No. S067353 SUPREME COUR PY COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. IVAN JOE GONZALES Defendant and Appellant.	(San Diego County Superior Court No. SCD 114421)

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of San Diego
(The Honorable Michael D. Wellington, Superior Court Judge)

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DEATH PENALTY

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APPELLANT'S OPENING BRIEF

INTRODUCTION

While in the care of her aunt and uncle, Veronica Gonzales and appellant, Genny Rojas was brutally abused and killed. She died from thermal burns to the lower half of her body. Prior to her death, Genny suffered numerous injuries from being bound, beaten, and burned.

There was no dispute at either of appellant's trials that Genny had been grievously victimized. But, there was a dearth of evidence regarding who had inflicted Genny's injuries. Appellant's first trial and the penalty retrial revolved around whether appellant, Veronica, or both of them had abused and killed Genny.

To support his defense that Veronica solely or primarily perpetrated the offense, appellant proffered evidence of the bizarre abuse Veronica and her sisters had suffered during their childhood. Veronica's mother, Utilia Ortiz, burned, beat, confined, and pulled the hair of her daughters. Genny was burned, beaten, and confined, and had her hair pulled. The evidence would have shown that Veronica experienced or observed her mother's excessive disciplinary techniques, learned how to use those techniques, modeled her behavior after her mother's, and applied those techniques against Genny. Although this indisputably relevant evidence formed the linchpin of appellant's defense at the guilt and penalty phases, the trial court barred it. (See *post*, Claim I.) In addition, at both trials the trial court excluded evidence of Veronica's antipathy for her sister Mary, who was Genny's mother, that appellant had proffered to show Veronica had a motive to perpetrate the offense. (See *post*, Claim II.) At the penalty retrial, the court excluded defense-proffered evidence of Veronica's admissions to police that suggested she had acted alone. (See *post*, Claim

III.) The court's exclusion of this evidence was erroneous and prevented appellant from establishing a defense at the guilt phase and penalty retrial. The juries that convicted appellant, found the special circumstance, and sentenced him to death reached those decisions while being denied crucial information that pertained to appellant's and Veronica's relative roles: evidence that would have buttressed appellant's defense that Veronica was the sole, or alternatively the primary, perpetrator of the offense.

Moreover, immediately following the first trial, two jurors told the trial court that the jury did not find that appellant had intended to kill Genny. Intent to kill was an essential element of the torture-murder special circumstance, which was the only basis for appellant's death-eligibility. The trial court erroneously ruled that jurors' statements regarding whether the jury found the intent-to-kill element were inadmissible and denied appellant's motion for a new special circumstance trial for that reason. (See *post*, Claim VI.)

Due to these and other errors, appellant's trial was fundamentally unfair. This Court should vacate the conviction, special circumstance, and death judgment.

STATEMENT OF THE CASE

On December 11, 1995, an information was filed against appellant and Veronica Gonzales, appellant's wife,[1] in San Diego County Superior Court. The one-count information alleged the murder of Genny Rojas (Pen.

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[1] Appellant and Veronica Gonzales divorced during the pendency of this appeal. (See *Gonzales v. Gonzales* (Super. Ct. San Diego County, 1997, No. D440378).) Although they are no longer married, appellant refers to Veronica as his wife throughout this brief to reflect their marital status at the time of the incident underlying this appeal.

Code, § 187, subd. (a)) and the torture-murder special circumstance (Pen. Code, § 190.2, subd. (a)(18)). (CT 1:39-40.)[2] On February 27, 1997, the trial court granted appellant's and Veronica Gonzales's severance motions. (CT 13:2905.)

On March 21, 1997, jury selection commenced for appellant's trial. (CT 13:2924.) The seated and alternate jurors were sworn on April 14, 1997. (CT 13:2953.) The case was submitted to the jury for guilt-phase deliberations on May 7, 1997. (CT 13:2998.) Nine days later, the jury convicted appellant of first degree murder and found true the torture-murder special circumstance. (CT 9:2120-2121; CT 13:3009.)

The penalty phase commenced on May 22, 1997, and the jury began deliberating on May 28, 1997. (CT 13:3014, 3023.) On June 5, 1997, after seven days of deliberations, the court found the jury hopelessly deadlocked and declared a mistrial. (CT 13:3037.)

The prosecution opted to retry appellant, and jury selection for the penalty retrial commenced on October 10, 1997. (CT 13:3038, 3059.) The seated and alternate jurors were sworn on October 28, 1997. (CT 13:3075.) Sixteen days later, the case was submitted to the jury. (CT 13:3100.) On November 14, 1997, the jury returned a death verdict. (CT 12:2677; CT 13:3102.)

On January 13, 1998, the court denied appellant's motions for a new trial, to modify the sentence, and to reduce the sentence. (CT 12:2812-2814; CT 13:3110-3111.) The court sentenced appellant to death and

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[2] Throughout this brief, the record citations list the volume number, followed by a colon and the pertinent page citation. "CT" refers to the Clerk's Transcript, "PX" refers to the separately paginated preliminary hearing transcript, and "RT" refers to the Reporter's Transcript.

entered a death judgment. (CT 12:2815-2817; CT 13:3111-3112.)

STATEMENT OF APPEALABILITY

This automatic appeal is from a final judgment imposing a verdict of death. (Pen. Code, §1239, subd. (b).)

STATEMENT OF FACTS

I. Genny Rojas's Arrival At Appellant And Veronica Gonzales's Apartment

Genny Rojas was the youngest child of Veronica Gonzales's sister and brother-in-law, Mary and Pete Rojas. (RT 51:6143, 6174.) Veronica's mother, Utilia Ortiz ("Tillie"), acquired custody of Genny because Mary and Pete were found to be unfit parents. (CT 8:1758; RT 51:6143-6144, 6150, 6175, 6186.) In addition to being abusive and neglectful, Mary was in a drug rehabilitation program, and Pete was incarcerated for molesting another daughter. (CT 8:1758; RT 50:5977; RT 51:6172.)

For four months while Tillie was supposed to be caring for her, Genny lived with her aunt and uncle Anita and Victor Negrette. (RT 60:7735-7736.) Tillie had asked her oldest daughter, Anita, to take care of Genny because Tillie's poor health hindered her ability to care for Genny. (RT 60:7736.) Genny was troubled and terrified; she was difficult to calm down, care for, and handle. (RT 60:7736-7738.) Consequently, Anita and Victor returned Genny to Tillie. (RT 60:7739.)

Shortly thereafter, Tillie asked Veronica, who was her youngest daughter and appellant's wife, if she could take care of Genny, and Veronica assented. (CT 8:1758-1759; RT 60:7739.) In February 1995, Genny, who was four years old, began to live with appellant and Veronica and their six children in their small two-bedroom apartment, which was located at 1430 Hilltop Drive, Apartment 7 in Chula Vista. (CT 8:1759; RT

50:5898; RT 52:6393; RT 92:11511; RT 95:12073-12075.) In addition to having behavioral difficulties, Genny was incontinent. (CT 8:1760, 1787-1788, 1883-1884; RT 95:12078, 12091.)

II. Genny Rojas's Burn To Her Head

In June 1995, Genny sustained a serious burn to her head. (RT 56:7066, 7069, 7072; RT 95:12075-12076.) Appellant asked his mother, Belia Gonzales, for an ointment to treat the burn. (RT 56:7072; RT 95:12076.) Appellant also said that he and Veronica were trying to obtain Genny's Medi-Cal card from Tillie, so they could take Genny to the doctor. (CT 8:177; RT 98:12597.)

A few days after July 4, 1995, appellant's sister Guadalupe Baltazar visited appellant and Veronica's apartment to drop off food Belia had obtained and clothing that Guadalupe's children had outgrown. (RT 56:7066-7067; RT 57:7192; RT 95:12073.) Guadalupe observed that Genny had a tightly wrapped towel draped over her head. (RT 56:7068-7069; RT 95:12074.) Appellant explained that the towel was covering up Genny's burn. (RT 56:7069.) At Guadalupe's request, Veronica removed the towel, and Guadalupe saw that the burn, which was on the back of Genny's head and shoulders and the left side of her head, appeared to be healing and that a scab had formed. (RT 56:7072-7073; RT 57:7194; RT 95:12076-12078, 12089.) Due to the burn, hair was missing from the back of Genny's head. (RT 57:7193.)

The wound was troublesome, however, because the scab was extraordinarily itchy. (RT 53:6519; RT 93:11647.) Consequently, Genny repeatedly picked at the scab with her hands or rubbed her head against the wall. (PX 2:241, 282-283, CT 8:1767, 1771, 1780, 1783-1784, 1880-1884, 1889; CT 9:1913, 1915-1918, 1920-1921, 1936-1937, 1948.)

III. Genny Rojas's Appearance In Early July 1995

During her early July visit to appellant and Veronica's apartment, Guadalupe could see most of Genny's body because Genny was wearing a short tank top and shorts. (RT 56:7074-7075; RT 95:12078-12079.) Guadalupe did not see any injuries besides the burn to Genny's head and shoulders. (RT 56:7075; RT 57:7195-7196; RT 95:12079, 12092-12093.) Had she seen any signs of abuse, Guadalupe would have alerted the authorities. (RT 95:12093.)

IV. The Events Of July 21, 1995

A. Interactions with Appellant in the Afternoon and Evening

Between 3:00 and 3:30 p.m. on July 21, 1995, appellant went into a grocery and liquor store called Hilltop Liquor that was located near appellant and Veronica's apartment in Chula Vista. Appellant purchased cereal, milk, and soda on credit. (RT 52:6242.)

In the late afternoon, Juan Manuel Banuelos went to appellant and Veronica's apartment to speak to appellant. (RT 51:6130.) Banuelos worked at the Hilltop Calimax Market, where appellant also regularly purchased groceries on credit. (RT 51:6139; RT 56:7051; RT 96:12125.) Banuelos spoke to appellant outside the apartment for five to ten minutes about appellant's credit account, to which appellant was uncharacteristically late making a payment. (RT 51:6135, 6140.)

Between 7:30 and 8:00 that evening, Marisa Lozano and Christina Robles, who lived in the apartment complex, were mingling with their cousins and friends in the courtyard near appellant and Veronica's apartment. (RT 52:6264; RT 53:6531; RT 94:11824, 11827.) They heard a banging, thumping, or pounding sound coming from a wall in the

apartment. (RT 52:6265, 6281, 6288; RT 53:6534; RT 57:7181; RT 94:11825, 11833; RT 95:12034.) Seconds later, they heard a baby crying.[3] (RT 52:6266; RT 94:11825.) Appellant subsequently looked out a window facing the courtyard and shut the window. (RT 52:6267, 6282; RT 94:11825.) Immediately thereafter, he walked out of the apartment, slammed the front door, and went toward Hilltop Drive. (RT 52:6270; RT 53:6536; RT 94:11826-11828.) Appellant appeared angry. (RT 52:6286-6287; RT 94:11829.) Marisa testified that this occurred while it was starting to get dark. (RT 52:6262, 6278; RT 94:11824.) Sunset occurred at 7:55 p.m. that day. (RT 54:6701-6703; RT 94:11856; RT 96:12224-12225.)

No later than 8:45 p.m., appellant went into Hilltop Liquor. (RT 52:6242, 6260, 6353, 6358; RT 96:12180-12181, 12184.) Bassan Kalasho, a store manager, carefully noted and remembered the time because he needed to go to his brother's store in National City by 9:15 p.m. (RT 52:6243.) Appellant purchased, on credit, milk, cereal, and other groceries, but no alcoholic beverages. (RT 52:6244, 6353; RT 96:12183.) He left the store at approximately 9:00 p.m. (RT 52:6244-6245, 6260, 6353; RT 96:12181, 12184.)

B. Alicia Montes Hears Water Running in Appellant and Veronica Gonzales's Bathroom

Alicia Montes lived in the apartment directly above appellant and Veronica's apartment. (RT 57:7085-7086; RT 95:11927.) Between 8:00

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[3] At both trials, Marisa testified that the crying followed the noise. (RT 52:6266, 6281; RT 94:11825, 11838.) Prior to the first trial, she told appellant's investigator that she was certain the crying preceded the noise. (RT 52:6279-6280; RT 94:11835-11836, 11839.) Christina testified that she heard a child screaming or yelling after hearing the noise. (RT 53:6534-6535.)

and 8:10 p.m., she sat down to watch *Si Dios Me Quita La Vida*, a telenovela that she watched regularly. (RT 57:7087-7088; RT 95:11929.) However, the sound of water running in appellant and Veronica's bathroom prevented her from hearing her television. (RT 57:7087; RT 95:11928-11930.) She heard the water running between 8:00 and 9:00 p.m. (RT 57:7088, 7099; RT 95:11929.) The water was not running when she heard the police cars that responded to the incident. (RT 57:7088.)

C. Ivan Gonzales, Jr. Asks for Rubbing Alcohol

Sometime that evening, appellant and Veronica's oldest son, Ivan Jr., asked Patricia Espinoza, a neighbor, if Veronica could borrow rubbing alcohol. (RT 51:6196; RT 92:11444, 11458.) Ivan Jr. had a blank expression on his face. (RT 51:6196; RT 92:11445.) Days later, Patricia Espinoza told Officer Susan Rodriguez that Ivan Jr. asked to borrow the alcohol an hour before the authorities arrived at 9:22 p.m. (RT 50:5889; RT 95:12032; RT 98:12627.) Her sister Noemi Espinoza testified that Ivan Jr. asked for the alcohol between 6:00 and 7:00 p.m. (RT 51:6195; RT 92:11444.) Patricia Espinoza testified that she did not remember when Ivan Jr. came over to her apartment. (RT 92:11486.) Eighteen months after the incident, she told an investigator from the District Attorney's Office that she recalled that Ivan Jr. asked for the rubbing alcohol between 6:00 and 6:30 because she was getting ready to watch *The Simpsons*, which began at 7:00. (RT 96:12217; RT 98:12629.)

D. Appellant and Veronica Gonzales Seek Help

Several minutes after 9:00 p.m., Veronica screamed for the attention of Patricia Espinoza, who lived at 1428 Hilltop Drive, Apartment 1, which was located directly across a courtyard from appellant and Veronica's apartment. (RT 51:6204-6205; RT 92:11468-11469.) Veronica said that

she needed help because her niece had burned in the bathtub. (RT 51:6205-6206.) Patricia asked Veronica how someone could get burned in the bathtub, and Veronica told Patricia to come with her and cautioned Patricia not to call the police. (RT 51:6206; RT 92:11482.) Patricia followed Veronica into Apartment 7, in which appellant and Veronica lived. (RT 51:6206; RT 92:11470.) Genny was lying motionless on the bedroom floor, and appellant was at her side. (RT 51:6206-6207; RT 92:11471, 11487.) Patricia said to appellant and Veronica that she could not do CPR, but that her sister Noemi could. (RT 51:6207; RT 92:11474.) Patricia told appellant and Veronica to call the police, but Veronica, who appeared nervous, insisted that the police not be called. (RT 51:6207-6208; RT 92:11482, 11484, 11498; RT 95:12031.)

Noemi Espinoza's nephew's girlfriend, Denise Onate, told Noemi to come downstairs to assist a child who was not breathing. (RT 51:6191; RT 92:11446.) Noemi was a nurse's assistant and knew how to perform first aid and CPR. (RT 51:6192; RT 92:11446.) She went toward appellant and Veronica's apartment and saw appellant carrying Genny. (RT 51:6192; RT 92:11447.) Appellant said that Genny did not know how to regulate the water in the bath and had burned herself. (RT 51:6193; RT 92:11449.) Noemi told appellant to bring Genny to Apartment 1, which was better lit than the courtyard between Apartments 1 and 7. (RT 51:6193, 6200; RT 92:11449.) Appellant quickly brought Genny to Apartment 1, where Patricia lived, and laid Genny down on the rug. (RT 51:6193; RT 92:11449-11450, 11460.) Veronica, who still appeared nervous, told appellant not to call the police because she was concerned that the police would blame them for what had happened. (RT 52:6273-6274.)

Noemi determined that Genny was dead; she was not breathing, had

no pulse, and was cold to the touch. (RT 51:6194; RT 92:11450-11451.) She touched Genny's hand, which was not stiff. (RT 92:11451.) Noemi noticed a bald spot on the right side of Genny's head, injuries to her neck and arm, and saw that Genny's legs were red. (RT 51:6194; RT 92:11451.) Noemi and her nineteen-year-old nephew, Juan Lozano, performed CPR on Genny.[4] (RT 51:6194, 6201-6202; RT 56:7021-7023, 7029; RT 92:11451-11453, 11462-11463; RT 95:11937-11939, 11943-11944.) Juan attempted CPR first. (RT 56:7023; RT 95:11938-11939.) After finding no pulse or respiration, he cleared Genny's airway and had no difficulty opening her jaw. (RT 56:7022; RT 95:11938-11939.) When Noemi attempted CPR, Genny's jaw was sufficiently open for her to blow into Genny's airway. (RT 51:6202; RT 92:11452.) She performed two rounds of CPR, but she could not resuscitate Genny. (RT 51:6194; RT 92:11452-11453.) After one minute, Noemi stopped attempting CPR because she knew it was fruitless. (RT 92:11453.)

As Juan and Noemi were attending to Genny, appellant showed little emotion, but seemed shocked. (RT 52:6271; RT 56:7027, 7033; RT 95:11948-11949.) Veronica appeared nervous and frightened. (RT 51:6197; RT 52:6272-6274; RT 56:7023; RT 95:11941.) She repeatedly asked, "What am I going to do?" (RT 56:7023; RT 95:11941.)

E. Police Officers and Firefighters Arrive

Around the time Noemi stopped trying to perform CPR on Genny,

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[4] Except for practicing on mannequins, this was the first time either Noemi or Juan performed CPR. (RT 56:7030; RT 92:11446; RT 95:11944.)

the police arrived.[5] (RT 92:11453, 11463.) Despite Veronica's insistence that the police not be called, at 9:20 p.m. Denise Onate called 9-1-1 at Patricia Espinoza's direction. (RT 56:7020; RT 92:11484; RT 95:11936, 12626.)

At 9:22 p.m., Sergeant Barry Bennett and Officer William Moe of the Chula Vista Police Department arrived at 1428 Hilltop Drive, Apartment 1, after learning that a young child who was not breathing was in that apartment. (RT 50:5889; RT 91:11293, 12627.) Veronica motioned for them to come into the apartment and told them that she had pulled Genny from the bathtub after discovering that she was not breathing. (RT 50:5890, 5908, 5933; RT 91:11295.) They came inside the apartment and saw Genny lying on her back in the living room. (RT 50:5891, 5933; RT 91:11294.) They approached her, and, when checking for vital signs, discovered that Genny was cold and stiff. (RT 50:5895, 5934; RT 91:11299-11301.) Because they determined that Genny was lifeless, they did not attempt CPR. (RT 50:5894-5895, 5935; RT 91:11299.)

Shortly afterward, firefighters arrived at the apartment. (RT 50:5835-5836, 5989; RT 93:11760; RT 98:12627.) John Miller, a fireman and an emergency medical technician, saw Genny on the floor and approached her. (RT 50:5990-5991; RT 93:11760.) Miller, who did not write a contemporaneous incident report and was testifying solely from memory, recalled that he Genny had no pulse and was cold. (RT 50:5991, 6008; RT 93:11760, 11763.) He testified that he did not attempt CPR because he believed that rigor mortis had set in Genny's jaw, which made

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[5] Juan erroneously recalled that firefighters, one of whom used a flashlight, had arrived before police officers. (RT 95:11949-11952.)

her jaw hard to spread to facilitate CPR and suggested that she had not had a pulse and had not been breathing for too long to be resuscitated. (RT 50:5991-5994; RT 93:11762-11764, 11766.)

Veronica said to Sergeant Bennett that she ran a bath for Genny and put her into the bathtub. Veronica added that she went into the kitchen to cook dinner and, when she returned twenty minutes later, found Genny submerged under the water. Veronica said that she subsequently picked Genny up and ran to Apartment 1 to call the police.[6] (RT 50:5895.)

Sergeant Bennett recognized the inconsistencies between Veronica's story and Genny's injuries. (RT 50:5898.) He observed that Genny had been burned and had suffered other injuries. (RT 50:5899.) Consequently, he requested the assistance of homicide and child-abuse detectives. Having learned that Apartment 7 was the primary crime scene, he also asked for additional officers to assist with the investigation. (RT 50:5898.)

Sergeant Bennett and Officer Moe then went to Apartment 7, where they found appellant and Veronica's children watching television in the living room. (RT 50:5902, 5921, 5941; RT 91:11302-11305.) The children did not appear harmed or fearful. (RT 50:5921; RT 91:11315.) The police officers peeked into the bathroom and noted that the bathtub appeared to be dry. (RT 50:5904, 5941; RT 91:11306.) They took the children to the next-

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[6] Although Veronica's statements to Sergeant Bennett were admitted at the guilt phase of appellant's first trial, the trial court ruled that they were inadmissible at the penalty retrial. (RT 90:11179-11187; see *post*, Claim III.)

door neighbor's apartment.[7] (RT 50:5924, 5941.)

After Sergeant Bennett and Officer Moe left for Apartment 7, Officer Philip Collum, the third police officer to arrive at the apartment complex, stayed in Apartment 1 to watch appellant and Veronica. (RT 50:5906, 5910-5913, 5955, 5967; RT 91:11309; RT 95:11957.) Veronica said to Officer Collum that she drew a bath of lukewarm water for Genny and checked on her periodically while preparing dinner. Veronica stated that she found Genny submerged under the water, which had cooled, ten minutes after Veronica had last left the bathroom. (RT 50:5965.) She said that she grabbed Genny and sought help.[8] (RT 50:5978.)

In his police report and previous testimony, Officer Collum stated that appellant and Veronica were crying heavily and visibly upset. (RT 50:5969-5970, 5975; RT 95:11964-11965, 11969-11970.) Officer Collum testified at trial that appellant attempted to console Veronica. (RT 50:5960, 5973-5974, 5978; RT 95:11961-11963, 11975-11976.) Appellant was emotional, anxious, and disturbed by what had happened. (RT 50:5968, 5978; RT 95:11976.)[9]

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[7] Later that night, the children were taken to the police station, where they were examined and found to be uninjured, aside from age-appropriate, benign bumps and bruises. (RT 54:6639, 6641; RT 93:11741.)

[8] Like Veronica's statements to Sergeant Bennett, these statements to Officer Collum were admitted at the first trial, but were excluded at the penalty retrial. (RT 90:11179-11187; see *post*, Claim III.)

[9] Sergeant Bennett, who wrote nothing about appellant's demeanor in his contemporaneous police report, testified that appellant was nonchalant and that Veronica's demeanor was calm and inconsistent with an aunt and guardian losing her niece. (RT 60:5896-5897, 5927-5928; RT 91:11297, 11311.) Officer Moe, who also neglected to write about appellant's demeanor in the police report, testified that appellant appeared

V. Appellant And Veronica Gonzales's Arrests

Officer William Reber drove appellant to the police station for questioning. (RT 56:7041-7042; RT 95:11980.) Although he did not place appellant in handcuffs, appellant was calm, quiet, and very cooperative. (RT 56:7043; RT 95:11981-11984.) At the police station, appellant remained cooperative. (RT 56:7044; RT 95:11984.) Ten or fifteen minutes after appellant's arrival at the station, Officer Reber placed appellant under arrest and handcuffed him. (RT 56:7044.) He also covered appellant's hands, which had not been washed since Officer Reber arrived at the apartment complex between 9:30 and 9:35 p.m., in paper bags. (RT 56:7041, 7044-7045; RT 95:11984-11985.) Appellant's hands did not appear to have been burned. (RT 50:5982; RT 53:6608; RT 56:7045.)

Officer Collum drove Veronica to the police station. (RT 50:5966; RT 95:11972.) After arriving at the police station, Veronica used the bathroom. (RT 50:5979; RT 95:11972.) While she was in the bathroom, Officer Collum was instructed not to permit Veronica to wash her hands; however, she washed her hands in the bathroom. (RT 50:5979; RT 95:11972-11973.) Officer Collum nonetheless bagged her hands, which did not appear burned, when he placed her under arrest. (RT 50:5981; RT 95:11793.)

VI. The Police Investigation

After reentering Apartment 7 following the issuance of a warrant (RT 52:6387), detectives examined, photographed, and filmed the apartment and seized scores of items. A blow dryer, a curling iron, a pair of

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indifferent. (RT 50:5938, 5950.) John Miller, who made no contemporaneous report, testified that appellant displayed no emotion. (RT 50:5997; RT 93:11765-11766.)

handcuffs stored in a woman's booties, and skin and toenail debris found in the bathtub were among the items seized.[10] (RT 52:6313, 6318, 6378-6381, 6402-6406, 6414; RT 92:11517-11518, 11543-11544, 11568-11570.)

Behind the northeast bedroom door, a small area was demarcated with the door, a nightstand, and a cord tying the inside doorknob to the nightstand. (RT 52:6335-6336; RT 92:11522-11523.) A hole and blood stains were on the wall in this area. (RT 52:6337-6339, 6364-6366; RT 92:11524-11529.) In the northeast bedroom closet, a hook was attached with a cloth to the clothes rod. (RT 52:6325, 6327; RT 92:11530, 11538-11540.) The hook was visible through a hole in the closet door. (RT 52:6326-6327; RT 92:11685.) A wooden box with blood and fecal stains was located underneath the hook, and there were blood stains on the back wall. (RT 52:6325, 6328-6329, 6333-6335, 6359; RT 92:11530, 11532-11536, 11540-11541.) A bloodstained section of a pants leg, tied together with a woman's scrunchy containing strands of hair, was found in or in front of the closet. (RT 53:6610-6612; RT 92:11533; RT 93:11692.) Other pieces of cut cloth were found nearby. (RT 53:6613-6614, 6631-6635; RT 93:11691, 11693-11696.) The door to the northwest bedroom, which was used as the children's bedroom, had no doorknob and had a lock accessible only from the outside; the bathroom was visible through the doorknob hole. (RT 51:6220-6223; RT 92:11518-11520, 11566.)

Rodrigo Viesca, an evidence technician with the Chula Vista Police Department, performed temperature tests on the bathtub, blow dryer, and curling iron. (RT 52:6407-6409, 6415-6416; RT 53:6562-6564; RT

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[10] The evidence technicians did not find and seize the skin debris until four days after Genny's death. (RT 52:6318; RT 92:11543-11544.)

92:11557-11559, 11561-11565, 11571-11572.) The water in the bathtub was 148 degrees at the faucet and 140 degrees in the tub throughout the fifteen minutes it took to fill the bathtub 8½ inches high. (RT 53:6562-6564; RT 92:11557-11559, 11561.) The blow dryer reached 181 degrees at contact when on the high setting. (RT 52:6408; RT 92:11563.) The curling iron, on its high setting, reached temperatures of 134 degrees externally and 216 degrees inside the alligator clip. (RT 52:6415; RT 92:11571-11572.)

VII. Appellant's Interrogation

After interrogating Veronica, Detectives Richard Powers and Larry Davis interrogated appellant for two-and-a-half hours, beginning at 9:43 the morning after Genny's death. (RT 55:6781, 6783, 6785, 6789; RT 94:11780-11781.) Throughout the interrogation, appellant unwaveringly said that he did not injure Genny. (CT 8:1752-1843.)

According to appellant, he began running warm water for a bath and checked the water temperature. (CT 8:1761, 1774, 1796, 1800-1801, 1824.) The water was warm enough for the mirror to collect condensation, but steam did not rise from the water. (CT 8:1803, 1823.) He and Veronica then put Genny in the bathtub. (CT 8:1761-1762, 1796, 1841.) Appellant quickly used the toilet, and he and Veronica left the bathroom. (CT 8:1841.) Appellant returned to the bathroom to turn off the water and told Genny to stay in the bath. (CT 8:1775, 1801, 1815, 1841.) He went to the living room and later to the store, and he forgot to check on Genny before leaving for the store. (CT 8:1817.) Approximately ten minutes after he returned from the store, Veronica pulled Genny, who was unconscious, from the bathtub. (CT 8:1764, 1776, 1824.) Appellant and Veronica tried performing CPR and then sought help from their neighbor, Patricia Espinoza. (CT 8:1778, 1829-1832.) Appellant said that the water being hot

was an accident and that he and Veronica did not hold Genny in the water. (CT 8:1801, 1834, 1838.) He regretted not checking Genny in the bath more often. (CT 8:1835.)

According to appellant, Genny burned her head when she knocked over a pot of boiling water onto herself while Veronica was cooking. (CT 8:1770.) Appellant would sometimes scold her or slap her hands to prevent her from reopening her scabs from that burn. (CT 8:1784-1786.) He and Veronica spanked Genny, but not hard enough to hurt her. (CT 8:1834.) Veronica tied Genny's hands with cloth so Genny would not pick at her scabs. (CT 8:1787, 1819-1821.) Veronica once tied Genny's hands behind her back, but appellant never did that. (CT 8:1819-1820.) Genny slept in the bedroom closet three or four times as discipline for picking at her scabs and rubbing her itchy head against the wall. (CT 8:1782-1783.) Genny also slept behind the bedroom door. (CT 8:1821.) He and Veronica put Genny in a wooden box for a few hours to scare her; the purpose was to get her to stop picking at her scabs. (CT 8:1804-1805, 1810.) A couple of times, Genny, who did not like baths, was placed in the bathtub to scare her. (CT 8:1788-1789.) Also to scare Genny, he put up a hook in the closet and told Genny that her mother was coming. (CT 8:1807-1809.)

Appellant stated that most of the time Veronica was the person who disciplined Genny. (CT 8:1805, 1836.) He said that he did not inflict any intentional injuries. (CT 8:1838.) Appellant explained that, when Veronica did things to Genny with which he did not agree, he would tap on the wall to make her think that someone was knocking at the front door. (CT 8:1839.) When Detective Davis asked appellant why Genny had to die, appellant responded that he has been asking the same question. (CT 8:1837.)

VIII. Ivan Gonzales, Jr.'s Statements And Preliminary Hearing Testimony

Detective Larry Davis interviewed appellant and Veronica's oldest son, Ivan Gonzales, Jr., on July 22, 23, and 26 and October 25, 1995, when Ivan Jr. was eight years old. (RT 55:6855; RT 58:7305.) In addition, Ivan Jr. testified at the preliminary hearing on November 8, 1995.[11] (PX 2:223-312.)

During the first three interviews, Ivan Jr. never suggested that anybody burned Genny in the bath. He said that Genny took two baths on July 21, 1995, and, with one exception, said that Veronica ran the latter bath. (CT 8:1853, 1885-1886; CT 9:1901, 1903.) He said that he saw Genny playing in the bath that evening and saw her alone in the bathtub. (CT 8:1857; CT 9:1897, 1905.) He heard her say "ow" several times and believed that she had caused the burn by turning up the hot water. (CT 8:1851, 1853; CT 9:1902, 1904.)

In July 1995, Ivan Jr. never indicated that Veronica or appellant had singled out Genny for abuse. He said that his parents punished her like they did their own children. (CT 9:1914.) Although he was aware that Genny often ate and slept in the master bedroom, he did not discern anything sinister; rather, Ivan Jr. believed that Genny liked being in that bedroom. (CT 9:1900, 1914.) He said that he never saw the hook or box in the master bedroom closet and never observed Genny restrained by handcuffs. (CT

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[11] Due to the trauma that would have resulted from testifying against their parents at their capital trials, the trial court declared that Ivan Jr. and Michael Gonzales, appellant and Veronica's second-oldest child, were unavailable to testify at trial. (RT 25:2591.) Nonetheless, the court ruled that Ivan Jr.'s preliminary hearing testimony was admissible at trial. (RT 29:3213-3214, 3246-3252; CT 13:2903.)

9:1915, 1918.) He stated that Genny slept in the bathtub when she dozed off during a bath. (CT 9:1915.) He also said that a bruise to her head was self-inflicted. (CT 9:1922.) Ivan Jr. believed that the burn to Genny's head was self-inflicted and said that she lost her hair by repeatedly scratching the top of her head. (CT 9:1917-1918.) He recalled that Genny would get disciplined for picking her scabs or soiling herself. (CT 8:1882-1883; CT 9:1913-1917.) He said that she would get spanked or told to take naps. (CT 8:1882-1883; CT 9:1913.) Ivan Jr. said that, about three dozen times, Veronica used clothing to tie Genny's hands so she would not pick at her scabs. (CT 9:1915-1916.) He said that his parents told him not to talk to strangers and never said he should not talk to the police or anyone about what happened to Genny. (CT 9:1923-1924.)

Through the middle of August 1995, Ivan Jr. consistently indicated to Karen Oetken, a social worker assigned to appellant and Veronica's children, that he had not seen Genny being abused. (RT 58:7404-7406.) In late August, Ivan Jr. was placed in a different foster home, where he lived with teenagers whom the probation department also placed at the home. (RT 58:7402, 7407.) Ivan Jr. talked about Genny with the foster mother at this home.[12] (RT 58:7408.)

The substance of Ivan Jr.'s October 25, 1995 interview bore little resemblance to the interviews conducted during July. Ivan Jr. said that on the night Genny died, appellant and Veronica both put Genny in a bathtub filled with hot water, closed the door, and later lied that Genny had

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[12] The court excluded evidence that the foster mother was believed to have improperly initiated conversations with Ivan Jr. or Michael about what had happened to Genny. (RT 58:7351, 7366-7367; RT 60:7570-7576, 7775-7777.)

drowned; he claimed that he knew Genny had not drowned because appellant and Veronica were trying to torture and kill her. (CT 9:1938-1939, 1941.) He declared that he knew that the bath water was hot because Genny always took hot baths. (CT 9:1939.) He stated that Genny kicked the water when she was put into the bath. (CT 9:1940.) He said that he did not see both parents put Genny in the bath because the door was closed, but said that they always put her in the bath together. (CT 9:1941.) He said that he obtained the rubbing alcohol from a neighbor before that bath. (CT 9:1945.)

In the October 25, 1995 interview, Ivan Jr. said that his parents twice made Genny eat her feces. (CT 9:1932-1933.) He believed that his parents were trying to get rid of one of the kids because they had too many children. (CT 9:1934.) Ivan Jr. said that they were trying to eliminate Genny first and had stated they wanted to get rid of her, that they were torturing her, and that he believed that Genny would die, which she did. (CT 9:1934-1935.) He stated that appellant and Veronica would use a knife to cut off Genny's skin, rip her hair out, and hit and punch Genny. (CT 9:1935, 1937-1938, 1940.) He said that one night, Genny went to bed with no scars, but his parents let her sleep for only two minutes and, in the morning, Genny had all of her scars and hardly any hair. (CT 9:1945.) He stated that he saw his parents hang Genny, while her arms were tied behind her back, from a red hook in the closet. (CT 9:1946-1947.) He said that Genny's arms would bleed from the ligature. (CT 9:1948.) He stated that his parents made Ivan Jr. and his siblings throw a hard ball at Genny. (CT 9:1949-1950.) He claimed that when Genny first came to live with his family, his parents told him and his siblings to be mean to Genny, throw her to the ground, and hit her. (CT 9:1953.) He said that his parents would

either give Genny no food or give her food with so much hot sauce that it was inedible. (CT 9:1954.) Ivan Jr. declared that when his parents were asleep, he and his siblings would make sandwiches for Genny, though their parents would punish them when they found out that Genny was being given food. (CT 9:1954-1956.) He said that his parents told him not to tell people about what they were doing to Genny, that they covered up her scars when they had visitors, and that they kept the windows closed so neighbors would not hear Genny scream. (CT 9:1941-1942, 1951-1952.)

At the preliminary hearing, Ivan Jr. testified on direct examination that he last saw Genny while both of his parents were bathing her and last heard her when she was screaming and crying. (PX 2:236.) He also testified that he and his siblings were locked in their bedroom during this bath. (PX 2:235-237, 268-269.) He further testified that he did not see anybody put rubbing alcohol on Genny the night she died. (PX 2:311.) During cross-examination by Veronica's trial counsel, Ivan Jr. testified that the one time he saw Genny in the bathroom that night, she was sitting in an empty bathtub and was alone in the bathroom. (PX 2:275, 293.) Ivan Jr. also testified that he was sure he did not see appellant put Genny in the bathtub that night. (PX 2:293.)

In addition, Ivan Jr. testified that Genny would sleep in the bathtub or on the floor in his parents' bedroom closet or behind the door to that room. (PX 2:228-229.) He added that he once saw Genny sleeping in a wooden box and another time he saw her hanging in the closet. (PX 2:249-252, 292-293.) He said that several times he saw Genny with her hands or feet bound with clothing. (PX 2:243, 247-248.) He testified that Genny had all of her hair and no marks or bruises on her face when she came to live with him and his family. (PX 2:240.) He recalled that she lost her hair

when his parents burned her and pulled her hair out. (PX 2:240, 302.) He said that never saw his parents burn her, but he saw them both pull her hair. (PX 2:240, 302-303.) He said that her head had been burned a number of times with hot water from the bathtub faucet. (PX 2:283-286.) He stated that his parents made him and his siblings throw hard balls at Genny and that his parents would hit them if they didn't comply. (PX 2:244-246, 277-282.) Ivan Jr. testified that Genny did not eat with him and his siblings at the kitchen table and that Ivan Jr. and his siblings would get in trouble for giving her food. (PX 2:242-243.)

IX. Forensic Evidence

Dr. John Eisele, the deputy medical examiner who performed the autopsy on Genny, opined that Genny died of an immersion burn to the lower half of her body that was consistent with Genny being set into the water and held motionless. (RT 51:6070, 6084; RT 91:11375.) In 140-degree water, Genny would have sustained those burns in one second. (RT 51:6099, 6111.) Dr. Kenneth Feldman, a child-burn expert, concluded that it was a third-degree burn caused by an immersion in a hot liquid of between 140 and 150 degrees for no more than ten seconds. (RT 53:6479-6481, 6486, 6489, 6523; RT 93:11605-11607, 11610-11611, 11649-11651.) Dr. Eisele estimated that Genny probably died between one to three hours after being burned, but could have died within half an hour. (RT 51:6122, 6126; RT 91:11376.) Death was preceded by shock, which caused her body to be cold to the touch. (RT 51:6117, 6119; RT 91:11375; RT 92:11406.) Dr. Feldman testified that Genny went into shock between one and four hours after the burn and that death could have occurred minutes afterward. (RT 53:6495, 6524; RT 93:11618, 11620, 11651-11652.)

According to Dr. Eisele, the burn on Genny's head, shoulders, and

ear was caused by hot liquid at least a week before her death and had become infected. (RT 51:6039-6043; RT 91:11332-11333.) Dr. Feldman opined that it was partly a third-degree burn caused by a flowing hot liquid and likely not accidental. (RT 53:6497-6503; RT 93:11623-11628.)

In addition to those burns, Genny had abrasions to her ear, eyebrows, nose, lip, chin, neck, shoulders, forearm, and wrist, bruising under her eyes, and a torn gum; many of these injuries appeared to have been caused by ligatures. (RT 51:6045-6049, 6052-6056, 6061, 6064-6067, 6088-6089; RT 91:11333-11335, 11341-11346, 11349-11356, 11360, 11378-11380.) She had grid-like injuries on her arms and cheeks, which were inflicted with a blow dryer within hours of her death, and parallel marks of ulceration, which were caused by handcuffs.[13] (RT 51:6047, 6057-6060, 6063, 6065, 6114; RT 55:6806, 6814-6815, 6832-6848; RT 91:11336, 11355-11364; RT 92:11418, 11423-11425, 11428-11435.) Genny had triangular injuries on her shoulder that could have been burns caused by a hot curling iron. (RT 53:6513-6514; RT 93:11638-11639.) She also had many small abrasions on her upper cheek and lower nose that may have been caused by a hair brush several days before her death. (RT 51:6048, 6050; RT 91:11348.)

On both thighs, Genny had a series of small bruises caused by fingertips of a person grabbing her from behind. (RT 51:6073-6075; RT 91:11365-11366.) She had a subdural hematoma, which is an accumulation of blood between the brain and skull lining, that could have resulted from

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[13] Dr. Norman Sperber, a forensic odontologist, compared these injuries to the blow dryer and handcuffs found in appellant and Veronica's apartment and concluded that those items caused the injuries. (RT 55:6835-6848; RT 92:11428-11435.)

being violently shaken within a day of her death. (RT 51:6076-6081; RT 53:6503-6506; RT 91:11371-11372; RT 93:11634.) Genny also had an old subanachroid bleed that could have occurred at any time since birth. (RT 51:6079-6080; RT 91:11372-11373.) She had petechial hemorrhaging in her right eye, which could have come from having her neck squeezed. (RT 51:6082; RT 91:11373-11374.)

DNA analysis revealed that Genny was a possible source of the bloodstains in and around the northeast bedroom closet and the area behind the northeast bedroom door, as well as the bloodstains on the blow dryer. Furthermore, she was a possible source of the skin and toenail debris. Appellant and Veronica were excluded as sources of the biological material. (RT 56:7005-7010; RT 95:11871-11872.)

Brian Kennedy, who was qualified as an expert in crime-scene reconstruction, opined that the bloodstains around the hook tied to the clothes rod and bloody footprint stains located on the wall and wooden box beneath the hook were consistent with a 38-inch-tall child hanging from the hook while bleeding and pushing herself against the wooden box or wall for leverage. (RT 54:6664, 6685-6687; RT 93:11569, 11675-11676.)

Genny was adequately nourished, though small for her age. (RT 51:6037; RT 92:11400-11401.) Genny had an usually small thymus gland, which Dr. Eisele inferred was the result of chronic stress. (RT 51:6082-6084; RT 91:11391-11393.) Dr. Eisele opined that Genny was chronically and repeatedly abused. (RT 51:6085, 6095.) Dr. Feldman concluded that an adult of average strength could have inflicted her injuries. (RT 53:6526; RT 93:11653.)

X. Appellant And Veronica Gonzales's Relationship

Appellant's cousin Rosa Maria Rangel introduced appellant to her

friend Veronica when appellant was in his late teenage years. (RT 57:7240-7241; RT 70:8922; RT 95:11994; RT 96:12302; RT 97:12366; RT 98:12563.) Veronica was appellant's first girlfriend. (RT 70:8923; RT 97:12366.) Not long after they met, appellant moved to Corona. (RT 57:7241; RT 95:11994.) Against the advice of appellant's parents, they married shortly thereafter. (RT 70:8923; RT 96:12302-12303; RT 98:12567-12568.)

During their marriage, Veronica gave birth to six children, whom appellant and Veronica raised until Genny Rojas's death. (RT 54:6639; RT 56:7075; RT 68:8781; RT 93:11733; RT 95:12070.) In the early years of their marriage, appellant and Veronica often moved between Corona, where Veronica was raised and her family lived, and Chula Vista, where appellant was raised and his family lived. (RT 57:7241; RT 60:7710, 7744; RT 95:11995; RT 98:12568.) They ultimately settled down in Chula Vista. (RT 60:7745; RT 91:12378; RT 92:12569.)

Although there were occasional moments in which appellant and Veronica appeared to be affectionate toward and in love with each other (RT 57:7168, 7203, 7222-7223, 7272; RT 95:12060, 12064; RT 97:12396, 12399), Veronica's abusiveness, infidelity, and dominance marred their marriage. (RT 56:7078-7079; RT 57:7105-7107, 7133-7135, 7148-7150, 7200-7202, 7213-7218, 7243, 7247-7249, 7261-7277; RT 68:8747-8748; RT 70:8924-8925; RT 92:11491-11495; RT 95:11997-11998, 12046-12052, 12056, 12083-12085; RT 96:12111-12122, 12127-12129, 12137-12142, 12152-12157, 12164-12166, 12312; RT 97:12367-12373, 12383, 12476; RT 98:12577.)

Mere months after the wedding, Veronica began displaying her abusive behavior in the presence of appellant's family. The first time

appellant and Veronica moved together to Chula Vista, they resided with appellant's sister and brother-in-law Patricia and George Andrade. (RT 57:7261; RT 97:12367.) Patricia observed several altercations during the latter part of the approximately six months in which appellant and Veronica lived with the Andrades. (RT 57:7267; RT 97:12367-12368.) These incidents would begin with Veronica hurling profanities and epithets toward appellant, to which appellant would not respond. (RT 57:7261-7262; RT 97:12368-12369.) When the altercations ended, appellant left his and Veronica's bedroom with his shirt stretched out, scratches on his face and arms, and, sometimes, bruises or a swollen lip; Veronica emerged unscathed, but her face was red and tense. (RT 57:7266; RT 97:12371-12373, 12396.) After these fights, appellant would walk away and return 30 to 90 minutes later. (RT 57:7277; RT 97:12372.)

When appellant and Veronica lived in Chula Vista during the following year, they lived with appellant's parents, sister Guadalupe Baltazar, and brother-in-law Santiago Baltazar. (RT 56:7077; RT 95:12082.) During that time, Guadalupe never saw appellant be verbally or physically abusive toward Veronica; however, she observed Veronica hurl objects at and assault appellant. (RT 56:7078; RT 95:12083.) On one occasion, Veronica dropped the large hood of their car on appellant's head while appellant was repairing the vehicle. Appellant did not retaliate. (RT 56:7079; RT 57:7200-7202; RT 95:12083-12085; RT 96:12111-12112.)

A year later, appellant and Veronica lived with their friends Frank and Lorena Peevler for approximately three months. (RT 57:7212, 7230, 7242; RT 95:11995-11996, 12045-12046.) During this time Lorena, who had a close relationship with Veronica, spent a lot of time with appellant and Veronica throughout each day. (RT 57:7213; RT 95:12045-12046.)

She observed appellant and Veronica argue two or three times per week. (RT 57:7213; RT 95:12065.) During these spats, Veronica would scream at and try to provoke appellant, who would remain calm and plead with Veronica to quiet down. (RT 57:7213-7215; RT 95:12046-12048.) Veronica routinely would threaten to leave appellant and take their children with her. (RT 57:7214; RT 95:12047.) In several of these altercations, Veronica resorted to physical violence. (RT 57:7215; RT 95:12049, 12065.) In these instances, she would punch and scratch appellant, who would never retaliate and instead would merely attempt to protect himself. (RT 57:7215-7216; RT 95:12049-12052.) Afterward, to calm himself down, appellant would run or walk away and return 30 to 60 minutes later. (RT 57:7217; RT 95:12052.) Following a particularly intense altercation, in which Veronica amplified her threat to leave and take the children by punching and scratching appellant so he would let go of the child whom he was holding, appellant ran away and climbed up a utility pole. (RT 57:7223-7226, 7232-7234; RT 95:12052-12054.) Frank went to the utility pole and convinced appellant to come down.[14] (RT 95:12002.)

The following year, while appellant and Veronica were living in Corona, Veronica's cousin Eugene Luna, Sr. saw Veronica punch appellant in the mouth. (RT 57:7105, 7114; RT 96:12137.) Rather than respond physically or confront Veronica verbally, appellant just stood there. (RT 57:7106; RT 96:12138.) That evening, Eugene Luna, Jr. saw Veronica

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[14] Frank Peevler testified that appellant told the police officers to shut up and leave him alone and uttered profanities at the officers, but that appellant did not spit at the police officers. (RT 95:12001-12002.) Lorena Peevler testified that Frank had told her that appellant had spit at the police officers. (RT 95:12063.)

throw a plate at appellant that hit appellant in the mouth and cut him. (RT 57:7135, 7154; RT 96:12154-12156.) Again, appellant did not retaliate. (RT 57:7135; RT 96:12156-12157.) He merely asked Veronica what he had done wrong and later exclaimed to Eugene Sr. and Eugene Jr. that he had done nothing wrong. (RT 57:7155; RT 96:12156.) On another occasion around this time, Veronica's drunken outburst directed toward appellant at a McDonald's parking lot, during which appellant tried in vain to convince Veronica to calm down, resulted in police intervention. (RT 57:7155-7162, 7168-7177.) Neither Eugene Jr. nor Eugene Sr. ever observed appellant hit, strike, or physically abuse Veronica.[15] (RT 96:12136, 12153.)

In addition to abusing appellant, Veronica bore a child sired in an adulterous affair. For several months in 1989 and 1990, Veronica and Eugene Jr., who at the time was her sixteen- and seventeen-year-old cousin, had a sexual relationship. (RT 57:7133-7134; RT 96:12152-12153.) They would have sex in appellant and Veronica's apartment while appellant was at work. (RT 57:7134; RT 96:12152-12153.) Appellant received his first hint of the affair after Ivan Jr. said that he had seen Veronica and Eugene Jr. kiss. (RT 57:7111, 7121.) At appellant's request, Eugene Sr. asked Eugene Jr. whether he was having an affair with Veronica; Eugene Jr. denied the allegations. (RT 57:7111, 7137; RT 96:12140-12141, 12158.) Approximately one month later, appellant again approached Eugene Jr. about his suspicions, which Eugene Jr. stopped denying. (RT 57:7136; RT

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[15] In rebuttal, Veronica's brother-in-law Victor Negrette testified that Veronica once said to him that appellant had hit her. (RT 60:7718.) Martha Halog, a neighbor, testified that Veronica told her that appellant had pulled a telephone out of the wall. (RT 60:7614; RT 98:12615.)

96:12160.) Hurt because Eugene Jr. had the affair and lied about it, appellant tried to punch Eugene Jr. but landed only a glancing blow. (RT 57:7136, 7138; RT 96:12159, 12170-12171.) Eugene Jr. then knocked down appellant with a punch and helped appellant back to his feet. (RT 57:7136; RT 96:12159.) Appellant made no more efforts to express his displeasure to Eugene Jr. (RT 57:7137; RT 96:12160-12161.)

Eugene Jr. accompanied Veronica to a health clinic where Veronica took a pregnancy test, which revealed that she was pregnant. (RT 57:7148; RT 96:12164.) On the ride home, Veronica told Eugene Jr. that she believed he was the father. (RT 57:7149; RT 96:12165.) Shortly afterward, while appellant was in earshot, Veronica again told Eugene Jr. that she thought that he had fathered the child. (RT 57:7150; RT 96:12165-12166.) Indeed, Anthony Gonzales, the child to whom Veronica gave birth several months later, bears a strong physical resemblance to Eugene Jr. (RT 57:7112; RT 96:12142.)

After learning that Veronica's affair with her teenage cousin resulted in her pregnancy, appellant traveled from Corona to Chula Vista to speak to Frank and Lorena Peevler. (RT 57:7219, 7244; RT 95:12005, 12057.) In a rare display of emotion, appellant had tears in his eyes as he told them about the affair and pregnancy. (RT 57:7219; RT 95:12006, 12057, 12059.) They advised appellant that he would have to decide how to handle his predicament. (RT 57:7219; RT 95:12057, 12060.) Appellant returned to Corona to live with Veronica and their children. (RT 57:7220; RT 95:12058, 12060.) After Anthony was born, appellant raised him as if he were appellant's biological son. (RT 57:7268; RT 95:12082.)

It was clear to everyone who observed their marital relationship that Veronica dominated appellant. (RT 57:7106-7107, 7218, 7243, 7247; RT

95:11997, 12056; RT 96:12128.) She often screamed at him.[16] (RT 57:7213, 7261-7264; RT 92:11491-11495; RT 95:12046-12047; RT 96:12137-12140, 12312.) When Veronica was present, appellant was less comfortable and spoke much less freely than when she was not. (RT 57:7249; RT 68:8747-8748; RT 70:8925; RT 97:12383.) When appellant visited his parents, he would be open and affectionate only when Veronica was not with him. (RT 70:8924; RT 97:12476; RT 98:12577.) When appellant lived with Frank and Lorena Peevler, appellant would ask Veronica for permission to go with Frank to the store. When she said no, appellant meekly accepted his fate. (RT 57:7243; RT 95:11998.) Veronica's dominance was even apparent when she joined appellant at the grocery store: Appellant would cower behind her as she did all the talking and handled the transaction. (RT 56:7055, 7063; RT 96:12127-12129.)

XI. Appellant's Character

People consistently described appellant as being passive, meek, timid, nonviolent, quiet, shy, mild-mannered, polite, and respectful. (RT 51:6140; RT 52:6253, 6356; RT 56:7050; RT 57:7129, 7138, 7210, 7240, 7272; RT 60:7705; RT 67:8535, 8544-8546, 8564, 8571-8573, 8591, 8601-8604, 8612; RT 68:8649-8650, 8658, 8747; RT 70:8897-8898, 9010; RT 92:11491; RT 95:11993-11994, 12018-12020, 12042-12044; RT 96:12123, 12162, 12179, 12232-12233, 12238, 12243-12244, 12249-12250, 12277-12279, 12288, 12303; RT 97:12343, 12357, 12360, 12365-12366, 12414-

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[16] In rebuttal, Victor Negrette testified that he heard appellant yell at Veronica. (RT 60:7723-7724.) Martha Halog heard them scream at each other. (RT 60:7609; RT 98:12606-12609.) Patricia Espinoza often heard them yell at each other, but she heard Veronica more often than she heard appellant. (RT 92:11495-11496.)

12415, 12472-12473, 12480-12481.) He was a follower, not a leader. (RT 96:12232, 12243-12244, 12278.) As a teenager, appellant would hide behind things or people and rarely talk. (RT 57:7211; RT 95:12042.) For a significant period of time, instead of talking directly to Lorena Peevler, who then was Frank's girlfriend, appellant would conduct conversations with her through Frank. (RT 57:7211; RT 95:12043.) Eduardo Gutierrez, a friend from junior high and high school, told appellant that he should stand up for himself when he got teased; appellant laughed off the advice. (RT 67:8602; RT 96:12278.)

People who managed the grocery stores where appellant shopped easily discerned these character traits. When shopping, appellant consistently looked down and appeared quiet, embarrassed, and submissive. (RT 52:6253, 6356; RT 56:7050, 7063; RT 96:12124, 12179.) Although it was well-established at two stores near his apartment that he was entitled to purchase items on credit during the course of a month and pay the accumulated bill at the beginning of the following month, appellant would ask to receive credit every time he went into each of those stores, which he did once or twice per day. (RT 51:6139; RT 52:6244, 6252, 6254; RT 56:7052; RT 96:12124-12125.)

XII. Discipline In Appellant's Family Of Origin

Appellant's parents did not discipline appellant or his siblings excessively. Appellant's mother, Belia Gonzales, primarily disciplined appellant and his siblings. (RT 57:7238; RT 68:8773; RT 95:11990; RT 96:12301.) When she meted out punishment, she typically forbade her children from playing outside with their siblings or barred them from watching television. (RT 68:8731; RT 96:12309; RT 97:12352.) She rarely resorted to physical discipline; when she did so, she spanked them with a

hand or belt. (RT 68:8732; RT 97:12352.) She was never physically abusive. (RT 57:7238; RT 95:11991; RT 97:12353.)

Occasionally, Belia would delegate the disciplining to appellant's father, Armand Gonzales and tell the children to wait until their father came home. (RT 96:12199, 12297, 12309.) When Armand arrived, he would speak sternly to the children. (RT 68:8773; RT 91:12309.) He never disciplined the children physically. (RT 57:7239; RT 68:8773; RT 95:11991.)

XIII. Discipline And Violence In Veronica Gonzales's Family Of Origin[17]

Veronica was reared in a home in which her mother, Tillie, excessively disciplined her and her sisters. Tillie's abuse of her children, Anita, Mary, and Veronica, came to the attention of the Riverside County Department of Social Services in August 1980, when personnel in the Sheriff Satellite Unit observed scratches and bruises over most of Mary's body and two quarter-sized knots on her head. Mary explained that Tillie inflicted those injuries by beating her regularly with sticks and boards to punish misbehavior. She also said that she had suffered significantly more severe injuries on other occasions. (CT 7:1528.)

Alexandra Krahelski, a Social Service Practitioner, investigated the household and concluded that Tillie inflicted "unbelievable physical abuse" on Mary. (CT 7:1529-1530.)

Veronica Gonzales's cousin Beverly Ward told Krahelski that she

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[17] The trial court excluded this evidence of violence, discipline, and abuse in Veronica Gonzales's family of origin. (RT 21:1845-1848; RT 28:3096-3103; RT 48:5763; RT 49:5807-5813; RT 56:6944-6945; RT 58:7454; RT 60:7684-7685; RT 65:8282-8283; RT 103:12940; see *post*, Claim I.)

observed Tillie hit Mary several times with a broomstick and burn her feet with newspapers that Tillie had ignited. Ward also saw Tillie pulling Anita, Mary, and Veronica by their hair. (CT 7:1532.) She explained that Tillie, when intoxicated, was frightening and violent. (CT 7:1532-1533.) She feared for Anita, Mary, and Veronica's lives. (CT 7:1533.)

Shirley Leon, Veronica's friend, heard a conversation between Mary and Veronica regarding how Tillie used to abuse them. (CT 7:1534.) They discussed how Tillie would punish them by tying them together back-to-back and setting their legs on fire. (CT 7:1534-1535.)

Veronica Gonzales's uncle Paul Becerra said that Veronica was the favorite stepdaughter of Isaias Ortiz ("Chine") and that he and Tillie treated her better than Mary and Anita. Tillie would scream at her daughters and call them "pinche pendeja cabronas," which means "fucking ass bitches." Mary showed Becerra the burns on her body that Tillie had inflicted. (CT 7:1533.) Tillie would start fights while she was intoxicated. On one of those occasions, she tried to punch Becerra's stepdaughter Rachel and attempted to attack Becerra when he interceded. (CT 7:1534.)

Ward recalled that Tillie would initiate verbal altercations and shoving matches with and throw objects at Chine. (CT 7:1531.) Becerra saw Tillie hit Chine, but never observed the converse. When Becerra tried to intervene in one altercation, Tillie hit Becerra. (CT 7:1534.)

XIV. The Impact Of Appellant's And Veronica's Backgrounds[18]

Dr. Patricia Perez-Arce, a neuropsychologist who has studied how

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[18] The trial court excluded Dr. Perez-Arce's testimony regarding Veronica Gonzales. (RT 47:5600-5601; RT 48:5763; see *post*, Claim I.) In light of that ruling, Dr. Perez-Arce did not testify at either trial.

Latino culture impacts family relationships and mental health, explained that children identify with their parents and model their behavior after their parents' behavior. (RT 47:5518-5520.) That is a fundamental tenet of social learning theory. (RT 47:5521.)

Dr. Perez-Arce noted the abuse and lack of nurturing in Veronica's family of origin. (RT 47:5536.) Tillie was an alcoholic who was abusive toward Chine and her children. (RT 47:5534.) She exhibited impulsive or reactive behaviors and responded threateningly or violently toward stressful situations. (RT 47:5536.) Tillie hit Mary with sticks all over her body, thereby creating visible bruises. She would pull Veronica or Mary's hair, burn their legs or feet, or tie their hands behind them. Veronica and her siblings learned and were influenced by Tillie's coping mechanisms. (RT 47:5537.)

Dr. Perez-Arce opined that, according to social learning theory, one would expect Veronica to have difficulty coping with frustrations and to behave in a threatening or hurtful manner when faced with stress. (RT 47:5538.) In Dr. Perez-Arce's opinion, Veronica would be expected to function normally so long as her frustration-tolerance level was not reached. (RT 47:5539.) If that level were exceeded, Veronica would experience heightened levels of stress, to which she would be expected to respond by resorting to the extreme physical abuse she learned from her mother. (RT 47:5540).

Dr. Perez-Arce opined that child-rearing practices to which appellant was exposed as a child would have greatly influenced the manner in which he reared children. She would not expect him to exercise severe physical discipline or abuse on his own children or children visiting his home. She concluded that nothing in appellant's history suggested that he

had a low frustration tolerance or was impulsive. (RT 47:5532.) She noted that appellant's behavior was not threatening or assaultive and that appellant's parents did not fight with each other. (RT 47:5533.)

XV. Genny Rojas's Symbolic Meaning To Veronica Gonzales[19]

Veronica harbored ill will toward her sister Mary, who was Genny's mother. While she was interrogated mere hours after Genny's death, Veronica made these feelings clear. Detective Larry Davis asked Veronica why Mary was in a rehabilitation facility. Veronica responded, "Cause she's a little bitch." (CT 2:383.) When Detective Davis asked her why Genny didn't scream, Veronica said, "She does not talk. Her damn mother. . . . I'm saying her damn mother gets her so goddamn freaked out (unintelligible)." (CT 2:454.)

Mary had lied to Veronica and said that she and appellant had an affair. (CT 8:1840.) Veronica believed that Mary had an affair with appellant and accused appellant of fathering Genny. (RT 47:5543.)

Dr. Perez-Arce opined that Genny had many symbolic meanings for Veronica that related to her childhood and her relatives who abandoned or abused her. (RT 47:5544.) Veronica harbored tremendous resentment toward Tillie and Mary and presumably blamed both of them for foisting Genny upon her. Moreover, she erroneously believed that appellant may have been Genny's biological father. (RT 47:5543.)

