for further investigation or so forth, but more to ameliorate the publicity that was at a pretty high pitch back when this case took place." (3 CT 836.) Given that the recognition rate was still 85% a year later, the trial court's only remaining option was to grant the motion for change of venue. (*Sheppard v. Maxwell, supra,* 384 U.S. at p. 363.)

this case in the public consciousness - and weighed heavily in favor of a change of venue.

3. The size and nature of the community.

The offense occurred in Kern County. As this Court noted in *People v. Weaver, supra,*

> "The size of the community is relatively neutral; as defendant asserts, Kern County is 'neither large nor small.' At the time of trial, the county had a population exceeding 450,000 and Bakersfield, where the trial was held, had a population of 200,000. The key consideration is "whether it can be shown that the population is of such a size that it ' neutralizes or dilutes the impact of adverse publicity.' "[Citations.]" (*People v. Weaver, supra,* 26 Cal.4th at p. 905.)

As shown above, the recognition rate of this case among the jury pool, the jury panel, and the seated jurors was very, very high and the case was "deeply embedded" in the public mind. Thus, the size of the population clearly did not dilute the impact of the publicity. This factor weighs in favor of a change of venue, or at the very least, is neutral.

4. The status of the defendants in the community.

If the defendant is a resident of the same county as his victims, his status is viewed as a neutral factor. (*People v. Harris* (1981) 28 Cal.3d 935, 948-949.) If, as here, however, the defendant is a stranger to the county and the victim is a resident, this weighs in favor of a change of venue. (*People v. Williams, supra*, 48 Cal.3d at p. 1129.) It also is significant when the defendant is portrayed in an unflattering way or as being friendless in the

community. (*Williams v. Superior Court, supra*, 34 Cal.3d at p. 594; *Martinez v. Superior Court, supra*. 29 Cal.3d at pp. 584-585; see also *Frazier v. Superior Court* (1971) 5 Cal.3d 287, 282-284 [defendant portrayed as a hippie].)

Here, the media coverage portrayed the defendants as outsiders from Missouri on a crime spree who swooped in upon an unsuspecting and trusting local girl from a good family. As one of the respondents to the public opinion survey commented, "These people come here to California to do their crimes." (5 CT 943.) Another stated "I want to hang them from the light posts around town." (*Ibid.*) Finally, one respondent commented, "I don't think they can get a fair trial in Kern County." (5 CT 944.) The defendants' status as outsiders weighed in favor of a change in venue.

5. The popularity and prominence of the victim.

There are two ways a victim can become "popular" or "prominent" within the meaning of the law. The first is obviously by notoriety before death. The second is notoriety from death, a "posthumous celebrity." (*Odle v. Superior Court* (1982) 32 Cal.3d 932, 940.)

Public sympathy for the victim is a strong indication that venue should be changed (*Maine v. Superior Court, supra,* 68 Cal.2d at p. 385), and it is significant if the victim comes from an extended family with long and extensive ties to the community. (*People v. Williams, supra*, 48 Cal.3d

at p. 1129.)

Here, the victim, Diana Contreras, attained a posthumous celebrity which weighed in favor of a change of venue. As columnist Rick Heredia put it: "Diana Contreras was one of us, in a communal sense, belonged to us. We've lost her. She would have done a lot of good in a world that sorely needs it...." (3 CT 921.) As described above, the impact of her death was such that law enforcement officers from various agencies took to patrolling Kern County in their off-duty hours, a foundation was formed, rallies and marches were held where prominent politicians and celebrities spoke. Diana Contreras achieved a posthumous celebrity that weighed heavily in favor of a change of venue.

D. Because The Voir Dire of the Prospective and Actual Jurors Showed Prejudice from the Pre-Trial Publicity, The Trial Court Reversibly Erred in Denying the Renewed Motion.

On post-conviction review, the appellate court examines the voir dire of both prospective and actual jurors. (*People v. Williams, supra*, 48 Cal.3d at p. 1128; *People v. Tidwell, supra*, 3 Cal.3d at p. 67.)

> "[T]he analysis of a reasonable likelihood that a fair trial cannot be had in the county -- is separate from, and requires a far more searching analysis than, the decision to qualify a particular juror. That each juror is qualified under applicable statutes and, specifically, that no juror fails to meet the criteria of [CCP] section 1076, is not controlling. [Citation omitted.] Resolution of the venue question requires consideration of the responses of jurors who do not ultimately become members of the trial panel as well as those who do. [Citation omitted.]"

(*Odle v. Superior Court, supra,* 32 Cal.3d at p. 932.)

In other words, a trial court cannot take allegedly impartial jurors at their word under circumstances where many of their fellow jurors are admitting to prejudice based on publicity. As shown below, decades of social science research, case law, and common sense all agree that a juror's own assessment of their impartiality cannot be taken at face value, and when the responses of the jury panel as a whole are reviewed it is apparent that both the panel and ultimately the jury in Mr. Rountree's case were tainted by pre-trial publicity.

1. Social science research over the last 30 years has proven that pre-trial publicity has a prejudicial impact on jurors in all stages of trial.

Social science research has shown over decades of research that pre-trial publicity has a prejudicial effect on jurors' consideration of evidence and their ultimate decisions. In one study, the authors did a meta-analysis of 44 empirical studies, representing 5,755 subjects, conducted by dozens of scholars using a variety of methodologies, and concluded that jurors exposed to negative pre-trial publicity were significantly more likely to judge the defendant guilty. (Steblay, Fulero & Jimenez-Lorente, *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review* (1999) 23 Law and Human Behavior 219-235.) The studies show that the effects of pre-trial publicity survive the jury selection process, survive the

presentation of trial evidence, endure the limiting effects of judicial instructions, and persevere, or even intensify, during deliberations. (*Ibid.*)[9] Research has also shown that a delay between first exposure to evidence and exposure to contradictory defense evidence will lead jurors to reject or misremember any evidence that conflicts with the story model they have already constructed about the crime. (D. Sherrod, *Trial Delay as a Source of Bias in Jury Decision Making* (1985) 9 Law & Human Behavior 101.) This is particularly troubling not just because of the powerful impact of pre-trial publicity, but because of the great difficulty a voir dire questioner will have in discovering its effects.

Given that 8 of the 12 sitting jurors who convicted Mr. Rountree had been exposed to the emotional pre-trial publicity surrounding this case, social science data has shown that it is reasonably likely that the jurors were biased by that exposure. (*People v. Fauber, supra*, 2 Cal.4th at p. 819.)

2. Under the law, a trial court cannot blindly accept a potential juror's "assessment of self-righteousness."

The law is replete with warnings against blind acceptance of juror assertions of impartiality. A juror cannot reasonably be expected to

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[9] This research suggests that the only true solution to pre-trial publicity is that proposed by the prosecutor in this case at the hearing on closing the preliminary hearing held on January 20, 1994 - voir dire of all prospective jurors for knowledge of the case, and "anyone who does have prior knowledge is eliminated." (1 CT 104-105.) A simple and effective solution to a serious problem. Because that was not done here and a tainted jury was empaneled, reversal is required.

"evaluate the facts and conclude that they do not interfere with his or her impartiality." (*People v. McNeal* (1979) 90 Cal.App.3d 830, 838; *People v. Farris* (1977) 66 Cal. App. 3d 376, 386.) Jurors, being human and thus fallible, are not always conscious of the extent to which they may be influenced by extraneous factors in reaching their conclusions. (*Stone v. United States* (6th Cir. 1940) 113 F.2d 70, 77.) In sum, a juror's own "assessment of self-righteousness" is not a reliable indicator of impartiality. (*Silverthorne v. United States* (9th Cir. 1968) 400 F.2d 627, 639.)

As shown above, social science research has proven what common sense and case law have always indicated: asking a potential juror if they can be impartial is a meaningless exercise. Or, in the somewhat more colorful language of *Corona v. Superior Court* (1972) 24 Cal.App.3d 872, 879:

> "Authoritative decisions now recognize the lack of realism inherent in expectations that jurors can insulate their verdict from inadmissible knowledge. [Citations] [¶¶] When prejudicial publicity has been injected into jurors' consciousness, the courts do not give dispositive effect to jurors' assurances of impartiality. [Citations.][¶¶] 'To expect a juror to confess prejudice is not always a reliable practice. A juror can be completely honest in denying prejudice. In the words of Alexander Pope, ''All looks yellow to the jaundiced eye.' [Citation.]" (*Id.* at fn 6.)

Here, the jury pool, jury panel, and ultimately 8 of the 12 jurors in Mr. Rountree's case were infected by pre-trial publicity. They viewed Mr. Rountree and the entire trial through the prism of a belief framework and

emotions that had been developed - not by the evidence at trial - but by media reports, conversations with friends, and other prejudicial sources. Scientific research done over decades, as well as our own common sense, tells us that those jurors then inevitably rejected or minimized evidence that conflicted with that belief framework - or that conflicted with emotional positions taken months earlier, denying Mr. Rountree a fair trial.

3. The voir dire of prospective and actual jurors shows prejudice from pre-trial publicity.

As noted above, a pre-trial public opinion survey done a year after the crime and a few months before trial found an overwhelming 85% recognition rate among the jury pool. (3 CT 934; 4 CT 986O, 986S.) Of those who recognized the case, over 46% felt Mr. Rountree was definitely or probably guilty (3 CT 937; 4 CT 986Q) and 54.8% would give Mr. Rountree the death penalty. (4 CT 978, 986V.)

This was no fluke, as the actual jury panel showed a recognition rate of 75%, of whom 42% felt Mr. Rountree was guilty. (11 RT 2066.) In the renewed motion after jury voir dire based upon the contamination of the jury panel by pre-trial publicity, trial counsel showed that, of the panel of 82 prospective jurors, 61 had heard something about the case. (11 RT 2066.) Of those, 26 had formed the opinion that the defendants were either guilty or guilty of something. (*Ibid.*)

Thirty-one of the prospective jurors exposed to the pre-trial publicity

were honest enough to admit that they could not put it aside and were dismissed for cause. (2-4 RT 118-779.) For example, prospective juror Craig M. admitted that, because of pre-trial publicity, he not only believed the defendants were guilty, but that they would have to prove to him that someone else had done it before he could believe them innocent. (2 RT 305-307.)

Despite this, the trial court denied the renewed motion and denied challenges to any juror who would say they could be "fair" or would follow the law - even if that same juror admitted to having followed the case closely in the media, being convinced that Mr. Rountree was guilty, being upset or angry about the crime, or who already felt Mr. Rountree should receive the death penalty. This gives new meaning to the phrase "legal fiction." Nor was this based upon the court's judgment of credibility and character, the court refused all challenges if the juror could say the magic words. Some - but by no means all - examples:

Prospective juror Barbara G. followed the case both when it first happened and later when the defendants were arrested. She formed the opinion that Mr. Rountree was guilty long before trial and wasn't sure she could put it aside. She admitted that she might search for facts that would support her opinion that Mr. Rountree was guilty. Despite this, the challenge was denied. (8 RT 1516-1538.)

Prospective juror Leta R. had been exposed to pre-trial publicity, had the opinion that Mr. Rountree was guilty, and would "surely try" to set aside that opinion. She didn't know if she could until confronted with the situation. The challenge was denied. (6 RT 1169-1182.)

Prospective juror Edith S. had been exposed to pre-trial publicity, had the opinion that Mr. Rountree was guilty and could not guarantee that the prosecution didn't have a head start because of the pre-trial publicity. She had been convinced they were guilty for at least a year and hadn't seen anything to indicate that they weren't. The challenge was denied. (5 RT 1027-1044.)

Prospective juror Deborah C. had been exposed to pre-trial publicity and indicated on her questionnaire that she could not be fair and would always impose the death penalty, but backed away from those answers on voir dire. On voir dire, she stated that the case had impacted her more because she had a daughter the same age and size as the victim who also shops at the mall from which the victim was abducted, that the crime had upset her, and that she had discussed the case with her daughter. She believed in "an eye for an eye and a tooth for a tooth" and believed the defendants were guilty, but could be "as fair as humanly possible." (5 RT 892-919.) The challenge was still denied.

The only reason given by the trial court for the denial of challenges

to tainted prospective jurors such as Deborah C. was their implausible assertions of impartiality. (11 RT 2070, 2093-94.) This was factually and legally insupportable.

> "As to the protestation of impartiality, the court stated: 'No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. *Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight.*'" (*Odle v. Superior Court, supra,* 32 Cal.3d at p. 945, quoting *Irvin v. Dowd, supra,* 366 U.S. at p. 759.)

More telling was the voir dire of the jurors who actually sat on Mr. Rountree's case and sentenced him to death.

Juror 048108 had read about the case in the newspaper, heard about it on TV, and felt that Stroder and Mr. Rountree were guilty of something. (6 RT 1153-1154.)

Juror number 048382 had also read about the case in the local newspaper, felt Mr. Rountree was guilty, and was *angry* about the crime before trial ever started. (4 RT 705-714.)

Juror number 049614 had also followed the case in the media, and was leaning strongly towards the death penalty for a murder during a kidnaping or robbery - in fact he was already 95% of the way there. (9 RT 1669-1685.)

The idea that those seated jurors could flick some kind of internal switch and begin trial as if they knew and felt nothing is patently absurd and

contrary to both science and the law. They started the trial angry and feeling that the death penalty was warranted, and, being human, focused on the evidence that would justify those views.

Five of the other seated jurors had also followed the case on the radio, TV, and in the newspaper, and with that exposure simply could not be "a panel of impartial 'indifferent' jurors." The recognition rate of this case among the jury pool, jury panel, and actual jurors, as well as the voir dire itself, show that pre-trial publicity had prejudiced the jury and it is more than reasonably likely a fair trial was not, in fact, had. (*People v. Webb, supra,* 6 Cal.4th at p. 514.) The trial court erred egregiously in denying the renewed motion for change of venue.

E. Reversal is Required.

"On appeal after judgment, the defendant must show a reasonable likelihood that a fair trial was not had." (*People v. Williams, supra*, 48 Cal.3d at p. 1126.) "A showing of actual prejudice 'shall not be required.'" (*Ibid.*)

With a recognition rate of 85% among the jury pool, 75% among the jury panel, and 8 of the 12 actual jurors, the media saturation of this case is simply incontrovertible. In light of that recognition rate, an analysis of the five controlling pre-trial factors shows that the nature and gravity of the offense, the nature and extent of the news coverage, the size of the

community, the status of the defendants in the community, and the posthumous popularity and prominence of the victim all indicated that a change of venue should have been granted before jury selection ever began.

In *People v. Williams, supra*, 48 Cal.3d 1112, the Court reversed a conviction for error in the denial of a change of venue motion. (*Id.* at pp. 1131-1132.) In that case 52% of the prospective jurors had read or heard about the case, fewer than 9% were excused for cause because they could not disregard their opinion about the case, and eight of the twelve jurors ultimately seated had heard of the case. (*Id.* at p. 1128.) This Court found that the crime "had obviously become deeply embedded in the public consciousness (half of the jurors questioned knew something about the case). Thus it is more than reasonable probability that the case could not be viewed with the requisite impartiality." (*Id.* at p. 1129.)

The voir dire in Mr. Rountree's case shows this case to be one in which the taint of pre-trial publicity was even greater than in *Williams*. Here, 38% of the venire were excused for cause related to juror opinions, not 9% as in *Williams*. Here, 75% of the venire knew something about the case, not 52% as in *Williams*. (11 RT 2066.) If the pretrial publicity required a change of venue in *Williams*, a change of venue was definitely required here.

In addition, although media attention was pervasive in the Kern

County area, this case did not receive statewide publicity. There is therefore every reason to believe Mr. Rountree could have obtained the benefit of a jury relatively untainted by the media as a result of a change of venue. (See *People v. Manson* (1976) 61 Cal.App.3d 102, 190.)

The trial court's failure to grant any of Mr. Rountree's repeated motions for change of venue deprived him of his Fifth and Fourteenth Amendments rights to a fair trial and due process, his Sixth Amendment right to a fair and impartial jury, and his Eighth Amendment right to a reliable, rational, and accurate determination of his eligibility for a sentence of death, as well as their counterparts under the California Constitution. (*Irvin v. Dowd, supra*, 366 U.S. at pp. 728-729; U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7,15,16, & 17.) Such an error is structural in nature and requires per se reversal. (*Irvin v. Dowd, supra*, 366 U.S. at pp. 728-729; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-282.)

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II. THE TRIAL COURT IMPROPERLY DENIED MR. ROUNTREE'S CHALLENGES FOR CAUSE TO FOURTEEN PROSPECTIVE JURORS WHO WERE UNDULY BIASED.

During jury selection, Mr. Rountree challenged fourteen prospective jurors for cause after they expressed views showing them to be infected by the extensive pre-trial publicity or extremely partial to the death penalty in this case. Those challenges were denied and Mr. Rountree exhausted his peremptory challenges after being forced to use many of them to excuse jurors who should have been dismissed for cause. (11 RT 2084, 2086, 2089-2090.) Counsel then expressed his dissatisfaction with the jury and renewed his motion for a change of venue as an alternative remedy. The motion was denied. (11 RT 2092-94.) Four of the challenged jurors served on the jury and one as an alternate juror. Mr. Rountree's jury panel was therefore weighted in favor of the death penalty.

The denial of those challenges was error under California statutory law, the California and federal constitutions, and deprived Mr. Rountree of his rights to due process and equal protection, to a trial by an impartial jury, and to receive a fair and reliable penalty determination. (Code of Civ. Proc., § 225; Cal. Const., art. I, §§ 1, 7(a), 15, 16 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

A. Relevant Law.

Both the state and federal constitutions guarantee criminal

defendants the rights to due process and an impartial jury. (See, e.g., *Irvin v. Dowd, supra,* 366 U.S. 717.) Those rights encompass a further right to have the issues presented at the trial determined by jurors who are free from prejudice or bias. (*Bayramoglu v. Estelle* (9th Cir. 1986) 806 F.2d 880; *People v. Riggins* (1910) 159 Cal. 113, 120; *People v. Hughes* (1961) 57 Cal.2d 89, 95.) If even *one juror* is unduly biased or prejudiced, the defendant is denied the right to an impartial jury. (*United States v. Plache* (9th Cir. 1990) 913 F.2d 1375, 1377; *Tinsley v. Borg* (9th Cir. 1989) 895 F.2d 520, 523-524.)

The Constitutional standard for determining whether a juror is subject to challenge by the defendant is now settled in capital cases. A defense challenge for cause to a prospective juror at a capital trial must be sustained if "the juror's views [in favor of the death penalty] would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Ross v. Oklahoma* (1988) 487 U.S. 81, 85, internal quotations omitted; *People v. Coleman* (1988) 46 Cal.3d 749, 765; *People v. Williams, supra,* 16 Cal.4th at p. 667.) "[T]he quest is for jurors who will conscientiously apply the law and the facts. That is what an 'impartial' jury consists of . . . ." (*Wainwright v. Witt* (1985) 469 U.S. 412, 423.) A state cannot "entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death."

(*Morgan v. Illinois, supra,* 504 U.S. at p. 732, quoting *Witherspoon v. Illinois* (1968) 391 U.S. 510, 520.)

California's statutory law provides for the exclusion of jurors under a standard similar to that required by the federal Constitution. (See *People v. Earp* (1999) 20 Cal.4th 826, 853; *People v. Williams, supra,* 16 Cal.4th at p. 667.) Code of Civil Procedure, section 225, provides that a juror is subject to disqualification based on a challenge for cause where the juror exhibits a "state of mind . . . which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." That provision provides a statutory "right to challenge for cause jurors who have a bias in favor of the death penalty *even though they state they are able to render an impartial verdict of guilt.*" (*People v. Gilbert* (1965) 63 Cal.2d 690, 712, emphasis added.)[10]

Once bias has been revealed, the fact that the juror may assert that he or she can set aside that bias and act impartially is "wholly immaterial . . . ." (*People v. Riggins, supra,* 159 Cal. at p. 119; see also *Cumbo v. State* (Tex. Crim. App. 1988) 760 S.W.2d 251, 256 ["When . . . a prospective juror is shown to be biased as a matter of law, he must be excused when challenged, even if he states that he can set his bias aside and provide a fair trial."].)

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[10] *Gilbert* dealt with former Penal Code section 1073, the provisions of which were transferred to section 225 of the Code of Civil Procedure with only minor changes in wording. (Code of Civ. Proc., § 225, subd. (b)(1)(C); see Stats. 1988, ch. 1245, §§ 2, 33.)

"One of the striking instances of the frailty of human nature is the fact that a prejudiced person usually believes himself fair-minded and impartial." (*People v. Riggins, supra*, 159 Cal. at p. 120.) "Doubts regarding bias must be resolved against the juror" (*Burton v. Johnson* (10th Cir. 1991) 948 F.2d 1150, 1158; *People v. Helm* (1907) 152 Cal. 532, 545), particularly in a capital case. (See *Jackson v. United States* (D.C. Cir. 1968) 395 F.2d 615, 617.)

In order to be biased in a capital case, a prospective juror need not engage in "'automatic' decisionmaking" in the choice of penalties, or demonstrate that "he would never vote for [one of the penalty choices]." (*Wainwright v. Witt, supra*, 469 U.S. at p. 424.) "[D]eterminations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." (*Id.* at p. 424.) Thus, the fact that "a venireman might vote for [life without parole] under certain personal standards" is not sufficient to establish that juror's lack of bias. (*Id.* at p. 422.)

Moreover, the determination about whether a juror should be excused for cause may be based upon circumstances likely to be found in the present case. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005.) Thus, a juror should be excused if there are particular factors in a defendant's case that would prevent a fair and impartial judgment.

B. The Trial Court Improperly Denied Mr. Rountree's Challenges for Cause.

The trial court erred in this case because it denied every challenge as long as the prospective juror indicated that they would follow the court's instructions or consider both options in deciding the appropriate penalty - even if that same juror had just admitted to having followed the case closely in the media, being convinced that Mr. Rountree was guilty, being upset or angry about the crime, or who already felt Mr. Rountree should receive the death penalty. The trial court did so without any kind of credibility analysis or questioning about any contradictions or bias revealed by the juror's questionnaire or previous voir dire.[11]

This was clear error, and forced Mr. Rountree to use peremptory challenges to excuse biased jurors from both the sitting jury and alternate panel. Four of the challenged jurors eventually served on the jury, including jurors who had followed the case in the press, were *angry* about it, and one seated juror who told the court that, faced with the circumstances charged in Mr. Rountree's case, he was already 95% of the way towards voting for the death penalty - *before trial had even begun.*

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[11] At the end of one morning of voir dire, the trial court commented that they were able to "salvage" six of the nine prospective jurors, perhaps indicating that the court had priorities other than empaneling an unbiased jury . (7 RT 1394-95.)

1. Seated Juror Number 049614.

Juror number 049614 was a strong supporter of the death penalty who had read about the case in *The Bakersfield Californian* and remembered that the defendants had been caught in possession of the victim's car and credit cards. (9 RT 1669.) He had also watched TV coverage of the case. (9 RT 1677.)

Juror 049614, a court clerk who had unsuccessfully applied to be a California Highway Patrol officer and had a brother who was a correctional officer, felt that convicted criminals had too many rights, and should serve 75% of their sentences. (9 RT 1677, 1682; 1 JCT 274.) After prompting, however, he told the court he had no problem with the presumption of innocence and could set aside everything he already knew about the case. (9 RT 1669-1670.)

In deciding the sentence, there was nothing this juror wanted to know about Mr. Rountree before deciding. (9 RT 1679.) The juror told the court that for an intentional killing during a robbery and kidnaping he would be leaning strongly towards the death penalty - that he would already be 95% of the way there:

> "Q. If it's proved to you beyond a reasonable doubt, just assume it has been for the purposes of this question, that a person deliberately planned to kidnap, rob someone during that robbery and kidnaping, and they intentionally killed

somebody, okay, a willful, deliberate act, would you be leaning toward the death penalty?

A. Yes.

Q. Would you be leaning strongly towards the death penalty under those circumstances?

A. Under those circumstances, yes.

Q. In your mind, would the death penalty, would your gut reaction to that factual situation be pretty much the death penalty?

A. To that situation explained, yes.

Q. So to that extent, if it was proved to you that the person planned the robbery, planned the kidnap and deliberately did that, deliberately killed a person with premeditation, deliberation, planned the whole thing, deliberately did everything, your gut reaction is the death penalty?

A. Yes.

Q. And that would pretty much be automatic, an automatic reaction?

A. Not automatic, I would say leans towards that.

Q. You would be what, 95 percent there at that point?

A. Oh percentages. Yeah, about there, I mean if it goes that far, whatever is premeditated, they thought about every single thing, whether someone died or not, it didn't matter to them, then, yes.

Q. Thank you." (9 RT 1683-84.)

The court denied the defense challenge for cause. (9 RT 1685.)

2. Seated Juror Number 048108.

Juror 048108 had both read about the case in the newspaper and

heard about it on TV. He recalled that the victim was found murdered in Taft, the defendants were captured driving her car somewhere in the Midwest, and that the rifle used to kill her was found in the vehicle. (6 RT 1153; 1 JCT 179.) He asserted that he could set that aside. (*Ibid.*) He had also formed the opinion that Stroder and Rountree were guilty of something, but insisted that he could also set that aside. (6 RT 1153-1154.)

The challenge for cause was denied, and trial counsel later used this juror as an example of one he would have excused if he had not exhausted his peremptory challenges. (6 RT 1161-62; 11 RT 2092-94.)

3. Seated Juror Number 047328.

Juror number 047328 believed in the death penalty and felt it was imposed too slowly. (1 JCT 160, 168; 4 RT 698.) In the case of an intentional killing, she stated that she would be leaning towards the death penalty but could think of a few circumstances where she might find life without parole appropriate. (4 RT 700-701.) The challenge based upon the juror's predisposition towards the death penalty was denied. (4 RT 703, 713.)

4. Seated Juror Number 048382.

Juror number 048382 read about the case in *The Bakersfield Californian* and thought Mr. Rountree was guilty of something. (4 RT 709.) He was angry, upset, and outraged about the murder and still thought Mr. Rountree was guilty of something as looked at him during voir dire, but

asserted that he could start "at ground level . . . like nothing happened." (4 RT 709-710.) The challenge was denied. (4 RT 713.)

5. Alternate Juror Number 049845.

Juror number 049845 read *The Bakersfield Californian* every morning and probably read most of the articles about the case. He also heard reports on television. (5 RT 1051-1052.) For a deliberate murder, he stated he would be leaning toward the death penalty, but "would be forced to listen to the rest or the remainder of the information in the second phase." (5 RT 1050.) The challenge was denied. (5 RT 1054.)

6. Prospective Juror Judith Burns.

Burns had heard about the case from the radio, and knew that the victim was abducted from the Plaza Shopping Center and that her body was found in the Taft area. (2 RT 310-311.) In her questionnaire she indicated that the death penalty should be used more, and that it was a waste of taxpayer money to house a repeat offender. (2 RT 311-312.) Given the two choices, she would automatically lean towards the death penalty. (2 RT 313-314.) She felt strongly that someone who committed a premeditated murder should get the death penalty, although she allowed that she would consider life without possibility of parole. (2 RT 312-313.)

Burns, who worked with the Sheriff's Department Search and Rescue Auxiliary (2 RT 322), believed the police did not make too many mistakes (2 RT 315), and stated repeatedly that Mr. Rountree must be guilty

of something or he wouldn't be there. (2 RT 315-316.) She stated that, because he was a defendant in court, Mr. Rountree already had one strike against him (2 RT 316), and that if sent to the jury room right then, having heard no evidence, her verdict would be that the Mr. Rountree was guilty of something. (2 RT 318.)

Even after the Court instructed Burns about the presumption of innocence, she stated that, although she wanted to think that she was a fair person, she just didn't know whether she could put aside her feelings that the defendant was guilty. (2 RT 317.) Her feelings probably would have made it more difficult for her to decide in favor of Mr. Rountree. (2 RT 321.) At the end of questioning, Juror Burns repeated that she still believed that the Mr. Rountrees were guilty of something, or they wouldn't be in court. (2 RT 324.) The challenge was denied. (2 RT 325-326.)

Mr. Rountree and co-defendant Stroder eventually were forced to use a peremptory challenge to excuse Burns. (11 RT 2079.)

7. Prospective Juror Mary Whitten.

Whitten had heard enough details about this case through the newspaper and television that she had already formed a clear opinion before coming to court. (3 RT 386.) She heard through the televison coverage that money was taken from the victim and used to have a good time and get married, which was upsetting to her. (3 RT 392.) After a lengthy explanation by the court about the presumption of innocence, and the need

to base her decision solely on the evidence presented to her in the courtroom, Whitten said that she was unable to presume Mr. Rountree was innocent at that point. (3 RT 387, 394, 396.)

She felt that the death penalty was too seldom imposed, believed in an "eye-for-an-eye" and a "tooth-for-an-tooth," and that anyone who deliberately kills another human being should be put to death. (3 RT 398-400.) Based on what she knew, if it was shown that Mr. Rountree deliberately killed somebody, he should die. (3 RT 399.) The challenge was denied. (3 RT 402.)

Mr. Rountree and co-defendant Stroder were again forced to use a peremptory challenge to excuse Whitten. (11 RT 2078.)

8. Prospective Juror Edith Sanford.

Sanford was in favor of the death penalty, believed it should be imposed more often, and should be considered for every murder. (5 RT 1038.) She had read about the case in the newspaper and saw it on television. (5 RT 1027.) At the time of voir dire, she had felt that Mr. Rountree and Stroder were guilty of something for at least a year and hadn't seen anything to show that they weren't. (5 RT 1034-1035, 1041-1042.) She could not guarantee that the prosecution did not have a head start with her, or that the pre-trial publicity would not affect her decision. (5 RT 1036.) However, she also stated that she would base her decision solely on the evidence from the courtroom. (5 RT 1043.) The challenge was denied.

(5 RT 1044.)

Mr. Rountree and co-defendant Stroder were again forced to use a peremptory challenge to excuse Sanford. (11 RT 2077.)

9. Prospective Juror Cleete Baron.

Baron stated that she would lean towards the death penalty for a deliberate killing. (4 RT 716.) If she found someone guilty of murder, Baron stated that she wouldn't want to know anything about the defendant's life. Her penalty decision would be based upon the crime they committed, "regardless of how good a person they were 15 years ago." (4 RT 717-718.) But she would follow the court's instructions to consider such evidence. (4 RT 719.) The challenge was denied. (4 RT 720-21.)

Mr. Rountree and co-defendant Stroder were again forced to use a peremptory challenge to excuse Baron. (11 RT 2077.)

10. Prospective Juror Leta Russell.

Russell had heard about the case on television and thought that Mr. Rountree was guilty of something, but stated that she would "surely try" to set aside that opinion. (6 RT 1169-1171.) She didn't know until actually confronted with the situation if she could set aside what she knew and judge the case only on evidence from the courtroom, but she would try. (6 RT 1179.) The challenge was denied. (6 RT 1190.)

Mr. Rountree and co-defendant Stroder were again forced to use a peremptory challenge to excuse Russell. (11 RT 2073.)

11. Prospective Juror Filemon Vigil.

Vigil had read about the case in *The Bakersfield Californian*, heard about it on television, and concluded that Mr. Rountree was guilty of something. (6 RT 1124.) He had warned his wife to be careful at the mall because of the case. (6 RT 1129.) He could not really say whether the prosecution would have an easier time convincing him because of the pre-trial publicity. (6 RT 1130.) The challenge was denied. (6 RT 1139.)

Mr. Rountree and co-defendant Stroder were again forced to use a peremptory challenge to excuse Vigil. (11 RT 2074.)

12. Prospective Juror Gene Arbegast.

Arbegast stated repeatedly that if a person is found guilty, he should die. (7 RT 1483, 1485.) After questioning by the prosecutor, Arbegast stated he would weigh both possible verdicts. (7 RT 1488.) The trial court denied the challenge, stating that it thought the last few questions "rehabilitated" the juror. (7 RT 1488-89.)

Mr. Rountree and co-defendant Stroder were again forced to use a peremptory challenge to excuse Arbegast. (11 RT 2072.)

