IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>HOWARD LARCELL STREETER,<br><br>Defendant and Appellant. | No. S078027<br><br>(San Bernardino County Superior Court No. FVA 07519 ) |

**APPELLANT'S OPENING BRIEF**

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

Honorable Bob N. Krug

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DEATH PENALTY

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**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>HOWARD LARCELL STREETER,<br><br>Defendant and Appellant. | ) | S078027<br><br>San Bernardino County Superior Court<br>No. FVA 07519 |

# APPELLANT'S OPENING BRIEF

## STATEMENT OF APPEALABILITY

This automatic appeal is from a final judgment imposing a verdict of death. (Pen. Code § 1239, subd. (b); Cal. Rules of Court, rule 8.204(a)(2)(B).)

## STATEMENT OF THE CASE

On August 28, 1997, an information was filed in San Bernardino County Superior Court against appellant Howard Larcell Streeter, charging him with the first degree murder of Yolanda Buttler on April 27, 1997, in

violation of Penal Code section 187, subdivision (a).[1] Two special circumstances were alleged in connection with the murder: (1) that appellant did intentionally kill Butler while lying in wait, within the meaning of section 190.2, subdivision (a)(15); and (2) that the murder was intentional and involved the infliction of torture, within the meaning of section 190.2, subdivision (a)(18). (CT 55.)[2]

Appellant was arraigned in San Bernardino County Superior Court on August 28, 1997, and entered a plea of not guilty and denied the special circumstance allegations. (CT 58.)

On August 10, 1998, pursuant to Penal Code section 995, the court determined that the evidence presented at the preliminary hearing did not support the lying-in-wait special circumstance. The complaint of May 16, 1998, was deemed to be refiled, and the matter proceeded to a preliminary hearing on the special circumstance. The court then held appellant to answer on the lying-in-wait special circumstance, and the information was deemed refiled. (CT 101.)

Jury selection began on August 17, 1998. (CT 110.)

On August 27, 1998, appellant sought to obtain different counsel by making a motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. (CT 130.) On August 31, appellant withdrew his motion. Jury selection

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

[2] The Clerk's Transcript is referred to as "CT;" the portions of the Clerk's Transcript supplemented during record correction proceedings are referred to as "Aug. CT"; the jury questionnaires are referred to by letter and volume number preceding their CT page citation; the Reporter's Transcript is designated "RT," and is referred to by citing the appropriate volume and page number.

continued, and a jury was impaneled and sworn on August 31, 1998. (CT 135.)

The guilt phase of the proceedings commenced on September 2, 1998. (CT 153.) The prosecution and defense rested their cases on September 15. (CT 171.) The following day, closing arguments were given, followed by the delivery of jury instructions. (CT 174.)

Jury deliberations began in the afternoon of September 16, 1998. (CT 174.) The jurors deliberated all day on September 17, 1998 (CT 177), and resumed deliberations on September 21, when they returned a verdict of guilty of first degree murder and found both special circumstances to be true. (CT 180.)

On September 29, 1998, appellant requested a continuance to obtain another attorney for the penalty phase. The request was denied, and the penalty phase commenced with the prosecution's presentation of evidence. (CT 267.) On October 5, 1998, the defense presented its penalty phase case in mitigation. (CT 270.)

The case was recessed until October 13, 1998, at which time both sides gave closing arguments, and the jury was instructed and began deliberations. (Aug. CT 394-395.) On October 15, the court held that the jury was hopelessly deadlocked and declared a mistrial. (CT 286.)

On November 2, 1998, jury selection for the penalty phase retrial commenced. (CT 329.) On that same date, appellant's counsel moved to be removed as attorney for appellant. Appellant then moved for substitute counsel. (CT 331.) On November 5, a hearing was held, and the court refused to replace counsel. (CT 337.)

Jury selection resumed on November 9, 1998. (CT 339.) The following day, appellant filed a motion to disqualify the trial judge pursuant

to Code of Civil Procedure section 170.3. Prospective jurors were excused until the matter was resolved. (CT 342.) On November 25, the motion to disqualify was denied. (CT 368-369.)

A continuance of the trial was granted to January 11, 1999, without objection, because the prosecution had yet to provide additional discovery to the defense. The jury panel was discharged. (CT 367.)

The trial date was continued to January 19, 1999. (CT 377.) Appellant appeared without his attorney present. He was informed that another attorney would be standing in for his counsel for this date and for the following day. Jury selection then began. (CT 382.) Appellant's appointed counsel returned on February 1, and was present for the remainder of the proceedings. (CT 388.)

On February 1, 1999, appellant, through counsel, made a *Wheeler* motion on the ground that the prosecutor was systematically excusing African Americans from the jury panel. The court denied the motion, stating that the defense had not established a prima facie case. (XVIII RT 1839-1844.)

The jury was selected and sworn on February 2, 1999. (CT 393.) The penalty phase began on February 8. (CT 405.) The prosecution rested on February 10, and the defense began its case on February 18. (CT 411, 415.) The defense rested on February 23. (CT 425.) Both parties gave closing arguments and the jury was instructed on February 24. (CT 428.)

The jury began deliberating in the afternoon of February 24, 1999. (CT 428.) Deliberations continued on February 25, but the jury could not come to a unanimous verdict. (CT 462, 464.) The jury was ordered to return on March 2. (CT 464.) On that date, the jury continued its deliberations and returned a verdict of death. (CT 467-468.)

On April 1, 1999, the defense motion for new trial and application for modification of the verdict of death were denied. The court then sentenced appellant to death. (CT 568.)

## STATEMENT OF FACTS

Appellant, Howard Streeter, Jr., lived with Yolanda Buttler for almost seven years, beginning in 1991. (VIII RT 860.) They had a son together named Howie. (VIII RT 760.) Also living with them were Buttler's son, Patrick Myles, her daughter, Lawanda, and her niece, Shavonda. (*Ibid.*) Streeter loved the children, and was particularly devoted to his son, Howie. (IX RT 834, 850-851.)

The relationship between Streeter and Buttler began to fall apart, and in early January 1997, after an incident which resulted in Buttler seeking a restraining order against Streeter (see Claim V), Buttler and the children moved away without telling Streeter they were leaving. He came home from work and they were gone. The television, furniture and clothes were also taken. (VIII RT 762; IX RT 862-868; X RT 974-975, 994-997.)

Streeter was upset and shocked that Buttler left. (IX RT 869.) He drank and used drugs. (IX RT 870.) Streeter contacted Buttler's siblings and demanded to know where she and their son had gone. None of them would tell him, and in his increasing frustration, he continued to call them, broke one brother's car window, and threw a rock through the window of another brother's house. (IX RT 872-873, X RT 1024-1025.) According to their testimony, he also threatened them. (X RT 1009-1011, 1030.) Streeter was ultimately arrested for this conduct and served approximately

30 days in jail. (IX 876-877.)[3] When he was released, on February 28, 1997, he had lost his apartment and was forced to live out of his car or with his parents and sister, and he sometimes slept in the park. He was extremely lonely and depressed. (IX RT 833-834, 879.)

After about two weeks, Streeter finally discovered where Buttler and the children were staying, and he called Buttler telling her he loved her and wanted her back, and that he wanted to see his son Howie. A visit was arranged and it proceeded without incident. (VIII RT 763, 882-885.) Streeter and Buttler set up another visit two or three weeks later. They agreed to meet in front of the Chuck E. Cheese Restaurant, which was located in a shopping mall in Fontana, on April 27, 1997. (VIII RT 756, 764, 886.)

Streeter became increasingly upset and agitated as he waited for Buttler in the parking lot of the Chuck E. Cheese, believing she was not coming. (IX RT 891-892.) As explained in detail below in Claim VI, when she finally did arrive, Streeter took his son Howie and headed toward his own car. Buttler followed him, and after an argument escalated into a physical altercation, Streeter poured gasoline on Buttler and lit her on fire, causing her death.

According to the defense, this was a domestic dispute that spun out of control. Streeter admitted to having committed the lethal acts but denied the prosecutor's theory that they were the culmination of a premeditated and deliberate plan to kill and inflict extreme pain. Streeter was tearful during

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[3] Appellant pleaded guilty to one felony count of assault with a deadly weapon based on this conduct. (§ 245(a)(2).) This conviction was introduced by the prosecutor in aggravation at the penalty phase. (XIX RT 1935.)

his testimony and asked for forgiveness. (IX RT 897-898.)

At the penalty phase retrial, the prosecution presented evidence of the homicide. (XIX 1987-2003 [Jeff Boyles, firefighter at scene], XX RT 2045-2070 [police officers]; RT 2069 [stipulated testimony of Shavonda Buttler]; RT 2071-2080 [Patrick Myles]; RT 2095-2117 [Dr. David Vannix, burn doctor]; XXI RT 2174-2187 [Edward Jasso, witness].) Its case in aggravation centered on the circumstances of the crime, including victim impact evidence. (XIX RT 1950-1952 [Buttler's daughter Lawanda]; 1971-1976 [Buttler's brother Rallin]; 2019-2022 [Buttler's brother Victor], XX RT 2087-2093 [Buttler's sister Belinda]; RT 2132-2142 [Buttler's sister Lucinda]; RT 2196-2198 [Buttler's mother Maria].) Also presented by the prosecution was evidence of the incident which led to Buttler seeking a restraining order (XIX RT 1937-1949, 2016-2017), and Streeter's efforts to locate his wife and son, referred to above, which led to his conviction for assault with a deadly weapon. (XIX RT 1957-1971, 2005-2016, 2124-2131.) The only other evidence introduced by the prosecution was an incident in which Streeter shot a gun through the window of a house after a dispute. (XXI RT 2164-2172, 2190-2195.) This resulted in a misdemeanor conviction for shooting into an inhabited dwelling. (See Claim XX.)

The case in mitigation was primarily presented through Streeter's own testimony. He testified about his background, his relationship with Buttler, the events leading to her death, and the other aggravating incidents. (XXII 2318-2375 [direct], 2390-2478 [cross], 2511-2526 [redirect], 2526-2549 [recross], 2550-2558 [further redirect].) In addition, there was brief testimony by appellant's mother (XXII RT 2296-2309), and by a neighbor who testified to Streeter's attentiveness to the children when Streeter and Buttler were living together. (XXII RT 2310-2317.)

## CLAIMS

## RIGHT TO COUNSEL AND RIGHT TO JURY ISSUES

## I.

## THE TRIAL COURT REFUSED TO GRANT APPELLANT'S REQUEST FOR NEW COUNSEL DESPITE AN UNDISPUTED IRRECONCILABLE BREAKDOWN IN THE ATTORNEY-CLIENT RELATIONSHIP

### A. Introduction

It is essential in a capital case that counsel "make every appropriate effort to establish a relationship of trust with the client," "maintain close contact with the client," and "engage in an interactive dialogue with the client." (Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003) (hereafter "ABA Guidelines"), Guideline 10.5, reprinted in (2003) 31 Hofstra L. Rev. 913, 1005-1011.) Throughout critical stages of the proceedings in this case, Robert Amador, Streeter's appointed lawyer, disregarded these fundamental requirements. Amador's repeated failure to communicate with his client, together with the lackluster nature of his representation and his close personal relationship with the prosecutor (e.g., XI RT 1089 ["The prosecutor and I are friends"]), ultimately led to a breakdown in the attorney-client relationship. This breakdown became irrevocable when, after the mistrial at the penalty phase, Amador went on vacation to Reno without first meeting with Streeter to explain to him the significance of such a critical event in the case. After two weeks of unsuccessful efforts to contact Amador, Streeter reached out to another attorney for an explanation as to the impact of the mistrial. When Amador learned of this contact, his response was to seek to withdraw on the ground that another attorney was interfering with his representation. Streeter soon joined in the request for new counsel. At that point, Streeter,

Amador, and Chuck Nacsin, the attorney appointed to represent appellant for the *Marsden* proceedings, all agreed that appellant's relationship with his counsel had become irreparably damaged.

The court denied Amador's request to withdraw and appellant's request for new counsel. The court unreasonably minimized the importance of communication between an attorney and client in a capital case, and erroneously laid the blame for any problems on appellant, despite uncontroverted facts demonstrating that it was counsel's conduct which led to the insoluble problems between them. The court blithely dismissed the undisputed actual breakdown of the relationship as merely a breakdown of a "personal relationship." Instead, the court applied what it called an "objective" test and, relying on its belief that counsel was a good lawyer who had been doing a competent job, denied the motion.

The court's denial of appellant's request for new counsel at the penalty phase violated state law as well as the Sixth, Eighth and Fourteenth Amendments to the federal Constitution and their state constitutional analogs. Reversal of appellant's death sentence is therefore required.

**B. Summary of Proceedings**

Robert Amador was appointed to represent appellant on May 16, 1997. (CT 22.) As soon became clear, Amador was far from the zealous advocate a defendant on trial for his life would expect to have.

For example, at the preliminary hearing, Amador stipulated to the introduction of evidence, essentially conducted no cross-examination, and raised no objections. (1-A RT 16-36.) As was later revealed by the prosecutor during a challenge to the sufficiency of one of the special circumstances:

> The Court should understand that the morning

> we did this preliminary, Mr. Amador was late to trial in central and wanted us to speed through the preliminary and so I accommodated him instead of putting on some additional evidence . . . I rushed the preliminary through for the sake of counsel's calendar . . . .

(I RT 34.)

Amador did not file written opposition to the motions filed by the prosecution. For example, on August 14, 1998, the prosecutor filed the People's Motion to Introduce Evidence of Deceased Victim's Statements. (CT 103.) This motion sought the introduction of the victim's application for a restraining order against appellant. As noted in Claim V, this evidence played a central role at both the guilt and penalty phases of the trial. Nevertheless, the defense failed to file a written response to the motion. Amador apologized to the court for failing to do so, and explained that he had been "a little busy." (III RT 203.) Amador was clearly unprepared to argue the motion and relied on an argument based on a misunderstanding of the relevant statute. (III RT 204-207.) After the court granted the prosecutor's motion to introduce this evidence, counsel expressed surprise and indicated he might need a continuance to investigate the information despite the fact, as the prosecutor stated, counsel had been given notice of it months prior. (III RT 212-213.)

During jury selection, after the first twelve jurors were called to the jury box, and after some preliminary questions by the court, Amador addressed the jurors. (IV RT 310.) His discussion with the prospective jurors of the issue of race was remarkable in its ineffectiveness for discerning the presence of racially biased jurors:

> I'm going to ask you all as a group, so anybody that has a problem – remember, these questions

> are not right or wrong. They don't have right or wrong answers. You know, you have your own feelings and that's the way we are. That's the way we all are. We have our own feelings and beliefs, and so while we're here, we just want to know how you feel. [¶] For instance, my client, you see, is a black man, an African American, and we know there are some people who are prejudiced against minorities, especially blacks. And if anybody has something that bothers them about this – I can't say whether you're prejudiced or discriminatory, whatever it is – would you be fair and set that prejudice aside if you have any? Would you do that for this trial? Everybody say yes? [Multiple jurors answered in the affirmative] Okay. Good. Because if you're selected, you're going to be performing a very important job, mission, task, whatever. Okay. You all, I'm sure, understand that now, right? You all can be fair in this case.

(IV RT 311.) This exchange could hardly be reassuring to an African American capital defendant.

Through the course of the trial, defense counsel, rather than subjecting the prosecutor's case to adversarial testing, stipulated to an extraordinary amount of evidence. (See, e.g., VI RT 554; VII RT 702, 709, 738; VIII RT 743, 754-759, 767-774.)

In addition to his rather tepid performance throughout the trial, one of counsel's major failings, and the primary cause of the difficulties he had with Streeter, was his unwillingness to meet with and talk to his client. As records substantiate, Amador failed to communicate with Streeter in any meaningful way prior to trial, having visited with him at the jail on May 21, 1997, shortly after his appointment, and only four other times over the course of more than a year: on July 14, 1997, April 22, 1998, August 4,

1998, and August 11, 1998. (CT 495.)

On August 27, 1998, at the time of jury selection, Streeter filed his first *Marsden* motion. (IV RT 272.) Streeter stated as follows: "I feel I am not being represented to the fullest and like to have other representation." (*Ibid.*) Streeter complained that Amador was not communicating with him: "[N]othing is being said to me or how the case is going or what is going to happen. Or, you know, I haven't been told anything. And the only thing I've been told —." (IV RT 273.) At that point, the prosecutor – not appellant's counsel – suggested that this discussion might involve privileged matters and that the prosecutor should be excused. (*Ibid.*)

An in camera hearing was held during which the court asked Streeter to be more specific in his complaints about counsel. Streeter complained that Amador had not talked to him about the defense, had not shown him police reports or any other discovery, and had not talked to him about the case or his life. (Sealed RT 275.) Streeter then pointed out that Amador did not appear to be prepared to respond to motions filed by the prosecution, citing specifically to the People's motion to introduce the victim's statements for which counsel stated he had not had time to prepare a response. (Sealed RT 276.)

Despite the specificity of appellant's complaints, the court asked for more:

> Can you tell me specifically what you would like Mr. Amador to do that he hasn't done? Specifics. Factually. Specifics. Not conclusions. Not feelings. Not gut feelings. Not what you think is happening. But factually, can you tell me what you would like Mr. Amador to do?

(Sealed RT 276.)

Streeter responded that he just told the court his concerns and reiterated that he wanted counsel to act like an advocate by more vigorously opposing the prosecutor's motions. The court took the matter under submission. (Sealed RT 277, 278A.)

The court informed Streeter that it was searching for an attorney to talk with him, stating:

> I'm not going to relieve Mr. Amador. Frankly, I'll suggest you have not yet at this point convinced me that there is a reason. But before I go any further with deciding what to do, you're going to have the opportunity to talk to another lawyer, not Mr. Amador.

(IV RT 355.)

Chuck Nacsin was appointed as independent counsel for Streeter for purposes of his *Marsden* motion. Nascsin met with Streeter at the jail on August 28, and they talked for over an hour. After Nacsin left, Amador met with Streeter. At a hearing on August 31, Streeter stated that he wished to withdraw the motion, saying that after talking with Amador, he believed his problems and concerns had been resolved. (Sealed RT 359-360.)

The trial court then offered appellant its opinion about counsel's obligation to communicate with him in the future, stating – contrary to professional norms – that it was appropriate for counsel in a capital case not to be in communication with his client:

> I have sat on that bench and I've heard many death penalty cases and I've had all kinds of lawyers in here defending those kinds of cases, and lawyers have a different way of working. I realize the concerns of the client, because he is the one that is in jail. He is the one whose life is on the line, and he is the one going to suffer the consequences . . . But lawyers work

> different ways. Some of the best lawyers in the world that I know of hardly ever spoke to their clients, because they knew what they were doing and they had their plan, their trial tactics worked out, and they did it, and it was to the benefit of their client. [¶] And I realize this may be dissatisfying to the client, because he'd like to sort of know what is going on and I can understand that . . . Well, there are attorneys, for whatever reason, think they need to be in constant communication and hold the hand of their clients, and that is okay too. I'm just telling you that different lawyers have different styles.

(Sealed RT 361.)

Streeter responded: "This is all new to me, and after talking to my attorney, I understand what he is doing, and I – like I said, I withdraw my *Marsden* motion and thank the Court for listening to me and hearing me out." (*Ibid.*)

The court reassured appellant that "Mr. Amador is a very qualified lawyer, been in this courtroom many times and handled many cases of this equal severity. And I have full confidence and I can assure you, sir, I don't want a retrial or mistrial or appeal or anything else on this matter any more than anybody else, and I want to see that you are tried fairly and squarely and, I believe me, you will get a fair trial in this courtroom." (*Ibid.*)

The case then proceeded to trial. Streeter was found guilty with two special circumstances on September 21, 1998. (CT 180.) On September 29, 1998, when the penalty phase was scheduled to begin, appellant again expressed his displeasure with counsel. Counsel informed the court that his client was intending to disrupt the proceedings unless he was permitted to put his concerns about the case and counsel on the record. Streeter denied

this, and claimed that he merely wanted to put something on the record and that his lawyer told him to wait until after he was sentenced. Streeter had replied that at that point it would be too late. (XII RT 1155.)

Streeter continued to discuss his communications with counsel in the presence of the prosecutor without his counsel suggesting that the prosecutor be excused. Streeter complained about various aspects of Amador's representation, and continued to express his frustration with Amador's failure to communicate with him. (XII RT 1155-1158.) In this regard, it should be noted that after Amador's visit with Streeter on August 28, 1998, after which Streeter withdrew the first *Marsden* motion, Amador visited Streeter only one more time at the jail, on September 4, 1998. (CT 495.)

Streeter asked to waive time for the penalty phase while he sought to obtain another attorney. The court then asked if Streeter had been talking with another lawyer, and Streeter said that he had met with an attorney named Karlson. The court denied the motion for continuance. (XII RT 1160-1161.)

The penalty phase began on September 29, 1998. On October 15, the court determined that the jury was hopelessly deadlocked and declared a mistrial. (CT 286.)

On November 2, 1998, jury selection for the penalty phase retrial began. (CT 329.) Between the time of the hung jury and the beginning of the retrial, counsel never met with his client despite repeated requests, and therefore left Streeter completely in the dark with regard to the status of the case. After Streeter was unable to reach Amador to get an explanation of what was going to happen, he sought advice elsewhere, an act which ultimately resulted in the complete breakdown of the attorney-client

relationship. Amador sought to withdraw and Streeter joined in the request. (CT 331.)

Amador stated in open court as follows:

> I think it has come to the point where I am going to ask the court to be relieved. The reason I am asking the court to be relieved is because I'm getting interference from another lawyer by the name of Karlson. [¶] My client won't tell me what is going on and he continues to visit my client in jail. And I don't know why nobody will tell me why. I don't like somebody looking over my shoulder. It makes me nervous. This is not a *Keenan* type of trial. I didn't ask for a second lawyer. And this makes me very uncomfortable.

(XIV RT 1375-1376.)

Then, in another example of a shocking breach of loyalty, the prosecutor, who should not have even been present at this hearing, stated that Amador had asked him to run the jail visiting log to find out who was visiting his client "because we had heard rumors from other people in town that there were some L.A. lawyers that were getting themselves involved in this case and so on regarding potential claims of ineffective assistance. So I ran the jail logs and provided copies of the summaries thereof to Mr. Amador. And, indeed, Mr. Karlson has continued to visit the defendant." (XIV RT 1376.)

The records showed there were no "L.A. lawyers" involved, but that Karlson, a local attorney (XII RT 1161), did visit Streeter several times during the guilt phase trial, including twice immediately after the guilt phase verdicts. He had visited appellant only once over the past month, on October 28, 1998. (CT 495.)

In any event, the prosecutor continued to speculate about "L.A. attorneys" who "love to pounce on trial attorneys and criticize their performance" and that "it appears from what I'm hearing that this is going on right at the moment and I am also concerned about making sure Mr. Amador's concerns are taken care of." (XIV RT 1376-1377.)

The court, like the prosecutor, seemed far more concerned with the trial attorney's feelings than with appellant's rights. The court chastised Streeter as follows: "I am very concerned. Mr. Amador is a very competent attorney and I don't know who is telling you otherwise, they are all wet. And I will not stand and tell you – I will not stand for somebody interfering with Mr. Amador's representing you during this trial." (XIV RT 1377.) The court stated it intended to order Karlson to appear in court to explain what has been going on, and to order him not to interfere with "Mr. Amador's trial of this case in any fashion." (*Ibid.*)

Since neither the court nor counsel asked for his version of events, Streeter asked if he could address the court. He then explained his relationship with Karlson, which as will be seen, was subsequently confirmed by Karlson:

> I don't know what the District Attorney getting his information from. I don't know where my attorney is getting his information from. Mr. Karslon have came and see me. He come to the jail, visit the other inmates at the jail. [¶] Also, he haven't talked to me about – we haven't talked about him about taking over my case or nothing like that or even coming in and interfering with my attorney. [¶] Mr. Karlson is not interfering with my attorney, not looking over my attorney's shoulder. All he do is coming to the jail, sees me, talks to me. I was introduced to Mr. Karlson by a good friend of

> mine, inmate at the jail, and just came to talk to me. Not really about my case. Just pulled me out and talked to me. He already told me nothing he can do for me on my case. [¶] I asked him. I talked to him about my case. He told me nothing he can do for me on my case until after my case is over with. And like I said, after my case is over with and after the penalty phase is said and done, then I can pick and choose whoever I want to hire for an attorney.

(XIV RT 1379.)

Streeter asked that counsel be relieved given that counsel did not want to represent him: "I feel very strongly, the same way my attorney feel. I feel like he don't want to represent me and I don't want him to represent me in the penalty phase. So if he want to be relieved that would be perfectly all right with me." (XIV RT 1382.)

The court stated it still wanted to hear from Karlson under oath. (XIV RT 1379.) Amador clarified that he only wanted to be relieved if he continued to feel that other attorneys were interfering with his representation. The court reassured Amador that such interference would stop and that Amador was not going to be relieved. (XIV RT 1382.)

The prosecutor then suggested that perhaps the court should hold a *Marsden* hearing, to which defense counsel agreed. (*Ibid.*) After the court stated it was disinclined to hold such a hearing, the prosecutor urged the court to do so in order to protect the record. In a further indication of the close relationship between the defense counsel and prosecutor, the prosecutor admitted that he alerted Amador to some off-hand comments made during the trial by appellant's sister to a deputy D.A. who happened to be in court that the family was upset with Amador's representation and asked what they could do about it. The prosecutor then stated – without any

factual support – that he believed that "things are afoot and there are problems going on. And I just think that in an abundance of caution we ought to have somebody look into it." (XIV RT 1384-1385.)

The court agreed to contact attorney Nacsin to consult with Streeter to determine whether another *Marsden* hearing was warranted. (RT 1384.) The court assured appellant that his attorney was doing "a hell of a job." (*Ibid.*)

On Wednesday, November 4, 1998, a hearing was held. Present were Streeter, Amador, Nacsin and Karlson, as well as the prosecutor. After summarizing the prior proceedings, the court asked Amador if he had anything additional to add. Amador stated:

> No[,] other than the fact that there was several visits [by Karlson]. And if Mr. Karlson is not advising him or – or something like that, I don't know why so many visits were necessary. Some of these visits occurred after the penalty phase, after the hung jury. And my client doesn't want to tell me anything. He just says – he just says nothing to him. So I guess therein lies the breakdown. And I don't know what caused it, but – I am unable to communicate.

