IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,* v. WILLIAM ALFRED JONES, JR., *Defendant and Appellant.*	No. S076721 Riverside County Superior Court No. RIF73193

Automatic Appeal From the Superior Court of Riverside County

Honorable Robert G. Spitzer, Judge

APPELLANT'S OPENING BRIEF

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PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	No. S076721
Plaintiff and Respondent,	)	
	)	Riverside County
v.	)	Superior Court
	)	No. RIF73193
WILLIAM ALFRED JONES, JR.,	)	
	)	
Defendant and Appellant.	)	
	)	

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STATEMENT OF APPEALABILITY

This is an automatic appeal, pursuant to California Constitution, article VI, section 11, and Penal Code section 1239, subdivision (b), from a conviction and judgment of death entered against appellant, William Alfred Jones, Jr. (hereinafter "appellant"), in Riverside County Superior Court on February 8, 1999. The appeal is from a final judgment following a jury trial and is further authorized by Penal Code section 1237, subdivision (a).

STATEMENT OF THE CASE

PRE-TRIAL PROCEEDINGS

An indictment filed on February 18, 1997, charged appellant with the June 19, 1996, murder of Ruth Eddings (Pen. Code, § 187), and alleged that the murder was committed during the course of rape, sodomy and burglary (Pen. Code, § 190.2, subd. (a)(17)). Appellant was also charged with arson with respect to a fire occurring at Ms. Eddings' residence on that same date

(Pen. Code, § 451, subd. (b)). (1 CT 1-2.) The indictment further alleged that appellant had suffered two prior "Strike" convictions (Pen. Code, § 667, subd. (c)-(e)), and one prior serious felony conviction (Pen. Code, § 667, subd. (a)), for which he had served a prior prison term (Pen. Code, § 667.5). (CT 2-4.) On March 3, 1997, appellant entered pleas of not guilty to the charges, and denied the enhancement allegations. (1 CT 9.)

Several motions were litigated prior to trial including a defense motion to exclude statements appellant made during three police interviews, one conducted at his home and two conducted at the police station. With regard to the statements made during the first interview at appellant's house, the motion was made on the ground that, although appellant was in custody at the time, police failed to advise him of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. The statements made during the interrogation sessions at the police station were argued to be inadmissible on two grounds: first that they were taken after appellant invoked his right to counsel, and second that they were involuntary. (3 CT 587.) Appellant also filed a companion motion to recuse Deputy District Attorney Patricia Erickson because she was present during the interrogation sessions at the station and was, therefore, a percipient witness in the case. (3 CT 631.) The prosecution filed opposition to these motions on August 11, 1998 (3 CT 646, 685), and the matter was heard on August 17 (4 CT 881; 4 RT 358-422), October 6 (4 CT 960; 6 RT 450-466), October 7 (5 CT 1357; 6 RT 467-476), and October 13, 1998 (6 CT 1550; 7 RT 477-572). The trial court ultimately denied appellant's motion to exclude his statements on all grounds (6 CT 1550; 7 RT 537-548), and denied the motion to recuse Deputy District Attorney Erickson (7 RT 561-568).

The defense also filed a motion to exclude evidence of uncharged acts on August 7, 1998. (3 CT 541.) The prosecution filed, on August 11, 1998,

a memorandum of points and authorities in support of introduction of evidence pursuant to Evidence Code section 1101, subdivision (b). (3 CT 665.) A supplemental memorandum of points and authorities in support of the introduction of evidence pursuant to Evidence Code section 1101, subdivision (b), was filed by the prosecution on August 14, 1998. (4 CT 876.) Appellant filed a response to the People's motion to introduce additional evidence of uncharged acts on October 1, 1998. (4 CT 940.) The matter was heard on October 14, 1998 (6 CT 1552; 8 RT 573-609), at which time the court ruled that some of the evidence the prosecution sought to introduce would be admissible at both the guilt and penalty phases of trial and some would be excluded from the guilt phase. The question of admissibility of the excluded evidence at the penalty phase was reserved until a later date. (8 RT 593-595, 601-602.)

Jury selection in the case began on October 19, 1998 (6 CT 1579), and lasted for six days. The jury was sworn on October 29, 1998. (16 CT 4517.)

THE GUILT PHASE

On November 3, 1998, the trial court read preliminary instructions to the jury (16 RT 1677-1688), and the parties presented their opening statements (16 RT 1690, 1694). (17 CT 4560.) The prosecution thereafter began presenting its case-in-chief. (16 RT 1711.) After five days of testimony, the prosecution rested its case on November 10, 1998. (17 CT 4823; 20 RT 2162.)

Prior to the presentation of defense evidence, the prosecution objected to proposed defense evidence relating to appellant's psychological condition including proposed testimony of a psychologist describing and explaining appellant's personality disorder and the effects of alcohol intoxication on him. The trial court sustained the objection and prohibited appellant from calling

his expert witness. (20 RT 2153.) Appellant then began his case-in-chief. (17 CT 4823; 20 RT 2165.) The defense evidence took six days to present (17 CT 4823-4856), and appellant testified on his own behalf (17 CT 4834, 23 RT 2500-2510, 24 RT 2545-2612). Appellant then renewed his request to call his expert witness (25 RT 2651), but the request was again denied (25 RT 2652-2655). The court also granted the prosecution's request to strike defense evidence regarding appellant's earlier hospitalizations for mental health treatment. (25 RT 2655-2656.)

The prosecution's case in rebuttal was conducted on November 19, 1998. (18 CT 4856; 25 RT 2670.) On November 23, 1998, the parties presented their closing arguments, and the court instructed the jury. (18 CT 4861; 26 RT 2780-2913.) The jury retired to commence deliberations at 2:45 p.m. that day (18 CT 4862), and returned verdicts the following day at 3:23 p.m. finding appellant guilty on both counts and finding all of the special circumstances and enhancement allegations to be true (18 CT 4863, 4865-4872). Each juror was polled as to his or her verdict, and ordered to return on December 1, 1998, when the penalty phase of trial was set to begin. (18 CT 4863.)

THE PENALTY PHASE

On November 25, 1998, the parties and the court met to discuss potential issues regarding the penalty phase. (18 CT 4883, 4897; 27 RT 2934-2960.) The discussion continued the following day with respect to specific issues including the admissibility of proposed prosecution evidence relating to prior crimes and victim impact.[1] (18 CT 4897; 28 RT 2961-3006.) The

[1] The court reviewed the following written motions filed by the parties on this issue: Prosecution Motion to Admit Witness Statements at Trial as Spontaneous Declarations Pursuant to Penal Code section 1240 filed on

defense objected to the proposed evidence on several grounds including relevance, hearsay, denial of the right to confrontation, and Evidence Code section 352. (28 RT 2979-2982.) The court rendered a tentative decision, but deferred final ruling until after a foundational hearing (28 RT 2983-2986), which was conducted the following day (18 CT 4979; 29 RT 3007). After listening to testimony, and the arguments of counsel, the court overruled the defense objection and held that the prosecution's proposed evidence was admissible. (18 CT 4979; 29 RT 3013-3016, 3033-3039.)

Following the foundational hearing, the prosecution and defense presented their opening statements to the jury. (18 CT 4979; 29 RT 3048, 3051.) The prosecution then presented its evidence in aggravation over the course of three days, December 1, 2, and 3, 1998. (18 CT 4979-5000.) The defense evidence in mitigation was presented on December 3, 7, 8, and 9, 1998. (18 CT 5000-5045.) Closing arguments were given by the parties on December 10, 1998. (18 CT 5053; 34 RT 3822, 3844, 3878, 3889.) The trial judge then instructed the jurors. (34 RT 3898.) Jury deliberations began at 2:25 a.m. on December 10, 1198 (18 CT 5053), and continued on December 14, 1998 (18 CT 5055). On December 15, 1998, at 11:45 a.m., the jury returned a verdict fixing the penalty for the murder at death. (18 CT 5064.)

August 6, 1998 (2 CT 363); Defense Motion to Exclude Evidence of Uncharged Acts and for Evidentiary Hearing filed on August 7, 1998 (3 CT 541); Prosecution Memorandum of Points and Authorities in Support of Introduction of Evidence Code section 1101, subdivision (b) filed on August 11, 1998 (3 CT 665); Prosecution Supplemental Memorandum of Points and Authorities in Support of Introduction of Evidence Pursuant to Evidence Code section 1101, subdivision (b), filed on August 14, 1998 (4 CT 876); Defense Response to People's Motion to Introduce Additional Evidence of Uncharged Acts filed on October 1, 1998 (4 CT 940). (28 RT 2975.)

On February 8, 1999, the trial judge conducted an automatic review of the verdict under Penal Code section 190.4, subdivision (e), and concluded the jury's verdict of death would not be modified. (35 RT 3944-3950.) The court then formally imposed the death sentence as well as a sentence of 25 years to life on the arson charge, and a five year term for the prior serious felony conviction. (19 CT 5149; 5151, 5157-5160; 35 RT 3959-3961.)

STATEMENT OF THE FACTS

THE GUILT PHASE

I. INTRODUCTION

During the early morning hours of June 19, 1996, a fire was reported at the residence of 81 year old Ruth Eddings. Ms. Eddings was found dead in her home. Although her body sustained thermal damage, she died before the fire started as the result of blunt force trauma and possibly strangulation. She was found unclothed, but had sustained no apparent physical injuries indicative of sexual assault. Appellant, who lived next door with his parents, became the focus of the investigation almost immediately. He was interviewed by homicide detectives and District Attorney Patricia Erickson three times beginning that afternoon. During the course of two interviews conducted on June 19th appellant admitted responsibility for the fire and for Ms. Eddings' death, but consistently denied any sexual assault took place. After spending the night in jail, appellant was interrogated again the following day. During this third interrogation session, appellant admitted putting his penis between Ms. Eddings' legs and ejaculating; however, he was uncertain whether vaginal or anal penetration had occurred.

Because appellant admitted responsibility for the fire and for Ms. Eddings' death, the central issues to be resolved by the jury related to intent.

The defense presented evidence raising questions as to whether appellant harbored the intent necessary for burglary, attempted rape, attempted sodomy, or murder, and whether either a rape or a sodomy had occurred. However, the trial court precluded appellant from calling his primary witness relating to this issue, an expert who was prepared to testify that appellant suffered from a severe personality disorder, that he harbored significant rage, and that he had limited control over his anger which intoxication would further reduce. Questions were also raised as to whether Ms. Eddings died as the result of a bear hug and a fall with appellant's weight on top of her as the defense contended, or as the result of multiple blows as was the prosecution's theory. Among the primary disputes below was whether a rape or sodomy occurred. Although there was no physical evidence indicating that vaginal or anal penetration had occurred prior to death, the autopsy surgeon was permitted to testify over defense objection that, in his opinion, Ms. Eddings was raped and murdered and that she was raped and sodomized prior to death.

II. SUMMARY OF THE EVIDENCE

A. THE PROSECUTION'S CASE-IN-CHIEF

1. The Homicide and Arson

Riverside County Sheriff's Deputy Philip Matheny was working patrol that morning. (16 RT 1712.) Around 4:20 a.m. he was instructed to assist fire department personnel responding to a structure fire, at 17831 Cajalco Road in Mead Valley, with people possibly inside. As he drove to that location, Deputy Matheny observed the fire from about a mile away. (16 RT 1713-1714.) Fire fighters were on the scene attempting to put out the flames when Deputy Matheny arrived, so he closed off the street and diverted traffic. (16 RT 1714.) Later California Highway Patrol officers took over control of

traffic in the area (16 RT 1715), and other law enforcement personnel, including homicide detectives, fire investigators, and Deputy District Attorney Erickson, took charge of the scene. (16 RT 1720.)

California Department of Forestry investigator Wesley Alston arrived between 4:00 and 5:00 that morning, along with Captain Hutchinson of the San Bernardino County Fire Department, and Captain Easton of the county Fire Authority, accompanied by his accelerant detection dog. (16 RT 1723, 1727-1728.) Investigator Alston walked around the outside of the structure, which was a single wide trailer with attached outbuildings, and observed that the fire had involved only the rear portion of the residence. (16 RT 1728-1729.) Two areas of origin were detected; one in the livingroom, and one half way down the west side of the trailer inside the remains of a door. The fire had been started with accelerant in these locations. (16 RT 1737-1738.) A book of matches was found in the driveway, and a gas can label was observed lying in the Jones' yard near the 6' chain link fence which ran between the two properties. (16 RT 1745-1749, 1751.)

Ms. Eddings' unclothed body was found lying face down on the floor inside the front room of her trailer. (16 RT 1716, 1777-1778.) She had suffered severe thermal injury, but an autopsy later determined she had, in all probability, died before the fire started since there was no evidence of soot in her airways and the level of carbon monoxide in her blood was within normal limits. (18 RT 1907, 1935.) Ms. Eddings died as the result of multiple injuries consistent with blunt force trauma and strangulation. Her injuries included broken ribs, fractured vertebra, and fractured bones in her neck. (18 RT 1914-1930.) In the opinion of the autopsy surgeon, the injuries were consistent with tremendous force and would not have resulted from a single

blow. (18 RT 1972, 1978.) However, there were no signs of blunt force injury to any of the vital organs. (19 RT 2050, 2054.)

During the autopsy a small 4" by 4" piece of cloth was observed protruding from the vaginal cavity. (18 RT 1911.) Oral, rectal, and vaginal swabs were collected. (18 RT 1910.) Although there were no signs of trauma to the vaginal or anal canals[2] (18 RT 1935), the autopsy surgeon was permitted to testify, over defense objection, that in his opinion Ms. Eddings had been raped and murdered and that she had been raped and sodomized before her death (18 RT 1957-1958). No anatomic findings established that the cloth was inserted into the vagina prior to death or that bodily fluids collected during the autopsy were deposited in the rectal cavity prior to death. (19 RT 1995.)

Daniel Gregonis of the County of San Bernardino Sheriff's Department crime lab performed both RFLP (Restriction Fragment Length Polymorphism) and PCR (Polymerase Chain Reaction) analysis on the rectal swab. (17 RT 1789, 1795, 1800; 20 RT 2161-2162.) DNA extracted from the swab contained both a sperm fraction and a non-sperm fraction. (17 RT 1803.) The non-sperm fraction was composed of a primary type and a secondary type. The primary type was matched to Ms. Eddings through PCR testing. (17 RT 1804.) Appellant could not be excluded as a potential contributor of the secondary type, nor could he be excluded as the contributor of the sperm fraction of the sample, by means of PCR testing. (17 RT 17 RT 1804-1805.) The frequency of that particular DNA profile in the general population was calculated to be 1 in 1.9 million Caucasians, 1 in 11 million African Americans, and 1 in 1.4 million Hispanics. (17 RT 1806.) RFLP analysis

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[2] Both the vaginal and rectal canals were removed from the body during the autopsy and inspected visually; no signs of injury were observed. (19 RT 2009, 2011.)

produced a similar result in that appellant could not be excluded as the contributor of the sperm fraction of the sample. (17 RT 1811.) With regard to the RFLP analysis, the statistical probability of a random match was calculated at less than 1 in 5 billion for all racial groups. The combined statistical probability for the PCR and RFLP results was calculated at 1 in 10 quadrillion. (17 RT 1813.)

2. Appellant's Statements to Police

As a next-door neighbor, appellant was contacted by one of the first officers on the scene. (16 RT 1719.) He told the officer he was staying with his parents who were in Washington and said he had been asleep when the fire started. He had been awakened by a young lady pounding on his window who told him there was a fire next door, and he called the fire department at her request. (16 RT 1719-1720.)

Appellant was contacted at his home later that afternoon by homicide Detective Eric Spidle who questioned him over a period of about 2 ½ hours. (20 RT 2101.) During this time they talked at the kitchen table and walked around outside together. (17 RT 1851-1852; 20 RT 2103.) At some point Detective Spidle asked appellant for matches, and appellant gave him some with Camel cigarette advertising on the cover which was the same advertising Detective Spidle had seen on the cover of the matches found earlier in Ms. Eddings' driveway. A similar book of matches was found in appellant's bedroom closet. (16 RT 1746-1747, 1758-1759.) Also found on the property was a Blitz brand gas can located near a riding lawn mower and rototiller under a tarp in the yard. (16 RT 1760-1761.) The label found earlier in the yard near the fence bordering Ms. Eddings' property was also a Blitz brand. (16 RT 1751,1754.)

After talking to appellant at his home Detective Spidle asked him if he would be willing to accompany him to the police station. (17 RT 1852.) Appellant agreed and Detective Spidle drove him to the station, stopping on the way to pick up some food. (17 RT 1852.) Appellant waited in the reception area until Deputy District Attorney Erickson arrived. Around 4:30 p.m. he was taken into another room for further questioning by detectives and Ms. Erickson. (17 RT 1851; 20 RT 2105.) After appellant was advised of his right to counsel and his right to remain silent, and signed a written waiver of those rights, Detective Spidle continued questioning him.[3] (17 RT 1852, 1855.)

At Detective Spidle's prompting appellant detailed his activities prior to the fire and explained that he had arrived home from work around 6:00 p.m., then went to his neighbor Lowell's house for 20 or 30 minutes. (17 CT 4572, 4575.) Afterward he went to the store and bought a 12-pack of Bud Light, milk, some gum, and a couple packs of cigarettes. (17 CT 4575-4576.) When he returned home, he cranked up the radio and drank a couple of beers before going outside to wash construction adhesive off his hands with gasoline. (17 CT 4576-4577.) He brought the gas can back to the house when he had finished because he was not sure how much gas was left and he needed to use the rototiller the following day. (17 CT 4577.)

Detective Spidle inquired whether appellant possibly had too much to drink and accidentally started the fire, but appellant denied having done so. (17 CT 4578-4580.) Appellant first denied having gone over to Ms. Eddings house that night then said he might have gone over after he washed his hands

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[3] A tape of the interview was played for the jury during trial. (17 RT 1867, 1869, 1873-1874, 1895-1896.) A transcript of the tape is included in the clerk's transcript. (17 CT 4633-4792.)

with the gas. (17 CT 4581-4582.) He said he put the newspaper in the fence that evening for Ms. Eddings after he had read it. (17 CT 4583.) He then remembered going over to check on her later, saying he knocked on the door and asked if she was alright. She did not come to the door, but yelled out that she was in the tub. (17 CT 4585-4586.) Appellant explained that he had no problems with Ms. Eddings, that he liked her, and that she had always been good to him. He repeatedly denied harming her when the interviewers suggested he might have done so. (17 CT 4611, 4625-4627, 4640.)

As the questioning continued, Detective Spidle told appellant: "I'm not saying you hurt the woman, I'm saying there was a fire that started over there and I believe you know what happened. And I'm telling you, if you stepped inside the house last night, you had a few beers, and she didn't like it, she got scared, she passed out and somehow, maybe, maybe . . . ." (17 CT 4660.) He then asked appellant about a scratch on his face and appellant told him it had happened at work. (CT 4670.)

Over the course of the 4½ hour interrogation session appellant's demeanor varied from cooperative and inquisitive to confused, nervous and argumentative. (20 RT 2104, 2118-2120.) At one point he asked Detective Spidle for a gun so he could kill himself. (17 CT 4963.) Two other detectives were present during this portion of the interview. One of them, Detective Purkiss, told appellant that he had talked to his brother Donald. He said Donald told him he was afraid something bad was going to happen when his parents went away and left appellant alone. Donald said he did not ask appellant whether he had done it because he thought he had. (17 CT 4695.) After these statements were made, appellant asked to talk to his brother, but the interrogation continued until he admitting starting the fire. (17 CT 4696-4697.)

Appellant said he had a beer on the way home from work that day and had 6 more when he got home. He explained that he went over to check on Ms. Eddings and found her lying on the floor naked. (17 CT 4700-4702.) He panicked when he saw blood on her face and went home to try to think what to do. (17 CT 4704-4705.) Although he could not explain why, he got a gas can and went back to the house and attempted to start a fire. He said he left and then went back two more times pouring gasoline and lighter fluid around the house to set it on fire. It took three tries before the fire began to burn. (17 CT 4708-4715.) Appellant said he had panicked because he knew his fingerprints were in the house. (17 CT 4711.) He did not want to go back to prison, and told the officers he would rather die.[4] (17 CT 4694, 4697.)

Appellant was asked to explain again what had happened, and he said that, after he saw the newspaper in the fence, he went over to check on Ms. Eddings. He had gasoline on his hands at the time. The door was unlocked so he went in and found Ms. Eddings lying naked on the floor. He went home and sat for a while before deciding to run. (17 CT 4730-4731.) Appellant said he got in his truck and drove off, but as he was driving he began to worry about his fingerprints being discovered in Ms. Eddings trailer. He went back to the house and tried to start a fire with lighter fluid. (17 CT 4731.) When he walked out he could see a flame burning, but the fire did not catch. (17 CT 4732.) Appellant said he went back two more times, once with a jar of gasoline and then with a can of gasoline, before he was able to start the fire. (17 CT 4736.) After the trailer began to burn he went home and took a shower to try to clear his head. (17 CT 4741.)

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[4] Specifically, appellant said: "They'll kill me. . . . I don't think I can do it again. I'd rather shoot myself. I should have shot myself. . . ." (17 CT 4694.)

When asked whether any of his bodily fluids would be found on Ms. Eddings' body, appellant offered that he might have dripped sweat on her. He explained that he had turned her head, had touched her wrist to see if she had a pulse, and had put his head on her back to listen for sounds of breathing, all while he was sweating heavily. (17 CT 4749-4753.) He admitted the scratch on his face had not been there when he got home from work (17 CT 4750), and supposed it happened when he bumped into something at Ms. Eddings' in the dark (17 CT 4733). When asked about a bruise on his right hand, appellant guessed he must have hit it on the door going out. (17 CT 4754-4755.)

Detective Spidle went through the details with appellant a final time before terminating the interview around 9:00 p.m. (17 CT 4759-4791.) He then processed him for booking into county jail where he was received around 1:40 a.m. (17 RT 1855-1856; 20 RT 2105-2109.) The following day Detective Spidle brought appellant back to the station and conducted a second taped interrogation session after appellant signed another written waiver of his rights.[5] (17 RT 1856-1857.)

At the outset of this session, Detective Spidle established that he believed something physical had happened between appellant and Ms. Eddings. He asked appellant to tell him if it did so appellant's mother would not be worried about someone else being out there she needed to be afraid of. He also told appellant that he had talked to his family and they did not believe the story he had been telling. (17 CT 4802.) Appellant told Detective Spidle he did not know what happened. He said he went over, knocked on the door, and Ms. Eddings let him in. She threw her arms up and they "got in a

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[5] A tape of the interview was played for the jury during trial. (18 RT 1899-1900; 20 RT 2903.) A transcript of the tape is included in the clerk's transcript. (17 CT 4793-4820, 4827-4829.)

wrestling match." (17 CT 4807.) When Detective Spidle asked appellant if he choked her, he said he did. (17 CT 4811.) He revealed that he had taken her clothes off and put his penis between her legs. She was not struggling with him then, and he did not know whether penetration occurred. (17 RT 4811, 4818.) Appellant insisted that he did not mean to harm Ms. Eddings, and that it would not have happened if he had not been drinking. (17 CT 4808, 4817.)

3. Other Crimes Evidence

Over defense objection, the prosecution was permitted to introduce evidence relating to appellant's conviction in a prior case involving Toni Pina under Evidence Code section 1101, subdivision (b). (8 RT 593-595, 601.) Prior to Ms. Pina's testimony the trial court instructed the jury: "this evidence from Miss Pina is being presented to you for a limited purpose. She is going to be discussing an event that occurred, obviously, in 1990. And you may consider it for the limited purpose, if it is helpful for you, in evaluating the state of mind of the defendant, William Alfred Jones, Jr., on June 19th, 1996, including the state of mind and the existence or nonexistence of the specific intent which may be an element of the crime charged or of the special circumstances which are alleged in this case. [¶] For that limited purpose at this time you may consider the evidence and for no other purpose." (17 RT 1818.)

After the admonition, Toni Pina testified that in March of 1990, when she was 16 years old, she lived with her aunt and uncle, Sandra and John Seneff, in the Pedly area of Riverside County. The Seneff's three children ages 2, 3, and 5 were also living in the house, as was Donald Jones who was Sandra's brother. (17 RT 1817-1818.) The morning of March 16th, appellant arrived at the Seneff residence and spoke to Donald briefly before Donald left

for a job interview. Sandra and John had already gone to work when Donald left for his interview. (17 RT 1820-1821.)

As Pina was preparing to leave the house appellant asked her where she was going. She told him she was going to school, but appellant said: "No, you're not," then put his hands on her shoulders and pushed her through the hallway and into a bedroom. (17 RT 1822-1823.) He told her to take off her clothes and, when she refused, he took them off for her then pushed her to the floor, took his pants down, and put his penis in her mouth. (17 RT 1845-1846.) Pina told appellant "No," and asked him to stop, but he continued until he ejaculated. (17 RT 1823.) He then stood up looking disoriented and pulled Pina to her feet, then walked her into the bathroom and handed her a wet washcloth for her face. After warning her not to say anything about what had happened, appellant left her crying in the bathroom. (RT 1824.) Pina changed her clothes and then fled the house. She ran to the home of neighbors who were deputies with the sheriff's department and told them what had happened. (17 RT 1825-1826.)

B. DEFENSE EVIDENCE

1. Appellant's Testimony

a. Direct Examination

Appellant testified that he drank two beers on his way home from work the evening of the fire. When he got home he drank four or five more and then went to the store and bought another six pack which he also consumed before going over to Ms. Eddings' house. (23 RT 2501-2502.) He was holding an open can of beer when he knocked on Ms. Eddings' door. She opened the door and let him in, then became angry that he was drinking and knocked the can out of his hand and began swinging at him. (23 RT 2502.)

b. Cross-Examination

Despite the limited nature of appellant's testimony on direct examination, and over defense objection, the prosecution was permitted to question appellant about his activities on the 18th and 19th of June in and around the Eddings residence and his prior statements concerning those events. Also over defense objection the prosecution was permitted to impeach appellant with his prior conviction in the case involving Toni Pina as well as three other incidents not resulting in convictions. (24 RT 2520-2535.)

Appellant admitted that he lied to Detective Spidle about several things during the course of his interviews. He told him that he did not hurt Ms. Eddings, and did not kill her, but those things were untrue. (24 RT 2551, 2553.) He remembered telling Detective Spidle he went to Ms. Eddings' house and found her dead, but that was not true. (24 RT 2559-2560.) He also said he had never hurt anyone in his family, and that was not true. (24 RT 2557.) Appellant lied to Detective Spidle when he told him he was not drunk that night, and understated amount the amount of beer he had consumed. (23 RT 2506.)

On the night of the incident appellant grabbed Ms. Eddings in the hallway and put his hands around her throat. (24 RT 2567.) He choked her, she went limp, and they fell. (24 RT 2574.) Appellant admitted he "had sex" with Ms. Eddings, but he did not know whether vaginal or anal penetration occurred. (24 RT 2566-2567.)

When he was questioned by police in 1991 regarding the incident involving Toni Pina he told them he had not touched her. He said that the last sex he had was oral copulation by a prostitute. (24 RT 2561.) Appellant was convicted of felony sexual assault with intent to commit rape and forced oral

copulation (24 RT 2575); however, he consistently denied having assaulted Pina. (24 RT 2570, 2573.)

With respect to other incidents, appellant admitted that in September of 1972, while he was in High School, he walked into a classroom and stabbed a teacher in the back. (24 RT 2563.) A second incident occurred when appellant went into the home of his mother's friend, Barbara Cady, one night and found her asleep. He remembered jumping on her but did not remember anything else about the incident; he was high on drugs at the time. (24 RT 2563-2564.)

c. Redirect

Although appellant killed Ms. Eddings, he did not go to her house intending to kill her nor did he go there intending to have sexual contact with her. (24 RT 2586-2587.) Ms. Eddings stopped breathing after they landed on the floor and she was not breathing or moving when he put his penis between her legs. (24 RT 2576.) In hindsight appellant assumed Ms. Eddings died because he choked her, although he did not really know what caused her death. (24 RT 2579.) Appellant had both hands on Ms. Eddings' neck when they began to fall. He used one hand to try to stop the fall, but was unable to prevent himself from landing on top of her. (24 RT 2597-2598.)

When appellant spoke to Detective Spidle on the 20th he had not slept for 3 days and had not eaten for 48 hours. (24 RT 2587-2589.) He was afraid and upset over what had happened and did not remember making all of the statements he made during the interview. (24 RT 2588-2589.)

Appellant had no intention of raping Barbara Cady. He had a drug problem at that time, and had been using drugs the day of the incident. (24 RT 2590-2591.)

2. *Forensic Evidence*

Dr. Barry Silverman, a medical expert in anatomic and clinical pathology reviewed the Riverside County Coroner's report of the autopsy conducted on Ms. Eddings, a reporter's transcript of the trial testimony of the coroner's doctor, photographs taken at the scene and at the coroner's office, and police reports in this case. (22 RT 2277-2282.) Dr. Silverman's testimony related to primary two issues: the amount of force required to cause the injuries sustained by Ms. Eddings, and whether or not penetration of the vaginal and rectal canals had occurred prior to death. In this regard Dr. Silverman testified as to Ms. Eddings general physical condition and the effects of age upon the body.

Dr. Silverman explained that menopausal and post-menopausal women do not produce the hormone estrogen. (22 RT 2286.) Additionally, because Ms. Eddings had undergone a radical hysterectomy she was not producing androgens which are converted into estrogen-like compounds. Her estrogen levels, therefore, would have been zero. (22 RT 2290-2291.) The lack of estrogen results in profound changes to bone structure and Ms. Eddings showed signs of severe osteoporosis, including curvature or lordosis of the spine. She had undergone hip replacement surgery, also indicative of severe osteoporosis. (22 RT 2287.) Osteoporosis weakens the structure of the bones and makes them more prone to fracture. (22 RT 2290.) Further, Ms. Eddings displayed kyphosis or curvature of the spine rendering her vertebral column more prominent and, therefore, more prone to fracture. (22 RT 2293-2294.) Dr. Silverman opined that, in light of Ms. Eddings bone structure, and considering that she was 81 years of age and weighed 91 pounds, and appellant was 6' and weighed 180-200 pounds, Ms. Eddings injuries could have been caused by appellant falling on her during a struggle. (22 RT 2293.)

The injuries were also consistent with the application of a bear hug or squeeze followed by a fall with weight on top. (23 RT 2478-2480.)

If Ms. Eddings' injuries had been caused by multiple blows, Dr. Silverman would have expected to see other evidence of blunt force trauma. Beating or kicking type blows would have telescoped into the body such that organs deep to the rib cage, spinal cord, muscles and skin would have shown signs of injury. The autopsy protocol, however, showed none of this — no deep injury to the brain, lungs, heart, kidneys, liver, spleen, large intestines, small intestine, or stomach. Dr. Silverman would have expected those organs to display injury if Ms. Eddings had been subjected to multiple blows or a savage beating. (22 RT 2294-2295.)

Dr. Silverman also explained that low levels of estrogen affect the skin, causing it to become thinner. Lack of estrogen also affects the skin's elasticity and the secretion of mucus in the female tract which acts as a lubricant. Consequently, in the case of rape before death there should be evidence of injury, and more significant injury in a post-menopausal woman than in a woman of child bearing years. (22 RT 2306.) During the autopsy in this case the female genitalia were removed and examined for signs of injury, yet no injury was observed. (22 RT 2310.) Dr. Silverman also indicated that if the cloth had been inserted into the vaginal cavity prior to death, one would expect to see evidence of injury such as blood on the cloth, and none was reported. (22 RT 2309.) Similarly, if forcible sodomy had occurred prior to death, injury would be expected, yet none was found. (22 RT 2314-2315.) Consequently, any penetration would have occurred after death. (22 RT 2315.)

3. *Evidence re Toni Pina's Allegations*

The deputy who responded to the call regarding appellant's assault on Toni Pina testified that she told him appellant had ejaculated in her mouth and that she had spit out the ejaculate. (22 RT 2358.) In an attempt to locate evidence to corroborate her story, the officer went to the area of the residence where she said the assault had taken place and looked carefully for, but did not find, any evidence of semen. (22 RT 2360.)

Appellant's sister, Sandra Seneff, testified that she also looked for evidence of semen based upon Pina's report but did not find any. (20 RT 2168-2171.) Seneff testified that she did not trust Pina, that she had caught her in lies before, and that Pina had falsely accused another family member of molesting her but later admitted she had lied. (20 RT 2171-2173.)

4. *Evidence Re Ms. Eddings' Attitude Toward Alcohol*

Ms. Eddings' daughter, Helen Harrington, testified that her mother did not keep alcohol in the house and did not drink. (24 RT 2632.) Drunks upset her and she avoided them if possible. (24 RT 2633-2634.)

C. THE PROSECUTION'S REBUTTAL EVIDENCE

The prosecution's rebuttal related to the Toni Pina incident and included previously redacted statements made by appellant during his interviews with Detective Spidle. Additionally, the prosecution introduced the prison packet relating to the Pina case. (25 RT 2693-2696.)

1. *Pina Incident*

Deputy Brett Johnson testified that he went to the Seneff residence to arrest appellant. Before Deputy Johnson explained anything about the charges, appellant said: "I didn't touch that little girl. I want to turn myself in and clear this up." (25 RT 2671.) Deputy Johnson then took appellant into

custody and transported him to jail. (25 RT 2673.) Appellant told Deputy Johnson he had "partied" very hard the night before and went to his sister's house because he did not feel he could drive all the way home. He said he spoke to his brother outside the house then went in and went to sleep. Deputy Johnson asked appellant when the last time he had sex was, and appellant told him that he had picked up a prostitute earlier that morning and paid her $20 for oral sex. (25 RT 2674.)

After they heard a radio call about retrieving a washcloth as evidence, Deputy Johnson asked appellant why they would need a washcloth. Appellant said he did not know, then said he had a washcloth on his head like a cold compress while he was sleeping. For a few minutes nothing more was said, then appellant told Deputy Johnson "There was come on my shirt." Deputy Johnson asked how it got there, and appellant said the prostitute got it on his shirt. Deputy Johnson asked where the shirt was, and appellant told him it had been washed. (25 RT 2675-2676.)

When Deputy Johnson told appellant a rape kit would be taken, he asked to have a doctor present saying that the doctor could confirm he had scars on his penis which would be visible to anyone who had contact with it. Appellant believed this would be helpful to his defense. (25 RT 2676.) Deputy Johnson was present when the rape kit was taken and observed a pink substance on appellant's penis. He asked him what it was, and appellant told him he had used Calamine lotion to try to heal the scars. Deputy Johnson observed an abrasion on one side of appellant's penis and a scar on the other. (25 RT 2677.) As part of the rape kit the nurse swabbed appellant's penis with a cotton swab. Appellant asked her why and she told him it was for evidence of vaginal secretions. Appellant then said he had touched the prostitute's vagina with his finger. Deputy Johnson asked him what relevance that had to

secretions on his penis, and appellant replied "Yeah, I guess you're right." (25 RT 2679-2680.)

Also called to testify regarding the Pina incident was a Riverside County Superior Court clerk who heard appellant make a statement outside of the courtroom during that case. Kathy White testified that after Ms. Pina testified at trial, a lunch break was taken. During the break Ms. White overheard appellant talking to his brother outside of the courtroom. Appellant's brother asked him if "she was crying and carrying on." Appellant replied that she was not crying, and said that it looked pretty good and that he thought he was going to beat this one too. (25 RT 2702-2704.)

2. Appellant's Previously Redacted Statements

The prosecution was also permitted to play sections of appellant's interview with Detective Spidle which had previously been redacted. (25 RT 2698; 18 CT 4858-4860.) These portions related to statements appellant made about the Pina and Cady incidents. When Detective Spidle asked appellant about the incident with Toni Pina he replied: "I don't know what it was. You know, all these years, you know, I had to live in that lie." (18 CT 4858.) With respect to Barbara Cady Detective Spidle asked appellant: "What happened with Barbara?" Appellant replied: "Same thing, dope and beer and stuff and —" Detective Spidle then asked: "But, I mean, what did you try to do, rape her?" and appellant replied: "Yeah." (18 CT 4859.) Detective Spidle also asked appellant: ". . . the sexual urge that you have that cause, causes you to wanna, a, force sex on somebody like this . . . it doesn't differentiate between younger women and older women, does it?" Appellant replied: "I guess, I guess not. It don't look like it." (18 CT 4860.)

THE PENALTY PHASE

At the penalty phase the prosecution relied upon the circumstances of the crime and previous misconduct by appellant in support of its case for imposition of the death penalty. Additional evidence was produced relating to prior acts of force or violence committed by appellant. The prosecution also presented victim impact evidence. The defense introduced evidence in mitigation relating to appellant's psychological background and make-up including testimony from appellant's relatives regarding his upbringing as well as expert testimony. Defense evidence was also presented relating to the prior violent activity described by prosecution witnesses.

I. PROSECUTION EVIDENCE

A. OTHER CRIMINAL CONDUCT

1. Former Girlfriends

The prosecution called as witnesses three of appellant's former girlfriends, Terry Garrison with whom appellant had a four-year relationship between 1975 and 1979 and with whom he had three children, Tina Kidwell with whom appellant had a two-year relationship between 1980 and 1982, and Elsie Swarringim with whom appellant maintained an on again off again relationship between 1982 and 1988. Each of these women described their tumultuous relationships with appellant and detailed incidents of physical abuse. Terry Garrison's daughter from a prior relationship, Angela, also testified to acts of abuse by appellant.

a. Terry Garrison

Terry Garrison met appellant in St. Louis during 1975 while he was staying with his uncle and lived across the street from the restaurant where Garrison worked. They began dating and Garrison eventually moved in with him. Appellant and Garrison lived together until January of 1979 and, over the

course of their relationship, had three children together, two girls and a boy. Garrison also had two daughters from a prior relationship, Angela and Deborah. (30 RT 3090-3091.)

Sometime in 1977 the relationship between appellant and Garrison deteriorated and appellant became physically abusive. The mistreatment began with pushing and slapping, and eventually escalated to punching and kicking. Violence between the two was sometimes, but not always, alcohol related, and appeared to Garrison to occur whenever appellant had a bad day. (30 RT 3092-3093.) On one occasion appellant hit Garrison in the head with an axe handle. (30 RT (30 RT 3093.) During another argument, appellant grabbed Garrison by the neck and threw her across the bed. During the course of their relationship Garrison sustained an eye injury, a head injury, and a rib injury at the hands of appellant. (30 RT 3095-3096.)

In addition to the physical abuse, appellant also threatened Garrison, on occasion telling her that if she ever left him, he would find her and kill her. (30 RT 3095.) Appellant also told her of other acts of violence and said that when he was in the 9th grade one of his teachers made him mad so he stabbed her 21 times in the back with a paperweight. (30 RT 3091.) In addition, appellant told her he had been accused of trying to strangle a former girlfriend. (30 RT 3092.)

Appellant and Garrison ended their relationship in January of 1979.[6] At that time appellant moved out and went to California, only to return to St. Louis within a month to stay with Garrison for two or three weeks while she

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[6] On cross-examination Garrison testified that she knew appellant was facing the death penalty and admitted that she was biased against him. She said she "despised" him, and when asked to rate the intensity of this feeling on a scale of 1 to 10, she rated it at 11. (30 RT 3115.)

was 5 months pregnant with their son. One night during his stay, appellant returned to the house and, although he did not appear to be drunk or high, shoved Garrison face first into a wall in the bedroom, then followed her into the bathroom and pushed her into the bathtub. Garrison went into labor and was taken to the hospital where she gave birth prematurely. (30 RT 3094.)

After their break-up, Garrison received information that appellant might have molested her oldest daughter, Angela. (30 RT 3096.) She called him and asked him about her suspicions. Appellant asked her if she really thought he was capable of something like that; she said yes, and he laughed. (30 RT 3111.) Prior to this time Garrison had never suspected appellant of abusing any of the children. He was always a good father while she was around. (30 RT 3105.)

Angela also testified at the penalty phase and described conditions in the household during the three or four years her mother lived on and off with appellant. (30 RT 3241.) During this time appellant and her mother both drank and would fight frequently. Angela was a witness to, and victim of, abuse during this time. She had seen appellant slap her mother, and she had been beaten by her mother[7] and abused by appellant. (30 RT 3240, 3250.)

Angela related two specific incidents of abuse by appellant. On the first occasion, while Garrison was at work, appellant called Angela over to the couch, put her on top of him, and began rotating his hips. Angela cried and appellant told her to stop being such a baby. He wanted her to take her pants off, but Angela refused and asked to call her mother. Appellant phoned Garrison at work and told her she needed to come home. Garrison returned

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[7] In 1981, all five of Garrison's children were removed from her custody and placed in foster care. (30 RT 3243.)

angry, and slapped Angela after she told her appellant had wanted her to take her pants off, then sent her to bed. (30 RT 3239.)

Another incident occurred after Angela and her younger sister had crossed the street against appellant's instructions. Appellant yelled for them to come back to the house. Once inside, he made the girls take off their clothes and lay face down on the floor. He then sat behind them for a period of time and told them to keep their eyes on the floor. (30 RT 3240.)

Appellant was home alone with the children on another occasion when he instructed Angela to take her nightgown off and give it to her sister. Angela removed her nightgown and gave it to her sister then put on another nightgown, but appellant told her he wanted her to take the nightgown off and come over to him. Angela went to where appellant was sitting and he put her on his lap and raped her. Angela screamed and appellant told her that was what she got for being curious (referring to a night when Angela, thinking appellant and Garrison were fighting, walked in on them while they were having sex). Afterward appellant put his finger in Angela's vagina, telling her he was checking to see if she was pregnant, then put her in the bathtub. Garrison came in and noticed blood in the bath water, but appellant told her Angela had cut her foot. (30 RT 3241-3242.)

b. Tina (Perfater) Kidwell

Tina Kidwell, formerly Tina Perfater, met appellant in St. Louis in September of 1980. (30 RT 3181-3182, 3189, 3190.) At the time he was working with Kidwell's brothers. Kidwell dated appellant for about six months before she and her baby son moved in with him. She moved out three months later, but they continued to see each other. (30 RT 3182, 3190.)

During the course of their relationship, Kidwell and appellant drank together to intoxication and incidents of violence sometimes occurred while

they were drunk.[8] (30 RT 3198.) On one occasion when Kidwell was visiting appellant and wanted to get a bottle of milk for her son, appellant pushed her out of the house and locked the door behind her. He refused to let her back in, threatened to "beat her ass," and told her to get out of there. (30 RT 3183, 3197.) During another incident appellant, who was apparently dissatisfied with a meal Kidwell had prepared, overturned a table and pushed Kidwell across the room. Another time Kidwell made chili and appellant, angry because it was not homemade, threw the pot across the kitchen, shoved Kidwell, overturned the table, then forced Kidwell out of the house. (30 RT 3184.) A last incident occurred on Christmas Eve in 1982 while Kidwell was living in an apartment with her son and appellant was staying over a few nights a week. That night they had a few neighbors over for a Christmas party. Appellant became jealous and put his fist through a window then stormed out of the house. Kidwell had no further contact with him after that incident. (30 RT 3185.)

Kidwell was not seeing appellant when another woman, Elsie Swarringim, accused her of having a relationship with him. A fight ensued between the women and Kidwell cut Swarringim's face with a box cutter. (30 RT 3189, 3201-3203, 3206.)

c. Elsie Swarringim

Elsie Swarringim and appellant maintained an on again off again relationship in St. Louis between 1982 and 1988. (30 RT 3143, 3147, 3151.) When they met, Swarringim was living across the street from appellant's grandfather. (30 RT 3123.) The first time they were alone together, appellant

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[8] Kidwell testified that when appellant was physically abusive toward her he had usually been drinking. On occasion fights occurred when he had not been drinking, but had a bad day at work. (30 RT 3187.)

took Swarringim for a ride down by the river-front in his truck. At one point he pulled Swarringim's pants down, but she told him no. He stopped and took her home. (30 RT 3125.)

Two or three months later appellant came to Swarringim's door, said he wanted to talk to her, and asked her to go for a ride with him. (30 RT 3125-3126.) She agreed, and they drove down by the railroad tracks. When they got out of the car, appellant grabbed Swarringim by the neck and pushed her into the backseat. As she struggled with him he pulled her pants down, got on top of her, and forced intercourse. Afterward appellant drove her home. (30 RT 3126-3127.) Swarringim told her sister about the incident a week later. (30 RT 3127.)

Swarringim did not see appellant again until a few months later. From then on she saw him at various times and had sexual relations with him, sometimes voluntarily and sometimes not. (30 RT 3128.) They lived together for a week or two in 1986. (30 RT 3129, 3151.) Sometime toward the middle of their relationship, Swarringim began to feel used by appellant. She was upset he did not feel the same way about her that she felt about him. (30 RT 3165.) They both saw other people at times during their relationship which ultimately ended in 1988. (30 RT 3159, 3165.)

According to Swarringim, appellant sometimes forced sex with her and at various times he tied her up, put a knife to her throat, put his hands around her neck, and choked her with a pair of underwear.[9] On one occasion appellant put a pair of underwear around Swarringim's neck while they were having sex and tightened it to the point where she asked him to stop. He then

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[9] Swarringim estimated they had intercourse approximately 100 times over the course of their relationship, and out of those times appellant tied her up five or six times against her will. (30 RT 3167.)

gave her a pill of some kind which caused her to pass out. When she woke up, he was gone. (30 RT 3129.) On another occasion, appellant tied Swarringim to the bed and put a foreign object, which she guessed was a candle, in her vagina. (30 RT 3131.) Swarringim had appellant arrested in 1986 when, during an argument, he punched her in the face and ran a pocket knife down the front of her blouse threatening to "cut her beyond recognition." (30 RT 3132, 3159, 3173.) Police found a 3" pocket knife in his possession when he was arrested. (30 RT 3174.)

On cross-examination, Swarringim testified that she instigated a fist fight with Tina Perfater over appellant in 1988. The fight ended when Perfater cut Swarringim's face with a straight razor. (30 RT 3139-3141, 3143.) Swarringim had been in other fights with women, sometimes over a man, sometimes for other reasons. She had also been in fist fights with men, exchanging blows and wrestling with them. (30 RT 3142.)

2. Single Incidents

The prosecution also introduced evidence of single incidents of violence committed against four women: Norma Knight, a teacher at a school appellant attended; Barbara Cady, the mother of appellant's then girlfriend; Cathy Dunn, the girlfriend of one of appellant's friends; and Francis Stuckinschneider, a neighbor for whom appellant did some maintenance work.

a. Norma Knight

In 1972, during the week before school began, Principal Robert Packer met with teachers at Nogales High School in La Puente. (29 RT 3055.) After the meeting Packer was in his office when the switchboard operator called and told him a teacher, Norma Knight, had been stabbed. (29 RT 3056.) Packer asked the operator to wait by the switchboard while he went to check on Knight. He found her sitting at her desk, and asked her if she was all right.

She calmly told him she had been stabbed, and when he walked around the desk he saw a hunting knife in her back. (29 RT 3056-3057.) Packer encouraged Knight to remain quiet, then went to the phone in her classroom, called the switchboard operator, then instructed her to call for law enforcement and medical assistance, and bring him whatever first aid equipment they had on hand. (29 RT 3057-3058.)

While they waited for help to arrive, Packer asked Knight what happened. She said a student had paused at the open door to her classroom and asked her what time it was. Rather than telling him the time she indicated that the clock was on the wall, and said something to the effect of "Can't you see it?" The student, whom she did not know, continued toward her desk and, the next thing she knew, he plunged a knife in her back and left the room." (29 RT 3058.)