13. Prospective Juror Jerry McNatt.

McNatt had heard about the case on television (9 RT 1734-35) and stated that "[i]f it was a premeditated murder, I mean, they set out to commit a murder, I would probably have to vote for the death penalty." (9 RT 1739.) He then stated it again:

Q. And now, assume what I am telling you, you found it to be true and there is no question about it, number one, it was planned and they intentionally killed the victim and they intentionally planned a robbery or kidnaping and the girl was killed during the kidnaping, it was all planned, it was all intended.

Would your gut reaction be death penalty?

A. Yeah, I believe that it would. I would still have to weigh the evidence, but in that case I think that it would." (9 RT 1741.)

The challenge was denied. (9 RT 1744.)

Mr. Rountree eventually used a peremptory challenge to excuse McNatt. (11 RT 2082.)

14. Prospective Juror Jeffrey Cox.

Cox stated repeatedly that in all cases involving an intentional killing, he would automatically vote for the death penalty, and under no circumstances would he vote for life in prison without the possibility of parole. (2 RT 205-209.) He had indicated the same thing on his questionnaire. (2 RT 208.) Under questioning by the prosecutor, Cox agreed his feelings were not so strong he could never vote for a sentence of life without parole, and that he would listen to the judge. (2 RT 210-211.) The challenge was denied. (2 RT 212.)

Mr. Rountree and co-defendant Stroder eventually used a peremptory challenge to excuse Cox. (11 RT 2078.)

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C. The Trial Court's Errors Require Reversal

Each of the jurors at issue expressed strong views about the death penalty, Mr. Rountree's guilt, pre-trial publicity, or other factors that demonstrated they would be "substantially impaired" in the performance of their duties. (*Wainwright v. Witt, supra*, 469 U.S. at p. 424; *People v. Williams, supra*, 16 Cal.4th at p. 667.) Four of the jurors eventually served in this case, violating Mr. Rountree's Sixth Amendment right to a fair and impartial jury.

Moreover, the trial court's errors required Mr. Rountree to exhaust his peremptory challenges on jurors that should have been excused for cause. This effectively reduced Mr. Rountree's statutory right to use a full number of peremptory challenges by compelling him to use challenges on jurors that were substantially impaired under the facts of this case. Accordingly, the trial court's errors violated Mr. Rountree's federal due process liberty interest in using the full number of challenges available under California law. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

Under these circumstances, the trial court artificially created a death prone jury in violation of due process; the errors led to a jury that was not impartial and ultimately the errors implicated the reliability of the penalty verdict. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. 1, §§ 7 & 15; see *Witherspoon v. Illinois, supra*, 391 U.S. at p. 522, fn. 20.) Mr. Rountree exhausted his peremptory challenges, expressed dissatisfaction

with the jury, and four of the impaired jurors actually sat on his jury. Under these circumstances, this Court should find that the errors require reversal.

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III. THE TRIAL COURT'S ERRONEOUS DISMISSAL FOR CAUSE OF JAMES H., A QUALIFIED PROSPECTIVE JUROR, VIOLATED MR. ROUNTREE'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS AND REQUIRES REVERSAL OF THE DEATH JUDGMENT.

The trial court conducted sequestered jury voir dire pursuant to *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 69-81, and excused several prospective jurors for cause due to their purportedly impaired ability to return a death verdict. (See *Wainwright v. Witt, supra,* 469 U.S. 412; *Witherspoon v. Illinois, supra,* 391 U.S. 510.) The trial court's excusal of prospective juror James H., however, was not based upon an evaluation of his ability or willingness to follow the court's instructions or his oath as a juror, as is required by *Witherspoon* and *Witt*. Instead, the trial court created a new legal standard, finding cause to excuse a juror if serving in the case might require the juror to violate a precept of their religious beliefs - and even if the juror is willing to do so. (6 RT 1100.) As shown below, this new rule not only violates *Witherspoon* and *Witt*, but would bar followers of most of the major religions in the United States from serving in capital cases. This was clearly a much, much "'broader basis' [for exclusion] than inability to follow the law or abide by their oaths," and thus, Mr. Rountree's death sentence cannot be carried out. (*Adams v. Texas* (1980) 448 U.S. 38, 47-48.)

Because James H. repeatedly asserted that he could follow the trial court's instructions and oath in regard to the death penalty, and because the

court's legal determination of disqualification was fatally flawed, the excusal of James H. violated Mr. Rountree's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article I, sections 1, 7, 15 and 16 of the California Constitution. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7,15,16, & 17.) Reversal of Mr. Rountree's death judgment is therefore required. (*Gray v. Mississippi* (1987) 481 U.S. 648, 658, 668.)

A. Procedural Background.

Prospective juror James H., oil field repairman and former tank commander, had friends in law enforcement and kept firearms in his home for target practice. (11 JCT 2978-3006.) He indicated, both on his questionnaire and during voir dire, that he did not feel the death penalty was wrong for any reason, including religious, moral, or ethical reasons. (11 JCT 3002; 6 RT 1090.) When asked about his feelings about the death penalty on the questionnaire, he wrote "I think if it's in place then its[sic] up to the Courts to do as the[y] see fit." (11 JCT 3001.) He also wrote that he would have no trouble voting to impose the death penalty in an appropriate case where the facts and circumstances of the case warranted it. (11 JCT 3003; 6 RT 1091.)

During voir dire by the court, James H. stated that he was "an associate pastor of a church and it is hard because I see both sides, I look at things a little different, and it is sometimes hard because one side of me

sees compassion, one side sees the other side of it, too, and it is hard sometimes to make that step." (6 RT 1088-1089.) He had "mixed emotions." (6 RT 1089.) The court then continued questioning him about his religious beliefs:

"Q. ...I know that there are some religious beliefs, and based on biblical scripture that would suggest, well, that you are not to judge other people.

A. Right.

Q. Would you have difficulty sitting as a juror in this case because of those beliefs?

A. Yes, sir.

Q. Okay. And, you know, we have the [F]irst [A]mendment, and I can't force you to sit on a jury if it is going to cause you to have to ignore religious beliefs that you have.
Would you basically be forced or put in to that position if you were forced to remain on this jury; in other words, you would have to ignore religious beliefs that you have?

A. That would be hard to do, your Honor.

Q. Well, you know –

A. As far as I'm concerned, I would have a hard time standing in judgment of somebody, to be honest with you, to tell the truth.

Q. And in order to do that, would you, in fact, need to or have to ignore religious beliefs that you have?

A. Yes, sir." (6 RT 1089-1090.)

The prosecution then challenged the juror for cause. (6 RT 1090.) However, on further voir dire, James H. again stated that he could follow

the law and impose the death penalty:

"Q. The question is, at least as far as the death penalty, you may not like it, may not totally agree with it, but you have indicated that, one, you would apply the death penalty if you felt the circumstances warrant it, maybe reluctantly, maybe with a heavy heart, but you would do it if it was the law of the land.

A. Right." (6 RT 1091.)

During further discussion, he repeatedly stated that it would be a "hard decision" (6 RT 1092-1093) but again confirmed that he would obey the law:

"Q. And so let me ask you this: Would you be able – despite your religious beliefs, would you be able to pursue some kind of judging – pursue judging in this case as it is required under the law of the State of California, pass judgment on somebody and determine a factual situation, either yeah or nay?

A. If I was picked for a jury and I had to do that, yes, I would have to do that. I have to obey the laws of the land. It is like going 55 miles an hour down the road. See what I'm saying? You have to do that. Like I said, it would be hard, it would be the hardest thing I would ever have to do." (6 RT 1093.)

He later confirmed that he would have to ignore his religious beliefs against judging in order to follow the law (6 RT 1097) and that he would have to ask God for forgiveness for making a judgment and would feel that he had violated his religious beliefs. (6 RT 1099.)

The defense then objected to the challenge, arguing that "[h]e may be reluctant, but he indicated that he would go ahead and do what he had to do in respect to judging his fellow man and also in respect to the death penalty." (6 RT 1099-1100.) The court responded:

> "I don't know that the law would require that someone violate a precept of their religious beliefs, even though this man presumably was willing to do that if I ordered him to do that, but – but I think that it is – I think that it is cause." (6 RT 1100.)

James H. was excused for cause. (6 RT 1099.)

B. The Applicable Law.

> "[A] State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected. (*Witherspoon v. Illinois, supra*, 391 U.S. at pp. 520-523 (footnotes omitted.))

The United States Supreme Court has held that "*Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out." (*Adams v. Texas, supra,* 448 U.S. at pp. 47-48.)

In *Wainwright v. Witt, supra*, 469 U.S. 412, the United States

Supreme Court held that under the federal Constitution "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (469 U.S. at p. 424, quoting *Adams v. Texas, supra*, 448 U.S. at p. 45; footnote omitted.) The same standard is applicable to a defendant's claims under the California Constitution. (See, e.g., *People v. Guzman* (1988) 45 Cal.3d 915, 955; *People v. Ghent* (1987) 43 Cal.3d 739, 767.)

It is reversible error to exclude for cause a juror who says that he can follow the instructions and oath in regard to the death penalty. (See *Gray v. Mississippi, supra*, 481 U.S. at pp. 667-668.) Thus, the relevant inquiry is whether the juror can perform his or her duties in accordance with the court's instructions and the juror's oath. (*Id.*, at p. 658.) The mere fact that a prospective juror expresses "scruples about the death penalty" does not by itself establish the juror's inability to conscientiously perform the duties of a juror in a capital case; rather, such scruples may "merely heighten the [prospective] jurors' sense of responsibility." (See *Gray v. Mississippi, supra*, 481 U.S. at p. 653, fn. 3; *Witherspoon v. Illinois, supra*, 391 U.S. 510.)

> "It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may

> nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176.)

The burden is on the party seeking exclusion to demonstrate, through questioning, that the potential juror lacks impartiality. (*Wainwright v. Witt, supra*, 469 U.S. at p. 423.) "A motion to excuse a venire member for cause of course must be supported by specified causes or reasons that demonstrate that, as a matter of law, the venire member is not qualified to serve." (*Gray v. Mississippi, supra*, 481 U.S. at p. 652, fn.3.)

The trial court's decision whether to excuse a prospective juror for cause under *Witherspoon/Witt* must be based on the record of the voir dire "as a whole." (*Wainwright v. Witt, supra*, 469 U.S. at p. 435; *People v. Cox* (1991) 53 Cal.3d 618, 646-647.) Accordingly, when the trial court's decision is based on a few individual answers in isolation and not on the voir dire "in its entirety" (*People v. Cox, supra*, 53 Cal.3d at p. 647), it is not fairly supported by the record and is not worthy of deference from this Court. The trial court must follow the process this Court has laid down for itself in assessing jury voir dire: "In short, in our probing of the juror's state of mind, we cannot fasten our attention upon a particular word or phrase to the exclusion of the entire context of the examination and the full setting in which it was conducted." (*People v. Varnum* (1969) 70 Cal.2d 480, 493.)

Although the trial court's "determinations of demeanor and credibility" are entitled to deference by the reviewing court *(Wainwright v. Witt, supra*, 469 U.S. at p. 428), the Sixth Amendment requires that a trial court's resolution of the issue of juror bias must be examined in "the context surrounding [the juror's] exclusion" in order to determine whether it is "fairly supported by the record." (*Darden v. Wainwright* (1986) 477 U.S. 168, 176; *Wainwright v. Witt, supra*, 469 U.S. at p. 434) Excusal of a prospective juror cannot be upheld unless there is substantial evidence in the record supporting the trial court's ruling. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962.) This Court therefore must independently assess the jurors' responses on the record "as a whole," in the correct factual context, and in light of the proper legal standards. (See *Darden v. Wainwright, supra*, 477 U.S. at p. 176.)

Moreover, this Court can accord no deference to the trial court's decision to discharge a prospective juror where the trial court has applied an erroneous legal standard in making its determination. (See *Gray v. Mississippi, supra*, 481 U.S. at p. 661, fn. 10 [deference to the trial court's factual findings "is inappropriate where, as here, the trial court's findings are dependent on an apparent misapplication of federal law . . . ."]; cf. *Wainwright v. Witt, supra*, 469 U.S. at p. 427, fn. 7.)

Analyzed in light of these constitutional standards, it is apparent that the trial court here committed reversible error in granting the prosecution's

challenge for cause as to prospective juror James H.. The voir dire and questionnaire of James H. demonstrates that the prosecution failed to carry its burden of demonstrating any disqualification, and further demonstrates that the trial court, in excusing the juror, applied an incorrect standard.

C. The Prospective Juror's Answers Demonstrated That He Was Qualified To Be A Capital Juror.

James H. clearly stated, both in his questionnaire and his voir dire, that he did not feel the death penalty was wrong for any reason, including religious, moral, or ethical reasons, and that he would have no trouble voting to impose the death penalty in an appropriate case. (11 JCT 3002-3003; 6 RT 1090-1091.) Where, as here, the juror's willingness to adhere to the court's instructions and uphold his oath as a juror is uncontradicted on the record, "the court's discretion [is] extremely diminished to justify the disqualification" of the juror. (*People v. Franklin* (1976) 56 Cal.App.3d 18, 24-26.) The answers given by James H. showed that he was not "so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its" death penalty scheme, the standard that *Witt* requires for exclusion. (*Adams v. Texas, supra*, 448 U.S. at p. 51; see also *Gall v. Parker* (6th Cir. 2000) 231 F.3d 265, 330-332.) He was, in fact, not opposed to capital punishment at all. (11 JCT 3002; 6 RT 1090.) He repeatedly and clearly stated that he would follow his oath and the court's instructions and impose the death penalty if it was warranted. (6 RT

1091, 1093; 11 JCT 3003.) *The trial court itself acknowledged that he was willing to so,* (6 RT 1100), but then excused him anyway under a "violation of religious beliefs" standard that has no basis in the law, and which clearly violated the holdings and rationale of *Witherspoon* and *Witt.*

This situation is, in fact, very similar to the facts of *Witherspoon*, where veniremen who expressed any "conscientious or religious scruples" about the infliction of the death penalty were excused for cause without determining whether they could still vote for the death penalty. (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 515.) The U.S. Supreme Court noted that:

> "....it cannot be assumed that a juror who describes himself as having 'conscientious or religious scruples' against the infliction of the death penalty or against its infliction 'in a proper case' (see *People v. Bandhauer*, 66 Cal.2d 524, 531, 58 Cal.Rptr. 332, 337, 426 P.2d 900, 905) thereby affirmed that he could never vote in favor of it or that he would not consider doing so in the case before him. See also the voir dire in *Rhea v. State*, 63 Neb. 461, 466--468, 88 N.W. 789, 790. Cf. *State v. Williams*, 50 Nev. 271, 278, 257 P. 619, 621. Obviously many jurors could, notwithstanding their conscientious scruples (against capital punishment), return * * * (a) verdict (of death) and * * * make their scruples subservient to their duty as jurors.' [Citations.] ...." (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 515, fn. 9.)

Here, a prospective juror who admitted to religious scruples against judging his fellow man made it abundantly clear that he could make those feelings subservient to his duty as a juror. His exclusion was clearly unconstitutional under *Witherspoon*, *Adams*, and *Witt.*

In fact, the end result of the trial court's "violation of religious precepts" rule would be to bar the followers of any religion which opposes capital punishment from serving in capital cases, including the 60 million members of the Roman Catholic Church, members of the Presbyterian churches, the Episcopal Church, the Reformed Church in America, the American Baptists, the United Church of Christ, some Jewish sects, the Eastern Orthodox Church, the Methodist Church, the Mennonites, the Quakers, and a number of others.[12]

Thus, the trial court's "violation of religious precepts" rule was clearly a much "'broader basis' [for exclusion] than inability to follow the law or abide by their oaths." (*Adams v. Texas, supra*, 448 U.S. at pp. 47-48.) Because the trial court's ruling is unsupported by the record, and based upon a blatantly erroneous standard, this Court must give no deference to the trial court's ruling. (*Gray v. Mississippi, supra*, 481 U.S. at p. 661, fn. 10.) Taking prospective James H.'s voir dire and questionnaire responses as a whole (*Wainwright v. Witt, supra*, 469 U.S. at p. 435; *People v. Cox* (1991) 53 Cal.3d 618, 646-647), the record demonstrates that he was qualified to serve under *Witherspoon*, *Adams*, and *Witt*. The exclusion of prospective James H. was clearly erroneous. The judgment of death must therefore be reversed. (*Gray v. Mississippi, supra*, 481 U.S. at pp.

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[12] (See, e.g. http://www.religioustolerance.org.)

667-668.)

D. Reversal of the Death Judgment Is Required.

The erroneous exclusion of a single juror because of his or her opposition to the death penalty is reversible error per se and is not subject to harmless error analysis. (See, e.g. *Gray v. Mississippi, supra*, 481 U.S. at p. 668.) As shown above, the trial court's decision to excuse James H. for cause is not fairly supported by the record or by substantial evidence, and should not be accorded any deference by this Court because of the trial court's legal errors in making that determination.

The trial court's erroneous discharge of James H. violated Mr. Rountree's rights to a fair and impartial jury, to due process, and to a reliable penalty determination under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 1, 7, 15 and 16 of the California Constitution. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7,15,16, & 17.) Mr. Rountree's death judgment must therefore be reversed. (*Gray v. Mississippi, supra*, 481 U.S. at pp. 660, 668.)

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IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING REDACTED VERSIONS OF MR. ROUNTREE'S CONFESSIONS AND DENYING HIS REPEATED MOTIONS FOR SEVERANCE, SEPARATE JURIES, OR ADMISSION OF THE FULL CONFESSIONS AT PENALTY PHASE.

Mr. Rountree confessed - twice - to the robbery and killing of Diana Contreras. However, the jury never heard or saw the true text of Mr. Rountree's confessions. Instead, due to *Aranda/Bruton* concerns, Mr. Rountree's confessions were altered by the prosecution to eliminate any reference to co-defendant Stroder, who had lured the victim to their car and who, according to the physical evidence, was more likely the actual shooter. (See 4 CT 1059; 18 RT 3211-3216, 3311; *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123.) At guilt phase, the investigating officer read wholly-concocted "summaries" of the two confessions to the jury in which it appeared that Mr. Rountree had done everything by himself. (17 RT 2997-3035.) The trial court then refused to sever the penalty trials, use separate juries at penalty phase, or let the jury hear the real confessions. This was clear error.

Mr. Rountree's statements were redacted in a way that created the false impression that he was the sole planner and perpetrator of the crime, thus violating his right to a fair trial and to due process of law. Moreover, because the trial court ruled that Mr. Rountree could not cross-examine witnesses about the redacted portions of his statements, but could only

present them if he took the stand, Mr. Rountree's Sixth Amendment right to cross-examine witnesses against him and his Fifth Amendment right to remain silent were violated. The redaction and ruling also denied Mr. Rountree his rights to counter false aggravating evidence and present true mitigating evidence at the penalty phase of his capital trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the comparable provisions of the California Constitution. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7,15,16, & 17.) Accordingly, Mr. Rountree's death sentence must be vacated and the case remanded for a new penalty phase.

A. Procedural Background.

The use of Mr. Rountree's confessions was the subject of repeated motions to bar their use, bar their redaction, for severance of trials, severance of penalty trials, separate juries, and for mistrial. On March 3, 1995, a motion was heard to sever the trials, or in the alternative, for separate guilt and penalty juries, or for separate juries for each defendant or for the introduction of Mr. Rountree's unedited statements. (4 CT 1204-1241.) The motion was denied without prejudice by minute order on March 9, 1995. (4 CT 1242-1243.)

Mr. Rountree renewed the motion to sever, or in the alternative, for mistrial, on June 12, 1995, and again the motion was denied. (5 CT 1544-1548.) Trial counsel argued that the redacted statements placed more moral

responsibility on Mr. Rountree than was reflected in his true confession - to his prejudice because the circumstances of the offense were an element that the jury could use to aggravate the offense under code section 190.3. The only way Mr. Rountree could then show the true circumstances of the crime was by taking the stand - something trial counsel did not want him to do. Trial counsel argued that this violated due process, Evidence Code section 356, and Mr. Rountree's right to counter aggravating evidence and introduce mitigating evidence. (17 RT 2863-65.)

On June 23, 1995 and again on June 26, 1995, Mr. Rountree's renewed motions to sever the penalty trials or for mistrial were heard and denied. (6 CT 1785-1788, 1789-1793.)

After trial, Mr. Rountree moved for a new penalty phase trial based upon admission of the redacted statements, prohibition from cross-examining Detective Giuffre about co-defendant Stroder's actions, and failure to sever the trials or empanel separate juries. (7 CT 2109-2113.) The motion was again denied. (7 CT 2141-2144.)

B. Applicable Law.

Mr. Rountree's statements were redacted to omit mention of Stroder, the co-defendant with whom he was tried, pursuant to *People v. Aranda, supra*, 63 Cal.2d 518[13] and *Bruton v. United States, supra*, 391 U.S. 123.

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[13] In *People v. Fletcher* (1996) 13 Cal.4th 451, 465 [53 Cal. Rptr. 2d 572, 917 P.2d 187], the California Supreme Court held that to the extent

Aranda provides,

> "When the prosecution proposes to introduce into evidence an extrajudicial statement of one defendant that implicates a codefendant, the trial court must adopt one of the following procedures: (1) It can permit a joint trial if all parts of the extrajudicial statements implicating any codefendants can be and are effectively deleted without prejudice to the declarant. By effective deletions, we mean not only direct and indirect identifications of codefendants but any statements that could be employed against nondeclarant codefendants once their identity is otherwise established. (2) It can grant a severance of trials if the prosecution insists that it must use the extrajudicial statements and it appears that effective deletions cannot be made. (3) If the prosecution has successfully resisted a motion for severance and thereafter offers an extrajudicial statement implicating a codefendant, the trial court must exclude it if effective deletions are not possible." (*People v. Aranda, supra*, 63 Cal2d. at pp. 530-531, fn. omitted.)

As this Court has recently noted,

> "[s]everance may be necessary when a defendant's confession cannot be redacted to protect a codefendant's rights without prejudicing the defendant. [Citation.] A defendant is prejudiced in this context when the editing of his statement distorts his role or makes an exculpatory statement inculpatory." (*People v. Lewis* (2008) 43 Cal.4th 415, 457 [75 Cal. Rptr. 3d 588, 181 P.3d 947].)

Here, although Mr. Rountree and his co-defendant urged no redaction, severance or separate juries, the trial court opted to redact all references to Stroder and to proceed with a joint trial and a single jury. The

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Aranda "constitutes a rule governing the admissibility of evidence, and to the extent this rule of evidence requires the exclusion of relevant evidence that need not be excluded under federal constitutional law, it was abrogated in 1982 by the 'truth-in-evidence' provision of Proposition 8 (*Cal. Const., art. I, § 28, subd. (d)*)."

trial court may have effectively deleted portions of his statements that implicated Stroder, but it failed to recognize the prejudice against Mr. Rountree that was worked by the resulting distortion of his role.

C. The Trial Court's Failure to Either Sever The Penalty Trials, Order Separate Penalty Juries, Or Admit the Full Text of the Confessions During Penalty Phase Was Clear Error.

The fundamental problem with the trial court's rulings, as trial counsel neatly summarized it, is that what the jury heard "ain't what happened." (4 CT 1211.) The canned questions and answers that were presented to the jury were not what happened in the actual interrogation and were not the facts and circumstances of the crime as Mr. Rountree had described it. All plural pronouns and verbs were changed to singular, and Stroder, a co-participant in the crime, was completely erased from the picture in the interests of judicial economy. Not surprisingly, Stroder received a life sentence while Mr. Rountree was sentenced to death.

1. The redacted statements distorted Mr. Rountree's role in the crime.

The original statements were wandering conversations that would loop around to the same points over and over:

"Giuffre: So she just seemed like maybe the one?

Rountree: Just seemed like she wouldn't be as much trouble.

. . . .

Giuffre: So when she walks back out, you and Liz have already talked about this was gonna be the one you were gonna

try to do, try to rob?

Rountree: Yes sir

...

Giuffre: She comes walking out and you guys are sitting next to each other, the cars are parked there, does she actually get into her car before Liz meets her or how does . . .

Rountree: Well, the car's parked, this is the Golf.

Giuffre: Uh huh.

Rountree: And this is her car.

Giuffre: Um hm.

Rountree: She walked in, Liz just got out. . .

Giuffre: Walked in between the two cars?

Rountree: Yeah.

Giuffre: Okay.

Rountree: We parked right next to her. That's why (inaudible).

Giuffre: Okay.

Rountree: And you know, Liz got out, and you know, just asking her, how to get back on 15, you know and just talking to her, you know, we're from out of town, you know, blah, blah. Liz didn't know if she should do it, cause you know, she was scared and she's not, you know, she had never done this stuff before. I never hurt nobody, I looked at her and I just gave her a look like 'Do it or don't do it,' you know, cause we thought about doing it before, like I told you, and we couldn't do it. Finally she said 'Please get in the car. My boyfriend's got a gun and we need some money.' She got scared and got in the car and . . .

Giuffre: Did Liz actually have to push her or did she get in by

herself?

Rountree: She pretty much just got in by herself. You know, she stopped at the thing and looked at me, like at the -, in the car door and Liz just stood behind her and she got in, she was shaking." (4 CT 1057-1060.)

The jury, however, never heard any of that. Instead, the prosecution redacted the statements to erase Stroder altogether:

"Q. Where did Mr. Rountree first see Diana Contreras?

A. At the Valley Plaza shopping center.

Q. Did Mr. Rountree tell you if Diana Contreras arrived at the Valley Plaza in a vehicle?

A. He said she did.

Q. Did Mr. Rountree tell you why he decided to rob Diana Contreras?

A. He said she "just seemed like she wouldn't be as much trouble."

Q. Did Diana get in to the Volkswagen Golf?

A. Yes." (17 RT 2998.)

It is indisputable that the changes–which made Mr. Rountree the sole planner and actor – did change the meaning of defendant's statements and overstated his role in everything that happened. (See *People v. Tealer* (1975) 48 Cal. App. 3d 598, 603-604 & fn. 10 [122 Cal. Rptr. 144] [changing "we" to "I" in defendant's confession was error because "the effect of [the] modification was to throw the entire onus of the planned robbery on defendant ..."]; cf. *People v. Duarte* (2000) 24 Cal.4th 603, 622

[101 Cal. Rptr. 2d 701, 12 P.3d 1110] (conc. & dis. opn. of Baxter, J.) [statement of accomplice that was redacted to remove references to defendant impliedly overstated accomplice's role].)

2. Mr. Rountree's full statements were admissible under Evidence Code section 356.

Under the clear language of Evidence Code section 356, either Mr. Rountree's statements should have been excluded in their entirety or the full, unredacted statements should have been admitted:

> "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

As trial counsel told the court, "...once the prosecution has selected or chosen to introduce a portion of a statement, no longer can they pick and choose between the good and bad. No longer is it a situation where only those things that the prosecution wants to talk about are talked about, and the statement comes in to get the flavor of the thing." (21 RT 3410.)

This case is similar to that to that in *People v. Douglas* (1991) 234 Cal.App.3d 273 [285 Cal. Rptr. 609] (*Douglas*), in which prejudicial redactions distorted the defendant's account of his role in a murder and required reversal of his conviction. Here, as in *Douglas*, the declarant defendant gave a statement to a detective that implicated both himself and

his co-defendant. (*Id.* at pp. 282-285.) Here, as in *Douglas*, the defendant moved for a separate trial, but the trial court denied the defendant's motion and instead ordered the detective who was to testify regarding the content of the statement to make references only to what the defendant did, and to omit all references to the co-defendant's actions. (*Id.* at pp. 280-281.) Here, as in *Douglas*, the detective's testimony about the content of the statement omitted all reference to the actions of the co-defendant, and the jury was admonished that the statement was admissible only against the defendant. (*Id.* at p. 281.) Here, as in *Douglas,* defendant's counsel was precluded from cross-examining the detective about the content of the unredacted statement. (*Ibid.*) The Court of Appeal reversed, stating that

> " 'It is an elementary rule of law that when admissions of one on trial for the commission of a criminal offense are allowed in evidence against him, all that he said in that connection must also be permitted to go to the jury, either through cross-examination of the witness who testified to the admissions or through witnesses produced by the accused. The fact that declarations made by the accused were self-serving does not preclude their introduction in evidence as a part of his whole statement, provided they are relevant to, and were made on the same occasion as the statements introduced by, the prosecution.' "

(*People v. Douglas, supra*, 234 Cal.App.3d at p. 285, quoting 29 Am.Jur.2d, Evidence, § 599, pp. 654-655, fns. omitted; see now 29 Am.Jur.2d (2008) § 759.) Here, as in *Douglas,* the use of the redacted statement

> "set the stage for an inevitable collision between [the

> codefendant's] constitutional rights protected by the *Aranda/Bruton* decisions and appellant's right to have the jury hear his entire statement as provided in Evidence Code section 356. While *Aranda* offers as an option the redaction of the confession, it expressly limits that option to cases in which deletions are made without prejudice to the declarant. [*People v. Aranda, supra*, 63 Cal.2d at p. 530.] When deletions cannot be made without prejudice to the declarant the court should either grant severance or exclude the statement. [*Id.* at p. 531.]" (*Ibid.*)

Here, the redactions prejudiced the declarant because it threw "the entire onus of the planned robbery on defendant by converting the sometimes ambiguous and partially exculpatory 'we' into an unmistakable 'I.'" (*People v. Tealer, supra,* 48 Cal.App.3d at pp. 603-604.) The trial court erred in failing to either admit the unredacted statements at penalty phase, empanel two juries or sever the trials.

3. Admission of the redacted statements violated Mr. Rountree's rights to due process and a fair trial.

As shown above, the redacted statements presented a picture of the crime that was essentially false because it showed Mr. Rountree as the sole planner and perpetrator of the crime. Admission of the redacted confessions thus denied appellant his right to a fair trial and due process of law. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7,15,16, & 17 ; see, e.g., *State v. Rakestraw* (Kan. 1994) 871 P.2d 1274; *State v. Barnett* (N.J. 1969) 252 A.2d 33; *People v. La Belle* (N.Y. 1966) 222 N.E.2d 727; see also *United States v. Figurski* (4th Cir. 1976) 545 F.2d 389, 391 ["the basic concern of American criminal jurisprudence is that a

defendant be convicted on nothing less than the full truth"][citations omitted]; *Commonwealth v. Young* (Pa. 1979) 397 A.2d 1234 [if deleted portions of redacted confession contain exculpatory material, court must either grant severance or forbid use of confession]; *Mooney v. Holohan* (1935) 294 U.S. 103 [knowing use of false testimony violates due process clause].) As one court explained, "The injustice of allowing the [state] to put in evidence only those portions of [the defendant's] statement which incriminate him, with the exculpatory portions deleted, is manifest." *(La Belle, supra,* 222 N.E.2d at p. 730.)

Here, the redacted portions of the statements showed that Stroder was a full participant in the planning - such as it was - and execution of the crime. They also showed that the two had fled and gotten married because Mr. Rountree knew he was going to jail and both thought that being married meant they could always stay in touch. (4 CT 1161.) He wanted to deliver Stroder safely back to Missouri before he was arrested. (4 CT 1161.) Trial counsel, anticipating that the prosecution would use the flight and marriage as evidence of Mr. Rountree's callousness and lack of remorse, wanted to bring these facts out, either through the statements themselves or through cross-examining Detective Giuffre. (21 RT 3397-3398.) The motion was denied (21 RT 3424), and the jury never heard about those portions of the statements. The prosecution then asked the jury at both guilt and penalty phases to contrast a photo of Contreras dead at the scene with a picture of

Stroder with her wedding ring, and the image of the defendants driving away in the victim's car. (18 RT 3312-3313; 24 RT 3872.)

The Confrontation Clause of the Sixth Amendment to the federal Constitution, made applicable to the states through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The right of confrontation includes the right of cross examination. (*Pointer v. Texas* (1965) 380 U.S. 400, 404-407.) Here, Mr. Rountree was barred from cross-examining Detective Giuffre about any aspect of his statements that concerned Stroder, effectively barring him from countering the prosecution's aggravating evidence. This was clear error.