(XV RT 1413.)

At this point, the prosecutor – not defense counsel – stated that he should probably not be present for these proceedings, and excused himself. (XV RT 1413-1414.)

An in camera hearing was then held in which Karlson was placed under oath. The court noted that the record reflected three visits from Karlson to Streeter at the jail: September 22 and 23, 1998, after the guilt phase verdicts, and a third visit on October 28, 1998, two weeks after the penalty phase mistrial. Karlson confirmed Streeter's earlier account of their

contacts: that Streeter asked to speak with him after the jury deadlocked at the penalty phase because of some "deep concerns he had about his future," but that Karlson told him he could not give him advice until after the conclusion of his trial. (Sealed RT 1417.) Karlson explained that he met with Streeter personally because, given the emotional nature of a death penalty case, he believed that he needed to explain to him in person rather than over the telephone, that he could not help or interfere in any way. (*Ibid.*) Karlson further explained – consistent with Streeter's remarks – that any additional times he saw Streeter were brief visits when he was already at the jail seeing other clients. (Sealed RT 1418.)

The court asked Nacsin, who had spoken to Streeter, to report his findings. Curiously, Amador objected, stating that if this were a *Marsden* hearing he would object to what his client told Nascin. The court replied that this was not a *Marsden* hearing. (Sealed RT 1421.) Nacsin then stated as follows: "My feeling after talking with Mr. Streeter for quite some time, there's been a breakdown in the relationship between he and Mr. Amador. And at this point in time I think there is a need for a *Marsden* hearing, so that the Court can decide, based upon what Mr. Streeter tells the Court, whether or not to grant that motion." (*Ibid.*) Nacsin agreed to represent appellant for the *Marsden* hearing and stated his willingness to represent appellant at the penalty phase if the *Marsden* motion was granted. (Sealed RT 1422.)

The court agreed to schedule a *Marsden* hearing. The court cautioned Streeter that it did not want to provide him with any "false hopes" that Amador was going to be relieved, and attempted to convince Streeter that Amador had done an excellent job in representing him. (Sealed RT 1422-1423.) Showing complete disregard for the undisputed facts that there

had been no interference by outside counsel and that Streeter had merely been reaching out to another attorney because of the lack of communication from his own lawyer, the court warned him that it "cannot abide with continual interference with somebody trying to represent you, if you are constantly out there talking to other lawyers for whatever reason. The appearance of that happening is enough to discourage counsel trying to represent you." (Sealed RT 1423.) The court then told Streeter that it had ordered Karlson to have no further contact with him. (*Ibid.*)

The *Marsden* hearing was held on November 5, 1998. Streeter was questioned under oath by Nacsin. He explained that he lost all confidence in his counsel after his counsel asked to be relieved. In addition, on several occasions during the guilt phase, he had asked Amador to investigate certain things which Amador said he would do but never did. He also believed that Amador was not adequately prepared for trial. (Sealed RT 1439.)

Streeter then explained why he withdrew his earlier *Marsden* motion which, as noted above, was made prior to the commencement of the guilt phase, after Amador had spoken with him:

> Mr. Amador came to the jail . . . . We talked and he assured me that things would be a lot better, that he had stuff up his sleeve he was going to bring out. And I took his word and I assumed that things would you know, kind of like would be better. I felt he probably do a better job in representing me. And as the trial continued to went on, it continued to go the same way it was going in the beginning. Like, he showed me no more interest than when he did the first time. Had Mr. Amador given me 100 percent, no matter how the outcome would have came, I would have been satisfied with

that. I just wanted him to give me 100 percent.

(Sealed RT 1440-1441.)

Streeter explained what really damaged his relationship with counsel was counsel's lack of communication after the jury deadlocked at the penalty phase, which also explained why he tried to talk with Karlson. Streeter stated that after the judge dismissed the jury, he, quite understandably had questions: "I had stuff in my mind, [racing] through my mind 100 miles an hour. I needed somebody to talk to." (Sealed RT 1441.) He called the defense investigator and told him he needed to speak with Amador, and was told that Amador was in Reno. The investigator agreed to tell Amador that Streeter wished to speak with him. (Sealed RT 1442.) After four or five days, he called Mrs. Amador, and told her he needed to talk with Amador. He told her: "there is questions I want to ask him concerning the deadlock issue and what is going to happen next. And what is going to happen next." (*Ibid.*) Amador, however, did not come to see him during this time period. (*Ibid.*) Streeter explained that he only contacted Karlson because he had questions about his case and he was unable to reach his lawyer. Karlson told him to contact his lawyer. (Sealed RT 1443.)

The court asked Streeter what his feelings were about Amador's motion to be relieved. Streeter's response evidenced the breakdown in the relationship: "My feelings about that was Mr. Amador really didn't want to continue to represent me, because I felt like even if I was talking to Mr. Karlson, that if Mr. Amador was doing the job that he was supposed to be doing, he wouldn't worry about what I was saying to Mr. Karlson or Mr. Karlson saying to me." (Sealed RT 1443.) Streeter stated that he had "lost all faith and confidence in Mr. Amador. I feel like now I am not going to

be given a fair trial in the penalty phase." (Sealed RT 1444.) Streeter also stated that there had not been much communication from the beginning of their relationship and now there was no communication: "There's no communication there. We don't even see each other, don't talk about the case. We don't talk about my future. We don't talk about anything. There is nothing there and to go through a death penalty case?" As a result, he asked the court to relieve Mr. Amador. (Sealed RT 1445.)

Amador then testified. He agreed that "the attorney-client relationship has broken down sufficiently enough to have me relieved," stating there had been "irreparable harm." (Sealed RT 1446-1447.) Paradoxically, Amador then said that he could still try the case "because I have got all the information that I had before in the guilt and the penalty phase." Amador, however, unequivocally stated that he no longer wished to represent appellant. (Sealed RT 1447-1448.)

Despite the evidence in the record that the genesis of the problems between attorney and client was Amador's failure to communicate with Streeter, particularly after the jury deadlocked and a mistrial was declared, the court focused on *Streeter's* alleged lack of cooperation and failure to communicate with his counsel, asking Amador as follows: "[I]f Mr. Streeter were to recognize that you are with him to the bitter end, or the good end, as the case may be, and he was counseled to cooperate with you, to communicate with you, would you in your professional capacity be able to cooperate with him?" (Sealed RT 1449.) Amador agreed. (*Ibid.*)

Nacsin, who represented appellant for the *Marsden* proceedings was permitted to make a statement in which he made clear the serious nature of the breakdown in the attorney-client relationship:

> It appears to me that on both sides of this, the

> relationship has broken down. Even though Mr. Amador acknowledges he would try his best and he would try to be professional, it is clear at this point in time he doesn't really want to represent Mr. Streeter. He said that. [¶] I think Mr. Streeter at this time doesn't want Mr. Amador to represent him. [¶] And it seems to me these two people have to get along in this particular case. Especially if you don't believe your client and still trying to be professional and your client doesn't like you, it is going to come out and it is going to show. [¶] Now, how that may affect the verdict, who knows, one way or the other, in all honesty. But it affects this relationship.

(Sealed RT 1450.)

The court denied the motion. The court framed the issue as whether there was a conflict that "objectively is going to affect the representation that Mr. Amador gives to Mr. Streeter and will affect the outcome of the trial." (Sealed RT 1450-1451.) In doing so, the court discounted Amador's role in the breakdown of the relationship, and dismissed the importance of attorney-client communication. The court focused instead on the fact that Streeter had lost confidence in his counsel because his counsel asked to be relieved. (RT 1451.) As Streeter clearly explained – and attorney Karlson confirmed – the underlying reason for the breakdown in the relationship was that his lawyer failed to talk with him during a time when communication was critical.

The court sympathized with Amador, explaining that it was reasonable that he became upset when he learned that Streeter was consulting another lawyer. While the court conceded that this may not have been what Streeter actually had been doing, it noted that Amador did not know that. "All he knows is that some other lawyer was coming to see you

on a fairly regular basis as established by the evidence from the jail visits." (Sealed RT 1451-1452.)

The court further stated that Streeter's general complaints about things that Amador failed to do lacked specificity. With regard to the complaint that counsel did not seem prepared, the court explained this away by saying that "lawyers have different styles." (Sealed RT 1452.) The court stated that Amador "is a good lawyer, been around this courthouse a long time." He has a "laid back, relaxed atmosphere or attitude, because that is his style of trying a lawsuit." (Sealed RT 1452-1453.) The court defended counsel's performance in this case and when Streeter tried to interject, the court would not let him. (Sealed RT 1453.)

Finally, the court addressed Amador's failure to talk to Streeter after the penalty phase mistrial. The court stated that while it "likes to hear that the defendant and his attorney are on open, candid wave lengths, able to communicate openly," it "also knows that the representation that an attorney does is not gauged by the number of times he talks to his client or is available to answer questions." (Sealed RT 1454.)

The court characterized the problem as the breakdown of a "personal relationship," and stated it was only concerned with the "professional relationship." Thus, while the court acknowledged the complete breakdown in communication between attorney and client, it believed this was not important: "And frankly, you don't have to talk to him. But on the other hand, he is not going to talk to the wind; he is not going to get a communication or response from you. I can't force you and don't intend to and not going to try to get you to recognize that it is to your benefit to cooperate, communicate with Mr. Amador." (Sealed RT 1455.)

The court denied the motion to relieve counsel on two grounds,

neither of which had anything to do with the quality of the attorney-client relationship: (1) the court did not believe there was any showing of ineffective representation by Mr. Amador; and (2) the court had "confidence in Mr. Amador's ability to continue to act as a professional and to try this case as it should be tried and let the jury decide what the ultimate verdict should be." (Sealed RT 1455.)

The trial judge's refusal to consider the undisputed facts and his minimization of the importance of communication between an attorney and client is further demonstrated in the judge's declaration, filed on November 10, 1998, in response to Streeter's motion to disqualify him. (CT 345-349.) In its declaration, the court summarized the *Marsden* proceedings, stating that "[i]t was determined during that hearing that [Karlson] had in fact contacted Mr. Streeter in the County Jail several times during and after the trial," that the court ordered Karlson to no longer contact Streeter until after trial, and that this was "appropriate and necessary to ensure proper representation by Mr. Amador and that he be allowed to work free from this interference." (CT 351.)

The court essentially blamed Streeter's poor attitude for the breakdown in the relationship. Rather than discussing Amador's inexcusable failure to communicate with his client, particularly after the mistrial, the court stated that Streeter was "unable to articulate any specific reasons other than that he did not feel Mr. Amador was prepared and that Mr. Amador did not interview and call other witnesses which Mr. Streeter requested. His primarily stated reason was that Mr. Amador had requested to be relieved, so he, Mr. Streeter, wanted Mr. Amador to be off the case." (CT 351.)

The court then credited Amador's testimony that Streeter was talking

to other lawyers and refusing to communicate with him: "[Amador] testified that he felt there had been a breakdown in the personal relationship between himself and his client because of Mr. Streeter's conduct and attitude." (CT 351.) The court stated that it denied the motion on the basis that "Mr. Amador could continue to represent his client in a competent, professional manner, notwithstanding his client's attitude toward him." (CT 352.) In a completely unwarranted comment, the court stated that Streeter "was not going to be permitted to manipulate the trial by his own conduct or attitude and his determination to interrupt the proceedings." (*Ibid.*)

### C. Applicable Legal Principles

It is well settled that a defendant is entitled to have appointed trial counsel discharged upon a showing that counsel and defendant "have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." (*People v. Marsden*, *supra*, 2 Cal.3d at pp. 123-124; see also *People v. Welch* (1999) 20 Cal.4th 701, 728; *People v. Memro* (1995) 11 Cal.4th 786, 857.) The duty to hold a hearing is triggered by information suggesting that a "fundamental breakdown . . . occurred in the attorney-client relationship." (*People v. Padilla* (1995) 11 Cal.4th 891, 927.) The decision whether to grant a requested substitution is within the discretion of the trial court; appellate courts will not find an abuse of that discretion unless the failure to remove appointed counsel and appoint replacement counsel would "substantially impair" the defendant's right to effective assistance of counsel. (*People v. Smith* (2003) 30 Cal.4th 581, 604.)

This Court does not find *Marsden* error "where the complaints of counsel's inadequacy involve tactical disagreements." (*People v. Dickey*

(2005) 35 Cal.4th 884, 946.) Nor will the Court find error where it is the defendant who is at fault for the breakdown in the relationship. (See *People v. Smith* (1993) 6 Cal.4th 684, 696 ["a defendant may not force the substitution of counsel by his own conduct that manufactures a conflict"].) Neither of these circumstances apply here. The irreconcilable conflict between Streeter and his attorney stemmed from counsel's failure to communicate with him, particularly during an important stage in the proceedings, and the breakdown in the relationship was the fault of counsel, not client.

This Court has recognized that the denial of a motion for substitute counsel implicates the Sixth Amendment. (*People v. Abilez* (2007) 41 Cal.4th 472, 490; *People v. Hart* (1999) 20 Cal.4th 546, 603.) In analyzing a Sixth Amendment claim, this Court has cited the three-part test used by the Ninth Circuit:

> "On direct review of the refusal to substitute counsel, the Ninth Circuit Court of Appeals considers 'the following three factors: (1) timeliness of the motion; (2) adequacy of the court's inquiry into the defendant's complaint; and (3) whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense.'" [Citations]

(*People v. Abilez*, *supra*, 41 Cal.4th at p. 490.)

Here there is no dispute that the motion was timely made, and appellant does not dispute the adequacy of the trial court's inquiry. As explained below, Streeter's Sixth Amendment rights were violated because – as counsel, appellant and *Marsden* counsel all agreed – there was a breakdown in the relationship between the defendant and his attorney

resulting in a total lack of communication which made continued representation impossible.

### D. The Trial Court Erroneously Relied on Its View That Counsel Was Competent and Ignored the Breakdown in the Attorney-Client Relationship in Denying the Request for Substitute Counsel

Streeter originally sought the appointment of new counsel prior to the guilt phase. Among Streeter's chief complaints was that his attorney rarely visited him and failed to communicate adequately with him about the case. (IV RT 272-273.) After meeting with an independent attorney appointed by the court for the *Marsden* proceedings and then meeting with his counsel, Streeter withdrew the motion. (Sealed RT 360.) The trial court then misleadingly told Streeter that different lawyers had different styles and that it was appropriate for his lawyer to be uncommunicative with him. (Sealed RT 361.) As the record shows, counsel visited Streeter only one more time at the jail for the entirety of the proceedings. (CT 495.)

Conflicts between Streeter and Amador continued through the guilt phase trial, and Streeter expressed his dissatisfaction to the court. (XII RT 1155-1161.) After the mistrial at the penalty phase, counsel's failure to communicate with his client about the meaning of the mistrial and counsel's unreasonable reaction to appellant's attempts to talk to another attorney when his own lawyer was unavailable led to a complete and utter breakdown in the relationship. Streeter then moved for substitution of counsel.

The court denied the *Marsden* motion, and in doing so abused its discretion. Amador, Streeter, and the attorney representing Streeter at the hearing all believed that there had been an irreparable breakdown in the relationship. (Sealed RT 1146, 1443-1445, 1450.) Even the court

acknowledged that Amador and his client were not speaking to one another. (Sealed RT 1455.) The court, however, rejected as irrelevant Streeter's complaints, particularly counsel's failure to communicate with him during crucial stages of the case, as well as the consensus of all the parties that there was an irrevocable breach of the relationship. The court minimized the breakdown of the relationship as merely a breakdown in a "personal relationship." (*Ibid.*) According to the court, as long as the attorney was willing to try hard, a relationship with the client was not important. The court relied on its own view that counsel was a good lawyer who would do an adequate job at the penalty phase regardless of the relationship he had with his client. (*Ibid.*)

This Court has long held that a trial court's ruling on a request to substitute counsel must not be based on the trial court's observations. (*People v. Marsden*, *supra*, 2 Cal.3d at p. 124.) As this Court stated:

> The defendant may have knowledge of conduct and events relevant to the diligence and competence of his attorney which are not apparent to the trial judge from observations within the four corners of the courtroom. Indeed, '[w]hen inadequate representation is alleged, the critical factual inquiry ordinarily relates to matters outside the trial record . . . .' [Citation.] Thus, a judge who denies a motion for substitution of attorneys solely on the basis of his courtroom observations, despite a defendant's offer to relate specific instances of misconduct, abuses the exercise of his discretion to determine the competency of the attorney.

(*Id.* at pp. 123-124.)

Here, the court's determination that the conflict itself was

unimportant was unduly influenced by the court's own courtroom observations and its opinion of the qualifications of counsel based on prior experiences. The result was the court's unreasonable failure to give weight to Streeter's complaints about his counsel's lackadaisical approach to the case and failure to meet with him. Rather than consider how counsel's actions – or inactions – impacted the attorney-client relationship, the trial court explained away these aspects of counsel's representation by asserting that they were just a matter of counsel's "style"; that some lawyers do not need to speak with their clients in order to be effective (Sealed RT 361) and that Amador had a "laid back, relaxed atmosphere or attitude." (Sealed RT 1453.)

Having vouched for trial counsel's abilities, the court then defended counsel's reaction to finding out that Streeter was consulting with another lawyer, despite the fact that the only reason Streeter was reaching out to others was because his lawyer was missing in action. The record establishes that when Karlson met with Streeter in the wake of the penalty phase mistrial on October 28, 1998, this was their first visit in over a month. Moreover, as Karlson explained, his other visits with Streeter were brief and occurred when he was at the jail seeing other clients. And at the October 28 visit, Karlson explained to Streeter that he could not give him any advice. (CT 495; Sealed RT 1417.) The court implicitly acknowledged that Amador was mistaken in his impression that another lawyer was interfering with his representation: "All he knows is that some other lawyer was coming to see you on a fairly regular basis as established by the evidence from the jail visits." (Sealed RT 1451-1452.) The court, however, never grasped the critical fact that counsel was at fault for abandoning his client, and that this completely undermined the attorney-client relationship.

Instead, the court erroneously blamed Streeter's conduct and attitude for any problems. (CT 352.)

### E. Trial Counsel's Violation of Basic Norms in Failing To Communicate With His Client Throughout the Case Including During Critical Stages Created a Breach of the Attorney-Client Relationship That Justified New Counsel

In a capital case, where defense counsel must humanize the defendant for the jury in order to plead effectively for his life, a trusting relationship between attorney and client is a significant aspect of the right to counsel. (See, e.g., ABA Guideline 10.5.) In addition, where, as here, the case in mitigation was based primarily on Streeter's own testimony, communication was particularly essential. Had counsel acted in a manner consistent with professional norms by meeting with his client regularly, establishing a relationship, and in particular, explaining to his client the meaning of the mistrial, Streeter would not have sought advice elsewhere and the relationship may not have broken down.

Indeed, as the ABA Guidelines explain, "[o]vercoming barriers to communication and establishing a rapport with the client are critical to effective representation." (Commentary to Guideline 10.5, 31 Hofstra L. Rev., *supra*, at p. 1009.) Counsel, therefore, has an obligation "at every stage of the case to keep the client informed of developments and progress in the case, and to consult with the client on strategic and tactical matters." (*Id.* at p. 1008.)

As explained in the Commentary:

> Establishing a relationship of trust with the client is essential both to overcome the client's natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense, and to ensure that the client will listen to counsel's

> advice on important matters such as whether to testify and the advisability of a plea.

(*Id.* at p. 1008.)

Accordingly, "[c]lient contact must be ongoing, and include sufficient time spent at the prison to develop a rapport between attorney and client." (*Id.* at p. 1008.) "[A] client will not – with good reason – trust a lawyer who visits only a few times before trial, does not send or reply to correspondence in a timely manner, or refuses to take telephone calls." (*Ibid.*) On the other hand, "[s]imply treating the client with respect, listening and responding to his concerns, and keeping him informed about the case will often go a long way towards eliciting confidence and cooperation." (*Id.* at p. 1009.) Furthermore, an attorney cannot "[c]ommunicate effectively on the client's behalf" to the jury and to the trial court without being able to "humanize the defendant" which "cannot be done unless the lawyer knows the inmate well enough to be able to convey a sense of truly caring what happens to him." (*Ibid.*)

It cannot be disputed that Amador violated these basic principles by failing to meet, respond to and communicate with his client on a regular basis, particularly during critical stages of the case. As a result, as Streeter explained without contradiction, he and Amador had not been and were not able to communicate: "There's no communication there. We don't even see each other, don't talk about the case. We don't talk about my future. We don't talk about anything. There is nothing there and to go through a death penalty case?" (Sealed RT 1445.) Amador agreed that he was "unable to communicate" with Streeter. (XV RT 1413.) He conceded that the attorney-client relationship had broken down sufficiently for him to be relieved. (Sealed RT 1447.) The attorney appointed to represent

Streeter during the *Marsden* proceedings also agreed that there had been an irreconcilable breakdown. (Sealed RT 1450.) Finally, the court acknowledged that Amador and his client could not communicate, but erroneously discounted this fact as unimportant, relying instead on its view that counsel was a good lawyer who had performed competently and would continue to do so. According to the court, counsel's refusal to communicate with his client was simply a matter of counsel's style. (Sealed RT 1454-1455.)

This Court has held that "the number of times one sees his attorney, and the way in which one relates with his attorney, does not sufficiently establish incompetence" and that the defendant is "required to show more." (*People v. Silva* (1988) 45 Cal.3d 604, 622.) Here, the deterioration of the relationship was initially caused by counsel's repeated failure to meet with his client, together with counsel's "laid back style" throughout the trial. There was more, however, than the mere lack of visits that led to the complete and irrevocable breakdown in the relationship. Counsel decided to go on vacation after the jury deadlocked at the penalty phase without explaining to his client the ramifications of the mistrial. Given the lack of trust between client and counsel, Streeter's consultation with another lawyer when he could not reach Amador for two weeks after the mistrial and Amador's overreaction resulted in a breach that simply could not be repaired.

Thus, where counsel repeatedly violates his duty to establish trust with his client, essentially abandons his client during a critical stage of the proceedings, and fails to act as a zealous advocate in a case where the client's life is on trial, the ensuing breach of the relationship must be treated seriously. Where as here, counsel caused the breakdown, and the fact of the

breakdown itself was not in dispute, the request for substitute counsel should have been granted. Where a court "compel[s] one charged with [a] grievous crime to undergo a trial with the assistance of an attorney with whom he has become embroiled in [an] irreconcilable conflict [it] deprive[s] him of the effective assistance of any counsel whatsoever." (*Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1197, quoting *Brown v. Craven* (9th Cir. 1970) 424 F.2d 1166, 1170.) The court's denial of the *Marsden* motion was an abuse of discretion and violated appellant's constitutional rights.

### F. The Court's Refusal To Substitute Counsel Constitutes Reversible Error

In *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 126 S.Ct. 2557, the Supreme Court held that the denial of the right to retained counsel of choice in violation of the Sixth Amendment constituted a structural defect requiring reversal. While *Gonzalez-Lopez* involved the substitution of retained counsel, the reasons why harmless error analysis was inappropriate – that the consequences are "necessarily unquantifiable and indeterminate," (*id.* at p. 2564) – are equally applicable to a case involving the refusal to substitute appointed counsel:

> Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial

> proceeds," [*Arizona v.*] *Fulminante* [(1991) 499 U.S. 279], 310 – or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.

(*Id.* at pp. 2564-2565.)

The trial court's erroneous denial of appellant's *Marsden* motion requires reversal and is not subject to harmless error review. But even were this Court inclined to conduct a harmless error analysis, reversal would be required. Given the critical importance of communication between attorney and client in a capital case, as outlined above, the wholesale breakdown of communication between Streeter and Amador was prejudicial. In this case, as noted above in the Statement of Facts, the penalty phase presentation relied substantially on Streeter's own testimony. It is inconceivable that effective preparation and presentation of such testimony could be accomplished when attorney and client do not have a positive, trusting relationship, and, to the contrary, are not even talking to one another. Nor is it possible for an attorney who has no relationship with his client to "humanize" him for the jury and genuinely "convey a sense of truly caring what happens to him." (Commentary to Guideline 10.5, 31 Hofstra L. Rev., *supra*, at p. 1009.)

The penalty phase was extremely close, as evidenced by the hung jury at the first trial and a temporary deadlock at the retrial. The State

cannot meet its heavy burden to prove beyond a reasonable doubt that the failure to ensure that appellant was represented by counsel with whom he did not have an irrevocably broken relationship did not contribute to Streeter's death verdict. (*People v. Marsden, supra,* 2 Cal.3d at p. 126; *Chapman v. California* (1967) 386 U.S. 18, 24.) Accordingly, the death sentence must be reversed.

## II.

## JURY SELECTION FOR THE PENALTY PHASE RETRIAL BEGAN WITHOUT THE PRESENCE OF APPELLANT'S LAWYER IN VIOLATION OF THE RIGHT TO COUNSEL

### A. Introduction

It cannot be disputed that in a capital trial, given the "extraordinary and irrevocable nature of the penalty, at every stage of the proceedings counsel must make 'extraordinary efforts on behalf of the accused.'" (ABA Guidelines, Introduction, 31 Hofstra L.Rev., *supra,* at p. 923 [citations].) This is certainly true with regard to jury selection, which is "important and complex in any criminal case," and is all the more critical in a capital case. (ABA Guidelines, 10.10.2, *id.* at p. 1051.) "The purpose of voir dire, from a judicial perspective, is to select an unbiased panel in the shortest time possible. To the lawyers and the litigants, voir dire is the most important aspect of the trial for various reasons. Thus, voir dire must be afforded such time and attention that something this significant deserves." (*Louisiana v. Allen* (La. 2001) 800 So.2d 378, 386.)

