IN THE SUPREME COURT OF THE STATE OF CALIFORNIA



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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CHRISTOPHER ALAN SPENCER,<br><br>Defendant and Appellant. | ) | Crim. S057242<br><br>Santa Clara County<br>Superior Court No. 155731 |

# APPELLANT'S OPENING BRIEF

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

HONORABLE HUGH F. MULLIN III JUDGE

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DEATH PENALTY

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| | ) | |
| Defendant and Appellant. | ) | |
| | ) | |

## APPELLANT'S OPENING BRIEF

## STATEMENT OF APPEALABILITY

This is an appeal from a judgment of death following a jury trial. This appeal is automatic. (Penal Code section 1239, subdiv. (b).)

## STATEMENT OF THE CASE

On January 30, 1991, a complaint was filed in Santa Clara County charging Daniel Silveria, John Travis, Matthew Jennings and Christopher Spencer in Count I with the murder of James Madden, committed on January 29, 1991, in violation of Penal Code section 187. Four special circumstances were alleged: That the murder involved an intentional killing while lying in wait; that the murder occurred during the commission of a robbery and a burglary; and the murder involved the infliction of torture. It was further alleged that defendants Silveria, Travis and Spencer, and each of them, personally used a dangerous and deadly weapon, to with a knife (Silveria, Travis,

Spencer) and a "stun gun" (Silveria) within the meaning of Penal Code section 12022, subdiv. (b). (1 CT 269-270.)[1]

Count II charged all defendants with the robbery of Madden, in violation of Penal Code section 211. Count III charged all defendants with defendants with the burglary of the store in which Madden worked, Leewards, in violation of Penal Code section 459. Count IV charged Silveria and Jennings only, with the burglary of Sportsmens Supply store on January 24, 1991, Count V charged Silveria and Jennings only, with the burglary of the Quick Stop Market, on January 24, 1991, in violation of Penal Code section 459. Count VI charged Silveria and Jennings only, with the robbery of Ramsis Yousseff, the Clerk at the Quick Stop Market, in violation of Penal Code section 211. Count VII charged Silveria, Jennings and Spencer only, with the burglary of the Gavilan Bottle Shop on January 24, 1991, in violation of Penal Code section 459. Count VIII charged Silveria, Jennings and Spencer only, with the robbery of Ben Graber, the Clerk at the Gavilan Bottle Shop, in violation of Penal Code section 211. (1 CT 269-270.)

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"CT" refers to the Clerk's Transcript on Appeal. "Aug. CT" refers to the Spencer Supplemental Clerk's Transcript. "ST CT" refers to the Supplemental Clerk's Transcript consisting of materials from the Silveria and Travis Clerk's Transcript. "RT" refers to the Reporter's Transcript on Appeal.

On March 25, 1991, information no. 145818 was filed in the Santa Clara County Superior Court, charging juvenile Troy Rackley with the same counts that were alleged as to the four adult codefendants. (1 CT 270.)

On April 3, 1991, an indictment (146127) was returned against the four adult defendants, Silveria, Travis, Jennings and appellant, alleging the same counts as alleged in the complaint except for Counts V and VII (the indictment did not charge the Quick Stop and Gavilan burglaries). The complaint was dismissed as duplicative. On April 4, the prosecution moved to consolidate no. 146127 with no. 145818. This motion was granted on April 8, 1991. (Aug. CT 38 11160-11655; 1 CT 270-271.)

On April 10, 1991, Rackley entered pleas of guilty to Counts IV, VI and VIII (the burglary of Sportsmen's Supply and the robberies at the Quick Stop Market and Gavilan Bottle Shop). Duplicative counts were dismissed, leaving only the murder and Leewards robbery and murder charges pending against him. (1 CT 272-273.) On September 20, 1991, Rackley was sentenced to seven years, eight months in the California Youth Authority for the burglary and robbery charges. (2 CT 408.)

On May 8, 1992, a second indictment (155731) was returned against the four adult defendants, alleging the same offenses as the prior indictment, 146127. (1 CT 231-236, 273-274; Aug. CT 39 11686-11691; 2 ST CT 458-463;.)

On June 3, the prosecution moved to consolidate nos. 146127, 145818 and 155731. On June 11, 1992, Rackley withdrew his previous time waivers. On July 10, 1992, the motion to consolidate was heard. The motion to consolidate Rackely's case

with that of the adult codefendants was denied. The trial court consolidated cases 146127 and 155731. No. 146127 was then dismissed pursuant to Penal Code section 1385. (1 CT 274-275.) Accordingly, the present case, no. 155731, proceeded against the adult defendants, Silveria, Travis, Jennings and appellant. On October 26, 1992, Rackley plead guilty to first degree murder with three special circumstances; and was sentenced to 25 years to life in state prison. (5 CT1471.)

On August 19, 1992, the four defendants plead not guilty to the charges contained in information no. 155731 and denied all special allegations. Attorney Susan Swanberg appeared on behalf of appellant. (1 CT 278.)

On March 26, 2003, counsel for all defendants joined in a motion filed by Silveria's counsel for discovery of certain grand jury information. On that date, the motion was granted in part. (2 CT 381.)[2]

On January 14, 2004, appellant moved to suppress evidence pursuant to Penal Code section 1538.5, and moved to suppress his statement as involuntary and in violation of *Miranda v. Arizona* (1966) 384 U.S. 436. Appellant on that date also moved to sever his case from that of the codefendants under the *Aranda/Bruton* rule (*People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123) and to exclude victim impact evidence .(3 CT 785-794; 816.)

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Between March 26, 1994 and January 10, 1994, the trial court dealt primarily with calendaring and discovery compliance matters (CT 382-784.)

On April 7, 1994, Appellant joined in previously filed motions to dismiss the indictment pursuant to 995 based on irregularities in the grand jury process and proceedings; and to dismiss the special circumstances. (9 RT 940; 8 ST CT 1950, 1959.)

On April 18, 2004, the motions to suppress the confession and to suppress physical evidence were denied, as were the motions to dismiss pursuant to section 995. (4 CT 959; 8 ST CT 1958, 1974.)

On April 29, 2004, appellant moved to dismiss the special circumstances on grounds that the "Three Strikes Law" (Penal Code section 667 et. seq.) superceded California's death penalty statute. (4 CT 1002.) This motion was denied on May 20, 1994. (4 CT 1044.)

On July 13, 1994, attorney Susan Swanberg was relieved as counsel of record in appellant's case and attorney James Mantell substituted in as counsel of record. (4 CT 1120.)

On January 20, 1995, the trial court denied appellant's motion to exclude victim impact testimony, but ordered that opinion's of the victim's family regarding the crime, the defendant and the appropriate sentence would not be admissible; and further, that prior to the admission of such evidence, the District Attorney would be required to demonstrate at an evidentiary hearing that the testimony to be presented to the jury was proper victim impact testimony within the meaning of Penal Code section 190.3, subdiv. (a). (4 CT 1135-1139.)

On April 6, 1995, the cases of Silveria and Travis were severed from the cases of appellant and Jennings, pursuant to the *Aranda/Bruton* rule, on grounds that it was impossible to redact the defendants' statements so as to render them admissible at a joint trial. (4 CT 1162.) The jury trial for Silveria and Travis was set for May 8, 1995. Appellant's and Jennings' jury trial was for July 27, 1995. The court ordered appellant and Jennings ordered to appear and monitor the Silveria/Travis trial; and further, that additional dates would be set as necessary. (4 CT 1164.) On October 30, 1995, Silveria and Travis were found guilty of first degree murder with special circumstances. (ST 1 CT2 2817, 2934.)

On February 15, 1996, and February 21, 1996, respectively, penalty phase mistrials were declared as to Silveria and Travis. (14 ST CT 3481, 3568.)

On May 30, 1996, appellant's case was severed from that of Jennings. (4 CT 1191.) Appellant was tried by himself and his jury trial commenced on June 10, 1996. The "torture" and "lying in wait" specials were dismissed. (4 CT 1195.)[3]

On September 9, 1996, appellant lodged an objection due process objection to the District Attorney's argument and the trial itself, arguing that the prosecutor in appellant's trial asserted that appellant was the most culpable defendant, whereas he had

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3 The Silveria/Travis case was pending, as least as to penalty, as of appellant's trial; so too was Jennings' case. (5 CT 1477-1478; 49 RT 18437, 85 22278, 22281.)

argued in the prior Silveria and Travis trial that those two defendants were the most culpable. (86 RT 22390.) This objection was overruled. (86 RT 22391.)

On August 21, 1996, the jury returned verdicts of guilty as to all counts applicable to him (renumbered Counts I-IV), and found the remaining special circumstances to be true. (5 CT1348.) On September 19, 1996, following a penalty trial, the jury recommended the death penalty. (5 CT1507.)

On November 7, a motion for modification of the verdict was denied. Appellant was sentenced as follows: Count I, death. As to the weapons allegation (Penal Code section 12022(b)) appellant was ordered to spend a year in state prison. As to Count II, robbery, the court imposed the midterm of three years, stayed pursuant to Penal Code Section 654. As to Count III, burglary, court imposed the midterm of two years in state prison, stayed pursuant to Penal Code Section 654. As to Count 4, robbery, the court imposed the midterm of three years in state prison. The sentences for the arming allegation as well as for Count IV, were ordered stayed pending the finality and execution of the sentence and judgment as to Count 1. (5 CT1508-1509.)

On November 18, 1996, a notice of appeal was filed on appellant's behalf. (5 CT1541.)

## STATEMENT OF FACTS

## I.
## GUILT PHASE - PROSECUTION'S CASE

The following summary is based entirely upon the testimony of prosecution witnesses, inasmuch as the defense called no witnesses during the guilt phase of the trial. (77 RT 21661.)

### A. THE PARTIES AND THE CIRCUMSTANCES OF THE CRIME

#### 1. DANIEL SILVERIA, JOHN TRAVIS AND JAMES MADDEN

The events that culminated in the death of James Madden in the early hours of January 29, 1991 actually began months earlier with the hiring and firing of Daniel Silveria and John Travis. About a year earlier, James Madden became the manager of LeeWard'sLeewards craft store located at 4175 Stevens Creek Boulevard in Santa Clara. (71 RT 20971; 20955; 73 21175.) Each employee was aware that the main safe in the store was kept in the manager's office because that is where the employees picked up their paychecks. (72 RT 21125.) Employees were also familiar with the routine for closing the store. While James Madden was manager of LeeWardsLeewards, Johnny Travis ("Travis") and Daniel Silveria ("Silveria") worked in the stock rooms. (71 RT 20976-20977.) From all accounts, Travis and Silveria were not model employees. In fact, they were often late or absent from work. (71 RT 20984)..) Around November 1990, just a few months after they had been hired, James Madden fired them both. (72 RT 21125.)

### 2. APPELLANT CHRIS SPENCER, DANNY SILVERIA AND JOHN TRAVIS

Chris Spencer lived in what was called the Rountable Area of San Jose at 208 Roundtable Drive. (71 RT 20894-20895.) The people he associated with were Silveria, Travis, Troy Rackley, and Matt Jennings. (71 RT 20902.) This group of five occupied an uninhabited cabin at 6775 Croy Road in Uvas Canyon, south of San Jose. (71 RT 20900; 73 21231.) While the house was owned by Mr. Charles Larson, he rarely went to the property. (73 RT 21223-21224.) Thus, it became the perfect hang out place for the group. Neighbors of the Larson property recalled the group coming and going from the Larson property and told Mr. Larson about the "squatters." (71 RT 20930; 73 21224.)

After he was told about the "squatters" Mr. Larson went out to his property to investigate and discovered personal items belonging to someone else. (73 RT 21237.) He immediately called the police. (73 RT 21226.) Among the items the police found were a newspaper article regarding the stun gun robberies, a paper bag containing a receipt for food purchased at a NobHill grocery in Gilroy, a Toys R Us application with Danny written on it, a Leewards name tag with Dan Silveria on it, and a piece of duct tape. (73 RT21239-21240.)

## B. ROBBERIES

### 1. SPORTMEN'S SUPPLY IN SAN JOSE

In January 1991, there was a burglary at the Sportmen's Supply store on Cambden Avenue in San Jose. (70 RT 20864.) During the burglary, the perpetrators,

later identified as Troy Rackley, Matt Jennings and Daniel Silveria, took guns out of the store, including a taser or stun gun. (70 RT 20864.)

### 2. GAVILAN BOTTLE SHOP ROBBERY

On January 21, 1991, Ben Graber was working at the GavilanGavilian Bottle Shop. (70 RT 20843.) Around 10:00 p.m. when Ben Graber was closing up the store, he was approached by three individuals and ordered to return to the store. (70 RT 20871, 20843 20844.) As he moved back inside the store, one of the individuals, later identified as Daniel Silveria, zapped him with a stun gun. (70 RT 20844.) When he was ordered to lie down on the ground, the robbers took money from Mr. Graber's wallet as well as from the cash register. (70 RT 20845.) They were unable to get into the safe, however because Mr. Graber did not have the combination. (70 RT 20847.) One of the individuals, later identified as Troy Rackley also took a bottle of liquor.

Later, when Officer Boyles conducted a photo line-up, Mr. Graber identified Daniel Silveria as one of the robbers. (70 RT 20873.) He did not identify Chris Spencer from the photo lineup as one of his assailants. (70 RT 20873-20874.) According to Officer De La Rocha of the San Jose Police Department, Chris Spencer told him that the robbery was Daniel Silveria's idea. (75 RT 21520.)

### 3. LEEWARDS

According to police, on January 28, 1991, Daniel Silveria, John Travis, Troy Rackley, Matt Jennings and Christopher Spencer went to Leewards craft store to commit a robbery. Manager Madden's vehicle was parked in the parking lot. Silveria, a former employee of Leeward's told Spencer to slash Madden's tires so that he could not get away when he was confronted. (See People's Exhibit 57 Spencer's statement).) Rackley served as the lookout and Jennings as the getaway driver.

When James Madden exited the store, Travis, Silveria, and Spencer surprised him. (People's Exhibit 57.) Upon confronting Madden they made him go back into the store and into his office. There they restrained him and bound him by covered his mouth with duct tape.

When they surprised Madden they triggered the security alarm. (People's Exhibit 57.) At the same time, 10:53 p.m., the alarm registered at Honeywell Protection Services ("Honeywell"), the company responsible for monitoring LeeWardsLeewards. Nine minutes later, around 11:02 p.m., Honeywell registered an irregular opening. (72 RT 21012.) It was at that time that Tina Marie Smith, an employee at Honeywell, called Leewards to assess the need for law enforcement. (72 RT 21012-21013.)

When the call came in, Chris Spencer removed the duct tape from James Madden's mouth so that he could speak with the alarm company. (76 RT 21563.) James Madden gave the alarm company the number on his passcard. Because he gave her the

number and did not indicate that anything was wrong, Ms. Smith concluded that the irregular opening was nothing to be concerned about and did not dispatch law enforcement to the location. (72 RT 21012-21013.)

After they removed the money from the safe, Silveria and Spencer started to leave when Travis said, "No. We have to kill him." (People's Exhibit 57.) He then ordered Spencer to kill Madden. Silveria used the taser on Madden. Spencer, Silveria, and Travis stabbed him and Travis delivered the last stab wound, apparently to Madden's throat. (People's Exhibit 57.) They left the store, leaving the knife. John Travis discarded the gloves. (77 RT 21625.)

With Jennings driving, all five left Leeward's in Spencer's black and red Dodge Charger. They first drove back to Uvas County before heading to Redwood City. (75 RT 21518.)

The robbery yielded $10,000.00 in cash and coins. (70 RT 20818.) They started making plans to leave San Jose. However, before leaving they used the proceeds from the robbery to buy cars and clothes. (74 RT 21279-21290; 21388.)

### C. THE ROBBERY INVESTIGATION

San Jose Police began investigating what they coined the "stun gun robberies" after the robbery of the Gavilan Bottle Shop. The officer in charge of the investigation was John Boyles. On January 28, 1991, an unidentified woman called the San Jose Police Department to speak with Officer Boyles. (70 RT 20861-20862)..) The caller, later identified as Cynthia, provided the names of the individuals she believed were

involved in the "stun gun robberies." The names she provided to Officer Boyles were Matt, Troy, and Danny. (71 RT 20883.)

An acquaintance of Spencer, Silveria, Travis Jennings and Rakley, Alice Gutierrez also , called police to tell them that two to three weeks before the LeeWardsLeewards incident, she saw Matt Jennings playing with the taser. (74 RT 21383.)

She called again later in the evening to speak with Officer Boyles, but he was unavailable, so she spoke with Sergeant George McCall instead. (71 RT 20883)..) She gave Sergeant McCall the first names of the individuals who were involved in the stun gun robberies along with the last names Silveria and Jennings. (70 RT 20862.) Gutierrez told McCall that the group was planning on committing another robbery that night and then leaving town. (71 RT 20908-20910.) Officer Boyles and Officer McCall passed that information along to Officer Brian Hyland of San Jose's M.E.R.G.E. Unit. (71 RT 20885, 70 RT 20868.) Officer Hyland entered Silveria's name in the computer system and came up with a Daniel Silveria with an address in San Jose. (71 RT 20891.)

With the names, Silveria and Jennings, Officer Hyland went to Matt Jennings' home where he found Jennings' brothers. (71 RT 20892.) While there he was told that Chris Spencer and John Travis were also friends of Jennings. There were five of them that hung out together. (71 RT 20893.)

Officer Hyland then went to Chris Spencer's home at 208 Roundtable Drive. He met Spencer's father who allowed him to search Spencer's room. (71 RT 20894-20895.)

In Spencer's room, the officer found a traffic ticket issued for Spencer's Charger. (71 RT 20896.)

From Spencer's home, Hyland went to Silveria's residence at 5490 Carry Back Avenue. At Silveria's home, he met Julie Snedley who informed him that the five guys were probably in Uvas Canyon, south of San Jose. (71 RT 20900.) Hyland also received information that the group was planning on leaving San Jose that night. (71 RT 20901-20902, 71 20909-20910)..) Ultimately, Officer Hyland was unable to make contact with Spencer, Silveria, Travis, Jennings and Rackley. (71 RT 20904.)

### D. THE INVESTIGATION OF JAMES MADDEN'S KILLING

At 7:00 a.m. on January 29, 1991, Cecilia Jenrick arrived at LeeWardsLeewards for her shift. (72 RT 21063-21069.) The door was locked, which was unusual. Edna Chapman, another employee, arrived at 7:45 a.m. (72 RT 21081.) Gail Carlisle, the assistant manager, arrived at around 8:00 a.m. with a key and opened the store. (72 RT 21081-21082; 70 RT 20823; 72 RT 21069.) When they entered the store, they noticed that the music was already on and the alarm had been disabled. (72 RT 21071; 21128.) Both conditions were unusual. They walked into the manager's office and discovered James Madden's body. (72 RT 21073, 21083.) According to Gail Carlisle, Madden's hands and his feet were taped together. There was also duct tape on his face. (72 RT 21083.) It was obvious to her that he was dead. She then called the police. (72 RT 21091.)

The autopsy revealed that Madden incurred multiple stab wounds, sustaining injuries to the throat and neck, abdominal wall, chest, lungs and heart. . (77 RT 21653-21655.) There wereare two burn marks on his body consistent with a stun gun. (70 RT 20822; 77 21652.)

Sergeant Ted Keech and Officer Jack Solderholm of Santa Clara Police Department were two of the first officers on the scene. (73 RT 21167; RT 21170.) After reviewing the scene and interviewing Carlisle, the officers concluded that whoever committed the robbery must have had some familiarity with the store's procedures. (74 RT 21353.)

The officers began their investigation with current employees and immediate past employees. (74 RT 21340.) They looked through the personnel files and settled on John Travis and Daniel Silveria, two employees who were recently terminated and who had a knowledge of the store. (74 RT 21341; 21353.) The officers decided to look for Travis and Silveria, along with David Anthony, the last employee to leave the store before James Madden was killed. (74 RT 21342.)

### E. THE ARREST

At around 6:46 p.m. on January 29, 1991, San Jose Police received a call that Matt Jennings and Troy Rackley were at Oakridge Mall in San Jose. (74 RT 21360; 75 21413.) Police officers arrived at Oakridge Mall and Sergeant Brandt and Officer Jean Edward Sellman stopped a Honda Civic and a Datsun 280Z. (75 RT 21416.) Rackley

and John Travis were in the Datsun. (RT 21437.) Daniel Silveria was in the Honda. (75 RT 21417.)

During a search of the Datsun, officers found $1,544 in the rear portion of the car and $1,131 in a black fanny pack. There was also a white fanny pack behind the passenger's seat in which there was approximately $33.40 in rolled coins. (75 RT 21438.)

In the Honda, the officers found a fanny pack with money. They also found the taser gun and silver duct tape. (70 RT 20825; 75 21419, 21429.) When asked where Spencer and Jennings were, Daniel Silveria offered to help police once he was away from Travis and Rackley. (75 RT 21478.)

The three individuals, Silvearia, Travis, and Rackley were transported to the San Jose Police Department. (75 RT 21439.) Because Rackley was a juvenile, he was transferred to and booked at the juvenile hall.

At the police station Silveria told officers that Jennings and Chris Spencer were planning on leaving town, with Spencer heading to Kentucky and Jennings to Reno, Nevada. (75 RT 21479.) Silveria also gave the police a description of the cars Jennings and Spencer were driving. Finally, he offered to page Jennings and ask Jennings to meet him so that the police could apprehend them. (RT 21482-75 21485.) Silveria called Jennings again and found out that Spencer and Jennings were at a friend's apartment. (75 RT 21487.)

Because Silveria did not know the address of the apartment where Jennings and Spencer were, the officers drove Silveria to the apartment, where he identified Spencer's car in the carport. (75 RT 21489.) Officers set up surveillance and later that same day, Officer Esquivel arrested Spencer and Jennings as they returned to the apartment. (75 RT 21499.)

### F. THE INTERROGATION AND SPENCER'S CONFESSION

San Jose Police Officers interrogated Silveria, Spencer, Travis, Jennings, and Rackley regarding the stun gun robberies. The four adults were advised of their Miranda rights and all but Jennings waived their rights and confessed to the robberies. (75 RT 21543.) Spencer admitted to driving the getaway car during the Gavilan Bottle Shop robbery. (70 RT 20827; 75 21510-21514.)

While looking for Silveria and Travis, Sergeant Keech and his partner Cusimano, learned that they were in the custody of the San Jose Police Department. A little past midnight on January 30, 1991 Cusimano and Keech arrived at the San Jose Police Department. They asked whether the suspects had been Mirandized. (75 RT 21540.) They were assured that they had been. (75 RT 21543.)

Officers Keech and Cusimano began interrogating Chris Spencer at 4:00 a.m. (75 RT 21547)..) Previously, at 11:30 p.m. the previous night, Chris Spencer had been interrogated by Officer George De La Rocha. (RT 21510.) Gradually, Chris Spencer

admitted his involvement in the robbery and homicide to Officers Keech and Cusimano. (75 RT 21553.)

Officer Keech testified that he believed Chris Spencer put a lot of the blame on the other suspects. (75 RT 21553.) His belief that Chris Spencer put a lot of the blame on the others was based on the theory of the case he developed using Daniel Silveria's interview. (76 RT 21566.)

## II.

## GUILT PHASE–DEFENSE CASE

Appellant challenged the prosecution's case by attacking via cross-examination, the police procedures employed in the course of the investigation. Appellant pointed out that no microscopic comparison was made on the torn edges of the duct tape found in Silveria's car and the torn edges of the duct tape used to bind the victim, which supposedly "matched." (76 RT 21594.) Although blood found on the knife at Leewards could only have come from the victim based on blood analysis under the "HBO" system, no DNA testing was done on the blood. (76 RT 21594.) Shoes recovered from the dumpster at the Oak Ridge Mall which were compared to casts of shoeprints found at Leeward's were apparently not retained. (RT 21634.)

Attempts by interrogating officers to trick appellant into making an incriminating statement, in this case by telling appellant that his fingerprints had been found on the knife used in the homicide when, in fact, no knife had at the time been recovered, is standard police procedure. (76 RT 21565.) It is also standard police procedure for

officers to take notes during interrogations; however, in this case, Officer Cusimano did not take notes during the police interview of appellant. (76 RT 21563.)

Appellant presented evidence during cross-examination that the coroner's photographs of the victim's shirt depicted more blood than was actually on the shirt when the victim was discovered, due to the manner in which the victim's body was transported to the coroner's office. (77 RT 21658-21659.) Appellant also objected to admission of multiple photographs of the victim's bloody remains. (72 RT 21058.)

## III. PENALTY PHASE

### A. PHYSICAL EVIDENCE OFFERED IN AGGRAVATION

Sergent Ted Keech, the Santa Clara detective who investigated James Madden's killing, testified in detail for the prosecution at the guilt and penalty phases. He identified the shirt James Madden was wearing when he was killed. (82 RT 21903.).) Sergeant Keech also identified defects in the shirt which, he testified, were "apparently" caused by a knife. (82 RT 21904.)

It was Sergeant Keech and the prosecutor who thought of the idea of displaying the shirt to try and persuade the jury that the attack against James Madden was especially vicious. Sergeant Keech and another officer designed the actual display. (82 RT 21906.)

SergentSergeant Keech admitted that the shirt shown to the jury contained additional blood that was not present on the shirt at the time the body was found. SergentSergeant Keech testified that additional bloodstains got on the shirt when the body was transported to the coroner's office. (82 RT 21905-21908.)

Dr. Pakdaman, the coroner who performed the autopsy on James Madden's body, testified in detail for the prosecution in both the guilt and penalty phases. According to Dr. Pakdaman, James Madden died of multiple stab wounds to the abdomen, chest and neck. (82 RT 21923, 21962.) Specifically, there were five superficial stab wounds to the neck with an additional stab wound penetrating the trachea. Madden was also stabbed in each lung and in the heart. (82 RT 21937-21939.) Dr. Pakdaman testified that his "guesstimate" was that James Madden died within "fifteen, twenty or thirty minutes" of being wounded. (82 RT 21935.)

Dr. Pakdaman confirmed that there was a difference between the amount of blood on Madden's shirt when the body was delivered to the coroner's office and th;e amount of blood on the shirt when Dr. Pakdaman viewed the body at the crime scene. (82 RT 21971.)

The prosecution was permitted, over defense objection, to offer photographs of the stun gun wounds on James Madden's body, although the "torture" special circumstance had been dismissed and it was clear based on the evidence that appellant did not use a stun gun on James Madden. (RT 9 974, 82 21909-21910.)

**B. WITNESS TESTIMONY OFFERED IN AGGRAVATION**

Susan Thuringer workeds in the biology department at University of California at Santa Cruz and wais a coworker of Shirley "Sissy" Madden, James Madden's wife. Ms. Thuringer recalled that on the morning of January 29, 1991, Sissy Madden came to work obviously upset. (82 RT 21880.) Ms. Madden told Ms. Thuringer and Kay House, their immediate supervisor, that her husband did not make it home the previous night and she feared something terrible had happened to him. (82 RT 21880.) Ms. Thuringer learned from a called a friend of hers who was the police chief of Watsonville that James Madden was in fact dead. (82 RT 21881-21882.) This information was confirmed by the Santa Clara Police Department. (82 RT 21883.)

Ms. Thuringer, Ms. House, and their boss, Bernice Frankl, together, told Ms. Madden that her husband had died. (82 RT 21883.)

Ms. Thuringer, Ms. House, Ms. Frankl, and Sergeant Lane drove Ms Madden home. (82 RT 21884.)

Later, while at home, Ms. Madden and her borother-in-law Jim Sykes told Julie, the Madden's eight-year-old daughter, that her father had died. Ms. Thuringer recalled that Julie became very upset when she was told. (82 RT 21884.)

Kay House, Ms. Madden's immediate supervisor, testified to the same facts that Susan Thuringer had testified to. (82 RT 21888-21890.)

Additionally, Ms. House testified that Ms. Madden still had a lot of trouble handling her husband's death. (82 RT 21890.)

Sergeant Bryan Lane was asked by Sergeant Keech to notify Ms. Madden of her husband's death. (82 RT 21893.).) Shortly after 10:00 a.m. on January 29, 1991, Sergeant Lane arrived at Ms. Madden'.s place of employment, the biology department at the University of California at Santa Cruz. Upon his arrival, he was told that Ms. Madden had already bee informed of her husband's death. (82 RT 21893-21894.) He then accompanied Ms. Madden and her coworkers to Ms. Madden's home.

## C. VICTIM IMPACT TESTIMONY

Eric Linderstrand, James Madden's brother-in-law, is Ms. Madden's broorther. Linderstrand testified that his sister and Sissy and James Madden married in 1979. (RT 21978.) According to Mr. Linderstand, when Sissy and James met and fell in love, Sissy became a new person. (83 RT 21979.) James Madden made her very happy. (83 RT 21979-21980.)

They had their daughter Julie in 1983. Mr. Linderstrand testified that James Madden went out of his way to do things for his daughter; . (RT 21979-21980.) James Madden was also devoted to her. (83 RT 21979-21981.)

After her father's death Julie did not want to go outside. She was afraid someone was after her. (83 RT 21983.) Her schooling was affected by her father's death and she had to take remedial classes. (83 RT 21984.)Ms. Madden His sister was also suffering, and even though she may not always show it, when she came out of her room, her eyes were red and you could tell that she has been crying. (83 RT 21984.)

James Madden was also a very good friend to Mr. Linderstand. (83 RT 21979.) They had common interests in golf and photography. James Madden was also a big help to Mr. Linderstrand's father, whom he assisted with home repair projects. Mr. Linderstrand testified that James Madden's death was so "unfair." (83 RT 21982.) He testified "God, this makes me so mad." (83 RT 21985.)

The next family member to testify was Judith Sykes, James Madden's older sister. (83 RT 21986.) As his older sister, Ms. Sykes was very protective of James Madden. To her he was very strong, gentle, and compassionate. (83 RT 21987.) They were very close. (83 RT 21988.) Her husband became good friends with James Madden. James Madden was a considerate husband who was supportive of Ms. Madden's work and her family. (83 RT 21990.) They had a good relationship. (83 RT 21989.)

After Julie's birth, Ms. Madden had postpartum depression, and James Madden helped the family through it. (83 RT 21992.)

Following James Madden's death, Julie has become very frightened. She will not let her mother out of her sight. (83 RT 21998-21999.) She also has nightmares. (83 RT 21999.)

James Madden and his mother, Joan Madden were very close. He was also close to his grandmother. (83 RT 21992.) When Judith Sykes was told that James Madden had been killed, Ms. Sykes had to inform her mother and her grandmother. (RT 21993.)

When she told her mother, her mother became hysterical. Her grandmother kept saying that "it can't be." (83 RT 21995.)

After the news, her grandmother became frightened if it was dusk and her daughter was not home yet. Ms. Sykes grandmother believes the world has become more violent. (83 RT 21997.) As for her mother, she lost her husband and now she lost her son. She was afraid that things would continue like that and she would end up by herself. (83 RT 22000.)

Shirley Ann Madden, or Sissy, James Madden's wife, testified that she and James Madden met in college. They were married in 1979 and had their daughter Julie on January 3, 1983. (83 RT 22001-22002.) James Madden became the manager of Leewards in Santa Clara in 1989. (83 RT 22002.)

Ms. Madden worked at the Biology Department at University of California at Santa Cruz. She had problems at work and he was very supportive. (83 RT 22003)..) James Madden was very loving. (83 RT 22002.) They had a very good relationship. (RT 22002.)

On January 29, 1991 at about 5:00 a.m. when James Madden still had not come home, she called Santa Clara Police. (83 RT 22009.) They sent an officer out to the store who checked the doors and said everything was fine. (83 RT 22010.)

Still worried, she called another Leewards manager but was unable to find out anything. (83 RT 22010-22011.) Later that morning, she dropped her daughter off at daycare and went in to work. (83 RT 22010.) It was at work she learned that her

husband was dead. (RT 22011.) She picked up Julie from daycare, took her home, and told her that her daddy was dead. (83 RT 22012.) Julie started screaming and crying. (RT 22012.)

Ms. Madden testified that she misses her husband terribly. She loved him very much and now she feels empty and incredibly lonely. (83 RT 22012.) Before he was killed the murder they had such a happy family, not that they are not happy now, it is just that something is missing. (83 RT 22012..) James Madden was a great pretty much the perfect dad and Julie adored him. (83 RT 22006.) James Madden did not mind taking care of Julie. He just loved her and she loved him. (83 RT 22006.)

His death has had a terrible impacted on the family. The murder has robbed Julie's of her innocence. She did not want to believe that her father was dead until she saw the coffin at the funeral. (83 RT 22014.)

For a year and a half she slept in the same bed as her mother. At the at age of twelve, she would not sleep in her room with the lights off. (83 RT 22013.) She has stomach aches and saw a therapist following her father's death. (83 RT 22013.)

At her school she cannot take part in any father-daughter functions. (83 RT 22014)..) The murder has also been hard on James Madden's mother Joan. (83 RT 22014.) Christmas, is also extremely hard, and on January 28, Ms. Madden does not even go to work. (83 RT 22015.)

Joan Madden, James's mother, .described her son as a good son. He was the kind of son a mother wishes for and which she got. (83 RT 22023.) He was loving,

warm, funny, and considerate. (83 RT 22024.) He grew up to be a fine young man who married a great girl. (RT 22024)..) During her testimony, Joan Madden began sobbing on the witness stand. (83 RT 22024.)

Joan Madden testified that when James Madden was a child, he was involved in Little League and Cub Scouts. (83 RT 22025.) He was into track, and was involved in his church and youth group. (83 RT 22025)..) He wanted to become a minister for a while, he performed lay sermons for his pastor. (83 RT 22025.)

While he was going to college, James worked as a puppeteer at Happy Hollow. (83 RT 22025.) He had a puppet crow by the name of Benjamin. (83 RT 22025.) Although he started college at San Jose State, he graduated from San Francisco State. (83 RT 22025.)

Joan continued to see James Madden a lot even after he and Sissy were married. (83 RT 22026.) About one week before Julie was born, Joan Madden's husband died of a heart attack. (83 RT 22028.) James Madden made all the arrangements for the funeral. (83 RT 22028.) James Madden and his grandmother were also very close. They were both Dodger fans. (83 RT 22029.)

Julie was daddy's girl. If daddy was working on the plumbing, Julie worked on the plumbing. He had a train set that she still has. (83 RT 22030.)

On January 29, 1991, she was told that James had been killed. (83 RT 22033.) Joan Madden's mother, James's grandmother, was hard of hearing before the his death. Since then she hears nothing because she simply gave up listening. (83 RT 22035.)

Julie has been "panicked" about James Madden's death murder. She would not let her mother go out on the patio because she was afraid that something was going to happen to her. Before James Madden's death, Julie and Joan Madden had a great relationship, but after his death, Julie would not leave her mother. (83 RT 22035-22037.) After two and a half years Julie would once again go out with Joan Madden again. (83 RT 22037.)

The loss continues to impact Joan every day and she has just learned to live with it. (83 RT 22038.)

**D. DEFENSE CASE IN MITIGATION**

Chris Spencer's life was marked by serious neglect. The defense told the jury that the neglect he suffered throughout the duration of his life was substantial and served as one explanation for his conduct. (84 RT 22046.)

Appellant grew up in Harlan County Kentucky. Harlan County is not a sophisticated metropolis, nor a place full of opportunity. To the contrary, it is a very remote and isolated place, located at the farthest point in Eastern Kentucky. It is very much Appalachian country. (85 RT 22205.) There are no major roads that go through Harlan County and the only reason a person would go there would be to visit someone living there; however, not many people visit this remote and desolate place. The people of Harlan County stay to themselves and do not take well to strangers coming to their town. (85 RT 22205-22206.)

Baxter, appellant's home town, is a coal mining town that has either a boom or bust economy as no other industry exists in Harlan County. The people of Harlan County are very, very, poor and most of the families are dysfunctional and have been broken apart. (85 RT 22206.) The family or inner circle in Harlan County includes everybody someone is related to. There are not a lot of daycare providers in Harlan County and people rely on family members to watch their children. (85 RT 22222.)

A middle class does not exist and kids there can rarely find an opportunity to better themselves. (85 RT 22205-22206.) The poorness of the community gives kids growing up there very little to hope for and very little to look forward to. Harlan County does not have any art or humanities programs available to the kids of the community, nor does it have a local YMCA or other outlet that the kids can go to and improve themselves. (85 RT 22208-22209.) Kids growing up in Harlan County have a very hard time adapting to the world outside Harlan County, and of the few kids who have seized the rare opportunity to leave and go to college, most soon return finding it too difficult to adjust to the world outside. In order for children from Harlan County to adjust to the outside world, they need a strong "solidified" and supportive family. (85 RT 22247.)

Given this history, things started to go wrong for Chris Spencer long before Jim Madden's death. (84 RT 22047.)

Elizabeth Howard, Chris's maternal grandmother, was married twice. She was married to her first husband for , who was shot and killed. to whom she had been married three years and then he, was shot and killed. Ms. Howard remarried and

remained married to her second husband for twenty-seven years. (84 RT 22048)..) She had five children from her second marriage: Robert Lee, Geraldine, Glenna, Bill, and Sally Joe Spencer, Chris's mother. (84 RT 22050)..) She has one sister and one brother, but she lost her brother in 1949 when he, too, was shot and killed. (84 RT 22051.)

With the exception of the fourteen years she lived in Oklahoma, Ms. Howard lived all of her life in Harlan County. (84 RT 22051.)

She moved to Oklahoma City in 1958. She lived there for two years, and then moved back to Harlan County. (84 RT 22051-22052.)

The primary industry in Harlan County was the coal mine industry. There were also some lumber companies, block companies and small business. (84 RT 22052.) In Harlan, Ms. Howard's husband supported the family as a baker. When they lived in Oklahoma City, her husband worked as a carpenter. The family moved back to Harlan after her second husband became ill. He later died of cancer. (84 RT 22052.)

After her husband died Ms. Howard had no source of income. She had no pension and the only money available to her was an $80.00 social security check meant for her and her children. (84 RT 22060-22061)..) To support her children, she had to start working. There were no jobs for single women in Harlan so she moved back to Oklahoma City and worked in a Woolworth store. (84 RT 22062.)

Like most who leave Harlan County, Elizabeth eventually moved back to Harlan County where she worked as a cook, waitress, and cashier in a restaurant. (84 RT 22059.) Elizabeth could never afford to own her own home, but in 1971, Jim Walters, a

co-op that builds homes for people who could not afford a house, built a home for her. At age 58, she finally had a home she could call her own. (84 RT 22062.)

Elizabeth's youngest daughter Sally married when she was sixteen. She left Harlan County. In 1970, Sally moved back to Harlan County. At the time she moved back, Sally was married to Alan Spencer, her second husband. (84 RT 22054.) Sally also had three children at that time, Delmar and Dabietta Cole from her first marriage, and Chris Spencer who was born in 1969. (84 RT 22054-22056.) Sally and her family lived in Harlan until 1983.

From 1970 to 1983, Elizabeth Howard watched her grandson appellant grow up in Harlan County. (84 RT 22056.) From what she could tell, Chris was an active child who was not a leader; nor was he aggressive. (84 RT 22057.) He liked nature and football. He was always obedient. (84 RT 22056, 22063.)

When Chris was about sixteen or seventeen years old and living with his family in San Jose California, Chris' mother learned that he was smoking marijuana. (84 RT 22110.) As a result, she sent him back to Harlan to live with his grandmother, Elizabeth. (84 RT 22058.) During this time, Elizabeth had no idea what Chris was doing because she worked all of the time, and she did not keep track of him. (84 RT 22059.)

All that Elizabeth Ms. Howard could remember about Chris' behavior during this period was that he did not attend school and he simply hung out with his family and friends. (84 RT 22059.)

Sally Spencer, Chris's mother was born in Harlan County Kentucky on May 20, 1945. (84 RT 22065.) She has two brothers and two sisters. Sally grew up in Harlan County and Oklahoma City. (84 RT 22066.) She lived in Oklahoma City for two years and then moved back there again and lived there for another year. (84 RT 22066.)

When her father became ill, her family brought him back to Harlan County, where he grew up, to die. (84 RT 22066.) When her father died, Sally was twelve years old. (84 RT 22066.) After he died, the family moved back to Oklahoma City because there was no work for a single woman in Harlan and her mother needed to work. (84 RT 22066.)

At age sixteen, Sally married and left home. (84 RT 22067.) Shortly, after they were married, she and her first husband moved from Oklahoma City to San Jose, California. Her first marriage lasted six and a half years and produced two children, Delmar Duane Cole and Dabietta Cole. (84 RT 22068.) During her first marriage, the family lived in San Jose, Oklahoma City, and the states of Washington State, and Oregon. (84 RT 22068.)

The marriage was not a good one, and while living in San Jose, Sally divorced her first husband. (84 RT 22069.) Two and a half years later, Sally was pregnant with Chris when she married his father, Alan Spencer, on March 3, 1969. (84 RT 22069.).) Chris was born a month after the marriage. (RT 22070.) They lived in San Jose until Chris was fourteen months old. (84 RT 22070.) In addition to Chris, the family

consisted of Sally's children from her first marriage, Delmar and Dabietta, and Alan's children, Tammy and Julia. (84 RT 22142, 22155.)

They decided to leave San Jose to get away from Sally's first husband, who had abducted and abused Sally. (RT 22071-22072). So in July 1970, they moved back to Harlan County to be near her family. (RT 22072). A year later, however, Alan insisted that Tammy and Julia move to Arizona to live with their real mother. (RT 22155.) They then fled San Jose toot get away from Sally's first husband who continued to harass Sally and who had abducted and abused her. (84 RT 22071-22072.).) In July 1970 the family moved toy returned Harlan County to be near Sally's family. (84 RT 22072.).) Along with Sally, Alan and Chris, Delmar, and Dabietta, Tammy and Julia moved in with them. (84 RT 22071)..) A year later after moving to Harlan, Alan insisted that his daughters, Tammy and Julia, move to Arizona to live with their real mother. (84 RT 22155) Sally and Alan's second child, Alisa (Lisa) Catherine Spencer was born in Harlan County on December 23, 1972. (84 RT 22070, 22078)..)

There was no work for Alan in Harlan. So, after a few months, Alan and Sally moved the family to Indiana. (84 RT 22074.) Months later, Sally and Alan separated. She moved back to Harlan with her children and Alan stayed in Indiana. (84 RT 22074.) When she first moved back to Harlan, Sally stayed with her mother. She later moved into her grandmother's two-room house and began receiving welfare benefits. (84 RT 22075.) The house they lived in was very small, just twenty-four by twenty-four feet. (84 RT 22081.)

Nine months passed and Alan, who at this time was having a difficult time getting paid for the construction work he was performing in Indiana, decided to reunite with his family by moving back to Harlan County. (84 RT 22125.) After Alan moved back to Harlan County, Tammy and Julia again also lived with them. (84 RT 22080-22081.) Thus, in the twenty-four by twenty-four foot house, there were six children and two adults. (84 RT 22081, 22084.) The house had only two and a half bedrooms for all eight of them. It was a prefabricated home with no central heating and no hot water. (84 RT 22081.) It was not until a couple of years later that they were able to get a water heater. (84 RT 22082.)

Family life was difficult for the Spencers. Julia lived with Alan and Sally unti l she was thirteen, when she ran away to Galveston, Texas. (84 RT 22158.) She was gone for two or three weeks before her father and Sally came to get her. (84 RT 22158.) By the time she was sixteen, Julia had run away from home about three or four times. (84 RT 22158.) At age sixteen she placed herself in a foster home because she wanted to get away from her father and Sally. (84 RT 22158.) Julia felt like her stepmother Sally did not want her and that no matter what she did it was never good enough for her father. (84 RT 22158.)