A week after the incident, Thomas Lindley, the school Vice Principal, was with Knight when she was shown a photographic line-up and identified appellant as the youth who had stabbed her. (29 RT 3067.) Knight took time off from work after the incident then returned for a period of time, but was frightened, nervous and apprehensive with respect to daily business, and quit teaching later that same year. (29 RT 3067.) At the time of trial she was under psychiatric care. (29 RT 3061.)

b. Barbara Cady

Barbara Cady and appellant's family lived in the same La Puente neighborhood, and appellant dated her daughter. (29 RT 3072.) One night Cady awoke to find appellant sitting on her chest, with his hands around her neck, choking her. (29 RT 3073-3074.) Although she was having trouble breathing, she managed to say appellant's name. He stopped when she did, and began to cry, saying he was on drugs or alcohol and needed help. (29 RT

3075-3076.) Cady, who had never had a problem with appellant before this, told him she would do what she could to help. (29 RT 3077-3078.) After appellant walked out of the room, she dressed then went into the living room to find him, but he had gone. Cady later found a knife on her pillow. (29 RT 3076.)

c. ***Cathy Dunn***

Cathy Dunn met appellant in St. Louis through Harvey Temple, a married man she was dating. (30 RT 3212.) One night in 1983 Dunn and Temple ran into appellant at a bar. He was with another woman and the four of them went to a restaurant for breakfast then back to appellant's house. (30 RT 3214-3215.) Appellant and the woman moved to the bedroom leaving Temple and Dunn in the livingroom. About 30 minutes later, Temple's wife came to the front door with their daughter. (30 RT 3215-3216, 3222.) Temple answered the door, went outside and argued with his wife, then came back in and told Dunn he was going to take his wife home and would be back shortly. Dunn agreed to wait for him there. (30 RT 3217.)

After Temple left, appellant, who was apparently drunk, came into the living room alone. (30 RT 3217-3218, 3233.) He and Dunn talked for a few minutes and he told her he had called Temple's wife. He said he had done so because he wanted to be alone with Dunn. When Dunn rejected appellant's advances, he grabbed her and pulled her into the bedroom, threw her down on the bed, held her arms down, unfastened her pants, and pulled them down. Dunn yelled at appellant to let her go and tried to hit him, but he told her to shut up, pulled her underwear down, and raped her. (30 RT 3217-3219.) Afterward Dunn had to unlock the door to get out of the room. As she was leaving the house, Temple called and she told him to pick her up in a nearby

parking lot. Dunn told Temple what had happened but did not tell her family and did not report the incident to police. (30 RT 3220-3221.)

She next saw appellant about eight months later when she and Temple were at a bar. Appellant acted as if nothing had happened until he spotted Temple; then he turned and left. Dunn never saw appellant again after that encounter. (30 RT 3221.)

d. Francis Stuckinschneider

Because Francis Stuckinschneider died prior to trial, evidence relating to this incident was presented over defense objection by her grand-daughter Sherry Melson and Sherry's husband James. At the time of the incident Stuckinschneider, who was then 62 years old, owned a duplex in St. Louis. She occupied the second story of the unit while Sherry and James lived in the downstairs unit. The two apartments shared a common hallway. (30 RT 3260-3262, 3264-3265.) Appellant's uncle Bill lived in the neighborhood and did odd jobs for Stuckinschneider. He had arranged for appellant, known to them as "Willy," to do some work for her also. (30 RT 3262.)

One evening Sherry heard someone enter the building and go upstairs to her grandmother's residence, then heard Stuckinschneider talking to someone in the hallway. (30 RT 3264.) A short time later she heard a loud noise, like someone falling or running down the stairs, and opened her door in time to see the screen door of the entryway closing behind the figure of a man. Sherry went upstairs and asked Stuckinschneider what was wrong. Stuckinschneider, who was nervous, upset, and angry, said "Willy tried to rape me." (30 RT 3265.) Sherry noticed that Stuckinschneider appeared disheveled and that the top of her blouse was unbuttoned. (30 RT 3266.)

Sherry and Stuckinschneider went inside and talked more about what had happened. Stuckinschneider was crying, upset and shaken as she told

Sherry that appellant asked for a glass of water, went into her kitchen, then returned with a knife in his hand, and told her he was going to have sex with her. As he grabbed her breast, and groped her between her legs, Stuckinschneider told him her grand-daughter was downstairs and said her grandson was expected home at any minute. She also mentioned appellant's uncle Bill. As she was talking she managed to work appellant toward, and finally out, the door. (30 RT 3266-3267.) When James arrived home, Sherry told him what had happened. Later he went to confront appellant, but was unable to find him. (30 RT 3267, 31 RT 3288-3290.)

B. VICTIM IMPACT EVIDENCE

Several of Ruth Eddings' relatives testified, and numerous family photographs were displayed to the jury over defense objection (31 RT 3315-3316, 3327, 3338-3352, 3368.) Ms. Eddings' daughter, Helen Harrington, testified that she last saw her mother about 10 days before she died. (31 RT 3353.) A neighbor called and told her of the fire and of her mother's death. (31 RT 3354.) At the time of trial she was still experiencing recurring nightmares, and had been prescribed Prozac. (31 RT 3355-3356.) She found herself calling her mother's phone number even after it had been disconnected, and would begin talking to her mother when the recording came on announcing the number was no longer in service. (31 RT 3356.)

Ms. Eddings' niece, Donna Velasquez, testified that Ms. Eddings was like a mother to her. She spoke of Ms. Eddings' generous nature and explained that she had always been there for her. They spent quite a bit of time together and, after Ms. Eddings died, there was a void in her life. (31 RT 3314-3317.) Another niece, Ernestine Pierson, attested to Ms. Eddings' loving and compassionate nature. (31 RT 3326.) Ms. Pierson thought frequently about the way she died. (31 RT 3330, 3335.) Ms. Eddings was Shirely

Grimmett's great aunt, and Ms. Grimmett described her as a sweet, independent, and funny lady, and confirmed that she was always there when anyone needed her. (31 RT 3367.)

II. DEFENSE EVIDENCE

A. APPELLANT'S FAMILY HISTORY

Appellant's parents had five children in the following order: Sandra, Richard, appellant, Donald, and David. Mr. and Mrs. Jones had completed only 8 years of education and both of them worked while the children were growing up. (32 RT 3463, 3526.) Mr. Jones did not attend the children's school activities. (32 RT 3471, 3528-3529.) He drank excessively and was physically abusive to the boys, beating them with his hands and a belt when he was drunk. (32 RT 3465-3466, 3469.) Appellant and his younger brother Donald received most of the abuse. (32 RT 3486, 5212.) Their father, who was 6'2" and weighed about 220 pounds, sometimes threw them against walls and would hold them by their shirts off the ground. (32 RT 3486.) On one occasion, Mr. Jones picked the oldest boy Richard up by his shirt collar, slammed him against a wall, then threw him down the hall, after Richard broke a window. (32 RT 3506.) Another time Mr. Jones beat Richard with a belt until he bled. (32 RT 3507.)

After the children reached their 18th birthdays Mr. Jones would sometimes throw them out of the house in anger. (32 RT 3472.) Donald was expelled from the family home a few months after he turned 18. (32 RT 3488.) Richard was told to get a job or leave the house when he was 18 or 19 years old. (32 RT 3509.) He enlisted in the military and served for 17 years before becoming a correctional officer at Calipatria State Prison. (32 RT 3503, 3509.)

Appellant was hospitalized at Ingleside Memorial Mental Health Center in Rosemeade, California, after the Norma Knight incident. (32 RT 3473, 3531.) After he was released from the hospital, he remained in custody until he turned 18 (32 RT 3533), and he received some counseling through the probation department after his release (32 RT 3535). When he was 19, Mrs. Jones arranged for him to stay with relatives in St. Louis because he was unhappy and wanted a new start. (32 RT 3552.) He lived there, off and on, for the next 20 years of his life. (32 RT 3534, 3526.)

Appellant was not violent as a young child and has never been abusive or aggressive toward family members. (32 RT 3470, 3488, 3530, 3543.) His mother testified that when he is sober he is congenial, loving, fun to be around, and she enjoys his company. However, when he drinks he becomes agitated, nervous, and argumentative. (32 RT 3542-3542.) Until the Norma Knight incident appellant had never behaved in a violent manner. (32 RT 3544.) Barbara Cady informed appellant's mother that he had assaulted her, and told her he said he needed help. (32 RT 3534-3535.) Unfortunately Mrs. Jones was not able to provide him with help at that time. (32 RT 3535.)

B. PSYCHOLOGICAL EVIDENCE

Clinical psychologist Dr. Michael Kania evaluated appellant after meeting with him 10 times and administering a battery of psychological tests including the Wechsler Adult Intelligence Scale, the MMPI, the Rorschach Ink Blot Technique, and the Thematic Apperception test. (32 RT 3565, 3568, 3582.) Dr. Kania also spoke to appellant's mother, sister, and brother David. (32 RT 3582.)

Appellant's overall score on the intelligence test was 85, which qualifies as low average to borderline. (32 RT 3571.) Dr. Kania found no indication of organic impairment in the tests results or in appellant's medical

or work history. (32 RT 3570.) Based upon interviews and tests results, Dr. Kania determined that appellant suffers from a severe personality disorder with paranoid and dependent features. He also diagnosed episodic alcohol abuse or dependence and concluded that alcohol is a significant factor in the impairment appellant suffers from. (RT 3484.)

Dr. Kania found it difficult to gain information from appellant and discovered that he is afraid that if he opens up to other people, what he discloses will be turned on him and he will suffer for it. Generally, appellant could not bring himself to reveal things he had done wrong or that would reflect badly on the family. (32 RT 3587.)

Appellant harbors significant anger and resentment, particularly towards his mother because she did not protect him from his physically abusive father. He has high dependency needs and wants to be close to people, but fears he will be rejected or harmed in some way by them. He deals with anger, frustration and hostility by "putting a lid on it." When he drinks, his inhibitions are lowered and he is unable to contain his anger. (32 RT 3585.) Appellant generally expects women to reject him and interprets their actions according to this preconception even if it is incorrect. His abuse of women with whom he has had relationships is in keeping with this character trait. (32 RT 3604.) Appellant's drinking magnifies the problems he has with women. (32 RT 3605.)

Appellant functions best in a work type setting where emotions do not predominate. Conflictive situations with women or his family are disruptive to him. (32 RT 3598.) However, he is able to function well in the structured setting of prison without getting into trouble and without harming anyone. (32 RT 3603.) While in custody appellant did not receive many write ups for inappropriate behavior and did not receive any for violent behavior. (32 RT

3600.) He shows no signs of being a person who is hardened to the effects of his behavior on others or one who actively tries to hurt people. (32 RT 3607.)

C. APPELLANT'S BEHAVIOR IN CUSTODY AND ON PAROLE

According to the Department of Corrections records relating to appellant's prior conviction, he received only a few write-ups for minor infractions, one for sitting in class with his shoes on the desk, and two for smoking in class. (33 RT 3683-3684.) Notations in his file relating to his work performance were generally positive. (33 RT 3687-3688.) After his release, appellant was supervised on parole for a period of 21 months during which time he complied with all conditions and committed no technical violations or new criminal offenses. (33 RT 3713-3716.)

D. EVIDENCE RE OTHER INCIDENTS

1. Francis Stuckinschneider

District Attorney investigator Wesley Daw interviewed Francis Stuckinschneider in St. Louis in 1996.[10] (31 RT 3383.) Her son and 16 year old grandson were present during the interview. (31 RT 3406.) When Daw asked Stuckinschneider about the incident with appellant, she told him that appellant "got fresh" with her. (18 CT 5003-5004.) More specifically, she said: "He grabbed me and uh, I, I got away from him and went on down the steps and he followed me down the steps." Her son asked her whether appellant touched her "private parts," and Stuckinschneider responded: "Oh no-no-no-no, he didn't do nothing like that." (18 CT 5008.)

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[10] The interview was taped recorded and the audio tape was played for the jury during trial. (31 RT 3389.) A transcript of the tape is included in the clerk's transcript. (18 CT 5003-5015.)

2. *Terry Garrison*

Danny Davis, a private investigator employed by the defense, interviewed Terry Garrison in St. Louis at a neighborhood bar where she worked as a bartender. (31 RT 3408-3409.) Garrison told Davis she thought appellant was a good father to the children and did not say anything about appellant molesting her daughter. (31 RT 3416.) She said that appellant did not drink during the week, but would get drunk on the weekends and that she would drink with him. She and appellant fought physically at times but not very often when appellant was sober. (31 RT 3417-3418.) Toward the end of the interview, Garrison asked Davis if he was married and whether he would be willing to get involved with an older St. Louis girl, referring to herself. (31 RT 3420.)

3. *Tina Kidwell*

Davis also interviewed Tina Kidwell. She told him she had met appellant in 1981 and said they had been boyfriend and girlfriend on and off for two years and lived together for three months. Kidwell also said appellant was a very good father and that he never acted inappropriately with her child or his daughter. (31 RT 3424-3425.) Kidwell explained that the longer she and appellant were together the more problems they had. Appellant would sometimes hit her, usually when he was drunk. She said when appellant was sober he was a very nice person, but when he drank he changed. (31 RT 3425.) He liked to be in control of all aspects of the relationship. (31 RT 3426.) Kidwell was surprised by the charges in this case. (31 RT 3427.)

4. *Cathy Dunn*

Davis also spoke to Cathy Dunn. She told him that she and appellant had been "drinking buddies" in 1982. (31 RT 3430-3431.) Dunn said appellant was a very nice guy when he was sober, but when he was drinking

or using drugs he was short tempered and could be violent. (31 RT 3431-3432.) She said he drank frequently. (31 RT 3422.) She also told Davis of the incident in appellant's apartment when he became sexually aggressive with her after her boyfriend left. (31 RT 3434.)

5. Elsie Swarringim

After Swarringim and appellant ended their relationship, she called appellant's mother's house several times looking for him. Mrs. Jones eventually told her that appellant did not want to speak to her and the calls stopped. (32 RT 3537-3538.)

III. PROSECUTION'S CROSS-EXAMINATION OF DEFENSE WITNESSES AND REBUTTAL

A. DONALD JONES

The day of the Toni Pina incident, Donald left for a job interview after appellant arrived, although he was uncomfortable leaving appellant alone with Pina since he appeared to have been drinking excessively and perhaps taking drugs. (32 RT 3494.) Donald thought appellant was under the influence, and was apprehensive because appellant generally had problems getting along with people, and would sometimes get into fights, when he was drunk. He was afraid appellant might do something to Pina. (32 RT 3495.) Although Donald found books out of place on the floor when he returned home, appellant denied that anything had happened and said that Pina was making it all up because he would not lend her money. He also said he had been with a prostitute the night before. (32 RT 3502.)

B. DR. KANIA

Appellant discussed past relationships with Dr. Kania, and told him that Terry Garrison had hit him and spit in his face during their time together.

He explained that there was constant conflict between the two of them, and admitted going to bars and seeing other women while they were together. (32 RT 3611-3612.) He described Tina Perfater as his one true love and did not mention any violence in the relationship. (32 RT 3613.) He described his relationship with Elsie Swarringim as a nightmare and said she had a mental disability and accused him of doing things he had not done. Their relationship was on again off again in that he would throw her out but she would return. (32 RT 3612.) He also mentioned several short term relationships including a woman named Juanita with whom he said he had a good relationship, a woman named Dixie whom he saw for three months but broke up with because of some problem with her ex-boyfriend, a woman named Virginia who was a prostitute he stayed with for two weeks without any incidents of violence, and Debbie Hisler a woman he dated for three months but who had a boyfriend. (32 RT 3613-3614.)

When Dr. Kania first contacted appellant he was on suicide watch and had been medicated. (32 RT 3618.) However, by the time of trial he had been off medication for about a year. (32 RT 3615.) Dr. Kania did not find any evidence of a psychotic disorder or any history of such a disorder. (32 RT 3617.) Appellant does not display any symptoms of psychosis or delusions. (32 RT 3642.) However, his view of himself is pathological in that he thinks of himself as being very competent but underlying the illusion of competency is a sense of inferiority he is trying to cover up. (32 RT 3649.) Appellant has a low tolerance for frustration. (32 RT 3648.) Dr. Kania detected strong underlying anger in appellant, a feeling that he had been mistreated, which is usually the basis of anger, and a resentment that he had not been treated fairly. Appellant lacks the psychological resources to deal with stressors in his life.

Consequently, he experiences chronic stress resulting from underlying turmoil in everything he does. (32 RT 3650.)

Appellant told Dr. Kania he had pushed Ms. Eddings by the neck but he did not think he had strangled her. (32 RT 3640.) He said he tries not to think about the incident because it makes him angry; he feels sick and nauseous and is unable to eat or sleep. (32 RT 3662.) In Dr. Kania's opinion what happened the night Ms. Eddings died is that, in the face of what he perceived as an attack, appellant lashed out angrily and then sexually assaulted Ms. Eddings after she was dead as an expression of rage. (32 RT 3665.)

C. APPELLANT'S PAROLE OFFICER

Appellant's parole officer Spencer Stadler was called by the defense and questioned about appellant's record on parole. The prosecution was then permitted to question him, over defense objection, about statements appellant made to him regarding the instant offense. (33 RT 3727-3729.) Appellant admitted he burned Ms. Eddings' residence, but said he did not harm her and denied any sexual misconduct or physical violence. He explained that he had been concerned because they usually leave the newspaper for Ms. Eddings to read by sticking it in the fence. When he noticed she had not picked it up, he went over to check on her. Appellant said he knocked on the door but got no response. He then went in and found her nude body lying face down on the floor. He checked to see if she was alive then panicked and left the residence. He took off in his truck because he thought he would be put in prison due to the nature of his prior prison commitment. He then decided to return to destroy any evidence of having been in the trailer. (33 RT 3729.)

D. REDACTED PORTIONS OF APPELLANT'S STATEMENTS TO POLICE

When appellant was interrogated by police on this case, he was asked about the incident involving Barbara Cady. He said that he was on drugs at

the time and did not remember what had happened. (33 RT 3732 [excised portion of tape played for jury]; 18 CT 5049 [transcript].) With regard to "that lady in St. Louis" appellant said she owed him money for work he had done on her house "[a]nd then that's when the accusation came out on that one." (18 CT 5050.)

AUTHORITIES AND ARGUMENT

ISSUES RELATED TO GUILT AND SPECIAL CIRCUMSTANCES

INTRODUCTION

The trial court made several critical errors relating to the guilt phase of the trial. In order to put these errors into perspective, it is important to first understand the parties' theories of the case. The prosecutor argued for a first degree conviction under a felony-murder theory based upon the underlying felonies of burglary, rape, sodomy, attempted rape and attempted sodomy. The People's theory of the case was that appellant committed burglary when he entered Ms. Eddings' trailer with the intent to commit rape and/or sodomy, and that he killed her either during the attempt to commit these crimes or in the commission of these crimes. The central dispute below was whether any of the underlying felonies relied on by the prosecution were committed by appellant.

Burglary requires an act of unlawful entry accompanied by the specific intent to commit theft or any felony. (Pen. Code, § 459; *People v. Montoya* (1994) 7 Cal.4th 1027, 1041.) The intent to commit the underlying crime must exist at the time of entry. (*People v. Gbadebo-Soda* (1995) 38 Cal. App.4th 160, 166.) Here the prosecution's theory was that appellant entered the residence with the intent to commit rape or sodomy and the jury instructions regarding burglary were expressly limited to these crimes. (6th Supp. CT 20.). If, as the defense argued, appellant had not entered Ms. Eddings' residence with the intent to sexually assault her, no crime of burglary would have been committed.

Further, if Ms. Eddings had not been sexually assaulted until after she had died, appellant would not have been guilty of rape or sodomy since both

of these crimes require a live victim. (See *People v. Kelly* (1992) 1 Cal.4th 495, 524 ["Rape requires a live victim. 'Rape must be accomplished with a person, not a dead body. . . .'"]; *People v. Ramirez* (1990) 50 Cal.3d 1158,1176 [applying a similar rule to the crime of sodomy].)

Finally, if appellant had not formed the intent to sexually assault Ms. Eddings until after she was dead, a first degree murder conviction based upon attempted rape or sodomy would not have been justified. This Court has determined that a person who attempts to rape a live victim, kills the victim in the attempt, then has intercourse with the body, has committed only attempted rape, not actual rape, but is guilty of felony-murder and is subject to the rape special circumstance. (See *People v. Kelly*, *supra*, 1 Cal.4th at p. 526; *People v. Goodridge* (1969) 70 Cal.2d 824, 838; *People v. Quicke* (1964) 61 Cal.2d 155, 158.) However, for the felony-murder rule and special circumstance to apply, the defendant must have been attempting to rape the victim at the time of the killing. It would not suffice if, after the killing, defendant acquired the intent to have intercourse with the dead body. (*People v. Kelly*, *supra*, 1 Cal.4th at p. 526.) Thus, if appellant had not formed the intent to sexually assault the victim while she was still alive, he would not have been guilty of attempted rape or attempted sodomy.

In order to establish guilt of the underlying felonies, the prosecution argued that appellant went to Ms. Eddings' trailer intending to sexually assault her, and that he raped and sodomized her, and then brutally killed her by strangling her and inflicting multiple blows which resulted in significant injury. The defense theory was that appellant did not intend to sexually assault or otherwise harm Ms. Eddings went he went to her trailer that evening, but that he became enraged and lashed out at her after she knocked a beer can out of his hand. She died as the result of injuries she sustained

when he fell on top of her during a struggle. Due to the difference in their size, and the fact that Ms. Eddings suffered from osteoporosis which rendered her bones particularly brittle, Ms. Eddings suffered injuries which proved to be fatal as the result of the impact of appellant's body falling on hers. Under the defense version of events, appellant did not sexually assault Ms. Eddings while she was alive, and he was not attempting to do so when she was killed. Rather if penetration took place, it occurred after death and was committed as an expression of rage.

Based upon the parties' differing theories of the case, two central issues were presented to the jury: (1) whether appellant had the intent to sexually assault Ms. Eddings prior to her death; and (2) whether vaginal or anal penetration occurred before Ms. Eddings died. As discussed in the arguments to follow, errors made by the trial court in this case went directly to these two issues, and necessarily affected the jury's verdicts. Several of the errors impacted the jury's resolution of appellant's intent and one would have affected the jury's determination of whether Ms. Eddings was alive at the time a sexual assault took place.

With respect to the issue of intent, in the absence of any convincing evidence on the matter, the prosecution relied upon "other crimes evidence" notably the prior incident involving Toni Pina, to argue essentially: "If he did it before, he probably intended to do this time." The two incidents, however, were not remotely similar and, consequently, evidence regarding the Pina incident was irrelevant on the issue of intent. The evidence constituted improper character evidence which was erroneously admitted over defense objection. This error was compounded by instructional error which permitted the jurors to consider other crimes evidence involving Norma Knight, Barbara Cady, and Kathy Dunn, which was clearly admitted for impeachment purposes

only, in determining appellant's intent. These errors by the trial court lessened the prosecution's burden on a key element of its case by improperly permitting and encouraging the jurors to find intent based upon propensity.

Also with respect to intent, the trial court excluded an entire category of critical defense evidence including expert testimony by a qualified mental health professional regarding the severe personality disorder appellant suffers from, as well as testimony regarding appellant's history of mental health commitments. This evidence was critical to the jury's evaluation of appellant's defense as it would have provided the jury with insight into appellant's thought processes, and would have explained why appellant might have reacted violently to Ms Eddings as the result of little or no provocation even though he did not harbor any pre-existing intent to harm her.

Finally, with respect to the timing of the sexual assault, the trial court erroneously permitted the autopsy surgeon to render his personal opinion, based upon everything he knew about the case including appellant's statements to police, that the victim had been raped and murdered and that she had been raped and sodomized prior to death. The error lessened the prosecutor's burden of proof with respect to this critical issue by presenting the conclusion the prosecution sought to have the jurors draw from the evidence as definitively established by expert testimony.

The errors committed by the trial court in this capital trial deprived appellant of his constitutional rights to due process, to a fair trial, and to a reliable adjudication at all stages of a death penalty case. For the reasons discussed more fully below the judgment of the trial court with respect to appellant's murder conviction must be reversed.

I.

THE TRIAL COURT ERRED IN PERMITTING THE JURY TO CONSIDER EVIDENCE OF APPELLANT'S CRIMINAL DISPOSITION IN REACHING VERDICTS ON THE CHARGE OF FIRST DEGREE MURDER AND THE SPECIAL CIRCUMSTANCE ALLEGATIONS.

A. INTRODUCTION

Before trial the defense moved to exclude (3 CT 541; 4 CT 940), and the prosecution moved to introduce (3 CT 665; 4 CT 876), evidence of unrelated prior misconduct by appellant. The conduct in question related to the Toni Pina case and the incident involving Frances Stuckinschneider. Appellant moved to exclude the evidence on the grounds it was improper character evidence under Evidence Code section 1101, subsection (a), and was more prejudicial than probative under Evidence Code section 352. (3 CT 541-565.) The prosecution argued that the evidence was admissible under subsection (b) of section 1101 as evidence tending to show "the defendant's intent and plan when he entered Ruth Eddings[']s home on June 19, 1998." (4 CT 877.)

The matter was heard on October 14, 1998 (6 CT 1552; 8 RT 573-609), and the trial court ultimately ruled that evidence relating to the Pina case would be admissible at the guilt phase on the issue of intent (with respect to felony-murder based upon burglary), but evidence relating to the Stuckinschneider incident would be excluded from the guilt phase. (8 RT 593-595, 601-602.) However, as discussed more fully below, the trial court erred in failing to exclude all of this material as improper character evidence which was more prejudicial than probative. The error was compounded by jury instructions which permitted the jurors to also consider, on the issue of intent, evidence relating to three other incidents — involving Norma Knight, Barbara

Cady, and Kathy Dunn — which had been admitted for the limited purpose of impeachment after appellant elected to testify. The prosecution, in turn, capitalized on the trial court's instructional and evidentiary errors by urging the jurors to conclude that appellant entered Ms. Eddings' residence with the intent to sexually assault her with respect to the first degree murder charge under a felony-murder theory and the special circumstances allegations. In light of the fact that appellant's intent was the central issue of the case, the error was prejudicial and the judgment must be reversed.

B. WRITTEN PLEADINGS

Appellant filed a "Motion to Exclude Evidence of Uncharged Acts and For Evidentiary Hearing" on August 7, 1998. (3 CT 541.) In the accompanying memorandum of points and authorities, appellant argued that evidence of uncharged acts was inadmissible as character evidence pursuant to Evidence Code section 1101, subdivision (a), and that the uncharged conduct was not relevant to any issue in the case. Appellant also argued that the evidence should be excluded as more prejudicial than probative under Evidence Code section 352. Finally, appellant argued that admission of evidence of uncharged acts would violate appellant's state and federal constitutional rights. (3 CT 541-565.)

The prosecution filed a "Memorandum of Points and Authorities in Support of Introduction of Evidence Pursuant to Evidence Code Section 1101(b)" on August 11, 1998. (3 CT 665-669.) The memorandum argued that evidence regarding the incident involving Francis Stuckinschneider was admissible under subdivision (b) of Evidence Code section 1101 on the issue of "the defendant's plan and intent when entering Ruth's home." (3 CT 665-666.) The memorandum also argued that the probative value of the evidence outweighed its potential for prejudice under Evidence Code section 352. (3

CT 668-669.) Because Francis Stuckinschneider died of natural causes prior to trial, the prosecution sought to prove the incident by means of prior statements she made to her granddaughter Sherry Melson and her granddaughter's husband Michael. These statements were argued to qualify as spontaneous declarations pursuant to Evidence Code section 1240 in a motion filed by the prosecution on August 6, 1998. (3 CT 363-368.) Subsequently, on August 14, 1998, the prosecution filed a "Supplemental Memorandum of Points and Authorities in Support of Introduction of Evidence Pursuant to Evidence Code Section 1101(b)" arguing that evidence relating to the Pina incident would also be admissible on the issue of "defendant's intent and plan when he entered Ruth Eddings' home on June 19, 1998." (4 CT 876-877.)

Appellant filed a "Response to the People's Motion to Introduce Additional Evidence of Uncharged Acts" on October 1, 1998. (4 CT 940.) In the response appellant argued that evidence relating to the Pina incident and the Stuckinschneider incident was not relevant on the question of intent, and that evidence regarding the Stuckinschneider incident was inherently unreliable hearsay which should not be admitted for any purpose. (4 CT 940-954.)

C. HEARING ON THE MOTIONS

The matter was heard on October 14, 1998. (6 CT 1552; 8 RT 573-602.) At the outset of the hearing, the court paraphrased the prosecution's position as follows:

> [T]he People are endeavoring to introduce this evidence under the theory that it is relevant to the charge in the special allegation under 190.2(a)(17)(g), that is, that the murder which occurred and is alleged under Count I was done under the special circumstance that it occurred in the commission of or attempted commission of or in the immediate

> flight after committing or attempting to commit the crime of burglary, in violation of Section 459 of the Penal Code.

(8 RT 583.) The prosecutor added that she believed the evidence would also be "relevant to the special circumstance of rape and sodomy." (8 RT 584.) The court, however, correctly noted that: "Neither of those crimes has a scienter requirement or a specific intent requirement. They are general intent crimes. Now, it distinguishes them from the burglary special circumstance, and the People would, therefore, not be offering it for the purpose of showing intent because it's not relevant on the issue of intent." (8 RT 584.) The court then inquired whether the prosecution was offering the evidence "on a common plan or scheme theory," and the prosecutor responded affirmatively. She also argued that the evidence was admissible under Evidence Code section 1108. (8 RT 585.)

The court announced a tentative decision to exclude evidence relating to the Stuckinschneider incident, under Evidence Code section 352, as follows:

> My inclination at this point in time is to grant the defense motion in limine [under Evidence Code section 352] with regard to the 1985 incident concerning Francis Stuckinschneider. The reason for that is primarily the fact that the — I believe there's insufficient evidence to establish what the defendant's intent was in this particular incident based on the evidence that has been presented.
>
> With regard to the statement taken from Francis Stuckinschneider apparently in 1996, which would have been some nine years after the incident, when she's asked what happened, her response on page 2 is "He just got fresh with me."
>
> When asked for further explanation as to what happened, on page 6, [she stated] "He got fresh with me. He grabbed me. I got away from him and went down the steps, and he followed me down the steps."
>
> When asked "When he used both his hands to grab you?" she responds "I don't remember."

> Another individual present at the interview, Larry Stuckinschneider, asked "He never touched no private parts?" to which Mrs. Stuckinschneider responds, "No, no, no. He didn't do nothing like that. He said something about me being old enough or something, but I don't remember."
>
> When asked on page 10 by Mr. Daw, "Did he make any sexual statements to you?" her response was "No, no."
>
> And then at the bottom of page 12, she makes a statement "He never did get fresh with me at any time."
>
> It's certainly clear that something happened. The account of the incident given by Miss Melson and Mr. Melson is more graphic and specific. In both accounts, they report that their grandma said, quote, he tried to rape me, close quote.
>
> Miss Melson says at one point in time "She said he said he is — "He said he was going to fuck me, and he had a knife and I was scared."
>
> The interviews with the Melsons occur apparently in October of 1997, more than a year after the interview with Mrs. Stuckinschneider, and there is no evidence that's been presented to the Court of a contemporaneous account of the incident reported back in 1985. So the evidence is at best ambiguous on the issue of intent, and the Court is going to reject the People's offer to prove the statements made by the victim under the provisions of Evidence Code Section 1240 as spontaneous statements. That is my current inclination with regard to the Stuckinschneider incident.

(8 RT 593-594.)

The court then announced a tentative decision to admit evidence relating to the Pina incident under Evidence Code section 1101, subdivision (b), as evidence of intent relating to the burglary, but not for more general purposes under Evidence Code section 1108, as follows:

> With regard to the 1990 incident regarding Toni Pina, the Court's inclination at this point in time is to grant — is to deny the motion made by the defense and to grant the People's request to present that evidence under the provisions of . . . Evidence Code Section 1101(b)

— on the issue of the intent with which the defendant entered the residence on the 18th or 19th of June, 1996, under the special circumstance of murder in the commission of a burglary. The witness, Miss Pina, appears to be available to testify as to the circumstances and that there was some kind of assault.

* * * *

The evidence is somewhat collateral in nature insofar as it may be corroborative of other evidence relating to the other special circumstances. The evidence may also be considered, depending on how the defense wishes to proceed on some of these issues, on the issues relating to the reliability of the defendant's admissions or statements made to Detective Spidle.

At this point in time with regard to this particular motion, the People are not seeking and the Court is not ruling on the admissibility of the results of the attack on Miss Pina, namely, that the defendant may have suffered a conviction, and as a result of that conviction, he was incarcerated and subsequently released from prison and placed on parole, but merely that Miss Pina may come and testify concerning the event for the limited purpose of establishing defendant's intent with regard to that special circumstance.

(8 RT 594-595.)

In light of the court's intended ruling, argument by defense counsel was limited to the admissibility of evidence relating to the Pina incident as follows:

MR. CABRERA: Very well, your Honor. I'll move on. To the Pina matter, your Honor, under 1101(b) and the cases interpreting that, we have cited *People vs. Robbins*, Cal Supreme Court 1988, 45 Cal.3d 867. In that case, I think the court's actual holding was, quote, "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant probably harbored the same intent in each instance."

As far as common design and plan, under 1101(b) and under the intent aspect of 1101(b), the incident with Toni Pina is — other than the fact that there was some activity of a sexual nature and that both were female, I believe that there is insufficient commonality of factors.

In the instant matter, Mrs. Eddings was, I believe, 82 years old at the time of the incident. In the Pina matter, we have a 17-year-old girl.

In the case of the — in the instant case, the alleged burglary that — there's a burglary alleged — excuse me — in the Indictment as one of the special circumstances.

In the Pina matter, as I understand the information regarding Pina, there was no burglary. Mr. Jones would, in fact — was, in fact, a temporary resident of the sister's residence from time to time during the events in question.

In this case — in the incident alleged herein, the Eddings incident occurred at night. In the Pina matter, the incident occurred during the day.

In this instance, there is allegations of violence, and I believe that the prosecution is going to be presenting the evidence of the murder. In Pina, there was no evidence of any type of violence.
* * *

All in all, your Honor, the actual differences are so overwhelming as to not make them reliable to show a plan or modus operandi or preparation. Motive certainly is an issue, and I think in this case to show the intent is really attempting to bootstrap the intent issue by the admissibility of the defendant's propensity to commit such an act.

In Pina, if allowed to be introduced at trial — excuse me — the Pina evidence is merely to inflame the jury, that if he could have done this to a 17-year-old girl in 1990, he certainly has the propensity to do it now.

I don't believe that absent a showing of a burglary in the Pina matter that you have a sufficient commonality of factors. So under — and further and finally — and even if there is a sufficient showing under 1101(b), the factors, as I've distinguished them for the Court, would make the matter overly prejudicial under Evidence Code Section 352, and I'd ask the Court, in spite of its intended ruling, to not allow the evidence in this case.

> As we've also pointed out, to allow that kind of presumption to be created by the introduction of the Pina incident in 1990 is effectively relieving the prosecution of proving an essential element of its case in chief, namely, the specific intent to commit the burglary and first-degree premeditated murder, and if that's the case, your Honor, it's certainly a violation of the holding in *Paterson vs. New York*, 432 U.S. 197, and it's a violation of Mr. Jones' rights under the Sixth Amendment, Fourth Amendment, and the Fourteenth Amendment of the federal constitution and related state provisions.
>
> So I'd ask the Court to not allow the evidence of the Pina matter based upon my foregoing argument.

(8 RT 599-601.)

The court ultimately held in accordance with its announced tentative decision as follows:

> The Court's inclination, as I stated before, is to admit this evidence for the purpose of establishing, if it tends to do so, the defendant's intent at the time of the entry into the Eddings residence on June 18th or 19th. I do not find at this point in time that there is a sufficient commonality between the events involving Miss Eddings' residence and the events involving the Pina assault to justify an admission under the common plan or scheme theory as articulated by the Supreme Court in the *Ewoldt* decision and its progeny, so I would not be admitting it for that purpose.

(8 RT 602.)

D. EVIDENCE AT TRIAL

As discussed more fully in the statement of facts, Toni Pina testified in the prosecution's case-in-chief that when she was 16 years old, and living with appellant's sister and her husband, she was alone in the house with appellant one morning when he pushed her into a bedroom and forced her to perform an act of oral copulation. Appellant did not hit or physically injure Pina, nor did he prevent her from leaving the house after the incident. (17 RT 1817-1824.) Pursuant to the trial court's pre-trial ruling, the jury was not informed of appellant's prior conviction during the prosecution's case-in-chief.

Additionally, no evidence was presented by the prosecution regarding any other uncharged acts of misconduct, and statements made during appellant's interrogation in this case regarding the Stuckinschneider and Cady incidents were redacted from the tape and transcript provided to the jury. (15 RT 1629.)

The situation changed when appellant exercised his right to testify. At that point the court ruled appellant could be impeached with his prior conviction related to the Pina incident, and the prior conviction allegation in that case would no longer be bifurcated. (24 RT 2530.) The prosecution also argued that all of the prior incidents involved moral turpitude and were, therefore, admissible for impeachment purposes under *People v. Wheeler* (1992) 4 Cal.4th 284. (24 RT 2533.) As to the Pina incident, the court ruled that the prosecution would be permitted to cross-examine appellant with regard to the conviction as well as the underlying facts. (24 RT 2534.) The court also permitted cross-examination with respect to the incidents involving Norma Knight, Barbara Cady, and Kathy Dunn. (24 RT 2535.) In so ruling the court determined that the evidence was not more prejudicial than probative under Evidence Code section 352. (24 RT 2542.)

When questioned by the prosecution regarding these matters, appellant admitted that in 1972 he walked into a classroom and stabbed a teacher in the back, although he did not know the teacher's name was Norma Knight. (24 RT 2563.) He also admitted he went to Barbara Cady's house one night, found her asleep, and "jumped on her." He testified that he was under the influence of drugs at the time and did not remember much else about what happened, but denied he had intended to rape Cady. (24 RT 2563-2565, 2590-2591.) With respect to the Pina incident, appellant admitted he had been convicted of felony sexual assault with intent to commit rape and forced oral

copulation (24 RT 2575); however, he denied committing these crimes (24 RT 2561, 2576, 2610).

In addition to cross-examining appellant with respect to these other incidents, the prosecution was permitted to introduce documents relating to appellant's prior prison commitment pursuant to Penal Code section 969b. (25 RT 2684-2685, 2693.) The court overruled appellant's objection to this evidence pursuant to Evidence Code section 352 reasoning as follows:

> Under Article 1 Section 28 of the California constitution, the prior is admissible as relevant evidence on the issue of credibility of the witness.
>
> The Court has considered the exercise of its discretion under Evidence Code Section 352 to exclude the prior. The prior is — involves a crime of moral turpitude as well as being a felony and it is relevant in this case.
>
> And that is without regard to the fact that the prior relates to the testimony of a witness who was offered by the People under Evidence Code Section 1101, subdivision (b), and the fact that on cross-examination and I believe redirect examination the defendant himself denied responsibility for the actions for which he was convicted. There has been — continues to deny responsibility for the actions involving the alleged victim in this case.

(25 RT 2685-2686.)

The prosecution was also permitted to call in rebuttal Brett Johnson, the Riverside County Sheriff's Department deputy who had arrested appellant in connection with the Pina case. Johnson testified that, before he had explained anything about the charges, appellant said: "I didn't touch that little girl. I want to turn myself in and clear this up." (25 RT 2671.) As Johnson transported him to jail, appellant made several more statements. He explained that he had "partied" very hard the night before and went to his sister's house because he did not feel he should drive all the way home. He said he spoke

to his brother outside the house then went in and went to sleep. (25 RT 2674.) When Johnson asked him about the relevance of a washcloth, he said he had a washcloth on his head like a cold compress while he was sleeping. Appellant also told Johnson he had been with a prostitute the night before and, as a result of that encounter, there was a semen stain on his shirt; however, he said the shirt had since been washed. (25 RT 2675-2676.) Appellant asked to have a doctor present when the rape kit was taken to verify he had a scar on his penis which he believed would be helpful to his defense. (25 RT 2676.) Johnson testified that, when the rape kit was taken, he observed an abrasion on one side of appellant's penis, a scar on the other, and a pink substance which appellant said was Calamine lotion. (25 RT 2677.) When the nurse swabbed appellant's penis with a cotton swab, and told him it was for evidence of vaginal secretions, appellant said he had touched the prostitute's vagina with his finger. (25 RT 2679-2680.)

Also called in rebuttal regarding the Pina incident was a Riverside County superior court clerk who heard appellant make a statement outside of the courtroom during that case. Kathy White testified that after Ms. Pina testified at trial, a lunch break was taken and during the break Ms. White overheard appellant and his brother talking outside the courtroom. Appellant's brother asked him if "she was crying and carrying on." Appellant said she was not crying, and remarked that it looked pretty good and he thought he was going to beat this one too. (25 RT 2702-2704.)

The prosecution was also permitted to play previously redacted portions of appellant's taped interview with Detective Spidle relating to statements appellant made about the Pina and Cady incidents. (25 RT 2698; 18 CT 4858-4860.) When Detective Spidle asked appellant about the incident with Toni Pina he replied: "I don't know what it was. You know, all these years, you

know, I had to live in that lie." (18 CT 4858.) With respect to Barbara Cady Detective Spidle asked appellant: "What happened with Barbara?" Appellant replied: "Same thing, dope and beer and stuff and —" Detective Spidle then asked: "But, I mean, what did you try to do, rape her?" and appellant replied: "Yeah." (18 CT 4859.) Detective Spidle also asked appellant: ". . . the sexual urge that you have that cause, causes you to wanna, a, force sex on somebody like this . . . it doesn't differentiate between younger women and older women, does it?" Appellant replied: "I guess, I guess not. It don't look like it." (18 CT 4860.)

E. INSTRUCTIONS AND ARGUMENT TO THE JURY

At the time Toni Pina testified, the trial court instructed the jury as follows:

> Ladies and gentlemen, I should indicate before we proceed much further that this evidence from Miss Pina is being presented to you for a limited purpose. She is going to be discussing what occurred, obviously, in 1990. And you may consider it for the limited purpose, if it is helpful for you, in evaluating the state of mind of the defendant, William Alfred Jones Jr., on June 19th 1996, including the state of mind and the existence or nonexistence of the specific intent which may be an element of the crime charged or of the special circumstances which are alleged in this case.

(17 RT 1818.)

After the prosecution was permitted to cross-examine appellant regarding the Pina, Cady and Knight incidents, the court instructed the jury that instances of prior misconduct could be considered for purposes of impeachment ***and*** in determining appellant's intent as follows:

> Ladies and gentlemen, let me remind you of something that I indicated to you earlier. There was testimony early on, a couple weeks ago from Miss Pina, and then again today there has been testimony from Mr. Jones about incidents that occurred before June 19th or 18th, 1996. You may consider those incidents for a limited purpose.

> At this point in time, with regard to the incidents that Mr. Jones has testified to, you may consider those incidents insofar as they may weigh on your determination of the witness's credibility. The fact that an individual, for example, has been convicted of a felony offense or has committed a criminal act evidencing dishonesty or moral turpitude may be considered by you in weighing the credibility of such a witness.
>
> The fact of such a conviction or such activity does not necessarily discredit or destroy the testimony of a particular witness. However it is a factor which the law says you may take into account in weighing the credibility of such a witness.
>
> In addition to that, you may consider such evidence if it has a tendency to show the existence or nonexistence of the required specific intent or mental state which is an element of the crime or special circumstance which is charged in this particular case. At least at this point in time, and for no other purpose, you may consider such evidence.

(24 RT 2599-2600.)

At the conclusion of the case the trial court again instructed the jury that evidence of prior crimes could be considered in determining appellant's intent:

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than those for which he is currently on trial. Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes.
>
> Such evidence was received and may be considered by you only for the limited purpose of determining, if it tends to show, the existence on or about June 19, 1996, of the specific intent or mental state which is a necessary element of the crime or special circumstance charged.
>
> For these limited purposes (and as I have previously instructed you with regard to the credibility of witnesses), you must weigh such evidence in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purpose.

(6th Supp. CT 25; 26 RT 2901.) The court also instructed the jury that the prosecution had the burden to prove prior crimes by a preponderance of the evidence (6th Supp. CT 25; 26 RT 2902), and defined preponderance of the evidence. (6th Supp. CT 25; 26 RT 2902.)

In closing argument, on more than one occasion, the prosecution urged the jury to consider all of the prior crimes evidence in determining appellant's intent. Initially the prosecutor argued:

> You heard a lot of testimony and you will hear arguments about what was Billy Jones' intent when he went over to that house, and that's key to this case. What was his intent? The defendant's opening statement I believe said that Bill Jones was doing the honorable thing of checking on his neighbor, and that's all he was doing. He was being a good neighbor to Ruth Eddings. And when he took the stand and testified in court, when he raised his hand and swore to tell the truth to all of you, he said no, I never intended to have sex with her. I just went over there because I was going to check on her. And what he told you in court is something you never heard him tell Detective Spidle. You have to decide whether or not Billy Jones was being truthful when he testified in court, when he gave you the new and most recent version.
>
> In determining whether Billy Jones is truthful and credible, you can consider what he did to the teacher Norma Knight when the defendant was in high school. Walked in on a teacher, a female teacher he didn't even know, wasn't his teacher, she did nothing to him. She was simply sitting in her classroom eating her lunch, and he stabbed her in the back.
>
> In determining whether or not the defendant was truthful when he said "I only went over to check on Ruth Eddings like a good neighbor," you can consider what he did to Barbara Cady. That was his girlfriend's mother — when he went over to her house and there was no one else home, and he entered her house and found her asleep and attempted to rape her.
>
> When you consider what the defendant's intent was when he went over to Ruth Eddings' house, you can consider what he did to Toni Pina and appreciate the parallels between what happened to Toni Pina and what

happened to Ruth Eddings. Toni Pina was only 16 years old, living with the defendant's sister. She was Billy Jones' brother-in-law's niece. He had never been alone with her before that date, and he assaulted her. He waits until he is left alone with her. He prevents her from leaving the house. She had never done anything to him before. He had no problems with Toni Pina. Takes her back into the bedroom, forces her to orally copulate him, assaults her with intent to commit rape. He then has her wipe her face, tells her don't call the police. He leaves. He goes home. He takes a shower. He washes his clothes, and he says he was with a hooker the night before, and it just so happened when he was with a hooker, she provided the same sexual activity that he forced on Toni Pina, oral copulation.

With Ruth Eddings, he had never been left alone with her in her house before, someone he knew for many years, someone who had never done anything wrong to him. He went over to her house. He waited for an opportunity when his parents were gone, the first time they had ever gone on a vacation and left him alone. He went over to Ruth Eddings' house, knocked on the door, and Ruth Eddings made the fatal mistake of simply opening the door to let in a neighbor. He brutally beats her. He rapes her. He sodomizes her. He strangles her to death. He burns her house, burns her body to destroy evidence. He goes home. He takes a shower, and he washes his clothes, and earlier that evening he had told his brother he was going to be with a hooker.

(26 RT 2788-2790.) Later the prosecutor again referred to the improper character evidence and argued:

You heard that you can't say, well, I'm considering the evidence involving Norma Knight and Barbara Cady and Toni Pina and then just simply say, well, if he did it to those women, he must be guilty of what he did to Ruth Eddings. When the defendant took the stand in this case — and that was his choice and his alone — what became at issue is his credibility, and that is at issue for every witness who takes the stand, every single witness. Their credibility is in issue, and you are the sole judges of the believability of any witness.

The defendant admitted what he did to Norma Knight, stabbing her in the back. He admitted what he did to Barbara Cady, attempted to rape her. You can consider that for the believability of the witness in

everything he said when he was on the stand, including his testimony in court, that he didn't go over to Ruth Eddings' house to have sex.

You can consider the incident involving Toni Pina and all the evidence relating to Toni Pina's assault in considering the defendant's intent when he went over to Ruth Eddings' house.

The law is very clear on what evidence can be brought before you and what evidence cannot. The law allows this kind of evidence to be put before you, and the defendant admitted, as far as Barbara Cady and Norma Knight were concerned, that that evidence was true, and yet somehow the People are doing something wrong by presenting the truth to you, by providing you with the truth.

It is no reflection on the strength or weakness of the People's case. It is a reflection on how you are to judge the defendant's testimony.

(26 RT 2856-2857.) The prosecution, thus, relied heavily upon improper evidence of criminal disposition to prove appellant's intent — a matter described by the prosecutor as "key to this case."

F. EVIDENCE REGARDING THE TONI PINA INCIDENT SHOULD HAVE BEEN EXCLUDED AS IMPROPER CHARACTER EVIDENCE.

Generally, prior crimes evidence is not admissible to establish criminal disposition and probability of guilt. As the United States Supreme Court stated in *Michelson v. United States* (1948) 335 U.S. 469:

> The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

(*Id.* at pp. 475-476, fns. omitted.)