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[19] The trial court excluded the evidence of Veronica's rancor toward Mary Rojas, as well as Dr. Perez-Arce's expert testimony on this topic. (RT 21:1860-1861; RT 28:3090-3091; RT 47:5600-5601; RT 48:5763; RT 65:8291; RT 103:12940; see *post*, Claim II.)

XVI. Appellant's Childhood

Appellant, the youngest of Armand and Belia Gonzales's four children, was born in San Diego on July 23, 1966. (RT 70:8904; RT 98:12514.) Appellant lived in Chula Vista and often traveled with the family on weekends to visit relatives in Corona, Tijuana, and Mexicali. (RT 68:8660-8661, 8675, 8776, 8786; RT 70:8917; RT 97:12354-12355.) Appellant was a well-behaved, affectionate boy who had an usually strong bond with his mother. (RT 68:8665; RT 70:8905-8906; RT 98:12517-12518.) He was raised Roman Catholic and participated in the major religious rites of passages, including baptism, confirmation, and first communion. (RT 67:8608; RT 68:8676, 8774-8775; RT 70:8917, 8920; RT 96:12287-12288, 12297-12298; RT 97:12496-12407; RT 98:12531-12533.)

When he was a little boy, appellant played a lot with his older siblings. (RT 68:8661.) Appellant would assist his father with gardening, watch him make repairs around the home, and accompany him on trips to the garbage dump. (RT 68:8770-8772, 8779.) When he was six or seven years old, appellant played the drums, albeit with little skill. (RT 68:8663; RT 97:12413; RT 98:12526-12527.)

Later in his elementary school years, appellant learned to play the guitar. (RT 67:8543-8544; RT 68:8663; RT 96:12228-12230, 12237, 12298-12299.) In contrast to his experience with the drums, appellant became an accomplished guitar player. (RT 67:8543; RT 68:8664; RT 96:12230, 12237.) Appellant often played guitar with Mario Ortiz, who was appellant's best friend at the time. (RT 68:8675, 8771-8772; RT 96:12238-12241; RT 97:12411; RT 98:12524-12525.)

Appellant lost touch with Mario after they began attending different junior high schools. (RT 96:12244.) Appellant thereafter developed a close

friendship with Frank Peevler; they were like brothers. (RT 57:7235-7236; RT 95:11989.) They spent a lot of time at each other's homes, and they regularly slept over one another's homes. (RT 57:7236-7237; RT 95:11989-11990, 12017-12019; RT 96:12247-12249.)

When appellant was a teenager, he was shy around girls. (RT 57:7240; RT 95:11993.) Frank tried to prod appellant to become more assertive around girls, but that endeavor was fruitless. (RT 57:7240; RT 95:11994.)

Appellant had strong relationships with his sisters.[20] Appellant remained close to his sister Patricia Andrade, who is one year older than appellant, while she lived with appellant at their parents' home. (RT 68:8662, 8728-8729; RT 97:12351.) They used to walk to and from school, ride bicycles, and climb trees together. (RT 68:8736; RT 97:12357.)

Appellant's oldest sibling, Guadalupe Baltazar, and appellant provided each other with emotional support. (RT 68:8662, 8669.) Before Guadalupe got married, appellant chaperoned her dates with Santiago. (RT 68:8666-8667; RT 97:12420.) Appellant and Guadalupe have continued to conclude their telephone conversations by saying that they love each other. (RT 68:8676.) While Guadalupe's newborn son, Santiago Jr., was hospitalized for three months, appellant was supportive and prayed for him. (RT 68:8685-8686; RT 97:12422-12424.)

Appellant regularly helped his elderly aunt and neighbors with yard work and other matters. (RT 68:8671-8672; RT 97:12416-12417.) He also would change his sisters' babies' diapers. (RT 68:8668.)

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[20] Evidence of appellant's relationship with his older brother was not elicited at trial.

Appellant was the second person in his immediate family to graduate from high school, and this accomplishment was the source of great pride for appellant and his family. (RT 67:8612; RT 68:8673-8674, 8780; RT 70:8913-8914; RT 96:12300-12301; RT 97:12417-12419; RT 98:12535-12536.) After graduating from high school, appellant received vocational training in electronics and earned a certificate. (RT 68:8779-8780; RT 70:8921-8922; RT 98:12561-12562.) While studying for his electronics certificate, appellant worked at a job in which he filled vending machines. (RT 98:12563.)

XVII. Appellant's Children's Love For Appellant

Appellant and Veronica's six children regularly expressed their love for appellant and discussed how they miss him.[21] (RT 67:8583-8584; RT 68:8708-8710, 8723; RT 70:8927-8930; RT 97:12459-12461; RT 98:12579.) Whenever they visited their paternal grandparents, Ivan Jr. and Michael, who were living in a foster home, asked Armand and Belia about how appellant was doing and requested that appellant be told that they love him very much. (RT 70:8929-8930; RT 97:12462; RT 98:12581-12582.)

The youngest four children were living with Armand and Belia and often spoke about their feelings for appellant. (RT 68:8708; RT 70:8927; RT 97:12461-12462; RT 98:12579.) Vanessa and especially Anthony often said that they missed appellant, loved him, and wished he were home. They regularly asked when appellant will come home. (RT 68:8708; RT

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[21] Due to the trial court's ruling that evidence of appellant's love or good fathering of his children would open the door to rebuttal evidence of negative aspects of his fathering, appellant did not present evidence of his love for, or loving and fatherly acts toward, his children. (RT 65:8235-8236, 8239-8240, 8331-8333, 8350.)

97:12461-12462; RT 98:12579-12580.) Anthony routinely blew kisses toward a photo of appellant. (RT 70:8928.) Valerie, the youngest daughter, stated to her family that she missed and loved appellant, but said so less frequently than Vanessa and Anthony. (RT 68:8708; RT 97:12462; RT 98:12580.) In addition, she talked to her preschool teacher about her love for appellant. (RT 67:8584; RT 97:12485-12486.) Alex also said that he loved and missed appellant and would ask appellant when he was coming home. (RT 68:8709; RT 98:12580.)

When Armand and Belia visited appellant, they brought one of the four youngest children with them. (RT 67:8583; RT 68:8709-8710, 8789-8791; RT 70:8929; RT 97:12459.) The children were always happy to see appellant when they visited and asked if they could stay with him. (RT 68:8709; RT 70:8929; RT 97:12460; RT 98:12580.) Appellant could not have contact visits with them, so the children would blow kisses at appellant and place their hands up to the glass to get as close as possible to touching appellant. (RT 67:8583; RT 68:8710, 8790; RT 97:12459-12460.)

Appellant called his parents every day, and his children always wanted to speak to him. (RT 70:8928; RT 97:12459; RT 98:12581.) When appellant called, Alex would sing appellant the songs that he learned in school. (RT 70:8929.) The children got very excited whenever the phone rang because they hoped it was appellant who was calling. (RT 70:8928-8929; RT 97:12459.)

XVIII. The Impact Appellant's Execution Would Have On His Family

Appellant's children would be utterly devastated if appellant were executed. (RT 68:8724; RT 97:12495-12496; RT 98:12584.) Because they are older than the other children and have special bonds with appellant, the

impact on Ivan Jr. and Michael would be especially damaging. (RT 68:8724; RT 97:12496-12497.)

Appellant's sisters, Guadalupe Baltazar and Patricia Andrade, articulated that appellant is a part of them and that executing him would be killing a part of them. (RT 68:8698, 8753-8754; RT 97:12390, 12464.) Their children, particularly their oldest daughters, Jacqueline Baltazar and Sandra Andrade, also would be devastated. (RT 97:12390-12391, 12464.) Appellant's uncle and godfather, Alexander Gonzales, the person for whom appellant's youngest child was named, said that it would be deeply hurtful if appellant were executed because he loves appellant very much and because the execution would hurt appellant's parents, siblings, and children. (RT 67:8613; RT 96:12290.) Appellant's father, Armand Gonzales, expressed that a piece of his heart would be pulled out if appellant were executed. (RT 68:8792; RT 96:12305.)

Appellant's mother, Belia Gonzales, testified poignantly that appellant means the world to her and Armand, that they love appellant very much, and that they need him. (RT 70:8930-8931.) She and Armand had been ill. (RT 68:8792; RT 70:8930; RT 98:12584.) She articulated that she could not go on without appellant if he were executed. (RT 70:8930; RT 98:12584.)

XIX. Appellant's Exemplary Jailhouse Behavior

Appellant behaved flawlessly while incarcerated at the Central Detention Facility and George Bailey Detention facility. Appellant did not receive a single rules violation report and never created problems or trouble for the corrections officers. (RT 67:8536; RT 68:8648-8649, 8657-8658; RT 97:12343-12344, 12348.) Appellant was quiet and usually kept to himself. (RT 67:8535; RT 68:8649, 8658; RT 97:12343, 12349.) He

treated inmates and corrections officers with respect, and he always followed instructions and the institutional program. (RT 67:8535; RT 68:8650, 8658; RT 97:12349-12350.) He was a tank captain. (RT 67:8498, 8537; RT 95:11897; RT 97:12344.)

While incarcerated, appellant took bible-study courses to further his Christian faith, and regularly prayed with a chaplain. (RT 67:8534; RT 96:12256.) Reverend James Budlove, a chaplain, believed that appellant's faith was sincere. (RT 96:12258.) Appellant was anxious to receive spiritual help and encouraged other inmates to join him in bible study. (RT 96:12256-12257, 12259-12260.)

James Park, a prison consultant who used to classify prisoners for the Department of Corrections, concluded that appellant would unquestionably be a useful and conforming prisoner and would not be a danger to corrections officers or other inmates.[22] (RT 67:8498; RT 95:11901.) He based that opinion on appellant's age, willingness to do work, respectable work history, high-school diploma, electronics certificate, bible study, tank captaincy, and conforming behavior in jail. (RT 67:8497-8499; RT 95:11891, 11896-11898.)

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[22] James Park also testified to the prison conditions appellant would face if he were sentenced to life imprisonment without the possibility of parole. (RT 67:8478-8528; RT 95:11876-11924.) Despite the trial court's reservations about the admissibility of prison-condition evidence, the prosecutor did not object to this evidence. (RT 67:8466-8469.)

CLAIMS OF ERROR

I

THE EXCLUSION OF EVIDENCE SUGGESTING THAT VERONICA GONZALES MASTERMINDED AND SOLELY PERPETRATED THE ABUSE INFLICTED UPON GENNY ROJAS VIOLATED THE EVIDENCE CODE AND APPELLANT'S CONSTITUTIONAL RIGHTS

Throughout the proceedings before the trial court, appellant sought to present evidence that Veronica Gonzales witnessed, and was sometimes victimized by, physical abuse that was strikingly similar to the abusive acts perpetrated on Genny Rojas. This was circumstantial evidence of third-party culpability. Contrary to the prosecutor's assertions, appellant did not attempt to use the evidence of Veronica's background to show her guilt through the inferences forbidden by Evidence Code section 1101, subdivision (a). Indeed, appellant did not endeavor to prove that Veronica had the proclivity to abuse children or that she acted in accordance with such a disposition. Rather, appellant strove to show that Veronica learned excessive disciplinary techniques from her mother, modeled her behavior after her mother's, and applied those techniques against Genny. This evidence was crucial to appellant's guilt-phase defense that Veronica was the sole perpetrator and his principal penalty-phase defense that appellant was a minor participant. Erroneously concluding that the proffered evidence constituted character evidence lacking a valid evidentiary purpose, the trial court improperly excluded the evidence. By barring this evidence, the trial court ran afoul of the rules of evidence and violated appellant's constitutional rights to present a complete defense, to call witnesses in his defense, to present mitigating evidence, to rebut aggravating evidence, and to have a fair and reliable capital-sentencing determination. This grave

error requires vacating the conviction, special circumstance, and death sentence.

A. Facts And Procedural History

At both the guilt phase and the penalty phase, appellant attempted to introduce evidence of physical abuse in Veronica's family of origin as well as expert testimony that Veronica, when faced with a stressful situation, would be expected to utilize the excessive disciplinary techniques she learned from her mother. (See *ante*, at pp. 32-35.) The trial court excluded this evidence. As a result, neither the jury that convicted appellant and found the special circumstance nor the jury that sentenced appellant to death was aware of this critical exculpatory evidence.

The abuse inflicted on Genny paralleled the physical abuse that Veronica had observed and occasionally experienced. The four methods of abuse directed at Genny — burning, beating, confining, and hair pulling — were techniques used by Veronica's mother Utilia Ortiz ("Tillie") against her daughters, Mary Rojas, Anita Negrette, and Veronica Gonzales. Genny's death was caused by an immersion burn to the lower half of her body; in addition, she suffered a burn from a hot liquid on her head and neck and had numerous other burns inflicted with a blow dryer and curling iron. (RT 51:6039-6043, 6084; RT 53:6513-6514; RT 55:6832-6833.) Tillie burned her daughters' legs and feet. (CT 7:1532-1535.) Genny had numerous facial injuries, bruising on her thighs, and a recently inflicted subdural hematoma that suggested she had been beaten. (RT 51:6045-6050, 6073-6081.) Tillie beat Mary with sticks, including a broomstick, and boards. (CT 7:1528, 1532.) Genny was confined by having her hands bound or handcuffed, having a ligature placed around her head, being hanged from a hook, and being placed in a wooden box or a small area

behind the master bedroom door. (RT 51:6052-6067; RT 52:6325-6339; RT 54:6669-6690.) Tillie bound Mary and Veronica's legs together before burning them. (CT 7:1534-1535.) Genny was missing hair on areas of her head that had not been burned, and evidence suggested that her hair had been pulled out. (PX 2:240, RT 51:6041.) Tillie pulled her daughters' hair. (CT 7:1532.)

Numerous times, appellant sought to introduce evidence of excessive discipline in Veronica's family of origin and expert testimony that disciplinary techniques are passed from one generation to the next. Appellant filed a motion in limine to admit this evidence to show that Veronica was raised in a home in which discipline was excessive and abusive, learned those techniques, and applied them by excessively disciplining Genny. (CT 6:1324-1331.) The court initially ruled that the evidence was inadmissible as irrelevant third-party culpability evidence and reasoned that evidence tending to prove Veronica's culpability did not negate appellant's culpability. (RT 21:1845-1848.)

Appellant filed a timely motion for reconsideration.[23] (CT 6:1409-1423.) After hearing argument on the motion for reconsideration, the trial court concluded that the proffered evidence was capable of raising a reasonable doubt and, thus, not barred under *People v. Hall* (1986) 41 Cal.3d 826 [refining standards for admitting third-party culpability evidence]. (RT 28:3096-3097.) The court, however, expressed doubts that the evidence would be admissible under Evidence Code section 1101. (RT

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[23] In addition to noting the similarities between the abuse that Tillie meted out to her daughters and what was done to Genny, appellant pointed out the parallels in Tillie's violent acts toward her husband and Veronica's abusive behavior toward appellant. (CT 6:1410-1413.)

28:3068.) The court requested the defense to file an offer of proof so the court could determine whether the proffered evidence was inadmissible character evidence. (RT 28:3100-3103.)

The prosecution filed a supplemental points and authorities contending that the proffered evidence should be excluded as inadmissible propensity evidence. (CT 7:1523-1525.) Appellant filed the offer of proof that the trial court had requested. (CT 7:1526-1536.)

The court held a hearing pursuant to Evidence Code section 402 to determine the admissibility of Dr. Patricia Perez-Arce's proffered expert testimony that Veronica and appellant would be expected to model their behavior after their parents' behavior, including the disciplinary methods that their parents used. (RT 47:5517-5582.) After Dr. Perez-Arce testified at the hearing, the court stated that her opinions regarding the relationship between the excessive discipline in Veronica's family of origin and Veronica's acts directed toward Genny appeared to be character evidence excluded by Evidence Code section 1101. (RT 47:5585.) The court barred her from testifying about how Veronica would have been expected to have acted or her likelihood to be an abuser.[24] (RT 47:5600; RT 48:5763.) The court also expressed its belief that the testimony about abuse that Veronica had observed and experienced during her childhood would also be inadmissible under Evidence Code section 1101. (RT 48:5763.)

Prior to ruling formally on the admissibility of the evidence of excessive discipline in Veronica's family of origin, the court shared its

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[24] The court permitted Dr. Perez-Arce to testify generally to child behavioral development and Latino culture. (RT 47:5612.) It also permitted her to testify, pursuant to Evidence Code section 1102, about appellant's nonviolent character. (RT 48:5762.)

tentative view that the proffered evidence was indistinguishable from the battering-parent-syndrome-profile evidence the Court of Appeal held was inadmissible in *People v. Walkey* (1986) 177 Cal.App.3d 268. (RT 49:5774-5775.) Defense counsel argued that the proffered evidence did not constitute character evidence, had legitimate non-character purposes, and had to be admitted into evidence in order to protect appellant's constitutional rights. (RT 49:5775-5799, 5804-5806.) Reasoning that the proffered evidence in this case was analytically identical to the profile evidence found inadmissible in *Walkey*, the court ruled that the evidence was inadmissible under Evidence Code section 1101, subdivision (a). (RT 49:5808-5809.) Explaining that the proffered evidence suffered from the weaknesses inherent in character evidence, the court also ruled that appellant's constitutional rights did not compel the admission of the evidence.[25] (RT 49:5810-5813.) Believing that the prosecution could not admit the proffered evidence against Veronica at her trial, the court stated that it would be unfair to the prosecution for appellant to be exonerated with third-party-culpability evidence that the prosecution could not use when trying the alleged alternative perpetrator. (RT 49:5812.)

The court also barred the defense from presenting evidence that Tillie, when applying to become the permanent guardian for Genny and her siblings, failed to disclose that she had abused Mary. (RT 51:6184-6185.) The court likewise excluded evidence of Veronica's relationship with Tillie. (RT 56:6946-6953.) In addition, the court excluded evidence that Tillie

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[25] The prosecutor questioned the reliability of the allegations of abuse. (RT 49:5800.) The court stated that assuming that Tillie had abused Veronica would not impact its ruling excluding the evidence. (RT 49:5817.)

burned her granddaughter Utilia's face. (RT 60:7676.)

Toward the close of the prosecution's guilt phase case-in-chief, appellant renewed his motion to admit the evidence of the techniques Tillie used to abuse her daughters. (RT 56:6941-6943.) Adhering to its conclusion that it was inadmissible character evidence, the court continued to exclude it. (RT 56:6944-6945.) The court later denied a motion to reconsider the exclusion of this evidence. (RT 58:7453-7454.) When the prosecution announced its intent to call Veronica's sister Anita as a guilt-phase rebuttal witness, the defense sought to present the proffered evidence to show that Anita felt protective of Veronica and was therefore a biased witness. (RT 60:7677-7680.) The court permitted evidence that Anita felt protective of Veronica because they were raised in a troubled home, but barred evidence of specific acts of abuse or defense counsel's using the word "abuse" when questioning Anita or her husband, Victor Negrette. (RT 60:7684-7685.)

Prior to the commencement of the penalty phase of the first trial, appellant sought again to admit this evidence. (RT 65:8268-8281.) Defense counsel argued that the proffered evidence pertained to mitigating factors (g) (extreme duress or domination) and (j) (minor participation), was not barred by Evidence Code section 1101, subdivision (a), and, assuming arguendo that it was character evidence, was admissible under Evidence Code section 1101, subdivision (b). (RT 65:8269-8271, 8276-8278; see also Pen. Code, § 190.3.) Articulating that the proffered evidence showed Veronica to be the major participant, defense counsel argued that barring appellant from presenting this mitigating evidence would violate his constitutional rights. (RT 50:8271-8281.) Concluding that the right to present a defense or mitigating evidence did not abrogate Evidence Code

section 1101, the trial court excluded the proffered evidence at the penalty phase. (RT 65:8282-8283.) This ruling remained in effect at the penalty retrial. (RT 75:9383; RT 81:9551.)

After the penalty retrial, appellant moved for a new trial, in part based on the exclusion of this evidence. (CT 12:2702-2706.) The court ruled that it had correctly excluded the evidence and denied the motion for a new trial. (RT 103:12940-12941.)

B. Appellant Proffered Relevant, Admissible Evidence

The evidence of the disciplinary techniques used in Veronica's family of origin was relevant and, thus, presumptively admissible. (See Evid. Code, § 351.) Evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action" constitutes relevant evidence. (Evid. Code, § 210, quoted in *People v. Carter* (2005) 36 Cal.4th 1114, 1166.) It was undisputed at trial that the proffered evidence was relevant.

The evidence tended to prove that it was Veronica who abused and killed Genny. The evidence would have revealed the striking similarity between the abusive techniques that Tillie employed against Veronica, Mary, and Anita and the methods used against Genny. Like her mother and maternal aunts, Genny had been burned, beaten, and confined and had her hair pulled. (See *ante*, at pp. 43-44.) When supplemented with Dr. Perez-Arce's testimony that children model their behavior after their parents' conduct, the proffered evidence would have shown that Veronica experienced or observed Tillie's excessive disciplinary techniques, learned how to use those techniques, modeled her behavior after her mother's, and applied those techniques against Genny.

The evidence was relevant for reasons far beyond the mere fact that Veronica had been abused. The abusive techniques used by Tillie and perpetrated against Genny were both similar and bizarre. For instance, much of the escalating abuse began as a misguided attempt to prevent Genny from picking at her scabs and impeding a burn to her head from healing. Tying Genny's hands and wrapping a cloth around her head so tightly that it created ligature marks were peculiar responses to Genny's behavior. Evidence that Tillie would tie her daughters up would have explained the unusual method used to attempt to prevent Genny from picking at her scabs. The proffered evidence would have created the inference that Veronica resorted to a disciplinary technique that she had learned from her mother and thus perpetrated the abuse against Genny.

The evidence was unquestionably material. At trial, no one disputed defense counsel's assertion that the proffered evidence was the keystone to appellant's defense. In view of the dearth of evidence of who had inflicted Genny's injuries, the principal issue at the guilt phase was whether appellant, Veronica, or both abused and killed Genny. Evidence suggesting that Veronica had masterminded or committed the offense was critical to that determination. Likewise, the evidence was crucial for assessing appellant's degree of participation, which formed the fundamental controversy at the penalty retrial.

C. The Trial Court Erred When It Ruled That The Evidence Of Excessive Disciplinary Techniques In Veronica Gonzales's Family Of Origin Constituted Character Evidence Barred By Evidence Code Section 1101

The trial court's exclusion of the proffered evidence was error. The erroneous ruling resulted from the court's misconception of Evidence Code

section 1101. The inferences appellant sought to make from the excluded evidence were not forbidden by the rule barring the use of character evidence to show action conforming to that character. Thus, Evidence Code section 1101, subdivision (a) presented no impediment to introducing this evidence.

The trial court's ruling excluding this defense evidence pursuant to Evidence Code section 1101 is not entitled to this Court's deference. Although rulings under Evidence Code section 1101 are reviewed for abuse of discretion (e.g., *People v. Cole* (2004) 33 Cal.4th 1158, 1195), the trial court lacked the discretion to use an inapplicable section of the Evidence Code to exclude evidence. "The discretion of a trial court is, of course, 'subject to the limitations of legal principles governing the subject of its action.'" (*People v. Eubanks* (1996) 14 Cal.4th 580, 595, quoting *Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355; see also, *People v. Jackson* (1998) 17 Cal.4th 148, 162; *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977; *In re Carmaleta B.* (1978) 21 Cal.3d 482, 496.) Because "all exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue" (*People v. Russel* (1968) 69 Cal.2d 187, 195), a trial court's legal error is an abuse of discretion per se. (*Koon v. United States* (1996) 518 U.S. 81, 99; *Cooter & Gell v. Hartmarx Corp.* (1990) 496 U.S. 384, 405; *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1105 (dis. opn. of Kennard., J.); *Paterno v. State* 1999) 74 Cal.App.4th 68, 85.) In this case, the trial court committed legal error by concluding that the proffered evidence constituted character evidence lacking a valid evidentiary purpose and thereby excluding the evidence.

Evidence Code section 1101 provides that "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) "A person's character or character trait is an emotional, mental, or personality fact constituting a disposition or propensity to engage in a certain type of conduct." (2 Jefferson Cal. Evidence Benchbook (Cont.Ed.Bar 3d ed. 1997) Evid. of Character, Habit, & Custom § 33.1, p. 697.) Accordingly, Evidence Code section 1101 forbids a party from inferring that a person acted in a certain way on a specified occasion by showing that he or she has a disposition to act in that manner. For instance, the prosecution in a theft case cannot elicit evidence that the defendant is a thief to infer guilt.

Appellant did not seek to make any inferences forbidden by Evidence Code section 1101. An analysis of the categories of evidence implicated by Evidence Code section 1101, subdivision (a) illustrates that the proffered evidence was not character evidence and, thus, was admissible.

1. The Proffered Evidence Did Not Violate the Propensity Rule

The propensity rule lies at the heart of Evidence Code section 1101, subdivision (a). The propensity rule bars the use of past acts to prove a person's disposition to act in that manner and further prove that he acted accordingly on a specified occasion. For example, in the previously described theft example, the prosecution cannot elicit evidence of prior thefts for the purpose of showing that the defendant is a thief and inferring guilt from that propensity. (See *People v. Guerrero* (1976) 16 Cal.3d 719,

724 ["It is well established that evidence of other crimes is inadmissible to prove the accused had the propensity or disposition to commit the crime charged"].) That chain of logic — he stole before, he is a thief, and thus he stole the items in this case — comprises the forbidden inference. (See *People v. Garceau* (1993) 6 Cal.4th 140, 186 [noting propensity "evidence invites the jury to be swayed by speculation that, because the defendant previously has murdered, he or she also committed the charged murder"]; Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials* (1998) 49 Hastings L.J. 663, 669.)

The propensity rule was entirely inapplicable to the proffered evidence in this case. Appellant did not attempt to elicit evidence that Veronica had previously abused children. Consequently, there was no prior-act evidence from which Veronica's purported propensity to abuse children could be inferred. Indeed, appellant never sought to show that Veronica had a propensity to abuse children. Rather, appellant attempted to introduce evidence of excessive disciplinary techniques in Veronica's family of origin to show that Veronica experienced or observed such acts, learned how to use those techniques, modeled her behavior after her mother's, and applied those techniques against Genny. Veronica's purported propensity to abuse children is not part of that logical chain; appellant never sought to make the forbidden inference with this circumstantial evidence of third-party culpability. Only the prosecutor, when arguing that the court should exclude the proffered evidence under Evidence Code section 1101, mentioned or made references to Veronica's purported propensity to abuse children.

The rationales undergirding the propensity rule further demonstrate the inapplicability of the propensity rule to the proffered evidence. The

principal purpose of the rule is to prevent the factfinder from placing inordinate weight on the defendant's commission of prior acts when determining the defendant's guilt. (See *Michelson v. United States* (1948) 335 U.S. 469, 475-476; *People v. Smallwood* (1986) 42 Cal.3d 415, 428; 1 Wigmore, Evidence (3d ed. 1940) p. 646.) A secondary purpose is to prevent the factfinder from convicting the defendant because he is a bad person or to punish him for his uncharged prior crimes, irrespective of whether he committed the charged offense. (See *Old Chief v. United States* (1997) 519 U.S. 172, 181; *People v. Falsetta* (1999) 21 Cal.4th 903, 916; Wigmore, at p. 646.) Another purpose is to relieve the defendant of the burden of defending against the other acts. (See *People v. Falsetta*, at p. 415.) For two reasons, none of these rationales for the propensity rule support excluding the proffered evidence in this case. First, there is no evidence of misconduct by Veronica. Evidence of Veronica being victimized by and observing Tillie's abusive actions would not lead a jury to believe that Veronica was a bad person: She did not commit the prior bad acts, and the evidence would have earned her sympathy, not ire. Second, the trial court severed Veronica's trial from appellant's; because Veronica was not a party at appellant's trial, she could not have been prejudiced by any evidence admitted at appellant's trial.

Furthermore, this Court has undermined the only rationale for the propensity rule this Court has cited that could in part pertain to the proffered evidence: "promot[ing] judicial efficiency by avoiding protracted 'mini-trials' to determine the truth or falsity of the prior charge." (*People v. Falsetta*, *supra*, 21 Cal.4th at pp. 415-416.). This Court has concluded that Evidence Code section 352, which grants discretion to trial courts to exclude evidence that requires an undue consumption of time, sufficiently

promotes judicial efficiency with respect to propensity evidence admissible pursuant to Evidence Code section 1108. (*Id.* at p. 416.) Accordingly, interests in judicial efficiency provide no basis for excluding the proffered evidence under Evidence Code section 1101. Moreover, the trial court did not express any concerns about the length of time it would have taken to elicit the proffered evidence.

2. The Proffered Evidence Did Not Constitute Profile Evidence

Recognizing that appellant did not seek to elicit evidence of Veronica's prior bad acts, the trial court considered the proffered evidence to be analytically identical to the battering-parent-profile-syndrome evidence the Court of Appeal held was inadmissible in *People v. Walkey*, *supra*, and excluded the evidence on that basis. The court's conclusion was erroneous, because the evidence that appellant proffered was not profile evidence.

"A profile is a collection of conduct and characteristics commonly displayed by those who commit a certain crime." (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084.) Profile evidence has multiple components. "Testimony regarding a criminal profile is . . . an expert's opinion as to certain characteristics which are common to some or most of the individuals who commit particular crimes." (*Commonwealth v. Day* (Mass. 1991) 569 N.E.2d 397, 399.) Evidence of the profile then gets supplemented with evidence that a specific person fits the profile. (See *People v. Walkey*, *supra*, 177 Cal.App.3d at p. 277.) Evidence that a person matches a profile implies that person's disposition. Accordingly, evidence that a person fits a criminal profile to show that he acted in accordance with that profile might constitute character evidence inadmissible under Evidence Code section

1101, subdivision (a).[26]

In this case, the proffered evidence did not constitute profile evidence. The chain of logic for the proffered evidence did not include any allegations or inferences that Veronica had a disposition to abuse children. Appellant sought to elicit evidence of abusive methods of discipline in Veronica's family of origin to prove that Veronica experienced or observed her mother utilize those methods, learned those techniques, and employed them against Genny. Any disposition that Veronica may have had does not form part of this logical chain.

Acquiring knowledge and applying that knowledge need not entail a disposition to apply that knowledge. A recent case decided by this Court exemplifies how disposition is not part of the inferential chain at issue in this case. In *People v. Griffin* (2004) 33 Cal.4th 536, 582-583, this Court

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[26] This Court has not determined whether profile evidence, when introduced by the prosecution to prove guilt, is barred by Evidence Code section 1101 (see *People v. Smith* (2005) 35 Cal.4th 334, 357-358 [suggesting, but not deciding, that Section 1101 does not bar probative profile evidence]; *People v. Kelly* (1990) 51 Cal.3d 931, 961-962 [assuming error in prosecutor's cross-examining defense expert whether defendant fit sex-offender profile]; *People v. Stoll* (1989) 49 Cal.3d 1139, 1152-1163 [considering evidence that defendant was not a sexual deviate to constitute character evidence admissible under Evidence Code section 1102]), and the Court of Appeal has provided inconsistent answers to that question (compare *People v. Robbie*, *supra*, 92 Cal.App.4th at pp. 1083-1088 [holding trial court erred in admitting profile evidence]; *People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1072 [same]; *People v. Martinez* (1991) 10 Cal.App.4th 1001, 1004-1008 [same]; *People v. Derello* (1989) 211 Cal.App.3d 414, 425-426 [same]; *People v. Walkey*, *supra*, 177 Cal.App.3d at pp. 276-279 [same] with *People v. Barnes* (2004) 122 Cal.App.4th 858, 868-873 [upholding trial court's admission of profile evidence]; *People v. Singh* (1995) 37 Cal.App.4th 1343, 1378-1380 [same]; *People v. Harvey* (1991) 233 Cal.App.3d 1206, 1226-1229 [same]).

upheld the admission of evidence that the defendant had worked in a slaughterhouse and observed sheep get slaughtered, as well as testimony detailing the technique utilized to slaughter sheep. In that case, the prosecutor argued that the victim was slaughtered like an animal. (*Id.* at p. 582.) There was no argument that the defendant was a slaughterer; it was not a part of the logical chain that the defendant worked in a slaughterhouse, observed animals get slaughtered, learned slaughtering techniques, and applied that knowledge against the victim. Likewise, in this case, disposition played no part of the logical chain defense counsel articulated when proffering the excluded evidence. Veronica did not need to have the disposition of a child abuser to apply against Genny the disciplinary techniques she had learned from her mother.

Moreover, people often do not act consistently with their dispositions. (E.g., Alison, et al., *The Personality Paradox in Offender Profiling* (2002) 8 Psychol. Pub. Pol'y & L. 115, 120-121 [noting low degree of consistency in people's behavior across different situations].) Accordingly, employing one's knowledge may be consistent or may be inconsistent with one's disposition. Because Veronica may not have been acting consistently with her disposition when she implemented the excessive disciplinary techniques she had learned from her mother, her disposition was not part of the logical chain linking the evidence of abuse in Veronica's family of origin to the abuse inflicted on Genny.

In addition to lacking inferences pertaining to Veronica's dispositions, the proffered evidence differed from profile evidence in two other critical respects. First, appellant did not seek to elicit evidence of a battering-parent profile. In *People v. Walkey, supra,* 177 Cal.App.3d at p. 277, the prosecution elicited expert testimony delineating the components

of a battering-parent profile. Second, appellant did not attempt to present evidence that Veronica fit the battering-parent profile. Without evidence listing the factors comprising the profile, the proffered evidence that Tillie had abused Anita, Mary, and Veronica did not imply that Veronica fit the profile; the jury had no evidentiary basis to conclude that Veronica, because she and her sisters had been physically abused, was a child abuser or was predisposed to abuse children. In contrast, in *People v. Walkey*, *supra*, the evidence that the defendant had been abused as a child matched what the prosecution's expert had said was the most important factor in the child-batterer profile. For these reasons, appellant's proffered evidence differed greatly from the profile evidence that the Court of Appeal held was admitted erroneously in *Walkey*.

The rationales supporting a bar on profile evidence also fail to justify the exclusion of the proffered evidence in this case. In concluding that the trial court erred in admitting the prosecution's child-batterer-profile evidence, the *Walkey* court explained:

> "Such evidence invites a jury to conclude that because the defendant has been identified by an expert with experience in child abuse cases as a member of a group having a higher incidence of child . . . abuse, it is more likely the defendant committed the crime." [Citation.] Thus, the nature and extent of the potential prejudice to a defendant generated by character evidence renders it inadmissible.

(*People v. Walkey*, *supra*, 177 Cal.App.3d at p, 278, quoting *State v. Maule* (Wash.App. 1983) 667 P.2d 96, 99.) In this case, no witness would have testified that Veronica belonged to a group that had an increased incidence of child abuse. As a result, the proffered evidence would not have induced the jury to infer from her disposition a greater likelihood that Veronica committed the crime. Moreover, because Veronica was tried separately

from appellant, the proffered evidence could not have prejudiced her. The Court of Appeal's rationale for holding profile evidence in *People v. Robbie*, *supra*, inadmissible likewise cannot justify the trial court's exclusion of the proffered evidence in this case:

> [P]rofile evidence is inherently prejudicial because it requires the jury to accept an erroneous starting point in its consideration of the evidence. We illustrate the problem by examining the syllogism underlying profile evidence: criminals act in a certain way; the defendant acted that way; therefore, the defendant is a criminal. Guilt flows ineluctably from the major premise through the minor one to the conclusion. The problem is the major premise is faulty. It implies that criminals, and only criminals, act in a given way. In fact, certain behavior may be consistent with both innocent and illegal behavior, as the People's expert conceded here.

(*People v. Robbie*, *supra*, 92 Cal.App.4th at p. 1085.) Unlike the evidence in *Robbie*, the proffered evidence in this case did not allege that criminals act in a certain way, that Veronica acted in a certain way, or that Veronica was a criminal. Again, it could not have prejudiced Veronica.

Even if this Court determines that the proffered evidence constituted profile evidence, the trial court erred by excluding it. This Court has stated that profile evidence should be barred "only if it is either irrelevant, lacks a foundation, or is more prejudicial than probative." (*People v. Smith* (2005) 35 Cal.4th 344, 357.) None of those three bases for exclusion were met; accordingly, the trial court erred by excluding the evidence merely because the court deemed it to be profile evidence.

3. The Proffered Evidence Was Admissible Even Assuming Arguendo That the Jury Might Have Made an Improper Character Inference

As explained above, the proffered evidence provided no basis for

concluding that Veronica had a proclivity to abuse children. The only possible way in which the jury could have concluded from the proffered evidence that Veronica was predisposed to abuse children would be if jurors had and used knowledge gained outside the courtroom that child abuse tends to be intergenerational. This remote possibility fails to support the exclusion of the proffered evidence.

Jurors would have committed misconduct if they had injected specialized knowledge obtained from outside sources into the deliberations to make forbidden inferences regarding the proffered evidence. Although jurors' views of the evidence may be shaped by their educational and professional experiences, jurors may not discuss specialized opinions acquired from outside sources. (See *In re Malone* (1996) 12 Cal.4th 935, 963.) Accordingly, it would have been improper for jurors during deliberations, based on their specialized knowledge, to say that Veronica had the proclivity to abuse children because she had been a child-abuse victim, or generally that child-abuse victims are more likely than other people to be child abusers.

To the extent that some jurors could have silently made an improper character inference without committing misconduct, the court erred by excluding the proffered evidence of excessive disciplinary techniques in Veronica's family of origin. Evidence that could be character evidence is generally admissible if it has legitimate, noncharacter purposes. (E.g., *People v. Hill* (1967) 66 Cal.2d 536, 557.) Evidence Code section 1101, subdivision (b) states that section 1101, subdivision (a) does not prohibit the admission of evidence of prior "acts when relevant to prove some fact . . . other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).) Section 1101, subdivision (b)'s list of permissible

evidentiary purposes is not exhaustive. (*People v. Catlin* (2001) 26 Cal.4th 81, 146.)

In this case, the evidence of excessive discipline in Veronica's family of origin had admissible, noncharacter purposes. As explained above, the evidence was offered to show that Veronica experienced and observed those abusive acts, learned how to perform those acts, and implemented her knowledge by perpetrating similar abusive acts against Genny. Appellant did not seek to use the evidence to show Veronica's propensity or disposition to abuse children, and neither propensity nor disposition formed a link in the logical chain that appellant sought to make with the proffered evidence. Recently, in *People v. Griffin, supra*, 33 Cal.4th at pp. 582-583, this Court held that the logical chain put forth by appellant here was indeed valid. Accordingly, the proffered evidence in this case was admissible for a legitimate purpose, and the trial court erred in concluding that the proffered evidence lacked a valid purpose.

Moreover, as trial counsel had argued, the proffered evidence had permissible purposes that are delineated in Evidence Code section 1101, subdivision (b). The evidence pertained to Veronica's disciplinary motive for her acts against Genny. By observing her mother, Veronica learned excessive disciplinary techniques. As Tillie had done to Veronica, and to Anita and Mary in Veronica's presence, Veronica disciplined Genny excessively and abusively. Also, the proffered evidence was probative toward identity. The evidence tended to show that Veronica was the sole, or alternatively the primary, perpetrator of the acts against Genny. Contrary to the trial court's conclusion, appellant did not seek to show identity through Veronica's character. Again, Veronica's propensity or disposition was not part of the logical chain that accompanied the proffered evidence.

From the evidence of excessive disciplinary techniques in Veronica's family of origin, appellant sought to infer that Veronica observed her mother use those techniques, learned them, modeled her behavior after her mother's, applied those disciplinary techniques, and, therefore, Veronica perpetrated the abuse against Genny and killed her. For these reasons, assuming arguendo that the proffered evidence was susceptible to improper character inferences, the evidence was nonetheless admissible for a limited purpose under Evidence Code section 1101, subdivision (b).

Moreover, as a matter of policy, Evidence Code section 1101, subsection (a) should not have barred the proffered evidence. As explicated above, the purposes of the propensity rule and the possible bar on profile evidence did not support the exclusion of third-party-culpability evidence against a separately tried codefendant. The proffered evidence was critical to appellant's defense (see *post*, at pp. 65-68), and the trial court determined that the evidence was capable of raising a reasonable doubt (RT 28:3096-3097). Under these circumstances, appellant's third-party-culpability evidence should not have been excluded under Evidence Code section 1101.

D. The Trial Court's Exclusion Of The Evidence Of Abuse In Veronica Gonzales's Family Of Origin Violated Appellant's Constitutional Rights

The trial court's erroneous exclusion of the proffered evidence eradicated the heart of appellant's defense that Veronica, not he, perpetrated the acts against Genny. This was not mere state-law evidentiary error. The court's rulings infringed appellant's constitutional rights to offer testimony and present a complete defense. The continued exclusion of the evidence at the penalty phase further violated appellant's constitutional rights to present relevant mitigating evidence and rebut aggravating evidence, and to a fair

and reliable capital-sentencing determination.

1. The Erroneous Exclusion of the Evidence Violated Appellant's Constitutional Rights to Present Defense Witnesses and to Present a Compete Defense

The compulsory process clause of the Sixth Amendment and article I, section 15 of the California Constitution, and the due process clause of the Fourteenth Amendment and article I, sections 7 and 15 of the California Constitution provided appellant with the rights to produce witnesses on his behalf and to present a complete defense. (See *Holmes v. South Carolina* (2006) __ U.S. __, 126 S. Ct. 1727, 1731; *Taylor v. Illinois* (1988) 484 U.S. 400, 409; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294; *Washington v. Texas* (1967) 388 U.S. 14, 22-23.) "Few rights are more fundamental than that of an accused to present witnesses in his own defense." (*Chambers v. Mississippi*, *supra*, at p. 302.) Furthermore, notions of fundamental fairness inherent in the due process clause require "that criminal defendants be afforded a meaningful opportunity to present a complete defense." (*California v. Trombetta*, *supra*, at p. 485, quoted in *Crane*, *supra*, at p. 690.) The exclusion of third-party-culpability evidence is the paradigmatic evidentiary ruling that violates a defendant's rights to a defense.[27] (See *Holmes v. South Carolina*,

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[27] Although the rights to elicit testimony from defense witnesses and to present a complete defense have separate constitutional sources, courts have analyzed claims arising under each of those rights similarly. (See *Holmes v. South Carolina*, *supra*, 126 S. Ct. at p. 1731 ["'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to

supra, 126 S. Ct. at p. 1731-1735; *Green v. Georgia* (1979) 442 U.S. 95, 97; *Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 302-303; *Pettijohn v. Hall* (1st Cir. 1979) 599 F.2d 479, 480-483; *Miller v. Angliker* (2nd Cir. 1988) 848 F.2d 1312, 1323-1324; *Government of Virgin Islands v. Mills* (3rd Cir. 1992) 956 F.2d 443, 448; *Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1177-1179, overruled on other grounds in *Payton v. Woodford* (2003) 346 F.3d 1204, 1217, fn. 18; *Ex Parte Griffin* (Ala. 2000) 790 So.2d 351, 355; *State v. Lewis* (Conn. 1998) 717 A.2d 1140, 1152; *Newman v. United States* (D.C. 1997) 705 A.2d 246, 254-258; *Blair v. Commonwealth* (Ky. 2004) 144 S.W.3d 801, 809-810; *State v. Jones* (Minn. 2004) 678 N.W.2d 1, 19; *State v. Jimenez* (N.J. 2003) 815 A.2d 976, 982.) The exclusion of evidence of excessive disciplinary techniques in Veronica's family of origin violated appellant's constitutional rights to present witnesses and a complete defense.

Although a trial court's evidentiary rulings do not ordinarily implicate a defendant's constitutional rights (see *People v. Kraft* (2000) 23 Cal.4th 978, 1035), the Constitution does not tolerate bars on defense evidence if the evidentiary bar infringes a defendant's weighty interest and is arbitrary or disproportionate to the purposes the evidentiary bar was designed to serve. (*Holmes v. South Carolina*, *supra*, 126 S. Ct. at p. 1731.)

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present a complete defense."""], quoting *Crane v. Kentucky*, *supra*, 476 U.S. at p. 690 and *California v. Trombetta*, *supra*, 467 U.S. at p. 485.) When proffered defense testimony is excluded from the defense case-in-chief, the rights to present defense witnesses and to present a complete defense are coextensive. In this brief, where appellant refers explicitly only to the violation of his rights to present a defense, he alleges violations of both his rights to present defense witnesses and to present a complete defense.

United States Supreme Court precedents indicate that exclusions of defense evidence violate a defendant's rights to present a defense if the evidence is exculpatory and critical to the defense, so long as the state lacks an overriding interest in maintaining the integrity of the adversarial process by excluding the evidence. To ensure that the exclusion of evidence prejudiced a defendant, the excluded evidence must be favorable to the defense. (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867.) The primary mechanism for differentiating between ordinary state-law evidentiary error and a constitutional violation is the requirement for a rights-to-a-defense claim that the excluded evidence be crucial to the defense. In most cases finding a violation of the rights to a defense, the United States Supreme Court has emphasized the centrality of the excluded evidence to the defense. (See *Rock v. Arkansas* (1987) 483 U.S. 44, 57; *Crane v. Kentucky*, *supra*, 476 U.S. at p. 690; *Green v. Georgia* (1979) 442 U.S. 95, 97; *Davis v. Alaska* (1974) 415 U.S. 308, 317-318; *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302.)

Lastly, recognizing that "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials" (*United States v. Scheffer* (1998) 523 U.S. 303, 308, quoted in *Holmes v. South Carolina*, *supra*, 126 S. Ct. at p. 1731), the United States Supreme Court has concluded the exclusion of crucial exculpatory evidence would not violate a defendant's constitutional rights if the exclusion advances state interests in maintaining the integrity of the adversarial process sufficiently to outweigh the defendant's interest in presenting crucial exculpatory evidence. (See *Taylor v. Illinois*, *supra*, 484 U.S. at pp. 414-415; *Rock v. Arkansas*, *supra*, 483 U.S. at p. 56.) Accordingly, a defendant's Sixth and Fourteenth Amendment rights are not

violated by the exclusion of unreliable scientific evidence (see *United States v. Scheffer*, *supra*, at pp. 308-317), or untrustworthy hearsay (see, e.g., *People v. Morrison* (2004) 34 Cal.4th 698, 724-725; *People v. Ayala* (2000) 23 Cal.4th 225, 269), or the exclusion of evidence as a sanction for failure to give timely notice of a witness or evidence (see *Michigan v. Lucas* (1991) 500 U.S. 145, 149-153; *Taylor v. Illinois*, *supra*, at p. 415).

The trial court's exclusion of the proffered evidence infringed appellant's constitutional rights. As demonstrated below, the evidence of excessive disciplinary techniques in Veronica's family of origin was both favorable and central to appellant's defense.

At the guilt phase, appellant's principal defense was that Veronica was the sole perpetrator and that he was guilty only of child endangerment resulting in death, a lesser-related offense. At her guilt phase summation, defense counsel asserted that appellant did not participate in the homicide and that appellant's failure to protect Genny constituted child endangerment, but not murder. (RT 63:8151-8156.) Appellant relied on evidence suggesting that Genny was burned in the bathtub and not given prompt medical attention while appellant was out of the apartment. (RT 52:6242-6245, 6261-6271, 6353; RT 53:6533-6536; RT 57:7085-7088.) To assert that Veronica alone burned Genny in the bathtub, appellant also used evidence that Veronica, when seeking help, said that she had run Genny's bath and put Genny in the bath, and otherwise spoke in the first-person singular when trying to explain what happened to Genny.[28] (RT 50:5895, 5908-5909, 5965.) Evidence that the devices used to abuse Genny were

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[28] At the penalty retrial, the trial court barred evidence that Veronica at the apartment complex told police officers that she alone drew the bath and placed Genny in the water. (RT 90:11179-11187; see *post*, Claim III.)

used by, belonged to, or were stored in items belonging to Veronica further supported the third-party-culpability defense. (RT 51:6088-6089; RT 52:6325, 6378-6381; RT 53:6513-6514, 6610-6614; RT 55:6832-6833.)

In further support of his defense, appellant presented evidence that he treated Anthony like his other children though appellant was aware that Anthony was an illegitimate child who was the product of an affair between Veronica and her teenage cousin. (RT 57:7112, 7150, 7268.) That evidence was used to show that appellant would not single out a child for maltreatment and suggest that it was Veronica, not appellant, who singled out Genny for abuse. To buttress the third-party-culpability defense and explain why appellant did not intervene to protect Genny, the defense introduced evidence that Veronica was the dominant and abusive partner in her relationship with appellant. (RT 57:7105-7107, 7135, 7213-7218, 7243, 7247, 7261-7267.) The defense also elicited evidence that appellant was meek, passive, and peaceful. (RT 56:7050; RT 57:7105-7106, 7240.)

The prosecution presented evidence that partly rebutted appellant's defense. An emergency medical technician testified that rigor mortis had set in Genny before he attempted CPR, which suggested that Genny had been burned earlier than the defense theorized. (RT 50:5990-5994.) Appellant made statements during his interrogation that he had run the water for a bath and that both he and Veronica had placed Genny in the bathtub. (CT 8:1761-1762.) Appellant also stated that he had put up the hook in the bedroom closet and sometimes had placed Genny in a wooden box or the bathtub to scare her. (CT 8:1788-1789, 1804-1810.)

In view of this conflicting evidence admitted at the guilt phase, the excluded evidence would have provided powerful evidence that Veronica masterminded and solely perpetrated the abuse and homicide of Genny.

The proffered evidence would have demonstrated that Veronica and her sisters had been abused in a manner similar to how Genny was abused. Coupled with Dr. Perez-Arce's testimony that children model their behavior after their parents' conduct, the proffered evidence would also have shown that Veronica learned the excessive disciplinary techniques from Tillie and suggested that she was the person who used those methods against Genny.

The similarities in abusive techniques were especially probative of Veronica's culpability in this case because of the bizarreness of the acts against Genny. (See *ante*, at p. 49.) Had the evidence of the similarity in abusive techniques used by Tillie and employed against Genny been limited to common methods, such as beating, the evidence of abuse that Veronica experienced and observed would have been somewhat probative. The unusual nature of the excessive disciplinary techniques utilized by Tillie and perpetrated against Genny greatly enhances the probity of the evidence of excessive discipline in Veronica's family of origin.

If the trial court had admitted the excluded evidence, appellant's third-party-culpability defense would have been far more convincing than it was in the absence of the proffered evidence. The evidence that was admitted in appellant's defense was circumstantial and partly contradicted by prosecution evidence. Potential assumptions that the only man and only non-blood-relative of Genny in the household would be the likely perpetrator further undercut appellant's defense. The proffered evidence was highly probative of Veronica's guilt and, thus, would have fortified appellant's third-party-culpability defense. Throughout the proceedings below, defense counsel asserted, without the prosecutor's disagreement, that the proffered evidence was critical to the defense. (RT 28:3061-3062; RT 49:5786-5794; RT 56:6943; RT 65:8280; CT 12:2706.) The trial court

agreed. (RT 28:3103.) Therefore, the excluded evidence was both exculpatory and critical to appellant's defense.

Although the evidence, which strongly suggested that Veronica masterminded the offense, did not foreclose the possibility that appellant was culpable as an accomplice, the proffered evidence need not have definitely proven appellant's innocence in order to be crucial to his third-party-culpability defense. (See *People v. Cash* (2002) 28 Cal.4th 703, 727 ["Evidence that falls short of exonerating a defendant may still be critical to a defense."].) The proffered evidence need only have tended to establish his innocence. (See *State v. Blob* (Minn. 2004) 682 N.W.2d 578, 621 [stating constitutional right to present witnesses in one's defense "includes evidence tending to show that an alternate person committed the crime" when identity is at issue]; *State v. Koedatich* (N.J. 1988) 548 A.2d 939, 976 ["the Supreme Court recognized that an accused has a constitutional right under the due process clause of the fourteenth amendment to offer probative evidence tending to show that a third party committed the crime charged"].) By indicating that Veronica, rather than appellant, masterminded the offense, the proffered evidence tended to show that Veronica, rather than appellant, was the primary perpetrator and weakened the prosecution's case that appellant was guilty of homicide as a primary perpetrator or an aider and abettor. Moreover, the proffered evidence tended to prove that appellant lacked the intent to kill Genny, an essential element of the torture-murder special circumstance, or the intent to torture her, an element of both murder by torture and the torture-murder special circumstance. The evidence suggested that the primary perpetrator had only the intent to discipline, rather than the intent to kill, and that appellant was neither a primary perpetrator nor an accomplice or, at the very least, that appellant

was a minor participant who had a less culpable mens rea than the primary perpetrator. Thus, the excluded evidence was critical to appellant's defense, with respect to the murder charge and the torture-murder special circumstance.

The trial court's conclusion that excluding the proffered evidence did not violate appellant's right to a defense because it lacked sufficient probity was erroneous. First, it is the centrality of evidence to the defense — not probity — that factors into determining whether the exclusion of defense evidence would violate a defendant's constitutional rights. (See *Rock v. Arkansas*, *supra*, 483 U.S. at pp. 61-62 [holding per se exclusion of defendant's posthypnosis testimony under state evidence law infringed defendant's constitutional rights to testify despite questions regarding accuracy of testimony].) Second, the court based its determination that the proffered evidence was weak and speculative in a manner inherent in character evidence on the erroneous premise that the proffered evidence was probative only as character evidence. The proffered evidence was powerful because the unusual excessive disciplinary techniques that Tillie employed paralleled the methods used to injure Genny. The evidence and the inferences that Veronica observed and experienced Tillie use the techniques, learned them, and applied them, is not weak and speculative. (See *People v. Griffin*, *supra*, 33 Cal.4th at pp. 582-583 [finding probative the evidence of defendant's employment in slaughterhouse to show that defendant observed animals get slaughtered, learned slaughtering techniques, and applied those techniques to slaughter victim like an animal].)

The exclusion of the proffered evidence failed to advance legitimate state interests, which are defined as interests in maintaining the integrity of

the adversarial process. Appellant did not seek to admit untrustworthy hearsay or unreliable scientific evidence. The proffered evidence did not impede the fair and efficient administration of justice or prejudice the truth-determining function of the trial process. (See *Taylor v. Illinois*, *supra*, 484 U.S. at pp. 414-415.) Rather, the exclusion of the evidence impeded the integrity of the adversarial process by preventing the jury from considering reliable and potent evidence that was central to appellant's defense.

The prosecution's purported right to a fair trial provided no bona fide basis for denying appellant's constitutional claims regarding the proffered evidence. In rejecting appellant's argument that his constitutional rights to a defense demanded the admission of the proffered evidence, the court expressed a concern with the ramifications of admitting evidence of Tillie's excessive disciplinary techniques at appellant's trial and subsequently excluding the same evidence at Veronica's trial. The court believed that admitting the evidence in appellant's trial, but not Veronica's trial, would infringe the prosecution's interest in a fair trial. The court explained:

> I don't believe that constitutional rights to a fair trial would be served by allowing one defendant to escape justice, if indeed he's guilty, to escape justice on the basis of evidence that someone else committed that crime, when that evidence is simply unavailable to seek justice as to that other person.

(RT 49:5812.)

The trial court's reasoning is flawed in several respects. The state's interest should be measured only by its stake in maintaining the evidentiary rule used as a basis for excluding the defense evidence — not by whether the constitutionally compelled admission of the evidence would decrease

the likelihood of a conviction. (*Rock v. Arkansas* (1987) 483 U.S. at p. 56 ["In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify"].) In addition, this Court has concluded that when a defendant seeks to introduce third-party-culpability evidence, the admissibility of that evidence in the alleged alternative perpetrator's trial is immaterial. (See *People v. Jones* (1998) 17 Cal.4th 279, 305 ["Defendant also asserts in effect that the trial court applied a double standard to the foregoing offers of proof by permitting the prosecution to admit similar testimony in proceedings against [the codefendant in his separate trial]. But what happened in those proceedings has no bearing on the propriety of the ruling in this case."].) The purpose of severing appellant's and Veronica's trials was to permit the parties at one trial to elicit evidence that would be inadmissible at the other trial. The admissibility of evidence at Veronica's trial should have no bearing on the admissibility of that evidence at appellant's trial.[29] Likewise, the admissibility of evidence at Veronica's trial should not impact the analysis of whether the exclusion of the proffered evidence infringed appellant's constitutional rights to a defense.

For these reasons, the supposed inadmissibility of the proffered evidence at Veronica's separate trial did not constitute a legitimate state interest that could outweigh appellant's interest in presenting a defense.

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[29] Assuming arguendo that the trial court correctly concluded that the admissibility of the evidence at Veronica's trial was relevant to the determination at appellant's trial, the court should have expected that Veronica would present the evidence that Tillie abused her and her sisters as mitigating evidence, which the prosecutor would have been able to exploit. Thus, the court's concerns that the prosecution could not have used the proffered evidence against Veronica were unsound.

Because the proffered evidence was exculpatory and central to the defense, and the state lacked a valid countervailing interest in excluding the evidence, the trial court's exclusion of evidence of excessive disciplinary techniques in Veronica's family of origin violated appellant's constitutional rights to elicit testimony from defense witnesses and present a complete defense.

This Court's pronouncement in *People v. Cudjo* (1993) 6 Cal.4th 585, 611, that the rights to present a defense can be infringed only by general rules of evidence, and not a trial court's misapplication of the evidentiary rules, finds no support in United States Supreme Court precedent, the principles of constitutional law, or logic. In *Cudjo*, this Court rested its conclusion that the trial court's erroneous exclusion of an alleged alternative perpetrator's jailhouse confession, which was admissible under the declaration-against-interest exception to the hearsay rule, did not violate the defendant's constitutional rights to present a defense on the premise that a trial court's misapplication of the rules of evidence to exclude crucial defense evidence does not implicate those constitutional rights. (*Id.* at pp. 604-612.) That premise is fundamentally flawed.

The United States Supreme Court has never restricted the rights to present a defense to cases in which an evidentiary rule, rather than a trial court's application of the rule, was the source of the exclusion of crucial defense evidence. Although in several cases in which the United States Supreme Court has found infringements of the rights to a defense, an applicable evidentiary rule facially foreclosed the admission of defense evidence (see *Rock v. Arkansas*, *supra*, 483 U.S. at pp. 61-62; *Green v. Georgia*, *supra*, 442 U.S. at p. 97; *Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 302-303; *Washington v. Texas*, *supra*, 388 U.S. at pp. 22-23), the

United States Supreme Court has found such constitutional violations where the exclusion of defense evidence was not foreordained by a codified evidentiary rule. (See *Holmes v. South Carolina*, *supra*, 126 S. Ct. at pp. 1733-135; *Crane v. Kentucky*, *supra*, 476 U.S. at pp. 689-691.) The United States Supreme Court has never hinted, let alone held, that the exclusion of crucial, exculpatory defense evidence is constitutionally permissible whenever it is due to the trial court's application or misapplication of an evidentiary rule. To the contrary, the United States Supreme Court has concluded that it is immaterial whether a trial court's exclusion of defense evidence was consistent with state law, because the trial court's ruling had the effect of a state-law rule precluding the defendant from introducing evidence. (See *Skipper v. South Carolina* (1986) 476 U.S. 1, 7.)

Furthermore, this Court's distinction between whether the rules of evidence or a trial court's misapplication of the rules of evidence is the source of the exclusion of defense evidence lacks support in the principles of constitutional law. The identity of the state actor infringing somebody's constitutional rights is not material.[30] (See *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 373-374 [holding discriminatory application of a law, in addition to law that discriminates on its face, may violate equal protection clause].) The United States Supreme Court has long held that a state officer, as well as a statute, may violate a person's rights under the due process clause of the Fourteenth Amendment. (See *Saunders v. Shaw* (1917) 244 U.S. 317,

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[30] An exception to this precept exists for rights that are limited by their terms to a specific branch of government. For example, the proscription on bills of attainder does not apply to the judiciary. (U.S. Const., art. I, § 9, cl. 3.) The rights to present a defense do not fall within this limited exception.

320; *Home Teleph. & Teleg. Co. v. Los Angeles* (1913) 227 U. S. 278, 287-288.) In the context of an equal protection claim, the United States Supreme Court recently reiterated that a person's constitutional rights are violated regardless of whether the express terms of a statute or improper execution of a law caused the discrimination. (See *Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564.) As stated above, the United States Supreme Court has explained that a state court's evidentiary ruling, even if idiosyncratic or inconsistent with state law, has the effect of a state-law rule. (See *Skipper v. South Carolina, supra*, 476 U.S. at p. 7.) It matters little to appellant that the trial court, rather than the framers of the Evidence Code, was responsible for barring powerful exculpatory evidence central to his defense. Regardless of whether the Legislature or the trial court primarily caused the exclusion of evidence, appellant was hamstrung from presenting his defense.