Alan struggled to find work in Harlan County. (84 RT 22125.) Eventually the family was again torn apart when Alan left Sally and the kids and moved back to San Jose, California. (84 RT 22076.) Alan stayed in San Jose for about ten months. While

he was away from his family he did not stay in touch, nor did he provide them with any financial support. (84 RT 22077.)

During this period, Sally divorced Alan and once again got back on welfare. She also worked when she could find employment. (84 RT 22077.) To support the family, Sally sporadically cleaned houses and worked in a restaurant on and off washing dishes and cooking. (84 RT 22077.) Chris was around two and half at the time. Some time later, Alan came back and the two remarried and have remained married ever since. (84 RT 22077.)

For about three years after he returned home to Kentucky, Alan worked for Sally's brother who ran a government-sponsored workshop for disabled people. (84 RT 22078.) After two and a half years of doing this, he quit and went to work for a hospital chain in their central maintenance department. (84 RT 22080, 22128.).) His job required him to travel through three states to perform a variety of maintenance and remodeling projects. (84 RT 22080.) Every week he left on Monday and did not return home until Friday. (84 RT 22129.) This continued for five years. (84 RT 22086-22087.) When he was at home, he was not very active or emotional with any of his children. (84 RT 22163.) He never told his children he loved them. (84 RT 22183.)

When his children were young and during the years he worked at the hospital, Alan was an alcoholic who drank all of the time. (84 RT 22127, 22163.) His children remember him as a mean and violent drunk. (84 RT 22163.) Later, he was diagnosed with a bleeding ulcer and stopped drinking. (84 RT 22079.)

During this period Sally was working the swing shift from 3:00 p.m. until midnight, at a restaurant. (84 RT 22086.) She relied on the older children to keep tabs on the younger ones while she was away. (84 RT 22084.) Her mother, who lived two houses away, also watched the children. (84 RT 22084.) After five years, Alan left the hospital's central maintenance department and started working in the coal mines. (84 RT 22086-22087.)

By December 1982, the family, included Lisa, Chris, Alan, and Sally. Despite becoming pregnant at age fifteen, Alisa stayed home with her parents and did not move out until she was seventeen. (84 RT 22190.) Julia left home for good when she was seventeen and pregnant by a married man. (84 RT 22161.) She later married, but after her marriage broke up she moved to California to once again live with Alan and Sally. (84 RT 22161.) Tammy also got married when she was sixteen and left home. She later married, but after her marriage broke up she moved to California toot once again live with Alan and Sally. (84 RT 22161.).) Delmar and Dabietta move out of the home, also. (84 RT 22090-22091, 22133-22134.)

Fourteen year old Chris, his sister Lisa and their parents left Harlan because neither Alan nor Sally could find work. First, the family went to Oklahoma City where Alan got a carpentry job helping his nephew. (84 RT 22136.) The family stayed in Oklahoma City for a couple of months, but the people Alan and his nephew were working for ran out of money so they were unable to complete the job. (84 RT 22087.) Alan and his family moved on to San Jose, California. Once in San Jose Alan quickly

found work as a carpenter. (84 RT 22136.).) Upon arriving in San Jose, Alan, Sally, Chris and Lisa moved in with Sally's daughter Dabietta, her husband Marion, and their infant daughter , Sarah. (84 RT 22089.)

Julia, was nineteen at the time, also came to California and stayed with them for a few months. (84 RT 22106.) At the time, Julia had a daughter named Antonia. (84 RT 22106.) Sally also testified that when the family lived in Harlan, Julia came to stay with them. While she lived with them, Julia ran away from time to time. According to Sally, Julia, she said was a very mixed up kid. (84 RT 22107.)

In San Jose, Sally worked for Rolm Electronics. (84 RT 22103.) Alan worked as a carpenter. (84 RT 22104)..) Later, Sally worked for BR Communications and was promoted to inspector before she was laid off. (84 RT 22105.) During this time Alan worked a lot of different jobs. (84 RT 22104.)

As a child Chris was always a good boy. (84 RT 22094.) His main interest was football. He played on regular teams beginning in the second grade. (84 RT 22094)..) Before football, Chris played basketball. (84 RT 22094)..) Alan was often not home so Sally went to Chris's games as often as she could, but a lot of the games were held while she was working. (84 RT 22095.)

Growing up, Chris and his friends played tag, football, baseball, and mountain climbed, and during the summer, the kids swam in the river. (84 RT 22099-22101.) Due to Alan's frequent absences and Sally's work schedule, these activities were mostly unsupervised. (84 RT 22100.) During Chris' adolescent years, his parents did not know

whether Chris was smoking, using drugs, or drinking because he was left unsupervised so often. (84 RT 22100-22096.)

Usually, Chris got along with his friends. (84 RT 22096.)

Like his grandmother, both of Chris' parents described him as a follower. (84 RT 22097, 22140.) Chris was not at all the person who would take charge and decide what the group would do. (84 RT 22098.) He went along with the suggestions of others. Chris let his friends take advantage of him. (84 RT 22095.) Chris showed this trait from a very early age. For example, when Chris was in Kindergarten, he got beat up by a bully. When his mother asked him why he did not fight back, Chris responded that he did not want to hit the bully because the bully was his friend. (84 RT 22095.)

Mr. Musick was Chris' football coach in junior high school and he also taught Chris' History class. (85 RT 22203.) Mr. Musick drove the school bvus to take the kids home from football practice. (85 RT 22204.) He also drove Chris home and as a result he came to know Chris well and developed a personal relationship with him. (85 RT 22204.)

Mr. Musick believed that Chris came from a dysfunctional family that had a hard time making ends meet. (85 RT 22204.) Chris had to fight and scratch for what he had to do at school. Sometimes Mr. Musick provided socks and shoes for Chris. (85 RT 22204.) He provided these items because he did not want Chris standing out from the crowd as far as his looks or attitude or how he felt about himself,. (85 RT 22204.)

Sometimes Chris' hygiene was not as good as the other students. To prevent the other kids from making fun of Chris, Mr. Musick offered Chris the use of the shower rooms at the school. (85 RT 22215.)

Chris was a good football player. "He played with a little heart." (85 RT 22213..)" He simply loved to play football. Mr. Musick believed that football would be the thing that kept Chris interested in school. (RT 22213.) That is why Mr. Musick pushed to make sure that Chris remained in school and in the football program. (85 RT 22213.)

Mr. Musick considered Chris an at-risk student. (85 RT 22215.) However, by eighth grade, Mr. Musick believed that Chris had finally reached a stable point in his life where he was doing well in football and in school. (85 RT 22216.) Chris was also looking forward to high school. (85 RT 22216.).) Mr. Musick was afraid that if Chris left Harlan County, he would fall in with the wrong crowd and would not have guidance to stay in high school. (85 RT 22217.)

For this reason he begged Chris' family to let him stay in Harlan County instead of moving to California. (85 RT 22216, 22217.) When he suggested that Chris stay in Harlan, Chris responded that it was his duty to go with his parents so as not to break up the family. (85 RT 22220.)

At around the age seventeen, Chris stopped going to school. (84 RT 22110.) It was also around this time that Chris told his mother that he had a problem with marijuana. (84 RT 22110.) Before Chris told her, Sally was unaware that he used

marijuana. (84 RT 22113.) She was also unaware that Chris used hard drugs. (84 RT 22113.) He did not want medical help, so she sent him back to Harlan to live with his grandmother, Elizabeth Howard. (84 RT 22110.)

Life with his grandmother in Harlan County did not prove beneficial to Chris. He did not listen to her and he did not attend school. (84 RT 22111.) Chris stayed in Harlan for a just a few months and then returned to California. (84 RT 22112)..) Once he returned home, he did not go back to school. He promised to go back, but neither of his parents saw to it that he kept that promise. Education was not important in the Spencer home. (84 RT 22184.) Chris never did go back to high school. In fact, none of Sally and Alan's children finished high school. Later, Chris did get his GED, however, as did his siblings Julia, and Dabietta. (84 RT 22112.)

In addition to abusing marijuana and other hard drugs, also apparent when Chris came back from Harlan, was his abuse of alcohol. Sally recalled seeing him intoxicated for the first time. (84 RT 22113.) As the alcohol problem escalated, Chris was arrested for drunk driving two weeks before his eighteenth birthday. (84 RT 22114.)

Sally knew Danny Silveria, John Travis, and Matthew Jennings. She did not know Troy Rackley, but the other three were occasionally at her home. (84 RT 22115-22116)..) She did not care for Matthew Jennings because he had too many girlfriends. (84 RT 22117.) She knew Danny Silveria because he was the cousin of Delmar's wife. (84 RT 22118.) She did not care much for Danny Silveria either. (84 RT 22118.) John

Travis was very polite, but she thought he was the mischief-maker. (84 RT 22119)..) He came over to get Chris even when Chris did not want to go out. (84 RT 22119.)

Chris was not especially close to his half sister Dabietta and his half brother Delmar because of the age difference. For example, Delmar was eight years older than Chris. (84 RT 22142.) Delmar did live in the same house with Chris in Kentucky and California; however, he divided his time between living with Sally and Alan and living with his biological father. (84 RT 22144-22145.)

When they lived in Kentucky, Delmar and his friends used marijuana and alcohol. (84 RT 22149.) Delmar did not include Chris in any of those activities. When they moved to California, however, Delmar obtained drugs or alcohol for Chris and they drank together. (84 RT 22149.)

Delmar knew Danny Silvearia. Danny is his cousin, by marriage. (84 RT 22050.) He also knew John Travis and Matt Jennings. (84 RT 22050.) They all used to go fishing and camping together. (84 RT 22050.) During these outings they would drink alcohol and use drugs like methamphetamine, marijuana, and cocaine. (84 RT 22151.)

Like Delmar, Lisa knew Danny Silveria, John Travis and Matthew Jennings. They all hung out together in a group of about twenty kids. (84 RT 22195.)

They came up with the plans for the group's activities. (84 RT 22195.) Chris was definitely a follower in the group, not a leader. (84 RT 22195.)

Growing up, Chris also drank and did drugs with his half-sister Julia. Julia, who is five years older than Chris, started drinking at age thirteen and started doing drugs at age fourteen. (84 RT 22155, 22176.) She used Quaaludes, toluene, alcohol, and a hallucinogens, including "acid" and "strawberry T." (84 RT 22164, 22169-22170.) One time Julia, Delmar and other friends were doing drugs when they got into an auto accident and both Julia and Delmar broke their backs. (84 RT 22147, 22165.)

Chris also started getting drunk on cheap wine at a very early age. (RT 22167.) When the family lived in Kentucky, Lisa, like Chris, also began drinking at an early age. She recalled she started drinking at age five. (84 RT 22192.) One time, when young Chris and Lisa got drunk, Alan and Sally did not find out because Chris fell asleep and Julia put Lisa to bed. (84 RT 22167.) It was not unusual in Harlan County for older children to give younger children alcohol, even children as young as five, six or seven years old. (85 RT 22227.) In Harlan County, alcohol was the big thing, as was marijuana, which was grown and hidden in the mountains. (85 RT 22227.)

In general, drug abuse was ignored in the Spencer household. Both Sally and Alan were aware but did nothing about Julia's drug abuse. Neither was drug use hidden in Chris' extended family. Chris, as well as the other children in the family, were aware of the drug subculture because their Uncles Joby and Clyde all smoked marijuana in front of him. (84 RT 22175.) Every time the children went to their aunt's house, there was alcohol. (84 RT 22192.).) The older boys would get the alcohol and start drinking.

Chris drank with them as well. (84 RT 22192.) Their cousins would also get alcohol from their Uncle Joby, and Chris and Lisa would drink this alcohol with their cousins. (84 RT 22192.).)

When Julia he moved out to California, she and Chris did cocaine together. (84 RT 22170.) Both Julia and Chris used cocaine in their home. (84 RT 22172.) They were both working at Sizzler and eventually Chris was fired. (84 RT 22170.) Chris' father was aware that Chris was using drugs. Once after he observed Chris, Alan remarked to Julie: "He's blitzed, isn't he?" She responded, "Dad, he's gone." (84 RT 22173.) That was the end of the conversation and there were no repercussions.

This was not an unusual response in the Spencer home. The home lacked discipline and concern. The children were not taught right from wrong and no matter what the behavior they engaged in, the parents either ignored it or acquiesced in it. (84 RT 22185-22186.)

Julia described her family as very dysfunctional. (84 RT 22180.)

"No matter what us kids done, it was okay." (84 RT 22182.) Julia was aware of the "experiment" to send Chris to live with his grandmother. (84 RT 22180.) She also knew that it did not work out. Chris was drinking and getting bad grades. (84 RT 22179.) "We were all responsible for what happened to Chris." (84 RT 22180.)

Julia strongly disagreed with Dabietta's statement to the investigator that Chris was taught "very strong values" by his "very close family." (84 RT 22185.) She agreed that Chris was taught the Bible and attended Sunday school until age seven. (84 RT

22185.) But she insisted that her family was dysfunctional and is responsible for what happened to Chris. (84 RT 22186.)

Alisa testified that she lived in Kentucky for almost eleven years before the family ended up in San Jose. (84 RT 22188.) She became pregnant at age fifteen. (84 RT 22190.) She stayed at home with her parents and did not move out until she was seventeen. (84 RT 22190.)

Lisa did not use drugs while she was living in Kentucky. It was in California, at age thirteen, that she started using drugs. (84 RT 22193.) She used crack cocaine, "crank," and powder cocaine. (84 RT 22193.) Chris also used these drugs and drank alcohol with her. (84 RT 22194.) Once they had a party at their home when her parents went out of town. There was alcohol, cocaine and acid at the party. (84 RT 22197.) Someone called the police. (84 RT 22197.) While the police discovered the alcohol, they did not find the cocaine and acid. (84 RT 22197.) No one was arrested.

Family and friends alike all describe Chris as a very likeable young man. According to Lisa, Chris was outgoing and kindhearted. (84 RT 22198.) If you had a problem, he would help you fix it. If you needed something, he tried to get it for you. (84 RT 22198.)

People liked Chris. Julia described Chris as was her little brother and he was a sweetie. (84 RT 22166.) Chris was the most lovable of all the group. He was the good child of the family who never got into trouble. (84 RT 22176.) He was fairly active and liked to draw. He also did not have a problem getting along with the other kids. But he

was definitely a follower. (84 RT 22166.) Mr. Musick described him as a very quiet individual. He was a follower and a people pleaser. (85 RT 22212.) Chris would do anything for his friends and his football teammates. (85 RT 22215-22216.) With regard to his teachers, Chris was respectful and a "yes sir, "no sir" type of individual. " (85 RT 22212.)

Furthermore, Chris was never disrespectful to Mr. Musick or to any of his other teachers. (85 RT 22212.) In his capacity as the main disciplinarian of the school, Mr. Musick never saw Chris in his office for a disciplinary issue. (85 RT 22212.) Chris, Mr. Musick concluded, was easy to influence because he was a pleaser, who had low self-esteem, and was a follower. (85 RT 22249.)

## ARGUMENT

## I

## THE TRIAL COURT ERRONEOUSLY GRANTED THE PROSECUTION'S CHALLENGE UNDER *WITHERSPOON V. ILLINOIS* AND *WAINWRIGHT V. WITT*, VIOLATING APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR AND IMPARTIAL JURY AND TO BE FREE OF CRUEL AND UNUSUAL PUNISHMENTS AND ARBITRARY IMPOSITION OF THE DEATH PENALTY. (U.S. CONST., AMENDS. VI, VIII, XIV; CAL. CONST., ART. I, SECS. 15, 16, 17.)

### A. Introduction and Summary of Claim

In *Witherspoon v. Illinois* (1968) 391 U.S. 510, the United States Supreme Court held that a state infringes a capital defendant's rights under the Sixth and Fourteenth Amendments to trial by an impartial jury when it excuses for cause, all those members of the venire who voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 522 [88 S.Ct. 1770, 20 L.Ed.2d 776].) Moreover, prospective jurors cannot be excluded for cause simply because they indicate there are some kinds of cases in which they would refuse to recommend capital punishment. (*Id.* at p. 522, fn. 21.) At most, the state can demand that a juror be willing to *consider* all of the penalties provided by state law and that he not be predisposed before trial to vote against the penalty of death regardless of the facts and circumstances developed at trial. (*Ibid.*)

If the voir dire indicates that a prospective juror was excluded on *any* basis broader than this, the death sentence cannot be carried out. (*Ibid.*) It cannot be assumed that a juror's position is one against capital punishment unless that prospective juror unambiguously states that he or she would automatically vote against capital punishment

no matter what the trial may reveal. (*Id.* at p. 515-516, fn. 9.) The court made clear that a challenge for cause exercised in conflict with its holding would deny the defendant's rights under the Sixth and Fourteenth Amendments. (*Id.* at p. 518; accord, *Adams v. Texas* (1980) 448 U.S. 38, 40 [100 S.Ct. 2521, 65 L.Ed.2d 581].)

The *Witherspoon* principles were further refined in subsequent cases. For example, the Supreme Court, in *Davis v. Georgia*, made clear that a violation of the *Witherspoon* standards requires that a judgment of death be set aside, even if only one prospective juror was improperly excused for cause. (*Davis v. Georgia* (1976) 429 U.S. 122 [97 S.Ct. 399, 50 L.Ed.2d 339].)

In a later case, the Supreme Court clarified the standard for judging the proper exclusion of a juror opposed to capital punishment. (*Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841].) In *Witt*, the Court refined the Witherspoon holding, finding that a prospective juror who expresses conscientious objections to capital punishment may not be excused unless the juror's beliefs would "substantially impair" the performance of the juror's duties. (*People v. Abilez* (2007) 41 Cal.4th 472, 497-498, *citing Witt* and *People v. Roldan* (2005) 35 Cal.4th 646, 696.) However, even if jurors firmly believe that the death penalty is unjust, they nevertheless may serve in a capital case as long as they clearly state they are willing to set aside their beliefs temporarily in deference to the rule of law. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176 [106 S.Ct. 1758, 90 L.Ed.2d 137].)

Similarly, in *People v. Kaurish* (1990) 52 Cal.3d 648, 699, this Court recognized that a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty. Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted (" . . . you are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider . . . " (CALJIC 8.88, emphasis added)), the circumstances that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will "substantially impair the performance of his (or her) duties as a juror" under *Witt*.

Thus, the fact that a juror, due to his or her philosophical objections to the death penalty, would have a higher threshold for finding an appropriate case for the death penalty is not disqualifying, unless there is no realistic possibility that the juror could ever find the death penalty to be "appropriate" or "warranted." Absent this circumstance (and there is no evidence of it in the present case, as demonstrated below), the prospective juror is not "substantially impaired" if the juror clearly indicates that he or she would vote for the death penalty, if he or she found it to be warranted in

the case before it (an "appropriate case"), even taking into account the juror's unusually high threshold for finding any case to be an "appropriate case." *People v. Stewart,* (2004) 33 Cal.4th at p. 447, citing *People v. Kaurish supra*, 52 Cal.3d 648.)

In the present case, prospective juror C-67 was dismissed for "cause" based on his personal views opposing the death penalty. However, as demonstrated below, this dismissal was improper and in violation of *Witt* and the foregoing legal principles because none of the juror's responses to questions propounded provided any evidence of substantial impairment. Many of the inquiries propounded to the juror, while arguably useful in determining the juror's general views on the death penalty, were not framed in such a manner as to uncover "substantial impairment," and the juror's responses to these questions, therefore, were, therefore, at best inconclusive on the subject. As to those questions which did bear directly on the issue of "substantial impairment," the juror's responses affirmatively demonstrated that he was *not* substantially impaired. In either case, there was no evidence of substantial impairment.

Therefore, appellant was denied his state and federally protected constitutional rights to due process and a jury trial, as well as his right to be free of cruel and unusual punishments and arbitrary imposition of a death sentence.

**B. The Error**

**1. The Juror's Responses**

Here, the trial court conducted the following *voir dire* of prospective juror C-67 regarding the juror's views on the death penalty:

Q: [By the court]: Okay, now, also, when you were here previously, I indicated that it's possible this case could be tried unlike the usual criminal case in that it could possibly have two parts or two phases.

The first phase is like the usual criminal case where the jury hears the evidence out here in court, the arguments of counsel, the instructions on the law, and then they go back and deliberate to determine whether or not the defendant is guilty or not guilty. And they have to do so without in any way considering penalty or punishment.

Okay?

A: Right.

Q: Okay. Now, again, in order to explain the second phase, we have to assume certain things. By this assumption, I'm not saying it's going to happen or not going to happen.

But assume that in this first phase, the guilt phase, the jury found the defendant guilty of murder in the first degree and at least one special circumstance was found to be true. Then, and only then, do we get into the second part of the trial, which is called the penalty phase, where the jury has to, for the only time, consider which penalty is appropriate.

They do this after considering evidence in the form of what we call circumstances in aggravation and mitigation. A circumstance in aggravation can be a negative or unfavorable thing about the defendant or the case. A circumstance in mitigation can be a favorable or positive thing about the defendant or the case.

The jury also hears additional arguments of counsel, instructions on the law from the Court, and then goes back to determine which penalty is appropriate.

Now, with this long explanation n mind, if you were a juror participating here, first of all, in the guilt phase, the first part, would you be able to keep an open mind throughout the course of the guilty phase, that is, not make up your mind until you've heard everything out here in court that you're supposed to and then had a chanced to go back and deliberate?

A: Yes, I think so.

Q: When you go back there to deliberate, do you think you would be able to do so without in any way considering the subject of penalty or punishment?

A: Excuse me?

Q: In the guilt phase, when you went back to deliberate, during deliberations would you be able to go through those without in any way considering the subject of penalty or punishment?

A: Yes.

Q: It's not an issue at this point.

All right, now assume again that you're a juror participating here and we find ourselves in a penalty phase. Again, would you be able to keep an open mind throughout the course of the penalty phase, not make up our mind until you've heard everything out here in court that you're supposed to hear and had a chance to go back and deliberate?

A: Yes.

Q: Do you think you would automatically vote for one of those penalties simply because you might favor it over the other one?

A: Well, in the questionnaire, there were—there was a lot of discussion about the death penalty.

Q: Right.

A: And I suppose I have a lot of reservations about that, as my answers probably indicate.

Q: All right. With your reservations about the death penalty in mind, do you think in a penalty-phase determination during deliberations, do you think you would always vote against the death penalty despite any aggravating or negative evidence that may have been presented?

A: I don't know. I've never had to be in that situation before.

Q: All right. Let me ask you another assumption type question. Assume that as a juror you had found that the defendant had deliberately participated in the multiple stabbing of the victim in this case during the course of a robbery and the victim died. Do you think you would always vote for life without parole and reject death despite any of this negative evidence that may have been presented during the course of the trial?

A: Well, this is obviously the hardest single thing in that whole thing for me and I don't know.

Q: All right. Let me ask you this: Assume that you sat through the penalty phase, and this is after the guilt phase, and you had all this evidence about the crime itself, you've had back ground evidence about the defendant, all the evidence is in, you're back in the jury room, you've been back there for some time because you've been discussing the case with your fellow jurors, during deliberations you listen to their views and they put forth their views and in your own mind based on the evidence and the law you believe the death penalty is appropriate in this case, would you vote for it?

A: Well, if I believed the death penalty was warranted in the case, but for me to believe that the death penalty is warranted is the whole issue.

Q: Do you think the death penalty would ever be warranted in any kind of a case?

A: Yes.

Q: Do you think that it would be possible for you to vote for the death penalty in a given case without going into what that case might be?

A: I can imagine things horrible enough to get me to vote for the death penalty, I suppose. . . . (64 RT 19978-19982.)

In his juror questionnaire, prospective juror C-67 answered questions 149 and 150, respectively, as follows:

Question 149

Given the fact that you will have two options available to you, can you see yourself, in the appropriate case, rejecting life in prison without the possibility of parole and choosing the death penalty?" Answer: "No." (64 RT 19982.)

Question 150:

In a capital case, the factors in aggravation and mitigation upon which a penalty decision must rest are set forth in a law will be given to you by the judge. (64 RT 19983.)

Can you set aside any preconceived notions you may have about the death penalty, and make any penalty decision in this case based upon the law as it is given by the judge?

Answer: "My true beliefs are not preconceived notions that can be set aside."

The prosecutor challenged the prospective juror for cause under *Witherspoon* and *Witt.*

The trial court sustained the challenge and dismissed the juror, concluding that he was "substantially impaired and would not be able to follow his oath as a juror in this case." (64 RT 19983.)

Based on Prospective Juror C-67's responses, the prosecutor challenged the prospective juror for cause under *Witherspoon* and *Witt*. The trial court sustained the challenge and dismissed the juror, concluding that he was "substantially impaired and would not be able to follow his oath as a juror in this case." (64 RT 19983.) This ruling was erroneous, as Juror C-67's responses do not support a finding that he was "substantially impair[ed]" thus, depriving appellant of his federal constitutional rights as described above, and necessitating reversal of the penalty judgment.

Appellant contends that the trial court erred when it granted the People's challenge for cause of Prospective Juror C-67. As appellant will show, the granting of the challenge was contrary to clearly established federal law, set forth in a number of United States Supreme Court decisions, precluding the prosecution from challenging a

juror for cause absent a showing that the juror holds views concerning the death penalty that prevent or substantially impair the performance of her duties as a juror. In this case, Prospective Juror C-67 expressed a reservation about being in the unfamiliar situation of imposing a sentence of death against a fellow human being, but nevertheless, unequivocally stated he recognized there were cases where the death penalty was warranted and further he could imagine himself imposing such a punishment. Prospective Juror C-67 expressed views that support his ability to perform the duties of a juror. He expressed no views about capital punishment that would have prevented or substantially impaired her ability to perform those duties.

In total, Juror C-67's responses expressed concern that he would have difficulty voting for the death penalty, at least in part because he did not know how he would react in an unfamiliar situation in which the life of another person was at stake. This position does not disqualify Prospective Juror C-67 nor is it unusual because many jurors experience such uncertainty. "Many . . . veniremen may not know how they will react when faced with imposing the death sentence . . . (*People v. Lewis* (2008) 43 Cal.4th 415, 483.) Indeed, such uncertainty is a critical component of a morally defensible capital sentencing scheme; i.e., a clear understanding by penalty jurors of the grave responsibility confronting them. It is the gravity of this responsibility that helps ensure that the death penalty will be reserved for only the most heinous crimes; i.e., the "worst of the worst." (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 332-333; *People v. Carasi* (2008) 44 Cal.4th 1263, 1316.) That Prospective Juror C-67 expressed such uncertainty

is in reality a fact rendering the juror highly qualified to be a penalty juror, rather than the reverse.[4]

While Prospective Juror C-67 expressed hesitancy in imposing a sentence of death, he never stated he could not do so and his questionnaire answers and voir dire responses failed to expose substantial impairment in his ability to perform his duties as a juror. As demonstrated below, this dismissal was improper and in violation of *Witt* and the foregoing legal principles. Therefore, appellant was denied his state and federally protected constitutional rights to due process and a jury trial, as well as his right to be free of cruel and unusual punishments and arbitrary imposition of a death sentence.

**2. There is no evidence of substantial impairment**

At the outset, it is apparent that the juror's his answers did not indicate that juror C-67 would have been "substantially impair[ed]" in the performance of his duties as a juror.

Under the law in California, a penalty juror weighs the factors in mitigation against the factors in aggravation, and affording such moral value to each factor as the juror deems proper, to vote for the most appropriate penalty. That is, after engaging in

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Defense counsel pointed this out in arguing against the prosecutor's challenge of prospective juror C-67: "It's clear that he [juror C-67] certainly is no great enthusiast for the death penalty and he recognizes that it would be a major crisis of conscience to have to consider it. I don't think that's a substantial impairment. In fact, I think that's what the law basically prefers." (64 RT 19983, emphasis added.)

this weighing process, if the juror finds the aggravating factors to be so substantial in comparison to the mitigating factors that it warrants death instead of a sentence of life without the possibility of parole, the juror is to vote for the death penalty; otherwise, the juror is to vote for life without the possibility of parole. (CALJIC 8.88.)

If a prospective juror, due to his or her moral or philosophical objections to the death penalty, would be unable to, or would have great difficulty in, voting for the death penalty even where such a vote is warranted, that juror is "substantially impaired" under *Witt* and *Witherspoon*. (*People v. DePriest* (2007) 42 Cal.4th 1, 22 imposing capital punishment even in an appropriate case].)

As stated, the fact that a juror, due to his or her philosophical objections to the death penalty, would have a higher threshold for finding an "appropriate case" for the death penalty in the first instance, or even would have great difficulty in finding an "appropriate case," is not disqualifying, unless there is *no* realistic possibility that the juror could *ever* find the death penalty to be "appropriate" or "warranted." Absent this circumstance (and there is no evidence of it in the present case, as demonstrated below), the prospective juror is not "substantially impaired" if the juror clearly indicates that he or she would vote for the death penalty, if he or she found it to be warranted in the case before it (an "appropriate case"), even taking into account the juror's unusually high threshold for finding any case to be an "appropriate case." *People v. Stewart*, *supra*, 33 Cal.4th at p. 447, citing *People v. Kaurish supra,* 52 Cal.3d 648.)

**(a) On the only occasion when Juror C-67 was squarely confronted with the question whether, in an appropriate case (that is, a case in which he thought the death penalty was warranted), he would vote for the death penalty, he unequivocally stated that he would**

The record discloses the following questions propounded to juror C-67, and the following answers obtained:

Q: Do you think the death penalty would ever be warranted in any kind of a case?

A: Yes.

Q: Do you think that it would be possible for you to vote for the death penalty in a given case without going into what that case might be?

A: I can imagine things horrible enough to get me to vote for the death penalty, . . (64 CT 19981-19982.)

*As a matter of law*, nothing in the above responses offer any evidence of "substantial impairment" within the meaning of the Witt and Witherspoon cases and their progeny.

**(b) Nothing about the juror's other responses suggest a contrary result because none of the court's questions, and none of the juror's answers, directly addressed the question of the juror's possible impairment. Therefore, the juror's responses did not disclose evidence of substantial impairment**

Juror C-67 was asked if he would always vote for one penalty or the other, without specifying which penalty he would vote for. The juror acknowledged that he had a lot of reservations about the death penalty, without indicating that he would vote for one penalty or another in every case.

The juror then stated:

A: I don't know. I've never had to be in that situation before. (64 RT 19980.)

As indicated above, Juror C-67's responses expressed concern that he would have difficulty voting for the death penalty, not necessarily because of his philosophical views, but because he did not know how he would react in an unfamiliar situation in which the life of another person was at stake. This position is not disqualifying nor unusual because as noted many jurors experience such uncertainty. "Many . . . veniremen may not know how they will react when faced with imposing the death sentence . . . (*People v. Lewis* (2008) 43 Cal.4th 415, 483.) Indeed, such uncertainty is a critical component of a morally defensible capital sentencing scheme; *i.e.*, a clear understanding by penalty jurors of the grave responsibility confronting them. It is the gravity of this responsibility that helps ensure that the death penalty will be reserved for only the most heinous crimes; *i.e.*, the "worst of the worst." (*Caldwell v. Mississippi, supra,* 472 U.S. at 332-333). That juror C-67 expressed such uncertainty is in reality a fact rendering the juror highly qualified to be a penalty juror, rather than the reverse.[5] In any case, inasmuch as the juror's response, on its face,

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Defense counsel's argument arguing against the prosecutor's challenge of prospective juror C-67, merits emphasis here: "It's clear that he [juror C-67] certainly is no great enthusiast for the death penalty and he recognizes that it would be a major crisis of conscience to have to consider it. I don't think that's a substantial impairment. *In fact, I think that's what the law basically prefers.* If he had said at any point that I'm not going to do this, I'm not going to follow the law, I'm not going to listen to reason—*but he hasn't said those things.*" (64 RT 19983, emphasis added.)

did not reflect uncertainty which could be attributed to the juror's views on the death penalty, and did not distinguish the juror from most other prospective penalty phase jurors, juror C-67 was not disqualified under *Witt* and *Witherspoon*. At worst, these answers were inconclusive on the issue of 'substantial impairment" under *Witt* and *Witherspoon*.

The trial court further pursued the issue with Juror C-67. The court asked the juror a question, fairly construed, as follows: Whether the juror could impose the death penalty if the crime involved a robbery during which someone, not necessarily the defendant, stabbed a victim more than once, and that victim died. The juror replied that he did not know if he would always vote for the death penalty. (64 RT 19981.)

Again, the juror's response was inconclusive and did not address the issue of substantial impairment within the meaning of *Witt* and *Witherspoon* and cast no additional light on that issue. The aggravating circumstances the juror was asked to comment upon (robbery murder; victim stabbed more than once) was, in effect, nothing more than a "routine" felony murder. There was nothing about the circumstances of the crime described by the court that suggested it might represent "the worst of the worst" in the universe of first-degree murders. That being the case, the juror's lack of certitude as to whether he could impose the death penalty in that hypothetical offense is no evidence of impairment. Under the facts given, most if not all penalty jurors, save most stridently *in favor* of the death penalty, would be unable or at least unlikely to impose the death penalty, or at least uncertain, as was this juror.

Apparently acknowledging the inconclusiveness of the response, the court, for the first time, squarely joined the issue of whether the juror could impose the death penalty if it were warranted. The juror without equivocation stated that he could. (64 RT 19981.) The juror then, on his own, identified the issue of what it would take for him to find the death penalty to be warranted in the first instance, suggesting a relative high threshold on the part of this juror for purposes of finding the death penalty to be warranted in a given case. (*Id.*)

Once again, seemingly aware that a mere high threshold for finding an "appropriate case" not to be disqualifying fact, but having established for the without equivocation that the juror would vote for the death penalty assuming an appropriate case could be presented, the court, for the first time, directly framed the issue of whether the juror could ever find an "appropriate case." As noted in the previous subsection, the juror unequivocally indicated that he could:

"Q: Do you think the death penalty would ever be warranted in any kind of a case?

A: Yes." (64 RT 19981.)

Q: Do you think that it would be possible for you to vote for the death penalty in a given case without going into what that case might be?

A: I can imagine things horrible enough to get me to vote for the death penalty, I suppose , . . (64 CT 19981-19982.)

In sum, when directly asked questions calculated to determine whether the juror could even find the death penalty to be warranted and if so, whether he would vote

for it, the juror clearly and unmistakably replied in the affirmative. That prior answers may have brought forth inconclusive responses does not suggest a contrary result. *Inconclusive answers to questions not framed to determine impairment under Witt and Witherspoon do not amount to substantial evidence of impairment.* (*Stewart, supra,* 33 Cal.3d at p. 447.)

**(c) A contrary result suggested by the juror's answers on the juror questionnaire**

As regards question 149 on the jury questionnaire, the juror's response, while perhaps counseling further clarification, is not by itself evidence of substantial impairment without a working definition of exactly what constitutes an "appropriate case." For example, the juror may have assumed that an "appropriate case" is one in which a judgment of death is to be imposed based on objective criteria requiring a threshold far less than that which the juror would himself apply, were the decision up to him. If so, the answer to Question 149 is not evidence of substantial impairment. (*E.g., People v. Stewart, supra,* 33 Cal.4th at p. 447 [inconclusive written answer on questionnaire may merit further questioning but is not substantial evidence of impairment]; *see also, People v. Kaurish, supra,* 52 Cal.3d 699 [mere high threshold in willingness to find an appropriate case for the death penalty is not evidence of substantial impairment].)

As to question 150, this was a compound question to which the juror's response may reasonably be construed as responding to the first part of the question only; i.e., whether the juror could set aside his "preconceived notions" on the death

penalty. The juror obviously took umbrage at the wording of the questionnaire which he perceived to trivialize his firmly-held beliefs. Nevertheless, the juror's response was not only not disqualifying, it was not even evidence of impairment.

Here, the juror stated that he could not set aside his "preconceived notions" because his true beliefs were not preconceived notions to be set aside. (64 RT 19983.) On its face, this was nothing more than a statement of a firmly held philosophical opposition to the death penalty. This by itself, is not disqualifying. Indeed, firmly held beliefs opposing the death penalty are not disqualifying if the juror clearly indicates he or she can put aside those beliefs to the extent that he can follow the law as given by the judge. (*Stewart, supra*, 33 Cal.4th at p. 447; *Kaurish, supra*, 52 Cal.3d at p., 699.) The juror's written questionnaire, on its face, did not respond to this, the second part of the question. As stated, a juror's philosophical opposition to the death penalty is not disqualifying. A juror harboring such opposition may nevertheless serve as a penalty phase juror. If he does, it does not mean that he/she no longer harbors a philosophical opposition to the death penalty. It merely means that the juror can vote for the death penalty in an "appropriate case," *i.e.*, where the death penalty is warranted, notwithstanding his/her philosophical opposition to the death penalty. If the juror clearly indicates that he can do this, he is not impaired under *Witt* and *Witherspoon*. This is the essence of the requirement that the juror must "set aside" [his beliefs] in order to serve. Serving on a penalty jury does not require a juror to forswear his beliefs

or do to no longer be opposed to the death penalty; it merely required that the juror be able to fairly and impartially apply the law notwithstanding those beliefs.

The juror's written response to question 150, on its face, did not address this issue and therefore did not provide substantial evidence of "impairment" within the meaning of *Witt* and *Witherspoon*. (*Stewart, supra*, 33 Cal.4th at p. 447.) However, the juror's responses in the course of *voir dire* clearly and unmistakably did. *When asked*, the juror clearly and without hesitation stated (1) that there were cases in which he could find the death penalty to be warranted; and (2) he would vote to impose the death penalty in such a case. (64 RT 19981.)

Thus, notwithstanding his philosophical beliefs, he could ignore, if not forswear, those *beliefs to the extent necessary* to fulfill his duties as a penalty juror.

Thus, the juror's written answers on the juror questionnaire were, at worst, inconclusive. As such they did not provide evidence, substantial or otherwise, of impairment under *Witt* and *Witherspoon*. (*Stewart*, at p. 447.)

In sum, neither the answers on the written questionnaire nor the responses during *voir dire* provided substantial evidence of impairment. The written responses, on their face, are clearly insufficient as a matter of law, as demonstrated above. During follow-up *voir dire*, the juror indicated both the ability and willingness to find an "appropriate case" and the ability and willingness to vote for death in such a case. As to those responses which were inconclusive, these did nothing more than express concerns that could have been expressed by virtually any juror with a relatively high threshold for

finding the death penalty warranted in a given case, or in some cases, by any juror, period. Neither category is disqualifying. The juror's responses did nothing to distinguish himself from other jurors, or other "higher threshold" jurors (*Stewart*, at p. 447), who are *not* "substantially impaired" within the meaning of *Witt* and *Witherspoon*. Indeed, the answers given here do not even rise to the level of ambiguity; they in fact suggest no "grounds" for disqualification other than the juror's opposition to capital punishment, a rationale insufficient as a matter of law.[6]

**(d) The juror's ability to follow the law was realistic and not merely a theoretical or abstract possibility**

Respondent presumably will attempt to argue that notwithstanding the juror's answers to the effect that he could vote for the death penalty if warranted, the prosecution's challenge was nevertheless properly granted because the juror (so the

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Examples of responses that do distinguish qualified jurors from those who are not, and which do create an ambiguity as to the jurors qualifications when considered with other responses indicating an ability and willingness to follow the as given by the court, are far too numerous to present in complete detail; however, they include expressions of doubt or even of inability as to whether the juror could impose the death penalty (*People v. Martinez* (2009) 47 Cal.4th 429; *People v. Hill* (1992) 3 Cal.4th 959, 1005; *Wainwright v. Witt, supra*, at p. 416; *Darden v Wainwright* (1986) 477 U.S. 168, 177; *Uttecht v. Brown, infra*, (2007) 551 U.S. 1, 18; strident or vituperative statements (the death penalty makes killers of us all," suggestions of a political agenda in opposition to the death penalty to the extent that the juror believes that jurors who would automatically vote against the death penalty in every case should be allowed to sit on penalty juries, among others. (*Martinez*, at pp. 429, 436-438.) The point is, none of these, or their equivalent, is present here. As defense counsel succinctly, and correctly, stated: "If he had said at any point, I'm not going to do this, I'm not going to follow the law, I'm not going to listen to reason—but he hasn't said those things." (64 RT 19983.)

argument would go) would only find the death penalty to be warranted in such a small percentage of cases that the chances of his finding such a case would be theoretical only, and not realistic; thus, he would not give a fair hearing to the prosecutor in a capital case. (*E.g.*, (*See, People v. Hamilton* (2009) 45 Cal.4th 891, 863.)

Any such argument would be meritless because there was no *evidence* of this. To the contrary, such an argument would necessarily depend on the juror's statement, preceded by a pause, "[I suppose] I can imagine things horrible enough to get me to vote for the death penalty . . . (64 RT 19982-19983.) There is absolutely nothing about this statement that a crime "horrible enough" warrant the death penalty, was a mere theoretical as opposed to a realistic possibility, or that the juror would not give the prosecution fair opportunity to show that the crime in question was in fact, such a crime. (*See, People v. Hamilton, supra,* 45 Cal.4th 891, 863.) Indeed, the juror's statement, on its face, did nothing to distinguish this juror from all other prospective jurors. That is, *all* prospective must decide if they can imagine a crime horrible enough to warrant the death penalty. To some jurors, this might be a more difficult task than for other jurors. After all, the death penalty is intended to be reserved for the "worst of the worst" (i.e., most horrible) offenses, and some jurors possess a higher threshold than others for purposes of finding an "appropriate case." Moreover, the juror's hesitation so as to formulate what it might take to get him to vote for the death penalty in a given case (64 RT 19883), is an event that might reasonably be expected to occur during the *voir dire* of *any* "higher threshold" juror (which C-67 probably was). Assuming this is true,

and there is no articulable or rational basis for believing it is not, the juror's response did not disqualify him under *Witt* and *Witherspoon*.[7]

This is readily seen from those cases in which the juror has given answers complying with *Witt* and *Witherspoon* but nevertheless found to be impaired within the meaning of those cases, based on the theory that there was no realistic possibility that the juror would ever find an "appropriate case" for the death penalty, the trial court was presented with tangible *evidence* supporting this conclusion; *i.e.*, statements of the prospective juror providing clear and direct evidence his or her averment that he or she could find an "appropriate case," in truth, merely described an a theoretical or abstract possibility and not a tangible reality.

For example, in *People v. Martinez* (2009) 47 Cal.4th 399, 428-431, a recent case in which this Court Examined the *Witt* and *Witherspoon* holdings in some detail, a prospective juror stated that she could impose the death penalty, but the trial court was deemed to have properly upheld a challenge to her in view of the juror's statements that it was realistic that she would impose the death penalty in a child molestation case. (*Id.*, at p. 429.) Additionally, this Court repeatedly relied on the juror's strident and even vituperative assessment that the death penalty "makes everyone a killer" and "makes

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Even in *People v. Abilez* (2007) 41 Cal.4th 472, 495, a case in which the juror's many lengthy pauses and attempts to avoid questions regarding the death penalty were cited in support of the prosecutor's *Witt* challenge, the juror *explicitly* stated that he could *not* deliberate with the other penalty jurors based on his religious beliefs against capital punishment.

killers of us all" in upholding the challenge, noting the "tension" between this statement and the juror's averments that she could vote for the death penalty. (*Id.*, at p. 431.)