In California this prohibition is codified in Evidence Code section 1101, subdivision (a), which 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." This section expressly prohibits the use of evidence of prior bad acts committed by the defendant "if the only theory of relevance is that the accused has a propensity (or disposition) to commit the crime charged and that this propensity is circumstantial proof that the accused behaved accordingly on the occasion of the charged offense." (*People v. Thompson* (1980) 27 Cal.3d 303, 316.)

As recognized in *Michelson*, *supra*, the purposes of the foregoing exclusionary rule are threefold: (1) to avoid placing the accused in a position in which he must defend against uncharged offenses, (2) to guard against the probability that evidence of uncharged acts would prejudice the defendant in the minds of the jurors, and (3) to promote judicial efficiency by restricting proof of extraneous crimes. (*People v. Thomas* (1978) 20 Cal.3d 457, 464.) In brief, although a defendant's prior criminal acts may demonstrate his bad character and his propensity or disposition to commit the crime charged, a defendant is not to be convicted because the prosecution can prove, on his prior or subsequent record, that he is a bad man. (*Ibid.*)

Although evidence of prior bad acts is generally inadmissible to prove that the accused had the propensity or disposition to commit the crime charged, "evidence may be admitted, even though it embraces evidence of the commission of another crime, if it logically tends to prove a material element

in the People's case." (*People v. Guerrero* (1976) 16 Cal.3d 719, 724.) In this regard subdivision (b) of section 1101, provides as follows:

> (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

As subdivision (b) recognizes, that a defendant previously committed a similar crime can be circumstantial evidence tending to establish his identity, intent, and motive with respect to the present crime. Like other circumstantial evidence, admissibility depends on the materiality of the fact sought to be proved, the tendency of the prior crime to prove the material fact, and the existence of any other rule requiring exclusion. (*People v. Catlin* (2001) 26 Cal.4th 81, 146.)

"Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent." (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) To be admissible on the question of intent, the prior conduct and the charged offense must be sufficiently similar to support the inference that the defendant probably harbored the same intent in each instance. (*People v. Cole* (2004) 33 Cal.4th 1158, 1194; *People v. Yeoman* (2003) 31 Cal.4th 93, 121; *People v. Ewoldt* (1994) 7 Cal.4th 380, 402.)

In the present case, however, the offenses were decidedly dissimilar and did not rationally support an inference that appellant probably harbored the same intent in each instance. Although both incidents involved alleged sexual assaults against females, that is where the parallels end. The victims were not

alike since one incident involved a teenager, while the other involved a senior citizen. Further the manner in which the offenses were alleged to have been committed were not comparable in that the Pina case involved only pushing while the present case involved violence and homicide. Even the sex offenses alleged were different, with the prior involving oral copulation and the present including rape and sodomy. Finally, the incidents were not even committed close in time since the Pina offenses were committed more than six years prior to the charged offenses. Considering the circumstances, the Pina incident and the present case were not sufficiently similar to support the inference that the defendant probably harbored the same intent in each instance.

In this regard the present case is unlike others where this Court has found sufficient points of similarity between different incidents to logically support an inference that the defendant probably harbored the same intent with respect to each. For example, in *People v. Lewis* (2001) 25 Cal.4th 610, the defendant denied any intent to steal in a burglary-murder, robbery-murder case. There the prosecution sought to introduce evidence that, hours before the victim was killed, the defendant had forcibly taken money from another man in the same apartment building, arguing that the evidence was highly probative of the defendant's intent in entering the murder victim's apartment, particularly in light of his testimony that he entered the unit by mistake and with no intent to steal. The trial court admitted the evidence for this purpose. (*Id.* at p. 636.) On appeal this Court found the two events were sufficiently similar based upon the following: "In both the charged and uncharged crimes, defendant overcame the victim by force, then reached into the victim's back pocket to obtain his wallet. Both times, after having taken the money, defendant proceeded to [a nearby] apartment to buy methamphetamine. Although the incidents themselves are not particularly distinctive, they are

sufficiently similar to support an inference that defendant harbored the same intent in both instances, that is, to forcibly obtain cash from the victim." (*Id.* at p. 637.) Consequently, the Court found "no abuse of discretion and no federal constitutional violation in the admission of the uncharged crimes evidence." (*Ibid.*)

Similarly, in *People v. Hayes* (1990) 52 Cal.3d 577, this Court found that other crimes evidence was properly admitted on the issue of intent where the defendant was convicted of robbery, burglary, and first degree murder and the jury found as special circumstances that the murder was committed in the perpetration of robbery and burglary. In that case the body of the victim, the resident manager of a motel, was found on the floor of one of the motel rooms. He had been bound with coat hanger wire and stabbed to death. The motel's office, as well as the adjoining living quarters for the manager, had been ransacked. Missing items included cigarettes and cash. Testifying in his own behalf at trial, the defendant admitted killing the victim but maintained that he did so only after being assaulted by him. (*Id.* at p. 597.) The prosecution was permitted to introduce evidence of another incident, in which the defendant had robbed another man in a hotel room, on the issue of intent. Examining the circumstances of the two incidents, this Court found "striking similarities" between them, and determined the evidence regarding the other crimes was properly admitted on the issue of intent, reasoning as follows:

> In each instance, defendant assaulted a male victim in a motel room that defendant was occupying or visiting, the victim was bound with coat hangers, and another room at the motel was searched for property belonging to the victim. These similarities have substantial probative value on a material disputed issue. Defendant's intent when he assaulted and bound Cross was shown by Cross's testimony: to take any money Cross carried with him, to make Cross reveal the location of any money in Cross's motel room, and to take the money from Cross's room.

> Because he treated Patel in the same distinctive fashion as Cross — luring Patel to a motel room, assaulting him, and binding him hand and foot with coat hanger wire — it is reasonable to infer that defendant had the same intent, namely, to take money and other valuables. The trial court's ruling admitting the evidence was not an abuse of discretion.

(*Id.* at p. 617.)

Unlike *Lewis* and *Hayes*, in the present case there were essentially no significant points of similarity between the current and past offenses. The Pina incident and the present case were, therefore, not sufficiently similar to logically support an inference that appellant probably harbored the same intent in each instance. Evidence relating to the Pina incident was, therefore, not relevant or admissible on the question of intent and should have been excluded by the trial court as improper character evidence.

G. THE EVIDENCE SHOULD HAVE BEEN EXCLUDED UNDER EVIDENCE CODE SECTION 352 AS MORE PREJUDICIAL THAN PROBATIVE.

Even if evidence relating to the Pina incident was marginally relevant on the issue of intent, it should have been excluded under Evidence Code section 352 as more prejudicial than probative. Once it has been determined that evidence of prior acts of misconduct by the defendant is relevant to some issue other than the defendant's disposition or propensity to commit the crime charged, additional factors must be taken into consideration. "Admission of [other crimes] evidence involves, inter alia, the danger of confusing issues, introducing collateral matters, or tempting the jury to condemn the defendant because he has escaped adequate punishment in the past. [Citation.] It is therefore appropriate, when the evidence is of an uncharged offense, to place on the People the burden of establishing that the evidence has substantial probative value that clearly outweighs its inherent prejudicial effect." (*People v. Bean* (1988) 46 Cal.3d 919, 938.)

Courts have cautioned that evidence of other acts should be scrutinized with great care in light of its inherently prejudicial effect, and should be received only when its connection with the charged crime is clearly perceived. (See *People v. Daniels* (1991) 52 Cal.3d 815, 856; *People v. Deeney* (1983) 145 Cal.App.3d 647, 655; *People v. Elder* (1969) 274 Cal.App.2d 381, 393-394.) The exercise of discretion to admit or exclude evidence pursuant to Evidence Code section 352 should, therefore, favor the defendant in cases of doubt because in comparing prejudicial impact with probative value the balance "is particularly delicate and critical where what is at stake is a criminal defendant's liberty." (*People v. Lavergne* (1971) 4 Cal.3d 735, 744; *People v. Murphy* (1963) 59 Cal.2d 818, 829.) The standard of review for evidence admitted under section 352 is abuse of discretion. (*People v. Cole*, *supra*, 33 Cal4th at p. 1195.)

In determining the probative value of the uncharged offense, the court should consider: "'(1) the materiality of the fact sought to be proved . . .; (2) the tendency of the uncharged crime to . . . disprove the material fact; and (3) the existence of any rule or policy requiring the exclusion of relevant evidence.' [Citation.]" (*People v. Deeney, supra,* 145 Cal.App.3d at p. 655 [emphasis omitted]; see also *People v. Daniels*, *supra*, 52 Cal.3d at p. 856.) In the present case evidence regarding the Pina incident was argued to be relevant on issue of intent, a key issue in the case. However, the evidence had no tendency in reason to prove appellant's intent in any manner other than as evidence of propensity because the incidents did not share sufficient points of similarity. Even if it is assumed that evidence regarding the Pina incident had some probative value on any issue other than appellant's character, the probative value would have been slight at best. On the other hand, it's potential for prejudice was great since courts have long recognized the

prejudicial nature of other crimes evidence because of its tendency to "overpersuade" the jury. (*Michelson v. United States*, *supra*, 335 U.S. at pp. 475-476 [69 S.Ct. 213, 218-219, 93 L.Ed. 168]; *Old Chief v. United States* (1997) 519 U.S. 172, 181 [117 S.Ct. 644, 650-651, 136 L.Ed.2d 574]; *People v. Alcala* (1984) 36 Cal.3d 604, 630-631; *People v. Falsetta* (1999) 21 Cal.4th 903, 913-915; *People v. James* (2000) 81 Cal.App.4th 1343, 1353.) Here the evidence of prior misconduct lacked sufficient probative value to overcome its inherently prejudicial nature. The trial court, thus, erred in failing to sustain the defense objection to this testimony both under Evidence Code section 1101 as improper character evidence and under Evidence Code section 352 as more prejudicial than probative.

H. THE JURY INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURORS TO CONSIDER EVIDENCE OF OTHER CRIMES WHICH THE TRIAL COURT HAD DETERMINED WAS NOT RELEVANT ON THE QUESTION OF INTENT IN RESOLVING THIS VERY ISSUE.

As noted above evidence regarding the incidents involving Norma Knight, Barbara Cady and Kathy Dunn was admitted for impeachment purposes only. Yet the jury instructions did not inform jurors of this limited purpose. To the contrary, the instructions permitted the jurors to consider the evidence for purposes of determining appellant's intent, a clearly improper purpose. In this respect the instructions were erroneous.

It is settled that, even in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311; *People v. Perez* (1992) 2 Cal.4th 1117, 1129; *People v. Daniels, supra,* 52 Cal.3d at p. 885.) The instructions must be full and complete (*People v. Poddar*, *supra*, 10 Cal.3d at p. 759), and the court must insure that the

instructions adequately state the law and assist the jury in resolving the issues addressed (*People v. Key*, *supra*, 153 Cal.App.3d at p. 898). The trial court has a correlative duty to refrain from instructing on principles of law which have the effect of confusing the jury or relieving it from making findings on relevant issues (*People v. Satchell*, *supra*, 6 Cal.3d at p. 33, fn. 10). Further, "[i]t is error to give an instruction which correctly states a principle of law which has no application to the facts of the case." (*People v. Sanchez*, *supra*, 30 Cal.2d at p. 572.)

Where, as here, evidence of prior crimes is admitted for impeachment purposes, and other prior crimes evidence also has been admitted pursuant to Evidence Code section 1101, subdivision (b), the trial court should instruct the jury as to which evidence is referred to in the CALJIC No. 2.50 instruction. (*People v. Catlin*, *supra*, 26 Cal.4th at p. 146; *People v. Rollo*, *supra*, 20 Cal.3d at p. 123, fn. 6.) The trial court erroneously failed to do so here. The prejudice inherent in the error is clear.

Evidence of prior bad acts is closely scrutinized because such evidence is likely to inflame the passions of the jury, and where "passions are aroused, the jury may convict simply because the defendant is a bad man, not because he is proven guilty." (*People v. Hoze* (1987) 195 Cal.App.3d 949, 954.) It is generally recognized that "[a] jury which is made aware of a similar prior conviction will inevitably feel pressure to conclude that if an accused committed the prior crime he likely committed the crime charged." (*People v. Rist* (1976) 16 Cal.3d 211, 219.) As this Court has observed: "If a defendant testifies and is impeached by means of a prior felony conviction, there is a widely acknowledged danger that this evidence will be misused by the trier of fact." (*People v. Fries* (1979) 24 Cal.3d 222, 227.)

Even when proper limiting instructions are given "'the jury is likely to consider this evidence for the improper purpose of determining whether the accused is the type of person who would engage in criminal activity.'" (*Ibid.*) Specifically this Court has stated:

> As the United States Supreme Court has noted in a related context, evidence of a "defendant's prior trouble with the law . . is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." [Citation.] This tendency to prejudge the issue of guilt denies an accused the presumption of innocence and lessens the burden of the prosecutor to prove guilt beyond a reasonable doubt.
>
> There is also the "obvious danger" that the jury will decide that based on his prior convictions, the accused "ought to be put away without too much concern with his present guilt." [Citation.] Further, the admission of prior convictions often confuses the issues at trial and "draw[s] [the juror's] minds away from the real issue" of guilt or innocence. [Citation.]

(*People v. Fries, supra,* 24 Cal.3d at p. 228.) Here no limiting instructions were given.

In the absence of any such instruction it is likely the jurors accepted the prosecutor's invitation to consider evidence of other crimes which had been admitted for impeachment purposes in determining appellant's intent. The danger that appellant's was improperly convicted on the basis of propensity evidence is, therefore, clear.

1. ***The Issue Is Cognizable on Appeal***

Although there was no specific objection made on the record to this aspect of the jury instructions, an appellate court's authority to review instructional error despite the absence of an objection or request is firmly grounded in Penal Code section 1259. (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 6.) This section provides, in pertinent part: "The appellate court may also

review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." The *sua sponte* obligation to correctly instruct "reflect[s] concern both for the rights of persons accused of crimes and for the overall administration of justice." (*People v. Wickersham* (1982) 32 Cal.3d 307, 324.)

The court's affirmative duty to correctly instruct the jury, on its own motion, on the general principles of law relevant to the issues of the case "'can be negated only in that special situation in which defense counsel deliberately and expressly, as a matter of trial tactics'" objects to the rendition of a required instruction or requests an erroneous one. (*Id.* at p. 331; *People v. Wader* (1993) 5 Cal.4th 610, 657-658.) The rule is supported by sound policy considerations which have been explained as follows:

> This rule is necessary to ensure that an accused's right to complete instructions is fully protected. ". . . .'Nevertheless, error is nonetheless error and is no less operative on deliberations of the jury because the erroneous instruction may have been requested by counsel for the defense. After all, it is the life and liberty of the defendant in a case such as this that is at hazard in the trial and there is a continuing duty upon the part of the trial court to see to it that the jury are properly instructed upon all matters pertinent to their decision of the cause.' Accordingly, if defense counsel suggests or accedes to the erroneous instruction because of neglect or mistake we do not find 'invited error'; only if counsel expresses a deliberate tactical purpose in suggesting, resisting, or acceding to an instruction, do we deem it to nullify the trial court's obligation to instruct in the cause."

(*Id.* at p. 332.) Consequently, claims of instructional error are reviewable on appeal even where the error in question was in effect urged by defense counsel where counsel's actions were not the result of a conscious and deliberate tactical choice. (*People v. Beardslee* (1991) 53 Cal.3d 68, 88; *People v.*

Hernandez (1988) 47 Cal.3d 315, 353; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1234.)

Here the record is entirely silent as to appellant's position on the trial court's failure to properly limit the other crimes evidence. Initially it had been the rule that in order for the doctrine of invited error to apply, the record must reflect an articulated tactical purpose on the part of defense counsel (*People v. Trevio* (1988) 200 Cal.App.3d 874, 877, fn. 7). More recent cases may have eased this requirement by finding "invited error" where a tactical objection was inferable from the record. (*People v. De Leon* (1992) 10 Cal.App.4th 815, 824; *People v. Duncan* (1991) 53 Cal.3d 955, 969-970 [all-or-nothing tactical strategy]; *People v. Cooper* (1991) 53 Cal.3d 771, 827 [all-or-nothing tactical strategy]; *People v. Whitt* (1990) 51 Cal.3d 620, 641 ["Death row" redemption strategy].) However, where as here the effect of counsel's actions is to lessen the prosecution's burden of proof, there would appear to be no conceivable tactical purpose. (See *People v. Beardslee*, *supra*, 53 Cal.3d at p. 88 ["There appears no conceivable tactical purpose, however, for defense counsel's requesting an instruction that would erroneously lessen the prosecutorial burden of proving malice, premeditation, or deliberation."].) Consequently, no tactical purpose can be implied from the silent record, and it cannot be said that the error complained of on appeal was invited by counsel based upon a conscious and deliberate tactic choice. The error is, therefore, properly addressed on appeal.

I. THE TRIAL COURT'S ERROR ALSO VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS

Besides the state law violations set forth above, the error deprived appellant of his constitutional rights. State evidentiary rules create "a substantial and legitimate expectation" that a defendant will not be deprived of his life or liberty in violation of those rules. (*Hicks v. Oklahoma* (1980)

447 U.S. 343, 346.) This expectation is protected against arbitrary deprivation under the Fourteenth Amendment. (*Ibid.*) By misapplying well-established state law that prevents the prosecution from using evidence admitted for a limited purpose as general propensity evidence (Evid. Code, § 1101, subd. (a)), and excludes the use of unduly prejudicial evidence (Evid. Code, § 352), the trial court arbitrarily deprived appellant of a state-created liberty interest.

Additionally, admission of the evidence violated the Due Process Clause of the Fourteenth Amendment because it was unduly prejudicial. (See *Payne v. Tennessee* (1991) 501 U.S. 808, 825.) Erroneous admission of evidence of uncharged criminal acts may render a trial fundamentally unfair and thereby violate a defendant's right to due process. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1380-1381; see also *Spencer v. Texas* (1967) 385 U.S. 554, 572-574, dis. opn. of Warren, C.J. ["While this Court has never [so] held . . . , our decisions . . . as well as decision by the courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause."].)

The admission of this evidence also violated appellant's right to due process under the Fourteenth Amendment, which "protects the accused against conviction except upon proof [by the State] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.) Here, the trial court's erroneous admission of other crimes evidence lightened the prosecution's burden of proof, improperly permitting the jury to find appellant guilty because of his criminal propensity. (See e.g., *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524.) The introduction of such evidence so infected the trial as to render appellant's convictions fundamentally unfair. (*Estelle v. McGuire* (1991) 502

U.S. 62, 67; see also *McKinney v. Rees*, *supra,* 993 F.2d 1378.) In addition, appellant was deprived of his right to a reliable adjudication at all stages of a death penalty case. (See *Lockett v. Ohio* (1978) 438 U.S. 586, 603-605; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *Penry v. Lynaugh* (1989) 492 U.S. 302, 328, abrogated on other grounds *Atkins v. Virginia* (2002) 536 U.S. 304.)

J. PREJUDICE

Because the error here is of federal as well as state constitutional dimension, violating as it does appellant's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution, as well as his right to a reliable adjudication at all stages of a death penalty case under the Eighth Amendment, prejudice must be evaluated under the reversible error standard set forth in *Chapman v. California* (1967) 386 U.S. 18. This test provides that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (*Yates v. Evatt* (1991) 500 U.S. 391, 402-403, disapproved on other grounds in *Estelle v. McGuire*, *supra*, 502 U.S. at pp. 72-73, fn. 4; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) The burden is on the beneficiary of the error "either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." (*Chapman v. California*, *supra*, 386 U.S. at p. 24; see also *People v. Louis* (1986) 42 Cal.3d 969, 993-994.)

Error in admitting the evidence is, therefore, deemed prejudicial unless the prosecution shows beyond a reasonable doubt the error did not affect the verdict. (*Arizona v. Fulminante* (1991) 499 U.S. 279; *People v. Bradford* (1997) 15 Cal.4th 1229, 1313; *People v. Cahill* (1993) 5 Cal.4th 478, 510; *People v. Sims* (1993) 5 Cal.4th 405, 447.) "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the

record." (*Yates v. Evatt, supra*, 500 U.S. at p. 403; see *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [the proper *Chapman* inquiry is whether the guilty verdict actually rendered in the trial at hand was surely unattributable to the error].)

Where federal constitutional error is not involved, the erroneous admission of other crimes evidence is prejudicial if it appears reasonably probable that a result more favorable to the defendant would have resulted had the prior crimes evidence not been admitted. (See *People v. Cole, supra,* 33 Cal.4th at p. 1195; *People v. Welch* (1999) 20 Cal.4th 701, 750; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Here, under either standard of review, the error cannot be regarded as harmless since it went to the central issue in the case — appellant's intent.

The trial court's ruling and instructions permitted the jurors to resolve one of the key issues in the case — whether appellant intended to sexually assault Ms. Eddings when he entered her residence — based upon prior unrelated misconduct involving Toni Pina, Barbara Cady and Norma Knight. Although evidence regarding the Cady and Knight incidents was not admitted for this purpose, the jury instructions did not so inform the jurors and, in fact, permitted this misuse of the evidence. The evidence had no tendency in reason to establish appellant's intent — particularly the evidence relating to the assault on Norma Knight which had no sexual component. Consequently, the danger that the jurors found appellant guilty because they concluded he was a "bad man" was great. In the absence of the errors it is probable the jurors would not have found, beyond a reasonable doubt, that appellant harbored the requisite intent.

The prosecutor exploited the error and relied heavily upon all of this evidence in urging the jurors to find criminal intent at the time of entry, a

necessary element of first degree murder under a felony-murder theory and the special circumstances allegations. The error impacted not only the felony-murder theory involving burglary but also the prosecution's other felony-murder theories based upon rape and sodomy or attempts to commit these crimes.

If Ms. Eddings had not been sexually assaulted until after she had died, appellant would not have been guilty of rape or sodomy since both of these offenses require a live victim. (*People v. Kelly* (1992) 1 Cal.4th 495, 524; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1176 .) This court has determined that a person who attempts to rape a live victim, kills the victim in the attempt, then has intercourse with the body, has committed only attempted rape, not actual rape, but is guilty of felony-murder and is subject to the rape special circumstance. (*People v. Kelly*, *supra*, 1 Cal4th at p. 526; *People v. Goodridge* (1969) 70 Cal.2d 824, 838; *People v. Quicke* (1964) 61 Cal.2d 155, 158.) However, for the felony-murder rule and the special circumstance to apply, the defendant must have been attempting to rape the victim at the time of the killing; it would not suffice if, after the killing, defendant acquired the intent to have intercourse with the dead body. (*People v. Kelly*, *supra*, 1 Cal.4th at p. 526.) Thus, if appellant had not formed the intent to sexually assault the victim until after she was dead, he would not have been guilty of attempted rape or attempted sodomy, or of rape or sodomy.

Absent a finding that appellant entered Ms. Eddings' residence with the intent to sexually assault her, the jury could not have convicted appellant of first degree murder under a felony-murder theory and could not have found the special circumstances allegations true. Under these circumstances appellant intent was critical to the jury's resolution of the case. In light of all the circumstances it is likely the jury determined appellant's intent, and thus his

guilt, based upon evidence of propensity or probability of guilt. Consequently, the error was prejudicial and the judgment of the trial court must be reversed.

II.

THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE AUTOPSY SURGEON TO RENDER HIS PERSONAL OPINION, BASED NOT UPON ANATOMIC FINDINGS BUT RATHER UPON EXTRINSIC FACTORS SUCH AS APPELLANT'S STATEMENTS TO POLICE, THAT THE VICTIM HAD BEEN RAPED AND MURDERED, AND THAT SHE HAD BEEN RAPED AND SODOMIZED PRIOR TO DEATH.

A. INTRODUCTION

Dr. Robert DiTraglia performed the autopsy in this case and was called as a prosecution witness. In addition to testifying about his findings and observations during the autopsy, Dr. DiTraglia was permitted to testify over defense objection that in his opinion Ms. Eddings had been raped and murdered and that she had been raped and sodomized before her death. (18 RT 1957-1958.) These conclusions were not based upon any anatomic observations during the autopsy since, although both the vaginal and rectal canals were removed from the body and visually inspected in an effort to detect evidence of sexual assault, there were no signs of injury or trauma to either, and no signs of external injury, other than thermal injury, to the genital area. (19 RT 2009, 2011.)

When the prosecution first asked Dr. DiTraglia for his opinion on the greater issue of whether Ms. Eddings was sexually assaulted prior to death, the following exchange took place:

> Q. Were you able to form an opinion as to whether or not Ruth Eddings was alive at the time she was raped and sodomized?
>
> MR. CABRERA: Your Honor, again, based on the status of the evidence as we have it in the record, there's insufficient data for this expert to render an opinion.

THE COURT: I think the appropriate objection, sir, is that in the form of the question it assumes facts not in evidence at this point in time.

MR. CABRERA: I'll accept that correction and thank you.

THE COURT: Rephrase the question, Miss Erickson.

Q. (By Ms. Erickson) What basis do you have for forming an opinion as to whether or not Ruth Eddings was raped or sodomized?

A. Everything that I know about this case, some of it we've talked about today, some of it we haven't talked about directly — for example, DNA evidence and sexual assault evidence — my training and experience in cases of rape-murder, the sorts of things that happen when people are raped and murdered, the cause of death, the circumstances of death, my experience in rape-murder versus — if I understand your question correctly, you're asking me to evaluate necrophilia, which would be sex with a dead person, which is exceedingly uncommon. So I would say my training and experience, textbooks and literature, all of the evidence that I know about what happened in this particular case is what I would use to formulate an answer to your question.

(18 RT 1938-1939.) Dr. DiTraglia's response makes clear that his opinion in this area was based upon extrinsic factors rather than upon anatomic findings during the autopsy.

The court then read CALJIC No. 2.80 regarding expert testimony to the jurors, and asked the witness additional questions relating to his general qualifications as a forensic pathologist:

THE COURT: . . . . Dr. DiTraglia, you testified earlier that it is not uncommon for you to be asked to express an opinion on the cause of death. Is that correct?

THE WITNESS: Yes.

THE COURT: That's what you normally do as a forensic pathologist?

THE WITNESS: That's one of the things that I normally do.

THE COURT: Okay. You indicated that you testified 150 times in court.

THE WITNESS: Approximately.

THE COURT: Have you ever been asked to testify and express an opinion as to whether or not the individual upon whom you performed an autopsy had been the victim of some kind of sexual assault?

THE WITNESS: Yes.

THE COURT: Approximately how many occasions?

THE WITNESS: It's a hard thing to recall. I mean, I would say — certainly more than five times and maybe less than 25 times. That's not something that I keep track of.

(18 RT 1940.)

Following this exchange the court permitted the prosecutor to resume questioning, and she again asked Dr. DiTraglia: "Do you have an opinion as to whether Ruth Eddings was raped in this case?" Defense counsel objected on the grounds that the question called for an opinion which was outside the scope of the witness's expertise. (18 RT 1940-1941.) The trial court then permitted defense counsel to voir dire Dr. DiTraglia on his qualifications in this specific area. (18 RT 1942-1957.)

When questioned, Dr. DiTraglia could not point to anything in his experience or training which would qualify him as an expert in determining whether a sexual assault took place prior to, as opposed to immediately after, death. Although Dr. DiTraglia felt that he had extensive experience with cases of sexual assault leading to murder, he had no experience or training with regard to cases involving sexual assault after death. Dr. DiTraglia also had no formal training or experience in the area of crime scene reconstruction. In the absence of any relevant training or experience, Dr. DiTraglia clearly was not

an expert in distinguishing, based upon the factors considered, between cases involving sexual assault prior to death and those involving sexual assault immediately after death.

Despite this inadequate foundation, the trial court permitted the prosecution to ask the following questions:

> Q. . . . . You have an opinion whether Ruth Eddings was raped?
>
> A. I do.
>
> Q. Your opinion is, sir?
>
> * * * *
>
> THE WITNESS: My opinion is that she was raped and this is a rape-murder.
>
> Q. (By Ms. Erickson) You have an opinion regarding if Ruth Eddings was sodomized?
>
> A. I do.
>
> Q. And what is that opinion, sir?
>
> A. And just because sodomy, I believe, is a legal term, I want to make sure that we're using it accurately. My understanding is — why don't you define sodomy.
>
> THE COURT: She can't do that. I only define those things.
>
> THE WITNESS: Okay.
>
> THE COURT: Do you have an opinion, Doctor? Do you have an opinion?
>
> THE WITNESS: I do.
>
> THE COURT: What is that opinion?

THE WITNESS: My opinion is that she was sodomized.

Q. (By Ms. Erickson) What is your understanding of sodomy?

A. I think that the — the definition is more broad than just anal sex. It's some more broad definition like sex that's not vaginal intercourse, but I know that anal sex is included in sodomy. At least that's my understanding.

Q. Is your opinion, in fact, Ruth Eddings was subjected to anal intercourse?

A. Yes, that's my opinion.

Q. Do you have an opinion regarding whether this sodomy took place before or after death?

A. I do.

Q. What is your opinion?

A. My opinion is that it occurred before death.

Q. You have an opinion regarding whether she was raped before or after death?

A. I do.

Q. And your opinion?

A. My opinion is that she was raped before death.

(18 RT 1957-1958.) Dr. DiTraglia was allowed to offer his opinion on these matters despite the fact that it was based not upon anatomic findings, but rather upon extrinsic factors — or, as he put it, on everything he knew about the case — and despite the fact that Dr. DiTraglia had no particular training or experience in determining whether a sexual assault had been committed prior to or immediately after death in the absence of anatomic evidence.

As discussed more fully below, Dr. DiTraglia's testimony on these matters was improperly admitted and should have been excluded on three grounds: (1) Dr. DiTraglia did not have any specialized education, training and experience qualifying him as an expert in this particular area; (2) the opinion rendered was not a proper subject of expert testimony since Dr. DiTraglia was no more qualified than the jurors to examine the evidence he considered and reach a conclusion on the greater issues addressed; and (3) under Evidence Code section 352 the evidence was more prejudicial than probative because it enabled the prosecution to present its version of the facts to the jury in the form of expert testimony and encouraged the jury to shift responsibility for evaluating the evidence to the prosecution's expert.

B. DR. DITRAGLIA'S TRAINING AND EXPERIENCE

Dr. DiTraglia's testified as a forensic pathologist which he defined as follows:

> A forensic pathologist is obviously a medical doctor who first specializes in laboratory medicine, the diagnosis of death and disease through things like autopsies and lab tests and tissue biopsies, and then further subspecializes in the area of forensic pathology, which simply means that you relate the two fields of pathology and law. Typically, you perform autopsies on certain kinds of cases, determine the cause of death, sometimes the manner of death, and relate those findings in legal settings like this one.

(18 RT 1904.) He described his educational background and experience during the following exchange:

> Q. Can you describe for us, please, your educational background.
>
> A. I earned an undergraduate degree in chemistry. I attended a medical school for four years at St. Louis University. I did a four-year residency in anatomic and clinical pathology at the University of California, Irvine.

I did two fellowships, one in surgical pathology for a year and one in forensic pathology.

I then worked on the staff at the Los Angeles County coroner's office for approximately one year, and then worked at the Riverside County coroner's office for approximately seven years.

I've forgotten if you want me to talk about training and experience or just training.

Q. Proceed with your experience.

A. My experience, I've personally performed something like 3,000 to 3,500 forensic autopsies. I am certified by the American Board of Pathology in both anatomic and forensic pathology.

I have — I've been called to testify on a number of occasions in superior courts and municipal courts in California, something like 150 times approximately. That's about it.

Q. The testimony that you've given in courts in the past, the 100 or 150 times, is that in the area of cause of death?

A. Yes, vast majority of times.

(18 RT 1904-1905.)

After appellant objected to Dr. DiTraglia offering his opinion on the ultimate issues of murder, rape and sodomy, the trial court permitted defense counsel to question him on voir dire regarding his qualifications to express an opinion that Ms. Eddings was raped and murdered and that she was raped and sodomized before death. His testimony established that he had no specific training in psychology or psychiatry, that he knew little or nothing about necrophilia, and that he had never performed an autopsy on a body that had been sexually violated after death. (18 RT 1942-1945.) Further, Dr. DiTraglia

had no training in criminology and was not qualified as a criminalist. Nor had he ever received any training in crime scene reconstruction. (19 RT 2039.)

Overall, Dr. DiTraglia's testimony established that he was a forensic pathologist — a medical doctor who specializes in the diagnosis of death and disease through laboratory medicine, and further specializes in the area of forensic pathology or relating the fields of pathology and law. He was qualified to performs autopsies, determine the cause of death and perhaps the manner of death, and to relate those findings in a legal setting. Dr. DiTraglia had no specialized training or experience qualifying him as an expert in determining whether a sexual assault on a deceased victim was committed prior to or after death.

C. THE BASIS FOR DR. DITRAGLIA'S OPINION

When questioned on voir dire generally regarding how he would determine whether a rape had occurred in a given case, Dr. DiTraglia testified as follows:

> Q. Then let's go back, then, just to rape and murder.
>
> In that situation, what else would you look at to formulate an opinion that an individual had been raped?
>
> A. The scene. There are times when I go to the scene personally. There are numerous situations where I look at photographs of the scene. There's a lot of information from scene investigation that bears on that question.
>
> The autopsy itself, the presence or absence of trauma, foreign bodies in body cavities, sexual assault evidence like sperm, proteins, DNA.
>
> An understanding of the connection between rape and murder, and what I mean by that is there is a usual or more common scenario. For example, the most common cause of death in rape-murder is strangulation, and strangulation is coupled

> sometimes — or many times with beating — blunt force trauma like this case or stab wounds, and so that's another example of information that can be utilized to formulate an opinion as to whether or not rape has occurred.

(18 RT 1947.)

When asked specifically about the basis for his conclusion that the cloth found in the vaginal canal was inserted prior to Ms. Eddings' death, the following exchange took place between Dr. DiTraglia and the court:

> THE COURT: What facts beyond the presence of the foreign object in the vagina or the vaginal canal that you observed or are aware of in association with this case might lead you to the conclusion that the central penetration was antemortem, before death, as opposed to postmortem?
>
> THE WITNESS: That's the question I was attempting to answer, and I started with the presence of the foreign object in the vagina. I included the presence of sperm in the rectum. I was about to discuss the cause of death itself, strangulation and blunt force trauma, very common in cases of rape because rape is a very intimate event, and the cause of death typically goes along with that. It's a very intimate thing. It's not a gunshot wound. It is strangulation and blunt force trauma.
>
> In addition, the trauma, when it is present, is often severe and brutal, like it is in this case.
>
> The circumstances at the scene, the presenting position that the body was found in is a fact that bears upon this. The statements made by the defendant are facts that bear upon this question. The evidence, in my mind, consists of many different facts, some of which I've delineated to you.

(18 RT 1952-1953.) When defense counsel attempted to ask additional questions in this area, the court cut him off stating: "Counsel, right now we're on voir dire. If you want to take this up on cross-examination and ask it again, I suppose you can." (18 RT 1953-1954.)

During cross-examination, Dr. DiTraglia provided additional details concerning the basis for his opinion:

Q. Doctor, in continuation of our interaction last week, let me go back a bit and ask you about the blind pouch that was found in the vaginal cavity.

Can you tell me what physical findings you made at the autopsy to determine that that was inserted antemortem?

A. I don't believe that there are purely anatomic findings that can answer that question.

Q. All right. Let me ask you about the fluids that were taken from the rectal cavity. What physical evidence did you find at the autopsy to determine that they were inserted antemortem?

A. The answer to that question as phrased, physical evidence, is the same lengthy list of things that I delineated last week, the circumstances of the case, the nature of the evidence, what I know about rape-murder, et cetera, et cetera. I think you may not have intended to word the question that way.

Q. What we're looking at is, do you consider what you know about rape-murder to be a physical finding?

A. Physical evidence — my understanding of the term physical evidence is not the same thing as an anatomic finding.

In other words, I don't use the word "physical evidence" to mean simply a physique or a body. I think the term is a lot more broad than that.

Q. Thank you for the education.

What anatomical finding did you make at the time of the autopsy to base your opinion that the rectal fluid or whatever was extracted from the rectal cavity was placed there antemortem?

A. There's no way to answer that question simply from looking at anatomic findings alone. So by limiting the question, the answer is I cannot tell you.

(19 RT 1994-1996.)

From Dr. DiTraglia's testimony it is apparent that the conclusions he drew and the opinions he offered were based not upon findings of injury during the autopsy but upon extrinsic factors including the presence of a foreign object in the vagina, the presence of sperm in the rectum, the cause of death being blunt force trauma and strangulation, the circumstances of the scene including the position of the victim's body, and appellant's statements to police.

D. THERE WAS INSUFFICIENT FOUNDATION FOR DR. DETRAGLIA'S "EXPERT" OPINION ON THESE MATTERS.

Despite the fact that Dr. DiTraglia did not have any specialized training or experience qualifying him as an expert in determining whether a sexual assault had occurred prior to rather than immediately after death, he was permitted to offer his "expert" opinion on the subject. Under Evidence Code section 720, subdivision (a): "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert." "While a trial court's decision as to the qualification of a witness will be upheld absent an abuse of discretion [citation], error must be found if 'the evidence shows that a witness clearly lacks qualification as an expert and the judge has held the witness to be qualified as an expert witness.'" (*People v. Hogan* (1982) 31 Cal.3d 815, 852 [emphasis omitted].)

"'The competency of an expert is relative to the topic and fields of knowledge about which the person is asked to make a statement. In considering whether the person qualifies as an expert, the field of expertise must be carefully distinguished and limited.' [Citation.]" (*People v. Kelly* (1976) 17 Cal.3d 24, 39.) "It is not unusual that a person may be qualified as a expert on one subject and yet be unqualified to render an opinion on matters beyond the scope of that subject." (*People v. Williams* (1992) 3 Cal.App.4th 1326, 1334.) "Even a treating physician may not be qualified to give an opinion on esoteric causation issues in a specialized area." (*Ibid.*)

This Court has previously addressed the issue of expert witness testimony exceeding the scope of the witness's area of expertise in the context of blood spatter evidence. In *People v. Hogan*, *supra*, 31 Cal.3d 815, the defendant was charged with first degree murder of a woman and her 4-year-old son, and assault with intent to commit murder on the woman's infant son. A criminalist testified for the prosecution on the source of blood stains on the defendant's pants and shoes at the time of his arrest. He also opined that certain stains were "spatters" caused by blood flying through the air following impact rather than by mere contact with a bloody object. On appeal this Court held that the criminalist, Kyle, was not qualified to offer that opinion as an expert, concluding that "Kyle's qualifications as an expert to determine whether blood had been spattered or transferred by contact were nonexistent." The Court explained:

> He had never performed any laboratory analysis to make such determinations either in the past or in the present case. He had admittedly received no formal education or training to make such determinations. His background on the subject consisted of viewing some years prior an exhibit, which had since been discarded, prepared by some unknown criminalist which demonstrated patterns of human blood dropped from various heights and angles. Kyle has also read some years prior a book

> about flight patterns of blood. Also he had observed bloodstains at many crime scenes, and had determined in his own mind whether they were spatters or 'wipes,' but had never verified his conclusions in any way.

(*Id.* at p. 852.) The Court ultimately concluded: "Kyle was undoubtedly qualified to testify about whether the stains were blood and about the blood typing of the stains. However, under Evidence Code section 720, he did not demonstrate special knowledge, skill, experience, training or education to testify as an expert on the particular subject of determining whether blood was deposited by flying drops or by surface-to-surface movement." (*Id.* at p. 853.)

An expert opinion has no value if its basis is unsound. (*People v. Lawley* (2002) 27 Cal.4th 102, 132.) "Matter that provides a reasonable basis for one opinion does not necessarily provide a reasonable basis for another opinion." (*Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564.) Under Evidence Code section 801, subdivision (b), courts must determine whether the matter upon which the expert relies is of a type that an expert reasonably can rely on "in forming an opinion upon the subject to which the testimony relates." Consequently, the matter relied on must provide a reasonable basis for the particular opinion offered. (*Ibid.*) In the present case, Dr. DiTraglia's opinion was based upon extrinsic factors rather than anatomic findings and, as a result, his testimony exceeded the scope of his expertise.

While Dr. DiTraglia may have been an expert in the area of forensic pathology qualified to render an opinion on cause of death and on whether certain anatomic findings are consistent with sexual assault, his opinions in this case were not limited to these areas and, thus, exceeded the scope of his training and experience. A forensic pathologist who has performed an autopsy is generally permitted to offer an expert opinion as to the cause and time of death and perhaps as to the circumstances under which the fatal injury could

or could not have been inflicted. (*People v. Mayfield* (1997) 14 Cal.4th 668, 766.) Dr. DiTraglia, however, was permitted to testify that, based upon extrinsic factors, he had concluded that Ms. Eddings had been raped and murdered, and that she had been raped and sodomized prior to death. This testimony was permitted over defense objection even though Dr. DiTraglia had no special knowledge, skill, experience, training or education in determining whether a sexual assault took place prior to or immediately after death.

Although Dr. DiTraglia indicated that his opinion was based in part on the fact that necrophilia was "exceedingly uncommon" (18 RT 1938-1939), he had no training or experience in the areas of psychology or psychiatry and had no special training with respect to necrophilia. Further, despite the fact that Dr. DiTraglia's opinion was based on "the circumstances at the scene" (18 RT 1953), he had no training or experience in criminology, was not qualified as a criminalist, and had received no training in crime scene reconstruction. Overall, the prosecution failed to establish the competency of Dr. DiTraglia to render an opinion as to whether a sexual assault occurred prior to or after death. Absent a proper foundation as Evidence Code section 720 requires, the trial court erred in permitting Dr. DiTraglia to offer his opinion as to whether Ms. Eddings was the victim of rape and sodomy prior to death.

E. THE OPINIONS RENDERED BY DR. DITRAGLIA WERE OF NO VALUE TO THE JURY AND, THUS, WERE NOT PROPER SUBJECTS OF EXPERT TESTIMONY.

In the absence of any specialized training or experience in distinguishing between cases of pre and post mortem sexual assault, and in the absence of any evidence of injury which would support a conclusion that a sexual assault had occurred prior to death, Dr. DiTraglia's conclusions amounted to nothing more than his personal opinion on the greater issues

before the jury. Rather than providing the jury with the benefit of any specialized knowledge, Dr. DiTraglia simply reviewed the prosecution's evidence and drew the conclusion the prosecution wanted the jurors to draw from this evidence — that Ms. Eddings had been raped and murdered, and that she had been raped and sodomized prior to her death. The trial court's ruling, thus, improperly permitted the prosecution to introduce Dr. DiTraglia's personal opinion on these matters into evidence in the guise of "expert" testimony.

Generally, a qualified expert may render an opinion on any subject "that is sufficiently beyond common experience that the opinion of the expert would assist the trier of fact." (Evid. Code, § 801.) Stated otherwise, "[a] witness is qualified to testify about a matter calling for an expert opinion if his particular skill, training, or experience enable him to form an opinion that will be useful to the jury." (*People v. Davis* (1965) 62 Cal.2d 791, 800.) In determining whether the expert opinion would be helpful to the trier of fact, courts consider: "whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*People v. Cole* (1956) 47 Cal.2d 99, 103; *People v. Harvey* (1991) 233 Cal.App.3d 1206, 1127.)

"'When [an expert] testifies to conclusions which even a lay jury can draw, the expert is no longer testifying "on a question of science, art, or trade" in which he is more skilled than the jury.' [Citation.] As Professor McCormick says: 'There is no necessity for such evidence, and to receive it would tend to suggest that the judge and jury may shift responsibility for

decision to the witnesses.' [Citation.]" (*People v. Arguello* (1966) 244 Cal.App.2d 413, 418-419; accord *People v. Page* (1991) 2 Cal.App.4th 161.)

In the present case, Dr. DiTraglia's conclusions were not based on any specialized skill or training rendering him an expert in determining whether a sexual assault took place prior to or after death under the circumstances of this case. Rather they were based upon a general evaluation of extrinsic evidence including the presence of a foreign object in the vagina, the presence of sperm in the rectum, the cause of death being blunt force trauma and strangulation, the circumstances of the scene including the position of victim's body, and appellant's statements to police. However, he was no more qualified than the jurors to examine this evidence and draw the conclusions he did. The trial court's ruling, in essence, permitted the prosecutor to put the inference she wished the jurors to draw from the evidence before them in the guise of expert testimony. The function of expert testimony is to provide the jury with the benefit of the expert's specialized knowledge without invading their province. (See e.g., *People v. Clay* (1964) 227 Cal.App.2d 87, 98-99 and cases cited therein; *People v. Brown* (1981) 116 Cal.App.3d 820, 828-829; *People v. Roscoe* (1985) 168 Cal.App.3d 1093, 1100.) Such was not the case here and the evidence should have been excluded on this basis.

F. THE EVIDENCE WAS MORE PREJUDICIAL THAN PROBATIVE AND SHOULD HAVE BEEN EXCLUDED UNDER EVIDENCE CODE SECTION 352.

Under Evidence Code section 352: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, or confusing the issues, or of misleading the jury." Although the trial court is vested with wide discretion under this section it is well established that "'judicial discretion is by no means

a power without rational bounds' [citation], and that the exercise of judicial discretion 'implies absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. . . .'" (*People v. Allen* (1977) 65 Cal.App.3d 426, 435.)

Evidence Code section 352 requires the trial judge to strike a careful balance between the probative value of proffered evidence and the danger of prejudice, confusion and undue time consumption. (*People v. Lavergne, supra,* 4 Cal.3d at p. 744.) "This balance is particularly delicate and critical where what is at stake is a criminal defendant's liberty." (*Ibid.*) Under section 352, the trial court's discretion must be exercised "'within the context of the fundamental rule that relevant evidence whose probative value is outweighed by its prejudicial effect should not be admitted.'" (*People v. Williams* (1970) 11 Cal.App.3d 970, 977.)

"The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues." (*People v. Yu* (1983) 143 Cal.App.3d 358, 377.) In this respect it is well recognized that improperly admitted scientific evidence has a unique potential for prejudice. Indeed "'[s]cientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury.'" (*People v. Kelly, supra,* 17 Cal.3d at p. 31.) This "aura of infallibility" is particularly difficult to refute. (*Ibid.*; *People v. McDonald* (1984) 37 Cal.3d 351, 372.) Here the prosecution presented Dr. DiTraglia to give an air of scientific respectability to the inference it wanted the jury to draw from the evidence. However, Dr. DiTraglia's conclusions were a matter of personal opinion rather than being based upon specialized training and experience, and he was no more qualified

to draw them than the average juror. The probative value of Dr. DiTraglia's personal opinions on the greater issues before the jury was virtually non-existent, while the potential for prejudice resulting from his testimony in this area was great. Under these circumstances the evidence should have been excluded as more prejudicial than probative under Evidence Code section 352.

G. THE TRIAL COURT'S ERROR ALSO VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS

Besides the state law violations set forth above, the error deprived appellant of his constitutional rights. State evidentiary rules create "a substantial and legitimate expectation" that a defendant will not be deprived of his life or liberty in violation of those rules. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) This expectation is protected against arbitrary deprivation under the Fourteenth Amendment. (*Ibid.*) Further, admission of evidence may violate the Due Process Clause of the Fourteenth Amendment when, as in this case, it is unduly prejudicial. (*Payne v. Tennessee*, *supra*, 501 U.S. 808, 825.) The error also violated appellant's right to due process under the Fourteenth Amendment, which protects the accused against conviction except upon proof by the State beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged by effectively lessening the prosecution's burden of proof. (See *In re Winship*, *supra*, 397 U.S. at p. 364.) Finally, appellant was deprived of his right to a reliable adjudication at all stages of a death penalty case. (See *Lockett v. Ohio*, *supra*, 438 U.S. at pp. 603-605; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *Penry v. Lynaugh* (1989) 492 U.S. 302, 328, abrogated on other grounds *Atkins v. Virginia*, *supra,* 536 U.S. 304.)