Furthermore, insulating a trial court's erroneous evidentiary rulings, but not a trial court's rulings correctly made under the Evidence Code, from constitutional scrutiny makes little sense. A state has a far greater interest in maintaining the vitality of its evidentiary rules than in immunizing a trial court's erroneous ruling from being deemed federal constitutional error. Principles of federalism require that greater deference be given to a law enacted by a state legislature than to a state trial court's ruling that violates state law. This Court's rationale in *People v. Cudjo, supra*, 6 Cal.4th at p. 611, was not premised on a distinction without a difference; it was based on a distinction for which the difference undercut the distinction. Accordingly, this Court should reject its pronouncement in *Cudjo* and hold that the trial court's rulings excluding the proffered evidence infringed appellant's Sixth and Fourteenth Amendment and article I, section 7 and 15 rights to elicit

testimony from defense witnesses and to present a complete defense.

2. Assuming Arguendo That the Exclusion of the Evidence Was Proper under Evidence Code Section 1101, the Trial Court's Rulings Nonetheless Violated Appellant's Constitutional Rights to Present Defense Witnesses and to Present a Compete Defense

Even if the trial court did not commit state-law error by barring the proffered evidence, appellant's constitutional rights compelled the admission of the evidence. The constitutional rights to present a defense may supersede state law. (See *Rock v. Arkansas*, *supra*, 483 U.S. at pp. 61-62; *Green v. Georgia*, *supra*, 442 U.S. at p. 97; *Davis v. Alaska*, *supra*, 415 U.S. at pp. 315-320; *Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 302-303; *Washington v. Texas*, *supra*, 388 U.S. at pp. 22-23.) In this case, if Evidence Code section 1101 barred the evidence, the evidentiary provision had to yield to appellant's constitutional rights to present a defense.

As stated in the previous subsection, a defendant's rights to a defense are violated if evidence that is exculpatory and central to the defense is not admitted at trial and the state lacks interests in maintaining the integrity of the adversarial process that outweigh the defendant's interests in presenting a defense. (See *ante*, at pp. 64-65.) As also discussed in the previous subsection, the proffered evidence of Tillie's excessive disciplinary techniques was undoubtedly both favorable and central to the defense. (See *ante*, at pp. 65-68.) The exclusion of the evidence "significantly undermined fundamental elements of [appellant's] defense." (*United States v. Scheffer*, *supra*, 528 U.S. at p. 315.) The assumption that the proffered evidence was barred by Evidence Code section 1101 changes the analysis of the countervailing state interests supporting the exclusion of the evidence. Nevertheless, exclusion of the

evidence violated appellant's constitutional rights.

The state's interest in maintaining Evidence Code section 1101's exclusion of the proffered evidence does not suffice to justify the bar on appellant's efforts to present his defense. "Once a sixth amendment right is implicated, the state must offer a sufficiently compelling purpose to justify the practice. Various state evidentiary rules which advanced legitimate state interests have bowed to the defendant's right to let the jury hear relevant evidence." (*Pettijohn v. Hall*, *supra*, 599 F.2d at p. 481; accord, *Alicea v. Gagnon* (7th Cir. 1982) 675 F.2d 913, 923.) The application of an evidentiary rule to bar crucial, exculpatory defense evidence cannot withstand constitutional scrutiny if the rule is arbitrary or disproportionate to its purposes. (See *Holmes v. South Carolina*, *supra*, 126 S. Ct. at p. 1731; *United States v. Scheffer*, *supra*, 523 U.S. at p. 308; *Rock v. Arkansas*, *supra*, 483 U.S. at p. 56.)

The trial court arbitrarily used Evidence Code section 1101 to bar the proffered evidence. As explained above, appellant never sought to use the evidence to prove Veronica's propensity or disposition to abuse children, and appellant never intended to infer from it a propensity or disposition that Veronica perpetrated the acts against Genny. (See *ante*, at pp. 52, 55.) Because appellant did not seek to make any of the inferences forbidden by Evidence Code section 1101, the use of that provision of the Evidence Code to exclude appellant's proffered evidence was arbitrary.

Moreover, excluding the proffered evidence under Evidence Code section 1101 was disproportionate to the purposes the evidentiary provision was designed to serve. As stated above, the exclusion of the evidence did not support the purposes of either the propensity rule or a bar on profile evidence. (See *ante*, at pp. 52-54, 57-58.) Appellant did not seek to admit

evidence of Veronica's prior bad acts, from which the jury could infer a propensity to commit such acts. Likewise, appellant did not seek to admit evidence of a battering-parent profile, from which the jury could infer that Veronica fit the profile and thus has the disposition to abuse children in her care. Additionally, Veronica could not have been prejudiced by the proffered evidence at appellant's trial because her trial had been severed from appellant's.

The exclusion of the proffered evidence failed to serve the original purpose of the evidentiary rule under which it was excluded. Evidence Code section 1101 originated as the propensity rule in England about three hundred years ago. The propensity rule's purpose was to protect criminal defendants from prejudicial other-acts evidence. The common-law rule was never used to prevent defendants from presenting exculpatory evidence. (Larsen, *Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b)* (1993) 87 Nw. U. L.Rev. 651, 666-670 (hereafter Larsen).)

Therefore, the exclusion of appellant's proffered third-party-culpability evidence that did not implicate Veronica's purported propensity or disposition to abuse children under Evidence Code section 1101 did not advance the evidentiary provision's current or historical purposes. The application of Evidence Code section 1101 to bar evidence of Tillie's excessive disciplinary techniques was indeed "disproportionate to the purposes [the evidentiary rule was] designed to serve." (*Rock v. Arkansas*, *supra*, 483 U.S. at p. 56, quoted in *Scheffer v. United States*, *supra*, 523 U.S. at p. 308.)

Furthermore, applying Evidence Code section 1101 to exclude the proffered evidence was peculiar and barring third-party-culpability evidence

under that section has been subject to scholarly criticism. (See *People v. Lucas* (1995) 12 Cal.4th 415, 464-465 [holding exclusion of defense hearsay evidence did not violate rights to present defense because defendant neither showed hearsay statements were trustworthy nor pointed to rule of evidence that was peculiar, archaic, or subject to scholarly criticism].) Excluding the proffered evidence as character evidence, though the prior acts were not committed by Veronica and appellant did not attempt to elicit evidence of a profile, was unprecedented. As well, scholars have criticized the exclusion of third-party-culpability evidence under rules barring the use of character evidence. (See McCord, *"But Perry Mason Made It Look So Easy!": The Admissibility of Evidence Offered by a Criminal Defendant to Suggest that Someone Else Is Guilty* (1996) 63 Tenn.L.Rev. 917, 985-986; Larsen, *supra*, 87 Nw. U. L.Rev. 651.) Professor Larsen articulated why character-evidence rules should apply differently when evidence relates to an alleged alternative perpetrator, as opposed to a defendant:

> [The] concerns of prejudice [underlying the propensity rule] are not present when the accused seeks to introduce exculpatory specific acts evidence. The accused does not bear the burden of proving his innocence at trial and, therefore, uses evidence of a third party's prior misconduct merely to raise a reasonable doubt as to his culpability for the charged crime. [Footnote] Because this third party is not on trial, there is no basis for Wigmore's fear that the jury will convict an innocent person due to "the overstrong tendency to believe the accused guilty of the charge merely because he is a likely person to do such acts" [footnote] or to "condemn not because the accused is believed guilty of the present charge but because he has escaped unpunished from other offenses." [Footnote]

(*Id.* at pp. 659-660.) Accordingly, the peculiarity of applying Evidence Code section 1101 to the proffered evidence and the scholarly criticism of

using character-evidence rules to bar third-party-culpability evidence further demonstrate that appellant's rights to a defense override Evidence Code section 1101's bar on appellant's proffered evidence.

3. The Exclusion of the Proffered Evidence at the Penalty Phase Infringed Appellant's Rights to Present Relevant Mitigating Evidence, to Rebut Aggravating Evidence, and to Have a Fair and Reliable Capital-Sentencing Hearing

The trial court's exclusion of the proffered evidence contravened appellant's Eighth and Fourteenth Amendment rights, plus his rights under article I, sections 7, 15, and 17 of the California Constitution, to present mitigating evidence, to rebut aggravating evidence, and to have a fair, accurate, and reliable capital-sentencing determination. The continued exclusion at the penalty phase of the proffered evidence further violated appellant's Sixth and Fourteenth Amendment rights, as well as his rights under article I, sections 7 and 15 of the California Constitution, to present a defense.

In the penalty phase of a capital case, a defendant has the constitutional right, pursuant to the Eighth and Fourteenth Amendments and article I, section 17, to present relevant mitigating evidence. (*Skipper v. South Carolina*, *supra*, 476 U.S. at p. 7; see also, *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112-115 [holding sentencer's failure to consider defendant's violent family history as mitigating evidence violated defendant's Eighth Amendment rights]; *Green v. Georgia*, *supra*, 442 U.S. at p. 97 [holding penalty-phase exclusion under state-law hearsay rule of codefendant's admission violated defendant's due process rights]; *Lockett v. Ohio* (1978) 438 U.S. 586, 614-616 [holding statutory limitations on mitigation violated defendant's Eighth and Fourteenth Amendment rights].)

"[W]hen any barrier, whether statutory, instructional, evidentiary, or otherwise [citation], precludes a jury or any of its members [citation] from considering relevant mitigating evidence, there occurs federal constitutional error, which is commonly referred to as '*Skipper* error.'" (*People v. Mickey* (1991) 54 Cal.3d 612, 693.)

The exclusion of the proffered evidence, which was both relevant and mitigating, at the penalty phase constituted a per se violation of appellant's right to present mitigating evidence. (See *Tennard v. Dretke* (2004) 542 U.S. 274 , 284-285 [explaining evidence tending to prove fact or circumstance factfinder could reasonably find mitigating is relevant mitigating evidence that factfinder must be able to consider].) In *People v. Brown* (2003) 31 Cal.4th 518, 577-578, this Court applied a rule that the exclusion of relevant mitigating evidence was per se *Skipper* error. As discussed throughout this claim of error, evidence of excessive disciplinary techniques used in Veronica's family of origin suggested that it was Veronica who primarily perpetrated similar acts upon Genny. The proffered evidence thus was probative toward factor (a) (circumstances of the offense) and factor (j) (minor participant) (see Pen. Code, § 190.3, factors (a), (j)), and the trial court's exclusion of the relevant mitigating evidence was a per se *Skipper* error.

Even if this Court does not use a per se standard for *Skipper* error, the trial court nonetheless violated appellant's right to present mitigating evidence. Viewed most narrowly, the right to present mitigating evidence is coextensive to the rights to present a defense. (See *People v. Ramos* (2004) 34 Cal.4th 494, 528 [seemingly equating right to present mitigating evidence to rights to present a defense].) Under that stringent standard, it is apparent that the exclusion of the proffered evidence violated appellant's

constitutional rights to present mitigating evidence.

The proffered evidence was central to appellant's case in mitigation, and the state lacked a sufficient interest to justify excluding the evidence. The primary thrust of appellant's mitigation case focused on the degree of appellant's participation in the acts committed against Genny. Appellant argued that his participation, if any, was minor. As explained above, evidence of excessive discipline in Veronica's family of origin suggested that Veronica was the mastermind of and major participant in the offense. (See *ante*, at pp. 48-49.) At the guilt phase, evidence that Veronica was the primary perpetrator was probative of appellant's innocence, but it did not conclusively prove that appellant was neither the primary perpetrator nor an accomplice. In contrast, at the penalty phase, evidence that Veronica was the lead participant was, in and of itself, a mitigating factor. (See Pen. Code, § 190.3, factor (j).) The excluded evidence was the linchpin to appellant's penalty-phase defense that he was, at most, a minor participant.

The state did not have a sufficient countervailing interest in excluding the proffered evidence, irrespective of whether Evidence Code section 1101 barred the evidence. The state's interest in maintaining the evidentiary rule was weaker at the penalty phase than at the guilt phase, because the state is required to conduct capital-sentencing proceedings with heightened reliability. (See *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) Accordingly, the state's interest in maintaining the rule of evidence is counterbalanced by the state's interest in holding a reliable penalty phase. Because the state's interest in maintaining the evidentiary rule was insufficient to outweigh appellant's interest in presenting crucial exculpatory evidence at the guilt phase (see *ante*, at pp. 69-70.), it follows a fortiori that the state's interest was insufficient at the penalty phase. Thus,

under the standard used for rights-to-present-a-defense claims, the trial court violated appellant's constitutional rights to present relevant mitigating evidence. By definition, the trial court also violated appellant's constitutional rights to present a defense at the penalty phase.

The trial court's refusal to admit the evidence of excessive discipline in Veronica's family of origin also violated appellant's Eighth and Fourteenth Amendment and article I, section 17 rights to rebut aggravating evidence. (See *Gardner v. Florida* (1977) 430 U.S. 349, 362 [holding defendant's due process rights were violated by sentencer's consideration of prosecution evidence that defendant did not have opportunity to deny or explain].) Because appellant had no history of violent acts or crimes, circumstances of the offense comprised the lone aggravating factor against appellant. The prosecution presented extensive evidence of the abusive acts perpetrated on Genny. With respect to appellant's deathworthiness, the aggravating nature of the prosecution evidence would have been blunted by the proffered evidence, which would have suggested that Veronica was the mastermind and primary perpetrator of the acts against Genny, including the immersion burn that caused Genny's death. The trial court's ruling that the evidence of Tillie's excessive disciplinary techniques was inadmissible denied appellant an opportunity to explain the aggravating evidence and violated his constitutional right to rebut aggravating evidence.[31]

Furthermore, the exclusion of the proffered evidence infringed

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[31] As with appellant's right-to-present-relevant-mitigating-evidence claim, appellant's right to rebut aggravating evidence was infringed regardless of whether a per se standard is used to evaluate this claim. The analysis of the former claim coincides with the analysis of this claim.

appellant's Eighth and Fourteenth Amendment and article I, section 17 rights to a fair, accurate, and reliable capital-sentencing determination. The United States Supreme Court has declared that "capital sentencing must be reliable, accurate, and nonarbitrary" and explained that, because death is qualitatively different from other punishment, a capital-sentencing determination requires a heightened degree of reliability. (*Saffle v. Parks* (1990) 494 U.S. 484, 493; see also, *Lankford v. Idaho* (1991) 500 U.S. 110, 125, fn. 21; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-329; *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Lockett v. Ohio, supra,* 438 U.S. at p. 604; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (lead opn. of Stewart, Powell, and Stevens, JJ.).) The proffered evidence was crucial to the defense's case in mitigation; appellant's contention that he was, at most, a minor participant in the crimes against Genny relied heavily on the excluded evidence. The trial court's exclusion of the evidence prevented the jury from basing its capital-sentencing determination on the full complement of salient facts. A death verdict issued at a trial in which critical defense evidence pertaining to the minor-participation mitigating factor and the circumstances-of-the-offense factor was excluded could not be fair, accurate, or reliable. (See Pen. Code, § 190.3, factors (a), (j).)

E. The Exclusion Of The Proffered Evidence Was Extraordinarily Prejudicial And Requires That Appellant Be Given A New Trial

The trial court, by refusing to admit the evidence of Tillie's excessive disciplinary techniques, infringed the Evidence Code and violated appellant's constitutional rights. These errors were highly prejudicial at all phases of appellant's trial; consequently, the murder conviction, the torture-murder special circumstance, and the death sentence cannot stand.

1. The Murder Conviction Must Be Vacated

The evidentiary and constitutional errors impacted the first degree murder conviction. Under the standard for state-law evidentiary error or federal constitutional error, the exclusion of the evidence prejudiced appellant.

Reversal is the remedy for state-law error excluding evidence if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.) That standard is met in this case.

If the trial court had admitted the proffered evidence, it is reasonably probable that appellant would not have been convicted of first degree murder. The excluded evidence was critical to the defense that Veronica solely perpetrated the offense. (See *ante*, at pp. 65-68.) The evidence strongly suggested that Veronica used against Genny the excessive disciplinary techniques that Veronica had learned from her mother. Evidence that Veronica was the mastermind implied that appellant did not participate at all in the offense and was thus not guilty of murder.

Had the trial court admitted the excluded evidence, the jury would likely have found that appellant was neither a primary perpetrator nor an aider and abettor. The similarities between the abuse Veronica observed and experienced and the abuse foisted upon Genny indicated that Veronica conceived of and performed the acts perpetrated against Genny. Given the bizarreness of the excessive disciplinary techniques used against Genny, it is improbable that the jury would have concluded that appellant conceived of the methods used to abuse Genny. Because the jury presumably would have concluded that Veronica devised the methods of abuse, the jury also would likely have inferred that Veronica, rather than appellant, personally

perpetrated the abuse. The conclusion that Veronica masterminded and committed the abusive acts also casts significant doubt on appellant's culpability as an aider and abettor. Because the abusive acts toward Genny appear to have been Veronica's handiwork, the jury could have concluded that Veronica was the sole perpetrator. Alternatively, the jury could have concluded that appellant engaged in an occasional act that facilitated Veronica's actions, but that appellant lacked the intent to torture, lacked the knowledge of Veronica's intent to torture, or lacked the intent to commit or assist Veronica's commission of the crime. For instance, the jury could have concluded that appellant installed the hook in the closet, yet determined that he was not an aider and abettor because he merely intended to scare Genny.

Evidence that appellant perpetrated, as a primary perpetrator or an aider and abetter, the offense was thin. (See *ante*, at pp. 65-66.) At his guilt-phase closing argument and rebuttal, the prosecutor argued that appellant's admissions and Ivan Jr.'s statements and testimony demonstrated appellant's culpability. (RT 63:8056-8065, 8097-8103, 8163-8164, 8168.) Those arguments, however, required that several inferences be made. Appellant's statements that he would, as a disciplinary tactic, try to scare Genny did not constitute admissions that he had abused Genny or intended for Veronica to abuse her. Appellant's remarks that he and Veronica put Genny in a bathtub with appropriately warm water that he had drawn for the bath were not admissions that he had scalded Genny in 140-degree water. Moreover, significant evidence undercut the prosecutor's arguments. Veronica said to police officers at the apartment complex that she alone drew the bath and placed Genny in the water. (RT 50:5894-5895, 5955, 5965.) Alicia Montes, the neighbor who lived upstairs, heard water

running in the bathroom after appellant had left the apartment; this testimony supported appellant's defense theory that Veronica alone burned Genny. (RT 57:7087-7088.) At the preliminary hearing, Ivan Jr., in response to open-ended questioning from Veronica's counsel, testified that he was sure that he did not see appellant put Genny in the bathtub on the night that she died. (PX 2:293.) The excluded evidence would have further undermined the prosecutor's argument. Though circumstantial, the excluded evidence would have reduced the likelihood that the jury would have made the adverse inferences against appellant and adopted the prosecutor's theory of the case.

Based on the evidence that was admitted at trial, the jury had difficulty determining whether appellant was guilty of murder. The guilt-phase deliberations lasted for seven days. (CT 13:2997-3009.) The duration of deliberations was remarkable, considering that appellant was charged with only one offense. Based on jurors' statements to the court and declarations, the jury did not discuss whether appellant intended to kill Genny. (See *post*, Claim VI.) Whether appellant was culpable for the murder comprised the lone remaining significant contested issue for the jury to resolve during its deliberations. The length of deliberations shows that this was a close case.[32] (See *Parker v. Gladden* 1966) 385 U.S. 363, 365

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[32] Witkin and Epstein have explained the significance of a close case in the determination of whether an error is prejudical:

> The rule is occasionally declared that, in a "close case," i.e., one in which the evidence is "evenly balanced" or "sharply conflicting," a lesser showing of error will justify reversal than where the evidence strongly preponderates against the defendant.

(6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, §

["the jurors deliberated for 26 hours, indicating a difference among them"]; *In re Sakarias* (2005) 35 Cal.4th 140, 167 [concluding ten-hour deliberations showed closeness of case]; *People v. Cardenas* 1982) 31 Cal.3d 897, 907 [twelve hours]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [six hours]; *Gibson v. Clanon* (9th Cir. 1980) 633 F.2d 851, 855, fn. 8 [nine hours]; *Dallago v. United States* (D.C. Cir. 1969) 427 F.2d 546, 559[five days]; *United States v. Brodwin* (S.D.N.Y. 2003) 292 F.Supp.2d 484, 497 ["the jury found this a close case, as reflected by their five and a half days of deliberations before returning their verdict"].) Given that it took seven days of deliberations for the jury to conclude, based on the evidence the trial court admitted, that appellant was guilty of murder, the admission of the excluded evidence, which was critical to appellant's defense, likely would have tipped the scale toward acquittal of the charged offense.

Hence, it is reasonably probable that appellant would have been acquitted of first degree murder if the court had not erroneously excluded the evidence. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089-1090 [finding prejudice under *Watson* standard for erroneous restriction of defense testimony]; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) The conviction must be vacated.

Assuming arguendo that the *Watson* standard is not met, reversal is nonetheless required. Because the evidentiary error violated appellant's constitutional rights to a defense, respondent has the burden of showing beyond a reasonable doubt that the error was harmless. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) Respondent cannot meet that burden.

45, pp. 506-507.)

As explained above, evidence that appellant was personally culpable for murder was far from overwhelming.[33] (See *Harrington v. California* (1969) 395 U.S. 250, 254 [finding constitutional error harmless in part because of overwhelming admissible evidence of guilt].) In addition, the error had an effect on the verdict. (See *Chapman*, 386 U.S. at p. 24.) The excluded evidence was crucial to appellant's third-party-culpability defense. Even if this Court rules that it is not reasonably probable that the excluded evidence would have tipped the scale in appellant's favor, it cannot conclude that the exclusion of powerful evidence that cut to the heart of appellant's defense could not have tipped the scale toward acquittal, especially in view of the lengthy deliberations regarding whether appellant was guilty of murder rather than child endangerment. The conviction for first degree murder must be vacated.

2. The Torture-Murder Special Circumstance Must Be Vacated

Even if appellant's murder conviction is upheld, the torture-murder special circumstance should be reversed. Unlike the murder-by-torture theory of first degree murder, specific intent to kill is an element of the torture-murder special circumstance. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1226.) In the trial court's opinion, intent to kill was the weakest link of the prosecution's case. (RT 20:1747; RT 56:6903, 6912.)

The proffered evidence, if admitted, would have negated the intent-

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[33] When conducting the overwhelming-evidence test, this Court should not evaluate the strength of the prosecution evidence independently from the defense evidence. (See *Holmes v. South Carolina*, *supra*, 126 S. Ct. at p. 1735 ["by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt"].)

to-kill element. There was no direct evidence that appellant intended to kill Genny; the prosecution could show intent to kill only by inferring it from appellant's conduct. The excluded evidence suggested that Veronica was the mastermind and the primary, if not sole, perpetrator of the acts against Genny. The exclusion of the evidence inflated the jury's perception of appellant's participation in the offense. The finding of intent to kill was founded on that inaccurate impression of appellant's participation.[34] If the trial court had admitted the excluded evidence, it is reasonably probable that the jury would have concluded that the prosecution had not met its burden to prove, beyond a reasonable doubt, that appellant intended to kill Genny.[35] (Cf. *People v. Ross* (1979) 92 Cal.App.3d 391, 404 [affirming murder-by-torture conviction, but reversing torture-murder finding due to insufficient evidence of personal participation and intent to kill].) Accordingly, it is reasonably probable that, absent the evidentiary error, the jury would not have found the torture-murder special circumstance. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) The torture-murder special circumstance must be vacated.

Assuming arguendo that the state-law evidentiary error does not mandate reversal of the special circumstance, the violation of appellant's constitutional rights to a defense requires a new special circumstance trial. Evidence that appellant had the intent to kill was questionable. (See *Harrington v. California*, *supra*, 395 U.S. at p. 254.) The trial court repeatedly remarked on the weaknesses of the prosecution's case of

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[34] For the purposes of this argument, appellant assumes arguendo that the jury found intent to kill. (But see *post*, Claim VI.)

[35] As with the murder conviction, the exclusion of the evidence was prejudicial with respect to the intent-to-torture element.

appellant's alleged intent to kill. (RT 20:1747; RT 56:6903, 6912.) If admitted, evidence that Veronica likely masterminded and principally perpetrated the offense would have shown that appellant was, at most, an aider and abetter to the offense who may not have intended to torture and kill Genny even if Veronica had intended to torture and kill her. Accordingly, the error had an effect on the verdict. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Thus, under either the overwhelming-evidence test or the effect-on-the-verdict test, the exclusion of the proffered evidence cannot be deemed harmless, and this Court must vacate the torture-murder special circumstance.

3. The Death Sentence Must Be Vacated

Even if this Court affirms the conviction and torture-murder special circumstance, it should vacate the death sentence. The evidence of the excessive disciplinary techniques Tillie used against her daughters, juxtaposed against evidence that similar methods were employed against Genny, was the linchpin of appellant's penalty-phase defense that he was, at most, a minor participant in the offense. The continued exclusion of the proffered evidence at the penalty phase undermined appellant's ability to establish the minor-participation mitigating factor, or present mitigating circumstances of the offense. This error cannot be considered harmless under state-law or federal-constitutional standards. As a result, appellant must be granted a new penalty trial.

If the trial court had not erroneously excluded the evidence, there is, at a minimum, a reasonable possibility that the jury would not have returned a death verdict. For state-law errors impacting the penalty phase of a capital case, this Court has refined the *Watson* test: A penalty phase error is reversible if there exists a reasonable possibility the defendant would not

have been sentenced to death if the trial court had not erred. (*People v. Brown* (1988) 46 Cal.3d 432, 448.) That standard is met in this case.

Appellant's minor participation constituted his primary defense at the penalty retrial. Among other things, appellant elicited evidence that he had stormed out of the apartment before Genny was severely burned in the bath, and the items used to inflict abuse belonged to Veronica. This evidence, however, paled in comparison to the excluded evidence, which would have shown that Veronica observed and experienced her mother use unusual disciplinary techniques, learned those techniques, and then employed them against Genny. It was substantially more probative of Veronica being the mastermind and primary perpetrator than the evidence admitted at trial. Accordingly, the admission of the excluded evidence would have greatly strengthened appellant's mitigation case that he was at most a minor participant in the offense.

The exclusion of the proffered evidence was more prejudicial at the penalty retrial than at the guilt phase. At the guilt phase, the evidence strongly suggesting that appellant was a minor participant did not conclusively prove that appellant was not an aider and abettor to the homicide or lacked an intent to torture or kill; a further inference was necessary for appellant to have a favorable outcome on the guilt or special-circumstance determination. At the penalty retrial, however, appellant being a minor participant was itself a mitigating factor. (See Pen. Code, § 190.3, factor (j).) The exclusion of evidence pertaining to the minor-participation mitigating factor necessarily impacted the jury's weighing process. Moreover, Veronica masterminding and primarily perpetrating the offense were mitigating circumstances of the offense that would have affected the weighing process.

Evidence of a capital defendant's minor culpability is particularly persuasive evidence in a jury's determination of deathworthiness. (Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty* (1998) 83 Cornell L.Rev. 1557, 1577-1583 [reporting California study finding jurors' concern about the extent of the defendant's involvement, rather than their doubts as to whether he was involved at all, was most likely to persuade jurors to return life-without-parole verdict].) The United States Supreme Court has recognized the importance of relative culpability with respect to the capital-sentencing decision. (See *Enmund v. Florida* (1982) 458 U.S. 782, 798-801.) In addition, this Court recently concluded that the inaccurate overstatement of a capital defendant's relative culpability constituted prejudicial penalty phase error. (See *In re Sakarias*, *supra*, 35 Cal.4th at pp. 165-167.) Because the excluded evidence in this case would have strongly suggested that appellant was, at most, a minor participant in the commission of the offense, the jury likely would have accorded significant weight to the proffered evidence if the trial court had found it admissible.

The proffered evidence would also have blunted the aggravating evidence. Although the victimization of Genny was an aggravating circumstance of the offense, the extent to which it aggravated appellant's deathworthiness was proportional to the degree of appellant's participation. The jury founded its determination of appellant's deathworthiness on an inaccurately inflated perception of appellant's participation. If the trial court had admitted the proffered evidence, the jury likely would have given less aggravating weight to the prosecution evidence.

If the trial court had admitted the excluded evidence, it is, at the very least, reasonably possible that appellant would not have been

sentenced to death. The proffered evidence would have weakened the strength of the aggravating evidence and added great force to the minor-participation mitigating factor. The jury would have considered the powerful minor-participant evidence along with his other mitigating evidence: Appellant had never before committed a crime or violent act;[36] Veronica was the dominant partner in the relationship; appellant was an affectionate, helpful, polite, and respectful child who played the guitar and never created trouble; appellant was the second person in his family to graduate from high school; he received an electronics certificate and worked before and for the first few years after marrying Veronica; and appellant's family, including his six children, loved him and would be devastated by his execution. (RT 52:6253; RT 57:7102-7104; RT 67:8546, 8612; RT 68:8665, 8671-8672, 8675, 8698, 8724, 8739; RT 70:8930-8931; RT 95:11997; RT 98:12561-12563.) Based on the evidence, it is not far-fetched that appellant would not have been sentenced to death if the trial court had not erroneously excluded the proffered evidence.

Even with the trial court's exclusion of the evidence, this was undoubtedly a close case at the penalty phase. (See 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 45, pp. 506-507 [noting threshold for reversal is lowered in close cases].) At the first trial, the jury was hopelessly deadlocked after seven days of deliberations. (CT 13:3022-3037.) The aggravating evidence at the penalty retrial was virtually identical to the aggravating evidence presented at the first trial.

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[36] At the guilt phase of the first trial, Veronica's brother-in-law Victor Negrette testified that Veronica told him that on one occasion appellant had hit her during an argument. (RT 60:7718.) The prosecution did not present his testimony at the penalty retrial.

Thus, the hung jury makes clear that a death sentence in this case was not preordained. Moreover, the capital-sentencing determination was a subjective moral judgment for which the jury had discretion. (See *People v. Brown*, *supra*, 46 Cal.3d at pp. 447-448.) The admission of the evidence could have altered the outcome.

Therefore, there is a reasonable possibility that appellant would not have been sentenced to death if the trial court did not erroneously find the proffered evidence inadmissible. Appellant's death sentence must be vacated due to the erroneous continued exclusion of the proffered evidence under Evidence Code section 1101.

For the reasons explicated above, the violation of appellant's constitutional rights stemming from the exclusion of the evidence also requires reversal of the death sentence. Reversal must follow federal constitutional error at the penalty phase of a capital case, unless the state demonstrates beyond a reasonable doubt that the error did not contribute to the death verdict. (*Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259.) In this case, respondent cannot meet that burden.[37]

It is far more difficult to show harmlessness under *Chapman v. California*, *supra*, at the penalty phase than at the guilt phase. When a jury makes a guilt determination, it must mechanistically determine whether the prosecution has proven every element of a crime. The jury's penalty phase determination is quite different; the jury has discretion to make a subjective moral judgment.

[T]he nature of the penalty phase necessarily endows a jury

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[37] Even if this Court finds the error harmless under *People v. Brown*, *supra*, this Court should reverse appellant's death sentence because the state cannot prove harmlessness beyond a reasonable doubt.

> with greater discretion than does the guilt phase. Guilt phase jurors are expected to make findings of fact and apply the law to the facts without injecting their personal feelings or sense of justice. [Footnote.] Penalty phase jurors, by contrast, are expected to bring their own values into play. . . . Since the jury cannot be instructed regarding the proper expression of these values, the death penalty decision necessarily involves subjective and discretionary elements not present when a jury decides the question of guilt.

(Kessler, *Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases - A Comparison & Critique* (1991) 26 U.S.F. L.Rev. 41, 52-53 (hereafter Kessler); accord, Scoville, *Deadly Mistakes: Harmless Error in Capital Sentencing* (1987) 54 U. Chi. L.Rev. 740, 755 (hereafter Scoville) ["[T]he statutory definitions of aggravating circumstances act as only a partial constraint on the decision of the sentencer in a capital case: the sentencer may find some aggravating circumstances and yet still choose not to impose a death sentence. In noncapital cases or in the guilt phase of a capital case, on the other hand, the tribunal's choice is constrained as soon as it finds that the statutorily defined elements of a crime are present."].) Harmless-error analysis at the penalty phase must take this distinction into account. (See *Satterwhite v. Texas*, *supra*, 486 U.S. at p. 258 ["the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer"]; *State v. Kleypas* (Kan. 2001) 40 P.3d 139, 271-273 [recognizing how harmless-error analysis differs at penalty phase]; Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied* (1993) 28 Ga. L.Rev. 125, 150 (hereafter Carter) ["The individual choices jurors make about the existence of mitigating circumstances coupled with the unique

weighing of factors creates a proceeding fundamentally different from a guilt trial. [¶] An analysis of harmless error in the penalty phase should be refined to take into account the unique characteristics of the decision"].)

The nature of the discretionary, moral judgment inherent in a capital-sentencing determination substantially raises the burden on the state to show that an evidentiary error that violates a defendant's constitutional rights is harmless.

> [G]iven the highly subjective nature of a death penalty decision, it can never be clear what might have turned the verdict in the opposite direction had the jury heard — or not heard — [the evidence]. It might be something that, in retrospect, seems inconsequential in light of the 'more important' things that were presented at the penalty phase.

(McCord, *Is Death "Different" for Purposes of Harmless Error Analysis? Should it Be?: An Assessment of United States and Louisiana Supreme Court Case Law* (1999) 59 La. L.Rev. 1105, 1144 (hereafter *Is Death "Different" for Purposes of Harmless Error Analysis*); see also, Carter, *supra*, 28 Ga. L.Rev. at p. 153 ["Unlike the assessment whether a piece of evidence has affected a decision that an element of a crime exists, where one can be more confident of the likely use of the evidence, the use of evidence in the penalty phase is unpredictable"].) "Furthermore, where mitigating evidence has been erroneously withheld, the reviewing court cannot determine what the outcome would have been if the sentencer had heard this evidence. The sentencer had discretion to impose mercy if it so chose." (Scoville, *supra*, 54 U. Chi. L.Rev. at p. 755.) For these reasons, the exclusion of relevant mitigating evidence should rarely be held harmless. (See *Is Death "Different" for Purposes of Harmless Error Analysis?*, *supra*, 59 La. L.Rev. at p. 1144.)

Using an overwhelming-evidence test to conduct harmless-error analysis of a penalty phase error is not appropriate, despite this Court's practice of finding penalty phase errors harmless due to the presence of overwhelming aggravating evidence. The overwhelming-evidence test is unduly deferential.[38]

> Even overwhelming evidence in support of a verdict does not necessarily dispel the risk that an error may have played a substantial part in the deliberation of the jury and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.

(Traynor, *The Riddle of Harmless Error* (1970) p. 22.) It is particularly ill-suited for penalty phase errors.

> [S]ince capital punishment is reserved for those who have committed only the most heinous crimes, if error is held harmless whenever the aggravating evidence is overwhelming, penalty phase error will rarely be prejudicial. In addition, the "overwhelming evidence" test is particularly inappropriate in death penalty cases since the evidence presented and evaluated is of a moral rather than a factual nature.

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[38] Indeed, this Court has found a remarkably high percentage of penalty phase errors to be harmless. (See Kamin, *Harmless Error and the Rights/Remedies Split* (2002) 88 Va.L.Rev. 1, 70-72 [reporting Lucas Court found 85% of penalty phase errors harmless].) Aside from errors for which reversal is automatic, this Court has rarely found a penalty-phase error prejudicial in recent years. Furthermore, in finding penalty-phase errors harmless, this Court focuses on the aggravating evidence and pays little heed to the quality and quantity of the mitigating evidence presented. The United States Supreme Court has criticized the one-sided process of evaluating the strength of prosecution evidence without considering the defense evidence. (See *Holmes v. South Carolina*, *supra*, 126 S. Ct. at p. 1735.)

(Kessler, *supra*, 26 U.S.F. L.Rev. at p. 88.) Accordingly, the application of the overwhelming-evidence test to penalty-phase errors improperly transforms harmlessness analysis into something akin to a sufficiency-of-the-evidence test. (Cf. *Kyles v. Whitley* (1995) 514 U.S. 419, 434-435 & fn. 8 [contrasting sufficiency test from materiality prong of *Brady* claim].) These factors presumably explain why the United States Supreme Court used the contribute-to-the-verdict test articulated in *Chapman v. California*, *supra*, 386 U.S. at p. 24, in upholding the use of harmless-error analysis for penalty-phase errors, and has not endorsed the application of the overwhelming-evidence test used in *Harrington v. California* (1969) 395 U.S. 250, 254 for penalty-phase errors.[39] (See *Sochor v. Florida* (1992) 504 U.S. 527, 540; *Satterwhite v. Texas*, *supra*, 486 U.S. at p. 258.)

In this case, because respondent cannot show beyond a reasonable doubt that the exclusion of evidence that cut to the heart of appellant's primary penalty-phase defense did not contribute to the death verdict, the

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[39] Application of the overwhelming-evidence test in this case would nevertheless result in reversal. Despite the nature of the acts inflicted on Genny, evidence that appellant was a major participant in the offense was hotly contested. In addition to evidence that he was at most a minor participant, appellant's mitigation case included evidence that he had no prior criminal record, no acts of violence, and that his six children and the rest of his family loved him and would be devastated by his execution. (See *ante*, at pp. 38-40, 85-86.) Accordingly, the aggravating evidence did not outweigh the mitigating evidence so heavily that the error must have been harmless.

constitutional errors could not have been harmless. (See *Satterwhite v. Texas*, *supra*, 486 U.S. at p. 258.) The judgment of death must be vacated.[40]

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[40] For the reasons described throughout this claim of error, the trial court further erred and violated appellant's constitutional rights by denying appellant's new-trial motion, which asserted that appellant should receive a new trial due to the exclusion of the evidence.

II

THE EXCLUSION OF EVIDENCE OF VERONICA GONZALES'S ANTIPATHY FOR MARY ROJAS VIOLATED THE EVIDENCE CODE AND APPELLANT'S CONSTITUTIONAL RIGHTS

Evidence of Veronica Gonzales's motive for abusing Genny was kept from the jury. The trial court excluded evidence of Veronica's hostility and resentment toward her sister Mary Rojas, who was Genny's mother. Veronica's feelings toward Mary constituted evidence of Veronica's motive for her maltreatment of Genny. The court, however, concluded that the evidence was irrelevant. The court's ruling was an evidentiary error that also infringed appellant's constitutional rights to present a defense, present mitigating evidence, rebut aggravating evidence, and have a fair and reliable capital-sentencing determination.

A. Facts And Procedural History

At 6:35 a.m. on July 22, 1995, mere hours after Genny's death, the police began interrogating Veronica. (CT 2:373-483.) Early in the interrogation, Detective Larry Davis sought background information. He asked Veronica where her sister Mary was living. (CT 2:382.) After Veronica answered that Mary was residing in a drug-rehabilitation home, Detective Davis asked, "[W]hy is she there?" Veronica responded, "Cause she's a little bitch." (CT 2:383.) Later in the interrogation, Veronica said that Genny never screamed. (CT 2:451.) In response to Detective Davis challenging that assertion, Veronica said, "She does not talk. Her damn mother. I'm not saying (unintelligible) no I'm not saying. I'm saying her damn mother gets her so goddamn freaked out (unintelligible)." (CT 2:454.)

Appellant sought to admit these statements that show Veronica's

enmity toward Mary. Prior to trial, he filed an in limine motion requesting the statements' admission. (CT 6:1316-1319.) The court recognized that Veronica's animosity toward Mary could be inferred from Veronica's remarks and that the statements did not constitute hearsay. (RT 21:1853.) The court, however, expressed skepticism that Veronica's feelings toward Mary had any bearing on whether appellant committed culpable acts and ruled that the statements were irrelevant and inadmissible. (RT 21:1854, 1860.) The court subsequently explained that appellant's theory that Veronica's antipathy toward Mary motivated Veronica to harm Genny was too speculative to be relevant. (RT 28:3091.)

At a hearing held pursuant to Evidence Code section 402, Dr. Patricia Perez-Arce, a neuropsychologist at the University of California at San Francisco who had published articles on the impact of Latino culture on mental health and family relationships, testified that Genny had several symbolic meanings for Veronica. (RT 47:5518-5519, 5544.) She explained that Veronica and Mary had a rancorous relationship and that Veronica resented Mary because Veronica had to care for Genny. Dr. Perez-Arce added that Veronica believed that appellant and Mary had engaged in extramarital relations and accused appellant of being Genny's father.[41] (RT 47:5543.) At the conclusion of the hearing, the trial court barred Dr. Perez-Arce from testifying about Veronica. (RT 47:5600-5601; RT 48:5763.)

Prior to the commencement of the first trial's penalty phase, the court again ruled that Veronica's statements about Mary were inadmissible. The court reasoned that it would be too large a leap to conclude that

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[41] During his interrogation, appellant alluded to Veronica's mistaken belief that there had been an affair between appellant and Mary. (CT 8:1840.)

Veronica's animus toward Mary provided a motive to torture and kill Genny. (RT 65:8291; CT 13:3010-3011.) This ruling remained in effect at the penalty retrial. (RT 75:9383; RT 81:9551.)

The exclusion of Veronica's statements was one of the issues appellant raised in his new-trial motion filed after the penalty retrial. (CT 12:2704-2706.) Concluding that it had not erred in excluding the evidence, the court denied the motion. (RT 103:12940-12941.)

B. The Proffered Evidence Was Relevant And Erroneously Excluded

The trial court erred by excluding as irrelevant evidence of Veronica's enmity toward Mary, who was Veronica's sister and Genny's mother.[42] Although irrelevant evidence is undoubtedly inadmissible (Evid. Code, § 350), the excluded evidence was both relevant and admissible.

Veronica's venomous remarks about Mary and Dr. Perez-Arce's expert testimony explaining their significance were relevant to show Veronica's motive for her maltreatment of Genny. "Relevant evidence includes evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.'" (*People v. Cash* (2002) 28 Cal.4th 703, 729, quoting Evid. Code, § 210.) Evidence is relevant if it "tends 'logically, naturally, and by reasonable inference' to establish material facts." (*People v. Garceau* (1993) 6 Cal.4th 140, 177, quoting *People v. Daniels* (1991) 52 Cal.3d 815, 856 and quoted in *People v. Benavides* (2005) 35 Cal.4th 69, 90.) Veronica's ill will

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[42] The trial court's relevancy determinations are reviewed for an abuse of discretion; nevertheless, the exclusion of relevant evidence on irrelevancy grounds necessarily constitutes an abuse of discretion. (See *ante*, at pp. 136-137.)

toward Mary tended to prove that she, rather than appellant, was the lone or primary perpetrator.

Two links in the chain of logical relevancy for the proffered evidence were indisputably present. The court quickly concluded that Veronica's statements were probative of her animus toward Mary. (RT 21:1853.) After the court recognized that evidence of Veronica's guilt constituted exculpatory evidence for appellant (RT 28:3096-3097), there was no doubt that evidence of Veronica's motive tended to exculpate appellant. (See, e.g., *People v. Heard* (2003) 31 Cal.4th 946, 973 [stating evidence tending to prove perpetrator's motive is relevant].) The court, however, concluded that the inference that Veronica's animosity toward Mary created a motive to harm Genny was speculative and rendered the evidence irrelevant. That was error.

Veronica's rancor toward Mary tended to prove that she had a motive to mistreat Genny. Before Genny came to live in Chula Vista, appellant and Veronica had their hands full taking care of six children, none older than eight years old, in a small two-bedroom apartment. (RT 52:6391-6398.) In addition, they lived in poverty. (RT 52:6356; RT 57:7192-7193.) The crowded, stressful living situation worsened when Genny moved into the apartment. Genny was a troubled child who was difficult to handle and incontinent. (RT 60:7736-7738; RT 95:12078, 12091; CT 8:1760, 1787-1788, 1883-1884.) Because she had to care for Genny, Veronica resented Mary. (RT 47:5543.) Moreover, Dr. Perez-Arce's testimony explained that Veronica's resentment toward Mary in part resulted in Genny having symbolic meanings for Veronica. (RT 47:5544.) Based on these facts, it would have been logical and reasonable for a factfinder to infer that Veronica's anger and resentment toward Mary

manifested themselves in Veronica's violent acts toward Genny. Accordingly, the proffered evidence did not logically require a speculative inference; rather, all inferences comprising the logical chain of relevancy were reasonable. This evidence was material to the circumstances-of-the-offense and the minor-participation sentencing factors. (See Pen. Code, § 190.3, factors (a), (j).) Thus, the proffered evidence was relevant and erroneously excluded under Evidence Code section 350.

The proffered evidence was not otherwise inadmissible. Because Veronica's statements were not offered to prove the truth of the matter asserted, they were not hearsay. Further, the statements were admissible under Evidence Code section 352. Third-party culpability evidence that is capable of raising a reasonable doubt of a defendant's guilt cannot be excluded under that evidentiary provision. (*People v. Cudjo* (1994) 6 Cal.4th 585, 609; *People v. Hall* (1986) 41 Cal.3d 826, 831-834.) The inquiry of whether proffered third-party culpability evidence can raise a reasonable doubt must consider all of the available evidence; the proffered evidence should not be evaluated in isolation. (See *Cudjo*, 6 Cal.4th at pp. 609-610 [considering third-party culpability evidence in conjunction with other evidence to determine admissibility of third-party culpability evidence].) In addition to having the motive to abuse Genny, evidence of Veronica's opportunity could not have been stronger: Genny lived with Veronica, and there was no evidence that Veronica had left her apartment on the day Genny died. Further, Veronica made several comments suggesting that she alone perpetrated the acts that caused Genny's death.[43]

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[43] At the penalty retrial, the trial court barred evidence of Veronica's inculpatory statements. (RT 90:11179-11187; see *post*, Claim III.)

(RT 50:5895; RT 5908-5909, 5965.) Appellant presented additional evidence that inculpated Veronica. (See *ante*, at pp. 65-66.) Moreover, the trial court erroneously excluded a cluster of critical exculpatory evidence. (See *ante*, Claim I.) When considered with other third-party-culpability evidence, the evidence of Veronica's animosity toward Mary was capable of raising a reasonable doubt; thus, Evidence Code section 352 could not have barred its admission. (Compare *People v. Edelbacher* (1989) 47 Cal.3d 983, 1017-1018 [holding evidence of alleged alternative perpetrator's possible motive was inadmissible because no other third-party-culpability evidence was presented].)

C. The Exclusion Of The Proffered Evidence Infringed Appellant's Constitutional Rights

Beyond being evidentiary error, the trial court's exclusion of Veronica's statements about Mary violated appellant's constitutional rights to present a defense, to present relevant mitigating evidence, to rebut aggravating evidence, and to have a fair and reliable capital-sentencing proceeding, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, and 17 of the California Constitution.

Barring the proffered evidence at the guilt phase infringed appellant's rights to present witnesses in his defense and to present a complete defense. As detailed in Claim I, the exclusion of defense evidence infringes the rights to present a defense if the evidence is exculpatory and critical to the defense, unless the state has a countervailing interest in maintaining the integrity of the adversarial process that warrants excluding the evidence. (See *ante*, at pp. 64-65.) Because the proffered evidence was exculpatory and crucial and the state lacked an overriding

interest in excluding it, the trial court's ruling violated appellant's rights to present a defense.

Evidence of Veronica's motive was exculpatory. At the guilt phase, appellant presented a third-party culpability defense. Evidence that Veronica, the alleged alternative perpetrator, had a motive to harm Genny supported the defense. As explained in the previous subsection, Veronica's motive can be reasonably inferred from her statements regarding Mary.

The motive evidence was central to appellant's defense. Appellant's guilt-phase defense was that Veronica, not appellant, had perpetrated the offense. Evidence that Veronica had a motive to hurt Genny formed a crucial component of that defense. Juxtaposed against the absence of evidence that appellant had a motive to mistreat Genny, the proffered evidence was highly probative. Because the identity of the perpetrator could not be discerned from the physical evidence (RT 53:6526), evidence of Veronica's motive was especially consequential. (See *People v. Garceau, supra*, 6 Cal.4th at p. 177 [explaining "the presence of a motive was particularly significant" in case where no physical evidence implicated defendant].) Furthermore, the motive evidence was critical to overcome the assumption that appellant, as the only man and only person not related to Genny by blood who lived in the apartment, had perpetrated the offense.

The state did not have a countervailing interest in maintaining the integrity of the adversarial process that could have justified excluding the critical exculpatory evidence. The minute excerpts from Veronica's first interrogation would not have caused undue delay or confusion of the issues. Further, the large quantum of evidence of Veronica's guilt, as well as the significant evidence of appellant's innocence, would have ensured that the

jury would not have irrationally acquitted appellant due to a minuscule doubt in appellant's guilt. The proffered evidence was not a red herring designed to mislead the jury. Rather, it was a principal component of a mass of evidence suggesting that Veronica was the sole perpetrator of the offense.[44]

Similarly, the court ruling that Veronica's statements were inadmissible at the penalty phase further violated appellant's constitutional rights to present a defense. The excluded evidence was mitigating and central to appellant's primary penalty-phase defense that Veronica's culpability transcended his. At the penalty phase, the state continued to have no adversarial-process interest in barring the evidence.

Likewise, excluding the evidence infringed appellant's right to present relevant mitigating evidence. Evidence tending to prove a fact or circumstance that a factfinder could reasonably find mitigating is relevant mitigating evidence. (*Tennard v. Dretke* (2004) 542 U.S. 274, 284-285.) As explained above, the evidence was relevant. (See *ante*, at pp. 102-104.) Thus, the evidentiary bar constituted per se *Skipper* error. (See *Skipper v. South Carolina* (1986) 476 U.S. 1, 7; *People v. Brown* (2003) 31 Cal.4th 518, 577-578.) If this Court does not apply a per se standard to *Skipper* error, this Court must nonetheless find a constitutional violation. The most stringent standard for showing *Skipper* error is co-extensive with the rights-to-a-defense standard. Because the court's rulings violated appellant's rights to a defense, the court necessarily infringed the right to

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[44] Contrary to this Court's statement in *People v. Cudjo*, *supra*, 6 Cal.4th at p. 611, a trial court's misapplication of an evidentiary rule can violate a defendant's constitutional rights to a defense. (See *ante*, at pp. 72-75.)

present relevant mitigating evidence.

Furthermore, the bar on evidence of Veronica's motive infringed appellant's constitutional rights to rebut aggravating evidence. (See *Gardner v. Florida* (1977) 430 U.S. 349, 362 [holding that sentencer's consideration of prosecution evidence that defendant did not have opportunity to deny or explain violated defendant's due process rights].) As explained in Claim I, evidence in support of appellant's relative-culpability defense would have blunted the aggravating evidence presented against appellant. (See *ante*, at p. 82.) Because all of the aggravating evidence concerned the acts inflicted upon Genny, evidence that only Veronica had a motive to harm Genny would have suggested that she was the sole or primary perpetrator and thus diminished the power of the aggravation against appellant.

Lastly, the exclusion of Veronica's statements violated appellant's constitutional rights to a fair, accurate, and reliable capital-sentencing determination. (See *Saffle v. Parks* (1990) 494 U.S. 484, 493.) Appellant's key penalty-phase defense centered around the minor-participation mitigating factor. (See Pen. Code, § 190.3, factor (j).) Evidence of Veronica's motive to harm Genny formed one of the pillars of this penalty-phase defense. In view of the absence of evidence that appellant had a motive to mistreat Genny, the excluded evidence was particularly significant. The exclusion of the evidence gave the jury an inflated, inaccurate sense of appellant's relative culpability and thus precluded a fair, accurate, and reliable capital-sentencing decision.

D. The Exclusion Of The Proffered Evidence Was Prejudicial

The trial court's ruling that Veronica's statements revealing her

hostility toward Mary were inadmissible constituted evidentiary and constitutional error. Because these errors were prejudicial, this Court should vacate the conviction, special circumstance, and death judgment.

The murder conviction cannot be upheld. It is reasonably probable that appellant would not have been convicted absent the erroneous exclusion of Veronica's statements under Evidence Code section 350. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) The evidence was critical to appellant's third-party-culpability defense. (See *ante*, at pp. 65-68.) The statements would have revealed that Veronica had a motive to harm Genny. When contrasted from the absence of a motive for appellant, the excluded evidence was especially probative. In addition, the proffered evidence suggested that Veronica, but not appellant, intended to torture Genny. The exclusion of the evidence permitted the jury to conclude inaccurately that appellant had the requisite intent to torture and, thus, that he was guilty of murder by torture. Further, evidence of appellant's personal culpability was meager and hotly contested, and the jury's seven-day guilt-phase deliberations reveal this to have been a close case. (See *ante*, at pp. 85-87.) The admission of Veronica's remarks about Mary would have tipped the scales toward acquittal. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1089-1090 [finding prejudice under *Watson* standard for exclusion of defense evidence].)

For these reasons, the violation of appellant's constitutional rights to present a defense cannot be deemed harmless. Respondent cannot show that the exclusion of evidence suggesting that Veronica had a motive to harm Genny would have had no effect on the verdict. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) Moreover, the evidence of appellant's culpability was not remotely overwhelming. (See *Harrington v. California*

(1969) 395 U.S. 250, 254.) The conviction must be vacated.

If appellant's conviction is affirmed, the torture-murder special circumstance should nevertheless be vacated. As discussed above, the excluded evidence suggested that appellant, unlike Veronica, lacked the intent to torture. Also, the excluded third-party culpability evidence related to the intent-to-kill element of the special circumstance. (See *ante*, at pp. 88-89.) As the trial court recognized, evidence of intent to kill was the weakest facet of the prosecution's case. (RT 20:1747; RT 56:6903, 6912.) Veronica's statements were probative toward showing that she had a motive to hurt Genny and was, at the very least, the primary perpetrator. Even if Veronica's intent to kill could be inferred from her conduct, it is reasonably probable that the jury would not have found that appellant intended to kill if the evidentiary error had not improperly inflated the perception of appellant's participation.[45] (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836; cf. *People v. Ross* (1979) 92 Cal.App.3d 391, 404 [upholding murder-by-torture conviction, but reversing torture-murder finding because of insufficient evidence of personal participation and intent to kill].)

The constitutional violations of appellant's rights to a defense further require vacating the special circumstance. For the reasons discussed above, the exclusion of Veronica's statements that revealed her motive impacted the special-circumstance verdict. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Given the weakness of evidence of appellant's intent to torture and, especially, intent to kill (RT 20:1747; RT 56:6903, 6912), the error cannot be deemed harmless under the overwhelming-

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[45] For the purposes of this argument, appellant assumes arguendo that the jury found intent to kill. (But see *ante*, Claim VI.)

evidence test. (See *Harrington v. California*, *supra*, 395 U.S. at p. 254.)

Even if this Court affirms the conviction and special circumstance, it should vacate the death judgment. If the trial court had not erroneously excluded Veronica's statements articulating her animosity toward Mary, it is reasonably possible that the jury would not have sentenced appellant to death. (See *People v. Brown* (1988) 46 Cal.3d 432, 448.) Veronica's statements that suggested she had a motive to harm Genny were highly probative toward appellant's minor participation, which constituted the linchpin of appellant's penalty-phase defense. Evidence that Veronica had a motive to hurt Genny suggested that Veronica was the primary, if not the only, perpetrator and that she had masterminded the offense. Thus, the evidence would have buttressed appellant's mitigation case and would have rebutted the aggravating evidence. The exclusion of appellant's third-party-culpability evidence was more prejudicial at the penalty phase than the guilt phase, especially because minor-culpability evidence is particularly powerful penalty-phase evidence. (See *ante*, at p. 92.) Moreover, a review of the penalty-phase evidence, as well as the original jury's deadlock at the penalty phase, reveals this to be a close case. (See *ante*, at pp. 93-94.) Therefore, the admission of Veronica's statements may well have shifted this case from equipoise to a life verdict.

The federal constitutional errors related to the exclusion of Veronica's statements further require reversing the death sentence. Due to the importance of the evidence at mitigation and rebuttal to aggravation and the subjective nature of the capital-sentencing determination, respondent cannot demonstrate beyond a reasonable doubt that the error did not

contribute to the verdict.[46] (See *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259.) The overwhelming-evidence test is an inappropriate harmlessness analysis for penalty phase errors. (See *ante*, at pp. 96-98.) In any event, the closeness of this case demonstrates that the aggravating evidence, when balanced against the mitigating evidence, was hardly overwhelming. Accordingly, the violations of appellant's constitutional rights to present a defense and relevant mitigating evidence, rebut aggravating evidence, and have a fair, accurate, and reliable capital-sentencing determination were not harmless.

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[46] Due to the discretionary nature of the capital-sentencing determination, respondent has a high burden of showing that a penalty phase error is harmless. (See *ante*, at pp. 94-96.)

III

THE EXCLUSION AT THE PENALTY RETRIAL OF VERONICA GONZALES'S ADMISSIONS MADE AT THE CRIME SCENE IN THE MOMENTS FOLLOWING THE POLICE'S ARRIVAL WAS EVIDENTIARY ERROR THAT INFRINGED APPELLANT'S CONSTITUTIONAL RIGHTS

The trial court barred appellant from presenting mitigating evidence at the penalty retrial that Veronica Gonzales told two police officers that she had put Genny Rojas in the bathtub. The court's ruling that the statements were inadmissible hearsay was erroneous. The exclusion of the evidence undercut appellant's relative-culpability defense and thus infringed appellant's constitutional rights to present mitigating evidence, have a fair trial and a fair, accurate, and reliable capital-sentencing proceeding, and rebut aggravating evidence.

A. Facts And Procedural History

Minutes after Veronica screamed for help after pulling Genny from the bathtub, Sergeant Barry Bennett and Officer William Moe arrived at appellant and Veronica's apartment complex. (RT 50:5889; RT 51:6191, 6205.) After the officers quickly determined that Genny could not be revived, Veronica told Sergeant Bennett that she had put Genny in the bathtub and ran the water. (RT 50:5894-5895.) Veronica also said that she went to the kitchen to cook dinner and, upon returning to the bathroom twenty minutes later, found Genny submerged under the water. (RT 50:5895.) Shortly afterward, she made similar statements to Officer Phillip Collum, who was the third police officer to arrive at the apartment complex. (RT 50:5955, 5965.) Throughout this time, Veronica was visibly upset, crying, and rambling. (RT 50:5960, 5966, 5969-5971, 5975; RT 52:6274; RT 56:7026, 7047.)

At the first trial, Veronica's statements were admitted in the prosecution's guilt phase case-in-chief. (RT 27:2940-2942; RT 50:5895, 5965.) At the penalty retrial, the prosecution moved in limine to bar the statements. (RT 88:10993-10994; RT 90:11164-11187.) The trial court concluded that appellant sought to use Veronica's statements for a hearsay purpose. (RT 90:11179.) The court ruled that the spontaneous-statement exception did not apply because, based on Veronica's story, she was excited about finding Genny submerged in the bathtub, not by placing Genny in the bathtub. (RT 90:11180.) The court stated that the rationale for the exception was also inapplicable because Veronica had the opportunity to and did fabricate her statements. (RT 90:11180-11181.) In addition, the court ruled that the statement-against-interest hearsay exception was inapplicable because Veronica's statements denied responsibility and, thus, were not against her interest. (RT 90:11186-11187.) The trial court also ruled that the statements were not admissible through the catch-all exception to the hearsay rule. (RT 90:11181.) Accordingly, the court barred appellant from presenting evidence of Veronica's statements. Furthermore, the trial court concluded that appellant's constitutional rights did not compel admission of Veronica's statements. (RT 90:11185.)

B. Although Veronica's Admissions Were Hearsay, They Were Admissible as Spontaneous Statements And Declarations Against Interest Or Under The Catch-All Hearsay Exception

Veronica's admissions to Sergeant Bennett and Officer Collum were admissible under three hearsay exceptions. The trial court abused its discretion by ruling that no exception was implicated and excluding the evidence. (See *People v. Roldan* (2005) 35 Cal.4th 646, 714 [stating standard of review for spontaneous-statement exception]; *People v.*

Brown (2003) 31 Cal.4th 518, 536 [stating standard of review for declaration-against-interest exception].)

Veronica's admissions constituted spontaneous statements. "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." (Evid. Code, § 1240.) Veronica told the police officers that she ran the bath and put Genny in the water. Thus, her statements purported to narrate acts that she both saw and committed. The forensic evidence presented at trial showed that Genny was held in scalding-hot water for one to ten seconds and died thereafter from the burns she had sustained. After Genny died, Veronica screamed for help and was visibly upset while neighbors and police officers went to assist Genny. These facts demonstrate that Veronica was under the stress of the excitement created by lethally burning Genny in the bathtub when she made the statements. Accordingly, Veronica's admissions met the requirements for the spontaneous-statement exception to the hearsay rule.