Additionally, in connection with another juror, this Court found that the trial court was not bound by a prospective juror's statements that she could vote for the death penalty, where the juror appeared to have a political agenda against the death penalty; believed that persons categorically opposed to the death penalty should be allowed to sit on penalty juries, and indicated that she would be willing to carry out her political agenda in the case before the court. (*Id.*, at p. 436-437.) As to both of these prospective jurors, the trial court was deemed justified in concluding that notwithstanding their averments that they could follow the law, the possibility that either would ever vote for the death penalty was only a theoretical one at best; and that neither would afford the prosecution at least a fair opportunity to at least persuade the juror to vote for the death penalty. (*Id.*, at pp. at pp. 431, 437.)

Importantly, in the only two cases relied cited by this Court in *Martinez* in support of its conclusion that there was no realistic possibility that the prospective jurors in the case before it would ever vote for the death penalty, the record provided tangible, articulable reasons ("evidence") for drawing this conclusion. (Id., at p. 431.) In *People v. Wharton* (1991) 53 Cal.3d 522, 588, the prospective juror expressed skepticism that the District Attorney could present sufficient evidence to convince the juror to vote for the death penalty. In *People v. Lancaster* 2007) 41 Cal.4$^{th}$ 50, 80, the juror indicated there was only a "slim possibility' he could vote for the death penalty.

In the present case, the answer provided by juror C-67 could apply to any Witt-qualified juror, who could "imagine a crime horrible enough to warrant the death penalty, I suppose . . ." The ruling granting the challenge was clearly erroneous.

Appellant acknowledges that it is possible (although far from certain) that *if* the court had chosen to directly confront the juror with the question whether his ability to find an "appropriate case" was merely an unrealistic, merely theoretical possibility the juror may have provided some evidence of this. Or not. While this is a proper formulation of the *Witt/Witherspoon* issue (*Martinez, supra*, at p. 432, citing *Lancaster, supra*, at p. 80, *and People v. Mason* (1991) 52 Cal.3d 909, 954), the court chose not to pursue it, notwithstanding defense counsel's suggestion that the court could further explore the juror's qualifications. Or not. The court, however, chose not to ask that question. Speculation as to what the juror might have said had he been asked the appropriate question, is not *evidence*. (*People v. Kunkin* (1973) 9 Cal.3d 245, 250.) The record simply does not support the court's ruling, and to the extent there is a deficiency in the record, it is the state, and not appellant, who must bear the adverse consequences of that, inasmuch as the prosecutor bore the burden of proof to show "impairment" and the trial court bore responsibility for creating the record on review, over appellant's objection. (*People v. Stewart, supra*, 33 Cal.4th at p. 446; *Uttecht v. Brown, infra*, 551 U.S. 1, 17-19.)

**(e) The court's ruling may not be rescued or salvaged by resort to implied trial court evaluations of juror "demeanor."**

Nor may the court's ruling be rescued or salvaged by resort to implied trial court evaluations of juror "demeanor." Appellant readily acknowledges that it is the trial court, not the reviewing court, that is in a position to view the demeanor of the prospective juror when answering questions regarding his or her views on the death penalty; and that the trial court's conclusions regarding the state of mind of the juror is therefore entitled to considerable deference. (*Martinez*, at p. 425.) First, appellant observes that the court's ruling in this case was, explicitly, based on the juror's responses ("what he [juror C-67] said" (64 RT 19881-19883)), none of which amounted to any evidence of impairment, and not on juror C-67's "demeanor."

Moreover, the judicial deference to the trial court's ability to observe "demeanor" is not absolute; and appellant has found *no case* upholding a prosecutor's *Witt/Witherspoon* challenge based *solely* on the fact that the trial court was able to observe the prospective juror's "demeanor." Stated another way, "demeanor" is not a substitute for "evidence" but merely a mechanism for evaluating evidence.

Thus, in *every case* in which reliance is placed on observation of the juror's "demeanor," there exist on the record a statement or statements of the juror which on their face supports a finding of impairment (absent in the present case), which the trial court was required to evaluate for credibility, either (1) for purposes of determining whether such statements *in fact* formed a basis for finding the juror impaired; or (2) for purposes of resolving a conflict between such statements and other statements tending to

show that the juror is not or might not be impaired. (*E.g.*, footnote 2, *supra*, and cases cited therein.)

This is understandable; were it otherwise, were it otherwise, any trial court finding of "impairment" under *Witherspoon* could be sustained on appeal merely by deferring to the trial court's ability to observe the speaker, no matter how innocuous the statements and regardless of any actual reliance on or attachment of significance to the juror's purported "demeanor." Such a rule would effectively eviscerate the *Witherspoon* holding and would eliminate any need for a meaningful exercise of discretion by the trial court, inasmuch as *any* ruling would be subject to rubber-stamp approval by the reviewing court. In another context (admission of "other acts" evidence to prove charged sexual offenses), it has been stated that an exercise of discretion must be effective and *meaningful.* (*People v. Harris* (1998) 60 Cal.App.4th 727, 737.)

Recently, in *Uttecht v. Brown* (2007) 551 U.S. 1, our Supreme Court reaffirmed this principle in cases involving challenges under *Witherspoon.* *Uttecht* is a case upon which this Court has heavily relied for purposes of emphasizing the importance of the trial court's ability to observe the demeanor of a prospective juror and the need to afford great deference to those observations. (*See, Martinez, supra*, at p. 426.)

In *Uttecht*, the Supreme Court , indeed, emphasized the importance of a prospective juror's demeanor and the deference attached to lower court rulings because of it. However, the Court was absolutely clear that *such deference is not absolute*, and

that there must be *specific and tangible indications that the juror is in fact impaired, apart from his or her demeanor, in order for the reviewing court to uphold a Witherspoon challenge.*

In *Uttecht*, the juror gave numerous confusing and conflicting responses on death penalty *voir dire*. For example, on his questionnaire he stated that he was in favor of the death penalty if it was proved beyond a shadow of a doubt that if a person was kicked and would kill again. On death penalty *voir dire*, the prosecutor explained that the burden of proof was proof beyond a reasonable doubt, not proof beyond and shadow of a doubt, and asked whether the juror understood that. The juror explained "it would have to be in my mind very obvious that the person would reoffend." The juror was told that there was no possibility that the defendant would be released and was asked if there was a time he could impose the death penalty, knowing that, and he replied "I would have to give that some thought." At another time, he "believe[d] in the death penalty an believed in the death penalty in severe situations. (*Uttecht*, 551 U.S. 14.)

The state challenged the juror for cause because the juror seemed confused as to when the death penalty could be imposed and seemed to think that the death penalty was only appropriate if there was a risk of release and recidivism. The defense counsel said "we have no objection." The trial court then excused the juror. (*Id.* at p. 15.)

The Supreme Court upheld the granting of the challenge. In doing so, the Court first noted that based on the juror's responses alone, the trial court could have

dismissed the juror, and the fact that it did that was entitled to deference because the trial court was able to observe the juror. The trial court also relied heavily on the fact that trial counsel failed to object to the juror's excusal. As a result, it was clear that "everyone in the courtroom" believed that the court correctly found the juror to be impaired. Additionally, the defense failure to object caused the factual record on the juror's qualifications to be limited. (*Id.*, at pp. 17-19.)

The Court in fact strongly expressed dismay over being hobbled in this way for purposes of exercising appellate review. Importantly, it did so after having reaffirmed the vitality of the *Witt/Witherspoon* rule. (*Id.*)

From the holding of *Uttecht*, a number of facts are clear. First, while deference is due the observations of the prospective juror by the trial court ("demeanor") this deference is not absolute. This is seen from the Court's reaffirmance of the vitality of *Witt/Witherspoon* and the importance the Court attached to the exercise of meaningful appellate review of *Witt/Witherspoon* issues. Obviously, for *Witherspoon* to be viable and for appellate review to be meaningful, the record must contain tangible and affirmative evidence of impairment in order for a finding of impairment to be upheld. And, indeed, in *Uttecht*, there was evidence which on its face justified a finding of impairment without further examination of the juror (as there is in all cases upholding Witherspoon challenges). [8]

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Additionally, the failure of the defense to object to the excusal of the juror, served to magnify the significance of the element of "demeanor" in the case before the Court. First, because the defense attorney himself apparently believed that juror's demeanor was not inconsistent with a finding of impairment; thus, the trial court's belief in this regard was probably justified. Second, It was necessary to attach significant weight to observations of demeanor because the defense's acquiescence directly resulted in a sparse record for purposes of developing facts bearing on the juror's qualifications. The clear implication is that where there are deficiencies in the record hindering appellate review, the party causing the deficiency must bear the brunt of the consequences thereof.

*Uttecht* is instructive on specific aspects of the present case, on multiple fronts. First, there must exist on the record, tangible and affirmative evidence (beyond indications that the juror is philosophically opposed to the death penalty and concerns common to all such jurors) in order for a challenge under *Witt* and *Witherspoon* to be upheld. (*See, Uttecht*, 551 U.S. at p. 17].) Here, there was none. ***Any discussion of "demeanor" is thus irrelevant because there was no cognizable evidence of***

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This is not to suggest that a juror's impairment need not be shown with "unmistakable clarity." (*Martinez, supra,* 47 Cal.4th at p. 425.) But it is to suggest that the cases upholding challenges under *Witherspoon* hare virtually unanimous in finding some factual basis for concluding that the juror is impaired (apart from mere philosophical opposition to the death penalty or concerns common to jurors having such a "higher threshold"), beyond sole reliance on the juror's "demeanor."

***"impairment" to evaluate and no conflict or ambiguity on the point to resolve based on observations of "demeanor."***

Second, defense counsel here did *not* acquiesce in the trial court's evaluation of juror C-67. Thus, he did *not* provide evidence is support of the trial court's finding of "impairment." Such support from the defense was probably the most significant factor justifying the ruling in *Uttrecht*, apart from the explicit statement of the juror expressing substantial impairment. Indeed, counsel's acquiescence n *Uttecht* was a factor affording enhanced significance to observations of juror demeanor in that case. (*Id.*, at pp. 17-19.)

In the present case, not only are both of these factors absent, but there are *no* factors demonstrating enhanced significance of such observations. (*See, e.g., Martinez, supra*, at pp. 429-431 [juror stated that the death penalty "makes everyone a killer" and "makes killers of us all."].) Unlike *Uttecht*, there is no indication that juror C-67's "demeanor" was a significant minor factor in the court's ruling; as indicated above, the trial court, made its ruling based on the evidence before it ("what he said") even though if that ruling was incorrect. While the hesitated before stating that he could in fact find an appropriate case for imposing the death penalty. (64 RT 19881-19983) this reaction does not distinguish C-67 from countless other "higher threshold" jurors. Thus, absent tangible evidence or indications of impairment, this fact is not only inconclusive (and thus, no evidence of substantial impairment), it is irrelevant.

The record here sets forth statements that merely expressed the fact that the juror had a higher than average threshold for finding an appropriate case for the death penalty; or, expressed concerns common to virtually all prospective penalty jurors. Unlike *Uttecht*, 551 U.S. at p. 18, *Darden v Wainwright*, 477 U.S. at p. 172, Witt, 469 U.S. 412, 416, *Martinez*, 47 Cal.4th at p. 429, *Abilez*, 411 Cal.4th at p. 495 (*see,* fn. 3, *supra*), and, virtually every other case upholding a prosecution's *Witt/Witherspoon* challenge, there is no statement which on its face would support a finding of impairment, which must be evaluated for credibility, or which creates a conflict with other evidence which must be resolved by means of resort to observations of "demeanor."[9]

Even as the Court in *Uttecht* acknowledged the importance of such observations in the case before it, it also acknowledged that these were likely unknown to the appellate court (at p, 17-18), and by its holding decried the need for them for purposes of appellate review and appears to have deemed them a poor fallback to a complete record. (*Id.*at 17-19.)

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In *Martinez, supra*, 47 Cal.4th at p. 430, this Court strongly suggested that deference to the trial court's ruling is necessary only to resolve conflicts that cannot be resolved otherwise on the face of the record, although it was not directly presented with this issue. In Martinez, the defendant claimed there was no need to defer to the trial court's ruling because there was no evidence of equivocation on the part of the juror. This Court rejected the argument, although it did not reject the premise appellant presents here. Instead, it found (unlike the present case) that the juror's answers, on their face, expressly demonstrated equivocation.

Finally, this is not a case in which the defense must bear the negative brunt of any deficiency in the record. Here, it is theoretically possible that had the court engaged in further questioning, as defense counsel suggested, he may have uncovered additional facts bearing on the juror's qualifications. However, the court *chose* not to engage in such questioning notwithstanding defense counsel's suggestions that it do so, even though it could easily have done so and in a relatively short period of time. This was *not* a case in which "the defense [denied] the conscientious trial judge an opportunity to explain his judgment or correct any error . . [and] denied reviewing courts of further factual findings that would have helped to explain the trial court's decision .. . ." *Uttecht*, at p. 18.) Unlike *Uttecht*, where the sparse record was the fault of defense counsel who thus bore the burden of that sparse record, any deficiency in the record is the responsibility of the trial court. To the extent there were facts that could have been developed in aid of the court's ruling that were not, that is the responsibility of the court; and the failure of the record to provide facts supporting the court's ruling is simple judicial error.

Stated another way, the record is what it is; the court curtailed development of what might have been a more complete record, and ruled based on the record it created. (64 RT 19983, court relies on "what [juror C-67] said.".)

The court was wrong. The record created and relied upon by the court, either showed no substantial impairment or did not address the issue (*see, Stewart, supra*, at p. 446 [*prosecutor* bears the burden of showing "substantial impairment"

within the meaning of *Witt* and *Witherspoon*]); did not distinguish the juror from other jurors or other *Witherspoon* qualified "higher threshold" jurors, and offered no affirmative evidence of "substantial impairment" so as to render resort to the fallback position of "observation of demeanor" relevant, let alone necessary.

As argued above, appellant, respectfully, has found no case upholding a prosecution's *Witt/Witherspoon* challenge based on such a record. Doing so in this case would fly in the face of virtually every aspect of the *Uttrecht* holding, which this Court has deemed to be highly persuasive and compelling.: It would effectively eviscerate the *Witt/Witherspoon* rule; it would effectively eliminate appellate review in such cases; it would eliminate the need for *evidence* of impairment now compelled by existing authority; it would render meaningless the concept of "exercise of discretion" in such cases, and it would punish the defendant for the court's failure to fashion a more complete record,[10] all in the name of observation of "demeanor" that may not even exist.

**C. Prejudice**

The error in this case is not subject to review for "harmless error." Reversal is automatic. (*Gray v. Mississippi* (1987) 481 U.S. 648, 659.) Accordingly, and for the above reasons, the judgment of death must be reversed in appellant's case.

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10 *See, Uttrecht*, 551 U.S. at pp. 18-19; see also, *People v. Serrato* (1965) 238 Cal.App.2d 112, 119 (defendant entitled to relief where state failed to provide adequate record on appeal, through no fault of the defendant.)

## II

## APPELLANT'S ARREST WAS MADE WITHOUT PROBABLE CAUSE IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS; THEREFORE, ANY SUBSEQUENT STATEMENTS HE MADE WHILE IN CUSTODY WERE THE ILLEGAL FRUITS OF THAT ARREST AND THEIR ADMISSION INTO EVIDENCE WAS IN ERROR

Appellant moved to suppress two statements given to police: one to the San Jose Police Department on January 29, 1991 and one to the Santa Clara Police Department on January 30, 1991.[11] The arrest preceding these statements was made without probable cause and in violation of appellant's constitutional rights; therefore, *both* of the statements obtained pursuant to the arrest were illegal fruits of that arrest and should have been excluded from trial.

### A. Summary of General Factual and Procedural History[12]

In mid-to-late January of 1991, the SJPD was investigating a series of stun gun robberies. (1 RT 17.) Initially, co-defendants Silveria, Travis and Rackley were arrested on the evening of January 29, 1991. (3 RT 325-26.) Subsequently, on that same evening, appellant and co-defendant Jennings were arrested and transported to the SJPD. (5 RT 619-20.) At approximately 11:30pm on January 29, 1991, SJPD Officer George

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11 The San Jose Police Department will hereinafter be referred to as the SJPD and the Santa Clara Police Department as the SCPD.

12 There are several related issues concerning the police conduct surrounding appellant's January 29-30, 1991 arrest and statements. This Argument's general factual and procedural history is applicable to Arguments III and IV as well.

de la Rocha advised appellant of his rights, obtained a waiver, and questioned him regarding the San Jose stun gun robberies. (5 RT 583-84.) Appellant admitted driving the getaway car in one, the Gavilan Bottle Shop robbery. (5 RT 585.)

Later in the evening, SCPD officers arrived at the San Jose station in search of appellant and his co-defendants as part of their investigation into the Leewards killing. (5 RT 646-47.) At 4:00am on the morning of January 30, 1991, SCPD Sergeant Ted Keech interrogated appellant regarding Leewards. (6 RT 739.) Sergeant Keech did *not* re-advise appellant of his rights; instead, he merely attempted to confirm that appellant had been previously advised. (6 RT 740.) During the course of the interrogation, appellant admitted involvement in the Leewards killing. (6 RT 746.)

On January 14, 1994, appellant filed a motion to suppress both his statement to the SJPD and his statement to the SCPD. (3 CT 785-87.) The thrust of the motion was threefold: (1) that the January 29, 1991, arrest of appellant was made without probable cause or warrant in violation of his constitutional rights, and thus any subsequent statements he made while in custody were the illegal fruits of that arrest; (2) that appellant's statements were obtained in violation of *Miranda* insofar as that any advisement of rights, if in fact one was given at all, was given improperly; and (3) that the statements obtained from appellant were not obtained voluntarily. (3 CT 786.) Appellant's motion also incorporated by reference and joined with all the motions and accompanying authorities submitted by co-defendants Silveria, Travis, and Jennings. (3 CT 787.)

The prosecution opposed each of appellant's arguments. (3 CT 822-881.) A suppression hearing was held, and on April 18, 1994, the court issued its rulings, finding that there was probable cause to arrest appellant, that he was properly advised of his rights and waived them, and that his confession was voluntary. (1-9 RT 1-960; 4 CT 984, 960-61.) The court made several supplementary findings and all of the co-defendants' motions to suppress were denied. (4 CT 962, 987.)

### B. Specific Circumstances Surrounding Appellant's Arrest

By late January of 1991, the SJPD's ongoing investigation into the stun gun robberies had revealed a surveillance videotape of one of the robberies—the Quik Stop robbery—which led to the positive identifications of co-defendants Jennings and Rackley. (1 RT 17, 33, 41.) Then, at approximately 5:00pm on January 28, 1991, SJPD Officer John Boyles received an anonymous phone call from a woman who said she had information about the stun gun robberies: namely, that the perpetrators were "Danny, John, Matt, and Chris," and they were planning another robbery. (1 RT 44-46.) The anonymous woman did not tell Officer Boyles that the suspects had personally actually admitted anything to her. (1 RT 117.) The only thing she claimed to have seen firsthand was "Matt" playing with a stun gun in her house at some point. (1 RT 146.) While the anonymous woman told Officer Boyles that these men were going to commit another crime, this statement was based on nothing more than her own

speculation.[13] (1 RT 116-17.) On the basis of the information provided by the anonymous woman, Officer Boyles put out a BOL ("be on the lookout") for "Troy Rackley, Matthew Jennings and anybody associated with them with the names John, Chris and Dan, Daniel." (1 RT 47.)[14]

Later that same evening, the anonymous woman called back and this time identified herself as "Cynthia." (1 RT 48.) At this time, she provided the last names of Jennings for "Matt" and Silveria for "Danny," as well as a suggestion that the group customarily drove a "red vehicle, possibly a Charger." (1 RT 49-51.) "Cynthia" once again did not say how she came about any of this information, and she specifically refused to provide her last name or address to Officer Boyles. (1 RT 121-22.) Officer Boyles updated his earlier BOL with this new information. (1 RT 51.) "Cynthia" called one final time that night and spoke to another SJPD officer, Sergeant George McCall; that time, she stated that the subjects were going to pull another robbery that night and then they were going to leave town. (2 RT 223.) Once again, she provided no firsthand basis for her knowledge. (*Id.*)

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13 The anonymous woman at first claimed that "they were going to do another job soon" because "they were all broke." However, she later admitted that they had not *said* that they were going to do another job but rather, she had only inferred it from the fact that they had tried to borrow money.

14 The last names of Rackley and Jennings were not supplied by the anonymous woman at that time; rather, Officer Boyles combined her tip with the previously acquired identities of two of the perpetrators of the Quik Stop stun gun robbery.

Shortly thereafter, SJPD Officer Brian Hyland launched an investigation in an attempt to confirm the information "Cynthia" had provided. (3 RT 251.) He was able to ascertain the addresses at which several of the suspects lived. (3 RT 252, 256, 259.) His investigation at these addresses revealed that co-defendant Jennings and appellant had been together earlier in the day and Jennings had packed a suitcase. (3 RT 252-55.) Officer Hyland also confirmed that appellant was friends with co-defendants Silveria, Travis and Rackley. (3 RT 256-58; 260-62.) However, he was unable to learn anything about the information that "Cynthia" had provided regarding the group's involvement in any past or future robberies.

The next day, January 29, 1991, another informant Officer Hyland had developed during his investigation called the SJPD with a tip that would lead to the location and arrest of co-defendants Silveria, Travis and Rackley at the Oakridge Mall that evening. (3 RT 266-67.) Silveria then cooperated with police and led them to appellant and Jennings where, after ascertaining the identity of Jennings, both were also placed under arrest for the stun gun robberies. (3 RT 274, 285.) The arrest was made at the direction of Officer Hyland, despite the fact that he did not himself hear from any source that appellant was involved in robberies but rather "put some things together and believed that to be the case." (RT 3-4 395, 439.) SJPD Officer Larry Esquivel testified at both the suppression hearing and the guilt phase of appellant's trial as to the circumstances of appellant's arrest. (5 RT 615-45; 75 RT 21452-57.) However, he was not the one that

actually detained appellant; the officer that physically arrested appellant did not testify at any point during the proceedings. (5 RT 636-37.)[15]

### C. General Law on Probable Cause to Arrest and Anonymous Informants

Probable cause to arrest exists when the facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that a person is guilty of a crime. *Beck v. Ohio* (1964) 379 U.S. 89, 96; *People v. Harris* (1975) 15 Cal.3d 384, 389. There is no precise articulation of the meaning of probable cause; rather, it is a "practical, non-technical" conception that encompasses the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Illinois v. Gates* (1983) 462 U.S. 213, 231 (quoting *Brinegar v. United States* (1945) 338 U.S. 160, 176). Similarly, there is no exact formula for the determination of probable cause; each case must be decided on its own facts and "total atmosphere." *People v. Ingle* (1960) 53 Cal.2d 407, 412-13.

In some cases, probable cause may exist solely on the basis of information obtained from others. *Ker v. California* (1963) 374 U.S. 23, 35-36; *People v. Smith* (1958) 50 Cal.2d 149, 151. The credibility of information received from a third-party informant must be weighed under the "totality of the circumstances" in order to

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15 This was either an Officer Albin or an Officer Vaneck, according to Officer Esquivel's testimony. (5 RT 637.)

determine whether the information warrants a finding of probable cause. Gates, *supra*, 462 U.S. at p. 238; *People v. Ramirez* (1984) 162 Cal.App.3d 70, 73. This flexible totality of the circumstances test replaced a former strict two-prong standard; nevertheless, those prongs—the veracity of the informant and their basis of knowledge—remain the closely intertwined and crucial factors. *Gates*, *supra*, 462 U.S. at p. 238.[16] Even when the informant's identity is unknown, probable cause may still exist. However, in such cases more care is required, because "[u]nlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity.'" *Florida v. J.L.* (2000) 529 U.S. 266, 270 (quoting *Alabama v. White* (1990) 496 U.S. 325, 329).

One of the situations where an anonymous tip may support a finding of probable cause is when the tip comes from a "citizen informant." "A 'citizen informant' is a citizen who *purports to be the victim of or to have been the witness of a crime* who is motivated by good citizenship and acts openly in aid of law enforcement. It is reasonable for police officers to act upon the reports of such an observer of criminal activity. [Citations.] A 'citizen informant' is distinguished from a mere informer who gives a tip to law enforcement officers that a person is engaged in criminal conduct.

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For the former test, see *Aguilar v. Texas* (1969) 378 U.S. 108 and *Spinelli v. United States* (1969) 393 U.S. 410.

[Citation.]" *People v. Schulle* (1975) 51 Cal.App.3d 809, 814-15 (emphasis added). A citizen informant is given special deference because, unlike many informants who act in pursuit of pecuniary or other personal gain, a citizen informant is someone who has been a "chance witness to or victim of a crime." *People v. Ramey* (1976) 16 Cal.3d 263, 268-69. As a result, a citizen informant need not be further corroborated; such an informant is deemed presumptively reliable. Id. However, not all informers will qualify, and a designation of an informer as a citizen informant must be supported by facts showing the reliability required by this standard. *People v. Smith* (1976) 17 Cal.3d 845, 851.

Statements of an anonymous untested informant that is *not* a citizen informant are *not* presumptively reliable, and therefore circumstances indicating veracity and basis of knowledge sufficient to support a finding of probable cause must be shown by some other means. Generally, this requires that statements be "corroborated in essential respects by the facts, sources or circumstances," supplying probative indications of criminal activity along the lines suggested by the informant. *People v. Gotfried* (2003) 107 Cal.App.4th 254, 263-64. To be corroborated in essential respects, the information being corroborated must be information that pertains to the alleged criminal activity itself. Id. Accuracy of information regarding the suspect generally (i.e. his clothes or personal appearance) is insufficient. *People v. Costello* (1988) 204 Cal.App.3d 431, 446. Courts must determine whether information received from an informant of unknown reliability is sufficiently corroborated to supply probable cause under the totality of the circumstances. *Gates, supra*, 462 U.S. at p. 238; *Ramirez, supra*, 162

Cal.App.3d at p. 73. In these situations, probable cause exists when corroboration from other sources of information provides a "substantial basis" for crediting the questioned information. *Gates, supra*, 462 U.S at pp. 244-45; *People v. Medina* (1985) 165 Cal.App.3d 11, 18.

On appeal, this Court accepts the trial court's factual findings relating to the challenged arrest if substantially supported, but independently measures the facts as found by the trier against the constitutional standard of reasonableness. *People v. Loewen* (1983) 35 Cal.3d 117, 123.

### D. Appellant's Arrest Was Unconstitutional When It Was Made Without Probable Cause[17]

Appellant's arrest, based solely on information received from "Cynthia," was made without probable cause and thus was illegal. The court ruled that there was sufficient probable cause from "Cynthia" to support the arrest, finding that "Cynthia" was a citizen informant and therefore presumptively reliable. (4 CT 984.) Further, the court found that even though a citizen informant did not need to be corroborated, "Cynthia" had in fact been. (Id.) However, the court erred in both respects: first, when

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17 It is not disputed that there was sufficient probable cause from another source (a videotape of the Quik Stop stun gun robbery) to arrest co-defendants Jennings and Rackley. Appellant was with Jennings at the time of his arrest, and thus, the search of the vehicle in which they were traveling is not challenged. However, the SJPD's arrest and transport of appellant to the station house was not supported by independent probable cause specific to appellant, and thus, his subsequent statements cannot stand.

it found that "Cynthia" was a citizen informant and second, when it found that in the alternative, she was corroborated. Therefore, the court also erred in its conclusion that there was sufficient probable cause to support appellant's arrest.

"Cynthia" did not fulfill the requirements necessary to be deemed a citizen informant, and therefore, by definition, could not be assumed presumptively reliable. See *Schulle*, *supra*, 51 Cal.App.3d at pp. 814-15. She was not a victim of one of the stun gun robberies, nor did she claim to have witnessed any of them herself. As such, she was not an observer of criminal activity and had no firsthand knowledge that appellant—or anyone in the group for that matter—had perpetrated any crimes. Furthermore, there was no independent indication that she was motivated by good citizenship or acted openly in aid of law enforcement. If anything, her refusal to provide a last name or address made her motivations decidedly unclear.

Because she did not fit the definition of a citizen informant, the court erred in finding that "Cynthia" was such a person. Accordingly, the information she provided was *not* presumptively reliable insofar as to support a finding of probable cause on its own. The police officers in appellant's case were therefore required to corroborate the statements provided by "Cynthia" in "essential respects by the facts, sources or circumstances," in order to justify a finding of probable cause to arrest appellant. See *Gotfried*, *supra*, 107 Cal.App.4th at pp. 263-64. Under the totality of the circumstances, the corroboration needed to supply a substantial basis for crediting the questioned information. See *Ramirez*, *supra*, 162 Cal.App.3d at p. 73; *Medina*, *supra*, 165

Cal.App.3d at p. 18. To fulfill this standard, they were required to corroborate her statements regarding appellant's past or future criminal activities, not merely facts about or characteristics of him generally. See *Costello*, *supra*, 204 Cal.App.3d at p. 446.

"Cynthia" provided police officers with only a scant amount of information that was not sufficiently corroborated to meet the requirements of establishing probable cause. Initially, "Cynthia," who at that time refused to provide the police with her name, told the police that someone named "Chris" was one of four perpetrators of the stun gun robberies and that this group was going to "do another job." (1 RT 44-46.) However, none of the perpetrators actually *told* "Cynthia" that they were involved in crime; rather, she speculated that it might be true because these men had tried to borrow money from her. (1 RT 116-17.) The only thing that she ostensibly witnessed firsthand was co-defendant Jennings playing with a stun gun in her house, a circumstance that did not in any way indicate *appellant* was involved in the stun gun robberies. (1 RT 46.) By the time of her second phone call to the police, she was able to provide last names for several of the suspects, but *not* for appellant. (1 RT 49-51.) At that time, she was also able to offer a somewhat fitting (though still not entirely accurate) description of appellant's car, though she was not able to tie it to him or the robberies in any way. (Id.) It was only in her third phone call when she claimed that the subjects were going to pull another robbery that night and then planned to leave town. (2 RT 223.) The only concrete information regarding appellant specifically that "Cynthia" provided was that

someone with his first name was one of a group of friends and drove a certain kind of car.

Officer Hyland's attempt to corroborate the information supplied by "Cynthia" was cursory at best. Essentially all that he did was verify several addresses and confirm that all the co-defendants were friends with each other. (3 RT 251-62.) There was no corroboration of anything that "Cynthia" had said regarding the group's involvement in any robberies, past or future. One person that Officer Hyland spoke to did mention that co-defendant Jennings had packed a suitcase that day. (3 RT 252.) However, this one fact, in and of itself, did not serve to corroborate the entire story "Cynthia" told about the group's involvement in the robberies. At most, it served to corroborate the *possibility* that these men were leaving town—an action that they could have been taking for numerous non-criminal reasons.

In sum, the information provided by "Cynthia" did not amount to probable cause for arrest. There were no hard facts from which the SJPD could have arrived at the conclusion that "Cynthia" was a citizen informant and therefore presumptively reliable. Nor was there sufficient independent information to corroborate her statements so as to make them sufficient to establish probable cause in the absence of any citizen informant status. Officer Hyland's attempts to corroborate "Cynthia" were not successful. He corroborated the addresses, last names, and association of this group of people, but was unable to corroborate anything about appellant's involvement in any of the stun gun robberies specifically as required by the standard.

Therefore, under the totality of the circumstances, there was no substantial basis for crediting the information supplied by "Cynthia." Her statements were the only information that even remotely implicated appellant in any crime prior to his arrest. However, because she was neither a citizen informant nor sufficiently corroborated, she did not possess the necessary veracity or basis of knowledge. Therefore, there was an insufficient basis for probable cause and her information cannot serve as the basis for appellant's arrest.

### E. Appellant's Subsequent Statements to Police Were the Fruit of the Illegal Arrest and Should Have Been Suppressed

During his interrogations with both Officer de la Rocha of the SJPD and Sergeant Keech of the SCPD, appellant made several inculpatory statements. (See Arguments III and IV.) However, because the arrest itself was illegal, both the January 29, 1991 statement to Officer de la Rocha and the January 30, 1991 statement to Sergeant Keech should have been suppressed as the illegal fruits of that arrest.

When a defendant is arrested illegally and taken to a station house where a statement is obtained from him, that statement is considered to be an "indirect" result of the Fourth Amendment violation. *New York v. Harris* (1990) 495 U.S. 14, 18-19. Even if otherwise knowing, voluntary, and intelligent, these indirect results of an illegal arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality. Id. This Court excludes statements of the victim of an illegal arrest when it

appears that the statements were induced or impelled by the unlawful acts. *People v. Stoner* (1967) 65 Cal.2d 595, 598.

The exclusion of such evidence is governed by what is known as the "fruit of the poisonous tree" doctrine. "Fruit" evidence is only admissible if the doctrine of inevitable discovery applies, the evidence was obtained by an independent source, or if the connection between the source of the taint and the evidence has been sufficiently attenuated. *People v. Superior Court (Sosa)* (1983) 145 Cal.App.3d 581, 587-88. In order for the government to prove there has been sufficient attenuation, they must show that the statement was obtained by not by exploitation of the illegality, but rather by means "sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States* (1963) 371 U.S. 471, 488. Whether there was attenuation is a question that must be analyzed based on the "totality of the circumstances." *Brown v. Illinois* (1975) 422 U.S. 599, 603-04. The factors to be considered include the temporal proximity of the arrest to the statements, the nature of the *Miranda* warnings given, the intervening circumstances, and the "purpose and flagrancy of the official misconduct." *Id.*

In the instant case, both appellant's statement to the SJPD and his subsequent statement to the SCPD bore a sufficiently close relationship to the underlying illegal arrest so as to require suppression. See *Harris*, *supra*, 495 U.S. at pp. 18-19. The People do not argue that the doctrine of inevitable discovery applies or that the statements were obtained by an independent source. Therefore, the only question

becomes whether the connection between the source of the taint—the illegal arrest—and the statements was sufficiently attenuated. *See Sosa*, *supra*, 145 Cal.App.3d at pp. 587-88.

Upon consideration of the relevant factors in appellant's case, there was insufficient attenuation of the taint to render the statements admissible in the face of the Fourth Amendment violation. Appellant was illegally arrested and immediately transported to the SJPD, where he was held in custody until Officer de la Rocha began his interrogation a mere 45 minutes after the initial stop. (5 RT 583-84, 641.) As such, there was essentially no temporal break between the illegal arrest and the first of his statements. Furthermore, due in large part to this short time lapse, there were no intervening circumstances of significance that could have given rise to an independent act of free will on the part of appellant. Though appellant's statement to the SCPD followed his statement to the SJPD by a few hours, the lack of any further intervening circumstances renders that statement a fruit of the illegal arrest as well. See *Brown*, *supra*, 422 U.S. at p. 605.

Under the totality of the circumstances, appellant's statements bore a close relationship to the underlying illegality. His statements were obtained by exploitation of his illegal arrest and *not* by means "sufficiently distinguishable to be purged of the primary taint." Therefore, both statements were fruits of appellant's illegal arrest and should have been suppressed.

### F. Appellant Was Prejudiced by the Court's Failure to Suppress Appellant's Statements and the Judgment of Guilt Must Be Reversed

Appellant was substantially prejudiced by the violation of his rights against illegal arrest, against self-incrimination, to due process of law and to a fair trial under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Appellant's illegal arrest directly led to the unconstitutionally admitted statements that formed the most damaging evidence against him in his capital trial. An error of federal constitutional law by a trial court requires that the prosecution bear the burden on appeal of proving that the error was harmless behind a reasonable doubt. *Chapman v. California* (1986) 386 U.S. 18, 24. Considering that appellant's inculpatory statements contained explicit confessions to both capital murder and robbery/burglary, the prosecution cannot meet this burden. This Court has observed that a confession is one of the most damaging kinds of evidence, "a kind of evidentiary bombshell which shatters the defense." *People v. Neal* (2003) 31 Cal.4th 63, 86.

Therefore, the entire judgment must be reversed.

## III

## APPELLANT'S STATEMENT TO SERGEANT KEECH WAS OBTAINED WITHOUT PROPER RE-ADVISEMENT OF *MIRANDA* IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS; THEREFORE ITS ADMISSION INTO EVIDENCE WAS IN ERROR

Appellant moved to suppress his January 30, 1991 statement to the SCPD.[18] Several hours after appellant's arrest and interrogation by the SJPD for the stun gun robberies, he confessed his involvement in the Leewards killing to Sergeant Keech of the SCPD.[19] However, Sergeant Keech failed to properly re-advise appellant of his rights as required by *Miranda*. As a result, the statement was taken in violation of appellant's constitutional rights and should have been excluded from trial.

### A. Specific Circumstances Surrounding the Failure of Sergeant Keech to Properly Re-Advise Appellant of his *Miranda* Rights

Appellant was transported to the SJPD for questioning solely regarding the stun gun robberies. (See Argument II.) At approximately 11:30pm on the night of January 29, 1991, SJPD Officer de la Rocha advised appellant of his rights, obtained a waiver, and then questioned him regarding these robberies. (5 RT 583-84.) During this

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18 Assuming, *arguendo*, that there was sufficient probable cause to arrest appellant, then appellant concedes that his statement to SJPD Officer de la Rocha would stand on its own. However, his statement to SCPD Sergeant Keech *still* suffers from several constitutional defects, including Sergeant Keech's failure to properly re-advise appellant of his Miranda rights.

19 For details regarding the circumstances of appellant's illegal arrest, see Argument II.

interrogation, appellant admitted to driving the getaway car in the Gavilan Bottle Shop robbery. (5 RT 585.) However, later on that same evening, shortly after midnight on January 30, 1991, several SCPD officers also arrived at the SJPD station as part of their investigation into the Leewards killing. (5 RT 646-47.)

The environment and circumstances surrounding appellant's time at the station were out of the ordinary. Although SJPD Officer de la Rocha interrogated appellant about the stun gun robberies, he was not formally assigned to that investigation. (5 RT 595.) The unit investigating these robberies was shorthanded, so Officer de la Rocha was brought in to help by conducting the interrogations of appellant and co-defendant Jennings. (*Id.*) In fact, the scene that night at the SJPD was downright disorganized and confusion abounded at the station amongst the various agencies. (5 RT 589.)[20]

In the midst of this, SCPD Sergeant Keech began to interrogate appellant regarding the Leewards killing. (6 RT 739.) His interrogation began at approximately 4:00am on January 30, 1991, more then four hours after SJPD Officer de la Rocha had interrogated appellant about the stun gun robberies. (Id.) Sergeant Keech acknowledged appellant's prior SJPD interrogation and his prior advisement of *Miranda* warnings, but he did *not* re-advise appellant of those rights as they related to the

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Officer de la Rocha agreed that there was "confusion around the police department with various agencies." (5 RT 589.) Officer James Werkema, another SJPD officer who participated in the arrest of appellant, reported that the SCPD's arrival was "kind of a surprise," when asked if it was "one of the more orderly evenings" at the station. (4 RT 530.)

interrogation regarding the Leewards killing. (CT Supp. 2 1 2-4.) In fact, when asked if he was willing to talk, appellant indicated that he didn't have anything to say about Leewards by responding, "If I knew anything, I'd let you know." (CT Supp. 2 1 4.)

After this initial exchange, Sergeant Keech dropped the subject of any crimes and asked appellant logistical questions about his address and phone number. (Id.) Then, Sergeant Keech switched gears and again attempted to reconfirm appellant's previous waiver as it related to the stun gun robberies, though *still* without any actual re-advisement as to the new crime. (Id.) Subsequently, during the course of the interview, appellant made inculpatory statements, admitting involvement in the Leewards killing. (6 RT 746.)

At the conclusion of the interview, Sergeant Keech again acknowledged appellant's waiver in the prior interrogation but still did nothing to let appellant know that the same rights that were given to him by SJPD Officer de la Rocha should have been applied to the SCPD interrogation regarding the Leewards killing. (CT Supp. 2 1 56-57.)

Sergeant Keech was the lead SCPD officer working the Leewards investigation and the one who conducted the interrogations of all four co-defendants present at the station. (5 RT 658-62.) Co-defendant Jennings was interrogated after appellant; however, Sergeant Keech quickly discovered that Jennings had not waived his rights during his SJPD interrogation and that he had in fact chosen to invoke his right to counsel. (6 RT 761-62.) At that point, Sergeant Keech promptly re-advised co-

defendant Jennings of his rights and only then proceeded with the interrogation regarding the Leewards killing. (6 RT 763.) The interrogations of co-defendants Silveria and Travis proceeded without incident.

### B. General Law Regarding Re-Advisement of *Miranda* Rights

The Fifth Amendment guarantees that a statement made by a criminal suspect during police interrogation shall be admissible at trial only if the suspect was informed of important constitutional rights and given the opportunity to knowingly and voluntarily waive those rights before being interrogated about suspected wrongdoing. *Miranda v. Arizona* (1966) 384 U.S. 436, 478-79. The circumstances of the confession must show *both* that waiver was voluntary and that it was made with full awareness of both the rights and the consequences of the waiver. *Moran v. Burbine* (1986) 475 U.S. 412, 421.

This Court repeatedly has held that re-advisement of Miranda warnings is not required before each custodial interrogation. See, e.g., *People v. Smith* (2007) 40 Cal.4th 483, 504; *People v. Mickle* (1991) 54 Cal.3d 140, 170. One warning will suffice, so long as the "subsequent interrogation is 'reasonably contemporaneous' with the prior knowing and intelligent waiver." *Mickle*, *supra*, 54 Cal.3d at p. 170. The term "reasonably contemporaneous" has avoided precise definition; rather, the question of whether the subsequent interrogation is "reasonably contemporaneous" or requires re-advisement must be analyzed under a "totality of the circumstances" test. Id.

In determining whether the totality of the circumstances indicates that the warning was "reasonably contemporaneous," the key question is whether the Miranda warning "sufficiently informs a defendant of his constitutional rights so that he has an understanding of these rights during subsequent interrogations." *People v. Brockman* (1969) 2 Cal.App.3d 1002, 1006. Several established factors guide judgment of this issue, including "the amount of time that has passed since the waiver, any change in the identity of the interrogator or the location of the interview, any official reminder of the prior advisement, the suspect's sophistication or past experience with law enforcement, and any indicia that he subjectively understands and waives his rights." *Mickle, supra,* 54 Cal.3d at p. 170.

California courts have repeatedly addressed the question of when re-advisement is required, with varying results. The first factor analyzed is often the amount of time that has passed between waiver and interrogation. At one end of the spectrum, a mere fifteen minute time lapse was found to be clearly "reasonably contemporaneous." *People v. Meneley* (1972) 29 Cal.App.3d 41, 58 (overruled on other grounds). At the other end, a six week time lapse was found not to be "reasonably contemporaneous," *even with* a reminder. *People v. Bennett* (1976) 58 Cal.App.3d 230, 238-39. However, as would be expected, most cases fall somewhere in between these two extremes and further analysis is required; this is the point at which the other factors enumerated in cases such as *Mickle, supra,* come into play.

Because each case involves a balance of factors, courts have generally enumerated the reasons that contributed to their findings that re-advisement was or was not required. For example, in *Smith*, *supra*, the second interrogation occurred approximately twelve hours after the first interrogation ended. However, the defendant remained in custody in the interim, the same officers conducted both interrogations in the same office, the defendant was asked whether he would like to hear his rights again (he declined), and the defendant was quite familiar with the criminal justice system; thus, re-advisement was not required. 40 Cal.4th at pp. 504-05. Similarly, in *Mickle*, *supra*, re-advisement was unnecessary even though 36 hours had elapsed between interrogations because the defendant was still in custody, was interviewed by the same interrogators, was reminded of his prior waiver, was familiar with the justice system, and there was nothing to indicate he was mentally impaired or otherwise incapable of remembering the prior advisement. 54 Cal.3d at p. 171. See also *People v. Stallworth* (2008) 164 Cal.App.4th 1079, 1089-90 (16-hour break acceptable when defendant remained in custody, the interrogation was conducted in the same location and by one of the same officers, and defendant acknowledged that his rights had been read to him the previous day).