A defendant must be given an opportunity to deny or explain evidence offered in aggravation (*Gardner v. Florida* (1977) 430 U.S. 349), and must be allowed to present to his sentencing jury any information that could serve as a "basis for a sentence less than death." (*Skipper v. South Carolina* (1986) 476 U.S. 1 (quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [plurality opinion].) Where evidence is "highly relevant to the critical issue in the penalty phase of the trial," due process requires its admission even though ordinary evidentiary rules would deem it inadmissible hearsay. (*Green v. Georgia* (1979) 442 U.S. 95.) Thus, due process compels the admission of the unredacted statements made by a defendant when those statements relate to mitigation issues. The trial court's failure to admit the

unredacted statements was reversible error.

4. Mr. Rountree was not required to relinquish his Fifth Amendment privilege to correct misleading testimony.

At trial, the district attorney repeatedly argued that Mr. Rountree was perfectly free to correct the distorted picture in the redacted confessions "by taking the witness stand, testifying to those facts and being subject to cross-examination." (21 RT 3395.) However, there is simply no authority for the proposition that a defendant may be required to abandon his Fifth Amendment privilege against self-incrimination in order to attempt to undo the prejudice caused by misleading redactions to his out-of-court statements. Under *People v. Aranda, supra*, 63 Cal.2d 518, it is clear that the trials needed to be severed, two juries impaneled, or the statements excluded altogether.

An admissible confession is a voluntary statement by the defendant waiving his privilege under the Fifth Amendment to the United States Constitution against being compelled to be a witness against himself. (*Ex parte Sneed* (2000) 783 So.2d 863, 870; see also *United States v. Walker* (7th Cir. 1981) 652 F.2d 708, 713 [Fifth Amendment right to remain silent is violated if the omission "paints a distorted picture . . . which [the defendant] . . . is powerless to remedy without taking the stand"]; 1 Weinstein's Evidence (1979) § 1106[01], at pp. 106-109 ["Forcing the defendant to take the stand in order to introduce the omitted exculpatory

portions of [a] confession is a denial of his right against self incrimination"]; *United States v. Washington* (D.C. Cir. 1991) 952 F.2d 1402, 1404 [Fifth Amendment rights not violated by *Bruton* redaction only because the redacted material was elicited during cross-examination]; *Burns v. Beto* (5th Cir. 1966) 371 F.2d 598, 602 [where prosecutor read defendant's confession but omitted exculpatory portions, due process would have been violated but for Texas law that defendant could himself introduce remaining exculpatory portions without taking the stand].) The scope of the waiver must be measured by the words used in his voluntary act – i.e., his confession. (*Ex parte Sneed, supra,* 783 So.2d at pp. 870-871.) Here, Mr. Rountree's statements were altered to his detriment and he was then told that he must take the stand to correct them in violation of the Fifth Amendment. Reversal is required.

5. Admission of the redacted statements denied Mr. Rountree the individualized sentencing determination guaranteed by the Eighth Amendment.

Beginning with *Woodson v. North Carolina* (1976) 428 U.S. 280, the United States Supreme Court has stressed the principle that "the fundamental respect for humanity underlying the Eighth Amendment" requires an "individualized" sentencing determination in which the jury considers "the character and record of the individual offender and the circumstances of the particular offense . . . ." (*Id.* at p. 304; see also *Zant v.*

Stephens (1983) 462 U.S. 862, 879 ["What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime"].)

In *Lockett v. Ohio*, *supra*, 438 U.S. 586, the Court further recognized that "an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases." (*Id.* at p. 605.) Again, in *Penry v. Lynaugh* (1989) 492 U.S. 312, the Supreme Court reaffirmed the principle "that punishment should be directly related to the personal culpability of the criminal defendant." (*Id.* at p. 319.) It is critical that the sentencer treat the defendant "as a 'uniquely individual human bein[g],' and has made a reliable determination that death is the appropriate sentence." (*Ibid.* (quoting *Woodson v. North Carolina, supra*, 428 U.S. at pp. 304- 305). "'Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character and crime.'" (*Ibid.* [quoting *California v. Brown* (1987) 479 U.S. 538, 545 (O'Connor, J., concurring)(emphasis in original)].)

Here, as noted above, the redactions prejudiced Mr. Rountree because they threw "the entire onus of the planned robbery on defendant by converting the sometimes ambiguous and partially exculpatory 'we' into an unmistakable 'I.'" (*People v. Tealer, supra,* 48 Cal.App.3d at pp. 603-604),

as well as keeping the jury from hearing the reason for the defendants' marriage and flight towards Missouri. The Ninth Circuit has recognized the primary danger of a joint penalty phase of co-defendants: "A single jury . . . may well assess relative blame, with the resultant imposition of a non-capital sentence on the less blameworthy of the two defendants." (*Beam v. Paskett* (9th Cir. 1993) 3 F.3d 1301, 1304, fn.1.)

Such a comparison certainly occurred here when the jury reached a verdict of death for Mr. Rountree and a verdict of life without possibility of parole for Stroder. Having one jury decide the appropriate penalty for both defendants without ever having heard Mr. Rountree's actual statements deprived him of his due process and Eighth Amendment rights to a fair, reliable, individualized and non-arbitrary sentencing determination.[14]

D. Reversal is Required.

Had the jury heard appellant's unredacted statements, there is a reasonable possibility that at least one juror would have decided that Mr. Rountree and co-defendant Stroder bore equal responsibility for the death of Contreras, that Mr. Rountree's remorse was genuine and his flight prompted by concern for Stroder - and therefore that for Mr. Rountree, as for Stroder, death was not the appropriate penalty. (*Wiggins v. Smith* (2003) 539 U.S.

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[14] Mr. Rountree is not arguing that a joint penalty trial is always unconstitutional, but only that the distorted picture provided by the redacted statements in this case rendered the trial fundamentally unfair and deprived him of a fair, reliable and individualized sentencing determination.

510.) Given the extraordinary complexity of the capital sentencing decision (see, e.g., *Turner v. Murray* (1986) 476 U.S. 28, 37), and the heightened "need for reliability in the determination that death is the appropriate punishment" (see, e.g., *Caldwell v. Mississippi* (1985) 472 U.S. 320), it is impossible to say that the distorted picture painted by the redacted statements was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Accordingly, Mr. Rountree's death sentence must be vacated and the case remanded for a new penalty phase.

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V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO INSTRUCT THE JURY THAT AN ACCIDENTAL ACT RESULTING IN DEATH DURING THE COURSE OF A FELONY FAILS TO MEET THE REQUIREMENTS OF THE FELONY-MURDER SPECIAL CIRCUMSTANCES.

Mr. Rountree confessed to robbing, kidnaping, and shooting the victim, but consistently maintained that he and Stroder had intended to strand Diana Contreras in a remote area so as to get a head-start on any pursuit, and that the shooting had been an accident. (See 17 RT 3004, 3028, 3034.) Trial counsel emphasized this fact throughout the trial as Mr. Rountree's only defense.

The trial court had a sua sponte duty under both the U.S. and California Constitutions to accurately instruct the jury on Mr. Rountree's defense and all material issues raised by the evidence, but failed to properly instruct the jury regarding the only disputed issue at guilt phase: whether the shooting was accidental and, if so, whether that met the requirements of the felony-murder special circumstances. However, the trial court instructed the jury only with CALJIC 8.81.17, which fails to accurately reflect California law and improperly lowered the prosecution's burden of proof because it did not require the jury to find that the murder was intended to advance an independent felonious purpose. (*People v. Green* (1980) 27

Cal.3d 1, 59-63.)[15]

This error denied Mr. Rountree's right to due process, to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to the verdict of a unanimous jury, and his right to a fair and reliable determination that he committed a capital offense. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.) Reversal of the death sentence is required.

A. Procedural Background.

Mr. Rountree confessed repeatedly and consistently that he did not intend to kill Diana Contreras but shot her accidentally while she was arguing against being left in a remote area. Either Contreras ran into the gun or Mr. Rountree twitched when she approached, causing the rifle to accidentally fire. (4 CT 1167, 1170-71, 1173.) During guilt phase, trial counsel gave no opening statement (12 RT 2132) and presented no evidence. (17 RT 3063-3064.) In his cross-examination of prosecution witnesses, counsel emphasized that Mr. Rountree had consistently said the shooting was an accident and that the rest of his confession was completely

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[15] Instructional errors are reviewable even without objection if they affect a defendant's substantive rights. (Pen. Code, §§ 1259 & 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.) Merely acceding to an erroneous instruction does not constitute invited error; nor must a defendant request modification or amplification when the error consists of a breach of the trial court's fundamental instructional duty. (*People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.)

consistent with the physical evidence. (17 RT 2921, 3028, 3034.)

In his closing argument at guilt phase, trial counsel emphasized that, as the prosecution was relying upon Mr. Rountree's statement when it suited them, the jury should believe all of it - and that meant the shooting was accidental. (18 RT 3230-3235.) He argued that this was important for the charge of premeditated murder, but conceded that an accidental shooting was still felony-murder. He never mentioned the special circumstances and never asked for any particular verdict. (*Ibid.*)

The trial court instructed the jury as to the special circumstances with the language of CALJIC 8.81.17:

> "To find that the special circumstance, referred to in these instructions as murder in the commission of robbery is true, it must be proved:
>
> 1A. The murder was committed while the defendant was engaged in the commission or attempted commission of a robbery; or
>
> 1B: The murder was committed during the immediate flight after the commission of a robbery by the defendant to which the defendant was an accomplice; and
>
> 2. The murder was committed in order to carry out or advance the commission of the crime of robbery or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the attempted robbery was merely incidental to the commission of the murder." (18 RT 3189; 6 CT 1654.)

The court also used CALJIC 8.81.17 for the kidnaping special circumstance. (18 RT 3190; 6 CT 1655.)

In her closing argument, the prosecutor addressed the requirements of the special circumstances allegations and told the jury "the only time it wouldn't apply is if the special circumstance is not established. When the robbery or kidnaping is merely incidental to the murder." She gave them an example of a planned murder where the killers incidentally take the victim's wallet afterwards and told them that would be the only time the special circumstances would not apply. (18 RT 3219-3223)

The jury found both special circumstances to be true. (19 RT 3332-3343; 6 CT 1723-1732.)

B. The Trial Court's Jury Instructions Lessened the Prosecution's Burden of Proof as to the Special Circumstances and Failed to Instruct the Jury on Mr. Rountree's Theory of the Case.

To meet the requirements of the U.S. Constitution and narrow the class of felony-murderers eligible for a sentence of death to those most blameworthy, this Court created a heightened intent requirement that distinguishes the felony-murder special circumstance from the crime of felony-murder. Because CALJIC 8.81.17 does not reflect that requirement, its use in Mr. Rountree's trial lessened the prosecution's burden of proof as to the special circumstances and deprived Mr. Rountree of his only defense at guilt phase.

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1. The U.S. Constitution requires that California's special circumstances must genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence on those made death-eligible.

The Eighth Amendment requires a state's capital sentencing scheme to narrow the definition of the circumstances that place a defendant within the class of persons eligible for the death penalty and to reasonably justify the imposition of a more severe sentence on the defendant as compared to others found guilty of murder. (*Zant v. Stephens, supra,* 462 U.S. at pp. 877-878; *Furman v. Georgia* (1972) 408 U.S. 238; *Gregg v. Georgia* (1976) 428 U.S. 153.)

The United States Supreme Court has repeatedly reaffirmed the *Zant* rule, (see *Pulley v. Harris* (1984) 465 U.S. 37, 50; *McKleskey v. Kemp* (1987) 481 U.S. 279, 305; *Tuilaepa v. California* (1994) 512 U.S. 967, 972), and it is clearly established that the United States Constitution requires a state's capital sentencing scheme to create a class of death-eligible defendants "demonstrably smaller and more blameworthy" than the class of all murderers. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 364.)

2. The California capital sentencing scheme purports to narrow the class of death-eligible defendants, in part, by means of an additional intent requirement for the felony-murder special circumstance.

In California, any unlawful killing committed during the perpetration of a robbery is murder in the first degree. (Calif. Pen. Code §§187/189;

People v. Dillon (1983) 34 Cal.3d 441, 462-472.) The felony-murder rule encompasses a wide range of individual culpability. In addition to premeditated and deliberate murder, first degree felony-murder includes

> "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 unforseeable." (*People v. Dillon, supra,* 34 Cal.3d at p. 477.)

To meet the requirements of the *Zant* rule and narrow the class of felony-murderers eligible for a sentence of death to those most blameworthy, California has separate and distinct felony-murder special circumstances. "In California, the special circumstances serve to guide and channel jury discretion by strictly confining the class of offenders eligible for the death penalty." (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 467, internal quotations omitted.) Thus, this Court has held that, in passing the statute containing the robbery-murder special circumstance, the Legislature intended to narrow death-eligible felony murderers to *"those defendants who killed in cold blood in order to advance an independent felonious purpose, e. g., who carried out an execution-style slaying of the victim of or witness to a holdup, a kidnaping, or a rape."* (*People v. Green, supra,* 127 Cal.3d at p. 61. Footnote omitted. Emphasis added.)

The narrowing was to be done through an additional intent requirement - a killing deliberately done in order to advance the underlying

felony:

> "Since 'the Legislature must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not,' the determination as to whether or not a murder was committed during the commission of robbery or other specified felony is not 'a matter of semantics or simple chronology.' [Citation.] Rather, this determination involves proof of the intent of the accused. A murder is not committed during a robbery within the meaning of the statute unless the accused has 'killed in cold blood in order to advance an independent felonious purpose, e.g., [has] carried out an execution-style slaying of the victim of or witness to a holdup, a kidnaping, or a rape.' [Citation.]" (*People v. Thompson* (1980) 27 Cal.3d 303, 322. Emphasis added.)

This Court later restated and reshaped the requirement in *People v. Berryman* (1993) 6 Cal.4th 1048, 1088, holding that "[t]he felony-murder special circumstance requires that the 'defendant [must] commit [ ] *the act resulting in death* in order to advance an independent felonious purpose.' [Citing *People v. Bonin* (1989) 47 Cal.3d 808, 850.]" (*Ibid.* Emphasis added.)[16] Thus, there must be an intentional act done with the purpose of furthering the underlying felony and that act must result in death. An accidental act, by definition, could never meet that requirement.

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[16] This Court has repeatedly reaffirmed the *Green* rule over the last twenty years. See, e.g., *People v. Smithey* (1999) 20 Cal.4th 936, 984–85; *People v. Barnett* (1998) 17 Cal.4th 1044, 1157-59; *People v. Wright* (1990) 52 Cal. 3d 367, 417; *People v. Garrison* (1989) 47 Cal. 3d 746, 791–92; *People v. Bonin, supra*, 47 Cal. 3d at pp. 850–51; *People* v. *Kimble* (1988) 44 Cal.3d 480, 501, fn. 16; *People v. Weidert* (1985) 39 Cal. 3d 836, 842 ; *People v. Thompson, supra,* 27 Cal. 3d at pp. 321–25.

3. The trial court's erroneous instruction of the jury regarding the special circumstances was prejudicial error.

Mr. Rountree consistently told the police that the shooting had been accidental. (17 RT 3004, 3028, 3034.) Merriam-Webster's Dictionary (10th Edition) defines "accidental," in part, as "happening without intent or through carelessness and often with unfortunate results." An accidental shooting, by definition, is done without intent and can therefore never satisfy the heightened intent requirement of the felony-murder special circumstances under *Green* and *Thompson*. However, the jury instructions told the jury that, "[i]n other words, the special circumstance referred to in these instructions is not established if the attempted robbery was merely incidental to the commission of the murder." (18 RT 3189-3190; 6 CT 1654-1655.) The prosecutor then told them the same thing. (18 RT 3219-3223.) Thus, the jury never addressed the question of whether the shooting was accidental.

In reviewing ambiguous instructions for the existence of federal constitutional error, a reviewing court must determine "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Boyde v. California* (1990) 494 U.S. 370, 380.)

Here, it is obvious that at least some jurors could have interpreted the jury instructions to mean that they need not deliberate on whether the

shooting was done to carry out or advance the robbery or kidnaping as long as they found the robbery and kidnaping were not incidental to the murder. (*Boyde v. California, supra*, 494 U.S. at p. 380.) Therefore, because it is reasonably likely that at least one juror could have misinterpreted the requirement, there was error. Because that error erased the distinction between felony murder and the special circumstance and lessened the prosecution's burden of proof, Mr. Rountree's rights under both the United States and California Constitutions were violated. Jury instructions relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense, including the total failure to instruct on an element of the offense, or an instruction directing the jury to find an element against the defendant, violate the Sixth Amendment right to a jury trial, as well as the Due Process Clause. (*Sullivan v. Louisiana, supra*, 508 U.S. 275; *United States v. Gaudin* (1995) 515 U.S. 506, 510; *Apprendi v. New Jersey* (2000) 530 U.S. 466; *People v. Flood, supra,* 18 Cal. 4th 470; U.S. Constitution, 6th, 8th and 14th Amendments; *Boyde v. California, supra*, 494 U.S. at p. 380.)

C. The Trial Court's Special Circumstance Instructions Deprived Mr. Rountree of a Meaningful Defense at Guilt Phase.

The trial court is required to instruct sua sponte on general principals of law relevant to issues raised by the evidence. (*People v. Wickersham* (1982) 32 Cal.3d 307, 323) and on particular defenses when a defendant

appears to be relying on such defense and there is substantial evidence to support it. (*People v. Sedeno* (1974) 10 Cal.3d 703, 716.) Here, trial counsel's only theme at guilt phase was that Mr. Rountree had consistently said the shooting was an accident, that the rest of his confession was completely consistent with the physical evidence, and that the jury should believe the shooting was accidental. (17-18 RT 2921, 3028, 3034, 3230-3235.) It was apparent that Mr. Rountree's only defense was that the shooting was accidental. The trial court's failure to properly instruct the jury on whether an accidental act was sufficient for the special circumstances meant Mr. Rountree had no defense at all.

The failure to instruct on Mr. Rountree's theory of the case violated his right under the Sixth and Fourteenth Amendments to adequate instructions on his theory of the defense, and the Sixth Amendment right to a jury trial. (*Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739-740; *Barker v. Yukins* (6th Cir. 1999) 199 F.3d 867; *United States v. Unruh* (9th Cir. 1988) 855 F.2d 1363, 1372; in accord, *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202.)

D. Because The Only Direct Evidence Of Mr. Rountree's Intent Showed The Shooting To Be Accidental, The Error Was Prejudicial.

"Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter v. Kentucky* (1981) 450 US 288, 302.) Here, as trial counsel pointed out to the

jury, the prosecution did not dispute any other aspect of Mr. Rountree's confessions. Those confessions were the only direct evidence of Mr. Rountree's intent, but under the instructions given the jury any juror who believed the shooting to be an accident would still have found the special circumstances to be true because the robbery and kidnaping were not "incidental to" the shooting. Thus, it cannot be concluded that the finding on the special circumstance was "surely unattributable" to the erroneous instruction. The special circumstances must be stricken.

After conducting an exhaustive review of United States Supreme Court decisions in *People v. Flood, supra*, 18 Cal.4th at pp. 492-503, this Court concluded that an instructional error that improperly describes or omits an element of an offense, or that raises an improper presumption or directs a finding or a partial verdict upon a particular element, is subject to *Chapman* review. (*Id.* at p. 503, 513.)

The *Chapman* test is not whether a reasonable jury would have returned a verdict of guilty; in order for constitutional error to be deemed harmless, the court must conclude beyond a reasonable doubt that "' the guilty verdict actually rendered in *this* trial was surely unattributable to the error.'" (*People v. Flood, supra*, 18 Cal.4th at p. 494, quoting *Sullivan v. Louisiana, supra,* 508 U.S. at p. 279, original italics.)

Given the consistency of Mr. Rountree's statements with the physical evidence and the prosecution's reliance upon those statements, the state

cannot prove beyond a reasonable doubt that the jury's findings on the special circumstances were "surely unattributable to the error." The jury's true findings on the special circumstances must be stricken and Mr. Rountree's death sentence stricken. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17; *Chapman v. California, supra*, 386 U.S. at p. 23; *People v. Flood, supra*, 18 Cal.4th at p. 494; *Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.)

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VI. TO THE EXTENT CALJIC 8.81.17 ACCURATELY REFLECTS CALIFORNIA LAW, THE CALIFORNIA FELONY-MURDER SPECIAL CIRCUMSTANCES VIOLATE THE NARROWING REQUIREMENTS OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As shown in Argument V, above, the trial court erred in instructing the jury with CALJIC 8.81.17, which failed to accurately reflect California law and improperly lowered the prosecution's burden of proof because it did not require the jury to find that the murder was intended to advance an independent felonious purpose. (*People v. Green, supra,* 27 Cal.3d at 59-63.)

In the alternative, and to the extent the trial court's instructions accurately reflected California law, the California felony-murder special circumstances violate the Eighth and Fourteenth Amendments of the United States Constitution because the special circumstances have become identical to the crime of felony-murder, fail to narrow the class of offenders eligible for death, and no longer allow the sentencer to make a "principled distinction between those who deserve the death penalty and those who do not." (*Lewis v. Jeffers* (1990) 497 U.S. 764, 774; *Zant v. Stephens, supra,* 462 U.S. at pp. 877-878; *Furman v. Georgia, supra,* 408 U.S. 238; *Gregg v. Georgia, supra,* 428 U.S. 153; U.S. Const., 8th, & 14th Amends.)

A. Procedural Background.

Trial counsel for co-defendant Stroder brought a motion to set aside

the Information, arguing that the special circumstances were unconstitutional because they failed to adequately narrow the class of death-eligible persons and allowed a person with no intent to kill to be put to death. The primary case cited in the moving papers was *U.S. v. Cheely* (9th Cir. 1994) 36 F3d 1439. Counsel for Mr. Rountree joined in the motion. (5 CT 1298-1326; 1 RT 3, 17-19.) The motion was summarily denied. (*Ibid.*)

B. The California Felony-Murder Special Circumstances Have Become Identical to the Crime of Felony-Murder and Fail To Narrow the Class of Offenders Eligible for Death.

As discussed at greater length in Argument V, *supra*, the Eighth and Fourteenth Amendments to the U.S. Constitution require a state's capital sentencing scheme to narrow the definition of the circumstances that place a defendant within the class of persons eligible for the death penalty and to reasonably justify the imposition of a more severe sentence on the defendant as compared to others found guilty of murder. (*Zant v. Stephens, supra,* 462 U.S. at pp. 877-878.)

To meet the requirements of the *Zant* rule and narrow the class of felony-murderers eligible for a sentence of death to those most blameworthy, this Court held that the felony-murder special circumstances narrow death-eligible felony murderers to

> *"those defendants who killed in cold blood in order to advance an independent felonious purpose, e. g., who carried out an execution-style slaying of the victim of or witness to a holdup, a kidnaping, or a rape."* (*People v. Green, supra,* 27

Cal.3d at p. 61. Emphasis added.)

Without that rule, the special circumstances are unconstitutional:

> "Under California law, it is not enough that murder happen during a kidnaping, or vice-versa; for the felony-murder special circumstance to be satisfied, the murder must be intended to advance an independent felonious purpose. [*People v. Green*, 27 Cal.3d 1, 59-63, 164 Cal.Rptr. 1, 609 P.2d 468 (1980).] Moreover, as the California Supreme Court explained in *Green*, it added this element out of constitutional necessity, not mere state law nicety, for without this narrowing construction, the special circumstance would run afoul of the requirements of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) that states provide a rational basis for distinguishing between those who deserve to be considered for the death penalty and those who do not. [*Green*, 27 Cal.3d at 61, 164 Cal.Rptr. 1, 609 P.2d 468.]"

(*Williams v. Calderon* (9th cir. 1995) 52 F.3d 1465, 1476, emphasis added.)

However, in *People v. Ainsworth* (1988) 45 Cal.3d 984, 1026, this Court held that

> "*Green* and *Thompson* stand for the proposition that when the underlying felony is *merely incidental* to the murder, the murder cannot be said to constitute 'a murder in the commission of' the felony and will not support a finding of felony-murder special circumstance."

This holding, however, misrepresents the holdings of *Green* and *Thompson* and amounts to overruling those cases *sub silentio*.[17] Here, for

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[17] Subsequently, in *People v. Pensinger* (1991) 52 Cal.3d 1210, 1255-56, this Court held that the trial court has no sua sponte duty to instruct the jury regarding the *Green* rule as it was re-interpreted by *Ainsworth*. In sum, this Court announced the *Green/Thompson* rule to meet the requirements of the Eighth Amendment, then eviscerated it to a tiny

example, the fact that the kidnaping and robbery were not incidental to the murder does not mean that "the accused has 'killed in cold blood in order to advance an independent felonious purpose, e.g., [has] carried out an execution-style slaying of the victim of or witness to a holdup, a kidnaping, or a rape,'" as is required to find the special circumstance true. (*People v. Thompson, supra,* 27 Cal.3d at p. 322.) A situation where the felony is incidental to the murder is simply one example of a felony-murder that does not satisfy the stricter requirements of the special circumstances under *Green* and *Thompson*. A purely accidental killing is another example - and is what the only direct evidence of Mr. Rountree's intent indicated in this case.

Subsequent decisions of this Court have further erased any remaining distinctions between felony-murder and the felony-murder special circumstances. The seminal case on the issue is *People v. Anderson* (1987) 43 Cal.3d 1104, 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 abettor rather than the actual killer, intent must be proved." (*Id.* at p. 1147.)[18] The *Anderson* majority did not

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subset of cases in *Ainsworth*, and finally announced in *Pensinger* that a jury need not be instructed on it at all.

[18] As a result of the decision in *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 154, which was reversed in *People v. Anderson, supra,* 43 Cal.3d 1104, this Court has required proof of the defendant's intent to kill

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 has repeatedly held that the felony-murder special circumstances have no additional intent requirements. (See *People v. Hayes* (1990) 52 Cal.3d 577, 631-632 [the 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.'"].) In fact, the robbery-murder special circumstance is even broader than the robbery felony-murder rule because it covers a species of implied malice murders, so-called "provocative act" murders. (See *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1080-1081.)

In *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1264, 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, supra,* 20 Cal.4th 826, the defendant argued that the felony-murder

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as an element of the felony-murder special circumstance with regard to felony-murders committed during the period December 12, 1983 to October 13, 1987. This Court has held that *Carlos* has no application to prosecutions for murders occurring either before or after the *Carlos* window period. (*People v. Johnson* (1993) 6 Cal.4th 1, 44-45.)

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, supra,* 20 Cal.4th at p. 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.[19]

Thus, in California the felony-murder special circumstances have become identical to - or broader than - the crime of felony-murder, fail to narrow the class of offenders eligible for death, and no longer allow the sentencer to make a "principled distinction between those who deserve the death penalty and those who do not." (*Lewis v. Jeffers, supra*, 497 U.S. at p. 774.)

C. The California Felony-Murder Special Circumstances Are Unconstitutional because They Create The Potential for Disparate and Irrational Sentencing.

In *U.S. v. Cheely, supra,* 36 F3d 1439, the court held that the 8th Amendment precludes the imposition of the death penalty for a killing resulting from the use of a mail bomb. The court held that the statute was disproportionately severe and insufficiently narrow to preclude the prospect

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[19] Alternatively, this Court found that there was sufficient evidence that the defendant did act with reckless indifference to justify the death penalty. (*People v. Smithey, supra,* 20 Cal.4th at pp. 1016-1017.)

of "wanton" and "freakish" death sentencing.

> "The constitutional defect in [the statutes] is that they create the potential for impermissibly disparate and irrational sentencing because they encompass a broad class of death-eligible defendants without providing guidance to the sentencing jury as to how to distinguish among them. [Fn omitted]." (*Cheely, supra*, 36 F.3d at p. 1444.)

Because the California felony-murder special circumstances have become identical to the crime of felony-murder, they are unconstitutionally overbroad under the reasoning of *Cheely*. Nor can it be argued that the special circumstance is valid because the class of felony-murderers is numerically smaller than the class of murderers as a whole. That argument was specifically rejected in *Cheely* :

> "The government argues that these sections genuinely narrow the class of death-eligible persons because they authorize the death penalty only for those relatively few persons who use mail bombs. [Fn omitted] This argument reveals a fundamental misunderstanding of the case law. Narrowing is not an end in itself, and not just any narrowing will suffice. The narrowing must be such that it forecloses the prospect of the cruel and unusual punishment from 'wanton or freakish' imposition of the death penalty. When juries are presented with a broad class, composed of persons of <u>many different levels of culpability</u>, and are allowed to decide who among them deserves death, the possibility of aberrational decisions as to life or death is too great. [Emphasis added.] The statute before us is unconstitutional because it utterly fails to foreclose this prospect."

In *McConnell v. State* (Nev., 2004) 102 P.3d 606, the Nevada Supreme Court, overruling its prior case law, unanimously held that Nevada's felony-murder statute violated the Eighth and Fourteenth

Amendments, as well as the state constitution, because "it fails to genuinely narrow the death eligibility of felony murderers and reasonably justify imposing death on all defendants to whom it applies." (*Id.* at p. 624.) *McConnell* held that an aggravating circumstance – the basis for death eligibility in Nevada – could not be based "on the felony upon which a felony-murder is predicated." (*Ibid.*)

The Nevada felony-murder aggravating circumstance, unlike the Nevada felony-murder statute, "requires that the defendant '[k]illed or attempted to kill' the victim or '[k]new or had reason to know that life would be taken or lethal force used." (*McConnell v. State, supra*, 102 P.3d at p. 623, emphasis omitted.) The Nevada Supreme Court found this requirement to be inadequate because it permits a jury to impose death on a defendant who killed the victim accidentally. (*Id.* at p. 623, fn. 67.) In *McConnell,* the Court held that the *mens rea* requirement statutorily provided for an accomplice also applies to the actual killer, and made clear that "even if the defendant killed the victim, they must still find that the defendant intended to kill or at least knew or should have known that a killing would take place or lethal force would be applied." (*Ibid.*)

Even with this new proportionality limitation, the Nevada Supreme Court held the felony-murder aggravating circumstance failed to genuinely narrow the death eligibility of felony murderers. (*Id.* at p. 624.) Like the Nevada Supreme Court, this Court should recognize the constitutional

infirmity of its felony-murder special circumstances.

As is often noted, in California,

> "[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, supra*, 34 Cal.3d at p. 477.)

Because felony-murder embraces so many levels of culpability, and because the California felony-murder special circumstances have become identical to the crime of felony-murder, they no longer foreclose the prospect of the cruel and unusual punishment from "wanton or freakish" imposition of the death penalty. The California felony-murder special circumstances must be declared unconstitutional and Mr. Rountree's sentence stricken. (*U.S. v. Cheely, supra,* 36 F3d 1439; *McConnell v. State, supra*, 102 P.3d at p. 623; *Zant v. Stephens, supra,* 462 U.S. at pp. 877-878; *Furman v. Georgia, supra*, 408 U.S. 238; *Gregg v. Georgia, supra*, 428 U.S. 153; U.S. Const., 8th and 14th Amends.)

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VII. MR. ROUNTREE'S DEATH SENTENCE, IMPOSED FOR FELONY MURDER *SIMPLICITER*, IS A DISPROPORTIONATE PENALTY UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS AND VIOLATES INTERNATIONAL LAW.

As shown in Argument V, above, the trial court erred in instructing the jury with CALJIC 8.81.17, which failed to accurately reflect California law and improperly lowered the prosecution's burden of proof because it did not require the jury to find that the murder was intended to advance an independent felonious purpose. (*People v. Green, supra,* 27 Cal.3d at pp. 59-63.)

To the extent that the trial court's instruction accurately reflected California law, Argument VI, above, demonstrates that the California felony-murder special circumstances have become identical to felony-murder and therefore violate the narrowing requirement of the Eighth and Fourteenth Amendments of the United States Constitution because they no longer allow the sentencer to make a "principled distinction between those who deserve the death penalty and those who do not." (*Lewis v. Jeffers, supra,* 497 U.S. at p. 774; *Zant v. Stephens, supra,* 462 U.S. at pp. 877-878; U.S. Const., 8th & 14th Amends.)