Streeter was deprived of his lawyer during the first two days of jury selection for the penalty phase retrial. He consented to replacement counsel – an attorney he had not previously met – only after the court falsely assured him that nothing of any consequence would occur other than the handing out and collecting of questionnaires. Contrary to the court's

representation, however, a great deal occurred which required the presence – indeed the advocacy – of appellant's own attorney. All of the potential jurors, over 200 in all, were introduced to the case and parties, and were provided with a legal framework for deciding the case before being given questionnaires to complete. These prospective jurors were told about the first trial and its impact on the penalty phase in a way which should have concerned defense counsel because it undermined the concept of lingering doubt, but to which no objection was made by substitute counsel. (See e.g., XVII RT 1625 [appellant has been found guilty and the special circumstances were found true and that is "not something that you will have to concern yourself with"].) In addition, prospective jurors who claimed to be unable to serve based on various claims of hardship were questioned by the court and excused by stipulation of the prosecutor and substitute counsel even though many of these jurors did not fall under the statutory criteria for excusal.

These proceedings, at a critical stage of the trial, should not have gone forward without the presence of Streeter's attorney. Appellant was deprived of his counsel in violation of the Sixth, Eighth and Fourteenth Amendments and their state constitutional analogs. Reversal of the death sentence is therefore required.

**B. Summary of Proceedings**

On January 19, 1999, the date that selection of the jury for the retrial of the penalty phase began, Streeter appeared without his appointed attorney, Robert Amador. (XVII RT 1617.) Amador was apparently ill and undergoing medical tests. (XVII RT 1623, 1647.) Another attorney, Julian Ducre, who was not appointed to represent appellant, had never met Streeter and had no relation to the case, was sitting at counsel table when

Streeter arrived.[4] (XVII RT 1617-1618.)

The court explained to Streeter that the absence of his appointed counsel was not a problem because nothing of substance would occur in Amador's absence. The court stated: "It isn't going to have any effect to presentation of any evidence or any position that you may have or the District Attorney has. It is simply going to be as you experienced before, a procedure whereby the Court explained to them, the jury panel, what is going to be happening during the next couple three weeks and going to hand out questionnaires." (XVII RT 1617.) The Court then told Streeter it wanted his consent to proceed without his attorney:

> The Court: And I need to obtain from you your consent to proceed on this basis with this counsel, Mr. Ducre, who is going to come and sit in for Mr. Amador. And I have had Mr. Ducre in this courtroom many times and he is an excellent lawyer. I am not getting into that. I am merely explaining to you Mr. Amador is not going to be here, and I want your consent that we can proceed with this part of the proceedings in Mr. Amador's absence [with] you being represented by Mr. Ducre with the explanation and understanding that nothing will happen regarding the presentation of your case or the prosecutor's case except to explain to the jury the procedure and hand out the questionnaires and have them returned on a later date. You agree with what I've said, Mr. Whitney [the prosecutor]?

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[4] Not only did Mr. Ducre have no connection with this case, but during this time he was experiencing significant psychological, personal and family problems that resulted in State Bar disciplinary proceedings. Pursuant to Evidence Code sections 452 and 453, appellant has filed a separate motion requesting that this Court take judicial notice of its Order in *In re Julian I. Ducre on Discipline*, No. S099500, and the Stipulation re Facts, Conclusions of Law and Disposition, and attachments, approved by the State Bar Court, attached hereto as Appendix A.

Mr. Whitney: I do, your honor.

The Court: And Mr. Streeter, will you consent that we can proceed this morning and accomplish this much and Mr. Amador will then be here the next time that you will be here?

(XVII RT 1617-1618.)

Streeter asked for assurance that Amador would be present at the next court appearance. The prosecutor said that Amador might also be absent the following day, and the court agreed, but assured Streeter that "we'll be going on with this jury panel situation tomorrow, but both days will be exactly the same procedure. Nothing will be done regarding your case, just the taking and handing out of questionnaires." (XVII RT 1618.)

The court asked Streeter to consent "to proceed to do that in the presence of this new attorney, or at least this substituted attorney, and Mr. Amador then being here when we do actually start your case." Appellant replied: "Yes." (XVII RT 1618.)

Proceedings then commenced with Mr. Ducre standing in for Mr. Amador with two panels of prospective jurors on January 19 and one on January 20. Contrary to the trial court's representation, however, the proceedings went beyond ministerial procedures with regard to the handing out of questionnaires. Substantive proceedings were held that required the presence of appointed counsel who would be an advocate for his client rather than merely a passive stand in, with an awareness of trial strategy and an understanding of the unique aspects of the case.

Three panels of prospective jurors amounting to over 200 jurors were sworn. After informing the prospective jurors that they would be given numbers for purposes of identification, a roll was taken in which such numbers were assigned, the court introduced the parties, and the

Information was read. (XVII RT 1620-1624, 1644-1648, 1683-1687.)

Next, rather than merely explaining the process of jury selection or the case in generic terms, the court discussed the nature of the prior proceedings, and explained how the jury should (or should not) consider the first jury's findings in determining whether appellant should be sentenced to death:

> The unique thing about your service in this case is that Mr. Streeter has already been tried and found guilty of the first degree murder charge and the allegation that the murder was committed under circumstances of while lying in wait has been found to be true and the allegation that the murder involved the infliction of torture has been found to be true. So those items have already been litigated and resolved. They will not be something that you will have to concern yourself with.

(XVII RT 1625; see also XVII RT 1649,1688-1689.)

The court informed some of these prospective jurors that there had not only been a prior guilt phase proceeding but also a prior penalty phase proceeding. (XVII RT 1650.) To the third panel of prospective jurors the court stated that in the prior penalty trial a decision had not been made. (XVII RT 1689.) As discussed below, these comments required the input of counsel.

After this introduction, the court did not merely hand out questionnaires to prospective jurors, but proceeded to excuse jurors based on hardship. First, the court explained the criteria for hardship excusal, providing four bases: (1) if employer will not pay for jury duty; (2) medical

problem; (3) full-time student; (4) pre-paid, pre-planned vacation.[5] (XVII RT 1644, 1657-1658, 1695-1696, 1704.)

The court questioned those who claimed hardship. Several jurors were excused by the court or by stipulation based on (1) medical reasons (XVII RT 1635, 1665, 1680, 1698, 1702-1703); (2) financial hardship (XVII RT 1666-1667; (3) the juror's need as a care-giver (XVII RT 1639, 1670, 1675-1676, 1680-1681, 1699-1700); (4) pre-planned vacation (XVII RT 1639-1640, 1663, 1674, 1676-1677, 1707); (5) full-time student (XVII RT 1679, 1710); (6) moving out of the county (XVII RT 1705-1706).

Several other prospective jurors were excused by stipulation of the prosecutor and stand-in counsel even though they did not meet either the court's criteria or the statutory basis for hardship excusal. For example, the following jurors were excused because they were not going to be paid fully by their employers but were never asked if this would create a financial hardship, much less an "extreme" financial hardship.

Juror 49 stated that he worked for the County, that he supported no one but himself, and that he would not get paid for jury duty, but was not asked whether this would pose a hardship. (XVII RT 1637-1638.)

Juror 8 stated she worked as a waitress and her employer would not pay for jury duty but was not asked whether this would pose a financial hardship. (XVII RT 1641-1642.)

Juror 145 was self-employed, paid by commission in the field of

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[5] As discussed below, the court's list of appropriate bases for hardship excusal was more lenient than the statutory criteria, which, inter alia, requires a showing of "extreme" financial hardship, a medical problem that poses "undue risk of mental or physical harm" and does not include jurors with pre-planned vacations or who are full-time students. (California Rules of Court, rule 2.1008(d).)

financial services, loans, and insurance. She was married, her husband was a civil engineer and they had no children. She was not asked whether not getting paid for the duration of the trial would be a financial hardship. (XVII RT 1659-1660.)

Juror 91 stated he would not get paid for jury duty. He was employed by the company that made bats for Louisville Slugger. He supported his daughter and three grandchildren. However, he was not asked if sitting on the jury would be a financial hardship. (XVII RT 1660-1661.)

Juror 135 stated he would not get paid for jury duty but was never asked about whether this would pose a financial hardship, whether he supported anyone else or whether there were any other providers in his family. (XVII RT 1664-1665.)

Juror 94 stated that he did not get paid by his employer but was not asked whether this would be a financial hardship. (XVII RT 1666-1667.)

Juror 108 worked at a savings and loan, and would not be paid for jury service. She was excused by stipulation without any further questions. (XVII RT 1667.)

Juror 102 did not get paid for jury duty, and was excused without further questioning. (XVII RT 1673.)

Juror 87 testified that her employer would pay for only three days of jury duty. She was excused by stipulation without any questions regarding hardship. (XVII RT 1674-1675.)

Juror 185 stated she would only be paid for three days by her employer. She was excused by stipulation without being asked if this would cause a financial hardship. (XVII RT 1704-1705.)

Juror 243 stated that she would get paid for five days of jury duty by

her employer but was never asked whether this would pose a financial hardship. (XVII RT 1706-1707.)

Juror 229 stated that his employer did not pay for jury service. He was never asked whether or not this would pose a financial hardship. (XVII RT 1709-1710.)

Others were excused on grounds that did not meet any statutory criteria[6] or even the court's less stringent criteria. The prosecutor and stand-in counsel stipulated to their excusal based on the following grounds:

Juror 39 was a tax counselor for the elderly for two days and was a quality assurance person for the program. She described this as a voluntary program that provided a service for the elderly. (XVII RT 1636-1637).

Juror 83 was a retired woman who had signed up for an Adult Education computer class. (XVII RT 1640-1641.)

Juror 90, a teacher, said that jury service would conflict with parent-teacher conferences. (XVII RT 1661-1662)

Juror 107 had planned to go on vacation in an R.V. to visit friends and her daughter. She noted that she was somewhat flexible, but was excused by stipulation anyway. (XVII RT 1663-1664.)

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[6] California Rules of Court, rule 2.1008 (former rule 860(d)) provides the following grounds for hardship excusal: (1) the prospective juror has no reasonably available means of transportation to court; (2) the prospective juror must travel an excessive distance; (3) the prospective juror will bear an extreme financial burden; (4) the prospective juror will bear an undue risk of injury to the juror's property; (5) the prospective juror has a physical or mental disability or impairment that would expose the juror to undue risk of mental or physical harm; (6) the prospective juror's services are needed for the protection of the public health and safety; (7) the prospective juror has a personal obligation to provide actual and necessary care to another.

Juror 139 had "a couple" of medical appointments to get new medication. She was excused by stipulation without further inquiry. (XVII RT 1665.)

Juror 122 claimed emotional difficulties because of his brother's prior arrest for murder, stated he had financial problems although he would get paid for jury service from his employer, and noted he would be required to take a bus to court. (XVII RT 1668-1669)

Juror 150 stated that although he would get paid for jury duty it would be a hardship on his company because his unit would not run without him. (XVII RT 1671-1673)

Juror 137 complained that because of her rotating schedule at work for Environmental Services, County Medical Center, she worked weekends and most of her days off were in the middle of the week. Therefore, if she were on jury duty, she would have no time off. (XVII RT 1677-1679.)

Juror 212 claimed she was a full-time student, but her school hours were from 4:00-10:00 p.m., two days a week. She claimed she needed the mornings to study. She also worked at a hospital but was not asked about her ability to take time off or whether her employer paid for jury duty. (XVII RT 1700-1701.)

Juror 174 stated he had two doctors appointments, one of which he could cancel but the other was for minor surgery and he was not sure he could cancel it. (XVII RT 1701-1702.)

Juror 238 was on medication for his prostate which required frequent trips to the bathroom. (XVII RT 1702)

Juror 189 stated that he would not get paid for jury duty but was never asked whether this would be a financial hardship. He also complained that he was doing an internship at a community hospital which

he needed to finish so that he could apply for a job there. (XVII RT 1703-1704.)

Juror 177 stated she had "some medical problems which older people do have" and was under a doctor's care. She was excused without explaining the nature of her medical problems or whether it would pose a hardship during the trial. (XVII RT 1706.)

Juror 170 had a son who had an appointment with a pediatric surgeon on one day. (XVII RT 1707-1708.)

Juror 247, a high school teacher, said she would not be able to find a substitute to train a new semester of students on computers. (XVII RT 1709.)

### C. Appellant Was Deprived of His Constitutional Right To Counsel During a Critical Stage of the Proceedings

A criminal defendant has the right to the assistance of counsel under the Sixth and Fourteenth Amendments. (*Gideon v. Wainwright* (1963) 372 U.S. 335, 342-344.) A trial is unfair if a defendant is denied counsel at a critical stage of the proceedings. (*United States v. Cronic* (1984) 466 U.S. 648, 659; see also *Penson v. Ohio* (1988) 488 U.S. 75, 88.) Because voir dire is a critical stage in a criminal trial (*Gomez v. United States* (1989) 490 U.S. 858, 873; see *Lewis v. United States* (1892) 146 U.S. 370, 374), Streeter was deprived of his constitutional rights by the absence of his attorney during the first two days of jury selection.

In *Gomez v. United States*, the Supreme Court held that jury voir dire is a critical stage of the proceedings and therefore had to be conducted by a judge not a magistrate. As the Court stated:

> Even though it is true that a criminal trial does not commence for purposes of the Double Jeopardy Clause until the jury is empaneled and

> sworn [citation], other constitutional rights attach before that point, see, e.g., *Brewer v. Williams*, 430 U.S. 387, 398 [] (1977) (assistance of counsel). Thus in affirming voir dire as a critical stage of the criminal proceeding, during which the defendant has a constitutional right to be present, the Court wrote: "'[W]here the indictment is for a felony, the trial commences at least from the time when the work of empanelling the jury begins.'" *Lewis v. United States*, 146 U.S. 370, 374 [] (1892) [citations]. Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice [citations], or predisposition about the defendant's culpability. [Citation.]

(*Gomez v. United States*, *supra,* 490 U.S. at pp. 872-873.)

The Court went on to say that "voir dire represents [the prospective] jurors' first introduction to the substantive factual and legal issues in a case" and the "gestures and attitudes of all participants" must be scrutinized "to ensure the jury's impartiality." (*Id.* at pp. 874-875.)

The proceedings at which Streeter's counsel was absent involved the first opportunity for all 200 prospective jurors to be introduced to the case, the court, the defendant and counsel. Counsel's presence would have provided him with his first impression of the jurors, including an opportunity to scrutinize their "gestures and attitudes." (*Id.* at p. 875.)

Furthermore, at these proceedings, the court provided information about the case, including how jurors should consider the prior jury's verdicts on guilt and special circumstances. Streeter's attorney should have been present for any statement made by the court which had the potential to undermine or impact the jury's consideration of lingering doubt, so that

appropriate objections could be lodged. (See Claim XVIII.)

The two days of voir dire during which counsel was absent cannot be characterized as mere administrative proceedings in which jurors were excused based on strict criteria. The court questioned jurors after they had been sworn regarding their ability to serve based on hardship, relying on grounds for excusal which were far more lax than the statutory criteria, noted above, and then relied on the prosecutor and an attorney standing in for appellant's counsel to agree to their excusal by stipulation. Appellant's counsel should have been present to explore and, if necessary, challenge the stated obligations of these prospective jurors. (See, e.g., *Snyder v. Louisiana* (2008) __ U.S. __, 128 S. Ct. 1203, 1206 ["More than 50 prospective jurors reported that they had work, family, or other commitments that would interfere with jury service. In each of those instances, the nature of the conflicting commitments were explored, and some of these jurors were dismissed"].)

This is dramatically different from cases where pre-screening jurors for financial hardship is done in the absence of counsel or defendant. (See *People v. Basuta* (2001) 94 Cal.App.4th 370 [trial court may conduct initial hardship screening of prospective jurors outside the presence of the defendant and defense counsel, even over a defense objection].)

Cases in which a defendant's or counsel's absence has not been found to violate constitutional rights are those in which the proceedings are merely administrative in nature, prior to any substantive discussion regarding the particular case, and require no discretion by the court. For example, in *United States v. Williams* (2d Cir. 1991) 927 F.2d 95, two "talesmen" were excused by the clerk from a panel of prospective jurors according to specific instructions from the trial judge. The appellate court

found this was not constitutionally impermissible, and made a distinction between a purely administrative function and a proceeding at which jurors are actually introduced to factual and legal issues in the case: "Voir dire is not an issue in the instant case. Voir dire is conducted by the judge in the courtroom, not by the clerk in the central jury room." (*Id.* at p. 96.) In *Williams,* it was held that the critical moment when the accused's constitutional rights attach is "the jurors' 'first introduction to the substantive factual and legal issues in a case,' [rather than] a mere 'administrative impanelment process.'" (*Id.* at p. at 97.)

Similarly, in *Commonwealth v. McNamara* (Pa. 1995) 662 A.2d 9, the Court held that appellant's right to be present with counsel at all phases of jury selection did not apply to the preliminary stage of the process where prospective jurors, prior to being assigned to individual courtrooms for voir dire, assembled in a room to fill out questionnaires regarding background information and circumstances which might prohibit them from serving as impartial jurors. The questionnaires were subsequently provided to the judge, prosecutor and defendant for use during voir dire questioning. (*Id.* at pp. 13-14.) The Court noted that "at no point in that procedure are the jurors introduced to the substantive issues of an accused's case." (*Ibid.*) The filling out of questionnaires to "elicit background information that will help the judge, counsel, and the accused evaluate the prospective jurors' availability, impartiality, and similarity to defendant," as opposed to the questioning and excusing of jurors, was not considered to be voir dire. (*Id.* at p. 15.)

In another case, *United States v. Greer* (2d Cir. 2002) 285 F.3d 158, the appellate court found no error in excluding the parties and counsel from the questioning of prospective jurors for hardship prior to announcing the

case. The Court characterized the process as "routine administrative procedures" and not a critical stage of the trial. (*Id.* at pp. 167-168, citing *United States v. Candelaria-Silva* (1st. Cir. 1999) 166 F.3d 19, 31 ["If a judge does no more than what a jury clerk is authorized to do in excusing jurors, that . . . does not raise an issue of impropriety"].)

In none of these cases was there any suggestion that the judge (or clerk) was doing anything other than applying straightforward rules without the need for input of counsel. Here, by contrast, the trial court addressed jurors who would be serving regarding facts of the case, relied on counsel to stipulate excusals of jurors where the criteria for such excusals was not met, and utilized criteria for hardship excusals that were not consistent with the statutory provisions. This is akin to *United States v. Bordallo* (9th Cir. 1988) 857 F.2d 519, where on the day before the trial proceedings began, while the venire members were in the courtroom, the judge excused some of the prospective jurors in the absence of the defendant and his counsel. The jurors knew which case they would hear if chosen and some were excused because they were friends or supporters of the defendant, who was the Governor of Guam. The Ninth Circuit distinguished this situation from the mere "ministerial stage of drawing the prospective juror pool" by jury commissioners before a specific case is called for trial. The Court concluded that this was "more appropriately analogized to voir dire, because the prospective jurors knew which specific case they would hear, and some were excused due to factors related to [the defendant's] particular cause." (*Id.* at p. 523.) "Requiring the defendant's presence before excusing prospective jurors for a specific case" protects against a judge "either consciously or inadvertently" excusing "a disproportionate percentage of a juror population, such as women or minorities" or

"otherwise adversely affect[ing] the neutrality of the juror pool." (*Id.* at p. 523.)[7]

Even assuming that a judge's excusal of jurors on hardship grounds is generally not part of jury selection requiring the presence of counsel, the court in this case, after providing a factual and legal framework of the case to prospective jurors, excused several jurors on the basis not of its own discretion according to statutory criteria, but only by stipulation of counsel. The attorney who stipulated to the excusals on behalf of the defense, however, was not appointed to the case, had no relationship with appellant and knew nothing about the case. This stand-in attorney simply stipulated to every request for excusal every time the court asked him to do so.

Even a brief absence by counsel during a critical stage of the proceedings is error of constitutional dimensions. (See e.g., *United States v. Minsky* (6th Cir. 1992) 963 F.2d 870, 874 [absence of counsel from sidebar conference]; *Carter v. Sowders* (6th Cir. 1993) 5 F.3d 975, 979 [counsel absent from part of pretrial deposition].) Accordingly, counsel's absence when the jurors were first introduced to the parties, when the court made substantive remarks to the jury regarding how they should consider the prior verdicts, and when several jurors were excused by stipulation denied Streeter his constitutional right to counsel.

Another attorney's presence did not compensate for counsel's absence. In *James v. Harrison* (4th Cir. 2004) 389 F.3d 450, the Fourth

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[7] The presence of appellant's counsel to ensure that a disproportionate number of African Americans were not excused by stipulation during the hardship process was particularly important in this case in light of the prosecutor's use of peremptory challenges to strike African Americans from the jury. (See Claim III.)

Circuit found that a defendant's lawyer's ill-advised absence from jury selection was not a violation of the Sixth Amendment right to counsel. (*Id.* at 456.) In that case, however, there were thirteen defendants and eight lawyers, and defendant's counsel determined that one of the codefendant's lawyers, who was a local attorney, would ably protect his client's interests which were determined to be consistent with those of the codefendant he was representing in selecting the jury. (*Id.* at pp. 453, 456.) In addition, this procedure was discussed previously with the defendant who expressed no objection to the attorneys' absence. Under these circumstances, the appellate court held that there was no abandonment of the client. Here, by contrast, the lawyer who was chosen to substitute for appellant's counsel had no prior knowledge of the case, and was not representing a codefendant with compatible interests. According to the trial court's prefatory remarks, substitute counsel was simply standing in while questionnaires were handed out, but ended up participating far beyond any understanding of appellant.

Similarly, in *Gregg v. United States* (D.C. 2000) 754 A.2d 265, there was no violation of the right to counsel where the defendant's counsel was absent during part of voir dire but counsel had specifically deferred to codefendant's counsel to conduct the voir dire of potential jurors. In affirming the conviction, the court stressed that the circumstances of the case were unusual and that "ordinarily an attorney's absence during a critical stage of the trial would in all likelihood constitute a Sixth Amendment violation." (*Id.* at p. 271.) The court found no such violation where the defendant "had the benefit of his codefendant's counsel during his own attorney's absence and expressly waived his attorney's presence at voir dire." (*Ibid.*)

In *Olden v. United States* (6th Cir. 2000) 224 F.3d 561, the

defendant's attorney was absent on numerous occasions during critical stages of the trial. (*Id.* at p. 568.) The court held that if the defendant did not knowingly and intelligently waive his right to counsel, the substitution of a codefendant's counsel to stand in during his attorney's absences was a denial of the right to counsel. (*Id.* at p. 568; see also *United States v. Patterson* (7th Cir. 2000) 215 F.3d 776 [vicarious representation by codefendant's lawyers at critical stages of proceedings in absence of knowing and intelligent waiver is denial of right to counsel]; *United States v. Russell* (5th Cir. 2000) 205 F.3d 768 [counsel's absence during two days of trial with codefendant's counsel "sitting in" was a denial of the right to counsel].)

This Court rejected a right to counsel claim where lead counsel was absent during an hour of voir dire. (*People v. Benavides* (2005) 35 Cal.4th 69.) In that case, however, cocounsel was present to conduct voir dire. Thus, "either lead counsel or cocounsel, or both, were present at all times, and defendant does not contend that cocounsel entirely failed to subject the prosecution's case to meaningful adversarial testing." (*Id.* at pp. 86-87.) Here, by contrast, an attorney who knew nothing about the case failed to object to the court's characterization of the case to prospective jurors, failed to object to the court's use of a more lenient standard for hardship excusals than provided by court rules, and stipulated to excusals of jurors despite the absence of statutory criteria. The stand-in lawyer thus did not subject the case to adversarial testing.

The fact that someone who happens to be a lawyer is present at the trial alongside the accused at trial is not enough to satisfy the Sixth Amendment. (See *Powell v. Alabama* (1932) 287 U.S. 45, 58.) The right to counsel "guarantees more than just a warm body to stand next to the

accused during critical stages of the proceedings." (*Delgado v. Lewis* (9th Cir. 2000) 223 F.3d 976, 980.) Courts have found error under *Cronic* based on the absence of counsel even where another attorney sits in for the missing lawyer. (See e.g. *Holley v. Florida* (Fla. 1986) 484 So.2d 634, 635-636 [*Cronic* error where retained counsel sends two lawyers, including his partner, to try case shortly before trial begins]; *Olden v. United States, supra,* 224 F.3d at pp. 568-569 [*Cronic* error where codefendant's counsel substituted for defendant's counsel during latter's various absences during trial]; *Green v. Arn* (6th Cir. 1987) 809 F.2d 1257, 1263 [*Cronic* error where codefendant's counsel conducted cross-examination in counsel's absence]; see also *Commonwealth v. Brennick* (Mass. 1982) 437 N.E.2d 577, 578 [right to counsel violated when court orders public defender with no knowledge of case to stand in for another attorney in same office at sentencing].)

The absence of appellant's counsel from the first two days of trial during which the jury was being selected violated his right to counsel at a critical stage of the proceedings within the meaning of article I, section 15 of the California Constitution, and the Sixth and Fourteenth Amendments of the United States Constitution. The deprivation of counsel also denied appellant his right to a fair trial by jury in violation of the Sixth and Fourteenth Amendments, and rendered the death judgment unreliable within the meaning of the Eighth Amendment.

### D. Appellant Did Not Knowingly Waive His Right To Counsel

Appellant did not waive his right to have his counsel present during voir dire. Waiver of the Sixth Amendment right must be knowing and intelligent. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464-465.) The trial

court's statement that nothing of substance would occur during counsel's absence did not adequately inform appellant of the right to counsel he was being asked to waive. (See *United States v. Morrison* (7th Cir. 1991) 946 F.2d 484, 502 [no knowing and intelligent waiver where defendant affirmatively consented to allow the trial to continue in face of repeated absences by trial counsel, but where court failed to conduct a *Faretta* inquiry]; *Olden v. United States*, *supra*, 224 F.3d at pp. 568-569 [defendant must be apprised in a manner "similar" to *Faretta* colloquy when a criminal defendant agrees to temporarily accept counsel of a co-defendant as substitute counsel].) Appellant agreed to have stand-in counsel only for the purpose of handing out jury questionnaires. The additional proceedings, which included the court's substantive remarks to prospective jurors and the excusal of prospective jurors, were held without a knowing and intelligent waiver of appellant's right to counsel.