H. PREJUDICE

"Although defendant is not entitled to a completely errorless trial, he is entitled to a trial on 'relevant nonprejudicial evidence.'" (*People v. Slone* (1978) 76 Cal.App.3d 611, 633; accord *People v. Thompson* (1979) 98

Cal.App.3d 467, 482.) Because the error here is of federal as well as state constitutional dimension, violating as it does appellant's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution, as well as his right to a reliable adjudication at all stages of a death penalty case under the Eighth Amendment, prejudice must be evaluated under the reversible error standard set forth in *Chapman v. California*, *supra*, 386 U.S. 18. This test provides that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (*Yates v. Evatt*, *supra*, 500 U.S. at pp. 402-403, disapproved on other grounds in *Estelle v. McGuire*, *supra*, 502 U.S. at pp. 72-73, fn. 4; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) The burden is on the beneficiary of the error "either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." (*Chapman v. California*, *supra*, 386 U.S. at p. 24; see also *People v. Louis*, *supra*, 42 Cal.3d at pp. 993-994.)

Error in admitting the evidence is, therefore, deemed prejudicial unless the prosecution shows beyond a reasonable doubt the error did not affect the verdict. (*Arizona v. Fulminante*, *supra*, 499 U.S. 279; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1313; *People v. Cahill*, *supra*, 5 Cal.4th at p. 510; *People v. Sims*, *supra*, 5 Cal.4th at p. 447.) "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt*, *supra*, 500 U.S. at p. 403; see *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [the proper *Chapman* inquiry is whether the guilty verdict actually rendered in the trial at hand was surely unattributable to the error].)

Where federal constitutional error is not involved, the erroneous admission of other crimes evidence is prejudicial if it appears reasonably probable that a result more favorable to the defendant would have resulted had the prior crimes evidence not been admitted. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1195; *People v. Welch*, *supra*, 20 Cal.4th at p. 750; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Under *Watson*, probability does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility. (*College Hosp., Inc. v. Superior Court (Crowell)* (1994) 8 Cal.4th 704, 715.) In a close case, any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant. (*People v. Von Villas* (1992) 11 Cal.4th 175, 249 [quoting *People v. Zemavasky* (1942) 20 Cal.2d 56, 62].)

Here the danger that Dr. DiTraglia's improperly admitted "expert" testimony influenced the jury's verdict with respect to the murder charge was real since the central dispute involved appellant's intent, a matter not readily susceptible to proof. The defense theory of the case was that, in the face of what he perceived as an attack, appellant lashed out angrily at Ms. Eddings killing her, then sexually assaulted her after her death in an expression of rage. Under this theory appellant was not guilty of first degree murder under a felony-murder theory because he did not harbor the specific intent required for burglary, attempted rape or attempted sodomy and could not have committed rape or sodomy. Dr. DiTraglia's testimony that Ms. Eddings was raped and murdered, and raped and sodomized prior to death echoed the prosecution's theory of the case and negated appellant's defense. Because the trial court's ruling permitted the jury to abdicate its responsibility for determining these key issues of fact in favor of the prosecution's expert's opinion on the matter, the error cannot be regarded as harmless and reversal is required.

III.

THE TRIAL COURT ERRONEOUSLY EXCLUDED AN ENTIRE CATEGORY OF CRITICAL DEFENSE EVIDENCE, INCLUDING EXPERT TESTIMONY BY A QUALIFIED MENTAL HEALTH PROFESSIONAL AND EVIDENCE PERTAINING TO APPELLANT'S HISTORY OF MENTAL HEALTH COMMITMENTS, WHICH RELATED TO THE CENTRAL ISSUE TO BE DECIDED BY THE JURY— APPELLANT'S INTENT.

A. INTRODUCTION

In the present case, the trial court improperly excluded an entire category of defense evidence — evidence relating to appellant's psychological condition — by excluding the proposed testimony of a psychologist describing and explaining appellant's personality disorder and the effects of alcohol intoxication on him and by striking testimony relating to appellant's prior mental health commitments. The trial court's ruling was based upon an improper interpretation of Penal Code section 29 as prohibiting evidence relating to "diminished actuality or intent." (20 RT 2153.) Contrary to the trial court's ruling, the excluded defense evidence was relevant and admissible on issues relating to intent which were central to the controversy below.

The defense theory of the case was that, although appellant did not intend to harm Ms. Eddings when he went to her residence, in the face of what he perceived as an attack, he lashed out angrily at Ms. Eddings killing her, then sexually assaulted her body after death in an expression of rage. This defense, which would have precluded a first degree murder conviction by negating the necessary specific intent, was based upon appellant's testimony as well the testimony of expert witnesses.

Appellant testified that he had been drinking heavily the night of the incident (23 RT 2501-2502), and that he did not go to Ms. Eddings' house

intending to sexually assault her. (24 RT 2563-2564.) He explained what had happened that evening between himself and Ms. Eddings saying he had been holding an open can of beer when he knocked on Ms. Eddings' door. She let him in, then became angry he was drinking, knocked the can out of his hand, and began swinging at him. (23 RT 2502.) Appellant grabbed Ms. Eddings by the neck and choked her; she went limp and they fell to the ground. (24 RT 2567, 2574.) Appellant had both hands on Ms. Eddings' neck when they began to fall. Although he used one hand to try to stop their momentum, he was unsuccessful, and fell on top of her. (24 RT 2597-2598.) After they fell, she was not breathing or moving when he put his penis between her legs and "had sex" with her. (24 RT 2576.)

Appellant's testimony was consistent with earlier statements he made to police. During an interview which took place shortly after the incident, appellant eventually admitted that he and Ms. Eddings "got in a wrestling match" after she let him in. (17 CT 4807.) He said he was not sure what had happened, but he remembered Ms. Eddings threw up her arms and they fought. (17 CT 4810.) After the "fight" Ms. Eddings was motionless and appellant took her clothes off and "had sex" with her by putting his penis between her legs. He did not know whether penetration had occurred. (17 CT 4811, 4818.) Appellant repeatedly stated that he did not mean to harm Ms. Eddings, and that it would not have happened had he not been drinking. (17 RT 4808, 4817.)

Appellant's version of events was supported by the testimony of Dr. Barry Silverman, a medical expert in anatomic and clinical pathology. Dr. Silverman reviewed documents and photographs from the autopsy and testified about the injuries Ms. Eddings sustained. He also stated his opinion that Ms. Eddings' injuries were consistent with appellant's version of the incident. (22

RT 2293, 2478-2480.) In addition to Dr. Silverman, the defense had intended to call clinical psychologist Dr. Michael Kania to testify regarding appellant's personality disorder and the effects of alcohol on him. This testimony would have provided the jury with insight into appellant's thought processes, and would have explained why appellant might have reacted violently to Ms. Eddings as the result of little or no provocation even though he did not harbor any pre-existing intent to harm her.

In light of the importance of the evidence, the trial court's ruling was not only erroneous under state law, but also constituted a violation of appellant's constitutional rights to due process, to present a defense, and to heightened reliability in a capital case in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

B. BACKGROUND INFORMATION

Appellant sought to present the testimony of clinical psychologist Dr. Michael Kania in support of the defense theory of the case. As discussed more fully above, the defense theory was that appellant did not intend to harm Ms. Eddings when he went to her residence that evening. However, in the face of what he perceived as an attack, appellant lashed out angrily at her killing her, then sexually assaulted her body after death in an expression of rage. Dr. Kania's testimony, defining and explaining appellant's severe personality disorder, and the effects of alcohol intoxication on him, was critical to the defense case.

Dr. Kania interviewed appellant on numerous occasions and administered a battery of psychological tests. (32 RT 3565, 3568, 3582.) Based upon the interviews and the test results, he determined that appellant suffers from a severe personality disorder with paranoid and dependent features. He also diagnosed episodic alcohol abuse or dependence, and

concluded that alcohol is a significant factor in the impairment appellant suffers from. (RT 3484.) According to Dr. Kania, appellant harbors significant anger and resentment, particularly towards his mother because she did not protect him from his physically abusive father. He copes with anger, frustration, and hostility by not dealing with it, in other words by "putting a lid" on it. When appellant drinks, his inhibitions are lowered and he is unable to contain his anger. (32 RT 3585.) Dr. Kania's testimony on these subjects would have supported appellant's testimony as to the manner in which events transpired by providing an explanation for appellant's behavior, and would have assisted the jury in evaluating appellant's state of mind on the night of the incident.

In granting the prosecution's motion to exclude the testimony of Dr. Kania (17 CT 4837), the court directed "counsel's attention to the provisions of Penal Code section 29, which indicates that he cannot testify about diminished actuality or intent, knowledge, malice aforethought, or anything of that sort." (20 RT 2153.) During further discussion of the matter, defense counsel argued that Dr. Kania's testimony was relevant and admissible on the issue of intent, citing *People v. Saille* (1991) 54 Cal.3d 1103 for the proposition that "diminished actuality is not testimony that's prohibited under Penal Code section 29." (20 RT 2201-2202.) Counsel cited additional authority as follows: "I think . . . examples of specific mental states whose existence could be refuted by a proof of diminished actuality, malice aforethought, *People v. Cruz*, 26 Cal.3d 233; premeditation and deliberation, again, *People v. Cruz*, *In re Kemp*, 1 Cal.3d 190; intent to commit the underlying felony in a felony murder prosecution, *People v. Mosher*, 1 Cal.3d 379. These are all specific intent crimes. . . ." (20 RT 2202-2203.) The trial

court rejected counsel's argument and again ruled that Dr. Kania would not be permitted to testify. (20 RT 2210-2212.)

After all other defense witnesses had testified, appellant renewed his request to call Dr. Kania. The trial judge again denied the request setting forth his reasoning at length as follows:

> THE COURT: There has been evidence concerning the state of voluntary intoxication of the defendant on the 18th and perhaps carrying over to the 19th of June, 1996, both from the defendant's testimony and from the testimony of Mr. Donald Jones. There has been further testimony admitted by the Court over the objection of the People concerning the attitude of the victim in the case towards alcoholic beverages, her habits and customs relating to consumption of alcoholic beverages.
>
> During the examination of two defense witnesses, both the defendant and Miss Mina Jones, there was testimony that at some point in time during his adolescent years defendant was hospitalized implicitly but not explicitly for some mental health condition.
>
> The Court has before it a report from Dr. Kania. I would note that the report itself — at least on my recollection of the report — correct me if I'm wrong here, Mr. Cabrera — does not mention anything regarding prior psychiatric treatment of the defendant nor does it indicate that Dr. Kania has reviewed documents relating to that psychiatric treatment.
>
> In the second from the penultimate paragraph, Dr. Kania writes "Mr. William Jones suffers from a severe personality disorder and a significant drinking problem that results in a sudden change in his personality. This change is primarily the result of a weakening of his already weak controls. He lacks adequate psychological resources to deal with stressful situations, and alcohol only serves to weaken these taxed resources. Underlying this control is considerable anger and a dependency on other people. He has a feeling that his affectional needs have never been met, a profound sense of loneliness, and very low appraisal of himself and his abilities."
>
> Dr. Kania in his report does not offer a differential diagnosis of a mental disease or disorder, some diagnosis that might be found in the Diagnostic and Statistical Manual, Fourth Edition, of the American

> Psychiatric Association. Therefore, in the — based on the offer of proof, the Court will deny the motion on the part of the defense to reopen and call Dr. Kania.

(20 RT 2652-2653.) In excluding this relevant and admissible evidence, the trial court misinterpreted Penal Code section 29, and other related code sections abolishing the defense of diminished capacity, which do not prohibit expert testimony relevant to intent.

Finding that psychological evidence relating to the issue of intent was inadmissible, the trial court also struck evidence regarding appellant's prior mental health commitments, and instructed the jury as follows:

> One other thing, ladies and gentlemen, before we take our break. Yesterday during the defendant's testimony and during the testimony of witness Mina Jones, there was testimony concerning a hospitalization of the defendant during his adolescent years. There was an objection made at that point in time. I overruled that objection and allowed the testimony to be presented.
>
> On a motion of the People at this point in time, there's been a motion to strike on the grounds that the testimony is irrelevant to the issues in the case. I've granted that motion to strike, and you are admonished at this point in time to disregard that testimony concerning adolescent hospitalizations of the defendant as evidence in this case.

(25 RT 2681-2682)

The combined effect of these rulings by the trial court was to exclude an entire category of defense evidence on a key aspect of the case. Appellant was precluded from offering any psychological evidence relevant to the issue of intent while prosecution evidence relating to the issue was unfettered. The rulings had the effect of lessening the prosecution's burden of proof with respect to first degree murder. They were erroneous under state law, and constituted a violation of appellant's constitutional rights. The error was prejudicial and appellant's murder conviction must, accordingly, be reversed.

C. STANDARD OF REVIEW

Generally, a trial court exercises discretion when ruling on the admissibility of expert testimony, and the ruling is reviewed for abuse of discretion. (*People v. Mickey* (1991) 54 Cal.3d 612, 687-688 ; *People v. Bui* (2001) 86 Cal.App.4th 1187, 1196.) However, "'[t]o exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision.'" (*People v. Allen, supra*, 65 Cal.App.3d at p. 435.) Thus, "'all exercises of legal discretion must be grounded in reasoned judgment guided by legal principles and policies appropriate to the particular matter at issue.'" (*In re Adoption of Driscoll* (1969) 269 Cal.App.2d 735, 737.) "Because decision making, hence discretion, is largely a process of choosing alternatives, a mistake as to the alternatives open to the court affects the very foundation of the decisional process." (*Ibid.*) Judicial discretion can only truly be exercised if there is no misconception by the trial court as to the basis for its action. (*In re Carmaleta B.* (1978) 21 Cal.3d 482, 496.) Consequently, a decision "that transgresses the confines of the applicable principles of law is outside the scope of discretion" and is an abuse of discretion. (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297; see also *Penner v. County of Santa Barbara* (1995) 37 Cal.App.4th 1672, 1676 [legal conclusions are reviewed de novo] .)

Here the trial court misinterpreted code sections to require exclusion of otherwise relevant and admissible evidence. As a result, the rulings prohibiting the testimony of Dr. Kania, and striking evidence relating to appellant's mental health commitments, do not represent sound exercises of discretion entitled to deferential review for abuse. Instead they should be reviewed de novo.

D. THE PROPOSED TESTIMONY OF DR. KANIA, A QUALIFIED MENTAL HEALTH EXPERT, WAS RELEVANT AND ADMISSIBLE ON THE ISSUE OF INTENT.

Courts have recognized that expert evidence has become "increasingly important in modern litigation." (*Korshak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523.) "Unquestionably, expert witnesses can be very persuasive to jurors on topics unfamiliar to the layperson. [Citation.]" (*Ibid.*) Consequently, it may be prejudicial error to exclude relevant and material expert evidence where a proper foundation for it has been laid, and the proffered testimony is within the proper scope of expert opinion." (*Ibid.*) Such is the case here.

That Dr. Kania's credentials qualified him to testify on topics related to mental health was not in dispute. Generally, "[a] person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) Dr. Kania is a licensed clinical psychologist and former staff psychologist at Patton State Hospital. (32 RT 3562-3563.) On average he testifies 40 to 50 times per year as an expert witness. (32 RT 3564.) The trial court recognized he was qualified to testify about "mental disease or defect." (20 RT 2153.) Since Dr. Kania's credentials were not in question, the issue below was whether the subject matter of his proposed testimony was permissible.

Testimony by expert witnesses is ordinarily appropriate where the expert has knowledge and experience beyond that of ordinary jurors and could assist them to weigh the evidence more perceptively than they could unaided. (*People v. Carter* (1957) 48 Cal.2d 737, 750-751.) "Factual testimony by an expert is admissible if it complies with the general statutory requirements that the witness be 'qualified' by his special knowledge [citation] and that his

testimony be relevant to the issues [citation]." (*People v. McDonald*, *supra*, 37 Cal.3d at p. 366.)

In the present case, the excluded expert testimony was factual in nature and relevant to the issue of intent. Under the California Constitution "truth-in-evidence" provision, all relevant evidence is admissible in any criminal proceeding when not statutorily prohibited. (Cal. Const., art. I, sec. 28(d).) Relevant evidence is defined as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Evidence is relevant it if merely """"render[s] the desired inference more probable than it would be without the evidence."""" (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 787.) This definition encompasses all evidence which, no matter how weak, tends to prove any issue in a proceeding either directly or by reasonable inference. (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 347; *People v. Slocum* (1975) 52 Cal.App.3d 867, 891.)

Here, Dr. Kania would have explained appellant's personality disorder to the jurors and given them an understanding of the effects of alcohol on appellant's thought processes, reasoning ability, and behavior. Appellant testified that he did not intend to sexually assault or otherwise harm Ms. Eddings when he went to her trailer that night. Dr. Kania's testimony would have explained to the jurors why appellant might have reacted violently to even slight provocation by Ms. Eddings even though he had not intended to harm her. The evidence would have bolstered appellant's credibility and would have been helpful to the trier of fact on the issue of intent. Consequently, Dr. Kania's testimony was admissible as relevant and proper expert testimony. However, this Court has recognized that expert psychiatric

testimony may be limited by statute (*People v. San Nicolas* (2004) 34 Cal.4th 614, 662; *People v. Saille*, *supra*, 54 Cal.3d 1103, 1111), and the trial court ruled that Dr. Kania's proposed testimony was prohibited by Penal Code section 29. As discussed more fully below, the expert testimony here was not prohibited by statute.

E. STATE LAW DID NOT PERMIT THE EXCLUSION OF PSYCHOLOGICAL EVIDENCE RELEVANT TO SHOW THE ABSENCE OF THE REQUIRED MENS REA.

The trial court would not permit Dr. Kania to testify, reasoning that, under Penal Code section 29, "he cannot testify about diminished actuality or intent, malice aforethought, or anything of that sort." (20 RT 2153.) In so ruling, the court misinterpreted Penal Code sections abolishing the defense of diminished capacity and prohibiting an expert from offering an opinion on the ultimate issue to be determined by the jury — whether the defendant actually harbored the requisite intent. None of these sections prohibit expert testimony relating to psychological factors relevant to intent.

In 1981, "Sentate Bill No. 54 added to the Penal Code sections 28 and 29, which abolished diminished capacity and limited psychiatric testimony. It amended section 22 on the admissibility of evidence of voluntary intoxication, section 188 on the definition of malice aforethought, and section 189 on the definition of premeditation and deliberation." (*People v. Saille* (1991) 54 Cal.3d 1103, 1111 [footnote omitted].) "A provision abolishing the defense of diminished capacity was also included in the initiative measure adopted in June 1982 and known as Proposition 8." (*Id.* at p. 1112.) Penal Code section 25, subdivision (a), which was added by Proposition 8, states: "The defense of diminished capacity is hereby abolished. In a criminal action, . . . evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate *capacity*

to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged." (Pen. Code, § 25, subd. (a) [emphasis added].) This section has been found to be in keeping with and complimentary to the provisions enacted under Senate Bill 54 rather than to encompass a broader prohibition. (*People v. Rangel* (1992) 11 Cal.App.4th 291, 302; *People v. Saille*, *supra*, 54 Cal.3d at p. 1112.)

Even though the defense of diminished capacity has been eliminated, "diminished actuality" remains a viable concept. (*People v. Steele* (2002) 27 Cal.4th 1230, 1253; see also *People v. Coddington* (2000) 23 Cal.4th 529, 583, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Thus, while the Legislature "precluded jury consideration of mental disease, defect, or disorder as evidence of a defendant's *capacity* to form a requisite criminal intent, . . . it did not preclude jury consideration of mental condition in deciding whether a defendant actually formed the requisite criminal intent." (*People v. Williams* (1997) 16 Cal.4th 635, 677 [emphasis added].) Nor did it preclude consideration of voluntary intoxication with respect to specific intent. (See Pen. Code, §22, subd. (b) ["Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent . . . ."]; *People v. Martin* (2000) 78 Cal.App.4th 1107, 1113 [holding that evidence of voluntary intoxication is admissible with respect to the actual formation of a required specific intent."]; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1125 [holding that the broader statutory revision abolished the defense of diminished capacity "while preserving the relevance of voluntary intoxication to the question whether the defendant *actually* had the necessary mental state for the charged offense."] [emphasis in original]; *People v. Whitfield* (1994) 7 Cal.4th 437, 447 [holding "while the Legislature, in conformity with its abolition of

the concept of diminished capacity, rendered evidence of voluntary intoxication inadmissible to negate the defendant's capacity to form any mental state . . . it at the same time explicitly retained the existing rule that evidence of voluntary intoxication was admissible with regard to whether a defendant actually harbored" the required intent.].)

Although evidence of voluntary intoxication and/or mental disorders may no longer be used as an affirmative defense to a crime, such evidence is admissible to negate an element of the crime which must be proven by the prosecution. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 982.) The expert testimony of a forensic psychiatrist or psychologist which is addressed not to the defendant's mental capacity but rather to the issue of his actual intent is, therefore, relevant and admissible. (*People v. Saille*, *supra*, 54 Cal.3d at p. 1115.)

In ruling that Dr. Kania would not be permitted to testify, the trial court directed counsel's "attention to the provisions of Penal Code section 29, which indicates that he cannot testify about diminished actuality or intent, knowledge, malice aforethought or anything of that sort." (20 RT 2153.) However, the section referred to by the court does not so broadly prohibit expert testimony. Specifically, this provision states:

> In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.

This statute only prohibits "expert witness from directly stating their conclusions regarding whether a defendant possessed a required mental state."

(*People v. San Nicolas*, *supra*, 34 Cal.4th at p. 662.) However, the trial court read the section too broadly as prohibiting all testimony related to intent.

In *People v. Coddington*, *supra*, 23 Cal.4th 529, this Court determined that a trial court ruling overly restricting the expert testimony of a psychiatrist which was relevant to the issue of intent was error. The opinion describes the proffered evidence and trial court ruling as follows:

> In advance of the guilt phase trial session at which appellant planned to offer psychiatric testimony, the court and counsel discussed the scope of the mental state evidence that would be admitted. Appellant conceded that no evidence of "diminished capacity" was admissible, but sought a ruling that the expert would be permitted to testify regarding "diminished actuality." The court ruled that the defense could offer any relevant evidence on mental defect or disease. However, no questions could be asked of the expert by either appellant or the People about whether or how such defect or disease would affect the defendant's mental state or actuality, or if it would impair his ability to form an intent, deliberate, or premeditate, unless the psychiatrist would testify, out of the presence of the jury, that he believed that appellant did not premeditate and deliberate the killings. The court extended that ruling to preclude any hypothetical questions regarding the effect of mental defect or illness on a person's ability to deliberate or premeditate. Appellant then offered no evidence of mental illness at the guilt phase. He now claims that the court erred.

(*Id.* at pp. 581-582.) This Court determined that "[t]he ruling was an overly restrictive reading of the statutory limitations on admission of evidence of mental illness." (*Id.* at p. 582.) More specifically the Court found that: "[s]ections 28 and 29 permit introduction of evidence of mental illness when relevant to whether a defendant actually formed a mental state that is an element of a charged offense, but do not permit an expert to offer an opinion on whether a defendant had the mental capacity to form a specific mental state or whether the defendant actually harbored such a mental state. An expert's

opinion that a form of mental illness can lead to impulsive behavior is relevant to the existence *vel non* of the mental states of premeditation and deliberation regardless of whether the expert believed appellant actually harbored those mental states at the time of the killing." (*Id.* at pp. 582-583 [footnotes omitted].) Although the trial court erred, the issue was not properly preserved because "appellant was free to offer evidence that he suffered from a mental disease or defect as well as evidence about that disease or defect. Had the evidence he introduced at the sanity phase about his mental illness offered a basis from which the jury could infer that he did not premeditate or deliberate the murders, that evidence could have been introduced at the guilt phase. Inasmuch as he failed to offer any such evidence at the guilt phase and the record does not reflect that this failure was due to the court's ruling, the issue is not properly preserved or presented." (*Id.* at pp. 583-584.) The Court made clear, however, that "[s]ections 28 and 29 do not preclude offering as a defense the absence of a mental state that is an element of a charged offense or presenting evidence in support of that defense." (*Id.* at p. 583.) The trial court's ruling to the contrary in this case was erroneous.

Because Dr. Kania had not diagnosed a mental illness such as paranoid schizophrenia, the trial court erroneously concluded he had no relevant information and would not permit him to provide the jurors with information regarding appellant's personalty disorder. In this regard the court stated:

> Normally, what I would expect from a forensic alienist is for that person to testify, for example, obviously not in this case but defendant Smith was examined on such and such a day on October 1st 1997, and upon my examination I determined that he suffered from the following mental disease or defect, paranoid schizophrenia — and I have the following opinion as to whether or not he was suffering from that disease on June 19th, 1996. My opinion is that, yes, he was suffering from that disease on that day, in my opinion. And the effect of that disease on a person and his ability to think is X, Y, and Z.

(20 RT 2211.) However, for purposes of proving intent there is no principled distinction between a mental illness such as schizophrenia and a personality disorder such as Dr. Kania had diagnosed. Consequently, if the trial court believed expert testimony regarding schizophrenia was admissible, there was no rational basis for excluding Dr. Kania's testimony regarding appellant's personality disorder.

The court also improperly concluded that an expert on mental health could not testify about the effects of voluntary intoxication on a defendant's thought processes indicating that "[v]oluntary intoxication is one thing, mental disease or defect is another." (20 RT 2211.) However, the two areas are not factually or legally separate. Indeed, mental incapacitation has been construed to include such things as voluntary intoxication. (*People v. Rangel*, *supra*, 11 Cal.App.4th at p. 302; *People v. Spurlin* (1984) 156 Cal.App.3d 119, 127.) Further, the Proposition 8 provision abolishing the defense of diminished capacity refers to "evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect . . . ." (Pen. Code, § 25, subd. (a).) Clearly the two areas are interrelated with respect to issues of intent, and there is no prohibition against expert testimony explaining the factual basis of the relationship to jurors.

The trial court erred in precluding Dr. Kania from testifying regarding appellant's personality disorder and the effects of alcohol on him. Since sections 28 and 29 did not prohibit the proposed testimony, the trial court erred in excluding it. Further, in light of the importance of the evidence, the error was of federal constitutional dimension.

F. THE RULING VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH , AND FOURTEENTH AMENDMENTS.

A criminal defendant has a federal constitutional right, grounded in the due process clause, to present a defense and to present relevant, exculpatory evidence in his behalf. (U.S. Const., Amends. VI and XIV; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Webb v. Texas* (1972) 409 U.S. 95, 98; *People v. Ansbro* (1984) 153 Cal.App.3d 275, 277; *People v. Mizchele* (1983) 142 Cal.App.3d 686, 691.) In addition, the Sixth Amendment guarantees a defendant the right to present witnesses in his defense and to confront the witnesses against him. (U.S. Const., Amend. VI.) Finally, under the Eighth Amendment a defendant has a right to a reliable adjudication at all stages of a death penalty case. (See *Lockett v. Ohio*, *supra,438* U.S. at pp. 603-605; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

As stated in *Crane v. Kentucky* (1986) 476 U.S. 683, there is a constitutional right to a fair opportunity to present a defense and the defendant has "the basic right to have the prosecution encounter and survive the crucible of meaningful adversarial testing." (*Id.* at page 645; see also *Mullaney v. Wilbur* (1975) 421 U.S. 684, 702-704 [Due process guarantees the defendant the right to require the prosecution to prove every element necessary to sustain the conviction for the charged offense].) The right to present a defense, including the right to offer the testimony of witnesses, is a fundamental element of due process. (*People v. Jones* (1998) 17 Cal.4th 279, 304; *Taylor v. Illinois* (1988) 484 U.S. 400, 408; *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 302; *Washington v. Texas* (1967) 388 U.S. 14, 19.)

A criminal defendant also had a due process right to the assistance of expert witnesses, including the right to consult with a psychiatrist or psychologist if necessary to prepare his defense. (*Ake v. Oklahoma* (1985) 470 U.S. 68, 83.) The Sixth Amendment right to counsel also includes the

right to ancillary experts. (*Doe v. Superior Court* (1995) 39 Cal.App.4th 538, 543; *People v. Worthy* (1980) 109 Cal.App.3d 514, 519; *In re Ketchel* (1968) 68 Cal.2d 397, 399 ["cases have held that the right to an effective counsel at trial includes not only the personal advice and service of counsel but also the aid and advice of experts whom counsel deems useful to the defense and, in particular, the services of a psychiatrist."]; *Ex Parte Ochse* (1951) 38 Cal.2d 230, 231 ["A fundamental part of the constitutional right of an accused to be represented by counsel is that his attorney must be afforded reasonable opportunity to prepare for trial. . . . To make such right effective, counsel is obviously entitled to the aid of such expert assistance as he may need . . . in preparing the defense."].) The Sixth and Fourteenth Amendments also guarantee a defendant's right to present the testimony of these expert witnesses at trial. (*People v. San Nicolas*, *supra*, 34 Cal.4th at p. 662; *Doe v. Superior Court*, *supra*, 39 Cal.App.4th at p. 543; see also *People v. Valdez* (1986) 177 Cal.App.3d 680, 703, Franson, J., dissenting ["Trial and appellate judges should be extremely sensitive to defendants' Sixth Amendment right to call witnesses in their defense; this is the essence of our criminal justice system."].)

Although this Court has held that the exclusion of defense evidence on a minor or subsidiary point does not interfere with an accused's right to due process, the complete exclusion of evidence intended to establish a defense may impair that constitutional right. (*People v. Cunningham* (2001) 25 Cal.4th 926, 999; *People v. Fudge* (1994) 7 Cal.4th 1075, 1103; *People v. Hawthorne* (1992) 4 Cal.4th 43, 58.) The Court has also recognized a defendant's "due process right to a fair trial and the right to present all relevant evidence of significant probative value to his or her defense." (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 999.) Here the trial court erroneously

excluded an entire class of evidence which was critical to the jury's understanding of appellant's case and, thus, deprived appellant of his due process right to present a defense.

Under different circumstances this Court has found either no constitutional error or has determined that any error was harmless. For example, in *People v. Breaux* (1991) 1 Cal.4th 281, the trial court would not permit the testimony of a defense expert as to whether the defendant had premeditated and deliberated at the time of the killing, indicating section 29 precluded such testimony. On appeal the Court found no interference with the defendant's rights to present a defense and to due process, noting that the expert did testify "about the symptoms of psychosis due to cocaine and stated that defendant had those symptoms; he described the disorganizing effects of defendant's cocaine use and sleep deprivation and the resulting paranoia, explosiveness, and anger. He testified fully as to his opinion of defendant's condition before and at the time of the murder. He stated that defendant's mental state was inconsistent with premeditation. He opined that defendant could not and did not premeditate the shooting. In his opinion, defendant shot the victim while in an 'enraged' state, and the doctor equated rage with lack of intent." (*Id.* at p. 303.) In light of the expert's extensive testimony, and the fact that the defendant pointed "to no evidence that was excluded by the court's ruling," this Court concluded "that there was no interference with defendant's rights to present a defense and to due process in the court's ruling on the psychiatrist's testimony." (*Ibid.*)

Similarly, in *People v. San Nicolas*, *supra*, 34 Cal.4th 614, no error was found where:

> The [trial] court . . . allowed . . . expert opinion testimony on defendant's personality characteristics, whether defendant formed or acquired the relevant mental states, and his review of

> all available information on defendant. This testimony included the effects of alcohol on the central nervous system, defendant's general personality and makeup, defendant's mental condition on the date of the killings, and evidence from psychological tests that were administered to defendant. But the trial court excluded Dr. Vicary's testimony on spillover rage that related to whether defendant actually had the requisite mental state, testimony on general brain physiology that dealt with capacity to form a mental state, and testimony on neurotransmitters and those elements of spillover that amounted to capacity evidence. The court concluded that such testimony fell within the direct purview of section 28's prohibition of a defense of diminished capacity and section 29's prohibition of expert testimony on whether the defendant had the required mental state. The trial court also excluded Dr. Vicary's observations regarding defendant's mental condition during their interviews together.

(*Id.* at pp. 662-663.) In light of the limited nature of the trial court's ruling, this Court found no error, and also stated that any error was harmless beyond a reasonable doubt. (*Id.* at pp. 664.)

The present case differs markedly from *San Nicolas* and *Breaux* in that here the trial court completely excluded this category of evidence. In fact the evidence *excluded* by the trial court here was virtually identical to the evidence *admitted* by the trial court in *San Nicolas*. In the present case the court did not simply preclude the expert from offering an opinion on the ultimate question as to whether appellant harbored the requisite intent, but instead excluded the expert testimony in its entirety and prohibited appellant from even calling his witness to the stand. Further the court struck the only other defense evidence relating to appellant's psychological condition, thus precluding counsel from even arguing to the jury against a finding of intent based upon psychological factors. Under these circumstances the error violated appellant's constitutional rights and cannot be regarded as harmless.

G. THE ERORRS REQUIRE REVERSAL

The trial court's exclusion of all defense evidence relating to appellant's personality disorder, the effects of alcohol on him, and his prior mental health commitments was profoundly prejudicial because it interfered with appellant's ability to present a critical component of his defense. Under such circumstances the error is of federal constitutional magnitude, and reversal is required under *Chapman v. California*, *supra*, 386 U.S. 18, unless the prosecution can demonstrate the error was harmless beyond a reasonable doubt. (*People v. Carrera* (1989) 49 Cal.3d 291, 313.) The proper inquiry under this standard of review is whether the guilty verdict actually rendered at trial was surely unattributable to the error. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.) "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question." (*Yates v. Evatt*, *supra*, 500 U.S. at p. 403.)

Even if the error were to be tested in accordance with the standard of prejudice otherwise applicable to the exclusion of relevant expert testimony, the error would require reversal because it was at least reasonably probable the error affected the outcome. (See *People v. McDonald*, *supra*, 37 Cal.3d at p. 376 [applying standard set forth in *People v. Watson*, *supra*, 46 Cal.2d at p. 836].) In *People v. McDonald*, *supra*, the trial court erroneously excluded expert psychological testimony regarding the unreliability of eyewitness identification. This Court held that the error required reversal because the trial court's ruling was "crucial," i.e., it "undercut the evidentiary basis of defendant's main line of defense" and "impair[ed] the jury's determination of an issue that [was] both critical and closely balanced . . . ." (37 Cal.3d at p. 376.) In the present case the trial court's error in excluding the proposed

expert testimony also "undercut the evidentiary basis" of appellant's "main line of defense" and impaired the jury's determination of the most critical issues in the case.

Although the trial court admitted evidence of appellant's intoxication the night of the incident, and provided the jury with instructions relating to intoxication (6th Supp CT 26 [CALJIC No. 4.21.1]), the jury was deprived of expert testimony explaining appellant's personalty disorder and the effect alcohol has on him. Because the psychological evidence would have provided the jury with information regarding the magnified effect alcohol has on someone with appellant's personalty disorder, and on appellant in particular, in the absence of any psychological evidence, the defense case was significantly diminished. The evidence of intoxication could not be considered in context and properly related to the element of intent, and, therefore, may not have been viewed as persuasive. As discussed at length above, the primary issue to be resolved by the jurors with respect to the first degree murder charge was intent. The prosecution's case against appellant was weak on this issue and encouraged jurors to speculate as to appellant's intent based upon dissimilar prior conduct. The trial court's error eliminated an entire category of defense evidence related to intent and profoundly weakened appellant's case.

In light of the importance of the excluded evidence, it is reasonably possible under *Chapman*, and reasonably probable under *Watson*, that if the evidence had been presented a reasonable doubt would have arisen in the mind of at least one juror as to the whether appellant reacted out of rage attributable to his personality disorder and intoxication or whether he instead acted based upon his preconceived specific intent to commit a sexual assault. Under these

circumstances the error cannot be regarded as harmless, and appellant's murder conviction must be reversed.

IV.

THE ABSTRACT OF JUDGMENT MUST BE CORRECTED TO ACCURATELY REFLECT THE SENTENCE IMPOSED BY THE TRIAL COURT ON COUNT 2.

On February 8, the trial court imposed a sentence of 25 years to life, pursuant to the Three Strikes Law, on Count 2 charging appellant with arson, and added a five year term for the prior serious felony conviction under Penal Code section 667, subdivision (a). In this regard the court stated: "The indeterminate term, therefore, under Count II is 25 years to life with an additional determinate term of five years pursuant to 667(a)." (35 RT 3961.) The minutes of the court accurately reflect the sentence imposed by the court. (CT 5149.) However, the sentence is not accurately recorded in the Abstract of Judgment.

Three abstracts of judgment are included in the clerk's transcript. All three contain the same error. The abstract of judgment filed February 16, 1999, states: "The court imposes under Count 2 the sentence of 25 years to life imprisonment[.] Total state prison 8 yrs plus 25 yrs to life." CT 5157.) A second abstract of judgment included in the clerk's transcript states: "Count 2 imposes 8 years. The court imposes under Count 2 the sentence to 25 years to life. Total state prison 8 yrs + 25 yrs to life." (CT 5160.) A third "Amended" abstract of judgment filed on February 24, 1999, states: "Count 2 imposes 8 years. The Court imposes under Count 2 the sentence to 25 years to life purs to 667(c)&(e). Total state prison 8 yrs + 25 yrs to life." (CT 5163.) The abstract of judgment does not accurately record the sentence of 25

years to life plus five years imposed by the trial court and must, therefore be corrected.

The judge's oral pronouncement is the actual judgment (see *People v. Thomas* (1959) 52 Cal.2d 521, 529, fn. 3; *In re Bateman* (1928) 94 Cal.App. 639, 641), and the abstract, by its very nature, definition and terms, is not the judgment (see Pen. Code, §§ 1213, 1213.5). (See *People v. Hong* (1998) 64 Cal.App.4th 1071, 1075-1076.) Consequently, the abstract cannot add to or modify the judgment which it purports to summarize or digest. (*People v. Mesa* (1975) 14 Cal.3d 466, 471-472; *People v. Williams* (1980) 103 Cal.App.3d 507, 517-518.)

"A court has inherent power to correct clerical errors to make court records reflect the true facts. This power exists independent of statute and may be exercised in criminal cases. The court may correct such errors on its own motion or on application of the parties." (*People v. Jack* (1981) 213 Cal.App.3d 913, 915; accord *People v. McGee* (1991) 232 Cal.App.3d 620, 624.) Consequently, "if the minutes or abstract of judgment fails to reflect the judgment pronounced by the court, the error is clerical and the record can be corrected at any time to make it reflect the true facts." (*People v. Little* (1993) 19 Cal.App.4th 449, 452; see also *In re Candelario* (1970) 3 Cal.3d 702, 705; *Bogart v. Superior Court* (1964) 230 Cal.App.2d 874 [minute entry corrected based upon reporter's transcript of oral proceedings]; *People v. Flores* (1960) 177 Cal.App.2d 610, 612-613 [abstract of judgment properly corrected by trial court to accurately reflect oral pronouncement of judgment].)

"Abstracts of judgment in matters imposing imprisonment in state prison are orders sending the defendant to prison and imposing the duty upon the warden to carry out the judgment. (*People v. Hong, supra*, 64 Cal.App.4th at p. 1076.) The Department of Corrections is bound by the abstract of

judgment submitted to it until a court corrects the abstract. (*In re Sandel* (1966) 64 Cal.2d 412, 418-419.) In the present case the abstract must be corrected to reflect the actual judgment imposed by the court.

ERRORS UNDERLYING THE PENALTY PHASE

Jury Selection Issues

I.

THE TRIAL COURT'S EXCLUSION OF QUALIFIED JURORS, AND INCONSISTENT APPLICATION OF THE *WAINWRIGHT V. WITT*[11] STANDARD FOR EXCLUSION WHICH UNFAIRLY FAVORED THE PROSECUTION, VIOLATED APPELLANT'S RIGHTS TO A FAIR AND IMPARTIAL JURY, TO DUE PROCESS OF LAW, AND TO A RELIABLE PENALTY DETERMINATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. INTRODUCTION

The trial court excused two prospective jurors for cause who voiced reservations about capital punishment, but who also stated they would follow the court's instructions and could impose the death penalty if they found the circumstances warranted it. Nothing in the questionnaires completed by these individuals, or in their responses during voir dire, demonstrated that their opinions regarding capital punishment would interfere with the performance of their duties as jurors. The improper exclusion of either of these prospective jurors for cause requires reversal of appellant's death sentence.

The court also refused to excuse five prospective jurors who stated that they would automatically vote to impose the death penalty if the charged crimes and special circumstance allegations were proven. Considering these rulings in the context of the entire voir dire proceedings demonstrates that the trial court's application of the *Wainwright v. Witt* standard for exclusion was inconsistent and unfairly favored the prosecution. As a consequence, while the defense was required to utilize peremptory challenges to remove potential

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[11] *Wainwright v. Witt* (1985) 469 U.S. 412.

jurors who would automatically vote in favor of the death penalty and should have been excused for cause, the trial court's ruling excluding otherwise qualified jurors with reservations against the death penalty afforded the prosecution the opportunity to exercise peremptory challenges to remove any remaining potential jurors with misgivings about capital punishment. As a combined consequence of the trial court's uneven application of the *Witt* standard, and the prosecutor's use of peremptory challenges, all of the prospective jurors who expressed strong opposition to, or conscientious scruples against, the death penalty were excluded from the jury. A death sentence imposed by such a jury cannot be executed without violating the United States Constitution, and the judgment must be reversed for this additional reason.

B. GENERAL LEGAL PRINCIPLES

An accused's right to a fair and impartial jury drawn from a representative cross-section of the community is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as article I, section 16, of the California Constitution. (*Morgan v. Illinois* (1992) 504 U.S. 719, 727; *People v. Fauber* (1992) 2 Cal.4th 792, 816.) In capital cases, if the state has excluded from the jury members of the community with any reservations about capital punishment, the sentencing body is not impartial. "[T]he decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 521-522, fn. 20.) When those opposed to capital punishment are excluded from the venire, the State "crosse[s] the line of neutrality," "produce[s] a jury uncommonly willing to condemn a man to die," and violates the Sixth and Fourteenth Amendments. (*Id.* at pp. 520-521.) "[A] sentence of death cannot be carried out if the jury imposing or recommending it was

chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Id.* at p. 522, fn. omitted.)

As a consequence of these principles, in *Witherspoon v. Illinois*, *supra*, the United States Supreme Court held that a prospective juror cannot be excused for cause based on his or her views on capital punishment without violating a defendant's right to an impartial jury under the Sixth Amendment, unless the prospective juror has made it "unmistakably clear" that he or she would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case . . . ." (391 U.S. at p. 522, fn. 21.) Revisiting the issues 18 years later in *Wainwright v. Witt*, *supra*, the Court reaffirmed the fundamental principles underlying the *Witherspoon* decision and clarified the test for determining when a juror may be excluded for cause. The Court made clear that a prospective juror may be excused for cause based upon his or her views on the death penalty if the juror's answers convey a "definite impression" that his views "would 'prevent or substantially impair' the performance of his duties as a juror in accordance with his instructions and his oath." (469 U.S. at p. 424, 426 [adopting the test applied in *Adams v. Texas* (1980) 448 U.S. 38, 45].)

In *People v. Ghent* (1987) 43 Cal.3d 739, 767, this court adopted the *Witt* standard as determinative of whether a defendant's right to an impartial jury under article I, section 16 of the state Constitution has been violated by an excusal for cause based upon a prospective juror's views on capital punishment. (See also, *People v. Stewart* (2004) 33 Cal.4th 425, 440-441; *People v. Heard* (2003) 31 Cal.4th 946, 963; *People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Mincey* (1992) 2 Cal.4th 408, 456.) Under this

standard, "[a] prospective juror is properly excluded [only] if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate.' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 974; accord *People v. Heard*, *supra*, 31 Cal.4th at p. 958.) "The real question is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror." (*People v. Heard*, *supra*, 31 Cal.4th at pp. 958-959 [internal quotation marks omitted, quoting from *People v. Ochoa* (2001) 26 Cal.4th 398, 431, *People v. Bradford*, *supra*, 15 Cal.4th at p. 1318, and *People v. Hill* (1992) 3 Cal.4th 959, 1003].) "'Because the qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty (*Morgan v. Illinois*, *supra*, 504 U.S. at pp. 726-728), it is equally true that the 'real question' is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror.' (*People v. Cash* (2002) 28 Cal.4th 703, 719-720.)" (*People v. Heard*, *supra*, 31 Cal.4th at p. 959.)

The moving party bears "the burden of demonstrating to the trial court that the [*Witt*] standard [is] satisfied as to each of the challenged jurors." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 445.) "As with any other trial situation where an adversary wishes to exclude a juror because of bias, . . . it is the adversary seeking exclusion who must demonstrate through questioning that the potential juror lacks impartiality . . . . It is then the trial judge's duty to determine whether the challenge is proper." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 423.) The court's ruling ordinarily is entitled to deference and will be upheld on appeal if supported by substantial evidence. (*Wainwright v. Witt*, *supra*, 469 U. S. at pp. 426-430; *People v. Stewart*, *supra*, 33 Cal.4th

at p. 451; *People v. Heard, supra*, 31 Cal.4th at p. 965; *People v. Memro* (1995) 11 Cal.4th 786, 817-818.) "Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. [Citation]." (*People v. Weaver* (2001) 26 Cal.4th 876, 910; see also *Wainwright v. Witt, supra*, 469 U.S. at p. 429.)

Of course, judicial discretion "implies absence of arbitrary determination, [and] capricious disposition," and must be "free from partiality." (*People v. Surplice* (1962) 203 Cal.App.2d 784, 791.) Discretion is "neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice." (*People v. Warner* (1978) 20 Cal.3d 678, 683.) Furthermore, "a trial court's broad discretion in the conduct of voir dire is nevertheless 'subject to essential demands of fairness.' [Citations.] 'At stake is [Petitioner's] right guaranteed by the Sixth Amendment to an impartial jury; the principal way this right is implemented is through the system of challenges exercised during the voir dire of prospective jurors.' [Citations.]" (*Hughes v. United States* (6th Cir. 2001) 258 F.3d 453, 457.)

Hence, a trial court must apply the *Witt* standard in an even-handed and impartial manner. (Cf. *People v. Champion* (1995) 9 Cal.4th 879, 908-909 [holding that "trial courts should be evenhanded in their questions to prospective jurors during the 'death qualification' portion of the voir dire . . . ."].) A court's application of the *Witt* standard in an arbitrary, capricious, or partial manner does not comport with the essence of fairness guaranteed by due process of law. (Cf. *Gray v. Klauser* (9th Cir. 2001) 282 F.3d 633, 645-648, 651 [and authorities cited therein, holding that a trial court's unjustified or uneven application of legal standard in a way that favors the prosecution

over the defense violates due process].) At a minimum uneven rulings amount to an abuse of discretion, which are not entitled to deference.

Applying the foregoing principles to this case, it is clear that the trial court erroneously excluded qualified jurors merely because they expressed reservations about the death penalty, erroneously refused to exclude disqualified jurors who would automatically vote for the death penalty, and otherwise applied the *Witt* standard in an arbitrary, capricious, and partial manner. Since the improper exclusion of even a single qualified juror for cause under the standards set forth above is reversible per se (*Gray v. Mississippi* (1987) 481 U.S. 648, 666-668; *Davis v. Georgia* (1976) 429 U.S. 122; *People v. Heard*, *supra*, 31 Cal.4th at pp. 965-966), the penalty judgment must be reversed. Furthermore, because the trial court's rulings produced "a jury uncommonly willing to condemn a man to die" in violation of the Sixth and Fourteenth Amendments, the judgment of death can not be executed.

C. THE EXCLUSION OF TWO PROSPECTIVE JURORS FOR CAUSE WAS UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND REQUIRES REVERSAL OF THE DEATH SENTENCE.

"Decisions of the United States Supreme Court and of this court make it clear that a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case . . . ." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 446.) In *Lockhart v. McCree* (1986) 476 U.S. 162, the high court held that "[n]ot all those 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 clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Id.* at p. 176.) Similarly this court has stated: "[a] prospective juror personally opposed to the death penalty may nonetheless be capable of

following his oath and the law. A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict." (*People v. Kaurish* (1990) 52 Cal.3d 648, 699.)

The trial court's ruling regarding the prospective juror's views must be supported by substantial evidence. (*People v. Griffin* (2004) 33 Cal.4th 536, 558.) On appeal, courts must examine the context in which the trial court ruled on the challenge in order to determine whether the trial court's decision that the juror's beliefs would or would not "'substantially impair the performance of [the juror's] duties' fairly is supported by the record." (*People v. Crittenden, supra*, 9 Cal.4th at p. 122.)