Police conduct also appears to be relevant consideration when assessing the totality of the circumstances of a subsequent interrogation. Any misconduct by the police in reinstituting the interrogation must be considered. See *People v. Riva* (2003) 112 Cal.App.4th 981, 993-94. Officers that took turns interrogating a defendant did not

alter the "reasonably contemporaneous" nature of the subsequent interrogation, when their work was part of an ongoing and cooperative process. *People v. Lewis* (2001) 26 Cal.4th 334, 387. However, if the person conducting the second interview is not readily identifiable as an agent of the entity that originally gave the *Miranda* warnings, it would be "more encumbent [sic] upon the interviewer to readvise a defendant of his *Miranda* rights." *People v. Quirk* (1982) 129 Cal.App.3d 618, 630. Furthermore, the fact that a defendant initiates the second interrogation is a factor that weighs in favor of finding no re-advisement is necessary. Id. at pp. 627-28.[21]

To what extent the presence of *two different* police agencies investigating *two different* crimes affects the calculus is an open question. However, different proceedings and different subject matters have required re-advisement. In one case, a fresh admonition was required when the prior admonition was given in the context of a proceeding different from that to which the questioned interrogation relates. *People v. Garcia* (1969) 268 Cal.App.2d 712, 714. In *Garcia*, the two proceedings were not both criminal investigations and did relate to the same conduct; however, the proposition that two different and unrelated proceedings might require two separate warnings stands. *Id.* Similarly, in *Quirk, supra*, the fact that the two interrogations were in two different

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*Quirk* distinguished its situation from other cases of similar time lapses where re-advisement was not necessary because defendants in those cases had re-initiated discussions themselves. *See People v. Brockman* (1969) 2 Cal.App.3d 1002; *People v. Booker* (1977) 69 Cal.App.3d 654; and *People v. McFadden* (1970) 4 Cal.App.3d 672.

contexts and by two different agencies (one a standard police interrogation and one an interview with a government psychiatrist) weighed heavily in the court's finding that re-advisement was required. 129 Cal.App.3d at p. 628.

In reviewing Miranda issues on appeal, this Court accepts the trial court's resolution of disputed facts and inferences as well as its evaluations of credibility if substantially supported, but independently determines from undisputed facts and facts found by the trial court whether the challenged statement was legally obtained. *People v. Cunningham* (2001) 25 Cal.4th 926, 992.

### C. Appellant's Statement to Sergeant Keech was Obtained in Violation of Miranda

Sergeant Keech failed to properly re-advise appellant of his rights before interrogating him regarding the LeeWards killing; thus, the statement Sergeant Keech obtained was in violation of Miranda and should have been suppressed.[22] The court ruled that, under the circumstances, Sergeant Keech did not need to re-advise appellant before interrogating him regarding a different crime. (4 CT 961.) However, the court erred in this conclusion.

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22 Appellant acknowledges that he was properly advised of his *Miranda* rights by SJPD Officer Boyles and he chose to waive those rights. However, that does *not* necessarily mean that his subsequent interrogation by the SCPD was covered by that same waiver.

Whether or not Sergeant Keech was required to re-advise appellant of his Miranda rights prior to interrogating him about the LeeWards killing is a question that must be analyzed under the totality of the circumstances. *See Mickle, supra,* 54 Cal.3d at p. 170. Appellant's case falls squarely between the extremes of time lapses for which the necessity of re-advisement would be clear. Thus, the analysis of his case requires consideration of more of the relevant factors.

Admittedly, the fact that appellant remained in the SJPD station during the interval between interrogations is a fact that argues against re-advisement, as is the fact that Sergeant Keech at least cursorily reminded appellant of his prior waiver. However, no one factor is dispositive under the totality of the circumstances test. The change in identity of the interrogator is a recognized variable that argues in favor of re-advisement, as is appellant's lack of experience with law enforcement.[23] In addition, appellant's case presents a circumstance previously unaddressed by this Court—namely, the presence of two different police departments investigating two different crimes—that tends to argue in favor of re-advisement.

Appellant is not comparable to the defendants in *Mickle* and *Smith*, both of whom were veterans of the criminal justice system and were interrogated by the same officers regarding the same crimes. See *Mickle, supra,* 54 Cal.3d at p. 171; *Smith,*

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23 Appellant had an "insignificant record of criminal conduct," never having been convicted of a felony or served any jail time. (5 CT1488, 1493, 1494-96.)

*supra*, 40 Cal.4th at pp. 504-05. In fact, appellant was in a situation more similar to that of the defendant in *Quirk*. See *Quirk*, *supra*, 129 Cal.App.3d at p. 630. Like in that case, it was clear that Sergeant Keech was from a different agency from the person to who appellant had waived his rights; thus, there was at least some onus on Sergeant Keech to clarify the situation through re-advisement. Id. Similarly arguing in favor of re-advisement on the basis of police conduct, appellant was *not* the one to initiate the second interrogation. Id, at pp. 628-29.

Most importantly to appellant's case, the two interrogations were conducted by *two different* police departments investigating *two different* crimes. It was absolutely clear that the interrogations were about two different things. (5 RT 594.) In fact, the SJPD withdrew from questioning appellant and his co-defendants as soon as they learned that the SCPD was on the way in recognition of the different and more serious nature of the LeeWards killing investigation. (5 RT 605.)[24]

Therefore, appellant's situation raises a narrow issue previously unaddressed by this Court. However, previous cases do inform the proper course of action. The fact that a subsequent interrogation was part of a different proceeding has required re-advisement. See *Garcia*, *supra*, 268 Cal.App.2d at p. 714. Similarly, the fact that a

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Officer de la Rocha was clear about this, when he said: "Well, a homicide takes priority over an armed robbery in the sensitivity of the investigation and it became obvious to me at that point and to the other investigators that we should stop our interviews pending Santa Clara P.D.'s arrival." (5 RT 605.)

subsequent interrogation was performed by a different agency in a completely different context also weighed heavily for re-advisement. *See Quirk, supra*, 129 Cal.App.3d at p. 628. In appellant's case, his subsequent interrogation involved both a different proceeding *and* a different interrogator; thus, it can be inferred that re-advisement was required.

In fact, Sergeant Keech's actions with one of appellant's co-defendants belied his belief that the SCPD investigation was a completely separate proceeding, requiring re-advisement. Hours after Sergeant Keech interrogated appellant, he realized that co-defendant Jennings had *not* waived his rights when they were given to him by SJPD Officer de la Rocha regarding the stun gun robberies. (6 RT 761-62.) As a result, Sergeant Keech promptly re-advised him and interrogated him regarding the LeeWards killing—a decision that was upheld by the trial court. (6 RT 763.) If Sergeant Keech had not believed the SCPD investigation to be a completely separate proceeding, re-advisement would not have been sufficient to overcome Jennings' previous waiver; Sergeant Keech would simply have been barred from questioning him further. He necessarily made a determination that Jennings's invocation of rights related only to the SJPD investigation and that thus, if Jennings were read his rights anew in the completely unrelated investigation of the LeeWards killing, he could then be questioned. Sergeant Keech should have known in appellant's case, as he did with Jennings, that his subsequent interrogation was in relation to a completely different crime and constitutionally required that appellant be re-advised.

When Sergeant Keech arrived, he tap-danced around properly re-advising appellant of his rights before beginning his interrogation but did not ever actually do so. Because of this, appellant was not made aware before his subsequent interrogation that his rights were still applicable despite the drastic change in circumstances. There was no practical reason not to re-advise appellant of his rights other than to induce a confession. An after-the-fact acknowledgment is not enough to rectify the problem that a lack of re-advisement creates, and even at the end of the interrogation, Sergeant Keech's "reading" of rights was not full and proper, especially given the difference of penalty exposure between a burglary/robbery charge in which appellant was only peripherally involved and a first-degree murder charge with special circumstances.

Thus, upon examining the totality of the circumstances, the SCPD's interrogation of appellant was not "reasonably contemporaneous" with the prior waiver; therefore, Sergeant Keech was required to re-advise appellant of his Miranda rights before interrogating him regarding the LeeWards killing.[25]

### D. Appellant Was Prejudiced by the Court's Failure to Suppress Appellant's Statement and the Judgment of Guilt Must be Reversed

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Recent authority such as *Berghuis v. Tompkins* (2010) 130 S.Ct. 2250, 2261-2262) does not affect the present case. *Berghuis* simply held that an "implicit" waiver may satisfy the Miranda requirement if it is clear that the defendant understood his rights and engaged in a course of conduct indicating a waiver. (*Id.*) The formulation set forth in cases such as *Stallworth, supra*, are directed to determining whether the defendant understood his rights so as to permit questioning without a re-advisement. (*Id.*, at pp. 1090-1091.)

Appellant was substantially prejudiced by the violation of his rights against self-incrimination, to due process of law, to a fair trial and to a reliable guilt phase determination under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Appellant's unconstitutionally admitted statements were the most damaging evidence against him in his capital trial. An error of federal constitutional law by a trial court requires that the prosecution bear the burden on appeal of proving that the error was harmless behind a reasonable doubt. *Chapman v. California* (1986) 386 U.S. 18, 24. Considering that appellant's inculpatory statements contained explicit confessions to both capital murder and robbery/burglary, the prosecution cannot meet this burden. (*See, People v. Neal, supra*, 31 Cal.4th at p. 86.)

Therefore, the entire judgment must be reversed.

## IV

## APPELLANT'S STATEMENT TO SERGEANT KEECH WAS INVOLUNTARY IN THAT IT WAS THE PRODUCT OF COERCION THAT OVERBORE APPELLANT'S FREE WILL IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS; THEREFORE ITS ADMISSION INTO EVIDENCE WAS IN ERROR

Appellant moved to suppress his January 30, 1991 statement to Sergeant Keech of the SCPD. Appellant's arrest was illegal and he was improperly questioned by Sergeant Keech without re-advisement of his *Miranda* rights. (See Arguments II and III.) However, in addition, appellant's statement to Sergeant Keech was itself the product of impermissible coercion and thus involuntary, in violation of appellant's constitutional rights. This provides yet a *third* basis for the suppression of appellant's statement and thus, the statement should have been excluded from trial.[26]

### A. Specific Circumstances Surrounding the Involuntary Nature of Appellant's Statement to Sergeant Keech

After Sergeant Keech's failure to re-advise appellant of his rights, the topic of interrogation eventually turned to appellant's arrest; at this time appellant reiterated his involvement in the Gavilan Bottle Shop robbery. (CT Supp. 2 1 12-13.) Immediately thereafter, and in response to appellant's denial of even being at Leewards the previous

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As was the case in Argument III, assuming, *arguendo*, that there was sufficient probable cause to arrest appellant, then appellant concedes that his statement to SJPD Officer de la Rocha would stand on its own. However, his statement to SCPD Sergeant Keech *still* suffers from several constitutional defects, including the fact that it was obtained involuntarily.

night, Sergeant Keech, for the first time since his introduction, mentioned the Leewards killing. (CT Supp. 2 1 13-14.)

When appellant denied his presence, Sergeant Keech badgered appellant and expressed disbelief. (CT Supp. 2 1 14.) Sergeant Keech then laid out an extremely detailed version including times and dialogue of how he believed the crime happened, all the while inserting appellant into the narrative in an accusatory manner. (CT Supp. 2 1 14-16.) After this, he berated appellant and enticed him to confess once again:

> Keech: Now, that's the story I'm gonna tell the jury and I got somebody, and I got evidence. . . . And it's gonna get laid on you because a lot of the information we got has already been laid on you. Now, you got the chance right now to give us, out front, right up front, what your side is. You don't take this chance right now, *you may never get it again*. And if you don't think I can't prove this case, *if you don't think I can't fry you, you're sadly mistaken*, Chris. Now don't let these guys lay it all on you 'cause that's what's happening. You get a chance to lay some back and say exactly what happened. Whose idea was it? (CT Supp. 2 1 16, emphasis added.)

These bullying tactics were more than appellant could handle, and in the face of being told he could be "fried," he began to confess, initially admitting only to being at Leewards with his friends that night. (CT Supp. 2 1 17.) However, as the interrogation progressed, Sergeant Keech continued to put pressure on appellant by confronting him with untrue information as well as incriminating information gleaned from co-defendants. (CT Supp. 2 1 24, 26.) Increasingly, through techniques such as these, Sergeant Keech forced appellant to admit to more and more details of the crime. (CT Supp. 2 1 17-33.) At one point, Sergeant Keech even referenced what appellant should do to best position himself for trial:

Keech: [Y]ou know, at least if you're up front and it comes out on paper that you're up front, okay? [sic] Because talking in circles like this and playing games with us when we know exactly what you did in there, don't look good. You're insulting me. You're insulting my partner because we know what happened in there. And if a judge and jury heard this, you'd be insulting them, too. (CT Supp. 2 1 32.)

Finally, towards the end of the interview, appellant admitted full participation in the killing. (CT Supp. 2 1 44.) He did so, after long resistance, in response to Sergeant Keech's implied suggestions, finally acknowledging that he meant to cut, but not kill, the victim. (*Id.*)

At the close of the interview, Sergeant Keech made a veiled attempt to get appellant to acknowledge that he had not been coerced in any way into admitting his involvement. (CT Supp. 2 1 57.) When appellant indicated he did not understand the meaning of coerce, Sergeant Keech provided him with a very limiting definition, explaining that coerce means the same thing as "threaten." (*Id.*) To this, appellant acknowledged not being threatened. (*Id.*)[27]

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27 The following exchange was had:

Keech: Did we make you any promises?

Appellant: No.

Keech: Did we coerce you in any way?

Appellant: What does that mean?

Keech: Did we threaten you?

Appellant: [Laughs] No. (CT Supp. 2 1 57.)

### B. General Law Regarding Voluntariness

"It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession [Citation.], and even though there is ample evidence aside from the confession to support the conviction. [Citations.]" *Jackson v. Denno* (1964) 378 U.S. 368, 376. A confession is considered voluntary "if and only if, it was, in fact, voluntarily made . . . [A] confession obtained by compulsion must be excluded whatever may have been the character of the compulsion." *Miranda v. Arizona* (1966) 384 U.S. 436, 462 (quoting *Ziang Sung Wan v. United States* (1924) 266 U.S. 1, 3-4).

A confession must "not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, *however slight*, nor by the exertion of any improper influence." *Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (quoting *Bram v. United States* (1897) 168 U.S. 532, 542-43) (emphasis added). "The use in a criminal prosecution of a confession, admission or statement which is obtained by force, fear, promise of immunity or reward is a denial of the state and federal constitutional guarantees of due process of law." *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1483; see also *Malloy*, *supra*, 378 U.S. at p. 7. To that end, a confession is considered coerced if the defendant's will has been overborne and that therefore, the statement was "not the product of [a defendant's] rational intellect and free will." *Blackburn v. Alabama* (1960) 361 U.S. 199, 208; *People v. Sanchez* (1969) 70 Cal.2d 562, 572. Put

another way, in determining whether a confession was voluntary, the question is whether the choice to confess was "essentially free." *Schneckcloth v. Bustamonte* (1973) 412 U.S. 218, 225; *People v. Massie* (1998) 19 Cal.4th 550, 576.

In making this determination of voluntariness, the court must look at "all of the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Schneckcloth, supra*, 412 U.S. at p. 226; *In re Shawn D.* (1993) 20 Cal.App.4th 200, 208-09. Voluntariness does not turn on any one factor, but on is judged under the "totality of the circumstances." *Withrow v. Williams* (1993) 507 U.S. 680, 688-89. Among the things to be considered are: "*the crucial element of police coercion*; the length of the interrogation; its location; its continuity; the defendant's maturity, education, physical condition and mental health; . . . [and] the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation." *Withrow, supra*, 507 U.S. at pp. 693-94 (citations omitted) (emphasis added); *People v. Williams* (1997) 16 Cal.4th 635, 660.

Instances where California courts have found confessions involuntary are varied and numerous. For example, in *Esqueda, supra*, the defendant's obvious reluctance to confess, together with the police's use of deception, tended to support a finding of involuntariness. 17 Cal.App.4th at p. 1470. Officers repeatedly told Esqueda what they wanted him to say, including that he would be better off if he admitted the shooting was an accident. Id. at p. 1486. The *Esqueda* court also held that a *Miranda* violation is a factor that seriously weighs in favor of involuntariness. *Id.* at p. 1484.

Similarly, in another case, a statement was found involuntary on account of deliberate police misconduct including use of deception, the lack of a break between custodial interrogation, the defendant's young age (18) and lack of experience with the criminal justice system, and police threats of first degree murder charges if defendant did not cooperate. *People v. Neal* (2003) 31 Cal.4th 63, 89-90. In *Neal*, the defendant did not confess during the initial interview, but asked to speak to the police again at a later date, when he confessed. Yet, despite this showing of free will and the time lapse, the court *still* held that his confession was involuntary because the officer had threatened him with a first degree murder charge if he did not confess during the first interview. Id. In addition, police threats regarding the death penalty have been cause for particular concern, and several other cases have also held that threatening the death penalty itself renders a statement inadmissible. *See, e.g., People v. Hinds* (1984) 154 Cal.App.3d 222, 238 (confession involuntary where officers told defendant he would get the death penalty unless he talked because they would assume the worst until told differently); *People v. McClary* (1977) 20 Cal.3d 218, 229 (confession involuntary where police told defendant that if she confessed, she might be charged as only an accessory and not as a principal) (overruled on other grounds).

This Court does not defer to the trial court's decision regarding the voluntariness of a confession. *People v. Benson* (1990) 52 Cal.3d 754, 779. Rather, all factual determinations about questions such as whether there was coercive police conduct are reviewed independently on appeal. Id. Admission into evidence of an involuntary

confession is judged under a harmless beyond a reasonable doubt standard. *Arizona v. Fulminante* (1991) 499 U.S. 279, 310; *People v. Cahill* (1993) 5 Cal.4th 478, 510.

### C. Appellant's Statement Was Involuntary

In the instant case, an examination of the details of the interrogation and the characteristics of the accused reveals an appellant whose will was overborne; thus, the statement was involuntary and should have been suppressed. The court ruled that, under the circumstances, nothing could show that appellant's statement was not freely and voluntarily given. (4 CT 961.) However, the court erred in this conclusion.

During appellant's interrogation, Sergeant Keech combined tactics that, together with appellant's physical state and personal characteristics, constituted impermissible coercion. These tactics included his failure to re-advise appellant of his rights (constituting a lack of proper *Miranda* warnings to appellant), repeated expressions that appellant was lying, an implication that the death penalty would be imposed, fabricated evidence against appellant, and implied promises of leniency. Under the totality of the circumstances, the overall picture is one of a defendant whose statement was not the product of his rational intellect and free will and whose choice to confess was not "essentially free." As a result, the confession that was obtained from appellant on January 30, 1991 was the product of coercion and therefore involuntary.

It is true that no one factor is dispositive, but in sum, the details of appellant's interrogation point towards a finding of involuntariness. Sergeant Keech's

conduct was made problematic from the very beginning of the interview by his failure to re-advise appellant of his rights. (See Argument III.) The fact that statements are tainted by an earlier Miranda violation is a factor that argues against the voluntariness of a statement. See *Esqueda, supra*, 17 Cal.App.4th at p. 1484. However, this indiscretion was only the beginning of a pattern of further impermissible coercion.

Failing to immediately extricate inculpatory statements—other than a repetition of the earlier confession to the Gavilan Bottle Shop robbery—Sergeant Keech began forcefully telling appellant exactly what he was suspected of by inserting appellant's name into a narrative of a gruesome murder. (CT Supp. 2 1 14-16.) Coercion could also include "the brainwashing that comes from repeated suggestion." See *People v. Anderson* (1980) 101 Cal.App.3d 563, 574. Despite appellant's vehement denials, Sergeant Keech told him repeatedly that the police knew he was lying about the extent of his involvement. (See, e.g., CT Supp. 2 1 24, 26, 31-32.)

Furthermore, Sergeant Keech told appellant that if he did not tell the truth at that moment, he might never get a chance to again. Sergeant Keech even went so far as to tell appellant that he could "fry" him (implying that if he didn't confess, the death penalty would be imposed). (CT Supp. 2 1 16.) The fact that the death penalty is threatened is a factor that argues strongly against the voluntariness of a statement. *See Neal, supra*, 31 Cal.4th at pp. 81-82; *McClary, supra*, 20 Cal.3d at p. 223; and *Hinds, supra*, 154 Cal.App.3d at p. 238. Based on this case law, the fact that the death penalty

was threatened here could be nearly enough on its own to render appellant's statement involuntary.

Still not receiving the magnitude of a confession that he was after, Sergeant Keech began to tell appellant lies about evidence that the police had recovered. For example, he claimed that appellant's fingerprints had been found on the duct tape used to tape the victim. (CT Supp. 2 1 24.) Though not per se sufficient, "[l]ies told by the police to a suspect under questioning can affect the voluntariness of an ensuing confession." *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1240. Sergeant Keech then went on to tell appellant exactly what he wanted him to say, based on statements obtained from co-defendants; for example: "How about if I told you John handed you the knife and told you to kill him, and you tried to cut his throat?" (CT Supp 21 26.) Telling the defendant what he was supposed to say was a factor that contributed to the involuntary statement found in *Esqueda, supra.* 17 Cal.App.4th at p. 1486. Similar actions here by Sergeant Keech are yet another factor that argues against voluntariness.

Sergeant Keech also implied to appellant that the punishment would be less grave if appellant did not mean to kill the victim but rather, only meant to cut him. (CT Supp 2144.) This was the final tactic that led to appellant's admission of the full extent of his involvement. "[M]ere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary." *People v. Jimenez* (1978) 21 Cal.3d 595, 611 (overruled on other grounds). Nor will the statement be considered involuntary

"[w]hen the benefit pointed out by the police . . . is merely that which flows naturally from a truthful and honest course of conduct." Id. at 611-12 (quoting *People v. Hill* (1967) 66 Cal.2d 536, 549 (overruled on other grounds)). However, in the instant case, Sergeant Keech's implied leniency by suggesting that it was okay to admit involvement so long as appellant did not mean to *kill* the victim went beyond that.

In addition to the details of the interrogation, the characteristics of the accused in this case also point towards involuntariness. Throughout the interrogation with Sergeant Keech, appellant was obviously suffering from a severe cough—so much so that his coughs were recorded in the written transcript that was prepared. (See, e.g., CT Supp. 2 1 3, 4, 11, 17, 44, 49.) Sergeant Keech was aware of this condition, and inquired of it at the outset, to which appellant responded, "I have bronchitis." (CT Supp. 2 1 4.) Furthermore, appellant's young age and lack of criminal history is a factor that should be considered. Appellant was only 21 years old at the time of his arrest and had an "insignificant record of criminal conduct," never having been convicted of a felony or served any jail time. (5 CT1488, 1493, 1494-96.) Other cases have found that young defendants with little prior contact with the criminal justice system are more susceptible to police coercion. See, e.g., *Neal, supra*, 31 Cal.4th at p. 84-85 (citing *Fare v. Michael C.* (1979) 402 U.S. 707, 725).

Many of the factors disapproved of in the cases discussed earlier are present here. The details of the interrogation and the characteristics of the accused both tend to show involuntariness. Appellant was improperly not re-advised of his Miranda rights,

and was obviously reluctant to confess and resisted doing so for some time, caving in only when confronted with the choice between his last chance at telling the truth and being "fried." He was badgered, threatened, and misled by promises of leniency. And to make matters worse, his physical state belied that he was young, unfamiliar with the system, and suffering from bronchitis. All of these factors combine to indicate that, under the totality of the circumstances, appellant's choice to confess was not essentially free; rather, his will was overborne and the confession was a product of coercion rather than his own free will. Therefore, his statement to Sergeant Keech was involuntary.

### D. Appellant Suffered Prejudice by the Court's Failure to Suppress Appellant's Statement and the Judgment of Guilt Must be Reversed

Appellant was substantially prejudiced by the violation of his rights against self-incrimination, to due process of law and to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution. Appellant's unconstitutionally admitted statements were the most damaging evidence against him in his capital trial. An error of federal constitutional law by a trial court requires that the prosecution bear the burden on appeal of proving that the error was harmless behind a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1986). Considering that appellant's inculpatory statements contained explicit confessions to both capital murder and robbery/burglary, the prosecution cannot meet this burden. (*People v. Neal, supra*, 31 Cal.4$^{th}$ at p. 86.)

Therefore, the entire judgment must be reversed.

## V THE SUPERIOR COURT, AND THIS COURT, HAVE DENIED APPELLANT HIS RIGHTS TO DUE PROCESS, MEANINGFUL APPELLATE REVIEW, COUNSEL, AND A NONARBITRARY DETERMINATION OF HIS SUITABILITY FOR THE DEATH PENALTY, BY VIRTUE OF THEIR REFUSAL TO ALLOW APPELLANT TO RAISE ON APPEAL, ISSUES WHICH WERE PROPERLY PRESERVED BELOW AND WHICH SIMILARLY SITUATED DEFENDANTS ARE PERMITTED TO RAISE ON APPEAL. THESE INCLUDE ALLEGATIONS OF BAD-FAITH PROSECUTION AND POTENTIAL INSTRUCTIONAL ISSUES

### A. Background and Overview

This case initially involved five codefendants, three of whom, Travis, Silveria and appellant, were sentenced to death. Appellant's case was severed from that of Travis and Silveria, and those two defendants were tried first. They were found guilty of first degree murder with special circumstances, but the jury was unable to reach a verdict on penalty. (14 ST (Silveria/Travis) CT 3481, 3568.)

Travis and Silveria were subsequently retried on the issue of penalty and sentenced to death. Prior to that, however, and subsequent to their first trial, appellant's trial took place. (S062417.) During the prosecutor's penalty phase closing argument, appellant's counsel vigorously objected to the prosecution's characterization of appellant as the lead or dominant actor in the charged offenses, which was completely contrary to the position the prosecution argued in the severed case of codefendants Silveria and Travis:[28]

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THE PROSECUTOR: . . . and remember, when he [defense counsel] says follows the lead there was no stabbing before Mr. Spencer started it. Under Mr. Spencer's

version, in effect, John Travis and Danny Silveria followed his lead. He led the stabbing." (86 RT 22389.)

MR. MANTELL [outside the presence of the jury]: "I'm very disturbed about where the argument is going at this point. I recognize that there are some lacunae in the evidence in this case with regard to the details of every actor's participation, but I apparently am about to hear . . . Travis and Silveria reduced to the position of stooges for Chris Spencer. And that I think is not permissible.

"This case has already been tried once where they were the principals and Mr. Spencer was absent. Of course, that was not the prosecution's theory at the time. But more importantly there is on the record of this case evidence which the prosecution must be aware of which establishes very clearly the tertiary position of of Chris Spencer in the planning and plotting of this entire operation.

"I think that the suggestion by the prosecution that this is even possible to the jury on the basis of hard evidence to the contrary in this case hovers perilously close to shystering, if it does not in fact fall over the edge. I would like it abandoned. I would like the jury admonished. I think that one more word and a motion for mistrial would be in order." (86 RT 22390.)

The trial court effectively overruled counsel's objection, and merely admonished the parties to "stick . . . to what was brought out during the course of *this trial*." *(Ibid.*, emphasis added.)

The trial court's ruling allowed the prosecutor, in effect, to argue any theory he wanted, even if it was factually inconsistent and incompatible with the theory he argued andat the previous trial, and in fact the prosecutor thereafter continued his argument, telling the jury that "you're not going to find evidence that . . . [appellant] was just following the lead . . . " (86 RT 22391.)[29]

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While the prosecutor's argument summarized herein was clearly calculated, by its very terms, to cast appellant in a leadership role in this case, evidence *not* presented to the jury demonstrated just the opposite; and strongly suggests that defense counsel had an appellate claim worth pursuing had he been provided with the complete record needed to present it. For example, according to Travis, the Leewards robbery was his idea and both

Silveria and Travis claimed to have planned it. (Suppl. CT#1 37 11050, 11072.) While appellant indeed said that he was the first to stab the victim, he did not do so in a leadership role but at the direction of Travis. (*Ibid.*, 11066.) Travis, according to Silveria, was in control of the situation at the scene, and it was his idea to kill the victim when the others wanted to leave. (34 RT 2949; 35 3009, 3027, 3051, 3062-3063, 3077.)

Appellant's statement to police accurately setting out his subservient role in this case was minimized by law enforcement prosecution witnesses as self-serving on appellant's part; easy to do since the codefendants' statements demonstrating this to be untrue (and supporting appellant's version of events) was not presented to appellant's jury. (75 RT 21553, 76 RT 21566.)

By virtue of his proper and timely objection, appellant at trial undeniably raised a colorable issue on appeal by contending that the prosecutor acted improperly to the extent he was arguing contradictory theories in a case in which multiple defendants were charged with the same offense. It is factually impossible that appellant was the "ringleader" in the charged offenses as opposed to Silveria and Travis, as argued at appellant's trial, *and at the same time*, that *Silveria and Travis* were the ringleaders and appellant merely a follower, as allegedly occurred at the first Silveria-Travis trial. If counsel was correct that this is in fact is what occurred, appellant was denied due process by this use of factually inconsistent and irreconcilable theories to secure the death penalty in appellant's case. (U.S. Const., Amends. V, XIV; Cal. Const., Article I, sec. 15; *Donnelley v. DeChristoforo* (1974) 416 U.S. 637, 643 [conduct of prosecutor so infected the trial with unfairness as to make the resulting conviction a denial of due process].)

Courts have consistently disapproved of the state's use of inconsistent and irreconcilable theories in separate trials. In *In re Sakarias* (2005) 35 Cal.4th 140, 156, our Supreme Court stated

"Judicial disapproval of the state's use of inconsistent and irreconcilable theories in separate trials for the same crimes was first articulated in opinions by individual Supreme Court and lower federal court judges. (See (See, *Jacobs v. Scott* (1995) 513 U.S. 1067 (dis. opinion of Stevens., J., from denial of stay) [fundamentally unfair to execute a person 'on the basis of a factual determination that the State has formally disavowed" in coperpetrator's later trial]; *Drake v. Kemp* (11th cir. 1985) 762 F.2d 1499, 1479 (conc. opn. of Clark, J.) [prosecutor's 'flip flopping of theories of the offense was inherently unfair'].)"

Subsequent opinions have reaffirmed this condemnation. In *Thompson v. Calderon* (9th Cir. 1997) 120 F.3d 1045, 1055-1057, reversed on other grounds *sub nomine Calderon v. Thompson (*1998) 523 U.S. 13) the court held that inconsistent prosecutorial theories may present a due process violation. In *Smith v. Groose* (8th Cir. 2000) 205 F.3d 1045, the court concluded that "*the use of inherently . . . contradictory theories violates the principles of due process*" (*Smith*, at p. 1052) for "[t]he State's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for the truth." (*Smith,* at p. 1051; emphasis added.)

In *Smith v. Groose*, *supra*, the prosecutor at one trial offered one impeached statement of a witness in support of its theory of the case; then, at a subsequent trial of the same charge, offered another, incompatible, statement of the same witness in support of a different theory. The due process violation resulted from the prosecution presenting in one case what it rejected in the other case, and vice versa. (*Smith*, at p. 1050.)

In *Thompson v. Calderon, supra,* at p. 1063 Judge Tashima states that "prosecutorial use of wholly inconsistent theories violates due process"); *Smith v. Groose, supra,* at p. 1052 ['the use of inherently contradictory theories violates due process"].)

The due process violation results from the unfair comprising of the ability of the accused to defend the charges against him, which in turn undermines the reliability of the result and integrity of the criminal justice system as a whole. In *Drake v. Kemp* (11th

Cir. 1985) 762 F.2d 1449, 1479, the prosecutor noted the "inherent unfairness" in the prosecutor's "flip-flopping theories of the offense."

*In re Sakarias, supra*, at p. 158. "For the government's representative, in the grave matter of a criminal trial, to 'chang[e] his theory of what happened to suit the state' is unseemly, at best. (*Sakarias*, at p. 158, citing *Drake v. Kemp, supra*, at p. 1479.) "Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed purpose of a search for the truth. (*Ibid.*) See also, *United States v. Kattar* (1st Cir. 1988) 840 F.2d 118, 127["disturbing to see the Justice Department change the color of its stripes to such a significant degree . . . depending on the strategic necessities of the separate litigations."].)

As Justice Kozinski correctly stated in his dissenting opinion in *Thompson v. Calderon,, supra*, at p. 1072, the prosecutor's use of inconsistent theories "surely does not inspire public confidence in our criminal justice system."

Accordingly, defense counsel, at a minimum, raised a colorable due process claim by virtue of his properly lodged objection and the trial court's *de facto* denial of it.

Importantly, this issue was is one that appellant wasis required, under California law, to pursue as part of his *appeal* as opposed to the mechanism of *habeas corpus*. This is because the documents and papers upon which appellant's objection was based, i.e., the respective transcripts of Spencer's trial and the first *Silveria-Travis* trial (hereinafter, "Silveria/Travis I"), under this Court's jurisprudence, were all properly part of the appellate record in appellant's case. Accordingly, appellant risked waiver of the issue

were he to not pursue the issue by means of appeal. (*In re Dixon* (1953) 41 Cal.2d 756, 759; habeas corpus is not a substitute for appeal and a claim that can be raised on appeal will not be considered on habeas corpus.) Therefore, appellant moved in the superior court to casue the to augment the record on appeal to include the "Silveria/Travis I" transcript in his record on appeal. Unfortunately, the motion was denied, first in the superior court, and subsequently in this Court. These denials deprived appellant of his state and federal rights to due process and meaningful appellate review and specified in this argument.

**B. Silveria/Travis I Is Properly Part of the Record on Appeal in the Present Case**

That Silveria/Travis I is properly part of appellant's record on appeal is clear from the jurisprudence of this Court, which has long acknowledged that a complete and accurate record is an essential component of meaningful appellate review and effective assistance of counsel on appeal. (*See, Hardy v. United States* (1964) 375 U.S. 277, 282 [noting that anything short of a complete transcript is incompatible with effective appellate advocacy].) Accordingly, appellant has a constitutional due process right to such a complete record on appeal as will assure him meaningful and effective appellate review. (*In re Steven B.* (1979) 25 Cal.3d 1, 8; *People v. Barton* (1978) 21 Cal.3d at pp. 518520; *March v. Municipal Court* (1972) 7 Cal.3d 422, 427429; *In re Roderick S.* (1981) 125 Cal.App.3d 48, 53.) See also, *People v. Frye* (1998) 18 Cal.4th 894, 941 [An incomplete record is not only a violation of statute but requires reversal of the

conviction if the appellant would thereby be deprived of meaningful appellate review].)[30] With respect to capital cases, this right is codified in Penal Code section 190.7 and Rules 39.50 and 39.51.

Because trial in this case commenced before January 1, 1997, Rule 35 and Penal Code sections 190.7 and 190.9 govern this request for correction and completion of the record.) Indeed, Rule 39.51, California Rules of Court, in effect at the time of appellant's trial, mandated that upon a judgment of death, the clerk shall prepare the *entire record* of the case. The express language of Penal Code 190.7, subdiv. (2), which

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A complete and accurate record is also required under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, and under article I, sections 7, 15, and 17 of the California Constitution. Failure to accord a capital defendant a complete record on appeal denies his or her constitutionally protected rights under the United States Constitution to meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. (*Parker v. Dugger* (1991) 498 U.S. 308, 321; see also *Dobbs v. Zant* (1993) 506 U.S. 357, 358, citing *Gardner v. Florida* (1977) 430 U.S. 349, 361, *Gregg v. Georgia* (1976) 428 U.S. 153, 167, 178 ["We have emphasized before the importance of reviewing capital sentences on a complete record."].) A complete and accurate appellate record is likewise mandated by California's independent interest in ensuring the reliability of its death judgments. (*People v. Stanworth* (1969) 71 Cal.2d 820, 832834; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 63 [affirming the "critical role of a proper and complete record in facilitating meaningful appellate review in the context of a capital case."].)

"[T]he Rules on Appeal contemplate that no reporter is infallible, that errors may exist in a proposed transcript, that correction may be proposed, and that it shall be the duty of the trial judge to finally determine the record." (*People v. Chessman* (1949) 35 Cal.2d 455, 461.)

governed this case at the time of appellant's trial, defines "entire record" as including but not necessarily being limited to

> "[a] copy of any paper or record on file or lodged with the superior or municipal court and *a transcript of any other oral proceeding reported in the superior or municipal court pertaining to the trial of the case.*" (Emphasis added.)

Here, by any definition of the term, the transcript of the first *Silveria/Travis* trial was an "oral proceeding reported in the superior or municipal court pertaining to the trial of the case." Appellant's *Sakarias* claim necessarily and *by definition*, implicated events that occurred at Silveria/Travis I. Those events were effectively *before the trial court* and *were considered by it* in ruling on appellant's objection at his trial. This, regardless of whether that transcript was ever formally lodged as an exhibit or document in Spencer's case or was even prepared at the time of the objection (although, as discussed subsequently, the record shows that the trial court deemed the entire file of the Silveria-Travis case up to and including the first trial to properly be part of Spencer's case file).

In sum, the correctness of the trial court's *de facto* ruling on the defense's properly-lodged objection, and the prejudicial effect of the assertedly improper argument, again which was the subject of a properly-lodged objection and request for admonition (*People v. Green* 27 Cal.3d 1, 27), required reference to the earlier proceeding. Silveria/Travis I was thus part of the "entire record" of appellant's case and

any conclusion to the contrary flies in the face of this Court jurisprudence requiring a complete record on appeal in a capital case, the preparation of the "entire record" and the inclusion of the transcript of any oral proceeding reported in the superior or municipal court pertaining to the trial of the case.

Cases such as *People v. Waidla* (2000) 22 Cal.4th 690, and *People v. Sanchez* (1995) 12 Cal.4th 1, 59, fn.5, do not contraindicate the notion that the Silveria-Travis transcript was properly part of appellant's record on appeal. In *Waidla*, this Court declined to consider a claim of prosecutorial bad faith based on the record of a codefendant's trial *because the issue had not been raised below*, therefore, the record on any such claim was not fully developed and such claim was better raised via habeas corpus. (*Waidla* at pages 743-744.)[31]

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In this case it wasn't only objected to in the trial court, it was fully developed in that the Court over objection permitted such argument by ruling that the prosecutor was to argue on the record of this case. This allowed the prosecutor to argue the facts of this case regardless of what he argued in Silveria/Travis I, even if it was factually incompatible with what he argued in this case. This effectively overruled appellant's objection and presupposed that the prosecutor did not raise arguments incompatible with theories presented in appellant's case, in Silveria/Travis I.

In *Sanchez*, the Court simply found that actions taken by the prosecutor subsequent to the defendant's trial were beyond the scope of the defendant's record on appeal. (*Sanchez*, at p. 59.)

In both cases, to be sure, this Court concluded that in the *particular cases before them*, the codefendant's trial transcripts were not part of the appellate record. Neither case however, held that the codefendant's trial transcripts could never be part of an appellant's record on appeal. That issue was simply not before the Court in either case,[32] and neither *Waidla* nor *Sanchez* set forth any discussion of what if any steps had been taken during the augmentation phase in the trial court to incorporate the codefendant's trial into the defendant's record on appeal.

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It is, of course, axiomatic that an opinion is not authority for cases not considered therein. (*People v. Knoller* (2007) 41 Cal.4th 139, 155.)

In *People v. Sakarias* (2000) 22 Cal.4th 596, the appellant, Waidla's codefendant, requested judicial notice by the reviewing court of Waidla's trial transcripts, asserting that he intended to raise the issue of conflicting prosecutorial theories on appeal. The Court acknowledged that it *could grant* the request, but it declined to do so *because the issue was not litigated the trial court*, thus the requested judicial notice could not provide a complete record. Under those circumstances, the Court held, the issue was properly raised by habeas corpus and not appeal. (*Sakarias*, at pages 635-636.)

In the present case, by contrast, the "inconsistent theories" issue *was* raised in the trial court, and was argued and ruled upon on the basis of events occurring at the prior trial. For these reasons, the holdings of *Waidla*, *Sakarias* and *Sanchez* do not even suggest, let alone require, that the "inconsistent prosecutorial theories" issue be deemed anything other than a properly-preserved appellate issue. There is nothing in those cases that even remotely suggest that section 190.7 and those cases mandating a complete record on appeal in a capital case, are not applicable to appellant's case.[33]

This being the case, appellant was duty-bound to pursue the claim via the appellate remedy. Indeed, he had no other option; had he chosen to pursue it via habeas

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Appellant has to date found no other California capital case where it has been held that materials upon which the the trial court relied in overruling a properly made objection in the trial court, are not properly part of the appellate record. By contrast, there is at least one case, and possibly more, in which a codefendant's record from a separate trial made part of appellant's record on appeal. (*E.g.*, *People v. Richardson* (2008) 43 Cal.4th 959.)

corpus, as occurred in *Waidla*, *Sakarias* and *Sanchez*, the result would have been a waiver of the issue, under this Court's long-standing jurisprudence. (*In re Dixon*, *supra,* 41 Cal.2d 756, 759; habeas corpus is not a substitute for appeal and a claim that can be raised on appeal will not be considered on habeas corpus.)

Accordingly, in order to ensure a correct and accurate record on appeal, appellant counsel moved in the superior court, to have the record on appeal formally augmented to include the transcript of the first Silveria-Travis trial so that the issue of "inconsistent prosecution theories" could be fully explored as a possible appellate issue. In support of this motion counsel, in addition to and apart from facts relating to the "Sakarias" claim, cited multiple statements on the record indicating that the trial court in fact deemed the transcript of the first Silveria-Travis trial to be part of the record on appeal in Spencer's case.

In this connection, counsel noted that portions of Mr. Spencer's (post severance) record cannot be understood without reference to the Travis and Silveria records, and in some situations it appeared a foregone conclusion among the court and counsel that the Travis-Silveria record would routinely be before the reviewing court in Mr. Spencer's appeal. Examples abound: In creating the jury questionnaire in the present case the parties apparently began with the questionnaire used in the first Silveria-Travis trial. The Court stated "I'm not going to have this questionnaire marked as a court's exhibit, because any court of appeal can take a look at the actual questionnaires that were actually filled out by the other two juries." (RT 18410.) In explaining its overruling a

defense objection during the instructions conference, the Court stated, "Read my rulings in the penalty phase of the [Silveria-Travis] trial." (49 RT 18437.)

Also during the instructions conference in appellant's case, the court stated. "I will use Silveria 23, which was also a combination of T-1, S3 and S3A. They will have to read the Silveria record for that one." (85 RT 22278.) And at 85 RT 22281 the court stated that it wouldn't even talk about Silveria 24 because it was "already covered."

The hearing on appellant's motion to augment the record was held in the superior court on November 7, 2002. At that hearing, respondent did not oppose appellant's request for inclusion of the Silveria-Travis trial transcript in his appellate record. The trial court indicated that it was inclined to grant the request because "there appear[ed] to be good cause to do so." (November 7, 2002 RT 64.) However, appellant's motion was denied, not on the ostensible merits, but based on an *ex parte* communication from this Court directing the trial judge to do so.

At the November 7, 2002 hearing, the trial court noted that it had received a letter from this Court, dated August 28, 2002, expressing concern over the apparently delay in the certification of the record in appellant's case.