### E. The Denial of the Right To Counsel Requires Reversal

The absence of counsel from voir dire constituted a "structural error" which requires reversal of the judgment without reference to harmless-error analysis. (*Fulminante v. Arizona, supra,* 499 U.S. at p. 309.) Under *Fulminante*, those errors which are trial errors – "errors which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt" – may be subjected to a *Chapman* analysis. (*Id.* at pp. 307-308.) The absence of appellant's counsel during voir dire was not a trial error, but was a constitutional deprivation "affecting the framework within which the trial proceeds" and one which defies ordinary harmless error analysis. (*Id.* at p. 310.) As discussed above in the context of analyzing prejudice from the

wrongful denial of substitute counsel, the consequences are "necessarily unquantifiable and indeterminate." (*United States v. Gonzalez-Lopez, supra*, 126 S.Ct. at pp. 2563-2564.) For example, there is no way of knowing if some of the jurors who did not meet the statutory criteria for excusal who were removed by agreement of the stand-in attorney would have been favorable to the defense, or whether counsel's presence would have provided him with certain impressions of prospective jurors that would have better informed his decisions on the ultimate composition of the jury panel.

Alternatively, applying the *Cronic* standard, the conviction cannot stand. Under *Cronic*, prejudice is presumed where counsel was absent at a critical stage of the proceedings. (*United States v. Cronic, supra*, 466 U.S. at p. 658.) A complete denial of counsel at a critical stage, including during jury voir dire (*Gomez v. United States, supra*, 490 U.S. 858, 873), gives rise to a presumption that the trial was unfair. (*Cronic, supra*, 466 U.S. at p. 659.) The prosecution cannot overcome the presumption of prejudice.

Finally, even applying the *Chapman* standard, respondent cannot establish that the deprivation of counsel during the first two days of voir dire was harmless beyond a reasonable doubt.

Reversal of the death sentence is therefore required.

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## III.

## THE TRIAL COURT RELIED ON ERRONEOUS GROUNDS TO FIND NO PRIMA FACIE CASE OF DISCRIMINATION WHEN THE PROSECUTOR IMPROPERLY STRUCK THREE PROSPECTIVE AFRICAN AMERICAN JURORS

### A. Introduction

Howard Streeter, an African American man, was convicted by a jury that had no African Americans on the panel, after the prosecutor excused the only African American called to the jury box. The jury deadlocked at the penalty phase, and a mistrial was declared. During jury selection for the penalty retrial, the prosecutor used peremptory challenges to excuse three eligible African Americans. This time defense counsel objected and moved for a mistrial based on *People v. Wheeler* (1978) 22 Cal.3d 258, arguing that the prosecutor had unlawfully excused these three prospective jurors on the basis of their race. The court found no prima facie case of discrimination, agreeing with the prosecutor's protestations that he was not a racist and relying on the fact that the defense had also struck African Americans from the jury. These were inappropriate grounds upon which to base its ruling. In addition, the prosecutor's stated reasons for excusing two of the three African Americans were pretexual, and all three strikes were, in fact, discriminatory.

Appellant's death sentence must be reversed because it was obtained in violation of his rights to a fundamentally fair trial by an impartial jury drawn from a representative cross-section of the community, due process of law, equal protection and a reliable penalty verdict, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article 1, sections 1, 7, 13, 15, 16 and 17 of the California Constitution.

## B. Summary of Proceedings

Both the defendant and victim are African American. At the guilt phase trial, there were no African Americans on the jury.[8] The prosecutor exercised four peremptory challenges, including one against the only African American called to the box (V RT 415; A-III CT 761-780), and another against a woman who identified herself as "black/white." (V RT 370; A-II CT 341-360) The defense did not raise any objections at the guilt phase to the discriminatory exercise of peremptory challenges by the prosecutor.

At the penalty phase retrial, however, after the prosecutor exercised three of his first five peremptory challenges to strike African Americans from the jury, defense counsel objected that the prosecutor was "systematically eliminating black jurors." (XVIII RT 1839.) At the time of the motion, a total of seven African Americans had been called to the jury box. Two were excused by the defense after defense challenges for cause were denied. (Juror 35 [XVIII RT 1802-1808, 1836; B-III CT 628-646], and Juror 43 [XVIII RT 1827-1828; B-III CT 741-759].) Two African Americans, Juror 23 (XVIII RT 1783; B-II CT 400-418) and Juror 42 (XVIII RT 1809; B-III CT 723-740) were still in the jury box at the time of the motion. The other three (Jurors 3, 44, and 46) had been excused by the prosecutor. (XVIII RT 1819, 1829,1838.)

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[8] The guilt phase jury (CT 138) consisted of seven Caucasians (Jurors 3 [A-I CT 1-21], 32 [A-I CT 221-240], 37 [A-I CT 261-280], 87 [A-II CT 541-560], 92 [A-II CT 561-580], 140 [A-III CT 841-860], and 153 [A-IV 961-980]), three Hispanics (Jurors 68 [A-II CT 381-400], 133 [A-III 781-800] and 144 [A--III CT 781-800]), a juror identified as "Caucasian/Hispanic (Juror 10 [A-I CT 81-100]) and a juror identified as "mixed" (Juror 14 [A-I CT 101-120].)

Juror No. 3 was 27 years old. She had been married for eight years and had two children. She was a high school graduate, employed as a case worker for San Bernardino County Department of Social Services. (XVIII RT 1736; B-ICT 39-57.) Juror 44 was a 63 year-old widow. She had three children. She graduated from college with a B.A. in Sociology. She was a social worker for 30 years, and worked for the County as a supervising social worker. (XVIII RT 1828; B-III CT 760-788.) Juror 46 was 44 years old. She had been married for 23 years and had three children. She graduated high school and worked for the Los Angeles County Department of Public Health as an eligibility worker and as a Medi-Cal liaison. (XVIII RT 1829; B-III CT 798-816.)

The prosecution used peremptory challenges against these three African American women. In response to the defense *Wheeler* motion, the court did not initially rule on whether a prima facie case had been made, but asked the prosecutor if he had any comments. First, the prosecutor stated: "I don't think Mr. Amador is claiming that I have a racist bone in my body. He knows better than that." (XVIII RT 1841.) The prosecutor protested that the strikes "have been without regard to color," and noted that he "tried vigorously to keep on certain black jurors and have been unsuccessful in retaining them, because of the peremptories exercised by the defense." (*Ibid.*) The prosecutor continued to argue that a challenge was unwarranted given that he did not have a history of being a racist: "I think a prima facie case simply has not been nor could it ever be shown with the prosecutor, and I think Mr. Amador will agree. He knows me personally and knows that I do not take into account the color of a person's skin in selecting a jury." (*Ibid.*)

The trial court noted that the defense had also excused African

American prospective jurors. (XVIII RT 1841.) The court agreed that the prosecutor's excusal of Juror 3 was justified after having heard her answers despite there being nothing in her responses that distinguished her from Caucasian jurors.[9] (*Ibid.*)

The prosecutor sought to justify his strikes of Jurors 44 and 46. With regard to Juror 44, the prosecutor claimed that his decision was based on her questionnaire answers and her demeanor. (XVIII RT 1842.) He noted that the juror had a B.A. in Sociology and had done social work and nursing all of her life. He then stated that her answer to question number 23 on her questionnaire suggested that she could not ever actually render a death verdict. According to the prosecutor, she "does not believe a person should murder another human being and that could well prevent her from invoking the death penalty." (*Ibid.*) He also noted that her answer to question number 25 suggested she believed that "unless a person can be rehabilitated, there is no point in giving the death penalty." (*Ibid.*) The prosecutor badly distorted this juror's responses, and his failure to ask for clarification of her questionnaire answers strongly suggests pretext.

With regard to Juror 46, the prosecutor merely stated that she "seemed to be distant from the rest of the jurors' responses. Although the rest of jurors reacted in generally a similar way, she was kind of a loner. And I think all those factors are calling out for a possible hung jury, if nothing else." (XVIII RT 1842-1843.) In fact, there was nothing to suggest

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[9] There was some question whether Juror No. 3 was African American or part Creole. However, as this Court has said, "In *Wheeler*, we imposed no requirement that the defendant establish that systematically excluded black jurors were of Afro-American, Caribbean, African or Latin American descent." (*People v. Gray* (2005) 37 Cal.4th 168, 187, fn. 3 [citations].)

that this juror was a loner, and the disparate questioning of this juror, together with all the other circumstances, establishes a prima facie case of discrimination. Indeed, the lack of any legitimate basis for her excusal, particularly when viewed with the other two excusals of African Americans, demonstrates that the prosecutor had a discriminatory purpose for excusing her.

The trial court failed, however, to find that there was a prima facie case of discrimination on the completely irrelevant grounds that it did not personally believe that the prosecutor was a racist and because the defense had struck an equal number of African Americans from the jury.[10] The court stated as follows:

> I have tried enough cases with you, Mr. Whitney, to know you are not a racist, and I think that is probably the most obvious thing that has been exemplified by your effort in this case on prior occasions and on previous occasions. [¶] In light of the fact that of the four that have been excused, the number is equal between the two parties, and having reviewed the questionnaires, and the answers given, it is my conclusion that at this juncture, at least, there has been no prima facie showing of an intentional intent of the prosecution to enter into a pattern of excusing people from the panel merely because they are of the Black, African-American race.

(XVIII RT 1844.)

After the defense noted that there were *three* African Americans, not two, excused by the prosecutor and that he was not arguing that the

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[10] As defense counsel pointed out and as noted above, the prosecutor had excused three African Americans and the defense had excused two. (XVIII RT 1844.)

prosecutor was a racist, but that he was nevertheless systematically eliminating black jurors, the trial court reiterated its finding that no prima facie case had been shown: "And I again feel that there has been no systematic excusal without some basis for that exercise other than race. The motion is denied." (XVIII RT 1844.)

Jury selection continued. No other African American jurors were called to the jury box. The jury that was ultimately seated included only one African American, Juror 23, with defense counsel having exercised a peremptory challenge against Juror 42, an African American, after a challenge for cause was denied. (XVIII RT 1814-1818, 1848; B-III CT 723-740.)

### C. The Trial Court Erroneously Failed To Find a Prima Facie Case of Discrimination

Under the California Constitution, a defendant's right to trial by a representative jury is violated by the use of peremptory challenges to exclude jurors solely on the ground of group bias. (*People v. Wheeler*, *supra,* 22 Cal.3d at pp. 276-277.) The equal protection clause of the Fourteenth Amendment of the federal Constitution similarly forbids peremptory challenges of potential jurors on account of their race. (*Batson v. Kentucky* (1986) 476 U.S. 79, 97; see also *Powers v. Ohio* (1991) 499 U.S. 400, 409.)

Under both *Batson* and *Wheeler*, a defendant has the initial burden of showing that peremptory challenges are being exercised for discriminatory reasons. (*Batson v. Kentucky*, *supra*, 476 U.S. at pp. 93-97; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) The applicable legal standards are as follows:

> First, the defendant must make out a prima facie case 'by showing that the totality of the relevant

> facts gives rise to an inference of discriminatory purpose.' [Citations.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.'

(*People v. Cornwell* (2005) 37 Cal.4th 50, 66-67, citing *Johnson v. California* (2005) 545 U.S. 162, 168.)

To make a prima facie showing, "a litigant must raise the issue in a timely fashion, make as complete a record as feasible, [and] establish that the persons excluded are members of a cognizable class." (*People v. Gray*, *supra*, 37 Cal.4th at p. 186) As the United States Supreme Court has explained, "a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Id.* at p. 186, quoting *Johnson v. California*, *supra*, 545 U.S. at p. 231.) "An 'inference' is generally understood to be a 'conclusion reached by considering other facts and deducing a logical consequence from them.'" (*Id.* at p. 186, quoting *Johnson v. California, supra*, 545 U.S. at p. 230, fn. 4.)

In deciding whether a prima facie case has been established, this Court considers "the entire record of voir dire for evidence to support the trial court's ruling." (See *People v. Yeoman* (2003) 31 Cal.4th 93, 116.) Certain types of evidence are especially relevant:

> [T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories

> against the group. He may also demonstrate that the jurors in question share only this one characteristic – their membership in the group – and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all.

(*People v. Bonilla* (2007) 41 Cal.4th 313, 342, quoting *Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.)

**1. The Trial Court Used the Wrong Legal Standard**

The court in appellant's case did not state which standard it was using to determine whether a prima facie case was made, but it can be assumed that it required an inappropriately high burden when it stated, "at this juncture, at least, there has been no prima facie showing of an intentional intent of the prosecution to enter into a pattern of excusing people from the panel merely because they are of the Black, African-American race." (XVIII RT 1844.)

At the time of trial, California courts required proof by a preponderance of the evidence, that it was "more likely than not" that the challenge was based on impermissible group bias in order for a defendant to establish a prima facie case at step one of a *Wheeler/Batson* challenge. (See *People v. Cornwell, supra*, 37 Cal.4th at p. 73). The United States Supreme Court, however, expressly disapproved of this standard, holding that "California's 'more likely than not' standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case." (*Johnson v. California*, *supra*, 545 U.S. at p. 163.) Instead, an appellant need only present facts that "raise an inference" of discrimination. (*Ibid.*)

This Court has previously held that where "the trial court found no prima facie case had been established, but whether it applied the correct 'reasonable inference' standard rather than the 'strong likelihood' standard is unclear, 'we review the record independently to apply the high court's standard and resolve the legal question whether the record supports an inference that the prosecutor excused a juror on a prohibited discriminatory basis." (*People v. Bonilla, supra,* 41 Cal.4th at p. 342, quoting *People v. Bell* (2007) 40 Cal.4th 582, 597 [citations]; see also *People v. Lancaster* (2007) 41 Cal.4th 50, 75 [Court notes that in "post- *Johnson* cases," it reviews the record to resolve the legal question whether defendant's showing supported an inference that the prosecutor excused a prospective juror for an improper reason].) Thus, where, as here the trial court at least implicitly used an incorrect standard, this Court should not accord any deference to the trial court's finding.

As discussed below, after reviewing "the totality of the relevant facts," (*Johnson v. California, supra*, 545 U.S. at p. 168), it is clear that appellant made out a prima facie case of racial bias motivating the prosecutor's challenges to the three African American prospective jurors.

### 2. The Trial Court's Grounds for Finding No Prima Facie Case Were Irrelevant and Improper

In addition to holding the defense to an unreasonably high standard, the trial court's asserted grounds for finding no prima facie case were irrelevant to the question of whether the prosecutor had excused three prospective jurors based on their race. Once these improper considerations are removed, it becomes clear that there was no proper basis for the court's determination that a prima facie case was not established.

The court stated that, as the prosecutor himself maintained, the

prosecutor was not a racist. However, whether or not the prosecutor was personally prejudiced against African Americans is not dispositive. While "historical evidence of racial discrimination" in the district attorney's office would be relevant to whether a *Batson* claim had been established, *Miller-El v. Cockrell* (2003) 537 U.S. 322, 347, the defense does not have to prove that the prosecutor is an overt racist. A prosecutor could improperly exercise discriminatory challenges without being a racist. For example, a prosecutor's determination that an African American is a "loner" or is "distant," as in this case (XVIII RT 1842-1843), could be the result of unconscious racism which is equally impermissible. (See *Batson*, *supra*, 476 U.S. at p. 106 (dis. opn. of Marshall, J.) ["A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically]."")

Moreover, a prosecutor may unlawfully exercise strikes to exclude African Americans not because he is a racist but because he or she believes it is a winning tactic: "It is not just the repulsive racist who, for the sake of winning, selects a jury according to strategic and tactical considerations that are discriminatory, whether intended or not." (*State v. Jones* (N.M.App. 1995) 911 P.2d 891, citing *Keeton v. State* (Tex.Crim.App.1988)(en banc) 749 S.W.2d 861, 868 [although not intentionally discriminating, an attorney may for strategic reasons try to find reasons other than race to challenge a black juror, when race may really be the primary factor].) As the Supreme Court stated in *Batson*, "[n]or may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.'" (*Batson*, *supra*, 476 U.S. at p. 98, citing *Alexander v. Louisiana* (1972) 405 U.S. 625, 632.)

The trial court also relied on its view that the defense excused an equal number of African Americans from the jury. It was immaterial, however, that the defense excused African Americans from the jury in determining whether the prosecutor's strikes were discriminatory. (*People v. Snow* (1987) 44 Cal.3d 216, 225 ["the propriety of the prosecutor's peremptory challenges must be determined without regard to the validity of defendant's own challenges"]; see also *Miller-El v. Dretke* (2005) 545 U.S. 231, 245, fn. 4.) Moreover, in contrast to the prosecutor's strikes of three impartial African Americans, the two African Americans excused by the defense (Jurors 35 and 43) were clearly excused for non-racial reasons given their answers on voir dire, and only after challenges for cause were denied. (See *United States v. Battle* (10th Cir. 1987) 836 F.2d 1094, 1086 ["under Batson, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black members"]; *Snyder v. Louisiana, supra,* 128 S.Ct. at p. 1208.)

Juror 35 had read about the case in the newspaper. (B-III CT 633.) He was "particularly put off by the crime," believed this was a "brutal murder" and had discussed the case with his wife. (B-III CT 635; XVIII RT 1799-1800.) Juror 35 was "strongly in favor" of the death penalty, and stated that if a person takes a life he should have to "pay with his." (B-III CT 637.) He acknowledged that "from what I read in the paper, I was prejudiced" and expressed uncertainty whether he could be fair. (XVIII RT 1800.) He said that if he were on trial he would not want someone with his views to sit in on the jury. (XVIII RT 1801.) He admitted "it would be difficult" to set aside what he knew about the case and consider only the evidence. (XVIII RT 1807.) The challenge for cause was denied, and the

defense was forced to use a peremptory challenge to excuse Juror 35. (XVIII RT 1808, 1836.)

Juror 43 stated in her questionnaire that she had feelings about the crime that would make it difficult for her to be impartial. (B-III CT 748.) She stated that viewing graphic or gruesome photographs would cause her to be partial against someone found to be guilty. (B-III CT 749.) She was strongly in favor of the death penalty and believed that the death penalty was given too seldom. (B-III CT 750-751.) She stated that she would vote for death simply because the defendant was convicted of first degree murder in this case because "I feel the crime is worthy of the death penalty." (B-III CT 753.) In conclusion she stated, "I do not feel that I could be impartial with the facts given by the judge and this questionnaire. I believe the defendant should receive the death penalty." (B-III CT 754-755.) On questioning by defense counsel, Juror 43 stated: "Well, I feel rather strongly about the case," and believed it would be difficult to be fair, but she agreed to keep an open mind and would try to be fair and impartial. (XVIII RT 1823, 1827.) The court denied the challenge for cause, and the defense was required to use a peremptory challenge to strike her. (XVIII RT 1827-1828.)[11]

The fact that the defense excused these extremely opinionated African American prospective jurors has no bearing on whether the

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[11] A third African American prospective juror was struck by the defense after the *Wheeler* challenge was denied. Like the other two defense strikes, Juror 42 appeared biased. (See, e.g., juror's questionnaire: "that son of a bitch should burn for what he did." (CT B III 730; see also XVIII RT 1813.) Juror 42 was excused by the defense after challenge for cause was denied. (XVIII RT 1818, 1848.)

prosecutor's strikes of three African Americans were discriminatory.

### 3. A Prima Facie Case Was Established

As noted above, prior to the guilt phase, although no *Wheeler/Batson* challenge was made, the prosecutor used two of his four peremptory challenges to excuse the only African American on the venire and a prospective juror who identified herself as "black/white." At the penalty retrial, there were seven African Americans on the venire out of 25 prospective jurors who had been called to the jury box at the time of the motion or 28%, and the prosecutor used three of his five challenges (60%) to strike African Americans from the jury. (XVIII RT 1731-1839; see *People v. Bell, supra,* 40 Cal.4th at p. 598, fn. 4 ["A more complete analysis of disproportionality compares the proportion of a party's peremptory challenges used against a group to the group's proportion in the pool of jurors subject to peremptory challenge].) As the Supreme Court held in *Miller-El v. Cockrell, supra,* 537 U.S. 322, 342, where 10 of the prosecutor's strikes or roughly 70% were used against African Americans, "[h]appenstance is unlikely to produce this disparity."

Moreover, a comparison of the questions asked by the prosecutor and answers given by both African American and non-African American prospective jurors demonstrates that the prosecutor questioned jurors differently depending on their race. Such disparate questioning constitutes evidence of purposeful discrimination because it was used to create the appearance of divergent views that became a pretext for excusal. (*Miller-El v. Cockrell, supra*, 537 U.S. at p. 344, quoting *Batson*, *supra*, 476 U.S. at p. 97 ["[t]he prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose"].)

Voir dire began with 12 jurors seated in the box. Juror 1 stated on the questionnaire she was "neutral" regarding the death penalty. (B-I CT 10.) She also responded that she would need to know the facts before voting for death. (B-I CT 10, 12.) The prosecutor's questioning of Juror 1 was minimal. (XVIII RT 1754.) The one question the prosecutor asked Juror 1 was whether she could weigh aggravating and mitigating factors to which she gave a somewhat equivocal answer: "I can do that. I haven't never been in the situation before, so hard to say for sure, because I've never been there before, but I think I could." (*Ibid.*)

The prosecutor then moved on to Juror 2. Juror 2 admitted on the questionnaire to being "moderately in favor" of the death penalty, but noted that "all situations are different." (B-I CT 29.) Juror 2 did not believe that the death penalty reduces crime but "there are some instances where the crime is so terrible that the death penalty does apply." (*Ibid.*) The prosecutor merely asked Juror 2 about the sentencing process, and Juror 2 replied that "my feeling was I have to know what the facts are and decide, make a decision on this." (XVIII RT 1755.)

The prosecutor then questioned Juror 3, the one African American who had been called to the jury box at that point. (B-I CT 41.) He zeroed in on Juror 3, stating, "Okay. I want to pick on you for a second" (XVIII RT 1756), and asked her pointed questions about her views on the death penalty even though her responses on her questionnaire were little different from the first two Caucasian jurors.

Juror 3 stated on her questionnaire that she was "neutral" regarding the death penalty. (B-I CT 48.) She responded to a question asking for her general beliefs about the death penalty as follows: "I feel that when a person is of sound mind, and admits to death and acts of cruelty willingly,

knowingly, such as executionist (gang activites) then maybe the death penalty is appropriate." (*Ibid.*) The prosecutor asked her about this response during voir dire, and she stated that she wanted to hear everything before deciding on penalty. (XVIII RT 1757.) She clarified that the examples she gave were only examples and that she would not be limited to voting for death in only those circumstances. (XVIII RT 1758.) She stated that she would not automatically vote to impose death even as to a serial killer, but that it would depend on the situation and the evidence. (*Ibid.*) Juror 3 also clarified that, by her statement in the questionnaire that someone who intentionally killed should not get the death penalty if they had a good reason to kill, she meant something like self-defense. (XVIII RT 1761-1762.)[12]

None of the Caucasian jurors of the first twelve called to the box, including those who ultimately sat as jurors, were questioned in the manner that Juror 3 was despite the fact that their questionnaires provided similar answers, including some which called their impartiality more into question. In fact, the prosecutor asked no questions of the other jurors who were called to the box of the initial 12, despite one juror's statement that he believed that life without possibility of parole was a harsher penalty than death. (B-I CT 87.) This juror, Juror 5, spent time in custody after being falsely accused of a crime. (B-I CT 82.)

Juror 10 gave answers that cried out for questioning. In his questionnaire he wrote that he read accounts of the first trial in the newspaper. (B-I CT 160-161.) He also said that "based on news reports of

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[12] The juror was also questioned in chambers about the fact that her uncle tried to rape her when she was 14, and that she went to court to testify about it. (XVIII RT 1764-1765.)

the murder I feel I would have a hard time viewing the evidence." (B-I CT 166.) In response to a question on whether he would follow the instructions if they conflicted with his beliefs, he said that he did not know but "will probably follow the judge's instructions." (B-I CT 166.) No questions were asked of this juror on voir dire.

Juror 23 was called to the jury box after the prosecutor exercised one peremptory challenge (XVIII RT 1768), a prosecution challenge for cause was granted (XVIII RT 1779) and the defense exercised one peremptory challenge. (XVIII RT 1782.) Juror 23 was the second African American called to the box, and eventually sat as a juror.[13] As with Juror 3, the prosecutor questioned this prospective juror far more extensively than any of the Caucasian prospective jurors (with the exception of Juror 19, whom he successfully challenged for cause). As had the other jurors who were passed without any or virtually any questions by the prosecutor, Juror 23 stated being "neutral" on the death penalty, and noted that every case is different and must be decided on the facts. (B-II CT 409.) Juror 23 stated that "I feel if someone decides to take another person's life they should be willing to give up their own." (*Ibid.*) This juror also stated in answer to a question as to the purpose served by the death penalty, that it served "none, because people are still committing murder." (*Ibid.*) Juror 23 stated that life without the possibility of parole was harsher than the death penalty. (B-II CT 410.) The juror also stated that an intentional killing would not warrant the death penalty if the killing was in self-defense. (*Ibid.*)

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[13] The fact that the prosecutor accepted a jury containing an African American does not end the inquiry, "for to so hold would provide an easy means of justifying a pattern of unlawful discrimination which stops only slightly short of total exclusion." (*People v. Snow*, *supra,* 44 Cal.3d at p. 225, citing *People v. Motton* (1985) 39 Cal.3d 596, 607-608.)