Here, as discussed more fully below, the exclusion for cause of two prospective jurors, Ms. Brown and Mr. Lee, was not supported by substantial evidence.

1. ***Prospective Juror Brown***

The prosecutor challenged prospective juror Brown for cause on the following basis: ". . . particularly Miss Brown who indicated in response to both the Court's question and mine that she could not tell us that she could consider the death penalty. And she was very adamant about that that she has more convictions and she truthfully could not say that she could consider the death penalty, and she found herself in that position where based on the evidence a death verdict was appropriate." (12 RT 1078.) The Court granted the request and excused Ms. Brown for cause over defense objection, reasoning as follows: ". . . Miss Brown's statements both in response to the questionnaire where she indicated that she doesn't feel the death penalty is the

appropriate action against any person, ["]I do believe that in punishment where the — where the individual lives with the consequences of their action, for example, a prison term ["] — her responses to the questioning that was done I think are more in line with the responses in the *Holt* case of juror Jerry Richards. [¶] The Court's evaluation of her responses is that although saying ultimately at the end she didn't know what she would do, everything else about her answers and her body language made it unmistakably clear that she had a position in this case with regard to the ultimate punishment. And she did not appear to the court to be open to the possibility of considering equally, based on the evidence, the two possible alternative punishments in this matter." (12 RT 1080-1081.) The record, however, does not support these findings.

a. Prospective Juror Brown's Responses to the Jury Questionnaire and on Voir Dire.

The questionnaire asked prospective jurors whether because of their views on the death penalty they would automatically refuse to vote in favor of the death penalty and automatically vote for life without parole "without considering any of the evidence concerning any aggravating and/or mitigating factors." Ms. Brown answered "No" to this question. (8 CT 2053.) She stated that she could not think of any reason she could not be a fair and impartial juror. (8 CT 2055.) Asked to rate her feelings about the death penalty on a scale from 1 to 10 — with 10 being strongly in favor of the death penalty, 5 having no opinion, and 1 being strongly against it. Ms. Brown rated herself at 1. (8 CT 2051.) She described her general thoughts and/or feelings about the death penalty as: "I don't feel the death penalty is the appropriate action to take against a person. I do believe in punishment when the individual lives with the consequences of their actions for example prison term." (*Ibid.*) As to her general thoughts or feelings about life imprisonment without the

possibility of parole, Ms. Brown wrote: "As mentioned above I believe this is a[n] appropriate punishment for someone who has committed a crime." (*Ibid.*) Asked which of the two penalties was the more severe punishment Ms. Brown stated: "Death is more severe because it ends a person's life without he/she living with their wrong and mistakes for example prison term." (8 CT 2055.)

When initially questioned by the court as to whether she would be able to consider the death penalty in this case, Ms. Brown indicated she was unsure. The court asked whether she would "automatically vote for life imprisonment regardless of the evidence" and she replied that it was "hard to say." (11 RT 974-975.) After several other prospective jurors were questioned by the court and counsel, during which time the duties and obligations of jurors in determining penalty were explained to the panel in some detail, Ms. Brown was questioned by the prosecutor as follows:

> MS. ERICKSON: Miss Brown, the judge asked you some questions about your response to the questionnaire concerning the death penalty, and you indicated, I believe — it's hard to say if you would reject the death penalty or not. Is that your feeling right now, ma'am?
>
> PROSPECTIVE JUROR BROWN: It's hard to say if I would reject it or not?
>
> MS. ERICKSON: Correct. He asked you because of your beliefs, because of your feelings —
>
> PROSPECTIVE JUROR BROWN: Now I've heard the judge speak, I have a better understanding of it now. I would be fair. I would keep my own beliefs to myself.

(11 RT 1059-1060.) The prosecutor then asked if she would be able to "walk into this courtroom, look at the defendant and say 'I sentence you to die. I sentence you to death.'" Ms. Brown responded: "I — I don't really know. It's tough." The prosecutor acknowledged that "[i]t's going to be difficult. For

some people, it will be difficult. Others will be very comfortable with it. Some people have a difficult time." Ms. Brown replied: "I'm not very comfortable with it, but I would respect the law." (11 RT 1061.) Ms. Brown agreed with the prosecutor's statement that "doing the easy thing is not always doing the right thing or the appropriate thing." (11 RT 1062.) She was then asked again if she could "come back, look the defendant in the face, and say 'I sentence you to death.' Because each and every one of you who ends up on this jury will have to be able to do that." Ms. Brown expressed doubt she would be able to do that. (11 RT 1063.)

b. The Exclusion of Prospective Juror Brown for Cause Was Not Supported by Substantial Evidence That Her Feelings about the Death Penalty Would Prevent or Substantially Impair Her Ability to Perform Her Duties as a Juror.

"[I]f prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out." (*Adams v. Texas*, *supra*, 448 U.S. at p. 48.) "[I]t is entirely possible that a person who has a 'fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law — to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." (*Boulden v. Holman* (1969) 394 U.S. 478, 483-484.) "[N]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever [of the possibility of the death penalty] is 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." (*Adams v. Texas*, *supra*, 448 U.S. at p. 50.) "[T]o 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." (*Ibid.*)

Certainly, it is beyond dispute that "'[e]very right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow man.' [Citation.]" (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 515, n.8; see also *Eddings v. Oklahoma* (1982) 455 U.S. 104, 127, dis. opn. of Burger, J. ["It can never be less than the most painful of our duties to pass on capital cases"]; *McGautha v. California* (1971) 402 U.S. 183, 208 [recognizing the "truly awesome responsibility of decreeing death for a fellow human being"].) Hence, the pain or extreme difficulty that otherwise inheres in the decision to execute another human being simply does *not* establish that a prospective juror would be prevented from, or substantially impaired in, performing her duties. (*People v Stewart*, *supra*, 33 Cal.4th at pp. 446-449.) As this Court has explained:

> In light of the gravity of that punishment, for many members of society their personal and conscientious views concerning the death penalty would make it "very difficult" ever to vote to impose the death penalty. . . . [H]owever, a prospective juror who simply would find it "very difficult" ever to impose the death penalty, is entitled — indeed, duty-bound — to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror. . . . .
>
> 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.

(*Id.* at p. 446.)

Ms. Brown's responses on the questionnaire revealed that she was not automatically for a life sentence and that she could not prejudge in the absence of facts. (8 CT 2053.) Her responses during voir dire demonstrated that she would put her personal feelings aside and follow the court's instructions. She said she would be fair, would not automatically vote in favor of life without the possibility of parole, and would respect the law. Nothing in her responses indicated she was unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death was the appropriate penalty under the law, and in fact she said she could and would do so. Although the prosecutor argued that Ms. Brown "could not tell us that she could consider the death penalty," such was not the case. When Ms. Brown hesitated or equivocated in her answers it was before the obligations of a juror had been explained to her or in response to the prosecutor's questions as to whether she would be able to march into the courtroom, look the defendant in the eye, and say "I sentence you to death." This, however, is not the standard.

The trial court excluded Ms. Brown based upon her questionnaire responses disclosing opposition to the death penalty, and the court's conclusion drawn from her answers, and her unspecified "body language," that she would not consider the two sentencing options "equally." However, even if the court concluded from Ms. Brown's "body language" indicated she was biased in favor of the death penalty, this is not the standard to be applied. The

trial court's findings of bias were not the equivalent of a determination that Ms. Brown's opinions on the death penalty "would 'prevent or substantially impair' the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath" and the trial court erred in excusing her for cause. First, there is no requirement that a juror view the two penalties "equally." In fact the two penalties are not equal.

A juror cannot vote for death without finding that the aggravating circumstances substantially outweigh the mitigating circumstances. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Hence, this court has explicitly held 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 to ever impose the death penalty." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 447.) The court has also held that "[a] juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict." (*People v. Kaurish*, *supra*, 52 Cal.3d at p. 699.)

The trial court compared Ms. Brown's responses to the responses of a prospective juror in the case of *People v. Holt* (1997) 15 Cal.4th 619. However, the responses of the two jurors are not comparable. In Holt this Court found:

> [The prospective juror] Richards's answer was not, as defendant now claims, simply the expression of a preference for life imprisonment. Nor was it only a moral assessment or statement of what he believed would be the appropriate penalty under the evidence in the particular case. The voir dire did not set forth

> the evidence. It was directed only to the charges. The law of this state provides that death may be imposed for a murder committed in the perpetration of an enumerated felony regardless of whether the killing was intentional. (§ 190.2, subd. (a).) The juror stated unequivocally that he could not impose death for a killing that was not intentional and simply occurred in the course of the felonies set out in the charged special circumstances. This was a statement indicating that he could not follow the law.

(*Id.* at p. 652.) At no point did Ms. Brown indicate she would be unable to vote for the death penalty under any particular set of circumstances.

The trial court apparently concluded that because Ms. Brown expressed strong opposition to the death penalty in general, she would be unable to set aside her personal beliefs and follow the court's instructions. However, "to presume that personal beliefs automatically render one unable to act as a juror is improper." (*United States v. Padilla-Mendoza* (9th Cir. 1998) 157 F.3d 730, 733; see also *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 515, fn. 9 ["it cannot be assumed that a juror who describes himself as having . . . religious scruples against the infliction of the death penalty . . . thereby affirms that he could never vote in favor of it or that he would not consider doing so in the case before him."].) Contrary to the trial court's presumption, Ms. Brown expressly confirmed that she "would be fair," and "would keep [her] own beliefs to [herself]," and that she "would respect the law." (11 RT 1060-1061.)

The prosecutor did not bear her burden of demonstrating that the *Witt* standard was satisfied as to Ms. Brown, and the trial court's stated reasons for excusing her fell far short of amounting to substantial evidence that her feelings would prevent or substantially impair the performance of her duties as a juror. Consequently, the record does not support the trial court's excusal of prospective juror Brown for cause under the governing legal standard

(*Wainwright v. Witt*, *supra*, 469 U.S. 412, 424), and under the compulsion of United States Supreme Court cases this error requires reversal of appellant's death sentence, without inquiry into prejudice. (See *Davis v. Georgia*, *supra*, 429 U.S. 122, 123; *Gray v. Mississippi*, *supra*, 481 U.S. 648, 659-667 (opn. of the court); *id.*, at pp. 667-668 (plur. opn.); *id.*, at p. 672 (conc. opn. of Powell, J.); *People v. Ashmus* (1991) 54 Cal.3d 932, 962; accord, *United States v. Chanthadra* (10th Cir. 2000) 230 F.3d 1237, 1272-1273, 1275.)

2. Prospective Juror Lee

The prosecution challenged prospective juror Lee for cause arguing as follows: "Mr. Lee, who indicated that if evidence was presented that the defendant had some sort of mental illness or mental condition — and I believe it's fair to say that that evidence will in fact be presented, based on the defendant's witness list — and if he found that the defendant had not been receiving medication or counseling — and it's my belief that he will hear that evidence as well — Mr. Lee indicated that with that assumption he could not sentence Mr. Jones to death." (14 RT 1544.) The trial court granted the challenge, over defense objection, reasoning as follows:

> My problem with Mr. Lee is not what Miss Erickson argues. The problem with Mr. Lee is his I think quite candid response to the difficulties this case is going to present him. The questions asked by Miss Erickson — and I believe were probably objectionable insofar as they asked him to prejudge the evidence and come to a conclusion, but the ultimate result in response that came back was that he indicated a difficulty in — in doing — not following the judge's instructions. That wasn't his problem. It was fulfilling the oath that he would take to make a decision based on the evidence and law that was presented.
>
> And although he responded affirmatively with regard to what would happen in the guilt phase of the proceedings, and that his concern over possible penalty would not interfere with his

> decision in the guilt phase, he indicated a profound inability or concern about his ability to make a decision in the penalty phase. I don't think he has made up his mind necessarily. But the challenge for cause at this point in time will be granted.

(14 RT 1545.) The record, however, does not support the trial court's ruling excluding Mr. Lee for cause.

a. Prospective Juror Lee's Responses to the Jury Questionnaire and on Voir Dire.

On the jury questionnaire Mr. Lee explained his thoughts on the death penalty as follows: "If the person deserves it I'm in favor of it." (9 CT 2364.) He described himself as strongly in favor of the death penalty, and indicated he felt the penalty was imposed "too seldom." (9 CT 2364.) He also indicated that he would not refuse to find the defendant guilty of first degree murder, even though he personally believed the defendant to be guilty of the crime, to prevent the penalty phase from taking place. (9 CT 2366.) Similarly he would not refuse to find the special circumstances allegations to be true, even though he personally believed them to be true, to prevent the penalty phase from taking place. (*Ibid.*) He also stated that he would not automatically reject the death penalty without considering the evidence relating to aggravating and mitigating factors. (9 CT 2351.) Mr. Lee further indicated that he could think of no reason he might not be a fair and impartial juror. (9 CT 2368.)

During voir dire Mr. Lee requested to speak to the court and counsel in private about mental health issues. (14 RT 1460-1461.) He explained that his teenage son was being treated for "severe emotional problems" (14 RT 1501), then related his experiences with his son's problems and his treatment in some detail. (14 RT 1502-1504.) Mr. Lee indicated that he "wanted the Court to be aware of this, because I have very strong feelings of this type of problems." (14 RT 1503.) When defense counsel inquired what Mr. Lee meant by "strong feelings," he responded: "As far as trying to get help for the people. You

know, my wife and I have gone way out of our way, probably way out, most people would say, to help our child, which as a parent that's my responsibility. As far as this case would be concerned, I would have to admit, not knowing the evidence, if any, that would be involved in this, and listening to the psychologist or psychiatrist, whichever, it would be really tough for me to sit here and say that if I got to the second phase of this trial that I could even, without hearing the evidence, impose either one of those sentences on anyone. And that's my personal beliefs. But not knowing the evidence, I can't really say." (14 RT 1503.)

Mr. Lee's thoughts and feelings on the subject were explained in more detail when he responded to questions posed by the prosecutor and the court as follows:

EXAMINATION BY MS. ERICKSON:

Q. What if you, after hearing the evidence, felt that individuals didn't go to the extreme to help Mr. Jones that you have gone to help your son?

A. Then I feel that I would have a very difficult decision to impose those types of punishment.

Q. Either one?

A. Right. At this point I would have to say yes.

Q. And you obviously have a great deal of sympathy for individuals who you feel have mental problems or are suffering from some sort of —

A. I think it depends on the degree and the amount of help that has been given to these individuals. And, you know, I guess it's really a difficult situation to be in. I know what medications are available to help various types of problems, you know, because I deal with it, you know, on a daily basis. At this point, I can't honestly give you an answer until I would hear all the evidence.

Q. And I appreciate it that we are asking you questions in a vacuum, and it's difficult for you to respond having not heard the evidence yet. If you hear — and you have seen the witness list — there are doctors listed on the witness list. If a psychologist or psychiatrist testifies and indicates that in his or her opinion the defendant is suffering from some sort of mental illness or mental condition — now, you have done research in a lot of areas, involving a lot of different conditions?

A. That's correct.

Q. Have you found that, based on your research, that had the defendant not yet been given the opportunity to see if he responds to medications, had not been given the counseling or the guidance that your son had been given, would that put you back in that position where you felt that the defendant hadn't been given a chance to rehabilitate or turn his life around?

A. I think at that point my personal feeling is they should be given an opportunity for that type of rehabilitation.

Q. And if you found after hearing the evidence that Mr. Jones had not been given that opportunity, would you be able to consider either death or life without the possibility of parole?

A. I think it would be very difficult.

Q. And if you were in that position where you had to pick one or the other, would you consider them both equal or would you automatically go with the lesser of the two sentences?

A. It's really a tough question to have to answer not knowing the evidence, you know, because I think — I mean, you can go back on these type of issues to early childhood, you know, and not knowing the complete background and all the evidence that would be — I think it would be a difficult thing to really answer at this point. I would probably have to say, you know, not knowing any of the things that's going to be involved in this, as much as I hate to admit it, I could possibly see my son doing a type of crime because of not being medicated properly. I could actually see that, because we are at the point right now where —

that my wife and I are probably going to have to go to court next year to maintain control of him when he turns 18.

Q. Sir, now you have indicated that you have done a lot of research —

A. Right.

Q. — in the area of mental illnesses?

A. Uh-huh. Various types.

Q. Various types. You know about medications, you know about treatments?

A. Right.

Q. If you were sitting as a juror in this case would you be able to set aside your own personal research and own personal knowledge in that area?

A. I would do my very best to — and listen to all the evidence involved.

Q. So it's your testimony that, even though you have a very strong — you have indicated a very strong opinion about people with mental illnesses deserving an opportunity for treatment, medication, you would be able to put aside your —what you have learned through your own personal research and not apply that to the evidence that you have heard in this case?

A. I think I could do that. The only problem I would really have, depending on the evidence involved, would be the two penalties involved. That would be my biggest dilemma, although I know what I am instructed to do.

EXAMINATION BY THE COURT:

Q. Well, my concern is this: You don't know what the evidence is going to be.

A. Correct.

Q. But you can look down the road, so to speak, based on the — what the attorneys have said, what's in the questionnaire, and you can imagine, if you will, what part of the — what some of the evidence may be.

A. Right.

Q. My concern is this: In the guilt phase of the case, you may not hear the kind of evidence that you are looking for — that matters to you?

A. Right.

Q. That evidence that may deal with background?

A. Right.

Q. It may be that that is the kind of evidence that comes in or might be admitted in the penalty phase of the trial. But what you have indicated is that you don't — you would be really hard-pressed to make a decision on the penalty, particularly if you heard certain kinds of evidence. So what I'm concerned about is you looking down the road and saying, gee, I don't know what this kind of evidence is going to be, maybe, out there. I have all of these emotional feelings, and I don't want to deal with that, and the easiest way for me not to deal with that is to find the special circumstances not true or find the defendant not guilty of the crime?

A. No. I would not do that, because at this point, not knowing any of the evidence, it is impossible. I just — the main reason that I put this down is because I want the Court to understand where my feelings are at.

Q. Sure. So you would not –

A. would not automatically.

Q. You wouldn't ignore my instructions on the law?

A. No, I would not.

Q. And you wouldn't, in order to avoid an issue on penalty, throw out your reasoned decision —

A. No.

Q. — that the People had proven the elements in the guilt phase beyond a reasonable doubt?

A. Right.

THE COURT: I'm sorry, Miss Erickson, you may continue.

EXAMINATION BY MS. ERICKSON:

Q. Sir, assuming we get to the second phase and you have heard evidence — again, I'm asking you to assume — you have heard evidence that the defendant is suffering from some mental condition or mental illness, he has not received medication, he has not received a fair chance of counseling, could you honestly vote to sentence him to death?

A. No, I could not. I am sorry, but I could not do that.

Q. You don't have to be sorry, sir.

A. No.

(14 RT 1505-1510.)

Nothing in Mr. Lee's responses on the questionnaire or during voir dire supported a finding that his feelings about mental health issues as related to punishment would prevent or substantially impair his ability to perform his duties as a juror in accordance with the court's instructions and his oath, and the trial court erred in excusing him for cause.

b. *The Exclusion of Prospective Juror Lee for Cause Was Not Supported by Substantial Evidence.*

The prosecutor sought to exclude Mr. Lee because she felt he could not vote in favor of the death penalty if the evidence showed appellant was suffering from a mental condition and had not been afforded an opportunity for treatment. (14 RT 1544.) However, the prosecutor's argument did not provide the basis for a challenge for cause for two reasons. First, a prospective juror cannot be asked to prejudge a case and state which penalty he would vote for based upon the evidence likely to be produced at trial. Second, the reason the prosecutor attributed to Mr Lee for rejecting the death penalty would be an entirely acceptable basis for doing so.

As this court has held, "death-qualifying voir dire should focus on juror attitudes toward the death penalty in the abstract, and should not be used to seek a prejudgment of the facts to be presented at the trial." (*People v. Pinholster* (1992) 1 Cal.4th 865, 915; *People v. Clark* (1990) 50 Cal.3d 583, 597.) In *Witherspoon*, the court noted that jurors "cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." (391 U.S. at p. 522, fn. 21.)

This important precept of *Witherspoon* was recognized by this court in *People v. Fields* (1983) 35 Cal.3d 329. In that case nine prospective jurors, none of whom had been told anything about the facts of the case before them

beyond the bare language of the charges and special circumstances, were dismissed for cause when they stated they would automatically vote against the death penalty in that case, though not necessarily in every case. (*Id.* at p. 354, fn. 11, 355.) This court upheld the exclusions ruling that "[a] court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him, regardless of his willingness to consider the death penalty in other cases." (*Id.* at pp. 357-358.) The court, however, made it clear that it was not authorizing the exclusion of prospective jurors whose objections to the death penalty in a given case were based on the particular facts of the case:

> When the court excludes a juror on this ground, however, it must take care to avoid violation of *Witherspoon's* command that a juror can be dismissed for cause only if he would vote against capital punishment "without regard to any evidence that might be developed at the trial of the case . . .." (391 U.S. at p. 522, fn. 21 [20 L.Ed.2d at p. 785].) If a prospective juror has been informed of the evidence to be presented, his asserted automatic vote may be based upon this information, in which case exclusion of the juror because of his views on the death penalty would violate *Witherspoon*. For example, a juror who announces that he would automatically vote against death in the case before him because he has been told (whether true or not) that the prosecution case rests entirely on circumstantial evidence is not casting a vote without regard to the evidence, and cannot be excluded under the *Witherspoon* formula.
>
> In the present case, each of the excluded jurors unequivocally asserted that he would automatically vote against the death penalty in the case before him regardless of the evidence. None even hinted that his vote was based upon a preconception of the evidence. With the exception of juror Harris, none suggested that his opposition to the death penalty was limited to this specific case, and Harris knew nothing of the evidence in this case except what she could infer from the charges and special circumstances. On this record, we can only conclude that each excluded juror would have cast an automatic vote against the

> death penalty regardless of the evidence, and thus were properly excluded for cause.

(*Id.* at p. 358, fn. 13.) The court thus affirmed that a juror may not be excused for cause if his or her unwillingness to vote for the death penalty in the particular case rests upon an evaluation of the evidence to be presented. (See also *People v. Pinholster*, *supra*, 1 Cal.4th at p. 916 [jurors properly excused where "[e]ach juror's reluctance to impose the death penalty was based not on an evaluation of the particular facts of the case, but on an abstract inability to impose the death penalty in a felony-murder case."].) Yet this was precisely the basis for the prosecutor's challenge of Mr. Lee.

Recognizing that the prosecutor had not presented a valid basis for a challenge for cause, the trial court nevertheless excused Mr. Lee on the grounds that he "indicated a profound inability to make a decision in the penalty phase." (14 RT 1545.) However, nothing in Mr. Lee's responses indicated his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

Initially it should be noted that Mr. Lee brought his experiences with his son's mental illness to the attention of the court because he wanted "to be fair to the prosecution, the defense and the court." (14 RT 1504.) This court has recognized that "a juror . . . who candidly states his preconceptions and expresses concerns about them, but also indicates a determination to be impartial, may be preferable to one who categorically denies any prejudgment but may be disingenuous in doing so." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 488.) Here Mr. Lee indicated that, based upon his life experiences with his son's mental illness, he might or might not have difficulty with the issue of punishment depending on the evidence presented. (14 RT 1506-1508.) However, he stated that he would not automatically find the special circumstances allegations not true in order to avoid the issue of punishment;

he would not ignore the court's instructions (14 RT 1509-1510); and he would put aside his independent knowledge of mental illness and treatment options and decide the case based upon the evidence (14 RT 1508).

Nothing in Mr. Lee's responses indicated that any preconceptions he might have about the appropriateness of capital punishment in the case of a defendant with mental health problems who had not been afforded the opportunity for treatment, would interfere with his ability to follow the court's instructions and conscientiously weigh relevant mitigating and aggravating factors in reaching an ultimate decision at the penalty phase. Furthermore, unlike other cases where prospective jurors have been properly excluded because their preconceptions were at odds with the law regarding capital punishment, Mr. Lee's views were not in conflict with his responsibilities as a juror in the penalty phase.

In *People v. Pinholster*, *supra*, this court held that prospective jurors who indicated they would automatically vote against the death penalty in the case before them, regardless of their willingness to consider the death penalty in other cases, were properly excused for cause. Specifically the court held that a juror who stated he would automatically reject the death penalty in a case involving felony-murder was properly excused. In this regard the court observed: "The people of the State of California have determined that burglary-murder is a category of crime for which a defendant may be subject to death, depending on the circumstances. (§ 190.2, subd. (a)(17)(vii).) This prospective juror unequivocally stated his inability to follow the law in this respect." (1 Cal.4th 865, 917.) The prospective juror was properly excused because his opinions regarding the death penalty were in conflict with state law. Such was not the case with respect to Mr. Lee.

The concern with Mr. Lee was that he would vote against the death penalty if the evidence showed appellant suffered from mental problems for which he had not received treatment. Unlike the juror in *Pinholster*, Mr. Lee's preconception was not contrary to the law and his views would have been an entirely appropriate basis for rejecting the death penalty. Whereas the prospective jurors in *Pinholster* indicated they would automatically reject the death penalty in any case involving felony-murder without regard to relevant aggravating and mitigating circumstances, Mr. Lee indicated only that he might reject the death penalty based upon what would be relevant and proper mitigating circumstances depending on the evidence presented.

As this court has observed, the Eighth Amendment teaches "with respect to the process of selecting . . . those defendants who will actually be sentenced to death, "[w]hat is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime." [Citation.] It is not simply a finding of facts which resolves the penalty decision, "'but . . the jury's moral assessment of those facts as they reflect on whether [a] defendant should be put to death . . . .'" [Citation.] The jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that it is not the appropriate penalty." (*People v. Brown* (1985) 40 Cal.3d 512, 540.) Consequently, "[e]ach juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider," and to vote against death "unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances." (*Id.* at p. 541.)

Given these principles it becomes clear that the State may not exclude a prospective juror from a capital trial because he frankly concedes his view that under a particular description of the evidence to be presented, death is not

an appropriate penalty. In rendering such a judgment, a juror is doing only what the Constitution requires — making his own moral assessment of the evidence as it relates to penalty. Whether one would agree or disagree with the assessment, it cannot be said that a prospective juror who undertakes this process and concludes that death would be an inappropriate sentence is, or would be, untrue either to his oath as a juror or to the mandate of any constitutional instruction. (*Adams v. Texas*, *supra*, 488 U.S. at 46.)

As this court first recognized in *People v. Brown*, *supra*, 40 Cal.3d at pp. 542-544, it is entirely a matter for each individual juror to determine what weight to accord to aggravating and mitigating circumstances and to decide, as a normative judgment within that process, whether death is the appropriate penalty in that particular case. It follows necessarily that a juror is free to decide that any one particular mitigating circumstance outweighs whatever aggravating circumstances might be involved, and this court has repeatedly upheld instructions to this express effect. (See, e.g., *People v. Odle* (1988) 45 Cal.3d 386, 420; *People v. Grant* (1988) 45 Cal.3d 829, 857-858, fn. 5; *People v. Caro* (1988) 46 Cal.3d 1035, 1066.)

Unlike the situation presented in *Pinholster*, Mr. Lee's responses to the prosecutor's questions did not demonstrate a refusal to consider relevant aggravating and mitigating circumstances but, quite the contrary, demonstrated a consideration of just such factors. There is no basis in the record for concluding that Mr. Lee held views on capital punishment which would have prevented or substantially impaired the performance of his duties as a juror in accordance with the instructions and his oath. That is the governing standard of *Witherspoon* as modified by *Witt*, and it was violated in this case. As noted with respect to prospective juror Brown, the improper exclusion of even one prospective juror because of his views on capital punishment requires

automatic reversal of a death sentence and the harmless error doctrine has no application. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 668.) Consequently, for this additional reason, appellant's death sentence must be reversed.

D. The Actions of the Trial Court and the Prosecutor Produced a Jury Culled of All Those Who Revealed During Voir Dire That They Had Conscientious Scruples Against or Were Otherwise Opposed to Capital Punishment, Which Violated Appellant's Right to a Fair and Impartial Jury.

As discussed above, the United States Supreme Court has unequivocally declared that "a State may not constitutionally execute a death sentence imposed by a jury culled of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment." Such a scrubbed jury violates the Sixth, Eighth, and Fourteenth Amendments. (*Adams v. Texas*, *supra*, 448 U.S. at p. 43; accord *Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 520-521.) The voir dire process in the present case produced just such as jury. Asked to rate their feelings on the death penalty on a scale of 1 to 10 — with 10 being strongly in favor of the death penalty, 5 having no opinion, and 1 being strongly against — three of the deliberating jurors rated themselves at 10, five rated themselves at 8, two at 7, one at 5, and one at 3. (6 CT 1594,1616; 7 CT 1639, 1662, 1685, 1708, 1730, 1753; 13 CT 3444, 3466; 16 CT 4383.) The state excluded from the jury all of the venirepersons who had identified themselves as strongly opposed to the death penalty in principle or who otherwise expressed reservations about imposing the death penalty. Specifically, and as fully explained below, the trial court applied the *Witt* standard in an arbitrary, inconsistent, and fundamentally unfair manner to exclude "life-inclined" jurors. As to the few remaining "life-inclined" jurors who escaped the court's uneven application of *Witt*, the prosecutor excluded them with peremptory

challenges. The joint efforts of the two state actors thus resulted in a "jury culled of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment" (*Adams v. Texas*, *supra*, 448 U.S. at p. 43), and therefore produced "a jury uncommonly willing to condemn a man to die" (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 520-521). For this reason the death sentence must be reversed.

1. The Trial Court Applied the Witt Standard in an Arbitrary and Capricious Manner, Which Was Fundamentally Unfair and Amounted to an Abuse of Discretion Not Entitled to Deference.

A number of prospective jurors made it "unmistakably clear" that they would automatically vote for one penalty over another, regardless of the evidence, and were accordingly excused for cause. Of course, there is little discretion for the trial court to exercise with respect to such clearly disqualified jurors. (See *Wainwright v. Witt*, *supra*, 469 U.S. at p. 423; *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 522 and n.21.) The court's exercise of discretion becomes significant, however, as to those jurors who are not so "unambiguous" or "unmistakably clear" about their feelings. (*Wainwright v. Witt*, *supra*, 469 U.S. at pp. 426, 429.) Under the *Witt* standard, the court must make the more difficult determination of whether those jurors' feelings would "prevent or substantially impair" their ability to follow their oaths and perform their duties as jurors. (*Id.* at p. 423.) As discussed above, the court's exercise of discretion in determining whether challenged jurors meet this standard is "subject to essential demands of fairness" (*Hughes v. United States*, *supra*, 258 F.3d at p. 457) and may not be arbitrary, capricious or partial (*People v. Warner*, *supra*, 20 Cal.3d at p. 683;

People v. Surplice, *supra*, 203 Cal.App.2d at p. 791; *Gray v. Klauser*, *supra*, 282 F.3d pp. 645-648, 651 [and authorities cited therein].)

Unfortunately, an examination of the court's rulings in this case on challenges for cause of jurors who were not "unmistakably clear" about their feelings reveals that its application of the *Witt* standard was not even-handed. To the contrary, as demonstrated below, a comparison of the trial court's application of the *Witt* standard to "life-inclined" and "death-inclined" venirepersons whose answers were remarkably similar reveals that its exercise of discretion was arbitrary and capricious. (Cf. *People v. Heard*, *supra*, 31 Cal.4th at p. 964 [in concluding that trial court improperly excused juror for cause based on particular answer, court observed that a number of seated jurors provided the same answer].) In other words, the court's uneven application of the *Witt* standard was fundamentally unfair (*cf. Gray v. Klauser*, *supra*, 282 F.3d at pp. 645-648, 651 [and authorities cited therein, holding that a trial court's unjustified or uneven application of legal standard in a way that favors the prosecution over the defense violates due process]), resulted in a "jury culled of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment" (*Adams v. Texas*, *supra*, 448 U.S. at p. 43), and therefore produced "a jury uncommonly willing to condemn a man to die" (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 520-521). For this reason alone, the death sentence cannot be executed. (*Ibid.*) At the very least, because the court's application of the *Witt* standard was arbitrary and capricious, its rulings as to Ms. Brown and Mr. Lee, discussed above, are not entitled to deference. (See *People v. Welch*, *supra*, 5 Cal.4th at p. 234.)

a. "Death-Inclined" Jurors Whom the Court Refused to Excuse for Cause.

Defense counsel challenged five jurors who indicated they would automatically vote for death over life without the possibility of parole if the evidence showed appellant was guilty of first degree murder and the special circumstances allegations were proved to be true. The trial court denied all of these challenges, forcing counsel to exercise five peremptory challenges to remove these biased jurors from the panel. The voir dire of these prospective jurors, and the trial court's ruling on the challenges, demonstrates that a different standard was applied to "death-inclined" jurors than was applied to "life-inclined" jurors.

i. Prospective Jurors Nielson, Powers and Romero

Defense counsel challenged prospective jurors Nielson, Powers and Romero for cause. (12 RT 1075.) The trial court denied the challenges (12 RT 1077-1078), and defense counsel exercised peremptory challenges to remove them from the panel (12 RT 1083-1084).

On her juror questionnaire Ms. Nielson indicated she was strongly in favor of the death penalty [rating her support for capital punishment at 8] and described her feelings about the penalty as follows: "I believe the death penalty should be implemented when someone has murdered another individual — when that has been proven in a court of law. A murderer should suffer such consequences." (9 CT 2500.) With regard to the penalty of life without possibility of parole she stated: "In the case of murder not really acceptable." (*Ibid.*)

Mr. Powers also described himself as strongly in favor of the death penalty [rating his support for capital punishment at 10] and said: "I feel it is a part of the justice system and should be used when the law provides for it."

(10 CT 2578.) He also stated that he felt the penalty of life without the possibility of parole "should be used when the law provides for it." (*Ibid.*)

Ms. Romero similarly described herself as strongly in favor of the death penalty [rating her support for capital punishment at 10] and said: "If a person has been found guilty in a court of law and the death penalty was a consideration I feel the death penalty should then be given." (14 CT 3905.) She also indicated she felt the death penalty was imposed too seldom. (*Ibid.*)

During voir dire these three jurors were questioned together after they indicated they would automatically vote for death if the defendant was found guilty of murder and the special circumstances allegations were found to be true:

> MR. CABRERA: How many of you of the 18 that are currently seated feel that if — in response to question number C on page 16, that if — if my client was found, number one, guilty of murder in the first degree, number two, that the special circumstances — and for purposes of this question were all proven, one or all — one, two, or three of those special circumstances were proven. How many feel an obligation because death penalty [sic] — at that point in time there would be two options, death penalty or life without possibility of parole. How many of you feel that it would be your obligation to vote for the death penalty?
>
> THE COURT: That's juror No. 1 [Romero], 4 [Powers] — Miss Nielson and Mr. Lara.
>
> MR. CABRERA: Now, Miss Romero, tell me why you feel it would be your obligation to vote for the death penalty.
>
> PROSPECTIVE JUROR ROMERO: I feel that if the person was found guilty in all of those matters, came down to us deciding that, I feel that for a life, a life should be taken.
>
> MR. CABRERA: By the way, folks, your personal opinions are fine. I'm not here to influence anyone's personal opinions. I'm just here to discover what they are. So please by virtue of any of your answers,

don't think that I'm trying to convince you otherwise. I just need to know what yours are.

So in your case, then, you would automatically vote for the death penalty if murder in the first degree was proven and any one of the three special circumstances alleged in this case were proven?

PROSPECTIVE JUROR ROMERO: Yes.

THE COURT: You would not consider life without possibility of parole under those circumstances?

PROSPECTIVE JUROR ROMERO: Under those circumstances.

THE COURT: Juror No. 4, Mr. Powers.

PROSPECTIVE JUROR POWERS: Yes.

MR. CABRERA: Now, in your questionnaire — well, forget the questionnaire for the time being. Again, given those set of circumstances — number one, murder in the first degree, number two, one of the three or all of the three or any number thereof of the special circumstances have been proved — do you feel it's your obligation, then, to vote for the death penalty?

PROSPECTIVE JUROR POWERS: It would be my personal conviction to vote for that, yes.

MR. CABRERA: And —

PROSPECTIVE JUROR POWERS: If that went in accordance with the judge's instructions and the law provided for it, yes.

MR. CABRERA: Further, for this question, ladies and gentlemen, the law will provide for one of two punishments, death or life without possibility of parole. Now, with that extra information, would you automatically vote for the death penalty and not consider life without possibility of parole?

PROSPECTIVE JUROR POWERS: Yes, I believe I would.

MR. CABRERA: Juror No. 13 — and please don't feel I'm being impersonal by using the numbers. It's just that gives me a chance to look at it. It's not intended to be an affront. That's Miss Nielson, the woman directly in front of you, ma'am.

Miss Nielson, again, for purposes of this question, you've heard my fact pattern: Number one, that my client, Mr. Jones, has been found guilty of murder in the first degree, and number two, that one or more of the special circumstances have been proven, number three, that the judge has advised you that there are two possible penalties, one death and one life without the possibility of parole. Do you feel that you would then feel it your obligation to vote for death?

PROSPECTIVE JUROR NIELSON: Yes, it would be.

MR. CABRERA: That's to the exclusion of considering life without possibility of parole?

PROSPECTIVE JUROR NIELSON: Yes, sir.

MR. CABRERA: And finally, Juror No. 15, that's Mr. Lara. Now again, do you feel it would be helpful for me to repeat the facts? Number one, the jury has found my client for purposes of this question guilty of murder in the first degree, one or more of the special circumstances proven, and the judge has now advised you there are two punishments available to you under the law, death or life without the possibility of parole. What would you do?

PROSPECTIVE JUROR LARA: I would choose death.

MR. CABRERA: When you say "choose death," is that to the exclusion of the consideration of life without the possibility of parole?

PROSPECTIVE JUROR LARA: I would consider the evidence and weigh it from there, but flying off the seat of my pants right now, I would consider death.

MR. CABRERA: My point is, assuming you now have the evidence — because I'm giving you that as part of the facts. Murder guilty, first degree, special circumstances, either rape, sodomy, or burglary or all

three have been proven. Are you going to vote death or are you going to vote for life without possibility of parole?

PROSPECTIVE JUROR LARA: I vote death.

MR. CABRERA: That's to the exclusion of considering life without the possibility of parole under those circumstances?

PROSPECTIVE JUROR LARA: Yes.

MR. CABRERA: Regardless of what the other evidence — this goes for all four of you. This goes with regard to any evidence of Mr. Jones' background. He's done the deed, background be damned, he should get the death penalty. Is that also a fair assumption, Miss Romero?

PROSPECTIVE JUROR ROMERO: Yes.

MR. CABRERA: Mr. Powers?

PROSPECTIVE JUROR POWERS: Yes.

MR. CABRERA: Miss Nielson?

PROSPECTIVE JUROR NIELSON: Yes.

MR. CABRERA: Mr. Lara?

PROSPECTIVE JUROR LARA: I would be open to regarding some background.

MR. CABRERA: You're backing down a little bit? Is that what I'm understanding? You would consider background before voting for the death penalty?

PROSPECTIVE JUROR LARA: That would be one of the things I would weigh, to begin with.

(11 RT 1039-1043.) Because prospective juror Lara indicated he would consider other factors before determining the appropriate punishment, the defense did not request he be excluded for cause.

The prosecutor attempted to rehabilitate the other three prospective jurors who had said they would automatically vote for the death penalty, questioning them as follows:

> MS. ERICKSON: Now, if you find yourself in a penalty phase where you are considering only two choices, death for Mr. Jones or life without the possibility of parole, could you carefully follow the law in that stage of the proceedings?
>
> PROSPECTIVE JUROR ROMERO: Yes, I would.
>
> MS. ERICKSON: If the judge tells you at that point even though you favor the death penalty, even though you think it's fair under most circumstances involved with special circumstances — if the judge told you at that point deciding death or life without parole, you must weigh the factors, the good things in the defendant's life, the bad things in his life — I'm implying aggravating and mitigating factors. Would you be able to do that? Would you follow the law?
>
> PROSPECTIVE JUROR ROMERO: Yes.
>
> MS. ERICKSON: By refusing to consider life without parole, you would not be following the law. Do you understand that?
>
> PROSPECTIVE JUROR ROMERO: I do understand that. I would go by the law. I feel strongly about the death penalty, but I would go by the law given by the judge.
>
> MS. ERICKSON: I appreciate that. Your feelings are important, and you shouldn't negate them or discount them or be ashamed of them.
>
> PROSPECTIVE JUROR ROMERO: I also know that's not — I can't be swayed by my feelings. I understand that I must follow the law, the judge's instructions.
>
> MS. ERICKSON: Would you do that?
>
> PROSPECTIVE JUROR ROMERO: Yes, I would.
>
> MS. ERICKSON: Mr. Powers, same question.

PROSPECTIVE JUROR POWERS: Yes.

MS. ERICKSON: You appreciate it's important in a case of this severity — it's important to follow the law?

PROSPECTIVE JUROR POWERS: Yes.

MS. ERICKSON: Every instruction the judge gives you, it's your statement you would follow the law?

PROSPECTIVE JUROR POWERS: Yes.

MS. ERICKSON: I want you to assume you're in that situation. As a member of the jury, you found the defendant guilty of murder, special circumstances. You've heard the evidence presented at the penalty phase. Now you have to decide. Would you consider all of the evidence presented to you?

PROSPECTIVE JUROR POWERS: I would — I would follow the judge's instructions. I don't know the law. I would have to consider both. I know nothing.

MS. ERICKSON: That's why I'm trying to clarify that. I appreciate you're all in the dark. You've never been in this situation before. You haven't read the judge's instructions. The judge tells you you must consider both. You must weigh evidence to support both.

PROSPECTIVE JUROR POWERS: That's what I would do.

MS. ERICKSON: Miss Nielson, same question. Would you follow the law?

PROSPECTIVE JUROR NIELSON: Yes, I would.

MS. ERICKSON: Would you appreciate how important it is to follow the law?

PROSPECTIVE JUROR NIELSON: I do.

MS. ERICKSON: Again, would you disregard the law and refuse to even consider life without parole?

PROSPECTIVE JUROR NIELSON: No, I wouldn't.

(11 RT 1052-1054.)

The court denied defense counsel's challenge for cause as to prospective jurors Powers, Romero and Nielson as follows:

> THE COURT: Mr. Cabrera's characterization of the evolution of opinions that were expressed I have no quarrel with, and it appears accurate. But the Court did question each of those individuals on the issues relating to the imposition of the death penalty. In response to questions asked by Mr. Cabrera, each of those three individuals stated unequivocally that they would, at a certain stage, impose the death penalty. And then on rehabilitation and examination by the prosecuting attorney, each of them, to use Mr. Cabrera's words, "backed off" of that automatic position and stated a more moderate position in conformance with their initial statements to the Court.
>
> Each of them clearly has a bias or an inclination in favor of the death penalty. Each of them has also stated clearly that they will consider both penalties and consider the evidence in the case. I don't believe that Mr. Cabrera's questioning was ambiguous or tricky in any way.
>
> What he asked them to do, however, in that instance — and I would indicate that he was not alone in this style of questioning — was he was asking the jurors at certain stages to prejudge the evidence, to say what they would decide now when they haven't heard the evidence, simply based on some assumed facts — questions insofar as they asked the jurors to prejudge the evidence were unfair, and I would not use that as a basis to excuse someone for cause. Each of the jurors attempted to honestly answer the questions that were posed to them. And the Court finds that each of them at this point in time are able to consider and have indicated their willingness to consider the full range of possible punishments, including life without the possibility of parole.
>
> Defense motion and challenge for cause against jurors No. 1, 14, and 13 is denied.

(12 RT 1077-1078.)

ii. Prospective Juror Dyer

Defense counsel also challenged prospective juror Dyer for cause. (12 RT 1213.) The court denied the challenge (*ibid.*), and counsel exercised a peremptory challenge to remove her from the panel (12 RT 1214).

On her juror questionnaire Ms. Dyer described herself as strongly in favor of the death penalty [rating her support for capital punishment at 10] and said: "If it's good enough for the victim it's good enough for the killer." (6 CT 1556.) During voir dire the court asked her: "If we get to that second stage or second trial, what I've called the penalty phase, do you think you could carefully weigh the aggravating and mitigating circumstances to determine what the appropriate punishment is?" (11 RT 1161.) Ms. Dyer responded: "Yes. I don't want to, but I could." (*Ibid.*) Defense counsel then questioned her about her responses on the questionnaire:

> PROSPECTIVE JUROR DYER: It's not a definite. But if it was good enough for the victim, it's good enough for the killer, if I find any evidence that that's the case.
>
> MR. CABRERA: Okay. So if you found evidence that he was found guilty of first-degree murder and the special circumstances were proven, then you would automatically vote for the death penalty. Is that what I'm hearing? I'm not sure.
>
> PROSPECTIVE JUROR DYER: Yeah.

(12 RT 1199.)

The prosecutor then attempted to rehabilitate Ms. Dyer asking her if she would listen to the evidence presented and follow the court's instructions before returning a verdict. She predictably responded that she would. (12 RT 1204.) However, when the prosecutor asked: "So when you indicated you would automatically impose a death sentence, what did you mean by that ma'am?" she replied: "If we found out the other were true, the burglary, the

sodomy, the rape." (12 RT 1204-1205.) The prosecutor asked her again if she could consider all the evidence on both sides and engage in the necessary weighing process and she said she could. (12 RT 1205.) The court followed up with:

> THE COURT: . . .Do you think if we got to that phase, if you had found the defendant guilty of the crimes charged and found true the special circumstances, rape, murder occurred during the course of a rape or attempted rape or in the course of a sodomy or attempted sodomy, and you found that to be true beyond a reasonable doubt and were in the penalty phase, are you telling me that you could seriously consider a punishment other than death?
>
> PROSPECTIVE JUROR DYER: No.
>
> THE COURT: You would automatically —
>
> PROSPECTIVE JUROR DYER: If those were true, it would be the death penalty.
>
> THE COURT: In your mind?
>
> PROSPECTIVE JUROR DYER: In my mind.
>
> THE COURT: Okay.
>
> PROSPECTIVE JUROR DYER: Well, I have got to weigh the good with the bad, though.
>
> THE COURT: Right. And let's say you weigh the good with the bad at that point in time, and in terms of looking at the good and bad, let's say they were pretty equal, the bad did not so substantially outweigh the good. Do you think even though you found him guilty of the crime charged and you found true all those special circumstances you could ever vote for life?
>
> PROSPECTIVE JUROR DYER: Yeah.
>
> THE COURT: You do?

PROSPECTIVE JUROR DYER: Yeah, I think so.

(12 RT 1211-1212.)

iii. Prospective Juror Bare

Defense counsel also challenged Ms. Bare for cause. (13 RT 1357.) The court denied the challenge (*ibid.*) and counsel exercised a peremptory challenge to remove her from the panel (13 RT 1358.)

On her jury questionnaire Ms. Bare rated herself strongly in favor of the death penalty [rating her support for capital punishment at 8] and stated: "If a person is found guilty beyond a doubt the death penalty would be the correct punishment for the crime." (13 CT 3555.) She also stated: "I do not agree with life imprisonment. The victim had no choice." (*Ibid.*) She said she felt the death penalty was imposed too seldom adding that she felt "[w]e give the criminals all the rights the victim had none." (*Ibid.*) During voir dire the court questioned her about these responses as follows:

> Q. Okay. So let's look at the bottom of page 16 and the top of page 17. That's the question that asks you to assume that we are in the penalty phase of the trial, the jurors have found the defendant guilty of murder, they found it to be murder of the first degree, they found true one or more of the special circumstances that the crime occurred in the commission of a rape or attempted rape, or in the commission of a sodomy or attempted sodomy, or in the commission of a burglary or attempted burglary, you found all of that true. We are now in the penalty phase, and the question is, would you, because of your views concerning capital punishment, automatically refuse to vote in favor of the penalty of life without the possibility of parole and automatically vote for the penalty of death?
>
> A. Well, again, I would have to — I would have to hear all the evidence, I would have to listen to all of your instructions, and I would probably lean to that if all of those factors were true. In other words, if — maybe I am like someone else said here — I would have to listen to what you say and maybe put my thoughts aside for that time and disengage my mind from my heart.