The trial court read this letter into the record, as well as its letter response to this Court, dated September 3, 2002, and this Court's follow-up letter in response to that, dated September 6, 2007:

> [JUDGE MULLIN]: "I'll read these into the record for what they're worth.
>
> "Dear Judge Mullin:

"On February 22, 2000, appellant's counsel filed a request for correction , completion and supplement of the record in the Superior Court referencing this case. ON August 5th we received a monthly status report from the Deputy Court Manager Bob Geer, advising "Awaiting Judge's ruling on corrections." We presume this information is accurate.

"Rule 35(c)(4) of the California Rules of Court requires that a trial judge determine whether the requested corrections be made within 60 days of the date of the request for corrections is filed.

The Supreme Court is concerned that months have elapsed with no apparent disposition of that request. The Court would like to know when you intend to rule on the motion. . . .

I responded on September 3rd, 2002:

". . . I am in receipt of your August 28 letter in re the above matter. Let me give you a brief history of the case.

This case originally involved five defendants, Mr. Spencer, Mr. Travis, Mr. Silveria, Mr. Rackley and Mr. Jennings. Mr. Rackley was a juvenile and his case was severed and settled. The four other defendants' cases were severed after lengthy pretrial motions.

"Defendants Silveria and Travis went to trial before separate juries and were convicted, but each jury could not reach a verdict in the penalty phase and a mistrial was declared.

"The district attorney decided not to seek the death penalty as to Jennings, so the Spencer case was tried next and the jury returned a death verdict as to him.

"The Court then conducted a retrial of the Travis and Silveria penalty phase and the jury returned deaths verdicts as to each defendant.

"At the time we started this retrial, Jennings withdrew his time waiver and was sent to Judge Chang almost simultaneously with the Travis and Silveria retrial.

"On appeal, Spencer was appointed counsel first and then Travis and finally Silveria. Spencer's request for corrections, completion and settlement of the record was filed on February 22nd, 2002 and was received by me sometime in May. I received the trial transcripts in June.

I have reviewed the requested corrections and the reporters' transcripts and am having the reporters involved check their notes as to some of their requests.

In his requests, Spencer wants the entire record in the entire record in the Travis, Silveria and Jennings portions of this case corrected and included in his record on appeal. I'm inclined to grant this request except as to the portion containing the Jennings trial, as there appears to be good cause to do so. I anticipate that Travis and Silveria will make similar requests.

"In order to avoiding [sic] having three versions of the corrected record on appeal, I believe it makes sense to correct the record as to all three defendants at one time, even though this will case a delay in the Spencer case.

"On April 15, 2002, the Travis request for correction of transcripts on appeal was filed and I received them along with Spencer's. I have not received any paperwork on behalf of Silveria until July when I received an order granting counsel's request for an extension. That was granted by Justice Ming Chin and filed in the Supreme Court on July 17, 2002. The extension is until September 13, 2002.

"In the meantime, I have begun to work on the Travis request, even though our appeals clerk will have to contact Travis' attorney and ask for more information to clarify what he is expecting.

"If what I'm proposing to do, that is, do one record correction for all three defendants, does not meet with the approval of the Supreme Curt, please advise and I will correct the record as to Spencer."

I received a reply two days later dated three days later, dated September 6th of this year:

Dear Judge Mullin:

Thank you for your letter of September 3rd. Because Appellant Christopher Alan Spencer was tried separately from Daniel Todd Silveria and John Raymond Travis, his appeal from the ensuing judgment of death will necessarily be based on a separate record on appeal. There fore , the court requests that you proceed with record correction matters as to Appellant Spencer.

[JUDGE MULLIN]: I would encourage anybody here to file a petition with the Supreme Court asking that we have one corrected record on appeal and to delay this

Spencer one becoming certified until Travis and Silveria can get their records. So I have done what I can." (November 7, 2002 RT 62-65.)

Following the trial court's denial of this aspect of his motion to augment the record, appellant moved this Court for an order augmenting the record to include the transcript of the Silveria-Travis trial. This motion was denied. As explained below, this denial, and the denial of the motion in the superior court, compels reversal of the judgment in this case.

**C. The Refusal of the Court to Include the Silveria/Travis Transcript in his Record on Appeal Deprived and Continues to Deprive Appellant of His state and federal rights to due process, counsel, meaningful appellate review, and to a nonarbitrary determination of his eligibility for the death penalty. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., Art. I, secs. 15, 17.)**

In the previous section, appellant pointed out that a complete and accurate record has long been held a prerequisite to effective appellate advocacy and meaningful appellate review.

Appellant asserts, by clear analogy to cases such as *People v. Serrato* (1965) 238 Cal.App.2d 112, 118-119, that fundamental notions of due process compel the conclusion that it is the prosecution that must bear the burden of lost or destroyed evidence where the lost evidence is clearly material, possibly exonerating and lost solely due to the action of the state.

In *Serrato, supra,* the reporter's transcript was unavailable, and the court reporters' notes were destroyed, through no fault of the defendant. The Clerk's Transcript was available. Serrato's claims included the assertions that his testimony at

trial established an alibi defense; his trial counsel was ineffective and that his offenses were not legally severable, therefore mandating that sentences on some of the counts should be set aside.

The decision of the Court of Appeal was not surprising. The Court concluded that it was a "vital necessity" for the defendant to have a reporter's transcript of the proceedings for purposes of "permit[ing] him to urge a reversal of the judgment" *Serrato*, at p. 118), and that the denial of access to that transcript denied Serrato his right to effective presentation of his appeal, entitling him to reversal of the judgment and a new trial. (*Ibid.*, at p. 119.)

In this case, appellant, through no fault of his own (and in fact, through the action of the superior court and this Court), has been deprived appellant the necessary documents necessary to prove that he suffered a due process violation by virtue of the prosecutor's utilization of factually inconsistent and incompatible theories at successive trials involving the same charges. ( (See, *Jacobs v. Scott*, *supra,* 513 U.S. 1067 (dis. opinion of Stevens., J., from denial of stay) [fundamentally unfair to execute a person 'on the basis of a factual determination that the State has formally disavowed" in coperpetrator's later trial]; *Drake v. Kemp* (11th cir. 1985) 762 F.2d 1499, 1479 (conc. opn. of Clark, J.) [prosecutor's 'flip flopping of theories of the offense was inherently unfair'].)" The transcript of the first Silveria/Travis trial was every bit as much a "vital necessity" for purposes of presenting this claim, as was the missing transcript in *Serrato*, for purposes of presenting Serrato's claims. It was also essential for purposes of

allowing appellant to determine whether jury selection or instructional errors occurred. (*E.g.*, 49 RT 18,410, 18,437.)

This lack of a complete appellate record denies appellant his right to due process, to meaningful appellate review; to effective assistance of counsel on appeal the right to be free of an arbitrary or irrational determination of death eligibility. (U.S. Const., Amends. V, VI, VIII, XIV; *Parker v. Dugger* (1991) 498 U.S. 308, 321; see also *Dobbs v. Zant* (1993) 506 U.S. 357, 358, citing *Gardner v. Florida* (1977) 430 U.S. 349, 361, *Gregg v. Georgia* (1976) 428 U.S. 153, 167, 178 ["We have emphasized before the importance of reviewing capital sentences on a complete record."]; *Hardy v. United States* (1964) 375 U.S. 277, 282; [noting that anything short of a complete transcript is incompatible with effective appellate advocacy].)

The lack of a complete and accurate record also denied appellant his rights under article I, sections 7, 15, and 17 of the California Constitution. A complete and accurate appellate record is likewise mandated by California's independent interest in ensuring the reliability of its death judgments. (*People v. Stanworth* (1969) 71 Cal.2d 820, 832834; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 63 [affirming the "critical role of a proper and complete record in facilitating meaningful appellate review in the context of a capital case."].)

**D. Any Theoretical Remedy by Way of Habeas Corpus Would Not Cure The Defect in Constitutional Violations in Appellant's Case**

Assuming it were argued that the above constitutional violations could be ameliorated by the remedy of habeas corpus, such arguments would fail because appellant enjoyed a state-created liberty interest, protected by the due process clause contained in the Fourteenth Amendment to the United States Constitution, to having his Sakarias claim heard as part of his *appeal*. (*Hicks v. Oklahoma* (1980) 477 U.S. 343.) First, were appellant to bring the *Sakarias* claim by way of habeas corpus, such claim would properly be subject to dismissal because it is a claim that was properly brought by way of appeal. (*In re Dixon, supra*, at p. 759.)

Moreover, as explained below, the habeas remedy, assuming it exists, can at most transmogrify a fatally flawed *appellate* remedy into a fatally flawed *post-conviction* remedy. However, it cannot cure the due process, denial of counsel and Eight Amendment violations visited by the exclusion of Silveria/Travis I from appellant's record on appeal.

The crux of the holding of *Hicks, supra*, is that it is a federal due process violation to arbitrarily deny a criminal defendant, rights and privileges that are by state law afforded to other, similarly situated criminal defendants. (*Ibid.* at p. 364.) This even if the underlying rights or privileges are not themselves required by federal law. (*Ibid.*)

In the previous section, appellant demonstrated that by statute, Court rule and this Court's jurisprudence, Silveria/Travis I is properly part of his record on appeal. Unlike the situations presented in *Sakarias*, *Waidla* and *Sanchez*, *supra*, the Sakarias

issue was litigated at trial, preserved for appeal and litigated on the basis of what is now the transcript of Silveria/Travis I.

The events of the first Silveria/Travis trial as preserved in the transcript of that trial are by any rational reading of the applicable authorities, pat of the "entire record" of appellant's case, and cases in which no objection was made on Sakarias grounds and which were not even litigated at their respective trials, do not even remotely suggest the contrary.

Accordingly, appellant is uniquely situated among California capital defendants in that the transcript of a major proceeding which by all rights should be part of the appellate record, is missing from *his* record. No reason appears for this apart from the fact that an arbitrary decision was made to exclude Silveria/Travis I from appellant's record on appeal.

The practical effects of this decision vis-a-vis appellant are significant and material. At the time appellant's counsel was appointed by this Court, to handle the appeal and any habeas corpus proceedings, this case, pursuant to the "Guidelines . . . " "Category 4" case under the Court's fixed fee system, as the record was 6,000-12,000 pages in length, which entitled counsel to a fee of $241,000. Significantly, the Guidelines do not allow for a higher category (which would bring with it a higher fee for appointed counsel) based on additions to the record on appeal secured through augmentation. However, additional fees are available for such additions through section 3 of the fixed fee guidelines, which states "In extraordinary and unique situations, the

Court will entertain requests for additional fees based on exceptional circumstances (e.g., circumstances that were unforeseeable at the time of the appointment of counsel on a fixed fee basis). In such situations, counsel shall have the burden of proof to justify any additional fees."

This section is in fact, is designed to correct inequities that occur under the fixed fee system generated by large augmentations to the record occurring subsequent to the appointment of counsel. Under Court practice, upon a proper showing, the Court will allow additional fees calculated as follows: the number of additional pages divided by 40 pages per hour multiplied by the applicable hourly rate.

However, section 3 contemplates such additional fees *only* if the additional record is part of the *record on appeal* in the particular case in question. It does *not* contemplate such additional fees for materials gathered as part of the habeas corpus investigation. This may be due to the fact that a habeas investigation in a capital case typically generates a massive amount of documentary information; in any case, the Court through the years has held the line on the expenditures it will authorize for the preparation of a habeas petition. For example, counsel knows of no case in which allowable habeas budget of $50,000 has ever been increased for any California capital case, and has been informed that no such case exists.

The result is a dramatic difference in allowable fees based on whether particular documents are or are not deemed part of the "record on appeal" in a given case.

In appellant's case, it can easily be determined from the records on file with this Court that had the record in Silveria/Travis I been included in the record in the present case, appellant's record would probably be at least double what it is now. If it is assumed that such record is 10,000 pages in length (probably a conservative assumption), the Silveria/Travis I transcript would have entitled Spencer's counsel, up to an additional $30,000 in fees, had it been deemed part of Spencer's "record on appeal."

As matters have developed and given the denials of Spencer's motions to augment the record to include this transcript on the part of the Superior Court and this Court, the securing and reviewing Silveria/Travis I, which tasks counsel has an ethical obligation to perform given the obvious colorable merit of a potential "inconsistent theories" claim, must be borne within the framework of the existing fee structure, contemplating a record on appeal of between 6,000 and 12,000 pages.

This places an unfair and arbitrary burden on appellate counsel which is not borne by other counsel otherwise similarly situated, but who, unlike appellant, have been provided the "entire record" in their cases. This burden exists regardless of the length of the missing record because *any* additional uncompensated work creates a handicap relative to other counsel to that extent. Whatever the quantum of work Spencer's counsel could perform, properly contemplated counsel could do more. This deficit potentially affects each and every aspect of Spencer's case in the post conviction arena.

To arbitrarily force counsel to be "hobbled" in this way; (*Mayle v. Felix* (2005) 545 U.S. 644, 675; Souter, J., dissenting), to represent appellant "with one arm tied behind his back" (*Ibid.*, at p. 676, fn. 9), is a denial of the right to counsel, violates due process, renders the judgment of death arbitrary in appellant's case and is fatal to the judgment in his case. (*Whorton v. Bockting* (2007) 127 S.Ct. 1173, 1182, citing *Mickens v. Taylor* (2002) 535 U.S. 162, 166; *See, United States v. Cronic, infra,* (1984) 466 U.S. 648, 658-659 [denial of counsel creates intolerably high risk of unreliable verdict].)

The case law is clear that even after counsel has been appointed, the arbitrary limitation by the government of counsel's ability to represent his client by *circumventing* or *diluting* the right to counsel, results in a *denial* of the right to counsel to the extent of the circumvention or dilution.

In *Maine v. Moulton* (1985) 474 U.S. 159, 177-171, the Court stated

"Once the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the state cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State and affirmative obligation to respect and preserve the accused's choice to seek this assistance. We have on several occasions been called upon to clarify the scope of the State's obligation in this regard, and have made clear that , at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that *circumvents* and hereby *dilutes* the protections afforded by the right to counsel. [Emphasis added; footnote omitted]." *See also, United States v. Henry* (1980) 447 U.S. 264m 274 ["By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel . . ." (footnote omitted)].)

In *Mayle v. Felix, supra,* Justice Souter in his dissenting opinion questioned the fundamental fairness of the holding of the majority in that case. *Felix* involved an

amendment to federal habeas petition. The amendment was filed beyond the one-year limitation period in AEDPA.[34] The question was whether the amendment "related back" to the defendant's trial conviction and sentence, as claimed by Felix, or only to the core facts forming the basis of a claim or claims set forth in the original petition, as claimed by the government. The majority sided with the government. (*Mayle v. Felix*, at p. 654.)

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34 Anti-Terrorism and Effective Death Penalty Act; 28 U.S.C. 2241 *et. seq.*

Justice Souter noted that the Court's ruling would place indigent prisoners at a significant disadvantage because such litigants are typically not afforded counsel until much later in the post-conviction proceedings as compared with non-indigent litigants, who are likely to have counsel from the outset of such proceedings. The practical effect of the Court's ruling was that an indigent's attorney, once he or she is ultimately appointed, ". . . [w]ould be precluded from exercising professional judgment when that judgment would calls for adding a new ground for relief that would relate back to the filing of the original petition. "For hobbling counsel this way, the Court limits the capacity of appointed counsel to provide the professional service that a paid lawyer, hired at the outset . . . (*Felix*, at p. 676.) Justice Souter went on to state that in his view, it "was . . . not a sound assumption" that Congress, in authorizing the appointment of counsel in habeas cases, "intended the appointed lawyer to have one had tied behind his back, as compared with an attorney hired by a prisoner with money." (*Felix*, at p. 676, fn. 9.)

The *Felix* majority conceded that the dissent's concern regarding unequal treatment was "understandable" but argued that appointed counsel had ample time to file an amended petition within the AEDPA time limitation. The majority "need not equ;alize econimic conditions between criminal defendants of lesser and greater wealth." *Mayle v. Felix*, at p. 664, fn. 8.)

In the present case, relative to similarly situated capital defendants, appellant's appointed counsel is "hobbled" and working with "one hand tied behind his back" to a readily quantifiable degree defined by the length of the Silveria/Travis I transcript, as stated, as much as $30,000.00 or more (a major percentage of the $50,000 budget for a habeas corpus investigation in a California capital case). To that extent, the government has arbitrarily "circumvented" and "diluted" his right to counsel. This disadvantage taints every aspect of counsel's representation. That is, whatever the quality of counsel's work on appellant's behalf on any particular issue or claim, counsel's work could have and should have been of higher quality and more thorough, to the extent of the additional fees that should have been forthcoming when compared to other, similarly situated counsel

Were the judgment of death to be affirmed in this case, and habeas relief denied, it cannot possibly be concluded that the funds to which appellant was entitled but did not receive, were of no consequence. Where a defendant . . . is denied representation, . . . *the risk of an unreliable verdict is intolerably high. Whorton v. Bockting* (2007) 127 S.Ct. 1173, 1182, citing *Mickens v. Taylor* (2002) 535 U.S. 162, 166; *United States v. Cronic* (1984) 466 U.S. 648, 658-659; [*Gideon v. Wainwright* (1963) 372 U.S. 335]. (Emphasis added.) The danger of an unreliable result is no less tolerable in the post-conviction arena.

For all of the above reasons, the judgment must be reversed in appellant's case.

## VI THE TRIAL COURT'S ADMISSION OF EXCESSIVE, IRRELEVANT AND HIGHLY PREJUDICIAL VICTIM IMPACT EVIDENCE WAS CONTRARY TO CALIFORNIA LAW AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS.

### A. Introduction.

The State concluded its case in the penalty phase by presenting a dramatic combination of irrelevant and inflammatory victim impact evidence and testimony. Over a two day period, jurors heard from nine prosecution witnesses whose testimony occupied approximately 140 transcript pages. Family members and friends of the victim, James Madden, gave the jury lengthy and sentimental accounts of his childhood history, family relationships, and positive qualities. Madden was eulogized as a wonderful father, husband, brother, grandson, friend, and son-in-law. The witnesses spoke in great detail about the lasting effects of his death on his wife, child, parents and friends. The testimony was accompanied by several sentimental photographs of the victim reading to his young daughter and celebrating Christmas with the family.

The prosecution amplified the prejudicial effects by juxtaposing this victim impact material against gruesome and misleading evidence concerning the victim's death. Jurors heard a more detailed repetition of the medical testimony from the guilt phase, and a very speculative and prejudicial account of the victim's imagined suffering from a police detective involved in the investigation. This testimony was given in full view of a clear case displaying the victim's blood-soaked shirt. The quantity and tenor of this emotionally wrenching testimony was sufficient on its own to overwhelm the

jury. The prosecutor maximized the dramatic effect in an inflammatory closing argument where, among other things, he compared Chris Spencer to a wild animal, violated Spencer's Fifth, Sixth, Eighth and Fourteenth Amendment rights and misstated the law.

Appellant raises several inter-related legal challenges to the victim impact evidence and argument. The scope of the victim impact presentation vastly exceeded the limited constitutional authorization of the United States Supreme Court in *Payne v. Tennessee.* (Section C, *infra.*) The sheer quantity of evidence was sufficient to violate due process and to undermine the fundamental fairness required in capital sentencing, and the content was overwhelmingly prejudicial. Certain categories of evidence and testimony were irrelevant; they were not "circumstances of the capital crime" under California's death penalty statute according to any reasonable definition of the term. Other evidence, although arguably relevant according to the decisions of the California Supreme Court in this area, was unduly prejudicial and ought to have been excluded or substantially limited according to clearly established state law.

Appellant's claims are based on the quantity and the specific content of the evidence, testimony and prosecutorial argument. The victim impact and victim character evidence in this case was voluminous and presents multiple forms of prejudice. To clarify the discussion, excerpts of the record are included in connection with the analysis of each specific claim. Counsel is aware of the risk that the present reader may find this testimony disturbing. These substantial record excerpts, however, demonstrate the

excesses of the prosecution's penalty phase case. Evidence and testimony which is upsetting to experienced judges and attorneys was certainly overwhelming for the jurors. For all of the reasons discussed below, Appellant's sentence must be reversed because he was deprived of his constitutional rights to a fair and rational determination of the penalty.

**B. Overview of Legal Claims.**

By admitting this excessive and inflammatory victim impact evidence and argument the trial court created a fundamentally unfair atmosphere for the penalty phase, thereby depriving Appellant of his state and federal constitutional rights to due process of law and a reliable sentencing determination. (U.S. Const. Amends. V, VIII, XIV; Calif. Const. Art. I, §§ 7, 15, 17 and 24; *Payne v. Tennessee* (1991) 501 U.S. 808 [115 L.Ed.2d 720, 111 S.Ct. 2597]; *People v. Edwards* (1991) 54 Cal.3d 787 [819 P.2d 436, 1 Cal.Rptr.2d 696].) The trial court also abused its discretion under California law by admitting irrelevant victim impact evidence with no connection to the circumstances "materially, morally or logically" surrounding the capital crime. (Evid. Code §350; *People v. Edwards*, *supra*, 54 Cal.3d 787, 835.) In a number of other instances the evidence, although arguably relevant, ought to have been excluded because the potential for undue prejudice outweighed its probative value. (Evid. Code §352; *People v. Haskett*, (1982) 30 Cal.3d 841, 846 [640 P.2d 776, 180 Cal.Rptr. 640]; *People v.*

*Edwards, supra*, 54 Cal.3d 787; *People v. Love* (1960) 53 Cal.2d 843 [350 P.2d 705, 3 Cal.Rptr. 665].)

Appellant also urges this Court to reconsider its rejection of certain other claims in previous cases. First, he contends that the trial court deprived him of a state created liberty interest and due process of law by admitting this evidence and argument contrary to established California law. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [65 L.Ed.2d 175, 100 S.Ct. 2227]; *Lambright v. Stewart* (9th Cir. 1999) 167 F.3d 477; contra, *People v. Boyette* (2002) 29 Cal.4th 381, 445-446, fn. 12 [58 P.3d 391, 127 Cal.Rptr.2d 544].) Second, the California Supreme Court's construction of Penal Code Section 190.3(a) under which the "circumstances of the crime" encompasses virtually everything which "materially, morally, or logically" surrounds the crime is unconstitutional. This broad interpretation of Section 190.3(a) renders the statute void for vagueness, encourages arbitrary decision-making, and fails to provide proper notice to the defendant. (U.S. Const. Amends. V, VIII, XIV; Calif. Const. Art. I, §§ 7, 15, 17 and 24; contra, *People v. Wilson* (2005) 36 Cal.4th 309, 358 [114 P.3d 758, 30 Cal.Rptr.3d 513]; *People v. Boyette, supra*, 29 Cal.4th 381.) For all of the reasons discussed below, this Court must reverse the judgment of death.

### C. The Basic Law Of Victim Impact.

#### 1. The Limited Constitutional Authorization Of *Payne v. Tennessee.*

In 1991 the United States Supreme Court radically altered the evidentiary landscape of capital sentencing with its decision in *Payne v. Tennessee* (1991) 501 U.S.

808 [115 L.Ed.2d 720, 111 S.Ct. 2597].) The Court partially overruled its previous decisions in two cases (*Booth v. Maryland* (1987) 482 U.S. 496 [96 L.Ed.2d 440, 107 S.Ct. 2529], and *South Carolina v. Gathers* (1989) 490 U.S. 805 [104 L.Ed.2d 876, 109 S.Ct. 2207]), which had strictly prohibited the introduction of victim impact evidence or prosecutorial argument on the subject in the sentencing phase of a capital trial. A divided Supreme Court held that the Eighth Amendment is not a per se bar to all "evidence about the victim and about the impact of the murder on the victim's family." (*Payne v. Tennessee*, *supra*, 501 U.S. 808, 825, 827.)

The *Payne* majority reasoned that *Booth v. Maryland*, *supra*, 482 U.S. 496, had been too restrictive as it "barred [the state] from either offering a 'glimpse of the life' which a defendant 'chose to extinguish,' [citation omitted] or demonstrating the loss to the victim's family and to society which have resulted from the defendant's homicide." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 822.) Two general rationales were advanced in support of allowing victim impact. First, victim impact evidence may demonstrate "the specific harm" caused by the defendant's capital crimes which would be relevant "for the jury to assess meaningfully the defendant's moral culpability and blameworthiness . . . ." (*Id.* at p. 825.) Second, the state was entitled to present victim impact to balance mitigating evidence presented by the defense. (*Ibid.*) In the event that unduly prejudicial victim impact was admitted, the defendant could seek relief under the due process clause of the Fourteenth Amendment. (*Id.* at p. 825.)

*Payne v. Tennessee* removed the "bright line" prohibition on victim impact imposed by *Booth* and *Gathers* and authorized the use of two types of evidence about the capital murder victim: "victim character," i.e., evidence concerning the victim's good qualities, life history and personal achievements; and "victim impact," which is evidence of the effect of the victim's death on others. The Court, however, did not specify the constitutional limits of this authorization. [35]

If the Court's holding is interpreted in light of the case in which it was made, *Payne v. Tennessee* plainly does not imply approval of extensive victim impact material. The victim impact evidence challenged in *Payne* was actually quite restrained, particularly in light of the underlying facts. In *Payne*, a twenty-eight-year-old mother and her two-year-old daughter were killed with a butcher knife in the presence of the mother's three year old son who survived critical injuries in the attack. The disputed testimony was a brief response to a single question posed to the surviving child's grandmother. When asked about what she had observed in the child after witnessing his

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35 Now well into its second decade as the law of the land, the range of admissible victim impact under *Payne* continues to be a source of controversy. In the nearly fifteen years since *Payne* was decided the Supreme Court has not taken the opportunity to address the substantive limits or procedural requirements of victim impact evidence and argument. The Court's failure to provide further guidance in this area has been widely lamented at all levels of the state and federal judiciary. Legal scholars have also observed that the need for direction grows more acute as courts face an "overwhelming trend" toward the admission of victim impact in greater quantities and in a widening array of forms. (See Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases* (2003) 88 Cornell L.Rev. 257, 280.)

mother's and sister's murders, the grandmother testified that the boy cried for his mother and that he missed her and his sister. In closing argument, the prosecutor argued that the boy will never have his "mother there to kiss him at night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby." (*Ibid.*)

The precise constitutional parameters of victim character evidence are also uncertain based on the Court's opinion in *Payne v. Tennessee.*[36] *Payne* allows jurors to receive some information about the victim's personal characteristics beyond those facts disclosed in the guilt phase of trial. The Supreme Court's references to victim character evidence, however, do not impliedly authorize the introduction of extensive biographical information or detailed descriptions of specific character traits. *Payne* speaks of permitting the jury to see a "quick glimpse of the [victim's] life." The majority comment that the victim need not remain a "faceless stranger" in the penalty phase of a capital trial. *Payne* at p. 825, quoting *Gathers*, 490 U.S. at p. 821 [109 S.Ct. at 2216]

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36 The Supreme Court did not need to address the distinction directly in *Payne* because the testimony at issue there was actually "victim impact" as opposed to "victim character" evidence. The grandmother in *Payne* testified very briefly about her grandson's reactions to the deaths of the victims - his mother and younger sister. The prosecutor's closing argument also focused on the crime's immediate and long term impact. No specific qualities were attributed to the victims and, as noted by the *Payne* dissenters, the jurors gained no more information about the victims in the penalty phase than they had received in the guilt phase of the trial. (*Payne, supra*, at pp. 865-866 (dis. opn. Stevens, J. and Blackmun, J.).)

(O'Connor, J., dissenting). Elsewhere, the Court notes that the "uniqueness" and "individuality" of the victim may be considered as a means of balancing the defense evidence in mitigation. (See, e.g., *Payne* at pp. 839-839 (conc. opn. of Souter, J., and Kennedy, J.).) It could reasonably be argued that *Payne* sanctions **only** a very limited amount of victim character information, i.e., enough to prevent the victim from becoming "faceless." (See Blume, *Ten Years of Payne*, *supra*, at pp. 266-267.) What is clear from the *Payne* opinion is the conspicuous absence of blanket approval for any and all victim impact and victim character evidence.

*Payne* does not sanction the wholesale admission of evidence about the victim's character, personal history, unique attributes and accomplishments. Nor does the Supreme Court in *Payne* suggest that evidence about the "impact" of the crime is unlimited by concerns of relevance, probative value and undue prejudice. The victim character evidence presented in this case was that far reaching. The testimony at issue in *Payne* consisted of a single response by one witness. This jury heard approximately 140 transcript pages of testimony over two court days. The prosecution presented nine witnesses, who not only spoke about their own experience but described the effects of Madden's death on a wider circle of friends, relatives and members of the community. Arguably more significant are the qualitative differences between the victim impact testimony in *Payne* and the evidence and argument Appellant's jury heard. In *Payne*, the grandmother's response was a very brief observation about the sadness and sense of loss

any normal child would experience after losing a parent and a sister. The testimony here was far more detailed, extensive and dramatic.

The testimony about James Madden was as exhaustive as evidence about the impact of his death. The family members and friends, some of whom were visibly distraught during their testimony, disclosed every aspect of James Madden's character, personality and life history. Far from providing a "brief glimpse" of the victim's life, the prosecution here performed a microscopic examination of the victim's outstanding character and unique qualities.

This case contains victim impact and victim character evidence of a magnitude never contemplated in *Payne v. Tennessee*. The *Payne* decision, therefore, does not support the admission of all of the victim impact received here. As discussed further in the sections which follow, the reasoning of *Payne* and other decisions in the state and federal courts requires that the sentence of death must be reversed due to the enormity of the prejudice which surely flowed from the evidence and argument in this case.

**2. The Relevance And Admissibility Of Victim Impact In California.**

Shortly after the United States Supreme Court's decision in *Payne v. Tennessee,* the California Supreme Court decided *People v. Edwards* (1991) 54 Cal.3d 787 [819 P.2d 436, 1 Cal.Rptr.2d 696], holding that victim impact evidence and argument is relevant and admissible under factor (a) of Section 190.3 – which allows the jury to consider the circumstances of the capital murder when deciding whether to impose life

imprisonment or the death penalty. (*Id.* at pp. 835-836.)[37] The *Edwards* Court defined "circumstances" so broadly as to include almost any imaginable form of victim impact evidence:

> The word circumstances as used in factor (a) of section 190.3 does not mean merely the immediate temporal and spatial circumstances of the crime. Rather, it extends to "[t]hat which surrounds morally, materially, or logically" the crime. (3 Oxford English Dict. (2d ed. 1989) p. 240, "circumstance," first definition.)
>
> (*People v. Edwards, supra,* at p. 833.)

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37 The California Supreme Court has held that aggravating evidence is admissible in the penalty phase only where it is relevant to one of the factors set forth in California's death penalty statute. (Pen. Code sec. 190.3; *People v. Boyd* (1985) 38 Cal.3d 762, 775-776.)

It is generally agreed that this set of relevant circumstances includes the guilt phase evidence,[38] and any of the victim's personal characteristics which were known or apparent to the defendant.[39] Although both federal and state principles require that there be some "outer limits" for victim impact evidence, the California Supreme Court has given few indications, in the fifteen years since *Edwards*, of where they may be found. The Court has refused to exclude from the realm of relevant circumstances matters which the defendant did not know and could not readily observe,[40] and has been similarly disinclined to confine victim impact evidence in other respects. For example,

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See, e.g., *People v. Clark (Richard Dean)* (1993) 5 Cal.4th 950 [857 P.2d 1099, 22 Cal.Rptr.2d 689] [prosecutor's argument concerning victim's age, vulnerability and innocence]; *People v. Zapien* (1993) 4 Cal.4th 929 [846 P.2d 704, 17 Cal.Rptr.2d 122] [argument about the crime's impact on victim's children] *People v. Fierro* (1991) 1 Cal.4th 173, [821 P.2d 1302, 3 Cal.Rptr.2d 426] [prosecutor's comment that victim was killed in front of his business of 40 years and that his wife, who was present, will have to live with the memory of the shooting].

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See, e.g., *People v. Wash* (1993) 6 Cal.4th 215, 267 [861 P.2d 1107, 24 Cal.Rptr.2d 421] [victim's plan to enlist in the army which she discussed with the defendant]; *People v. Montiel* (1993) 5 Cal.4th 877 [855 P.2d 1277, 21 Cal.Rptr.2d 705] [victim's general good health and positive outlook in spite of his need for a walker]; *People v. Edwards, supra,* 54 Cal.3d at p. 832 [photographs of victims shortly before their death to demonstrate how they appeared to the defendant].

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See, e.g., *People v. Roldan* (2005) 35 Cal.4th 646 [110 P.3d 289, 27 Cal.Rptr.3d 360]; *People v. Pollock* (2004) 32 Cal.4th 1153 [89 P.3d 353, 13 Cal.Rptr.3d 34].

victim impact witnesses are not limited to persons who were present at the scene or soon thereafter,[41] and need not be members of the victim's immediate family.[42]

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41 *People v. Taylor* (2001) 26 Cal.4th 1155 [3 Cal.Rptr.2d 827, 34 P.3d 937].

42 *People v. Pollock* (2004) 32 Cal.4th 1153 [89 P.3d 353, 13 Cal.Rptr.3d 34]; *People v. Marks* (2003) 31 Cal.4th 197 [72 P.3d 1222, 2 Cal.Rptr.3d 252].

The expansive definition of "circumstances of the crime" established in *Edwards* has been criticized as illogical, unconstitutionally vague and susceptible to arbitrary application. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 492, fn.2 (disn. opn. of Mosk, J.); *People v. Fierro*, *supra*, 1 Cal.4th at pp. 264-265 (conc. and dis. opn. of Kennard, J.).) The United States Supreme Court upheld California's death penalty statute, including factor (a) of section 190.3, against a challenge alleging that the statute was unconstitutionally vague in *Tuileapa v. California* (1994) 512 U.S. 967 [129 L.Ed.2d 750, 114 S.Ct. 2630]. The High Court commented "The circumstances of the crime are a traditional subject for the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper . . ." (*Id.* at p. 976.) However, the United States Supreme Court's holding was based on the assumption that California would utilize a "traditional" definition of the circumstances of the crime. A more traditional and conservative approach to statutory interpretation would be to define "circumstance" as "[a]ttendant or accompanying facts, facts, events or conditions." (Black's Law Dict. (6th ed. 1990) p. 243.) A federal court has defined "circumstances" as "facts or things standing around or about some central fact." (*State of Maryland v. United States* (4th Cir. 1947) 165 F.2d 869, 871.) Another state court has defined "circumstances of the offense" as "the minor or attendant facts or conditions which have legitimate bearing on the major fact charged." (*Commonwealth v. Carr* (Ct.App. 1950) 312 Ky. 393, 395 [227 S.W.2d 904, 905].)

However, to the extent "circumstances of the offense" entails a non-rational, emotional appeal to passion and prejudice against the defendant, the defendant is denied any ability to defend on a rational basis or to mount an effective challenge to a demand for death based on facts and reasoned judgment. This violates the Eighth and Fourteenth Amendments because it prevents the jury from giving due consideration to any factor the defendant might present that might justify a sentence less than death. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 107 [failure to allow sentencer to consider mitigating factors violates the Eighth Amendment].) (See, *Woodson v. North Carolina* (1976) 428 U.S. 280, 304.) Appellant contends that this is what occurred in his case.

The California Supreme Court has acknowledged that the United States Supreme Court has not considered whether factor (a) is unconstitutionally vague to the extent that it "is interpreted to include a broad array of victim impact evidence . . . " (*People v. Boyette, supra,* 29 Cal.4th 381, 445, fn. 12.) As reflected in the capital decisions of this Court, the array of victim impact evidence is expanding at an increasing rate.[43] As the amount of victim impact offered and admitted grows, so does the likelihood that trial courts will erroneously admit irrelevant victim impact in an unconstitutionally vague and arbitrary application of California's statute.

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43 See *Through the past darkly: A survey of the uses and abuses of victim impact evidence in capital trials*, 41 Ariz. L.R. 1:143 (1999).

For all of these reasons, the time has come for the California Supreme Court to refine and narrow the definition of relevant circumstances set forth in *Edwards*. Appellant urges the Court to reconsider its rulings declining to expressly limit victim impact evidence to matters which the defendant knew or might have observed. (See, e.g., *People v. Roldan* (2005) 35 Cal.4th 646 [110 P.3d 289, 27 Cal.Rptr.3d 360]; *People v. Pollock* (2004) 32 Cal.4th 1153 [89 P.3d 353, 13 Cal.Rptr.3d 34].) Alternatively, it is respectfully suggested that the Court adopt a narrower definition of "circumstances" for purposes of Penal Code section 190.3 which would be less susceptible to arbitrary decision-making and would provide proper notice to the defendant.

Evidence which is relevant pursuant to Penal Code Section 190.3(a), remains subject to exclusion if it is cumulative, misleading or unduly prejudicial. (Evid. Code §352; *People v. Box* (2000) 23 Cal.4th 1153, 1200-1201; *People v. Staten* (2000) 24 Cal.4th 434, 462-463.) Victim impact is subject to exclusion or limitation like any other proffered evidence. (See, e.g., *People v. Gurule* (2002) 28 Cal.4th 557, 654 [51 P.3d 224, 123 Cal.Rptr.2d 345].) *People v. Edwards* cautions that excessively emotional victim impact evidence carries an unacceptable risk of improper prejudice:

> Our holding does not mean that there are no limits on emotional evidence and argument. In *People v. Haskett, supra*, 30 Cal.3d at page 864, we cautioned, 'Nevertheless, the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citations.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, 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. (*Id.* at p. 836, fn. 11.)

However, as noted above with respect to relevance, the exclusion of victim impact evidence for undue prejudice has largely remained merely a theoretical possibility. The California Supreme Court has yet to reverse a capital case based on the admission of unduly prejudicial victim impact evidence. This Court's capital decisions provide little guidance to trial courts needing to make evidentiary rulings on larger quantities and wider-ranging varieties of victim impact material and, for all of the reasons discussed previously, Appellant respectfully suggests that the administration of justice in this state would benefit from this Court's guidance in this area. However, even without more specific instructions on the proper balance of prejudice and probative value in the admission of victim impact evidence, the evidence in this case should not have been admitted according to basic concepts of due process of law and fundamental fairness.

The California Supreme Court recently stated that reversal based on unduly prejudicial victim impact will only be justified in an "extreme case." (*People v. Smith* (2005) 35 Cal.4th 334 [107 P.3d 229, 25 Cal.Rptr.3d 554].) [44] Appellant's is the extreme

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44 The Court in *Smith* found the brief testimony of the mother of the child victim was not inflammatory. The Court commented: "We do not, however, know of any cases after *Payne* and *Edwards* holding victim impact evidence inadmissible, or argument based on that evidence improper. The references in *Payne* and *Stanley* [*People v. Stanley* (1995) 10 Cal.4th 764, 832 [897 P.2d 481, 42 Cal.Rptr.2d 543]] to the

case where reversal is necessary. The victim impact evidence was more plentiful, its content more inflammatory and the manner of its presentation more emotional than in any other decision issued by the California Supreme Court. As discussed in greater detail in the sections which follow, this evidence and argument combine several distinct forms of improper prejudice, any one of which would support a claim for reversal. This combination of inflammatory evidence and argument produced an overwhelmingly prejudicial atmosphere in which the jury was unable to perform its proper function at sentencing. Under these circumstances, there is an unacceptable risk that this jury's decision to impose a death sentence was based on emotion rather than reason. (*Gardner v. Florida* (1977) 430 U.S. 349, 358 [51 L.Ed.2d 393, 97 S.Ct. 1197]; *Gregg v. Georgia* (1976) 428 U.S. 153, 189 [49 L.Ed.2d 859, 96 S.Ct. 2909].)

**D.The Voluminous Testimony Describing The Impact of the Crime On The Victim's Family Was Largely Irrelevant And Unduly Prejudicial.**

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exclusion of unduly inflammatory victim impact evidence contemplates an extreme case, which is not the situation here." (*People v. Smith*, *supra*, at p. 365.)

Each of the four family members gave lengthy testimony relating how they learned of James Madden's death, their immediate reactions to the news, and their present feelings of loss and sadness. The witnesses testified not only about their own reactions, but also described the impact on the testifying family members and other relatives who did not testify in the penalty phase. Three family members and three other witnesses described the crime's impact on Sissy Madden. Sissy Madden and Judith Sykes were questioned about the way the crime has impacted James Madden's mother, Joan Madden. All four of James Madden's family members were questioned about the effect of the crime on his daughter Julie; and two witnesses described the impact on his elderly grandmother.

Appellant contends that the testimony given by the victim's four family members (the wife, mother, sister, and brother-in-law) was too detailed and far too plentiful. This testimony, however, was at least arguably relevant victim impact. The same cannot be said for testimony consisting of merely the witnesses' impressions of another person's state of mind. Sissy Madden and Joan Madden were present in court to speak for themselves. The jury did not need to hear two additional descriptions of Mrs. Joan Madden's emotional reactions. Having jurors hear another six accounts of the crime's impact on Sissy Madden was absurd. The extensive accounts of the impact to the non-testifying witnesses (the victim's daughter and grandmother) were also inappropriate and highly prejudicial. At most, one witness could have testified briefly about the crime's negative impact on the two non-testifying members of the immediate family.

### 1. Sissy Madden - the victim's widow.

The victim's widow, Sissy Madden, appeared as a penalty phase witness for the prosecution. Mrs. Madden recounted in detail the events of the morning of January 29, 1991. She testified about her own reaction upon learning of her husband's death, and also described the shock and grief experienced by their young daughter, Julie. (See 83 RT 22001-22015.) Mrs. Madden's testimony was certainly emotional but it was presumably a competent and reliable account of the crime's impact. The prosecutor, however, questioned ***six other witnesses*** about Sissy Madden's and Julie Madden's immediate reactions and the ongoing effects of the victim's death.

#### *a. Immediate responses on January 29, 1991.*

Two witnesses worked with Sissy Madden in the Biology Department at the University of Santa Cruz. (82 RT 21880-21881.) Her boss, Kay House, and co-worker, Susan Thuringer, recalled how Sissy arrived at work tearful and upset on the morning of January 29, 1991. Jim had not come home from work the previous evening and had not called her. (82 RT 21881.) Sissy told Kay House she "had a feeling something terrible had happened." (82 RT 21886.) House, Thuringer and other friends and co-workers made telephone calls looking for information about James Madden. Thuringer called her friend who was the Chief of Police for the City of Watsonville. He returned her call and reported that Madden had been killed. (82 RT 21882.)

The Santa Clara Police Department called. They said not to tell Sissy; that someone was on the way to give her the news. (82 RT 21883.) Thuringer and House

decided to tell Sissy, however, because she had become so distraught that she was about to leave to search for her husband. (82 RT 21883; 21888-21889.) Thuringer described Sissy's reaction: "She reacted like – just like a wounded animal. She screamed and tried to get up and get away and we restrained her and tried to comfort her." (82 RT 21885.) Ms. House also described Sissy's reaction:

> She screamed. She screamed for a long time. You know, it was pretty awful. Everybody in the building heard it. I'll probably never forget that.
>
> And we tried – she was flailing around physically. We tried to hold her down and comfort her. And about that time the detective – I don't remember his name – arrived to help us and tell her what was really going on.
>
> (82 RT 21888-21889.)

Detective Brian Lane testified about going to notify Sissy Madden at her office. When he arrived just past 10:00 a.m. he could hear someone screaming and crying. (82 RT 21893-21894.) Sissy was "very hysterical and crying and upset and asking questions like how and why and that type of thing." (82 RT 21894.) It was difficult for Lane to continue the investigation that day at the Madden home because Sissy was so upset and the family photos in the house were difficult for everyone to look at. (82 RT 21895.)

***b. Sissy Madden's long term reactions.***

Not surprisingly, the prosecutor asked Sissy to testify about the crime's continuing impact:

> Q Mrs. Madden, how has the murder of your husband impacted on you and your life?