The prosecutor questioned Juror 23 regarding what he perceived to be an inconsistency between stating neutrality on the death penalty and stating that the death penalty served no general purpose. (XVIII RT 1784-1785.) Juror 23 explained that he did not think the death penalty was a deterrent even though it might be warranted. (XVIII RT 1785.) Interestingly, there were others who stated neutrality on the death penalty but did not provide an answer to the question as to what general purpose the death penalty served, or gave conflicting answers. The prosecutor did not ask questions of these Caucasian jurors.

For example, Juror 1 stated beliefs both for and against the death penalty. (B-I CT 10.) Juror 2 stated that the death penalty does not reduce crime although sometimes the crime is so terrible that the death penalty does apply. (B-I CT 29). Juror 10 said that the death penalty was overused but should be reserved for the most severe crimes. (B-I CT 162) Juror 12 stated that the death penalty should be applied for the worst crimes. (B-I CT 200.) Juror 55 stated he was "neutral" on the death penalty and gave no answer to what general purpose the death penalty serves. (B-IV CT 959.) Juror 61 stated that "no one should unilaterally choose who should live or die." (B-IV CT 1073.)

The prosecutor did not strike Juror 23, but the fact that the first two jurors who the prosecutor questioned at all substantively were African Americans is significant evidence of discriminatory intent. (*Miller-El v. Cockrell, supra*, 537 U.S. at p. 344; *Batson, supra*, 476 U.S. at p. 97.)

Juror 46, one of the three African Americans peremptorily challenged by the prosecutor, like other jurors, failed to provide an answer on her questionnaire with regard to what purpose the death penalty might serve. (B-III CT 807.) But while she was questioned about this, white

jurors were not. The prosecutor pressed her for an answer on the purpose of the death penalty. She stated that both sentences would serve the same purpose, and that life without possibility of parole was just as harsh as the death penalty. (XVIII RT 1830.) Other jurors were not questioned about their responses at all. (See B-I CT 10; B-I CT 29; B-I CT 162; B-I CT 200; B-IV CT 959.)

It is interesting to contrast this line of questioning with that of Juror 52. With regard to what purpose the death penalty serves, Juror 52 said that while it saves the system money it "lets the criminal off easy. Each day spent in prison without parole I think worse because they have to live and remember what they did." (B-III CT 902-903.) She reiterated that she believed that it might be better to have the person living each day thinking about what they did rather than use the death penalty. (B-III CT 904.) The prosecutor barely questioned her about these answers. After noting Juror 52's response to a question that death might not be as harsh a penalty, the prosecutor simply asked whether she understood that he will be asking for death because it is considered by others to be a harsher penalty. (XVIII RT 1837.) Juror 52 agreed that she could vote to impose death if the facts warranted. (XVIII RT 1838.)

In addition to disparate questioning, as discussed below in section D, a review of questionnaire and voir dire responses demonstrates that non-African American jurors who ultimately sat on the jury are indistinguishable from the African American jurors the prosecution struck. This Court has recently declined to engage in such a comparative juror analysis in a "first-stage" *Batson* case, although it did not indicate that such a review was impermissible. (See *People v. Bonilla, supra,* 41 Cal.4th at p. 350 ["We have concluded that *Miller-El v. Dretke*[, *supra,*] 545 U.S. 231 [] does not

mandate comparative juror analysis in these circumstances (*People v. Bell, supra*, 40 Cal.4th at p. 601 []), and thus we are not compelled to conduct a comparative analysis here"]; see also *People v. Howard* (2008) 42 Cal.4th 1000, 1019-1020.) In other cases, this Court has performed such an analysis where the trial court has denied a prima facie case. (See, e.g., *People v. Williams* (2006) 40 Cal.4th 287, 312; *People v. Guerra* (2006) 37 Cal.4th 1067, 1103-1104; *People v. Cornwell, supra,* 37 Cal.4th at p. 71.) Appellant submits that, particularly where as here, the prosecutor offered reasons for striking two of the jurors prior to the court's ruling on whether a prima facie case had been made, this Court cannot examine the totality of relevant facts without such an analysis. (See *Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1146.) The comparative analysis presented below should therefore be considered in determining whether or not appellant established a prima facie case of discriminatory intent.

It is clear from a review of the entire record that a prima facie case was established that the prosecutor's strikes of three African Americans were based on race. The prosecutor struck the only African American and only mixed race juror in the first trial, and he used three out of his first five challenges (60%) on African Americans at the penalty retrial where only 28% of prospective jurors called to the jury box at that point were African American. In addition, he questioned African Americans far more extensively than white jurors, and as shown by comparative analysis, described below, other than race, the characteristics of the struck African Americans were indistinguishable from the Caucasians who remained on the jury.

The trial court had "a duty to determine if the defendant has established purposeful discrimination." (*Batson, supra*, 476 U.S. at p. 98.)

Appellant raised an inference that the prosecution had excluded the three African-Americans on account of race and the burden should have shifted to the prosecution to articulate race-neutral explanations for the peremptory challenges in question. As discussed below, the prosecutor volunteered non-discriminatory reasons that should have been apparent to the court were sham excuses. The court's failure to find that appellant had established a prima facie case of discrimination based on the totality of the record on voir dire violated appellant's state and federal constitutional rights under *Batson* and *Wheeler*.

This Court has determined that, where the trial court has erroneously denied a *Wheeler/Batson* motion at the first step of the *Batson* analysis, the proper remedy is to remand the matter for a hearing at which the trial court can conduct the second and third steps of the *Batson* analysis. (*People v. Johnson* (2006) 38 Cal.4th 1096, 1103-1104.) First, as discussed below, since the prosecutor provided non-discriminatory reasons for two of the three strikes, the issue of whether a prima facie case has been established is moot, and the ultimate issue can be decided on the present record. Moreover, the time lapse between appellant's trial and this Court's eventual resolution of his appeal[14] will be substantially longer than in any case discussed in *Johnson*, *supra,* 38 Cal.4th at pp. 1101-1102, making a reliable hearing on the facts impossible as a practical matter on remand in this case. Particularly apt is the United States Supreme Court's comment in *Snyder v. Louisiana,* a third-step *Batson* case, that there is no "realistic possibility that [the prosecutor's proffered explanation for excusal] could be profitably explored further on remand at this late date, more than a decade after

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[14] Jury selection in this case took place in February 1999. (XVIII RT 1839-1844.)

petitioner's trial." (*Snyder, supra,* 128 S.Ct. at p. 1212.)

Penal Code section 1260 provides that an appellate court "may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances." Remand is appropriate "if there is any reasonable possibility that the parties can fairly litigate and the trial court can fairly resolve the unresolved issue on remand. . . ." (*People v. Braxton* (2004) 34 Cal.4th 798, 819.) In this case, no such reasonable possibility exists, due primarily to the lapse of time.

In *People v. Johnson*, this Court remanded the matter despite the lapse of between seven and eight years since jury selection had taken place. (*People v. Johnson, supra,* 38 Cal.4th at p. 1101.) The time lapse in this case, already almost ten years at the time of the filing of this opening brief, promises to be far longer. In cases prior to *Johnson* in which this Court considered and rejected remand, time lapses longer than involved here were considered too long to allow a realistic chance of a meaningful hearing on remand. (See, e.g., *People v. Snow, supra,* 44 Cal.3d at p. 226-227 [voir dire began approximately six years before reversal of judgment]; *People v. Hall* (1983) 35 Cal.3d 161, 170-171[trial held more than three years before reversal of judgment]; *People v. Allen* (1979) 23 Cal.3d 286, 295, fn. 4 [trial held nearly three years before reversal of judgment].)

Appellant submits that a remand in this case would be an exercise in futility and a waste of judicial resources. Reversal of the death judgment is the appropriate remedy after such a lapse of time, and should be ordered in this case. Should reversal not be ordered, then the matter should be remanded for further hearing pursuant to *Batson* and *Wheeler*, under the conditions specified in *People v. Johnson,* 38 Cal.4th at pp. 1103-1104.

### D. The Prosecutor's Reasons for Excusing the African American Jurors Were Pretextual

As a matter of federal law, "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." (*Hernandez v. New York* (1991) 500 U.S. 352, 359.) This Court, most recently in *People v. Lewis* (2008) 43 Cal.4th 415, found that "by proffering his reasons" for excusing the challenged juror, "the prosecutor rendered moot the question whether a prima facie case existed." (*Id.* at p. 471, citing *Hernandez, supra,* 500 U.S. at p. 359.) This is consistent with the "the overwhelming weight of authority in other jurisdictions." (*People v. Boyette* (2002) 29 Cal.4th 381, 469 [citations] (dis. opn. of Kennard, J.); see also *People v. Howard, supra,* 42 Cal.4th at p. 1034 (dis. opn. of Kennard, J.).)

In this case, the prosecutor volunteered non-discriminatory reasons for excusing two of the three African American jurors. Thus, the preliminary issue of whether the defense made the requisite prima facie showing is moot, and the Court must proceed to the second and third steps of *Batson,* in which a review of the prosecutor's reasons must be examined – together with the all the other relevant circumstances – to determine whether or not the excusals were impermissibly motivated by group bias. Such an analysis demonstrates that the prosecutor provided sham excuses in order to strike African Americans from the jury.

The prosecutor provided no explanation for Juror 3's excusal after the trial court simply noted that her removal appeared justified based on her answers. (XVIII RT 1841-1842 ["Having heard the voir dire on No. 3 and

her answers, the exercise of peremptory there was justified by the People"].) It was improper for the court, however, to assume the strike was proper based on the juror's answers without ever asking the prosecutor what his reasons actually were. It is the prosecutor who must provide non-discriminatory reasons for excusing a juror. As the United States Supreme Court has stated: "[w]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (*Miller-El v. Dretke, supra,* 545 U.S. at p. 252.) It is not for the trial judge to "imagine a reason that might not have been shown up as false." (*Ibid.*)

In fact, there was nothing in Juror 3's responses that was any different from non-African American jurors who were not challenged by the prosecutor. (*United States v. Alanis* (9th Cir. 2003) 335 F.3d 965, 969 [finding purposeful discrimination when a prosecutor struck men from a jury but included women "who possessed the same objective characteristics . . . claimed . . . objectionable in the men"]; *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1220 ["prosecutor's motives may be revealed as pretextual where a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge"]; see also *Miller-El v. Dretke, supra*, 545 U.S. at p. 241 ["[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination . . . ."].)

Several jurors who sat on the jury stated in their questionnaires, as did Juror 3, that they were "neutral" on the death penalty. (B-I CT 10 [Juror 1]; B-I CT 86 [Juror 5]; B-I CT 200 [Juror 12]; B-III CT 902 [Juror 52]; B-IV CT 959 [Juror 55]; B-IV CT 1092 [Juror 62].)

Juror 3 provided examples of crimes that would warrant the death penalty (execution-style, gang-related crimes) where the person is of sound mind. She clarified during voir dire that these were just examples. Others who sat on the jury also indicated that the death penalty should be reserved for the most serious crimes. (B-I CT 29 [Juror 2 stated "there are some instances where the crime is so terrible that the death penalty does apply"]; B-I CT 162-163 [Juror 10 stated while the death penalty was "appropriate in some cases," he believed it was "often overused" and that the death penalty was imposed "too often" and "randomly," and that "some cases, in my opinion, do not meet the criteria"]; B-I CT 200-202 [Juror 12 stated it is "the hardest sentence for the worst crimes" and that life without possibility of parole is a worse sentence than death, and that she was not a believer in "eye for an eye"]; B-III CT 902-903 [Juror 52 believed "each case is different" but would be in favor of the death penalty for particularly gruesome crimes; she believed that life without possibility of parole was a harsher penalty].)

As noted above, Juror 3 stated that there might be reasons why an intentional killing would not warrant the death penalty, including where the killing was in self-defense. She further stated that she would not automatically vote for death without knowing all the facts. (XVIII RT 1756-1763.) Non-African American prospective jurors gave similar answers but were not struck by the prosecutor. For example, Juror 2 also noted that "not everyone kills for no reason" and would oppose the death penalty for self defense or if the person is mentally ill. (B-I CT 31.) Juror 10 stated that he would want to know the circumstances before giving the death penalty. (B-I CT 164.) Juror 26 strongly disagreed with the proposition that anyone who intentionally kills should always get the death

penalty, stating it "depends on the circumstances." (B-II CT 468.) Juror 61 also strongly disagreed with this question, stating that "there are circumstances which could justify intentionally killing someone, such as war, protecting family from immediate danger." (B-IV CT 1075.) Juror 62 stated that "heinous crimes may warrant death," but that it depends on the "individual case" (B-IV CT 1092) and that one would "need to consider whether the person is psychotic." (B-IV CT 1094).

As noted above, the prosecutor did provide reasons for striking the other two African Americans, Jurors 44 and 46. The prosecutor stated with regard to Juror 44, "[m]y decision was based on the answers in the questionnaire and her demeanor." (XVIII RT 1842.) When asked which questions, the prosecutor responded:

> For example, I'll start from the front. She has a B.A. in Sociology, done social work and nursing all of her life. She, quote, in No. 23 "does not believe a person should murder another human being" and that could well prevent her from invoking the death penalty. [¶] 25, she seems to think that "unless a person can be rehabilitated, there is no point in giving the death penalty." That is my reading of her answers in that regard. She says she could actually vote, but that she also points out in No. 35 that though some murder is intentional, it can be very emotional and the person temporarily insane, etc., etc. [¶] That those facts may alter the decision to give the death penalty, given the facts of this particular case, I don't think that juror could ever actually render the death vedict given what we know to be the facts of our case. [¶] Those are factors that went into my thinking with respect to No. 44 as well as demeanor.

(XVIII RT 1842.)

Interestingly, despite these concerns with regard to Juror 44's responses on the questionnaire, the prosecutor chose to ask her no questions. A review of the questionnaire, particularly against the backdrop of questionnaires of white jurors, reveals that the prosecutor's reasons were pretextual.

Juror 44 stated that she was moderately in favor of the death penalty. (B-III CT 768.) It is clear from the context that the juror's statement that she did not believe that "a person should murder another human being" (B-III CT 769) was made in response to the question why she was *in favor* of the death penalty. It was an aversion to murder not to the death penalty that prompted this statement. The prosecutor's professed interpretation of her answers as meaning that she would be reluctant to impose the death penalty is simply false. If there was any ambiguity, it was up to the prosecutor to seek clarification. "The State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." (*Miller-El v. Dretke, supra,* 545 U.S. at p. 246, quoting *Ex parte Travis* (Ala. 2000) 776 So.2d 874, 881.)

Next, the prosecutor distorted the meaning of Juror 44's statement about her "general beliefs" about the death penalty, which stated in full: "Some people cannot live in a civilized society. Cannot be rehabilitated by chronic law breaking," and that the general purpose of the death penalty is that it "eliminates one unfit person." (B-III CT 769.) The prosecutor interpreted these comments to mean that she could not give the death penalty "unless a person can be rehabilitated." (XVIII RT 1842.) This ostensible interpretation makes no sense, which again, strongly suggests pretext.

The prosecutor also cited the juror's response to question 35, which asked whether the juror agreed with the statement that anyone who intentionally kills another person should always get the death penalty. Juror 44 stated that she agreed "somewhat" and explained that she would not automatically give the death penalty to all intentional murderers because "some murders although intentional can be very emotional and the person temporarily insane that the facts may alter the decision to give the death penalty." (B-III CT 771.) Again, the prosecutor took her answer out of context and used it to suggest that she would not vote for death because intentional murders could be excused by being emotional or stemming from mental illness when the response was meant to explain the circumstances under which she would not vote for death for an intentional murder.

None of the white jurors who gave equivalent responses were questioned or struck. Juror 2 also noted that "not everyone kills for no reason" and would oppose the death penalty for self-defense or if the person were mentally ill. (B-I CT 31.) Both Juror 26 and Juror 61 strongly disagreed with the question whether anyone who intentionally kills should always get the death penalty, both stating that it depends on the circumstances. (B-II CT 468; B-IV CT 1075.) Juror 62 stated that "heinous crimes may warrant death," that it depends on the "individual case" (B-IV CT 1092) and that one would "need to consider whether the person is psychotic." (B-IV CT 1094).

The prosecutor noted, without explanation of its relevance, that Juror 44 "has a B.A. in Sociology, done social work and nursing all of her life." (XVIII RT 1842.) Assuming that this was also a ground he relied on for excusal, it must be pointed out that there were non-African Americans left on the jury with similar backgrounds. For example, Juror 2 studied child

development in college and worked as a special education instructional aide for children with learning disabilities, physical disabilities and emotional problems. (B-I CT 23.) Juror 10 was an employment services analyst for the County Department of Public Social Services. (B-I CT 156.) Juror 62 held various positions at the VA Medical Center, including Patient Health Education Coordinator. (B-IV CT 1086.)

The prosecutor also stated that his decision was based on Juror 44's demeanor. The trial court, however, made no determination regarding the juror's demeanor in granting the challenge. (XVIII RT 1844.) Thus, it cannot be presumed that the trial judge in any way credited the prosecution's unexplained assertion that Juror 44's demeanor was a valid non-discriminatory basis for disqualification. (See *Snyder v. Louisiana, supra,* 128 S.Ct. at p. 1209.)

In sum, the prosecutor's distorted interpretation of the juror's answers suggest pretext. Moreover, the implausibility of prosecutor's proffered explanations for excusing Juror 44 is reinforced by the prosecutor's acceptance of white jurors who provided similar answers. And there is nothing in the record showing that the trial judge credited the prosecutor's claim that Juror 44's demeanor was problematic. These factors, together with the statistical analysis, the excusal of other African Americans, and disparate modes of questioning depending on the race of the jurors, discussed above, establish discriminatory intent. (See *Miller-El v. Dretke, supra,* 545 U.S. at p. 252 [noting the "pretextual significance" of a "stated reason [that] does not hold up].)

The prosecutor did not try to justify his strike of Juror 46 except to say somewhat incomprehensibly that "she seemed to be distant from the rest of the jurors' responses. Although the rest of jurors reacted in generally a

similar way, she was kind of a loner." (RT 1842-1843.) The prosecutor's characterization of Juror 46 as a "loner" is contradicted by the fact that she was married with three children. (XVIII RT 1829.) Furthermore, the trial court did not make any determination regarding the juror's demeanor in granting the challenge. Thus, it cannot be presumed that the trial judge in any way credited the prosecution's assertion that Juror 46 was a loner. (See *Snyder v. Louisiana*, *supra,* 128 S.Ct. at p. 1209.)

The Court in *Snyder* noted that in other circumstances, "once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative." (*Id.* at p. 1209 [citation].) Here, respondent cannot possibly meet this burden. Indeed, as in *Snyder*, "it is enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution." (*Ibid.*)

The challenges to each of these three African American jurors based on pretext and unsupportable explanations, together with the totality of relevant facts, show purposeful discrimination. As discussed above, remand would not be practical given the lack of "any realistic possibility" that the prosecutor's reasons could be "explored further on remand at this late date . . . ." (*Id.* at p. 1209.)

**E. Conclusion**

The trial court's erroneous denial of appellant's *Wheeler* motion at the penalty phase retrial deprived appellant of his rights under the equal protection clause of the federal Constitution (*Batson*, *supra,* 476 U.S. at p. 98) as well as the right under the California Constitution to a trial by a jury drawn from a representative cross-section of the community. (*Wheeler*,

*supra,* 22 Cal.3d at p. 258.) Reversal of appellant's death sentence is required.

## GUILT/SPECIAL CIRCUMSTANCE PHASE ISSUES

## IV.

## THE TRIAL COURT ERRONEOUSLY PERMITTED THE PROSECUTION TO INTRODUCE PREJUDICIAL EVIDENCE OF THE VICTIM'S PAIN AND SUFFERING DESPITE ITS IRRELEVANCE TO ANY DISPUTED ISSUE

### A. Introduction

The defense admitted that Streeter caused Buttler's death by pouring gasoline on her and lighting her on fire, and that Buttler suffered from extreme pain due to Streeter's actions. As defense counsel conceded in his opening statement: "We know she suffered. We know she died a horrible death. And we know Mr. Streeter caused it." (VI RT 507.) The primary issue in the case, therefore, was not whether Buttler's death and extreme pain were caused by Streeter but whether Streeter's actions were premeditated and deliberate. This area of dispute, however, was obscured by the unnecessary introduction of an unrelenting amount of various kinds of graphic evidence of Buttler's suffering. This evidence included tape-recorded sounds of agonized screams of Buttler while being transported to the hospital, gruesome photographs of her extensive wounds, and diagrams and detailed testimony from a burn expert regarding the nature of her injuries and the pain they caused. It was all irrelevant, cumulative and extremely prejudicial. This evidence could have only overwhelmed the jurors and precluded a dispassionate, rational decision on the issues before them. Admission of this evidence so skewed the jury's determination of guilt and the truth of the special circumstances that admission of the

photographs, the expert testimony and the tape recording, individually and collectively, not only violated California law but also denied appellant his Fourteenth Amendment due process and Sixth Amendment rights to a fair trial and violated his Eighth Amendment rights to a reliable, non-arbitrary adjudication of all stages of a death penalty case, including the determination of his eligibility for a sentence of death.

### B. Summary of Proceedings

Over defense objection – and despite the concession that the victim suffered from extreme pain due to the injuries caused by the defendant – the prosecution was permitted to introduce: (1) hospital and autopsy photographs of the victim; (2) expert opinion on the various kinds of burns suffered by the victim and the pain they caused; and (3) a tape recording of the victim screaming in pain in the ambulance on the way to the hospital.

#### 1. Photographs

The defense filed a written motion to limit the introduction of photographs of the victim on the grounds that they were cumulative, irrelevant and prejudicial, and that their introduction would violate state law as well as appellant's federal constitutional rights. (Aug. CT 90-96.) Appellant argued that the photographs from the hospital and of the autopsy were "exceedingly gruesome." (Aug. CT 93.) In addition, they were not relevant to any contested issue since the cause of death was not in dispute. Further, the photographs were cumulative, given that the autopsy surgeon and law enforcement officers who responded to the scene were going to provide details about the cause of death. (Aug. CT 94, 95.)

When the motion was argued, the prosecutor noted that there were six photographs at issue: one live photo of the victim and five "so-called gruesome photographs." (V RT 471.) Trial counsel objected to the

admission of the photographs because of their "goriness and tendency to inflame the passions of the jury." (*Ibid.*)

The court and counsel discussed each of the photographs the prosecutor sought to introduce. Exhibit 8 was described by defense counsel as showing "the peeling back of the skin from the victim's arm and some burns on her leg and some tubes." (V RT 473.) The prosecutor stated that the photograph was relevant for two purposes. First, the pathologist would utilize it in explaining the cause of death. In addition, the prosecutor argued, it was relevant to the issue of the infliction of torture. He stated "we have a lot of evidence regarding the amount of pain that this victim would have suffered as demonstrated by these photographs." (V RT 474.) He further stated that the treating physician believed the photographs were necessary to "explain to the jury the nature of the burns that were inflicted, the severity of the burns, the amount of pain that was inflicted . . . ." (*Ibid.*) The prosecutor conceded that the photographs are "hard to look at" but were "circumstantial evidence of a variety of things, such as malice and pain, degree of pain inflicted, the degree of torture, and so forth." (V RT 475.)

Defense counsel described Exhibit 9 as showing "the back side" and stated that it is just a "gory picture." (V RT 473.) The trial court stated that "it appears to be an unidentified portion of a female body or person showing dark areas and some obvious breaks in the skin of rather large dimensions showing red, and, again, some large tubes apparently inserted into the body." (V RT 474.) According to the court, the photograph showed, "the body turned up on the left side exposing the back portions of the body. The lower part of the body from the waist down is black. Hard to tell if it is something covering the body or it is a burn. Then there are large

red areas exposed on the hip and upper thighs. And, again, with a tube." (V RT 475.)

Exhibit 10, according to trial counsel, "shows a woman's head, her face all charred and burned up with tubes going up her mouth and up her nose and around her breasts and it looks like there's some doctor's work around the body or the torso of the woman. And I think photograph No. 10 is much, much too gory." (V RT 474.) The court described it as follows: "Exhibit 10 shows the upper torso of a female body, showing a great deal of blackening, some dark areas around the right eye, tubes, again, in the nostrils and in the mouth, some red on the right-side of the nose and mouth, some red areas on the arm down the side of the torso across the abdomen." (V RT 475-476.)[15]

The court assumed "for the sake of this ruling" that the relevance of the photographs was to show "the nature of the circumstances under which this body died and to illustrate through expert testimony what was likely to have caused those injuries and the effect of those injuries on the person as they were being inflicted. The effect being the degree of suffering, the extent of the suffering, period of suffering – all going to the issue of the special circumstance of torture." (V RT 476.) Initially, the court noted that since there were no issues of identification or cause of death, and no issue as to the circumstances leading up to death, i.e., the kinds of injuries inflicted that led to the victim's death, "then these photographs probably, at least as I now understand it, would not be particularly relevant." (V RT 476.) The court found, however, that the photographs were relevant to the

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[15] The prosecution sought to introduce two other photographs, Exhibits 11 and 12, both of which were ultimately not admitted. (V RT 476.)

issue of torture: "On the issue of the degree of this pain and suffering, et cetera, towards torture, then it becomes an issue as to whether these are cumulative and whether all of them are really necessary to explain those issues. (*Ibid.*) The court then held that "without having some assistance from the expert who intends to use these photographs in his testimony, that photographs 8, 9 and 10 will be adequate for the purpose I have understood they are being offered." (V RT 476-477.)

Over objection, the prosecutor presented Exhibit 10 to the jury during his opening statement to illustrate what happened to the victim after she was lit on fire. (VI RT 487.) As discussed below, Exhibits 8, 9 and 10 were admitted and shown to the jury during the testimony of both the pathologist and the treating physician.