In addition, to the extent that the trial court's instruction accurately reflected California law, the felony-murder special circumstances also violate the proportionality requirement of the Eighth and Fourteenth Amendments as well as international human rights law governing use of the

death penalty because there is no requirement that an actual killer have a culpable state of mind with regard to the murder before a death sentence may be imposed. (U.S. Const., 8th & 14th Amends; ICCPR Article 6 (2).)

A. Procedural Background.

Mr. Rountree confessed repeatedly and consistently that he did not intend to kill Diana Contreras but shot her accidentally while she was arguing against being left in a remote area. Either Contreras ran into the gun or Mr. Rountree twitched when she approached, causing the rifle to accidentally fire. (4 CT 1167, 1170-71, 1173.) In urging the jury to convict Mr. Rountree of first degree murder under the felony-murder rule, the prosecutor argued:

> "There is a second kind of first-degree murder, and that's felony murder. There's only three elements to that, human being was killed, killing was unlawful, killing occurred during the commission of specified felony. What that means is that the law says if you engage in certain felonies which we specify those felonies, they're so dangerous to human beings' life that if someone dies, we don't care if you intend to kill them or accidentally kill them, if someone dies, you're guilty of first-degree murder." (18 RT 3203.)
>
> "If there's a robbery and kidnaping, someone is killed accidentally, that's first-degree murder" (18 RT 3226.)
>
> "The law says if you commit a robbery or kidnaping or you aid and abet in those crimes and someone dies, you're guilty of murder." (18 RT 3229.)

In urging the jury to find the felony-murder special circumstances true, the prosecutor told the jury:

"the only time it wouldn't apply is if the special circumstance is not established. When the robbery or kidnaping is merely incidental to the murder."

She gave them an example of a planned murder where the killers incidentally take the victim's wallet afterwards and told them that would be the only time the special circumstances would not apply. (18 RT 3219-3223)

The jury was instructed pursuant to the standard felony-murder and felony-murder special circumstance instructions. (CALJIC No. 8.21; 6 CT 1608; 18 RT 3167; CALJIC No. 8.81.17; 18 RT 3189-90; 6 CT 1654-55.) The jury returned guilty verdicts on all counts and true findings as to both of the special circumstances. (6 CT 1723-1732.)

B. California Authorizes The Imposition Of The Death Penalty Upon A Person Who Kills During An Attempted Felony Without Regard To His Or Her State Of Mind Regarding The Killing.

Mr. Rountree was found to be death-eligible, in part, because he was convicted of a killing during the course of a robbery and kidnaping for robbery. (See §§ 189, 190.2, subd. (a)(17)(i) and (ii); 6 CT 1723-1732.) While normally the prosecution must prove that the defendant had the subjective mental state of malice (either express or implied) to obtain a murder conviction, in the case of a killing committed during any felony listed in section 189, the prosecution 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, supra*, 34 Cal.3d at p. 477.) This rule is reflected in the standard jury instruction for felony murder:

> "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 _____] is murder of the first degree when the perpetrator had the specific intent to commit that crime."

(CALJIC No. 8.21; 6 CT 1608, emphasis added.)

As previously discussed at greater length in Arguments V and VI, *supra*, except in one rarely-occurring situation,[20] if the defendant is the actual killer in a kidnaping or robbery felony murder, the defendant is also death-eligible under the kidnaping-murder or robbery-murder special circumstances. (See *People v. Hayes, supra,* 52 Cal.3d at pp. 631-632 [the 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

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[20] See *People v. Green, supra,* 27 Cal.3d at pp. 61-62 as re-interpreted by *People v. Ainsworth, supra,* 45 Cal.3d at p. 1026 (robbery-murder special circumstance does not apply if the robbery was only *incidental* to the murder).

continuous transaction.'"].)[21] This Court has consistently and repeatedly held that the felony-murder special circumstances have no additional *mens rea* requirements. (See, e.g., *People v. Musselwhite, supra,* 17 Cal.4th at p. 1264 [proof of malice not required for felony-murder special circumstance]; *People v. Earp, supra,* 20 Cal.4th 826 [proof of reckless disregard not required for felony-murder special circumstance].)

C. The California Felony-Murder Special Circumstances Violate The Eighth and Fourteenth Amendments' Proportionality Requirement 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.

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* (1977) 433 U.S. 584 [death penalty for rape of an adult woman]; *Enmund v. Florida* (1982) 458 U.S. 782 [death penalty for getaway driver to a robbery felony-murder]; *Thompson v. Oklahoma* (1988) 487 U.S. 815 [death penalty for murder committed by defendant under 16-years old]; *Atkins v. Virginia* (2002) 536 U.S. 304 [death penalty for

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[21] In fact, the robbery-murder special circumstance is even broader than the robbery felony-murder rule because it covers a species of implied malice murders, so-called "provocative act" murders. (*People v. Kainzrants, supra,* 45 Cal.App.4th at pp. 1080-1081.)

mentally retarded defendant].) 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 p. 183.)

1. *Enmund v. Florida* and *Tison v. Arizona* established a minimum *mens rea* requirement for all capital defendants.

The Supreme Court has addressed the proportionality of the death penalty for unintended felony-murders in *Enmund v. Florida*, *supra*, 458 U.S. 782, and in *Tison v. Arizona* (1987) 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 life, attempt to take life, or intend to take life. (*Enmund*, *supra*, 458 U.S. at pp. 789-793.) In *Tison*, the Court addressed whether proof of "intent to kill" was an Eighth Amendment prerequisite for imposition of the death penalty. 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. (*Tison v. Arizona*, *supra*, 481 U.S. 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. . . . *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 fact, it was Justice Brennan's dissent which 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 (*id.* 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 clearly 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. 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." For this reason, we held that a State could comply with *Enmund*'s requirement at sentencing or even on appeal. 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 p. 99, citations and fns. omitted; italics added.)[103]

Every lower federal court to consider the issue – both before and

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[103] See also *Graham v. Collins* (1993) 506 U.S. 461, 501 (conc. opn. of Stevens, J.) (stating that an accidental homicide, like the one in *Furman*, may no longer support a death sentence.)

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, supra,* 36 F.3d at p. 1443, fn.9.[104] The *Loving* court explained its thinking 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." 438 U.S. at 624. 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.)

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[104] See also *State v. Middlebrooks* (Tenn. 1992) 840 S.W.2d 317, 345.

2. There is a national consensus against imposition of the death penalty for felony-murder *simpliciter* .

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 Court's two-part test for proportionality would dictate such a conclusion. In *Atkins*, the Court 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.)

In *Roper v. Simmons* (2005) 543 U.S. 551, the United States Supreme Court declared the death penalty for juvenile offenders unconstitutional. The decision reaffirmed that in determining whether a punishment is so disproportionate as to be cruel and unusual, the Court first considers "the evolving standards of decency" as reflected in laws and practices of the United States and then exercises its own independent judgment about whether the challenged penalty furthers the goals of retribution and deterrence. (*Roper v. Simmons, supra*, 543 U.S. at p. 561.) Applying this Eighth Amendment framework, the Court in *Simmons* found a national consensus against capital punishment for juveniles in large part from the fact that the majority of states prohibit the practice. By the Court's calculations, 30 states preclude the death penalty for juveniles (12

non-death penalty states and 18 death penalty states that exclude juveniles from this ultimate punishment) and 20 permit the penalty. (*Id.* at p. 564.)

Even though the rate of abolition of the death penalty for juveniles was not as dramatic as the rate of abolition of the death penalty for the mentally retarded chronicled in *Atkins*, the Court found that "the consistency of the direction of the change" was constitutionally significant in terms of demonstrating a national consensus against executing people for murders they committed as juveniles. (*Roper v. Simmons, supra*, 543 U.S. at pp. 565-566.) The Court further held that because of the diminished culpability resulting from the adolescents' lack of maturity and under-developed sense of responsibility, their vulnerability to negative influences and outside pressures, and their still developing characters, the penological justifications of retribution and deterrence are inadequate to sustain the death penalty for juvenile offenders. (*Id.* at pp. 568-575.)

Simmons, like *Atkins*, leaves no doubt that, at least with regard to capital punishment, the proportionality limitation of the Eighth Amendment is the law of the land and that the most compelling objective indicia of the nation's evolving standards of decency about the use of the death penalty are the laws of the various states. There are now only five states, including California, that permit execution of a person who killed during a felony without any showing of a culpable mental state whatsoever as to the

homicide.[105] Forty five states – 90% of the nation – prohibit the penalty in this circumstance.

That at least 45 states (32 death penalty states and 13 non-death penalty states) and the federal government[106] reject felony-murder *simpliciter* as a basis for death-eligibility reflects an even stronger "current legislative judgment" than the Court found sufficient in *Simmons* (30 states), *Enmund* (41 states and the federal government) and *Atkins* (30 states and the federal government).

Simply put, there is a very strong national consensus against imposition of the death penalty for felony-murder *simpliciter*.

3. Professional opinion weighs against imposition of the death penalty for felony-murder *simpliciter*.

Although the legislative judgments of the states constitute "the

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[105] In Shatz & Rivkind, *The California Death Penalty: Requiem for Furman?* (1997) 72 N.Y.U. Law. Rev. 1283, 1319, fn. 201, the authors list seven states other than California as authorizing the death penalty for felony-murder *simpliciter*, but Montana, by statute (see Mont. Code Ann., §§ 45-5-102(1)(b), 46-18-303), North Carolina, by court decision (see *State v. Gregory* (N.C. 1995) 459 S.E.2d 638, 665) and Nevada, as noted above in *McConnell v. State, supra*, 102 P.3d at p. 624, now require a showing of some *mens rea* in addition to the felony murder in order to make a defendant death eligible. Besides California, only Florida, Georgia, Maryland and Mississippi permit execution of a defendant even when there is no *mens rea*. This dwindling number underscores that capital punishment for felony- murderers without proof of a culpable mental state is inconsistent with contemporary standards of decency that inform the Eighth Amendment's proportionality principle. (See *Atkins v. Virginia, supra*, 536 U.S. at pp. 311-312; *Trop v. Dulles* (1958) 356 U.S. 86, 100-101 (plur. opn. of Warren, J.).)

[106] See 18 U.S.C. § 3591, subdivision (a)(2).

clearest and most reliable objective evidence of contemporary values" (*Atkins v. Virginia, supra*, 536 U.S. at p. 312), professional opinion as reflected in the Report of the Governor's Commission on Capital Punishment (Illinois)[107] also weighs against finding felony-murder *simpliciter* a sufficient basis for death-eligibility. The most comprehensive recent study 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 ILCS 5/9-1(b)(6)(b)), 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>.) 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

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[107] The Court has recognized that professional opinion should be considered in determining contemporary values. (*Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21.)

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."

(*Id.* at p. 72.)

Thus, current professional opinion weighs against use of the death penalty for felony-murder *simpliciter*.

4. International law bars use of the death penalty for felony-murder *simpliciter*.

International opinion is also relevant to a proportionality inquiry.[108] International law, of course, is binding on California through the the Supremacy Clause of the federal Constitution. (U.S. Const., art. VI, § 1, cl. 2.) 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 [parallel citations omitted]). It is thus

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[108] The Court has regularly looked to the views of the world community to assist in determining contemporary values. (See *Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21; *Enmund v. Florida, supra,* 458 U.S. at pp. 796-797, fn. 22; *Coker v. Georgia, supra*, 433 U.S. at p. 596.)

> 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.)

International opinion has become even clearer since *Enmund*. Article 6 (2) of the International Covenant on Civil and Political Rights ("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.*)[109] The United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions considers 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, November 19, 1997, ¶ 13.)

Thus, Mr. Rountree's death sentence, without any proof that the murder was intentional, violates both the ICCPR and customary international law and must be reversed.

5. Imposition of the death penalty for felony-murder *simpliciter* serves no valid penological purpose.

The imposition of the death penalty on a person who has killed negligently or accidentally is not only contrary to evolving standards of decency, but it 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

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[109] The Safeguards are a set of norms meant to guide the behavior of nations that continue to impose the death penalty. While the Safeguards are not binding treaty obligations, they provide strong evidence of an international consensus on this point. "[D]eclaratory pronouncements [by international organizations] provide some evidence of what the states voting for it regard the law to be . . . and if adopted by consensus or virtual unanimity, are given substantial weight." (*Restatement (Third) of the Foreign Relations Law of the United States*, § 103 cmt. c.)

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*, *supra*, 433 U.S. at p. 592.)

With respect to retribution, 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 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.) 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 negligent and accidental 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 p. 186 (fn. omitted)."

(*Enmund v. Florida, supra*, 458 U.S. at pp. 798-99; 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.

D. Mr. Rountree's Death Sentence Must Be Set Aside.

Since imposition of the death penalty for kidnaping-murder or 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 felony murder *simpliciter* serves no penological purpose, it "is nothing more than the purposeless and needless imposition of pain and suffering." As interpreted and applied by this Court, the felony-murder special circumstances are unconstitutional under the Eighth and Fourteenth Amendments.

This Court should revisit its previous decisions upholding the felony-murder special circumstance and hold that the death penalty cannot be imposed unless the trier of fact finds that the defendant had an intent to kill or acted with reckless disregard to human life. Because the factual finding is a prerequisite to death-eligibility, which increases the maximum statutory

penalty, it must be found unanimously and beyond a reasonable doubt by a jury. (*Ring v. Arizona* (2002) 536 U.S. 584, 602-603; see also *Cunningham v. California* (2007) 549 U.S. 270; *Blakely v. Washington* (2004) 542 U.S. 296, 304-305; *Apprendi v. New Jersey, supra,* 530 U.S. at pp. 490, 493-494.) Because there is no jury finding in this case that Mr. Rountree intended to kill or acted with reckless indifference to human life, Mr. Rountree'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 killings. This international law limitation applies domestically under the Supremacy Clause of the federal Constitution. (U.S. Const., art. VI, § 1, cl. 2.) In light of the international law principles discussed previously, Mr. Rountree's death sentence, without any proof that the murder was intentional, violates both the ICCPR and customary international law and, therefore, must be reversed.

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VIII. THE TRIAL COURT IMPROPERLY ADMITTED AUTOPSY AND CRIME SCENE PHOTOGRAPHS THAT SERVED NO PURPOSE OTHER THAN TO INFLAME THE JURY, REQUIRING REVERSAL OF BOTH THE GUILT AND PENALTY PHASES.

A prosecutor may not use photographs of victims where they are "relevant only on what . . . is a nonissue," or they "are . . . largely cumulative of expert and lay testimony regarding the cause of death" or "are . . . unduly gruesome." (*People v. Anderson, supra,* 43 Cal.3d at p. 1137.) Here, the trial court should have excluded inflammatory crime scene and autopsy photographs as irrelevant to any disputed issue of fact. Their admission was also unduly prejudicial under Evidence Code section 352 and violated Mr. Rountree's constitutional rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.) Accordingly, reversal of the convictions, the special circumstance findings, and the death judgment is required.

A. Procedural Background.

Mr. Rountree and his co-defendant objected to the use of autopsy and crime scene photographs, some showing the victim's face, and moved the trial court to exclude all such evidence as highly inflammatory and prejudicial. (See 5 CT 1428-1434; 1 RT 36-38, 42-54; 13 RT 2381-

2383.)[110] The trial court overruled the objections and admitted all of the photographs except one, which it excluded as duplicative. (1 RT 54.)

Trial counsel argued that, because Mr. Rountree had admitted every element of the prosecution's case and the coroner and other expert witnesses corroborated Mr. Rountree's statements regarding the manner of shooting and trajectory of the bullets, the photographs were not relevant to any disputed issue. (1 RT 43-46, 50-54.) The prosecutor argued that the photos would help show that the victim was shot once while standing upright, then twice more while on the ground, showing deliberate, premeditated murder. (1 RT 46-47.) The trial court noted the "minimal" prejudicial effect of the photos, and overruled the objection. (*Ibid.*)

The photographs were irrelevant to any disputed issue at trial and were unduly inflammatory in both the guilt and penalty phases of the trial. The trial court erred in not excluding them.

B. The Photos Were Irrelevant to Any Disputed Issue.

No evidence is admissible unless it relates to a disputed fact that is of material consequence. (Evid. Code § 210.) Accordingly, a trial court has no discretion about whether to admit irrelevant evidence. (*People v. Turner*

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[110] The prosecutor filed a points and authorities in support of the admissibility of the autopsy photographs. (1 CT 1331-1338.) Counsel for co-defendant Stroder filed the written opposition, based upon both California and Federal Constitutional grounds. (5 CT 1247-1248, 1428-1434.) Counsel for Mr. Rountree joined in the written opposition (See 1 RT 3, 15-16) and argued separately.

(1984) 37 Cal.3d 302, 321, overruled on another ground in *People v. Anderson, supra,* 43 Cal.3d at p. 1149 [error to admit crime scene photos that were unnecessary to prove any part of the prosecution's case].)

As a general rule, "[t]he trial court's exercise of discretion in determining relevance and the admissibility of photographs will not be disturbed on appeal unless their probative value clearly is outweighed by their prejudicial effect." (*People v. Hughes* (2002) 27 Cal.4th 287, 336.) The determination of the probative value of evidence is inextricably bound to the issue of whether the evidence is relevant. This is so because there is no statutory definition of the word "probative," and thus one must assume that the term is to be understood by its common usage: something is probative if it serves to prove something else. (Webster's 10th New Collegiate Dict. (1993) p. 928.) This Court has inferentially adopted this definition, but keyed its application to the use of the term "relevant" in Evidence Code section 210. (See *People v. Alcala* (1992) 4 Cal.4th 742, 797.)

Even assuming that as a general rule photographs depicting the manner in which a victim was injured are relevant to the determination of malice, aggravation and penalty (see *People v. Farnam* (2002) 28 Cal.4th 107, 185-186), this Court has never held that this automatically qualifies photographs for admission at a capital trial. In fact, this Court has observed that trial courts should be alert to how gruesome photographs play on a

jury's emotions, especially in a capital trial. (*People v. Weaver, supra,* 26 Cal.4th at p. 934 [considering whether admission of gruesome photographs denied appellant a fair penalty phase determination].) Even in those cases which uphold the admission of photographs that seemingly relate only to the circumstances of the offense at issue, the photographs usually derive their probative value from the fact that they are able to uniquely demonstrate some aspect of the crime warranting consideration that cannot be demonstrated in another manner. (See, e.g., *People v. Thompson* (1990) 50 Cal.3d 134, 182 [manner in which 12-year-old victim was hogtied was "indescribable in mere words."].)

Here, the trial court found that the photographs had "some" evidentiary value and that their prejudicial effect did not outweigh their probative value. (See 1 RT 54.) However, Mr. Rountree did not dispute the nature of the wounds that the victim received, the manner of death, or any other fact that the photographs might depict. The prosecution repeatedly argued that the photographs were relevant because they would show that the victim was shot once while standing up at point blank range, and then again while lying on the ground, "...and if that doesn't show deliberate, premeditated murder, I'm not sure what does." (1 RT 47.) However, as trial counsel repeatedly countered, Mr. Rountree's statement explicitly admitted *every fact* that the prosecution was trying to prove. (1 RT 50-51.) The *inference* of premeditation was a matter for argument based upon those

undisputed facts. Accordingly, the autopsy and crime scene photographs were not relevant to any disputed fact that was of material consequence and should have been excluded. (Evid. Code § 210.)

In *People v. Turner*, *supra*, 37 Cal.3d 302, this Court held that photographs offered to show the position of the victims' bodies and the nature of their wounds were erroneously admitted where "[n]either the court nor the prosecution articulated the relevance of the position of the bodies or the manner of infliction of the wounds to the issues presented." (*Id.* at p. 321; see also *People v. Marsh* (1985) 175 Cal.App.3d 987, 998 [autopsy photographs irrelevant where coroner's testimony was uncontradicted and cause of death undisputed].)

This Court should similarly find that there was undisputed testimony establishing both how the victim was shot and the cause of death. In the "redacted" confessions read to the jury, Mr. Rountree repeatedly states that Contreras had been arguing about being left out in a desolate area and approached Mr. Rountree, that Mr. Rountree had accidentally shot her - either when she ran into the barrel of the gun or Mr. Rountree had twitched, that Contreras had fallen screaming, and that Mr. Rountree, panicking, had shot her twice more while she was on the ground. (17 RT 3000-3005, 3015-3018, 3028, 3030, 3034-3035.) Mr. Rountree stated that one of the shots had gone through her purse. (17 RT 3009, 3017-3018.) The coroner, Dr. Dollinger, likewise testified that the victim had been shot once at close

range and standing, then twice more while the victim was supine from a location near her feet. (13 RT 2439-2441.) One of the wounds was consistent with the bullet having passed through the victim's purse first and carrying a fragment of a credit card with it. (13 RT 2439-2440.) Death would have been almost instantaneous. (13 RT 2433, 2444-45.) Accordingly, the photographs were irrelevant to any disputed issue and should have been excluded.

C. The Photographs Were More Prejudicial than Probative, Affecting Both the Guilt and the Penalty Phases of Mr. Rountree's Trial.

Even assuming that the photographs might have had some marginal relevance, the trial court abused its discretion by finding that the photographs were more probative than prejudicial. Under Evidence Code section 352, a trial court "may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice. . . ." It applies to evidence that uniquely tends to evoke an emotional bias against defendant as an individual and that has very little effect on the issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588.) Accordingly, section 352 implicates due process guarantees of fundamental fairness and the Eighth Amendment guarantees of reliability in a capital case. (See *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 970-972; *Lesko v. Owens* (3d Cir. 1989) 881 F.2d 44, 52.) This was precisely the kind of inflammatory bias

that was created by the autopsy photographs in this case.

1. Graphic photos have a dramatic effect on juries.

When deciding the impact of photographs on jurors, a reviewing court is usually left to speculate as to how the jurors may have been affected by viewing the photographs. Studies have recognized that graphic photographs have the power to arouse jurors' emotions: "Juries are comprised of ordinary people who are likely to be dramatically affected by viewing graphic or gruesome photographs." (Rubenstein, *A Picture Is Worth a Thousand Words–The Use of Graphic Photographs as Evidence in Massachusetts Murder Trials* (2001) 6 Suffolk J. Trial & Appellate Advoc. 197; see, Douglas et al., *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?* (1997) 21 Law & Hum. Behav. 485, 491-492 [documenting jurors' emotional reactions to viewing graphic photographs of murder victim]; Kelley, *Addressing Juror Stress: A Trial Judge's Perspective* (1994) 43 Drake L.Rev. 97, 104 [recounting juror's posttraumatic-stress symptoms experienced after viewing graphic photos of murder victim].)

Studies also show that graphic photographs influence the verdicts that juries return. (Miller & Mauet, *The Psychology of Jury Persuasion* (1999) 22 Am. J. Trial Advoc. 549, 563 [juries that viewed autopsy photographs during medical examiner's testimony were more likely to vote to convict defendant than those not shown photographs]; Douglas et al.,

supra, 21 Law & Hum. Behav. at p. 492-494 [same].) If a jury is more likely to render a guilty verdict when shown autopsy photographs than it would be if not shown the photographs, there is reason to believe that a penalty phase jury would be more likely to return a death verdict when shown the photographs than it would be if not shown the photographs.

Logic supports this conclusion because jurors' decisions at the penalty phase are far more discretionary and less constrained by law than their decisions at the guilt phase. (See *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1044 ["The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts."].) Thus, a jury's death-sentencing discretion at the penalty phase is much more likely to be affected by evidentiary items such as inflammatory photographs. Viewing graphic photographs of victims' corpses creates a strong emotional reaction in a juror and creates a likelihood that the reaction will be so strong that it will override consideration of the other evidence presented on the ultimate question of whether the defendant should live or die.

The belief that the introduction of gruesome photographs causes jurors to ignore other evidence is supported by empirical study. It has been demonstrated that after viewing graphic photographs, jurors tend to prematurely reach a determination that the defendant should be sentenced to death. (Bowers et al., *Foreclosed Impartiality in Capital Sentencing:*

Jurors' Predispositions, Guilt-trial Experience, and Premature Decision Making (1999) 83 Cornell L.Rev 1476, 1497-1499 [noting jurors said autopsy photographs played prominent role in shaping death-sentencing decision that was reached prior to the conclusion of the trial].)

As reflected by the studies cited above, it is likely that the jurors effectively made their guilt and death-sentencing decisions upon viewing the photographs, at which point they shut their minds to the defense evidence and decided to convict Mr. Rountree and sentence him to death.

2. Admission of the photographs affected both the guilt and penalty phases.

In both the guilt and penalty phases, the pictures could only serve to inflame the jury against Mr. Rountree. Their image was in the jurors' minds even as they considered evidence of guilt and whether any lesser charge should apply, and then again when they weighed what penalty was appropriate. In the final argument of both the guilt and penalty phases, the prosecutor asked the jury to consider the photo of the victim at the scene - but not, as the prosecution had previously argued to the court - to show the location or nature of the wounds. Instead, the prosecutor told the jury to consider that photo together with a picture of Stroder with her wedding ring, and the image of the defendants driving away in the victim's car with a "Liz and Charles" keychain. (18 RT 3312-3313; 24 RT 3872.) In other words, the photo was important for its emotional impact. It is just this type

of graphic evidence and improper argument that is incompatible with a rational or impartial penalty judgement. (See *Saffle v. Parks* (1990) 494 U.S 484, 493 [death penalty must be reasoned moral response rather than emotional one].)

In *People v. Smith* (1973) 33 Cal.App.3d 51, three semi-nude photographs of the victim were at issue. The court emphasized that:

> "Such pictures are always offered as parts of an evidentiary mosaic; thus it is more appropriate to appraise their probative value as cumulative, not isolated, evidence. . . . In this case there were ample descriptions of the positions and appearances of these two bodies. There was autopsy testimony regarding the precise location and nature of the wounds, which needed no clarification or amplification." (*Id.* at p. 69.)

Under these circumstances, the Court of Appeal ruled that the trial court had erred in admitting the photographs. (*Ibid.*; see also *People v. Anderson, supra,* 43 Cal.3d at p. 1149 [photographs cumulative of expert and lay testimony regarding the cause of death, the crime scene, and the position of the bodies].)

Here too, there had been uncontradicted testimony about the crime scene and the precise location and nature of the wounds. Their true purpose - as shown by the prosecutor's closing arguments during both the guilt and penalty phases - was to inflame the jury, a jury composed of average citizens who, unlike both the trial court and this Court, had probably never seen such photos. That fact, combined with the photos' complete lack of

evidentiary relevance, is precisely why those photographs should have been excluded. (See *People v. Marsh, supra,* 175 Cal.App.3d at p. 998 ["Here, where the uncontradicted medical testimony identified the precise location and nature of the injuries the autopsy photographs have little, if any, additional probative value."].) In the words of the court in *Marsh*, " [T]he jury was not enlightened one additional whit by viewing these gory autopsy photographs." (*Ibid.*)

Such a relentless parade of horrible images could only have had a sharp, emotional effect upon the jury. Accordingly, this Court should find that the trial court erred in concluding that the pictures were more probative than prejudicial.

D. Admission of the Photos Compels Reversal.

Although as a general rule violations of state evidentiary principles do not implicate the federal and state constitutions, in this case the admission of the photographs prevented Mr. Rountree from receiving a fair trial and thus violated his constitutional rights. (See *Lisenba v. California* (1941) 314 U.S. 219, 228 [recognizing state court's admission of prosecution evidence that infuses trial with unfairness would violate defendant's right to due process of law]; *People v. Cavanaugh* (1955) 44 Cal.2d 252, 268-269 [recognizing admission of gruesome photographs may

deprive defendant of fair trial and require reversal of judgment].)[111] The admission of these photographs also infringed the Fifth, Sixth, Eighth, and Fourteenth Amendment rights of Mr. Rountree, as well as rights guaranteed by article I, sections 7, 15, 17, and 24 of the California Constitution, to a fair trial and a reliable capital sentencing proceeding.

"In the event that 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* (1991) 501 U.S. 808, 825.) Admitting photographs as graphic as the ones in this case under circumstances where they bore little probative value to the issues rendered them unduly prejudicial resulting in a fundamentally unfair trial. Moreover, Mr. Rountree had a due process liberty interest in having California's evidentiary standards properly applied to his case. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346; *People v. Partida* (2005) 37 Cal.4th 428, 431-439.)

The admission of these photographs also violated Mr. Rountree's right to a reliable capital-sentencing determination. (See *Woodson v. North Carolina, supra,* 428 U.S. at p. 305 [requiring heightened reliability for capital-sentencing determination].) "It is of vital importance to the

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[111] Other state courts have also held that the admission of graphic photographs can constitute reversible error. (See *State v. Cloud* (Utah 1986) 722 P.2d 750, 752-755 [reversing murder conviction because of erroneous admission of graphic photographs].)

defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.) The admission of the photographs evoked the jurors' emotions, rather than their reason, thus improperly affecting their deliberations and verdict. Those emotions would also cause a failure to consider mitigating evidence in violation of Eighth Amendment principles. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 398-399; *Skipper v. South Carolina, supra,* 476 U.S. at p. 4; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 114.) Therefore, this Court must reverse the judgment in this case unless the error is harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

Since guilt or death verdicts are never required or preordained by the state of the evidence (see *Woodson v. North Carolina, supra*, 428 U.S. at p. 301 [holding Eighth Amendment precludes automatic imposition of death penalty for first-degree murder]), this is an especially difficult burden for the State to bear. The facts of this case hardly render a death verdict an inevitability. "The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts. The statutory factors give the jury broad latitude to consider amorphous human factors, in effect, to weigh the worth of one's life against his culpability." (*Hendricks v. Calderon, supra*, 70 F.3d at p. 1044.)

The trial court's error in admitting inflammatory photographs that

likely tipped that balance should cause this Court to doubt the reliability of Mr. Rountree's death sentence in light of the heightened scrutiny which the Eighth Amendment places upon capital proceedings. Under these circumstances, the State cannot demonstrate beyond a reasonable doubt that admission of the photographs was harmless error. Both the guilt and penalty phase judgments must be reversed.

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IX. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT MR. ROUNTREE'S CONVICTION OF KIDNAPING AND THE TRUE FINDING ON THE KIDNAPING SPECIAL CIRCUMSTANCE.

As discussed in Argument IV, *supra*, the prosecution successfully fought to have Mr. Rountree's confessions heavily redacted and entered into evidence only through the testimony of the investigating officer. In doing so, however, the prosecution's case for a kidnaping was then based solely upon the victim's presence in Mr. Rountree's car, a conclusory statement by the investigating officer, and sheer speculation. There simply was no corroborating physical evidence or testimony. Due process and the requirements for a reliable capital verdict under the federal and state constitutions demand more than speculation.

Mr. Rountree's conviction of kidnaping, the true finding on the kidnaping special circumstance, and Mr. Rountree's first-degree murder conviction based on legally insufficient proof of guilt violated Mr. Rountree's state and federal rights to due process of law, a fair trial and reliable guilt and penalty determinations. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17, *Beck v. Alabama* (1980) 447 U.S. 625; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35.)

A. Legal Standards.

The due process clause of the Fourteenth Amendment and article 1, section 15, of the California Constitution require that a conviction be

supported by substantial evidence. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Holt* (1997) 15 Cal.4th 618, 667.) The Eighth Amendment demands for heightened reliability in a capital case also require that this Court carefully review the evidence to ensure that the death sentence is not imposed on the basis of speculative evidence. (See *Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585 [8th Amendment mandates heightened scrutiny].)

Although on appeal, this Court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence," it cannot affirm a judgment based on speculation or unwarranted inference. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577, citations omitted.) By definition,"substantial evidence" requires evidence and not mere speculation. (*People v. Perez* (1992) 2 Cal.4th 1117, 1113.) Thus, "a finding of first degree murder which is merely the product of conjecture and surmise may not be affirmed." (*People v. Rowland* (1982) 134 Cal.App.3d 1, 8-9.) As discussed below, the convictions in this case were based upon nothing more than conjecture and surmise and cannot be affirmed.

B. The Prosecution's Only Evidence For A Kidnaping Was Mr. Rountree's Redacted Statements.

Mr. Rountree was charged with kidnaping under Penal Code sections 207 and 209, and as a special circumstance within the meaning of Penal

Code section 190.2. (1 CT 2-5.) In 1993, when the kidnaping allegedly occurred, subdivision (a) of Penal Code section 207 provided that, "Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnaping."