A It's I miss my husband terribly. I loved him very much. It I when this first happened I I just feel empty. I feel at times I feel incredibly lonely.

I'm very glad that we that Jim and I have a daughter. I love her very much and I I'm afraid of anything happening to her. It's I before this happened we we just were such a happy family. And it's not that it's it's just it's not that we're not happy, it's that there's something missing.

(83 RT 22012.)

The prosecutor, however, was not satisfied with the witness's account of her own feelings. The testimony about the ongoing effects of the crime on Sissy Madden was even more extensive than the descriptions of her immediate shock and distress. Eric Linderstrand, testified:

It's been ruinous. She has she has been in therapy. She tries to put up the brave front. What are you going to do? You got a kid. At times I think she thought of suicide, but you can't. You know, what held her back, and I guess it's fortunate, is that she has her child. I'm sure she would have needed help.

She was she wouldn't get out of bed. You know, she was sick. She throws up all the time. She would just throw up all the time. She would have to leave work and go throw up. Pardon me.

That's not I don't mean to it's not the easiest thing to talk about, that kind of thing, but I mean, her body reacts. She's got psoriasis. It's all over her. She had it before, but the emotional I mean, these are small things. It's all these small things. I mean, it's like all over.

Q Is your sister someone who easily shows her emotions or not?

A I would say that she is not really prone to. She holds things in.

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I mean, she doesn't whereas I might fly off the handle or my other sister might fly off, she's more introspective. You can she doesn't, you know. But I can see it, you know. She will come out of the room and you can tell she has been crying. Her eyes are red. But she I think especially is trying to keep a brave front for Julie. She tries to have supportive put up a good demeanor, but I know inside she is crushed.

(83 RT 21982-21984.) Kay House testified that Sissy Madden still struggles, and that the judicial process has added to her suffering.

She still has a lot of trouble with it. I mean, she has come a long way. I mean, when she first came back to work, you know, she was in tears, she was in tears every day, and, you know, couldn't really focus or do her work.

And she's gotten past some of that, but it's still difficult. And with the trials going on and everything, it's very difficult. She still has really bad days. And, you know, she talks pretty openly with us about it, but it's still a struggle every day I would think.

Q Now, you've been called to testify before; is that correct?
A Yes.

Q And when you're notified, how is it that you get notified to come?

A We've been telephoned at home and then they fax the subpoenas to us in our office.

Q All right. Does that present any difficulty in terms of you said something about the trial.

A Well, she I mean, it's you know, it's upsetting to her. She knows it's going on and she has been here for them.

And this last trial, when the subpoenas came at work, she happened to be the first person in the office in the morning and usually the first person in takes any incoming faxes out and puts them in the mail boxes for the faculty or whoever they belong to.

She was actually the first person to see the faxes. Both Susan and I had intended to get to work early to intercept them. She got there early, before us. She was pretty shaken, because she hadn't realized they were coming and it's just another reminder.

(82 RT 21888-21890.)

Sister-in-law Judith Sykes was asked to relate the crime's effects on Sissy Madden:

A Well, the obvious things are obviously she was left with a small child, to deal with not only her grief, but a child's grief. And in my opinion, it's much different if someone is killed senselessly and brutally and you lose someone that way versus someone accidentally dying in a car accident or of natural causes.

Some things are really acceptable, even though it's very difficult and you miss the person. Somehow you can accept certain things. This type of thing is not acceptable. It's hard to get past.

(83 RT 21997-21998.)

Mother-in-law, Joan Madden, testified about the holiday season and how difficult that time of year was for everyone - particularly Sissy:

They just every year we make we decide this is going to be a good year and we're going to make it a happy year and we all try. We really do. We try to keep really up for Julie, but after it's over we're all depressed.

I didn't even think Sissy was going to get out of it this year. That's one of the reasons we planned a family vacation this year, because she really had a hard time with depression.

(83 RT 22039.)

2. **The effects of the crime on non-testifying family members.**

Two members of the victim's family received considerable attention in the penalty phase although neither testified. Witnesses were asked to describe the effects of the crime on James Madden's elderly grand-mother and his daughter, Julie Madden.

Julie was a constant presence in the penalty phase, and each member of the family gave a detailed account of the devastating effect of her father's death.

Sissy Madden was questioned about the impact of the crime on her daughter. She described the child's immediate reactions.

Q And let me ask you this about Julie: When Julie when you had to tell Julie that her father had been murdered, did she have any difficulty in believing that or accepting that or not?

A She didn't want to believe it and she didn't she did not believe that her father was dead until the funeral.

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She did not believe that he had died until she saw she went to the funeral and saw his coffin.

***

And then she finally believed that her dad was dead.

(83 RT 22014.) Sissy Madden spoke more extensively about the crime's lasting impact on her daughter.

Q How has this murder impacted on Julie?

A It has robbed her of her innocence. She she knows now that there's an awful lot of bad people out there and she had to learn that when she was seven. She knows that the world is not a safe place and she

Q Have you seen anything in her behavior that tells you that?

A The when this first happened she wouldn't I couldn't if I walked out of the room she had to know where I was going, because she was afraid something was going to happen to me.

She slept with me every night for almost a year and a half. She wouldn't sleep in her own room. She's twelve years old now. She won't sleep with the light off in her bedroom.

Q I'm sorry?

A She won't sleep with the light off in her bedroom because she can't sleep in the dark.

She gets in the beginning she would get terrible stomachaches and she was afraid that she was

going to die. She, from time to time, still gets them now. She's been seeing a therapist since she was seven and she continues to see him. She's

Q Let me ask you this: I don't have much more. You said she is twelve years old now. So she's getting into that age where social functions happen.

A Umhum.

Q Have you seen anything in that regard as to how this has impacted on her?

A At her school they have every year they have a fatherdaughter dance and we have a wonderful neighbor across the street that took Julie with his daughter and that was you know, that was okay the first year, but then the second year she didn't really want to do it because she wanted she just sort of felt you you could tell her dad was not there.

(83 RT 22013-22014.)

The prosecutor asked each of the three other family members to describe the crime's effects on Julie. Eric Linderstrand testified:

You know, my sister, you know, growing up, her life had seemed kind of hard and she meets Jim and life is good and, you know, now it just gets ruined. It's been ruined. It's like it hurts to see them. They're like the living dead.

For well over a year Julie didn't want to go outside. She was afraid. She's always looking over her back. She is afraid someone is after her. Things you wouldn't normally do unless you're trained and you have an eye. I never thought about that. You know, someone told me just it's like a living wound. It's

Q Have you been in a position to see how Jim's murder has affected his daughter Julie?

A Yeah. It's affected her in the well, several ways. Her schooling has been impaired. She has had to take some remedial classes, and the common census was it was because she was so freaked out.

She was afraid of being stalked. She was afraid of she would never let her mom out of her sight for well over a year practically. My sister couldn't even when she went to the bathroom Julie was right there. "Where are you going? Why are you leaving? What are you doing there? Stay." "Julie, I'm just going to the bathroom. No, no." She would cry. Nightmares.

And it's so just so wrong. It's you know, she is seven. Now she's got to try to put her life together and the and the best situation is God, this makes me so mad.

(83 RT 21984-21985.) James Madden's sister, Judith Sykes, was also asked about Julie's responses to her father's death:

Q Could you tell me how she's been impacted by the murder of her father.

A For the first year Sissy could not go from inside the house to outside the house where Julie couldn't see her without Julie becoming so hysterical that she was actually throwing up. And had I not seen it with my own eyes I would have found it hard to believe.

But my husband and I were over over her over their house and we were helping Sissy with something in the backyard and initially just my husband and I were in the backyard and Sissy walked out of the front door, walked around the back and Julie let out this scream and we thought she fell down or got hurt in the house and of course we all ran in.

And she was just frightened, the fact that she was by herself, she knew her dad was by himself and the fact she didn't know where her mother was. And that was pretty traumatic for all of us.

And it took her a long time to be able to let Sissy go out of her sight, even if she stayed with my mother who she always stayed with, you know, if my brother and sister went out. If they weren't home when she thought if Sissy wasn't home when she thought she should be, she would say, "Well, she's been killed."

I mean, that's a pretty strong thing for a little kid every time their parent goes away and doesn't come home, you know, within five minutes of their time that, you know, they would think they had been killed.

(83 RT 21998-21999.) The direct examination continued:

Q Have you have you been in a position to see whether let me rephrase that.

Have you and your husband Jim gone over to Sissy and Julie's to help do things that Jim would have done before?

A Actually we do on somewhat of a regular basis. In fact, last spring we went over to build like a like a little enclosure over their water pump and we kind of tried to make it a fun experience, but it became very obvious by the end of the first day that this is something Julie would be helping her father do and not her uncle and it turned out to be a pretty solemn weekend.

Q What do you mean?

A Well, I mean, Julie would you know, Jimmy would try my husband Jimmy would try to, you know, say, "Well, okay, hold this board" and that sort of thing and it in fact, Julie finally said, "You know, this is something that I used to help my dad with." And then that evening she she had some nightmares.

(83 RT 21999.)

Finally, the victim's mother, Joan Madden, testified at length:

Q Now, have you been in a position, Mrs. Madden, to see how Julie, your granddaughter, has been affected by her father's murder?

A Yes, because I tried after Jim was killed we tried to spend weekends with Sissy, one of us all the time, because we knew she needed the support and the help and we had to be there. So I saw Julie all the time.

Q All right. How has Julie been affected by this?

A Julie has been totally panicked about all of this. She just she panics at the slightest thing. She couldn't let her mother go out on the patio. She couldn't she just knew that something was going to happen to her.

If she fell down and cried and we tried to comfort her, she would say, "You don't understand. My daddy did everything, took care of everything."

Q Have you tried well, what was your relationship like with Julie before your son's murder?

A Oh, she's the apple of my eye. She and I were great friends. She always wanted to stay with grandmother and grandmother always wanted her. But, of course, like daddy used to say, "Well, you can stay, but just remember, you can't spoil her. She has to come home."

Q Would she go places with you?

A Everywhere, yes. We we she she liked to come up and stay for the weekend or she any time she was ill once Sissy went back to work, any time she was ill she they would call me and I would come and she would stay with me while she was sick.

Like she had chicken pox and stuff like that. She would stay with me, because she couldn't go to any kind of day care and so I would take care of her and she would stay with me.

Q Would you take her other places or on trips, or would she come see you?

A Umhum. We went to well, actually at that time we tried to do things as a family, camping and things with Judy and Jim and Jimmy and Sissy and Julie and take her you know, just try to keep vacations together as much as we can so that she would have a sense of security that she had really lost.

Q After your son's death, was there any change that you noted on Julie's part as to whether she was willing to go with you?

A She wouldn't come and stay with me. She wouldn't leave her mother. She wouldn't leave her mother. Even when I was there babysitting her, she was had to call her at work two or three times a day to make sure she was okay.

Or one day she was late coming in from work and she said, "My mother is dead." And I said, "No, your mother is not dead." "Yes," she said, "Yes, she is. Somebody has got her." And she was just panicstricken.

It took me two and a half years to finally get her to go with me again.

(83 RT 22035-22037.) The witness continued to relate other incidents:

Q Now, do you remember an incident that you told us about before about on a Mother's Day shopping

A Yes.

Q What do you remember about that?

A Since Jim was very good about taking Julie and wanted Julie to continue to learn that she should have the holidays not just for everything she's going to get, but to give, my daughter and I have tried to make sure that each holiday we take her to pick something out for her mother.

And we were doing this on this Mother's Day and Julie and I, and we had spent the whole day shopping and she finally made a choice. We went to lunch and we finally started home.

Q Let me stop you just for one second. Do you remember which Mother's Day this was? Was it a couple 8 years ago?

A Oh, yeah. It was probably about two or three years after my son was killed.

Q All right. Okay. And go ahead. So you were taking Julie shopping. What happened?

A We were taking Julie shopping and we were on our way home and she said, "Gee, grandmother, you know what I really, really wish?" And I thought she had seen a toy and I thought, well, I guess that's her Christmas list coming up. And she said, "I wish if you had to die you only had to die for one day."

Q Do you still notice things about Julie that shows that this still impacts on her to this very day?

A Yes. This past year for Mother's Day we were shopping and four of us went, my daughter and Julie and Sissy and I, and we separated so that Julie and Judy could go and choose her gift for her mother.

And Sissy and I went shopping and we were going to meet for lunch and when we got to the lunch table I just jokingly said, "Gee, I lost Sissy today. Couldn't find her in the store." And of course we thought that was kind of funny, but Julie said, "And you thought somebody got her, huh?" And I said, "No." It hasn't left her.

(83 RT 22038-22039.)

Another highly sympathetic family member received special attention in the presentation of victim impact evidence. James Madden's maternal grandmother was 91 years old at the time of the trial. Madden's mother and sister testified that James was a particularly attentive and loving grandson; they also described the severe impact of the crime on his elderly grandmother. The prosecutor questioned Judith Sykes:

Q Did you and Jimmy have a grandmother?

A Yes. She's still alive. She just turned 91.

Q All right. Were you ever in a position to see what Jimmy's relationship was like with your grandmother?

A Their biggest thing together, as they got older anyway, that I noticed, was baseball. My grandmother grew up in New York and she was a big baseball fan. At the

time the baseball team she followed was called the Brooklyn Bums and now they're the L.A. Dodgers.

And she's always been a diehard Dodger fan. And she and my brother used to go to baseball games together and he would actually try to make it a point a couple of times a year that just the two of them would go.

(83 RT 21992-21993.)

Joan Madden gave similar testimony describing the relationship between grandmother and grandson:

A They were great buddies.

Q And how so how would you describe their relationship?

A They're both Dodger fans and he was very good with her and he would explain a lot of the plays she didn't understand and he took her for her 80th birthday we went to L.A. and he took her to the game and got her all the souvenirs and did everything he could to make it a big day for her.

(83 RT 22028-22029.) These two witnesses described the crime's impact in nearly the same way. Judith Sykes testified:

Q Have you been in a position to see let me ask you this: Have you seen your grandmother's life change as a result of this?

A Yeah. Actually she as I said, she's 91, so she is not she's certainly not running around the block, but in my opinion she's become frightened. She gets in a panic if it becomes dusk and my mother is not home.

When she's home by herself, she tends to want to close the curtains and things so people don't if they walk by they don't see that she's sitting in there by herself. And I think that's to my observation is that it's an impact of that the world has gotten more violent and she's a bit frightened.

(83 RT 21997.) Joan Madden gave substantially similar responses to the same questions:

Q Have you been in a position to see how this has impacted on your mother, Jim's grandmother?

A My mother was very hard of hearing before this happened. After it happened, she hears nothing. She just kind of gave up listening.

(83 RT 22035.)

**3. The Victim Impact Testimony Was Inflammatory, Unreliable And Excessive In Comparison To This Court's Other Capital Decisions.**

The California Supreme Court has allowed witnesses to testify about "manifestations of the psychological impact" they have experienced as a result of the murder. (*People v. Brown (John George)* (2004) 33 Cal.4th 382, 397-398 [93 P.3d 244, 15 Cal.Rptr.3d 624].) The testimony in those cases, however, differs in several critical respects. In California cases, the testimony of the victim's survivors has been relatively brief and general, and described less dramatic symptoms of emotional and psychological stress. Moreo+ver, the testimony is usually limited to the witnesses' descriptions of their own experience - not their impressions of another person's reactions.

In *People v. Brown (Andrew Lamont)* (2003) 31 Cal.4th 518, this Court rejected defense claims of undue prejudice where two victim impact witnesses testified that they were still scared to go outside at night, more than three years after the crime. The Court observed: "It is common sense that surviving families would suffer repercussions from a

young woman's senseless and seemingly random murder long after the crime is over." (*Id.* at pp. 573-574.) Recently in *People v. Wilson* (2005) 36 Cal.4th 309 [114 P.3d 758, 30 Cal.Rptr.3d 513] the victim's sister's testified that she could not understand why someone whom the victim had befriended and whom he trusted would kill him, and that when detectives told her "it was for money" she "was angry that someone would kill for that." This Court found that the sister expressed merely an "'understandable human reaction.'" (*Id.* at p. 357, quoting *People v. Brown, supra*, 33 Cal.4th 382, 397-398.) (See also *People v. Stitley* (2005) 35 Cal.4th 514, 564-565 [108 P.3d 182, 26 Cal.Rptr.3d 1] [statement by victim's husband that she was his "whole life"]; *People v. Pollock, supra,* 32 Cal.4th 1153 [normal for friends of elderly victims to be shocked to learn of the brutal murders].)

Some of the strongest victim impact testimony permitted to date was given by the son of an elderly couple who were brutally murdered in the family home. In *People v. Pollock, supra,* 32 Cal.4th 1153, the defendant killed a husband and wife by slitting their throats. The opinion contains the following description of the testimony given by the victims' adult son.

> Donald Stephen Garcia, the victim's son, testified that he had cleaned the bloodstains from his parents' house and that he had decided to sell the property because "it was such a savage act, I just couldn't have the memory of their murder that close to me." He also testified that he had been forced to suppress his memories of his parents. He gave this explanation: "If I think about them I'm miserable, so if I don't think about them I'm not miserable. So it's kind of like my childhood was taken away from me and any memory of my parents was taken from me because -- the major problem I have is

the savageness of this murder" because he knew his parents must have suffered greatly in the last 15 minutes of their lives.

(*People v. Pollock, supra*, at p. 371.)

The victim impact testimony at issue here was both more extensive and more prejudicial than in any of the reported cases discussed above. Jurors in this case heard detailed accounts of the suffering resulting from the victim's death. The witnesses not only related their personal feelings, but also described in great detail the reactions of other family members. As a result, the jurors were told about Sissy Madden's grief seven times. Julie Madden's reactions were described by four witnesses, and the victim's grandmother's responses by two witnesses. The testimony was unquestionably cumulative. Unneeded repetition of the prosecution's evidence is neary always prejudicial. **In this instance, the effect was catastrophic.**

**The family members' intense grief, shock and despair were predictable reactions** to the news of James Madden's death. The testimony relating every detail of Sissy and Julie Madden's seemingly unending mourning process could not have been expected by these jurors. Mourning is an active, participatory experience. It is rarely a phenomenon viewed with detachment and it is this aspect above all which made this evidence so improper. The Missouri Supreme Court accurately identified this type of prejudicial effect. In *State v. Story, supra,* 40 S.W.3d 898, the court held that a photograph of the victim's tombstone was not relevant to show the impact of the victim's death, "and it

inappropriately drew the jury into the mourning process." (*Id.* at p. 909.) In *Welch v. State* (Okla. 2000) 2 P.3d 356, the Oklahoma Court of Criminal Appeals held that it was error to admit evidence that the victim's son put flowers on his mother's grave and brushed the dirt away. The Oklahoma Court found that this evidence "had little probative value of the impact of [the victim's] death on her family and was more prejudicial than probative." (*Id.* at p. 373.) Hearing this many emotional accounts of the widow and child's continuing grief and trauma had the same effect on the jurors in this case. This is precisely the type of inflammatory testimony capable of diverting the jury from its task or provoking an improper emotional response.

**E. The Victim Character Evidence Was Largely Irrelevant, Cumulative And Created Overwhelming Prejudice.**

The jury responsible for choosing life or death for Chris Spencer was instead flooded with information about the victim, James Madden. The witnesses related Madden's entire life history beginning with his childhood and teenage years, through his college experience, his courtship and engagement to Sissy, their marriage and family life. Jurors heard about every place James and Sissy lived and worked. The jury was given multiple accounts portraying James Madden as an exceptional husband and father. Jurors were given a detailed view of James Madden in each role of his life: son, brother, friend, husband and father. The witnesses described every aspect of his personality in testimony that included many touching anecdotes highlighting particular features of his sterling character. This already emotional evidence was augmented with a number of

touching family photographs showing James Madden reading his daughter a bedtime story and playing with her in front of the Christmas tree.

This jury received an in-depth profile of the victim bearing no relationship to the "glimpse of the life" the United States Supreme Court sanctioned in *Payne v. Tennessee*. The victim character evidence presented here was prejudicial through its sheer excess. Moreover, it contained several forms of prejudice which other state and federal courts have recognized as improper in capital sentencing. For all of the reasons discussed below, the trial court's admission of this evidence was error according to California law and deprived Chris Spencer of his state and federal constitutional rights to due process of law and a fair and reliable sentencing.

**1. The evidence and testimony describing the victim and his life history.**

Each of the family members was asked to describe their relationship with James Madden. This testimony was interspersed with information about Madden's life history from childhood to the time of his death. The prosecutor began his examination of the victim's mother, Joan Madden, by asking for a description of her relationship with her only son:

Q Now, I'm going to be asking you some questions about your son, Jim Madden. Could you tell us a little bit about your relationship with your son over the years. I know that's kind of an openended question.

A Well, he was always a good son. He was the kind son a mother just always wishes for and I got. He was loving and warm and funny and considerate. He grew up to be a fine young man. Married a great girl. He just was a good kid.

(83 RT 22023-22024.) Not surprisingly, Mrs. Madden became visibly upset at this point.[45] When she was able to continue, Mrs. Madden related all the significant details of the first twenty years of her son's life.

***a. James Madden's early life.***

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45 The witness's discomfort is apparent from the record:

> Q All right. Now, Mrs. Madden and if you need to take a moment, just let us know. Okay? Do you need a glass of water?
>
> A No, I'm fine. Thank you.
>
> Q Okay. Let us know.

(83 RT 22024.)

Joan Madden testified about her son's childhood. James always enjoyed sports. He participated in Peewee League baseball and Cub Scouts; and later he ran track. As a teenager James Madden was "very, very much into church." He was active in his church youth group, and frequently wrote lay sermons. For some time, he considered becoming a minister. (83 RT 22024-22029.) His older sister, Judith Sykes, gave the following description of Madden:

> He was a very he was strong, but he was very gentle and compassionate. He liked people a lot. He he was kind. He one thing I remember is he had a great imagination and I was always jealous of that. But he was a very nice person. He was somebody that even if you weren't related to him you would probably like him if you, you know, just met him. And he was just a nice, gentle person.
>
> (83 RT 21987-21988.)

After high school, James Madden went to college at San Jose State, but later transferred and graduated from San Francisco State. (83 RT 22025.) As a college student, he worked as a puppeteer at a place called Happy Hollow to help pay for his expenses. Madden designed and built a puppet crow named Benjamin which he used in all of the children's shows. During her testimony, Joan Madden retrieved a newspaper clipping about her son's work at Happy Hollow from the photo album she brought to court. (83 RT 22025-22026.)

James Madden and his sister were good friends in spite of the fact that she was five and one-half years older. Judith moved to Hawaii when James was in high school, and he came to visit her every summer. Judith Sykes was asked:

> Q What kind of a brother was Jimmy?

A He was actually he was a good brother, because he was always there I always felt like he was there if I needed him for anything, yet he wasn't, you know, someone who was always in my business or standing on my doorstep.

He was just very supportive. He was a strong, supportivetype person and yet we could go out and, you know, to a party or to the movies and just be friends. We didn't have to be, you know, brothersister. We it was good relationship, because we were brothersister, but we were also very good friends, I think.

(83 RT 21989-21990.)

***b. James and Sissy meet and become engaged.***

In the summer of 1978, Madden met Sissy's brother, Eric Linderstrand, through some friends from college. Linderstrand and Madden had many common interests and quickly struck up a friendship. (83 RT 21977-21978.) Linderstrand described James Madden's character and provided some illustrative anecdotes:

[H]e was just a really good guy. He was without trying to put too fine a point on it, he was a real generous kind of guy, go out of his way to help you.

There was a couple of times that he helped me out of some scrapes, small stuff. Like one time I had I was late for an appointment. He went out of his way to drive me through San Francisco. Things like that came to just show that he had a very caring quality, go out of his way to help you and

Q Okay. Now, I'm going to ask you some things. First of all, you mentioned that Jim Madden was first your friend and then became your brotherinlaw; is that right?

A That's right.

Q What kind of a friend was he to you?

A He was a good friend. Like I say, he we had lots of fun together. We had common interests. We both liked to golf, both liked photography. He was really an avid amateur photographer. Enjoyed movies.

And there were several times where he went out of his way to help me out of daily small messes and problems. I remember, because he had to give up something to do, what he was doing, to drive me through rushhour traffic. It really stuck with me.

(83 RT 21978-21979.)

James Madden met Sissy later that summer when a mutual friend brought him over to her parents home. (83 RT 21978.) According to Linderstrand, it was a "storybook romance." (*Id.*)

The Madden family saw a great deal of Sissy when she and James were dating; and they all liked her very much. (83 RT 22025-22026.) Both families were delighted when the couple announced their engagement. (*Id.*) Judith Sykes testified that the two families met during the holidays, and everyone got along very well. (83 RT 21989.) Eric Linderstrand recalled how James told him that he and Sissy were getting married.

There was an occasion. I kind of remember it fairly well. I was attending school in San Francisco, lived in the San Joaquin Valley, as did Jim's family. And he had a car. I didn't at the time. So we would drive back to school on returning from holidays and he had this neat little Triumph Spitfire that I remember well and we were driving along and he said, well, your sister and I are going to get married. I was really happy for them. . . . I was very happy for them.

(83 RT 21978-21979.)

Jurors learned a great deal about James and Sissy's life together in the years between their marriage in 1978 and the birth of their daughter Julie in January of 1984. Eric Linderstrand testified about the couple around the time of their marriage:

Q Do you recall when it was that Jim and your sister married?

A I believe it was in 1979. June of '79, if my memory recalls.

Q Was your sister happy?

A Yeah. She was that was part of the reason I was happy was because, although it sounds almost trite, they met and fell in love and she was like a new person. She was he made her very happy.

That sounds like a storybook, but it really is true. He they were good for each other and I really saw her start to blossom. It seemed like she was really happy with life.

(83 RT 21980.)

Even after his marriage, James Madden remained close to his parents; and he and Sissy often socialized with the Madden family. In lengthy testimony, Judith Sykes recalled how James and Sissy helped her husband find a place to live when the Sykes moved back to California. The two couples lived in the same apartment complex for a while and became very good friends. (83 RT 21988-21989.) As much as they socialized with Judith Sykes and her husband and with the senior Maddens, James always made sure that Sissy saw her family too. James often helped Sissy's father with household projects. Eric Linderstrand and James Madden played golf and kept up their friendship after the marriage. (83 RT 21979.) Everyone was excited when they heard that Sissy was pregnant. Joan Madden reminisced about the phone call when James and Sissy called to tell her they were expecting a baby. The news was especially welcome as this was to be their first and only grandchild. (83 RT 22026-22029.)

***c. James Madden as a husband.***

The prosecutor asked Sissy Madden to describe her relationship with her husband:

Q Could you tell me what was your relationship like with Jim? What kind of a husband was he?

A He was very loving. I think well, I know we had a good relationship.

Q Okay.

A He was a very loving person, very caring.

(83 RT 22002.) Sissy further testified that James had been very supportive of her working and had helped her through some problems at her job. (83 RT 22002- 22003.)

Not content with this testimony, the prosecutor posed the same question to all of the other witnesses. Each of the family members described James Madden as an ideal husband. Sissy's brother Eric Linderstrand responded as follows:

Q What kind of a husband did he seem to be?

A He seemed devoted. He was the kind of guy that would every once in a while surprise Sissy with some flowers on no special occasion.

He was very loving, you know. And part of that was apart from what I saw of his behavior was just how she seemed the marriage was very good for her and they were good for each other and she just seemed to blossom.

(83 RT 21980.)

Judith Sykes stated that Sissy and James appeared to have a very loving and happy relationship:

Q Were you in a position to see from the outside what kind of a husband your brother Jimmy seemed to be to Sissy?

A Yeah, I think so. I mean, as much as someone could. You know, it's always different when you're on the outside. But they I I always got the impression that they were very good friends as well as husband and wife and lovers.

And they respected one another. He respected her. He was supportive of her work, or if she you know, her family. He encouraged he made sure that they always saw her family. I thought he was a considerate husband.

(83 RT 21990.)

***d. James Madden as a son and grandson***

Joan Madden testified that she had a close and supportive relationship with her son James. In December 1983, the senior Maddens spent Christmas at James and Sissy's home, and extended their stay to wait for Sissy to have the baby. James' father, Mr. Madden, died unexpectedly of a heart attack that week. James tried unsuccessfully to resuscitate his father. Mrs. Madden testified that James did all he could to help her through this ordeal: "He made the funeral arrangements. He got the minister. He did everything." (83 RT 22028.) In spite of his responsibilities as a new father, James Madden took care of his mother after his father died. Joan Madden lived at either her son's or her daughter's home for the first nine months of 1984. Mrs Madden testified: "I sold my house in Los Banos and my condo wasn't ready, so I just lived ten days with one and then ten days with the other for nine months." (83 RT 22030.)

Once again, the prosecutor asked the other witnesses for the same information. Judith Sykes testified extensively in response to questions about the time after her father's death:

Q Now, after that you said that your mother relied a lot on your brother Jimmy for help?

A Umhum.

Q Okay. How from that point on, how would you describe your brother's relationship with your mom? What kind of a son was he to her?

A Well, I thought he was a good son, but, of course, he was my brother. But I think he was a very good son. I think he let her try to work out as many things as she could.

He was the type of person that you knew he was there if you needed him, but he didn't smother you or try to take over. He tried to encourage her to get on with her life and, you know, set up a new home and because she moved locations and I don't know. They just had a very nice relationship, I think.

Q I hadn't asked you about what had Jimmy's relationship been like with Joan, your mother?

A Actually I think they were close. After my father died I think my mother kind of turned to him for advice. You know, if something came up, she would she would call him and just run ideas by him and things.

And he was real supportive I think of her. He made sure he called her a couple of times a week and, you know, saw her as often as he could. But with everybody working, you know, sometimes it would be a month or two in between. But he called her on a regular basis.

And after Julie was born, Jimmy and Sissy depended on my mom to take care of Julie if she if, you know, they needed to go out for the evening or after Sissy went back to work, if Julie couldn't go to day care or something, if she became ill, my mother would go over and spend a couple of days and take care of her.

(83 RT 21992-21993.)

***e. James Madden as a father***

The prosecutor had Sissy Madden testify about the relation ship between James and their daughter Julie:

[S]he adored her father. Jim was pretty much a perfect dad. He didn't mind taking care of Julie or for a long time for several years I took just a needlepoint class at night and he he if he couldn't be get home by the time that I left for class he would stop and pick her up from class.

And he just wanted to spend time with her and wanted to, you know, do those types didn't shirk that sort of thing, didn't find it boring. Just loved her and she loved him.

Q Did Julie like going to LeeWards to see her dad?

A Oh, yeah, because she got to be with dad and he, you know, made her feel like a little employee. You know, she got to go around and put prices on price tags on things and, you know. So it was fun for her. She enjoyed that, yeah.

(83 RT 22007.)

All of other family members were asked to describe James Madden in his role as a father, and the special relationship he had with his daughter Julie. His sister and mother reported that Sissy had experienced post-partum depression after Julie was born, and James took over nearly all of the baby's care. (83 RT 21992.) He was a "natural father," who loved spending time with his young daughter. (*Id.*) Joan Madden testified:

Jim was a wonderful father. Unfortunately Sissy had postpartum depression. Of course my husband dying a week before the baby was born didn't help. And he had to do most everything for the baby. He tried to relieve Sissy as much as possible. And he loved it. He just enjoyed her.

(83 RT 22030.) Asked to describe the ongoing relationship between Jim and Julie, Mrs. Madden testified:

She was her daddy's girl. If daddy worked on the plumbing, Julie worked on the plumbing. If daddy was outside, Julie was outside. She was daddy's girl.

Q Did they was it just a fatherdaughter relationship or did they play together or

A Oh, all the time. She had he was Ken to her Barbie. He had a train set that she still has, because, after all, it was her daddy's, because he liked to play with her with it. So she just kept it. It's just one of these little wooden ones.

(83 RT 22030.)

Joan Madden held a photograph album while she testified. Asked to explain the album, she stated that it held photos of her son "from when he was little to the day he was killed." Mrs. Madden explained that she did not want to have the album placed into evidence because she wanted to save it for Julie. (83 RT 22025.) As she testified, Joan Madden removed two photos from her album and allowed these to be received in evidence. One showed James Madden with Julie at Christmastime, playing near a small playhouse she had received as a gift. (83 RT 22025-22026, 22031-32; People's Exh. No. 69.) Another photo was taken on the Christmas the year before his death when Julie was five years-old. Mrs. Madden stated that they have never been able to look through the photos taken on her son's last Christmas. (83 RT 22032.)

Asked about her brother as a parent, Judith Sykes testified in considerable detail:

A Oh, he thought it was great. He thought he thought he would like to be a dad. And he he never told us this until after Julie was born, but he said that if he was he

thought that they probably would only have one child and if they were going to have one he really wanted a girl, because he thought that would be a neat thing to do.

And he got his girl. I remember him saying when he called us on the phone and told us that Sissy finally had a baby, his first words were "I got my girl."

Q And did you were you ever in a position to see how your brother was as a father?

A Yes.

Q Could you explain.

A Actually I was quite proud. He was a very good father and it seemed to come naturally to him.

Sissy at first had a little bit of a problem with postpartum depression and he just jumped right in and said, you know, don't worry about it, we'll get through it. And I remember him, you know, taking the baby and telling Sissy to go take a bubble bath or whatever.

And he was close to her, to his daughter Julie, all the way until he was killed. They they had a very good fatherdaughter relationship and they were also friends, I felt, which I I have friends that have children and I also observed them to be a good parent, but I don't really feel there's a lot of friendship there, where Julie and Jim seemed to be friends as well as father and daughter.

(83 RT 21991-21992.)

**2. The Evidence And Testimony Describing James Madden's Character Vastly Exceeded Any Reported Decision Of This Court.**

Victim impact evidence (including victim character) is relevant and admissible under California law as a "circumstance of the crime." (*People v. Robinson,* 37 Cal.4th 592, 651; *People v. Edwards, supra,* 54 Cal.3d 787.) This Court has not, however, indicated where the outer limits of victim character evidence might be set. The Court

has rejected requests to confine evidence of the victim's characteristics to matters which the defendant knew or might have observed. (See, e.g., *People v. Roldan* (2005) 35 Cal.4th 646 [110 P.3d 289, 27 Cal.Rptr.3d 360]; *People v. Pollock* (2004) 32 Cal.4th 1153 [89 P.3d 353, 13 Cal.Rptr.3d 34].) This state's capital decisions to date have not required the Court to make this determination because, unlike the present case, those cases did not involve extensive or detailed victim character evidence.

This state's capital decisions to date have not involved extensive or detailed victim character evidence. Capital defendants have typically raised challenges to the relevance and/or prejudicial nature of only one or two items of victim character information. [46] In *People v. Pollock* (2004) 32 Cal.4th 1153 [89 P.3d 353, 13 Cal.Rptr.3d 34], the prosecution presented victim impact/victim character testimony about the two elderly victims, Mr. and Mrs. Garcia. Mrs. Garcia was described as "a very generous and kind person, and a devoted wife and mother." Mr. Garcia was said to be "hardworking and enthusiastic, with a great sense of humor." (*Id.* at p. 361.) On appeal the defendant

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See, e.g., *People v. Wash* (1993) 6 Cal.4th 215, 267 [861 P.2d 1107, 24 Cal.Rptr.2d 421] (evidence of victim's plan to enlist in the army at time of her death, which she discussed with the defendant); *People v. Montiel* (1993) 5 Cal.4th 877, 934-935 [855 P.2d 1277, 21 Cal.Rptr.2d 705] (evidence of victim's generally good health and positive outlook in spite of his need for a walker); *People v. Edwards, supra,* 54 Cal.3d at p. 832 (photographs of victims shortly before their deaths demonstrate how they appeared to defendant).

Evidence of victim characteristics which the defendant was not aware of and could not readily observe presents a more difficult question. (See *People v. Fierro, supra,* 1 Cal.4th at p. 264-265 (conc. and dis. opn. of Kennard, J.).)

challenged only one aspect of the victim character evidence claiming that it constituted an improper appeal to the jurors' religious sentiments. A family friend testified that she met Mrs. Garcia twenty years earlier when the latter taught Sunday school, and that more recently she and Mrs. Garcia participated in a weekly Bible study group. The California Supreme Court found that the characterizations of the victims had been relevant and appropriate. The brief reference to Mrs. Garcia's interest in Bible study was not an improper appeal to religious feeling. This information was not unduly prejudicial and was relevant to explain the origin of the witness's acquaintance with the victims and to show that they shared activities. This Court recently rejected a claim of undue prejudice based on testimony describing the victim, his family life and his character. (*People v. Roldan, supra,* 35 Cal.4$^{th}$ 646.) While the *Roldan* case involved more victim character than *Pollock*, the evidence was nowhere near as plentiful nor its content as prejudicial as the victim character evidence pertaining to James Madden. In *Roldan* the victim's widow testified about their life together, explaining how he worked three jobs to support the family of nine children, volunteered in the community and preached the Bible to juveniles in custody. This Court found that the evidence was "not so inflammatory that it would tend to divert the jury's attention from the task at hand." (*Roldan, supra,* at p. 429, citing *People v. Zapien, supra,* 4 Cal.4$^{th}$ at 992.) *Roldan* is particularly relevant because the California Supreme Court based its conclusion on factors which distinguish the case from Appellant's. Explaining its conclusion that the

widow's testimony in *Roldan* had not been unduly prejudicial, the California Supreme Court stated:

> [Her] time on the stand was relatively short and subdued, and no other family member testified. The trial court properly exercised its discretion by excluding the many plaques and certificates bestowed on the victim for community work and individual heroism. . . . Evidence from a surviving spouse, though no doubt possessing a strong emotional impact, was not overly inflammatory. (*Id.* at p. 429.)

The trial judge in *Roldan* did **not** allow the prosecutor to present a variety of plaques and certificates from different cities attesting to the victim's community work and to a heroic act he once performed. A videotape prepared by the victim's widow was also excluded and the *Roldan* jurors saw only **one** photograph of the victim with his nine children. (*Id.* at p. 732.)

The differences between *Roldan* and the victim impact/victim character presentation in Appellant's case are readily apparent, and the California Supreme Court's opinion suggests that those distinctions may be outcome determinative. [47] In *Roldan*, this Court considered the quantity of victim character testimony and the overall

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47 Testimony on a particular character trait of the victim may be relevant and admissible in rebuttal to defense evidence. (See, e.g., *McMichen v. State* (Ga. 1995) 265 Ga. 598 [458 S.E.2d 833]; *State v. Sexton* (N.C. 1994) 336 N.C. 321 [444 S.E.2d 879, 907-908] [no error resulting from re-submission of guilt phase evidence in penalty phase as provided by state statute where narrowly focused evidence of victim's good character for marital fidelity had been introduced to rebut defendant's claim of consensual sex and accident in rape/murder case].)

size and scope of the victim impact presentation. A single witness testified in *Roldan*, and the jury saw only one photograph of the victim and his children. Jurors in this penalty phase heard from nine witnesses, viewed multiple photographs, and were subjected to a gruesome and disturbing exhibit in the form of the victim's bloody shirt.

This Court's remarks in the *Roldan* also indicate that the tenor of the testimony is an important factor in the assessment of prejudice. The *Roldan* opinion notes that the widow's time on the stand was "relatively short and subdued." [48] (*Id.* at pp. 732-733.) Appellant's case is distinguishable on this basis as well. The witnesses who testified about James Madden spoke at length, and their testimony was anything but subdued. The dramatic value of much of the victim impact/victim character testimony is obvious even when read from a "cold record," and at least one of these witnesses became visibly upset while testifying. (See 83 RT 22024 [testimony of Joan Madden].)

The victim character evidence pertaining to James Madden was unique in several respects. In addition to the overwhelming quantity of material, the content of the testimony was more prejudicial than in any reported case discovered in the course of extensive research. As discussed in greater detail below, the victim character evidence admitted here combines multiple forms of prejudice which other courts have found to be

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The respondent's brief on file in *People v. Roldan* indicates that the widow's testimony covered approximately 20 transcript pages. (See Brief of Respondent, People v. Roldan S030644.)

improper in capital sentencing. Appellant's is the "extreme case" justifying reversal under California law. (*People v. Smith* (2005) 35 Cal.4th 334 [107 P.3d 229, 25 Cal.Rptr.3d 554].)

### 3. Other Jurisdictions Impose Stricter Limits On The Content And Quantity Of Victim Character Evidence.

Following *Payne v. Tennessee,* the challenge for lower courts has been to allow enough information to provide the victim with some identity while excluding evidence likely to provoke an emotional response from the jurors thereby interjecting an arbitrary factor into the sentencing decision. Several appellate courts have adopted standards for determining the appropriate quantity and content of evidence about the victim's character, background and life history. Courts in these jurisdictions uniformly disfavor detailed descriptions of the victim's character traits. Anecdotes are generally viewed as unduly prejudicial, as are certain topics of testimony such as childhood remembrances concerning the victim. As discussed below, the evidence and testimony regarding James Madden was excessive and highly prejudicial according to these standards.

#### *a. Descriptions should be brief and generally stated.*

Shortly after the United States Supreme Court's decision in *Payne v. Tennessee*, the Louisiana high court issued an opinion to guide trial courts in this area. In *State v. Bernard* (La. 1992) 608 So.2d 966, the Louisiana Supreme Court warned trial courts of the prejudice resulting from evidence presenting the jury with an in-depth view of the victim's character.

Informing the jury that the victim had some identity or left some survivors merely states what any person would reasonably expect and can hardly be viewed as injecting an arbitrary factor into a sentencing hearing. But the more detailed the evidence relating to the character of the victim or the harm to the survivors, the less relevant is such evidence to the circumstances of the crime or the character and propensities of the defendant. And the more marginal the relevance of the victim impact evidence, the greater is the risk that an arbitrary factor will be injected into the jury's sentencing deliberations.

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

(*Id* at 971-972.)

The New Jersey Supreme Court restricts victim character information to "[a] general factual profile of the victim, including information about the victim's family, employment, education and interests." (*New Jersey v. Muhammad* (N.J. 1996) 678 A.2d 164,180.) The court in *Muhammad* further cautioned that "testimony should be factual, not emotional, and should be free of inflammatory comments or references." (*Id.*) The Tennessee Supreme Court also disfavors detailed or extensive victim character evidence. "Generally, victim impact evidence should be limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed" (*State v. Nesbit* (1998) 978 S.W.2d 872, 891. See also *United States v. Glover* (D. Kan. 1999) 43 F.Supp.2d 1217, 1235-1236 [prosecution witnesses limited to presenting ""quick glimpse of the victim's life . . . ,"" including "a general factual profile of the victim [and] information about the victim's family, employment,

education and interests . . . ;" it must "be factual, not emotional, and free of inflammatory comments or references"] .)

The Louisiana Supreme Court's decision in *State v. Taylor* (La. 1996) 669 So.2d 364, provides a useful example of properly limited victim impact/victim character testimony. Three victim impact witnesses testified in *Taylor*: the sister, niece and fiancé of the victim. The opinion contains the following description of the testimony:

> Lisa Reeves, the victim's younger sister, stated that illness during Ponsano's high school years prevented her from graduating and from bearing children. She recalled that Ponsano loved children very much, and that her infertility had a dramatic effect upon her life. According to Reeves, Ponsano was a giving person who took care of others, including Reeves oldest daughter, Wendy, who looked upon Ponsano as a mother. As to the effect of Ponsano's death upon her life, Reeves testified that she has suffered, and that she misses her sister very much.
>
> Wendy Reeves, the victim's 13-year-old niece, stated that she was very close to Ponsano, and called her "mother." She testified that they spent almost every day together, and that she discussed her problems with Ponsano. Wendy stated that she missed her aunt very much, and that she felt like a part of her life was taken away when Ponsano died.
>
> James Shatzel, the victim's fiancé, testified that Ponsano was a great person. He stated that she was the best thing he ever had, and that he would probably never have another like her. He said that Ponsano treated him lovingly, and cared deeply for his two children from a previous marriage. He stated that he loved her very much, and that he and his children miss her.
>
> Shatzel testified that he found out about the shooting while working on his job at Capital City Press. He recalled reading about the events as they came off the press, and that this was not a pleasant way to find out that his fiancee had been shot. Shatzel went to the hospital, and stayed there until Ponsano was pronounced dead two days later. Shatzel stated that if he had one more chance to talk to Ponsano he would tell her that he was sorry that their plans were "thrown out the window" and that he wishes it could have been him instead of her.