This Court has explained that the declarant's mental state constitutes the crucial element for determining whether the spontaneous-statement exception is implicated. (*People v. Roybal* (1998) 19 Cal.4th 481, 516, quoting *People v. Farmer* (1989) 47 Cal.3d 888, 903-904.) In this case, the record is replete with evidence that Veronica was agitated from the moment she screamed for help through when she spoke to Sergeant Bennett and Officer Collum at the apartment complex. Several witnesses said that she was rambling, crying, and demonstrably upset. Burning Genny in the bathtub created Veronica's nervous excitement that

was "supposed still to dominate" at the time she made the statements to police officers. (*Showalter v. Western Pacific R.R. Co.* (1940) 16 Cal.2d 460, 468, quoted in *People v. Poggi* (1988) 45 Cal.3d 306, 318.) Further, her admission that she drew the bath and placed Genny in the bathtub related to the event that created Veronica's nervous excitement. (See *People v. Poggi, supra*, 45 Cal.3d at p. 318.)

For these reasons, Veronica's admissions were admissible under the spontaneous-statement exception to the hearsay rule. Because Veronica remained under the stress of excitement, the likelihood that over an hour had elapsed between the incident and the utterances was immaterial. (See *People v. Brown* (2003) 31 Cal.4th 518, 540-541 [holding statements made two and one-half hours after startling occurrence were admissible under spontaneous-statement exception].) Likewise, Veronica's admissions were spontaneous statements despite her involvement in the crime. (See *People v. Sully* (1991) 53 Cal.3d 1195, 1229 [holding co-perpetrator's statements about crime were admissible under spontaneous-statement exception].) Moreover, her statements were spontaneous although she made them to police officers. (See *People v. Morrison* (2004) 34 Cal.4th 698, 719 [holding statements to police officer may be spontaneous, even if in response to officer's brief inquiry].)

The trial court considered improper factors to determine that Veronica's admissions did not implicate the spontaneous-statement exception. It was irrelevant that Veronica's story suggested that she got excited from finding Genny submerged under water in the bathtub, rather than from drawing the bath and placing Genny in the tub. The key factors for whether a statement is admissible under the spontaneous-statement exception are the declarant's mental state at the time of the statement and

the antecedent for that mental state. The undisputed evidence supported appellant's position that the "occurrence startling enough to produce [Veronica's] nervous excitement" was the placement of Genny into a bathtub containing water hot enough to fatally scald Genny in mere seconds. (*Showalter v. Western Pacific R.R. Co.*, *supra*, 16 Cal.2d at p. 468.) Besides, it was not contested that Veronica remained under the stress of excitement when she made the admissions. For these reasons, the admissions met the requirements of the hearsay exception. Veronica's suggestion that the startling event was her finding that Genny had drowned in the bathtub was not material to the proper analysis of the exception's applicability. Moreover, as the trial court recognized, no evidence supported Veronica's contention. (RT 90:11180-11181.) Accordingly, no substantial evidence supported the trial court's ruling. (*People v. Brown*, *supra*, 31 Cal.4th 518, 541 [reviewing trial court's findings for substantial evidence].)

The trial court conducted an inappropriate analysis of extrinsic evidence to conclude that Veronica's statements as a whole were unreliable and that their admission would not fulfill the purposes of the spontaneous-statement hearsay exception. This Court on multiple occasions has concluded that external evidence of unreliability is immaterial. (See *People v. Arias* (1996) 13 Cal.4th 92, 150 [holding declarant's inability to confirm hearsay statement on later or calmer occasions does not render spontaneous statement inadmissible]; *People v. Sully*, *supra*, 53 Cal.3d at p. 1229 [concluding that apparently unreliable statement by accomplice-declarant is admissible if standards for admission of spontaneous statements are otherwise met]; *People v. Farmer*, *supra*, 47 Cal.3d at p. 906 [explaining that where standards for admission of spontaneous statements are met,

statements are deemed reliable irrespective of contention that statements in specific case lack indicia of reliability].) Thus, Veronica's remarks were admissible spontaneous statements though a portion of her statements, which appellant did not seek to admit for a hearsay purpose, appeared to be untrue.

Veronica's admissions were also declarations against her penal interest. "The proponent of such evidence must show 'that the declarant is unavailable, that the declaration was against the declarant's penal interest, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.'" (*People v. Lucas* (1995) 12 Cal.4th 415, 462, quoting *People v. Cudjo* (1993) 6 Cal.4th 585, 607; see also, Evid. Code, § 1230.) Veronica's invocation of her Fifth Amendment privilege against self-incrimination rendered her unavailable. (RT 52:6229; see *People v. Cudjo*, *supra*, 6 Cal.4th at p. 607.) Veronica's statements that she drew the bath and put Genny in the bathtub were against her penal interest; when coupled with the evidence that Genny was held in 140-degree water until she sustained third-degree burns to half of her body, the statements undoubtedly incriminated Veronica. Moreover, the statements were sufficiently reliable to warrant admission into evidence.

Veronica's admissions that she drew the bath and put Genny in the tub — the portion of Veronica's statements that appellant sought to admit to prove the truth of the matter asserted — were reliable. Those remarks, which Veronica made while she was well aware that Genny suffered fatal burns in the bathtub, were incriminating; accordingly, "a reasonable [person] in [her] position would not have made the statement[s] unless [s]he believed [them] to be true." (Evid. Code, § 1230.) Admittedly, the exculpatory portions of Veronica's statements were self-serving and not

covered by the hearsay exception. (See *People v. Leach* (1975) 15 Cal.3d 419, 441.) However, the trial court could have, and should have, redacted Veronica's statements to remove the exculpatory portions. (See *People v. Duarte* (2000) 24 Cal.4th 603, 614.)

Although a court, when considering the admissibility of a hearsay statement that is partly inculpatory and partly exculpatory, typically examines the entire statement to determine if it is sufficiently trustworthy to warrant admissibility (see *People v. Duarte*, *supra*, 24 Cal.4th at p. 614), that analysis was not appropriate for this case. Appellant neither attempted to introduce the exculpatory parts of the statements for a hearsay purpose nor asserted that they were true. Even viewing all of Veronica's statements, her admissions were trustworthy. Although her story maintained that her acts were innocuous, it seems unlikely that she would admit to committing an act that she should have known the police would consider incriminating, unless she was the person who had drawn the bath and put Genny in the water. Thus, her statements were, on balance, inculpatory. Consequently, her statements' exculpatory aspects did not render untrustworthy the portion of Veronica's statements that appellant intended to use for a hearsay purpose.

Moreover, Veronica's statements as a whole were trustworthy though they contained some self-serving statements. Significantly, this was "not a case in which [the declarant] admitted to some culpability in order to shift the bulk of the blame to another." (*People v. Brown*, *supra*, 31 Cal.4th at p. 537.) The totality of her statements were more incriminating than hearsay statements from a person who provided medical care to perpetrators of a robbery-murder that this Court found to be properly admitted as declarations against interest in *People v. Gordon* (1990) 50 Cal.3d 1223,

1251-1253. Also, the inconsistency between some of Veronica's statements and the physical evidence does not render her statements untrustworthy. (See *People v. Cudjo*, *supra*, 6 Cal.4th at pp. 607-609.)

Finally, Veronica's admissions were no less trustworthy than appellant's admissions made during his interrogation that were admitted into evidence at both trials and formed the linchpin of the prosecution's case that appellant was personally culpable for Genny's death. Like Veronica's crime-scene statements to the police officers, appellant made admissions along with exculpatory statements. Yet, the court, ruling that Veronica's admissions were not declarations against interest, excluded Veronica's statements and admitted appellant's statements.

In addition, the portions of the statements appellant sought to use for a hearsay purpose were admissible under the nonstatutory catch-all exception to the hearsay rule. (See *People v. Demetrulias* (2006) 39 Cal.4th 1, 27; Evid. Code, § 1200, Comment of the Senate Judiciary Committee.) As stated above, those portions of Veronica's statements were both reliable and critical to appellant's penalty-phase defense.

Besides, the statements had a nonhearsay purpose. Veronica's statements, particularly the untruthful portions, demonstrated her consciousness of guilt, which was probative toward her degree of participation, as compared to appellant's.[47] Accordingly, the court erred by not admitting Veronica's statements, irrespective of whether the statements fell within the ambit of any hearsay exceptions.

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[47] At the guilt phase, the trial court refused appellant's request to instruct the jury that Veronica's false statements may tend to prove her consciousness of guilt. (RT 62:8011-8012; see *post*, Claim XVII.)

C. The Exclusion Of The Proffered Evidence Infringed Appellant's Constitutional Rights

Aside from constituting evidentiary error, the trial court's exclusion of Veronica's admissions violated appellant's constitutional rights to present relevant mitigating evidence and a penalty-phase defense, have a fair trial and a fair and reliable capital-sentencing determination, and rebut aggravating evidence, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, and 17 of the California Constitution.

The trial court's exclusion of Veronica's admissions infringed appellant's right to present relevant mitigating evidence. Evidence tending to prove a fact or circumstance that a factfinder could reasonably find mitigating is relevant mitigating evidence. (*Tennard v. Dretke* (2004) 542 U.S. 274, 284-285.) Veronica's admissions that it was she who drew the bath and put Genny in the water were undoubtedly relevant: The evidence tended to prove that Veronica was, at a minimum, the primary perpetrator and was thereby probative toward the circumstances-of-the-offense and minor-participation mitigating factors. (See Pen. Code, § 190.3, factors (a), (j).) Thus, the court's refusal to admit the evidence was *Skipper* error per se. (See *Skipper v. South Carolina* (1986) 476 U.S. 1, 7; *People v. Brown*, *supra*, 31 Cal.4th at pp. 577-578 [enunciating per se standard for *Skipper* error].) If this Court abandons its per se standard, the exclusion of the evidence nevertheless violated appellant's constitutional right to present relevant mitigating evidence.

The exclusion of the evidence violated appellant's rights to present a defense at the penalty retrial. The exclusion of defense evidence at the penalty phase infringes the rights to present a defense if the evidence is

mitigating and critical to the defense, unless the state has a countervailing interest in maintaining the integrity of the adversarial process that warrants excluding the evidence. (See *ante*, at pp. 64-65.) Veronica's admissions were mitigating, particularly with respect to factor (j) (minor participation). Moreover, the admissions were central to appellant's principal penalty-phase defense that Veronica was the primary, if not the only, perpetrator of the offense. Additionally, excluding the admissions did not advance the state's interest in maintaining the integrity of the adversarial process. This Court has recognized that a capital defendant's due process rights require the admission of ordinarily inadmissible hearsay where the excluded evidence is highly relevant and substantial reasons exist to assume the hearsay statement's reliability. (See *People v. Champion* (1995) 9 Cal.4th 879, 938.) As explained above, Veronica's admissions were trustworthy.

Even if this Court deems Veronica's admissions unreliable, on the facts of this case the state lacked a sufficient interest in the adversarial process to permit the exclusion of the evidence. To be sure, this Court has ruled that a capital defendant's constitutional rights do not ordinarily compel the admission of unreliable hearsay. (See *People v. Morrison* (2004) 34 Cal.4th 698, 724-725.) However, in this case the prosecution admitted and heavily relied upon admissions appellant made during his interrogation, in which he made both inculpatory and exculpatory statements. Admitting appellant's statements, but excluding Veronica's statements, fails to advance the integrity of the adversarial process. Rather, the exclusion of Veronica's admissions created an imbalance in the adversarial process to appellant's detriment. Consequently, appellant's rights to present a defense at the penalty retrial precluded the exclusion of Veronica's admissions.

The imbalance of admitting appellant's, but excluding Veronica's, statements violated appellant's due process right to a fair trial, as guaranteed by the Fourteenth Amendment and article I, sections 7 and 15. The disparate treatment of the statements despite their similar reliability was fundamentally unfair. (See *Mayberry v. Pennsylvania* (1971) 400 U.S. 455, 469 (conc. opn. by Harlan, J.) ["evenhanded justice . . . is at the core of due process"].) Moreover, admitting Veronica's admissions as prosecution evidence during the first trial, but excluding them when appellant proffered them as mitigating evidence at the penalty retrial was fundamentally unfair. If the evidence was sufficiently reliable and probative for which to base, in part, appellant's guilt and death-eligibility, it was sufficiently reliable and probative for appellant to use as mitigation. Ths fundamental unfairness constituted another due process violation.

Also, the prosecutor's introduction of Veronica's statements at the first trial and use of those statements to argue that appellant had a consciousness of guilt (RT 63:8093-8094), followed by the prosecutor's opposition to appellant's introduction of the evidence at the penalty retrial to show Veronica's consciousness of guilt (RT 90:11166, 11170-11171), was inconsistent and impermissible. (See *In re Sakarias* (2005) 35 Cal.4th 140, 164.) The prosecutor should have been estopped from opposing appellant's introduction of Veronica's statements. (See *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493 [applying doctrine of equitable estoppel against government]; *In re V.B.* (2006) 141 Cal.App.4th 899, 907 [recognizing that prosecutors may not be immune from judicial estoppel].) The trial court permitting him to take inconsistent positions and excluding the statements at the penalty phase violated appellant's Fourteenth Amendment and article I, sections 7 and 15 rights to due process.

Likewise, the exclusion of the evidence deprived appellant of his right to a fair, accurate, and reliable capital-sentencing hearing. (See *Saffle v. Parks* (1990) 494 U.S. 484, 493.) Appellant's chief penalty-phase defense was his minor participation in the offense. Veronica's admissions to drawing the bath and placing Genny in the bath provided strong support for that defense. The exclusion of Veronica's admissions coupled with the presentation of and emphasis on appellant's admissions provided the jury with an exaggerated impression of appellant's relative culpability and thus precluded a fair, accurate, and reliable capital-sentencing decision.

Furthermore, the exclusion of Veronica's admissions infringed appellant's right to rebut aggravating evidence. (See *Gardner v. Florida* (1977) 430 U.S. 349, 362 [holding that sentencer's consideration of prosecution evidence that defendant did not have opportunity to deny or explain violated defendant's due process rights].) The prosecution, relying primarily on appellant's admissions at his interrogation, asserted that appellant drew the water for the bath and participated in placing Genny in the bathtub. (RT 99:12787, 12817-12820.) Veronica's admissions constituted appellant's most direct defense to those accusations. By ruling that Veronica's admissions were inadmissible, the trial court hamstrung appellant's ability to rebut the aggravating evidence regarding appellant's participation in Genny's death.

D. The Exclusion Of The Proffered Evidence Was Prejudicial

The trial court's ruling that Veronica's admissions were inadmissible at the penalty retrial requires reversal of appellant's death sentence. If appellant had been permitted to present evidence of Veronica's admissions at the penalty retrial, there is a reasonable possibility that

appellant would not have been sentenced to death. (See *People v. Brown* (1988) 46 Cal.3d 432, 448.)

Evidence of appellant's personal culpability was scant and sharply disputed. (See *ante*, at pp. 85-86.) At the penalty retrial, evidence of appellant's culpability was limited to the physical evidence, which could not reveal who had perpetrated the offense, and appellant's admissions. Notably, appellant said during his interrogation that he ran the water for the bath and that both he and Veronica placed Genny in the bathtub. (CT 8:1761-1762.) The prosecutor, at his penalty-retrial closing argument, placed tremendous emphasis on those statements, which were highlighted in the tape of interrogation excerpts that the prosecutor played during his summation. (RT 99:12760, 12785-12803, 12814; Peo. Exh. 111.)

Veronica's admissions were critical evidence that would have rebutted the inferences the prosecutor sought to make from appellant's admissions. After hearing evidence of Veronica's admissions, jurors could reasonably have concluded that Genny was placed in the bathtub twice on July 21, 1995: Appellant and Veronica innocuously placed Genny in the water for the first bath, and Veronica burned Genny in the bathtub after appellant had left the apartment and when Alicia Montes, the upstairs neighbor, heard water running in appellant and Veronica's bathroom. Alternatively, jurors could reasonably have concluded that appellant's admissions were untrue statements designed to protect Veronica.

In addition to rebutting the aggravating evidence, Veronica's admissions were a crucial component of appellant's relative-culpability defense. When combined with the physical evidence of Genny's burn to the lower half of her body, Veronica's statements showed that she alone inflicted Genny's fatal injuries. The exclusion of Veronica's statements,

however, neutered appellant's defense that his participation in the crime was, at most, minor.

Furthermore, this was a close case. (See *ante*, at pp. 93-94.) One significant difference in the evidence presented at the first trial and the penalty retrial was the exclusion of Veronica's admissions. The trial court's deeming the statements to be inadmissible hearsay may well account for the two trials' disparate results.

Because there is a reasonable possibility that appellant would not have been sentenced to death absent the erroneous exclusion of Veronica's admissions, state law requires reversal of appellant's death sentence. The federal constitutional errors compel a similar result. For the reasons described above, respondent cannot demonstrate that the exclusion of Veronica's admissions were harmless beyond a reasonable doubt.[48] (See *Chapman v. California* (1967) 386 U.S. 18, 24.) Thus, this Court should vacate the death judgment.[49]

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[48] Due to the discretionary nature of the capital-sentencing determination, respondent has a high burden of showing that a penalty phase error is harmless. (See *ante*, at pp. 94-96.)

[49] The overwhelming-evidence test is not an appropriate harmless-error analysis for a penalty phase error. In any event, the aggravating evidence, when weighed against all of the mitigating evidence, was not overwhelming. (See *ante*, at pp. 96-98.)

IV

THE TRIAL COURT'S EXCLUSION OF APPELLANT'S CHILDREN FROM THE COURTROOM WAS ERRONEOUS AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO PRESENT MITIGATING EVIDENCE AND A PENALTY-PHASE DEFENSE AND TO HAVE A PUBLIC TRIAL

The trial court denied appellant's request to exhibit his children to the jury during the penalty phase. (RT 67:8555-8558.) The trial court thereby erroneously excluded relevant, admissible evidence and violated appellant's Eighth and Fourteenth Amendment and article I, section 7, 15, and 17 rights to present relevant mitigating evidence and a penalty-phase defense. The court further barred appellant's four youngest children from briefly attending the trial during a portion of the direct examination of appellant's father. (RT 68:8621O.) That ruling infringed appellant's Sixth Amendment and article I, section 15 right to a public trial.

A. Facts And Procedural History

During his penalty-phase case-in-chief, appellant's counsel informed the court and the prosecutor that the defense intended to bring appellant's four youngest children into the courtroom so that the jury could see them. (RT 67:8548.) He asked that the children be formally exhibited in the manner that Veronica Gonzales had been.[50] (RT 67:8549.) To avoid traumatizing the children by exposing them to graphic testimony, defense counsel suggested bringing the children into the courtroom during the direct testimony of their grandparents, aunt, or attorney. (RT 67:8548-8549.)

The trial court ruled that appellant's children could not be exhibited

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[50] During its rebuttal at the guilt phase and the penalty retrial, the prosecution exhibited Veronica to the jury. (RT 60:7578; RT 98:12604.)

to the jury. The court did not want the children involved in the case. (RT 67:8555.) The court stated that the children's physical presence was irrelevant and explained that the children's presence did not add anything to the factual issues before the jury and that the jury could be informed that appellant's children were "real kids" by other means. (RT 67:8555, 8557-8558.)

The day after the court precluded the exhibition of the children, appellant's parents brought appellant's four youngest children, Vanessa, Anthony, Valerie, and Alex Gonzales, to the courthouse. (RT 68:8621A-8621B.) Appellant's parents, who had custody of those children, brought the children to court due to a lack of child-care alternatives on a day during which they were expecting to testify. (RT 67:8549; RT 68:8621B.)

The court expressed concerns that the defense was seeking to circumvent its ruling, but the trial court held no hearing to determine whether appellant's parents were acting in good faith. (RT 68:8621A-8621Q.) In addition, the court stated that it was deeply offended by appellant's family having brought the children to court to watch their father's capital trial. (RT 68:8621G.) The court said that the presence of the children in the courtroom would "blackmail" the jury. (RT 68:8621I.) The court stated that the children's involvement in the case, including merely watching the trial, could result in the children taking personal responsibility for the outcome if appellant were to be sentenced to death. (RT 68:8621I-8621J.) Invoking its authority as a superior court judge cross-designated as a juvenile court judge, the court concluded that excluding the children would be in their best interests and barred them from the courtroom. The court rejected defense counsel's requests to permit the children to stay in the courtroom during the direct examination of

appellant's father and refused to solicit the opinion of Roland Simoncini, the children's attorney, regarding whether it would be in their best interests to be excluded entirely from the courtroom. (RT 68:8621O-8621P.)

The exclusion of the children, as evidence or as spectators, remained in effect for the penalty retrial. (RT 75:9383; RT 81:9551.) Indeed, the court extended its ruling and barred the children from the courthouse during the retrial. (RT 81:9602-9603.)

B. The Denial Of Appellant's Request To Exhibit His Children To The Jury Was Error

The trial court abused its discretion by barring appellant from exhibiting his children to the jury during the penalty phase of his capital case. As the trial court recognized, the effect appellant's execution would have on his children was relevant mitigating evidence of appellant's character. Consequently, appellant was entitled to present demonstrative evidence of that impact. As illustrative evidence that appellant's children would be devastated by appellant's execution, the exhibition of appellant's children to the jury was relevant, admissible evidence.

At the penalty phase of a capital case, a defendant may present evidence of any aspect of his character offered as a basis for a life sentence. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Evidence that tends to prove a fact or circumstance that a factfinder could reasonably deem mitigating constitutes relevant mitigating evidence. (*Tennard v. Dretke* (2004) 542 U.S. 274, 284-285; *McCoy v. North Carolina* (1990) 494 U.S. 433, 440-440.) Because it related to appellant's character, evidence of the impact appellant's execution would have on his children was relevant mitigating evidence. (See *People v. Smith* (2005) 35 Cal.4th 334, 367; *People v. Ochoa* (1998) 19 Cal.4th 353, 456; *State v. Greene* (Ariz. 1998) 967 P.2d

106, 118; *Manley v. State* (Del. 1998) 709 A.2d 643, 659-660; *State v. Lugo* (Fla. 2003) 845 So.2d 74, 115; *Barnes v. State* (Ga. 1998) 496 S.E.2d 674, 687-89; *State v. Clark* (N.M. 1999) 990 P.2d 793, 819; *State v. Stevens* (Ore. 1994) 879 P.2d 162, 167-168.) The impact of appellant's execution was positively correlated to the intensity of the children's love for appellant, which was partly a product of appellant's positive qualities. The trial court correctly concluded that execution-impact evidence was both relevant and admissible. (RT 65:8325-8326.) The trial court, however, erred in its conclusion that the presentation of the children to the jury was irrelevant and, thus, inadmissible.

A party seeking to admit relevant evidence may present that evidence persuasively and forcefully. Whenever there are multiple ways for logically proving a material fact, the proponent of the evidence need not offer only the most antiseptic evidence that could establish the fact. (*People v. McClellan* (1969) 71 Cal.2d 793, 802.) It is well-established that a prosecutor is free to reject a defense stipulation, though the proffered stipulation would logically establish the facts the prosecutor seeks to prove through evidence, because the stipulation would "deprive the state's case of its persuasiveness and forcefulness." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1007.) Similarly, a capital defendant cannot be forced to present his evidence in its most sanitized form, so long as the more vivid forms of evidence are not barred for reasons other than relevance.

For this reason, the trial court erred in precluding the defense, on relevance grounds, from exhibiting appellant's children to the jury because "we can get the message to the jury that they're real kids in other ways." (RT 67:8558.) Evidence that appellant's children would be devastated by appellant's execution was relevant, and the exhibition of the children to the

jury — which would have ensured that the children were not perceived as mere abstractions — was one way of showing that. This Court has recognized that a party's ability to use alternative evidence to prove the same point as the proffered evidence has no bearing on whether the proffered evidence is relevant. (*People v. Heard* (2003) 31 Cal.4th 946, 975.) The trial court's ruling violated that principle.

Courts routinely admit demonstrative evidence at trials, irrespective of whether the same facts can be established by other means. Examples of illustrative evidence include photographs, mannequins, and people. The trial court admitted all three types of evidence, when offered by the prosecution in this case.

Photographs have become indispensable items of illustrative evidence. This Court has repeatedly upheld trial courts that overruled cumulativeness objections to the admission of photos. For instance, this Court has stated: "We have often rejected the argument that photographs of a murder victim should be excluded as cumulative if the facts for which the photographs are offered have been established by testimony." (*People v. Price* (1991) 1 Cal.4th 324, 441, quoted in *People v. San Nicolas* (2004) 34 Cal.4th 614, 665; accord, *People v. Cole* (2004) 33 Cal.4th 1158, 1199.) This Court has also concluded that the ability to prove a photograph's contents by other means is immaterial to the analysis of the photo's relevance. (*People v. Heard, supra*, 31 Cal.4th at p. 975.) Likewise, this Court has also rejected the notion that the prosecution could be forced to accept "antiseptic stipulations in lieu of photographic evidence." (*People v. Pride* (1992) 3 Cal.4th 195, 243, quoted in *People v. Marks* (2003) 31 Cal.4th 197, 226.) In this case, the trial Court admitted myriad autopsy and crime-scene photos, although many of the photographs proved the same

matters that had been proven by testimony and diagrams. (RT 34:3507-3508, 3562-3563, 3574-3577; RT 35:3654-3655, 3665-3667, 3677; RT 51:6019).

Mannequins are another example of demonstrative evidence. Mannequins offered into evidence have also been repeatedly found to be admissible. (See, e.g., *People v. Riel* (2000) 22 Cal.4th 1153, 1195; *People v. Medina* (1995) 11 Cal.4th 694, 754.) Like photographs, the logical points the proponent of the evidence intends to establish with mannequins can be shown through less graphic means, such as testimony or a two-dimensional diagram. Nonetheless, mannequins are admissible to permit their proponents to prove their propositions vividly. In this case, the prosecution introduced a life-sized mannequin of Genny, which the court ruled was admissible demonstrative evidence. (RT 51:6075, 6093; RT 91:11367.)

People also have been used as illustrative evidence. The exhibition of a person to the jury constitutes evidence. (Evid. Code, § 140, Law Revision Com. com. (1995 ed.); 31 Cal.Jur.3d (1976) Evidence, § 438.) This Court has long permitted the use of people as demonstrative evidence despite the capacity of other evidence to prove the same points. (See *People v. Richardson* (1911) 161 Cal. 552, 561-562 [upholding exhibition of five-month-old child to show that child defendant allegedly sought to abort was born "fully matured and perfect" and that child resembled defendant].)[51] The North Carolina Supreme Court recently endorsed an

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[51] At least one trial court in this state has permitted the prosecution at the penalty phase to exhibit, as victim-impact evidence, a child fathered by the victim but born after the victim's death. (See *People v. McKinnon* (S077166, app. pending).) In another case for which the automatic appeal

analogous use of a young child as evidence. The court upheld the identification of a murder victim's seven-year-old daughter, who was seated in the courtroom, as victim-impact evidence. (*State v. Barden* (N.C. 2002) 572 S.E.2d 108, 131.) The matters the prosecution in that case presumably sought to prove by having its witness identify the daughter — that the victim fathered and raised her and that she suffered from her father's death — mirror what appellant sought to show through the exhibition of his children to the jury. Moreover, in this case, the trial court permitted the prosecution to exhibit Veronica Gonzales in its rebuttals at the guilt phase of the first trial and at the penalty retrial. (RT 60:7579; RT 98:12604.)

The routine admission of photographs, mannequins, and people into evidence, including the introduction of those items in this case, further demonstrates the erroneousness of the court's ruling that the exhibition of appellant's children was irrelevant. The question the trial court had to answer in its analysis under Evidence Code section 350 was whether the exhibition of the children was relevant — not whether presenting the children to the jury would have been *uniquely* relevant. Appellant's ability to prove the same points without having the children exhibited to the jury has no bearing on the relevance of the proffered evidence. (See *People v. Heard*, *supra*, 31 Cal.4th at p. 975.) The court's denial of appellant's request to exhibit the children to the jury on the basis of a relative-relevance analysis constituted legal error and was thus an abuse of discretion. (See *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1105 (dis. opn. of Kennard, J.) ["Thus, a trial court abuses its discretion whenever it applies

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is pending, the decedent's child who was two months old at the time of the capital offense was exhibited to the jury. (See *People v. Garcia* (S045696, app. pending).)

the wrong legal standard to the issue at hand."]; *People v. Russel* (1968) 69 Cal.2d 187, 195 [explaining trial court's discretion must be exercised using applicable legal principles].)

In addition to being logically relevant, the presentation of the children to the jury had narrative relevance. Beyond proving points, evidence tells a story. Exhibiting appellant's children to the jury would have fulfilled both of these evidentiary functions. In *Old Chief v. United States* (1997) 519 U.S. 172, the United States Supreme Court explained the importance of the narrative role that evidence presented at trial plays:

> Evidence . . . has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them.

(*Id.* at p. 187.) In the context of the prosecution presenting evidence of a defendant's guilt, the Court contrasted vivid evidence from abstract statements:

> [T]he evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment. Thus, the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault.

(*Id.* at pp. 187-188.) Furthermore, a jury's decisions tend to be based on the selection of a party's competing story presented at trial. (Pardo, *Juridical*

Proof, Evidence, and Pragmatic Meaning: Toward Evidentiary Holism (2000) Nw.U. L.Rev. 399, 402-409 [explaining that story model of jury decision making is supported by empirical evidence, embraced by trial advocacy scholars, and endorsed by courts].) For these reasons, the trial court's relevance determination should have considered the proffered evidence's narrative, as well as the logical, relevance.

The exhibition of appellant's children to the jury would have transformed them from apparent abstractions to actual children. If the jury had seen appellant's children in their flesh and blood, rather than merely hear about them in adult witnesses' testimony and see them in still photographs, the evidence that appellant's execution would devastate the children would have been more powerful. In contrast to the sterilized evidence to which the trial court limited appellant, presenting the children to the jury would have enabled appellant to tell a convincing story of the impact appellant's execution would have on his young children.

More fundamentally, showing the jury appellant's children would have enabled appellant to present a superior narrative of why he should receive a life sentence. The previously discussed impact of appellant's execution on his children formed part of this narrative. In addition, creating and raising the children comprised a central component of appellant's adult life. Presenting his children as evidence would have enlivened the story of appellant's background. The jury would have seen the most positive products of appellant's adult life; in the years preceding Genny's death, appellant was a stay-at-home father. Evidence that appellant raised these children, including Anthony, whom appellant believed was not his biological son, would have been far more vivid if the trial court had permitted appellant to exhibit the children to the jury.

The effective presentation of a defense narrative in the penalty phase of a capital case is a crucial determinant of whether the defendant will receive a life sentence. (See Pokorak, *Dead Man Talking: Competing Narratives and Effective Representation in Capital Cases* (1999) 30 St. Mary's L.J. 421, 446.) Austin Sarat has explained the goals of a capital defendant's penalty phase narrative:

> [T]he overriding strategic goal in the narratives constructed by all death penalty lawyers is to humanize the client. [Footnote.] The strategy of using narrative to humanize the client is a response to the widely held belief that jurors and judges will only condemn those whom they see as fundamentally "other," as inhuman, and as outside the reach of the community of compassionate beings.

(Sarat, *Narrative Strategy and Death Penalty Advocacy* (1996) 31 Harv. C.R.-C.L. L. Rev. 353, 370-371.) When a capital defendant effectively presents extensive mitigating evidence, jurors tend to embrace the defendant's narrative and put themselves in his shoes. (Haney, *Commonsense, Justice and Capital Punishment* (1997) 3 Psychol. Pub. Pol'y & L., 303, 329.) Thus, by hamstringing appellant's ability to present a compelling narrative to the jury, the trial court's denial of appellant's request to exhibit his children to the jury undermined appellant's case in mitigation. In view of the importance of presenting the children to the jury to buttress appellant's mitigation narrative, the proffered evidence was relevant.

The court abused its discretion by excluding this evidence as irrelevant.[52] Trial courts lack the discretion to admit irrelevant evidence.

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[52] Although the trial court expressed concerns that appellant's children would be harmed if they were exhibited to the jury, the court excluded the evidence because it deemed the exhibition irrelevant. (RT

(*People v. Heard*, *supra*, 31 Cal.4th at p. 973.) Likewise, trial courts have no discretion to bar relevant evidence on irrelevancy grounds.

C. By Preventing The Children From Being Exhibited To Or Seen By The Jury, The Trial Court Violated Appellant's Sixth, Eighth, And Fourteenth Amendment Rights

The trial court's refusal to permit appellant to exhibit his children to the jury constituted more than mere evidentiary error. The ruling violated appellant's constitutional right to present evidence in mitigation and in his defense, as well as his right to present a complete penalty-phase defense. The contours of these constitutional rights are discussed in Claim I. (See *ante*, at pp. 79-80.)

The court's ruling formed a per se violation of appellant's Eighth Amendment right, and his article I, section 17 right, to present relevant mitigating evidence. (See *Tennard v. Dretke* (2004) 542 U.S. 274, 284-285; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-8; *People v. Brown* (2003) 31 Cal.4th 518, 577-578; see also, *ante* at p. 80.) As explained in the preceding subsection, the exhibition of appellant's children to the jury was relevant mitigating evidence. Therefore, the court's denial of appellant's request to present his children to the jury amounted to per se *Skipper* error.

By precluding appellant from showing his children to the jury, the trial court also violated appellant's rights to present a defense. (See *Green v. Georgia* (1979) 442 U.S. 95, 97.) The exclusion of defense evidence at the penalty phase violates a defendant's Sixth and Fourteenth Amendment

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67:8557.) The erroneousness of the court's subsequent conclusion that the children would be harmed if they appeared in the courtroom during appellant's presentation of mitigating evidence is discussed below. (See *post*, at pp. 139-141.)

and article I, section 7 and 15 rights to present a defense if the evidence was mitigating, the state lacked an overriding interest in maintaining the integrity of the adversarial process by excluding the evidence, and the evidence was critical to the defense. (See *ante*, at pp. 64-65.) The proffered evidence was mitigating. Because it was relevant and erroneously excluded on relevance grounds, the state lacked an overriding adversarial-process interest in barring appellant from exhibiting his children to the jury. Presenting appellant's children to the jury was also critical to appellant's case in mitigation. In addition to relative culpability, appellant's mitigation centered around how appellant's background and character demonstrated that his life should not be extinguished at the hands of the state. Fathering and raising his children comprised a significant aspect of appellant's background. The devastation appellant's children would face if appellant were to be executed reflected on appellant's character. The force of this mitigating evidence hinged on appellant's ability to present a convincing narrative. The trial court's ruling prevented appellant from advancing a compelling narrative of his background and character to the jury and, thus, increased the likelihood that the jury would return a death verdict. Consequently, exhibiting appellant's children was crucial to appellant's penalty-phase defense.

D. The Trial Court Lacked The Authority To Bar The Children From The Courtroom; Alternatively, The Court Erred By Ruling That The Children's Best Interests Required Precluding Appellant's Children From Watching The Direct Examination Of Their Grandfather At The Penalty Phase

The trial court had no authority to act in appellant's children's purported best interests and forbid them from attending any portion of appellant's trial. Although the children were dependents of the juvenile

court, the trial court was serving in the criminal division. The trial court's cross-designation as a juvenile court judge, a status held by all San Diego Superior Court judges (RT 68:8621O), was immaterial; the trial court was presiding over appellant's criminal case. That the trial court did not follow the formalities of a juvenile court, such as confidentiality, is further proof that the trial court was not acting as a juvenile court. (See Welf. & Inst. Code, § 827.) Basing rulings on determinations of a child's best interest is appropriate only for a juvenile or family court. (See *In re Chantal S.* (1996) 13 Cal.4th 196, 201; Welf. & Inst. Code, § 202, subd. (d).) Furthermore, application of the best-interests standard to preclude defense evidence or bar a defendant's children from attending his trial was improper and unprecedented. In a criminal case, the trial court must safeguard the defendant's constitutional rights, including the rights to present a defense and mitigating evidence and the right to a public trial.

The court had no authority to bar the children from the courtroom though it had the capacity, which it used, to declare Ivan Jr. and Michael unavailable to testify at trial. Evidence Code section 240 vested the trial court with the power to declare the child witnesses unavailable. But, no section of the Evidence Code conferred the court with the power to exclude appellant's children from the courtroom audience during appellant's trial.

Even if the trial court had the authority to bar appellant's children from the courtroom and the courthouse, the trial court's ruling that the exclusion of the children would be in their best interests was devoid of evidentiary support and, thus, in error. A trial court's best-interests determination must be supported by sufficient evidence. (See, e.g., *In re Laura F.* (1983) 33 Cal.3d 826, 831-838.) The court's ruling here was not.

The trial court heard no evidence regarding whether appellant's

children would be harmed if they were present in the courtroom during a portion of appellant's penalty-phase case-in-chief.[53] Rather, without receiving any input from mental health experts or therapists who had treated appellant's children, the court surmised that viewing any part of the trial would be detrimental to them. In contrast, prior to declaring Ivan Jr. and Michael unavailable to testify at trial, the trial court heard extensive testimony on the expected impact of their testifying for the prosecution in their parents' capital trials. (RT 23:2101-RT 24:2453.) The trial court's supposition that Vanessa, Alex, Valerie, and Anthony would be harmed by briefly appearing in the courtroom during their paternal grandfather's testimony about appellant cannot be extrapolated from the testimony pertaining to the harm two different children, Ivan Jr. and Michael, would have been expected to suffer if they had testified against their parents. Furthermore, a gargantuan difference existed between appellant's four youngest children attending a portion of appellant's trial in order to support appellant and enhance his mitigating evidence, and appellant's two oldest children testifying as prosecution witnesses and potentially contributing to death verdicts against their parents.

Moreover, the trial court's consideration of appellant's four youngest children's purported best interests was one-sided. The court expressed concerns that the youngest children would irrationally ascribe responsibility to themselves if appellant were to be sentenced to death if they attended a portion of appellant's trial. (RT 68:8621I.) The court never considered the regret and powerlessness the children would feel if they

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[53] The court denied appellant's request to seek the opinion of Roland Simoncini, the children's attorney, on whether it was in the children's best interest to be excluded from the courtroom. (RT 68:8621P.)

were denied the opportunity to appear in court and show support for their father while he was on trial for his life. Nor did the court consider the impact on the youngest children upon their realization that the trial court barred them from breathing life into appellant's mitigating narrative.

Additionally, the trial court exercised its purported power to protect appellant's children's best interests inconsistently. When admitting the videotapes of Ivan Jr.'s preliminary hearing testimony, the trial court concluded that the Ivan Jr.'s interest not to have his testimony used against his parents had to yield to the prosecution's need to make its case. (RT 29:3252; RT 55:6885, 6891-6892.) In contrast, when appellant sought the participation of his youngest children, the trial court's best-interests determination was paramount, despite the deleterious effect on appellant's case in mitigation and his right to a public trial.

E. By Barring Appellant's Children From The Courtroom, The Trial Court Violated Appellant's Sixth Amendment Right To A Public Trial

The trial court's exclusion of appellant's four youngest children from the courtroom infringed appellant's Sixth Amendment right to a public trial, as well as his rights to a public trial pursuant to article I, section 15 of the California Constitution and Penal Code section 686. In addition to ensuring that people with no affiliation to the parties can attend a trial, the right to a public trial encompasses a defendant's right to have his family attend his criminal trial. When discussing the right to a public trial, the United States Supreme Court wrote: "[A]n accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged." (*In re Oliver* (1948) 333 U.S. 257, 272.) The court, by banning appellant's youngest children from appearing in the courtroom, and ultimately the courthouse, contravened this right.

Although the right to a public trial is not absolute, the rare circumstances in which the public-trial right could yield to an overriding state interest were not present in this case. The United States Supreme Court detailed the high burden that must be reached before a defendant's public-trial right could be nullified:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

(*Waller v. Georgia* (1984) 467 U.S. 39, 48.) For several reasons, appellant's right to a public trial remained in full force in this case.

First, the state did not have an overriding interest in excluding appellant's children from the courtroom. Though protecting dependents of the juvenile court from harm is a worthy goal, it is unlikely that appellant's four youngest children would have been harmed by attending the portions of the penalty phase in which appellant's relatives testified about appellant's background and character. As explained in the previous subsection, the court had no evidentiary support for its supposition that any appearance in the courtroom during the trial would harm the children. Nor did the prosecution present evidence that harm would likely ensue from the children's attendance at any portion of the trial. Moreover, the state had no overriding interest in barring the children to protect the jury from what the court called blackmail. If a defendant's relatives could lawfully be barred from the courtroom because of a fear of "blackmail" or sympathy, then a defendant's right to a public trial, which includes the right to have family members attend his trial, would be neutered. Also, the presence of the

children would have been admissible mitigating evidence. (See *ante*, at pp. 129-130.) Additionally, it is incongruous to consider the presence of appellant's children as "blackmail" of the jury where the prosecution in a capital case may present photographs of the decedent before her death, as was done in this case (RT 51:6145), and introduce victim-impact evidence. Indeed, it is hardly uncommon for the prosecution to introduce the presence of a murder victim's child in the courtroom as victim-impact evidence. (See *People v. McKinnon* (S077166, app. pending); *People v. Garcia* (S045696, app. pending); *State v. Barden*, *supra*, 572 S.E.2d at p. 131.) The only thing remotely approaching an overriding state interest was the protection of appellant's children from harm, which was unlikely to result from appellant's proposal to have them attend brief portions of his penalty-phase case-in-chief.

Second, the court's complete bar on appellant's four youngest children attending the trial was overbroad. Even if the children would have been harmed if they had observed testimony and exhibits of Genny's injuries or the acts believed to have been inflicted upon her, excluding the children from the entire trial constituted an unduly broad remedy. Hearing their paternal grandfather testify about how appellant was raised in a tight-knit family, used to play the guitar, and was the second person in the family to graduate from high school could not have been more different from evidence regarding how their cousin died. The court's exclusion order — a blanket ruling barring appellant's children from attending any part of the trial — was broader than necessary to protect the interest of saving the children from harm.

Third, the court gave insufficient consideration to narrowly tailored alternatives to the complete bar to appellant's four youngest children

attending the trial. The court rejected out of hand defense counsel's suggestion that the children attend most of their paternal grandfather's direct examination but leave the courtroom before defense counsel asked what appellant's life meant to him. (RT 68:8621O.) In addition, the court refused to receive input from Roland Simoncini, the children's attorney. (RT 68:8621P.) The court also neglected to consider having the children present only for the portions of their paternal grandfather or aunt's testimony about them.

Fourth, the trial court's findings were not sufficient to support closing the courtroom to appellant's four youngest children. As discussed above, the court had no evidence to support its premise that the youngest children would be harmed by attending any part of appellant's trial. (See *People v. Garcia* (App. 2000) 710 N.Y.S.2d 345, 348 ["Moreover, when the exclusion applies to an identified family member, the trial court's reasons must be 'demonstrated and documented' in the record [citations] by specific findings adequate to permit appellate review of the order."], aff'd (N.Y. 2000) 750 N.E.2d 1049.) Neither speculation nor a naked assertion can suffice to exclude appellant's children from the courtroom, let alone the courthouse. (See *Rodriguez v. Miller* (2nd Cir. 2006) 439 F.3d 68, 74-76.) Rather, the court, by failing to conduct a particularized inquiry at which it was demonstrated that excluding the children was necessary to advance an overriding state interest, could not constitutionally bar the children from the courtroom. (See *Carson v. Fischer* (2nd Cir. 2005) 421 F.2d 83, 91-92.)

Accordingly, under the factors the United States Supreme Court delineated in *Waller v. Georgia, supra*, 467 U.S. at p. 48, appellant's Sixth Amendment right to a public trial could not give way to an overriding state interest. Besides flouting United States Supreme Court precedent, the trial

court's closing the trial to appellant's children conflicted with rulings from other jurisdictions holding that barring defendants' relatives from the courtroom infringed the defendants' public-trial rights. (See *Rodriguez v. Miller*, *supra*, 439 F.3d at pp. 73-76; *Vidal v. Williams* (2nd Cir. 1994) 31 F.3d 67, 69; *Walker v. State* (Md.App. 1999) 723 A.2d 922, 931-936; *People v. Garcia* (N.Y. 2000) 750 N.E.2d 1049; *People v. Nieves* (N.Y. 1997) 683 N.E.2d 764, 767; *People v. Gutierez* (N.Y. 1995) 657 N.E.2d 491.) Thus, the bar on appellant's four youngest children from attending any part of appellant's trial violated appellant's right to a public trial.

F. The Trial Court's Rulings And Concomitant Violations Of Appellant's Constitutional Rights Require Vacating The Death Judgment

Due to the exclusion of appellant's children from evidence and from the courtroom, appellant's death sentence must be reversed. It is reasonably possible that appellant would not have been sentenced to death if the trial court did not violate state law by barring appellant's children from being presented to, or seen by, the jury. In addition, respondent cannot show that the denial of appellant's constitutional rights to present a defense and introduce relevant mitigating evidence was harmless beyond a reasonable doubt. Furthermore, the denial of appellant's constitutional right to a public trial constitutes structural error that requires the automatic reversal of appellant's death sentence.

The trial court's state-law errors were prejudicial. Errors made under state law at the penalty phase must result in reversal of a death judgment if there is a reasonable possibility that the defendant would not have been sentenced to death absent the error. (*People v. Brown* (1988) 46 Cal.3d 432, 448.) Precluding appellant from introducing his children to the jury or having the jury observe the children hamstrung appellant's effort to

present a compelling narrative of his background and his character. (See *ante*, at pp. 134-136.) The court's erroneous rulings reduced appellant's children, as well as the effect appellant's execution would have on them and appellant's efforts to raise the children, to mere abstractions. Because the quality of the defense presentation of its mitigating evidence plays a critical role in a jury's death-sentencing determination, it is reasonably possible that appellant would not have been sentenced to death if the court had not erroneously forbidden appellant from exhibiting his children to the jury and excluded them from court.

In *Barnes v. State*, *supra*, 496 S.E.2d at pp. 687-689, the Georgia Supreme Court found a similar error to be prejudicial. The defendant in that case sought to admit photographs of his daughter, stepchildren, and nephew to "make more real and apparent to the jury" that a death sentence would adversely impact the children. (*Id.* at p. 687.) Concluding that the photos engendered sympathy, the trial court excluded the photos. On appeal, the state argued that the photographs were irrelevant and thus properly barred and that any error in their exclusion was harmless because eleven witnesses testified to what the photographs showed. (*Ibid.*) The Georgia Supreme Court, explaining that "the photographs of his child and stepchildren show that he is a father in a way that no amount of testimony could duplicate," rejected those arguments. (*Id.* at p. 689.) In this case, exhibiting appellant's children to the jury would likewise have shown more effectively than testimony that appellant is a father, that he raised the children, and that the children would be devastated by his execution. Photographs, which the trial admitted in this case, were a superior form of evidence than testimony; however, presenting the children to the jury would have more compellingly told appellant's narrative than the combination of

testimony and still photographs that the court admitted into evidence. Accordingly, the trial court's refusal to permit appellant to exhibit his children to the jury and its ban on having the children attend even a small portion of the trial was prejudicial.

In addition, this was a close case. (See *ante*, at pp. 93-94.) Because there was a reasonable possibility that appellant would not have been sentenced to death absent the trial court's errors, the state-law errors require that this Court vacate the death judgment.

Moreover, the infringement of appellant's constitutional rights to present a defense and relevant mitigating evidence also should result in reversal of appellant's death sentence. For the reasons elucidated above, respondent cannot show beyond a reasonable doubt that the denial of these rights had no impact on the death verdict. (See *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259; *Chapman v. California* (1967) 386 U.S. 18, 24.) Due to the discretionary and subjective nature of the capital-sentencing determination, respondent bears a high burden of showing that a penalty phase error is harmless. (See *ante*, at pp. 94-96.) The trial court, by denying appellant's constitutional rights to present a defense and mitigating evidence, diluted appellant's mitigating narrative, which likely, or at least possibly, contributed to the death verdict. (See Pokorak, *supra*, 30 St. Mary's L.J. at p. 446 [explaining that presenting effective narrative of capital defendant's life is only way to obtain life verdict].) As stated above, this was a close case. Respondent's inability to demonstrate that the constitutional errors had no impact on the death verdict precludes this Court from deeming the errors harmless. The overwhelming-evidence test is inappropriate for penalty phase errors. In any event, the aggravating evidence, when compared to the mitigating evidence, was not

overwhelming. (See *ante*, at pp. 96-98.)

The infringement of appellant's right to a public trial requires the automatic reversal of appellant's death sentence. The trial court, by banning appellant's children from all parts of appellant's penalty retrial, committed a structural error. (See *Johnson v. United States* (1997) 520 U.S. 461, 468-469.) Thus, prejudice is conclusively presumed. (*Waller v. Georgia*, *supra*, 467 U.S. at pp. 49-50.)

V

THE EXCLUSION OF APPELLANT'S MITIGATING EVIDENCE VIOLATED THE EVIDENCE CODE AND APPELLANT'S CONSTITUTIONAL RIGHTS

In addition to excluding defense evidence described in Claims I through IV, the trial court prohibited appellant from presenting evidence that Ivan Gonzales, Jr. would be especially damaged by appellant's execution because Ivan Jr. had been a prosecution witness, and hindered appellant's presentation of evidence of his family background. The court's rulings were evidentiary errors that also infringed appellant's constitutional rights to present mitigating evidence, rebut aggravating evidence, and have a fair and reliable capital-sentencing proceeding.

A. Facts And Procedural History

Ivan Jr. testified for the prosecution at the preliminary hearing, and the prosecution introduced his videotaped testimony at its guilt-phase case-in-chief. (See *post*, at pp. 201-202.) At the penalty phase of the first trial, the trial court barred appellant from eliciting evidence regarding the impact appellant's execution would have on Ivan Jr. based on his having been a prosecution witness. (RT 66:8419; RT 68:8724.) At the penalty retrial, at which neither party introduced Ivan Jr.'s preliminary hearing testimony or earlier statements, the court precluded appellant, primarily on relevance grounds and, secondarily, under Evidence Code section 352, from informing the jury that the prosecution used Ivan Jr.'s testimony at the first trial. (RT 82:9698-9701.)

In addition, the court excluded as irrelevant mitigating evidence of appellant's father's and uncle's backgrounds (RT 67:8611; RT 68:8626-8628, 8760-8761; RT 96:12286, 12293-12294), appellant's parents meeting each other and courting (RT 68:8761; RT 96:12294; RT 98:12512),

appellant's mother's feelings when she brought appellant home from the hospital after his birth (RT 97:12472), and the details of and explanations for appellant's mother's disapproval of appellant's relationship with Veronica (RT 98:12564-12568, 12574).

The trial court also ruled that the introduction of defense evidence that appellant was particularly supportive of Anthony, whom appellant and others believed was the product of Veronica's affair with her teenage cousin, would open the door to prosecution evidence that appellant was a bad parent who used drugs and kept a dirty house. (RT 82:9709-9710.) In light of that ruling, appellant did not present the evidence.

B. The Trial Court's Rulings Were Erroneous

The trial court erred in ruling that appellant's proffered evidence regarding Ivan Jr.'s guilt-phase testimony and appellant's family background was irrelevant and thus inadmissible. The United States Supreme Court has articulated a broad standard of relevance for mitigating evidence. Evidence that tends to prove a fact or circumstance that a factfinder could reasonably deem mitigating constitutes relevant mitigating evidence. (*Tennard v. Dretke* (2004) 542 U.S. 274, 284-285.) Each component of evidence that the trial court excluded met this "low threshold" of relevance. (*Ibid.*)

Ivan Jr. testifying as a prosecution witness at the preliminary hearing and, via the preliminary hearing videotape, at the guilt phase, was relevant mitigation. The impact appellant's execution would have on Ivan Jr. was relevant mitigating evidence because it pertained to appellant's character, a quintessential category of mitigating evidence. (See, e.g., *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *People v. Smith* (2005) 35 Cal.4th 334, 367.) The prosecution's use of Ivan Jr.'s preliminary hearing

testimony to obtain a jury verdict that rendered appellant eligible for the death penalty was probative of the impact that appellant's execution would have on Ivan Jr.: Because Ivan Jr.'s testimony would have helped bring about the result, the testimony could fairly be expected to intensify the impact the execution would have on Ivan Jr. (RT 22:1954, 1974, 2030-2031; RT 23:2263; RT 24:2297-2298, 2318, 2334, 2351.) Furthermore, appellant's character would partly determine the extent of the execution impact's increased intensity: the better appellant's character, the more devastating it would be for Ivan Jr. that he played a role in his father's execution. Accordingly, the fact that Ivan Jr. testified for the prosecution at the preliminary hearing and the prosecution introduced his testimony at the guilt phase was relevant at the penalty retrial. The trial court abused its discretion by barring the evidence.

Furthermore, the trial court's alternative holding that Evidence Code section 352 barred the evidence was error. The trial court's belief that the evidence lacked probative value tainted the trial court's weighing under section 352. Moreover, the trial court's concerns about the jury being confused or deceived by being informed that Ivan Jr. testified as a prosecution witness were overblown. There would have been nothing misleading about informing the jury at the penalty retrial that Ivan Jr. had been a prosecution witness. The prosecution called Ivan Jr. as a witness at the preliminary hearing and introduced his videotaped testimony at the guilt phase. Moreover, at the guilt phase, the prosecution relied heavily on Ivan Jr.'s videotaped preliminary hearing testimony. (See *post*, at pp. 231-232.) Although Ivan Jr.'s statements made in the days following Genny's death inculpated Veronica far more than appellant, Ivan Jr.'s testimony and prior statements as a whole formed a major component of the prosecution's case

against appellant at the guilt phase. Consequently, the penalty-retrial jury would not have been confused or deceived if it had been told that Ivan Jr. was a prosecution witness at the preliminary hearing and guilt phase.

The evidence regarding appellant's family was likewise relevant. Evidence of a capital defendant's background constitutes relevant mitigating evidence. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 318-319; *People v. Roldan* (2005) 35 Cal.4th 646, 739.) A capital defendant's family history comprises part of his background and, therefore, constitutes relevant mitigating evidence. (*Wiggins v. Smith* (2003) 539 U.S. 510, 523-525; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115; *People v. Marsh* (1984) 36 Cal.3d 134, 144, fn. 8.) Accordingly, the trial court abused its discretion by sustaining the prosecution's relevance objections to appellant's evidence of his family background.

In addition, Belia Gonzales's disapproval of appellant's relationship with Veronica and the reasons for her disapproval were also relevant. Appellant's relationship with Veronica, his wife and the alleged alternative perpetrator, pertained to appellant's background, as well as the minor-participation and substantial-domination mitigating factors. (See Pen. Code, § 190.3, factors (g), (j), and (k).)

The trial court also abused its discretion by ruling that evidence of appellant being supportive of Anthony, whom he raised as his son despite not being the biological father of the illegitimate child, would open the door to drug-use and dirty-house evidence. Appellant sought to introduce the evidence to show that because appellant did not single out Anthony for abuse or mistreatment, despite having a reason for doing so, he was not the person who singled out Genny for maltreatment. He did not seek to use the evidence to prove that he was a good father. The scope of proper rebuttal

was limited to rebutting the "character trait [appellant offered] in his own behalf." (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1193.) Because appellant did not attempt to prove that he was a good father, the court erred in ruling that the prosecution would have been entitled to use drug-use and dirty-house evidence to rebut an assertion that appellant did not try to make.

C. The Evidentiary Rulings Infringed Appellant's Constitutional Rights

Beyond being evidentiary errors, the trial court's rulings violated appellant's right to present relevant mitigating evidence provided by the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 17 of the California Constitution. As explained above, the evidence proffered at the penalty retrial was relevant. Because the "low threshold for relevance [was] met, the 'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence." (*Tennard v. Dretke*, *supra*, 124 S. Ct. at p. 2570, quoting *Boyde v. California* (1990) 494 U.S. 370, 377-378.) Therefore, the trial court's exclusion of the relevant mitigating evidence discussed above was *Skipper* error per se. (See *Skipper v. South Carolina* (1986) 476 U.S. 1, 7; *People v. Brown*, *supra*, 31 Cal.4th at pp. 577-578 [articulating per se standard for *Skipper* error].) The trial court's ruling that the evidence of appellant's relationship with Anthony would open the door to drug-use and dirty-house evidence also violated appellant's right to present mitigating evidence because, as the court was aware, the ruling impelled appellant not to present the evidence and was thus the functional equivalent of barring the evidence.

Additionally, the court's exclusion of the execution-impact evidence pertaining to Ivan Jr.'s preliminary hearing testimony violated appellant's

due process rights, as guaranteed by the Fourteenth Amendment and article I, sections 7 and 15, and appellant's right to a fair, accurate, and reliable sentencing hearing as guaranteed by the Eighth and Fourteenth Amendments and article I, section 17. Because this Court has interpreted factor (a) broadly to permit the generous introduction of victim-impact evidence, constitutional guarantees of fundamental fairness dictate that appellant be permitted to present execution-impact evidence. (See Logan, *When Balance and Fairness Collide: An Argument for Execution Impact Evidence in Capital Trials* (1999-2000) 33 U. Mich. J. L. Reform 1, 41-46; King & Norgard, *What About Our Families? Using the Impact on Death Row Defendants' Family Members as a Mitigating Factor in Death Penalty Sentencing Hearings* (1999) 26 Fla. St. U. L.Rev. 1119, 1160-1161.) The trial court's refusal to permit the jury to be informed that the prosecution used Ivan Jr.'s preliminary hearing testimony to convict appellant and establish his death-eligibility denied appellant impact-evidence parity.

D. The Errors Were Prejudicial

This Court should reverse appellant's death sentence. If appellant had been permitted to inform the jury that Ivan Jr. testified as a prosecution witness at the preliminary hearing and guilt phase, present the excluded evidence of his family background, and elicit evidence of his relationship with Anthony without opening the door to drug-use and dirty-house evidence, there is a reasonable possibility that appellant would not have been sentenced to death. (See *People v. Brown* (1988) 46 Cal.3d 432, 448.)

Because evidence of appellant's personal culpability was questionable and this was a close case (see *ante*, at pp. 85-87), the information withheld from the jury could well have tipped the scales away from death. The added impact appellant's execution would have on Ivan

Jr., which related to appellant's character, could have played a significant role in the jury's weighing process. The jury at the first trial, which was aware of Ivan Jr.'s role in the prosecution securing a conviction and special-circumstance finding, hung at the penalty phase, and the jury at the penalty retrial, which did not have that information, returned a death verdict. It was reasonably probable that the exclusion of the evidence at the retrial caused the disparate results. Likewise, the evidence about appellant's family that the court's rulings prevented the jury from hearing at the penalty retrial also could have had significant weight; the evidence that appellant came from an upstanding family and that his father and uncle served their county's armed forces would have underscored appellant's penalty-phase defenses that he was, at most, a minor participant in the offense and that appellant's character had redeeming value. Belia Gonzales's testimony regarding her disapproval of her son's relationship with Veronica would have buttressed the substantial-domination defense. Appellant's relationship with Anthony cast doubt on the degree of appellant's participation in the offense and shed positive light on appellant's character. At the very least, respondent cannot demonstrate that the errors were harmless beyond a reasonable doubt.[54] (See *Chapman v. California* (1967) 386 U.S. 18, 24.) Thus, this Court should vacate the death judgment.[55]

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[54] Due to the discretionary nature of the capital-sentencing determination, respondent has a high burden of showing that a penalty-phase error is harmless. (See *ante*, at pp. 94-96.)

[55] The overwhelming-evidence test is not an appropriate harmless-error analysis for a penalty-phase error. In any event, the aggravating evidence, when weighed against all of the mitigating evidence, was not overwhelming. (See *ante*, at pp. 96-98.)

VI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL DUE TO THE JURY'S FAILURE TO DELIBERATE ON AND FIND AN ESSENTIAL ELEMENT OF THE TORTURE-MURDER SPECIAL CIRCUMSTANCE

The torture-murder special circumstance was the sole basis for appellant's death-eligibility. Although the jury signed a verdict form signifying that it had found true the lone special circumstance the prosecution had alleged, immediately after the conclusion of the first trial two jurors revealed to the trial court that the jury did not find that appellant had intended to kill Genny, an essential element of the torture-murder special circumstance. In separate conversations with the trial court, the jurors said that the jury believed that appellant had lacked the intent to kill. A subsequent investigation uncovered that the jury failed to deliberate on the intent-to-kill element. Despite these fatal flaws with the special-circumstance verdict, the trial court denied appellant's motion for a new trial on the special-circumstance finding. Consequently, appellant sits on death row although the jury never deliberated on or found an element necessary to establish his eligibility for the death penalty.