Q. Well, I think it was Mr. Jensen that was talking about ego in that sense. But I guess the real question is this: If we get that far in the trial, the defendant Mr. Jones has been found guilty of murder, first-degree murder, special circumstances that I have already outlined, based on what you say on page 14, could you ever agree with life imprisonment?

A. Maybe.

Q. What does that —

A. I can't say a definite yes or no. I don't know right now how I would vote at that particular time.

Q. I'm not asking how you would vote. I'm asking right now, based on your current state of mind, whether or not you can go into that phase with an open mind.

A. I certainly would try.

Q. So do you want to change your answer on page 14 to question 27 or 26?

A. I don't know that I want to change it.

Q. Thank you.

(13 RT 1307-1309.)

b. Comparison of Treatment of "Death-Inclined" and "Life-Inclined" Jurors.

As discussed above, a prospective juror may be challenged for cause based upon his or her views regarding capital punishment if those views would prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath. (*Wainwright v. Witt*, *supra*, 469 U.S. 412, 424; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 121; *People v. Mincey*, *supra*, 2 Cal.4th at p. 456.) The qualification standard operates in the same manner whether a prospective juror's views are for or against the death

penalty. (*Morgan v. Illinois*, *supra*, 504 U.S. at pp. 726-728.) "A prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances, is therefore subject to challenge for cause. . . ." (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005.) The trial court granted the prosecution's challenges to prospective jurors Brown and Lee under this standard while denying defense counsel's challenges to prospective jurors Nielson, Powers, Romero, Dyer and Bare. In doing so the court applied the governing standard in an inconsistent and arbitrary manner since the responses of the prospective jurors who were not excused for cause did not differ appreciably from those who were. In fact, the pro-death jurors were more solidly pro-death than the pro-life jurors were pro-life.

Prospective jurors Nielson, Powers, and Romero all stated unequivocally that they would automatically vote for death if the charges and special circumstances allegations were proven. Ms. Romero made her position clear when she stated: "I feel that if the person was found guilty in all of those matters, came down to us deciding that, I feel that for a life, a life should be taken." (11 RT 1040.) When counsel asked "So in your case, then, you would automatically vote for the death penalty if murder in the first degree was proven and any one of the three special circumstances alleged in this case were proven?" she responded affirmatively. The court then asked: "You would not consider life without the possibility of parole under those circumstances?" She agreed: "Under those circumstances." (11 RT 1040-1041.) Mr. Powers and Ms. Nielson also stated they would feel obligated to vote for the death penalty if the charges and special circumstances allegations were proven. (11 RT 1040-1042.) All three of these jurors then predictably indicated they

would follow the law and would consider the evidence before returning a verdict. (11 RT 1052-1054.) The questions were bound to elicit certain responses since the average person would answer that they would follow the law rather than tell the District Attorney and judge they would not. Although the questions were not likely to reveal the prospective jurors true inclinations, the trial court denied defense counsel's challenges for cause as to these potential jurors based upon their self-proclaimed ability to follow the law.

Ms. Brown, on the other hand, was excluded by the trial court because "she had a position in this case with regard to the ultimate punishment. And she did not appear to the court to be open to the possibility of considering equally, based on the evidence, the two possible alternative punishments in this matter." (12 RT 1080-1081.) The court reached this conclusion despite the fact that Ms. Brown said she would put her personal feelings aside and follow the court's instructions, said she would be fair, said she would not automatically vote in favor of life without the possibility of parole, and said she would respect the law. (11 RT 1059-1060; 8 CT 2053.) If the trial court's interpretation of the *Witt* standard called for the removal of jurors who indicated they preferred one penalty over another but said they would follow the court's instructions and consider both penalties, as was the case with Ms. Brown, then prospective jurors Nielson, Powers, and Romero should have been excused as well. On the other hand, if the standard applied by the trial court was that jurors who promised to follow the law and consider both penalties even though they preferred one penalty over the other were not subject to exclusion under *Witt*, as was the court's ruling with respect to prospective jurors Nielson, Powers, and Romero, then Ms. Brown should not have been excused.

The trial court's ruling excusing Ms. Brown for cause was more than just inconsistent with its rulings concerning the potential jurors challenged by the defense since her views were not as one-sided and firmly stated as those of the pro-death jurors. Unlike the prospective jurors challenged for cause by the defense, Ms. Brown never stated unequivocally that she would automatically vote for one penalty over the other without regard to relevant mitigating and aggravating factors. Before the responsibilities of jurors in the penalty phase had been explained to her, the trial court asked Ms. Brown: "Do you think, based on your feelings, that you would automatically tend to reject the penalty of death, you wouldn't consider it regardless of what the evidence is, and you would automatically vote for life imprisonment regardless of the evidence? Do you think you would do that?" Ms. Brown responded: "It's hard to say." (11 RT 974-975.) When the prosecutor asked her: "Can you come in here, look at Mr. Jones, and say 'Mr. Jones, I sentence you to die'?" she responded: "I — I don't really know. It's tough." (11 RT 1061.) If Ms. Brown was excluded because her answers were viewed by the trial court as noncommittal, it should be noted that they were no more uncertain than those given by Ms. Dyer and Ms. Bare, both of whom were unable or unwilling to definitively commit to considering the punishment of life without the possibility of parole.

Ms. Dyer leaned heavily in favor of the death penalty and succinctly stated her philosophy regarding capital punishment on her questionnaire and during voir dire as: "If it was good enough for the victim, it's good enough for the killer." (6 CT 1556; 12 RT 1199.) When the court asked her during preliminary questioning if she "could carefully weigh the aggravating and mitigating circumstances to determine what the appropriate punishment is?" she replied: "Yes. I don't want to, but I could." (11 RT 1161.) However, she

afterward repeatedly stated that she would automatically vote for the death penalty if the charges and special circumstances allegations were proven. (12 RT 1199, 1204-1205, 1211-1212.) The court then phrased the question differently, asking her: "let's say you weigh the good and bad, let's say they were pretty equal, the bad did not so substantially outweigh the good. Do you think even though you found him guilty of the crime charged and you found true all those special circumstances you could ever vote for life?" To this Ms. Dyer replied "Yeah" and "Yeah, I think so." (12 RT 1211-1212.)

Ms. Bare similarly leaned heavily in favor of capital punishment and indicated on her questionnaire that she did not "agree with life imprisonment. The victim had no choice." (13 CT 3555.) When asked whether she could consider the penalty of life without the possibility of parole if appellant were found guilty of first degree murder and the special circumstances allegations were found to be true," she responded: "Maybe." (13 RT 1308.) She also said she "certainly would try" to go into the penalty phase with an open mind. (13 RT 1309.)

Neither Ms. Dyer nor Ms. Bare stated unequivocally that they would consider the two options "equally," as was demanded by the trial court of Ms. Brown. If the trial court's interpretation of the *Witt* standard was that individuals who could not state with certainty that they would consider both penalties equally should be excluded, then prospective jurors Dyer and Bare should have been excluded. If not, then Ms. Brown should not have been excluded. The fact that Ms. Brown was excluded by the trial court while these other two prospective jurors were not, indicates the trial court's application of the *Witt* standard was unequal and favored the prosecution.

Further support for this conclusion is found in the court's evaluation of prospective juror Lee as compared to its evaluation of prospective jurors

Nielson, Powers, Romero, Dyer and Bare. As will be remembered, the court excluded Mr. Lee after he indicated he would be inclined to vote against the death penalty if the evidence established that appellant had mental difficulties and he had not been provided the opportunity for treatment. If Mr. Lee was excluded by the trial court based on a perception that he would invariably vote for one penalty over the other in the case before him, then prospective jurors Nielson, Powers, Romero, Dyer, and Bare should have been excluded for this same reason since they all indicated they would automatically vote for death if the charges and special circumstances allegations were proven. The only difference between the positions taken by these jurors and that taken by Mr. Lee was that Mr. Lee's "automatic" verdict would ***not*** have been contrary to his instructions and the law, while an automatic vote for the death penalty based solely on the basis of the charges and special circumstances allegations would have been. (See *People v. Pinholser*, *supra*, 1 Cal.4th at pp. 916-918 [jurors properly excused where "[e]ach juror's reluctance to impose the death penalty was based not on an evaluation of the particular facts of the case, but on an abstract inability to impose the death penalty in a felony-murder case."].)

The trial court's treatment of life-inclined jurors as compared to its treatment of death-inclined jurors demonstrates an arbitrary and uneven application of the *Witt* standard. At the very least, because the court's application of the *Witt* standard was arbitrary and capricious, its rulings as to Ms. Brown and Mr. Lee, discussed above, are not entitled to deference. (See *People v. Welch*, *supra*, 5 Cal.4th at p. 234.) However, because the prosecutor utilized her peremptory challenges to exclude the remaining "life-inclined" jurors who escaped the court's uneven application of *Witt*, the voir dire in this case resulted in a "jury culled of all those who revealed during voir dire

examination that they had conscientious scruples against or were otherwise opposed to capital punishment" (*Adams v. Texas*, *supra*, 448 U.S. at p. 43), and therefore produced "a jury uncommonly willing to condemn a man to die" (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 520-521). For this reason the death sentence must be reversed.

2. ***The Prosecutor's Exercise of Peremptory Challenges to Excuse Life-Inclined Jurors Who Remained Produced a Jury From Which all Such Jurors Were Excluded in Violation of Appellant's Right to a Fair and Impartial Jury.***

Following the court's rulings on the challenges for cause the prosecution exercised a total of 22 peremptory challenges most, if not all, against prospective jurors who expressed any reservations against the death penalty. (Fletcher (12 RT 1083; 14 CT 3713) ["I think it is horrible to put anyone to death. However, there are certain situations & circumstances that I feel may require someone to be put to death. I would probably have a hard time with myself to vote for (death penalty)."]; Cavaretta (12 RT 1083; 13 CT 3577) ["Should be reserved for the most heinous crimes where there is no doubt of the person's guilt."]; Lund-Web (12 RT 1083; 9 CT 2411) ["I feel it's wrong for a person to purposly [sic] take the life of another person. At this point I'm not real sure of my feelings regarding the death penalty."] Mummert (12 RT 1153;14 CT 3807) ["I'm for the death penalty in capital cases that involve kidnapping. I don't think it should be used in all capital cases." "I would prefer this penalty [life without the possibility of parole] over the death penalty but believe individuals that receive such a penalty should be given a chance to help others if they want to."]; Gerritzen (12 RT 1154; 8 CT 2205) ["I am pro-death penalty, but I don't like the way it is done here. It should be done where everyone has to see it so it acts as a deterrent to potential criminals and all parties involved in the justice system."; Crawford (12 RT 1154; 8 CT

2095) ["A necessary tool of the criminal justice system which may be administered in extreme or special incidents. If after all avenues of justice system is afforded an individual it may be administered with compassion upon the convicted person."]; Ree (12 RT 1213; 14 CT 3896) ["It is warranted for especially heinous crimes in which guilt may be proven with high certitude."] DiMuccio (12 RT 1214; 8 RT 2139) ["I feel uncomfortable giving the death penalty." "I would rather give life imprisonment than the death penalty."]; Axelrod (12 RT 1214; 16 CT 4348) ["I do believe if and when a person is found guilty he should serve life imprisonment as it goes this is punishment enough especially in a murder case."]; Poore (13 RT 1429; 10 CT 2568 ["Though a very serious decision, it may serve as a deterrent for some people"]; Brinkman (14 RT 1547; 8 CT 2005) ["I would have to be completely convinced someone was guilty – i.e., not a decision lightly made, but I do believe in the death penalty in certain violent crimes."]; Endozo (14 RT 1549; 8 CT 2161) ["I'm not sure. As a Christian it's not easy to imagine rendering such a decision though many churches have done just that. But at times it seems that the death penalty is a suitable punishment."]; Lewis (12 RT 1214; 9 CT 2387) ["I think the death penalty is a poor manner of dealing with people who commit serious crimes. Incarceration and rehabilitation is my preference."]; Heslip (13 RT 1294; 14 CT 3735) ["In general I am opposed to the death penalty. However, under certain special conditions I feel the death penalty could apply."]; Jensen (13 RT 1358; 9 CT 2251) ["I feel it is necessary however I never thought I would need to decide this punishment."]; Sanchez (13 RT 1358; 10 CT 2683) ["I don't like it, but in some cases it seems the only justice of victim's friends and relatives. (I'm not really educated on death penalty.)]; Anderson (13 RT 1358; 13 CT 3532) ["I feel that death penalty is a very serious sentence. However, I feel it is justified on extreme cases, i.e.

serial murderers. Other than that no."]; Themont (14 RT 1548; 10 CT 2751) ["I feel torn on the subject, but in certain circumstances I feel it is justified."].)

Appellant recognizes this Court has repeatedly held that a prosecutor's exercise of peremptory challenges to exclude life-inclined jurors, or "death-penalty skeptics," does not offend the federal constitution. (See, e.g., *People v. Ochoa*, *supra*, 26 Cal.4th at p. 432 [and authorities cited therein].) However, where, as here, state action — whether on the part of the trial court, the prosecutor, or a combination of the two — results in a jury purged of all those with any scruples against imposing the death penalty, he respectfully submits that blind adherence to these decisions is contrary to clearly established United States Supreme Court precedent. (*Adams v. Texas*, *supra*, 448 U.S. at p. 43; *Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 520-521.)

The rationale underlying the court's finding that the use of peremptory challenges to exclude life-inclined jurors does not offend the constitution is that the defense is granted an equal number of peremptory challenges with which it is free to exclude death-inclined jurors. (See, e.g., *People v. Ochoa*, *supra*, 26 Cal.4th at p. 432 ["Because both parties may exercise peremptory challenges to remove jurors with unfavorable attitudes, the practice does not produce a jury biased toward death."].) Even assuming the correctness of this rationale and its application to some cases — indeed, to most cases — it does not apply to this case. This is so because the defense and the prosecution were *not* on equal footing when they exercised their peremptory challenges after the trial court's rulings on challenges for cause.

As discussed above, the trial court refused to exclude death-inclined jurors who were disqualified, excused life-inclined jurors who were not disqualified, and otherwise applied the *Witt* standard inconsistently and unfairly in a manner than benefitted the prosecution and resulted in the

unjustified exclusion of a disproportionate number of life-inclined jurors. Unlike the prosecution, many of the defense peremptory challenges had to be directed toward damage control against those jurors whom the court should have excused for cause. Clearly, the prosecution and the defense did not exercise their peremptory challenges on a level playing field. The pool of remaining jurors was already unfairly skewed toward death due to improper state action. Regardless of the vehicle by which the state achieves the result, it is settled that when the state has excluded all life-inclined citizens from a capital jury, the "State crosse[s] the line of neutrality," "produce[s] a jury uncommonly willing to condemn a man to die," and violates the Sixth and Fourteenth Amendments because "the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 520-522 and fn. 20.)

Finally, counsel's failure to object to the prosecutor's exercise of peremptory challenges to purge the panel of the few life-inclined jurors that remained after the court's unfair rulings on the challenges for cause should not be deemed to have waived the issue for appeal. It is well settled that counsel is not obligated to make futile objections. (See, e.g., *People v. Hamilton* (1989) 48 Cal.3d 1142, 1189 and n. 27.) As noted above, this court has consistently rejected claims that a prosecutor's use of peremptory challenges to exclude life-inclined jurors, or "death penalty skeptics," violates the federal constitution. What distinguishes this case from that line of authority is the trial court's erroneous application of the *Witt* standard to stack the deck against the defense and in favor of the prosecution. Since the trial court had already determined its application of *Witt* was correct and appropriate, it is clear that any objection on these grounds would have been futile. Additionally, waiver is not indicated since counsel cannot waive a defendant's right to an unbiased

jury without express consent. (See *Hughes v. United States*, *supra*, 258 F.3d 453.)

In sum, the combination of the court's inconsistent and fundamentally unfair application of *Witt* and the prosecutor's exercise of peremptory challenges resulted in a "jury culled of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment" (*Adams v. Texas*, *supra*, 448 U.S. 38, 43), and produced "a jury uncommonly willing to condemn a man to die" (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 520-521). Therefore, the death judgment imposed by this jury cannot be executed.

E. CONCLUSION

One accused of a crime has a constitutional right to a trial by impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [although the right to an impartial jury is not explicitly stated in the California Constitution, it is implied.].) """"The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution."""" (*In re Hitchings* (1993) 6 Cal.4th 97, 110.) In short, "[t]he right to a fair and impartial jury is one of the most sacred and important guarantees of the Constitution." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 283; accord *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1075 ["Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors. . . "].)

"Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188.) Here the trial court's exclusion of qualified jurors, and inconsistent application of the *Witt* standard which unfairly favored the prosecution, violated appellant's rights to

a fair and impartial jury, to due process of law, and to a reliable penalty determination. The prosecutor then utilized peremptory challenges to exclude the few remaining "life-inclined" jurors who escaped the court's uneven application of *Witt* and the joint efforts of the two state actors resulted in a "jury culled of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment" (*Adams v. Texas*, *supra*, 448 U.S. at p. 43), and therefore produced "a jury uncommonly willing to condemn a man to die" (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 520-521). Consequently, the death sentence must be reversed.

Overall Challenges

II.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents the arguments in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have *expanded* the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime — even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) — to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire

burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code section 190.2, the "special circumstances" section of the statute — but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death.

A. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.2 IS IMPERMISSIBLY BROAD.

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the United States Constitution. As this Court has recognized:

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726,

> 2764, 33 L.Ed.2d 346 [conc. opn. of White, J.]; *accord, Godfrey v. Georgia* (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 [plur. opn.].)

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.

(*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained 27 special circumstances[12] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty.

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[12] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now 34.

These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*" (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) This Court has construed the lying-in-wait special circumstance so broadly as to extend Section 190.2's reach to virtually all intentional murders. (See *People v. Hillhouse*, *supra*, 27 Cal.4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-558, 575.) These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder

that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind (1997) *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283, 1324-1326.)[13] It is quite clear that these theoretically possible noncapital first degree murders represent a small subset of the universe of first degree murders. (*Ibid.*) Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465

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[13]The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," i.e., a premeditated murder not falling under one of section 190.2's many special circumstance provisions. (Shatz and Rivkind, *supra*, 72 N.Y.U. L.Rev. at p. 1325.) This would be a premeditated murder committed by a defendant not convicted of another murder and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, i.e., a planned murder in which the killer simply confronted and immediately killed the victim or, even more unlikely, advised the victim in advance of the lethal assault of his intent to kill – a distinctly improbable form of premeditated murder. (*Ibid.*)

U.S. 37, 53. Not so. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, *supra*, 465 U.S. at p. 52, fn. 14.)

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law. (See section E of this Argument, *post*).

B. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE SECTION 190.3, SUBDIVISION (A), AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Section 190.3, subdivision (a), violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[14] Indeed, the Court has allowed extraordinary expansion of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[15] or having had a "hatred of religion,"[16] or threatened witnesses after his arrest,[17] or disposed of the victim's body in a manner that precluded its recovery[18].

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967, 987-988), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

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[14] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (6th ed. 1996), par. 3.

[15] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn.10, *cert. den.*, 494 U.S. 1038 (1990).

[16] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S.Ct. 3040 (1992).

[17] *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S.Ct. 498.

[18] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.*, 496 U.S. 931 (1990).

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. Thus, prosecutors have been permitted to argue as a "circumstances of the crime"aggravating factor to be weighed on death's side of the scale:

a. That the defendant struck many blows and inflicted multiple wounds[19] or that the defendant killed with a single execution-style wound.[20]

b. That the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[21] or that the defendant killed the victim without any motive at all.[22]

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[19]See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

[20]See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

[21]See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

[22]See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

c. That the defendant killed the victim in cold blood[23] or that the defendant killed the victim during a savage frenzy.[24]

d. That the defendant engaged in a cover-up to conceal his crime[25] or that the defendant did not engage in a cover-up and so must have been proud of it.[26]

e. That the defendant made the victim endure the terror of anticipating a violent death[27] or that the defendant killed instantly without any warning.[28]

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[23]See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

[24]See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[25]See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

[26]See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informed others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[27]See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT 4623.

[28]See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

f. That the victim had children[29] or that the victim had not yet had a chance to have children.[30]

g. That the victim struggled prior to death[31] or that the victim did not struggle.[32]

h. That the defendant had a prior relationship with the victim[33] or that the victim was a complete stranger to the defendant.[34]

These examples show that absent any limitation on factor (a) ("the circumstances of the crime"), different prosecutors have urged juries to find aggravating factors and place them on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of factor (a) to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

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[29]See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[30]See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

[31]See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

[32]See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[33]See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

[34]See, e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

a. The age of the victim. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[35]

b. The method of killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[36]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[37]

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[35]See, e.g., *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

[36]See, e.g., *People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

[37]See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840,

d. The time of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[38]

e. The location of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed in her own home, in a public bar, in a city park or in a remote location.[39]

The foregoing examples of how factor (a) is actually being applied in practice make clear that it is being relied upon as a basis for finding aggravating factors in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations

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RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

[38]See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

[39]See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16,749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.[40]

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].)

C. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY TRIAL ON EACH FACTUAL DETERMINATION PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (Pen. Code, § 190.2) or in its sentencing guidelines (Pen. Code, § 190.3). Section 190.3, subdivision (a), allows prosecutors to argue that every feature of a crime that can be articulated

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[40]The danger that such facts have been, and will continue to be, treated as aggravating factors and weighed in support of sentences of death is heightened by the fact that, under California's capital sentencing scheme, the sentencing jury is not required to unanimously agree as to the existence of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a reasonable doubt, or to make any record of the aggravating factors relied upon in determining that the aggravating factors outweigh the mitigating. (See section C of this argument, *post.*)

is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty.[41] In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that

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[41] Appellant's requested instructions on these points were refused by the trial court as contrary to law. (18 CT 4967-4968, 4978; 33 RT 3799-3800.)

aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But these interpretations have been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; and *Blakely v. Washington* (2004) 542 U.S. __, 124 S.Ct. 2531 [hereinafter *Blakely*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at p. 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Ring, supra*, 536 U.S. at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which can increase the penalty is the functional equivalent of

an element of the offence, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

This year, in *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2535.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 2543.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at 2537, italics in original.)

As explained below, California's death penalty scheme, as interpreted by this Court, does not comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*, and violates the federal Constitution.

a. In the Wake of Apprendi, Ring, and Blakely, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution,

not be unanimous. (*People v. Fairbank*, *supra*,16 Cal.4th 1223; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden of proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweighs any and all mitigating factors.[43] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (18 CT 5081),"an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88 [emphasis added].)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[44] These factual determinations are essential

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[43] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

[44] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring*

prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[45]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death, *Apprendi* does not apply. After *Ring*, this Court repeated the same analysis in *People v. Snow* (2003) 30 Cal.4th 43, and *People v. Prieto* (2003) 30 Cal.4th 226: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) This holding is based on a truncated view of California law. As section 190, subdivision (a),[46] indicates, the maximum penalty for *any* first degree murder conviction is death.

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expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at 460)

[45]This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

[46]Section 190, subdivision (a), provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 536 U.S. at 604.)

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 536 U.S. at p. 604.) Section 190, subdivision (a), provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance. (Pen. Code, § 190.2). Death is not an available option unless the jury makes the further findings that one or more aggravating circumstances exist and substantially outweigh the mitigating circumstances. (Pen. Code, § 190.3; CALJIC No. 8.88 (7th ed., 2003).) It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating

circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC No. 8.88), and this Court has recognized that a particular special circumstance can even be argued to the jury as a *mitigating* circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835 [financial gain special circumstance (Pen. Code, § 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].)

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency,[47] while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances.[48] There is no meaningful difference between the processes followed under each scheme.

"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, *supra*, 536 U.S. at p. 604.) In *Blakely*, the high court made it clear that, as Justice Breyer

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[47]Ariz.Rev.Stat. Ann. section 13-703(E) provides: "In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

[48]Section 190.3 provides in pertinent part: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances."

pointed out, " a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 124 S.Ct. at 2551[emphasis in original].) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32; citing *Anderson*, *supra*, 25 Cal.4th at pp. 589-590, fn.14.) The Court has repeatedly sought to reject *Ring's* applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto*, *supra*, *30* Cal.4th at p.275; *Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are *no* facts, in Arizona or California, that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. Additionally, in both states, the absence of an aggravating

circumstance precludes entirely the imposition of a death sentence. And *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal constitution.

In *Prieto*, the Court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California, supra*, 512 U.S. at p. 972.) No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate." (*Prieto, supra*, 30 Cal.4th at p. 263 [emphasis added].) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale in support of a death sentence. (See, *People v. Duncan, supra*, 53 Cal.3d at pp. 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, as noted above, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring, supra*, 65 P.3d at p. 943 ("Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency."); accord,

State v. Whitfield (Mo. 2003) 107 S.W.3d 253; *State v. Ring* (Az. 2003) 65 P.3d 915; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.[49])

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make the finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the state's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely*, *supra*, 124 S.Ct. at p. 2538.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially

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[49]See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether mitigating circumstances are sufficiently substantial to call for leniency since both findings are essential predicates for a sentence of death).

outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.[50]

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[50]In *People v. Griffin* (2004) 33 Cal.4th 536, this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, analogies were no longer made to a sentencing court's traditional discretion as in *Prieto* and *Snow*. The Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432, 437 [hereinafter *Leatherman*], for the principles that an "award of punitive damages does not constitute a finding of 'fact[ ]': "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of . . . moral condemnation"].) (*Griffin, supra*, 33 Cal.4th at p. 595.)

In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?

(*Leatherman, supra*, 532 U.S. at p. 429.) This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely*.

Leatherman was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed *de novo*. Although the court found that the ultimate amount was a moral decision that should be reviewed *de novo*, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. (*Id.*, 532 U.S. at pp. 437, 440.) *Leatherman* thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi*, *Ring* and *Blakely* are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC No. 8.88? The maximum sentence would be life without possibility of parole. (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence would still be life without possibility of parole unless the jury made an additional finding — that the aggravating circumstances substantially outweigh the mitigating circumstances.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*Prieto*, *supra*, 30 Cal. 4th at 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed.

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." [Citation.] The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting states more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence."

(*Ring*, *supra*, 536 U.S. at p. 606, quoting with approval Justice O'Connor's *Apprendi* dissent, 530 U.S. at 539.)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in both its severity and its finality"].)[51] As the high court stated in *Ring*, *supra*, 536 U.S. at pp. 608-609:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The final step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of

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[51]The *Monge* court, in explaining its decision not to extend the double jeopardy protection it had applied to capital sentencing proceedings to a noncapital proceeding involving a prior-conviction sentencing enhancement, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* (1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 [emphasis added].)

California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

b. The Requirements of Jury Agreement and Unanimity

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; *accord*, *People v. Bolin* (1998) 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to appellant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor – including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[52] And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence

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[52]See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; *Den ex dem. Murray v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the final deliberative process in which the ultimate normative determination is made. In *Ring* and *Blakely* the United States Supreme Court has made clear that such factual findings must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence.

These protections include jury unanimity. The Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.[53]) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California*, *supra,* 524 U.S. at p. 732;[54] *accord,*

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[53] In a non-capital context, the high court has upheld the verdict of a twelve member jury rendered by a vote of 9-3. (*Johnson v. Louisiana* (1972) 406 U.S. 356; *Apodaca v. Oregon* (1972) 406 U.S. 404.) Even if that level of jury consensus were deemed sufficient to satisfy the Sixth, Eighth, and Fourteenth Amendments in a capital case, California's sentencing scheme would still be deficient since, as noted above, California requires no jury consensus at all as to the existence of aggravating circumstances.

[54] The *Monge* court developed this point at some length, explaining as follows: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida* 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of

Johnson v. Mississippi (1988) 486 U.S. 578, 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., Pen. Code, §§ 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and certainly no less (*Ring*, 536 U.S. at p. 609).[55] See section D, *post*.

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[56] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People*

Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington,* 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (*Monge v. California*, *supra*, 524 U.S. at pp. 731-732.)

[55]Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).)

[56]The first sentence of article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

v. Medina (1995) 11 Cal.4th 694, 763-764) – would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. *The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.*

(*Richardson, supra*, 526 U.S. at p. 819 [emphasis added].)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and did not do and (b) that

the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne, supra,* 4 Cal.4th 43; *People v. Hayes, supra,* 52 Cal.3d at p. 643.) However, *Ring* and *Blakely* make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

2. *The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.*

a. *Factual Determinations*

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship*, *supra*, 397 U.S. at p. 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general, and the jury in particular, the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" the decision is appropriate. (*In re Winship*, *supra*, 397 U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen

procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 743, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value" (*Speiser, supra*, 375 U.S. at p. 525), how much more transcendent is human life itself! Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *In re Winship, supra,* 397 U.S. 358 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Cal.3d 306 [same]; *People v. Thomas* (1977) 19 Cal.3d 630 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life, and the dignity of the individual, be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure"(*Santosky, supra*, 455 U.S. at p. 755), the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as

> nearly as possible the likelihood of an erroneous judgment." [Citation.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at p. 755.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*In re Winship*, *supra*, 397 U.S. at p. 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638.) No greater interest is ever at

stake; see *Monge v. California*, *supra*, 524 U.S. at p. 732 ["the death penalty is unique in its severity and its finality"].) In *Monge*, the Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt that not only are the factual bases for its decision true, but that death is the appropriate sentence.

Appellant is aware that this Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See *People v. Griffin*, *supra*, 33 Cal.4th at p. 595; *People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is

> somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (Conn. 2003) 833 A.2d 363, 408-409, fn. 37.)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638.) No greater interest is ever at stake. (See *Monge v. California*, *supra*, 524 U.S. at p. 732 ["the death penalty is unique in its severity and its finality"].) Under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

3. *Even If Proof Beyond a Reasonable Doubt Were Not the Constitutionally Required Burden of Persuasion for Finding (1) That an Aggravating Factor Exists, (2) That the Aggravating Factors Outweigh the Mitigating Factors, and (3) That Death Is the Appropriate Sentence, Proof by a Preponderance of the Evidence Would Be Constitutionally Compelled as to Each Such Finding.*

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in *any* sentencing proceeding. Judges have never had the power to impose an enhanced sentence without the firm belief that whatever considerations underlay such a sentencing decision had been at least proved to be true more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to find "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of *any* historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the evidence burden of proof. (See, e.g., *Griffin v. United States*, *supra*, 502 U.S. at p. 51 [historical practice given great weight in constitutionality determination]; *Den ex dem. Murray v. Hoboken Land and Improvement Co.*, *supra*, 59 U.S. (18 How.) at pp. 276-277 [due process determination informed by historical settled usages].)

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in

aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

Accordingly, appellant respectfully suggests that *People v. Hayes, supra,* 52 Cal.3d 577 – in which this Court did not consider the applicability of section 520 – was erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, the question whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments and is reversible per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.) That should be the result here, too.

4. Some Burden of Proof Is Required in Order to Establish a Tie-Breaking Rule and Ensure Even-Handedness.

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the

defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "[C]apital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida, supra*, 428 U.S. at p. 260) – the "height of arbitrariness" (*Mills v. Maryland* (1988) 486 U.S. 367, 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

5. *Even If There Could Constitutionally Be No Burden of Proof, the Trial Court Erred in Failing to Instruct the Jury to That Effect.*

If in the alternative it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury. The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana, supra,* 508 U.S. 275.) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is *no* burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do

exist.[57] This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (*Sullivan v. Louisiana, supra,* 508 U.S. 275.)

6. ***California Law Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.***

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown, supra,* 479 U.S. at p. 543; *Gregg v. Georgia, supra,* 428 U.S. at p. 195.) And especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra,*16 Cal.4th 1223), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.) Of course, without such findings it cannot be determined that the jury unanimously agreed beyond

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[57]See, e.g., *People v. Dunkle*, No. S014200, RT 1005, cited in Appellant's Opening Brief in that case at page 696.

a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber*, supra, 2 Cal.4th at p. 859.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus, and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, at p. 269.)[58] The same analysis applies to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Pen. Code, § 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to *more* rigorous protections than those afforded

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[58]A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations § 2280 et seq.)

non-capital defendants. (*Harmelin v. Michigan*, *supra,* 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra,* 536 U.S. 584), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland*, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., 486 U.S. at 383, fn. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[59]

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[59] See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(I) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(c) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

7. *California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-Case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.*

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 [plurality opinion, alterations in original, quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251 opinion of Stewart, Powell, and Stevens, JJ.].)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris*, supra, 465 U.S. at p. 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, *supra*, 465 U.S. at 52, fn. 14.)

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra.* (See section A of this Argument, *ante*.) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see section C of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see section B of this Argument). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia, supra,* 428 U.S. at p. 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. (See *Atkins v. Virginia, supra,* 536 U.S. at p. 316 fn. 21; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, 830-831; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22; *Coker v. Georgia* (1977) 433 U.S. 584, 596.)

Twenty-nine of the thirty-eight states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute Georgia requires that the Georgia Supreme Court determine whether

". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman v. Georgia* (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726] . . ." (*Gregg v. Georgia* (1976) 428 U.S. 153, 198.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Proffitt v. Florida* (1976) 428 U.S. 242, 259.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[60]

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the

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[60] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Also see *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433,444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.)

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in *Furman* in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 192, citing *Furman v. Georgia*, *supra*, 408 U.S. at p. 313 (White, J., conc.).) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

8. ***The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.***

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in section 190.3, subdivision (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant and devoted a considerable portion of its closing argument to arguing these alleged offenses.

The United States Supreme Court's recent decisions in *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. (See section C of this Argument, *ante*.) The application of these cases to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

9. *The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.*

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, supra, 486 U.S. 367; *Lockett v. Ohio*, *supra*, 438 U.S. 586.)

10. *The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.*

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton*, *supra*, 48 Cal.3d at p. 1184; *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031, fn.15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant*

v. Stephens, *supra*, 462 U.S. at p. 879; *Johnson v. Mississippi*, supra, 486 U.S. at pp. 584-585.)

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

Even without such misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is

unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 973 quoting *Gregg v. Georgia*, *supra*, 428 U.S. at p. 189 (joint opinion of Stewart, Powell, and Stevens, JJ.)) and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.)

D. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS.

As noted in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, *second only to life itself*, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 [emphasis added].) "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." (*Commonwealth v. O'Neal* (Mass. 1975) 327 N.E.2d 662, 668.)

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra,* 17 Cal.3d 236; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification must be more strict, and any purported justification by the State of the discrepant treatment must be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In *Prieto*,[61] as in *Snow*,[62] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. However apt or inapt the analogy, California is in the unique position of giving

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[61]"As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (*Prieto*, 30 Cal.4th at 275 [emphasis added].)

[62]"The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*Snow*, 30 Cal.4th at 126, fn. 3; [emphasis added].)

persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., Pen. Code, §§ 1158, 1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. (See sections C.1-C.5, *ante*.) Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. Further, unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See section C.6, *ante*.) These discrepancies on basic procedural protections are skewed against persons subject to loss of life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See *People v. Allen*, *supra*, 42 Cal.3d at pp.1286-1288.) In stark contrast to *Prieto* and

Snow, there is no hint in *Allen* that capital and non-capital sentencing procedures are in any way analogous. In fact, the decision rested on a depiction of fundamental differences between the two sentencing procedures.

The Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen*, *supra*, 42 Cal. 3d at p. 1286.) But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses (*Coker v. Georgia*, *supra*, 433 U.S. 584), or offenders (*Enmund v. Florida*, *supra*, 458 U.S. 782; *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia*, *supra,* 536 U.S. 304). Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See Pen. Code, § 190.4; *People v. Rodriguez*, supra, 42 Cal.3d at pp. 792-794.)

The second reason offered by *Allen* for rejecting the equal protection claim was that the range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen*, *supra*, 42 Cal.3d at p. 1287 [emphasis

added].) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability [citation]. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright*, *supra*, 477 U.S. at p. 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305 [opn. of Stewart, Powell, and Stephens, J.J.]; see also *Reid v. Covert* (1957) 354 U.S. 1, 77 [conc. opn. of Harlan, J.]; *Kinsella v. United States* (1960) 361 U.S. 234, 255-256 [conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.]; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 187 [opn. of Stewart, Powell, and Stevens, J.J.]; *Gardner v. Florida*, *supra*, 430 U.S. at pp. 357-358; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605 [plur. opn.]; *Beck v. Alabama*, *supra*, 447 U.S. at p. 637; *Zant v. Stephens*, *supra*, 462 U.S. at pp. 884-885; *Turner v. Murray* (1986) 476 U.S. 28, 36 [plur. opn.], quoting *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994; *Monge v. California*, *supra*, 524 U.S. at p. 732.)[63] The qualitative difference between

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[63]The *Monge* court developed this point at some length: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*,

a prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply procedural safeguards used in noncapital settings to capital sentencing.

Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. (*Allen, supra*, 42 Cal.3d at p. 1287.) The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference – and one that was recently rejected by this Court in *Prieto* and *Snow*. A trial judge may base a sentence choice under the DSL on factors that include precisely those considered as aggravating and mitigating circumstances in a capital case. (Compare Pen. Code, § 190.3, subds. (a) through (j), with California Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate *all* sentencing choices.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000) 531 U.S. 98,

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at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington*, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (*Monge v. California, supra*, 524 U.S. at pp. 731-732.)

121 S.Ct. 525, 530.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has also been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, e.g., *Atkins v. Virginia*, *supra*, 536 U.S. 304.)

Nor can this fact justify the refusal to require written findings by the jury (considered by this Court to be the sentencer in death penalty cases [*People v. Allen*, *supra*, 42 Cal.3d at p. 1286]) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (*Blakely v. Washington*, *supra*; *Ring v. Arizona*, *supra*.)[64]

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[64] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at p. 609.)

California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland, supra*, 486 U.S. at p. 374; *Myers v. Ylst, supra*, 897 F.2d at p. 421; *Ring v. Arizona, supra.*)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California, supra,* 524 U.S. 721.) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

E. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former *apartheid* regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty*

in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339, 366; see also *People v. Bull* (Ill.1998) 705 N.E.2d 824 [dis. opn. of Harrison, J.].) (Since that article, in 1995, South Africa has abandoned the death penalty.)

The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (1 January 2000), published at http://web.amnesty.org/library/index/ENGACT500052000.)[65]

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

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[65]These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Id.*)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia*, *supra*, 408 U.S. at p. 420 [dis. opn. of Powell, J.].) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100; *Atkins v. Virginia*, *supra*, 536 U.S. at p. 325.) It prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the United States Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T.2001, No. 00-8727, p. 4.) More recently, in finding that the Eighth Amendment now prohibits the execution of offenders under the age of 18, the Court observed: "Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the

Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.' [Citation.]" (*Roper v. Simmons* (2005) ___ U.S. ___ [125 S.Ct. 1183, 1198].)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra,* 536 U.S. 304.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot*, *supra*, 159 U.S. at p. 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[66]

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[66]Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better

Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright, supra,* 477 U.S. 399; *Atkins v. Virginia, supra,* 536 U.S. 304.)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

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than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).)

III.

THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT AND PREJUDICIAL VICTIM IMPACT EVIDENCE.

A. INTRODUCTION

Prior to the penalty phase, appellant filed a motion to limit the amount of victim impact evidence introduced by the prosecution. (18 CT 4981-4995.) In support of the motion appellant argued, among other things, that the scope of victim impact evidence under Penal Code section 190.3, subdivision (a), is limited to the victim's personal characteristics known to the defendant at the time of the offense, and that a more expansive interpretation of Penal Code section 190.3 would render the statute unconstitutionally vague under the Eighth Amendment of the United Sates Constitution and article I, section 17, of the California Constitution. (18 CT 4981-4982.) Appellant also argued that victim impact evidence relative to Penal Code section 190.3, subdivision (b), prior criminal conduct should be excluded. (18 CT 4992-4994.) During a hearing on the matter, appellant further argued that the prosecution's proposed victim impact evidence should also be excluded under Evidence Code section 352 as more prejudicial than probative.[67] (28 RT 2988, 2992.)

The prosecution sought to introduce three types of victim impact evidence:

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[67] The court set forth its understanding of the scope of appellant's argument as follows: "The Court considers these objections or motions in limine to be, in effect, based not only on constitutional due process grounds, as stated in the motion, but also as requests on the part of the Court to exercise its discretion under 352 [] to conduct a balancing of probative versus prejudicial evidence in a manner which is in keeping of the constitutional protections for the defendant's right to a fair trial." (28 RT 2992.)

> (1) Evidence relating to the victim's life including "a videotape which . . . consists of a photo montage and some music. There are 42 separate photographs, and the running time is approximately seven minutes on this video tape with, . . . a soft musical theme in the background, a piano and solo saxophone"(28 RT 2965);
>
> (2) Evidence relating to the victim's life and the impact of the crime on the victim's family including "at least five individuals who would be testifying concerning victim impact" (28 RT 2965); and
>
> (3) Victim impact evidence relating to prior crimes including evidence relating to Norma Knight "[s]pecifically that she has had emotional problems and been treated by a psychologist or a psychiatrist for numerous years; that — and there is the vice-principal, could also testify that — of the effect that they observed on her following the stabbing by the defendant, that she wasn't able to return to work — only for a short period of time and ultimately quite teaching entirely and was unable to return or resume her duties as a teacher, all directly following the stabbing by the defendant" (28 RT 2977).

Although the trial court excluded the videotape montage of photographs with musical accompaniment, virtually all of the victim impact evidence the prosecution sought to present to the jury, including the individual photographs contained in the videotape, was admitted over appellant's objection. However as discussed more fully below, the trial court erred in admitting this evidence under Penal Code section 190.3, subdivision (a) and (b). Further, the evidence was more prejudicial than probative and should have been excluded under Evidence Code section 352. By admitting irrelevant and prejudicial victim impact testimony, the court denied appellant a state created liberty interest as well as his state and federal constitutional rights to due process of law and to a fair and reliable determination of penalty under the Eighth and Fourteenth

Amendments. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) The death sentence must, therefore, be reversed.

B. TRIAL COURT RULINGS AND EVIDENCE PRESENTED

1. VIDEO MONTAGE OF PHOTOGRAPHS

As to the videotape the prosecution wished to introduce, the trial court ruled as follows:

> The video, in the Court's opinion, is argument and not evidence.
>
> As a result, the defendant's objections are sustained and the defendant's motion to limit the use of victim impact evidence insofar as it related to this video is granted.
>
> The Court's ruling at this point in time is not meant to prevent the introduction through the testimony of one or more live witnesses with regard to the photographs — individual photographs which are depicted there. And the Court's ruling is not meant to prevent the People in the argument phase of this proceeding to present those selfsame photographs in a video montage, I would indicate, and it should be without music.
>
> The evidence associated with other aspects, and certainly a video montage which contained photographs that had already been admitted into evidence relating to the crime scene, and photographs which are identified by witnesses testifying about the impact this crime has had on their lives could be put together in a video and presented by way of argument.

(28 RT 2970-2971.) Although the court initially indicated it would "grant" appellant's motion with respect to the video montage of photographs, it excluded only the videotape from evidence, not the photographs. The court ruled that photographs contained in the montage which had not already been introduced into evidence at the guilt phase, could be introduced into evidence

with supporting victim impact testimony.[68] The court further suggested that the prosecution combine all of the photographs introduced at both phases of the trial into a video montage for purposes of closing argument. The only matter actually excluded from evidence was the background music.

During the penalty phase the prosecution introduced 34 photographs of Ms. Eddings through the testimony of her relatives. (18 CT 5125-5127; 31 RT 3315-3316, 3327-3328, 3338-3352, 3368-3369.) Appellant objected to receipt of the photographs into evidence. (31 RT 3377-3380.) The court overruled the objections for the most part, excluding only two photographs — one of a child who was distantly related to Ms. Eddings, and one of Ms. Eddings' headstone. (31 RT 3377-3380.)

Numerous photographs of Ms. Eddings with her family taken at birthday parties and holiday gatherings were introduced into evidence through the testimony of her daughter Helen Harrington. (31 RT 3340 [People's Exhibit #114 (birthday party)]; 3341 [People's Exhibit #115 (harvest time gathering)]; 3342 [People's Exhibit #116 (birthday party), People's Exhibit #117 (birthday party)]; 3343 [People's Exhibit #118 (Christmas), People's Exhibit #119 (Christmas)]; 3344 [People's Exhibit #120 (family visit)]; 3345 [People's Exhibit #121 (family photo), People's Exhibit #122 (family gathering with first great-grandchild), People's Exhibit #123 (photo with great-granddaughter), People's Exhibit #124 (Ms. Eddings reading to great-granddaughter)]; 3346 [People's Exhibit #125 (birthday party), People's Exhibit #126 (Ms. Eddings with grandchildren), People's Exhibit #127 Ms. Eddings with grandchildren)] 3347 [People's Exhibit #128 (family gathering),

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[68] On this point the court noted: "While each individual photograph may be relevant and admissible, it's the combination which pushes this document over the line from evidence into argument." (28 RT 2970.)

People's Exhibit #129 (photo taken in 1950 of Ms. Eddings with Ms. Harrington), People's Exhibit #130 (photo taken in 1939 of Ms Eddings with her daughters), People's Exhibit #131 (Ms. Eddings with great-granddaughter), People's Exhibit #132 (Ms. Eddings with Ms Harrington), People's Exhibit #133 (Ms. Eddings with her deceased husband)]; 3348 [People's Exhibit #137 (birthday party), People's Exhibit #138 (birthday party), People's Exhibit #139 (birthday party)]; 3349 [People's Exhibit #136 (Ms. Eddings with daughter)]; 3351 [People's Exhibit #134 (Ms. Eddings and husband in embrace at anniversary party)].) Additional photographs were introduced through the testimony of Donna Velasquez. (31 RT 3315 [People's Exhibit #104 (Ms. Eddings with Ms. Velasquez' husband)]; 3316 [People's Exhibit #105 (Ms. Eddings with Ms. Velasquez' son), People's Exhibit #106 (Ms. Eddings and Ms. Valesquez)].) Ms. Eddings' niece Ernestine Pierson also authenticated family photographs during her testimony. (31 RT 3327 [People's Exhibit #107 (Ms. Eddings and family members including her late husband)], 3328 [People's Exhibit #108 (Ms. Eddings with her sisters and her late husband)].) Additional photographs were introduced through the testimony of Ms. Eddings' great-niece Shirley Grimmett. (31 RT 3368 [People's Exhibit #109 (Ms. Eddings with family members)], 3369 [People's Exhibit #110 (Ms. Eddings with family members including her late husband)].)

The 32 photographs introduced into evidence at the penalty phase were in a addition to the numerous crime scene and autopsy photographs introduced during the guilt phase. (18 CT 5120-5121.)

2. VICTIM IMPACT CONCERNING RELATIVES OF RUTH EDDINGS

With regard to victim impact evidence falling under subdivision (a) of section 190.3, the trial court ruled that "individuals who are familiar with the victim in this case, Ruth Eddings, can come and testify about the impact that

her loss had on them and members of the family with whom they are familiar, within certain limits. (28 RT 2983.) The court described these limits as follows: "the opinions of family members about the crime, about the defendant, or the appropriate punishment have little or no relevance and should be excluded. I think this should be extended also to the witness's exposure to facts of the crime during the trial or to the impact that the trial proceedings have had on the family members themselves." (28 RT 2972.) In keeping with this ruling, the prosecution called four family members to testify including Ms. Eddings' daughter Helen Harrington, two of her nieces Donna Velasquez and Ernestine Pierson, and her great niece Shirley Grimmett.

a. ***Helen Harrington***

Ms. Harrington testified that her mother was "everything" to her, and described things her mother had liked to do including working in the yard and baking. She told the jury that her mother liked to spend time with her children, her grandchildren, and her great-grandchildren. (31 RT 3338.) Ms. Harrington explained that she had a daughter who had five children and a son who had two. Ms. Eddings would spend the holidays with her children, Ms. Harrington and her sister Marion Anthony, because they had large families. (31 RT 3338-3339.)