(*Id.* at 372.) The Louisiana Court upheld the trial court's admission of this evidence, specifically noting the absence of detailed descriptive information and illustrative anecdotes:

> [The testimony] did not contain "detailed descriptions" of Pension's good qualities or of the survivor's sufferings . . . [rather, each of the three witnesses simply gave general statements about Pension's virtuous nature, and her love of children. No specific examples were elicited, and the state did not dwell upon this topic." (*Ibid.*)

The Texas court in *Mosley v. State* (Tex.Crim.App. 1998) 983 S.W.2d 249, applied a similar standard to find that no error resulted because the descriptions of the victims were stated in broad generalities. In *Mosley* three witnesses gave relatively brief testimony (the combined total of victim impact occupied only 34 transcript pages) pertaining to the four murder victims. The witnesses' descriptions were limited to the victims' basic personality traits such as kindness, friendliness and generosity. The court found that this brief and non-specific victim character material served only to humanize the victims and was not unduly prejudicial. (*Id.* at p. 265.)

***b. Anecdotes and in-depth discussions of specific traits are disfavored.***

It is not unusual for the victim's family members or friends to mention some aspect of the victim's character in the course of their penalty phase testimony. Reviewing courts have not found brief or isolated references sufficiently prejudicial to require reversal. (See, e.g., *Black v. Collins* (5th Cir. 1992) 962 F.2d 394, 408 [description of victim as "a hard-working, devoted wife and mother"]; *Wiggins v. Corcoran* (D. Md. 2001) 164 F.Supp. 2d 538, 572 [one friend testified that victim was "a

very happy-go-lucky person," who was "always thinking of something interesting"]; *Roberts v. Bowersox* (E.D. Mo. 1999) 61 F.Supp.2d 896, 936 [testimony of two friends that victim was a kind person and they had a close friendship "like the Three Musketeers"].) The evidence here stands in stark contrast to the cases noted above and its admission compels a different result.

Far from being confined to one or two positive aspects of the victim's character, the evidence in this case amounted to a catalog of nearly every possible human virtue. As seen in the excerpts of testimony included herein, the witnesses described (often with the assistance of illustrative anecdotes) James Madden's numerous admirable qualities including: loyalty, perseverance, tenacity, kindness, selflessness, generosity, and responsibility. In several instances, more than one witness testified about the same aspect of Madden's character.

The likelihood of undue prejudice increases where victim character evidence is presented through specific examples or anecdotes. (See, e.g., *Lambert v. State* (Ind. 1996) 675 N.E.2d 1060, 1065; *Cargle v. State, supra,* 909 P.2d 806, 824-825, fn. 12.) In this case, the witnesses related a number of emotionally compelling stories about James Madden and his family. These anecdotes were highly prejudicial bolstering for the victim impact and victim character testimony. In addition, these reminiscences engendered tremendous sympathy for the witnesses themselves.

***c. Life history evidence is irrelevant and unduly prejudicial.***

The jurors in this case heard testimony concerning every significant event in Madden's life from childhood to the time of his death. The victim's life history was imparted through the reminiscences of his loved ones, in compelling testimony featuring illustrative anecdotes and charming family stories. This testimony was clearly not reliable or verifiable. Moreover, according to standards used in other jurisdictions, this testimony was irrelevant and should not have been admitted.

Nothing in the United States Supreme Court's opinion in *Payne v. Tennessee* suggests that the victim's personal history is relevant. "A 'glimpse' into the victim's life and background is not an invitation to an instant replay." (*State v. Salazar* (Tex. 2002) 90 S.W.3d 330, 336.) In *Conover v. State* (Okla. 1997) 933 P.2d 904, the Oklahoma Court of Criminal Appeals explained the lack of relevance and inherent prejudice of life history information:

> Comments about the victim as a baby, his growing up and his parents hopes for his future in no way provide insight into the contemporaneous and prospective circumstances surrounding his death; nor do they show how the circumstances surrounding his death have financially, emotionally, psychologically, and physically impacted a member of the victim's family. These types of statements address only the emotional impact of the victim's death. The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a "reasoned moral response" to the question whether a defendant deserves to die; and the greater the risk the defendant will be deprived of Due Process. (*Id.* at p. 921, quoting *California v. Brown* (1987) 479 U.S. 538, 545 [107 S.Ct. 837, 841, 93 L.Ed.2d 934].)

Another Oklahoma case notes the especially inflammatory effect produced when life history information is combined with testimony and illustrative anecdotes about the victim's exceptional character. In *Cargle v. State* (Okl.1995) 909 P.2d 806, the

Oklahoma Court disapproved of this type of evidence even where the testimony, which covered twelve transcript pages, was only a fraction of the victim impact testimony presented here.[49] In *Cargle* a single victim impact witness (the victim's sister) read a prepared statement for the jury. The Oklahoma Court's opinion characterizes the statement as "detailing the life [of the victim] from childhood to his death." (*Id.* at p. 824.) The sister related a number of anecdotes demonstrating her brother's virtues including self-reliance, kindness and generosity, essentially "eulogizing him as a good kid and adult." (*Cargle* at pp. 824-825, fn. 12.)

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49 The witness's entire testimony in *Cargle* covered approximately 12 transcript pages. In this case, **140** pages of the trial transcript is devoted to the testimony of the eight witnesses who testified about James Madden and the impact of his death.

Evidence of an adult victim's childhood is irrelevant and is widely regarded as especially prejudicial. In *Conover v. State*, *supra*, 933 P.2d 904, the Oklahoma Court of Criminal Appeals observed that "[c]omments about the victim as a baby, his growing up and his parents' hopes for his future in no way provide insight into the contemporaneous and prospective circumstances surrounding his death . . .[but] address only the emotional impact of the victim's death . . . [and increase] the risk a defendant will be deprived of Due Process." (*Id.* at p. 921.) All of the testimony about James Madden's childhood, his enjoyment of sports, his involvement in youth ministry and church activities, and his work as a puppeteer, was irrelevant and a particularly inappropriate aspect of the life history testimony. Madden was 35 years old at the time of his death. Information about his childhood was completely unrelated to circumstances which "materially, morally or logically surround the crime." (*People v. Edwards, supra*, 54 Cal.3d at pp. 835-836.)

**4. This Effusive Praise For The Victim Contributed To An Already Emotional Atmosphere In Which The Jury Could Not Apply Its Reasoned Judgment In Selecting The Appropriate Penalty For Appellant.**

The glowing descriptions of James Madden along with the numerous family stories and photographs, made for an impressive presentation which would have been appropriate for a memorial service. This is not, however, the purpose of the penalty phase in a capital case. As the Kentucky Court stated in *Bowling v. Commonwealth* (1997) 942 S.W.2d 293, "Just as the jury visually observed the appellant in the courtroom, the jury may receive an adequate word description of the victim *as long as*

*the victim is not glorified or enlarged.*" (*Id.* at pp. 302-303 [emphasis added].) The anecdotes and detailed discussions of James Madden's character transformed the overall tone of the testimony into an extended eulogy which had no place in the sentencing phase of a capital trial. (See *Salazar v. State, supra*, 90 S.W.3d 330, 335-336; *State v. Dennis* (1997) 79 Ohio.St.3d 421, 432-433 [683 N.E.2d 1096] [victim's mother's statement at sentencing was improper but harmless as the jury had already determined the sentence].)

In *Salazar v. State* (a case the California Supreme Court called an "extreme example of such a due process infirmity")[50] the defendant's sentence was reversed based on the admission of an emotionally charged victim character and life history evidence. featuring images of the victim's childhood. Jurors in *Salazar* saw a visual overview of the 21-year-old victim's life through a 17-minute video montage of approximately 140 still photographs of the twenty-year-old victim. The photographs (dating from infancy to adulthood) showed the victim in a number of charming and sentimental poses, and the videotape was accompanied by a musical soundtrack. (*Salazar v. State, supra,* at p. 333.) The Texas Court of Criminal Appeals observed that "the punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate

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50 *People v. Robinson* (2005) 37 Cal.4th 592, 656-657 [724 P.3d 363, 36 Cal. Rptr.3d 760].

eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial." (*Id.* at pp. 335-336.)[51]

The evidence here was at least as powerful as the 17 minute video montage in *Salazar* and arguably more so. Jurors in *Salazar* viewed the best aspects of the victim's life through a progression of 140 still photographs accompanied by sentimental popular music. Jurors in Chris Spencer's penalty phase spent a day and a half immersed in victim impact and victim character evidence. While the jurors here saw fewer photographs, the testimony was given by live witnesses who described overwhelming grief and devastation. Even the "cold record" of this trial reveals the tremendous emotion of the testimony about the victim. Moreover, the prejudice of the victim impact evidence was amplified by other aspects of the prosecution's penalty phase evidence and the prosecutor's inflammatory closing argument.

**F. Conclusion.**

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51 The defendant in *Salazar* was 16 years old at the time of the crime but was tried as an adult. He was convicted of murder for assisting a co-defendant (a man in his early twenties) to kill the victim (a twenty-year-old young man) after a dispute arose in connection with a drug deal. Although not a capital case, the court applied the same principles applicable to the admission of victim impact evidence in a capital penalty phase. (*Salazar*, *supra*, at p. 335 fn. 5.)

The victim impact and victim character evidence presented in this case was grossly excessive and highly emotional. As a result, the penalty phase was transformed from a proceeding dedicated to reaching a reasoned decision about Appellant's penalty into a memorial service for the victim. For all of the reasons discussed above, the numerous improprieties violated Appellant's state and federal constitutional rights and constituted an utter deprivation of his fundamental right to due process of law.

## VII

## PHYSICAL EVIDENCE AND TESTIMONY PURPORTEDLY RELEVANT TO THE CIRCUMSTANCES OF THE CRIME WAS IN FACT CUMULATIVE, MISLEADING AND HIGHLY INFLAMMATORY AND ITS ADMISSION DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHTS AND VIOLATED CALIFORNIA LAW.

### A. Introduction And Overview.

The prosecution used physical evidence and expert testimony to compound the prejudicial effects of its victim impact presentation. One new exhibit was introduced in the penalty phase, and the prosecution acknowledged that the display was specifically designed to inspire shock and horror. Nearly all of the guilt phase evidence concerning the victim's injuries and causes of death was re-submitted and the coroner was recalled to testify. This material was entirely cumulative and unneccessary as Appellant had already been convicted and intent was not at issue. In addition, the prosecutor's treatment of this evidence and the manner of questioning reveal that the true purpose was to inflame the jury.

These errors deprived appellant of his state and federal rights to due process, a fundamentally fair trial, and to a reliable and nonarbitrary penalty determination in a capital case. (U.S. Const., Amends. V, VIII, XIV; Cal. Const., Art. I, secs. 7, 15, 17, 24; *Buchanan v. Angelone* (1998) 522 U.S. 269, 274-275; *Payne v. Tennessee* (1991) 501 U.S. 808 [115 L.Ed.2d 720, 111 S.Ct. 2597]; *People v. Edwards* (1991) 54 Cal.3d 787 [819 P.2d 436, 1 Cal.Rptr.2d 696]; *Darden v. Wainwright, supra*, 477 U.S. 168, 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [94 S.Ct. 1868, 1871, 40 L.Ed.2d 431, 436.].)

**B. The Penalty Phase Exhibits And Testimony.**

The victim's injuries were described in detail and from multiple perspectives in the guilt phase of trial. Several Lee Wards employees related how they had discovered James Madden's body in the manager's office. (See, e.g., 72 RT 21063-21073 [testimony of Cecilia Jenrick]; 72 RT 21081-21091 [testimony of Gail Carlisle].) Police investigators related the details of the crime scene, including their observations about the victim's condition. (See 73 RT 21167 [testimony of Sergeant Ted Keech]; 73 RT 21170 [testimony of Officer Jack Solderholm].) The coroner, Parviz Pakdaman, M.D., described the autopsy procedures as well as his observations, findings and conclusions regarding the injuries and the cause of death. (See 8 RT 2038-2073.) The guilt phase testimony was accompanied by numerous photographs and exhibits illustrating every aspect of the physical evidence.

In the penalty phase, the coroner, Dr. Pakdaman, was recalled to testify concerning James Madden's injuries and the cause of his death. The prosecutor pressured the doctor to validate the state's version of events. Pursuant to the prosecution's theory of the case, Madden suffered a prolonged and painful death; struggling to break free of the duct tape which bound his wrists and ankles for an extended period of time before finally succumbing to his wounds. The prosecutor repeatedly tried to elicit medical testimony to support this view, over defense objections and despite Dr. Pakdaman's frank acknowledgement that the medical evidence did not establish this version of events. Doctor Pakdaman admitted that he could only "guesstimate" the time it had taken for the victim to die and that there was no certain way to determine whether the victim had in fact struggled. (See 82 RT 219180-21920; 21933-21935; People's Exh. Nos. 67C, 67D, 67E and 67F.)

None of the autopsy or crime scene photographs were relevant in the penalty phase. One photograph, however, was especially inappropriate and its use demonstrates the prosecutor's clear desire to inflame the jury. The photograph (People's Exhibit No. 67 K) was introduced during Dr. Pakdaman's testimony over defense objections. It showed four small burn marks on the victim's right thigh, allegedly made by a taser or "stun gun." (82 RT 21921-21922.) The prosecutor questioned the Doctor to demonstrate that the taser was applied to a particularly sensitive place on the victim's

body.[52] As the court and the prosecutor knew, the "torture" special circumstance had been dismissed and other evidence established that appellant had never used the stun gun on the victim. (See 9 RT 974, 82 RT 21909-21910.) The prosecutor's sole purpose was to cast appellant in the worst possible light before the jurors who would determine whether he lived or died.

The most disturbing exhibit offered in the penalty phase was ***admittedly*** designed to arouse shock and horror in the jurors. (See 82 RT 21899-21900.) People's Exhibit No. 65 was developed through the collaborative efforts of the trial prosecutor and at least two police officers, Sergeant Keech and Detective Allen. (82 RT 21898-21900; 21902, 21906.) The exhibit consisted of the top half of a mannequin dressed in the blood stained shirt the victim had been wearing at the time of the crime. (82 RT 21903.) Police witnesses described how the shirt was removed from the victim's body, and then dried and prepared for display at the Santa Clara Police Department. (82 RT 21897-21898; 21900.) A number of green arrows were also added to highlight deformities or tears in the shirt allegedly made by the knife. (82 RT 21903.) The coroner, Dr. Pakdaman, referred to the exhibit several times during his testimony.

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52 This effort was not entirely successful as Dr. Pakdaman stated that the thigh was not an especially sensitive area. (82 RT 21922.)

The shirt displayed in Exhibit No. 65 was heavily stained with blood. The witnesses acknowledged, however, that this was **not** consistent with the shirt's appearance at the crime scene. (82 RT 21905.) Most of the blood staining actually occurred after the victim's death, when the body was moved and transported to the coroner's office. (82 RT 21905-21906.) Sergeant Keech candidly testified that People's Exhibit No. 65 was designed to appeal to the jurors' sympathies and to arouse a sense of outrage about the killing.[53]

### C. The Exhibit Displaying The Victim's Blood-soaked Shirt Had No Legitimate Probative Value And Was Intended To Arouse Overwhelming Prejudice.

It is beyond dispute that clothing stained with the murder victim's blood is uniquely prejudicial evidence likely to arouse the jurors' emotions. (See *Miller v. Pate*, 386 U.S. 1, 4-5 [87 S.Ct. 785, 787, 17 L.Ed.2d 690] (1967) [wherein the United States Supreme Court observes that the murder defendant's "blood stained shorts" were not

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53 The following exchange took place during the prosecutor's questioning of Sergeant Keech on redirect examination:

> Q. And why did we [create this exhibit] ?
> A. The shirt itself I think says a tremendous amount in just looking at it about what happened to Mr. Madden back in January of 1991. The amount of defects that you can see in the shirt shows so vividly the viciousness of the attack that took place on Mr. Madden.

(82 RT 21907.)

only an important piece of circumstantial evidence but, also, that "their gruesomely emotional impact upon the jury was incaluculable."].) Despite the risk of undue prejudice, courts frequently do admit the victim's bloody clothing where the evidence is reliable and meets a certain threshold of relevance. As a general rule, "the clothing worn by the victim at the time of the killing is admissible in evidence . . . *if it tends to shed light on a material inquiry in the case*." (Annotation, "Admissibility, in Homicide Prosecution, of Deceased's Clothing Worn at Time of Killing," 68 A.L.R.2d 903, § 2[a] (1959) [emphasis added].) As discussed below, several reported cases suggest that the trial court mis-analyzed the relevant considerations and did not properly weigh the probative value against the possible prejudice arising from Exhibit No. 65. Under the facts of this case, it was error to admit this highly disturbing exhibit in penalty phase of Appellant's trial.

**1. Exhibit No. 65 was not necessary to the coroner's testimony, and did not accurately represent the circumstances of the crime.**

The assertion that an exhibit of bloody clothing bolsters the medical testimony is typically insufficient to justify admission. This is particularly so where, as in the present case, other evidence is available in the form of photographs and/or the results of forensic testing. Additionally, courts have been careful to ensure that displays of bloody clothing are thoroughly authenticated and factually accurate. Visual displays which do not mirror the actual events or circumstances they relate to have far less probative value.

This is especially true in the present case, in which the bloody clothing was not only highly inflammatory by its very nature, but depicted wounds *not* inflicted by appellant. Thus, it misrepresented the supposedly depraved nature of appellant's alleged conduct in this case. This was one of the bases of appellant's objection to this evidence at trial. (81 RT 21854-21856.)

In *People v. Blue* (Ill. 2000) 189 Ill.2d 99 [724 N.E.2d 920], the Illinois Supreme Court reversed the defendant's conviction and death sentence where the trial court had permitted an exhibit virtually identical to People's Exhibit No. 65. The victim in *People v. Blue* was a young police officer shot in the aftermath of a robbery. The victim's uniform jacket, stained on the front with dried blood and brain matter, was displayed on a mannequin torso set in plexiglass case. As in Appellant's case, the jury learned that much of the damage to the jacket resulted from rescue efforts and not the actual injuries. The prosecutor contended that the victim's jacket was relevant to corroborate the medical testimony regarding the path of the bullets, and to support allegations that the defendant had recognized that the victim was a policeman and deliberately aimed above the officer's bulletproof vest. (*Id.* at pp. 124-125.) The Illinois Supreme Court was not satisfied with this explanation, commenting "[n]ot all of these reasons withstand close scrutiny." (*Ibid.*)

The *Blue* Court noted that there was no need to bolster the already ample medical testimony. A paramedic and a physician had described the nature and placement

of the victim's wounds, and 16 autopsy photographs were admitted to document this testimony. Under these circumstances, the Illinois Supreme Court concluded that the bloodstained uniform was not highly relevant. "Therefore, although we agree that the uniform could corroborate the medical testimony describing the placement or nature of one of the fatal wounds on [the victim's] body, the evidentiary value of the uniformed mannequin - over and above the other proof introduced by the State - was minimal." (*Id.* at p.125 [724 N.E.2d 920, 934].)[54] Having found the bloodied jacket "nominally probative," the Court turned to the prejudice analysis. The Illinois Supreme Court acknowledged the significant body of case law allowing the admission of "pictures graphically displaying wounds and autopsy procedures," and distinguished the bloody shirt, noting "the physical evidence here was not photos of a gruesome scene, but the actual remains of the scene itself, spattered with the actual blood and brains of the victim." (*People v. Blue*, at pp. 125-126 [724 N.E.2d 920, 934] [citations omitted].)

**2.There was no need to prove Appellant's intent in the penalty phase, and this exhibit was not probative in that regard.**

Exhibits of bloody clothing are not automatically admissible as circumstantial evidence of the defendant's intent. (*See, e.g., Frazier v. Mitchell,* 188 F.Supp.2d 798,

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54 Compare *Fernandez v. State* (Fla. 1999) 730 So.2d 277 (victim's bloodstained uniform shirt and undershirt were relevant to establish fact that victim was a police officer, and because the bullet hole caused by the fatal wound was not visible in the photographs).

826 (N.D. Ohio 2001).) In *United States v. Sampson*, 335 F.Supp.2d 166 (D. Mass. 2004), the United States District Court addressed this issue in a lengthy opinion explaining the reasons for numerous evidentiary rulings in the first capital homicide prosecution to be held in the First Circuit under the Federal Death Penalty Act, 18 U.S.C. §§ 3591-3598. The court had refused to allow the government to display the bloodied shirts of two of the victims. In its opinion the district court explained why it had not been persuaded to admit this evidence to illustrate the defendant's intent and the brutal nature of the knife attacks. The *Sampson* court stated in this regard:

> The shirts were relevant in the same way that many of the gruesome photographs were germane. They could have been used by the jury in considering whether the offenses were committed in an especially heinous, cruel, or depraved manner in that it involved serious physical abuse. The shirts could have vivified the victims' struggles for the jury in a way that might not have been accomplished merely by oral testimony and medical diagrams. By having a more vivid picture of the struggle, the jury might have been better able to make inferences about the defendant's intent, an element necessary for establishing serious physical abuse. In the same way, the shirts might also have assisted the jury in giving weight to the heinous, cruel, or depraved aggravator, if the jury had found that factor to have been proven.

(*Id.* at p. 184.) Ultimately, however, the district court found that the probative value of the evidence was insufficient to justify admission. Here the court noted a potentially misleading aspect of the bloody shirt exhibits:

> [T]he shirts were not the best evidence of the specific size and number of wounds inflicted on the victims. The rips in the shirts might have been larger than the actual stab wounds. Likewise, if a shirt were doubled over at the time of the attack, a single knife thrust could have made two or more rips in the shirt. These dangers, however, could have been reduced or eliminated by testimony elicited on direct or cross-examination regarding the manner in which a knife attack causes holes in a garment.

(*Id.*)

**3. The trial court failed to closely evaluate the purpose of the evidence and the surrounding circumstances, and did not consider the extraordinarily prejudicial effect of bloody clothing.**

In Appellant's case, the trial court perfunctorily overruled defense objections to Exhibit No. 65. (81 RT 21854; 82 RT 21899.) The record does not indicate that the court gave any special consideration to this evidentiary ruling despite the unusual nature of the exhibit and the obvious seriousness of the proceedings. Due process requires more - especially in the penalty phase of a capital case.

The central concern shared by the Illinois Supreme Court in *People v. Blue*, and the district court in *Sampson* was the extensive prejudice inherent in exhibits of bloodied clothing. As the federal district court observed, "Display of the clothing of the dead is an age-old strategy for inciting a desire for revenge." (*Sampson, supra,* at p. 185, n. 9. )[55]

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55 The court illustrated its point about the emotional force of such exhibits with the following literary reference and extended quotation.

> In Shakespeare's The Tragedy of Julius Caesar, act 3, scene 2, Marc Antony displayed the toga of the murdered Caesar during his funeral oration as a means of encouraging the crowd to violence. Antony described each rip in the toga:If you have tears, prepare to shed them now. You all do know this mantle. I remember The first time ever Caesar put it on; 'Twas on a summer's evening, in his tent, That day he overcame the Nervii. Look, in this place ran Cassius' dagger through; See what a rent the envious Casca made; Through this the well-beloved Brutus stabb'd; And as he pluck'd his cursed steel away, Mark how the blood of Caesar follow'd it, As rushing out of doors, to be resolved If Brutus so unkindly knock'd, or no; For Brutus, as you know, was Caesar's angel. Judge, O you gods, how dearly Caesar loved him! This was the most unkindest cut

of all;The crowd responded as desired:FIRST CITIZEN. O most bloody sight!SECOND CITIZEN. We will be revenged.ALL. Revenge! About! Seek! Burn! Fire! Kill! Slay! Let not a traitor live!

(*United States v. Sampson, supra*, p. 185, n. 9.)

The *Sampson* opinion continued to note two other recent cases sharing the same view regarding displays of bloody clothing. (*Ibid. See also, Frazier v. Mitchell*, 188 F.Supp.2d 798, 826 (N.D.Ohio 2001) [with bloody clothing before the jury, prosecutor stated in closing that the victim "is not here. We have bloody clothing to represent her"; the reviewing court viewed this as "unprofessional, improper and excessive"]; and, *United States v. Rezaq*, 134 F.3d 1121, 1138 (D.C.Cir.1998) [wherein the District of Columbia Circuit Court of Appeal stated in its opinion: " 'Blood will have blood' "; excessive depictions of "gore may inappropriately dispose a jury to exact retribution," quoting William Shakespeare, The Tragedy of Macbeth, act 3, scene 4].)

In *Sampson* and in *Blue*, the courts concluded that the exhibits should not be admitted. The potential for prejudice in these instances was too great a risk given the limited evidentiary value. Both opinions make realistic assessments of the jurors' abilities to use reasoned judgment in the presence of such emotional evidence. In *United States v. Sampson*, the district court stated:

> While the shirts were _ relevant to material issues in this case, it is likely that the jury would not have considered them solely on those issues. During the trial, the prosecution produced evidence, especially through the confessions of the defendant, that was more directly probative of the intent element of serious physical abuse. Rather than as circumstantial evidence of intent, the jury would likely have regarded the shirts as powerful and immediate symbols of the victims and the brutality of their murders.
>
> ***
>
> *The presence of the shirts in the jury room during deliberations could have exerted an intense emotional force unconnected to their legitimate probative value. The display of the shirts during closing argument could have induced the jury to respond in a purely emotional way.*

(*Sampson, supra*, at p. 185 [emphasis added].) [56]

The extent of jury exposure to the exhibit is also a factor. It was particularly troubling to the *Blue* Court that, as in Appellant's case, the jury was exposed to the offensive exhibit for an extended period of time. The opinion notes that the jurors "saw the mannequin in the courtroom during the testimony of several witnesses." (*Id.* at p. 126.) The Illinois Court also observed that the jurors "were allowed an even closer exposure to the exhibit during their deliberations," was especially troubled by the fact that jurors were encouraged to handle the exhibit: "By furnishing the jurors with gloves, moreover, the trial court appeared to encourage the jury to engage in a tactile interface with the uniform." (*Ibid.*) For these reasons, the Illinois Court distinguished cases in which bloodied garments have been admitted into evidence. "In this case, however, we perceive a coalescence of facts that tip the evidentiary scale from items that are merely

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In its discussion of the extreme, inherent prejudice in displaying bloody clothing the federal district court cited two recent cases (*Frazier v. Mitchell*, 188 F.Supp.2d 798, 826 (N.D.Ohio 2001) [with bloody clothing before the jury, prosecutor stated in closing that the victim "is not here. We have bloody clothing to represent her"; the reviewing court viewed this as "unprofessional, improper and excessive"]; and, *United States v. Rezaq*, 134 F.3d 1121, 1138 (D.C.Cir.1998) [wherein the District of Columbia Circuit Court of Appeal stated in its opinion: " 'Blood will have blood' "; excessive depictions of "gore may inappropriately dispose a jury to exact retribution," quoting William Shakespeare, The Tragedy of Macbeth, act 3, scene 4]) sharing the same view regarding displays of bloody clothing. *United States v. Sampson, supra*, at p. 185, n. 9.

useful to those that are aimed directly at the sympathies, or outrage, of the jury." (*Blue* at p. 126.)

All of the concerns raised by the *Sampson* and *Blue* courts applied equally to Appellant's case and compel the conclusion that Exhibit No. 65 should not have been admitted. The trial court's decision to allow such a disturbing and emotionally volatile exhibit was ill considered and cannot be justified in retrospect. The admission of this exhibit would be sufficiently prejudicial by itself to require reversal of Appellant's sentence. In combination with the plethora of other improper victim impact evidence, testimony, and the prosecutor's misconduct in closing argument, the prejudice was overwhelming and deprived Appellant of his right to a reasoned determination of the penalty.

**D. The Coroner's Testimony And The Other Guilt Phase Evidence Served No Valid Purpose And Was Admitted Solely To Aid The Prosecutor 's Unfounded Speculation Regarding The Victim's Suffering.**

Evidence pertaining to a circumstance of the crime pursuant to Penal Code Section 190.3(a) remains subject to exclusion if it is cumulative, misleading or inflammatory. (*People v. Staten* (2000) 24 Cal.4th 434, 462-463 [11 P.3d 968, 101 Cal.Rptr.2d 213]; *People v. Box* (2000) 23 Cal.4th 1153, 1200-1201 [5 P.3d 130, 99 Cal.Rptr.2d 69].) The testimony described above ought to have been excluded for all of these reasons.

There is no question that the medical testimony was cumulative, and it was not needed to clarify any of the relevant facts. The crime scene's discovery was described in

considerable detail and from multiple perspectives in the guilt phase of trial. Several witnesses related every pertinent detail concerning Madden's injuries and the causes of death. The doctor had already testified regarding the biological processes and the manner of the victim's death. (See 8 RT 2038-2073.) The jury had been given all of the relevant, verifiable evidence. This was not a case in which the testimony regarding the crime scene was detached or sterile. As discussed previously, the penalty phase evidence included numerous descriptions of James Madden, and the witnesses' remembrances of the last time they had seen him alive. Under these circumstances, penalty phase testimony speculating about the victim's experience served no legitimate purpose and was presented solely for its emotional effect.

The California Supreme Court has long recognized the extreme prejudice inherent in detailed and graphic descriptions of a victim's final moments. In *People v. Love, supra*, 53 Cal.2d 843 (Traynor, C.J.), cited with approval in *People v. Edwards, supra,* 54 Cal.3d 787, and *People v. Haskett, supra*, 30 Cal.3d 841, 846, the Court reversed a death judgment based on the admission of similar evidence. In *Love*, the defendant was convicted of murdering his wife at close range with a shotgun. In the penalty phase, the jury saw a photograph of the victim lying dead on the hospital table. The jury also heard a tape recording taken in the hospital emergency room shortly before Mrs. Love died. The recording dealt with the facts of the shooting but also preserved Mrs. Love's groans as she died from her wound. (*Id.* at pp. 854-855.) The California Supreme Court reversed, holding that this evidence had no significant probative value in

the penalty phase and was likely to inflame the jurors and to distract them from their duty to make a "rational decision" concerning the appropriate penalty. (*Love, supra,* at p. 856.)

The testimony at issue here was both more inflammatory and less reliable than the evidence in *Love*. The audio recording in *Love* was objectively verifiable evidence pertaining to the victim's experience. The evidence in this case was largely speculation about the timing and order of the fatal injuries, on which was piled more speculation about the victim's probable experience. Considerable evidence purporting to show the depravity of the crime, *e.g.*, stab wounds and taser burns, were not even inflicted by appellant, and to that extent misrepresented and unfairly skewed the penalty phase case against appellant, and in effect punished appellant for someone else's conduct. Even assuming appellant was an "aider and abettor," this does not ameliorate the penalty phase unfairness because this evidence was calculated to show the depravity of the actual perpetrator of the wounds. Although it was not proved which wounds were inflicted by appellant, it was clear that he did not inflict all or even most of them (and in the case of the taser burns he inflicted none), yet the jury was invited to attribute *all* of the viciousness of the homicide to appellant.

Dr. Pakdaman could not testify as to the order in which the wounds were inflicted. The coroner acknowledged that he could not pinpoint the time of death and, further, that he could only guess as to the victim's likely experience in terms of pain, suffering and awareness. Undeterred by the lack of certainty, the prosecutor posed his

questions so as to put forth the most disquieting interpretation of the evidence. The way in which this testimony was presented in the penalty phase was prejudicial in and of itself, and the prejudicial effect was amplified by the prosecutor's exploitation of the testimony in closing argument. Evidence and testimony about the moments surrounding the victim's death may be permitted if it is both "brief" and "dispassionate." (*People v. Roldan* (2005) 35 Cal.4th 646 [110 P.3d 289, 27 Cal.Rptr.3d 360]; *People v. Boyette* (2002) 29 Cal.4th 381 [58 P.3d 391, 127 Cal.Rptr.2d 544].) The evidence and argument in this case was neither and should not have been admitted.

## VIII
## THE PROSECUTOR'S INFLAMMATORY CLOSING ARGUMENT DENIED APPELLANT HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS AND WAS MISCONDUCT UNDER CALIFORNIA LAW.

### A. Introduction and Overview of Legal Claims.

In Appellant's penalty phase, the prosecutor's closing arguments contained several different forms of impropriety any one of which justifies reversal of the sentence. Jurors were given a misleading picture of the law by the prosecutor telling them that their oaths bound them to return a death verdict. There were multiple appeals to passion and prejudice, culminating in exhortations to the jury to sentence Appellant to death in response to community sentiment and as a tribute to the victim's memory. The prosecutor improperly commented on Appellant's failure to testify. (*Griffin v. California,* (1965) 380 U.S. 609.) In addition, the prosecutor argued facts not in evidence and used an offensive metaphor comparing Appellant to a wild and dangerous animal.

This argument reveals a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Harris* (1989) 47 Cal.3d 1047, 1084 [767 P.2d 619, 255 Cal.Rptr. 352]; *Darden v. Wainwright, supra*, 477 U.S. 168, 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [94 S.Ct. 1868, 1871, 40 L.Ed.2d 431, 436.].) Reversal is required under California law because these repeated instances of misconduct demonstrate "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'" (*People v. Haskett, supra*, 30 Cal.3d 841, 866, quoting *People v. Strickland* (1974) 11 Cal.3d 946, 955 [523 P.2d 672, 114 Cal.Rptr. 632].) Appellant's state and federal constitutional rights to due process of law, to confront and cross examine witnesses, his privilege against self-incrimination, and his right to a fundamentally fair trial and a reliable, individualized sentencing determination all were violated in the course of this closing argument. (U.S. Constit., Amends. V, VI, VIII, and XIV; Cal. Const., art. I, §§ 7, 15, 16, 17 and 24; *Darden v. Wainwright, supra,* 477 U.S. 168, 181-183; *Crane v. Kentucky, supra,* 476 U.S. 683, 690-691; *Bruton v. United States* (1968) 391 U.S. 123, 136 [88 S.Ct. 1620, 20 L.Ed.2d 476]; *Caldwell v. Mississippi, supra,* 472 U.S. 320, 638; *Ford v. Wainwright, supra*, 447 U.S. 399; *Buchanan v. Angelone, supra,* 522 U.S. 269, 274-275; *People v. Edwards, supra,* 54 Cal.3d 787.) For all of the reasons discussed below, reversal is required.

**B. Standard of Review.**

This Court independently reviews the record to determine if there is a reasonable likelihood that the jury construed or applied the prosecutor's remarks in an objectionable fashion. (*People v. Turner* (1994) 8 Cal.4th 137, 193 [878 P.2d 521, 32 Cal.Rptr.2d 762]; *People v. Clair* (1992) 2 Cal.4th 629, 662-663 [828 P.2d 705, 7 Cal.Rptr.2d 564].) As discussed below, several instances of misconduct were sufficient by themselves to justify reversal of the penalty determination. Reversal is certainly required based on the combined prejudicial effect of this pervasive misconduct. (See *People v. Hill* (1998) Cal.4th 800, 822.)

**C. The Prosecutor Mischaracterized The Jurors' Oaths And Argued That Society Demanded A Death Verdict.**

Throughout two lengthy closing arguments, the prosecutor insisted that society demanded a death sentence for Chris Spencer, and that the jurors were duty bound to fulfill this expectation. From the outset, the prosecutor reminded the jury that each of them had claimed on voir dire to be capable of returning a death verdict. According to the prosecutor, society expected a death verdict in this case and nothing less would satisfy the jurors' sworn duty. Jurors were sternly advised that choosing a life sentence would be taking the "easy way out," and that they would be shirking their duty in the penalty phase by not recommending death for Chris Spencer.

> You, ladies and gentlemen, the few, have been selected as representatives of the community in this case to decide first the question of guilt, which you have done, and now the question of penalty. ***The jury verdict here will reflect the conscience of this community*** on the ultimate question of penalty for what this defendant, Christopher Spencer, has done.

This is a solemn responsibility and not one to be taken lightly, ***nor is this responsibility one of taking the easy way out by voting for life without parole*** simply because the alternative is too difficult to contemplate. That wouldn't be right, either.

I know that this is not something that any of you actively sought. Nevertheless, all of ***you have now become a part, and a very crucial part, of the law and of justice in operation here***.

As you recall from what now seems so very long ago when you came into this courtroom, when you filled out the jury questionnaire, when you came in and you answered questions in voir dire, ***each and every one of you agreed to accept this responsibility and you each raised your hand and took an oath to do it***. That's why you're all here.

(83 RT 22310 [emphasis supplied].)

Before discussing each of the statutory factors in mitigation, the prosecutor again expressly equated the jurors' duty with community expectations: "[I]f your verdict is death in this case, this verdict will act as a considered expression of condemnation of the dcefendant's conduct and will truly be imposed out of a sense of justice in light of what he has in fact done to Jim Madden, to his family and to the societal community in which we live." (83 RT 22313.) The prosecutor again made clear that nothing but a death sentence would suffice. According to the prosecutor, the oath taken by each juror was a binding promise to return a death verdict. The choice of life imprisonment was repeatedly characterized as "taking the easy way out," in abrogation of the jurors' duty. (See, *e.g.*, 83 RT 22040; 22310; 22317; 22377.)

The prosecutor amplified the prejudicial effect by combining these comments with remarks made to diminish the jurors' sense of personal, moral responsibility for the

penalty decision. Jurors were told to disregard any sympathy for Appellant or "misplaced feelings of guilt." (83 RT 22312.) Instead, they were told that a death verdict was their legal and moral obligation: "There is no guilt in performing one's duty, especially a duty required by law, passed by your fellow citizens and affirmed by the courts of this state and country." (*Id.*) According to the prosecutor, the jurors need not be overly concerned about the penalty decision because the responsibility for a death verdict belonged to the State of California, the legal system, and the defendant, Chris Spencer. The closing argument conveys the impression that the penalty phase is merely a formality; following the guilt phase a death verdict is the jury's only viable option.

> ***The only guilt here rests squarely on the defendant's shoulders, guilt for what he has done, guilt for what he must face. As he bears the guilt, so must he bear the punishment.***
>
> Now, during the jury selection process some of you expressed concern about imposing the death penalty upon someone unless you knew that person was truly guilty. Well, let's be very clear on that point. The guilty verdict entered at the conclusion of the guilt phase of this trial means that the defendant, Christopher Spencer, has been found guilty beyond any reasonable doubt of the murder of Jim Madden, as well as of the other crimes and the two special circumstances and a personal use of a knife enhancement. Those were also found to be true.
>
> The presumption of innocence has evaporated and guilt has been conclusively established. Chris Spencer is no longer an innocent man. ***You don't need to worry about imposing the ultimate penalty on somebody who is not truly and undeniably guilty.***
>
> (83 RT 22312-22313 [emphasis supplied].)

In concluding his first closing address, the prosecutor again told jurors that they were morally bound to return a death sentence on behalf of society, the legal system and the prosecutor himself.

I submit that for what this man has done he deserves the death penalty. He has brought that on himself. And I submit that if you're honest with yourselves you will agree with that, each and every one of you. ***The issue is whether you have the courage, the strength, the conviction to impose what is required here*** by the facts and circumstances of this most horrible crime.

Remember, we, as individual members of society, have given up our right to take the law into our own hands, having entrusted the state and our system of justice to apply it.

***A free society requires of its citizens, of its jurors, vigilance, courage and strength and resolve in making the hard decision that you're going to have to make. What I'm asking you to do*** is follow the law, consider the evidence and render a just verdict appropriate for this man for what he has done.

Ladies and gentlemen, on behalf of the District Attorney's Office of Santa Clara County, as well as on behalf of the People of the State of California, I would ask that you return, each and every one of you, a verdict of death against the defendant, Chris Spencer, for what he has done.

(83 RT 22354-22355 [emphasis supplied].)

These themes were repeated even more forcefully in the final closing argument, where the prosecutor played on the jurors' fears as well as invoking their loyalties to police and to the legal system. According to the prosecutor, the community's safety depended upon the jury's willingness to impose the ultimate penalty in this case.

What it gets down to, ladies and gentlemen, I submit is that everyone in a civilized society has a right to make sure that the law theoretically and ideally is carried out as it's supposed to be because each of us have given up our personal rights to do that ourselves.

The instinct for just retribution is part of the nature of every human being. Channeling that instinct to the administration of criminal justice serves an important purpose in a promoting the civility of a society that is governed by law, a society that is governed by law and order.

When people begin to believe that an organized society is unwilling or unable to impose on criminal offenders the punishment that they truly deserve for what they've done for the most horrible of crimes, then it seems clear that they are in effect are seeds of anarchy that are being sewn for people to engage in selfhelp.

Where certain crimes are concerned and I submit this is one of those few. Where certain crimes are concerned retribution is not a forbidden consideration or one inconsistent with society's respect for the very dignity of man, of humanity. Certain crimes are in and of themselves so grievous and an affront to humanity that the only appropriate response can be the penalty of death. And I submit this is one of those. Like it or not, ladies and gentlemen, retribution is still a part of being human and of being a human being.

When the State of California if you determine that in this case Mr. Spencer deserves the death penalty for what he's done, if you if you determine that and enter such a verdict, when the State of California executes Chris Spencer, if it does in this case, it is recognizing the worth of the life of his victim and of the lives of his victim's families the victim's family that he left behind and who he has harmed forever. It's recognizing the worth of those lives.

And Mr. Mantell may say, well, it doesn't really recognize the worth of a life, but I say that given the facts of this particular case, given what was done here that refusal to apply capital punishment in a case as serious and aggravated as this in effect cheapens all of our lives.

(83 RT 22401-22404.)

The due process and jury trial clauses of the federal constitution are violated when a prosecutor urges a jury to return a verdict based on perceived community feeling. (See, e.g., *Viereck v. United States*(1943) 318 U.S. 236, 247 [improper for the prosecutor to tell jurors, "The American people are relying on you"]; *United States v.*

*Solivan* (6th Cir. 1991) 937 F.2d 1146, 1151, 1155 [prejudicial appeal to jury to act as the community's conscience and to send a message of zero tolerance for drugs]; *United States v. Johnson* (8th Cir. 1992) 968 F.2d 768-770 [exhorting jurors to "stand as a bulwark" against the proliferation of drugs]; *United States v. Monaghan* (D.C. Cir. 1984) 741 F.2d 1434, 1441 [prosecutor may not urge jurors to convict a criminal defendant in order to protect the community's values].)

The jury in a criminal trial is presumed to be representative of the community, but is not to act as the community's representative. (See S. Kraus, *Representing The Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing* (1989) 64 Ind.L.J. 617, 651.) Capital sentencing decisions (essentially normative judgments) are not supposed to be an expression of the community's will. Rather, jurors are to make a "personal moral judgment regarding which penalty is the appropriate one to be imposed." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1035; *People v. Allen* (1986) 42 Cal.3d 1222, 1227 [729 P.2d 115, 232 Cal.Rptr. 849]; *People v. Brown (Albert)* (1985) 40 Cal.3d 512, 541 [726 P.2d 516, 230 Cal.Rptr. 834].)