A. Facts And Procedural History

After declaring a mistrial at the penalty phase of the first trial, at which the jury was deadlocked, the trial court invited the jurors to speak to counsel or the court about the case. (RT 73:9325-9326.) The court cautioned the jurors that what they said to counsel may be revealed in court. (RT 73:9526.) The court held separate conversations with two jurors, Numbers 6 and 12, who each in response to the court asking how the jury had analyzed the intent-to-kill issue, indicated that the jury's consensus was

that appellant had not intended to kill Genny. One of the jurors explained that the jury believed that Genny's death was unintentional. (RT 74:9330-9331; CT 13:3038.)

After learning about the jurors' statements to the trial court,[56] defense counsel spoke to nine of the jurors who had participated in the guilt-phase deliberations. (CT 11:2415.) Five of the jurors signed declarations, and four declined the defense request to sign declarations. (CT 11:2519.) In all five juror declarations, the jurors stated that the jury found the torture-murder special circumstance solely on the presence of torture. Four of the jurors declared that the jury did not find that appellant had intended to kill Genny. Three stated that the jury did not separately analyze whether he had intended to kill, and a fourth wrote that the jury did "not really" discuss or emphasize the issue. In addition, three of the jurors expressed their belief that appellant had not intended to kill, and another opined that he may not have intended to kill. (CT 11:2436-2440.) Besides the five jurors who stated in declarations that the jury did not discuss or find true the intent-to-kill element, a sixth juror made similar statements to defense counsel but did not sign a declaration, and a seventh juror made similar statements to the trial court but did not speak to defense counsel. (CT 11:2416-2418, 2436-2440.)

After the defense conducted its investigation, the prosecutor spoke to and obtained declarations from eight jurors. In those declarations, the jurors stated that the foreperson read the jury instructions multiple times and wrote out and posted the elements of the special circumstance. Four jurors

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[56] The court disclosed this information to counsel and appellant during the first on-the-record proceeding following the court's declaration of a mistrial. (RT 74:9331.)

stated that they discussed the facts in relation to whether appellant had intended to kill. One said that he discussed with another juror whether appellant had intended to kill. Additionally, seven jurors expressed a personal belief that appellant had possessed an intent to kill, though some of them had previously articulated a contrary view to the court or defense counsel. (CT 11:2467-2469, 2472-2483.)

Prior to the penalty retrial, appellant moved for a new trial on the special-circumstance finding. (CT 11:2409-2440.) In the motion, appellant argued that jurors' statements that the jury did not deliberate on or find that appellant intended to kill constituted statements of objective facts that were not barred by Evidence Code section 1150. (CT 11:2419-2426.) He also asserted that the exclusion of the juror declarations would violate appellant's Fifth, Eighth, and Fourteenth Amendment rights. (CT 11:2426-2429.) Lastly, he argued that the jury's failure to deliberate on or find an essential element of the torture-murder special circumstance required a new trial, either on nonstatutory grounds or due to jury misconduct. (CT 11:2429-2434.)

Arguing that Evidence Code section 1150 barred consideration of the evidence upon which appellant relied and that the jury committed no misconduct, the prosecution opposed the motion for a new trial. (CT 11:2455-2483.) The trial court held argument on the new-trial motion. (RT 81:9502- 9549.)

In a written ruling, the trial court denied the motion for a new trial. Deeming the absence of discussion or a jury finding not to be objectively verifiable events subject to corroboration, the court ruled that Evidence Code section 1150 barred the admission of the declarations proffered in support of appellant's new-trial motion. The court also determined that

appellant's rights to due process and a fair trial did not require a constitutional override to Evidence Code section 1150's bar.[57] Because the court ruled that the declarations were inadmissible, the court found no issue of fact necessitating an evidentiary hearing and thereby denied the motion for new trial. (CT 11:2510-2513.)

B. The Trial Court Erred In Denying Appellant's Motion For A New Trial

The denial of appellant's motion for a new special circumstance trial was error. Although this Court typically reviews a ruling on a new-trial motion for an abuse of discretion (*People v. Coffman* (2004) 34 Cal.4th 1, 128; *People v. Navarette* (2003) 30 Cal.4th 458, 526), the denial of a new-trial motion based on a jury's dereliction of its duties is reviewed de novo. (See *People v. Wisely* (1990) 224 Cal.App.3d 939, 947.) Basing its denial of appellant's new-trial motion on an erroneous ruling that appellant lacked competent evidence in support of the motion,[58] the trial court erred by denying the motion.[59]

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[57] The court based its conclusion on the shortcomings it perceived in the declarations. The court, however, did not consider appellant's right to present evidence of the jurors' statements to the trial court that the jury concluded that appellant did not intend to kill Genny, though that evidence presented none of the flaws that the court perceived in the declarations. (CT 11:2510-2513.)

[58] Of course, the party moving for a new trial must present admissible evidence to support the motion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1046.)

[59] If this Court does not review de novo the denial of the motion for a new trial, this Court should find that the trial court abused its discretion. (See *ante*, at p. 50 [trial court lacked discretion to commit legal error].)

1. Evidence Code Section 1150 Did Not Bar Consideration of Statements in Jurors' Declarations That the Jury Did Not Deliberate on or Find the Intent-to-Kill Element of the Torture-Murder Special Circumstance, or of Jurors' Statements to the Trial Court That the Jury Determined That Appellant Had Not Intended to Kill Genny

The trial court erred in ruling that Section 1150 rendered inadmissible the pertinent portions of the juror declarations appellant submitted in support of his motion for a new trial. Jurors' statements regarding whether the jury analyzed or found whether appellant had intended to kill Genny, an essential element of the torture-murder special circumstance, described objectively ascertainable events that were subject to corroboration. The statements were therefore admissible under Evidence Code section 1150.[60]

Evidence Code section 1150 creates a dichotomy between objectively ascertainable overt acts and individual jurors' subjective reasoning processes. (*People v. Steele* (2002) 27 Cal.4th 1230, 1260-1261.) "[J]urors may testify to 'overt acts' — that is, such statements, conduct, conditions, or events as are 'open to sight, hearing, and the other senses and thus subject to corroboration' — but may not testify to 'the subjective reasoning processes of the individual juror ....'" (*In re Stankewitz* (1985) 40 Cal.3d 391, 398, quoting *People v. Hutchinson* (1969) 71 Cal.2d 342, 349-350.)

The absence of deliberations on the intent-to-kill element was an

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[60] Appellant does not contend that the declarations were admissible in their entirety.

objectively ascertainable overt act subject to corroboration. The jurors were able to verify whether the jury discussed or analyzed whether appellant had intended to kill Genny. Statements made by jurors during deliberations are admissible under Evidence Code section 1150. (*In re Stankewitz*, *supra*, 40 Cal.3d at p. 398.) Likewise, statements not made and topics not discussed are similarly verifiable. Whether the jury engaged in deliberations on an essential element of a special circumstance is not an individual juror's subjective reasoning process that Evidence Code section 1150 bars. For these reasons in *People v. Ramos* (2004) 34 Cal.4th 494, 518, fn. 7, this Court held that the absence of discussion during jury deliberations is indeed admissible under Evidence Code section 1150. This Court thereby rejected the proposition that the absence of an event was inadmissible under section 1150; that premise undergirded the trial court's exclusion of the contents of the juror declarations that appellant submitted in support of his motion for a new trial. This Court's holding in *Ramos* requires the admission of jurors' statements that the jury did not deliberate on or separately analyze whether appellant had intended to kill Genny.[61]

Likewise, evidence that jurors failed to separately find whether appellant had intended to kill Genny, and thereby violated the trial court's instructions that it could not find true the special circumstance without

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[61] It is immaterial that appellant sought to use the absence of discussion to impeach a verdict and the prosecution in *Ramos* used the absence of discussion to rehabilitate a verdict. The text of Evidence Code section 1150 provides for a single standard for any "inquiry as to the validity of a verdict" regardless of whether the party proffering the evidence seeks to impeach or rehabilitate a verdict. (Evid. Code, § 1150.) This Court has applied the evidentiary provision to bar evidence seeking to rehabilitate a verdict through evidence of jurors' subjective thought processes. (See *In re Stankewitz*, *supra*, 40 Cal.3d at pp. 402-403.)

unanimously finding that each element of the special circumstance had been proven beyond a reasonable doubt, was admissible under Evidence Code section 1150. The finding of an essential element of the torture-murder special circumstance is an overt act subject to corroboration, and the failure to make such a finding is similarly verifiable. Because the jury must determine whether the prosecution has proven every essential element beyond a reasonable doubt (*United States v. Gaudin* (1995) 515 U.S. 506, 510), the finding of whether an essential element has been proven is an overt act subject to corroboration. It is something to which all twelve deliberating jurors must agree. The determination of such an agreement constitutes an overt act distinct from the subjective thought processes of individual jurors that Evidence Code section 1150 renders inadmissible. Section 1150 bars evidence of a juror's subjective thoughts, such as a juror's interpretation of instructions or the effect that an item of evidence had on a juror's views of a case. (*People v. Steele*, *supra*, 27 Cal.4th at p. 1261.) A juror's thought processes are internal and cannot be corroborated or verified. The jury as a whole making a finding that it was required to make, on the other hand, is an explicit act.[62] Determining whether the jury has made such a finding does not require discerning an individual juror's thoughts; rather, it requires reviewing the statements and votes — both overt acts — made by the jury during deliberations.

Whether the jury has found an element of an offense is something

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[62] This Court in *People v. Romero* (1982) 31 Cal.3d 685 did not consider whether jury findings on elements of crimes constitute overt acts. Rather, the Court narrowed the admissibility of jurors' statements under Evidence Code section 1150 to evidence of improper influences on the jury. (*Id.* at p. 690.) In *People v. Stankewitz*, *supra*, 49 Cal.3d at pp. 397-398, this Court eliminated that limit on admissibility.

that can be, and often is, recorded as a special finding on a hybrid verdict form. (See, e.g., *People v. Farmer* (1989) 47 Cal.3d 888, 919-920.) A jury finding of an essential element can be reduced to a special finding because it is an overt fact subject to corroboration. In contrast, a juror's thought processes, such as how convincing he or she found an expert witness's testimony or the impact arguably cumulative evidence had on his or her determination of the perpetrator's identity, typically cannot be recorded as a special finding. Even where a juror's subjective thought processes can be reduced to a yes or no question, such as whether the juror believed a specific witness was credible, placing that information on a verdict form would be inappropriate and unduly interfere with the jury's deliberative process.

If an item in a juror declaration can sensibly be made into a special finding on a hybrid verdict form, it should be admissible under Evidence Code section 1150. An appropriate subject for a special finding would constitute an admissible overt act, rather than an inadmissible subjective thought process. That whether the jury found the intent-to-kill element of the torture-murder special circumstance could have properly been made a special finding accompanying the special-circumstance verdict demonstrates that statements in jurors' declarations regarding whether such a finding was made described an overt act. Thus, jurors' statements that the jury did not find, or did not separately find, whether appellant had intended to kill Genny were admissible under Evidence Code section 1150. The trial court erred in ruling that every aspect of the juror declarations was inadmissible.

The jurors' statements in the declarations that the jury found the torture-murder special circumstance on the presence of torture alone were

admissible for a limited purpose. The statements could not have been used to show that the jurors misunderstood the instructions, because that inference would have implicated the jurors' subjective thought processes. (See *People v. Steele*, *supra*, 27 Cal.4th at p. 1261.) Nevertheless, the statements could have been used to show that the jury did not find the intent-to-kill element. For the reasons described above, statements that the jury found fewer than all of the essential elements concerned overt acts that were admissible pursuant to Evidence Code section 1150.

Likewise, two jurors' statements to the trial court, made immediately after the trial's conclusion, that the jury did not believe that appellant had possessed an intent to kill, were admissible under Evidence Code section 1150. Their statements constituted evidence of a jury finding that appellant had not intended to kill Genny. The statements also showed that the jury did not find that appellant had intended to kill her. Because jury findings on an essential element are overt acts admissible under Evidence Code section 1150, the evidentiary provision did not render the jurors' statements to the trial court inadmissible.

Accordingly, the jurors' statements regarding the jury's failure to deliberate or find the intent-to-kill element were not barred by Evidence Code section 1150. The trial court erred in ruling that appellant did not present admissible evidence to support his motion for a new trial and thereby denying appellant's motion on that basis.

2. Even If This Court Construes the Jurors' Statements to Concern Their Subjective Thought Processes, Evidence Code Section 1150 Should Not Render the Jurors' Statements to the Court or the Subsequently Obtained Juror Declarations Inadmissible

Assuming arguendo that this Court concludes that the jurors'

statements pertain to their subjective thought processes, this Court should nevertheless determine that the statements were admissible. The policies underlying the evidentiary provision would not be advanced by excluding the evidence, and countervailing policies militate that the evidence be admissible.

This Court has listed three rationales for Evidence Code section 1150 and its common-law predecessor: to "prevent instability of verdicts, fraud, and harassment of jurors." (*Kollert v. Cundiff* (1958) 50 Cal.2d 768, 773, overruled on other grounds by *People v. Hutchinson*, *supra*, 71 Cal.2d 342.) The United Supreme Court has articulated similar rationales. (See *McDonald v. Pless* (1915) 238 U.S. 264, 267-268, quoted in *Tanner v. United States* (1987) 483 U.S. 107, 119-120.) These rationales do not justify the exclusion of the jurors' statements in this case.

Barring the admission into evidence of the two jurors' statements to the trial court regarding the jury finding that appellant had not intended to kill Genny would not prevent juror harassment or fraud. In response to the court's invitation to jurors that they could speak with the court or counsel immediately after the trial, Seated Juror Numbers 6 and 12 voluntarily met with the trial court on their own initiative. Moments earlier, the court had warned them that the statements they make to counsel could wind up being presented in court. The court asked them individually how the jury had analyzed whether appellant had intended to kill Genny. Each juror's response that the jury concluded that appellant had lacked that intent came in response to the court's open-ended question. The court did not ask a question that could have confused or tricked the jurors. Nor did the court pose a question that was designed to elicit a response that would have undermined the special-circumstance verdict. Rather, a neutral arbiter

asked a neutral question. The possibility of fraud is further nullified because the statements regarding whether the jury found that appellant had possessed the intent to kill can be corroborated or refuted by the jurors themselves. Moreover, under these circumstances, the statements to the trial court appear reliable and trustworthy. Deeming the jurors' responses inadmissible under a mechanical application of Evidence Code section 1150 would not prevent juror harassment or fraud.

Furthermore, excluding the jurors' statements to the trial court does not sufficiently support the policy of preserving the stability of jury verdicts. The court's conversations with the jurors occurred immediately after the trial ended. Those conversations could hardly be more dissimilar to a situation in which counsel speaks to jurors, whose memories have faded, years or decades after the trial. The nearness in time to the jury deliberations, the open-endedness of the trial court's question, and the identity of the questioner negated the possibility that an advocate would try to fill in the gaps in jurors' memories by spurring jurors to "recall" events in a manner consistent with his or her client's interests. Moreover, if the trial court had admitted the statements and granted the motion for a new special-circumstance trial, the trial witnesses' memories would not have grown stale and a retrial would have been feasible, especially given the necessity for a penalty retrial following the jury deadlock at the penalty phase.

Similarly, exclusion of the jurors' statements in the declarations appellant appended to his new-trial motion that the jury did not discuss or find whether appellant had intended to kill Genny would not sufficiently advance the purposes of Evidence Code section 1150. Barring the statements would not prevent fraud; appellant merely spoke to jurors to corroborate Seated Juror Numbers 6 and 12's statements to the court.

Appellant did not invent allegations that the jury failed to find the intent-to-kill element; that information had already come to light. In addition, under the unusual circumstances of this case, disregarding the jurors' statements in the declarations would have little impact in preventing juror harassment. Defense counsel did not contact the jurors to embark on a fishing expedition "in the hope of discovering something which might invalidate the finding." (*McDonald v. Pless*, *supra*, 238 U.S. at pp. 267-268, quoted in *Tanner v. United States*, *supra*, 483 U.S. at pp. 119-120.) Rather, defense counsel contacted the jurors in response to the trial court revealing that two jurors had told him that the jury concluded that appellant had not intended to kill Genny. Consequently, the defense investigation of the jury in this case differs markedly from an investigation that takes place where the trial court provides no indication that the jury failed to find an essential element of a death-eligibility factor.

Likewise, excluding the statements in the declarations under Evidence Code section 1150 would not sufficiently advance the state's interest in preserving the stability of jury verdicts. As with the statements made to the trial court, the statements in the juror declarations were made close in time to the trial. Significantly, appellant obtained the juror declarations shortly after learning about Seated Juror Numbers 6 and 12's statements to the court and in order to corroborate those statements. Moreover, the stability of few verdicts would be affected by the admission of the jurors' statements in this case. It is unusual for jurors to inform the court immediately after a trial that they had not found an essential element of the lone special circumstance upon which a defendant's death-eligibility is based.

In addition to the purposes of Evidence Code section 1150 not being

met by the exclusion of the evidence, countervailing policy considerations further mandate the admissibility of the jurors' statements and declarations. The state has an interest in ensuring that a special circumstance not be found unless the jury finds each of its essential elements to be proven beyond a reasonable doubt. As a matter of state law and policy, the torture-murder special circumstance should not be found unless the jury has found that the prosecution has proven both a defendant's intent to kill and intent to torture. This policy is most important and fundamental when the torture-murder special circumstance is the lone basis for a defendant's death-eligibility. In order for the capital sentencing scheme to function properly, a person cannot be found to be death-eligible unless the jury has concluded that all the elements of at least one special circumstance have been proven beyond a reasonable doubt. Just as the state has a policy interest in avoiding wrongful convictions (see Sen. Res. No. 44 (2003-2004 Reg. Sess.) [creating the California Commission on the Fair Administration of Justice]), the state has a policy interest in not having people sit on death row, and in not executing people, if they are not eligible for a death sentence.

There are circumstances in which compelling, competing policies require that the evidentiary bar in Evidence Code section 1150 and similar evidentiary provisions in other jurisdictions give way in order to advance the other policies that would be thwarted by a mechanical application of the evidentiary bar. When a jury bases a verdict on racial or ethnic prejudice, the evidentiary bar on jurors' deliberative processes cannot shield the illegitimate verdict from scrutiny. (*Tapia v. Barker* (1984) 160 Cal.App.3d 761, 766-767 [admitting juror declaration regarding another juror's anti-Mexican prejudice and using that prejudice as primary basis for finding jury

misconduct]; *Carson v. Polley* (5th Cir. 1982) 689 F.2d 562, 581-582.) A juror's racial bias, and the impact of that bias on the way in which the juror perceives the evidence, is a subjective reasoning process of an individual juror that the terms of Evidence Code section 1150 would ordinarily prohibit. (See Gold, *Juror Competency to Testify That a Verdict Was the Product of Racial Bias* (1993) 9 St. John's J. Legal Comment 125, 127-128.) Yet, the evidence is admissible in this jurisdiction. As with evidence of a juror's racial prejudice, evidence that the jury did not deliberate on or find an essential element of the lone special circumstance that renders a capital defendant death-eligible should also be admissible even if this Court considers the evidence to entail only ordinarily inadmissible subjective reasoning processes.

Significantly, there were no substantial countervailing policy interests demanding the admissibility of juror declarations in *People v. Romero* (1982) 21 Cal.3d 685, 695, the principal precedent on which the trial court relied in this case to exclude the jurors' statements and declarations. In that case, in which the defendant was charged with two counts of burglary, the jury's alleged error caused the defendant to be convicted of count two and acquitted of count one, rather than convicted of count one and acquitted of count two. As this Court observed, erroneously convicting a defendant of the wrong second-degree burglary count created no miscarriage of justice. (*Id.* at p. 696.) Getting sentenced to death, and ultimately executed, though the jury found only one of two elements of the lone special circumstance, is an infinitely larger injustice than the one that occurred in *Romero*. Accordingly, *Romero* presents no obstacle to not applying Evidence Code section 1150, as a matter of state law and policy, to the jurors' statements in this case.

A policy-based exception to applying Evidence Code section 1150 to the jurors' statements and declarations regarding the failure to find or deliberate on the intent-to-kill element need not be a per se rule of admissibility with broad application. The balance of interests between the policies underlying Evidence Code section 1150 and the policies behind ensuring that people are not improperly found to be death-eligible would be markedly different in a run-of-the-mill state habeas petition alleging jury misconduct that was discovered by the defendant over a dozen years following the trial. The trial judge's role as the person who uncovered the jury's failure in this case to find the intent-to-kill element is critical to the analysis of this claim. The trial court was a neutral arbiter who had no interest in undermining the verdict over which it had presided. Additionally, it was illogical for the court to inquire, sua sponte, into a seemingly proper jury deliberation and then refuse to consider the results of the inquiry after discovering that the verdict was apparently invalid. For these reasons, this Court could narrowly shape the exception to applying Evidence Code section 1150 to the unusual facts of this case.

3. The Exclusion of Jurors' Statements Regarding the Jury Finding, or Lack Thereof, of the Intent-to-Kill Element of the Torture-Murder Special Circumstance under Evidence Code Section 1150 Violated Appellant's Constitutional Rights

The trial court's ruling that jurors' statements regarding whether the jury deliberated on or found the intent-to-kill element could not be considered in passing upon his motion for a new trial violated appellant's Eighth and Fourteenth Amendment rights, as well as his rights under article I, sections 7, 15, and 17 of the state constitution, to a fair trial, due process of law, and a fair and reliable capital-sentencing determination. The United

States Supreme Court has recognized that "there might be instances in which [the] testimony of the juror could not be excluded without 'violating the plainest principles of justice' in the gravest and most important cases." (*McDonald v. Pless* (1915) 238 U.S. 264, 268-269.) This is such a case.

The due process clause of the Fourteenth Amendment places limits on a state's power to fashion evidentiary rules. (See *Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) The exclusion of defense evidence violates a defendant's constitutional rights if the evidence is favorable and critical to the defense, so long as the state lacks an overriding interest in maintaining the integrity of the adversarial process by excluding the evidence. (See *ante*, at pp. 64-65.) The jurors' statements regarding the intent-to-kill element of the torture-murder special circumstance were both favorable and crucial to appellant's new-trial motion. The jury's failure to find an essential element was favorable to the defense: It requires granting appellant a new trial. (See *post*, at pp. 174-180.) The jurors' statements were critical to the defense: Without the statements, appellant lacked competent evidence in support of his motion for a new trial.

The state had no countervailing interest in excluding the evidence. Because the jurors' statements described overt acts that were admissible under Evidence Code section 1150, the state's interest in maintaining the evidentiary rule could not have supported the exclusion of the evidence. Moreover, the evidentiary bar did not advance the state's interest in preserving the integrity of the jury system; the Legislature has decided that admitting into evidence jurors' statements about overt acts protects the jury

system.[63] (*People v. Hutchinson*, *supra*, 71 Cal.2d at pp. 349-350.)

Even if Evidence Code section 1150 renders the jurors' statements inadmissible, the state's interest in enforcing the evidentiary bar failed to outweigh appellant's interest in presenting evidence that the jury failed to find an essential element of the lone death-eligibility factor that the prosecution alleged. Excluding the evidence under Evidence Code section 1150 did not advance the state's interests in applying the evidentiary rule to this case. As explained above (see *ante*, at pp. 165-167), exclusion of the evidence did not support the purposes of the rule, which are to prevent harassment and fraud and preserve the stability of jury verdicts.

In addition, the state's interest in ensuring the reliability of the capital-sentencing determination coincided with appellant's interest in the admission of the jurors' statements to the court and juror declarations that corroborated those statements. The capital-sentencing determination cannot be fair and reliable if the jury has not found beyond a reasonable doubt all of the elements of any special circumstance. (See *post*, at pp. 175-176.) The state's interest in preserving the stability of a jury verdict was limited by the Eighth and Fourteenth Amendments' requirement that the capital-sentencing verdict be fair, accurate, and reliable; the state had no legitimate interest in upholding a death judgment for which the very basis of appellant's death-eligibility was not properly and unanimously found by the jury.

Moreover, the Eighth and Fourteenth Amendment and article I,

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[63] Contrary to this Court's statement in *People v. Cudjo*, *supra*, 6 Cal.4th at p. 611, a trial court's misapplication of an evidentiary rule can violate a defendant's constitutional rights to a defense. (See *ante*, at pp. 72-75.)

section 17 right to a fair, accurate, and reliable capital-sentencing determination provided a separate basis for admitting the jurors' statements to the court and the jurors' declarations despite the evidentiary bar. (See *Jones v. United States* (1999) 527 U.S. 373, 416, fn. 19 (dis. opn. by Ginsburg, J.).) For the reasons discussed in the due process analysis, when a jury had not found all of the essential elements of the lone death-eligibility factor, using Evidence Code section 1150 to let the fundamentally flawed verdict evade scrutiny infringed appellant's right to a fair, accurate, and reliable capital-sentencing determination.

The circumstances of this case are rare; jurors rarely inform the trial judge immediately after the trial that they did not make the requisite finding underlying the special-circumstance verdict. Holding that appellant's Eighth and Fourteenth Amendment rights required the admissibility of the jurors' statements regarding not finding the intent-to-kill element would not eviscerate Evidence Code section 1150. The constitutional right to the admission of juror declarations would apply only to cases in which jurors reveal to the judge immediately after the trial that an essential element underlying the defendant's death-eligibility was never found proven.

The United States Supreme Court decision in *Tanner v. United States*, *supra*, 483 U.S. at pp. 126-127, that the Sixth Amendment does not require admission of juror affidavits, does not control this case. Appellant's claim that Evidence Code section 1150 must yield to his constitutional rights does not arise under the Sixth Amendment. In addition, the Supreme Court based its decision on the availability of other mechanisms for ensuring the defendant's right to a competent jury. (*Id.* at p. 127.) Where, as here, the issue is whether the jury found an essential element of a special circumstance, the jurors' statements to the trial judge and in the declarations

comprise the only means for ascertaining whether the jury properly found appellant to be death-eligible. Also, the Supreme Court in *Tanner* expressed an overriding concern with protecting "jury deliberations from intrusive inquiry." (*Ibid.*) In this case, however, it was jurors themselves who approached the trial court after the trial and, on their own accord, revealed that the jury concluded that appellant lacked the requisite intent to kill. Defense counsel commenced the investigation in response to the court stating on the record the contents of those conversations.

In sum, the state's interest in enforcing Evidence Code section 1150 must yield to appellant's rights to due process, a fair trial, and a reliable capital-sentencing determination. The ruling that the jurors' statements regarding the intent-to-kill finding were inadmissible under Evidence Code section 1150 violated those rights.

4. The Jury's Failure to Deliberate on or Find the Intent-to-Kill Element of the Torture-Murder Special Circumstance Demands that Appellant Be Given a New Trial

There was competent evidence in the trial record that the jury did not deliberate on or find an essential element of the lone special circumstance that rendered appellant eligible for the death penalty. That evidence, if credited, provided grounds for the trial court to have granted appellant's motion for a new trial.

This Court established in *People v. Fosselman* (1983) 33 Cal.3d 572, 582, that a trial court may grant a motion for a new trial that is not based on the grounds enumerated in Penal Code section 1181 if the defendant was denied his right to due process of law during the trial proceedings. (See also *People v. Mayorga* (1985) 171 Cal.App.3d 929, 940 ["new trials may be ordered for nonstatutory reasons when an error has

occurred resulting in the denial of defendant's right to a fair trial, and the defendant has had no earlier opportunity to raise the issue"].) The jury's failure to deliberate on or find the intent-to-kill element violated appellant's due process rights, among other constitutional rights, and entitled appellant to a new trial on nonstatutory grounds.[64]

The due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (*United States v. Gaudin*, *supra*, 515 U.S. at p. 510, quoted in *United States v. Booker* (2005) __ U.S. __, __, 125 S. Ct. 738, 747, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476-477.) This requirement applies equally to criminal offenses and special circumstances. (See *Ring v. Arizona* (2002) 536 U.S. 584, 609.)

The Eighth Amendment also demands that every essential element of a special circumstance be found beyond a reasonable doubt. Under the California capital-sentencing scheme, special circumstances "play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) Under the Eighth Amendment, there is greater constitutional scrutiny of the death-eligibility determination

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[64] The trial court did not question that a motion for a new trial was a proper vehicle for appellant to seek vindication of his rights. Especially given the fact that appellant was already facing a penalty retrial, it was vastly more efficient for appellant to seek relief in a new-trial motion than, for the first time, on appeal. (See *People v. Fosselman*, *supra*, 33 Cal.3d at p. 582 [explaining justice would be expedited by having trial court consider nonstatutory bases for new trial].)

than the assessment of a capital defendant's deathworthiness. (See *Jones v. United States* (1999) 527 U.S. 373, 381 [selection phase requires only "'broad inquiry' into all 'constitutionally relevant mitigating evidence'"]; *Buchanan v. Angelone* (1998) 522 U.S. 269, 275-276 [noting different constitutional treatment accorded to eligibility phase as opposed to selection phase].) "It is in regard to the eligibility phase that we have stressed the need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition." (*Id.* at pp. 275-276.) In order for a special circumstance to channel and limit a jury's discretion, the Eighth Amendment, as well as the Sixth Amendment, demands that the jury find every essential element of that special circumstance. (See *Ring v. Arizona*, *supra*, 536 U.S. at p. 609; *Zant v. Stephens*, *supra*, 462 U.S. at p. 878.) The Eighth Amendment's requirement for heightened reliability of a capital-sentencing determination further necessitates that every element be proven beyond a reasonable doubt. (See *Lankford v. Idaho* (1991) 500 U.S. 110, 125, fn. 21 [noting death is different and requires heightened reliability].)

The jury's failure to find that appellant intended to kill Genny compels that appellant receive a new trial. Because the Sixth, Eighth, and Fourteenth Amendments and article I, sections 7, 15, 16, and 17 of the California Constitution require that the jury find beyond a reasonable doubt every element of the torture-murder special circumstance (see *Ring v. Arizona*, *supra*, 536 U.S. at p. 609; *Zant v. Stephens*, *supra*, 462 U.S. at p. 878; *In re Winship* (1970) 397 U.S. 358, 364), merely finding the special circumstance true is insufficient; the special-circumstance verdict must be based on a finding that every element has been proven. Moreover, the trial court instructed the jury that it could not find the torture-murder special

circumstance true unless it found all of the elements proven beyond a reasonable doubt. (CT 10:2283; RT 63:8201-8202.) By returning a true verdict on the special circumstance without finding all of the elements proven beyond a reasonable doubt, the jury failed to follow the court's instructions. Consequently, the verdict is contrary to law and must be vacated. (See *People v. Williams* (2001) 25 Cal.4th 441, 451, fn. 6.) Letting the verdict stand would render impotent appellant's right to have the jury find every element of the special circumstance and would deprive appellant of a remedy.

The record contains uncontradicted evidence, in the two jurors' post-trial statements to the trial court and declarations submitted in support of appellant's motion for a new trial, that the jury did not find beyond a reasonable doubt that appellant intended to kill Genny. That evidence undermines the presumption that the special-circumstance verdict is valid. Although the jury was instructed to find the torture-murder special circumstance true only if it found every element proven, the jury was instructed that intent to kill was an element of the special circumstance, and the special-circumstance verdict form mentioned the intentional-murder requirement (CT 9:2121; CT 10:2283; RT 63:8201-8202),[65] the jurors themselves said immediately following and shortly after the trial that the jury did not find that appellant had intended to kill Genny. Consequently, the direct evidence from the jurors that the jury failed to make the intent-to-kill finding precludes an inference from the instructions, the verdict form, or the verdict that the jury did find that appellant had harbored an intent to

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[65] Significantly, the verdict form did not specify that appellant himself, rather than Veronica, needed to have had an intent to kill. (CT 9:2121.)

kill.

The jury declarations the prosecution attached to its points and authorities opposing appellant's motion for a new trial did not state that the jury found the intent-to-kill element. Though several jurors expressed a personal belief that appellant had intended to kill Genny,[66] the declarations provided no indication that the jury, acting collectively and unanimously, found that appellant's alleged intent to kill had been proven beyond a reasonable doubt. Based on the uncontradicted evidence that the jury failed to find the intent-to-kill element, this Court should, based on the appellate record, reverse the denial of the new-trial motion and vacate the special circumstance and death verdicts.

Furthermore, to have complied with appellant's Sixth, Eighth, and Fourteenth Amendment rights, plus his rights pursuant to article I, sections 7, 15, 16, and 17 of the California Constitution, the jury must have deliberated on every element of the torture-murder special circumstance. The requirement that the jury deliberate on each element flows directly from the rights that each element of the special circumstance be found to have been proven beyond a reasonable doubt. Deliberations are a necessary precondition for reaching a finding. Before reaching a verdict, the jury has a duty to deliberate. (See *People v. Gainer* (1977) 19 Cal.3d 835, 856 [endorsing use of CALJIC No. 17.40, which instructs jurors of their duty to deliberate].) Indeed, a juror's failure to deliberate constitutes misconduct. (*People v. Hernandez* (2003) 30 Cal.4th 1, 11; *People v. Engelman* (2002) 28 Cal.4th 436, 442; *People v. Cleveland* (2001) 25 Cal.4th 466, 485.) This

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[66] As the prosecutor conceded (RT 81:9532), Evidence Code section 1150 renders inadmissible evidence of jurors' personal thoughts regarding whether appellant intended to kill Genny.

Court has assumed that one juror's failure to deliberate creates a basis for a trial court to grant a new trial. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1046.) Whenever all twelve jurors do not deliberate on an essential element of the only alleged special circumstance, the jury has abdicated its duty. A new trial, before a jury that fulfills its duty to deliberate, constitutes the remedy.

Although a jury need not deliberate for a set period of time to comply with its duty (see *United States v. Anderson* (9th Cir. 1975) 561 F.2d 1301, 1303), in this case there was an absence of deliberations regarding the intent-to-kill element. Undoubtedly, not every element of a charged offense or death-eligibility factor must be discussed at length. For example, in a homicide case in which law enforcement officers recovered a dead body, the jury can deliberate in an instant on whether the victim was dead. But, the jury must engage in meaningful deliberations on a contested element of a death-eligibility factor. The trial court recognized that whether appellant had possessed the intent to kill was the weakest component of the prosecution's case at the guilt phase. (RT 20:1747; RT 56:6903, 6912.) In order for the jury to find whether the prosecution had proven the intent-to-kill element beyond a reasonable doubt, the jury needed to engage in some discussion of this element. Appellant presented evidence that no such discussion took place.

The special-circumstance finding in a capital case must be distinguished from a civil case, for which the Court of Appeal has held that a jury may retire, immediately vote, and return a verdict without discussing whether the elements of the causes of action have been met. (See *Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 910-913.) In a civil case, litigants merely have a state constitutional right to a jury trial. (See Cal.

Const. art. I, § 16.) In this capital case, appellant had rights under the Sixth, Eighth, and Fourteenth Amendments for a jury determination that every essential element of the special circumstance had been proven beyond a reasonable doubt, as well as an Eighth Amendment right to a reliable capital-sentencing determination. Because appellant had rights with which civil litigants are not vested, the possible ability of a civil jury to return a verdict without discussion does not permit capital juries to find a defendant death-eligible without discussing whether all contested elements of a special circumstance have been proven. In addition, the Court of Appeal in *Vomaska* based the holding that the jury in a civil case need not engage in any discussions on Code of Civil Procedure section 613, which gives civil juries the option of rendering a verdict in court without retiring for deliberations. (See *Vomaska v. City of San Diego*, *supra*, at p. 910-911.) Of course, if a civil jury need not deliberate at all, logic dictates that it may retire for deliberations and immediately vote and reach a verdict. Though Penal Code section 1128 contains a similar provision, a jury verdict in a capital case rendered without the jury retiring for deliberations would violate a defendant's constitutional rights, for the reasons discussed above. Accordingly, unlike in *Vomaska*, the jury deliberations in this case cannot be found permissible under a greater-includes-the-lesser theory.

C. The Error Was Prejudicial

The jury finding true the torture-murder special circumstance despite not finding, or not deliberating on, the intent-to-kill element cannot be deemed harmless error. Because appellant argues that the jury verdict itself was error, not that an error impacted the jury verdict, harmless-error analysis is not appropriate. A jury verdict not supported by a finding that all elements have been proven beyond a reasonable doubt is a structural

error. Like the erroneous reasonable doubt instruction in *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-282, harmless-error analysis cannot be used to hypothesize a special circumstance "verdict that was never in fact rendered"; thus, the premise of harmlessness analysis is absent. Harmless-error analysis determines whether the jury would have issued the same verdict absent the error; in this case, the jury never reached a verdict based on a finding that the prosecution had proven every element of the torture-murder special circumstance beyond a reasonable doubt. (See *id.* at p. 280.) Moreover, upholding appellant's death sentence despite the jury's failure to find the intent-to-kill element would violate appellant's constitutional right under *Ring v. Arizona*, *supra*, 536 U.S. at p. 609, to have the jury, rather than a court, find all the essential elements of a death-eligibility factor.

Besides, respondent cannot show that the error was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) By not finding the intent-to-kill element to be proven beyond a reasonable doubt, the jury was obliged to return a not-true verdict on the torture-murder special circumstance. Because that was the lone special circumstance alleged, appellant would not have been eligible for the death penalty. Additionally, using the overwhelming-evidence test the United States Supreme Court articulated in *Harrington v. California* (1969) 395 U.S. 250, 254, would yield similar results. Several times, the court noted the weaknesses of the prosecution's case that appellant had possessed an intent to kill. (RT 20:1747; RT 56:6903, 6912.) Appellant's intent could be inferred only from his conduct, and the evidence that appellant was a major participant in the offense was hotly contested and questionable. Thus, evidence that appellant had intended to kill Genny was not overwhelming. At a minimum, had the jury not improperly found the torture-murder special

circumstance without unanimously finding the intent-to-kill element to have been proven beyond a reasonable doubt, the jury would have hung; the record establishes without contradiction or ambiguity that Jurors Numbers 4, 10, and 12 did not find that appellant had intended to kill Genny. (RT 74:9330-9331; CT 11:2437-2438; CT 13:3038.) In conclusion, the jury's failure to deliberate on or find the intent-to-kill element of the torture-murder special circumstance was indeed prejudicial.

D. Alternatively, This Court Should Remand This Case For A New Determination Of The Motion For A New Trial

If this Court does not vacate the special-circumstance verdict, this Court should, at the very least, vacate the denial of appellant's motion for a new trial and remand this case for a new determination of the motion. The trial court based its denial of the motion on its ruling that appellant failed to present admissible evidence in support of the motion. As discussed above, the record on appeal contains evidence that warrants granting appellant a new trial on the torture-murder special circumstance. Although appellant urges this Court to vacate the special circumstance and death verdicts based on this record, appellant alternatively requests a remand. (See *People v. Braxton* (2004) 34 Cal.4th 798, 818-819 [remanding for determination of new trial motion]; *People v. Rodriguez* (1986) 42 Cal.3d 730, 794 [same]; *People v. Fosselman, supra*, 33 Cal.3d at p. 577 [same].) If this Court concludes that there are unresolved issues of fact regarding whether the jury failed to deliberate on or find the intent-to-kill element, then this Court should remand the matter to the superior court for an evidentiary hearing.

VII

THE ERRONEOUS REMOVAL OF PROSPECTIVE JUROR NO. 504 FOR CAUSE AT THE PENALTY RETRIAL VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY AND REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE

Despite expressing an abstract opposition to capital punishment, Prospective Juror No. 504 consistently affirmed that she was open-minded regarding how appellant should be sentenced, would consider both sentencing options, and would be able to vote for a death verdict. Her willingness to abide by her oath and follow the trial court's instructions precluded the prosecution from demonstrating that she was not qualified to serve on appellant's capital jury. The trial court thereby erred by dismissing her for cause from the penalty retrial jury venire; accordingly, appellant's death sentence must be reversed.

A. Facts And Procedural History

In her questionnaire, Prospective Juror No. 504, the daughter of a police captain, stated that she was glad that appellant had been convicted at the first trial and expressed her repugnance toward child abuse. (CT 45:10209, 10218-10219.) She wrote that she formerly supported capital punishment, but believed that it should be abolished. She opined that the death penalty was not an appropriate punishment because it spared perpetrators from having to reflect on the crimes that they had committed and that life imprisonment was the more severe penalty. (CT 45:10222-10223.) She indicated that she nevertheless would not always vote against the death penalty, would be able to listen to the evidence and instructions and give honest consideration to both sentencing options, and was open-minded about which sentence appellant should receive. She wrote that

sometimes death is the lone appropriate punishment. (CT 45:10224.)

During the voir dire conducted by the trial court, Prospective Juror No. 504 articulated her mixed feelings about capital punishment: She believed that people who commit horrible crimes deserve to die, but it would not serve society for them to escape having to contemplate their crimes. In addition, she expressed concerns about the irreversibility of death sentences and said that her uncle's murder conviction in the Virgin Islands, which she believes was wrongful, would probably affect her. (RT 87:10646-10648, 10650.) Despite holding these opinions, she affirmed that she could be objective and would open-mindedly consider both sentencing options. She further explained that, although it would be very unlikely that she would vote for a death verdict, there was a real possibility that she would vote to impose death. (RT 87:10649-10650.)

When questioned by defense counsel, Prospective Juror No. 504 avowed that she was not adamantly opposed to capital punishment despite her uncle's experience with the criminal justice system. She said that there were some crimes for which she believed death was an appropriate penalty, there were situations in which she could impose a death sentence, she could be open-minded regarding the appropriate penalty in this case, and she could give honest consideration to both sentencing options. (RT 87:10701-10702.)

In response to the prosecutor asking her if there would be capital punishment if she were governing the state, Prospective Juror No. 504 said that she would subject criminals to medical research. (RT 87:10718.) She also opined that at times death was not an appropriate punishment for murder because the perpetrators would not suffer thinking about the crimes they had committed, but that some people like Jeffrey Dahmer deserved to

die. (RT 87:10719.) She averred that a torture-murder was the type of case for which she could vote for a death sentence and that she could compartmentalize her moral opposition to capital punishment from her evaluation of this case. When asked if she could override her moral objection to capital punishment when making a moral decision regarding whether appellant should live or die, she requested additional information. (RT 87:10720.) She said that she believed that her moral views on drunk driving could preclude her from being objective in a driving under the influence trial, but that she could be objective in this capital case because her loathing of child abuse challenged her moral opposition to the death penalty. (RT 87:10722-10723.)

The prosecutor challenged Prospective Juror No. 504 for cause, and defense counsel vehemently objected. (RT 87:10737.) The trial court said that it was struck by the prospective juror's opposition to the death penalty and belief that criminals should be made subjects in medical experiments. The court ruled that her views substantially impaired her ability to perform her duties as a juror and granted the challenge for cause. (RT 87:10740.)

B. Prospective Juror No. 504 Was Death-Qualified; Therefore, The Trial Court's Dismissal Of Her For Cause Infringed Appellant's Rights To An Impartial Jury

Prospective Juror No. 504 was qualified to serve on appellant's capital jury at the penalty retrial. Her abstract views on capital punishment and criminal justice would not have precluded her from abiding by her oath or following the trial court's instructions. Because the prospective juror said that she was open-minded regarding the sentence appellant should receive, she would fairly consider both sentencing options, and that there was a real possibility she would vote for a death verdict, the prosecution did

not demonstrate that Prospective Juror No. 504 could not be impartial. Consequently, the trial court violated appellant's rights, under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 7, 15, 16, and 17 of the California Constitution, to an impartial jury by dismissing her.

The legal standard for dismissing prospective jurors due to their views on capital punishment is well settled. "The state may not, in a capital trial, excuse all jurors who express conscientious objections to capital punishment. Doing so violates the defendant's Sixth Amendment-based right to an impartial jury and subjects the defendant to trial by a jury 'uncommonly willing to condemn a man to die.'" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1285, quoting *Witherspoon v. Illinois* (1968) 391 U.S. 510, 521.) "[T]he proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 424, quoting *Adams v. Texas* (1980) 448 U.S. 38, 45; accord, *People v. Ghent* (1987) 43 Cal.3d 739, 767.) In other words, a prospective juror may not be removed merely because she believes that the death penalty should be abolished; rather, the court can lawfully dismiss her for cause only if her personal opinions on capital punishment would preclude her from abiding by her oath or following the trial court's instructions. The party challenging the prospective juror for cause bears the burden of demonstrating that she is not death-qualified. (See *Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) The trial court's dismissal of a prospective juror should be upheld if supported by substantial evidence. (See *People v. Schmeck* (2005) 37 Cal.4th 240,

261-262.)

The prosecution did not meet that burden in this case. To be sure, Prospective Juror No. 504 repeatedly expressed that she believed capital punishment should be abolished. Nevertheless, she consistently asseverated that she was open-minded regarding whether appellant should receive a life or death sentence, would fairly consider both sentencing options, and could return a death verdict. (CT 45:10224; RT 87:10649-10650, 10701-10702, 10720, 10722-10723.) She even told the prosecutor that she could compartmentalize her moral views from her evaluation of this case. (RT 87:10720.) In *Lockhart v. McCree* (1986) 476 U.S. 162, 174, the United States Supreme Court explained: "It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." By being willing to follow the trial court's instructions to weigh the aggravating factors against the mitigating factors and fairly consider both sentencing options, Prospective Juror No. 504 was able to subvert her views on the death penalty to the rule of law. (See *Brown v. Lambert* (9th Cir. 2005) 451 F.3d 946, 950 ["excusing a juror for cause in a capital case is unconstitutional, absent evidence that the juror would not follow the law"].) Accordingly, she was death-qualified.

Prospective Juror No. 504 was not disqualified from serving on appellant's jury though she stated that it was very unlikely that she would return a death verdict. A high threshold for imposing the death penalty does not provide grounds for challenging a prospective juror for cause so long as those views do not prevent her "from engaging in the weighing process and

returning a capital verdict." (*People v. Kaurish* (1990) 52 Cal.3d 648, 699.) As explained above, Prospective Juror No. 504 said that she could impose a death sentence, she was open minded regarding the penalty appellant should receive, and there was a real possibility she could return a death verdict. This Court recently explained that a venireperson like Prospective Juror No. 504 is death-qualified:

> *Kaurish, supra*, 52 Cal.3d 648, recognizes 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, the circumstance 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, supra*, 469 U.S. 412. . . . A juror might find it very difficult to vote to impose *the death penalty*, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law.

(*People v. Stewart* (2004) 33 Cal.4th 425, 447 [emphasis and alteration in original]; see also, *People v. Heard* (2003) 31 Cal.4th 946, 959-966 [finding prospective juror was death-qualified although he stated that he probably would vote for life imprisonment in case with mental health mitigation].) Therefore, Prospective Juror No. 504's statement that it was very unlikely

that she would return a death verdict did not substantially impair her from performing her duties as a juror.

Likewise, Prospective Juror No. 504 was qualified to serve on appellant's jury although she thought she would probably be affected by the irreversibility of a death sentence and what she perceived to be her uncle's wrongful conviction for murder. The possibility of an irreversible death penalty affecting her penalty retrial deliberations did not render the prospective juror removable for cause. (See *Adams v. Texas*, *supra*, 448 U.S. at pp. 49-51.) The United States Supreme Court explained that "to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law" because being affected by the possibility that the defendant could be executed is not "equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty." (*Id.* at p. 50.) In addition, Prospective Juror No. 504 saying she would probably be affected by what she believes was her uncle's wrongful murder conviction did not substantially impair her from performing her duties as a juror. "Jurors' views of the evidence . . . are necessarily informed by their life experiences." (*In re Malone* (1996) 12 Cal.4th 935, 963.) "Indeed, lay jurors are expected to bring their individual backgrounds and experiences to bear on the deliberative process." (*People v. Pride* (1992) 3 Cal.4th 195, 268; accord, *McCleskey v. Kemp* (1987) 481 U.S. 279, 311.) Thus, Prospective Juror No. 504's belief that her uncle's experiences with the criminal justice system would probably affect her did not substantially impair her from following her oath and the trial court's instructions.

Lastly, Prospective Juror No. 504's belief that convicted criminals should become subjects for medical experiments did not hinder her from performing her duties as a juror. There is no indication in the record that this abstract belief would have had any impact whatsoever on her deliberative process. *Witherspoon* and its progeny make clear that a prospective juror's personal beliefs do not disqualify her from serving on a capital case unless those views would prevent or substantially impair her from abiding by her oath and following her instructions. The record lacked evidence suggesting that Prospective Juror No. 504's belief that criminals should be subjects for medical experiments was anything more than an isolated abstract opinion.

For these reasons, the trial court's removal of Prospective Juror No. 504 was not supported by substantial evidence. Therefore, the trial court violated appellant's constitutional rights to an impartial jury.

C. The Death Judgment Must Be Vacated

The erroneous removal of a life-leaning prospective juror whom the prosecution had challenged for cause under *Witherspoon-Witt* cannot be harmless. (See *Gray v. Mississippi* (1987) 481 U.S. 648, 668; *People v. Ashmus* (1991) 54 Cal.3d 932, 962.) Because the trial court erroneously ruled that Prospective Juror No. 504 was not death-qualified and dismissed her for cause, appellant's death sentence must be reversed.

VIII

APPELLANT DID NOT VALIDLY WAIVE HIS RIGHT TO BE PRESENT AT EITHER THE INTRODUCTORY PROCEEDINGS WITH THE JURY VENIRES AT THE FIRST TRIAL AND THE PENALTY RETRIAL OR THE HARDSHIP VOIR DIRE AT THE FIRST TRIAL

At the outset of both trials, the court forced appellant to make an untenable choice: Appellant had to either forgo his right to be present at a portion of his trial, or he would be shackled in full view of all of the prospective jurors. Because the trial court forced appellant to relinquish one of his constitutional rights, appellant's purported waivers of his Sixth and Fourteenth Amendment rights to be present was invalid. Moreover, the purported waivers were not written and thus violated Penal Code section 977, subdivision (b)(1). Furthermore, appellant made no personal waiver, of any sort, of his right to be present at the first trial's hardship voir dire; that further violated his constitutional and state-law rights.

A. Facts And Procedural History

When both trials commenced, the initial proceedings took place in the jury lounge because the courtroom could not accommodate all of the prospective jurors who had been summoned to comprise the jury venire. Though one or two extra marshals would be present in the jury lounge, the court required that appellant be shackled if he were to appear at the proceedings in the jury lounge. Prior to the first trial, the court stated that most defendants relinquish their presence right so the prospective jurors do not see them in handcuffs and waist chains. (RT 35:3723-3725.) Before both trials, appellant surrendered his right to be present at those proceedings, rather than have all of the prospective jurors see him shackled. (RT 35:3724-3725; RT 83:9831-9832.) At those proceedings, the court and

counsel introduced themselves to the prospective jurors, and hardship and substantive questionnaires were disseminated. The court made introductory remarks. (RT 38:4011-4043; RT 84:9834-9860.) At the first trial, those remarks included an orientation to the case; an explanation of the trial process; directions for filling out the jury questionnaire; and instructions on matters including reading the murder charge and special circumstance alleged in the information, explaining that the prosecution bears the burden of proof, defining reasonable doubt, stating that the charges themselves do not constitute evidence, and admonishing the prospective jurors with respect to their conduct.[67] (RT 38:4011-4043.) The court made analogous remarks at the outset of the penalty retrial that were tailored to that proceeding: The court instructed the prospective jurors about their duties and told them that at a previous trial appellant had been convicted of first degree murder and that the torture-murder special circumstance had been found. (RT 84:9834-9860.)

Prior to the first trial, at defense counsel's request, the court did not order that appellant be brought from the jail to the courthouse until the first day of substantive voir dire. (RT 37:4009.) Accordingly, appellant was absent from both sessions of hardship voir dire for the first trial, which took place in the courtroom.[68] (RT 38:4044-RT 39:4156.) Appellant was also absent from the court's introductory remarks to the prospective jurors who

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[67] At the first trial, the court said that appellant was not present for these proceedings, but would be present at future hearings. The court gave no explanation for appellant's absence. (RT 38:4025.) The court did not mention appellant's absence at the penalty retrial. (RT 84:9834-9860.)

[68] Appellant was present for the hardship voir dire at the penalty retrial. (RT 84:9864-9919.)

requested, but did not receive, hardship exemptions for the first trial.[69] (RT 39:4157-4179.) One of the seated jurors unsuccessfully sought a hardship dismissal and was present for these proceedings. (RT 38:4124-4128.) No personal waiver was sought or received from appellant regarding these proceedings that took place in the courtroom.

B. Appellant's Purported Waivers Of His Presence At The Proceedings In The Jury Lounge Were Invalid

Appellant did not validly waive his right to be present at the proceedings at the outset of both trials that occurred in the jury lounge because the purported waivers were the product of an unlawful choice that the court mandated appellant to make. The court required appellant to relinquish either his right to be present or his right not to be shackled. The byproduct of that constitutional error is that appellant's purported waiver of his presence was not valid.

A criminal defendant cannot be forced to choose between two distinct constitutional rights. (*Simmons v. United States* (1968) 390 U.S. 377, 394; *People v. Wilkins* (1990) 225 Cal.App.3d 299, 307-308.) A defendant may have to choose between constitutional rights that are inherently interrelated and cannot be exercised simultaneously. (*McGautha v. California* (1971) 402 U.S. 183, 213.) For example, a defendant must choose whether to invoke his right to testify or retain the privilege against self-incrimination, or whether to exercise either his right to counsel or his right to self-representation. In contrast, the right to be present and the right not to be shackled are not the converse of one another; consequently, the trial court could not require appellant to choose between those rights. (See,

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[69] These remarks were similar to those given to the jurors who did not request hardship dismissals. (RT 38:4022-4043; RT 39:4157-4179.)

e.g., *Howard v. Walker* (2nd Cir. 2005) 406 F.3d 114, 129-130 [defendant cannot be forced to choose between right to cross-examine witness and right to exclude co-conspirator's unreliable hearsay confession]; *United States v. Scott* (11th Cir. 1990) 909 F.2d 488, 492-494 [defendant cannot be forced to choose between right to counsel and right to testify].)

As the trial court acknowledged, the Sixth and Fourteenth Amendments and article I, sections 7 and 15 vested appellant with the right to be present at the proceedings that took place at the jury lounge. (RT 35:3724-3725; see *Kentucky v. Stincer* (1987) 482 U.S. 730, 745.) The initial proceedings constituted a critical stage of both trials. The trial court instructed the jury at both proceedings. Though given to prospective jurors during the jury-selection process, these were jury instructions. (See *People v. Frye* (1998) 18 Cal.4th 894, 957; *People v. Johnson* (2004) 115 Cal.App.4th 1169, 1172.) When a court instructs a jury, it is a critical stage of the trial at which the defendant has a right to be present. (*People v. Dagnino* (1978) 80 Cal.App.3d 981, 985-988; *United States v. Rosales-Rodriguez* (9th Cir. 2002) 289 F.3d 1106, 1110.) Furthermore, the proceedings in the jury lounge were a critical stage because the court communicated extensively with the jury. (See *Rogers v. United States* (1975) 422 U.S. 35, 39 [explaining defendant had right to be present when court communicated with jury], citing *Shields v. United States* (1927) 273 U.S. 583, 588-589.) Moreover, the commencement of both trials was a critical stage because the trial judge and trial attorneys introduced themselves and this case to the jury. At these proceedings, the prospective jurors comprising each jury venire formed their first impressions of the case and the people involved with the trial. Appellant's absence, which was unexplained and juxtaposed against the serious charges he faced, likely

impacted the jury's view of him.

Appellant also had a due process right, guaranteed by the Fourteenth Amendment and article I, sections 7 and 15, not to be shackled. (See *Deck v. Missouri* (2005) 522 U.S. 622, 626-633 [right not to be shackled]; see also, *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712, 720-721 [discussing pernicious impact of shackling].) Although shackling is constitutionally permitted upon a showing of case-specific special circumstances "related to the defendant on trial" (*Deck v. Missouri*, *supra*, 522 U.S. at p. 633), the prerequisite for permissible shackling did not exist in this case. As the court acknowledged, there was no reason to believe that appellant, a model prisoner, posed a security risk. (RT 35:3725.) A general concern about security comprised the lone basis for the court's generic requirement that appellant be shackled for the initial proceedings at each trial. Appellant's due process rights thus forbade the court from shackling appellant to compensate for the jury room's inferior security.

Moreover, this Court has long concluded that shackling is permissible only if the defendant's actions — not the venue's characteristics — create a "manifest need" for using restraints and the trial court makes an on-the-record determination that the defendant's nonconforming behavior necessitates shackling. (*People v. Duran* (1976) 16 Cal.3d 282, 290-291; see also, *People v. Cox* (1991) 53 Cal.3d 618, 651 [explaining what constitutes "manifest need"]; *People v. Harrington* (1871) 42 Cal. 165, 168-169; Pen. Code, § 688.) In this case, there was neither a manifest need for shackling nor an on-the-record determination that appellant's actions required restraining him. Accordingly, appellant had a state-law entitlement not to be shackled. The violation of appellant's state-law guarantee to be free from shackling also infringed appellant's due process rights under the

Fourteenth Amendment and article I, sections 7 and 15. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

Thus, appellant had constitutional rights to be present and not to be shackled at the proceedings in the jury lounge. The trial court violated appellant's constitutional rights by requiring him to choose between those rights. There was no valid basis for forcing appellant to cede one of them. As a result, appellant's purported waivers of his right to be present were invalid.

In addition, the purported waivers violated Penal Code section 977. Appellant had a statutory right to be present that could be waived only in writing. (See Pen. Code, § 977, subd. (b)(1).) Appellant's purported oral waivers failed to meet the written-waiver requirement.

C. Appellant Did Not Waive His Presence At The Hardship Voir Dire For The First Trial

The constitutional and statutory right to be present cannot be waived by proxy. Rather, a valid waiver of that right must be personal, knowing, intelligent, and voluntary. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464; *People v. Davis* (2005) 36 Cal.4th 510, 531-532; *United States v. Gordon* (D.C. Cir. 1987) 829 F.2d 119, 125-126.) There is no indication on the record that appellant understood that he was waiving his right to be present at the hardship voir dire, which took place in the courtroom, where appellant would not be shackled if present. Nor was there any indication that appellant understood the consequences of a presence waiver for those proceedings. Further, there was no statutorily required written waiver. Therefore, the court violated appellant's presence right by conducting hardship voir dire in appellant's absence.

D. Appellant's Absences Were Prejudicial

The state-law and federal-constitutional errors flowing from appellant's absence at his capital trials were not harmless. During the hardship voir dire proceedings at the first trial, held in appellant's absence, the trial court excused 24 prospective jurors. Furthermore, at both trials appellant was missing from the proceedings at which the prospective jurors were introduced to the case, the judge, and trial attorneys. Appellant's absence was unexplained and, at the penalty retrial, unmentioned. At the first trial, the jury learned that the state charged appellant with first degree murder and alleged the torture-murder special circumstance. At the penalty trial, the jury learned that appellant had been convicted of that offense and that the special circumstance had been found. Appellant's absence was thus coupled with the severity of the allegations, conviction, and special-circumstance finding. The prospective jurors inevitably came away from the opening proceedings with the impression that appellant was accused of doing, or had done, horrible things and that appellant callously did not bother to show up at his own capital trial. Although appellant's presence at subsequent proceedings mitigated this misperception, the prospective jurors' first impressions of appellant remained important. (See Lakamp, *Deliberating Juror Predeliberation Discussions: Should California Follow the Arizona Model?* (1998) 45 UCLA L.Rev. 845, 866, fn. 82 [explaining primacy effect and its impact on jurors]; Kassin & Wrightsman, *The American Jury on Trial: Psychological Perspectives* (1988) pp. 132-135.)

For these reasons, it is reasonably probable that the jury would not have convicted appellant of first degree murder or found the torture-murder special circumstance if appellant had been present, without shackles, throughout the first trial. (See *People v. Watson* (1956) 46 Cal.2d 818,

836.) This was a close case, and the evidence against appellant was not overwhelming. (See *ante*, at pp. 85-88.) Likewise, it is reasonably possible that the jury at the penalty retrial would not have sentenced appellant to death if appellant had attended all of the proceedings. (See *People v. Brown* (1988) 46 Cal.3d 432, 448.) At a minimum, respondent cannot demonstrate that the errors were harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) It would be speculative for this Court to conclude that the jurors who sat on appellant's trials would not have perceived appellant differently if he had been present at the proceedings at the commencement of both trials. (See *Wade v. United States* (D.C. Cir. 1971) 441 F.2d 1046, 1050-1051 [reversing convictions for violation of defendant's right to be present during rereading of certain jury instructions and during reading of *Allen* charge because holding "his absence harmless would be too speculative"].) Accordingly, the conviction, special circumstance, and death sentence must be vacated.