Although Ms. Eddings' husband had died some seven years before the incident, Ms. Harrington was asked about the relationship between her mother and father which she described as "passionate." (31 RT 3350.) Remembering an anniversary party, Ms. Harrington related that her parents had been kissing so much during the party that people kept asking them to stop. (31 RT 3351.) When Ms. Eddings' husband died in 1989 he was cremated. (31 RT 3351.) Ms. Eddings was also cremated and her ashes were placed with her husband's under a single headstone. (31 RT 3351.)

Ms. Harrington was also asked to described telling her grandchildren about Ms. Eddings death. She told the jurors: "I explained to them that God gives us free will, everyone and that Billy chose to exercise his free will by murdering my mother. And that my mother was now in heaven with God and someday we all would be with her." Ms. Harrington testified that the grandchildren missed her mother and spoke of her frequently. (31 RT 3352.)

Ms. Harrington was asked about her three day visit with Ms. Eddings which occurred 10 days before the incident. She said it was the "absolute best" time they had ever spent together and explained that Ms. Eddings had not been herself for a while due to the hip surgeries she had undergone, but during Ms. Harrington's last three day visit she was feeling better. She told Ms. Harrington she felt like her old self, and said "I might even get 15 more years out of this thing." They went to lunch together and shopping. They talked about Ms. Harrington's childhood and Ms. Eddings spoke of her childhood. They sang hymns together. (31 RT 3353.) Ms. Harrington also described a touching scene between the two of them the night before she left.[69] (31 RT 3353-3354.) She told the jurors: "it was just a very, very special time. I came home, I couldn't — I couldn't stop talking about this particular special time that I had had with her." (31 RT 3354.)

When Ms. Harrington learned of her mother's death from a neighbor, she was in shock. She went to the scene before her mother's body was removed from the trailer. In the days following the incident Ms. Harrington

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[69] "[T]he last night she came in and I was getting ready to go to bed and she put her hands on my face and kissed me and she says, 'I love you so much, Jeanie.' And I remember bringing my hands down over her hips. And I says, 'My poor little old mommy with metal hips,' because both hips had been replaced. And so she cupped my face again and she says, 'Jeanie, you are my buddy.'" (31 RT 3354.)

fell into a deep depression and was prescribed Prozac. (31 RT 3355.) She told the jurors about a recurring nightmare where she saw her mother running and screaming: "Help me, Jean. Help me Jean." She also told them that for over a year after her mother's phone had been disconnected, she continued to dial her number frequently and engage in imaginary conversations with her because she wanted so badly to talk to her. (31 RT 3356-3357.)

Ms. Harrington and her sister were responsible for retrieving Ms. Eddings' belongings from the trailer after the fire. However, she testified that "[t]here really wasn't too much to recover. It was all pretty well burned." (31 RT 3357.) She was asked to, and did, describe her feelings of sadness as she went through the remains of her mother's belongings. Ms. Harrington told the jurors: "We would come across little things like maybe one shoe that was charred or, you know, little pieces of things that — they all meant something to us, we had either seen her in the shoes or eating from the dishes, or seen her wear the clothes, whatever. They all told a story." She added that she and her sister were crying as they went through their mother's belongings. (31 RT 3358.)

The prosecutor asked Ms. Harrington what she missed most about her mother and she replied: "Being able to confide in her, being able to know that she loved me without reservation. She just — I could depend on her loving me. I could depend on her being interested in what happened [in] my life, and the li[ves] of my children and grandchildren." She told the jurors there was no one in her life that could fill that role after her mother's death. (31 RT 3360.)

b. Donna Velasquez

Ms. Velasquez had a very close relationship with her aunt Ruth. She explained to the jurors that when her mother died when she was 16, she

transferred what she had felt for her mother to her aunt because the two women sounded alike. (31 RT 3314-3315.) She told the jurors that her aunt had always been very generous to her family and elaborated as follows:

> My mother — we were very poor. We didn't — we didn't — they had a hard time raising us, I think, my parents, and when I was seven my dad left, so then it was even worse. And my aunt would also bring things over because we couldn't afford the milk or whatever.
>
> I remember once when I was ten she bought me a beautiful red coat with gold-colored buttons. That was very precious to me because she bought it. She picked it out, and it was for me from her.

(31 RT 3315.) Ms. Valesquez shared how devastated she was when she learned of her aunt's death (31 RT 3316), and said she thinks of her often: "I think of her in connection when it was her birthday. I think of her in September when it was my birthday. She always used to send me cards for a special niece, you know, on my birthday, and you know, I don't get Christmas cards from her anymore. I think of her a lot, you know different occasions and no occasions." (31 RT 3317.)

c. ***Ernestine Pierson***

Ms. Pierson described her aunt Ruth as very loving and considerate. (31 RT 3326.) She was asked about visiting Ms. Eddings in the hospital when she had hip replacement surgery, and told the jurors that all of the hospital staff loved her aunt. (31 RT 3328-3329.) She spoke of her feelings of shock and denial at the news of her aunt's death, and of emptiness in viewing the scene of the fire. (31 RT 3329.) Ms. Pierson told the jurors she thinks of her aunt often and has difficulty sleeping: "It's very difficult to go to sleep because this is all you see. . . . not having really seen it, you have your own conclusion of what it was like." (31 RT 3330.) When asked what her response to her feelings was she replied: "There isn't words for the response to it." She agreed that she was upset and cried when she thought about her aunt which

she did "just about constantly or whenever anything comes up that we would stop to tell her about or something and every time we come into Riverside when we go past her place." (31 RT 3330-3331.)

d. Shirley Grimmett

When asked to describe her great aunt Ruth, Ms. Gimmett replied: "She was a very, very sweet lady. She was independent. She was funny. And she was always there if you needed her." (31 RT 3367.) Ms. Grimmett was asked about the reaction of her granddaughter to Ms. Eddings' death and she explained that the little girl asked about Ms. Eddings and missed her very much. (31 RT 3369.) She also spoke about the effect of Ms. Eddings' death on her three children, explaining that her son Larry has had difficulty sleeping and that her daughter Karen was not dealing with the events very well. (31 RT 3370.) Ms. Grimmett related the very personal information that every time Karen and her husband "would go to make love, they would have to stop, because they thought of all the torment and everything that my aunt had gone through, just in that simple act." They also avoided driving in the area, because Karen would "fall apart" if they drove by where Ms. Eddings' trailer had been. Ms. Grimmitt explained that her other son Steve was angry over the incident and would not talk about it. (31 RT 3371.)

Ms. Grimmitt learned about the incident the day it happened and drove to Ms. Eddings' home. She told the jurors how devastated she was when she saw the burned-out ruins of the trailer; she sat and cried. (31 RT 3373.) When asked how the incident had affected her Ms. Grimmitt replied: "I think about it constantly. Try not to sometimes. It's there. You turn the TV on, you see it. You listen to the news, you hear it all over again. And going through this it's just like it did happen yesterday instead of two and a half years ago. (31 RT 3374.)

3. VICTIM IMPACT CONCERNING PRIOR CRIMES

With regard to the prosecution's proposed "victim impact" evidence concerning Norma Knight, the trial court ruled such evidence was admissible citing the following authority: "In terms of a citation to cases that permit or seem to permit such evidence, there is the case of *People v. Mickle* . . . 53 Cal.3d, 140, beginning at page 186 and going over to page 187, and . . . the case of *People v. Garceau* . . . 6 Cal.4th, 140, appropriate discussion beginning at page 200 and going over to page 202." (28 RT 2983.) In keeping with the trial court's ruling the prosecution introduced evidence of the lasting effect of the 1972 assault upon Ms. Knight. Thomas Lindley testified that Ms. Knight took time off from work after the incident and then attempted to return, but was frightened, nervous and apprehensive with respect to daily business, and ultimately quit teaching later that same year. (29 RT 3067.) Her son testified that at the time of trial, over 25 years after the incident, she was still undergoing psychiatric treatment. (29 RT 3061-3062.)

C. STANDARD OF REVIEW

The United States Supreme Court has made clear that capital cases require heightened due process, absolute fundamental fairness, and a higher standard of reliability. (*Beck v. Alabama*, *supra*, 447 U.S. 625; *Lockett v. Ohio*, *supra*, 438 U.S. 586; *Monge v. California*, *supra*, 524 U.S. 721.) This Court should, in accordance with these dictates, review *de novo* the trial court's admission of victim impact evidence in a capital trial. (See *People v. Gordon* (1990) 50 Cal.3d 1223, 1265.)

D. THE VICTIM IMPACT EVIDENCE RELATING TO MS. EDDINGS WAS FAR IN EXCESS OF WHAT SHOULD BE PERMITTED UNDER PENAL CODE SECTION 190.3, SUBDIVISION (A), AS A CIRCUMSTANCE OF THE CRIME, AND SHOULD HAVE BEEN EXCLUDED.

In *Payne v. Tennessee*, *supra*, 501 U.S. 808, a divided Supreme Court partially overruled two of its earlier decisions — *Booth v. Maryland* (1987) 482 U.S. 496 and *South Carolina v. Gathers* (1989) 490 U.S. 805) — and held that the Eighth Amendment is not a *per se* bar to all evidence or argument concerning the effect of the capital crime on the victim's family. The Supreme Court overturned *Booth* and *Gathers* to the extent that those cases established a blanket prohibition on any evidence, testimony, or argument about the effects of the crime. These earlier decisions, the Court reasoned, had been too restrictive as they "unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering 'a quick glimpse of the life' which a defendant 'chose to extinguish,' [citation], or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." (*Id.* at p. 822.) Thus, the Court determined that "a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." (*Id.* at p. 825.)

"Victim impact" evidence is not included among the list of factors which may be considered in California capital sentencing decisions set forth in Penal Code section 190.3. Nevertheless, shortly after the United States Supreme Court's decision in *Payne v. Tennessee*, this Court decided *People v. Edwards* (1991) 54 Cal.3d 787, and determined that some victim impact evidence and argument could be properly admitted under subdivision (a) of

Penal Code section 190.3 which provides for consideration of the "circumstances of the crime of which the defendant was convicted in the present proceeding . . ." (*Id.* at pp. 835-836.) The Court based this holding on a unique reading of the phrase "circumstances of the crime." The *Edwards* opinion stated that the specific harm caused by the defendant in a case could be considered because the "word 'circumstances' as used in factor (a) of section 190.3 does not mean merely the immediate temporal and spatial circumstances of the crime. Rather it extends to '[t]hat which surrounds materially, morally, or logically' the crime. (3 Oxford English Dict. (2d ed. 1989) p. 240, 'circumstance,' first definition.)" (*Id.* at p. 833.)

The language of *Edwards*, and its potential erosion of the very guiding principles that the 1978 initiative grafted onto the 1977 version of section 190.3 has been noted by both members of this Court and the United States Supreme Court. Justice Mosk decried the language of *Edwards* in his dissent in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 492, fn.2, asserting that the Court had potentially rendered the capital sentencing statute unconstitutionally vague. He was not the only one.

Justice Kennard, in her concurring and dissenting opinion in *People v. Fierro* (1991) 1 Cal.4th 173, artfully deconstructed the *Edwards* opinion's approach to the phrasing of section 190.3 factor (a). She noted that the language of *Edwards* was far too broad and illogical:

> In *People v. Edwards*, *supra*, 54 Cal.3d 787, the majority . . . relied primarily on a dictionary definition of the word "circumstance" as meaning " '[t]hat which surrounds materially, morally, or logically.'" (*Id.* at p. 833, quoting 3 Oxford English Dict. (2d ed. 1989) p. 240, "circumstance," first definition.) The majority concluded that the specific harm caused by the crime surrounds it "materially, morally, or logically," and therefore is a "circumstance of the crime" within the meaning of that phrase in section 190.3.

> Other accepted definitions are somewhat narrower than the one on which the majority relied. For example, a legal dictionary defines "circumstances" as "[a]ttendant or accompanying facts, events, or conditions." (Black's Law Dict. (6th ed. 1990) p. 243.) A federal court has defined "circumstances" as "'facts or things standing around or about some central fact.'" (*State of Maryland v. United States* (4th Cir. 1947) 165 F.2d 869, 871.) And a state court has defined "circumstances of the offense" as "'the minor or attendant facts or conditions which have legitimate bearing on the major fact charged.'" (*Commonwealth v. Carr* (Ct. App. 1950) 312 Ky. 393, 395 [227 S.W.2d 904, 905].)
>
> The majority's construction of "circumstances of the crime" makes this factor so broad that it encompasses all of the other factors listed in section 190.3. [footnote omitted.] To say that the "circumstances of the crime" includes everything that surrounds the crime "materially, morally, or logically," is to say that this one factor includes everything that is morally or logically relevant to an assessment of the crime, or, in other words, every fact or circumstance having any legitimate relevance to the penalty determination. This expansive definition makes all the other factors listed in section 190.3 unnecessary, because all are included within the "circumstances of the crime" as defined by the majority. For this reason, the construction adopted by the majority is improbable and should be disfavored.

(*People v. Fierro*, *supra*, 1 Cal.4th at 262-263 (conc. and dis. opn. of Kennard, J.).)

In her *Fierro* opinion Justice Kennard suggested, in place of the language of the majority opinion of *Edwards*, a more reasonable and understandable interpretation of "circumstances of the crime": "As used in section 190.3, 'circumstances of the crime' should be understood to mean those facts or circumstances either known to the defendant when he or she committed the capital crime or properly adduced in proof of the charges adjudicated at the guilt phase." (1 Cal.4th at 264.) This definition both

"appears most consistent with the rule of construction . . . and with the United States Supreme Court's understanding of the term as reflected in its opinions" and also "reduces the overlap with other factors and thus, in my view, most accurately reflects legislative intent." (*Ibid.*)

Justice Kennard began by noting that the Eighth Amendment "does not bar consideration of a victim's personal characteristics to determine penalty in a capital case, but evidence and argument on this subject must be authorized by statute." (*Fierro, supra*, 1 Cal.4th at p. 257 [conc. and dis. opn. of Kennard, J.].) Whether and to what extent victim impact evidence and argument is allowed is therefore determined in reference to the terms of California's death penalty statute, Penal Code section 190.3. Justice Kennard framed the issue as a problem of statutory construction, i.e., whether the "circumstances of the crime" which the jury may properly consider under subdivision (a) of Penal Code section 190.3, include the personal characteristics of the victim. (*Id.*, at p. 259.)

Turning to United States Supreme Court's decisions for assistance in defining the "circumstances of the crime" in this context, Justice Kennard noted that in *Booth v. Maryland, supra*, 482 U.S. 496, the majority expressly rejected the state's argument that evidence of the victims' personal characteristics and the reactions of their family members came within the "circumstances of the crime." (*Fierro, supra*, 1 Cal.4th at pp. 259-260 [conc. and dis. opn. of Kennard, J.].) Similarly, in *South Carolina v. Gathers, supra*, 490 U.S. 805, the United States Supreme Court held that it was error to admit evidence of a religious tract the victim was carrying because there was no evidence that the defendant was aware of or had read the tract. As in *Booth*, the High Court in *Gathers* again reasoned that the "circumstances of the crime" did not include personal characteristics of the victim that were

unknown to the defendant at the time. (*Fierro*, *supra*, 1 Cal.4th at p. 260 [conc. and dis. opn. of Kennard, J.].)

Justice Kennard recognized that, although it partially overruled *Booth* and *Gathers* in *Payne*, the Supreme Court had not revised the definition of "circumstances of the crime" used in those earlier cases. Rather, the *Payne* Court found that certain victim impact evidence was admissible not as a circumstance of the crime but as its own independent factor characterized as the "harm caused by the crime." (*People v. Fierro*, *supra*, 1 Cal.4th at p. 260, [conc. and dis. opn. of Kennard, J.] citing *Payne v. Tennessee*, *supra*, 501 U.S. 808 [111 S.Ct. at pp. 2608-2609].) Following *Payne* a state could, consistent with the Eighth Amendment, draft a statute allowing the jury to consider the victim's personal characteristics and other circumstances which the defendant was unaware of. This type of victim impact, however, would need to be authorized by a different statutory provision than one permitting the jury to consider the "circumstances of the crime."

As noted by Justice Kennard, the Court in *Payne* expressly reaffirmed the distinctions it had drawn in its earlier cases, *Booth* and *Gathers*, concerning the victim's personal characteristics which the defendant knew or could readily observe, and those which were not apparent at the time of the crime. *Payne* not only fails to authorize but actually prohibits the admission of this type of victim impact evidence as a "circumstance of the crime." The *Payne* court held that evidence about the victim's personal attributes was permissible to counteract similar evidence proffered by the defense in mitigation of the penalty — not because this evidence was a circumstance of the crime. [70] Noting the unfairness that would result if only the defendant

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[70] The capital sentencing jury in *Payne* heard testimony of defense witnesses offered in mitigation of the death penalty about the defendant's

were allowed to present evidence of personal characteristics the Court, referring to defense mitigation testimony, stated "[n]one of this testimony was related to the circumstances of Payne's brutal crimes." (*Fierro, supra,* 1 Cal.4th at p. 261 [conc. and dis. opn. of Kennard, J.] citing *Payne v. Tennessee, supra,* 111 S.Ct. at pp. 2608-2609.) Based on the Supreme Court's construction of "circumstances of the crime," and the plain meaning of that phrase, Justice Kennard concluded that "[a]s used in Penal Code section 190.3(a), 'circumstances of the crime' should be limited to those facts or circumstances either known to the defendant when he or she committed the capital crime or properly adduced in proof of the underlying charges adjudicated at the guilt phase." (*People v. Fierro, supra,* 1 Cal.4th at p. 264 [Kennard, J., conc. and dis. opn.].)

The Louisiana Supreme Court has defined relevant victim impact evidence consistently with Justice Kennard's formulation in *Fierro* holding that:

> To the extent that such evidence reasonably shows that the murderer knew or should have known that the victim, like himself, was a unique person and that the victim had or probably had survivors, and the murderer nevertheless proceeded to commit the crime, the evidence bears on the murderer's character traits and moral culpability, and is relevant to his character and propensities as well as to the circumstances of the crime.

(*State v. Bernard* (La. 1992) 608 So.2d 966, 972.) A more expansive interpretation of victim impact evidence would render Penal Code section

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church affiliations, his affectionate and kind relationship with his girlfriend's children, his good character as attested to by several witnesses, and his low I.Q.

190.3 unconstitutionally vague under the Eighth Amendment of the United States Constitution and article I, section 17, of the California Constitution.

The United States Supreme Court has held that California's death penalty statute, including section 190.3, subdivision (a), is not unconstitutionally overbroad or void for vagueness. (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 976; *People v. Bacigalupo*, *supra*, 6 Cal.4th 457, *cert. denied*, 512 U.S. 1253 (1994).) However, a statute that is facially valid may be unconstitutional in its application. A distortion of section 190.3, subdivision (a), to include extraneous classes of victim impact evidence, such as the evidence introduced in the present case, as "circumstances of the crime" raises serious state and federal constitutional concerns of vagueness and the arbitrary application of California's death penalty statute. (U.S. Const., Amends. V, VIII, XIV; Cal.Const., art. I, §§ 7, 15, 17, 24.)

The United States Supreme Court has always been concerned with arbitrariness in capital sentencing schemes. Indeed, as far back as *Furman v. Georgia* (1972) 408 U.S. 238, the Court held that the death penalty may not be imposed in an arbitrary fashion. In *Gregg v. Georgia*, supra, 428 U.S. at p. 189, the Court reiterated this principle: [W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." In other words, when a state wishes to establish a death penalty, it must tailor its law so that the sentencer's discretion is limited. Juries must receive adequate guidance so that sentences are, among other things, "rationally reviewable." (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 303.)

In the cases of *Godfrey v. Georgia*, *supra*, 446 U.S. 420, and *Maynard v. Cartwright*, *supra*, 486 U.S. 356, the Supreme Court reviewed the

constitutionality of two similar death penalty sentencing statutes. The Georgia statute permitted imposition of the death penalty if the offense "was outrageously or wantonly vile, horrible, or inhumane in that it involved torture, depravity of mind or an aggravated battery to the victim." (*Godfrey*, *supra*, 446 U.S. at p. 422, quoting Georgia Code.) The Oklahoma statute at issue in *Maynard* allowed a jury to consider as an aggravating factor whether the murder was "especially heinous, atrocious, or cruel." (*Maynard*, *supra*, 486 U.S. at p. 359.) In both cases the statutes were deemed unconstitutionally vague under the Eighth Amendment.

In *Godfrey*, the Court scrutinized the language of the statute (as well as the Georgia Supreme Court's interpretation of that language) to see whether it provided any meaningful guidance to the jury in the difficult task of distinguishing which defendants should be executed and which should be spared. The Court concluded that:

> There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed.

(*Godfrey*, *supra*, 446 U.S. at pp. 428-429.) In other words, "[t]here [wa]s no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." (*Id.* at p. 433.) The Court reached the same result in *Maynard* emphasizing that the *Godfrey* opinion "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." (*Maynard*, *supra*, 486 U.S. at p. 363.)

In *Stringer v. Black*, *supra*, 503 U.S. 222, the Court revisited the constitutionality of the "especially heinous, atrocious or cruel" language. This time the phrase was included in one of Mississippi's aggravating factors. Like California, Mississippi is a "weighing state." That is to say, having made a determination that a defendant is eligible for the death penalty, capital juries in Mississippi are required to weigh aggravating factors and mitigating factors to determine whether death is the appropriate penalty. "That Mississippi is a weighing State," the Court stressed, "only gives emphasis to the requirement that aggravating factors be defined with some degree of precision." (*Id.* at p. 229.)

After quickly dispatching the statute as unduly vague, Justice Kennedy went on to explain the importance of clearly defining aggravating and mitigating factors:

> A vague aggravating factor used in the weighing process is, in a sense, worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in *Zant* that there might be a requirement that, when the weighing process has been infected with a vague factor, the death sentence must be invalidated.

(503 U.S. at pp. 235-236.) The Court reviewed another vague aggravating factor in *Richmond v. Lewis* (1992) 506 U.S. 40. Striking down an Arizona statute which listed "especially heinous, cruel, and depraved" murders as circumstances in aggravation, the Court reiterated its concerns about vague aggravating factors:

> First, a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty. [Citations.] Second, in a "weighing"

> State, where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain. [Citations.] Third, a state appellate court may rely upon an adequate narrowing construction of the factor in curing this error.

(*Id.* at pp. 46-47.)

The Court focused its attention of Penal Code section 190.3, subdivision (a), in 1991 when it remanded *People v. Bacigalupo* [(1991) 1 Cal.4th 103] to this Court with directions to reconsider the constitutionality of the statute in light of *Stringer, supra.* (*Bacigalupo v. California* (1992) 113 S.Ct. 32.) On remand this Court upheld section 190.3 against an Eighth Amendment vagueness challenge. (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 464.) However, in doing so the Court defined subdivision (a) circumstances of the crime according to the United States Supreme Court's accepted definition of the phrase. Significantly the majority opinion does not mention *People v. Edwards, supra,* 54 Cal.3d 787, or its broad construction of factor (a). Indeed, Justice Mosk's concurring and dissenting opinion suggests that: "the majority *sub silentio* overrule[ed] *People v. Edwards* . . ., and adopt[ed] in its place *People v. Tuilaepa* (1992) 4 Cal.4th 569 . . . ." (6 Cal.4th at p. 492.)

The Unites States Supreme Court ultimately upheld section 190.3 in *Tuilaepa v. California, supra,* 512 U.S. 967. The Court specifically approved factor (a) after concluding that the term "circumstances of the crime" had a "common sense core meaning" that jurors could easily understand and apply. However, the Court based that determination upon its own traditional (and relatively narrow) definition of the term. It did not consider *Edwards* or its assertion that jurors could consider a broad array of victim impact evidence as part of the circumstances of the crime.

This Court has summarily rejected vagueness challenges to subdivision (a) of section 190.3 based upon *Tuilaepa*. (See e.g. *People v. Pollock* (2004) 32 Cal.4th 1153, 1183; *People v. Marks* (2003) 31 Cal.4th 197, 237; *People v. Catlin, supra*, 26 Cal.4th at p. 175.) However, in *People v. Boyette* (2002) 29 Cal.4th 381, the Court expressly recognized that the United States Supreme Court has not addressed whether factor (a) is unconstitutionally vague to the extent it "is interpreted to include a broad array of victim impact evidence . . . ." (*Id.* at p. 445, fn. 12.) Appellant asks this Court to revisit the matter in light of the expanded definition of circumstances of the offense currently employed by the courts of this state.

Subdivision (a) of Penal Code section 190.3 permits a capital jury to consider the circumstances of the crime as an aggravating factor. Narrowly construed, the statute is constitutional. However, under the broad construction suggested in *Edwards*, *supra*, factor (a) is unconstitutionally vague.[71] The Unites States Supreme Court has not hesitated to strike down vague aggravating factors, and the Court has emphasized that "[i]t is of vital importance to the community that any decision to impose death be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida*, supra, 430 U.S. 349.) Obviously, if a wide range of victim impact evidence is admitted under factor (a), and death is imposed, there is no principled way

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[71] As discussed more fully above, in practice, prosecutors rely upon subdivision (a) as a basis for finding aggravating factors in every case without any limitation whatever. For example prosecutors 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. In addition to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death, prosecutors rely on subdivision (a) to embrace facts which cover the entire spectrum of facets inevitably present in every homicide. (See, discussion *supra*, at pp. 182-188.)

to distinguish whether the jury decided the case upon reason or pure emotion. It is likewise all but impossible to rationally distinguish the imposition of death in this case from the many cases where it is not imposed. (*Godfrey*, *supra*, 446 U.S. at p. 433.) This is impermissible under the Eighth Amendment. In order to preserve the constitutionality of section 190.3, it must be given a narrow construction, one that provides a "common sense core meaning" that the jury can easily understand and be guided by. Justice Kennard's sensible definition of victim impact (*People v. Fierro*, *supra*, 1 Cal.4th at p. 257-265 [Kennard, J., conc. and dis. opn.]) provides the narrow construction that *Edwards*' broad dicta does not. Under this definition the victim impact evidence admitted in this case should have been excluded.

Although it might be argued appellant was familiar with the Ms. Eddings' personal characteristics as described by her relatives, the victim impact evidence was not limited to a general factual profile. The witnesses were also asked to identify various photographs of Ms. Eddings and to describe the subjects and the settings. Thirty-two photographs of Ms. Eddings and her family members, taken at different times throughout her life, were received in evidence. While appellant might have been familiar with Ms. Eddings, there was no indication he was aware of her entire history or of the relationships she had with various members of her extended family. Further, the bulk of the family members' testimony related not to Ms. Eddings, but to the witnesses' personal grief and sense of loss. None of these matters constitute "circumstances of the crime" as that phrase is commonly understood, and they should not have been introduced into evidence under subdivision (a) as properly defined. As discussed more fully below, the evidence was extremely prejudicial, and its admission requires reversal of appellant's sentence.

E. "VICTIM IMPACT" EVIDENCE REGARDING VICTIMS OF PRIOR CRIMES WAS IMPROPERLY ADMITTED.

Subdivision (b) of section 190.3 provides for the consideration of: "The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." The rationales of *Payne* and *Edwards* in allowing evidence of victim impact as part of the circumstances of the capital crime, discussed above, are entirely inapplicable in the context of a defendant's other violent criminal activity.[72] Consequently, there is no basis for interpreting subdivision (b) as including such evidence with respect to prior crimes.

In admitting the evidence of victim impact regarding prior crimes, the trial court relied upon *People v. Mickle* (1991) 54 Cal.3d 140, 186-187, and *People v. Garceau* (1993) 6 Cal.4th 140, 200-202; however, neither case is dispositive. *Garceau* is inapposite because it addresses the issue only in dicta. There the Court upheld the testimony of a victim of a prior kidnap under factor (b) against objections that such testimony was impermissible victim-impact evidence. The opinion does not describe the testimony, other than to mention that it demonstrated defendant's prior commission of a kidnap, or explain how the testimony could even be characterized as "victim-impact" evidence.

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[72] With the possible exception being other criminal activity actually charged and proven as a separate offense in the current capital proceedings and "related" to the capital crime. (See, *People v. Alvarez* (1996) 14 Cal.4th 155, 244, fn. 41, [recognizing that the "circumstances of the crime" under factor (a) would not include other crimes for which a defendant was convicted in a consolidated trial on the capital charges unless the other crime "was deemed related thereto . . . ."]; c.f., *People v. Clark*, *supra*, 50 Cal.3d at p. 629 [where the court first said there was no error, then said any possible error was harmless, in the admission of victim impact testimony by a victim of defendant who was raped on the same occasion defendant inflicted the fatal wounds on the decedent].)

Instead, the decision merely holds that, under factor (b), "[t]he prosecution was entitled to present testimonial evidence of defendant's violent 'criminal activity.'" Likewise, the citation to *People v. Mickle* refers to dicta and is not persuasive. The *Mickle* court held that there was no reversible error in admitting testimony concerning how defendant's prior sexual assaults had "affected" the victims of those assaults because defendant failed to object at trial; the "foreseeable effects" of sexual conduct with "children"— that is, "ongoing pain, depression, and fear"— were "admissible as circumstances of the prior crimes" because they were inevitable results of sexual conduct with children; and this portion of these victims' "testimony was insignificant in light of extensive properly admitted evidence concerning the despicable nature of both the prior and current crimes." Neither of these cases directly addressed the propriety of victim impact evidence under subdivision (b) of section 190.3, and consequently neither supports the trial court's ruling since "'an opinion is not authority for a proposition not therein considered.'" (*People v. Donaldson* (1995) 36 Cal.App.4th 532, 528, quoting from *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.)

Other state courts have excluded such evidence as irrelevant and inappropriate. In *People v. Hope* (Ill. 1998) 702 N.E.2d 1282, the Illinois Supreme Court concluded *Payne* "clearly contemplates that victim impact evidence will come only from a survivor of the murder for which the defendant is presently on trial, not from survivors of offenses collateral to the crime for which defendant is being tried." The court expressly agreed with the defendant's argument that "[t]he jury's highly subjective decision whether to impose death should be unfettered by emotionally-charged victim impact evidence that concerns something as collateral as a prior offense for which the defendant is not being sentenced."

The Nevada Supreme Court reached the same conclusion in *Sherman v. State* (Nev. 1998) 965 P.2d 903, 914, holding "that the impact of a prior murder is not relevant . . . and is therefore inadmissible during the penalty phase." The Court explained that "evidence of the impact which a previous murder had upon the previous victim is not relevant to show" the damage done by the current capital offense. (*Ibid.*)

Similarly, in *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, the Tennessee Supreme Court "reiterate[d] that victim impact evidence of another homicide, even one committed by the defendant on trial, is not admissible." (*Id.* at p. 889, fn. 11, citing *State v. Bigbee* (Tenn. 1994) 885 S.W.2d 797, 813.)

Likewise, in *State v. White* (Ohio 1999) 709 N.E.2d 140, 154, the Ohio Supreme Court held that evidence of the impact of a non-capital murder (i.e., second degree murder as a lesser offense of capital murder) and attempted aggravated murder were not admissible at the penalty phase of defendant's trial because the judge, not the jury, is responsible for determining the appropriate sentence for those convictions, although defendant was convicted of those crimes in the same trial which resulted in his conviction on the capital murder.

In addition, in *People v. Dunlap* (Colo. 1999) 975 P.2d 723, 744-745, the Colorado Supreme Court relied on the decision of the Illinois Supreme Court in *People v. Hope*, *supra*, 702 N.E.2d 1282, 1289, in holding that evidence of "the perceptions of the victims" of defendant's prior crimes was not admissible at the penalty phase, and requiring the exclusion of evidence describing the previous victims' fear and nervousness during those crimes, and a victim's emotional state following a previous aggravated robbery.

The Texas Court of Criminal Appeals reached a similar conclusion in *Cantu v. State* (Tex. Cr. App. 1997) 939 S.W.2d 627, 637, holding that it was error to present victim impact evidence concerning the non-capital murder, sexual assault and robbery of a teenage girl in the same incident as the capital murder of another girl, because the former girl was "not the 'victim' for whose death [defendant] has been indicted and tried, and *Payne* does not contemplate admission of such evidence as permissible under the Eighth Amendment."

As noted by the Illinois Supreme Court: "[t]he jury's highly subjective decision whether to impose death should be unfettered by emotionally-charged victim impact evidence that concerns something as collateral as a prior offense for which the defendant is not being sentenced." Consequently, such evidence should not be permitted under subdivision (b) of section 190.3 and the trial court erred in admitting it here.

F. THE VICTIM IMPACT EVIDENCE SHOULD HAVE BEEN EXCLUDED UNDER EVIDENCE CODE SECTION 352 AS MORE PREJUDICIAL THAN PROBATIVE.

Emotional victim impact evidence which is likely to provoke arbitrary or capricious action violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, sections 7, 15, 17, and 24 of the California Constitution. (See, *Gregg v. Georgia*, *supra*, 428 U.S. at p. 189 ["where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"]; *Gardner v. Florida*, *supra*, 430 U.S. at p. 358 ["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"]; see, also, *Godfrey v. Georgia*, *supra*, 446 U.S. at p. 428). Such evidence must also be excluded under Evidence

Code section 352[73] because its probative value is substantially outweighed by the danger of undue prejudice.

In *People v. Edwards*, this Court emphasized the unacceptable risk of prejudice resulting from excessively emotional victim impact evidence:

> Our holding does not mean that there are no limits on emotional evidence and argument. In *People v. Haskett*, *supra*, 30 Cal.3d at page 864, we cautioned, "Nevertheless, the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citations.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.

(*Id.* at p. 836.) This passage appears to urge trial courts to carefully weigh evidence of victim impact under Evidence Code section 352 before admitting it.

Opinions of other state courts have imposed limitations on the scope of victim impact evidence in order to minimize the potential for prejudice inherent in such evidence. Some have suggested limitations on the number of witnesses paraded before the jurors. As observed by the New Jersey Supreme Court:

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[73] As discussed elsewhere in this brief, this section provides as follows: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

> The greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for the victim impact evidence to unduly prejudice the jury against the defendant. Thus, absent special circumstances, we expect that the victim impact testimony of one survivor will be adequate to provide the jury with a glimpse of each victim's uniqueness as a human being and to help the jurors make an informed assessment of the defendant's moral culpability and blameworthiness.

(*New Jersey v. Muhammad* (N.J. 1996) 678 A.2d 164, 180.) Similar rules have been pronounced by the highest courts of other states. In *People v. Hope*, *supra*, 702 N.E.2d 1282, the Illinois Supreme Court interpreted the provisions of that state's law to limit victim impact testimony to "a single representative who may be the spouse, parent, child or sibling of a person killed as a result of a violent crime."

Courts have also addressed the content of victim impact testimony. The New Jersey Supreme Court has described the type of victim impact evidence which is properly admissible as follows:

> A general factual profile of the victim, including information about the victim's family, employment, education, and interests. The testimony can describe generally the impact of the victim's death on his or her family. The testimony should be factual, not emotional, and should be free of inflammatory comments or references.

(*New Jersey v. Muhammad*, *supra*, 678 A.2d at p. 180.) In *State v. Nesbit*, *supra*, 978 S.W.2d 872, the Tennessee Supreme Court held:

> Generally, victim impact evidence should be limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's immediate family. Of these types of proof, evidence regarding the emotional impact of the murder

> on the victim's family should be most closely scrutinized because it poses the greatest threat to due process and risk of undue prejudice, particularly if no proof is offered on the other types of victim impact. [Citations and footnote omitted.]

The court in *United States v. Glover* (D. Kan. 1999) 43 F.Supp.2d 1217, 1235-1236, reached a similar conclusion, holding that victim impact witnesses should be limited to presenting "'a quick glimpse of the [victim's] life . . . ,'" including "a general factual profile of the victim, [and] information about the victim's family, employment, education and interests . . . ;" it must "be factual, not emotional, and free of inflammatory comments or references."

Oklahoma, which permits victim impact evidence "as long as it is 'restricted to the "financial, emotional, psychological, and physical effects," or impact, of the crime itself on the victim's survivors[,] as well as some personal characteristics of the victim'" (*Short v. State* (Ok.Crim.App. 1999) 980 P.2d 1081, 1100), does not permit penalty phase evidence of pre-mortem photographs of the victim or other photographs of the decedent while he or she was alive (*id.*, at pp. 1101-1102; *Cargle v. State* (Ok.Cr.App. 1995) 909 P.2d 806, 830). This Court has found it proper to allow a penalty phase jury to view photographs of the victim while the victim was alive in order to illustrate how the victim appeared to defendant at the time of the murder (*People v. Cox* (1991) 53 Cal.3d 618, 688), and other courts have determined it is improper to admit pre-mortem photographs of the victim which do not depict the victim as he or she appeared at the time of the murder, for example, as a child, during another era in the victim's life, or dressed in particular uniforms or other special attire that were not related to the circumstances of the murder (see *Salazar v. State* (Tex. Ct. Crim. App. 2002) 90 S.W.3d 330, 337 [holding that it was improper to exhibit childhood photographs of the victim since the defendant killed the victim when he was an adult, not a child, and the

childhood photographs were extremely prejudicial, presenting a strong "danger of unconsciously misleading the jury . . . ."]).

Several other specific examples of inadmissible victim impact evidence have been recognized by many courts. For example it has been held that a victim impact witness is not permitted to testify about the impact of the trial because it is not a relevant consideration. (See, e.g., *Gattis v. State* (Del. Supr. Ct. 1994) 637 A.2d 808, 820.) It is also improper for a witness to testify "as to the impact on another person through the use of hearsay statements." (*Ledbetter v. State* (Okl.Cr. 1997) 933 P.2d 880, 896.) While the prosecution may be permitted to introduce victim impact testimony in the form of general statements describing the victim's qualities, "detailed descriptions" and "specific examples" should not be presented. (See, *State v. Taylor* (La. 1996) 669 So.2d 364, 372.) Likewise, with regard to evidence concerning the impact of the victim's death on the victim's family, family members should be limited to general statements describing the impact of the victim's death on their lives, and are not permitted to provide "detailed responses" or testify to "particular aspects of their grief . . . ." (*Ibid.*)

Most of the limitations described above were violated by the victim impact evidence permitted in this case. First, the testimony was not limited to a single witness. Rather the prosecution was permitted to call four of Ms. Eddings' relatives, and these four witness were permitted, in turn, to describe the impact of the incident on numerous other family members spanning three generations. The quantity of victim impact testimony in this case, thus, far surpassed what court's have found to be within acceptable limits and reached prejudicial proportion.

The substance of the testimony was also particularly prejudicial given that the evidence was not limited to a "brief factual profile of the victim."

Rather, the various witnesses were permitted to relate emotional details and specific instances concerning Ms. Eddings' life. Additionally, numerous photographs of Ms. Eddings at holiday celebrations and family gatherings were introduced. These photographs did not simply provide the jury with an image of the victim at the time of her death, but rather spanned a number of years from 1939. Through them, and the testimony of her relatives, the jurors were made privy to celebrations, special occasions, and warm moments with Ms. Eddings' family, including her deceased husband, over the course of many years.

Additional prejudice ensued when the evidence relating to the impact of Ms. Eddings' death was not limited to a brief factual account of the effect of the crime on family members. Instead the witnesses were permitted to provide detailed responses to emotionally charged questions, and to provide specifics regarding particular aspects of their grief. They each described emotional reactions to the news of Ms. Eddings death, and related their subsequent feelings of depression, sadness, and emptiness. The witnesses' testimony was punctuated with descriptions of nightmares, and grief stricken behavior — such as Ms. Harrington's habit of dialing her mother's phone number after it had been disconnected and engaging in imaginary conversations with her, and Ms. Grimmett's daughter's inability to maintain a sexual relationship with her husband for thinking of the way Ms. Eddings died.

In addition to the prejudicial victim impact evidence relating to Ms. Eddings, the prosecution was permitted to introduce evidence of the profound and long lasting impact appellant's 1972 assault had on Norma Knight. As discussed more fully above, most courts addressing the matter have determined

that such evidence is irrelevant to the sentencing decision before the jury. Yet the prejudicial nature of the evidence was intense.

Overall while having little bearing on appellant's "moral culpability and blameworthiness," and less still to do with the "circumstances of the offense," the "victim impact" evidence permitted here was bound to intensify natural feelings of sympathy for the victim and her family and may have encouraged a desire for retribution against appellant inviting an emotional and purely subjective response. The evidence was far more prejudicial than probative and should have been excluded for this reason.

G. THE ERROR WAS PREJUDICAL AND REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE.

Overall, the excessive quantity and highly emotional content of the victim impact evidence erroneously admitted in the penalty retrial trial created an atmosphere of prejudice in which emotion prevailed over reason. (*Gardner v. Florida*, *supra*, 430 U.S. 349, 358; *Gregg v. Georgia*, *supra*, 428 U.S. 153, 189.) Appellant was deprived of his rights under the federal constitution, as well as rights guaranteed to him under California law. Accordingly, the error must be reviewed under the standard set forth in *Chapman v. California*, *supra*, 381 U.S. at pp. 24), holding that reversal is mandated unless the state can show that the error was harmless beyond a reasonable doubt. When a violation of the constitution occurs in the penalty phase of a capital case, a reviewing court must proceed with special care. (*Satterwhite v. Texas* (1988) 486 U.S. 249, 258 ["[T]he 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."].) In evaluating the effects of the error, the reviewing court does not consider whether a death sentence would or could have been reached in a hypothetical case where the error did not occur. Rather, the court must find that, in that particular case, the death

sentence was "surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279.) The State cannot satisfy this standard here.

That the improperly admitted evidence was of a highly prejudicial nature was recognized by the trial court in the following observation: "This is evidence which has the potential of being extraordinarily powerful. No one who has sat through any portion of the victim impact evidence can deny that it has an effect on everyone in the courtroom." (28 RT 2974.) The victim impact evidence permitted in this case could not have failed to impress the jurors.

It is also of consequence that the evidence was stressed by the prosecution during closing argument. Generally, the significance the prosecutor assigns to erroneously admitted evidence is considered in assessing the evidence's prejudicial impact. (See, *e.g.*, *People v. Minifie* (1996) 13 Cal.4th 1055, 1071-1072; *People v. Patino* (1984) 160 Cal.App.3d 986, 994 [no prejudice where prosecutor does not dwell upon the evidence improperly admitted].) Here the prosecutor emphasized the evidence, expanded upon it by including all the victims of prior conduct, and encouraged the jurors to vote for the death penalty because of it:

> The ten women that he has assaulted and raped and abused have been changed forever because of the defendant. You can consider the effects on the lives of these women who have survived Billy Jones and the effects on the family members of Ruth Eddings who have to live with what he did to Ruth Eddings. Remember the testimony of the family members, the daughter Helen Harrington who had to go out in the fire and sift around to try to salvage what was left of her mother.
>
> [Defense objection interposed and overruled]
>
> Helen Harrington and her sister were left with the duty of trying to save anything that survived that fire. And Helen said she found a plate that reminded — there was a plate her mother ate off, a shoe her mother once wore.

> Remember the testimony of Donna Velasquez, a niece who said, yes, they gave me some items from the fire, some photographs I have in a collage hanging up in my house with the burned edges of those pictures. They remind her forever of how Ruth Eddings died. That is what is left of Ruth Eddings.
>
> You heard the testimony of Shirley Grimmett who talked about how it affects her still today, a television show, a news report about a woman who is raped or abused, and what goes through her mind is the last minutes of Ruth Eddings' life, the horrible, horrible thing. You can't imagine it. You're sitting here very safe and sound in a courtroom two years later. You can't imagine the horror that went through 81-year-old Ruth Eddings' mind, the last minutes of her life. You can't. There is no way any of us can, and who among us would want to, even if we could? Who here can appreciate what Ruth's family has to live with for the rest of their lives? Who among us here can appreciate what Angela Coleman has to live with the rest of her life, the effects he has had on the women he has touched? He has changed them forever.

(34 RT 3881-3882.) The erroneously admitted victim impact testimony in this trial was emotionally powerful and excessive and was used effectively by the prosecutor, in closing argument. The trial court's error in admitting the evidence cannot be regarded as harmless and, consequently, appellant's death sentence must be reversed.

Instructional Errors

IV.

THE TRIAL COURT ERRED IN FAILING TO GIVE PENALTY PHASE INSTRUCTIONS REQUESTED BY THE DEFENSE WHICH WERE NEITHER CUMULATIVE NOR ARGUMENTATIVE, WHICH CONTAINED CORRECT STATEMENTS OF THE LAW, AND WERE NECESSARY FOR THE JURY TO PROPERLY PERFORM ITS FUNCTION AT THE PENALTY PHASE.

A. INTRODUCTION

The trial court refused a number of specially tailored instructions requested by appellant which would have addressed various aspects of the penalty determination. However, because a criminal defendant is entitled upon request to instructions that either relate the particular facts of his case to any legal issue or that pinpoint the crux of his defense (*People v. Saille*, *supra*, 54 Cal.3d at p. 1119; *People v. Hall* (1980) 28 Cal.3d 143, 158-59; *People v. Sears* (1970) 2 Cal.3d 180, 190; see also *Penry v. Lynaugh*, *supra*, 492 U.S. 302; *Penry v. Johnson* (2001) 532 U.S. 782, 797), the trial court erred in denying the request. The defense instructions were neither cumulative nor argumentative, and all contained correct statements of law. (See *People v. Mickey*, *supra*, 54 Cal.3d at p. 697.) They were offered to address particular aspects of appellant's theory of the case, and were thus appropriate. (See *People v. Kraft* (2000) 23 Cal.4th 978, 1068; *People v. Andrian* (1982) 135 Cal.App.3d 335, 338.) Moreover, the requested instructions were required in order for the jury to adequately consider appellant's case in mitigation.

"Every man accused of crime is entitled to have his defenses properly presented in an understandable manner." (*People v. Monteverde* (1965) 236 Cal.App.2d 630, 642.) "A jury is entitled to instructions pertaining to the

particular facts of the case being tried. [Citation.] Defendant's fate, therefore, should not rest on abstract generalizations." (*People v. Pena* (1984) 151 Cal.App.3d 462, 474-475.) Here while the instructions given to the jury presented the law in a general way, the instructions requested by appellant addressed issues central to the case and related the law, in an understandable manner, to the circumstances presented by the evidence. The trial court's failure to instruct the jury as requested was in violation of its affirmative duty to provide instructions on a defendant's theory of defense where it is obvious the defendant is relying upon such a defense or if there is substantial evidence to support it. (See *People v. Stewart* (1976) 16 Cal.3d 133, 140; *People v. Bottger* (1983) 142 Cal.App.3d 974, 979.)

The errors violated appellant's right to present a defense (U.S. Const. amends. VI & XIV; Cal. Const. art. 1, §§ 7 & 15; *Chambers v. Mississippi*, *supra*, 410 U.S. 284), his right to a fair and reliable capital trial (U.S. Const. amends. VIII & XIV; Cal. Const. art. 1, § 17; *Beck v. Alabama*, *supra*, 447 U.S. 625, 638), and his right to trial by a properly instructed jury. (U.S. Const. amends. VI & XIV; Cal. Const. art. 1, § 16; *Carter v. Kentucky* (1981) 450 U.S. 288, 302; *Duncan v. Louisiana* (1968) 391 U.S. 145.) Further, by arbitrarily depriving appellant of his state right to the delivery of requested pinpoint instructions supported by the evidence, the errors violated appellant's right to due process. (U.S. Const. amend. XIV; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; *Fetterly v. Paskett* (9th Cir. 1991) 997 F.2d 1295, 1300.)

B. GENERAL PRINCIPLES

As recognized by the United States Supreme Court, jurors "are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter v. Kentucky*, *supra*, 450 U.S. at p. 302.) "It is quite simply a hallmark of our legal system that juries be carefully

and adequately guided in their deliberations." (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 193 [opn. of Stewart, Powell and Stephens, JJ.].) In a criminal case, even in the absence of a request, a trial court is required to instruct on the general principles of law relevant to issues raised by the evidence. (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.)

"As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Mathews v. United States* (1988) 485 U.S. 58, 63.) In *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1099, the Ninth Circuit found that under clearly established Supreme Court precedent, "the state's failure to correctly instruct the jury on the defense may deprive the defendant of his due process right to present a defense. This is so because the right to present a defense would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense."