As shown in Arguments V, VI, and VII, *infra*, the requirements of the related special circumstance required proof that the murder was committed "in the commission" or attempted commission of the kidnaping. (Pen. Code § 190.2 (a)(17)(B); CALJIC 8.81.17; 6 CT 1655.)[112] This means only that the killing was "committed in the perpetration of an enumerated felony if the killing and the felony 'are parts of one continuous transaction.'" (*People v. Hayes*, *supra,* 52 Cal.3d at pp. 631-632.) Here, the sum total of the prosecution's case for kidnaping was circumstantial evidence and speculation.

1. The evidence presented to prove the charge of kidnaping.

Because of the *Aranda-Bruton* issues presented by use of Mr.

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[112] In 1998, the California Legislature provided specific exceptions to the "independent felonious purpose" rule in enacting subparagraphs (M) of section 190.2(a)(17), relating to kidnaping and arson special circumstance allegations, however, those changes are not applicable to crimes committed before that date.

Rountree's confessions against defendant Stroder, the prosecution successfully fought to introduce Mr. Rountree's heavily redacted confessions only through the questioning of the investigating officer, Detective Giuffre:

"Q. Where did Mr. Rountree first see Diana Contreras?

A. At the Valley Plaza shopping center.

Q. Did Mr. Rountree tell you if Diana Contreras arrived at the Valley Plaza in a vehicle?

A. He said she did.

Q. Did Mr. Rountree tell you why he decided to rob Diana Contreras?

A. He said she "just seemed like she wouldn't be as much trouble."

Q. Did Diana get in to the Volkswagen Golf?

A. Yes.

Q. How much money did Diana have with her?

A. $7.

Q. Where was the 30-30 rifle when Diana got into the Volkswagen Golf?

A. It was sitting where the gear shift is, partly in Mr. Rountree's lap and pointing down.

Q. After Diana got in the car did Mr. Rountree do anything with the gun?

A. He set the gun down between the seats.

Q. Did Mr. Rountree say how much money Diana had?

A. She had $7.

Q. Did Mr. Rountree say anything to Diana about the fact that

she only had $7?

A. He said "is this all you got, all you can give me?"

Q. Did he tell you how Diana replied?

A. She said "well, I can go to the bank, you know, and get you some money and that's it, but I can only get $100 out."

Q. What did Mr. Rountree do when Diana made that statement to him?

A. He drove to Wells Fargo Bank...." (17 RT 2998-99.)

And later:

Q. During this interview did he tell you where Diana was when he first saw her?

A. She was sitting in her car when he pulled up next to her.

Q. Did he give any indication why he chose to rob her?

A. He said when she got out she was just a little girl that wouldn't fight or nothing.

Q. Did he say what his plan was?

A. He didn't really plan anything. He just thought maybe he could get some money from her.

Q. Did he say if he followed her inside the store?

A. He said he walked back to the car and did not follow her. He didn't know where she went, what store or anything.

Q. What did he say happened once Diana was in the Golf?.." (17 RT 3013.)

No evidence was presented as to how Diana Contreras came to be inside the car with Mr. Rountree and Stroder. Contreras entered the mall, and then was suddenly inside the car. The sole "evidence" for a kidnaping was the following exchange:

"Q. Did Mr. Rountree acknowledge that when he had Diana in the Golf that she wasn't there voluntarily?

A. He admitted she was not there voluntarily." (17 RT 3008.)

During closing arguments, trial counsel pointed out that there simply was no evidence of how Contreras came to be in the car, and that the prosecution's theory was just supposition and speculation. (18 RT 3230-3235.) The prosecutor argued that there was no innocent explanation for why Contreras got into the car with two strangers. (18 RT 3285-3313.)

2. The evidence was legally insufficient to prove that Mr. Rountree kidnapped Diana Contreras.

It has long been recognized that only movement accomplished by force can sustain a charge of kidnaping. (See *People v. Stanworth* (1974) 11 Cal.3d 588, 602; *People v. Harris* (1979) 93 Cal.App.3d 103, 114.) Thus, when the victim consents to the asportation there is no violation of Penal Code section 207. (*People v. Harris, supra*, 93 Cal.App.3d at p. 114.) Kidnaping cannot be accomplished by means of fraud or inducement by fraud or deceit (*People v. Green, supra*, 27 Cal.3d at p. 64; *People v. LaSalle* (1980) 103 Cal.App.3d 139, 162.)

Here, the only evidence of force was the detective's statements that the rifle had been lying by the gear shift and pointing at the floor and his conclusory statement that Mr. Rountree had admitted Contreras had not been inside the car voluntarily. There simply was no other evidence before

the jury to suggest that the asportation was involuntary rather than induced by trickery or deceit - or by the defendants' actual situation: broke and trying to get to Northern California to see Mr. Rountree's aunt. The manner in which Contreras offered Mr. Rountree and Stroder more money from the ATM - while limiting the amount she would give them - suggested that she had been persuaded by their hard luck story rather than a forcible kidnaping. (17 RT 2998-2999, 3013-3014.) Even if the circumstances created a suspicion that Contreras was moved by force, it was equally plausible that she was moved by pity. The evidence submitted to the jury was simply insufficient to support a conviction beyond a reasonable doubt. (*People v. Redmond* (1969) 71 Cal.2d 745, 755 [evidence that raises a strong suspicion of guilt is not sufficient to support a conviction; suspicion is not evidence but merely raises a possibility].)

Even viewing the evidence in the light most favorable to the prosecution, the circumstances of this case do not establish that Contreras went with Stroder and Mr. Rountree involuntarily or by the use of force. The evidence was insufficient as a matter of law to allow the trier of fact to reach a "subjective state of near certitude of the guilt of the accused . . .." (*Jackson v. Virginia, supra*, 443 U.S. at p. 315.) Mr. Rountree's conviction for kidnaping, felony murder and the kidnaping special circumstance must be reversed.

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C. Reversal is Required.

The trial court instructed on first degree murder based on felony-murder as well as premeditation and deliberation. Thus, this Court cannot know whether the jury actually based its conviction of Mr. Rountree on premeditation or on an invalid felony-murder theory. This Court has held that "when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect; and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1122; see also *Zant v. Stephens, supra,* 462 U.S. at p. 879 ["a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground"].) In this case at least one of the three theories of culpability were flawed and the jury was not required to agree on which type of first degree murder was committed. Mr. Rountree's conviction of first degree murder was fundamentally tainted and must be reversed. (*Zant v. Stephens, supra*, 462 U.S. at p. 879.)

Mr. Rountree was convicted of capital murder based on a special circumstance founded on nothing more than speculation. This was a violation of Mr. Rountree's rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special

circumstances and penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17; *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638, 643; *Lockett v. Ohio, supra,* 438 U.S. 586; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.)[113]

Even assuming *arguendo* that the evidence was sufficient to sustain the murder conviction and special circumstance findings, this Court should reverse the death judgment. In *Beck v. Alabama, supra,* 447 U.S. 625, the High Court held that because death is a "different kind of punishment from any other," it is vitally important that any death verdict be based on a reliable sentencing determination, which includes a reliable guilt determination. (*Id.* at p. 637; see also *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) Thus, "the risk of an unwarranted conviction ... cannot be tolerated in a case where the defendant's life is at stake." (*Beck v. Alabama, supra,* 447 U.S. at p. 637.) Because of the heightened need for reliability in fact-finding when a death sentence is involved, evidence which may meet the minimum requirements to uphold a guilt verdict on appeal, but which is equivocal, must be held insufficient to uphold a sentence of death.

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[113] The imposition of the death penalty on Mr. Rountree in these circumstances would also be arbitrary and capricious and in violation of the fundamental constitutional principles enunciated in *Furman v. Georgia, supra,* 408 U.S. at pp. 309-310 (Stewart, conc.), 313 (White, conc.); *Gregg v. Georgia, supra,* 428 U.S. at p. 189; *Woodson v. North Carolina, supra,* 428 U.S. 280; and *Roberts v. Louisiana* (1976) 428 U.S. 325.

This standard of heightened reliability is consistent with the protections that are applied under international law.[114] In 1984, the United Nations Economic and Social Council adopted a series of safeguards to protect the rights of those facing the death penalty. (See "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty," *supra,* ECOSOC Res. 1984/50, endorsed by the General Assembly in res. 39/118 of Dec 14, 1984.) These safeguards emphasize the importance of due process in death penalty cases and allow the death penalty only when the guilt of the person charged is based upon clear and convincing evidence "leaving no room for alternative explanation of the facts." (Id. at ¶ 4; see *Albert Wilson v. Philippines*, United Nations Human Rights Committee, Communication No. 868/1999, adopted Oct. 30, 2003, p. 5 [quoting above standard]; see also European Union, "Policy Towards Third Countries on the Death Penalty," General Affairs Council, June 29, 1998 [adopting standard].) These policies make clear that if the death penalty is imposed, it must be based upon the highest standards of evidence, without room for

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[114] International law is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." (*The Paquete Habana* (1900) 175 U.S. 677, 700.) It is determined by both treaty obligations and customary practices that define the law of nations. (*Siderman de Blake v. Republic of Argentina* (9th Cir. 1992) 965 F.2d 699,715 [content of international law determined by reference "to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators"].)

equivocal interpretation. This Court should adopt this standard in determining whether Mr. Rountree's death sentence is supported by reliable evidence. (See *Trop v. Dulles, supra,* 356 U.S. at p. 100 [8th Amendment draws its meaning from standards of decency that mark the progress of a maturing society]; *Lawrence v. Texas* (2003) 539 U.S. 558, 572-573 [recognizing importance of international law in determining constitutional issues]; *Atkins v. Virginia, supra,* 536 U.S. at p. 316, fn. 21[citing view of "world community"].)

Here, the prosecutor acknowledged that there was was no evidence of any kidnaping, but simply argued that there were no "innocent" explanations for Diana Contreras being in the car with Mr. Rountree and Stroder. (18 RT 3288.) Accordingly, the death judgment violates the restrictive nature of international standards and cannot meet the Eighth Amendment standards of heightened reliability. The judgment against Mr. Rountree must be reversed.

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X. THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER.

The trial court refused Mr. Rountree's request to instruct the jury on the lesser-included offense of voluntary manslaughter despite evidence showing that the killing took place during an argument between Mr. Rountree, co-defendant Stroder, and Contreras. (6 CT 1721-22; 17 RT 3117-3118.) There was substantial evidence to support an instruction on the lesser-included offense of voluntary manslaughter, and the trial court's refusal to give the instruction deprived Mr. Rountree of his rights to due process, a fair jury trial, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17; *People v. Geiger* (1984) 35 Cal.3d 510, 518-519; *Beck v. Alabama*, *supra*, 447 U.S. at p. 637.) Accordingly, reversal of the convictions, the special circumstance findings, and the death judgment is required.

A. The Trial Court Was Obligated to Instruct the Jury on All Lesser-Included Offenses Supported by the Evidence.

The trial court has the obligation to instruct on the general principles of law relevant to issues in the case before it; including giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense are present. (*People v. Vasquez* (2004) 32 Cal.4th 73, 115 [defendant has state constitutional right

to have jury determine every material issue presented by evidence].)

This Court has acknowledged that the criminal justice system has a vested interest in requiring instructions on lesser included offenses as a method of ensuring the integrity of the system itself:

> "Our courts are not gambling halls but forums for the discovery of truth." [Citation omitted.] Truth may lie neither with the defendant's protestations of innocence nor with the prosecution's assertion that the defendant is guilty of the offense charged, but at a point between these two extremes: the evidence may show that the defendant is guilty of some intermediate offense included within, but lesser than, the crime charged. A trial court's failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury's truth-ascertainment function. Consequently, neither the prosecution nor the defense should be allowed, based on their trial strategy, to preclude the jury from considering guilt of a lesser offense included in the crime charged. To permit this would force the jury to make an "all or nothing" choice between conviction of the crime charged or complete acquittal, thereby denying the jury the opportunity to decide whether the defendant is guilty of a lesser included offense established by the evidence." (*People v. Barton* (1995) 12 Cal.4th 186, 196.)

Thus, trial courts in this state have the obligation to ensure that the jury will be accorded the full range of possible verdicts in a case whenever the evidence suggests the defendant may be guilty of a lesser offense than the one charged. This obligation exists even if the parties object to such instructions. (*People v. Breverman* (1989) 19 Cal.4th 142, 154, 159 [obligation to give lesser included offense instruction not limited by the strategy, ignorance, or mistake of the parties].) This is the only way to give effect to the *Barton* edict that the verdict be no harsher nor more lenient

than the evidence merits. (*Id.* at p. 159.) Further, the rule is to be interpreted broadly, so that the trial court must instruct on all lesser included offenses raised by the evidence; not just those which seem the strongest based on the evidence or those upon which the parties have openly relied. (*Id.* at p. 155.)

Consequently, "[a] trial court must instruct on lesser included offenses whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present." (*People v. Breverman, supra*, 19 Cal.4th at p. 154.) Substantial evidence is evidence sufficient to deserve consideration by the jury; evidence that a reasonable jury could find persuasive. (*People v. Barton, supra*, 12 Cal.4th at p. 201, fn. 8; see *People v. Vasquez, supra*, 32 Cal.4th at p. 116.) "The testimony of a single witness, including the defendant, can constitute substantial evidence requiring the trial court to instruct" on a lesser included offense. (*People v. Lewis* (2001) 25 Cal.4th 610, 646.)

This Court must independently review the issue of whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.) This determination is a mixed question of law and fact and is made without deference to the trial court's ruling. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) There is a presumption, however, that "[d]oubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused." (*People v. Ratliff* (1986) 41 Cal.3d 675, 694; *People v. Flannel* (1979) 25 Cal.3d 668,

684-685.)

B. Voluntary Manslaughter Was A Lesser-Included Offense.

Penal Code section 192, subdivision (a), provides that a killing committed without malice and "upon a sudden quarrel or heat of passion" is voluntary manslaughter. Thus, a defendant who commits an intentional and unlawful killing, but who lacks malice, is guilty of voluntary manslaughter. (*People v. Barton, supra*, 12 Cal.4th at p. 199; *People v. Breverman, supra*, 19 Cal.4th at p. 153.) An absence of malice is presumed if the killing is "shown to have been committed in a heat of passion upon sufficient provocation." (*People v. Sedeno, supra*, 10 Cal.3d at p. 719.) Voluntary manslaughter is a lesser included offense of murder.[115] (*People v. Wickersham, supra*, 32 Cal.3d at p. 326; *People v. Sedeno, supra*, 10 Cal.3d at p. 719.)

Voluntary manslaughter has both subjective and objective components. First, the defendant must actually have killed in the heat of a reason-obscuring passion. Second, the provocation must be of a nature that, under the circumstances, would provoke a reasonable person to a state of passion. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1044; *People v. Steele* (2002) 27 Cal.4th 1230, 1252; *People v. Wickersham, supra*, 32 Cal.3d at pp. 326-327.) The first element is viewed subjectively and the

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[115] Mr. Rountree was charged with one count of second-degree malice murder under code section 187. (2 CT 463.)

second is viewed objectively. (*People v. Cole, supra*, 33 Cal.4th at p. 1215.)

Whether the two prongs of this test have been met is a question for the jury. (See *People v. Valentine* (1946) 28 Cal.2d 121, 132.) As to the objective component, no specific type of provocation is required to meet the test. (*People v. Berry* (1976) 18 Cal.3d 509, 515; *People v. Valentine, supra*, 28 Cal.2d at pp. 141-144; *People v. Lasko* (2000) 23 Cal.4th 101, 108.) As to the subjective component, evidence of provocation itself can be circumstantial evidence from which the jury can infer that the defendant killed in an intense emotion, or a heat of passion. (*People v. Wickersham, supra*, 32 Cal.3d at pp. 323, 329.)

Thus, a voluntary manslaughter occurs if the killer's reason was actually obscured as the result of a strong passion aroused by provocation sufficient to cause an ordinary person of average disposition to act from this passion rather than judgment; that is, to act rashly or without due deliberation and reflection. Intentional killings can be voluntary manslaughters. (*People v. Breverman, supra*, 19 Cal.4th at p. 163.)

C. There Was Substantial Evidence To Support An Instruction on Voluntary Manslaughter.

Here, Mr. Rountree's statements - the only direct evidence of how the shooting occurred[116] - showed that Mr. Rountree and Stroder had

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[116] In evaluating whether Mr. Rountree was entitled to the voluntary manslaughter instruction, this Court must take the proffered evidence as true, "regardless of whether it was of a character to inspire belief.

decided to take Contreras to a remote area with no phones around to give themselves a head start to get away. (4 CT 1064-1066.) Contreras was nervous about being left in the remote area, but never appeared scared of Mr. Rountree and Stroder. (4 CT 1139.) When they arrived in a desolate oilfield area, Stroder got out of the car, and after letting Contreras with her shopping bags out of the backseat, the two women began to argue. Contreras did not want to be left behind in the desolate oilfield. (4 CT 1067-1068, 1081.) Mr. Rountree got out of the car with the rifle to scare Contreras so he and Stroder could leave the area, but somehow the rifle accidentally discharged, striking Contreras. (4 CT 1069-1070, 1073.)

A reasonable jury could infer that Mr. Rountree killed the victim, either accidentally or purposefully, because she was arguing with Stroder and Mr. Rountree became overly excited or provoked. The *Breverman* court made clear that " 'no specific type of provocation [is] required ....' " [Citations.] Moreover, the passion aroused need not be anger or rage, but can be any "'*[v]iolent, intense, high-wrought or enthusiastic emotion*'" [Citations] other than revenge [Citation.]" (*Id.* At 163, emphasis added.) Here, Mr. Rountree was scared and ready to flee when suddenly an

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[Citations.]" (*People v. Wilson* (1967) 66 Cal.2d 749, 762.) "'Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused.'[Citations.]"(*People v. Flannel, supra,* 25 Cal.3d at p. 685.) Here, as shown in Argument IV, the trial court erroneously prevented the jury from hearing Mr. Rountree's confessions, then barred the voluntary manslaughter instructions supported by those confessions.

argument broke out between Stroder and Contreras, circumstances which might certainly cause a "violent, intense, high-wrought or enthusiastic emotion."

Thus, "a reasonable jury could infer that defendant was aroused to passion, and his reason was thus obscured, by a provocation sufficient to produce such effects in a person of average disposition." (*People v. Breverman, supra,* 19 Cal.4th at pp. 163-164.) Accordingly, under *Breverman*, the trial court erred by not giving the jury a voluntary manslaughter instruction based on the heat of passion theory.

Providing the jury in this case with a voluntary manslaughter instruction would also have been consistent with the common law. In discussing the common law, the Supreme Court in *People v. Flannel, supra*, 25 Cal.3d 668, quoted one scholar as follows:

> "Since manslaughter is a "catch-all" concept, covering all homicides which are neither murder nor innocent, it logically includes some killings involving other types of mitigation, and such is the rule of the common law. For example, if one man kills another intentionally, under circumstances beyond the scope of innocent homicide, the facts may come so close to justification or excuse that the killing will be classed as voluntary manslaughter rather than murder. [Perkins on Criminal Law (2d ed. 1969) pp. 69-70.]"

(*People v. Flannel, supra*, 25 Cal.3d at pp. 679-680.)[117]

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[117] As *Flannel* also noted: "Perkins goes on to add that 'some legislative enactments have spoken of voluntary manslaughter in terms only of a killing in "a sudden heat of passion caused by a provocation" and so forth. Such restriction is probably unintentional, being attributable to the

The jury in this case should have been given the opportunity to decide this question.

D. The Error Was Prejudicial.

The requirement that the jury receive comprehensive instructions on every supportable theory of a lesser included offense is particularly critical in capital cases. In *Beck v. Alabama, supra,* 447 U.S. at p. 632, the United States Supreme Court established that every capital defendant is entitled to a reliable lesser included noncapital offense instruction if the offense exists under state law and the evidence supports the instruction. (*Id.* at p. 627; *Everette v. Roth* (7th Cir. 1994) 37 F.3d 257, 261 [omission of lesser included voluntary manslaughter instructions violates federal due process where it results in "fundamental miscarriage of justice"]; *Vujosevic v. Rafferty* (3d Cir. 1988) 844 F.2d 1023, 1028 [failure to instruct on lesser included offense supported by the evidence violates federal due process].) Thus, in a capital case, where the evidence warrants a lesser included offense instruction, due process requires that the court give the instruction *sua sponte*. (*Vickers v. Ricketts* (9th Cir. 1986) 798 F.2d 369, 374.)

Thus, the court's error was prejudicial because it was not harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p.

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fact that this is by far the most common type of mitigation; but it is very unfortunate.'" (25 Cal.3d 668, 680 [quoting Perkins on Criminal Law, *supra*, (2d ed. 1969) at p. 70].)

24.) *Chapman* review is appropriate here because "the failure to instruct sua sponte, where evidence of heat of passion existed, that an intentional, unlawful killing is nonetheless without malice if done in a heat of passion, and thus constitutes not murder but voluntary manslaughter, caused the definition of the malice element of murder, the charged offense, to be incomplete." (*People v. Breverman, supra*, 19 Cal.4th at p. 170, fn. 19.)

The jury was not given the opportunity to convict Mr. Rountree of the full range of offenses supported by the evidence. The trial court's refusal to give the instruction therefore deprived Mr. Rountree of his rights to due process, a fair jury trial, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17; *People v. Geiger* (1984) 35 Cal.3d 510, 518-519; *Beck v. Alabama, supra*, 447 U.S. at p. 637.) Accordingly, reversal of the convictions, the special circumstance findings, and the death judgment is required.

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XI. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING MR. ROUNTREE'S MOTION TO QUESTION MEMBERS OF THE VICTIM'S FAMILY ABOUT WHETHER THEY WOULD BE SATISFIED WITH A SENTENCE OF LIFE WITHOUT PAROLE.

Prior to the taking of victim impact evidence, the trial court denied a defense motion to question certain members of the victim's family as to whether they would be satisfied with a sentence of life without the possibility of parole. (21 RT 3444S-3444Y.) This ruling was incorrect, as such evidence was admissible both as mitigation evidence and as rebuttal evidence to the prosecution's argument that redress for the family demanded a sentence of death.

The erroneous denial of the motion prevented the jury from considering all available mitigating evidence when it decided Mr. Rountree deserved to die, and precluded Mr. Rountree from introducing rebuttal evidence to counter the State's evidence and argument for the death penalty in violation of his rights to due process, a fair jury trial, equal protection, and a reliable jury determination on penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17; *Eddings v. Oklahoma*, *supra*, 455 U.S. 104; *Lockett v. Ohio*, *supra*, 438 U.S. 586; *Gardner v. Florida*, *supra,* 430 U.S. at p. 362; *Skipper v. South Carolina, supra,* 476 U.S. at p.5, fn. 1, *id.* at pp. 9-11 (conc. opn. of Powell, J.).) Mr. Rountree's death sentence must be reversed and the case remanded for a new penalty phase.

A. Factual Background.

Press reports during the trial indicated that one or more family members stated that they did not feel death was the appropriate sentence and would be satisfied with a sentence of life without parole. (See 21 RT 3353, 3444U.) Defense counsel argued that, because the jury would assume that family members giving victim impact evidence as prosecution witnesses wanted Mr. Rountree to receive the death penalty, the defense should be allowed to correct that mistaken assumption by asking whether the witness would be satisfied with life without parole. (21 RT 3444S-3444U.) The prosecutor argued that she was not allowed to ask the victim's family members whether they wanted the death penalty, and that the victim's family views on the appropriate punishment were not admissible. (21 RT 3444U-3444V.) The trial court denied the motion. (21 RT 3444X.)

During closing argument, the prosecutor told the jury that a death verdict was what Mr. Rountree and Stroder deserved for what they did to Diana Contreras and her loved ones, and to remember that "mercy can't rob justice." (21 RT 3889.)

B. The Fact That The Victim's Family Wished To Show Mr. Rountree Mercy Was Admissible Mitigating Evidence.

Under the Eighth and Fourteenth Amendments of the federal Constitution, and under California law (§ 190.3), a capital defendant must be allowed to present all relevant mitigating evidence to demonstrate he

deserves a sentence of life rather than death. (*Skipper v. South Carolina, supra,* 476 U.S. at pp. 4-5; *Eddings v. Oklahoma, supra,* 455 U.S. at pp. 110-114; *Lockett v. Ohio, supra,* 438 U.S. at p. 604; *People v. Fudge* (1994) 7 Cal.4th 1075, 1117, *People v. Mickey* (1991) 54 Cal.3d 612, 692; *People v. Harris* (1985) 36 Cal.3d 36, 68.) "The jury 'must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.'" (*People v. Frye* (1998) 18 Cal.4th 894, 1015, quoting *Jurek v. Texas* (1976) 428 U.S. 262, 271.) "[T]he mere declaration that evidence is 'legally irrelevant' to mitigation cannot bar the consideration of that evidence if the sentencer could reasonably find that it warrants a sentence less than death." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 441.)

As discussed below, the fact that members of the victim's family did not wish Mr. Rountree sentenced to death was highly relevant to the jury's penalty determination because a rational juror could have found that their merciful evaluation of Mr. Rountree and his character justified a sentence of less than death.

1. The scope of admissible mitigation evidence is far broader than that of admissible aggravation evidence.

In *People v. Smith* (2003) 30 Cal.4th 581, 622, this Court reasoned that

"It is clear that the *prosecution* may not elicit the views

> of a victim or victim's family as to the proper punishment. (*Booth v. Maryland* (1987) 482 U.S. 496, 508-509.) The high court overruled *Booth* in part, but it left intact its holding that "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 830, fn. 2.) That court has never suggested that the defendant must be permitted to do what the prosecution may not do." (*Ibid.*)

Mr. Rountree respectfully suggests that this type of reasoning is incorrect, and that this Court should reconsider the holding of *Smith*. Defendants in capital cases are allowed to introduce an extremely broad array of mitigation evidence. Under California law, a capital defendant may present as mitigation eight separate categories of mitigation evidence, including "[a]ny . . . circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime." (§ 190.3, subd. (k).) There is no equivalent provision for aggravating circumstances. In fact, there are precisely three narrowly-drawn categories of aggravating evidence. Thus, the fact that the prosecution is barred from introducing such evidence under *Booth* and *Payne* is irrelevant in determining whether the defendant may do so. As shown below, this evidence was highly relevant under both federal and state law to the jury's determination of whether Mr. Rountree deserved to live or die.

Both this Court and the United States Supreme Court have espoused an expansive view toward the type of mitigating evidence a jury may

consider in the sentencing phase of a capital trial.

> "In a capital case, the penalty jury looks at the individual as a whole and determines if he is fit to live. The scope of admissible evidence as to the defendant's character and background must therefore be very broad."

(*People v. Harris*, *supra*, 36 Cal.3d at p. 68, citations and internal quotation marks omitted.)

> "[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

(*Lockett v. Ohio, supra,* 438 U.S. at p. 604; see also *Buchanan v. Angelone* (1998) 522 U.S. 269, 276 ["we have emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination" of whether death is the appropriate punishment]; *People v. Frye, supra,* 18 Cal.4th at p. 1015 [the "constitutional mandate" that the jury not be precluded from considering any aspect of a defendant's character or record proffered for a sentence less than death "contemplates the introduction of a broad range of evidence mitigating imposition of the death penalty."].)

As noted above, under California law, a capital defendant may present as mitigation, "[a]ny . . . circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime." (§ 190.3, subd. (k).) To ensure that jurors understand the scope of mitigating

evidence, trial court's instructing on section 190.3, subdivision (k), should inform the jurors they may consider as a mitigating factor not just circumstances extenuating the gravity of the crime, but also "any other aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." (*People v. Easley* (1983) 34 Cal.3d 858, 878, fn. 10, citing *Lockett v. Ohio, supra,* 438 U.S. at p. 604.)

Relevant mitigating evidence therefore includes both evidence relating to the crime and victim, and evidence related to the defendant whose fate the jury will decide. (See, e.g., *Skipper v. South Carolina, supra,* 476 U.S. at pp. 4-5 [holding that even though inferences drawn from evidence relating to the defendant's future adaptability to prison life would not relate specifically to the defendant's culpability for the crime he committed, "such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'"].)

Here, members of the victim's family, those most hurt by the crime, had found Mr. Rountree worthy of mercy. Their mercy was certainly "a basis for a sentence less than death" and Mr. Rountree was entitled to have the jury consider that factor in making their decision.

"[T]he Supreme Court's decisions in *Lockett* [and] *Eddings* . . . 'make it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any "sympathy factor" raised by the

evidence before it.'" (*People v. Easley, supra,* 34 Cal.3d at p. 876, quoting *People v. Robertson* (1982) 33 Cal.3d 21, 58.) Sympathy in this context is synonymous with mercy and pity. (*People v. Ochoa* (1998) 19 Cal.4th 353, 459; *People v. Caro* (1988) 46 Cal.3d 1035, 1067.) Thus, Mr. Rountree was entitled to seek mercy and ask the jury to assign a value to his life that precluded execution. A rational juror in Mr. Rountree's case could have found the family's merciful response to Mr. Rountree both relevant and worthy of significant weight in making that decision.

The erroneous denial of the defense motion thus prevented a jury from considering all available mitigating evidence when it decided Mr. Rountree deserved to die. That omission violated Mr. Rountree's rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. (*Eddings v. Oklahoma, supra,* 455 U.S. 104; *Lockett v. Ohio, supra,* 438 U.S. 586.)

C. Once the Prosecutors Asked For A Death Sentence on Behalf of the Victim's Family, Due Process Required That The Contrary Views of the Victim's Family Be Admissible as Rebuttal Evidence.

A central theme in the State's penalty phase case was that justice for the victim's family demanded a death sentence. After summarizing the emotional victim impact evidence given by the victim's family and friends (24 RT 3865-3866), the prosecutor concluded by telling the jury:

> "In this case I am asking you for a verdict of death because these two deserve it for what they did to Diana Contreras and

> to her loved ones and to the community . . . When the defense attorneys stand before you and they ask you to exercise mercy, I want you to remember this phrase, and the phrase is, 'Mercy can't rob justice.' Don't let mercy for the defendants rob Diana Contreras of justice" (24 RT 3889.)

Of course, the only two choices given the jury at penalty-phase were death and life without parole. Thus, the prosecutor explicitly told the jury that "mercy" meant life without parole, "justice" meant a death sentence, and that she was asking them, on behalf of Diana Contreras, her loved ones, and on behalf of the community, for a death sentence. (*Ibid.*) The implicit assertion that the victim's family wanted Mr. Rountree to receive a death sentence was false. Mr. Rountree should have been able to rebut this assertion with the fact that at least some of the Contreras family thought that showing mercy *would be* justice.

In *Skipper v. South Carolina, supra,* 476 U.S. 1, the defendant was prevented during the sentencing phase of his capital trial from presenting witnesses who would have testified he had made a good adjustment to jail during his pretrial incarceration. After the trial judge ruled this evidence was irrelevant, the state prosecutor argued in closing argument that the defendant would be a discipline problem in prison and would likely rape other prisoners. (*Id.* at pp. 3.) The Supreme Court reversed the defendant's death sentence on the ground that evidence of defendant's good behavior in jail was a mitigating aspect of his character that was relevant to the jury's penalty determination. (*Id.* at p. 8.) In so doing, the High Court stated:

> "The relevance of evidence of probable future conduct in prison as a factor in aggravation or mitigation of an offense is underscored in this particular case by the prosecutor's closing argument, which urged the jury to return a sentence of death in part because petitioner could not be trusted to behave if he were simply returned to prison. Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of *Lockett* and *Eddings* that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'"

(*Id.* at p. 5, fn. 1, citing *Gardner v. Florida*, *supra*, 430 U.S. at p. 362.) The concurrence in *Skipper* agreed with the result reached by the majority, but would have reversed on the ground that the death sentence was imposed, at least in part, on the basis of information which the defendant had no opportunity to deny or explain. (*Skipper v. South Carolina, supra*, 476 U.S. at pp. 9-11(conc. opn. of Powell, J.) As did the majority, the concurrence pointed out that the constitutional error was aggravated by the prosecutor's closing argument, which emphasized the defendant's misconduct in prison after his arrest. (*Id.* at p. 11.) Citing both the lead and concurring opinions in *Skipper*, this Court has stated that, "[w]hen a defendant is precluded from introducing evidence rebutting the prosecutor's argument in support of the death penalty, fundamental notions of due process are implicated." (*People v. Frye, supra,* 18 Cal.4th at p. 1017.)