IX

THE TRIAL COURT'S ADMISSION OF VIDEOTAPES OF IVAN GONZALES, JR.'S PRELIMINARY HEARING TESTIMONY AT APPELLANT'S TRIAL WAS ERRONEOUS AND INFRINGED APPELLANT'S CONFRONTATION-CLAUSE RIGHTS

Three-and-a-half months after Genny's death, appellant's oldest child, Ivan Gonzales, Jr., testified at the preliminary hearing. Ivan Jr., who was eight years old, was living in a confidential foster home. Defense counsel lacked access to Ivan Jr., did not know where or with whom he was living, and was unaware that he was experiencing hallucinations, that Ivan Jr.'s recollection and testimony had been improperly influenced, or that his foster mother was concerned about his penchant for lying. Lacking crucial information, appellant had no opportunity to cross-examine Ivan Jr. effectively at the preliminary hearing. Prior to trial, the trial court declared Ivan Jr. unavailable to testify, due to the trauma that he would experience from testifying against his parents at their capital trials. Nonetheless, the trial court admitted into evidence, at the guilt phase of appellant's trial, the videotapes of Ivan Jr.'s preliminary hearing testimony. Based in part on his oldest child's preliminary hearing testimony, appellant was convicted of first degree murder, and the jury found the torture-murder special circumstance. The admission of the videotaped testimony violated state law, appellant's confrontation-clause rights, and appellant's rights to a fair trial and a fair, accurate, and reliable capital-sentencing determination, and requires vacating the conviction, special circumstance, and death judgment.

A. Facts And Procedural History

On July 22, 1995, the morning after Genny's death, the police brought appellant's children to the Polinsky Center, a receiving home for

children who are placed into protective custody. (RT 56:6980-6983; RT 58:7306.) Between that time and the preliminary hearing, Ivan Jr. was placed in two separate foster homes. (RT 58:7306-7311.) The foster home placements were confidential, and appellant and his counsel had no access to Ivan Jr. or the people living in Ivan Jr.'s foster homes during this time. (RT 17:1498; RT 48:5753.)

In August 1995, Ivan Jr. began attending weekly therapy sessions. (RT 22:2034.) His therapist, Edna Lyons, concluded that he suffered from depression and post-traumatic stress disorder. (RT 22:2018.) In October 1995, Ivan Jr.'s foster mother discussed with Lyons her concerns about Ivan Jr.'s proclivity to lie. (CT 6:1446.) On November 7, 1995, the day before Ivan Jr. testified at the preliminary hearing, Ivan Jr. said to Lyons that he saw double and believed that he had seen his soul. (CT 6:1447.)

Roland Simoncini, appellant's children's attorney, concluded that Ivan Jr.'s foster mother was inappropriately asking Ivan Jr. questions about this case, in violation of a court order. Believing that the foster mother violated a court order barring her from asking Ivan Jr. those questions, the judge assigned to the children's dependency case again ordered the foster mother not to ask Ivan Jr. questions. (RT 58:7342-7351; RT 60:7570-7576, 7763-7767.)

Appellant and his counsel had no access to this information at the time of the preliminary hearing. After extensive litigation, between July 1996 and February 1997 appellant gained piecemeal access to Ivan Jr.'s therapy records. (CT 5:1197; CT 6:1402-1407; CT 12:2840-2842, 2858; CT 13:2872, 2879-2881; RT 7:737; RT 22:1993, 2087-2089.)

The municipal court presided over the preliminary hearing on November 7 and 8, 1995. Expressing generalized concerns about the

intimidation of child witnesses, the municipal court granted the prosecution's motion for a protective seating arrangement. As a result of this order, when Ivan Jr. testified, he was seated so that he faced away from appellant and Veronica. (PX 1:9-10.)

After Ivan Jr. testified at the preliminary hearing, he continued to report to his therapist that he was experiencing hallucinations, illusions, or lapses in memory. On January 4, 1996, Ivan Jr. told his therapist that he saw double one to two times per day. In addition, he expressed concerns over the adequacy of his memory and said that sometimes he could not remember what had happened on the previous day. (CT 6:1448.) In April 1996, he informed his therapist that on two occasions he saw a bright orange light surrounded by white and believed that this light was Genny. (CT 6:1386.)

Dr. Charles Marsh evaluated Ivan Jr. on August 2, 1996 and determined that Ivan Jr. had post-traumatic stress disorder. (CT 6:1390; RT 22:1896.) In a subsequent evaluation, Dr. Marsh determined that Ivan Jr. had manifestations of clinical depression. (RT 22:1923.)

For several months, appellant and Veronica Gonzales moved in the dependency court for access to Ivan Jr. in order to interview him. (CT 1:64-66, 100-104; RT 20:1620.) The dependency court conditioned access to Ivan Jr. on those interviews not being detrimental to Ivan Jr.'s health. (CT 1:64-66, 100-104.) After finding that interviews would harm Ivan Jr., the dependency court barred the prosecutor, appellant, and Veronica from contacting Ivan Jr. (CT 6:1437; RT 20:1620.)

The prosecution subpoenaed Ivan Jr. and Michael Gonzales,

Veronica and appellant's second-oldest child, to testify at trial.[70] The children moved to quash the subpoenas. (CT 6:1370-1401.) After holding extensive hearings on the motion, the trial court, pursuant to Evidence Code section 240 and the court's purported inherent authority to protect children from clear and imminent harm, quashed the subpoenas and declared Ivan Jr. and Michael unavailable to testify at trial. (RT 25:2582-2591.)

The prosecution moved to introduce at trial the videotapes of Ivan Jr.'s preliminary hearing testimony. (CT 6:1251-1263.) Appellant objected to the admission of the preliminary hearing testimony on the basis that appellant did not have a meaningful opportunity for an effective cross-examination at the preliminary hearing, that the court's inherent authority to protect minors should bar admission of the prior testimony, and that Ivan Jr. was not competent to testify at the preliminary hearing. (CT 6:1428-1455.) The trial court rejected those contentions and ruled that the preliminary hearing testimony was admissible. (RT 29:3247-3253; RT 48:5760.) During the guilt phase of appellant's trial, the videotapes of Ivan Jr.'s preliminary hearing testimony were played and a transcript was provided to the jury.[71] (RT 55:6885, 6891-6892.) The court also admitted prior law enforcement interviews of Ivan Jr., which contained prior consistent and prior inconsistent statements. (RT 55:8655-6865; RT 56:6878-6879, 6884-6885.)

B. The Trial Court Erred By Admitting Ivan Jr.'s Preliminary Hearing Testimony Into Evidence

The trial court's admission of Ivan Jr.'s videotaped preliminary

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[70] Michael was not called to testify at the preliminary hearing.

[71] The videotape was not introduced at the penalty retrial. (RT 90:11204.)

hearing testimony was erroneous in several respects. First, because appellant never had a meaningful opportunity to cross-examine Ivan Jr. effectively, the testimony was inadmissible under Evidence Code section 1291. Second, the trial court erred in using its asserted inherent authority to protect children from harm to quash Ivan Jr.'s subpoena but permit his preliminary hearing testimony to be introduced at appellant's trial. Third, the trial court erroneously concluded that Ivan Jr. was competent to testify at the preliminary hearing.

1. Evidence Code Section 1291 Barred the Admission of Ivan Jr.'s Preliminary Hearing Testimony

Ivan Jr.'s preliminary hearing testimony was inadmissible under Evidence Code section 1291. That evidentiary rule permits the admission of former testimony at trial if the witness is unavailable at trial and the former testimony is offered against a party that had a meaningful opportunity for effective cross-examination at the prior proceeding. (*People v. Brock* (1985) 38 Cal.3d 180, 190; *People v. Cloyd* (1997) 54 Cal.App.4th 1402, 1409; Evid. Code, § 1291, subd. (a)(2).) Accordingly, when the party against whom the former testimony is offered had a similar interest and motive to challenge the witness's credibility at the prior proceeding, the former testimony would be admissible only if there was a meaningful opportunity to cross-examine the witness effectively at the prior proceeding. Appellant lacked such an opportunity during Ivan Jr.'s preliminary hearing testimony in this case.

Appellant's inability to access Ivan Jr. or information about Ivan Jr. between the night of Genny's death and the preliminary hearing prevented appellant from having a meaningful opportunity to cross-examine Ivan Jr. effectively at the preliminary hearing. Ivan Jr. had been placed in

confidential foster homes; consequently, appellant's counsel lacked access to him, the people with whom he had lived, and the people in whom he had confided. As a result of the confidentiality in the dependency system, appellant was unable to get information that would have been critical to the cross-examination of Ivan Jr.: symptoms leading to the diagnosis that Ivan Jr. suffered from post-traumatic stress disorder, the hallucination or illusion that Ivan Jr. reported seeing, improper influences on Ivan Jr.'s recollection and testimony, and Ivan Jr.'s foster mother's expression of concern over Ivan Jr.'s proclivity to lie.

Ivan Jr.'s report that he had seen double and belief that he had seen his soul would have been fertile ground for cross-examination if appellant had access to this information. (See *People v. Gurule* (2002) 28 Cal.4th 557, 592 ["Of course, the mental illness or emotional instability of a witness can be relevant on the issue of credibility, and a witness may be cross-examined on that subject, if such illness affects the witness's ability to perceive, recall or describe the events in question"].) Appellant's counsel could have asked Ivan Jr. if he had seen double or seen his soul. Flashbacks, nightmares, illusions, and hallucinations are among the symptoms for post-traumatic stress disorder. (RT 22:1896; see generally, American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. Text Revision 2000), pp. 463-468.) Ivan Jr. seeing double and believing that he was looking at his soul constitutes an illusion or hallucination. That was not an isolated incident. After the preliminary hearing, Ivan Jr. told his therapist that he saw double once or twice per day and on two occasions saw an orange and white light that he believed was Genny.

Had appellant's counsel been privy to its existence, symptoms

related to Ivan Jr.'s post-traumatic stress disorder would have undermined the credibility of Ivan Jr.'s testimony at the preliminary hearing. Ivan Jr.'s mental condition would have suggested that the wholesale changes in Ivan Jr.'s story between his interviews in the days following Genny's death and his preliminary hearing testimony were the product of Ivan Jr. having nightmares or hallucinations that became the source of his memory of the incident. Even if Ivan Jr.'s memory of the events to which he testified had not changed over time, Ivan Jr.'s illusions or hallucinations would have cast doubt on the validity of his perceptions. For these reasons, appellant's counsel would have cross-examined Ivan Jr. at the preliminary hearing about his flashbacks, nightmares, illusions, or hallucinations. Ivan Jr.'s answers to those questions would have provided additional reasons to doubt whether Ivan Jr.'s memory was accurate and whether his perceptions reflected reality.

In addition, awareness that Ivan Jr.'s foster mother had violated a court order and questioned Ivan Jr. about the case would have permitted appellant to cross-examine Ivan Jr. about improper influences on his recollection and testimony.[72] Appellant's counsel could have asked Ivan Jr. whether he had conversations with his foster mother about what had happened to Genny and whether the foster mother had initiated those conversations. In addition, counsel could have cross-examined Ivan Jr. about the content of those conversations. Evidence suggesting that Ivan Jr.'s preliminary hearing testimony was contaminated would have undercut the credibility of the allegations Ivan Jr. made against appellant.

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[72] The court excluded appellant's proffered collateral evidence that Ivan Jr.'s preliminary hearing testimony had been contaminated. (RT 58:7342-7351, 7366-7367; RT 60:7570-7576, 7760-7777.)

Knowledge of Ivan Jr.'s foster mother's allegations that Ivan Jr. lied perpetually would have further enhanced the cross-examination of Ivan Jr. Questions asking Ivan Jr. whether he could distinguish between truth and falsehood and whether his preliminary hearing testimony was truthful comprised a significant portion of Veronica's and appellant's cross-examination of Ivan Jr. He answered those questions affirmatively. (PX 2:259-261, 295-298.) Ivan Jr. initially claimed that he did not tell lies, but then conceded that he had lied when he was younger. (PX 2:260.) Because appellant was unaware of a contemporaneous report that Ivan Jr. was repeatedly lying, Ivan Jr.'s assertions went unchallenged. If appellant at the time of the preliminary hearing had known about Ivan Jr.'s foster mother's report, appellant could have questioned Ivan Jr. about it and impeached Ivan Jr.'s contentions regarding his truth-telling.

Appellant's lack of access to Ivan Jr. and this highly probative information precluded him from having a meaningful opportunity for effective cross-examination at the preliminary hearing. The ability to cross-examine a witness effectively depends on having access to information with which the witness can be impeached. (See *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1146 [explaining information on crucial prosecution witnesses was "essential to the defendant's ability to conduct an effective cross-examination"].) Pretrial discovery is founded on this premise. (See *Moore v. Conliffe* (1994) 7 Cal.4th 634, 663 (dis. opn. of Baxter, J.) ["The ability to discover the evidence upon which the opponent's case rests enables the parties to prepare effective cross-examination and to obtain and present impeaching evidence."]; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 537 [holding discovery of sheriff's investigators' prior statements was "necessary for effective

cross-examination of the deputies at trial"]; *People v. Mackey* (1985) 176 Cal.App.3d 177, 186-187 [explaining prosecution's withholding of witness statement prevented effective cross-examination]; *ABA Standards Relating to Discovery and Procedure Before Trial* (1974) § 1.2 ["In order to . . . afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible . . . ."].)

Defense counsel's lack of access to exculpatory information produces a pronounced effect on the opportunity for effective cross-examination. (See *Atkinson v. State* (Del. 2001) 778 A.2d 1058, 1061-1064 [explaining that suppression of impeachment evidence undercut opportunity for effective cross-examination]; *Jimenez v. State* (Nev. 1996) 918 P.2d 687, 694 [explaining that non-disclosure of impeachment evidence that would have enabled effective cross-examination prevented defendant from receiving fair trial]; *State v. Burke* (R.I. 1990) 574 A.2d 1217, 1225 ["Effective cross-examination can be impeded by the suppression of material evidence"].) That is why *Brady v. Maryland* (1963) 363 U.S. 83, 86-87, bars the prosecutorial suppression of impeachment evidence. (See *United States v. Bagley* (1985) 473 U.S. 667, 676 [holding that *Brady* forbids suppression of impeachment evidence because "if disclosed and used effectively, it may make the difference between conviction and acquittal"]; *Roberts v. State* (Nev. 1994) 881 P.2d 1, 8 ["It is well settled that evidence that would enable effective cross-examination and impeachment may be material and that nondisclosure of such evidence may deprive an accused of a fair trial"].)

In this case, at the time of the preliminary hearing, appellant lacked access to significant information with which he could have impeached Ivan

Jr. Consequently, appellant lacked a meaningful opportunity to cross-examine Ivan Jr. effectively at the preliminary hearing. Therefore, the trial court erred by admitting Ivan Jr.'s preliminary hearing testimony into evidence at trial. (See *People v. Brock*, *supra*, 38 Cal.3d at p. 198 [holding trial court erred in admitting preliminary hearing testimony at trial because defendant lacked meaningful opportunity for effective cross-examination].)

2. The Trial Court Erred in Using Its Purported Inherent Authority to Protect Children from Imminent Harm to Quash the Subpoena of Ivan Jr. and Not Using That Authority to Exclude the Videotapes of Ivan Jr.'s Preliminary Hearing Testimony

The trial court's incomplete and uneven use of what it believed to be its authority to protect children from harm was erroneous. The trial court used two grounds to find Ivan Jr. unavailable to testify at trial and quash the subpoena against Ivan Jr.: Evidence Code section 240 and the court's inherent authority to protect children from imminent harm. The court based its ruling on the extensive psychiatric testimony regarding the harm that Ivan Jr. would have suffered had he testified against his parents at their trials. The same testimony also demonstrated that Ivan Jr. would be harmed from the introduction of his preliminary hearing testimony at his parents' trials. The court's use of its inherent authority to protect minors to find Ivan Jr. unavailable, but not to find Ivan Jr.'s preliminary hearing testimony inadmissible, was error.

The mental health testimony on which the court relied to find Ivan Jr. unavailable also articulated the immense harm that Ivan Jr. would suffer from the admission of the preliminary hearing testimony. The mental health experts expressed fundamental concerns about the long-term trauma that Ivan Jr. would suffer after he began to appreciate the ramifications of

having his testimony used by the prosecution to get his parents executed. (RT 22:1938, 1954, 1973-1974; RT 23:2262-2263; RT 24:2318.) Ivan Jr.'s therapist, Edna Lyons, testified that Ivan Jr. would suffer long-term trauma from the admission of his preliminary hearing testimony at trial, regardless of whether he testified at trial. (RT 22:2030-2031.) Dr. Charles Marsh explained that Ivan Jr.'s testimony would cause him profound trauma when Ivan Jr. learned the ramifications of his testimony, because he would feel that his testimony caused his parents to be sentenced to death. (RT 22:1954, 1974.) Although Dr. Marsh testified that playing the preliminary hearing tape would not cause major trauma, he based that opinion on the assumption that the preliminary hearing has a limited purpose. (RT 22:1978, 1980.) The use of Ivan Jr.'s preliminary hearing testimony in a manner that contributed to his parents' convictions and death verdicts, rather than merely contributing to them being bound over for trial, would cause great trauma.

Dr. Cynthia Jacobs, Edna Lyons's supervisor, also opined that Ivan Jr. would face significant trauma in the future after he became aware of the ramifications of his testimony playing a role in having his parents put to death. (RT 23:2263; RT 24:2318.) She explained that Ivan Jr. faced a grave risk of blaming himself for his parents' death sentences and that the burden on him would be huge if he were the only one of appellant's children to testify. (RT 24:2334, 2351.) Although she believed that having his preliminary hearing testimony played at trial would be a qualitatively different experience from testifying at trial and would cause less short-term trauma, Dr. Jacobs declared that playing the tape of Ivan Jr.'s preliminary hearing testimony would be traumatic to him and that Ivan Jr. would have to come to terms with having delivered testimony that led to his parents' death

sentences. (RT 24:2297-2298.)

The trial court recognized that Ivan Jr. would endure harm from having the prosecution use his preliminary hearing testimony to secure death sentences against Ivan Jr.'s parents. (RT 29:3252.) Concluding that the prosecution's interest in presenting the evidence outweighed Ivan Jr.'s interest in not having long-term trauma from having his testimony contribute to his parents' executions, the trial court admitted the videotapes of Ivan Jr.'s preliminary hearing testimony into evidence. (RT 29:3252; RT 55:6885, 6891-6892.) The trial court's ruling was erroneous.

The potential for harm to Ivan Jr. from the use of his preliminary hearing testimony was so grave that the prosecution's interest in admitting the testimony did not outweigh Ivan Jr.'s interest in not being harmed. Having a young child deliver testimony, whether live or via videotape of prior testimony, that contributes to his parents getting sentenced to death and executed is far too great a burden to impose on him, even if protecting him prevents the prosecution from introducing the child witness's testimony. This is especially so in this case, in which the prosecutor stated at a dependency court hearing pertaining to this case that he did not need Ivan Jr.'s testimony to prove his case. (CT 6:1442.) The prosecution's decision not to introduce Ivan Jr.'s preliminary hearing testimony at the penalty retrial further demonstrates that the prosecution's interest in admitting the testimony at appellant's trial did not outweigh Ivan Jr.'s interest in not having the testimony introduced at his parents' capital trials.

3. The Trial Court Erred in Ruling that Ivan Jr. Was Competent to Testify at the Preliminary Hearing

The trial court found Ivan Jr. to be competent at the time he testified at the preliminary hearing. In view of the deficits in Ivan Jr.'s ability to

distinguish truth from falsehood and the adequacy of his memory, the court's ruling was erroneous.

Dr. Yanon Volcani, a clinical child psychologist, gave uncontradicted testimony that Ivan Jr.'s recollection at the time of the preliminary hearing was so tainted that Ivan Jr. lacked the ability to distinguish truth from falsehood and did not have an adequate memory of the events about which he testified. (RT 48:5733.) He testified that children who are Ivan Jr.'s age at the time of the preliminary hearing are most likely to confabulate and layer their own fantasies and associations onto the stored memories of the event, and that children's memories of a trauma could be impacted by adults and the services provided for the child to help him cope with the trauma. (RT 48:5705-5706.) Dr. Volcani concluded that there was a significant probability that Ivan Jr.'s stated memories of events at the preliminary hearing were inaccurate. (RT 48:5715.) He testified that chaotic circumstances and Ivan Jr.'s developmental stage would have impacted the encoding of Ivan Jr.'s memory. (RT 48:5717.) He explained that the input Ivan Jr. received from important figures in his life, including his foster mother, therapist, and the police officers who questioned him, and the fantasy elaborations and associations inherent in his developmental stage tainted the storage of Ivan Jr.'s memory. (RT 48:5717-5728.) Dr. Volcani stated that the changes between July and November 1995 in Ivan Jr.'s portrayal of events showed that Ivan Jr.'s memory had mutated. (RT 48:5724.) He opined that the interview of Ivan Jr. held hours after Genny died, during which the police told Ivan Jr. that he was lying, could not have been more conducive to impacting a memory. (RT 48:5727-5728.) Dr. Volcani testified that during the interviews with police, Ivan Jr. got confused and looked to the police

officer for cues, and that Ivan Jr. by late October 1995 began using new terms and further changed his wording when discussing the pertinent events; this suggested that others had tainted Ivan Jr.'s memory. (RT 48:5726-5727, 5730-5732.)

Due to his inability to distinguish truth from falsehood and lack of an adequate memory, Ivan Jr. was not competent to testify at the preliminary hearing. To be competent to testify, a witness must have "the ability to differentiate between truth and falsehood, the capacity to observe, sufficient intelligence, adequate memory, the ability to communicate, and an appreciation of the obligation to speak the truth." (*In re Nemis M.* (1996) 50 Cal.App.4th 1344, 1354; accord, *In re Basilio T.* (1992) 4 Cal.App.4th 155, 167, fn. 7.) Ivan Jr. did not have two of these prerequisites.

At the time of the preliminary hearing, Ivan Jr. did not possess the ability to distinguish truth from falsehood. This Court has recognized that a child witness's inability to distinguish between truth and falsity renders him incompetent to testify. (See *In re Cindy L.* (1997) 17 Cal.4th 15, 18, 31-35.) In Dr. Volcani's uncontradicted expert opinion, Ivan Jr. could not distinguish between what he saw and what somebody told him had happened. (RT 48:5733.) The drastic changes in Ivan Jr.'s recollection between the days following Genny's death and the time of his preliminary hearing testimony buttressed Dr. Volcani's conclusion. Moreover, Dr. Volcani's concerns about people influencing Ivan Jr.'s recollection was borne out; due to its concerns about Ivan Jr.'s foster mother overstepping her bounds, a dependency court judge ordered Ivan Jr.'s foster mother, who cared for Ivan Jr. during the months preceding the preliminary hearing, not to ask Ivan Jr. about the events surrounding Genny's death. (RT 58:7344-

7345.)

In addition, when Ivan Jr. testified, he did not command an adequate memory. Like the ability to distinguish truth from falsity, an adequate memory is a precondition for competency. (*In re Nemis M.*, *supra*, 50 Cal.App.4th at p. 1354; *In re Basilio T.*, *supra*, 4 Cal.App.4th at p. 167, fn. 7.) Without contradiction, Dr. Volcani testified that Ivan Jr.'s memory was likely so impaired that Ivan Jr. didn't know whether he was stating the truth. (RT 48:5733.) The wholesale changes in Ivan Jr.'s recollection, plus evidence that Ivan Jr.'s memory had been tainted by others, support Dr. Volcani's opinion that Ivan Jr. did not possess an adequate memory. Although defects in a witness's memory typically do not render him incompetent to testify and merely form a basis for finding the witness incredible (*People v. Lewis* (2001) 36 Cal.4th 334, 356-358), the adequacy of Ivan Jr.'s memory fell below the threshold for competency. When a witness's memory is so likely impaired that he lacks the ability to know whether his memories are truthful, the witness is incompetent to testify. Because he cannot distinguish between accurate and confabulated recollections and thus had a false confidence in the truthfulness of his testimony, there is no opportunity to cross-examine him effectively. (Cf. *People v. Shirley* (1982) 31 Cal.3d 18, 66-67 [barring admission of hypnotically aided testimony, in part because cross-examination would be rendered ineffective due to witness's inaccurate conviction in truth of hypnotically induced recollection]; *State v. Mack* (Minn. 1980) 292 N.W.2d 764, 769-770 [concluding hypnotically aided testimony of complaining witness prevented defendant from meaningfully cross-examining her because hypnotized witness could not distinguish accurate memory from confabulated memory]; *State v. Moore* (N.J. 2006) 902 A.2d 1212, 1227-

1229 [holding hypnotically aided testimony is inadmissible, largely because a witness's false confidence in the accuracy of her distorted recollections "subverts effective cross-examination"].)

C. The Admission Of Ivan Jr.'s Preliminary Hearing Testimony Violated Appellant's Confrontation-Clause Rights

By admitting the videotapes of Ivan Jr.'s preliminary hearing testimony, the trial court infringed appellant's confrontation-clause rights. Appellant never had an opportunity to cross-examine Ivan Jr. effectively. As a result, the introduction of Ivan Jr.'s prior testimony at appellant's trial violated appellant's constitutional right to have the opportunity for effective cross-examination of adverse witnesses.

The confrontation clauses of the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution prohibit the introduction of testimonial evidence, including prior testimony, against a defendant unless he has had a meaningful opportunity for effective cross-examination. (*People v. Harrison* (2005) 35 Cal.4th 208, 239.) Because the confrontation clause contains no hearsay exception for the admission of former testimony, "preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine." (*Crawford v. Washington* (2004) 541 U.S. 36, 57.) An opportunity to cross-examine the witness at the prior proceeding does not, by itself, satisfy the dictates of the confrontation clause; without an opportunity for *effective* cross-examination, the admission of the prior testimony cannot square with the defendant's confrontation-clause rights. (*United States v. Owens* (1988) 484 U.S. 554, 559 [explaining confrontation clause requires opportunity for effective cross-examination].)

Appellant never had an adequate opportunity to cross-examine Ivan

Jr. effectively. At the preliminary hearing, the lone occasion Ivan Jr. testified, appellant lacked access to information necessary to conduct an effective cross-examination. The state's confidentiality policies precluded appellant from knowing that Ivan Jr. had been experiencing symptoms associated with post-traumatic stress disorder, had reported seeing a hallucination or illusion, and had been improperly influenced by his foster mother, and that Ivan Jr.'s foster mother had expressed concerns regarding Ivan Jr.'s lying. As explained above, appellant not having access to this information precluded an effective cross-examination. (See *ante*, at pp. 203-208.) Appellant's inability to conduct an effective cross-examination of Ivan Jr. implicates the confrontation clause for two reasons.

First, state action prevented appellant from gaining access to the information regarding Ivan Jr. prior to, and for many months after, the preliminary hearing. "The appropriate question is whether there has been any interference with the defendant's opportunity for effective cross-examination." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745, fn. 17.) The State of California has a policy protecting the confidentiality of foster-home placements and records pertaining to dependent children. (See Welf. & Inst. Code, § 827.) The confidentiality policy that prevented appellant from obtaining evidence crucial to the cross-examination of Ivan Jr. distinguishes this case from a scenario where a witness's faulty memory hinders cross-examination. (Compare *United States v. Owens* (1988) 484 U.S. 554, 559-560 [holding that opportunity for effective cross-examination is not denied where witness suffers memory lapse].)

Second, the trial court in this case admitted prior testimony of a witness who did not testify at trial. The admission of the testimonial hearsay implicates confrontation-clause concerns. (*Crawford v.*

Washington, supra, 541 U.S. at p. 57.) Consequently, the confrontation-clause violation in this case does not transform the clause "into a constitutionally compelled rule of pretrial discovery," which a plurality of the United States Supreme Court was leery of doing. (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 52 (plurality opn.).) Appellant does not contend that there was a discovery violation; he asserts that the admission of Ivan Jr.'s preliminary hearing testimony, during which appellant had no meaningful opportunity for effective cross-examination, violated his constitutional rights. The confrontation clause undoubtedly pertains to situations, as here, in which the court admits preliminary hearing testimony of a witness that the defendant never had a meaningful opportunity to cross-examine effectively. (*Crawford*, 541 U.S. at p. 57.) Thus, the unconstitutional admission of testimonial hearsay in this case does not implicate the concerns of the *Ritchie* Court plurality about constitutionalizing discovery violations.

The trial court's ruling that Ivan Jr.'s preliminary hearing testimony was admissible despite the imminent harm that would result, which followed the quashing of Ivan Jr.'s subpoena in large part because of the long-term harm he would face after testifying against his parents in their capital cases, also violated appellant's confrontation-clause rights. By quashing the subpoena but admitting the preliminary hearing testimony, the court put appellant in an untenable position. The trial court admitted the testimony although the state had impeded cross-examination by denying appellant access to Ivan Jr., his foster family, and the information that would have undercut Ivan Jr.'s credibility. Had the trial court not quashed Ivan Jr.'s subpoena, appellant could have effectively cross-examined Ivan Jr. at trial, when appellant had access to the information pertaining to Ivan

Jr.'s memory and ability to perceive accurately. The trial court's rulings, however, forced appellant to contend with the worst of both worlds: the admission of Ivan Jr.'s testimony without the opportunity to conduct a cross-examination while having access to crucial information regarding Ivan Jr.'s credibility. That violated appellant's constitutional right to confront the witnesses against him.

Appellant further lacked an adequate opportunity for effective cross-examination because Ivan Jr. was not a competent witness at the time of the preliminary hearing. A witness who is incompetent due to an inability to distinguish truth from falsity or an inadequate memory cannot be cross-examined effectively. It is difficult to show during cross-examination that a witness's testimony is untrue if the witness himself cannot distinguish between truth and falsity or if he cannot distinguish between accurate and inaccurate memories. It is analogous to a situation in which a witness's testimony has been hypnotically aided. In that scenario, this Court has held that the testimony should be barred because the cross-examination of the witness would be rendered ineffective due to the witness's inaccurate conviction in the truth of hypnotically induced recollection. (*People v. Shirley*, *supra*, 31 Cal.3d at pp. 66-67.) Other courts have similarly concluded that there is no meaningful opportunity for effective cross-examination of a witness whose testimony was aided by hypnosis. (See *State v. Gonzales* (Mich. 1982) 329 N.W.2d 743, 747-748; *State v. Mack*, *supra*, 292 N.W.2d at pp. 769-770 [concluding hypnotically aided testimony of complaining witness prevented defendant from meaningfully cross-examining her because hypnotized witness could not distinguish accurate memory from confabulated memory but had firm belief in veracity of both]; *State v. Moore*, *supra*, 902 A.2d at pp. 1227-1229 [same].) Likewise, in

this case, Ivan Jr.'s inability to distinguish between truth and falsehood and his inadequate memory precluded the possibility of an effective cross-examination. The hindrance to cross-examining Ivan Jr. was exacerbated by the state impeding appellant's access to the information revealing Ivan Jr.'s incompetence to be a witness.

D. Due To The Admission Of Ivan Jr.'s Preliminary Hearing Testimony, The Municipal Court's Errors At The Preliminary Hearing Infected Appellant's Trial

Two significant errors that the municipal court made at the preliminary hearing spilled over into appellant's trial through the admission of Ivan Jr.'s preliminary hearing testimony. Those errors further infringed appellant's confrontation-clause rights.

1. The Court-Ordered Seating Arrangement Employed for Ivan Jr.'s Preliminary Hearing Testimony Violated Appellant's Right to Face-to-Face Confrontation

The municipal court ordered that Ivan Jr. be seated to face away from appellant and Veronica during his testimony, though the court never made a case-specific finding that this seating arrangement was necessary. This ruling violated appellant's Sixth Amendment and article I, section 15 right to face-to-face confrontation.

Prior to the preliminary hearing, the prosecution filed a motion for a protective courtroom seating arrangement for the child witnesses. (CT 1:24-31.) In the motion, the prosecution claimed that Ivan Jr. and Michael said to the police and prosecution team that they feared for their lives and that they had been warned by their parents not to tell anyone about what went on in their home, including what appellant and Veronica allegedly did to Genny. (CT 1:24-25.) The prosecution requested that the municipal

court order that Ivan Jr. and Michael be positioned to face away from appellant and Veronica while they testified. (CT 1:25, 31.)

Before receiving testimony at the preliminary hearing, the municipal court granted the prosecution's request for an alternate seating arrangement for the day Ivan Jr. and Michael were scheduled to testify. The municipal court stated that it did not want the children to face Veronica and appellant. (PX 1:9.) It added, "I don't want children of tender age intimidated, and that's what I'm guarding against." The court did not raise any case-specific concerns or justify its ruling on anything other than a generalized notion that children testifying against their parents may be intimidated by them. In response to appellant's counsel's confrontation-clause objections, the municipal court judge said that Veronica and appellant's Sixth Amendment rights would not be violated because they could see and hear the child witnesses and the witnesses could see them if they chose to look at them. (PX 1:10.)

By ordering that Ivan Jr. be seated so that he faced away from appellant, the municipal court impeded a face-to-face confrontation. Because the municipal court failed to make a case-specific finding of necessity regarding the seating arrangement, the municipal court's order violated appellant's confrontation-clause rights.

It is well-established that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." (*Coy v. Iowa* (1988) 487 U.S. 1012, 1016.) Appellant, however, did not meet Ivan Jr. face-to-face during the preliminary hearing. Instead, the court ordered that Ivan Jr. be seated so that he faced one side of the courtroom while appellant was seated at the prosecution table, which was located at the other side of the courtroom.

The municipal court's order that Ivan Jr. testify while facing away from appellant implicated the confrontation clause. Like the screen placed between the defendant and child witness that the United States Supreme Court held had violated the defendant's confrontation-clause right in *Coy v. Iowa*, *supra*, 487 U.S. at p. 1020, the seating arrangement employed during Ivan Jr.'s preliminary hearing testimony constituted a state-created impediment to face-to-face confrontation. Ivan Jr. and appellant were seated so that appellant was well outside Ivan Jr.'s field of vision. Consequently, the court-ordered special seating arrangement deterred a face-to-face encounter.

The United States Supreme Court has recognized that a "face-to-face confrontation between accused and accuser [is] 'essential to a fair trial in a criminal prosecution.'" (*Coy v. Iowa*, *supra*, 487 U.S. at p. 1017, quoting *Pointer v. Texas* (1965) 380 U.S. 400, 404.) A face-to-face confrontation facilitates an assessment of a witness's credibility. (*Coy*, 487 U.S. at pp. 1018-1020; *Commonwealth v. Johnson* (Mass. 1994) 631 N.E.2d 1002, 1006.) Furthermore, a defendant, after viewing the witness's demeanor and mannerisms, can suggest to defense counsel lines of questioning for cross-examination. (*People v. Lofton* (Ill. 2000) 740 N.E.2d 782, 794.) The defendant would be best able to provide assistance with a witness with whom he has a close relationship, as appellant had with his son Ivan Jr.

For these reasons, the confrontation clause circumscribes the state's ability to obstruct a face-to-face encounter. Except possibly under limited circumstances (see *post*, at pp. 223-225), barriers used in the courtroom to shield the defendant from the witness, such as a screen (*Coy v. Iowa*, *supra*, 487 U.S. at p. 1020), two podiums (*People v. Lofton*, *supra*, 740 N.E.2d at

p. 794), or a prosecutor's body (*Smith v. State* (Nev. 1995) 894 P.2d 974, 976), violate the defendant's constitutional right to confrontation. A court-ordered seating arrangement in which the witness faces away from the defendant similarly impedes a face-to-face confrontation between the witness and defendant. Although it is not impossible for the witness in the alternate seating arrangement to look at the defendant, the state-imposed seating arrangement informs a child witness that people in authority believe that a face-to-face encounter would not be advisable. The alternate seating arrangement itself and the message that it entailed dissuaded the face-to-face confrontation to which the Sixth Amendment and article I, section 15 entitled appellant.

It is immaterial that the confrontation clause does not "compel the witness to fix his eyes upon the defendant." (*Coy v. Iowa*, *supra*, 487 U.S. at p. 1019.) Justice Charles Fried explained:

> [I]t is a non sequitur to argue from the proposition that, because the witness cannot be forced to look at the accused during his face-to-face testimony, that therefore this aspect of the . . . confrontation right is dispensable. The witness who faces the accused and yet does not look him in the eye when he accuses him may thereby cast doubt on the truth of the accusation.

(*Commonwealth v. Amirault* (Mass. 1997) 677 N.E.2d 652, 662.) In addition to negating the possibility of a negative inference when a witness does not look the defendant in the eye, there is a crucial distinction between a witness averting his eyes from the defendant and a witness who is placed by court order so that the defendant is out of his field of vision: The latter scenario entails state action interfering with the defendant's confrontation-clause rights. When a witness, rather than the state, frustrates a defendant's ability to confront an adverse witness, the Sixth Amendment is not

infringed. (See *United States v. Owens*, *supra*, 484 U.S. at pp. 559-560 [holding that opportunity for effective cross-examination is not denied if witness suffers memory lapse].) On the other hand, the Sixth Amendment is implicated when the state interferes with a defendant's confrontation interests. (See *Coy v. Iowa*, *supra*, 487 U.S. at pp. 1020-1021 [holding use of screen that prevented child witness-accuser from seeing defendant violated defendant's confrontation-clause rights]; *Davis v. Alaska* (1974) 415 U.S. 308, 320 [holding bar on cross-examination of juvenile witness's adjudication for delinquency, which pertained to witness's bias, denied defendant's right to effective cross-examination.].) The court-ordered alternate seating arrangement in this case constituted state action.

Accordingly, the seating arrangement was a per se violation of appellant's face-to-face-confrontation rights. The United States Supreme Court's ruling in *Maryland v. Craig* (1990) 497 U.S. 836, 855-857 that a defendant's face-to-face confrontation right can give way to the state's interest to protect child witnesses is no longer viable. Quoting *Ohio v. Roberts* (1980) 448 U.S. 56, 63, *Craig* premised its holding on the proposition that the confrontation clause merely reflects a preference for, rather than requires, a face-to-face confrontation. (*Maryland v. Craig*, *supra*, 497 U.S. 836, 849.) In *Crawford v. Washington*, *supra*, 541 U.S. at pp. 60-68, the United States Supreme Court overruled *Ohio v. Roberts* and criticized *Roberts*'s departure from the confrontation clause's original meaning. *Craig* was founded on *Roberts*'s ahistorical denigration of the right to face-to-face confrontation. In light of *Crawford*, the holding in *Craig* that the state may, in limited circumstances, override the defendant's right to face-to-face confrontation cannot be reconciled with *Crawford* and is not good law. Accordingly, no case-specific showing of necessity can

overcome a defendant's right to confront adverse witnesses face-to-face. Under *Coy v. Iowa*, *supra*, the alternate seating arrangement violated appellant's confrontation-clause rights irrespective of whether the prosecution made a case-specific showing of necessity.

In the event that this Court determines that it lacks the authority to overturn a United States Supreme Court precedent and deems that *Maryland v. Craig* governs this case (but see *State ex rel. Simmons v. Roper* (Mo. 2003) 112 S.W.3d 397, 406-407 [reconsidering viability of United States Supreme Court precedent], aff'd (2005) 543 U.S. 551), the seating arrangement nonetheless violated appellant's confrontation rights. Absent a case-specific showing of necessity, a seating arrangement in which a child witness is positioned to face away from the defendant violates the defendant's confrontation-clause rights guaranteed by the Sixth Amendment. (*Ellis v. United States* (1st Cir. 2002) 313 F.3d 636, 649-650 [requiring case-specific showing of necessity to justify alternate seating arrangement]; *State v. Lipka* (Vt. 2002) 817 A.2d 27, 33 [same]; see also, *People v. Tuck* (N.Y. 1989) 551 N.E.2d 578 [holding that alternate seating arrangement violated confrontation clause].) The lone Court of Appeal case that upheld the use of a similar seating arrangement as that employed in this case recognized that the Sixth Amendment, as construed by the United States Supreme Court in *Maryland v. Craig*, *supra*, 497 U.S. at pp. 855-857, required a case-specific showing of necessity to override lawfully a defendant's right to a face-to-face confrontation. (*People v. Sharp* (1994) 29 Cal.App.4th 1772, 1783, fn. 4.)

Because the municipal court ordered the alternate seating arrangement in the absence of a case-specific showing of necessity, the seating arrangement violated appellant's confrontation-clause rights. In

Maryland v. Craig, *supra*, 497 U.S. at pp. 855-857, the United States Supreme Court permitted a child witness to testify via one-way closed-circuit television, but required a case-specific finding that the interference with the face-to-face confrontation was necessary to protect the particular child witness from trauma. The municipal court's ruling fell far short of this requirement.

The Supreme Court explained: "The requisite finding of necessity must, of course, be a case-specific one: the trial court must hear evidence and determine whether use of the . . . procedure is necessary to protect the welfare of the particular child witness who seeks to testify." (*Maryland v. Craig*, *supra*, 497 U.S. at p. 855.) The proponent of the procedure seeking to curtail the defendant's face-to-face confrontation rights bears the burden of proving, through competent evidence, the need to use the procedure. (*Hochheiser v. Superior Court* (1984) 161 Cal.App.3d 777, 793.) Generalized concerns regarding how child witnesses tend to be intimidated or may be frightened cannot satisfy the requirement of a case-specific showing of necessity. (*Commonwealth v. Amirault*, *supra*, 677 N.E.2d at p. 664 [concluding expert testimony regarding generalities of child witnesses testifying in sexual abuse cases did not show case-specific necessity].) In addition, a prosecutor's unsworn assertion that the particular child witness would be traumatized by a face-to-face encounter with the defendant cannot demonstrate a case-specific finding of necessity. (*People v. Murphy* (2003) 107 Cal.App.4th 1150, 1158.) Moreover, the defendant's presence must be the source of the trauma. (*Craig*, 497 U.S. at p. 856.) Expert testimony is needed to make that showing. (*Hochheiser*, 161 Cal.App.3d at pp. 792-794 [reversing trial court's order for sex abuse child-victims to testify via closed-circuit television, in part because victims' parents' testimony

regarding their mental health was insufficient to establish necessity of procedure].)

The prosecution made no showing of a case-specific necessity in this case. The municipal court granted the prosecution motion for an alternate seating arrangement despite not hearing any evidence in support of the motion. In its motion, the prosecution made unsworn representations that Ivan Jr. and Michael expressed fear of their parents and that they said their parents told them not to tell anyone about what had occurred in their home. These allegations were never subject to adversarial testing. Appellant was further unable to rebut them because only the prosecution had access to Ivan Jr. and Michael. In granting the motion, the municipal court made no specific reference to the prosecution's representations. Rather, the court expressed concerns regarding young witnesses being intimidated. In conjunction with those concerns, the court cited no information specific to this case or these particular witnesses.

Thus, the municipal court's ruling was fundamentally flawed in several respects. When the court ordered the alternate seating arrangement, no competent evidence supported the ruling. The court made no case-specific finding that the alternate seating arrangement was necessary to protect Ivan Jr. and Michael from suffering trauma that would have resulted from the standard courtroom seating arrangement. The two potential sources for the municipal court's ruling, general misgivings about child witnesses testifying for the prosecution in the defendants' presence and the prosecutor's unsworn allegations, failed to provide a remotely sufficient basis for overriding appellant's constitutional right to a face-to-face confrontation with prosecution witnesses. (See *People v. Murphy*, *supra*, 107 Cal.App.4th at p. 1158; *Hochheiser v. Superior Court*, *supra*, 161

Cal.App.3d at pp. 792-794.)

The basis for the municipal court's ruling was flatly inadequate although the alternate seating arrangement constituted a lesser deprivation of appellant's face-to-face confrontation rights than a screen or testimony via closed-circuit television. Some courts have articulated that the minimum showing necessary for a lawful deprivation of the right to face-to-face confrontation is correlated to the extent of the deprivation. (See *People v. Sharp*, *supra*, 29 Cal.App.4th at p. 1783; *Ellis v. United States*, *supra*, 313 F.3d at p. 650; cf. *People v. Lord* (1994) 30 Cal.App.4th 1718, 1722 [concluding minimal showing is required for permitting support person to join child witness].) Nevertheless, the trial court was obliged to make a case-specific finding of necessity before ordering the alternate seating arrangement in this case. (See *Sharp*, 29 Cal.App.4th at p. 1783, fn. 4; *Ellis v United States*, *supra*, 313 F.3d at pp. 649-650; *State v. Lipka*, *supra*, 817 A.2d at p. 33.) Though the required showing of necessity may not have been as difficult to make as that required before a court can order testimony via closed-circuit television, the showing must have been case specific and grounded in evidence received. By basing its ruling on a general reluctance to having child witnesses testify for the prosecution in the defendants' presence and the prosecutor's unsworn allegations, the municipal court failed to predicate its order of the alternate seating arrangement on anything approaching a sufficient case-specific showing of necessity.

Nothing in the preliminary hearing record, other than the prosecutor's unsworn assertions made in the moving papers, would have supported a case-specific finding of necessity. In *People v. Sharp*, *supra*, 29 Cal.App.4th at pp. 1780-1786, the lone appellate court ruling in this state

upholding this sort of seating arrangement, the trial court observed the witness's fear and distress prior to ordering the alternate seating arrangement. In contrast, in this case the municipal court had no valid basis for an implied or explicit finding of case-specific necessity permitting appellant's constitutional rights to face-to-face confrontation to be overriden.

Prior to the United States Supreme Court's decision in *Maryland v. Craig*, *supra*, the Court of Appeal held that a similar seating arrangement violated the defendant's Sixth Amendment rights. (See *Herbert v. Superior Court* (1981) 117 Cal.App.3d 661, 668-671.) Because there was no case-specific finding of necessity in this case, this Court should likewise conclude that the seating arrangement violated appellant's confrontation-clause rights. Moreover, courts in other jurisdictions have found similar alternative seating arrangements, coupled with an absence of a case-specific showing of necessity, to violate defendants' Sixth Amendment rights to face-to-face confrontation. (*People v. Tuck*, *supra*, 551 N.E.2d at p. 578; *State v. Lipka*, *supra*, 817 A.2d at pp. 32-33; cf. *Commonwealth v. Johnson* (Mass. 1994) 631 N.E.2d 1002, 1005-1007 [holding seating arrangement in which rape child-victims testified with their backs toward defendant violated defendant's state constitutional confrontation rights].) Accordingly, the municipal court erred by ordering the alternate seating arrangement that the prosecutor had requested.

2. Barring Defense Counsel from Asking Ivan Jr. about His Understanding of the Consequences of Lying During His Preliminary Hearing Testimony Violated Appellant's Right to Effective Cross-Examination

Although Ivan Jr.'s credibility was the focus of appellant's

counsel's cross-examination of Ivan Jr. at the preliminary hearing, the municipal court prevented counsel from inquiring about Ivan Jr.'s appreciation of the ramifications of lying during cross-examination. That was evidentiary and constitutional error.

Shortly after Ivan Jr. testified that "you get in trouble" for telling a lie but testified that he did not know with whom one would get in trouble, defense counsel asked Ivan Jr.: "[I]f I asked you a question and you gave me an answer and I said Ivan, you lied, would you get in trouble with me?" (PX 2:296.) The municipal court sustained the prosecutor's objection to that question.[73] The municipal court explained to Ivan Jr. that lying under oath is serious and that he would not get in trouble if he told the truth. Ivan Jr. answered affirmatively when the court asked if he understood those concepts. In response to the court asking if he had told lies during his testimony, Ivan Jr. answered in the negative. (PX 2:297.)

The municipal court abused its discretion by barring defense counsel from asking Ivan Jr. about what he believed the consequences of lying while testifying would be. Although the trial court has the discretion to control cross-examination (e.g., *People v. Eli* (1967) 66 Cal.2d 63, 79), "[c]ross-examination to test the credibility of a prosecuting witness in a criminal case should be given wide latitude." (*Curry v. Superior Court* (1970) 2 Cal.3d 707, 715.) "[T]he right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable." (*Pennsylvania v. Ritchie*, *supra*, 480 U.S. at pp. 51-52.) Nonetheless, under state law and the Sixth Amendment, a trial

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[73] Before the prosecutor lodged the objection, Ivan Jr. answered, "Yes." (PX 2:297.)

court may limit cross-examination of a prosecution witness that is marginally relevant, repetitive, or prejudicial. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1051.)

The legitimate bases for limiting cross-examination were absent in this case. The question to which the court sustained an objection was highly relevant; Ivan Jr.'s credibility, ability to distinguish truth from falsity, and appreciation of the consequences of not testifying truthfully were the principal subjects of Ivan Jr.'s cross-examination. Because Ivan Jr. was the only purported percipient witness to the incident, testing Ivan Jr.'s credibility and capacity for telling the truth was critical. The objected-to question was not repetitive. Trial counsel had not previously posed the question, which trial counsel asked in response to two answers Ivan Jr. gave on the same page of the transcript. Lastly, the question was not prejudicial in any regard. Thus, the trial court erred and violated appellant's confrontation-clause rights under the Sixth Amendment and article I, section 15 by sustaining the prosecutor's objection to the question.

The municipal court committed further evidentiary and constitutional error by asking Ivan Jr. leading questions that inevitably induced Ivan Jr. to testify that he had not lied during his testimony, he would get into trouble if he did lie, and would not get in trouble if he did not lie. The questions impermissibly undercut trial counsel's cross-examination of Ivan Jr. It is hardly surprising that an eight-year-old child answered leading questions from the Municipal Court judge, an authority figure, in the expected manner. Once the trial court asked those questions, which yielded the intended answers, defense counsel had no legitimate opportunity to question Ivan Jr. further on topics related to Ivan Jr.'s

credibility. Any such questions would have been objectionable as repetitive. Further, the likelihood that Ivan Jr. would answer a question contrary to the answer he had given the Municipal Court judge was low.

3. The Municipal Court's Errors Impacted Appellant's Trial

By admitting Ivan Jr.'s preliminary hearing testimony into evidence, the trial court permitted the municipal court's evidentiary errors and the related confrontation-clause violations at the preliminary hearing to infect the trial. These errors and infringements of appellant's constitutional rights provide further bases for relief.

E. The Admission Of Ivan Jr.'s Preliminary Hearing Testimony Also Violated Appellant's Constitutional Rights To A Fair Trial And To A Fair, Accurate, And Reliable Capital-Sentencing Determination

Appellant's confrontation-clause rights were not the only constitutional rights impacted by the trial court's admission of Ivan Jr.'s preliminary hearing testimony. Appellant's rights to a fair trial, guaranteed by the Fourteenth Amendment to the United States Constitution and article I, sections 7 and 15 of the California Constitution, and rights to a fair, accurate, and reliable capital-sentencing determination, guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 17 of the California Constitution, were also violated. The admission of Ivan Jr.'s preliminary hearing testimony, without a meaningful cross-examination or a face-to-face confrontation, rendered appellant's trial fundamentally unfair. (See *post*, at pp. 231-235.) Furthermore, the admission of the preliminary hearing testimony tainted the finding of the torture-murder special circumstance, which was the lone basis for appellant's death-eligibility, and thus the penalty determination was not fair,

accurate, or reliable. (See *post*, at pp. 235-236.)

F. The Admission Of Ivan Jr.'s Preliminary Hearing Testimony Requires Reversal Of Appellant's Conviction, The Special-Circumstance Finding, And The Death Judgment

The admission of Ivan Jr.'s preliminary hearing testimony gravely prejudiced appellant. Appellant's culpability was the principal contested issue in this case. Appellant and Veronica were the potential perpetrators, and there was a dearth of evidence showing which of them committed which acts. No percipient witness testified at trial. During appellant's interrogation, appellant did not admit to committing any criminal acts. The prosecution sought to ameliorate the evidentiary gap by presenting Ivan Jr.'s preliminary hearing testimony at the trial. Ivan Jr. was the only witness who testified at any stage of the proceedings who was present inside appellant and Veronica's apartment while acts were perpetrated against Genny. Accordingly, Ivan Jr.'s preliminary hearing testimony was critical to the prosecution's case.

At the guilt phase, the prosecutor relied extensively on Ivan Jr.'s preliminary hearing testimony. In his opening statement, the prosecutor explained that Ivan Jr.'s videotaped prior testimony would constitute one of three ways in which he would prove his case.[74] (RT 50:5851-5852.) He said that Ivan Jr. was an eyewitness and outlined the testimony. (RT 50:5854-5857.) In his closing argument, the prosecutor placed great weight

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[74] The other two avenues by which the prosecutor said he would prove his case were forensic evidence and appellant's interrogation. (RT 50:5851-5852.) However, the forensic evidence could not establish whether Veronica or appellant inflicted the injuries (RT 53:6526), and appellant did not admit to inflicting any of Genny's injuries.

on Ivan Jr.'s preliminary hearing testimony. (RT 63:8095-8102.) He emphasized that Ivan Jr. testified that both appellant and Veronica ran the bath water and placed Genny into the bathtub with scalding hot water. (RT 63:8097-8098.) The prosecutor also highlighted the inconsistencies between Ivan Jr.'s preliminary hearing testimony and appellant's statements during the interrogation and argued that appellant had lied when he denied handcuffing or binding Genny. (RT 63:8098.) The prosecutor credited the preliminary hearing testimony and argued that it was corroborated even where the testimony seemed implausible. (RT 63:8096-8102.)

The erroneous admission of Ivan Jr.'s preliminary hearing testimony was especially prejudicial because of the confrontation-clause violations flowing from the testimony. Appellant's counsel's lack of access to information with which to impeach Ivan Jr.'s credibility at the time of the preliminary hearing, Ivan Jr.'s incompetence, the absence of a face-to-face confrontation, and the municipal court's impermissible restriction of appellant's cross-examination improperly bolstered the perception of Ivan Jr.'s credibility. In view of Ivan Jr.'s role as the lone percipient witness to any of the acts against Genny, the inaccurate impression of Ivan Jr.'s credibility damaged appellant's defense.

The various errors relating to the admission of Ivan Jr.'s preliminary hearing testimony had a symbiotically prejudicial effect. The municipal court's granting the prosecution request for an alternate seating arrangement without requiring the prosecution to make an evidentiary showing of necessity impeded appellant's effort to test Ivan Jr.'s credibility. As stated above, the seating arrangement permitted Ivan Jr. to avoid looking at appellant without appearing to be averting his eyes from appellant. Although the seating arrangement might have been permissible if supported

by a case-specific showing of necessity, the absence of a showing allowed Ivan Jr. to testify without a face-to-face confrontation, yet not have his credibility challenged with the information that would have been revealed if the trial court had properly required the prosecution to make an evidentiary showing. The showing of necessity required by *Maryland v. Craig*, *supra*, 497 U.S. at pp. 855-857, would have entailed testimony regarding Ivan Jr.'s mental health that would have revealed that Ivan Jr. suffered symptoms that ultimately led to a diagnosis of post-traumatic stress disorder and reported seeing a hallucination or illusion, and that Ivan Jr.'s foster mother spoke to Ivan Jr.'s therapist about his proclivity to lie. That information may have permitted appellant to have a meaningful opportunity to cross-examine Ivan Jr. effectively. Instead, appellant had neither a meaningful opportunity for effective cross-examination nor a face-to-face confrontation.

Had the trial court not erroneously admitted Ivan Jr.'s preliminary hearing testimony pursuant to Evidence Code section 1291 or found Ivan Jr. competent, there is a reasonable probability that appellant would not have been convicted of first degree murder.[75] (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) As explained above, Ivan Jr.'s testimony was critical to the prosecution's case that appellant was culpable for Genny's death, and the erroneous admission of the testimony impermissibly bolstered the appearance of Ivan Jr.'s credibility. The testimony of appellant's alleged personal involvement impacted the jury deliberations in two fundamental ways. First, it exaggerated the jury's impression of appellant's personal

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[75] The July and October 1995 interviews of Ivan Jr. would not have been admissible if the preliminary hearing testimony had not been admitted at trial. The interviews were admitted as prior consistent and prior inconsistent statements.

involvement in the offense. Second, because the only path to finding intent to torture was through appellant's conduct, Ivan Jr.'s testimony gave the jury an inflated sense of appellant's alleged intent to torture.

Moreover, the jury requested and received a VCR and televison during guilt-phase deliberations, and the videotaped testimony was kept in the jury room during the guilt-phase deliberations. (RT 63:8209; CT 9:2113; CT 62:13421-13422; CT 63:13489.1.) The jury likely used the VCR and television to view Ivan Jr.'s preliminary hearing testimony again during the deliberations. That reveals the importance of the preliminary hearing testimony and shows that the admission of the testimony had a significant impact on the guilt-phase deliberations. In addition, the question of appellant's guilt was close (see *ante*, at pp. 85-87), and the admission of Ivan Jr.'s testimony likely tipped the scales in favor of conviction. Absent the erroneous admission of Ivan Jr.'s preliminary hearing testimony, the jury would have had little basis from which to conclude that appellant had perpetrated or aided and abetted any of the violent acts against Genny and that appellant had intended to torture her; thus, the jury probably would have found appellant not guilty of first degree murder.

For these reasons, the prosecution cannot show that the various confrontation-clause violations resulting from the admission of Ivan Jr.'s preliminary hearing testimony were harmless beyond a reasonable doubt with respect to the murder conviction. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) Exclusion of Ivan Jr.'s preliminary hearing testimony constitutes the remedy for the confrontation-clause violations. (See *Crawford v. Washington*, *supra*, 541 U.S. at pp. 68-69; *Coy v. Iowa*, *supra*, 487 U.S. at pp. 1021-1022.) Because the testimony was central to the prosecution's guilt phase case-in-chief, the prosecution cannot show that

the testimony had no effect on the verdict. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 ["The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error."] (emphasis in original).) Moreover, the evidence that appellant was personally culpable for Genny's death was not overwhelming (see *ante*, at pp. 85-88); consequently, this error cannot be found harmless under the overwhelming-evidence test. (See *Harrington v. California* (1969) 395 U.S. 250, 254.)

Likewise, it is reasonably probable that the jury would not have found the torture-murder special circumstance if the trial court had not erroneously admitted Ivan Jr.'s preliminary hearing testimony or found Ivan Jr. competent. The testimony, which lacked meaningful adversarial testing, insinuated that appellant participated in the abuse and homicide of Genny. Because Ivan Jr.'s preliminary hearing testimony was the prosecution's strongest evidence of appellant's alleged personal commission of criminal acts, the jury likely inferred appellant's intent to torture and intent to kill from this fundamentally flawed evidence of appellant's purported participation.[76] Thus, the special circumstance cannot be sustained because there is a reasonable probability that the jury would not have found the torture-murder special circumstance if the trial court had not erred. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

The confrontation-clause violations emanating from Ivan Jr.'s preliminary hearing testimony further require vacating the torture-murder

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[76] For the purposes of this argument, appellant assumes arguendo that the jury found intent to kill. (But see *ante*, Claim VI.)

special circumstance. Because Ivan Jr.'s testimony was crucial to the prosecution's case, the admission of the preliminary hearing testimony, which infringed appellant's rights to a meaningful opportunity for effective cross-examination and a face-to-face confrontation, had an effect on the special-circumstance verdict. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Furthermore, the evidence that appellant intended to torture and kill Genny was far from overwhelming. (See *ante*, at p. 89.) As a result, the error cannot be deemed harmless under the overwhelming-evidence test. (See *Harrington v. California*, *supra*, 395 U.S. at p. 254.)

Finally, vacating the murder conviction or the torture-murder special circumstances requires vacating the death judgment as well. The combination of the conviction and special-circumstance finding comprised the lone basis for appellant's death-eligibility.

X

THE ADMISSION OF VERONICA GONZALES'S HEARSAY STATEMENTS TO HER BROTHER-IN-LAW WAS ERROR THAT INFRINGED APPELLANT'S CONFRONTATION RIGHTS

At the guilt phase of the first trial, the prosecutor presented the testimony of Veronica's brother-in-law, Victor Negrette, to rebut the extensive evidence that Veronica had abused appellant on many occasions. Over a defense objection, Victor testified that Veronica told him that appellant had hit her on one occasion. The court erred and violated appellant's confrontation rights by admitting this evidence.