**2. Expert Testimony**

The defense objected to the testimony of Dr. Vannix, Buttler's treating physician, with regard to her pain and suffering. Counsel argued that such testimony was not relevant because there was no issue in dispute insofar as counsel admitted in his opening statement that Streeter had caused the victim's death "and that she suffered a horrible death and that she suffered a lot of pain and suffering." (VI RT 619.) The prosecutor countered that the evidence was still relevant to the issues of "malice, intent and intent to torture." (VI RT 620.) The court then asked the prosecutor, assuming the defense was willing to stipulate that the victim suffered a great deal of pain and suffering as a result of the burns – which the defense essentially did – "would you then be willing to accept that stipulation in light of the testimony of this doctor?" (*Ibid.*) The prosecutor would not so stipulate, arguing without specifying how, that the evidence was relevant to proving first degree murder, and to proving intent to inflict pain for

purposes of establishing torture. (*Ibid.*)

The trial court ruled that the doctor would be permitted to describe "the burns, severity of the burns, the possible source of infliction as to such burns, the severity of the pain that an individual would suffer receiving such burns and how long that suffering would, perhaps, continue and the ultimate cause of death." (VI RT 621.) The court, again, asked the prosecutor if he would stipulate to this set of facts, and the prosecutor refused. (VI RT 622.) As defense counsel then pointed out, "the only reason the prosecution's offering this evidence is to inflame the passions of the jury since we have and will admit that she suffered much pain and suffering." (*Ibid.*) The trial court denied the motion to exclude such testimony. (*Ibid.*)

Steven James Trenkle, the forensic pathologist who performed the autopsy on Buttler testified for the prosecution. (VII RT 624-640.) Dr. Trenkle testified that the cause of death was "thermocutaneous burns." (VII RT 630.) After reviewing the three photographs to which counsel's objections were overruled, Exhibits 8, 9 and 10, which depicted the nature of the burns on the body at the time of death, Dr. Trenkle explained that thermocutaneous burns are caused by heat or flame. (VII RT 631-633.) He testified that Buttler did not die immediately but survived for ten days in intensive care, and detailed the care that was provided to her, including intravascular lines, intratracheal tubes, and feeding tubes. He stated that the body was "very swollen," both internally and externally. (VII RT 631-634.) He provided further testimony regarding the secondary effects of the burns, which resulted in pulmonary failure, the inability to get oxygen into the lungs. (VII RT 634.)

Dr. Trenkle was asked to assess "the kinds of pain that this victim might have suffered because of the nature of the burns." (VII RT 635.) He

replied that "the pain could be severe" and agreed that it would be "potentially extreme." (VII RT 636.) He estimated that between 55-to-60 percent of the surface area of the victim's body suffered from burns. He explained the areas of burns, the nature of the burns, and the skin grafts that had been applied to the burns. (VII RT 637-638.)

Dr. Trenkle thus provided evidence that the burns caused Buttler's death and that Buttler suffered from extreme pain from the burns, evidence that was undisputed by the defense. It would therefore seem that no further evidence on these points was needed. Nevertheless, the prosecution presented, over defense objection, the testimony of Dr. Vannix, the burn specialist who treated Buttler, who testified in excruciating detail as to the extreme pain Buttler suffered.

Dr. Vannix, an attending surgeon at the San Bernardino Medical Center, and medical director of its Burn Center, was in charge of Buttler's care. (VII RT 640-643.) Her condition when she was admitted was critical; according to Dr. Vannix, "she had life-threatening injuries, which without very . . . aggressive or invasive support measures of treatment would have led to her eminent [sic] death." (VII RT 644.) He then described in detail the measures that were taken, including the placement of an intratracheal tube down her mouth, the insertion of various catheters, and the administration of medication. (*Ibid.*)

At this point the parties went into chambers to allow defense counsel to articulate his objection to Dr. Vannix's further testimony. Counsel argued that Dr. Vannix's testimony so far had been cumulative and he presumed "that the prosecution's going to start asking questions about pain." (VII RT 645.) Counsel argued that this expert's testimony on the victim's pain would serve no purpose since the fact that burns cause pain is

common knowledge, and "I don't think we need an expert to tell the jury how painful a burn would be." (*Ibid.*) Counsel pointed out that the jury had already heard testimony from the pathologist and viewed the photographs. (VII RT 646.) Counsel argued the testimony would serve no relevant purpose, and would be cumulative. (*Ibid.*) Without explaining why, the prosecutor responded that it was important for the jury to understand the "various types of pain caused by the various types of burns this victim suffered and the degree of pain and so forth in so far as it relates to the issues we've mentioned already on the record." (*Ibid.*)

The trial court noted that the jury must decide "whether these burns constituted a type of torture . . . and circumstances under which these type of burns might have been caused, the extent." (VII RT 646-647.) The court went on to say that we have all experienced "sun burns," "but to go beyond that and say we have any concept of what kind of suffering a human being might endure with this type of burning, I think that does require some kind of assistance, at least it does to me." (VII RT 647.) Despite the prior testimony of the pathologist and the defense concession that the victim suffered extreme pain due to Streeter's actions, the court ruled – incorrectly – that the jury still needed to hear expert testimony on "how much that kind of thing hurts or to what extent a person would have sensation." (*Ibid.*)

Back before the jury, the prosecution elicited from Dr. Vannix detailed testimony regarding the classification of first, second and third degree burns, accompanied by a diagram. (VII RT 647-652.) Dr. Vannix discussed the pain caused by various types of burns, which he explained is caused by injuries to nerve endings, with second degree burns being more painful than first degree burns because of more extensive damage to nerve endings. (VII RT 652.) Dr. Vannix testified that with regard to third

degree burns, there may not initially be much pain because the nerve endings are destroyed, but usually within 24 hours the burns will become "very painful." (VII RT 652-653.) Dr. Vannix testified that of the kind of pain caused by various kinds of injuries, pain caused by burns are "among the most significant types of pain in human experience." (VII RT 653.) It would be appropriate to characterize such pain as "extreme pain." (VII RT 654.)

The jury was again shown Exhibits 8, 9 and 10 during the course of Dr. Vannix's testimony. (VII RT 655.) Dr. Vannix agreed substantially with Dr. Trenkle's testimony regarding the area of the victim's body covered by burns. Dr. Vannix testified still further about the nature of the victim's burns, pointing to Exhibits 9 and 10 as showing third degree burns. (VII RT 655-657.) Dr. Vannix explained that much of what was depicted in the photographs showed areas that had been treated, where dead tissue had been removed and skin grafts were done. The photographs were taken down during Vannix's testimony after Streeter begged for them to be removed. (VII RT 658.)

Dr. Vannix testified that a review of the charts of the paramedics who transported the victim to the hospital showed that they attempted to give the victim pain medication intravenously but were unable to do so given the nature of her injuries. He reiterated that while there may be a period of less pain for a third degree burn immediately, the wounds would become very painful and persist until the wounds were treated. (VII RT 658-659.) Dr. Vannix clarified that someone with the burns suffered by the victim in this case would not have a "pain-free interval." (VII RT 660.) Dr. Vannix again stated that he would expect the victim here to be in "significant pain." (VII RT 661.) "My experience is that a patient with

these burns suffers significant pain at the time during which they are being transported from the scene to the hospital." (*Ibid.*) Dr. Vannix repeated that the victim in this case could not be given pain medication – morphine – on the way to the hospital because the paramedics were unable to place the catheters in her veins. (VII RT 661-662.)

Dr. Vannix testified about Exhibit 23, a chart showing that 54 percent of the body suffered burns, the vast majority of which were third degree. Dr. Vannix added that what also made it unlikely the victim could survive was the injury to her lungs. Again, the prosecutor asked about pain, eliciting further testimony that the victim would have experienced pain from the time of her original injury to her death. (VII RT 665-668.)

**3. Ambulance Tape**

The prosecutor sought to present even more gratuitous and disturbing evidence of Buttler's suffering through the testimony of Jeffrey Boyles, a San Bernardino County fire fighter, who arrived at the scene and transported Buttler to the hospital by ambulance. (VII RT 669-671.) Boyles provided additional testimony that the victim was in extreme pain. He described pouring cold water on her burns as the only way to somewhat ease her pain. (VII RT 672.) He described the victim as being in tears and screaming in pain. He testified, as did Dr. Vannix, that the paramedic who accompanied them in the ambulance was unable to administer pain medication, so that Buttler went the entire twenty-minute trip to the hospital without it. (*Ibid.*)

The prosecutor then sought to introduce the most disturbing evidence of the pain suffered by Buttler – a tape recording of her screams made while she was being transported from the scene by ambulance. (Exh. 20 [tape]; Exh. 20-A [transcript].) (VII RT 673.) The defense objected to the playing

of the tape as cumulative and more prejudicial than probative under Evidence Code section 352. (VII RT 678.) As trial counsel stated: "There's already been plenty of evidence regarding the suffering of this poor lady by Dr. Vannix, and I think any additional testimony – and to actually hear the screams and the moans I think is just too far." (*Ibid.*) The prosecutor argued that the tape was relevant so that the jury can "assess the degree to which this victim suffered pain." (*Ibid.*) Without offering any authority for his position, the prosecutor stated: "the jury should be entitled to hear from the victim's own mouth the degree of pain she was suffering because it relates to the issue of torture." (VII RT 678-679.) The prosecutor contended that the tape was also relevant to show the type of care that was being attempted as it related to the amount of pain the victim was suffering, but provided no explanation as to how this evidence was relevant. (VII RT 679.)

Remarkably, without any analysis of its prejudicial impact, the trial court ruled that the tape was admissible, stating as follows:

> Well, it certainly is a vivid illustration of what was going on there. I can understand the defense position and to some extent it is cumulative. It's a different type of evidence and it is actually a presentation of what was going on at the time, rather than somebody's verbal recitation of what they recall. [¶] I suppose the degree of suffering which the victim was going through at that point does have some relevancy considering the issues which are going to be decided by the jury. [¶] We've certainly heard that – a description by the doctors as to the type of injuries which she suffered and their opinions as to the degree of pain which such injury would result in. [¶] I can't say, however, that it's not material and not

> relevant for them to actually hear from the victim's own mouth expressions of the kind of pain that she was sensing as it goes to the issues in the lawsuit. [¶] I find it relevant and it will be received and the prosecution will be allowed to play it.

(VII RT 679-680.)

The tape recording was introduced into evidence and played for the jury. (VII RT 683, 686.) After the playing of the tape recording, the prosecutor asked Boyles what Buttler said to him in the ambulance, and he replied: "She grasped my collar and pulled me close to her face and said, 'Just kill me. Please kill me." (VII RT 690.)

### C. The Evidence of Pain and Suffering Was Irrelevant and Cumulative

"No evidence is admissible except relevant evidence." (Evid. Code § 350.) Relevant evidence is defined as that "having any tendency to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code § 210.) There was no dispute that the victim suffered extreme pain caused by the actions of Mr. Streeter. Moreover, evidence to illustrate the nature and quality of the victim's pain and suffering had no relevance to the issues before the finder of fact – particularly appellant's intent.

The focus of torture murder, either as a theory of first degree murder or a special circumstance, is on the intent of the perpetrator to inflict pain on the victim. It does not require that the victim be aware of the pain inflicted upon her. (*People v. Wiley* (1976) 18 Cal.3d 162, 168.) As this Court stated in *Wiley*:

> Attempts to measure the amount of pain, if any, suffered by victims of torturous acts . . . not only promises to be futile but are unnecessary.

> The Legislature did not make awareness of actual pain an element of torture-murder. Although it has been assumed in past opinions in torture-murder cases that the victim probably felt pain, it does not follow that awareness of pain is an element of the offense.

(*Id.* at p. 173.)

Presenting evidence that the victim suffered extreme pain as opposed to evidence of the defendant's intent is also misleading because, as this Court has recognized, "[s]evere pain . . . accompanies most homicides," and thus "murder by torture requires a premeditated *intent* to inflict extreme and prolonged pain. (*People v. Morales* (1989) 48 Cal.3d 527, 559, original italics, citing *People v. Steger* (1976) 16 Cal.3d 539, 546.) Indeed, the jury in this case was instructed, in accordance with standard CALJIC instructions, that for a finding of both torture murder and the torture-murder special circumstance proof that the victim was aware of pain or suffering was not necessary. (CT 213 [CALJIC No. 8.24]; CT 236 [CT 8.81.18].)

Intent to inflict pain, therefore, is not established by presenting detailed evidence of the pain the victim suffered. Rather, "intent to inflict pain may be inferred from the circumstances of the crime, the nature of the killing, and the condition of the victim's body." (*People v. Morales*, *supra*, 48 Cal.3d at p. 559.) As this Court previously held, although intent may be inferred from the condition of the victim's body, "[i]t is not the amount of pain inflicted which distinguishes a torturer from another murderer, as most killings involve significant pain [citation]." (*People v. Steger, supra,* 16

Cal.3d at p. 546.)[16] Thus, assuming the wounds inflicted on Buttler may have been relevant to show Streeter's state of mind, her actual suffering – and the quality of pain she suffered – were not disputed facts material to the issues before the jury.

Neither the trial court nor the prosecutor ever articulated how the detailed presentation of the victim's suffering was in any way relevant to the issue of intent, particularly given the defense concession that the victim suffered from extreme pain. In fact, it was not. For example, as Dr. Vannix and Jeffrey Boyles both testified, the paramedic's inability to administer pain medication was due to the nature of the injuries and was not a circumstance that could have been foreseen by the defendant. The victim's agonized screams in the ambulance were thus not relevant to the issue of whether Streeter intended to cause her pain.

The photographs, tape recording and expert testimony documenting Buttler's pain and suffering were also cumulative. As explained above, the pathologist testified that Buttler died from burns, and that the burns would have caused extreme pain. The defense conceded that Streeter caused the burns and that the burns caused extreme pain. Even assuming the trial court did not err in permitting the photographs to be admitted during the pathologist's testimony, there was no need for further detailed evidence from the treating burn doctor regarding the pain and suffering experienced by Buttler. Nor was it necessary for the tape of her screams to be played

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[16] This Court rejected the appellant's argument that evidence of the victim's suffering was irrelevant to the issue of intent to inflict torture in *People v. Cole* (2004) 33 Cal.4th 1158, 1197. Unlike *Cole*, Streeter's case occurred after the enactment of Proposition 115, which eliminated as an element of torture murder "proof of the infliction of extreme physical pain no matter how long its duration." (*Id.* at p. 1196 & fn.7.)

after both Boyles and Vannix testified that Buttler was suffering from excruciating pain in the ambulance. Of course, if evidence "is merely cumulative, it may be regarded as of less probative force than if it is the only evidence available to its proponent." (*Burke v. Almaden Vineyards, Inc.* (1978) 86 Cal.App.3d 768, 774.)

Nothing about the degree of the burns, the amount of pain they caused, or the intensity of pain as graphically depicted in photos and on tape was relevant to the issue of defendant's intent to cause pain. Indeed, the prosecutor did not even attempt in his closing argument to tie any of this evidence – the tape, the photographs or the expert testimony on pain – to the elements of the crime or to any disputed fact. Given the ample evidence regarding the cause of death and nature of the victim's wounds, there was no need to introduce detailed, graphic and highly disturbing and emotional evidence of the victim's suffering.

### D. Evidence of Suffering Was More Prejudicial Than Probative

Even assuming the evidence of Buttler's suffering had some marginal relevance, its prejudicial effect far outweighed any probative value in violation of Evidence Code section 352.

Under section 352, a trial court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Smithey* (1999) 20 Cal.4th 936, 973.) Evidence should be excluded under section 352 if it uniquely tends to evoke an emotional bias against the defendant as an individual, and yet has very little effect on the issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588.) Furthermore, "[w]hen section 352 speaks of excluding evidence

having 'substantial danger of undue prejudice' it looks to situations where evidence may be misused by the jury." (*People v. Filson* (1994) 22 Cal.App.4th 1841, 1851, overruled on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452.) Evidence is substantially more prejudicial than probative under section 352 if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Alvarez* (1996) 14 Cal.4th 155, 204, fn. 14.) The exercise of discretion to admit or exclude evidence pursuant to Evidence Code section 352 should 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)

When proposed testimony is subject to an objection grounded in section 352, the trial court's scrutiny must involve a thorough weighing of the probative value of the testimony and an assessment of its potential to prejudice the jury. (*People v. Jackson* (1971) 18 Cal.App.3d 504, 509 ["a trial judge must alertly supervise proceedings in his court, curbing when necessary over-zealous advocates and, in his rulings on evidence strike a 'careful balance between the probative value of the evidence and the danger of prejudice, confusion and undue time consumption.' (citation.)"] .)

Given the intensely emotional nature of the evidence, the trial court was required, therefore, to undertake a careful analysis under Evidence Code section 352 before permitting this evidence to be admitted. The balancing process mandated by section 352 requires "consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral

issue, and the necessity of the evidence to the proponent's case as well as the reasons cited in section 352 for exclusion." (*People v. Wright* (1985) 39 Cal.3d 576, 585.)

The trial court erroneously failed even to consider the prejudicial impact of any the evidence in comparison to its probative value. Although counsel argued that the evidence should not be admitted under Evidence Code section 352, the court simply – and erroneously – ruled that the evidence was relevant and therefore admissible, without considering the emotional impact evidence the victim's pain and suffering would have on the jury. (See V RT 476-477 [ruling on photographs]; VII RT 647 [ruling on expert testimony] VII RT 690 [ruling on tape recording].)

In light of its minimal – if any – probative value and weighed against its extremely prejudicial effects, the expert testimony, tape recordings of the victims's screams and moans, and photographs of the burns, offered only to illustrate the nature and extent of the pain suffered by the victim, was erroneously admitted in violation of Evidence Code section 352.

### E. The Admission of Irrelevant Yet Extremely Prejudicial Evidence Violated Appellant's Constitutional Rights

The admission of this evidence not only violated California law but 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.) The court's erroneous admission of the evidence lightened the prosecution's burden of proof, improperly bolstering the case against Streeter with overly emotional and disturbing yet irrelevant evidence. (See e.g., *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524.) Moreover, the introduction of the

evidence so infected the trial as to render appellant's conviction and special circumstance findings fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 67.) By failing to consider the prejudicial impact of the evidence under Evidence Code section 352, the trial court failed to apply the California Evidence Code in a non-arbitrary manner, depriving appellant of a state-created liberty interest in violation of due process. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) In addition, the introduction of this evidence violated appellant's Eighth and Fourteenth Amendment rights to a reliable adjudication at all stages of a death penalty case. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 638.)

### F. The Introduction of Photographic Evidence, Expert Testimony of Pain and Suffering and the Tape Recording of the Victim's Screams, Individually and Collectively, Was Prejudicial Error

The facts and circumstances of the homicide supported the defense theory that this was a crime of passion in which an argument got out of hand and the defendant "snapped," leading to the lighting of the victim on fire. As discussed in Claims VI and XI, there was insufficient evidence presented by the prosecution to prove the elements of torture murder and the torture-murder special circumstance, particularly with regard to the intent to torture. The evidence to support first degree murder under any other theory was also weak. (See Claim VI.) While the undisputed fact that the victim suffered enormously from burns – at the scene, on the way to the hospital, and for the ten days she lingered prior to her death – was powerful and likely to arouse the passions of the jury, it had no probative value with regard to determining the key disputed issue before the jury: whether the acts which caused the burns were deliberately designed to cause the victim's suffering. By presenting disturbing, graphic, detailed evidence of

the extreme pain and suffering – including gruesome photographs and a recording of the horrific screams and moans of the victim in the ambulance – the prosecutor was able to obscure the issues in the case and obtain an unwarranted first degree murder conviction and two special circumstance findings. Admission of this evidence was not harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

## V.

## THE INTRODUCTION OF TESTIMONIAL HEARSAY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AT BOTH PHASES OF THE TRIAL

### A. Introduction

The evidence of the victim's pain and suffering was not the only evidence presented by the prosecutor designed to prejudice the jury and divert it from a dispassionate determination of the relevant issues. The prosecutor also introduced an application for a temporary restraining order ("TRO") which comprised of statements of the victim describing, in her own words, incidents of domestic violence allegedly committed by appellant four months before her death.

The TRO application was admitted under a statutorily-created exception to the hearsay rule, Evidence Code section 1370. As explained below, the United States Supreme Court has since held that if a hearsay statement of an unavailable witness offered for its truth was testimonial in nature, its admission would violate the confrontation clause of the Sixth Amendment unless the defendant was given a prior opportunity to cross-examine the declarant. (*Crawford v. Washington* (2004) 541 U.S. 36.) *Crawford* has called the constitutionality of Evidence Code section 1370 into question. Even assuming, however, that the TRO application in this case meets the statutory requirements of section 1370, and that section

1370 has not been rendered unconstitutional, the admission of this testimonial document violates the confrontation clause under *Crawford.* Because it was used repeatedly by the prosecution throughout both phases of the trial to establish the elements of the crime, the special circumstances and as aggravation, its admission was prejudicial.

**B. Summary of Proceedings**

On February 7, 1997, almost three months prior to her death, Yolanda Buttler filed an application for a TRO against appellant in which she described various incidents. Ms. Buttler alleged that on December 30, 1996, Streeter "went crazy," "pulled on her braids," "pulled hair out of her head," and "put his hand on her neck," when she would not have sex with him. (CT 108.) She also claimed that on other occasions he drank and got "mean;" "he push[ed] me out of the house and lock[ed] the door;" he "held me down because I wouldn't give him my bank card;" he "push[ed] her around," insulted her and once while at Knotts Berry Farm threatened to "beat my ass" if she did not leave with him; and made her give him her money. (CT 109.) There is no evidence that Streeter was ever served with the TRO application. He testified that he did not see it until the time of his own trial. (IX RT 865.)

The prosecution filed a motion to introduce the statements made by Buttler in the TRO pursuant to Evidence Code section 1370. Under section 1370, a victim's statement made to law enforcement personnel or a recorded statement, which "purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant," made at or near the time of the injury or threat, is admissible notwithstanding the hearsay rule if the victim is an "unavailable . . . witness" and if the statement "was made under circumstances that would indicate its trustworthiness." (Evid.

Code § 1370.)

The prosecution argued that the evidence was relevant to "motive, intent to kill, premeditation and deliberation, along with such other issues as intent to inflict pain and torture, reasons why Defendant lured her to the scene while concealing his purpose and lying in wait, etc." (CT 105.) The prosecution further argued that the statements constituted "evidence from which the jury may make reasonable inferences about a hostile relationship on the part of the defendant toward the victim, the reason for her leaving him with the children, reasons for his anger toward her, previous abuse which in part is similar to that which he inflicted on the day of the murder (e.g., beating her and pulling hair out of her head, which he did on both occasions) and which in part escalated to the act of murder." (CT 106.)

At the hearing on the motion, defense counsel argued, inter alia, that the victim's statements were inadmissible under the Sixth Amendment's confrontation clause: "The defendant must have a right to have confronted the person or declarant regarding the accusations made in the document." (III RT 205.)

The trial court ruled that the document was admissible under section 1370 of the Evidence Code. (III RT 210.)

### C. Admission of the TRO Application Violated the Confrontation Clause

Evidence of a statement offered to prove the truth of the matter asserted is inadmissible unless it comes within one of the established exceptions to the hearsay rule (Evid. Code, § 1200; *People v. Noguera* (1992) 4 Cal.4th 599, 620-621), and is not "inadmissible against the defendant under the Constitution of the United States or the State of California." (Evid. Code, § 1204.) "The chief reasons for the general rule

of inadmissibility [of hearsay] are that the statements are not made under oath, the adverse party has no opportunity to cross-examine the declarant, and the jury cannot observe the declarant's demeanor while making the statements." (*People v. Duarte* (2000) 24 Cal.4th 603, 610; *People v. Fuentes* (1998) 61 Cal.App.4th 956, 960-961; see also *Williamson v. United States* (1994) 512 U.S. 594, 598-599 [discussing similar rationale underlying federal hearsay rule].) The "lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is reported is today accepted as the main justification for the exclusion of hearsay." (2 McCormick, Evidence (5th ed. 1999) Hearsay, § 245, p. 94.) Thus, as this Court has observed, the hearsay rule is "related" to the constitutional right of confrontation:

> The general rule that hearsay is inadmissible . . . has a recognized constitutional dimension, at least in the criminal context, because it is related to the confrontation clause of the Sixth Amendment to the United States Constitution. (See *Idaho v. Wright* (1990) 497 U.S. 805[. . .].)

(*In re Cindy L. v. Edgar L.* (1997) 17 Cal.4th 15, 27.)

Until recently, the United States Supreme Court's confrontation clause jurisprudence held that hearsay evidence could be admitted consistent with the Sixth Amendment provided that it fell under a "firmly rooted hearsay exception" or, in the alternative, bore "particularized guarantees of trustworthiness." (*Ohio v. Roberts* (1980) 448 U.S. 56, 66.) However, the high court now holds that "testimonial" hearsay evidence can be admitted consistent with the confrontation clause only if the witness was unavailable and the defendant had a prior opportunity for cross-examination. (*Crawford v. Washington, supra,* 541 U.S. 36.) The Court ruled that "[w]here testimonial statements are at issue, the only

indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Id.* at pp. 68-69.)

Here, there is no question that the statements made in the TRO application were testimonial in nature. While the Supreme Court in *Crawford* declined to define testimonial statements (*Crawford, supra,* 541 U.S. at p. 68), it did identify three examples: (1) ex parte in-court testimony or its functional equivalent, i.e., affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that a declarant would reasonably expect to be used in prosecution; (2) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and (3) statements made under circumstances that would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. (*Crawford*, 541 U.S. at pp. 51-52.) An application for a restraining order filed under oath clearly falls within these descriptions. (See *Davis v. Washington* (2006) 547 U.S. 813 [domestic battery victim's written statements in affidavit given to police officer who responded to domestic disturbance call were "testimonial" and, therefore, subject to confrontation clause].)

Nor is there any dispute as to whether appellant had an opportunity for cross-examination of the declarant. As discussed above, appellant was never served with the application, was not aware of its existence and never had the opportunity to challenge the statements made in it. Admission of the TRO therefore violated the confrontation clause of the Sixth Amendment.

In addition, the constitutionality of Evidence Code section 1370 has been called into question by *Crawford.* (Cf. *People v. Pirwani* (2004) 119

Cal.App.4th 770 [Evid. Code § 1380 which created hearsay exception for statements by elderly or dependent adults to law enforcement officials found unconstitutional pursuant to *Crawford*].) One appellate court sought to harmonize *Crawford* and section 1370 by interpreting the statute to "require a prior opportunity to cross-examine the declarant." (*People v. Price* (2004) 120 Cal.App.4th 224, 239.) Such an opportunity did not occur here.