As in *Skipper*, the victim's family's merciful evaluation of Mr. Rountree was crucial mitigating evidence that the jury needed to consider in

deciding whether he should live or die. (*Skipper v. South Carolina, supra,* 476 U.S. at p. 8.) And, as in *Skipper*, the relevance of this evidence was magnified by the prosecutor's penalty phase evidence and argument which emphasized that justice for the victim, family, and community demanded a death sentence. Accordingly, "it is not only the rule of *Lockett* and *Eddings* that require[d] that [appellant] be afforded an opportunity to introduce [the views of the family]; it is also the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" (*Skipper v. South Carolina, supra,* 476 U.S. at p. 5, fn. 1, citing *Gardner v. Florida, supra,* 430 U.S. at p. 362.)

This Court allows the State to argue non-statutory aggravation when it rebuts mitigating evidence offered by the defendant. (*People v. Davis* (1995) 10 Cal.4th 463, 537, citing *People v. Cox* (1991) 53 Cal.3d 618, 685 [dealing with lack of remorse].) Mr. Rountree certainly must be afforded similar consideration, as the family's views were highly relevant to rebut the State's arguments regarding what justice for the Contreras family might require.

The trial court's denial of the motion precluded Mr. Rountree from introducing rebuttal evidence to counter the State's evidence and argument for the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Gardner v. Florida, supra,* 430 U.S. at p. 362; *Skipper v. South Carolina, supra,* 476 U.S. at p. 5, fn. 1, *id.* at pp. 9-11 (conc. opn. of

Powell, J.).) Because that error was clearly prejudicial, Mr. Rountree's death sentence must be reversed and the case remanded for a new penalty phase.

D. The Error Requires Reversal.

Because a death judgment's reliability depends on the sentencer's ability to fully consider all relevant evidence that mitigates against a death sentence, the U.S. Supreme Court has seldom conducted detailed prejudice analyses in its cases reversing death judgments due to the erroneous exclusion of mitigating evidence. In its leading case on the subject, the High Court applied no prejudice analysis whatsoever. (*Lockett v. Ohio, supra,* 483 U.S. at p. 608.) When faced with the issue now before this Court - the erroneous exclusion of evidence that could have served as a basis for a sentence less than death, and would have rebutted the prosecutor's arguments for a death sentence - the Supreme Court held that, "under any standard, the exclusion of the evidence was sufficiently prejudicial to constitute reversible error." (*Skipper v. South Carolina, supra,* 476 U.S. at p. 8.)

This Court has held that exclusion of mitigating evidence is subject to the standard of review articulated in *Chapman v. California, supra,* 386 U.S. 18. (*People v. Frye, supra,* 18 Cal.4th at p. 1017; *People v. Fudge, supra,* 7 Cal.4th at p. 1117; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031-1032.) Under the plain language of *Chapman*, the question is not whether

the State's evidence and arguments supported a death sentence, but instead, whether the State can "prove beyond a reasonable doubt that the [exclusion of mitigating evidence] did not contribute to the [death] verdict obtained." (*Chapman, supra,* 386 U.S. at p. 24.) In other words, reversal is required if there is a reasonable possibility that the error complained of could have affected the jury's decision to impose the death penalty. (*Ibid.*; *People v. Frye, supra,* 18 Cal.4th at p. 1017.) The essential inquiry is whether the death verdict rendered at Mr. Rountree's trial "was surely unattributable to the error." (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.)

This error precluded the jury from hearing evidence that might have served as the basis for a sentence less than death, and certainly would have rebutted one of the State's most powerful and emotional arguments for a death sentence, thereby creating a risk that the death penalty was imposed on Mr. Rountree in spite of factors which may have called for a less severe penalty. (*Lockett v. Ohio, supra,* 438 U.S. at pp. 604-605.) Under U.S. Supreme Court precedent, that risk "is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Ibid.*)

> "Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, by the sentencing court, or by an evidentiary ruling. . . . Whatever the cause, . . . the conclusion would necessarily be the same: 'Because the [sentencer's] failure to consider all the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing.'"

(*McKoy v. North Carolina, supra*, 494 U.S. at p. 442, citing *Mills v. Maryland* (1988) 486 U.S. 367, 375 [internal citations omitted].) The same is true here. The death judgment must be reversed and the case remanded for a new penalty phase.

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XII. THE TRIAL COURT PREJUDICIALLY ERRED IN ADMITTING INFLAMMATORY VICTIM IMPACT EVIDENCE.

The trial court erroneously allowed substantial "victim impact" evidence to be introduced at trial, including photos that showed the victim throughout her life and testimony from friends and family that described her life and future plans. Going beyond the circumstances of the crime itself (Pen. Code, § 190.3, factor (a)), the prosecutor then compared the life the victim might have led against Mr. Rountree's life in prison. The evidence exceeded the scope of the circumstances of the crime in violation of Penal Code section 190.3, factor (a), and Mr. Rountree's federal due process liberty interest in the California statutory scheme. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.) Ultimately, the victim impact evidence used in this case, and the prosecutor's argument exploiting that inflammatory evidence, rendered the penalty phase fundamentally unfair under the due process clause and the death verdict unreliable under the cruel and unusual punishment clause. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15.)

A. Procedural Background.

The prosecution moved to introduce into evidence photos of Diana Contreras throughout her life, testimony about her future plans, and testimony from a friend as well as that from family. (5 CT 1371-1384; 6 CT 1745-1747; 20 RT 3350-3354; 22 RT 3469-3474.) Trial counsel

objected to anything other than immediate family members expressing emotional impact. (20 RT 3354, 3444Y-3444BB; 22 RT 3469-3474.) The trial court overruled the objections. (*Ibid.*) The prosecution then introduced a series of over twenty photographs, testimony from Contreras's sister, father, and best friend from high school. (22 RT 3483-3494.)

Annette Perales, Contreras's older sister, testified that she and her children were both very close to Contreras, who had been going to college and wanted to become a pediatrician. (22 RT 3483-84.) Contreras had also been very close to their mother, who had been disabled in an accident in 1986. Contreras would help her mother take baths or take her shopping. (22 RT 3485.) Her mother would still sometimes call out Contreras's nickname, "Luli." (22 RT 3485-3486.) Perales told the jury it had broken her heart in two when she learned of her sister's death. (22 RT 3486.) Perales gave the prosecutor a group of photos of Contreras at various stages of her life, which were then received in evidence. (22 RT 3483-3488.)

Valerie Lovett testified that she was Contreras's best friend at Arvin High School, from which they both graduated in 1993. (22 RT 3489.) Contreras was a caring person who thought she could find a nice person in anybody, even an evil person. (*Ibid.*) Lovett was badly hurt by her death because she believed Contreras would have done a lot to help people in this world. (*Ibid.*) Contreras had been the baby of their crowd, protected and liked by everybody. (22 RT 3490.) Lovett showed the jury pictures of

Contreras with high school friends at the senior picnic, senior breakfast, and golf club. (People's Exhibits 83, 84, and 85.) The pictures were received into evidence. (22 RT 3490-3491.)

Contreras's father, Raymond Soto Contreras, testified that Contreras had a heart of gold and was the kind of person who wanted to help people. (22 RT 3492.) She took psychology classes to help him cope with his wife's accident. After his wife's car accident, Contreras took care of her, bathed her, combed her hair, did her nails, and took her to dinner. (22 RT 3492.) She also worked with disabled people like his wife. (22 RT 3493.) She went to college and inspired his 14 grandchildren to think that they could also go. (22 RT 3493.) Contreras had been everything to his wife - everything. (22 RT 3492.) Mr. Contreras told the jury that his daughter's death had left him a broken man. (22 RT 3493.)

B. The "Victim Impact" Evidence Exceeded the Scope of the Circumstances of the Crime.

In *Payne v. Tennessee, supra*, 501 U.S. at p. 823, the United States Supreme Court approved the use of evidence that offered a "quick glimpse" into the life of the victim. Even assuming that victim impact evidence was permissible in this case, the extent and the type of evidence admitted exceeded limitations based on the circumstance of the crime (Pen. Code, § 190.3, factor (a)) or the type of evidence that was at issue in *Payne*.

In *Payne*, the victim evidence at issue was minimal. It was limited to

a single question eliciting brief testimony about the effect of the crime upon the victim's young son, who was in the same room when the crime was committed. The boy had been stabbed in the attack and suffered serious wounds. (*Payne v. Tennessee, supra*, 501 U.S. at pp. 812-815.) The evidence was closely tied to the circumstances of the crime - the impact upon a young child whom the killer knew was there at time the crime was committed and who was also a victim in the case. The Court held that a state may permit a jury to be able to consider "the specific harm caused by the defendant" without violating the Eighth Amendment. (*Id.* at p. 825.) However, the Court emphasized the due process protects against evidence that is so unduly prejudicial that it renders the trial fundamentally unfair. (*Ibid.*; see also *id.* at pp. 831 (conc. opn. of O'Connor, J.), 836-837 (conc. opn. of Souter, J.).)

In *Edwards*, this Court similarly reviewed very limited evidence - photographs of the victim and a short prosecutorial argument. (*People v. Edwards* (1991) 54 Cal.3d 832, 839.) This Court found that victim impact evidence was relevant to factor (a) of Penal Code section 190.3, which permits consideration of the "circumstances of the offense." (*Id.* at p. 835.) To be relevant to the circumstances of the offense, the evidence must show circumstances that "materially, morally, or logically" surround the crime. (*People v. Edwards, supra*, 54 Cal.3d at p. 833.) The only victim impact evidence that meets this standard is evidence of "the immediate injurious

impact of the capital murder" (*People v. Montiel* (1993) 5 Cal.4th 877, 935); evidence of the victim's personal characteristics that were known or reasonably apparent to the defendant at the time of the capital crimes; and, facts of the crime which were disclosed by the evidence properly received during the guilt phase. (*People v. Fierro* (1991) 1 Cal.4th 173, 264-265 (conc. and dis. opn. of Kennard, J.); see also *People v. Mitcham* (1992) 1 Cal.4th 1027, 1062-1064 ; *People v. Thomas* (1992) 2 Cal.4th 489, 535-536; *People v. Hardy* (1992) 2 Cal.4th 86, 200-201.)

In *Edwards*, this Court cautioned about the need for "limits on emotional evidence and argument," and especially the requirement to "'strike a careful balance between the probative and the prejudicial ...[and exclude material] that diverts the jury's attention from its proper role or invites an irrational, purely subjective response.'" (*People v. Edwards, supra*, 54 Cal.3d at pp. 835-836, quoting *People v. Haskett* (1982) 20 Cal.3d 841, 864.)

In keeping with *Payne* and *Edwards*, Mr. Rountree objected that any testimony given by the victim's family must be limited to the immediate injurious impact of the crime on immediate family. (20 RT 3354, 3444Y-3444BB; 22 RT 3469-3474.) Instead, the trial court admitted testimony and photographs about Diana Contreras's childhood, future plans, testimony from a friend, and emotional testimony that diverted the jury's attention from its proper role and invited an irrational, purely subjective response.

This went far beyond the "immediate injurious" impact of the crime (*People v. Montiel, supra*, 5 Cal.4th at p. 935.)

1. The evidence went far beyond what is allowed by *Payne*.

Justice Kennard's concurring and dissenting opinion in *Fierro* noted that Justice Souter illustrated how victim impact evidence may be admitted to establish the circumstances of the crime. (See *People v. Fierro, supra*, 1 Cal.4th at p. 264, fn. 3 (conc. and dis. opn. of Kennard, J.).) In *Payne*, Justice Souter provided a hypothetical situation where a minister was killed by a stranger while walking from his car to his church office. The minister's wife and daughter were present in the car and witnessed the stabbing. To explain the victim's presence at the scene of the murder, the prosecutor introduced evidence that the victim was a minister, a personal characteristic. The victim's widow and daughter testified as eyewitnesses of the murder, and this testimony inevitably revealed how they were emotionally affected by the crime. (*Payne v. Tennsessee, supra*, 501 U.S. at p. 840 (conc. opn. of Souter, J.).)

This hypothetical was similar to the facts in *Payne* itself, where the victim's son witnessed the crime and was also a victim, so that the emotional impact was directly linked to the circumstances of the crime itself. (*Payne v. Tennsessee, supra*, 501 U.S. at p. 815.)

In contrast to either of these situations, the testimony and

photographs admitted into evidence here concerned facts that had no direct link to the crime in that they were not known or reasonably apparent to the defendant at the time of the capital crimes. Nor did they concern facts of the crime which were disclosed by the evidence properly received during the guilt phase. (*People v. Fierro, supra,* 1 Ca1.4th at pp. 264-265 (conc. and dis. opn. of Kennard, J.)

Most importantly, the series of childhood photos, Diana Contreras's dreams of becoming a pediatrician, and her friend's testimony about her social life in high school, were the type of irrelevant emotional evidence that invited "an irrational, purely subjective response" and diverted the jury from their proper task of determining the appropriate penalty in this case. (*People v. Edwards, supra*, 54 Cal.3d at p. 836.) The trial court erred in allowing the testimony and photos.

C. The Improper Victim Impact Evidence and the Prosecutor's Inflammatory Argument Require Reversal.

The victim impact evidence introduced in this case gave far more than a "quick glimpse" into the victim's life. (*Payne v. Tennessee, supra*, 501 U.S. at p. 822, quoting *Mills v. Maryland, supra*, 486 U.S. at p. 397, [dis. opn. of Rehnquist, C.J.].) It presented a detailed picture of the victim that was not limited to the circumstances of the crime; it described her personality, showed her growing up through her childhood and high school photos, and told the jury about her future plans. The improper evidence and

argument violated federal and state constitutional requirements for due process and the Eighth Amendment guarantees of reliability in a capital case. (See *Payne v. Tennessee, supra*, 501 U.S. at p. 809 [unduly prejudicial victim impact evidence implicates due process protections]; *Johnson v. Mississippi* (1988) 486 U.S. 578, 585 [reliability required for capital judgments].)

The Texas Court of Criminal Appeals has cautioned that victim impact evidence may become prejudicial unless trial court places appropriate limits upon the amount, kind, and source of the material that is received. (*Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330, 336.) In *Salazar*, a memorial videotape depicted the victim's life and included substantial pictures of the victim as a child. The reviewing court found that the prejudicial effect of the videotape was enormous because the "implicit suggestion" was that the defendant murdered the young child, rather than the adult that the victim grew to be. (*Id.* at p. 337.) It stated, "A 'glimpse' into the victim's life and background is not an invitation to an instant replay." (*Id.* at p. 336.) Similarly, the series of photos introduced in this case also suggested that Mr. Rountree had murdered the child shown in them, a highly prejudicial suggestion.

This Court has also recognized that highly emotional victim impact evidence may be prejudicial in the penalty phase. In *People v. Gurule* (2002) 28 Cal.4th 557, the Court characterized as "highly inflammatory" the

brief portion of a guilt phase stipulation which stated that the victim's mother had hugged him goodbye on the morning of his death. (*Id.* at p. 622.) In reviewing the penalty phase, the Court noted that evidence of the victim's religious views and his hug with his mother would have been "potentially prejudicial" if it had been introduced at the penalty phase. (*Id.* at pp. 655-656.)

The "victim impact" evidence in this case was prejudicial because it introduced substantial extraneous emotional matters that influenced the jury's verdict. The prosecutor then used that emotion in her final argument:

> "The defendants made the deliberate choice in this case, and the choice they made is what they wanted, that that was more important than the life of Diana Contreras. Her life obviously didn't mean anything to them, but it did mean a lot to the family and her friends.
>
> You have heard some comments from Annette who told you that she misses Diana and her life is not the same without Diana, and that her kids miss Diana and that her and her kids had a good relationship with Diana, and that that love was taken from those children, and I asked Annette how she felt when she had been searching for Diana for 24 hours and the law enforcement officer show [sic] up at Diana's apartment and told Annette that your sister is dead. She said 'I was in shock like somebody broke my heart in two.' Well, it wasn't just somebody who did that to Annette, it was these two defendants by their actions.
>
> Valerie Lovett told you how she was impacted by Diana's death. 'It hurt me really bad because she was a good person. She could have done a lot to this world to help people.' And that's very true, Diana did have a lot to give to this world. She was going to college to make a better life for herself. She wanted to be a pediatrician, and she worked with disabled people, and she was contributing to this world, and

> that's been taken away. Those disabled people that she worked with have lost something, they don't have Diana there for them.
>
> What about Diana's parents? How have they been impacted by her death? Diana's father told you how much he loved Diana, how much her death has left him a broken man. I'm sure that's true, and you witnessed that when he was testifying.
>
> What about Diana's mother who had been disabled in that car accident, and she had a very special bond with Diana because Diana was closest of her children to the mother, she took care of her mother, she bathed her, she did her nails, she did her hair, she took her shopping, she took her out to dinner, and Diana's father told you that with regard to Diana's mother, Diana's mother's feelings towards Diana, 'She was her heart, she was her eyes, she was everything to my wife, everything," and that was the type of impact of what these defendants did, that is missing and you can consider that in how horrible this crime is by their actions because they have taken Diana from her mother." (24 RT 3865-3866.)

This argument highlighted the sheer emotional power of the victim impact evidence presented in this case. Such evidence was introduced throughout the trial and used by the prosecutor at the precise time when the balance is at its most delicate and the stakes are highest - when jurors are poised to make the normative decision of whether the defendant lives of dies. (See Joan W. Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors* (1994) 1994 Wis. L. Rev. 1345, 1396-98 [describing emotionally volatile nature of capital decisions]; Theodore Eisenberg, et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases* (2003) 88 Cornell L.Rev. 306, 317,

[summarizing study indicating that 51% of a mock jury exposed to the victim impact statement voted for death, while only 20% of those not exposed voted for death].)

The evidence and argument diverted the jury from its task of making a "reasoned moral response" (*Penry v. Lynaugh, supra,* 492 U.S. at p. 328) to the aggravating and mitigating evidence that was legitimately before it and led to the death verdict. Accordingly, the trial court's rulings permitting this evidence rendered the penalty phase fundamentally unfair under the due process clause and the death verdict unreliable under the cruel and unusual punishment clause. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15.) Mr. Rountree's death sentence must be stricken and the case remanded for a new penalty phase.

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XIII. THE PROSECUTOR'S PENALTY PHASE ARGUMENT IMPROPERLY PRESENTED AN EMOTIONAL PLEA TO THE JURORS TO SATISFY SOCIETY'S DEMANDS AND PROVIDE VENGEANCE FOR THE VICTIM AND HER FAMILY.

The prosecutor's penalty phase argument went beyond the limits of acceptable advocacy by using emotion in order to inflame the jury and by arguing that the death sentence was required to satisfy society's demands and to make the victim's family whole. The argument violated Mr. Rountree's federal and state constitutional rights to due process, a fair trial, equal protection, and a reliable jury determination on penalty. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15-17.)

A. The Prosecutor May Not Use Arguments Designed To Inflame A Juror's Personal Fears and Emotions.

A prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones." (*Berger v. United States* (1935) 295 U.S. 78, 88.) Accordingly, a prosecutor violates state law by using "deceptive or reprehensible methods" to attempt to persuade the jury. (*People v. Hill* (1998) 17 Cal.4th 800, 819.) A prosecutor's misconduct also implicates federal due process guarantees if it infects a trial with fundamental unfairness. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643.) Moreover, the Eighth and Fourteenth Amendment guarantees of reliability in capital sentences requires exacting scrutiny of a prosecutor's conduct and a trial court's errors. (*Beck v. Alabama, supra*, 447 U.S. at p. 638.)

The prosecutor's argument plays a particularly important role in the penalty phase. The death penalty must be a "reasoned moral response to the defendant's background, character and crime." (*Penry v. Lynaugh*, *supra*, 492 U.S. at p. 328.) Accordingly, it is misconduct for the prosecutor "to make comments calculated to arouse passion or prejudice." (*People v. Mayfield* (1997) 14 Cal.4th 668, 803.) Improper appeals include arguments designed to inflame a juror's personal fears and emotions. (*Newlon v. Armontrout* (8th Cir. 1989) 885 F.2d 1328, 1335; see *Darden v. Wainwright*, *supra*, 477 U.S. at pp. 180-181 [improper argument that death penalty was only guarantee against a future similar act]; *People v. Haskett*, *supra*, 20 Cal.3d at p.864 ["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"]; *Bertolotti v. State* (Fla 1985) 476 So.2d 130, 133 [prosecutor's appeal to consider the message sent to the community was "obvious appeal to the emotions and fears of the jurors"].) The prosecutor violated these limits in her closing arguments to the jury.

B. The Prosecutor Improperly Argued That Society's "Revulsion" for Grave Crimes Required Imposition of the Death Penalty.

The prosecutor told the jury that punishment is the way in which society expresses its denunciation of wrongdoing and that, in order to maintain respect for the law, it was essential that punishment for grave

crimes should adequately reflect the revulsion felt by the great majority of citizens for them. (24 RT 3888.) This argument misled the jury because the law is satisfied with either life imprisonment without parole or the death sentence. (See *People v. Brown* (1985) 40 Cal.3d 512, 537, fn. 7.) It prevented the jurors from considering mitigation and reaching an individualized judgment about Mr. Rountree, because if society's "revulsion" warranted the death penalty in and of itself, no amount of mitigation could ever overcome it. (See *Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 105 [8th and 14th Amendments require consideration of mitigating evidence].) In arguing this way, the prosecutor diminished the jurors' sense of personal responsibility for an individualized penalty verdict. (See *Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 328-329; *Darden v. Wainwright*, *supra*, 477 U.S. at p. 183, fn. 15 [*Caldwell* extends to any argument that diminishes a juror's sense of personal responsibility.)[118]

The prosecutor's argument improperly inflamed the jurors' emotions by suggesting that the death penalty was necessary to society's well-being. (See *United States v. Williams* (9th Cir. 1993) 989 F.2d 1061, 1072 [improper to use community role of jurors to appeal to their passions].) It is a juror's emotional response to such appeals that renders such arguments

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[118] The issue is preserved regardless of any failure to object at trial because no objection was required at the time of Mr. Rountree's trial. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1416; *People v. Moon* (2005) 37 Cal.4th 1, 17.)

egregious in the guilt phase. (See *Viereck v. United States* (1943) 318 U.S. 236, 247 [prosecutor's statements suggesting that others were relying on the jurors for protection compromised the verdict]; *United States v. Solivan* (6th Cir. 1991) 937 F.2d 1146 [improper for prosecutor to appeal to community conscience and fear of future crime].) It was similarly improper in the penalty phase to for the prosecutor to have stirred the emotions of the jurors by suggesting that they are under a societal duty to impose death. (See *Newlon v. Armontrout, supra*, 885 F.2d at p. 1335 [improper to appeal to jurors' personal fears and insinuate that all murders should be punished with death]; *Cunningham v. Zant* (11th Cir. 1991) 928 F.2d 1006, 1019-1021 [numerous comments, including, "how do you know that if you let him go this time it won't be done again" were designed to appeal "to the jury's passions and prejudices" and required reversal].)

The prosecutor told the jury that a death verdict was necessary because of society's views of serious crime. The impact of this argument would have been overwhelming to the jurors. Accordingly, this Court should find that the prosecutor violated due process by infecting the trial with fundamental unfairness and compromised the Eighth Amendment's requirements for a reliable penalty verdict. The argument also violated due process by arbitrarily depriving Mr. Rountree of his state-created liberty interest in a sentencing determination based solely on the statutory factors. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346 [due process liberty interest

in the requirements of state law].)

C. The Prosecutor Improperly Contrasted Mr. Rountree's Life in Prison With the Victim in Her Grave.

"[D]ramatic appeal to gut emotion has no place in the courtroom, especially in a case involving the penalty of death." (*Hance v. Zant* (11th Cir. 1983) 696 F.2d 940, 952.) The prosecutor in this case ignored this limitation and described both the family's emotions and everything the victim would never be able to do again, in order to contrast their loss with Mr. Rountree serving a life sentence without parole. (24 RT 3865-3866, 3886-3887.) This argument was designed solely to inflame the emotions of the jurors. It set up a standard that no defendant in a capital case could ever overcome because the victim's loss will always be real and a defendant's sentence to life in prison will always mean that he or she lives. The prosecutor's argument violated Mr. Rountree's constitutional rights to due process and a reliable penalty verdict. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 17.)

1. The argument was an inflammatory call for vengeance.

The prosecutor emphasized the comparison between the permanency of the victim's death and Mr. Rountree's life as a prisoner:

> "When the defense tries to impress upon you how horrible life without parole is, how horrible it's going to be for these two individuals, I want you to keep these things in mind: Diana Contreras will never see another sunrise or sunset, and she will never watch TV. She will never listen to

> the radio, she will never have another meal, she'll never be able to write letters to her friends and receive letters from her friends and family. She will never be able to talk to her friends and family on the telephone again. She will never be able to see any of her family again. So how horrible is life without parole for these two who will be able to do all those things when Diana is dead and can't do any of those things?
>
> If the defense tries to convince you how horrible life is for these two living in that small cell, you think about Diana who is in a two foot by six foot box because of the actions of these defendants. . . Diana Contreras will never have a chance to get married, she'll never finish college or be a pediatrician because of what these individuals did.
>
> When the defense asks you to show mercy for these two individuals, I ask you to show the same mercy that they showed for Diana Contreras which was none at all." (24 RT 3886-3887.)

In *Duckett v. State* (Okla.Crim.App. 1995) 919 P.2d 7, the prosecutor argued in words similar to the present case:

> "Ladies and Gentlemen, is it justice to send this man down to prison, let him have clean sheets to sleep on every night, three good meals a day, visits by his friends and family, while John Howard [the victim] lies cold in his grave? Is that justice? Is that your concept of justice? How do Jayme and Tom and John's son [the victim's family] go visit him?" (*Id.* at p. 19.)

The reviewing court unhesitatingly found this to be error: "These kinds of comments cannot be condoned. There is no reason for them and counsel knows better and does not need to go so far in the future." (*Ibid.*; see also *Welch v. State* (Okla.Crim.App. 2000) 2 P.3d 356, 373, [evidence that the victim's son put flowers on his mother's grave and brushed the dirt away "had little probative value of the impact of [the victim's] death on her

family and was more prejudicial than probative"]; *Walker v. Gibson* (10th Cir. 2000) 228 F.3d 1217, 1243 [prosecutor improperly appealed to the jury's emotions by referring to one victim as being "cold in his grave"]

Overemphasizing the permanency of the victim's death, as contrasted to life in prison, is also erroneous because all homicides by definition involve this situation. As the Oklahoma court has found,

> "the State's contention – it is unfair for [the defendant] to live since [the victim] is dead – creates a super-aggravator applicable in every death case. No amount of mitigating evidence can counter this argument, and if the jury agrees they may not even consider mitigating evidence."

(*Le v. State* (Okla.Crim App. 1997) 947 P.2d 535, 554-555; see also *Eddings v. Oklahoma, supra,* 455 U.S. at p. 105 [8th and 14th Amendments require individualized consideration of mitigating evidence].) Accordingly, the trial court erred in allowing the prosecutor to compare Mr. Rountree's life in prison with the permanency of the victim's death.

Under these circumstances, the prosecutor's argument was a call for vengeance, presented in a way that no juror could ignore. (See *Furman v. Georgia, supra*, 408 U.S. at pp. 344-345 (conc. opn. of Marshall, J.) [8th Amendment limits the role of retribution and vengeance in the penalty determination].)

D. Reversal is Required.

The prosecutor's argument focused on extremely emotional matters that led the jury to believe that the death penalty was required without any

real consideration of mitigating evidence – an easy way to make a hard choice. If a death sentence were required to make a societal statement or were necessary to avenge the victim's loss – then the jury need not make a "reasoned moral response to the defendant's background, character and crime." (*Penry v. Lynaugh*, *supra*, 492 U.S. at p. 328.) . Given the great weight afforded a prosecutor's words and the improper arguments used here, it is likely that the jury took the prosecutor's invitation and imposed the death penalty without the kind of determination required under the federal and state constitutions. (See *Berger v. United States*, *supra*, 295 U.S. at p. 88 [prestige of prosecutor carries great weight]; *People v. Talle* (1952) 111 Cal.App.2d 650, 677 [prosecutor given great weight]; *People v. Sandoval* (1992) 4 Cal.4th 155, 205 (dis. opn. of Mosk, J.) [prosecutor improperly offered jurors an easy way to avoid a hard choice].)

In the penalty phase, any substantial error requires reversal. (*People v. Robertson, supra,* 33 Cal.3d at p. 54; *People v. Ashmus* (1991) 54 Cal.3d 932, 965; *Chapman v. California*, *supra*, 386 U.S. at p. 24 [federal constitutional error requires reversal unless it is harmless beyond a reasonable doubt].) In this case, the emotional and far-reaching impact of the prosecutor's argument affected the jurors understanding of their duty and ensured that they would automatically vote for death. The error requires that the judgment of death be reversed.

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XIV. THE TRIAL COURT IMPROPERLY REFUSED MR. ROUNTREE'S REQUESTED INSTRUCTION THAT ONE MITIGATING FACTOR MAY BE SUFFICIENT TO SUPPORT A VERDICT OF LIFE WITHOUT PAROLE.

The trial court refused to give an instruction requested by Mr. Rountree that would have informed the jury that they could return a verdict of life imprisonment without possibility of parole even if aggravation outweighed mitigation. (7 CT 1949.) The proposed instruction stated, "[A] single mitigating factor is sufficient to support a decision against death." (*Ibid.*) The trial court's refusal to give the instruction undermined the likelihood that the jurors fully understood the process by which they were to determine the penalty or the overriding significance of mitigating evidence. It violated due process and failed to provide the "specific and detailed guidance" necessary to meet Eighth Amendment standards *(Gregg v. Georgia, supra*, 428 U.S. at p. 189; *Proffitt v. Florida* (1976) 428 U.S. 242, 253; *Woodson v. North Carolina, supra,* 428 U.S. at p. 303.)

The Eighth Amendment standard for reliability in a capital case requires sufficient procedural protection and "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." (*Simmons v. South Carolina* (1994) 512 U.S. 154, 172 [conc. opn. of Souter, J.], citing *Gregg v. Georgia, supra*, 428 U.S. at p. 190.) Accordingly, the jury should fully understand the role of mitigating evidence and its importance in the

sentencing process. Instructions that clarify the sentencing process should be given upon a defendant's request. (*Ibid.*)

The requested instruction correctly stated the law: one mitigating factor can outweigh any number of aggravating circumstances. (*People* v. *Hayes, supra,* 52 Cal.3d at p. 642; *People v. Visciotti* (1992) 2 Cal.4th 1, 64; *People* v. *Cooper* (1991) 53 Cal.3d 771, 845.) Indeed, in *People v. Duncan* (1991) 53 Cal.3d 955, 979, this Court held that a jury has discretion to impose a sentence of life without parole even if evidence is presented in aggravation and there is no evidence presented in mitigation.

This Court has held that it is proper to instruct a jury that a single mitigating factor may outweigh aggravation. (See *People v. Grant* (1988) 45 Cal.3d 829, 857, fn. 5.) Moreover, it has held that similar instructions to that requested by Mr. Rountree "significantly reduced the risk of juror misapprehension." (*People* v. *Sanders* (1995) 11 Cal.4th 475, 557; see also *People v. Webb, supra,* 6 Cal. 4th at p. 534 [instruction eliminated any possibility that the jury might not understand its sentencing discretion].) The possibility of such a risk should have compelled the trial court in this case to instruct the jury in accordance with Mr. Rountree's request.