A. Facts And Procedural History

During the prosecution's guilt-phase rebuttal, Victor Negrette testified that Veronica, when living with appellant in Chula Vista, phoned Victor and Veronica's sister Anita, and that in response to the phone call, they drove from their home in Corona to Chula Vista. (RT 60:7711.) Victor recalled that Veronica was crying during the telephone call and asked them to pick her up. (RT 60:7711-7712, 7717.) Victor testified that Veronica stated that, earlier in the day, she and appellant had been fighting and that Victor believed Veronica stated that appellant had hit her. (RT 60:7717-7718.) On the drive between Chula Vista and Corona, Veronica was crying and said that appellant had hit her. (RT 60:7718-7720.) The trial court admitted this testimony pursuant to Evidence Code section 1240 despite numerous hearsay objections.[77] (RT 60:7716-7720.) Appellant subsequently moved for a mistrial on confrontation-clause grounds, and the court, explaining that it properly admitted the hearsay testimony, denied the

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[77] The prosecution did not elicit this evidence at the penalty retrial.

motion. (RT 60:7780-7781.)

B. The Trial Court's Ruling Was Erroneous

The trial court abused its discretion by admitting Veronica's hearsay statements. The prosecution did not meet the foundational requirements for the spontaneous-statement hearsay exception. (See *People v. Morrison* (2004) 34 Cal.4th 698, 724 [proponent of hearsay has burden of establishing foundational requirements of hearsay exception].) A hearsay statement is not admissible under the spontaneous-statement exception unless "the utterance [was made] before there has been time to contrive and misrepresent." (*People v. Poggi* (1988) 45 Cal.3d 306, 318, quoting *Showalter v. Western Pacific R.R. Co.* (1940) 16 Cal.2d 460, 468; see also, Evid. Code, § 1240.) The record provides no indication that Veronica uttered either of her hearsay statements sufficiently close in time to her altercation with appellant. Victor testified that Veronica told him that she and appellant had a fight earlier on the day that she called him. Over the course of a day, a hearsay declarant has more than enough time to contrive and misrepresent what had occurred; thus, evidence that the hearsay statement was made on the same day as the occurrence was insufficient to meet the foundational requirement for the spontaneous-statement hearsay exception. (See *People v. Ramirez* (2006) __ Cal.App.4th __, __, 50 Cal.Rptr.3d 110, 116-120; *In re Cheryl H.* (1984) 153 Cal.App.3d 1098, 1130.) There is no evidence that Veronica's "reflective powers were still in abeyance" or that her physical condition "inhibit[ed] deliberation" when she made the hearsay statements. (*People v. Raley* (1992) 2 Cal.4th 870, 893-894.) Accordingly, the trial court should not have admitted Veronica's hearsay statements into evidence.

C. The Admission Of The Evidence Infringed Appellant's Constitutional Rights To Confront Adverse Witnesses

The trial court's ruling violated appellant's confrontation rights, which are protected by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution. Veronica's hearsay statements accused appellant of having hit her earlier in the day. As such, she sought to have them conclude that appellant had battered her. Although a "solemn declaration or affirmation made for the purpose of establishing or proving some fact" is the epitome of testimonial hearsay (see 2 N. Webster, *An American Dictionary of the English Language* (1828), quoted in *Crawford v. Washington* (2004) 541 U.S. 36, 51), unsworn statements to police officers not made during an emergency also constitute testimonial hearsay. (See *Davis v. Washington* (2006) __ U.S. __, 126 S. Ct. 2266, 2278-2279; *Crawford*, 541 U.S. at pp. 52-53.) Despite the fact that Veronica made the statement to her sister and brother-in-law, rather than the police, it was a testimonial statement that fell within the ambit of the confrontation clause. (See *Davis*, 126 S. Ct. at p. 2274, fn. 2 [explaining that the universe of testimonial statements may not be limited to statements made to law-enforcement officers].) Due to its accusatory nature, Veronica's hearsay statement was a far cry from the casual remark to an acquaintance that the United States Supreme Court has deemed the epitome of non-testimonial hearsay. (See *Crawford*, 541 U.S. at p. 51.) Rather, the hearsay statement was testimonial and, by admitting it into evidence when appellant had no opportunity to cross-examine Veronica, the court violated appellant's rights under the confrontation clause. (See *id.* at pp. 53-54.)

If this Court deems Veronica's statements to be nontestimonial, the

admission of those statements nevertheless violated appellant's confrontation-clause rights. The confrontation clause forbids the introduction of nontestimonial hearsay evidence, such as Veronica's statement, against a defendant unless that statement is reliable. (See *Ohio v. Roberts* (1980) 448 U.S. 56, 66.) Despite the United States Supreme Court's partial overruling of *Roberts* for testimonial hearsay, *Roberts* continues to govern the confrontation-clause analysis of nontestimonial hearsay. (*People v. Corella* (2004) 122 Cal.App.4th 461, 467 [holding that the *Roberts* reliability test continues to govern admission of nontestimonial hearsay]; *United States v. Thomas* (7th Cir. 2006) 453 F.3d 838, 844 [same]; *Compan v. People* (Colo. 2005) 121 P.3d 876, 881-882 [explaining that United States Courts of Appeals and state courts of last resort have universally concluded that *Roberts* controls confrontation clause analysis of nontestimonial hearsay].) Although spontaneous declarations typically fall "within a firmly rooted hearsay exception" (*Roberts*, 448 U.S. at p. 66; see also, *White v. Illinois* (1992) 502 U.S. 346, 357), the record lacked indications that Veronica's statement was sufficiently close in time to the incident she purported to describe for it to come within the ambit of the traditional excited-utterance hearsay exception. The trial court's conclusion that Veronica's remarks were spontaneous statements does not establish under the confrontation clause that the hearsay declarations fit a firmly rooted hearsay exception. (See *Lilly v. Virginia* (1999) 527 U.S. 116, 125.) Moreover, the prosecution made no "showing of particularized guarantees of trustworthiness" regarding the hearsay statements that would have otherwise permitted the admission of the statements without infringing appellant's confrontation rights. (*Roberts*, 448 U.S. at p. 66.)

D. The Error Was Prejudicial

This Court should reverse the conviction, special-circumstance finding, and death judgment, due to the state-law error and confrontation-clause violation stemming from the admission of Veronica's hearsay statement.

It is reasonably probable that appellant would not have been convicted and the jury would not have found the torture-murder special circumstance if the trial court had excluded the hearsay. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) To explain why appellant neither participated in nor stopped the abuse of Genny, appellant presented evidence that he was a battered spouse. The admission of Veronica's hearsay statements, however, created the appearance that the spousal abuse was a two-way street. At the trial, this hearsay comprised the only evidence that appellant had ever used force against Veronica. At the guilt-phase summation and rebuttal, the prosecutor used this evidence to argue that appellant was not a battered spouse and that appellant and Veronica beat each other. (RT 63:8069, 8073, 8160-8162, 8174.) The improper admission of the hearsay evidence thus weakened appellant's arguments that he did not participate in the offense or intend to kill and was thus not guilty of murder and that he lacked the intent to torture or kill required for the special-circumstance finding.

Furthermore, respondent cannot show that the error was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) The hearsay evidence transformed the jury's perception of appellant from spousal-abuse victim to spousal-abuse perpetrator. Evidence of appellant's guilt, participation, and intent to torture and kill was far from overwhelming, and this was a close case. (See *ante*, at pp. 85-89.) The

admission of the hearsay evidence could have tipped the balance in favor of a conviction or special-circumstance finding.

Because the conviction and special circumstance formed the lone basis for finding appellant death-eligible, vacating either the conviction or special-circumstance finding requires vacating the death judgment.

XI

THE ADMISSION OF THE VIDEOTAPE OF THE POLICE OFFICERS' CUSTODIAL INTERROGATION OF APPELLANT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

On the morning after Genny's death, after appellant had been up inordinately late following his arrest, Detectives Larry Davis and Richard Powers sought to interrogate appellant. Although appellant did not validly waive his privilege against self-incrimination or his right to counsel, Detectives Davis and Powers interrogated appellant for two-and-a-half hours. In the absence of a valid waiver, appellant's statements made during the interrogation were inadmissible. The trial court's denial of appellant's suppression motion infringed appellant's constitutional rights and constituted reversible error.

A. Facts And Procedural History

Detectives Davis and Powers began interrogating appellant at 9:43 a.m. on July 22, 1995. (RT 55:6781.) Detective Powers began the interrogation by asking appellant several introductory questions. (CT 8:1753-1755.) He then told appellant that he had already spoken to Veronica and had seen Genny and the apartment. (CT 8:1755-1756.) Detective Powers next said that he wanted to get appellant's side of the story. Afterward, he read appellant most of the *Miranda* warnings. (CT 8:1756.) Detective Powers then asked appellant if he wanted to tell his side of the story. When appellant hesitated, Detective Powers said that he had already spoken to Veronica and knew what had happened, and he would like to get appellant's side of the story. He said that in court appellant's statement would be compared to Veronica's and asked appellant if he wanted to tell him what happened. Appellant said, "Um, well, I," but

Detective Powers cut him off and, without waiting to see whether appellant would waive his *Miranda* rights, launched into the interrogation. (RT 8:1757.)

Prior to trial, appellant moved to suppress his statements to the police made during the interrogation. (CT 2:338-346.) The trial court recognized that appellant did not expressly waive his *Miranda* rights. (RT 15:1422, 1430.) The court nevertheless concluded that appellant made a conscious decision to answer the detectives' questions and impliedly waived his *Miranda* rights. (RT 15:1431-1432.) The court thus denied the suppression motion. (CT 6:1210.) The prosecution presented the videotape of the interrogation in its case-in-chief at the guilt phase and at the penalty retrial. (RT 54:6761; RT 55:6771-6772; RT 94:11786-11787, 11810; Peo. Exh. 66-68, 111.)

B. Appellant Did Not Validly Waive His Privilege Against Self-Incrimination And His Right To Counsel

Although "mere silence is not enough" to constitute an implied waiver of *Miranda* rights (*North Carolina v. Butler* (1979) 441 U.S. 369, 373), Detectives Davis and Powers unlawfully equated appellant's silence with a waiver and improperly interrogated appellant in the absence of a waiver. Even though a course of conduct may indicate that a defendant has waived his *Miranda* rights, the prosecution did not meet its "great" burden of overcoming the presumption against waiver and showing that a waiver should have been "clearly inferred" from appellant's actions. (*Ibid.*)

In *North Carolina v. Butler*, *supra*, 441 U.S. at p. 371, the defendant, despite refusing to sign a *Miranda* waiver form, explicitly expressed a willingness to talk to the interrogating officers. In that case, the defendant's stated willingness to talk to the police provided as strong an

indication of a knowing, voluntary, and intelligent waiver as an explicit waiver would have. In this case, appellant never articulated any agreement to speak to his interrogators. Appellant answering questions was not sufficient to demonstrate waiver. The United States Supreme Court has explained that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." (*Miranda v. Arizona* (1966) 384 U.S. 436, 475.) Yet, the trial court found an implied waiver from appellant's silence and the fact that the police eventually obtained statements from appellant.

Although this Court has found implied waivers from the mere fact that a suspect answered questions that the police posed during an interrogation (see, e.g., *People v. Whitson* (1998) 17 Cal.4th 229, 250), this Court should not uphold the trial court's finding of an implied waiver in this case. By finding an implied waiver of *Miranda* rights whenever a suspect makes statements to the police, this Court has lowered the burden of demonstrating an implied knowing, voluntary, and intelligent waiver that the United States Supreme Court established in *Miranda* and *Butler*. Indeed, if the absence of an invocation of *Miranda* rights plus a statement automatically equate with an implied waiver, then the absence of an explicit waiver is rendered immaterial.

Moreover, Detective Powers misled appellant by telling him that a court would use Veronica's statements against appellant and imploring appellant to speak to the police so the court would not determine appellant's fate based on Veronica's, but not appellant's, description of events. It would be farfetched to assume that appellant knew that Veronica's statements could not lawfully be admitted against him in court. The

police's chicanery, though it does not render appellant's statements involuntary per se, further demonstrates that appellant did not impliedly waive his *Miranda* rights. (See *Frazier v. Cupp* (1969) 394 U.S. 731, 739; *People v. Nitschmann* (1995) 35 Cal.App.4th 677, 682 [finding implied waiver in part because interrogators did not mislead suspect].)

C. The Conviction, Torture-Murder Special Circumstance, And Death Judgment Must Be Vacated

The erroneous admission of the interrogation prejudiced appellant. At both the guilt phase and the penalty retrial, the admissions appellant made during his interrogation comprised the centerpiece of the prosecution's case that appellant was personally culpable of the offense against Genny. At the guilt phase, appellant's admissions and Ivan Jr.'s preliminary hearing testimony provided the only evidence suggesting that appellant, rather than only Veronica, was guilty. (RT 63:8033.) The prosecutor devoted twenty-three reporter's transcript pages of his closing argument to extrapolating appellant's guilt from the statements. (RT 63:8043-8044, 8056-8072, 8097-8099, 8103.) At the penalty retrial, the prosecution did not introduce Ivan Jr.'s videotaped preliminary hearing testimony or earlier taped statements; consequently, appellant's interrogation was the only evidence presented at the penalty retrial intimating that appellant had participated in the offense. The prosecutor focused on the interrogation at the closing argument, during which he played a videotape of excerpts of the interrogation and again allocated twenty-three pages of his argument to inferring appellant's participation from those statements. (RT 99:12760, 12774, 12785-12803, 12814, 12848; Peo. Exh. 111.) At both the guilt phase and the penalty retrial, appellant's guilt and participation were hotly contested, and this was a close case. (See

ante, at pp. 85-87, 93-94.)

Thus, respondent cannot show that the admission of the unlawful interrogation was harmless beyond a reasonable doubt with respect to the jury verdicts and special-circumstance finding. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 312; *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259; *Chapman v. California* (1967) 386 U.S. 18, 24.) The conviction, special-circumstance finding, and death judgment must be vacated.

XII

THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE PHOTOGRAPHS AND A MANNEQUIN OF GENNY ROJAS, AND THE TRIAL COURT'S RULING INFRINGED APPELLANT'S CONSTITUTIONAL RIGHTS

The prosecution sought to introduce a slew of autopsy and crime-scene photos, as well as two photos of Genny while she was alive and a life-sized mannequin of her. The trial court admitted the mannequin and virtually all of the photos at the guilt phase of the first trial and at the penalty retrial. Because these items of demonstrative evidence were inflammatory and gruesome, the trial court's failure to exclude them under Evidence Code section 352 for being unduly prejudicial was error. These erroneous evidentiary rulings deprived appellant of his rights to a fair trial and a fair and reliable capital-sentencing determination.

A. Facts And Procedural History

Several months prior to trial, appellant filed a pretrial motion to limit photographic evidence, which Veronica joined and the prosecution opposed. (CT 2:330-337; CT 5:1079-1103; CT 54:11950-11951.) After initially deferring ruling on the motion until the prosecution selected the photos that it wished to introduce (CT 6:1209-1212; RT 15:1357), the court heard the motion (RT 34:3497-3631; RT 35:3654-3667). After reviewing the 52 autopsy and crime-scene photos that the prosecution sought to present at trial, the trial judge said that these were the most gruesome photos he had seen in the 25 years he had practiced criminal law and that they emotionally impacted him. (RT 34:3507, 3576.) Nevertheless, the court ruled that all of the autopsy and crime-scene photos of Genny were admissible, that one live photo of Genny was admissible, and that all but

three of the other crime-scene photos were admissible.[78] (RT 34:3507-3508, 3562-3563, 3574-3577, 3623-3630; RT 35:3654-3655, 3667; RT 51:6019.) The court admitted these photos into evidence at the guilt phase of the first trial and at the penalty retrial. (CT 10:2332-2338; CT 12:2683-2687.) After the prosecution surprised the defense by introducing a life-sized mannequin of Genny, appellant moved for a mistrial; however, the court determined that the mannequin was admissible and denied the motion. (RT 51:6090-6093.)

B. The Admission Of The Photographs Was Error

The trial court abused its discretion by admitting the autopsy and crime-scene photographs introduced by the prosecution. When photographs' prejudicial impact clearly outweighs their probative value, a court's admission of photos constitutes an abuse of discretion. (*People v. Ramirez* (2006) 39 Cal.4th 398, 453-454.) That occurred in this case.

The grave prejudicial impact of the autopsy and crime-scene photographs clearly outweighed the photos' probative value. The photos were remarkably graphic. The trial judge, who had extensive experience as a Deputy Attorney General representing respondent in capital cases, remarked that these were the most gruesome photos he had ever seen and discussed their emotional impact. During voir dire, countless prospective jurors commented on the photographs' hideousness. Prior to trial, the prosecutor expressed concern that merely showing the photos of Genny to prospective jurors would cause them to shut down emotionally. (RT 37:3995.)

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[78] These rulings stayed in effect at the penalty retrial. (RT 75:9383; RT 81:9551.)

In addition to the photographs' unusually severe gruesomeness, the risk of prejudice was particularly high because the homicide occurred in appellant's home, but the evidence that appellant had perpetrated it was questionable. The photos impeded the jury from evaluating dispassionately the evidence pointing toward and against appellant's guilt of first degree murder. The admission of the photos into evidence permitted the prosecutor to argue that appellant's participation was inevitable because he could not have seen Veronica torture Genny and not have participated in perpetrating the offense. (RT 99:12783, 12840.)

Furthermore, studies have recognized that graphic photographs have the power to arouse jurors' emotions. "Juries are comprised of ordinary people who are likely to be dramatically affected by viewing graphic or gruesome photographs." (Rubenstein, *A Picture Is Worth a Thousand Words — The Use of Graphic Photographs as Evidence in Massachusetts Murder Trials* (2001) 6 Suffolk J. Trial & Appellate Advoc. 197; see, Douglas et al., *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?* (1997) 21 Law & Hum. Behav. 485, 491-492 [documenting jurors' emotional reactions to viewing graphic photographs of murder victim]; Kelley, *Addressing Juror Stress: A Trial Judge's Perspective* (1994) 43 Drake L.Rev. 97, 104 [recounting juror's posttraumatic-stress symptoms experienced after viewing graphic photos of murder victim].) Studies also show that graphic photographs influence the verdicts that juries return. (Miller & Mauet, *The Psychology of Jury Persuasion* (1999) 22 Am. J. Trial Advoc. 549, 563 [juries that viewed autopsy photographs during medical examiner's testimony were more likely to vote to convict defendant than those not shown photographs]; Douglas et al., *supra*, 21 Law & Hum.

Behav. at p. 492-494 [same].)

The prejudicial effect of the autopsy and crime-scene photos clearly outweighed the photos' probative value. The photos were cumulative to the testimony of Dr. Eisele, the deputy medical examiner, Dr. Feldman, the burn expert, and Dr. Sperber, the forensic odontologist, as well as the testimony of the lay witnesses who saw Genny at the apartment complex. Although autopsy and crime-scene photographs can illuminate testimony, the photos' capacity to assist the jury's understanding of the expert testimony could not rival their power to prejudice the jury. Accordingly, the trial court erred in admitting the autopsy and crime-scene photos.

In addition, the trial court abused its discretion in admitting Exhibit 20, the photo of Genny taken in a Halloween costume in 1994. This Court has repeatedly recognized that trial courts should proceed cautiously with the possible admission of photos taken of murder victims while they were alive because of the inherent capacity of those photos to arouse sympathy. (E.g., *People v. Harris* (2005) 37 Cal.4th 310, 331.) The trial court said that the Halloween photo, which showed Genny wearing what appeared to be angel wings, was "most dramatic" and showed her to be "a cute little tot." (RT 34:3535.) Testimony from Paul Gaines, the social worker assigned to Genny while she was in Utilia Ortiz's custody, would have sufficed to convey to the jury that Genny was not visibly injured when he saw her living with her maternal grandmother. The prejudicial impact of the sympathy-inducing photo dwarfed the marginal probative value that the photo added to the prosecution's case.

C. The Admission Of The Mannequin Was Error

The trial court also abused its discretion by admitting the life-sized mannequin into evidence. Unlike a mannequin of an adult, a 38-inch

mannequin of a 4½-year-old girl has the power to arouse jurors' emotions and sympathy. Thus, the mannequin was prejudicial. The prejudicial effect clearly outweighed the probative value stemming from the prosecutor's use of the mannequin to theorize how one of Genny's injuries may have been inflicted.

D. The Court's Rulings Violated Appellant's Constitutional Rights

The admission of these photographs also infringed appellant's Fifth, Eighth, and Fourteenth Amendment rights, as well as his rights guaranteed by article I, Sections 7, 15, and 17 of the California Constitution, to a fair trial and a reliable capital-sentencing proceeding. Although violations of state evidentiary principles generally do not implicate the federal and state constitutions, in this case the admission of the shocking, gruesome photographs and the mannequin prevented appellant from getting a fair trial and thus violated appellant's constitutional rights. (See *Lisenba v. California* (1941) 314 U.S. 219, 228 [recognizing state court's admission of prosecution evidence that infuses trial with unfairness would violate defendant's right to due process of law].)

"In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.) Admitting photographs as graphic as the ones in this case, which the trial judge said were the most gruesome he had seen in 25 years of practicing criminal law, rendered the photographs unduly prejudicial and caused appellant's trial to be fundamentally unfair. The admission of the mannequin also made the trial fundamentally unfair.

The trial court exacerbated the unfairness of the trial by treating the prosecution's demonstrative evidence disparately from appellant's demonstrative evidence. The court gave the prosecutor free reign to admit its graphic autopsy and crime-scene photos, yet barred appellant from presenting his four youngest children to the jury. (See *ante*, Claim IV.) This disparate treatment was fundamentally unfair and formed a separate violation of appellant's due process rights.

The admission of the gruesome photographs and mannequin at the penalty retrial also violated appellant's right to a fair and reliable capital-sentencing determination. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [requiring heightened reliability for capital-sentencing determination].) "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.) The admission of the photographs and mannequin opened the floodgates for jurors' emotions, rather than their reason, to guide the penalty-phase deliberations and verdict. As discussed above, there is a great danger that when exposed to photographs like those at issue here, jurors will foreclose consideration of other evidence and render their verdict based upon the emotional impact of the photographs and mannequin. The result of this is the failure to consider mitigating evidence, which offends Eighth Amendment principles. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 398-399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 114.)

E. The Conviction, Torture-Murder Special Circumstance, And Death Judgment Must Be Vacated

The admission of the photos and mannequin was reversible error.

As explained above, the autopsy and crime-scene photos were highly prejudicial. The nature of the injuries inflicted on Genny was not in dispute. However, at both the guilt phase and the penalty retrial, appellant's involvement in the infliction of the injuries was hotly contested, and this was a close case, for which the evidence against appellant was not overwhelming. (See *ante*, at pp. 85-88, 93-94, 98.) Accordingly, it is reasonably probable that the jury would not have convicted appellant or found the torture-murder special circumstance if the court had not erroneously admitted the photos and mannequin. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) Likewise, it is reasonably possible that the jury at the penalty retrial would not have returned a death verdict in the absence of the error. (See *People v. Brown* (1988) 46 Cal.3d 432, 448.) Furthermore, the respondent cannot show that the admission of the photos and mannequin was harmless beyond a reasonable doubt. (See *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259; *Chapman v. California* (1967) 386 U.S. 18, 24.) Accordingly, the conviction, special-circumstance finding, or death judgment cannot be upheld.

XIII

APPELLANT'S CONVICTION AND THE SPECIAL-CIRCUMSTANCE FINDING WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE

The prosecution's evidence in this case contained a fundamental flaw: No evidence established what had occurred behind the closed doors of appellant and Veronica's apartment. The prosecution sought to fill the gaping hole in its proof through conjecture and speculation. Neither can sustain the murder conviction and torture-murder special circumstance. Evidence that appellant participated in the offense or intended to torture and kill Genny was insufficient.

At the close of the prosecution's case-in-chief at the guilt phase, appellant moved for a judgment of acquittal pursuant to Penal Code section 1118. The court denied the motion. (RT 56:6911-6913.) That ruling was error. In addition, the conviction and special-circumstance finding based on insufficient evidence violated appellant's due process rights and thereby presents a related but separate basis for reversing the conviction and special circumstance, as well as the death sentence. (See *In re Winship* (1970) 397 U.S. 358, 364.)

A. The Evidence That Appellant Perpetrated The Offense Was Insufficient

Although the evidence left little doubt that Genny had been mistreated and killed in appellant and Veronica's apartment, it provided few indications of who was culpable. The forensic evidence provided no hint of the perpetrator's identity (RT 53:6526). Appellant's admissions gave no sign that he was culpable for unlawful activity. Ivan Jr.'s direct examination testimony that appellant, along with Veronica, had bathed Genny on the day she died was the only evidence from a percipient witness

that appellant was culpable for Genny's death; however, on cross-examination, he testified that the bath had occurred on the previous day and that he did not see appellant put Genny in the bathtub on the night of her death. (PX 2:236, 293.)

Even viewing the evidence in the light most favorable to the judgment (e.g., *People v. Lewis* (2006) 39 Cal.4th 970, 1044), the evidence that appellant was either the primary perpetrator or an aider and abettor was not sufficient to support the conviction. Given the dearth of evidence implicating appellant, his guilt could not have been established through reasonable inferences from the evidence.

B. The Evidence That Appellant Intended To Torture Was Insufficient

Both the torture-murder theory of first degree murder and the torture-murder special circumstance require proof of "intent to inflict extreme pain."[79] (*People v. Cole* (2004) 33 Cal.4th 1158, 1197; see also, *People v. Davenport* (1985) 41 Cal.3d 247, 271.) Evidence that appellant possessed this mens rea was lacking. Although evidence of intent to torture might have been reasonably imputed to the person who inflicted the majority of abusive acts against Genny, the evidence that appellant personally victimized her was, at best, minimal. Appellant's admission to intending to scare Genny with nonviolent actions did not provide an adequate basis for a rational trier of fact to infer reasonably that appellant intended to inflict extreme pain. Similarly, it would not have been reasonable for the jury to infer an intent to torture from Ivan Jr.'s

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[79] The semantic differences in the intent-to-torture elements of murder by torture and the torture-murder special circumstance do not impact this claim.

implausible allegations, unsupported by the forensic evidence, that appellant and Veronica made Genny eat her feces, used a knife to rip out her skin, or engaged in other abusive behaviors. Consequently, the evidence that appellant intended to torture Genny was insufficient.

C. The Evidence That Appellant Intended To Kill Was Insufficient

At several points during these proceedings, the trial court stated that whether appellant possessed the intent to kill was the weakest component of the prosecution's case at the guilt phase. (RT 20:1747; RT 56:6903, 6912.) The court's assessment was accurate. The evidence that appellant intended to kill Genny was not sufficient to support the torture-murder special circumstance.

As stated above and elsewhere, the evidence that appellant personally perpetrated the offense was weak. The trial court instructed the jury on aiding and abetting (CT 10:2256), and the jury may well have convicted appellant on an aiding-and-abetting theory. Accordingly, appellant's alleged intent to kill cannot be inferred from the conduct against Genny. Even if the person who committed most or all of the abusive acts against Genny had intended to kill her, evidence that appellant was that person was insufficient. Also, there was a dearth of evidence that appellant, as an aider and an abettor, possessed the requisite intent to kill.

Moreover, evidence that the primary perpetrator had intended to kill Genny was deficient. Neither the act that caused the death, nor other acts, provided a reasonable basis from which to infer an intent to kill. Genny died from being burned for between one to ten seconds by water that had flowed from the bathtub faucet. It is quite unlikely that an unsophisticated person — and there is no indication in the record that Veronica or appellant

were sophisticated — would be aware that the fleeting exposure to the hot water in the bathtub would be fatal. Likewise, the most culpable explanation for Genny's subdural hematoma to her brain, that she was thrown hard against a mattress, does not suggest that the person who inflicted the injury harbored an intent to kill. Death seemed like an extraordinarily unlikely result of those actions. Additionally, despite being bizarre and disturbing, hanging Genny from a hook, from where she had the ability to support herself and avoid asphyxia, was unlikely to cause death.

This case presents the converse of the deadly weapon doctrine: Unlike a case in which a perpetrator's intent to kill could be inferred from a use of a deadly weapon in a manner likely to have been for a deadly purpose (see Oberer, *The Deadly Weapon Doctrine–Common Law Origin* (1962) 75 Harv. L. Rev. 1565), in this case the means used to inflict death were so unlikely to cause death that an intent to kill could not be reasonably inferred from the actus reus.

Significantly, neither appellant nor Veronica made any remark that hinted that either person had intended to kill Genny. Thus, conduct is the only route from which intent to kill could be inferred.

Furthermore, the jury did not find that the prosecution had proven appellant's intent to kill beyond a reasonable doubt. (See *ante*, Claim VI.) Typically, an appellate court determines a sufficiency claim by "[v]iewing the evidence in the light most favorable to the verdict." (*People v. Cervantes* (2001) 26 Cal.4th 860, 866.) However, in this case there is no valid verdict to which a reviewing court should defer. Accordingly, finding this claim to be meritorious would not require a conclusion that the jury's determination was unreasonable or irrational; the jury never determined in the first instance whether appellant possessed an intent to kill.

D. The Conviction, Special-Circumstance Finding, And Death Sentence Must Be Reversed

Because the evidence supporting the conviction and torture-murder special circumstance was insufficient, this Court should reverse the conviction and special-circumstance finding. The reversal of the conviction or the torture-murder special circumstance renders appellant ineligible for the death penalty; therefore, this Court must also reverse the death sentence.

XIV

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT DURING HIS GUILT-PHASE CLOSING AND REBUTTAL ARGUMENTS

In his exuberance to win a conviction and special-circumstance finding, the prosecutor suggested that he had knowledge of extra-record evidence and demonized appellant. The prosecutor's arguments constituted misconduct that deprived appellant of a fair trial and infringed his confrontation-clause rights.

A. Facts And Procedural History

During the defense closing argument at the guilt phase, appellant's counsel argued that Ivan Jr.'s description of events changed markedly between the days after Genny's death and the preliminary hearing because he had been influenced by many people, including his foster mother, therapist, and teenage probationers who were living in his foster home. (RT 63:8145-8150.) In rebuttal, the prosecutor, contending that Ivan Jr.'s testimony had not been coached, asked, "Why not call Bruce Campbell, the guy who's at the prelim, the man who is sitting next to Ivan, Jr., when he was testifying? Why not call him?" (RT 63:8165.) After the court overruled a defense objection that the prosecutor was impermissibly placing a burden of proof on appellant, the prosecutor added, "Why don't they call the process servers? Why don't they call Ivan, Jr.'s psychologist? Why don't they call whatever? Why don't they do something about that? Because they're all going to deny it." (RT 63:8165-8166.) The court sustained the defense objection to the prosecutor referring to purported facts outside the record and admonished the jury that it should not consider the speculative argument for which there was no evidence. (RT 63:8166.)

In addition, the prosecutor at his guilt-phase closing argument

asserted, "[Appellant's] conduct is so egregious that I have no problem comparing him to a person like Hitler [objection lodged] or the [objection sustained] conduct that was embraced in Bosnia." (RT 63:8031.) The court thereafter sustained another defense objection. (*Ibid.*) Shortly afterward, the prosecutor argued, "He's Ivan the Terrible. He was the camp commandant [objection lodged and overruled] and this was a campaign of terror." (RT 63:8032.)

B. The Prosecutor Committed Misconduct

The prosecutor's arguments constituted two strands of misconduct. In his rebuttal argument, the prosecutor improperly argued that several people, if they had been witnesses, would have testified that Ivan Jr.'s preliminary hearing testimony had not been coached. This reference to purported facts outside the record to bolster a prosecution witness's credibility was improper. (See *People v. Turner* (2004) 34 Cal.4th 406, 432-433; *People v. Frye* (1998) 18 Cal.4th 894, 976.) Likewise, the prosecutor's comparisons of appellant to Adolf Hitler and Slobodan Milosevic were impermissible. (See *State v. Pennington* (N.J. 1990) 575 A.2d 816, 831-832 [holding prosecutor's use of epithets constituted misconduct].) Although this Court permits prosecutors to use, in argument, opprobrious terms that have evidentiary support (*People v. McDermott* (2002) 28 Cal.4th 946, 1002), the prosecutor, by comparing appellant to two infamous architects of genocide, exceeded the bounds of permissible argument. (See *State v. Walters* (N.C. 2003) 588 S.E.2d 344, 366.) Despite the shared first name, the comparison of appellant to Ivan the Terrible was similarly improper; there was no evidentiary basis upon which to compare appellant to a despot who ordered that all the inhabitants of an entire large city be killed. The camp commandant epithet also was misconduct,

particularly because the prosecutor called appellant a camp commandant shortly after comparing appellant to Hitler. In addition to lacking evidentiary support, all of prosecutor's vituperation constituted improper appeals to the jurors' emotions. (See *People v. Fosselman* (1983) 33 Cal.3d 572, 580-581; *People v. Jones* (1970) 7 Cal.App.3d 358, 363.)

C. The Prosecutorial Misconduct Infringed Appellant's Due Process And Confrontation Rights

Beyond being state-law error, the prosecutorial misconduct deprived appellant of a fair trial and thus violated appellant's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and article I, sections 7 and 15 of the California Constitution. (See *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [prosecutorial misconduct that infects trial with unfairness infringes defendant's due process rights]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [same].) The two types of misconduct individually and cumulatively rendered the trial unfair.

The prosecutor impermissibly bolstering the credibility of Ivan Jr.'s preliminary hearing testimony prevented appellant from receiving a fair trial because Ivan Jr.'s allegations were crucial to the prosecution's case and the veracity of those allegations was disputed. The only evidence implicating appellant, rather than solely Veronica, was appellant's admissions to noncriminal conduct and Ivan Jr.'s allegations. Consequently, the prosecution's guilt-phase case against appellant relied heavily on the truthfulness of Ivan Jr.'s allegations. Accordingly, casting doubt on Ivan Jr.'s credibility comprised a critical component of appellant's defense. By referring to matters outside the record to undercut this line of defense that would have rebutted crucial prosecution evidence, the prosecutorial misconduct prevented appellant from receiving a fair trial.

The comparisons of appellant to Adolf Hitler and Slobodan Milosevic and the Ivan the Terrible and camp commandant epithets also rendered the trial unfair. These remarks were highly inflammatory and, thus, prejudicial. (See *Martin v. Parker* (6th Cir. 1993) 11 F.3d 613, 616-617 [holding prosecutorial misconduct, particularly comparison of defendant to Hitler, denied defendant right to fair trial].)

Appellant did not receive a fair trial though the trial court sustained defense objections to the prosecutor's witness vouching and comparisons and admonished the jury not to consider the prosecutor's vouching. (See *Moore v. Morton* (3rd Cir. 2001) 255 F.3d 95, 119-120 [concluding prosecutorial misconduct deprived defendant of fair trial despite curative instruction]; *Hill v. Turpin* (11th Cir. 1998) 135 F.3d 1411, 1419 [same]; *State v. Frost* (N.J. 1999) 727 A.2d 1, 5-6 [same].) Once the prosecutor made his improper remarks, the bell could not be unrung. It would be unrealistic to expect that the jury disregarded the prosecutor's allusions to matters outside the record and comparisons to Hitler and Milosevic. Moreover, the trial court overruled defense objections to the prosecutor calling appellant Ivan the Terrible and a camp commandant; the court's ruling informed the jury that the trial court believed that these epithets constituted fair prosecutorial comment on the evidence.

The misconduct also infringed appellant's confrontation-clause rights, which are guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution. When the prosecutor referred to extra-record facts, appellant had no opportunity to confront the adverse "witness." (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643, fn. 15; *People v. Harris* (1989) 47 Cal.3d 1047, 1083.)

D. The Prosecutorial Misconduct Was Prejudicial

As a result of the prosecutorial misconduct, this Court should vacate the conviction, special-circumstance finding, and death judgment. If the prosecutor had acted properly, it is reasonably probable that appellant would not have been convicted and the jury would not have found the special circumstance. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) This was a close case, and the evidence against appellant was not overwhelming. (See *ante*, at pp. 85-88.) The prosecutor vouching for Ivan Jr.'s credibility prejudiced appellant because the truthfulness of Ivan Jr.'s allegations was central to the prosecution's case. The epithets prejudiced appellant because the prosecutor compared appellant to some of history's most infamous, homicidal, and genocidal figures. (See *Martin v. Parker*, *supra*, 11 F.3d at p. 616 [holding prosecutor's comparison to defendant to Hitler "create[d] an overwhelming prejudice in the eyes of the jury"].) Furthermore, respondent cannot show that the violation of appellant's due process and confrontation rights stemming from the prosecutorial misconduct, which deprived appellant of a fair trial, was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) Because the conviction and special circumstance formed the only basis for finding appellant death-eligible, vacating either the conviction or special-circumstance finding requires vacating the death judgment.

XV

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT AT THE PENALTY RETRIAL

Throughout the penalty retrial, the prosecutor crossed the line in several respects in order to win the death verdict he could not obtain at the first trial. The prosecutorial misconduct deprived appellant of a fair and reliable penalty retrial. As a result, appellant should receive a new, misconduct-free penalty trial.

A. The Prosecutor Committed Misconduct

1. Epithets

Prior to the retrial, appellant moved to limit the prosecutor's argument. (CT 11:2577-2601.) Appellant specifically requested that the court bar the prosecutor from calling appellant Ivan the Terrible or a camp commandant, as he had done at the first trial. (RT 84:10000-10002.) Believing that those slurs constituted permissible argument, the court overruled the objections. (RT 84:10002; RT 90:11192-11193; RT 91:11253; RT 98:12699.) The prosecutor in his opening statement called appellant a camp commandant and in his closing argument called appellant Ivan the Terrible. (RT 91:11253; RT 99:12745.)

Because the prosecutor lacked evidentiary support for these epithets, the prosecutor's arguments constituted misconduct. Moreover, the prosecutor's invective improperly appealed to jurors' emotions. (See *ante*, at p. 262.)

2. Opening Statement

In his opening statement, the prosecutor argued that "[t]his case is the reason why we have capital punishment." The court sustained an objection to that remark. (RT 91:11231.) He also called appellant a camp

commandant although he had represented to the court that he would not use that epithet during the opening statement and, relying on that representation, the court had not definitively ruled on the propriety of that comment. The court overruled appellant's objection to that slur. (RT 90:11192-11193; RT 91:11253.)

The trial court correctly sustained the argumentativeness objection; saying that the death penalty was needed in this case did not prepare the jurors to follow the evidence. (See *People v. Dennis* (1998) 17 Cal.4th 468, 518.) Further, it was misconduct for the prosecutor to inform the court and appellant's counsel that he would not call appellant a camp commandant during the opening statement and then make the very argument he said he would not make. The court relied on that representation. It was misconduct to mislead the trial court and defense counsel. (See *Demjanjuk v. Petrovsky* (6th Cir. 1993) 10 F.3d 338, 349-350; *Korematsu v. United States* (N.D. Cal. 1984) 584 F.Supp. 1406, 1420.) The prosecutor misleading the court and counsel exacerbated the impropriety of the prosecutor calling appellant a camp commandant.

3. Reserved Chair

At his penalty-phase closing argument at the first trial, the prosecutor said that he had the bailiff reserve a seat in the courtroom to represent that nobody in the courtroom cared about, or had shed a tear for, Genny. (RT 70:8936.) At appellant's request, the trial court subsequently barred the prosecutor from stating at the penalty retrial that the court staff played a role in reserving the chair. (RT 84:10005-10006; RT 91:11386; RT 98:12705.) The court, however, overruled appellant's objections to the prosecutor placing a "reserved" sign on a chair for the penalty retrial. (RT 91:11208-11210; RT 92:11383-11386.) Prior to the closing argument,

appellant objected to prosecutorial argument regarding the reserved chair, but the court overruled the objection. (RT 98:12698, 12700, 12703-12705.) During his summation, the prosecutor argued that he reserved the seat to show "that somebody cares about Genny and that Genny does exist in all of our hearts." (RT 99:12828.)

The prosecutor's actions were improper for several reasons. Whether Genny existed in the prosecutor's and jurors' hearts was irrelevant, and the prosecutor's assertion was not derived from the evidence. (See *People v. Haskett* (1982) 30 Cal.3d 841, 864.) Indeed, the prosecutor's antics appeared to be designed to substitute for the absence of victim-impact evidence, which, for strategic reasons, the prosecutor did not elicit.[80] Moreover, the prosecutor's ploy improperly appealed to jurors' emotions. (See *People v. Fosselman* (1983) 33 Cal.3d 572, 580-581; *People v. Jones* (1970) 7 Cal.App.3d 358, 363.)

4. Questions About Appellant's Clothing and Grooming

At the penalty retrial, the prosecutor asked Officer William Reber if appellant on the night of Genny's death had a goatee or wore a purple cardigan sweater. Reber replied that appellant was not clean-shaven and was not wearing a sweater. (RT 95:11987.) The prosecutor later argued that appellant's purple cardigan sweater did not make appellant a human being. (RT 99:12822.) The court overruled an objection to the questioning and concluded that the related argument was permissible. (RT 95:11987;

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[80] Potential victim-impact witnesses included Genny's parents and grandmother, Tillie. Due to the pending capital prosecution against Veronica, they apparently would have been hostile witnesses. (RT 35:3665.)

RT 103:12940-12941.)

Because appellant's appearance at the time of the incident was irrelevant, this line of questioning constituted misconduct. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 755.) This was not an identification case in which appearance was material to the prosecution's case in aggravation. Appellant's clothing and grooming was thus not relevant to any aggravating factor and had no pertinence to the determination of his deathworthiness. Though the prosecutor sought to contrast appellant's appearance at the time of the incident to his being well-groomed in the courtroom, appellant's courtroom appearance was not evidence and, accordingly, not an appropriate subject for rebuttal. A defendant being well-dressed in the courtroom provides prosecutors with no justification for asserting or implying that his being unkempt at the time of the crime makes him deathworthy.

5. Closing Argument

Though the court had barred the prosecutor from eliciting evidence of the filth and odor in appellant and Veronica's apartment, during closing argument at the penalty retrial the prosecutor said that the apartment smelled of feces and urine. (RT 99:12750.) The court determined that this argument was proper. (RT 103:12940-12941.)

Furthermore, the prosecutor asserted that the acts against Genny also occurred at concentration camps in Eastern Europe and in Rwanda and Bosnia. The court overruled appellant's objection to this argument. (RT 99:12744.)

In addition, the prosecutor urged the jurors to picture themselves armed with a gun in appellant and Veronica's apartment and asked the jurors at which point they would intervene. The court overruled appellant's

ensuing objection. (RT 99:12769-12770.)

Also, the prosecutor contended appellant was arguing that he either did not injure Genny or that, if he did, it was an accident. The prosecutor claimed that the veracity of appellant's defense was belied by the number of defenses raised. The court overruled appellant's objection that the prosecutor misstated his argument. (RT 99:12819-12820.) Further, the prosecutor argued that it was ridiculous for defense counsel to humanize appellant because appellant, despite dressing well in the courtroom, was no longer a human being. (RT 99:12822.) The trial court concluded that this argument was permissible. (RT 103:12940-12941.) When reviewing the mitigating factors that he asserted did not apply in this case, the prosecutor claimed that appellant was arguing that Genny's conduct contributed to the homicidal acts. Again, the court overruled appellant's objection that the prosecutor misstated his argument. (RT 99:12835-12836.)

Toward the end of his summation, the prosecutor rhetorically asked, "If [appellant] was such a great father, why did he let his children see this?" (RT 99:12844.) Believing that this was permissible argument based on the evidence, the court overruled appellant's objection. (RT 99:12845, 12851-12853.)

All of these arguments were improper. The prosecutor disclosing the foul odors in the apartment — after the court had barred him from eliciting evidence of the stench — constituted egregious misconduct. The prosecutor cannot use closing argument to evade an adverse evidentiary ruling. (See *People v. Bolton* (1979) 23 Cal.3d 208, 212-213.) The comparison to concentration camps was inflammatory, designed to appeal to jurors' emotions, lacked evidentiary support, and was an end run around the court having sustained at the first trial an objection to comparisons to

Adolf Hitler and Slobodan Milosevic. (RT 63:8031; see *People v. Cash* (2002) 28 Cal.4th 703, 732; *People v. Fosselman, supra*, 33 Cal.3d at pp. 580-581.) Imploring the jurors to picture themselves armed with a gun at the apartment was inflammatory and an inappropriate appeal to jurors' emotions. (See *Fosselman*, at pp. 580-581.) This Court has found that argument to be improper. (*People v. Jackson* (1963) 59 Cal.2d 375, 381.) Moreover, telling the jurors to imagine having a gun that they could use to stop the abuse of Genny improperly implied to the jurors that they should vote for a death verdict because it was the best available alternative to preventing Genny's death. The misstatement of appellant's arguments, which permitted the prosecutor to set up and knock down fictional straw men, was also misconduct. (See *People v. Kennedy* (2005) 36 Cal.4th 595, 627 [suggesting prosecutor's misstatement of defense arguments can constitute misconduct].) The prosecutor also improperly disparaged defense counsel. (See *People v. Hill* (1998) 17 Cal.4th 800, 832.) The prosecutor asking why appellant allowed his children to see Genny being abused was not permissible because appellant did not elicit evidence or argue that appellant was a good father and the penalty retrial record lacked evidence that the children saw what had happened. Misstating appellant's argument and making an argument based on facts not in evidence constituted misconduct. (*Ibid.*; *Cash*, 28 Cal.4th at p. 732.)

6. The Trial Court Erred in Overruling Objections to Misconduct and Denying the Related Portion of the Motion for a New Trial

Aside from sustaining appellant's argumentativeness objection during the prosecutor's opening statement, the trial court overruled appellant's objections to the misconduct delineated above. Those rulings

were erroneous.

Appellant raised prosecutorial misconduct at the penalty retrial closing argument as one of two grounds in his motion for a new trial. (CT 12:2706-2712.) Finding the prosecutor's arguments to be proper, the court denied the motion. (RT 103:12940-12941.) That, too, was error.

B. The Prosecutorial Misconduct Infringed Appellant's Rights To Due Process Of Law, To A Fair And Reliable Capital-Sentencing Determination, To Counsel, And To Confront Adverse Witnesses

The prosecutorial misconduct deprived appellant of a fair trial and thus violated appellant's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and article I, sections 7 and 15 of the California Constitution. (See *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [prosecutorial misconduct that infects trial with unfairness infringes defendant's due process rights]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [same].) The misconduct steered the jury away from a proper evaluation of the evidence admitted and its relationship to the statutory aggravating and mitigating factors and toward an improper evaluation of appellant's deathworthiness. The prosecutor's appeals to jurors' emotions, inflammatory rhetoric, and references to purported facts that could not be reasonably inferred from the evidence provided the jury with unlawful bases for returning a death verdict. Research has demonstrated that this sort of misconduct indeed influences juries' penalty-phase verdicts. (Platania & Moran, *Due Process and the Death Penalty: The Role of Prosecutorial Misconduct in Closing Argument in Capital Trials* (1999) 23 Law and Hum. Behav. 471, 483-484.) Due to its impact, the prosecutorial misconduct deprived appellant of a fair trial.

Furthermore, the misconduct infringed appellant's right to a fair, accurate, and reliable capital-sentencing proceeding guaranteed by the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution. (See *Saffle v. Parks* (1990) 494 U.S. 484, 493.) Misconduct that infringes the right to a fair trial by definition also precludes a fair and reliable capital-sentencing proceeding.

The misconduct also violated appellant's rights to counsel and rights under the confrontation clause, which are protected by Sixth Amendment and article I, section 15. The prosecutor's disparagement of counsel infringed the former right, and the reference to extra-record facts transgressed the latter right. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643, fn. 15 [confrontation clause]; *United States v. Amlani* (9th Cir. 1997) 111 F.3d 705, 712 [right to counsel]; *People v. Harris* (1989) 47 Cal.3d 1047, 1083 [confrontation clause].)

C. The Prosecutorial Misconduct Was Prejudicial

As a result of the prosecutorial misconduct, this Court should vacate the death judgment. If the prosecutor had acted properly, it is reasonably possible that appellant would not have been sentenced to death. (See *People v. Brown* (1988) 46 Cal.3d 432, 448.) As stated above, misconduct at the penalty phase affects jury verdicts. This was a close case, and the evidence against appellant was not overwhelming.[81] (See *ante*, at pp. 93-94, 98.) Furthermore, respondent cannot show that the violation of

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[81] The overwhelming-evidence test should not be used to evaluate the harmlessness of penalty phase errors. (See *ante*, at pp. 96-98.)

appellant's constitutional rights stemming from the prosecutorial misconduct was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)

XVI

THE TRIAL COURT'S DENIAL OF APPELLANT'S PRETRIAL MOTIONS WAS ERROR

Several months before the first trial, appellant filed a panoply of pretrial motions. The court erred by denying the motions delineated below.

A. Motion For Sequestered Voir Dire

Appellant moved for individual and sequestered voir dire. (CT 1:207-218.) The trial court denied the motion. (RT 14:1238; CT 6:1210.) The court also declined appellant's request for an evidentiary hearing to determine the practicability of individual and sequestered voir dire.

The denial of appellant's request for individual and sequestered voir dire, which this Court had mandated in *Hovey v. Superior Court* (1980) 28 Cal.3d 1, was erroneous. Although this Court has denied similar claims in previous cases (e.g., *People v. Waidla* (2000) 22 Cal.4th 690, 714.), appellant urges this Court to reconsider those precedents. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 304 [articulating requirements for fair presentation of appellate claims].)

As appellant explained in his motion, Proposition 115 did not bar *Hovey* voir dire. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 633.) It has been demonstrated that group voir dire inhibits prospective jurors from being frank and results in conviction-prone and death-prone jurors. (Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death Qualification Process* (1984) 8 Law & Hum. Beh. 121; Broeder, *Voir Dire Examination: An Empirical Study* (1965) 38 S. Cal. L. Rev. 503.) Consequently, the group voir dire was not an adequate vehicle for assuring appellant an impartial jury. Moreover, a jury selection process that increases the risk of a death-prone jury undercuts the reliability of the death

judgment. Accordingly, the court, by denying appellant's motion for individual voir dire, deprived appellant of his Sixth, Eighth, and Fourteenth Amendment and article I, sections 7, 15, 16, and 17 rights to an impartial jury and a fair and reliable capital-sentencing determination.

B. Motion For Instruction Defining Life Without Parole

Appellant moved for the trial court to instruct the jury that a sentence of life imprisonment without the possibility of parole truly means that the defendant would not be eligible for parole. Appellant further requested that the court explain to the jury that notorious parole-eligible killers such as Charles Manson and Sirhan Sirhan had been sentenced under a different statutory scheme. (CT 2:257-262.) Believing that the requested instruction was redundant and unnecessary, the trial court denied the motion. (RT 14:1265-1267.)

The denial of the requested instruction was error. Although this Court has denied similar claims in previous cases (e.g., *People v. Jones* (1997) 15 Cal.4th 119, 189-190), appellant urges this Court to reconsider those precedents. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) The requested instruction correctly stated the law. Furthermore, researchers have documented that the overwhelming majority of California capital jurors' erroneously believe that a life-without-parole sentence does not foreclose the possibility of parole. (Steiner et al., *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness* (1999) 33 Law & Soc'y Rev. 461, 499.) Consequently, the requested instruction was necessary to correct jurors' misconceptions. As a result of the denial of appellant's motion, the death verdict was tainted by the jury's misperception of the alternative

sentence to death; that violated appellant's Eighth and Fourteenth Amendment and article I, section 7, 15, and 17 rights to a fair, accurate, and reliable capital-sentencing determination.

C. Motion To Set Aside The Indictment

Appellant moved to set aside the indictment due to several constitutional defects in the capital-sentencing statutory scheme. (CT 2:283-305.) Noting that the California Supreme Court had concluded that nearly all of the alleged constitutional defects were permissible, the trial court denied the motion. (RT 15:1335-1336; CT 5:1168; CT 6:1210.) That ruling was erroneous.

1. Failure to Delete Inapplicable Aggravating Factors

The failure to delete inapplicable aggravating factors violated appellant's Eighth and Fourteenth Amendment and article I, section 7, 15, and 17 rights to an individualized capital-sentencing determination based on permissible factors and to a fair and reliable capital-sentencing determination. Although this Court has denied similar claims in previous cases (e.g., *People v. Jones* (2003) 30 Cal.4th 1084, 1129), appellant urges this Court to reconsider those precedents. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.)

2. Failure to Designate Sentencing Factors as Aggravating or Mitigating

The unitary list of aggravating and mitigating factors, which failed to specify which factors were aggravating and which were mitigating, infringed appellant's Eighth and Fourteenth Amendment and article I, section 7, 15, and 17 rights to guide the jury's penalty-phase discretion and to ensure that mitigating factors not be used as improper aggravation. Although this Court has denied similar claims in previous cases (e.g.,

People v. Williams (1997) 16 Cal.4th 153, 268-269), appellant urges this Court to reconsider those precedents. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.)

3. Absence of Written Findings

The failure to require written findings for the aggravating factors that the jury found present violated appellant's Eighth and Fourteenth Amendment and article I, section 7, 15, and 17 rights to meaningful appellate review. Although this Court has denied similar claims in previous cases (e.g., *People v. Davenport* (1995) 11 Cal.4th 1171, 1232), appellant urges this Court to reconsider those precedents. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.)

4. Absence of a Beyond-a-Reasonable-Doubt Burden of Proof

The failure to require that all aggravating factors, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate penalty be found beyond a reasonable doubt violated appellant's Eighth and Fourteenth Amendment and article I, section 7, 15, and 17 rights to due process, equal protection, and a fair and reliable capital-sentencing determination. Although this Court has denied similar claims in previous cases (e.g., *People v. Manriquez* (2005) 37 Cal.4th 547, 589), appellant urges this Court to reconsider those precedents. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.)

5. Absence of Proportionality Review

The lack of intracase and intercase proportionality review, which is made available in noncapital cases, infringed appellant's Fourteenth Amendment and article I, section 7 and 17 right to equal protection and his Eighth and Fourteenth Amendment and article I, section 7, 15, and 17 rights

that the death penalty not be imposed arbitrarily or capriciously. It also violated appellant's Eighth and Fourteenth Amendment and article I, section 7, 15, and 17 rights to meaningful appellate review and a fair and reliable capital-sentencing determination. Although this Court has denied similar claims in previous cases (e.g., *People v. Caro* (1988) 46 Cal.3d 1035, 1068), appellant urges this Court to reconsider those precedents. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.)

6. Restrictive Adjectives in Mitigating Factors

The adjectives "extreme" and "substantial" in mitigating factors (d) and (g) served as unconstitutional barriers to mitigating factors, rendered the mitigating factors vague, arbitrary, and capricious, and precluded a fair and reliable capital-sentencing determination, in violation of appellant's Eighth and Fourteenth Amendment and article I, section 7, 15, and 17 rights. Although this Court has denied similar claims in previous cases (e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 276), appellant urges this Court to reconsider those precedents. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.)

7. Vagueness of Aggravating and Mitigating Factors

The aggravating and mitigating factors delineated in Penal Code section 190.3 were unconstitutionally vague and arbitrary, thereby resulting in having the jury's discretion insufficiently constrained. That violated appellant's Eighth and Fourteenth Amendment and article I, section 7, 15, and 17 rights. Although this Court has denied similar claims in previous cases (e.g., *People v. Stansbury* (1993) 4 Cal.4th 1017, 1071, revd. on other grounds (1994) 511 U.S. 318), appellant urges this Court to reconsider those precedents. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.)

8. Prosecutors' Unbridled Discretion to Seek Death

The complete discretion entrusted to prosecutors with respect to whether to seek a death sentence unconstitutionally permits arbitrariness, inter-county disparities, and invidious discrimination to enter the death-sentencing process, in violation of appellant's Eighth and Fourteenth Amendment and article I, section 7, 15, and 17 rights. Although this Court has denied similar claims in previous cases (e.g., *People v. Keenan* (1998) 46 Cal.3d 478, 505), appellant urges this Court to reconsider those precedents. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.)

D. Motions For Procedural Protections

Relatedly, appellant joined Veronica's motions requesting the following procedural protections: a reasonable-doubt standard on aggravating factors, written findings and unanimity on aggravating factors, and a beyond-a-reasonable-doubt standard for the determination that death is the appropriate punishment. (CT 4:740-753, 837-842.) Following this Court's precedents, the trial court denied these motions. (RT 16:1453; CT 5:1171-1172; CT 6:1211.)

The denial of these motions was erroneous. Although this Court has denied similar claims in previous cases (e.g., *People v. Manriquez*, *supra,* 37 Cal.4th at pp. 589-590), appellant urges this Court to reconsider those precedents. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.)

E. Motion To Declare Penal Code Section 190.3 Unconstitutional

Similarly, appellant joined Veronica's motion to declare the capital-sentencing statute unconstitutional on various grounds. Considering itself to be bound by precedent, the court denied the motion. (RT 16:1456; CT 5:1172.)

The denial of the motion was error. The unitary list of aggravating and mitigating factors, which failed to specify which factors were aggravating and which were mitigating, infringed appellant's Eighth and Fourteenth Amendment and article I, section 7, 15, and 17 rights by injecting arbitrariness and capriciousness in the death-sentencing process. The failure to designate factor (d) (extreme emotional disturbance) as mitigating is particularly problematic because some people may consider mental disturbance to be aggravating. Although this Court has denied similar claims in previous cases (e.g., *People v. Jackson* (1980) 28 Cal.3d 264, 316), appellant urges this Court to reconsider those precedents. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.)

F. Motions To Strike The Special Circumstance Due To Constitutional Defects

Appellant moved to strike the torture-murder special circumstance because it failed to meet constitutional muster in several respects. (CT 2:306-319.) Following this Court's precedents, the trial court denied the motion. (RT 15:1337-1338; CT 6:1210.)

The denial of the motion was error. As appellant asserted in his moving papers, the torture-murder special circumstance was vague and overbroad, in violation of appellant's Eighth and Fourteenth Amendment and article I, section 7, 15, and 17 rights to be free from cruel and unusual punishment and to due process of law. Although this Court has denied similar claims in previous cases (e.g., *People v. Davenport* (1985) 41 Cal.3d 247, 265-271), appellant urges this Court to reconsider those precedents. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.)

Moreover, the lack of nexus between the torture and the homicidal act was particularly problematic in this case. This Court has said that the

torture-murder special circumstance "requires 'some proximity in time [and] space between the murder and torture.'" (*People v. Bemore* (2000) 22 Cal.4th 809, 843, quoting *People v. Barnett* (1998) 17 Cal.4th 1044, 1161.) Indeed, the statute mandates that the special circumstance can be found only when "[t]he murder was intentional and involved the infliction of torture." (Pen. Code, § 190.2, subd. (a)(18).) Yet, CALJIC No. 8.81.18 requires no nexus whatsoever between either the torture and the homicide, or the intent to torture and the homicide. Rather, the instruction, which the court gave in this case, requires only an intent to torture and an intent to kill. (CT 10:2283.) Thus, the jury was instructed to base its special-circumstance finding without regard to any connection between the mens rea and actus reus or between the two distinct mens reae that comprise the only two elements of the torture-murder special circumstance. Accordingly, the trial court instructed the jury to find the special circumstance so long as the jury concluded that appellant, at some time, intended to torture Genny and, at any other time, intended to kill her.

Under the facts of this case, the jury may have found both intent to kill and intent to torture without there being any proximity in time between the homicide and torture, the intent to kill and intent to torture, or the homicide and intent to torture.[82] Unlike cases in which the infliction of superficial stab wounds allegedly preceded the infliction of fatal wounds by mere minutes (see *People v. Bemore*, *supra*, 22 Cal.4th at pp. 843-844; *People v. Barnett*, *supra*, 17 Cal.4th at p. 1162), in this case the prosecutor alleged that appellant and Veronica began torturing Genny several weeks

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[82] For the purposes of this argument, appellant assumes arguendo that the jury found the intent-to-kill element. (But see *ante*, Claim VI.)

before her death. (RT 63:8045.) Accordingly, it is entirely possible that the jury concluded that appellant possessed the intent to torture weeks before Genny's death, but not at the time of Genny's death. In light of appellant's admissions that he scared Genny at some unspecified time prior to her death and the evidence presented that appellant was not present in the apartment during the infliction of the fatal injuries, it is indeed likely that the jury found the intent to torture without finding any connection between that intent to torture and Genny's death.

The Eighth and Fourteenth Amendments, article I, section 7, 15, and 17, and the capital-sentencing statute require that there be a nexus between the torture, or at the very least the intent to torture, and the homicide. Because the jury was not required to find such a nexus, the trial court erred by denying the motion to strike the torture-murder special circumstance.