### D. The Rule of Forfeiture Does Not Apply Where Defendant Did Not Render the Witness Unavailable for Purpose of Preventing Her Testimony

It must be acknowledged that the reason Buttler was not available to testify is because appellant caused her death. As the United States Supreme Court has just held, however, the rule of forfeiture by wrongdoing[17] does not apply where the defendant wrongfully caused the absence of a witness but did not do so for the purpose of preventing the witness from testifying. (*Giles v. California* (June 25, 2008, No. 07-6053) __ U.S. __, 2008 WL 2511298.) Giles, like Streeter, was on trial for murder and at issue was admission of the victim's prior statements regarding domestic abuse. As here, Giles' trial occurred prior to the *Crawford* decision and the victim's statements were admitted pursuant to Evidence Code section 1370. On appeal, this Court held that admission of the victim's unconfronted statements did not violate the confrontation clause under the theory of

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[17] *Reynolds v. United States* (1879) 98 U.S. 145, 158-159 ["The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away . . . The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong"].

forfeiture by wrongdoing because the defendant's intentional criminal act rendered the victim unavailable to testify. (*People v. Giles* (2007) 40 Cal.4th 833.) The high court reversed, holding that where the defendant's conduct was not designed to prevent the witness from testifying, the rule of forfeiture by wrongdoing would not provide an exception to the confrontation clause.

It is undisputed that appellant was not even aware of the TRO application at the time of the homicide. He therefore did not cause her death with the intention of preventing her from testifying about her prior statements. Under such circumstances the doctrine of forfeiture by wrongdoing does not apply.

### E. Admission of the Statement at Both Phases of Trial Was Prejudicial

#### 1. Guilt Phase

Under federal constitutional law, the State has the burden to prove beyond a reasonable doubt that the error did not contribute to the verdict obtained. (*Chapman, supra,* 386 U.S. at p. 24; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680-681; *People v. Brown* (2003) 31 Cal.4th 518, 538.) "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

Although it was undisputed that appellant was responsible for the events which led to Yolanda Buttler's death, there was a substantial question regarding whether these were the spontaneous acts of a desperate, angry, frustrated individual or a pre-planned attack by an evil man with a

propensity for violence. The evidence, as described in the Statement of Facts and in Claim VI, below, shows that appellant waited at a pre-arranged location for Buttler to arrive so that he could have a visit with his son; that when she finally arrived, appellant took his son and headed toward his car; and that after she followed him, an argument ensued which escalated into the events that led to her death. Whether this was all part of some plan as the prosecution suggested (RT 495) or whether appellant "finally blew his stack" as the defense argued (VI RT 504) is the difference between a death-eligible first degree murder and a lesser crime.

Evidence of appellant's prior conduct toward the victim was critical to the prosecutor's efforts to show appellant's bad character and allegedly escalating violent behavior. As the prosecutor conceded, none of the victim's family members who testified were able to cite to any credible violent acts by appellant. Although they described him as controlling and verbally abusive, they were not aware of acts of physical abuse. (VI RT 492; VIII RT 771.) Buttler's brother Quentin was told by Buttler that Streeter pulled her hair out and beat her, but provided him with no further details about the incident which led to seeking a TRO. (X RT 974, 978.) Thus, the TRO played a central role in the prosecution's case.

The prosecutor's opening statement laid out the theory of the case, in which the events referred to in the TRO were critical. According to the prosecutor, Buttler left Streeter after these incidents, which were described as appellant "abusing her, beating her, pulling hair out of her head. On one occasion raped her." (VI RT 488.) It was after Buttler moved away and was eventually contacted by appellant that arrangements were made for appellant to visit with their son, Howie. It was a meeting for a second visitation at which the homicide occurred. (*Ibid.*)

After the prosecutor described the alleged details of the killing in his opening statement, he again discussed what led up to the event. He explained that while family members were not aware of any problems in the relationship between Streeter and Buttler, there had been problems in their last year together. (VI RT 492.) The primary evidence of this was the descriptions in the TRO, which the prosecutor read to the jury verbatim. (VI RT 492-493.) The prosecutor contended that Buttler was fearful of appellant as evidenced by the TRO. (VI RT 494; see also VI RT 495, 496.)

Buttler's declaration in support of the TRO was introduced into evidence in the prosecution's case-in-chief. (VIII RT 787, 792.) The prosecutor also used the TRO statements in cross-examining defense witnesses at the guilt phase to undermine the defense theory that appellant was a decent and devout person who lost control. For example, Sesil Green testified that he was the family's pastor, and that prior to the incident in which Buttler was killed, appellant had "found the Lord" and changed his lifestyle. (IX RT 838-839.) On cross-examination, the prosecutor used the TRO to ask Pastor Green whether his opinion of appellant would be changed "if you knew that in December he had attempted to rape his girlfriend, Yolanda Buttler, and pulled hair out of her head." (IX RT 843.)

When appellant testified, trial counsel asked him about the December 30th incident. Appellant conceded that on that date he and Buttler had an argument in which he kept asking her to come to bed and she refused. (IX RT 864.) He admitted to pulling her hair, but maintained that the "braids" referred to in the TRO were hair extensions and not Buttler's actual hair. (IX RT 865, 867.) Appellant denied that he tried to have sex with her after she refused and the children woke up. It was a few days after this incident that Buttler and the children left. (IX RT 866, 868.)

The prosecutor's cross-examination of appellant was dominated by references to the TRO. The prosecutor began by focusing on the restraining order, and returned to it repeatedly in order to undermine appellant's testimony about his relationship with Buttler, and to remind the jury of the inflammatory facts. This included Buttler's description of appellant pulling her hair because she would not agree to have sex with him (IX RT 905-909, 932), and her statement that appellant told her to "shut up" after she screamed and "put his hand on my neck" and said that her daughter who came into the room could watch them have sex. (IX RT 909-910; see also IX RT 918 [asking Streeter: "And she left you for these reasons she says in here in this restraining order, right? That you went crazy on December 30th and tried to rape her. That on other days you would start drinking and get really mean. And that you pushed her out of the house and blocked the door. That she would throw things – or that you would throw things at her"]; IX RT 919 ["So whenever she provoked you, you felt the way to go was to grab her by the hair or push her around or throw something at her?"]; IX RT 920 ["What did you tell [Buttler's daughter] Lawanda when she came in while you were trying to rape her mother?"]; IX RT 921 ["Have you ever called her a 'bitch' and a 'whore'?; "And the time about the Knott's Berry Farm, did you tell her if she didn't leave with [you] you would beat her ass?"]; see also IX RT 943.)

In rebuttal, the prosecutor presented evidence regarding the December 30 incident from Buttler's daughter Lawanda. (X RT 996-999.) On cross-examination, she admitted that she hated appellant and wished something bad would happen to him. (X RT 1001.) Other family members testified in rebuttal that they were unaware that appellant was physically abusive to Buttler. (X RT 1006, 1024.)

The prosecutor relied on the TRO to argue to the jury that the killing was a methodical and premeditated outgrowth of the earlier violent instances. Thus, in his opening argument, the prosecutor stated as follows:

> But the feelings that Yolanda had and expressed in the restraining [order application] were done well before this killing. This was done – the restraining order was filed in January, and this declaration, Yolanda's words, the only words we can hear from her from the grave, explaining how she felt and why she was afraid of the defendant and why she wanted the court to keep him away from her, this all happened well before the killing.

(XI RT 1102; see also XI RT 1104.)

The defense argued that appellant was depressed, distraught and desperate because his wife and family left him, and that he was out of control when he committed the homicide. (XI RT 1093-1100.) In rebuttal the prosecutor used the victim's prior statements in the TRO to undermine this argument, stating that appellant's controlling and abusive behavior as reflected in the TRO showed that "this is the kind of man who did these kinds of things, the man who chose to kill her because she done him wrong." (XI RT 1104; see also XI RT 1104-1105 ["Here the defendant's explanation is simply unreasonable, isn't it? And doesn't make sense as to what he is doing. It doesn't fit with all the activities that he did and how this happened"].)

Finally, the jury was given an instruction, CALJIC No. 2.09, which informed them that they could consider Buttler's statements "in connection with the issuing of a restraining order" for the purpose of "showing intent and/or malice at the time of the killing of Yolanda Buttler." (CT 191.) As discussed below in Claims VI, VIII and XI, the evidence to establish first

degree murder, lying in wait and intent to torture was not strong. Despite its lack of relevance to the disputed issues in the case, namely, appellant's state of mind at the time of the homicide, the jury was instructed that it could use what was essentially propensity evidence to bolster an otherwise equivocal case for first degree murder with special circumstances.

Given the use of Buttler's statements in the prosecution's case, in cross-examining defense witnesses, in argument and in the instructions, its admission violated the confrontation clause as well as the due process clause of the Fourteenth Amendment by lightening the prosecution's burden of proof and rendering the trial fundamentally unfair. Appellant's Eighth Amendment right to a reliable adjudication at all stages of a death penalty case was also violated. The admission of the TRO application was not harmless beyond a reasonable doubt, and reversal of the guilt verdict and special circumstance findings is required.

**2. Penalty Phase Retrial**

The prosecutor's opening statement at the penalty phase retrial informed the jury that it could consider in aggravation the victim's statements in the TRO: "if you don't know what he did or what led up to it, you wouldn't know what to do in terms of sentencing, would you?" (XIX RT 1915.) The incidents, based in large part on the TRO, constituted, according to the prosecutor, direct evidence of an aggravating factor. (XIX RT 1917-1918.) The prosecutor described appellant as a "battering spouse," based on these statements. (*Ibid.*) He read from the application in his opening statement (XIX RT 1918-1919), prefaced by the following: "you will hear her words. She's not here to tell them to you in person, obviously, but you will hear what she said he did to her. And these are her words on December 30th, 1996 . . . ." (XIX RT 1918.)

Without the statements from the TRO, there was insufficient evidence of the incidents the TRO depicted. Buttler's daughter Lawanda testified about the December 30 incident, claiming she observed appellant pulling Buttler's hair and demanding sex. (XIX RT 1942-1945.) Her credibility, however, was questionable given how extremely upset and angry with appellant she was. (See XIX RT 1937-1938, 1942, 1950, 1956.) The restraining order application corroborated Lawanda's otherwise biased testimony. (XIX RT 1945.) Similarly, Buttler's sister, Lucinda, claimed she knew about the incident from Buttler, but conceded that she had been present during the guilt phase trial where she heard the details of the TRO discussed. (XX RT 2130-2132.)

In his closing argument, the prosecutor used the TRO statements to demonstrate that Buttler was afraid of Streeter (XXIV RT 2584, 2588), that he was abusive to her, (XXIV RT 2586-2587, 2588) and the statements showed a continuing pattern of escalating violence. (XXIV RT 2599, 2600.) He acknowledged his reliance on the incident, commenting: "I'm sure you've got it memorized by now, we've gone over it so much." (XXIV RT 2587.)

As at the guilt phase, these powerful statements by the victim were used to undermine the defense position that Streeter was a decent person whose life deteriorated after Buttler left him, and that her killing was the result of an incident that spun out of control. The prosecutor was able to use the document – which was not subject to cross-examination – to establish that Streeter was an abusive, controlling and violent individual. Given the closeness of the case at the penalty phase, the admission of this evidence in violation of the confrontation clause, due process and the Eighth Amendment's requirement of a reliable death sentence, was not

harmless beyond a reasonable doubt.

## VI.

## THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION OF FIRST DEGREE MURDER UNDER ANY OF THE THEORIES PROFFERED BY THE PROSECUTION

### A. Introduction

A conviction that is not supported by sufficient evidence is invalid, and violates the due process clause of both the Fourteenth Amendment to the United States Constitution and article I, section 15 of the California Constitution. (*Jackson v. Virginia* (1979) 443 U.S. 307, 314; *People v. Johnson* (1980) 26 Cal.3d 557, 575-577.) The analysis for determining whether a conviction is supported by sufficient evidence is identical under both federal and state law. (*People v. Johnson*, *supra*, 26 Cal.3d at pp. 575-577.) "'[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767, quoting *People v. Johnson*, *supra,* 26 Cal.3d at p. 578; see also *Jackson v. Virginia*, *supra*, 443 U.S. at p. 319.)

While all reasonable inferences must be drawn in support of the judgment, the reviewing "court may not 'go beyond inference into the realm of speculation in order to find support for a judgment. A [conviction] which is merely the product of conjecture and surmise may not be affirmed.'" (*People v. Memro* (1985) 38 Cal.3d 658, 695, quoting *People v. Rowland* (1982) 134 Cal.App.3d 1, 8.) In other words, "[m]ere conjecture, surmise, or suspicion is not the equivalent of reasonable inference and does

not constitute proof." (*People v. Terry* (1962) 57 Cal.2d 538, 566.)

Here, the prosecution presented the jury with three alternative theories of first degree murder – deliberate and premeditated murder, murder perpetrated by means of lying in wait, and murder perpetrated by means of torture. (CT 211-213.) Not one of these theories of first degree murder is supported by substantial evidence.

Appellant also contends that the trial court erred in instructing the jury on each of the three theories of first degree murder. That issue, however, is essentially the same as that stated above; whether there is sufficient evidence to support the first degree murder conviction. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138, fn. 1.) Whether the appellate issue is framed as insufficient evidence to support a conviction, or insufficient evidence to warrant the giving of an instruction, this Court must determine whether there was substantial evidence to support the jury verdict. Streeter's first degree murder conviction violated the state and federal constitutional guarantees of due process as to both issues. For the sake of convenience, appellant will only discuss the issue as a question of the sufficiency of the evidence to support the conviction.

**B. Statement of Facts**

The facts leading to Buttler's death demonstrate that this was a tragic domestic dispute that escalated out of control, rather than any kind of planned killing.

Patrick Myles, Buttler's son, testified that Streeter lived with Buttler and her children for several years, and they had one child together, who was named Howie. (VIII RT 761-762.) After the incident discussed in Claim V, which led Buttler to seek a TRO, Buttler and the children left suddenly without telling Streeter. (VIII RT 762.) Eventually, Streeter located them

and called Buttler, requesting visitation with Howie. Their first visit occurred without incident. (VIII RT 763.) A couple of weeks later, Streeter asked for another visit with Howie. Buttler agreed to meet Streeter at the Chuck E. Cheese in Fontana, and from there they would go to Streeter's uncle's house, which was also in Fontana. (VIII RT 765, 768.)[18]

Streeter testified that he was waiting for Buttler in the Chuck E. Cheese parking lot for 30-45 minutes, and as he waited he became increasingly upset and frustrated. He did not believe she was going to show up, and by the time she arrived, he was quite angry. (IX RT 891.)

According to Myles, Buttler drove into the parking lot in front of the Chuck E. Cheese, where Streeter was waiting. In the car with Buttler were Myles, Little Howie, and another child, Shavonda. (VIII RT 768, 772.) Streeter then took Howie – either after Buttler let Howie and Myles out of the car or directly out of the backseat of the car (VIII RT 768, 772) – and started to walk toward his own car. Buttler yelled at Streeter and asked where he was taking Howie. Streeter replied, according to Myles, either "don't worry, I'm taking him" (VIII RT 768) or "we're going to be gone." (VIII RT 772.)

Streeter testified that he retrieved Howie out of the back seat of the car, and headed toward his own car. (IX RT 891-892.) He put Howie in his car, and then was attempting to remove the Club security device from the

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[18] Myles gave two interviews to the police, which provided somewhat different versions of events. They were read to the jury by stipulation. (VIII RT 767-773.)

steering wheel. (IX RT 894.)[19] Buttler approached the car and asked where he was going with Howie. Streeter replied he was taking him and would call her about bringing him back. She said he couldn't leave with Howie, and a struggle ensued. (IX RT 896.)

Myles recalled that after Streeter took Howie, Buttler parked, got out of her car, and went toward Streeter, and the two began arguing and fighting. (VIII RT 768-769, 772.) According to Myles, Buttler tried to take Howie out of Streeter's car, and Streeter pushed her away. Buttler and Streeter were pushing each other back and forth. (VIII RT 769.) In another interview with the police, Myles described a more extensive physical altercation, in which Streeter pulled Buttler by the hair, dragged her, and hit her. He pushed her to the ground and kicked her. (VIII RT 772.)

Another witness, John Martinez, had pulled into the parking lot and saw Buttler yelling for help. (VI RT 522, 525-526.) Martinez and his daughter walked toward one of the stores that shared the parking lot with the Chuck E. Cheese, but kept looking back. He saw Streeter yelling at Buttler, pulling her hair, beating her, and knocking her to the ground. (VI RT 522-523.)

Anzerita Chonnay first saw Steeter and Buttler yelling at each other, and then saw Streeter hitting and kicking Buttler. (VI RT 551, 553.) Chonnay recalled telling the police that she saw Streeter pushing Buttler down, and hitting and kicking her. (VI RT 566-567.) Chonnay ran into a store to get help. (VI RT 551, 553.) When Chonnay came back outside, she saw Streeter go to the trunk of his car, take out a container and start

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[19] No other witnesses observed Streeter attempting to remove The Club, which was still attached to the steering wheel when the car was impounded. (VIII RT 741.)

pouring a liquid. (VI RT 552.) From her vantage point, Chonnay could not see where Streeter was pouring the liquid. (VI RT 558.) Buttler was on the ground and out of view. (VI RT 568-569.)

Myles recalled that Streeter had gone back to his car, opened the trunk, and took out a can that had gasoline in it. According to Myles, when Buttler saw this, she began to run away toward her car. Streeter chased after her, and poured gasoline on her car. Buttler was on the other side of the car from Streeter, but he eventually caught up to her, and then poured gasoline on her as well. (VIII RT 769.)

Martinez also saw Streeter go to his car, retrieve a container and pour gasoline on Buttler's car, and then pour gas on Buttler. (VI RT 523, 529.) After the gas was poured on Buttler's car, Myles got in the car and drove it to a stall farther away out of concern for Shavonda, who had remained in the car. (VI RT 526-527; VII RT 770.)

When Edward Jasso first took notice of the events, he saw Streeter pouring a liquid on Buttler. (VI RT 576, 584-585.) He described a "little struggle and then there was more of a struggle and then Streeter . . . pushed her to the ground and started kicking her and hitting her." (VI RT 577.) After more kicking and punching, Streeter dragged Buttler, then let her go, and at that point Jasso "thought it was over." (VI RT 579.)

It appeared to Martinez that Streeter had nothing to light the gasoline with so he tried to drag Buttler back to his car to get a lighter. (VI RT 528-529, 543.) He let her go, and she began running around in circles. (VI RT 528-529, 543.) At that point, Martinez had gone into a store to get help. (VI RT 523-524, 529.) Jasso, who remained, observed that Buttler appeared dazed and was walking toward the Chuck E. Cheese, while Streeter went back to his car and reached in to get something which Jasso

later realized was a lighter. (VI RT 580, 582, 587.)

Myles returned, and saw Streeter hitting his mother, and then chasing her. (VII RT 770.) He saw a man later identified as Jasso trying to intervene. (*Ibid.*) Jasso tried to grab Streeter as he was going toward Buttler, but his arm slipped, and Streeter lit the lighter. (VI RT 589-591.) As soon as the gasoline ignited, Streeter ran from the scene. (VI RT 514, 524, 592.)

According to Streeter, he kept gasoline in his car to put in his carburetor. He claimed that he got angry and was in a rage when he poured gasoline on Buttler. (IX RT 896-898.)

The prosecution also relied heavily upon what was described as a suicide note written by Streeter and found in his car, which is described in more detail below. (CT 532, 536, 538.)

### C. Insufficient Evidence of Deliberate and Premeditated Murder

A verdict of first degree murder based on the theory of a deliberate and premeditated killing "is proper only if the defendant killed 'as a result of careful thought and weighing of considerations; as a deliberate judgment or plan; carried on coolly and steadily [especially] according to a preconceived design . . . .'" (*People v. Martinez* (1987) 193 Cal.App.3d 364, 369, quoting *People v. Bender* (1945) 27 Cal.2d 164, 183.) An appellate court's assessment of whether the evidence supports an inference that the killing occurred as a result of a preexisting reflection rather than an unconsidered or rash impulse is to be guided by the categories of evidence described in *People v. Anderson* (1968) 70 Cal.2d 15, 26-27. (*People v. Bolin* (1998) 18 Cal.4th 297, 331-332; *People v. Sanchez* (1995) 12 Cal.4th 1, 33.)

These categories of evidence are:

> (1) facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing – what may be characterized as 'planning' activity; (2) facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a preexisting reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to 'a preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2).

(*People v. Anderson*, *supra*, 70 Cal.2d at p. 26.)

*Anderson* further observed that in prior cases first degree murder convictions had been typically upheld where there was evidence from all three categories, or in the alternative, "extremely strong evidence" of planning activity, or evidence of motive in conjunction with evidence of either planning activity or exacting manner of killing. (*Id.* at p. 27.) "It is also well established that the brutality of a killing cannot in itself support a finding that the killer acted with premeditation and deliberation. If the evidence showed no more than the infliction of multiple acts of violence on the victim, it would not be sufficient to show that the killing was the result of careful thought and weighing of considerations.' (*People v. Caldwell*

(1955) 43 Cal.2d 864, 869.)" (*Anderson, supra*, 70 Cal.2d at pp. 24-25.) A brutal manner of killing, by itself, "is as consistent with a sudden, random 'explosion' of violence as calculated murder." (*People v. Alcala* (1984) 36 Cal.3d 604, 626.) Similarly, "proof of a sudden killing in the course of an argument and struggle . . . would not prove a deliberate and premeditated murder." (*People v. Velasquez* (1980) 26 Cal.3d 425, 435, vacated on other grounds by *California v. Velasquez* (1980) 448 U.S. 903.)

The record here does not contain substantial evidence of planning activity, motive to kill, or an exacting method of execution. Rather, the evidence reveals a rash, impulsive act and the absence of any of the factors discussed in *Anderson*. Indeed, the prosecutor barely argued premeditation and deliberation to the jury, but instead blurred the line between premeditated deliberate murder and intent to kill, arguing erroneously that if the jury finds "premeditation and a deliberate intent to kill, then it is first degree murder. . . . And I am not going to spend a whole lot of time on this . . . ." (XI RT 1072.) The prosecutor argued that the following established premeditation and deliberation: (1) the suicide note; (2) the manner of killing ["would any one of you do anything like this without intending the victim to die?"]; and (3) the presence of the gas cap on top of the car's bumper. (*Ibid.*)

**1. No Evidence of Planning**

The most important prong of the *Anderson* guidelines is the evidence relating to planning activity. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1018.) The events which unfolded, as described above, cannot by any stretch of the imagination be considered a coherent plan. The prosecutor's theory – that Streeter grabbed his son and put him in his own car, somehow knowing that Buttler would follow him and provoke an altercation, which

would then lead to Streeter pouring gasoline on her and lighting her – is the grossest of speculation. (XI RT 1077.)

The evidence of planning relied on by the prosecutor to establish that this was a premeditated and deliberate killing essentially consists of two items: the suicide note and the gasoline cap on the bumper. (XI RT 1072.)

The note, addressed to Streeter's parents, primarily focused on Streeter's own death. (CT 532, 536, 538.) The crux of the note reads like a suicide note. In it, Streeter stated that his life was over and that he had nothing to live for anymore. He apologized for putting his parents through this and was sorry that it would cost a lot to bury him. The note said, "I know what I did to Yolanda is wrong but she don't deserve to live like me," (*Ibid*) but contains no further explanation. In the note, Streeter asked his parents to try to raise his son Howie, and to tell Howie that his father "is sorry for what he did." (*Ibid.*)

The note consists of the rambling thoughts of a distraught man. It is, at best, hopelessly ambiguous. While the note refers repeatedly to Streeter's death, the reference to Buttler was not that she does not deserve to live, but that she does not deserve to "live like me." This reference most likely meant that Streeter did not want Buttler to live the kind of life he was living. Streeter explained that what he meant was that she "doesn't deserve to live like me, that lifestyle that we was living, drinking alcohol, doing drugs. She wanted a house, a better place, a better life. She didn't deserve to live the same life that I was living. I couldn't give her a better life, so she didn't deserve to live like I was living." (IX RT 899.)

The note also stated, in the past tense, that "I know what I *did* to Yolanda is wrong . . . ." (CT 532, italics added.) Streeter testified that the note was a suicide note and that it did not reflect an intent to do any harm to

Buttler in the future. He explained that the reference to having done something wrong to Buttler referred to the earlier incident that precipitated her moving out of the house, discussed above in Claim V. (IX RT 900.) This note is not sufficient to show that Streeter had a plan to kill Buttler.

The other purported evidence of planning is that the gas cap to Streeter's car was found on the bumper of the car. The jury was shown a photograph depicting the gas cap from the vehicle placed next to the license plate. According an officer at the scene, the gas cap was found on top of the car's bumper. (VIII RT 741-742.) The inference the prosecutor attempted to draw from this was that prior to his encounter with Buttler, Streeter took gas out of the gas tank and filled up the container that he ultimately used to pour gas on her and light her on fire. No one saw Streeter siphon gas out of his car, and there was no tubing or other siphoning device found at the scene. Streeter testified without contradiction that he kept a can of gasoline in his car to put in his carburetor. (IX RT 896.)

The evidence showed that Streeter hoped to meet with Buttler and visit with his son Howie. There was no evidence of any plan to kill her. He knew where Buttler lived, having found her address and phone number. (IX RT 801.) Instead of going to her house, he called to arrange a visit with his son. The first time he did this, the visit went off without incident. (IX RT 885.) For the next visit, they planned to meet at the parking lot of a shopping center in which there was a Chuck E. Cheese. Such a public venue is hardly an ideal spot to commit a murder. Further, when Buttler arrived, Streeter did not attack her. He grabbed his son and stated his intention to take him for a visit. He did not launch an attack on her, he had no weapon on his person, and he did not even have the container of gasoline

with him. In addition, once he poured gasoline on Buttler, he did not have the means to light it and had to return again to his vehicle to get a lighter.