In *People v. Jones, supra,* 17 Cal.4th at p. 314, this Court held that an instruction that "one mitigating circumstance may be sufficient to support a decision that death is not the proper penalty" was duplicative and, therefore, properly rejected. This conclusion was based on the fact that the

court instructed the jury to "return a verdict of life imprisonment without possibility of parole if it found that the aggravating factors did not substantially outweigh the mitigating factors, if it outweighed them at all." (*Ibid.*) However, the instruction used in Mr. Rountree's case focused upon the "totality of the aggravating circumstances" and "the totality of the mitigating circumstances." (6 CT 1862, 1864; CALJIC 8.88.) The emphasis on "totality" implies a quantitative judgment. The concept of a single mitigating factor justifying life without possibility of parole is not encompassed by such an instruction.[119]

It is not enough for the jury to be instructed that it can determine the appropriate verdict. Upon a defendant's request, it should be informed that an appropriate verdict may be based upon a single mitigating factor. That instruction was refused in the present case, violating due process and rendering the death sentence unreliable. (U.S. Const., 8th and 14th Amends.)

The trial court's error cannot be deemed harmless. There was substantial mitigating evidence before the jury and the penalty case was close. Given the normative decision inherent in the penalty deliberations,

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[119] The presence of one mitigating factor may be enough to warrant life without parole even if it is substantially outweighed by the aggravation. The law is clear that the jury may return a life verdict even if it finds that aggravation outweighs mitigation. (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1250.)

this Court cannot assume that a death verdict would have been imposed had the jury been instructed as Mr. Rountree requested. The penalty verdict must be reversed. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Robertson, supra*, 33 Cal.3d at p. 54.)

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XV. THE DEATH VERDICT IS DISPROPORTIONATE IN MR. ROUNTREE'S CASE.

"The California Constitution (art. I, § 17) prohibits imposition of a punishment disproportionate to the defendant's individual culpability." (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1187.) Similarly, "[t]he cruel and unusual punishments clause of the Eighth Amendment prohibits the imposition of a penalty that is disproportionate to the defendant's personal responsibility and moral guilt." (*People v. Padilla* (1995) 11 Cal.4th 891, 962.) The imposition of the death penalty in this case exceeds these standards by imposing a penalty that is reserved for the "worst of the worst" on a 22-year-old offender with a minor criminal record, and with a history of emotional and family problems.[120]

Whether a particular punishment is disproportionate to the offense is a matter of degree. (*People v. Dillon, supra*, 34 Cal.3d at p. 478.) In measuring this degree, the Court has considered both the nature of the offense and the offender. (*Id.* at p. 479, citing *In re Lynch* (1972) 8 Cal.3d 410, 425-429.)[121] Mr. Rountree does not dispute that facts of the crime for

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[120] Mr. Rountree made a motion for modification of verdict under section 190.4(e) based upon *People v. Dillon, supra,* 34 Cal.3d 441 and the mitigating factors discussed herein. (7 CT 2039-2047.) He also moved to reduce the penalty due to intra-case disproportionality. (7 CT 2060-2069.) Both motions were denied. (7 CT 2141-2144.)

[121] In addition to the constitutional provisions, this Court maintains the authority under Penal Code sections 1181, subdivision 7, and 1260 to modify a death sentence to one of life without parole. (*People v. Hines* (1997) 15 Cal.4th 997, 1081 [conc. opn. of Mosk, J.].) Section 1181 allows

which he was convicted were tragic. Any crime that encompasses a first degree murder with special circumstances is tragic. (See *People v. Brown*, *supra*, 40 Cal.3d at p. 541, fn. 13.) But even a tragic crime does not mean that the death penalty can never be disproportionate. Although the Legislature can define the offense in general terms, each offender is an individual. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 479.) Thus, punishment must be considered in regard to the specific facts and the specific person before the Court.

A punishment that is not disproportionate in the abstract may nevertheless violate constitutional guarantees if it is disproportionate to the defendant's individual culpability. (*Id.* at p. 480.) The unique nature of the penalty requires a heightened degree of judicial scrutiny to ensure that the punishment is appropriate to the offender. (See *Urbin v. Florida* (Fla. 1998) 714 So.2d 411, 416 [proportionality review necessary because death is "uniquely irrevocable penalty"].) This requirement is mandated by the federal Constitution, because the "individualized considerations [are] a constitutional requirement in imposing the death sentence, which means that we must focus on relevant factors of the character and record of the

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for alterations of trial court opinions in certain circumstances, including if the original verdict is contrary to law. Section 1260 explicitly empowers an appellate court to modify a judgment or reduce the degree of an offense. (*Ibid.*) Thus, the power of sentence modification is well within the realm of this Court and should be exercised in this case.

individual offender." (*People v. Dillon, supra*, 34 Cal.3d. at p. 481, citing *Enmund v. Florida, supra,* 458 U.S. at p. 798.) Thus, the punishment "should fit the offender and not merely the crime." (*Morrisette v. United States* (1952) 342 U.S. 246, 251, fn. 5.)

In *People v. Dillon, supra*, 34 Cal.3d 441, the defendant fired nine shotgun blasts into the victim who was attempting to protect marijuana from a team of youths who had armed themselves and invaded the victim's farm as part of a well-planned criminal conspiracy to rob him. Dillon was convicted of first-degree robbery felony murder and there was little dispute that the crime of which he was convicted was reprehensible. Indeed, the victim had been shot nine times. (*Id.* at p. 483.) Nevertheless, this Court carefully considered the defendant's individual background and state of mind. Based upon these factors, it reduced the defendant's conviction to second degree murder. (*Id.* at p. 489.)

This Court must similarly consider Mr. Rountree's culpability in light of his age, prior criminality, personal characteristics, and state of mind. (*Id.* at p. 479.) It should exercise its power and reduce Mr. Rountree's sentence from death to life without parole.

A. The Crime Was Not Sophisticated.

As discussed above, any first degree murder is tragic. However, here the crime was hardly sophisticated – Mr. Rountree and his girlfriend Mary Elizabeth Stroder had fled across the country to visit Mr. Rountree's aunt in

California and get married. They ran out of money in Bakersfield, California and, after a cold night sleeping in their car, impulsively made the decision to rob a young girl, Diana Contreras, for the money to get to Mr. Rountree's aunt's house. (4 CT 1043-1047.) After using her card to take $100 from an ATM, they tried to leave Contreras in a remote area to give themselves a head start, but she argued with them and Mr. Rountree's rifle accidentally discharged, striking Contreras. (4 CT 1064-1066, 1167, 1069-1071, 1173.) Mr. Rountree then panicked and fired twice more to stop her pain. (*Ibid.*) They then drove back across country to get Stroder home before Mr. Rountree was arrested, and got married so they would be able to stay in touch no matter what happened. (4 CT 1161.)

Upon being arrested, Mr. Rountree immediately confessed to the police and guided them through everything that had happened, telling them that what happened went against his religion and everything he believed in. (22 RT 3562.) All of this demonstrates Mr. Rountree's fundamental immaturity rather than the work of a hardened criminal and a sophisticated criminal plan. This factor should mitigate against the death penalty.

B. Mr. Rountree's Youth and Immaturity Make a Death Sentence Inappropriate.

This Court has established that age is an important factor in determining an individual's culpability. (*People v. Dillon, supra*, 34 Cal.3d at p. 479.) Mr. Rountree had just turned 22 years-old when he committed

the crime.[122] Although Mr. Rountree was eligible for the death penalty, he was still very young and inexperienced. His youth should be considered an "extremely weighty mitigator" that makes the death sentence inappropriate. (*Urbin v. Florida*, *supra*, 714 So. 2d at p. 418.)

Moreover, it is not Mr. Rountree's chronological age alone that must be considered. A defendant's immaturity – his mental and emotional development – must also be taken into account in determining whether the death sentence is appropriate. (See *People v. Dillon*, *supra*, 34 Cal.3d at p. 488 [emphasizing that the defendant was an "unusually immature youth"]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115-116; *People v. Marsh* (1984) 36 Cal.3d 134, 115-116.) Mr. Rountree was not just 22 years-old. He was a very young, immature, and emotionally disturbed 22 year-old who was not capable of acting with the kind of insight or deliberation that mark the worst murderers.

The clinical psychologist who evaluated Mr. Rountree before trial found that he had a low propensity for violence and exhibited true remorse for what happened. (23 RT 3600, 3602-3065.) However, Mr. Rountree was extremely impulsive and impaired in his judgment. (23 RT 3610.) Mr. Rountree was insecure around women and would compensate by trying to act like a protector or "savior." (23 RT 3607; 4 CT 1192.)

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[122] Mr. Rountree was born on November 13, 1971. (1 CT 16.)

Mr. Rountree's impulsiveness and immaturity played a major part in the crime, driven by desperation when they ran out of money and his desire to take care of Stroder. He then took full responsibility for the crime and directed his attorney not to take any action that might implicate Stroder (17 RT 3125; 22 RT 3498) - this despite the fact that the physical evidence pointed more towards Stroder as being the shooter. (See 18 RT 3211-3216, 3311.)[123] Accordingly, Mr. Rountree's young age and his emotional immaturity are factors that make the death penalty disproportionate in comparison to his culpability as an offender.

C. Mr. Rountree's Lack of Prior Violent Criminal Behavior Makes the Death Penalty Inappropriate.

Lack of prior criminality is an important factor to be considered by this Court in determining whether punishment is disproportionate to an offender. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 488 [noting that the defendant had no prior trouble with the law, and was not the prototype of a hardened criminal]; see also *Wright v. Florida* (1996) 688 So.2d 298, 300 [death sentence disproportionate where appellant's record "devoid of evidence of prior violent offenses"].) Here, Mr. Rountree had no prior

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[123] Stroder lured Contreras into the car, took items from her purse, and, based upon the trace evidence, was most likely the shooter. (See 4 CT 1059; 18 RT 3211-3216, 3311.) However, Stroder was sentenced only to life without parole (7 CT 2185-2189), another factor to be considered in determining whether Mr. Rountree's sentence was proportionate. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 488.)

violent criminal behavior. He had prior convictions for burglary, theft, tampering and forgery, some related to a dispute with a former girlfriend's mother. (2 CT EX 255-257, 430-535.) This Court should consider this factor in determining that the death penalty is disproportionate in this case.

D. Mr. Rountree's State of Mind Makes the Death Penalty Disproportionate.

Mr. Rountree's personal characteristics and his state of mind during the offense should be considered by this Court in determining whether the death penalty is a disproportionate punishment. (See *People v. Dillon*, *supra*, 34 Cal.3d at p. 479.) Here, Mr. Rountree's father was a glue-sniffing, self-destructive veteran who attempted suicide a number of times and finally died when he ran out into traffic. (23 RT 3581-3583.) Mr. Rountree's mother was an alcoholic who was only able to quit drinking for a very short time. (23 RT 3584-85.) Mr. Rountree was active in his church youth group, bible class, youth activities, and religious services. (22 RT 3536.) While in Kansas, Mr. Rountree wrote a letter stating "I failed my family and friends, I failed God. I know God is forgiving but he keeps giving me a chance, I blew it. I should have died last year but I'm still alive. I wish I would have died last year, then that little girl would be alive." (22 RT 3562-63.) These factors reduce Mr. Rountree's individual culpability and make the death penalty disproportionate in this case.

In *Dillon*, this Court considered that the killing was done while in a

"panic" -- the mental state of the defendant was important even when it did not provide a legal excuse. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 482.) Here too Mr. Rountree panicked after the first shot and fired twice more. While the jury did not find that Mr. Rountree's mental state and personal characteristics legally justified the crime, they certainly contributed to it and reduce his culpability. Accordingly, this Court should find that Mr. Rountree's death sentence was disproportionate to him as an offender. (*People v. Dillon, supra*, 34 Cal.3d at p. 479.) The penalty verdict therefore violated both the state and federal Constitutions and should be overturned. (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, § 17.)

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XVI. MR. ROUNTREE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT BOTH THE GUILT AND PENALTY PHASES, AND THOSE CLAIMS WILL BE RAISED BY PETITION FOR WRIT OF HABEAS CORPUS.

The right to counsel guaranteed to criminal defendants by the Sixth and Fourteenth Amendments "is the right to the effective assistance of counsel." (*McMann* v. *Richardson* (1970) 397 U.S. 759, 771, fn. 14.) Throughout the proceedings in the trial court, Mr. Rountree was deprived of his fundamental right to effective assistance of counsel. (*Strickland* v. *Washington* (1984) 466 U.S. 668.)

This Court has recognized that claims of ineffective assistance of counsel must generally be raised by petition for writ of habeas corpus. (See *People* v. *Pope* (1979) 23 Cal.3d 412, 426.) This Court has also explicitly held that the procedural bars of *In re Dixon* (1953) 41 Cal.2d 756, and *In re Waltreus* (1965) 62 Cal.2d 218, do not apply "to claims of ineffective assistance of trial counsel, even if the habeas corpus claim is based solely on the appellate record." (*In re Robbins* (1998) 18 Cal.4th 770, 814, fn. 34; accord, *People* v. *Mendoza Tello* (1997) 15 Cal.4th 264, 267.)

Accordingly, in reliance on this precedent, Mr. Rountree will raise his ineffective assistance of counsel claims only in his petition for writ of habeas corpus.

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XVII. IF ANY COUNT OR SPECIAL CIRCUMSTANCE IS REDUCED OR VACATED, THE DEATH VERDICT MUST BE REVERSED AND THE CASE REMANDED FOR A NEW PENALTY PHASE.

The jury made its decision to impose a death judgment at a time when Mr. Rountree had been convicted of one count of first-degree murder and the special circumstances of robbery and kidnaping had been found to be true. If this Court reduces or vacates any of the counts or special circumstances, the penalty verdict should be reversed. This is so because the jury's consideration of the unauthorized factors in aggravation added improper weight to death's side of the scale and violated Mr. Rountree's right to a fair trial and reliable penalty determination. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Article I, section 17; *Stringer v. Black* (1992) 503 U.S. 222, 232; ["[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale"]; but see *Brown v. Sanders* (2006) 546 U.S. 212 ["An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances"].)

Section 190.3 codifies the factors that a trier of fact may consider in

determining whether death or life imprisonment without parole should be imposed in a given case. In accordance with this provision, Mr. Rountree's jury was guided by CALJIC No. 8.85 which instructs that the trier "shall" consider and be guided by the presence of enumerated factors, including, *inter alia*, "the circumstances of the crime of which the defendant was convicted." (Pen. Code, § 190.3, factor (a); 6 CT 1852-1853; 24 RT 3847-49; CALJIC No. 8.85.)

The reliability of the death judgment would be severely undermined if it were allowed to stand despite the reduction or reversal of any of the counts. Accordingly, to meet the stringent standards imposed on a capital sentencing proceeding by the Eighth Amendment, as well as article I, section 17 of the California Constitution, Mr. Rountree must be granted a new penalty trial, to enable the fact-finder to consider the appropriateness of imposing death.

Moreover, in *Ring v. Arizona, supra,* 536 U.S. 584, the United States Supreme Court applied the rule of *Apprendi v. New Jersey, supra,* 530 U.S. 466 to capital sentencing procedures and concluded that specific findings the legislature makes as a prerequisite to a death sentence must be made by a jury and proven beyond a reasonable doubt. (See also *Cunningham v. California, supra,* 549 U.S. 270.) In California, the trier of fact has two critical facts to determine at the penalty phase of trial: (1) whether one or more of the aggravating circumstances exists, and (2) if one or more

aggravating circumstances exists, whether they outweigh the mitigating circumstances. If this Court reverses or reduces any of the convictions or special findings, the delicate calculus the trier of fact must undertake when weighing aggravating and mitigating circumstances is necessarily skewed, and there no longer remains a finding that the aggravating factors outweigh the mitigating evidence beyond a reasonable doubt.

This Court cannot conduct a harmless error review regarding the death sentence without making findings that go beyond "'the facts reflected in the jury verdict alone.'" (See *Ring v. Arizona, supra*, 536 U.S. at p. 589 [quoting *Apprendi v. New Jersey, supra*, 530 U.S. at p. 483]), and under *Ring*, the power to make those findings is the jury's alone. Thus, because jury findings regarding the facts supporting an increased sentence is constitutionally required, a new jury determination that aggravating factors outweigh mitigating factors - and that death is the appropriate sentence - must be made when any count or special circumstance is reversed or reduced.

Accordingly, if any count or special circumstance is reduced or vacated, the death verdict must be reversed and the case remanded for a new penalty phase. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Article I, section 17.)

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XVIII. THE FAILURE TO PROVIDE INTER-CASE PROPORTIONALITY REVIEW VIOLATES MR. ROUNTREE'S CONSTITUTIONAL RIGHTS.

California does not provide for inter-case proportionality review in capital cases, although it affords such review in noncapital criminal cases. As shown below, the failure to conduct inter-case proportionality review of death sentences violates Mr. Rountree's Eighth Amendment and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment. (U.S. Const., 8th, & 14th Amends.)

A. The Eighth Amendment Requires Death Judgments To Be Reliable and Proportional.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, 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* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original), quoting *Proffitt v. Florida, supra,* 428 U.S. at p. 251 (opinion of Stewart, Powell, and Stevens, JJ.).)

The United States Supreme Court has lauded comparative

proportionality review as a method for helping to ensure reliability and proportionality in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (See *Gregg v. Georgia, supra,* 428 U.S. at p. 198; *Proffitt v. Florida, supra*, 428 U.S. at p. 258.) Thus, inter-case proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

B. California's Lack Of Inter-Case Proportionality Review Violates The Eighth Amendment Protection Against The Arbitrary And Capricious Imposition Of The Death Penalty.

Despite recognizing the value of inter-case proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris, supra,* 465 U.S. 37, the United States Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Accordingly, this Court has consistently held that inter-case proportionality review is not constitutionally required. (See *People v. Farnam* (2002) 28 Cal.4th 107, 193.)

As Justice Blackmun has observed, however, the holding in *Pulley v.*

Harris was premised upon untested assumptions about the California death penalty scheme:

> "[I]n *Pulley v. Harris*, 465 U.S. 37, 51 [], the Court's conclusion that the California capital sentencing scheme was not 'so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review' was based in part on an understanding that the application of the relevant factors ''provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'' thereby ''guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'' *Id.* at 53, quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (9th Cir. 1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley v. Harris.*" (*Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).)

The time has come for *Pulley v. Harris* to be reevaluated since, as this case illustrates, the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia, supra,* 408 U.S. at p. 313 (conc. opn. of White, J.).) Comparative case review is the most rational – if not the only – effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative or inter-case proportionality review.[124]

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[124] 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.

The capital sentencing scheme in effect at the time of Mr. Rountree's trial was the type of scheme that the *Pulley* Court had in mind when it said that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) Penal Code section 190.2 immunizes few kinds of first degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital sentencing scheme lacks other safeguards as discussed in Arguments VI, VII, and XIX. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

Rev. Stat. §§ 29-2521.01, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); 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) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(c)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 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. § 6-2-103(d)(iii) (1988).

Many states have judicially instituted similar review. 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, 197; *Brewer v. State* (Ind. 1980) 417 NE.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed].

California's capital sentencing scheme does not operate in a manner that ensures consistency in penalty phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore, California is constitutionally compelled to provide Mr. Rountree with inter-case proportionality review. The absence of inter-case proportionality review violates Mr. Rountree's Eighth and Fourteenth Amendment right not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence. (U.S. Const., 8th, & 14th Amends.)

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XIX. CALIFORNIA'S DEATH PENALTY SCHEME, AS INTERPRETED BY THIS COURT AND APPLIED AT MR. ROUNTREE'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of California's capital punishment scheme violate the United States Constitution. This Court has consistently rejected arguments pointing out these deficiencies. In *People* v. *Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's capital punishment system will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.) In light of this Court's directive in *Schmeck,* Mr. Rountree briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review.

Mr. Rountree provides more detail where recent United States Court decisions or the facts in this case call this Court's previous decisions in question, particularly in the way that this Court has considered the burden of proof involved in the penalty decision (section C, *infra*), how it has interpreted the limitations requiring an "extreme mental or emotional disturbance" under Penal Code section 190.3, factor (d) (section E, *infra*), and the disparate treatment of civil and criminal litigants in their access to

procedural safeguards (section F, *infra*.) Should the court decide to reconsider any of these claims, Mr. Rountree requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad.

To meet constitutional muster, 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* (1989) 47 Ca1.3d 983, 1023, citing *Furman* v. *Georgia, supra,* 408 U.S. at p. 313 [conc. opn. of White, J.].) Meeting this criteria requires a state to genuinely narrow, by rational and objective standards, the class of murderers eligible for the death penalty. (*Zant v. Stephens, supra,* 462 U.S. at p. 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty.

At the time of the offense charged against Mr. Rountree, Penal Code section 190.2 contained 21 special circumstances. Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Ca1.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary

imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application of Section 190.3(a) Violated Mr. Rountree's Constitutional Rights.

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 6 CT 1852-1853.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts that cover the entire spectrum of circumstances inevitably present in every homicide, such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing. This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other

than that the particular set of circumstances surrounding the charged murder without some narrowing principle. (See *Maynard* v. *Cartwright, supra,* 486 U.S. at p. 363; but see *Tuilaepa* v. *California, supra,* 512 U.S. at pp. 987-988 [factor (a) survived facial challenge at time of decision].)

Mr. Rountree is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People* v. *Brown* (2004) 34 Cal.4th 382, 401.) Mr. Rountree urges the court to reconsider this holding.

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

1. Mr. Rountree's death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt.

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.86, 8.87; *People* v. *Anderson* (2001) 25 Cal.4th 543, 590; *People* v. *Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People* v. *Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, Mr. Rountree's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case

outweighed the mitigating factors before determining whether or not to impose a death sentence. A consistent line of cases from the United States Supreme Court require that any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. (*Apprendi v. New Jersey, supra,* 530 U.S. at p. 478; *Ring v. Arizona, supra,* 530 U.S. at p. 604; *Blakely v. Washington, supra,* 542 U.S. at pp. 303-305, *Cunningham v. California, supra,* 549 U.S. 270.) In order to impose the death penalty in this case, Mr. Rountree's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 6 CT 1862-64.) Because these additional findings were required before the jury could impose the death sentence, *Apprendi, Ring, Blakely,* and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People* v. *Sedeno, supra,* 10 Cal.3d at p. 715; see *Carter* v. *Kentucky, supra,* 450 U.S. at p. 302.)

This Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson, supra,* 25 Cal.4th at p. 589, fn.14), and does not require factual

findings. (*People v. Griffin* (2004) 33 Cal.4th 536, 595.) In so doing, this Court has repeatedly compared the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias, supra,* 39 Cal.4th at p. 41; *People v. Dickey, supra,* 35 Cal.4th at p. 930; *People* v. *Snow, supra,* 30 Cal.4th at p. 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto, supra,* 30 Cal.4th at p. 263.)

This Court applied similar reasoning to reject the application of *Apprendi* in cases where the trial court imposed the maximum verdict under California's determinate sentencing law ("DSL"). The Court upheld the DSL because it simply provided for the type of fact-finding incident to choosing "an appropriate sentence within a statutorily prescribed sentencing range." (*People v. Black* (2005) 35 Cal.4th 1238, 1254.) However, in *Cunningham,* the High Court made clear that this rationale does not comport with Sixth Amendment standards. (*Cunningham v. California, supra,* 549 U.S. 270.)

In *Cunningham,* the High Court emphasized that any fact that exposes a defendant to a greater potential sentence must be found true by a

jury and established beyond a reasonable doubt. (*Id.* at pp. 863-864.) The Court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (*Id.* at pp. 862-863.) Accordingly, the DSL violated the bright-line rule that requires all facts necessary to elevate a sentence to be found by a jury "employing a beyond-a-reasonable-doubt standard." (*Id.* at p. 870.) Since this Court has recognized that the DSL is comparable to the capital sentencing scheme, it is clear that the Sixth Amendment standards adopted in *Apprendi* must be applied here.

Cunningham also rejected the rationale that *Apprendi* does not apply because the maximum penalty for one convicted of first degree murder with a special circumstance is death. In the DSL, the aggravated sentence is obviously the maximum sentence that can be imposed for a crime, but the High Court recognized that the *middle* sentence was the most severe penalty that could be imposed by the sentencing judge without further factual findings. (*Cunningham* v. *California, supra,* 549 U.S. 270.) Similarly, to elevate a sentence from life to death, a jury must find that aggravation. substantially outweighs mitigation. (*People v. Brown, supra*, 40 Cal.3d at p. 541, fn. 13.) Since this decision involves further fact-finding, the Sixth Amendment's requirements for a unanimous jury verdict, beyond a reasonable doubt, must apply. Mr. Rountree urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport

with the principles set forth in *Apprendi, Ring, Blakely,* and *Cunningham.*

Apart from the applicability of the Sixth Amendment to California's penalty phase proceedings, Mr. Rountree also contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This court has previously rejected Mr. Rountree's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People* v. *Blair, supra,* 36 Ca1.4th at p. 753.) Mr. Rountree requests that the Court reconsider this holding.

2. Some burden of proof is required, or the jury should have been instructed that there was no burden of proof.

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and Mr. Rountree is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks* v. *Oklahoma, supra,* 447 U.S. at p. 346 [defendant constitutionally entitled to procedural protections afforded by state law].)

Accordingly, Mr. Rountree's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88 fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. *(People* v. *Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People* v. *Arias, supra,* 13 Cal.4th at p. 190.) Mr. Rountree is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias.*

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People* v. *Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of the misallocation of a

nonexistent burden of proof.

3. Mr. Rountree's death verdict was not premised on unanimous jury findings.

a. Aggravating factors.

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring* v. *Arizona.* (See *People v. Prieto, supra,* 30 Cal.4th at p. 275.)

As discussed above, Mr. Rountree submits that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina, supra,* 494 U.S. at p. 452 (conc. opn. of Kennedy, J.).) The failure to require that the jury unanimously find

the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Mr. Rountree asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated criminal activity.

Mr. Rountree's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violated due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering the death sentence unreliable. (See, e.g., *Johnson v. Mississippi, supra,* 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People* v. *Anderson, supra,* 25 Cal.4th at pp. 584-585.)

The United States Supreme Court's recent decisions in *Cunningham v. California, supra,* 549 U.S. 270, *Blakely v. Washington, supra,* 542 U.S. 296, *Ring v. Arizona, supra,* 536 U.S. 584, and *Apprendi v. New Jersey, supra,* 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Mr. Rountree is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Ca1.4th 186, 221-222.) He asks the Court to

reconsider its holdings in *Anderson* and *Ward.*

4. The instructions caused the penalty determination to turn on an impermissibly vague and ambiguous standard.

The question of whether to impose the death penalty upon Mr. Rountree hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88; 6 CT 1862-64.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard* v. *Cartwright, supra,* 486 U.S. at p. 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People* v. *Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The instructions failed to inform the jury that the central determination is whether death is the appropriate punishment.

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson* v. *North Carolina, supra,* 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the

aggravating evidence "warrants" death rather than life without parole. (CALJIC No. 8.88; 6 CT 1862-64.) These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone* v. *Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant* v. *Stephens, supra,* 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People* v. *Bacigalupo, supra,* 6 Cal.4th at pp. 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution. The Court has previously rejected this claim. (*People* v. *Arias, supra,* 13 Cal.4th at p. 171.) Mr. Rountree urges this Court to reconsider that ruling.

6. The instructions failed to inform the jurors that if they determined that mitigation outweighed aggravation, they were required to return a sentence of life without the possibility of parole.

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California, supra,* 494 U.S. at p. 377.) Yet, CALJIC No. 8.88 does not address this

proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated Mr. Rountree's right to due process of law. (See *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan, supra,* 53 Cal.3d at p. 978.) Mr. Rountree submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the non-reciprocity involved in explaining how a death verdict may be warranted, but failing to explain when a verdict of life without parole is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius* v. *Oregon* (1973) 412 U.S. 470, 473-474.)

7. The jury instructions violated the Sixth, Eighth and Fourteenth Amendments by failing to inform the jury regarding the standard of proof and lack of need for unanimity as to mitigating circumstances.

The failure of the jury instructions to set forth a burden of proof

impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286; *Mills v. Maryland, supra,* 486 U.S. at p. 374; *Lockett v. Ohio, supra,* 438 U.S. at p. 604; *Woodson v. North Carolina, supra,* 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) Such error occurred here because the jury was left with the impression that Mr. Rountree bore some particular burden in proving facts in mitigation.

A similar error occurred when the trial court failed to instruct the jury that unanimity was not required as to mitigating facts. Mr. Rountree's jury was told in the guilt phase that unanimity was required in order to acquit Mr. Rountree of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limited consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy* v. *North Carolina, supra,* 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question

that reversal would be required. (*Ibid.;* see also *Mills* v. *Maryland, supra,* 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of Mr. Rountree's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The instructions improperly failed to inform the penalty jurors on the presumption of life.

During voir dire, the trial court told jurors that there was no presumption for either death or life imprisonment without possibility of parole - that the law did not prefer one over the other. (See e.g. 2 RT 153, 280.) Mr. Rountree later requested a jury instruction which stated "If you cannot decide whether death or life-without-possibility-of-parole is the appropriate verdict in this case, you must return a verdict of life-without-possibility-of-parole." (7 CT 1934.) The trial court refused to give the instruction, stating that it knew of nothing suggesting that a jury is to start out with a presumption of life without the possibility of parole. (24 RT 3673.) The trial court erred.

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case.

(See *Estelle* v. *Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo* v. *Lashley* (1983) 507 U.S. 272.) The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated Mr. Rountree's right to due process of law (U.S. Const. 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. 8th & 14th Amends.), and his right to the equal protection of the law (U.S. Const. 14th Amend.).

In *People* v. *Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction was constitutionally required and the trial

court's failure to give such an instruction requires reversal for a new penalty phase.

D. Failing to Require the Jury to Make Written Findings Violates Mr. Rountree's Right to Meaningful Appellate Review.

Consistent with state law (*People v. Fauber, supra,* 2 Cal.4th at p. 859), Mr. Rountree's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived Mr. Rountree of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg* v. *Georgia, supra,* 428 U.S. at p. 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Mr. Rountree urges the court to reconsider its decisions on the necessity of written findings.

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

1. The use of restrictive adjectives in the list of potential mitigating factors prevented the jury from giving full effect to Mr. Rountree's mitigating evidence.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see 6 CT 1852-53; CALJIC No. 8.85; Pen. Code § 190.3, factors (d) and (g)) acted as barriers to the

consideration of mitigation in violation of the Sixth, Eighth, and Fourteenth Amendments. (See *Mills v. Maryland, supra*, 486 U.S. at p. 384; *Lockett v. Ohio, supra*, 438 U.S. at p. 604.) Mr. Rountree is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors.

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to Mr. Rountree's case, including factors (e) [victim a participant in or consented to homicide], (f) [offense committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of his conduct], (g) [defendant acted under duress or domination of another person], and (j) [defendant an accomplice and minor participant]. The trial court failed to omit those factors from the jury instructions (6 CT 1852-1853), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights.

Mr. Rountree asks this Court to reconsider its decision in *People v. Cook, supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The failure to instruct that statutory mitigating factors were relevant solely as potential mitigators.

In accordance with customary state court practice, the instructions

did not identify which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (6 CT 1852-1853.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.)

Prior to trial, Mr. Rountree had moved to declare the death penalty law unconstitutional based upon the statute's failure to identify the factors as either aggravating or mitigating. (1 CT 85-100.) Co-defendant and Mr. Rountree later moved to prohibit use of the defendants' age as an aggravating factor. (5 CT 1286-1289.) The trial court denied both motions. (1 CT 107; 5 CT 1437-1440.)

As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 -factors (d), (e), (f), (g), (h), and (j) -were relevant solely as possible mitigators. (*People v. Hamilton, supra,* 48 Cal.3d at p. 1184; *People* v. *Davenport, supra,* 41 Ca1.3d at pp. 288-289). However, Mr. Rountree's jury was free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate Mr. Rountree's sentence based on non-existent or irrational aggravating factors, thus precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black, supra,* 503 U.S. at pp. 230-236.) As such, Mr. Rountree

asks the court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

F. The State of California Violates The Equal Protection Clause of the Federal Constitution By Denying Procedural Safeguards to Capital Defendants Which Are Afforded to Non-Capital Felony Defendants and Civil Litigants.

A greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California, supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons facing civil penalties.

During the course of pre-trial discovery, trial counsel complained to the trial court that law enforcement witnesses could not be compelled to talk to him. (3 CT 832-833.) California's disparate treatment of criminal and civil defendants in the power it gives them to depose the witnesses against them violates the Equal Protection provisions of the United States and California Constitutions.

1. The right to life is a fundamental interest requiring strict scrutiny.

The equal protection clause of the Fourteenth Amendment to the United States Constitution[125] guarantees every person that he or she will not

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[125] The California Constitution also contains an equal protection clause, article 1, section 7. In some cases the state guarantee may provide

be denied fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (See *Bush v. Gore* (2000) 531 U.S. 98, 104-105.) In addition to protecting the exercise of federal constitutional rights, 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.)

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court 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 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles* 356 U.S. 86, 102 (1958)." (*Commonwealth v. O'Neal* (1975) 327 N.E.2d 662, 668, 367 Mass 440, 449.)

If the interest is "fundamental," then 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.) A state

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broader protection than the federal equal protection clause. (*People v. Leung* (1992) 5 Cal.App.4th 482, 494.)

may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra,* 17 cal.3d 236; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply a monetary judgment, but life itself. To the extent that there may be differences between capital defendants and civil defendants,[126] those differences justify more, not fewer, procedural protections for capital defendants.

2. Criminal defendants are treated less favorably than are civil litigants under California law.

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[126] Criminal and civil litigants are "similarly situated" for the purposes of the equal protection analysis applicable here. In *People v. Hofsheier* (2006) 37 Cal.4th 1185, this Court noted that:

> "Under the equal protection clause, we do not inquire 'whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged."(*Id.* at p. 1199; citations omitted.)

Here, the purpose of depositions is to ensure a fair trial and intelligent defense in light of all relevant and reasonably accessible information. (See *People v. Gonzalez* (2006) 38 Cal.4th 932, 960.) Criminal and civil litigants are thus similarly situated in that regard.

There can be no dispute that the defendant in a capital case is treated less favorably than the defendant in a civil proceeding with regard to depositions. A criminal defendant with some very limited exceptions, simply cannot take depositions in a criminal case. (See *People v. Municipal Court* (*Runyan*) (1978) 20 Cal.3d 523; Penal Code section 1054.) In contrast, a civil defendant has broad powers to subpoena parties and witnesses for cross-examination under oath as to any matter, not privileged, that is relevant to the subject matter involved if the matter is admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. (See California Code of Civil Procedure sections 2025.010 et seq.; 1985-1987; 2017.010.) This right is construed broadly, so as to uphold the right to discovery wherever possible. (*Greyhound Corp. v. Superior Court* (*Clay*) (1961) 56 Cal.2d 355, 377-378; *Emerson Elec. Co. v. Superior Court* (*Grayson*) (1997) 16 Cal.4th 1101, 1108.)

While all litigants, civil as well as criminal, have a right to a fair trial, the interest of criminal defendants is greater. A criminal defendant's right to a fair trial is a fundamental personal right. (*Irvin v. Dowd, supra,* 366 U.S. at p. 722.) As this Court has noted, "a criminal defendant's right to discovery is based on the 'fundamental proposition that [an accused] is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information. [Citations.]'" (*People v. Gonzalez, supra,* 38 Cal.4th at p. 960.) In a system where there is no longer a right to

cross-examine prosecution witnesses at a preliminary hearing, depositions are simply a crucial procedure for insuring that a defendant receives a fair trial and an intelligent defense. (*Ibid.*)

3. The California capital punishment scheme violates the Equal Protection Clause.

California's death penalty scheme also provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.420, (b) & (e).) In a capital case, there is no burden of proof at all; the jurors need not agree on what aggravating circumstances apply; and specific findings to justify the defendant's sentence are not required. Mr. Rountree acknowledges that this Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but asks the Court to reconsider.

G. The Trial Court's Failure to Suppress Mr. Rountree's Confessions Under *Miranda v. Arizona* Violated His Constitutional Rights.

Mr. Rountree moved to suppress his confessions under *Miranda v. Arizona* (1966) 384 U.S. 436. (17 RT 2859-2863.)

> "*Miranda* holds that '[t]he defendant may waive effectuation' of the rights conveyed in the warnings 'provided the waiver is made voluntarily, knowingly and intelligently.'[Citation.] The inquiry has two distinct dimensions. [Citations.] First, the relinquishment of the right must have been voluntary in the sense that it was a product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." (*Moran v. Burbine* (1986) 475 U.S. 412, 421.)

Here, Mr. Rountree's age and the failure of the police to advise him that he faced the death penalty meant his waiver was not made with a "full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it" and his statements should have been suppressed. This Court has rejected similar arguments (see *People v. Sanders* (1990) 51 Cal.3d 471, 512-514) but Mr. Rountree asks this Court to reconsider.

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H. The Instructions to the Jury on First-Degree Murder Violated Mr. Rountree's Constitutional Rights Because He Was Charged Only with Second-Degree Malice Murder.

In Count One of the Information, Mr. Rountree was charged with second degree malice-murder in violation of section 187, not with first degree murder in violation of Penal Code section 189. (2 CT 463.) However, the jury was instructed with two forms of first-degree murder: deliberate and premeditated murder (CALJIC No. 8.20; 6 CT 1606-1607), and first-degree felony-murder as a principal or as an aider and abettor. (CALJIC No. 8.21; 6 CT 1608; CALJIC 8.27; 6 CT 1609.) The jury found Mr. Rountree "guilty of Felony [sic], to wit: Murder of Human Being in the First Degree, in violation of Section 187(A) of the Penal Code, as charged in the first count of the Information." (6 CT 1723.)

Instructing the jury that it could convict Mr. Rountree of uncharged crimes violated Mr. Rountree's rights to notice of the charges against him, due process of law, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Calif. Const., art. I, §§ 7, 15, 16, & 17.) One particular aspect of that error, the instructions on first-degree felony-murder, was particularly egregious because it allowed the jury to convict Mr. Rountree of murder without finding the malice which was an essential element of the crime alleged in the Information. (U.S. Const., 5th, 6th, 8th &

14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423.) Nevertheless, this Court has held that "[f]elony murder and premeditated murder are not distinct crimes" (*People v. Nakahara* (2003) 30 Cal.4th 705, 712), and that a defendant may be convicted of first-degree murder even though the Indictment or Information charged only malice-murder in violation of section 187. (See, e.g., *People v. Hughes, supra*, 27 Cal.4th at pp. 368-370; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1034.) Mr. Rountree asks this Court to reconsider those decisions.

I. The Instructions to the Jury Were Unconstitutional Because the Jury was Not Required to Agree on Whether Mr. Rountree had Committed Premeditated Murder or Felony-Murder Before Finding Him Guilty of Murder in the First Degree.

The trial judge instructed the jury on first-degree premeditated murder (CALJIC No. 8.20; 6 CT 1606-1607; 18 RT 3165-3167) and on first-degree felony murder predicated on robbery or kidnaping. (CALJIC No. 8.21; 6 CT 1608; 18 RT 3167.) The trial judge also instructed that if the jurors found that Mr. Rountree had committed an unlawful killing, in order to convict him, they had to agree unanimously on whether he was guilty of first-degree murder or second-degree murder. (CALJIC No. 8.74; 6 CT 1630; 18 RT 3176.)

The trial judge failed, however, to instruct the jurors that they must agree unanimously on a theory of first degree murder in order to find Mr.

Rountree guilty of that charge. This error denied Mr. Rountree's right to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to the verdict of a unanimous jury, and his right to a fair and reliable determination that he committed a capital offense. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.) Mr. Rountree acknowledges that this Court has rejected the claim that the jury cannot return a valid verdict of first-degree murder without first agreeing unanimously as to whether the defendant committed a premeditated murder or a felony-murder (See, e.g., *People v. Carey* (2007) 41 Cal.4th 109, 132-133), but asks this Court to reconsider.

J. The Jury Was Unconstitutionally Instructed That It Could Not Return A Verdict of Second-Degree Murder Unless It Unanimously Acquitted Mr. Rountree of First-Degree Murder.

In accordance with California law, the jury was instructed with CALJIC No. 8.75 that "...The court cannot accept a verdict of guilty of second degree murder as to Count 1 unless the jury also unanimously finds and returns a signed verdict form of not guilty as to murder of the first degree in the same count..." (6 CT 1632-1634; 18 RT 3176-3179.) The instruction further instructed the jury that they must return a signed verdict form of not guilty as to both first and second degree murder before they could return a verdict of guilty as to the involuntary manslaughter count. (*Ibid.*)

The acquittal first instruction precludes full jury consideration of lesser-included offenses, and thereby implicates the due process and jury trial guarantees of the Sixth and Fourteenth Amendments and the Eighth Amendment's requirement for heightened reliability in capital cases. (U.S. Const. 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.) (*Zant v. Stephens, supra*, 462 U.S. at pp. 884-885; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305.)

Nevertheless, this Court has held that a jury must unanimously agree to acquit a defendant of a greater charge before returning a verdict on a lesser charge. (See, e.g., *People v. Nakahara, supra,* 30 Cal.4th at pp. 712-713; *People v. Kipp* (2001) 26 Cal.4th 1100, 1132; *People v. Carpenter* (1997) 15 Cal.4th 312, 394-395.) The Court should reconsider the propriety of this rule.

K. A Series of Standard Guilt-Phase Instructions Undermined the Requirement of Proof Beyond a Reasonable Doubt in Violation of Mr. Rountree's Constitutional Rights.

Due process "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." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage* v. *Louisiana* (1990) 498 U.S. 39, 39-40; *People* v. *Roder* (1983) 33 Cal.3d 491, 497.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle" (*In re Winship, supra,* 397 U.S. at p.

363) at the heart of the right to trial by jury (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 278). Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood [them] to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The trial court instructed the jury with CALJIC Nos. 2.01 [circumstantial evidence], 2.02 [sufficiency of circumstantial evidence to prove specific intent or mental state], 2.21.1 [discrepancies in witness testimony], 2.21.2 [false testimony by witness], 2.22 [force of evidence], 2.27 [testimony by one witness], 2.51 [motive], 8.83 [circumstantial evidence for special circumstances], and 8.83.1 [special circumstances - sufficiency of circumstantial evidence to prove required mental state]. (6 CT 1573-74, 1582-1586,1646, 1657-60 .) These pattern instructions violated the above principles and thereby deprived Mr. Rountree of his constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15) and trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const.; art. I, § 16). (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265.) They also violated the fundamental requirement for reliability in a capital case by allowing Mr. Rountree to be convicted without the prosecution having to present the full measure of proof. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17;

Beck v. Alabama, supra, 447 U.S. at pp. 637-638.) Because the instructions violated the federal Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 275.)

Mr. Rountree recognizes that this Court has previously rejected many of these claims (See e.g., *People v. Cleveland* (2004) 32 Ca1.4th 704, 750-751 [CALJIC Nos. 2.22, 2.51]; *People v. Riel* (2000) 22 Ca1.4th 1153, 1200 [false-testimony and circumstantial-evidence instructions]; *People v. Crittenden* (1994) 9 Ca1.4th 83, 144 [circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Ca1.4th 599, 633-634 [CALJIC Nos. 2.01, 2.02. 2.27]; *People v. Jennings* (1991) 53 Ca1.3d 334, 386 [circumstantial-evidence instructions]), but asks the Court to reconsider those decisions.

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XX. MR. ROUNTREE'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW.

Mr. Rountree's death sentence was unlawfully imposed in violation of international law, covenants, treaties and norms that bind the United States as the highest law of our land. This Court should review all of the arguments presented in this brief in light of the international standards for a fair trial. In particular, these standards affirm the right to life, an impartial tribunal, and a fair hearing. Those rights were violated during Mr. Rountree's trial, and the death judgment against Mr. Rountree should be reversed.

A. This Court Must Follow and Apply International Law.

The United States Supreme Court has recognized that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." (*The Paquete Habana, supra,* 175 U.S. at p. 700; see also *United States v. Pink* (1942) 315 U.S. 203, 230-231["state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement"]; *Murray v. Schooner Charming Betsy* (1804) 6 U.S. (2 Cranch) 64, 118 [courts must interpret domestic law consistently with international law] .) Thus, international law has provided an important basis for determining how our own constitution is to be

interpreted, including the evolving standards that inform the interpretation of the Eighth Amendment's prohibition against cruel and unusual punishment. (See *Roper v. Simmons, supra,* 543 U.S. 551 [citing international abolition of juvenile death penalty]; *Atkins v. Virginia, supra,* 536 U.S. at p. 316, fn . 21 [citing practices of the world community in prohibiting death penalty for mentally retarded offenders]; *Trop v. Dulles, supra,* 356 U.S. at p. 102 [referring to unanimity of the "civilized nations"].)

International law is determined by both treaty obligations and customary practices that define the law of nations. (*Siderman de Blake v. Republic of Argentina, supra,* 965 F.2d at p. 715 [content of international law determined by reference "to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators"]; *Restatement (Third) of the Foreign Relations Law of the United States, supra,* § 111(1) ["International law and international agreements of the United States are law of the United States and supreme over the law of the several States"]; and *Id.* at § 702, comment c ["[T]he customary law of human rights is part of the law of the United States to be applied as such by state as well as federal courts"].)

Even treaties and international agreements that are not ratified by a particular country may still be binding as demonstrating the customary law of nations. "International agreements create law for the states parties

thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted." (*Id.*, at § 102; see also *North Sea Continental Shelf Cases,* 1969 I.C.J. 3 [state practices may be deduced from treaties, whether ratified or not]; De la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right* (1994) 11 Harv. Blackletter J. 37, 41; Rest.3d Foreign Relations Law of the United States, § 324 ["an agreement among a large number of parties may give rise to a customary rule of international law binding on non-party states"].)

Courts in this country have acknowledged and followed the principles establishing the importance of international law. (See, e.g., *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba* (1983) 462 U.S. 611, 623 ["[the claim] arises under international law, which, as we have frequently reiterated is part of our law"]; *Banco Nacional de Cuba v. Sabbatino* (1964) 376 U.S. 398, 423 ["[I]t is, of course, true that United States courts apply international law as part of our own in appropriate circumstances"].) Moreover, in the area of human rights, numerous courts have recognized and applied international law. (See, e.g., *Jama v. United States Immigration and Naturalization Service* (D.N.J. 1998) 22 F. Supp. 2d 353; *Abebe-Jira v. Negewo* (11th Cir. 1996) 72 F.3d 844, 848; *Kadic v. Karadzic* (2d Cir. 1995) 70 F.3d 232, 246 ; *Hilao v. Marcos* (9th Cir. 1994) 25 F.3d 1467, 1474-1476; *Filartiga v. Pena-Irala* (2d Cir. 1980) 630 F.2d

876, 887.)

The body of international law that governs the administration of capital punishment by the State of California and the United States includes, but is not limited to, the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention Against All Forms of Racial Discrimination; the European Convention for the Protection of Human Rights and Fundamental Freedoms; and, the Vienna Convention on the Law of Treaties. Decisions of the Human Rights Committee (established under ICCPR, article 28) and other bodies interpreting these treaties provide authoritative guidance for this Court.

The purpose of these and other treaties is to require signatory nations, including the United States, to protect the rights of all people, including Mr. Rountree and others who have been accused of capital crimes. Human rights treaties are different from other treaties in that parties to human rights treaties agree to protect individuals within their jurisdictions, while parties to other treaties agree how to act with respect to each other. The "object and purpose" rule keeps state parties from eliminating important aspects of human rights treaties by making reservations to them, leaving its own citizens as well as other state parties

with no recourse. "[T]he true beneficiaries of the agreements are individual human beings, the inhabitants of the contracting states." (Rest.3d Foreign Relations Law of the United States, § 313, reporter's notes p. 184.) Accordingly, the rules found in these treaties and the customary law that they establish are directly enforceable in U.S. courts and are available as an alternate basis for granting relief. (See Jordan J. Paust, "Customary International Law and Human Rights Treaties are Law of the United States" (1999) 20 Mich. J. Int'l L. 301, 325-327.)

Accordingly, this Court must give effect to international law established through treaty provisions and customary application, regardless of whether it is interpreted as an independent requirement or as part of the "evolving standards" of the Eighth Amendment. (See *Atkins v. Virginia*, *supra*, 536 U.S at p. 312.) Under either interpretation, international law requires that both the guilt and penalty judgments against Mr. Rountree must be reversed.

B. The Right to Life

The "object and purpose" of the International Covenant is to bestow and protect inalienable human rights to citizens: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life." (Article 6, para. 1, International Covenant on Civil and Political Rights, June 8, 1992, 999 U.N.T.S. 171.) The right to life is a fundamental human right which is expressed throughout the

International Covenant. The death penalty clearly contravenes the "right to life."

The use of the death penalty in this country is increasingly at odds with other nations:

> The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . [and] with China, Iran, Nigeria, Saudi Arabia, and South Africa [under 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.

(*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *Ring v. Arizona, supra,* 536 U.S. at p. 618 (conc. opn. of Breyer, J.) [other nations have abolished capital punishment]; *People v. Bull* (1998 Ill.) 705 N.E.2d 824, dis. opn. of Harrison, J.)[127]

Article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable. (See Second Optional Protocol to the International Covenant on Civil & Political Rights, Aiming at the Abolition of the Death Penalty. Adopted by the General Assembly, December 15, 1989.)

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[127] Since this article was published in 1995, South Africa has abandoned the death penalty.

The Supreme Court of Canada has placed the use of the death penalty in the United States for ordinary crimes into an international context:

> Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist de facto (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan. . . . According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.

(*Minister of Justice v. Burns* (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.)

In particular, the nations of Western Europe are uniform in not using the death penalty (see, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma, supra,* 487 U.S. at p. 830 (plur. opn. of Stevens, J.)); *all* Western European nations have now abolished the death penalty. (See Cokley, *Whatever Happened to That Old Saying "Thou Shalt Not Kill?": A Plea for the Abolition of the Death Penalty* (2001) 2 Loy. J. Pub. Int. 67, 119-120.)

That uniformity of view among Western European nations is

especially important because our Founding Fathers looked to those countries for the "law of nations," as models of the laws of civilized nations, and for the meaning of terms in the Constitution. "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* (1871) 78 U.S. [11 Wall.] 268, 315 (dis. opn. of Field, J.), quoting 1 Kent's Commentaries 1; *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292.)

International law must be used in determining our constitutional standards. "'Cruel and unusual punishments' and 'due process of law' [are not] static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia, supra,* 408 U.S. at p. 420 (dis. opn. of Powell, J.).) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra,* 356 U.S. at p. 100; *Roper v. Simmons, supra,* 543 U.S. 551 [drawing from the practices of the international community]; *Atkins v. Virginia, supra,* 536 U.S. at p. 316, fn . 21 [citing practices of the world community in determining 8th Amendment

requirements].)

Thus, constitutionally "cruel and unusual punishment" is not limited solely to whatever violated the standards of decency of the civilized nations of Europe in the 18th century; it encompasses whatever violates *evolving* standards of decency. Eighth Amendment jurisprudence must recognize that the standards of decency of the nations of Europe have evolved, and in so doing re-examine the use of the death penalty in this country. These standards should now prohibit using a form of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose "standards of decency" are supposedly antithetical to our own. (See *Atkins v. Virginia, supra,* 536 U.S. at p. 316, fn. 21[the fact that the "world community" disapproves of executing the mentally retarded supports the conclusion that it violates the Eighth Amendment].)

Assuming *arguendo* that capital punishment itself is not contrary to international norms of human decency, using it as regular punishment for substantial numbers of crimes, rather than as an extraordinary punishment for extraordinary crimes, certainly is. The International Covenant on Civil and Political Rights, article 6(2), states: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes. . . ." The Human Rights Committee established under this treaty states that this section must be "read restrictively to mean that the

death penalty should be a quite exceptional measure." (General comment, International Covenant on Civil and Political Rights. Article 6.) Since the law of nations considers it improper to use capital punishment as regular punishment, it is unconstitutional in this country because international law is a part of our law. (*Hilton v. Guyot, supra,* 159 U.S. at p. 227 see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112.)

C. The Evidence in this Case Does Not Meet the Standards of International Law That Is Necessary Before a Death Verdict May Be Imposed

Even assuming that the death penalty may be imposed, international law imposes a particularly high standard that must be met in such cases. The standard adopted by the United Nations Economic and Social Council allows a death verdict only if there is clear and convincing evidence "leaving no room for alternative explanation of the facts." ("Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty," *supra,* ECOSOC Res. 1984/50, endorsed by the General Assembly in res. 39/118 of Dec 14, 1984, ¶ 4; see also *Albert Wilson v. Philippines*, United Nations Human Rights Committee, Communication No. 868/1999, adopted Oct. 30, 2003, p. 5 [applying standard]; European Union, "Policy Towards Third Countries on the Death Penalty," *supra,* General Affairs Council, June 29, 1998 [adopting standard]; Accordingly, this standard is part of the international customary and decisional law that this Court should apply. Because the record against Mr. Rountree does not preclude an alternative

explanation of the facts, the death penalty must be reversed.

As discussed in the arguments above, incorporated herein by reference, there was room in this case for an alternative explanation of the facts. As the prosecutor and trial court repeatedly noted, despite Mr. Rountree's repeated confessions to shooting Diana Contreras, all of the physical evidence pointed towards co-defendant Stroder as having been the shooter, and that Mr. Rountree only confessed because of his "savior" complex and desire to save Stroder. (See 17 RT 3105; 18 RT 3215, 3285-3313.) Under these circumstances, international law does not permit the death verdict to be imposed. (*Albert Wilson v. Philippines,* United Nations Human Rights Committee, Communication No. 868/1999, *supra*, at p. 5.)

D. The Right to an Impartial Tribunal

Mr. Rountree had a right to be tried before an impartial tribunal.[128] Under international law, the principle of impartiality, which applies to each individual case, demands that each of the decision-makers, including the jury, be unbiased. (See *Collins v. Jamaica* (1991) IIHRL 51,

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[128] The international standards refer to "tribunals" rather than courts. The right encompasses both juries and judges. For example, the European Court has defined a tribunal as a body which exercises judicial functions, established by law to determine matters within its competence on the basis of rules of law and in accordance with proceedings conducted in a prescribed manner. (See *Sramek Case*, 22 October 1984, 84 Ser. A 17, para. 36; *Le Compte, Van Leuven and De Meyere Case*, 23 June 1981, 43 Ser. A 24, para. 55.)

Communication No 240/1987 [impartial juries]; see also ICCPR, article 14(1) [criminal defendants entitled to fair hearing by impartial tribunal].)

The right to an impartial tribunal is fundamental. The Human Rights Committee has stated that it "is an absolute right that may suffer no exception." (*González del Río v. Peru*, (Communication No. 263/1987), 28 October 1992, Report of the HRC, vol. II, (A/48/40).) "The international standard on the issue of 'judge and juror impartiality' employs an objective test based on 'reasonableness, and the appearance of impartiality.'" (*William Andrews v. United States*, Report No 57/96, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 (1997) at ¶ 159.) Under this standard, "justice must not only be done, it must also be seen to be done." (European Court, *Delcourt Case*, 17 January 1970, 11 Ser. A 17, ¶ 31.) That the international standard is to be applied without exception should compel this Court to reverse the judgment without regard to standards of harmless error.

In this case, the jury selection procedures rendered Mr. Rountree's trial fundamentally unfair and violated Mr. Rountree's right to an impartial jury under international standards. In particular, the trial court empaneled jurors who had followed the case in the press, already thought Mr. Rountree guilty, were *angry* about the case, and one who was 95% convinced the death penalty was appropriate before the trial had even started. (Arguments I & II.)

The impartiality of the jury was also compromised by the trial court's

improper excusal of a potential juror because following the court's instructions might conflict with that juror's religion. (Argument III.) That excusal affected the impartiality of the tribunal by skewing the jury towards death-prone jurors and denying Mr. Rountree a jury drawn from a fair cross-section of the community. Accordingly, this Court should find that the jury selection process used in this case violated international standards for an impartial tribunal.

E. The Right to a Fair Hearing

The right to a fair hearing lies at the heart of the concept of a fair trial that is protected by both state and federal constitutional due process guarantees and international standards. Under international law, everyone is entitled to a fair hearing. This right encompasses all the procedural and other guarantees of fair trial laid down in international standards, but is wider in scope. It includes compliance with national procedures, provided they are consistent with international standards. Despite fulfilling all national and international procedural guarantees, however, a trial may still not meet the criterion of a fair hearing. (See, e.g., Universal Declaration of Human Rights (1948) G.A. res 217A (III), U.N. Doc A/810 at 71, Article 10; Article 14(1) of the ICCPR,; European Convention on Human Rights (1950) ETS 5, 213 UNTS 221, Article 6(1); American Declaration of the Rights and Duties of Man (1948) OEA/Ser.L.V./II.82 doc.6 rev.1 at 17, Article XXVI; American Convention on Human Rights (1969) OAS Treaty

Series No. 36, 1144 UNTS 123; 9 ILM 99, Article 8.)

The right to a fair hearing in criminal trials is specified by a number of concrete rights that are minimum guarantees. The observance of each of these guarantees does not, in all cases and circumstances, ensure that a hearing has been fair. The right to a fair trial is broader than the sum of the individual guarantees, and depends on the entire conduct of the trial. (See Human Rights Committee General Comment 13, para. 5; Advisory Opinion of the Inter-American Court of Human Rights, OC-11/90, Exceptions to the Exhaustion of Domestic Remedies, 10 August 1990, Annual Report of the Inter-American Court, 1990, OAS/Ser L./V/III.23 doc.12, rev. 1991, at 44, para. 24.)

In an advisory opinion sought by Mexico concerning failure to adhere to the Vienna Convention, the Inter-American Court on Human Rights has found that states may impose the death penalty only if they rigorously adhere to the fair trial rights set forth in the ICCPR. (OC-16/99, Inter-Am. Ct. H.R. (October 1, 1999).)

The 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*, No. 588/1994 (1996), H.R. Comm. para. 8.9 [delay of 51 months between conviction and dismissal of appeal to be violation of ICCPR art. 14, para. 3(c) and 5, and reiterating that imposition of a death sentence is prohibited where the provisions of the

ICCPR have not been observed]; *Reid v. Jamaica*, No. 250/1987, H.R. Comm. para. 11.5 ["[T]he imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes [. . .] a violation of article 6 of the Covenant."]; Report of the Human Rights Committee, GAOR, 45th Session, Supplement No. 40, Vol. II (1990), Annex IX, J, para. 12.2, reprinted in 11 Hum. Rts. L.J. 321 (1990) ["in capital punishment cases, the duty of state parties to observe rigorously all the guarantees for a fair trial. . . is even more imperative"].)

Mr. Rountree was denied his right to a fair hearing throughout his trial, as shown by the cumulative effect of all claims raised in this brief, which are incorporated herein by reference. In particular, Mr. Rountree's already death-prone jury never heard Mr. Rountree's two confessions, but only redacted versions that falsely showed Mr. Rountree as responsible for everything that had occurred. (Argument IV.) The trial court then gave numerous instructions that diminished the reasonable doubt standard, lowered the prosecution's burden of proof, and denied Mr. Rountree his only defense at guilt phase - that the killing had been accidental. (Arguments V-VII; XIX.) In the penalty phase, the trial court admitted inflammatory and impermissible victim impact evidence while simultaneously barring evidence that some members of the victim's family thought a life sentence was appropriate for Mr. Rountree. (Arguments XI & XII.) This resulted in a death sentence that was disproportionate to Mr.

Rountree's character, mental state, and personal responsibility. (Argument XV.)

Under these circumstances, Mr. Rountree's trial failed to meet the minimum guarantees of fairness required by international law. The judgment against Mr. Rountree must be reversed.

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XXI. CUMULATIVE ERROR REQUIRES THAT THE GUILT AND PENALTY VERDICTS BE REVERSED.

Even assuming that none of the errors identified by Mr. Rountree is prejudicial standing alone, the cumulative effect of these errors undermines the confidence in the integrity of the guilt and penalty phase proceedings. (*Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438- 1439; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476; *People v. Hill*, *supra*, 17 Cal.4th at pp. 844-845; *People v. Holt* (1984) 37 Cal.3d 436, 459.)

Even where no single error when examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be such that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at pp. 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"].)

Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace, supra*, 848 F.2d at p. 1476.) Reversal is required unless it can be said that the combined effect

of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of Mr. Rountree's trial. (See *People v. Hayes, supra,* 52 Cal.3d at p. 644 [court considers prejudice of guilt-phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial.

> "Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of Mr. Rountree, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in absence of error."

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase

requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

Other courts similarly have recognized that "what may be harmless error in a case with less at stake becomes reversible error when the penalty is death." (*Irving v. State* (Miss.1978) 361 So.2d 1360, 1363.) Accordingly, even if the individual errors are harmless on their own, the cumulative effect of these errors upon the penalty verdict must be examined with special caution. (See *Burger v. Kemp* (1987) 483 U.S. 776, 785 ["duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case"].)

Here, the trial court denied a motion to change the trial's venue and empaneled a jury - over Mr. Rountree's repeated objections - that had been saturated in media reports about the case, that contained jurors angry at Mr. Rountree and others ready to impose the death penalty before the guilt phase had even begun. (Arguments I & II.) Simultaneously, the court dismissed for cause a prospective juror with religious scruples about the death penalty who had repeatedly told the court he would follow its directions. (Arguments III.) Mr. Rountree's fate was effectively sealed when his jury was empaneled. (Arguments I-IV.)

In addition, that death-prone jury never heard Mr. Rountree's two

confessions, but only redacted versions that falsely showed Mr. Rountree as responsible for everything that had occurred. (Argument IV.) The trial court then gave numerous instructions that diminished the reasonable doubt standard, lowered the prosecution's burden of proof, and denied Mr. Rountree his only defense at guilt phase - that the killing had been accidental. (Arguments V-VII; XIX.) In the penalty phase, the trial court admitted inflammatory and impermissible victim impact evidence while simultaneously barring evidence that some members of the victim's family thought a life sentence was appropriate for Mr. Rountree. (Arguments XI & XII.) This resulted in a death sentence that was disproportionate to Mr. Rountree's character, mental state, and personal responsibility. (Argument XV.)

The cumulative effect of these errors so infected Mr. Rountree's trial with unfairness as to deprive Mr. Rountree of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643.) This Court can have no confidence in the reliability of the guilt and penalty verdicts in light of the combined effect of all the errors in this case, constitutional and otherwise. It cannot be satisfied that the errors were harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Accordingly, reversal of

the convictions, the special circumstance findings, and the death judgment is required.

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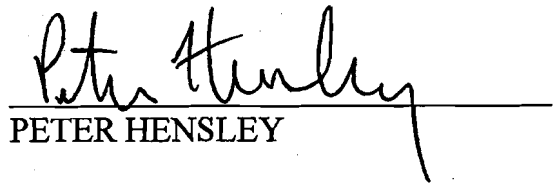
CONCLUSION

For all the reasons stated above, reversal of the convictions, the special circumstance findings, and the death judgment is required.

DATED: September 10, 2009

Respectfully submitted,



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CERTIFICATE OF COUNSEL

(Cal. Rules of Court, Rule 8.630(b)(2))

I, Peter Hensley, represent appellant in this automatic appeal. I conducted a word count of this brief using my office's computer software. On the basis of that computer-generated word count, I certify that this brief is 66,941 words in length.

Dated: September 10, 2009

PETER HENSLEY
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Re: *People v. Rountree* No. S048543
(Kern Sup. Ct. No. 57167-A)

I, Peter Hensley, declare that I am over 18 years of age, and not a party to the within cause; my business address is 315 Meigs Road, Suite A-382, Santa Barbara, CA 93109. A true copy of the attached:

APPELLANT'S OPENING BRIEF

was served each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

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Each envelope was then, on September ____, 2009, sealed and deposited in the United States Mail at Santa Barbara, California, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September ____, 2009 at Santa Barbara, California.

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Peter Hensley