Several federal constitutional doctrines affirm a capital defendant's right to present evidence and argument, and to have the jury properly instructed on the defense case in mitigation of the death penalty. Under the Eighth Amendment, the jury in the sentencing phase of a capital case may not be precluded from considering "as a mitigating factor, any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio*, *supra*, 438 U.S. 586, 604; see also *Hitchcock v. Dugger* (1987) 481 U.S. 393, 394; *Eddings v. Oklahoma* (1982) 455 U.S. 104.) Fundamental due process, and the heightened due process applicable to capital cases, similarly require that the defendant be allowed to offer any mitigating evidence or testimony that might justify a sentence less than death. (*Skipper v. South*

Carolina (1986) 476 U.S. 1, 4-5, citing *Lankford v. Idaho* (1991) 500 U.S.110, 126, fn. 22; *In re Oliver* (1948) 333 U.S. at 257, 273.)

This Court has recognized that "[w]hen any barrier, whether statutory, instructional, evidentiary, or otherwise [citation], precludes a jury from considering relevant mitigating evidence, there occurs federal constitutional error, which is commonly referred to as '*Skipper* error.'" (*People v. Mickey*, *supra*, 54 Cal.3d at p. 693; see *Skipper v. South Carolina*, *supra*, 476 U.S. 1.) Furthermore, the United States Supreme Court has ruled that a criminal defendant in a capital case has an Eighth Amendment right to an instruction directing the jury to consider a particular mitigating factor. (*Penry v. Lynaugh*, *supra*, 492 U.S. at p. 328.)

Under state law, Penal Code section 1093, subdivision (f), requires trial courts to instruct the jury on any points of law pertinent to specific issues in the case if requested by either party. Additionally, Penal Code section 1127 provides, in relevant part, as follows:

> In charging the jury the court may instruct the jury regarding the law applicable to the facts of the case . . . . Either party may present to the court any written charge on the law, but not with respect to matters of fact, and request that it be given. If the court thinks it correct and pertinent, it must be given; if not, it must be refused. . . .

"The scope of a trial court's duty to deliver instructions requested by the defense is greater than its obligation to instruct the jury *sua sponte* on the general principles of law applicable to the case." (*People v. LaFargue* (1983) 147 Cal.App.3d 878, 886.)

Since an accused is entitled to have the jury fully and correctly instructed on any and all tenable theories (*People v. Murphy* (1974) 35 Cal.App.3d 905, 935), "[t]he court must give any correct instructions on defendant's theory of the case which the evidence justifies . . ." (*People v.*

Bynum (1971) 4 Cal.3d 589, 604). Upon proper request a defendant has the right to a pinpoint instruction directing the jury's attention to specific evidence. (*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1386; *People v. Jeffers* (1996) 41 Cal.App.4th 917.)

The Supreme Court "presumes that jurors, conscious of the gravity of their task, attend closely [to] the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." (*Francis v. Franklin* (1985) 471 U.S. 307, 324, fn. 9.) For this reason the arguments of counsel are insufficient to cure the failure to instruct. As the Court explained in *Boyde v. California* (1990) 494 U.S. 370, 384: "[A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, . . . and are likely viewed as the statements of advocates; the latter [the Court has] often recognized, are viewed as definitive and binding statements of the law."

Here, the trial court refused to provide the jury with several requested defense instructions and, instead, elected to read standard CALJIC instructions. However, as discussed more fully below, the special instructions proposed by the defense represented correct statements of the law and were relevant to the defense theory of the case. It should be noted that, for the most part, the trial court did not find to the contrary, but rather refused the instructions on the ground they were "covered" by other instructions. While the pattern instructions have been held to be correct statements of the law, they are not as detailed and comprehensive as those proposed by the defense; nor are they as carefully tailored to the defense theory in light of the evidence presented. Consequently, the trial court erred in refusing to provide the jury with appellant's proposed instructions, much as it erred in disallowing defense

evidence in the guilt phase. As discussed more fully below, the instructional errors cannot be regarded as harmless and appellant's sentence must, therefore, be reversed..

C. THE TRIAL COURT ERRED IN READING PATTERN INSTRUCTIONS EMPHASIZING FACT-FINDING WHILE REFUSING A DEFENSE INSTRUCTION ACKNOWLEDGING THE JURY'S MORAL DECISION AND NORMATIVE FUNCTION.

The jury was provided with a number of instructions emphasizing fact-finding at the penalty phase. For instance CALJIC No. 8.84.1 informed the jurors: "You must determine what *the facts are from the evidence* received during the entire trial unless you are instructed otherwise." (18 CT 5068 [emphasis added].) The jury was also instructed with CALJIC No. 8.85 which told the jury that "in determining which penalty is to be imposed you shall . . . *consider the evidence*." (18 CT 5076 [emphasis added].) The jury was also read instructions emphasizing the manner in which it should use the evidence to determine the facts. For example, the jurors were instructed with CALJIC No. 2.00 informing them that: "[e]vidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or nonexistence of a *fact*. (18 CT 5069 [emphasis added].) CALJIC No. 2.27 told the jury that it could rely on the testimony of a single witness "for proof of a *fact*." (18 CT 5073 [emphasis added].) All of these instructions emphasized the fact finding responsibilities of jurors while none described the jury's normative function.

Appellant proposed an instruction explaining the juror's responsibilities at the penalty phase of the trial and distinguishing them from the guilt phase as follows:

Ladies and Gentlemen of the Jury:

> You have heard all the evidence and the arguments of the attorneys, and now it is my duty to instruct you on the law that applies to this case. The law requires that I read the instructions to you. You will have these instructions in written form in the jury room to refer to during your deliberations.
>
> You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise.
>
> You must accept and follow the law as I state it to you, whether or not you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.
>
> Your duty in this phase of the case is different from your duty in the first part of the trial, where you were required to determine the facts and apply the law. Your responsibility in the penalty phase is not merely to find facts, but also — and most important — to render an individualized determination about the penalty appropriate for the particular defendant — that is, whether he should live or die.

(18 CT 4927 [Proposed Penalty Phase Instruction No. 1.)

The trial court refused this instruction as argumentative and covered by other instructions. (33 RT 3794.) However, the rereading of the guilt phase instructions emphasizing the jury's fact finding responsibilities, without also reading the proposed defense instruction reminding jurors that their task was also moral and normative, may have misled jurors into believing that their only or primary role was to find facts when, actually, fact-finding plays only a partial role in the penalty phase determination.

The guilt phase and penalty phase tasks of a jury are different. Guilt phase jurors are expected to find facts and apply the law to the facts without injecting their personal feelings or sense of justice. (See CALJIC No. 1.00.) Penalty phase jurors, by contrast, are expected not only to find facts, but also to bring their own values into play. As both the United States Supreme Court

and this Court have recognized, jurors represent the "conscience of the community" in fixing penalty in a capital case. (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 519; *People v. Thompson* (1990) 50 Cal.3d 134, 185.) The jury is charged with the "truly awesome responsibility of decreeing death for a fellow human." (*McGautha v. California* (1971) 402 U.S. 183, 208.) In exercising that responsibility, they can, and indeed should, express their own sense of mercy. (*California v. Brown* (1987) 479 U.S. 538, 562-63 (dis. opn. of Blackmun, J.; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 331 ["The [mercy] plea is made directly to the jury as only they may impose the death sentence."]; *People v. Andrews* (1989) 49 Cal.3d 200, 237 (dis. opn. of Mosk, J.).) Each juror must also express his or her own sense of sympathy, compassion, and morality. (*People v. Easley* (1983) 34 Cal.3d 858, 875-76 [sympathy]; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304 (opn. of Stewart, Powell, and Stevens, JJ.) [compassion]; *California v. Brown*, *supra*, 479 U.S. at p. 545 (con. opn. of O'Connor, J.) [morality]; *Satterwhite v. Texas*, *supra*, 486 U.S. at p. 261 (con. opn. of Marshall, J.) ["[T]he question whether death is the appropriate sentence requires a profoundly moral evaluation of the defendant's character and crime."]; *People v. Haskett* (1982) 30 Cal.3d 841, 863 [a penalty phase jury "decides a question the resolution of which turns not only on the facts, but on the jury's moral assessment of those facts as they reflect on whether defendant should be put to death"].)

While jurors are not to be influenced by prejudice (see CALJIC No. 8.84.1) or mere emotion (*California v. Brown*, *supra*, 479 U.S. at p. 543), the death penalty decision may include "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." (*Woodson v. North Carolina*, *supra*, 428 U.S. at 304 (opn. of Stewart, Powell, and Stevens, JJ.).) This decision necessarily involves subjective and

discretionary elements not present when a jury contemplates questions of guilt. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at 333; see also *Lowenfield v. Phelps* (1988) 484 U.S. 231, 254-255 (dis. opn. of Marshall, J.) ["The capital sentencing jury is asked to make a moral decision about whether a particular individual should live or die. Despite the objective factors that are introduced in an attempt to guide the exercise of the jurors' discretion, theirs is largely a subjective judgment."].)

Appellant's requested instruction would have explained the difference between jurors' duties at the guilt phase and their duties at the penalty phase as follows: "Your duty in this phase of the case is different from your duty in the first part of the trial, where you were required to determine the facts and apply the law. Your responsibility in the penalty phase is not merely to find facts, but also — and most important — to render an individualized determination about the penalty appropriate for the particular defendant — that is, whether he should live or die." The language in this paragraph was taken from this Court's opinion in *People v. Brown*, *supra*, 46 Cal.3d at p. 448, and represents a correct statement of the law. No other instruction addressed the jury's normative function, while other instructions emphasized the jury's fact-finding duties. If appellant's jury believed that its essential role was to find facts, it was likely to misunderstand and neglect its normative role, *i.e.*, its role as the voice and "conscience of the community" (*Witherspoon v. Illinois*, *supra*, 391 U.S. at 519) charged with the moral responsibility of determining whether appellant should live or die. No instruction informed the jurors they were free to vote for life based solely on mercy. The proposed defense instruction was, therefore, necessary in order for the jury to competently perform its function at the penalty phase and the trial court erred in failing to

provide it. As discussed in subsection J. below, the instructional error requires reversal of appellant's sentence.

D. THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS BY REFUSING TO INSTRUCT THE JURY THAT IT WAS IMPROPER TO RELY SOLELY UPON THE FACTS SUPPORTING THE MURDER VERDICT AND SPECIAL CIRCUMSTANCES FINDINGS AS AGGRAVATING FACTORS.

Appellant requested three instructions that would have informed the jurors they could not base a decision to sentence appellant to death solely on the facts used to establish first degree murder or the special circumstance allegations. Proposed Penalty Phase Instruction No. 7 would have informed the jurors they could not treat the verdicts finding appellant guilty of first degree murder and finding the special circumstance allegations true, in and of themselves, as aggravating circumstances justifying a death sentence:

> You may not treat the verdict and finding of first degree murder committed under [a] special circumstance[s], in and of themselves, as constituting an aggravating factor. For, under the law, first degree murder committed with a special circumstance may be punished by either death or life imprisonment without the possibility of parole.
>
> Thus, the verdict and finding which qualifies a particular crime for either of these punishments may not be taken, in and of themselves, as justifying one penalty over the other. You may, however, examine the evidence presented in the guilt and penalty phases of this trial to determine how the underlying facts of the crime bear on aggravation or mitigation.

(18 CT 4934.) Proposed Penalty Phase Instruction No. 8 further instructed:

> In deciding whether you should sentence the defendant to life imprisonment without the possibility of parole, or to death, you cannot consider as an aggravating factor any fact which was used by you in finding him guilty of murder in the first degree unless that fact establishes something in addition to an element of the crime of murder in the first degree. The fact that you have found Mr. Jones guilty

> beyond a reasonable doubt of the crime of murder in the first degree is not itself an aggravating circumstance.

(18 CT 4935.) Finally, Proposed Penalty Phase Instruction No. 9 would have informed the jurors they could not double count the facts underlying a special circumstance allegation in the weighing process:

> You must not consider as an aggravating factor the existence of any special circumstance if you have already considered the facts of the special circumstance as a circumstance of the crimes for which the defendant has been convicted. In other words, do not consider the same factors more than once in determining the presence of aggravating factors.

(18 CT 4936.) The trial court refused to give any of these instructions finding that they were confusing and covered by CALJIC No. 8.85. (33 RT 3796.) In their absence, however, no other instructions informed the jurors of the prohibition against double counting necessary to properly channel the jury's discretion at the penalty phase by ensuring the jury would not sentence appellant to death merely because it had found him guilty of capital murder.

It is well-settled that a state's capital-sentencing scheme must channel the sentencer's discretion to "reasonably justify the imposition of a more severe sentence on the defendant as compared to others found guilty of murder." (*Zant v. Stephens*, *supra*, 462 U.S. at p. 877, quoted in *Lowenfield v. Phelps*, *supra*, 484 U.S. at p. 244; see also *Furman v. Georgia*, *supra*, 408 U.S. at p. 313 (conc. opn. of White, J.) [striking down capital sentencing statutes because "there is no meaningful basis for distinguishing the few cases in which [a death sentence] is imposed from the many cases in which it is not"].) As the Ninth Circuit Court of Appeals has recently held: "The Eighth Amendment requires that jury instructions in the penalty phase of a capital case sufficiently channel the jury's discretion to permit it to make a principled distinction between the subset of murders for which a death sentence is

appropriate and the majority of murders for which it is not." (*Valerio v. Crawford* (9th Cir 2002) 306 F.3d 742, 750.) Under the standard pattern jury instructions, California's system does not sufficiently channel the jury's discretion because jurors are informed they may consider the "circumstances of the offense" in determining penalty, but are not informed they may not base a verdict in favor of death solely on the facts necessary to support the first degree murder conviction and the special circumstance allegation[s].

The bare fact that a defendant committed first-degree murder fails to justify a death sentence as compared to life sentences given to others convicted of first-degree murder. (See Godfrey v. Georgia, *supra*, 446 U.S. at pp. 428-33 [holding an aggravating factor unconstitutional because a "person of ordinary sensibility" could find it in almost every murder and, thus, the aggravating factor failed to distinguish death-sentenced cases from life-sentenced cases].) The evidence cannot be used as an aggravating factor because the evidence exists, and the aggravating factor would exist, in every single capital case in California. (See *Tuilaepa v. California*, supra, 512 U.S. at p. 972 [holding aggravating factors must not apply to every defendant convicted of murder.].) Thus, the mere fact that a defendant committed a first-degree murder cannot justify the imposition of a death sentence; yet the standard jury instructions do not convey this concept to jurors.

Jurors are told simply to weigh aggravation against mitigation, and there is no assurance that the required constitutional channeling of discretion will occur simply by weighing aggravation against mitigation. In fact, rather than being given guidance as to how to channel its discretion, the jury is given free reign to consider all of the evidence previously admitted as a circumstance of the crime of which the defendant was convicted and the existence of any special circumstances found to be true. (See Pen. Code, § 190.3, subd. (a).)

Indeed, appellant's jury was so instructed. (CALJIC No. 8.85; 18 CT 5076.) Under the standard instructions, then, nothing precludes jurors from returning a verdict of death based solely upon the same factors used to find appellant guilty of first degree murder and/or to find the special circumstance allegations to be true. The penalty phase in California does not in and of itself accomplish the required channeling task because, as the scheme currently works in California, the jury is given minimal guidance at the penalty phase.[74] (See *Tuilaepa v. California*, *supra*, 512 U.S. 967 [holding California's system of aggravating factors not unconstitutional because it fails to instruct a jury on how to weigh any particular fact in the capital sentencing decision].)

In *People v. Melton*, *supra*, 44 Cal.3d 713, this Court addressed the problem of "double counting" facts underlying special circumstance allegations of burglary murder and robbery murder. On this point the court held: "Of course the robbery and the burglary may not each be weighed in the penalty determination more than once for exactly the same purpose. The literal language of [Penal Code section 190.3] subdivision (a) presents a theoretical problem in this respect, since it tells the penalty jury to consider the 'circumstances' of the capital crime and any attendant statutory 'special circumstances.' Since the latter are a subset of the former, a jury given no clarifying instructions might conceivably double-count any 'circumstances' which were also 'special circumstances.' On defendant's request, the trial court should admonish the jury not to do so." (*Id.* at p. 768.) Appellant made such a request here, and the trial court improperly denied it.

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[74] As discussed more fully above the statute provides no guidance and as a consequence prosecutors are free to argue mutually exclusive and contradictory factors as aggravation under subdivision (a) of section 190.3. (See discussion, *supra*, at pp. 182-188.)

In other capital sentencing schemes, the role of special circumstances (to determine death-eligibility) and aggravating circumstances (to determine death-worthiness) are presented together. (See, e.g., Nev. Rev. Stat. § 200.030(4)(a).) These systems contemplate a two-step process, with the first step involving the murder determination and the second step involving the penalty determination which combines death worthiness and death eligibility. Under this type of two-step system, whatever the additional finding at penalty phase is called, be it a "special circumstance" or an "aggravating factor," the jury determines whether the extra fact or facts exist and then weighs such facts against the mitigating evidence to determine whether a death sentence should be imposed. (See *Valerio v. Crawford, supra*, 306 F.3d at p. 752 ["In arriving at a penalty decision in a capital case, a Nevada jury is directed to weigh aggravating against mitigating circumstances. A Nevada jury may return a verdict of death for a death-eligible defendant 'only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances.'"].)

Under such a capital-sentencing system, the constitutional requirement that the sentencer's discretion be channeled is met at the penalty phase by having the jury determine death-eligibility by ascertaining the existence of an aggravating factor from a limited category of such factors. The sentencer then weighs those aggravating factors against the mitigating factors, with the characteristics of the aggravating factors serving simultaneously to narrow death-eligibility and to constrain the jury's discretion in the weighing process. This determines death worthiness. This type of capital-sentencing system precludes the jury from reaching a death determination based merely upon the same factors that caused it to find the defendant guilty of murder because it

must first find an aggravating circumstance and then must weigh that fact against mitigating evidence to determine death worthiness.

Under standard jury instructions, California's system provides no such constitutional safeguard because jurors are instructed to consider the facts of the offense in determining penalty but are not instructed they may not impose a penalty of death based solely upon the same facts utilized to find the defendant guilty of capital murder.

Further, the importance of channeling the jury's discretion regarding the balancing of aggravating and mitigating circumstances is magnified in California because the lengthy list of special circumstances only minimally narrows the class of persons eligible for the death penalty. Commentators have even questioned whether California's capital-sentencing statute is sufficient to perform this narrowing function in a proper manner. (See Stephen Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283.) This is a legitimate concern, given that only seven limited categories of first-degree murders are not death eligible, and that between 1988 and 1992 approximately 87 percent of first-degree murders had findings of special circumstances. (*Id.* at pp. 1324-1326, 1331.) This basic problem has been noted by Justice Broussard, who wrote that the California capital-sentencing statute "sweeps so broadly that most murderers are subject to the death penalty, and only a few excluded." (*People v. Adcox*, *supra*, 47 Cal.3d at p. 275 (conc. opn. of Broussard, J.).) Given the minimal narrowing accomplished by the special circumstances, and the open-ended nature of the aggravating factors in section 190.3, the jury's discretion must be channeled at the penalty phase so that there can be a meaningful distinction between persons sentenced to death and persons who are death-eligible, but not sentenced to death.

If the California capital sentencing scheme is to pass constitutional muster, the use of the same facts to find the defendant guilty of capital murder and to also find that the defendant deserves to die must be curtailed. Permitting such double-counting would mean that the same facts rendering a defendant death-eligible could then be used to sentence him to death, even in the absence of any additional facts being proved. Such a system is constitutionally impermissible since the death penalty is to be reserved for those few who are the most culpable perpetrators of crime. (See *Spaziano v. Florida* (1984) 468 U.S. 447, 460 n.7 ["There must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death."].) This is why it is impermissible to have a mandatory death penalty statute. (See *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 301.) Even though there may be the presumption that those who are guilty of committing capital crimes could be among a group of the most culpable, and who are thus death eligible, there must still be an individualized determination that separates members of this group from each other. Some are death worthy and some are not.

Appellant recognizes that United States Supreme Court cases have appeared to focus the channeling decision to the eligibility phase and emphasized that the sentencing phase is the place for a broad inquiry into all relevant mitigating evidence so that the jury can make an individualized determination regarding the appropriateness of a capital sentence. (See, e.g., *Buchanan v. Angelone* (1998) 522 U.S. 269, 275-76 ["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."].) However, decisions such as *Buchanan* do not contemplate a sentencing scheme such as that in place in California. United States Supreme

Court decisions de-emphasizing the need to constrain jury discretion at the penalty phase are rooted in the assumption that a capital-sentencing scheme effectively narrows the class of people eligible for the death penalty. (See *Tuilaepa*, *supra*, 512 U.S. at p. 981 (conc. opn. of Stevens, J.).) Since California's scheme allows for only minimal narrowing at the eligibility phase, the jury's discretion must be channeled at the selection phase in order to pass constitutional muster. Without employing such a ban, California's capital-sentencing scheme would not "adequately channel[] the sentencer's discretion so as to prevent arbitrary results." (*Harris v. Alabama* (1995) 513 U.S. 504, 511; see also *Graham v. Collins* (1993) 506 U.S. 461, 468 ["States must limit and channel the discretion of judges and juries to ensure that death sentences are not meted out 'wantonly' or 'freakishly.'"].)

Without instructions such as those requested in this case, there was no assurance jurors did not render a death verdict based only upon the same facts utilized to find appellant guilty of capital murder. By telling the jury it could not sentence appellant to death based merely upon the facts it utilized to find the elements of first-degree murder, appellant's requested instructions would have effectively served to inform the jury that it must find something to distinguish appellant from other first-degree murderers.

In a situation where the jury is assessing the circumstances of the crime to determine whether a death sentence is to be imposed, it is virtually impossible to determine with any degree of certainty that the jury did not assess a death sentence by finding no more culpability than that required to find appellant guilty of first-degree murder with a special circumstance.[75] If

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[75] This is particularly true since, as discussed more fully above, the jurors were not required to return written findings regarding aggravating factors. (See discussion, *supra*, at pp. 217-221.)

the trial court had properly channeled the jury's consideration at the penalty phase, the balance between the aggravating and mitigating circumstances may have been significantly altered. The failure to give appellant's requested instruction may well have been dispositive with respect to the jury's decision to sentence appellant to death. Without a doubt, the State cannot show that the error had no effect on the jury's weighing process. (*Chapman v. California, supra*, 386 U.S at p. 24.) For this reason, as well as those set forth in subsection J. below, the death judgment must be reversed.

E. THE TRIAL COURT ERRED BY REFUSING A DEFENSE INSTRUCTION INFORMING JURORS THEY WERE REQUIRED TO IMPOSE A SENTENCE OF LIFE WITHOUT POSSIBILITY OF PAROLE IF THEY DETERMINED MITIGATION OUTWEIGHED AGGRAVATION.

Appellant's Proposed Penalty Phase Instruction No. 35 would have informed the jurors as follows:

> In determining whether or not the aggravating circumstances outweigh the mitigating circumstances, you must not simply count up the number of circumstances and decide whether there are more of one than the other.
>
> The final test is in the relevant weight of the circumstances as determined by you, not the relative number.
>
> The existence of a single mitigating circumstance could be found by you to outweigh any number of aggravating circumstances.
>
> *If you find that the existence of a mitigating circumstance alone outweighs any number of aggravating circumstances, you shall return a verdict of confinement in the state prison for life without the possibility of parole.*

(18 CT 4965 [emphasis added].) The trial court refused this instruction as covered by CALJIC No. 8.88. (33 RT 3799.) However, CALJIC No. 8.88

does not include the language of the last paragraph and is constitutionally deficient as a result.

California Penal Code section 190.3 directs that, after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code, § 190.3.)[76] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) This mandatory language, however, is not included in CALJIC No. 8.88. Instead, the instruction only addresses directly the imposition of the death penalty, and informs jurors the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would plainly permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances. Put another way, reasonable jurors might not understand that if the mitigating circumstances outweighed the aggravating circumstances, they were required to return a verdict of life without possibility of parole.

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[76] The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. However, this Court has held that this formulation of the instruction improperly misinformed the jury regarding its role and disallowed it. (See *People v. Brown*, *supra*, 40 Cal.3d at p. 544, fn. 17.)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating." (*People v. Duncan, supra,* 53 Cal.3d at p. 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The opinion cites no authority for this proposition, and appellant respectfully urges that the case is in conflict with numerous opinions disapproving instructions emphasizing the prosecution theory of the case while minimizing or ignoring that of the defense. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-29; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955) 133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)[77]

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[77] There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the Due Process Clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" there "must be a two-way street" as between the prosecution and the defense. (*Wardius, supra,* 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the same principle must apply to jury instructions.

People v. Moore, *supra*, 43 Cal.2d 517, is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

> It is true that the . . . instructions . . . do not incorrectly state the law. . ., but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.

(*Id.* at pp. 526-527 [internal quotation marks omitted].)

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming it were a correct statement of law, CALJIC No. 8.88 stated only the conditions under which a death verdict could be returned, and contained no statement of the conditions under which a verdict of life was required. The instruction requested by appellant, on the other hand, clearly and accurately informed the jury of the law on this point, and the trial court erred in failing to provide it to the jury. As discussed in subsection J. below, the trial court's erroneous refusal to give the requested instructions requires the reversal of appellant's death sentence.

F. THE TRIAL COURT ERRED IN REFUSING APPELLANT'S INSTRUCTIONS THAT ONE MITIGATING FACTOR ALONE COULD SERVE AS THE BASIS FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE AND AN INSTRUCTION THAT THE JURORS WERE FREE TO VOTE FOR LIFE EVEN IN THE ABSENCE OF SPECIFIC MITIGATING FACTORS.

The trial court rejected several proposed defense instructions which would have informed the jury that any one mitigating factor, standing alone, may support a decision that death is not the appropriate punishment on the grounds that they were covered by CALJIC No. 8.88. (18 CT 4941 [Proposed Penalty Phase Instruction No. 11], 4948 [Proposed Penalty Phase Instruction No. 18], 4964 [Proposed Penalty Phase Instruction No. 34], 4965 [Proposed Penalty Phase Instruction No. 35]; 33 RT 3796-3799.) Appellant also requested an instruction informing the jurors of their ability to find in favor of life even in the absence of specific mitigating factors. (18 CT 4950 [Proposed Penalty Phase Instruction No. 20].) This instruction was also refused as covered by CALJIC No. 8.88. (33 RT 3797.)

The court's refusal to give these instructions was error. The instructions were non-argumentative and not cumulative with respect to other instructions on mitigation. Moreover, even if somewhat duplicative, the instructions would have clarified for the jurors the nature of the process of moral weighing in which they were to engage and explained the concepts set forth more generally in pattern instructions provided by the trial court. Most importantly, they made explicit the fact that any single factor in mitigation could provide a sufficient reason for imposing a sentence of less than death, and that the jurors were free to vote for life even in the absence of specific mitigating factors. All were correct statements of the law.

"The jury must be free to reject death if it decides on the basis of any constitutionally relevant evidence or observation that [death] is not the

appropriate penalty." (*People v. Brown*, *supra*, 40 Cal.3d at p. 540 [reversed on other grounds in *California v. Brown*, *supra*, 479 U.S. 538].) Jurors must be given this freedom, because the penalty determination is a "moral assessment of [the] facts as they reflect on whether defendant should be put to death." (*People* v. *Easley* (1983) 34 Cal. 3d 858, 880; accord *People* v. *Haskett* (1982) 30 Cal.3d. 841, 863.) Since this assessment is "an essentially normative task," no juror is required to vote for death "unless, as a result of the weighing process, [he or she] personally determines that death is the appropriate penalty under all the circumstances." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1035.)

People v. Sanders (1995) 11 Cal.4th 475, noted with approval an instruction that "'expressly told the jury that penalty was not to be determined by a mechanical process of counting, but rather that the jurors were to assign a weight to each factor, and that *a single factor could outweigh all other factors.*'" (*Id.* at p. 557, quoting *People v. Cooper*, *supra*, 53 Cal.3d at p. 845 [emphasis added].) As this Court has recognized, such an instruction helps eliminate the possibility jurors will misapprehend the nature of the penalty determination process or the scope of their discretion to determine the appropriate penalty through the weighing process. (*People v. Sanders, supra*, 11 Cal.4th at 557; see also *People v. Anderson*, *supra*, 25 Cal.4th at pp. 599-600 [approving an instruction that "any one mitigating factor, standing alone," can suffice as a basis for rejecting death].)

"The weighing process is 'merely a metaphor for the juror's personal determination that death is the appropriate penalty under all the circumstances.'" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1243-1244, quoting *People v. Johnson* (1992) 3 Cal.4th 1183, 1250.) Thus, the death penalty statute permits the jury in a capital case to return a verdict of life

without possibility of parole even in the complete absence of any mitigating evidence. (See *People v. Duncan*, *supra*, 53 Cal.3d at p. 979; *People v. Brown*, *supra*, 40 Cal.3d at pp. 538-541 [holding a jury may return a verdict of life without possibility of parole even if the circumstances in aggravation outweigh those in mitigation].) The jurors in this case were never informed of this fact. To the contrary, the language of CALJIC No. 8.88 implicitly instructed the jurors that if they found the aggravating evidence "so substantial in comparison with the mitigating circumstances," even assuming that this led them to believe that the aggravating evidence outweighed the mitigating evidence, death was *ipso facto* the permissible and proper verdict. From this jurors easily could have inferred that if aggravation was found to outweigh mitigation, a death sentence was compelled. In order to counteract this incorrect assumption, the trial court should have instructed the jury, as appellant requested, that it was unnecessary for them to find mitigation in order to impose a life sentence instead of a death sentence.

In the absence of instructions such as those requested by appellant jurors were likely unaware they had the discretion to impose a sentence of life without possibility of parole even if they concluded the circumstances in aggravation outweighed those in mitigation, and even if they found no mitigation whatever. Instead, the trial court instructed the jury to weigh the aggravating and mitigating circumstances without any guidance regarding how to weigh them. Without this guidance, it is likely that one or more jurors did not realize a single mitigating factor could outweigh all the aggravating evidence. Appellant's requested instructions on this point were accurate statements of law which pinpointed a crucial principle of mitigation; they were non-argumentative, essential to appellant's defense, and should have been given. (*People v. Sears*, *supra*, 2 Cal.3d at p. 190.) As discussed in

subsection J. below, the trial court's erroneous refusal to give the requested instructions requires the reversal of appellant's death sentence.

G. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURORS THAT, CONTRARY TO VIEWS EXPRESSED BY MANY POTENTIAL JURORS DURING VOIR DIRE, DEATH IS THE MOST SEVERE PENALTY THE LAW CAN IMPOSE.

During the course of voir dire several prospective jurors expressed the opinion that a sentence of life without the possibility of parole was actually worse than the death penalty. (7 CT 1920; 9 CT 2255, 2459; 10 CT 2778; 11 CT 2823, 3095; 12 CT 3182; 14 CT 3739, 3783, 3811, 3878; 15 CT 4034, 4170, 4238; 16 CT 4352.) However, under the law "death is qualitatively different from all other punishments and is the 'ultimate penalty' in the sense of the most severe penalty the law can impose." (*People v. Hernandez*, *supra*, 47 Cal.3d at p. 362, [citing *Caldwell v. Mississippi* (1985) 472 U.S. 320, 329; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305]; accord *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1027.)

Appellant sought to have the jurors informed of this fact under Proposed Penalty Phase Instruction No. 3A, as follows:

> Some of you expressed the view during jury selection that the punishment of life in prison without the possibility of parole was actually worse than the death penalty.
>
> You are instructed that death is qualitatively different from all other punishments and is the ultimate penalty in the sense of the most severe penalty the law can impose. Society's next most serious punishment is life in prison without possibility of parole.
>
> It would be a violation of your duty, as jurors, if you were to fix the penalty at death with a view that you were thereby imposing the less severe of the two available penalties.

(18 CT 4930.) The trial court refused the instruction on the grounds that it was argumentative and not supported by authorities. (33 RT 3794.) The

instruction, however, was not argumentative and correctly stated the law according to the authorities cited, *Murtishaw*, *supra*, and *Hernandez, supra.* No other instructions contained the information, and the trial court erred in refusing to provide it to the jurors. As discussed in subsection J. below, the trial court's erroneous refusal to give the instructions requested by the defense requires the reversal of appellant's death sentence.

H. THE TRIAL COURT ERRED IN REFUSING TO GIVE APPELLANT'S PROPOSED INSTRUCTIONS REGARDING THE SCOPE OF MITIGATION.

The trial court refused to give Proposed Penalty Phase Instruction No.s 10, 11, 13 through 17 and 23, each of which elaborated on the meaning of the term "mitigating factor," on the grounds that they were covered by other instructions. (18 CT 4937-4947, 4952; 33 RT 3796-3797.) All of these instructions clarified for the jury the scope of mitigation in the case. For example, Proposed Penalty Phase Instruction No. 10 was drafted to inform the jury in detail about all the evidence it could consider in mitigation. (18 CT 4937-4940.) Proposed Penalty Phase Instruction No. 11 informed the jurors that the mitigating factors mentioned by the court were merely examples of some of the matters they might take into consideration in reaching a decision, and indicated that they could also consider any other circumstances relating to the case or the defendant. (18 CT 4941.) Proposed Penalty Phase Instruction No. 13 stated that the jury could consider any fact about the offense or the defendant which "in fairness, sympathy or compassion" could be considered to reduce appellant's culpability. (18 CT 4943.) Proposed Penalty Phase Instruction No. 14 told the jury it should not consider mitigation limited to specific factors, and that the jury could consider anything mitigating that was shown by the evidence. (18 CT 4944.) Proposed Penalty Phase Instruction No. 15 told the jury that anything could be mitigating, including appellant's background, and taken into account when deciding to impose a

sentence of life without the possibility of parole. (18 CT 4945.) Proposed Penalty Phase Instruction No. 17 informed jurors that if the mitigating evidence gave rise to compassion or sympathy, they could reject death just based on this sympathy or compassion. (18 CT 4947.) Proposed Penalty Phase Instruction No.s 16 and 17 informed the jurors they could take into consideration their observations of appellant during the trial in addition to the evidence introduced. (18 CT 4946-4947.) Finally, Proposed Penalty Phase Instruction No. 23 elaborated on "sympathy" in the context of penalty determination. (18 CT 4952.)

As stated above, the defendant is entitled, upon request, to instructions which relate particular facts to a legal issue or pinpoint the crux of the defendant's case. Pinpoint instructions "are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given *sua sponte*." (*People v. Saille, supra,* 54 Cal.3d at p. 1119.) Appellant requested the pinpoint instructions here at issue and the trial court was obliged to deliver them. (*Id.* at p. 1119; see also *People* v. *Webster* (1991) 54 Cal.3d 411, 443.) Even when other instructions given are legally sufficient, a defendant is still entitled to instructions which plainly state his theory of defense such as those requested here. (See *People* v. *Castillo*, 16 Cal.4th 1009, 1020-21 (1997) (con. opn. of Brown, J.).)

This point was forcefully stated in *People v. Cook* (1905) 148 Cal. 334, 347, where this Court declared:

> The court, however, refused the instruction, and its refusal is justified on the ground that another instruction framed by the judge on the same point was given. It is true that the instruction given stated the law correctly, but it was brief, general, and colorless in comparison with the instruction asked, and had the effect of minimizing the importance of a consideration which could not have been stated with too much emphasis.

Cook also found that two other instructions requested by the defendant should have been given because, although the instructions given on the same point were "entirely correct and proper," they "contained only an implication of the proposition which the defendant had a right to have stated to the jury in direct terms." (*Id.* at pp 347-348.)

This Court has approved language similar to that requested here as insuring that the jury fully understands the concept of mitigation. (See *People v. Hunter* (1989) 49 Cal.3d 957, 988.) Appellant was also entitled to instructions which told the jury that mitigating factors are unlimited, and include anything about the defendant or the case, or the defendant's background. (See *People v. Robbins* (1988) 45 Cal.3d 867, 886 [approving an instruction detailing the kinds of mitigation the jury could consider]; *see also People v. Kelly* (1990) 51 Cal.3d 931, 969 n.12 [same].) It has also been recognized that a "jury may, in appropriate circumstances, consider a defendant's courtroom behavior and demeanor in its sentencing determination." (*People v. Jackson* (1990) 49 Cal.3d 1200, 1206.)

Here, appellant had the right to have the jury given illustrative examples of the types of evidence that could be considered as factors in mitigation beyond those specified by statute. The proposed instructions would have focused the jury's attention on particular theories of mitigation on which the defense was relying. The instructions therefore explained and illustrated in a non-argumentative manner the application of the general principles of mitigation to appellant's case. Had the instructions been given, they would have guarded against the possibility that the jury did not understand the breadth of the evidence it could consider as mitigating. The trial court, therefore, erred in refusing them. As discussed in subsection J. below, the trial

court's erroneous refusal to give the requested instructions requires the reversal of appellant's death sentence.

I. THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY REFUSING TO INSTRUCT ON LINGERING DOUBT OF GUILT.

Appellant requested that the following instruction regarding lingering doubt be delivered to jury:

> Although proof of guilt beyond a reasonable doubt has been found, you may demand a greater degree of certainty for imposition of the death penalty. The adjudication of guilt is not infallible, and any lingering doubts you entertain on the question of guilt may be considered by you in determining the appropriate penalty, including the possibility that at some time in the future, facts may come to light which have not been discovered.

(18 CT 4957 [Defendant's Requested Instruction No. 27].) The trial court refused the proposed instruction on the ground that it was argumentative and not supported by the authorities cited. (33 RT 3799.) This ruling was erroneous.

It is well established that a capital defendant has a right to have penalty phase jurors consider any residual or lingering doubt as to his guilt. (See, e.g., *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1238; *People v. Coleman* (1969) 71 Cal.2d 1159, 1168; *People v. Terry* (1964) 61 Cal.2d 137, 145-148.) A jury determining both guilt and penalty may properly conclude the prosecution has proven the defendant's guilt beyond a reasonable doubt, yet demand a greater degree of certainty of guilt for the imposition of the death penalty. (*People v. Terry*, *supra*, 61 Cal.2d at 145-148.)

In *People v. Cox*, *supra*, 53 Cal.3d at pp. 675-79, this Court, relying on *Franklin v. Lynaugh* (1988) 487 U.S. 164, 174, held that although a capital

defendant is entitled to present evidence on and argue residual doubt, neither the Eighth Amendment nor the California Constitution requires a residual-doubt instruction. This holding, at least as it pertains to the Eighth Amendment, should be reconsidered in light of recent United States Supreme Court cases. *Cox* relied on *Franklin's* holding that because "lingering doubt" is a not an aspect of the defendant's character, record or a circumstance of the case, the trial court had no obligation to instruct on it. (51 Cal.3d at p. 575.) However, recent United States Supreme Court cases undermine this statement in *Franklin*, and suggest that a jury must consider lingering doubt, even if not a circumstance of the case or an aspect of the defendant's record or character.[78]

Recently the United States Supreme Court observed: "'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" (*Tennard v. Dretke* (2004) __ U.S. __ [124 S.Ct. 2562, 2570], citing *McKoy v. North Carolina* (1990) 494 U.S. 433, 440.) The court concluded that mitigation evidence is any evidence the trier of fact could "reasonably find warrants a sentence less than death." (*Id.* 124 S.Ct. at p. 2570.) Nothing in this statement limits mitigation evidence to evidence of "character," "record," or the "circumstances of the case." Lingering doubt is an acknowledged factor which the jury could use to choose a sentence of life imprisonment, and because the "Eighth Amendment requires that the jury be able to consider and give effect to all of a capital defendant's mitigating

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[78] The Court will revisit the issue next term having granted certiorari in *Oregon v. Guzek* (2005) ___ U.S. ___ [125 S.Ct. 1929], which presents the question whether a capital defendant has a right under the Eighth and Fourteenth Amendments to offer evidence and argument in support of a residual doubt claim as to whether the jury should impose the death penalty.

evidence (*Boyde v. California*, *supra*, 494 U.S. at pp. 377-378), an instruction making it clear that lingering doubt can be considered as mitigation is required.

In the past, this Court's rejection of a constitutional right to an instruction on lingering doubt was based upon the notion that CALJIC No. 8.85 adequately alerts jurors they may consider lingering doubt in their penalty determination. (*People v. Lawley*, *supra*, 27 Cal.4th at p. 166; *People v. Osband* (1996) 13 Cal.4th 622, 716.) Specifically, this Court has held that factors (a) and (k) are adequate for a jury to give effect to lingering doubt. (*People v. Osband*, *supra*, 13 Cal.4th at p. 716.) This conclusion, however, should be reconsidered. Factor (a) directs itself to circumstances of the crime. (See CALJIC No. 8.85.) A reasonable juror would believe that this relates to the manner in which the crime itself was effectuated and not necessarily to the defendant's involvement in the crime. Thus, factor (a) encourages jurors to focus on the crime itself, not the culpability or guilt of the persons who may have committed the crime, and does not lend itself to consideration of a lingering doubt of guilt. Factor (k) directs the jury to consider any circumstance which may extenuate the gravity of the crime. (See CALJIC No. 8.85.) Once again, this factor focuses on the nature of the crime and not any lingering doubt that jurors may have about a defendant's participation in it. Factor (k) also directs the jury to consider any aspect of the defendant's character or record, but this language does not relate to residual doubt of guilt. In fact, it steers the jury in the opposite direction since an aspect of the defendant's character or record has nothing to do with the crime. Factors (a) and (k) simply do not address residual doubt regarding the defendant's guilt. Consequently, appellant's requested instruction, which focused specifically on residual doubt, should have been given by the trial court.

Appellant's proposed instruction was appropriately phrased, unlike other instructions previously rejected by this Court. For example, unlike the instruction requested in *People v. Thompson* (1988) 45 Cal.3d 86, 135, appellant's lingering-doubt instruction did not "invit[e] readjudication of matters resolved at the guilt phase." Instead, it properly "call[ed] upon residual feelings of doubt" and nothing more. Further, unlike the requested instruction in *People v. Cox,* supra, 53 Cal.3d 618, which would have required the jury not only to consider lingering doubt, but also to consider it as a mitigating factor, the one proposed by appellant did not "erroneously prescribe[] that the jury evaluate this factor in a particular manner." (*Id.* at p. 678 n.20.) Instead, the instruction merely permitted the jury to consider lingering doubt. In the clearly understandable language of this instruction, it was only if a juror entertained such doubts that he or she "may" (not "must") consider them in determining the appropriate penalty. (18 CT 4957 [". . . any lingering doubts you entertain on the question of guilt may be considered by you in determining the appropriate penalty . . .."].) Thus, the proposed instruction was effectively no different than the court-approved consciousness-of-guilt and confession/admission instructions which read: "If you find . . ., you may consider. . . ." (See CALJIC No. 2.03, CALJIC No. 2.70, CALJIC No. 2.71.) Moreover, in the capital sentencing context, appellant would have been justified in using the phrase "must consider" (rather than "may consider") since a penalty juror is required to at least consider any relevant mitigating evidence. (*Eddings v. Oklahoma, supra,* 455 U.S. at pp. 113-117; *People v. Brown, supra,* 40 Cal.3d at pp. 537-538 [reversed on other grounds in *California v. Brown, supra,* 479 U.S. 538]; see also Pen. Code, § 190.3.) Thus, far from being argumentative or pro-defense, appellant's requested

instruction actually asked from the jurors less, not more, than he was legally entitled to.

California law mandates that lingering doubt be considered as mitigation when warranted by the evidence. (*People v. Terry*, *supra*, 61 Cal.3d at 145-147.) Appellant requested an instruction on lingering doubt "intended to supplement or amplify more general instructions" (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 257). He was entitled to such an instruction under state law, and the trial court erred in refusing the request. As discussed in subsection J. below, the trial court's erroneous refusal to give the instructions requested by the defense requires the reversal of appellant's death sentence.

J. PREJUDICE

The trial court committed federal constitutional error by denying appellant his due process rights: (1) to instruction on the defense theory of the case (see *United States v. Sotelo-Murillo* (9th Cir. 1989) 887 F.2d 176, 180 [holding that a criminal defendant's right to an instruction on his theory of the case "implicates fundamental constitutional guarantee"]; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201 [holding that a criminal defendant's right to have the jury instructed on his theory of the case is "basic to a fair trial"]); (2) to a fair opportunity to defend against the state's accusations (see *Chambers v. Mississippi*, *supra*, 410 U.S. 284, 294 [holding "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations"]); and (3) to fundamental fairness in the process by which the jury determined his penalty (see *Albright v. Oliver* (1994) 510 U.S. 266, 283 [conc. opn. of Kennedy, J.) [noting that "due process "ensure[s] fundamental fairness in the determination of guilt at trial"]; *Spencer v. Texas*, *supra*, 385 U.S. at pp. 563-

564 [holding that "the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial"]). The error also violated due process by arbitrarily depriving appellant of his state right to the delivery of requested pinpoint instructions supported by the evidence. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. 343, 346; *Fetterly v. Paskett*, *supra*, 997 F.2d 1295, 1300.)

Where, as here, error of federal constitutional dimension has occurred, reversal is required unless the Court determines that it was harmless beyond a reasonable doubt. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279; *Yates v. Evatt*, *supra*, 500 U.S. at p. 404; *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Lucero*, *supra*, 44 Cal.3d at p. 1032.) For state law violations in the penalty phase of a capital trial, reversal is required if there is any "reasonable possibility" that the verdict would have been different in the absence of the error. (*People v. Brown*, *supra*, 46 Cal.3d at pp. 447-448.) Reversal is required under this standard if there is a reasonable possibility that even a single juror might have reached a different decision absent the error. (*People v. Ashmus* (1991) 54 Cal.3d 932, 983-984 ["we must ascertain how a hypothetical 'reasonable juror' would have, or at least could have, been affected."].) Given that the jurors' penalty determination is an individualized, normative one, and the need for heightened reliability in capital cases, the "reasonable possibility" standard is "more exacting" than the Watson standard for reversal applied to guilt phase errors. (*People v. Brown*, *supra*, 46 Cal.3d at p. 447; see also *People v. Ashmus*, *supra*, 54 Cal.3d at p. 965 [equating reasonable possibility standard under Brown with the federal harmless beyond a reasonable doubt standard].) Under either standard, it is clear that the penalty judgment must be reversed.

In the absence of the instructions proposed by the defense, the jury instructions in this case were vague and imprecise, failed accurately to

describe the weighing process the jury must apply in capital cases, and deprived appellant of the individualized consideration the Eighth Amendment requires. The aggravating and mitigating factors were closely balanced in this case. Although the prosecution relied heavily upon prior crimes as an aggravating factor, most of these involved domestic disputes and only moderate violence. The jurors were required to balance this factor against appellant's childhood history of parental abuse, his psychological background, and his record of good behavior in custody. Under these circumstances there is at least a reasonable possibility that at least one juror might have reached a different decision absent the error.

The instructions also were improperly weighted toward death and contradicted the requirements of Penal Code section 190.3 by indicating that a death judgment could be returned if the aggravating circumstances were merely "substantial" in comparison to mitigating circumstances, thus permitting the jury to impose death even if it found mitigating circumstances outweighed aggravating circumstances. The prosecution argued that if the jurors found the aggravators substantially outweighed the mitigators then death was the appropriate verdict — implying that jurors could not vote for life based on one mitigating factor alone, or even on no mitigating factors and based only on mercy. (34 RT 3887-3888.) Again, there is at least a reasonable possibility that at least one juror might have reached a different decision absent the error.

For all these reasons, reversal of appellant's death sentence is required. (*People v. Brown, supra*, 46 Cal.3d at 448.)

CONCLUSION

For the reasons set forth herein, the judgment of conviction and sentence of death must be reversed.

Respectfully submitted,

Kimberly J. Grove
Attorney for Appellant

CERTIFICATION OF WORD COUNT

I hereby certify that, according to my word processing program, this brief contains 94,580 words exclusive of this certification and the tables.

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Kimberly J. Grove

DECLARATION OF SERVICE

I, the undersigned, declare:

I am a citizen of the United States, over 18 years of age, employed in the county of Westmoreland, Pennsylvania, in which county the within-mentioned delivery occurred, and not a party to the subject cause. My business address is P.O. Box 425, Ligonier, PA 15658. I served the Appellant's Opening Brief by placing a copy in an envelope for the addressee named hereafter, addressed as follows:

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Kimberly J. Grove