G. Motion For A South Bay Jury Venire

Appellant moved for the jury venire to be selected from the South Bay Judicial District, where the offense took place and in which there was a higher percentage of Latinos and Mexican Americans than a countywide jury venire. (CT 3:652-660.) Concluding that no defendant has the right to a jury venire from a subdivision of a county, in general or for the purpose of altering the venire's racial mix, and that the countywide venire did not deny appellant's right to a jury drawn from the cross-section of his community, the court denied the motion. (RT 15:1418-1419.)

The court erred in denying the motion. The utilization of a countywide jury venire infringed appellant's Sixth and Fourteenth Amendment and article I, section 7, 15, and 16 rights to an impartial jury, equal protection of the laws, and due process of law. The incident occurred in the South Bay Judicial District; as such, the jury venire should have been

comprised of residents in that district. Although this Court has ruled that the Sixth Amendment is not violated when the trial court selects jurors from a jury pool that has lower percentages of underrepresented minorities than an alternate jury pool within the county (e.g., *O'Hare v. Superior Court* (1987) 43 Cal.3d 86, 93-97), appellant urges this Court to reconsider those precedents. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.).

Moreover, it was fundamentally unfair and discriminatory that defendants charged with homicides that occurred in the North County Judicial District, which has relatively few underrepresented minorities, had juries drawn from that judicial district, and defendants charged with homicides that occurred in the South Bay Judicial District, which has relatively more Latinos than the county as a whole, had juries drawn from the entire county. This disparity was particularly prejudicial for appellant, who is Mexican American.

H. Motion To Quash The Jury Venire

Appellant joined Veronica's motion to quash the jury venire. (CT 4:784-806, 849-850.) Following this Court's precedents, the trial court denied the motion. (RT 16:1469; CT 5:1173; CT 6:1212.)

The exclusion of non-citizen residents and former felons from the jury venire violated appellant's rights to an impartial jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 15, 16, and 17 of the California Constitution. Although this Court has denied similar claims in previous cases (e.g., *People v. Karis* (1988) 46 Cal.3d 612, 631-634), appellant urges this Court to reconsider those precedents. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.)

I. Motions Challenging Discriminatory Prosecution

Appellant moved for supplemental discovery of charging criteria in

capital cases and moved to dismiss the indictment for discriminatory prosecution. (CT 3:661-724.) Calling the discovery request a fishing expedition that would place an enormous burden on the District Attorney and concluding that appellant lacked statutory authority or plausible justification for the request, the trial court denied the discovery motion. Although appellant presented evidence that other child-abuse murders in San Diego County committed by white people were not prosecuted capitally, the trial court, determining that appellant did not show discriminatory intent and explaining that new capital charging policies of a newly elected District Attorney were not unconstitutional, denied the motion. (RT 17:1567-1573, CT 5:1170-1171, 6:1210.)

The trial court erred. The Fourteenth Amendment and article I, sections 7 and 15 forbid intentional racial discrimination from playing a role in a prosecutor's charging decision. (*Oyler v. Boles* (1962) 368 U.S. 448, 456, cited in *McCleskey v. Kemp* (1987) 481 U.S. 279, 291 fn. 8.) A defendant is entitled to discovery pertaining to a discriminatory-charging defense upon a prima facie showing of discrimination, which provides the requisite "plausible justification" for discovery. (*Griffin v. Municipal Court* (1977) 20 Cal.3d 300, 302, 306-307; *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 305.) Evidence that similar cases had both different racial characteristics and disparate results from the instant case provides that prima facie case. (*Griffin*, 20 Cal.3d at p. 307.) Between his moving papers and the testimony and photographs presented at a hearing, appellant presented evidence at least as extensive and probative as the declarations this Court in *Griffin* held sufficient to establish a prima facie case entitling the defendant to discovery. (RT 15:1368-1387, 1411-1416; RT 17:1533-1546; CT 3:674-680, 682-683, 693-706, 711-724.) Accordingly, the trial

court erred in finding that appellant had not provided a plausible justification to support his discovery motion.

Concededly, this Court since *Griffin* has appeared to have raised the bar for establishing a prima facie case of discriminatory prosecution. (See *People v. McPeters* (1992) 2 Cal.4th 1148, 1171; *People v. Ashmus* (1991) 54 Cal.3d 932, 980.) Under those cases, it appears that appellant did not provide a plausible justification for his discovery request. Appellant urges this Court to reconsider those precedents. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.)

Likewise, the trial court erred by denying the motion to dismiss. The denial of the discovery motion prevented appellant from making the showing of intentional discrimination required by *McCleskey v. Kemp*. Because the denial of the discovery motion inevitably led to the denial of the motion to dismiss, denying the motion to dismiss without ordering the discovery was error.

J. Appellant Is Entitled To A New Trial

The erroneous denial of the motion for a South Bay jury venire and the motion to quash the jury venire constituted structural error. (See *Vasquez v. Hillery* (1986) 474 U.S. 254, 263-264.) Accordingly, the conviction, special-circumstance finding, and death verdict must be vacated.

This Court should vacate the death judgment due to the denial of the other motions discussed above. The denial of those motions are not subject to harmless-error analysis and must result in automatic reversal of the death sentence. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-282.) Alternatively, there is a reasonable possibility that the jury would have returned a life verdict if the court had granted the motions. (See *People v.*

Brown (1988) 46 Cal.3d 432, 448.) The features in the capital-sentencing scheme that appellant challenged in the pretrial motions individually and collectively increased the likelihood of a death verdict. Moreover, this was a close case, and the evidence against appellant was not overwhelming.[83] (See *ante*, at pp. 93-94, 98.) At the very least, respondent cannot show that the erroneous rulings were harmless beyond a reasonable doubt. (See *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259.)

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[83] The overwhelming-evidence test should not be used to evaluate the harmlessness of penalty phase errors. (See *ante*, at pp. 96-98.)

XVII

THE TRIAL COURT COMMITTED SEVERAL PREJUDICIAL INSTRUCTIONAL ERRORS AT THE GUILT PHASE

The court made several instructional errors at the guilt phase. These errors were prejudicial.

A. The Court Erred When It Refused To Instruct The Jury That Failing To Stop Somebody From Committing Murder Is Not A Crime

Appellant requested that the trial court instruct the jury as follows:

> In general, a person who fails to help another person by preventing a crime is not guilty of a crime. Likewise, a person is not guilty of murder simply because he or she failed to stop someone else from committing a murder. However, the law provides that a parent or another adult who has custody of a child may be guilty of the crime of neglect under certain circumstances.

(CT 9:2107.) Believing that the requested instruction was addressed sufficiently in other instructions, the trial court refused to issue this instruction. (RT 62:8007-8010.)

This instruction should have been given to the jury. It is well settled that a defendant is entitled to instructions that pinpoint his theory of defense, as long as the instructions are a correct statement of the law and have support in the evidence. (*People v. Roldan* (2005) 35 Cal.4th 646, 715; *People v. Stewart* (1976) 16 Cal.3d 133, 141.) California law has long recognized the right to such a pinpoint instruction, provided that the instruction restricts itself to informing the jury about the applicable law and does not discuss the evidence at issue. (*People v. Panah* (2005) 35 Cal.4th 395, 486; *People v. Sears* (1970) 2 Cal.3d 180, 189-190.)

The requested instruction pinpointed appellant's theory of defense.

Appellant's guilt-phase defense was that he was neither the primary perpetrator nor an aider and abettor with respect to the homicide and was thus guilty of the lesser-related offense of child endangerment, but not guilty of murder. The proposed instruction would have spelled out clearly that according to appellant's factual theory of the case — appellant in no way participated in or assisted Veronica in abusing or killing Genny, but failed to prevent Veronica from doing so — appellant was not guilty of murder.

Moreover, the instruction presented a correct statement of law. It is axiomatic that a person's mere presence at a crime scene does not establish his guilt. (*People v. Villa* (1957) 156 Cal.App.2d 128, 133-134.) In addition, the instruction did not highlight specific evidence and was thus not argumentative. (Compare *People v. Musselwhite* (1988) 17 Cal.4th 1216, 1269-1270 [holding trial court properly denied requested instruction that highlighted some evidence and did not illuminate relevant legal standards].)

The instruction would not have merely duplicated other instructions. (Compare *People v. Bolden* (2002) 29 Cal.4th 515, 558 [holding trial court may refuse to give duplicative instructions].) No other instruction explicitly informed the jury that permitting, or failing to prevent, Veronica from abusing or killing Genny did not make appellant legally culpable for murder. An instruction explicating this lack of legal culpability was particularly important in this case because the jury may well have concluded the failure to intervene rendered appellant morally culpable for Genny's

death.[84] The requested instruction would have made clear — from the trial judge's mouth — that this moral culpability translated into a conviction of child endangerment, not homicide. Because the judge, unlike defense counsel, is a neutral arbiter and uniquely commands authority in the courtroom, a pinpoint instruction would have been far more effective than defense counsel's argument at impressing this legal principle upon the jury. Although the substance of the requested instruction could have been deduced from the other instructions, only the pinpoint instruction expressly indicated the legal ramifications of appellant's theory of the case. Consequently, the requested instruction was not duplicative.

Substantial evidence supported the requested instruction. The physical evidence provided no indication whether Veronica or appellant inflicted the injuries. Moreover, Ivan Jr.'s preliminary hearing testimony that appellant and Veronica put Genny in the bathtub was the only eyewitness evidence that appellant committed any criminal act, and Ivan Jr. on cross-examination testified that he did not see appellant putting Genny in the bath on the night she died. Thus, there was a large gap in the evidence regarding who inflicted Genny's injuries. Appellant presented evidence that he was not present in the apartment at the time Genny was burned in the bathtub. Also, he presented evidence that Veronica abused him, from which the jury could have inferred that appellant did not prevent Veronica from killing Genny because he was afraid of her.

In addition to violating state law, the trial court's refusal to give this instruction violated appellant's due process right to receive a fair trial, as

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[84] Indeed, one juror declared that she voted to convict appellant because he did not prevent Genny's death. (CT 11:2438.)

guaranteed by the Fourteenth Amendment and article I, sections 7 and 15. "A criminal defendant is entitled to adequate instructions on a defense theory of the case 'provided that [the defense theory] is supported by law and has some foundation in the evidence.'" (*Swindell v. Lewis* (9th Cir. 2001) 1 Fed. Appx. 744, 744-745, quoting *United States v. Mason* (9th Cir. 1990) 902 F.2d 1434, 1438.) As stated above, the proposed instruction accurately stated the law and had evidentiary support.

The court's ruling had the additional impact of violating appellant's constitutional rights to present a defense, as guaranteed by the Sixth and Fourteenth Amendments and article I, section 15. The denial of the instruction impeded appellant from having the jury consider his defense and thus violated his rights to present a defense. (See *McNeil v. Middleton* (9th Cir. 2003) 344 F.3d 988, 995-996.)

B. The Court Erred When It Refused To Instruct The Jury With Respect To Veronica Gonzales's Consciousness Of Guilt

Appellant requested that the trial court instruct the jury as follows:

> If you find that before this trial [a] [the] co-defendant Veronica Gonzales made a willfully false or deliberately misleading statement concerning the crime[s] for which [he] [she] is now being tried, you may consider such statement as a circumstance tending to provide a consciousness of her guilt.

(CT 9:2108.) The trial court stated that the jury could not determine Veronica's guilt at appellant's trial and denied the request to issue the instruction. (RT 62:8011-8012.)

The refusal to instruct the jury as requested was erroneous. Appellant's theory of defense was that Veronica, but not he, perpetrated the offense against Genny. Appellant's third-party culpability defense relied in part on showing that Veronica, the alleged alternative perpetrator,

demonstrated a consciousness of guilt. Accordingly, the requested instruction pinpointed appellant's theory of defense.

The requested instruction had evidentiary support. Neither party disputed that Veronica was untruthful when she contended that Genny had drowned in the bathtub. Indeed, the trial court excluded Veronica's statements at the penalty retrial because the drowning story was false. (See *ante*, Claim III.)

Contrary to the trial court's conclusion, a jury should consider the consciousness of guilt of an alleged alternative perpetrator irrespective of whether she is being tried simultaneously with the defendant. So long as it is capable of raising a reasonable doubt, otherwise competent third-party-culpability evidence is admissible. (*People v. Hall* (1986) 41 Cal.3d 826, 833-834.) The admission of the third-party-culpability evidence placed the correlative duty on the trial court to give the requested instructions pertaining to third-party culpability. (See *People v. Blair* (2005) 36 Cal.4th 686, 744.) Although the jury at appellant's severed trial was responsible for formally determining only appellant's guilt, appellant's third-party-culpability defense required the jury to consider Veronica's guilt as well. Because Veronica's guilt was material at appellant's trial, her consciousness of guilt was relevant. (See *People v. Farnam* (2002) 28 Cal.4th 107, 153.) Veronica's false statements were probative toward her consciousness of guilt. (See *People v. Cain* (1995) 10 Cal.4th 1, 33.) Thus, the requested instruction correctly stated the law.

Finally, the requested instruction would not have duplicated other instructions. The jury was instructed that appellant's false or misleading statements could be used to show his consciousness of guilt. (RT 63:8197; CT 10:2231.) The jury, however, was not instructed that Veronica's false

statements could be used to find her consciousness of guilt.

In addition to violating appellant's state-law rights, refusing the instruction violated his federal and state constitutional rights to a fair trial and to present a defense. Because the requested instruction pertaining to appellant's theory of defense had support in the law and the evidence, the court's refusal to give the instruction constituted a due process violation. (See *Swindell v. Lewis*, *supra*, 1 Fed. Appx. at pp. 744-745.)

In addition, the denial of the requested instructions created an impermissible imbalance in the instructions. The jury was instructed to consider appellant's allegedly false or misleading statements for his consciousness of guilt, but was not given an analogous instruction for Veronica. It was error for the trial court to give instructions that were slanted in the prosecution's favor. (See *People v. Moore* (1954) 43 Cal.3d 517, 526-529.) Moreover, the imbalance constituted a further violation of appellant's due process rights. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 475, fn. 6.)

C. The Court Erred By Giving CALJIC No. 2.04

Over appellant's objection, the trial court granted the prosecutor's request to instruct the jury in accordance with CALJIC No. 2.04. The court gave the instruction despite believing that the prosecutor's argument that appellant sought to coach Ivan Jr.'s testimony was weaker than the defense counterargument that appellant made no such efforts. (RT 61:7807-7808.) Accordingly, the court instructed the jury as follows:

> If you find that a defendant attempted to or did persuade a witness to testify falsely, such conduct may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are

matters for your determination.

(RT 63:8179; CT 10:2232.)

The trial court erred in giving CALJIC No. 2.04. This Court has explained that the instruction should not be given unless evidence presented at trial sufficiently supports the inferences sought by the prosecution. (*People v. Coffman* (2004) 34 Cal.4th 1, 103; *People v. Hannon* (1977) 19 Cal.3d 588, 597.) In this case, the prosecutor presented insufficient evidence to support the inference that appellant sought to persuade Ivan Jr. to testify falsely. There was no evidence that appellant ever told Ivan Jr. not to talk to the police about what had happened to Genny. After Genny's death, appellant told Ivan Jr. that Genny had stopped breathing. (CT 8:1867, 1889; CT 9:1906, 1908-1909, 1919.) That was a true statement that did not at all insinuate that Ivan Jr. should not speak truthfully to the authorities. It was Veronica who said that Genny had drowned. (CT 8:1889.) After getting arrested, appellant had no contract with Ivan Jr. and could not have made any efforts to coach Ivan Jr.'s testimony. (CT 6:1437.) Ivan Jr. expressing a generalized fear of appellant provided no grounds for concluding that appellant urged Ivan Jr. not to testify or speak to authorities about what was done to Genny. Similarly, appellant and Veronica locking their children in their room as Genny died did not warrant the CALJIC No. 2.04 instruction. There was no evidence that the children were instructed in any manner regarding what to say to law enforcement officers. Indeed, when speaking to police late on the night that Genny died, Ivan Jr. said that Genny had been burned. (CT 8:1849.) Moreover, if the children would have been permitted to leave their bedroom, the prosecutor would undoubtedly have argued that appellant maliciously allowed the children to see their cousin die.

Furthermore, by giving CALJIC No. 2.04 despite the lack of factual support, the trial court infringed appellant's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and article I, sections 7 and 15 of the California Constitution. Because the instruction had no evidentiary support, the jury could not have rationally made the "the connection permitted by the inference" invited by the instruction. (*County Court of Ulster County v. Allen* (1979) 442 U.S. 140, 157.) In these circumstances, the permissive presumption contained in CALJIC No. 2.04 created the "risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination." (*Ibid.*)

D. The Court Erred In Giving CALJIC No. 8.81.18 Because The Instruction Required No Nexus Between The Alleged Torture Or Intent To Torture And The Homicide

In accordance with CALJIC No. 8.81.18, the court instructed the jury on the torture-murder special circumstance. (CT 10:2283; RT 63:8201-8202.) In contrast to the statutory language and this Court's precedents, the CALJIC instruction required no nexus between the torture or intent to torture and the homicide. For the reasons discussed in Claim XVI, the trial court erred in giving CALJIC No. 8.81.18 without amending the instruction to require the jury to find a nexus between the torture or intent to torture and the homicide. (See *ante*, at pp. 280-282.)

Furthermore, giving the instruction violated appellant's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and article I, sections 7 and 15 of the California Constitution. The statute defines the special circumstance as an intentional murder that "involved the infliction of torture." (Pen. Code, § 190.2, subd. (a)(18).)

This Court has recognized that the torture-murder special circumstance "requires 'some proximity in time [and] space between the murder and torture.'" (*People v. Bemore* (2000) 22 Cal.4th 809, 843, quoting *People v. Barnett* (1998) 17 Cal.4th 1044, 1161.) Thus, a nexus between the torture and the murder is an element the torture-murder special circumstance. As a result of the failure to instruct the jury on this element, the jury found the special circumstance present without determining whether a nexus between the torture and the homicide had been proven beyond a reasonable doubt. That denied appellant due process of law. (See *In re Winship* (1970) 397 U.S. 358, 370.)

Likewise, the omission of the nexus element from the instruction infringed appellant's constitutional right to trial by jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 16 of the California Constitution. (See *Ring v. Arizona*, *supra*, 536 U.S. at p. 609.) The omission impermissibly took the question whether there was a nexus between the torture or intent to torture and the homicide out of the jury's hands. Thus, the failure of the jury to find the nexus element beyond a reasonable doubt violated appellant's trial-by-jury rights. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278.)

Moreover, the omission of the nexus element from the instruction violated appellant's Eighth Amendment and article I, section 17 rights to be free from cruel and unusual punishment. The principal constitutional constraint on a state's capital-sentencing scheme is the requirement that the class of murderers eligible for the death penalty be genuinely narrowed. (*Zant v. Stephens* (1983) 462 U.S. 862, 879-880.) The omission of an element from the instruction on a death-eligibility factor impedes this narrowing function. The omission of the nexus element is particularly

critical in this case because the torture-murder special circumstance comprised the lone death-eligibility factor alleged. Because the jury never found all of the elements of any special circumstance to have been proven beyond a reasonable doubt, the constitutionally mandated narrowing of death-eligibility did not occur in this case.

E. A Series Of Guilt-Phase Instructions Undermined The Requirement Of Proof Beyond A Reasonable Doubt In Violation Of Appellant's Rights To Due Process, A Trial By Jury, And Reliable Verdicts

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship*, *supra*, 397 U.S. at p. 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) The reasonable-doubt standard is the "bedrock 'axiomatic and elementary' principle" (*In re Winship*, *supra* at p. 363) at the heart of the right to trial by jury. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278.) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood [them] to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The trial court instructed the jury with CALJIC Nos. 2.02, 2.21.2, 2.22, and 2.51. (CT 10:2242-2243, 2245, 2259.) These instructions violated the above principles and thereby deprived appellant of his constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15) and trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16). (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278; *Carella v. California* (1989) 491 U.S. 263, 265.) They also violated the

fundamental requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (See U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) Because the instructions violated the federal Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (See *Sullivan*, 508 U.S. at p. 275.)

Appellant recognizes that this Court has previously rejected many of these claims. (See, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224; *People v. Crittenden* (1994) 9 Cal.4th 83, 144.) Nevertheless, he raises them here in order for this Court to reconsider those decisions and in order to preserve the claims for federal review if necessary.[85]

1. The Instruction on Circumstantial Evidence under CALJIC No. 2.02 Undermined the Requirement of Proof Beyond a Reasonable Doubt

The jury was instructed with CALJIC No. 2.02 that if one interpretation of the evidence regarding mental state "appears to be reasonable, you must accept [it] and reject the unreasonable" interpretation. (CT 10:2259; RT 63:8190-8191.) In effect, the instruction informed the jurors that if appellant reasonably appeared to have intended to torture and

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[85] In *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, this Court ruled that "routine" challenges to the state's capital-sentencing statute will be considered "fully presented" for purposes of federal review by a summary description of the claims. This Court has not indicated that repeatedly rejected challenges to standard guilt-phase instructions similarly will be deemed "fairly presented" by an abbreviated presentation. Accordingly, appellant more fully presents the claims in this argument.

kill Genny, they were to find present the torture-murder special circumstance even if they entertained a reasonable doubt as to whether he had intended to torture and kill her. Similarly, the instruction told the jurors to find appellant guilty of first degree murder by torture despite reasonable doubts regarding appellant's intent to torture. The defects in this instruction were particularly damaging here where the prosecution's case rested on circumstantial evidence and appellant countered with his own version of what had happened. The instruction undermined the reasonable-doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17). (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama*, *supra*, 447 U.S. at 638.)[86]

First, the instruction compelled the jury to find appellant guilty of murder and to find the sole special circumstance to be true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra*, 397 U.S. at p. 364.) The instruction directed the jury to convict appellant based on the appearance of reasonableness: The jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to be "reasonable." (CT 10:2259.) However, an interpretation that appears

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[86] Although defense counsel did not object to the giving of CALJIC No. 2.02, the claimed errors are cognizable on appeal. Instructional errors are reviewable even without objection if they affect a defendant's substantial rights. (Pen. Code, § 1259; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.)

reasonable is not the same as the "subjective state of near certitude" required for proof beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty"].) Thus, the instruction improperly required a conviction and true finding of the special circumstance, and findings of fact necessary to support those verdict, on a degree of proof less than the constitutionally mandated one.

Second, the circumstantial evidence instruction required the jury to draw an incriminatory inference when such an inference appeared "reasonable." In this way, the instruction created an impermissible mandatory inference that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted it by producing a reasonable exculpatory interpretation. Mandatory presumptions, even ones that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Francis v. Franklin* (1985) 471 U.S. 307, 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

Here, the instruction plainly told the jurors that if only one interpretation of the evidence appeared reasonable, "you must accept the reasonable interpretation and reject the unreasonable." (CT 10:2259.) In *People v. Roder* (1983) 33 Cal.3d 491, 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. Accordingly, this Court should invalidate the instructions given in this case, which required the jury to presume all elements of the crimes supported by a reasonable interpretation of the

circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

The instruction had the effect of reversing, or at least significantly lightening, the burden of proof, because it required the jury to find appellant guilty of first degree murder and find true the torture-murder special circumstance unless he came forward with evidence reasonably explaining the incriminatory evidence put forward by the prosecution. The jury may have found appellant's defense unreasonable but still have harbored serious questions about the sufficiency prosecution's case. Nevertheless, under the erroneous instruction the jury was required to convict appellant and find true the special circumstance if he "reasonably appeared" to have intended to torture and kill, even if the jurors still entertained a reasonable doubt regarding appellant's mens reae. The instruction thus impermissibly suggested that appellant was required to present, at the very least, a "reasonable" defense to the prosecution case when, in fact, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684.)

For these reasons, there is a reasonable likelihood the jury applied the circumstantial-evidence instructions to find appellant guilty of first degree murder and a true finding on the special circumstance on a standard which was less than the United States Constitution requires.

2. The Instructions Pursuant to CALJIC Nos. 2.21.2, 2.22, and 2.51 Also Vitiated the Reasonable-Doubt Standard

The trial court gave three other standard instructions that magnified the harm arising from the erroneous circumstantial-evidence instructions, and individually and collectively diluted the constitutionally mandated

reasonable-doubt standard — CALJIC Nos. 2.21.2 (witness wilfully false), 2.22 (weighing conflicting testimony), and 2.51 (motive). (CT 10:2242-2243, 2245; RT 63:8183-8185.) Each of those instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. Thus, the instructions implicitly replaced the reasonable-doubt standard with the preponderance-of-the-evidence test, and vitiated the constitutional prohibition against the conviction of a capital defendant upon any lesser standard of proof. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Cage v. Louisiana*, *supra*, 498 U.S. at pp. 39-40; *In re Winship*, *supra*, 397 U.S. at p. 364.)[87]

CALJIC No. 2.21.2 lessened the prosecution's burden of proof. It authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless, "from all the evidence, [they believed] the probability of truth favors his or her testimony in other particulars." (CT 10:2242; RT 63:8183.) That instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses if their testimony had a "mere probability of truth." (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness' testimony could be accepted based on a "probability" standard is "somewhat suspect"].) The essential mandate of *Winship* and its progeny — that each specific fact necessary to prove the prosecution's case must be proven beyond a reasonable doubt — is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable," or "probably true." (See

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[87] Although defense counsel failed to object to these instructions, appellant's claims are still reviewable on appeal. (See Pen. Code, § 1259.)

Sullivan v. Louisiana, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, CALJIC No. 2.22 provided as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(CT 10:2243; RT 63:8183-8182.) The instruction specifically directed the jury to determine each factual issue in the case by deciding which version of the facts was more credible or more convincing. Thus, the instruction replaced the constitutionally mandated standard of proof beyond a reasonable doubt with one indistinguishable from the lesser preponderance-of-the-evidence standard. As with CALJIC No. 2.21.2, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

The jury was instructed with former CALJIC No. 2.51 as follows:

> Motive is not an element of the crimes charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or

absence, as the case may be, the weight to which you find it to be entitled.

(CT 10:2245; RT 63:8184-8185.) This instruction allowed the jury to determine guilt based on the presence of alleged motive alone and shifted the burden of proof to appellant to show absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. As a matter of law, however, it is beyond question that motive alone, which is speculative, is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320 [a "mere modicum" of evidence is not sufficient]; see *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104 , 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally mandated standard under which the prosecution must prove each necessary fact of each element of each offense beyond a reasonable doubt. In the face of so many instructions permitting conviction upon a lesser showing, no reasonable juror could have been expected to understand that he or she could not find appellant guilty unless every element of the offense was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated appellant's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

3. This Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions

Although each of the challenged instructions violated appellant's federal constitutional rights by lessening the prosecution's burden, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [CALJIC Nos. 2.22 and 2.51]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [false-testimony and circumstantial-evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [circumstantial-evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [CALJIC No. 2.02]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [circumstantial-evidence instructions].) While recognizing the shortcomings of some of those instructions, this Court has consistently concluded that the instructions must be viewed "as a whole," and that when so viewed the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and give the defendant the benefit of any reasonable doubt, and that jurors are not misled when they are also instructed with CALJIC No. 2.90 regarding the presumption of innocence. That analysis is flawed.

First, what this Court characterizes as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale — that the flawed

instructions are "saved" by the language of CALJIC No. 2.90 — requires reconsideration. (See *People v. Crittenden, supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the beyond-a-reasonable-doubt standard of proof on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin*, (1985) 471 U.S. 307, 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the challenged instructions, as they were given in this case, explicitly told the jurors that those instructions were qualified by the reasonable-doubt instruction. It is just as likely that the jurors concluded that the reasonable-doubt instruction was qualified or explained by the other instructions that contain their own independent references to reasonable doubt.

F. Appellant Is Entitled To A New Trial

These errors were not harmless. Rather, the instructional errors individually and cumulatively warrant vacating the conviction, special-circumstance finding, and death judgment.

The court's refusal of appellant's requested instructions impeded

the jury's consideration of appellant's defense theory. The lack of culpability of murder for failing to prevent Veronica from abusing and killing Genny formed the legal centerpiece of appellant's defense. The statements Veronica made to the police at the apartment complex comprised a major component of appellant's evidentiary support for his defense. Accordingly, instructions informing the jury of the legal underpinning of his defense and the legal significance of Veronica's false statements were essential. As stated above, the trial court did not relate the substance of the requested instructions in the jury instructions that were given. Accordingly, the rejected instructions would have impacted the jury's understanding of the legal concepts governing this case.

Had the trial court given the requested instructions, it is reasonably probable that the jury would not have convicted appellant of first degree murder. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) Appellant presented significant evidence that he perpetrated none of the abusive acts and that he was, at most, merely present for the infliction of some of them. At least one juror erroneously found appellant guilty because of his failure to prevent Genny's death. (CT 11:2438.) Moreover, the evidence of appellant's culpability was hotly contested. The state of the evidence, as well as the jury's seven-day guilt-phase deliberations, shows that this was a close case. (See *ante*, at pp. 85-87.) It is likely that the requested instructions would have tipped the scales, which were virtually in equipoise, toward acquittal.

The due process violation stemming from the court's refusal to issue the requested instructions was also prejudicial. The failure to instruct the jury on the defense theory of the case is reversible error under the federal constitution if evidence supports the theory and other instructions do

not adequately cover the defense theory. (See *Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 743.) As discussed above, the requested instructions had evidentiary support and were not adequately addressed in the instructions that the court issued. Thus, the constitutional error was not harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)

The erroneous inclusion of the CALJIC No. 2.04 instruction in the jury charge impermissibly inflated the jury's perception of appellant's consciousness of guilt. Neither the state-law error nor the due process violation were harmless.

Had the trial court not erroneously given CALJIC No. 2.04, it is reasonable probable that the jury would not have convicted appellant of murder. The inclusion of the instruction in the jury charge insinuated that the prosecution had evidence that appellant had sought to persuade Ivan Jr. to lie to law-enforcement authorities. Because this was a close case for determining guilt, this instruction may well have tipped the balanced scales toward a conviction.

Respondent cannot show that the due process violation resulting from the instructional error was harmless beyond a reasonable doubt. (See *Rose v. Clark* (1986) 478 U.S. 570, 582 [applying harmless-error analysis to evaluate whether instructional error required reversal of defendant's conviction].) The instruction created an impermissible basis upon which the jury could convict appellant of first degree murder. Due to the possibility that the erroneous instruction may have impacted the jury's deliberations and contributed to the conviction, the due process violation caused by the instruction's permissive presumption was not harmless.

The omission of the nexus element in CALJIC No. 8.81.18 resulted

in the jury finding the special circumstance without determining whether a nexus existed between the torture and the homicide. That error was not harmless beyond a reasonable doubt. (See *People v. Prieto* (2003) 30 Cal.4th 226, 256-257 [explaining that this Court uses *Chapman* harmless-error standard for omission of element in special-circumstance instruction].) Unlike a case in which the alleged torture immediately preceded the homicide (see *People v. Bemore* (2000) 22 Cal.4th 809, 843-844; *People v. Barnett* (1998) 17 Cal.4th 1044, 1162), in this case the prosecutor theorized that the torture occurred for several weeks preceding Genny's death. (RT 63:8045.) The jury may well have concluded that appellant possessed the intent to torture Genny weeks before her death, but not at the time of Genny's death. In view of appellant's admissions to scaring Genny during the weeks before her death and the evidence that appellant had left the apartment shortly before Genny sustained the fatal burns, the jury likely found the intent to torture without finding any connection between that intent to torture and Genny's death.

The torture-murder special circumstance should be vacated although the jury convicted appellant of murder by torture. The torture-murder theory of first degree murder required that the acts committed with the intent to torture have caused the victim's death; however, the jury apparently finding the causation element in this case does not render the omission of the element in CALJIC No. 8.81.18 harmless. Numerous, significant errors impacted the jury verdict on the murder charge. For instance, the trial court's erroneous refusal to give appellant's requested instructions regarding his theory of defense and erroneous inclusion of CALJIC No. 2.04 increased the likelihood that the jury would convict appellant. Likewise, the trial court's exclusion of critical defense evidence

also increased the likelihood of a conviction. (See *ante*, Claims I and II.) These errors impacted the state of the evidence and the manner in which the jury perceived the evidence that was presented at trial. Consequently, the errors undermined the reliability of the jury verdict, including the implied finding that appellant's acts (as either a perpetrator or an aider and abettor), committed with the intent to torture, caused Genny's death. An error should not be found harmless due to the collateral impact of other errors. Therefore, the special-circumstance finding cannot survive the omitted element in CALJIC No. 8.81.18.

Because the erroneous circumstantial-evidence instruction required conviction on a standard of proof less than proof beyond a reasonable doubt, its delivery was a structural error that is reversible per se. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) At the very least, because all of the instructions violated appellant's federal constitutional rights, reversal is required unless the prosecution can show that the error was harmless beyond a reasonable doubt. (See *Carella v. California*, *supra*, 491 U.S. at pp. 266-267.)

The prosecution cannot make that showing here, because its proof of appellant's guilt and evidence in support of the lone special circumstance was weak for all of the reasons previously discussed. Given the dearth of direct evidence, the instructions on circumstantial evidence were crucial to the jury's determination of guilt. By distorting the jury's consideration and use of circumstantial evidence, and diluting the reasonable-doubt requirement, CALJIC No. 2.02 undermined the reliability of the jury's findings.

CALJIC Nos. 2.21.2, 2.22, and 2.51 further subverted the reasonable-doubt requirement. The dilution of the reasonable-doubt

requirement by the guilt-phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.)

Because the conviction and special circumstance formed the only basis for finding appellant death-eligible, vacating either the conviction or special-circumstance finding requires vacating the death judgment.

XVIII

THE TRIAL COURT COMMITTED SEVERAL PREJUDICIAL PENALTY-PHASE INSTRUCTIONAL ERRORS

At the penalty phase of the first trial, the trial court erroneously rejected several instructions that appellant had proposed. Those rulings remained in effect at the penalty retrial. The court made additional instructional errors at the penalty retrial. These errors require vacating the death judgment.

A. The Court Erred When It Refused To Instruct The Jury Which Capital-Sentencing Factors Could Be Either Aggravating Or Mitigating And Which Factors Could Only Be Mitigating

During the penalty phase of the first trial, appellant sought to either replace or supplement CALJIC No. 8.85 with two related instructions. Defendant's Proposed Instruction No. 1 would have instructed the jury that factor (a) (circumstances of the offense) could be either aggravating or mitigating and constituted the only factor that could be considered as an aggravating factor. (CT 10:2177.) Defendant's Proposed Instruction No. 2 would have done the same. (CT 10:2178-2180.) The court denied that request and instead gave CALJIC No. 8.85,[88] which does not delineate which of the factors can and cannot be aggravating factors. (RT 69:8821; RT 99:12735-12737; CT 12:2661-2663.)

Rejecting the proposed instructions and giving CALJIC No. 8.85 was erroneous and violated appellant's rights under the Eighth and Fourteenth Amendments to the United States Constitution and article I,

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[88] The court's rulings rejecting the proposed instructions remained in effect for the penalty retrial. (RT 75:9383; RT 81:9551.)

sections 7, 15, and 17 of the California Constitution. Appellant's jury was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital-sentencing determination required by the Eighth and Fourteenth Amendments. Although this Court has often rejected this claim (see, e.g., *People v. Ramirez* (2006) 39 Cal.4th 398, 469), appellant urges this Court to reconsider that ruling. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 304.)

Although the first two proposed instructions inaccurately labeled factor (i) as mitigating only (see *People v. Stanley* (1995) 10 Cal.4th 764, 831), rejecting the instruction in its entirety was not appropriate. Though the court noted that factor (i) could be aggravating, it rejected the instruction because it preferred CALJIC No. 8.85, not because of factor (i). Moreover, if the court had rejected the proposed instructions on that basis, appellant could have modified the proposed instructions. Instead, appellant had no opportunity to modify the instruction; besides, the modification would have been futile.

B. The Court Erred When It Refused Appellant's Modified Instructions Pertaining To The Catch-All Mitigating Factor

Defendant's Proposed Instruction No. 2 would have instructed the jury that factors (b), (c), (d), (e), (f), (g), (h), (i), (j), and (k), as well as a secondary catch-all factor labeled (l),[89] could be considered only as

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[89] In pertinent part, factor (l) reads:

Mitigating factors also include any sympathetic,

mitigating factors. It also delineated appellant's nonstatutory mitigating factors. Defendant's Proposed Instruction No. 12 split factor (k) into factors (k) and (l),[90] but neither listed any nonstatutory mitigating factors nor specified which factors were aggravating and which were mitigating. (CT 10:2193-2194.) The court, however, denied appellant's requests and instead gave CALJIC No. 8.85,[91] which does not delineate which of the factors can and cannot be aggravating factors. (RT 69:8821, 8843-8844; RT 99:12735-12737; CT 12:2661-2663.) Rejecting the proposed instructions and giving CALJIC No. 8.85 was erroneous and violated appellant's Eighth and Fourteenth Amendment and article I, section 7, 15, and 17 rights.

It was error not to delineate appellant's nonstatutory mitigating

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> compassionate, merciful or other aspect of the defendant's background, character, record, or social history that the defendant offers as a basis for a sentence less than death, whether or not related to the crime for which he is on trial.

(CT 10:2179.)

[90] Factor (k) reads:

> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

In pertinent part, factor (l) reads:

> Sympathy or any other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the crime for which he is on trial.

(CT 10:2194.)

[91] The court's rulings rejecting the proposed instructions remained in effect for the penalty retrial. (RT 75:9383; RT 81:9551.)

factors. An instruction containing a list of nonstatutory mitigating factors amounted to a pinpoint instruction. A defendant is entitled to pinpoint instructions so long as the instructions correctly stated the law and had evidentiary support. (See *ante*, at p. 287.) Because the requested instruction's list of nonstatutory mitigating factors were indeed mitigating, the instruction correctly stated the law. In addition, the nonstatutory mitigating factors delineated in the instruction, which included whether appellant attempted to avoided arrest or had a good jail record, were all supported by the evidence. Moreover, the instruction was not duplicative; CALJIC No. 8.85 generally defined factor (k), and no instruction fleshed out what categories of mitigating evidence could constitute factor (k) mitigation. Accordingly, the trial court erred by refusing the instruction. The denial of the instruction impeded full consideration of appellant's mitigating evidence; as a result, the error violated appellant's Eighth and Fourteenth Amendment rights. (See *Smith v. Texas* (2004) 543 U.S. 37, 46.)

Moreover, the court's refusal to modify CALJIC No. 8.85 to include a factor (l) catch-all factor was erroneous. Factor (l) in Defendant's Proposed Instruction No. 2 would have informed the jury that compassion and mercy were permissible mitigating factors; factor (k) in CALJIC No. 8.85 does not make that clear. Although factor (l) in Defendant's Proposed Instruction No. 12 merely split factor (k) into two mitigating factors, the instruction eliminated the ambiguity in factor (k) and would have ensured that the jury did not incorrectly believe that mitigating factors had to relate to the crime. The denial of both of these proposed modifications to CALJIC No. 8.85 infringed appellant's Eighth and Fourteenth Amendment rights to have the jury give full consideration to his mitigating evidence.

C. The Court Erred When It Refused To Instruct The Jury That It Should Not Limit Its Consideration Of Mitigating Evidence to The Delineated Factors

At the first trial, appellant requested the court to instruct the jury with Defendant's Proposed Instruction No. 3, which stated:

> The mitigating circumstances that I have read for your consideration are given to you merely as examples of some of the facts that you may take into account as reasons for deciding not to impose a death sentence in this case.
>
> But you should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstance relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty.
>
> Any one of the mitigating factors, standing alone, may support a decision that death is not the appropriate punishment in this case.

(CT 10:2181.) The trial court, stating that the proposed instruction defined mitigating too broadly, rejected the instruction.[92] (RT 69:8822-8825.) That, too, was error that violated appellant's rights under the Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, and 17 of the California Constitution.

The proposed instruction did not define mitigation too broadly. A capital defendant has the right to present and have the jury consider evidence regarding any aspect of his character, background, or record, as well as the circumstances of the offense, that could justify a sentence less than death. (See *Penry v. Lynaugh* (1989) 492 U.S. 302, 318-320.) The proposed instruction would have illustrated to the jury the expanse of appellant's right to present and have considered mitigating

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[92] The court's ruling rejecting the proposed instruction remained in effect for the penalty retrial. (RT 75:9383; RT 81:9551.)

evidence. Although the United States Supreme Court has deemed that the factor (k) (catch-all) instruction does not offend Eighth Amendment principles (see *Boyde v. California* (1990) 494 U.S. 370, 381-383),[93] the requested instruction better explicated the scope of mitigation than CALJIC No. 8.85, which excluded appellant's background from the scope of the catch-all mitigating factor. (CT 12:2663.) Because the requested instruction more accurately defined the constitutionally mandated scope of mitigation, the trial court erred by refusing it.

D. The Court Erred When It Refused To Instruct The Jury That It May Return A Life Sentence For Any Reason

At the first trial, appellant sought to have the trial court give one of two alternative proposed instructions. Defendant's Proposed Instruction No. 7 read:

> You may spare the defendant's life for any reason you deem appropriate and satisfactory, or for no reason at all. If something arouses mercy, sympathy, empathy or compassion such as to persuade you that death is not the appropriate penalty, you may act in response thereto.

(CT 10:2186.) The court declined the defense request.[94] By refusing to give this instruction, the court erred and violated appellant's Eighth and Fourteenth Amendment and article I, section 7, 15 and 17 rights.

The Eighth and Fourteenth Amendments require that jury instructions permit a jury to give full consideration and full effect to mitigating evidence. (*Johnson v. Texas* (1993) 509 U.S. 350, 381 (dis. opn.

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[93] The Supreme Court's adjudication pertained to CALJIC No. 8.85's predecessor, but appears to govern CALJIC No. 8.85 as well.

[94] The court's ruling rejecting the proposed instructions remained in effect for the penalty retrial. (RT 75:9383; RT 81:9551.)

by O'Connor, J.), quoted in *Penry v. Johnson* (2001) 532 U.S. 782, 797.) Neither CALJIC No. 8.85 nor CALJIC No. 8.88 inform the jury that mercy, sympathy, empathy, compassion, or anything else could provide a sufficient basis upon which to return a life verdict. Particularly in a case like this one in which a defendant presents extensive execution-impact evidence and has no criminal record or history of violence, the jury may well have reacted to the mitigating evidence by feeling sympathy, empathy, compassion, or the desire to be merciful. The requested instruction would have given the jury an avenue to give full effect to the mitigating evidence, and thus the trial court's rejection of the requested instruction violated appellant's constitutional rights. Although this Court upheld the denial of a similar proposed instruction in *People v. Ledezma* (2006) 39 Cal.4th 641, 739, appellant urges this Court to reconsider that decision. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 304.)

E. The Court Erred When It Instructed The Jury That It Need Not Be Unanimous In Finding Aggravating Factors

Defendant's Proposed Instruction Nos. 13 and 14 would have instructed the jury that it may consider in the weighing process mitigating factors that the jury did not find unanimously. (CT 10:2161-2163.) The trial court agreed to modify CALJIC No. 8.88 to include that instruction, but also ruled that the jury should be instructed that non-unanimous aggravating factors may also be considered. (RT 69:8845-8848.) At the penalty retrial, the court instructed the jury in accordance with that ruling. (CT 12:2665-2667.) That was error.

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted

the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 290, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*, 530 U.S. at p. 604. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Because capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994) — and, because providing more protection to a noncapital defendant than a capital defendant would violate the Equal Protection Clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421) — it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply

the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the Fourteenth Amendment and by its irrationality violate both the due process clause of the Fourteenth Amendment and the cruel and unusual punishment clause of the Eighth Amendment to the federal constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks this Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.)

F. The Court Erred When It Refused To Give A Lingering-Doubt Instruction At The Penalty Retrial

At the penalty retrial, appellant requested that CALJIC No. 8.85 be modified to instruct the jury that it could, when determining whether appellant should be sentenced to death, consider any doubt about the extent of appellant's involvement in the offense. The trial court, believing that the lingering-doubt instruction would be one-sided, declined to make the requested modification. (RT 99:12710-12712.) The court's ruling was erroneous and infringed appellant's rights under the Eighth and Fourteenth Amendments and article I, sections 7, 15, and 17.

The Eighth and Fourteenth Amendments to the United States Constitution guarantee appellant the right to have relevant mitigating evidence considered by the penalty jury. (See *Skipper v. South Carolina* (1986) 476 U.S. 1, 4; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) This right may be violated even though he was permitted to introduce that mitigating

evidence. (See *Penry v. Lynaugh* (1989) 492 U.S. 302, 319.)

Under California law, evidence tending to prove a lingering doubt in the defendant's guilt for the offense is relevant mitigating evidence. (*People v. Sanchez* (1995) 12 Cal.4th 1, 77-78; *People v. Terry* (1964) 61 Cal.2d 137, 145-147.) Because lingering-doubt evidence is relevant mitigating evidence, as defined by state law, the Eighth and Fourteenth Amendments entitled appellant to the requested lingering-doubt instruction.

Appellant was entitled to the lingering-doubt instruction notwithstanding the United States Supreme Court's recent opinion in *Oregon v. Guzek* (2006) __ U.S. __, 126 S. Ct. 1226. *Guzek* concerned a limitation on evidence, not the refusal of an instruction, and did not hold that there is no Eighth Amendment right to present lingering-doubt evidence. More significantly, appellant's right to the instruction is derived from his right to present evidence under state law.

G. The Court Erred When It Amended CALJIC No. 8.88 To Instruct The Jury That It Must Return A Death Verdict If Aggravation So Substantially Outweighs Mitigation That Death Is Warranted

At the penalty retrial, the trial court modified CALJIC No. 8.88. With respect to the jury's ultimate sentencing decision, the court instructed the jury as follows:

> If you conclude that the aggravating circumstances are so substantial in comparison to the mitigating circumstances that they warrant death instead of life without parole, you shall return a judgment of death.

(CT 12:2666.) This modified instruction, which the court gave over defense counsel's strenuous objection (RT 99:12712-12716, 12738-12740), was erroneous.

The instruction ran afoul of state law. The CALJIC instruction,

which states that each juror "must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole" in order to return a death verdict (CALJIC No. 8.88), is lifted directly from this Court's opinion in *People v. Brown* (1985) 40 Cal.3d 512, 541 & fn. 13, 544, fn. 17, revd. on other grounds (1987) 497 U.S. 538. The use note proscribes the trial court's modified instruction: "The court should never instruct the jury in penalty phase that it 'shall' impose a sentence of death." (CALJIC No. 8.88, use note.)

The instruction in this case is unusual because, unlike in other cases with mandatory instructions, the court instructed the jury with the forbidden mandatory language fourteen years after this Court barred such instructions in *People v. Brown, supra.* In recent years, this Court has been reluctant to find *Brown* error in cases where the trial court gave the standard CALJIC instruction before this Court decided *Brown* and when the trial court believed that the mandatory language, which tracks the text of Penal Code section 190.3, was valid under California law. (See, e.g., *People v. Cox* (2003) 30 Cal.4th 916, 965.) In this case, however, the trial court was well aware that California law bars such mandatory language.

Although the mandatory language in this case provided for a higher threshold for reaching a death verdict than CALJIC No. 8.84.2 did, the trial court's instruction nevertheless impermissibly shifted the jury's death-sentencing decision from permissive to mandatory. Under *Brown*, the jury may sentence a defendant to death only if all twelve jurors conclude that the aggravating factors are so substantial in comparison to the mitigating factors that a death sentence is appropriate. In contrast, the trial court's instruction compelled the jury to sentence appellant to death if those

circumstances were met. Moreover, the instruction foreclosed a full consideration of mercy for appellant. Under state law, the jury may render a life verdict as an act of mercy despite concluding that aggravation was so substantial to mitigation that death is warranted. The court's instruction foreclosed the jury from engaging in such an act of mercy.

The court's modification to the CALJIC No. 8.88 instruction violated appellant's Eighth and Fourteenth Amendment and article I, section 7, 15, and 17 rights. Because state law gave appellant a right to a permissive instruction regarding the jury's ultimate sentencing decision, the mandatory instruction constituted a due process violation. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Though a mandatory instruction is not a per se violation of the Eighth Amendment (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the instruction in this case infringed appellant's Eighth Amendment rights. Because state law permits a jury to exercise mercy and render a life verdict despite concluding that aggravation was so substantial to mitigation that death is warranted, the mandatory instruction prevented the jury from giving full consideration to mercy, as defined by state law.

H. The Court Erred When It Gave CALJIC Nos. 8.85 And 8.88 Despite Their Fundamental Flaws

At the penalty retrial, the trial court instructed the jury with CALJIC Nos. 8.85 and 8.88. In addition to the aspects of those instructions that appellant litigated in pretrial motions (see *ante*, Claim XVI) and sought to modify (see *ante*, pp. 311-320), the standard instructions were deeply flawed, and the trial court erred by giving them.

1. The Breadth of Factor (a) Violated Appellant's Constitutional Rights

Penal Code section 190.3, factor (a) directs the jury to consider in

aggravation the "circumstances of the crime." (CALJIC No. 8.85; CT 12:2661.) In this case, the circumstances of the offense comprised the lone aggravating factor. Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts that cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of aggravating factors has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as aggravating. As such, California's capital-sentencing scheme violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].) This Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of factor (a) in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (See *People v. Kennedy* (2005) 36 Cal.4th

595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges this Court to reconsider this holding. (See *People v. Schmeck, supra*, 37 Cal.4th at p. 304.)

2. The Instructions Failed to Impose a Burden of Proof on the Prosecution or Inform the Jury That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural sentencing protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (CT 12:2661-2663, 2665-2667), failed to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) Appellant urges this Court to reconsider its ruling. (See *People v. Schmeck, supra*, 37 Cal.4th at p. 304.)

Even assuming it were permissible not to have any burden of proof,

the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror voted for the death penalty because of a misallocation of a nonexistent burden of proof.

3. The Penalty Retrial Jury Should Have Been Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., Amend. 14th), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., Amends. 8th & 14th), and his right to the equal protection of the laws. (U.S. Const., Amend. 14th.)

In *People v. Arias* (1996) 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the

state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death-eligibility. (*Id.* at p. 190.) Appellant urges this Court to reconsider its decision. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) As the other sections of this brief demonstrate, this state's capital-sentencing scheme is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption-of-life instruction is constitutionally required.

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

The question of whether to impose the death penalty upon appellant hinged on whether the jurors determined that "the aggravating circumstances are so substantial in comparison to the mitigating circumstances that they warrant death instead of life without parole." (CT 12:2666.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violated the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Appellant asks this Court to reconsider that opinion. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.)

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

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate. On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violated the Eighth and Fourteenth Amendments to the federal Constitution.

This Court previously has rejected this claim (*People v. Arias*, *supra*, 13 Cal.4th at p. 171), but appellant urges this Court to reconsider that ruling. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.)

6. The Instructions Violated the Equal Protection Clause

As a product of the flawed instructions described in this claim and in Claim XVI, 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 in violation of the equal protection clause of the Fourteenth Amendment to the federal constitution. To the extent that there may be differences between capital defendants and

non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; California Rules of Court, rule 4.42, subds. (b), (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. This Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but appellant asks this Court to reconsider that ruling. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.)

I. Appellant Is Entitled To A New Trial

These errors were not harmless. Rather, the instructional errors individually and cumulatively warrant reversal of appellant's death sentence. The refusal to inform the jury that only factors (a) and (i) could be aggravating gave the jury the mistaken impression that the absence of mitigation was aggravating or, worse yet, that mitigating evidence could be used as a basis for, rather than against, a death sentence. The court's refusal to modify the jury instruction with respect to the catch-all mitigating factor reduced the ability and likelihood that the jury would give full effect to appellant's mitigating evidence. The court's unwillingness to instruct the jury that mitigation was not limited to the delineated factors or that the jury could return a life verdict for any reason had a similar impact. Instructing the jury that it need not find aggravating factors unanimously impermissibly

increased the weight of the aggravating evidence. Declining the lingering-doubt instruction further restricted the jury's ability to give full effect to appellant's mitigating evidence. The court's mandatory instruction also limited the jury's consideration of mitigating evidence and, by requiring the jury to render a death verdict under the specified conditions, increased the likelihood that the jury would indeed deliver a death verdict. The other flaws in CALJIC Nos. 8.85 and 8.88 also exaggerated the jury's perception of the strength of the aggravating evidence and derogated the weight of the mitigating evidence.

Viewed in isolation, each of these instructional errors added a thumb on death's side of the scale for the jury's delicate balancing between aggravating and mitigating factors. Taken together, the errors provided the weight of two hands supporting a death verdict. Given evidence of appellant's minimal, or lack of, participation in the offense and his nonviolent and noncriminal history and the closeness of this case (see *ante*, at pp. 93-94), these errors were not harmless as a matter of state law or federal constitutional error. (See *People v. Brown* (1988) 46 Cal.3d 432, 448; *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259; *Chapman v. California* (1967) 386 U.S. 18, 24.) Consequently, appellant's death sentence must be vacated.

XIX

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS TO MODIFY THE DEATH SENTENCE

Following the penalty retrial, appellant moved to modify the death sentence under Penal Code section 1181, subdivision (7). The motion had two strands: an automatic motion to modify governed by Penal Code section 190.4, subdivision (e) and an as-applied constitutional challenge to the death sentence pursuant to *People v. Dillon* (1983) 34 Cal.3d 441, 480-481. (CT 12:2730-2780.) Despite the dearth of evidence of appellant's participation and appellant's nonviolent and crime-free history, the court denied both aspects of the modification motion. (RT 103:12959-12965, 12968-12970; CT 12:2812-2814.) That was error. Furthermore, the denial of the motion had the effect of violating appellant's Eighth Amendment rights.

A. The Court Erred In Denying The Automatic Motion To Modify The Death Sentence

The trial court erred in denying the automatic motion to modify. On appeal, this Court undertakes an independent review of the trial court's ruling. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1267.) The weight of the evidence does not support the death verdict. The dearth of evidence that appellant was a participant, let alone a major participant, in the offense and appellant's lack of violent or criminal history demonstrate that the weight of the evidence did not support the death verdict.

B. The Court Erred In Denying The *Dillon* Motion to Modify

The court committed a separate error when it denied the motion to modify made pursuant to *People v. Dillon*, *supra*, 34 Cal.3d at pp. 480-481.

When a death sentence is disproportionate to a defendant's individual culpability, the sentence violates the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution, and should be modified by the trial court. (See *People v. Millwee* (1998) 18 Cal.4th 96, 168; *People v. Lang* (1989) 49 Cal.3d 991, 1045-1046.) Based on appellant's limited, or nonexistent, participation in the offense, the minimal evidence of his alleged intent to kill, and his nonviolent, crime-free history, appellant's death sentence is disproportionate to his culpability. Consequently, the court erred when it denied the *Dillon* motion to modify.

C. The Denial Of The *Dillon* Motion Violated Appellant's Constitutional Rights

The denial of appellant's *Dillon* motion to modify was not merely state-law error. The ruling also infringed appellant's Eighth Amendment and article I, section 17 rights to be free from cruel and unusual punishment. As stated above, the death sentence is disproportionate to appellant's culpability. Accordingly, the death sentence, and the trial court's denial of the *Dillon* motion, violated appellant's Eighth Amendment and article I, section 17 rights. (See *Solem v. Helm* (1983) 463 U.S. 277, 290.)

D. The Death Sentence Must Be Reversed

Any of the court's errors in denying the multifaceted motion to modify requires the reversal of appellant's death sentence.

XX

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Even where no single error when examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may require reversal. (See *Kyles v. Whitney* (1995) 514 U.S. 419, 436-437 [the cumulative effect of errors, none of which individually are significant, could be collectively significant]; *People v. Hill* (1998) 17 Cal.4th 800, 844-847 [reversing death sentence due to cumulative error]). Where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476, quoted in *United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381.) Reversal is thus required unless the cumulative effect of all of the errors was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying *Chapman* standard to totality of the errors when errors of federal constitutional magnitude combined with other errors].)

The errors in this case synergistically combined to deprive appellant of a fair trial. If this Court concludes that no individual error is reversible, this Court must vacate the conviction, special-circumstance finding, and death judgment because the cumulative effect of the errors was not harmless.

The trial court excluded several components of appellant's evidence proffered to support his guilt-phase and penalty-phase defenses. Throughout the proceedings below, evidence of the abuse Veronica suffered and observed when she was a child and of Veronica's antipathy for her sister Mary was excluded. (See *ante*, Claims I and II.) At the penalty retrial, the trial court barred appellant from presenting evidence of Veronica's admissions to police, eliciting evidence of Ivan Jr.'s role as a prosecution witness and how that role would contribute to the impact that appellant's execution would have on Ivan Jr., and exhibiting his children to the jury. (See *ante*, Claims III, IV, and V.) Most of the excluded evidence supported appellant's defense theory that Veronica was the sole, or the primary, perpetrator of the offense. Viewed individually, these errors were prejudicial. Considered together, the exclusion of defense evidence prevented appellant from defending himself against the murder charge and the special-circumstance allegation, and neutered appellant's penalty-retrial defense.

On the other side of the coin, the trial court's erroneous admission of prosecution evidence was individually and cumulatively harmful. The admission of Ivan Jr.'s preliminary hearing testimony at the first trial and the admission of appellant's interrogation at both trials were highly prejudicial (see *ante*, Claims IX and XI): Without those videotapes, no evidence provided any basis for concluding that appellant, rather than Veronica, committed any of the acts against Genny. The prosecutor's references to extra-record facts improperly enhanced the weight of the prosecution evidence. (See *ante*, Claims XIV and XV.) In addition, admission of the photos and mannequin, and the prosecutorial misconduct at the guilt phase and penalty retrial combined to inflame the jury's passions

and thereby increased the likelihood of a conviction, special-circumstance finding, and death verdict. (See *ante*, Claims XII, XIV, and XV.)

Furthermore, the instructional errors at the guilt phase and penalty retrial all served to make a conviction, special-circumstance finding, and death verdict more likely. (See *ante*, Claims XVII and XVIII.) When these errors are considered with the effect of the other errors, the jury verdicts were all tainted by error.

The panoply of errors affected the court's evaluation of appellant's automatic motion to modify the death sentence. In denying the motion, the trial court concluded that the aggravating weight of factor (a) was enormous and that appellant was an active participant (RT 103:12962-12963; CT 12:2812-2813); however, the exclusion of the strongest evidence of appellant's nonparticipation, or minor participation, tainted the trial court's determinations. (See *ante*, Claims I, II, and III.) The court also refused to consider evidence that the guilt-phase jury did not deliberate on or find whether appellant had intended to kill Genny. (See *ante*, Claim VI.) Further, the court erroneously admitted Ivan Jr.'s preliminary hearing testimony. (See *ante*, Claim IX.) In addition, the evidence supporting the conviction and special circumstance was insufficient, and the trial court erred in denying the motion for judgment of acquittal. (See *ante*, Claim XIII.) If this Court deems the evidence sufficient, the evidence just barely met the constitutional threshold for sufficiency. Had the trial court accurately evaluated the circumstances-of-the-offense factor, the death sentence would have been against the weight of the evidence.

In addition, the cumulative impact of these errors should also be evaluated in conjunction with the jury's failure to find or deliberate on the intent-to-kill element of the torture-murder special circumstance. (See *ante*,

Claim VI.) Because it cannot be shown beyond a reasonable doubt that the errors that infected the guilt phase and penalty retrial had no effect, either individually or collectively, on the conviction, special-circumstance finding, and death verdict, reversal is required.[95] (See *Chapman v. California*, *supra*, 386 U.S. at p. 24; *Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259.)

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[95] Due to the discretionary nature of the capital-sentencing determination, respondent has a high burden of showing that a penalty-phase error is harmless. (See *ante*, at pp. 94-96.) Moreover, the overwhelming-evidence test is not appropriate for penalty-phase error. (See *ante*, at pp. 96-98.) In any event, the evidence supporting the conviction and special-circumstance finding was not overwhelming, so the verdicts cannot be upheld on that basis. (See *ante*, at pp. 85-89.)

XXI

CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS

This Court numerous times has rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments to the federal constitution, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook* (2006) 39 Cal.4th 566, 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges this Court to reconsider its previous decisions. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.)

CONCLUSION

For the foregoing reasons, the conviction, special-circumstance finding, and death judgment must be reversed.

DATED: January 22, 2007

Respectfully submitted,

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CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630, subd. (b)(1))

I, Craig Buckser, am the Deputy State Public Defender assigned to represent appellant *Ivan Joe Gonzales* in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 90,617 words in length.

CRAIG BUCKSER
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Ivan Joe Gonzales* CSC No. S067353

I, Jeffrey McPherson, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; that on January 22, 2007 I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

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Each said envelope was then, on January 22, 2007, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 22, 2007, at San Francisco, California.

_____
DECLARANT