The prosecutor's argument was improper for the additional reason that it was couched in terms of a personal request. It is settled law that the prosecutor should not offer an opinion as to the defendant's guilt or the appropriateness of capital punishment. (*United States v. Young* (1985) 470 U.S. 1, 18-19 [105 S.Ct. 1038, 84 L.Ed.2d 1].) It is equally improper for the prosecutor to tell the jurors that their duty is to return the verdict the prosecution is seeking. (*United States v. Sanchez* (9th Cir. 1999) 176 F.3d

1214; *United States v. Polizzi* (9th Cir. 1986) 801 F.2d 1543, 1558 [improper for prosecutor to tell jury it had any obligation other than weighing evidence].)

The closing argument in this case cannot be interpreted as a "temperate speech concerning the function of the jury and the rule of law." (*People v. Cornwell* (2005) 37 Cal.4th 50, 92-93.) The jurors in Appellant's case were not merely lectured about the importance of the jury system, or reminded to "do your job" (*Cornwell, supra*; *United States v. Young, supra,* 470 U.S. 1, 18-19; compare *People v. Lang* (1989) 49 Cal.3d 991 [782 P.2d 627, 264 Cal.Rptr. 386] [acceptable for prosecutor to tell jurors that their jury service was an opportunity to have an effect upon the community]; *People v. Poggi* (1988) 45 Cal.3d 306 [753 P.2d 1082, 246 Cal.Rptr. 886].) While the prosecutors in the afore-mentioned cases emphasized the *process*, this prosecutor was only interested in the *result*. It was abundantly clear that, for this prosecutor, there could only be one acceptable result and *only* that outcome, a death verdict, would fulfill their oaths and their civic duty.

Nothing in the larger context of the prosecutor's argument ameliorates this message. In *People v. Davenport* (1996) 11 Cal.4th 1171, 1121 [906 P.2d 1068, 47 Cal.Rptr.2d 800] the prosecutor's statement that "Sometimes the law requires a literal retribution for the taking of a life," did not improperly inform the jury that the law automatically required the death penalty where the prosecutor continued to state, "*Now, you all told us that you would render your individual verdict in this case . . . If it is life without parole, or if it is the death sentence, please work with the other jurors.*" (*Id.* at

p. 1221 [emphasis added].) In this case, the prejudice actually increases when the comments concerning the jurors' societal obligations are viewed in the larger context. (Compare, *People v. Davenport, supra,* at p. 1221; *People v. Lucas* (1995) 12 Cal.4th 415, 475 [907 P.2d 373, 48 Cal.Rptr.2d 525].) These were not simply isolated remarks about community vengeance in an otherwise proper argument. (*People v. Wash* (1993) 6 Cal.4th 215, 262.) Instead, jurors were browbeaten with the message that they owed it to the victim's family, to the prosecutor, to the legal system, and to society to condemn Chris Spencer to death. This form of misconduct in the closing argument is serious enough to justify reversal of the penalty decision by itself, and reversal is clearly appropriate when this instance is considered in combination with the other misconduct. (*People v. Cornwell, supra,* at pp. 92-93; *People v. Lucas, supra,* 12 Cal.4th 415, 475.)

**D. Improper Appeals To The Jurors' Emotions.**

The extensive victim impact and victim character evidence presented in the prosecution's penalty phase case was calculated to overwhelm the jurors' emotions. The prosecution relied heavily on this evidence in closing arguments. Jurors were encouraged to personally identify with the Madden family, to align themselves with the prosecutor, and to view themselves and all of society as victims and survivors of the crimes. These arguments were made for no other purpose than to incite the jurors to the point that their emotions would overwhelm their reasoned moral judgment concerning the appropriate sentence for Chris Spencer.

At the outset, the prosecutor told the jury that in the penalty phase they properly could and *should* choose a sentence based on their emotional responses to the case. Early on in the first of two closing speeches, the prosecutor compared the jury's role in the penalty phase and the guilt phase of trial.

> Now, during the guilt phase you were told to put your emotions aside and to decide this case based on the facts and the law. That was the correct statement of the law during the guilt phase.
>
> ***
>
> Now, however, the defendant has been convicted and what is at issue here is penalty, what penalty should be imposed for this crime.
>
> Now you may consider, take into account any factors or aspects of the murder itself which you couldn't in the guilt phase, and in so doing . . . you're free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors that you are permitted to consider, including the circumstances of the crime.

(83 RT 22323-22324.) Having thus given the jurors permission to make an intiutive, emotional decision the prosecutor lectured the jury at length about the societal value of retributive justice. (See, *e.g.*, 83 RT 22402-22405.) Turning to this case, the prosecutor reviewed the victim impact evidence extensively, and exhorted the jury to return a death verdict to avenge James Madden.

> Now, criminal cases are presented in such a sterile, sanitized manner that the victims sometimes just become names with an age assigned to them and then they're relegated to the junk heaps of statistics, people that aren't with us anymore.
>
> Don't let that happen here.
>
> ***

Remember the victims here. Remember Jim Madden, remember Eric Lindstrand, remember Judy Sykes, remember Joan Madden, remember Sissy Madden, remember Jim Madden's grandmother, remember Julie Madden, whose father was forever stolen from her in a night by this man, Mr. Spencer, and his friends.

(83 RT 22352.) Throughout the argument, the prosecutor made every effort to dehumanize Chris Spencer to make a death sentence for him more palatable.

Remember what the defendant did. Don't let the memory of what the defendant did fade. It's been said there's no crime or depravity or sin so vicious for which a man given time or proper attitude cannot pardon himself. Don't do that for Mr. Spencer. He no doubt has already done that for himself. Afford him every benefit that the law does, but remember who he is and what he has done.

(83 RT 22352-22353.)

If you feel reluctant to do this, if there's that reluctance, it's because your human. But it's something that Mr. Spencer doesn't feel. When he took that knife and plunged it again and again into the living human being who has become nothing more than a photograph in a courtroom and a memory in a photo album there was no reluctance on his part to do that. There's no evidence that there was. When you're back in the jury room take that knife in your hand and consider that.

And that, ladies and gentlemen, the reluctance in arriving at a verdict, is because it is difficult thing to do. But I submit it's the right thing to do in this case. That's the difference between you and him. That's the difference.

(83 RT 22406-22407.)

Nearing the end of the final closing speech, the prosecutor played on the jurors' emotions by emphasizing the testimony about the Madden family's sadness and inability to enjoy Christmas and other occasions. Jurors were urged that Appellant should be prevented from enjoying any more holiday celebrations just as the victim had been. Because the victim was not shown mercy, neither should the jury show any mercy or

sympathy, and Appellant deserved no better treatment from the legal system than he gave the victim.

You've heard the testimony here. The holidays come and go each year. You know what this man has done. You know what he's done to not only the victim but his family. Holidays come and go for you, for Mr. Spencer, for the Maddens.

Mr. Spencer, of course, if he were sentenced to life without, would go off to prison to spend the rest of his natural life to live out, his holidays year after year. And I submit, ladies and gentlemen, that each and every holiday that comes up, each Valentines Day, Mother's Day, Father's Day, Christmas, Easter, that you will think and remember, you'll consider that Julie Madden no longer has a father to leave a Valentines gift to or a Father's Day gift.

You may find yourself wondering who will be taking her shopping for Mother's Day presents this year or to the fatherdaughter dance if she goes. As time goes on and the holidays come and go remember this case, ladies and gentlemen. You'll probably remember it for the rest of your lives.

Every Christmas what will you think of? Will you think of Julie Madden missing her father or an empty space at the table, the holiday table. As Mrs. Madden says, the holidays are no longer the same. Once the summer ends they start closing in on the holidays again.

(83 RT 22408-22409.) The prosecutor then compared the misery of the Madden family to an imaginary picture of Chris Spencer, still able to enjoy the holidays if this jury failed to impose a death sentence.

On the other hand, will you think of Mr. Spencer in a prison facility somewhere receiving visitors, sending holiday greetings or receiving cards or gifts living out the rest of his life from now on.

Mr. Mantell wants you or at least one of you to send his client to state prison for the rest of his natural life. Will you do that? Don't you think that if Mr. Madden had that choice he would rather be in prison for the rest of his life?

I submit, ladies and gentlemen, that when you consider all of the evidence here, when you evaluate this evidence from a moral standpoint, from a moral evaluation, moral viewpoint, that there is and can only be one decision that you will not regret for the rest of your life under this evidence. And that decision is the death penalty. (83 RT 22409-22410.)

These arguments were improper for several reasons. First, the prosecutor essentially says that the jury must give Appellant and the victim equivalent treatment. This type of "show the same sympathy" argument is an improper appeal to passion and prejudice which encourages jurors to ignore the guided discretion of California's statute in favor of a decision based on emotion rather than the "reasoned moral response" mandated by the Eighth and Fourteenth Amendments. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328.) The California Supreme Court has rejected a number of defense challenges to these arguments on both constitutional and state law grounds. (See, *People v. Young* (2005) 34 Cal.4th 1149 [105 P.3d 487, 24 Cal.Rptr.3d 112]; *People v. Kennedy* (2005) 36 Cal.4th 595 [115 P.3d 472, 31 Cal.Rptr.3d 160]; *People v. Benavides,* (2005) 35 Cal.4th 69; *People v. Viera* (2005) 35 Cal.4th 264, [106 P.3d 990, 25 Cal.Rptr.3d 337]; *People v. Ochoa* (1998) 19 Cal.4th 353, 464-465 [966 P.2d 442, 79

Cal.Rptr.2d 408].) There are, however, reasons for this Court to reconsider its previous decisions in this area.

Other jurisdictions have not looked favorably on prosecutorial arguments to "show the defendant the same mercy or sympathy." The Florida Supreme Court considers these arguments inflammatory appeals to passion and prejudice. Florida's high court has repeatedly held that "asking a jury to show as much mercy to a defendant as he showed the victim is a clear example of prosecutorial misconduct, which constitutes error and will not be tolerated." (*Thomas v. State* (Fla. 1999) 748 So.2d 970, 985, fn. 10, citing, *Urbin v. State* (Fla. 1998) 714 So.2d 411; *Richardson v. State* (Fla. 1992) 604 So.2d 1107; *Rhodes v. State* (Fla. 1989) 547 So.2d 1201.) The Tennessee Supreme Court has also found such arguments to be improper appeals to vengeance which "[encourage] the jury to make a retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the evidence." (*State v. Bigbee* (Tenn. 1994) 885 S.W.2d 797, 812.) At least two federal circuits have reached the same conclusion, finding these arguments to be improper appeals to passion and prejudice. (See *Lesko v. Lehman* (3rd Cir. 1991) 925 F.2d 1527, 1540-1541; *Duvall v. Reynolds* (10th Cir. 1998) 139 F.3d 768, 795.)

Barring this type of argument would be consistent with other California decisions setting boundaries for prosecutorial argument. The California Supreme Court has held that urging the jury to apply extra-judicial principles instead of the court's instructions constitutes misconduct. (*People v. Wrest* (1992) 3 Cal.4th 1088, 1107 [839

P.2d 1020, 13 Cal.Rptr.2d 511]; *People v. Hill, supra,* 17 Cal.4th 800, 830 [prosecutor's misstatement of applicable law].) Appeals to religious principles are also misconduct under California law. (*People v. Wash, supra,* 6 Cal.4th 215, 258-261; *People v. Sandoval* (1992) 4 Cal.4th 155, 193-194 [841 P.2d 862, 14 Cal.Rptr. 342].) By arguing that the defendant deserves the "same sympathy" as the victims were shown a prosecutor clearly states that justice lies in "the crude proportionality of 'an eye for an eye'." (See *Tison v. Arizona* (1987) 481 U.S. 137, 180-181[107 S.Ct. 1676, 95 L.Ed.2d 127] (dis. opn. of Brennan, J.)) This Biblical precept is in direct conflict with California law which requires capital sentencing to be based on guided discretion. (See *Jones v. Kemp* (N.D.Ga. 1989) 706 F.Supp. 1534, 1559-1560.)

**E. Appeallant was denied a fair penalty trial by virtue of the prosecutor's use of the so-called "golden rule" argument, asking the jurors to place themselves in the shoes of the victim's family in determining the proper penalty to be imposed.**

It is well settled that the use of deceptive or reprehensible methods by the prosecutor to sway the jury may render a trial fundamentally unfair. (See, *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) .) In particular, it is improper for the prosecutor to appeal to passion and prejudice so as to inflame the jury against the defendant. (See *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250.) "[I]mproper remarks by the prosecutor can 'so infect[]the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright* (1986) 477 U.S. 168, 181, *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642 ; *cf. People v. Hill* (1998) 17 Cal.4th 800, 817.) As explained in detail below, this is what occurred in appellant's case, thus depriving

appellant of his rights to a fair trial, confrontation and due process under the state and federal constitutions; as well as his right to be free of the arbitrary imposition of a judgment of death. *(Donnelly v. DeChristoforo* (1974) 416 U.S. 637; 643. U. S. Constitution, Amends. VI, VIII, XIV; Cal. Const., Art. I, sec. 15, 16, 17.)

It has long been held that it is *impermissible* for an attorney to argue to jurors that they should place themselves in the position of the victim in the case in assessing the sanction to be imposed against the defendant (the so-called "Golden Rule" argument). *Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 765; *Beagle v. Vasold* (1966) 65 Cal.2d 116, 182, fn. 11.) Such considerations are *irrelevant* (*Loth*, at p. 765), and it has been noted that such argument tends to "play on the emotions of sympathy, shock and horror" and to "create an atmosphere of bias and prejudice." *Horn v. Atchison, T.&S.F.R. Co.* (1964) 61 Cal.2d 602, 608-609.) This principle has recently been reaffirmed by this Court. (*People v. Lopez* (2008) 42 Cal.4th 960, 969-970 (. . . "a prosecutor may not invite the jury to view the case through the victim's eyes, because to do so appeals to the jury's sympathy for the victim [citations]"); *but cf., People v. Haskett, infra,* (1982) 30 Cal.App.3d 841, 863-864 [penalty phase argument to jurors to put themselves in the shoes of surviving victim, "appeared germane to the task of sentencing" although "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 . . ." *Held*, the argument was "insufficiently inflammatory to justify reversal"].)

In this case, the prosecutor made the following argumentative comments in the course of his penalty phase opening statement:

> . . . when you go back into that jury room again the next time, your deliberations will be a bit different, because this is going to be a moral evaluation that you will be engaged in, determining what is the appropriate punishment for what this man did.
>
> That's what the penalty phase is about. That's what I expect this one to be about, to provide you with a little bit more information not only about the defendant himself from the defense, but about the circumstances of the crime, about what this man did to the victim and how the victim suffered as a result, because you can consider that as well.
>
> *You can put yourself in the position of the victim* and consider how this crime caused his death and you can also consider and weigh how this crime has impacted on the family of the victim and how they still suffer because of what Chris Spencer did to Jim Madden. (82 RT 21879, emphasis added.)

Later, during closing argument when discussing details of the commission of the murder itself, the prosecutor asked the jurors "Put yourself in Madden's [the victim] shoes . . That is permissible under the law . . . " (86 RT 22321.)

**i. The Prosecutor's Comments Were Improper**

The prosecutor's comments here were clearly improper. After informing the jury that the determination of the penalty to be imposed required a "moral evaluation" on their part, the prosecutor asked the jury to consider the suffering of the victim and the family and in so doing, to place themselves in the position of the victim and the family of the victim. (*Id.*) This is *precisely* the type of argument that "play[s] on the emotions of sympathy, shock and horror" and "create[s] an atmosphere of bias and prejudice."

While appeals to emotion are not impermissible in a penalty phase, such appeals must be "within the *permissible bounds of argument.*" (*People v. Leonard* (2007) 40 Cal.4th 1370, 1418, emphasis added.)

Here, the prosecutor's comments were, *by definition*, beyond the permissible bounds of argument. (*Loth, supra*, at p. 765.) Indeed, as discussed in greater detail below, they invited the jurors to decide the case based on "events" that were *imaginary* and had not, and *could* not, ever, occur.

Appellant acknowledges that in *People v. Haskett, supra*, 30 Cal.3d at 863-864, the Court suggested that a "golden rule" type argument may not be improper unless it allows the jury to consider "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response . . ."

In the case before it, the Court concluded that the argument in question was "*insufficiently inflammatory* to justify reversal." *Id.*, at p. 864, emphasis added.)

Thus, the Court indicated that where the challenged argument invites and emotional response on the jury's part, and consideration of irrelevant matters or unfairly inflammatory matters, such argument is improper. In the present case, appellant challenges the use of the"golden rule" argument during the sentencing phase of a capital trial on grounds that such argument invites the jury to decide punishment based on imaginary considerations and on "events" and have not and could never happen; i.e., the imagined impact of the defendant's offense on the individual juror's own life, and loved

ones. This issue was not directly raised in *Haskett*. A case is not authority for propositions not considered. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.) *Had* the issue been raised, based on the analysis in *Haskett* (*see also, People v. Edwards, infra*, (1991) 54 Cal.3d 787, 836, fn. 11), reaffirming the *Haskett* analysis), the Court surely would have found reversible error.

**ii. The Error Was Unfairly Prejudicial**

The prosecutor's argument here was rendered particularly egregious, and prejudicial, by both its timing and by the nature of the prosecution's penalty phase evidence. The penalty jury here was told, *in advance* (during *opening statement*), to take what it was about to hear and apply it to their *own lives* in making the *moral judgment* as to the punishment to be imposed. What followed was a heart-rending tale of profound, prolonged and indeed, incapacitating despair, mourning and sadness. This was coupled with the bloody and gruesome spectacle of photographs of the victim ostensibly admitted to show the circumstances of the offense and victim's "suffering." As each piece of testimony and evidence was presented, the jurors were encouraged (by the prosecutor's prior) comments, to apply it to their *own lives*. This personalized the prosecution's already highly emotional case in a way that was obviously improper and manifestly prejudicial.

In a previous argument appellant has contended that the nature and sheer volume of this highly emotional and highly charged evidence went far beyond acceptable limits so as to render the penalty judgment in his case fundamentally unfair,

arbitrary and in violation of his due process rights. Appellant maintains that position here. But apart from the question of whether such evidence, by its very nature, rendered appellant's penalty trial unfair, it cannot be denied that it was in fact highly charged emotionally, and certainly calculated to induce the jury to vote for death. The prosecution's penalty phase here was not some dry recitation of prior convictions; this was a case which by its very nature was intended to sway the jury emotionally.

And to whatever extent such highly charged emotional evidence was relevant, it was, for the most part (and in case of evidence of impact on the victim's family, entirely) on the grounds that such evidence was "victim impact" evidence as permitted by *Payne v. Tennessee, supra*, 501 U.S. 808:

> In *Payne* [*Payne v. Tennessee* (1991) 501 U.S. 808 [115 L.Ed.2d 720, 111 S.Ct. 2597] the high court held that " if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." ( Id. at p. [115 L.Ed.2d at p. 736, 111 S.Ct. at p. 2609].) It also held "that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." ( Id. at p. [115 L.Ed.2d at p. 735, 111 S.Ct. at p. 2608].) *(People v. Edwards* (1991) 54 Cal.3d 787, 833.)

Significantly, *Payne* and its progeny do *not* render victim impact evidence nonprejudicial. As discussed above, victim impact evidence, particularly that presented in the present case, is, and was herein, highly prejudicial. The essence of *Payne* is not

that such evidence is not nonprejudicial but that it is not *unfairly* prejudicial because it is relevant and admissible as "victim impact" evidence. (*Edwards, supra*, at p. 833.)

In appellant's case, as suggested above, the prosecution's argument personalized the penalty phase evidence in a way that was manifestly improper. For while *Payne* and its progeny approved the use of victim impact evidence, it said nothing about *juror* impact evidence.

Indeed, *Payne* did not purport to address the imagined impact on an individual juror, of a defendant's offense, had it been a loved one of such juror who had been murdered; or the imagined impact on surviving family members. And such considerations are utterly irrelevant as "victim impact" evidence because, obviously, the imagined events never took place. Yet in appellant's case, the highly prejudicial impact remained, and in fact was exacerbated by the invitation of each individual juror to apply the events that befell the Madden family to their *own* loved ones and family members.

To that extent, the prosecutor's improper argument removed the prosecutor's penalty phase evidence, indisputably highly calculated to provoke an emotional and highly prejudicial response, from the protective umbrella of *Payne*. This renders the prejudicial impact of the evidence, *unduly* and *unfairly* prejudicial.

Such unfair prejudice from the "juror impact" evidence here was, inherently, far more prejudicial than in the typical case in which the "golden rule" argument has been presented (e.g., *Loth*, *supra*, 60 Cal.App.4th 757, at p. 761 [personal injury case]); yet in the latter cases, the error has mandated *reversal*. (*Id.*, at p. 770.)

The prejudicial impact was exacerbated, of course, by the prosecutor's penalty phase argument, during which he made repeated references to the victim's holiday gatherings, events, etc. (86 RT 22409 .) And it was not limited to the effect of the victim's absence on family members. The gruesome nature of the offense, untethered as it was (for purposes of the exhortation to the jurors to consider how they would feel if such an event were to befall a loved one) to any relevant purpose, was worse than prejudicial, in was inherently, and unduly, inflammatory. (*See, e.g., Godfrey v. Georgia* (1980) 446 U.S. 420, 433, fn. 16 [in finding "heinous, atrocious and cruel" special circumstance unconstitutional, Court states "it is constitutionally irrelevant that the petitioner used a shotgun instead of a rifle as a murder weapon, resulting in a gruesome spectacle in his mother-in-law's trailer. An interpretation of sec. (b)(7) [of the Georgia death penalty statute] so as to include all murders resulting in gruesome scenes would be totally irrational.].)

This Court's own authority strongly supports appellant's position. In *People v. Edwards, supra*, 54 Cal.3d at p. 836, this Court reaffirmed the reasoning of *Haskett, supra*, and acknowledged that victim impact evidence carries a high risk of unfair and improper prejudice. This Court listed considerations for purposes of ensuring that such evidence, found admissible in principle in *Payne*, does not cause unfair prejudice in a given case:

> Our holding does not mean that there are no limits on emotional evidence and argument. In *People v. Haskett, supra*, 30 Cal.3d at page 864, we cautioned, 'Nevertheless, the jury must face its obligation soberly and rationally, and should not be

given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citations.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, 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. (*Id.* at p. 836, fn. 11.)

When viewed as *juror* impact evidence and argument, the prosecution's penalty phase case fails the meet the above formula for preventing undue prejudice, on *every point*. A juror imagining what life would be like had the charged offense occurred to him or her and his or her family, would not be "fac[ing] its obligation soberly and rationally," and would be put in the position of allowing "emotion [to] reign over reason." Such a juror would not be deciding punishment on "relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction." To the contrary, "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response [would not] be curtailed."

Thus, even if the prosecution's penalty phase evidence was properly considered as "victim impact evidence," a position appellant disputes in the strongest possible fashion, and even assuming the jury could properly consider that highly emotional presentation in determining the appropriate punishment in appellant's case, such circumstances would not detract from the improper prejudicial and inflammatory impact of such evidence as *juror* impact evidence. There is nothing about the use of the

penalty phase evidence as "victim impact" evidence that served to diminish or neutralize the unduly prejudicial effect of such evidence as "juror impact" evidence. To the contrary, the opposite is probably true. The danger identified by the Court in *Edwards, supra*, at p. 836, is that irrelevant, inflammatory and unduly prejudicial considerations will overwhelm any "proper" considerations. In sum, nothing in *Payne* and its progeny in any way mitigates the improper prejudice that occurred in the present case.

Finally, a contrary result is not by the fact that defense counsel did not object to the prosecutor's comments. Ordinarily, a failure to object and to request an admonition to disregard the impropriety results in the waiver of any claim of impropriety on appeal. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) However, this is only a general rule. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) A defendant is excused from the necessity of either a timely objection and/or a request for an admonition if either would be futile. (*People v. Hill, supra*, at p. 820, citing *People v. Arias* (1996) 13 Cal.4th 92, 159.)

This case presents a hornbook example of a situation in which any objection or request for admonition would be futile. Once the prosecutor invited the jurors to imagine the impact of such an offense, and the immediate, bloody aftermath, of a case such as appellant's case, on their own lives, it was impossible to "unring the bell." (*People v. Wein* (1958) 50 Cal.2d 383 423.) Once the prosecutor uttered his comments, it became a practical impossibility for the jurors to not think about what effect such an offense would have had on his or her life, had it occurred to them. It would akin to

asking the jurors to never, under any circumstances and from that moment forward, to never think of a blue unicorn; only worse, given the nature of the evidence and the probable devastating impact any murder would likely have on a victim's survivors; and the fact that such "impact" would only be limited by the imagination of a particular juror.

Additionally, as discussed, the fact that the first comment came prior to the presentation of evidence, and thus invited the jurors to consider and mull over each piece of evidence and its theoretical impact on their lives as it was being presented, rather than as an afterthought, magnified the risk for undue prejudice and further rendered futile, any attempt at mitigation of the error by means of an admonition.

In sum, for all of the above reasons, in cannot be rationally concluded that the error could not possibly have affected the verdict of at least one penalty juror. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Accordingly, the judgment of death must be reversed.

**F. *Griffin* error.**

Appellant's rights under the Fifth and Fourteenth Amendments were violated by another aspect of the prosecutor's closing argument: the repeated references to Chris Spencer's failure to testify. The most blatant reference occurred in the prosecutor's first closing speech.

Mr. Mantell's argument no doubt will be eloquent and emotional, but it won't change the facts. What Mr. Mantell won't be able to speak of is any sympathy or compassion or charity that his client, Mr. Spencer, showed Jim Madden.

He won't be able to point to any remorse on the part of his client for what he has done, because there is none here before you. No remorse, of course, unless it's in his statement where he speaks of himself: "What am looking at? How long am I going to have to serve? I know I was wrong. I know I'm stupid. Oh, fuck. There went my life. Where will they send me?" "I don't know. I really don't know." "Not even on a firsttime offense?" His last words in the confession: "Chris, you fucked up."

Anywhere in there does he say that he's sorry for what he's done? Does he express feelings for Mr. Madden for what happened here?

(83 RT 22347-22348.)

The United States Supreme Court's decision in *Griffin v. California, supra,* 380 U.S. 609, prohibits a prosecutor from commenting on a criminal defendant's failure to testify. The California Supreme Court has long held that *Griffin* prohibits this type of argument in the penalty phase of a capital case. "[A] prosecutor may not urge that a defendant's failure to take the stand at the penalty phase, in order to confess his guilt after being found guilty, demonstrates a lack of remorse." (*People v. Boyette, supra,* 29 Cal.4th 381, 453-454; *People v. Crittenden* (1994) 9 Cal.4th 83.) A prosecutor may argue that the *facts* in a particular case fail to demonstrate remorse on the defendant's part. (See, e.g., *People v. Marshall* (1990)13 Cal.4th 799, 855.) The remarks set forth above do not fall within this exception. The prosecutor here can only be referring to Appellant's failure to testify. This is the plainest interpretation (and therefore the most obvious to the jurors) for the prosecutor's statement "[defense counsel]won't be able to point to any remorse on the part of his client for what he has done, because there is none here before you." The remark is squarely within the

prohibition of *Griffin* as was surely apparent to an experienced trial prosecutor. This prosecutor's conduct justifies reversal of Appellant's sentence.

Defense counsel's failure to object to this instance of *Griffin* error should be overlooked. The prosecutor's argument clearly ran afoul of *Griffin*. The trial court was dismissive of defense objections during argument and refused to admonish the jury or to provide curative instructions. Waiver should not apply to preclude this Court's consideration of this legal claim because even a timely objection would have been futile (*People v. Hill, supra,* 17 Cal.4th at p. 820; see also *People v. Arias*, *supra*, 13 Cal.4th at p. 159; *People v. Noguera* (1992) 4 Cal.4th 599, 638) and, even if the court had admonished the jury, an admonishment could not have cured the harm. (*People v. Hill, supra*, at p. 820; *People v. Bradford* (1997) 15 Cal.4th 1229, 1333.) Even if the claim were deemed waived, this Court should consider it for reasons of judicial economy; *e.g.*, to obviate the need to address a future a claim of ineffectiveness of trial counsel.

**G. Inciting Prejudice By Describing Appellant As A Monster or Wild Animal.**

The prosecutor made every effort to dehumanize Chris Spencer. In the closing arguments, Appellant is repeatedly referred to as a "monster," and described by the prosecutor as unfeeling and inhuman. (See, *e.g.*, 83 RT 22395; 22406-22407.) The prosecutor made use of a well-worn allegory to persuade jurors that Chris Spencer was irredeemably dangerous and fit only for execution.

> But in this little story there were two figures. One was someone who had a lot of money and was really enamored with animals and visited zoos and just liked

creatures wild and tame and liked to be able to see them. He liked to keep trophies on the wall.

The other character in this little story had to do with a hunter, a hunter who was a big game type of hunter. Well, it so happened that the two of them were together at a zoo and they were walking through the zoo and they happened upon a cage which has a sign over it that says "Bengal tiger." And there's a tiger, a Bengal tiger, and it's lying in the sun and it's kind of fat and relaxed and comfortable and its tail is whipping back and forth on the flies that are bothering him.

And the rich guy who likes the animals is really all excited about this and he goes to his big game hunter friend and says, "Look, they've got a Bengal tiger at this zoo. Come on over." The big hunter walks over to him. "Look, look. It's a Bengal tiger. I've always wanted to see one of these."

The hunter says, "That's not a Bengal tiger."

And he says, "Sure, it is. You know, I've seen pictures in books in bookstores and look at this and see the sign. It says 'Bengal tiger.' And look at him."

The hunter says, "No, that's not a Bengal tiger." He says, "I'll prove it to you. You put up the money and I'll prove it you." The guy says okay.

So they get an airline reservation. They fly off to India to the jungles. They take an expedition into the jungles. They're gone three days hiking and they are tired. They are looking around. And then suddenly one afternoon they hear this absolutely hellacious blood curdling roar from nearby enough to just send shivers down the spine of the guy who's financed the expedition.

They go to a clearing. As they come into the clearing there's this creature. It must be fifteen feet long and it's over its kill. And its eyes look up. It's got the blood dripping from its mouth. It looks up and it sees these two intruders and it lets out another roar.

This guy who's financed this trip freaks. He's out of there. The hunter goes with him. They are off and gone. They don't stop running for about twenty minutes. They stop, catch their breath. "Did you see that?"

The hunter says: "Now you've seen a Bengal tiger."

(83 RT 22395-22397.) Returning to Chris Spencer, the prosecutor made certain that not a single juror would miss the comparison:

> The point of it is this, ladies and gentlemen: You've got Mr. Spencer in court. You've got a photo of him here. Monsters. You know, it's a word. It's a catch phrase. What we're talking about is a monstrous act. We're talking about the effect. Right?
>
> The only one that saw the Bengal tiger, the real Bengal tiger, inside that man, Chris Spencer, was Jim Madden. In that setting that night the tiger came out and that's the result. The boy shown in the photographs is not the tiger. The boy didn't kill him. The defendant did, the man seated in court. There's that gap. Remember I said that gap in between time, in between the photos of Mr. Spencer when he was a child twelve and thirteen and when the crime took place? There's that gap.

(83 RT 22397.)

Sixteen years ago the California Supreme Court declined to overturn a capital case where the prosecutor told a milder version of the Bengal tiger story (*People v. Duncan* (1991) 53 Cal.3d 955, 960-961 [810 P.2d 131, 281 Cal.Rptr. 273].) Appellant's case, however, is distinguishable. The Court in *Duncan* determined that the jury in *People v. Duncan* was not likely to view the story as an improper allusion to the defendant's race. The prosecutor here did not use the Bengal tiger story to indirectly invoke racial or ethnic prejudices. This jury was expressly told the purpose of the story. Appellant was, like the tiger, a vicious and bloodthirsty "monster." He should be considered fundamentally different from the jurors and deserving of execution because he was inhuman, untrustworthy and vicious. In this case, the Bengal tiger story was used directly to arouse the jurors' fears of violence and to dehumanize Appellant.

For several reasons, it is time to retire the Bengal tiger from the repertoire of prosecutorial fables. Remarks and stories denigrating the defendant's character are offensive to the dignity and decorum of the proceedings" and, "possess a unique capacity to remain in the jury's mind and influence their deliberations." (Gershmann, *Trial Error and Misconduct*, 2-6(b)(1); *United States v. Pena*, 793 F.2d 486, 491 (2d Cir. 1986); *United States v. Goodwin*, 492 F.2d 1141, 1147 (5th Cir. 1974). Courts have condemned references to the defendants as an "animal and a beast," (*Darden v. Wainwright, supra*, 477 U.S. 168, 181; *People v. Brosnan* (N.Y. 1973) 298 N.E.2d 78, 82), the "wolves of society," (*People v. Martin* (Ill.App. 1978) 377 N.E.2d 1222, 1229), or a "blood-crazed animal hovering over the victim's grave" (*People v. Rivera* (N.Y.App.Div. 1980) 426 N.Y.S. 2d 785, 786).

Although not used for this purpose in Appellant's case, the Bengal tiger story should be retired because it is often interpreted as a racial slur. In the 15 years since this Court decided *People v. Duncan* society has grown less tolerant of even seemingly unintentional uses of racial or ethnic stereotypes. Perhaps in recognition of this shift in public attitudes, the Bengal tiger has not been as well received in recent years. Courts in other states have questioned its propriety. (See, e.g., *Carruthers v. State* (2000) 272 Ga. 306, 311-312 [528 S.E.2d 217].) Other courts have been more forceful in insisting that prosecutors avoid metaphors which are susceptible to interpretation as racial insults or ethnic slurs. (See *State v. Blanks* (Iowa Ct.App. 1991) 479 N.W.2d 601 [prosecutor's

reference to film "Gorillas in the Mist" was improper in the criminal trial of an African-American defendant].)

As this Court has observed, the credibility of the entire justice system rests not only on the actuality but the appearance of fairness and equal justice before the law. (See, e.g., *People v. Heard* (2003) 31 Cal.4th 946 [75 P.3d 53, 4 Cal.Rptr.3d 131].) The prosecutor is the state's representative and this role requires him or her to take the moral high ground even while vigorously pursuing a conviction in a criminal case. (See *People v. Hill, supra*, 17 Cal.4th 800, 820; *People v. Kelley* (1977) 75 Cal.App.3d 672, 690 [142 Cal.Rptr. 457], citing *Berger v. United States* (1935) 295 U.S. 78, 88 [55 S.Ct. 629, 633, 79 L.Ed. 1314].) When the prosecutor's conduct reaches the level of namecalling and abuse not only is the defendant prejudiced but the image of the justice system suffers. This Court should reverse Appellant's conviction, and in so doing reconsider its previous position on the Bengal tiger metaphor.

**H. Conclusion.**

Appellant's sentence must be reversed due to the overwhelmingly prejudicial effect of these instances of misconduct. "The kind of advocacy shown by this record has no place in the administration of justice and should neither be permitted nor rewarded . . ." (*United States v. Young* (1985) 470 U.S. 1, 9 [105 S.Ct. 1038, 84 L.Ed.2d 1].) The prosecutor's closing argument was improper in numerous respects and, in particular areas (*e.g.*, the related appeals to vengeance and the jurors' fears of crime and violence), exceptionally inflammatory. The prosecutor's argument and the improperly admitted

victim impact evidence created an atmosphere of prejudice in which emotion prevailed over reason. (*Gardner v. Florida, supra,* 430 U.S. 349, 358; *Gregg v. Georgia, supra,* 428 U.S. 153.) Reversal is also required because the prosecutor's improper argument encouraged the jurors to substitute an emotional response for their own reasoned moral judgment, and interfered with the jury's consideration of mitigating evidence thereby preventing the individualized sentencing determination the Eighth Amendment requires. (*Caldwell v. Mississippi, supra*, 472 U.S. 320; *Buchanan v. Angelone, supra,* 522 U.S. 269, 277.)

For all of the reasons discussed above, Appellant was denied several of his rights under the state and federal constitutions, as well as rights guaranteed to him according to California law, by the prosecutor's misconduct in closing argument. Accordingly, reversal is required unless the state can show that the errors were harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 381 U.S. at p.24.) On this record, the state cannot establish that the errors did not contribute to the penalty determination. (*People v. Sandoval, supra*, 4 Cal.4$^{th}$ 155, 194.)

## IX
## CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, Appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

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

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making virtually every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed

on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses, among the thousands of murderers in California, a few victims of the ultimate sanction.

### A. Appellant's Death Penalty is Invalid Because Penal Code Section 190.2 is Impermissibly Broad

To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)"

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.) The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make <u>all</u> murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. When the charges against Appellant were filed in this case, the statute contained twenty-six special

circumstances purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, accomplishing the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which has been construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The United States Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down 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 U.S. Constitution and prevailing international law. (See Section E. of this Argument, *post*).

**B. Appellant's Death Penalty is Invalid Because Penal Code Section 190.3(a) as Applied Allows Arbitrary and Capricious Imposition of Death In Violation of the Fifth, Sixth, eighth, and Fourteenth Amendments to the United States Constitution**

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself. The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime, or having had a "hatred of religion," or threatened witnesses after his arrest, or disposed of the victim's body in a manner that precluded its recovery. It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the

prosecution's theory of how the crime was committed. (See, Argument VI, *supra.* See also, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

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. (*Tuilaepa*, *supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S.

420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

### C. California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing and Deprives Defendants of the Right to a Jury Determination of Each Factual Prerequisite to a Sentence of Death; It Therefore Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not

required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

**1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.**

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*];

*Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [hereinafter *Blakely*]; and *Cunningham v. California* (2007) 549 U.S. ___, 127 S.Ct. 856, 166 L.Ed.2d 856 [hereinafter *Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at p. 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Ring, supra,* at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional"

sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at p. 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The United States Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 313.) The Supreme Court emphasized that the governing rule since *Apprendi* is that, other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at p. 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury

verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *(United States v. Booker, supra,* 543 U.S. at p. 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. *(Cunningham v. California, supra*, Section III.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

a. *In the Wake of Apprendi, Ring, Blakely, and Cunningham, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.*

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and

that such aggravating factor (or factors) substantially outweigh any and all mitigating factors. As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was given to appellant's jury (CT 1430),"an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors. These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the Determinate Sentence Law (hereafter, "DSL") "simply authorizes a sentencing court to engage in the type of fact-finding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at p. 1254.)

The United States Supreme Court explicitly rejected this reasoning in *Cunningham.* In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high 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. 6-7.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." (*Cunningham, supra*, p. 13.)

*Cunningham* then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but

beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.*, p. 14.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line").

(*Cunningham, supra,* at p. 13.) In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "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 holding is simply wrong. As section 190, subd. (a) indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, at p. 6.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The United States Supreme Court squarely rejected the State's position:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S. at p. 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 124 S.Ct. at 2431.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of

one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring, supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely v. Washington, supra,* at p. 327, 124 S.Ct. at p. 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether, as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth

Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

b. *Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt.*

A California jury in a penalty trial must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring, supra*, 65 P.3d 915, 943; accord, *State v. Whitfield,* 107 S.W.3d 253 (Mo. 2003); *State v. Ring,* 65 P.3d 915 (Ariz. 2003); *Woldt v. People,* 64 P.3d 256 (Colo. 2003); *Johnson v. State,* 59 P.3d 450 (Nev. 2002).)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) As the high court stated in *Ring, supra*, 122 S.Ct. at pp. 2432, 2443:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

**2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.**

a. *Factual Determinations*

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a

particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and by the Eighth Amendment.

b. *Imposition of Life or Death*

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.) It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630

(commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."
>
> (455 U.S. at p. 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a

specific case." (*Woodson, supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the United States Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California, supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt that not only are the factual bases for the decision true, but that death is the appropriate sentence.

**3. California Law Violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.**

The failure to require written or other specific findings by the jury regarding aggravating factors deprived Appellant of his federal due process and

Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, (1987) 479 U.S. 538, 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor."

(*In re Sturm*, *supra,* 11 Cal.3d at p. 267.) The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra;* Section D, *post*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis can be, and should be, articulated. The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *ante*.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra* [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

**4. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.**

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. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51 (emphasis added), the high court, while declining to hold that comparative proportionality review is an

essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review*."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See Section A of this Argument, *ante*.) California's statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative

proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

**5. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.**

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.)

The United States Supreme Court's recent decisions in *United States v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the

Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

**6. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.**

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.) In closing argument, the prosecutor asserted that none of the evidence regarding Chris Spencer's emotional difficulties and family problems and/or his immaturity and undeveloped character was significant enough to be considered as mitigation under the statutory factors. (See 83 RT 22338-22342.) The statutory language and the prosecutor's argument thus effectively foreclosed jury consideration of relevant defense evidence in mitigation.

### 7. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) of section 190.3– were relevant ***solely*** as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034). This jury, however, was not specifically informed of the factors' limited use. Instead, these jurors were left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft, supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors*." (*People v. Arias, supra,* 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

(*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 32 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)

The very real possibility that Appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived Appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma*

(1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].)

The likelihood that the jury in appellant's case would have been misled as to the potential significance of the "whether or not" sentencing factors was heightened by the prosecutor's misleading and erroneous statements during penalty phase closing argument. (See 83 RT 22337-22355.) The prosecutor then expressly told the jury that none of this evidence was sufficiently credible or compelling to be considered in mitigation. (See, e.g., 83 RT 22339.) Moreover, the prosecutor further argued that even if Spencer was a "follower" as some defense witnesses testified, this made his actions "worse" (i.e., made him more rather than less culpable) and was therefore an aggravating not a mitigating factor. (See 83 RT 22339-22340.) It is thus likely that Appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will thus be sentenced on the basis of different legal standards. Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.)

**D. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants Which Are Afforded to Non-capital Defendants**

The United States Supreme Court has repeatedly directed that 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 the High Court's clear directive, California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "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.) 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 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*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees 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 liberty, but life itself.

In *Prieto*, as in *Snow*, this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, *ante*.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, *ante*.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws. (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See,

e.g., *Mills v. Maryland, supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra.*)

**E. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Violates the Eighth and Fourteenth Amendments; Imposition of the Death Penalty Now Violates the Eighth and Fourteenth Amendments to the United States Constitution**

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*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.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "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.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. at p. 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch

as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes." Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

## CONCLUSION

Appellant's sentence must be reversed due to the overwhelmingly prejudicial effect of inflammatory victim impact evidence, physical evidence and prosecutorial misconduct. The prosecution's penalty phase as a whole was specifically calculated to appeal to the jurors' emotions and to overwhelm any possibility of a reasoned and rational penalty judgment. Such evidence and misconduct far exceeded the permissible bounds of a civilized society, let alone the bounds of the Eighth and Fourteenth Amendments. Additionally, appellant was found guilty based on an invalid confession; was tried by a jury which was unfairly prejudiced against him at the outset in view of *Witt/Witherspoon* error, and has been denied his right to meaningful appellate review. Finally, the California death penalty statute as interpreted by this Court violates the United States Constitution and international standards of humanity and decency.

For all of the above reasons, the judgment must be reversed in its entirety.

DATED: December 6, 2010

Respectfully submitted,

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**CERTIFICATION OF WORD COUNT**

I, Emry J. Allen, hereby declare that I prepared the attached Appellant's Opening Brief in *People v. Christopher Alan Spencer,* (S057242) on a computer using Word Office 2007. According to that program, the word count of said brief, excluding tables, cover, attachments and this certificate, is 77,240 words.

Dated: December 7, 2010

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EMRY J. ALLEN