In short, appellant's actions do not suggest that he "killed as the result of careful thought and weighing of considerations, as a deliberate judgment or plan, carried on coolly and steadily, especially according to a preconceived design." (*People v. Rowland, supra*, 134 Cal.App.3d at p. 7, citing *Anderson, supra*, 70 Cal.2d at p. 26.) Rather than any kind of methodical plan, the incident had all the earmarks of a domestic conflict that spun tragically out of control.

### 2. No Evidence of Motive Consistent With Planning and Deliberation

Motive evidence consistent with planning and deliberation was similarly lacking. Motive evidence consists of "facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill." (*Anderson, supra,* 70 Cal.2d at pp. 26-27.) Under the *Anderson* analysis, such motive evidence, *alone*, is insufficient to support a finding of premeditation and deliberation. It must be supported by facts of planning or the nature of the killing which would "support an inference that the killing was the result of a 'pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]." (*Id.* at pp. 26-27.)

In the present case, appellant was distraught about his failed relationship with Buttler, but all evidence pointed to the fact that he hoped to win her back, not kill her. (IX RT 884-887.) Buttler's son, Patrick Myles, was aware that the meeting was set up by Streeter in hopes that he could get back together with Buttler. (X RT 987.) It was only when

Streeter believed Buttler was not going to show up that he became angry.

There was no evidence that appellant possessed the kind of motive contemplated by *Anderson* to support a finding of premeditation and deliberation. Moreover, even assuming that there was evidence that appellant was motivated to kill Buttler, there was no evidence of prior planning or manner of killing, required by *Anderson* in addition to motive, to support a finding of premeditation and deliberation. (*Anderson, supra*, 70 Cal.2d at pp. 26-27.) The killing seems to exemplify a "mere unconsidered or rash impulse hastily executed." (*Id.* at p. 27.)

### 3. No Evidence of a "Particular and Exacting" Manner of Killing

The manner in which Buttler was killed is the strongest evidence negating a finding of premeditation and deliberation. Buttler was killed after she arrived at the location, and after Streeter took their son out of her car and walked away. She followed him and an argument ensued. This evolved into a physical altercation in which Streeter beat and kicked Buttler. He then went back to his car and retrieved gasoline that he had in the trunk of the car, and poured it on her. He then returned to his car again to get a lighter.

The prosecutor argued that the evidence established intent to kill, because no one would do such things if they did not intend to kill the victim. (XI RT 1072.) However, an intent to kill is not sufficient for a finding of premeditation and deliberation:

> A deliberate intent to kill . . . is a means of establishing malice aforethought and is thus an element of second degree murder in the circumstances of this case. In order to support a finding of premeditation and deliberation the manner of killing must be, in the words of the

> *Anderson* court, "so particular and exacting" as to show that the defendant must have intentionally killed according to a "preconceived design."

(*People v. Rowland, supra*, 134 Cal.App.3d at p. 9.)

In sum, there is simply no evidence that is reasonable, credible and of solid value to support a finding that Buttler's killing was deliberate and premeditated first degree murder. Even viewed in the light most favorable to the judgment, the evidence presented at appellant's trial does not support a finding of a premeditated and deliberated killing. The only reasonable interpretation of the evidence presented at trial is that the killing resulted from an impulsive and frenzied explosion of violence. The first degree murder conviction cannot be upheld on the prosecution's theory of premeditated and deliberate murder.

**D. Insufficient Evidence of Lying-in-Wait Murder**

In order to establish a first degree murder based on a theory of lying in wait, the prosecution must prove that a murder took place along with the following elements: (1) the defendant's true intent and purpose were concealed by his actions or conduct; (2) the defendant engaged in a substantial period of watching and waiting for an opportune time to act; and (3) immediately after the period of watching and waiting, the defendant made a surprise attack on an unsuspecting victim from a position of advantage. (*People v. Stanley* (1995) 10 Cal.4th 764, 795; *People v. Ceja, supra*, 4 Cal.4th at p. 1140.) The defendant can, but need not, intend to murder the victim. Lying-in-wait first degree murder "requires only a wanton and reckless intent to inflict injury likely to cause death." (*People v. Webster* (1991) 54 Cal.3d 411, 448; see also *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148-1149; *People v. Moon* (2005) 37 Cal.4th 1, 24, fn.

1.) Such a state of mind is considered to be the functional equivalent of premeditation and deliberation. (*People v. Ruiz* (1988) 44 Cal.3d 589, 614.)

### 1. There Was Insufficient Evidence That Streeter Concealed a Deadly Purpose

While lying-in-wait applies to those who did not physically conceal themselves from their victims, the law does require that the defendant conceal his or her true intent and purpose so that he or she can take the victim by surprise from a position of advantage. (*People v. Morales*, *supra*, 48 Cal.3d at p. 555; *People v. Ceja, supra,* 4 Cal.4th at p. 1140.) "A concealment of purpose suffices if it is combined with a surprise attack on an unsuspecting victim from a position of advantage." (*People v. Edwards* (1991) 54 Cal.3d 787, 825, citing *People v. Morales*, *supra*, 48 Cal.3d at pp. 555, 557 and *People v. Webster, supra,* 54 Cal.3d at p. 448.) The concealed purpose referred to is a murderous one rather than some other purpose. Indeed, as this Court has stated, "[t]he factor[] of concealing murderous intent" is one of the "hallmark[s]" of murder by lying in wait. (*People v. Stevens* (2007) 41 Cal.4th 182, 201, quoting *People v. Hardy* (1992) 2 Cal.4th 86, 164.)

There must be sufficient evidence that the defendant concealed an intent to kill or attack the victim at the time he was watching and waiting for the victim. (See, e.g., *People v. Stevens*, *supra*, 41 Cal.4th at p. 203 [sufficient evidence to establish that defendant "concealed his deadly purpose"]; *People v. Jurado* (2006) 38 Cal.4th 72, 119 [sufficient evidence that defendant concealed from victim his "purpose to kill her"]; *People v. Moon, supra,* 37 Cal.at p. 22 [defendant concealed his purpose such that the "victim could not have anticipated defendant's deadly intentions"]; *People v. Gutierrez, supra,* 28 Cal.4th at p. 1150 [sufficient evidence that

defendant concealed "his true murderous intentions"]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 500 [sufficient evidence where defendant concealed his intent to kill until he struck victim]; *People v. Gurule* (2002) 28 Cal.4th 557, 631 [defendant's concealment of "deadly purpose" was obvious from the evidence]; *People v. Carpenter* (1997) 15 Cal.4th 312, 389 [where defendant lies in wait intending to rape and then kill the elements of the lying in wait are met]; *People v. Sims* (1993) 5 Cal.4th 405, 433 [substantial evidence that defendant concealed purpose to rob and kill]; *People v. Hardy, supra,* 2 Cal.4th at p. 164 ["the jury could reasonably conclude defendants concealed their murderous intention"].)

In addition, the concealment must be done in order to attack the victim by surprise from a position of advantage. As explained in *Morales:*

> The concealment which is required, is that which puts the defendant in a position of advantage, from which the factfinder can infer that lying-in-wait was part of the defendant's plan to take the victim by surprise. [Citation.] It is sufficient that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim.

(*People v. Morales, supra*, 48 Cal.3d at pp. 554-555, quoting *People v. Sassounian* (1986) 182 Cal.App.3d 361, 406-407; see also *People v. Webster, supra,* 54 Cal.3d at p. 448.)

Streeter's actions when Buttler arrived at the Chuck E. Cheese parking lot do not provide sufficient evidence for a jury to reasonably infer that he was concealing an intent to kill or to inflict injury likely to cause death as part of a secret design to take her by surprise. When Buttler drove up, Streeter did not attack her, he grabbed his son and walked away from

her. It was only after Buttler followed him, and they had engaged in a verbal argument and then a physical fight, that Streeter went to his car for a container of gasoline, which he proceeded to pour on her car and then on her. It is highly unlikely that this was part of some secret design since even at that point, Streeter did not have the means to light the gasoline and had to again return to his car to get a lighter.

Even assuming, without conceding, that Streeter hid his true purpose – whether to take his son from Buttler or some other purpose – when he asked Buttler to meet him, this is not sufficient to meet the concealment element of lying in wait. As noted above, the concept of concealment for purposes of lying in wait must involve a concealed murderous intent and "put the defendant at an advantage" such that lying in wait was part of the plan to take the victim by surprise. (*Morales*, 48 Cal.3d at p. 555.) There was no concealment of purpose in order to take Buttler by surprise from a position of advantage in order to facilitate a murder or an attack.

Unlike the defendant in *People v. Stevens, supra,* 41 Cal.4th at p. 214, Streeter did not lure Buttler "into a vulnerable position by creating or exploiting a false sense of security." Indeed, Buttler was very much concerned for her safety before she even arrived. Evidence established that Buttler had left Streeter and remained in hiding out of fear of him. (VIII RT 762.) Her son, Patrick Myles, testified that the reason he went along with his mother on the day of the homicide was to protect her in case something went wrong. (VIII RT 767.)

Furthermore, whatever purpose Streeter may have concealed, it was not designed to put Streeter at an advantage. Whatever benign purpose Buttler may have believed Streeter had in asking her to meet him was dispelled as soon as she arrived when Streeter grabbed his son and headed

toward his own car. Streeter maintained no position of advantage until well after Buttler followed Streeter to his car, the two engaged in an altercation and Streeter beat Buttler and knocked her to the ground. Even at that point, Streeter still had to return to his own car twice, first to get the gasoline and again to get a lighter.

In cases where this Court has upheld the sufficiency of the evidence to demonstrate lying in wait, the defendant is positioned to advantage by virtue of the watching and waiting and concealment of purpose, neither of which occurred here. (See, e.g., *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 500 [defendant stabbed victim while victim was urinating]; *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 388-389 [defendant waited around corner from victims before approaching them at gunpoint]; *People v. Sims*, *supra*, 5 Cal.4th at p. 433 [defendant and codefendant called for pizza delivery, lured deliverer into hotel room, bound him with a clothesline, and fatally strangled him]; *People v. Ceja*, *supra*, 4 Cal.4th at p. 1144 [defendant lured victim into isolated area before shooting her]; *People v. Morales, supra,* 48 Cal.3d at p. 555 [defendant attacked victim from behind in automobile].) This case is not reflective of the scenarios in which this Court has found that the defendant was in a position of advantage by virtue of the concealed purpose prior to the attack.

### 2. There Was No Watchful Waiting for an Opportune Time To Attack

The purpose of the watching and waiting element is to distinguish those cases in which a defendant acts insidiously from those in which he acts out of rash impulse. (See *People v. Moon, supra,* 37 Cal.4th at p. 24.) As with the element of concealment, the waiting period is intrinsically connected to a murderous intent or reckless intent to inflict injury likely to

cause death. It necessarily involves waiting for an opportune time to attack the victim, not merely to act in accord with some other purpose. (See, e.g., *id.* at p. 22 [defendant "waited and watched for an opportune moment to attack" victim]; *People v. Michaels* (2002) 28 Cal.4th 486, 516 ["[w]aiting and watching until a victim falls asleep before attacking is a typical scenario of a murder by means of lying in wait"]; *People v. Hillhouse*, *supra*, 27 Cal.4th at pp. 500-501 [substantial period of watching and waiting for opportune time to attack from position of advantage]; *People v. Edwards*, *supra,* 54 Cal.3d at p. 825 ["jury could reasonably infer defendant waited and watched until [victims] reached the place of maximum vulnerability before shooting"]; *People v. Ruiz, supra,* 44 Cal.3d at p. 615 ["[f]rom such evidence, the jury reasonably could infer that defendant watched and waited until his victims were sleeping and helpless before executing them"].)

There was no classic watching and waiting in this case. The evidence shows that Streeter was indeed waiting for Buttler to arrive at the Chuck E. Cheese, but not so he could kill her or attack her, but in order to have visitation with his son. Even if this was, as the prosecution argued, a mere pretext to lure Buttler to the location (XI RT 1076-1077), once Buttler arrived, as discussed above, Streeter did not use the period of watching and waiting to launch a surprise attack from a position of advantage. The killing occurred after a prolonged struggle.

The lack of the element of watchful waiting in this case is illustrated by contrasting it with *People v. Cole, supra,* 33 Cal.4th 1158, where the defendant poured gasoline on the victim after the victim fell asleep. In that case, "a reasonable trier of fact could have found beyond a reasonable doubt that defendant had watched and waited until [the victim] was sleeping and helpless before he poured the flammable liquid on her and ignited it." (*Id.*

at p. 1206.) Here, by comparison, the watching and waiting did not put Streeter in any kind of advantage and his ultimate act of lighting the gasoline occurred after several interruptions in the action.

### 3. There Was No Surprise Attack Immediately after a Period of Watching and Waiting

Cases which have found lying-in-wait murder or special circumstances have included the following scenarios, all of which involve surprise: (1) a surprise attack from behind (*People v. Jurado*, *supra*, 38 Cal.4th 72; *People v. Combs* (2004) 34 Cal.4th 821; *People v. Nakahara* (2003) 30 Cal.4th 705; *People v. Roberts* (1992) 2 Cal.4th 271; *People v. Morales*, *supra*, 48 Cal.3d 527); (2) an attack while the victim is asleep (*People v. Cole, supra,* 33 Cal.4th 1158; *People v. Michaels, supra,* 28 Cal.4th 486; *People v. Hardy, supra,* 2 Cal.4th 86; *People v. Ruiz*, *supra*, 44 Cal.3d 589); (3) an attack from hidden position (*People v. Stanley, supra,* 10 Cal.4th 764; *People v. Edelbacher* (1989) 47 Cal.3d 983); (4) a surprise attack after victim is lured to a location (*People v. Bonilla*, *supra*, 41 Cal.4th 313; *People v. Sims, supra*, 5 Cal.4th 405; *People v. Webster, supra,* 54 Cal.3d 411); and (5) a sudden attack without warning (*People v. Stevens, supra,* 41 Cal.4th 313; *People v. Moon, supra*, 37 Cal.4th 1; *People v. Gutierrez*, *supra*, 28 Cal.4th 1083; *People v. Hillhouse*, *supra*, 27 Cal.4th 469; *People v. Carpenter*, *supra*, 15 Cal.4th 312; *People v. Edwards*, *supra,* 54 Cal.3d 787.)

The evidence in this case does not show that there was a surprise attack following the period of watchful waiting. The incident escalated from a domestic dispute over whether Streeter could take their son with him, and proceeded in several stages: (1) Streeter grabbed his son and walked away from Buttler; (2) Buttler followed him and initiated an

argument which developed into a physical altercation; (3) Streeter went back to his car to get gasoline; (4) Streeter returned and poured gasoline on Buttler's car and then on Buttler; (5) Streeter beat Buttler further; (6) Streeter pulled Buttler back toward his car, and then let her go while he retrieved a lighter from his vehicle; (7) Streeter chased Buttler, caught up with her and lit her on fire.

It is true that "[a]s long as the murder is immediately preceded by lying in wait, the defendant need not strike at the first available opportunity, but may wait to maximize his position of advantage before taking the victim by surprise." (*People v. Ceja*, *supra*, 4 Cal.4th at p. 1145.) But in this case the facts simply do not fit such a scenario. There is no proof of a fatal surprise attack or even that the physical struggle was instigated by Streeter.

The acts which caused Buttler's death were the culmination of a long, drawn out physical altercation that began as a verbal argument after Streeter took his son from Buttler's car. The lethal aspect of the confrontation in which Streeter ignited gasoline that he had previously poured on Buttler, occurred after a non-lethal physical struggle preceded by Buttler confronting Streeter. As the witnesses testified, Buttler was screaming and yelling for help while Streeter was beating her, before he went to get the container of gasoline. (VI RT 522, 525-526.) After the initial fighting between the two of them started and then escalated, Buttler was no longer an unsuspecting victim. Buttler was certainly not taken unaware after Streeter poured gasoline on her car and then chased her in order to pour gasoline on her person, returned to his car to get a lighter and chased her down again. There was simply no evidence of the required surprise attack on an unsuspecting victim from a position of advantage.

Ultimately, the prosecutor relied on three pieces of evidence to

support his theory of lying in wait: Streeter had gasoline in the car, he had a lighter to ignite the gasoline, and he wrote a note. (XI RT 1082.) Streeter explained – without contradiction – that he kept gasoline in the car for other purposes. (IX RT 896.) Patrick Myles testified that Streeter smoked cigarettes, thus explaining the lighter. (VIII RT 771.) The note focused primarily on Streeter anticipating that he was about to lose his own life although it did make reference to Buttler, stating "I know what I did to Yolanda is wrong but she don't deserve to live like me." (CT 532.) As discussed above, the note's meaning was murky and did not reasonably reflect a plan to harm Buttler, much less to attack her by surprise.

These items of evidence can only establish lying in wait by unduly relying on unsupported inferences suggested by the prosecution. (See *People v. Carter* (2005) 36 Cal.4th 1215, 1261.) According to the prosecution, Streeter lured Buttler "to the location pretending that he was just going to have a visit, knowing what he was going to do." (XI RT 1077.) There is no reasonable way, however, to connect this speculative evidence to the required elements of lying in wait without construing the elements of lying-in-wait murder so broadly as to unconstitutionally encompass virtually any intentional homicide.

### E. Insufficient Evidence of Torture Murder

Murder perpetrated by torture is "'murder committed with a willful, deliberate and premeditated intent to inflict extreme and prolonged pain.'" (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1239, quoting *People v. Steger*, *supra,* 16 Cal.3d at p. 546.) The law requires the same proof of deliberation and premeditation for first degree torture murder as it does for other types of first degree murder. There must be "careful consideration and examination of the reasons for and against" the torturing of the victim.

(*People v. Steger*, *supra*, 16 Cal.3d at p. 545.) In addition, the requisite intent to cause pain must have as its goal either "revenge, extortion, persuasion or any other sadistic purpose." (*People v. Wiley, supra,* 18 Cal.3d at p. 168.) Although not defined for the jury, "sadistic purpose" is defined as "the infliction of pain on another person for the purpose of experiencing pleasure." (*People v. Raley* (1992) 2 Cal.4th 870, 901.) Thus, "the definition of torture murder requires proof of intent to cause pain and suffering beyond the pain of death." (*Id.* at p. 889.) A killer who tortures "is not satisfied with killing alone" (*People v. Steger*, *supra*, 16 Cal.3d at p. 543); he wants "the victim to suffer pain in addition to the pain of death." (*People v. Davenport* (1986) 41 Cal.3d 247, 271.)

Torture murder requires an intent to cause pain and suffering. (*People v. Steger*, *supra*, 16 Cal.3d at p. 544 [holding that defendant's murder of her stepchild was not accomplished with a willful, deliberate and premeditated intent to inflict extreme and prolonged pain and thus not murder by torture]; see also *People v. Caldwell, supra,* 43 Cal.2d 864 [evidence did not support a finding that first-degree murder committed by torture since there was no evidence that the defendant had the intent to make the decedent suffer]; *People v. Bender, supra,* 27 Cal.2d at p. 177 ["The killer who, heedless of the suffering of his victim, in hot anger and with the specific intent of killing, inflicts the severe pain which may be assumed to attend strangulation, has not in contemplation of the law the same intent as one who strangles with the intention that his victim shall suffer"].)

Intent to torture has been variously described as intent to inflict or cause "extreme pain" (*People v. Bemore* (2000) 22 Cal.4th 809, 841; *People v. Crittenden* (1994) 9 Cal.4th 83, 140), "extreme and prolonged

pain" (*People v. Steger*, *supra*, 16 Cal.3d at p. 546; accord, *People v. Raley*, *supra*, 2 Cal.4th at p. 888; *People v. Pensinger, supra,* 52 Cal.3d at p. 1239), and "cruel pain and suffering for the purpose of revenge, extortion, persuasion or for any other sadistic purpose." (*People v. Wiley, supra,* 18 Cal.3d at p. 168; accord, *People v. Mincey* (1992) 2 Cal.4th 408, 432; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1101; *People v. Davenport*, *supra*, 41 Cal.3d at p. 267; *People v. Cole*, *supra*, 33 Cal.4th at p. 1226, citing CALJIC No. 8.81.18.)

Additionally, "there must be a causal relationship between the tortuous act and death, as Penal Code section 189 defines the crime as murder 'by means of' torture." (*People v. Pensinger*, *supra*, 52 Cal.3d at p. 1239; *People v. Proctor* (1992) 4 Cal.4th 409, 530; *People v. Davenport*, *supra*, 41 Cal.3d at p. 268.) Indeed, it has been stated by this Court that "[a]n essential element of murder by torture is that the acts of torture must be the cause of death of the victim." (*People v. Johnston* (1957) 48 Cal.2d 78, 89.)

In determining whether there is sufficient evidence of murder perpetrated by torture, the reviewing court must avoid "giving undue weight to the severity of the victim's wounds, as horrible wounds may be as consistent with a killing in the heat of passion, in an 'explosion of violence,' as with the intent to inflict cruel suffering." (*People v. Pensinger*, *supra*, 52 Cal.3d at p. 1239.) Furthermore, murder by torture may not be inferred solely "from the mode of assault" (*People v. Wiley*, *supra*, 18 Cal.3d at p. 167), or from the fact that the victim suffered severe pain. (*People v. Tubby* (1949) 34 Cal.2d 72, 77.) What is required is additional evidence of intent to cause pain and suffering. (*People v. Wiley*, *supra*, 18 Cal.3d at p. 167.) "Because the requisite element of first degree

torture murder is the deliberate and premeditated intent to inflict torture . . . the issue is whether there is sufficient evidence of planning, motive, or method to inflict torture." (*People v. Mincey, supra,* 2 Cal.4th at p. 434.)

Here, just as there is insufficient evidence of planning, motive and method of killing, there is insufficient evidence of planning, motive and method to cause Buttler to suffer extreme and prolonged pain. Indeed, the killing of Buttler falls into the "explosion of violence" category. There was nothing planned or methodical about Streeter's actions. After the initial dispute became physical, Streeter returned to his car for gasoline, which he poured on Buttler's car and, after chasing her, poured on her. He then had to return to his car a second time to retrieve a lighter because he did not even have the means to ignite the gasoline. There was no evidence to suggest that Streeter intended that Buttler linger in pain for days or even hours rather than die immediately from the fire. In fact, after lighting Buttler Streeter he ran off, never witnessing the pain he caused.

None of the types of evidence that courts typically rely upon in upholding a finding of torture murder are present in this case. The evidence shows a killing that was completely counter to the kind of exacting manner of death that is generally considered to be first degree murder based on torture. After a violent quarrel, Streeter poured gasoline on Buttler, lit her on fire and then immediately left the scene. There was nothing slow or methodical in the way Buttler was killed that suggests intent to cause extreme pain and suffering. Indeed, one would reasonably expect that pouring gasoline on someone and lighting them on fire would cause them an instantaneous death.

This is in contrast to *People v. Proctor*, *supra,* 4 Cal.4th at p. 517, where "[t]here were a number of shallow stab wounds and incisions caused

by dragging a weapon across the skin in the area of the neck. The curvature of some of the injuries indicated that they had been inflicted slowly and deliberately." (*Ibid.*) Additionally, the nature of many of the wounds, including repeated blows to the face and to other parts of the body, as well as the knife "drag" marks, suggested that the wounds were administered over a substantial period of time. (*Id.* at p. 532.) Finally, the medical examiner in *Proctor* actually rendered an opinion that the stab "wounds were inflicted for the purpose of causing pain and fear." (*Ibid.*) Similarly, in *People v. Pensinger*, *supra*, 52 Cal.3d at p. 1240, "the incisions were carefully made with a sharp instrument, leaving no jagged edges, and showing no evidence of either hesitation or frantic slashing. There was nearly a scientific air to the incisions. This was strong evidence of a calculated intent to inflict pain rather than a wild explosion of violence."

In *People v. Elliot* (2005) 37 Cal.4th 453, 467, the victim suffered 81 premortem stab and slash wounds, only three of which were potentially fatal. The Court found that "[s]ome of these wounds suggest a meticulous, controlled approach . . . [which] strongly implies the use of controlled force designed to torture." (See also *People v. Chatman* (2006) 38 Cal.4th 344, 390-391 [torture murder found where there were 51 stab wounds, only six of which were life-threatening]; *People v. Bemore, supra,* 22 Cal.4th at pp. 839-844 [torture murder upheld where most of the 37 knife wounds were superficial, and where eight shallow cuts were grouped on the victim's flank, away from vital organs]; *People v. Barnett* (1998) 17 Cal.4th 1044, 1076-1077 [evidence of torturous acts supplied by numerous shallow cuts on the hip and thigh inflicted while the victim was alive and restrained]; *People v. Mincey*, *supra*, 2 Cal.4th at p. 428 [requisite intent may be inferred from evidence that the defendant beat the 5 year-old victim

repeatedly over a period of 24 to 48 hours and caused hundreds of injuries, including swelling of the brain].)

Streeter did not inflict non-lethal wounds as a means to further some other goal, which has been considered evidence of torture in other cases. (See *People v. Elliot*, *supra,* 37 Cal.4th at pp. 467-468 [evidence suggested that defendant may have tortured victim to coerce her into revealing the combination to safe]; *People v. Bemore*, *supra,* 22 Cal.4th 809 [jury could infer that defendant intentionally tortured victim to gain entry to the safe, and that victim was killed after he failed to comply].)

Streeter did not tie, bind or gag Buttler, which is also commonly considered to be evidence of intent to torture. For example, in *People v. Crittenden, supra,* 9 Cal.4th at p. 141, the evidence of murder by torture was found to be sufficient based on the defendant binding and gagging the victims before stabbing them. *People v. Steger*, *supra,* 16 Cal.3d at p. 548, also observed that "if a defendant had trussed up his victim, proof that pain was inflicted continuously for a lengthy period could well lead to the conclusion that the victim was tortured."

Nor did Streeter show callous indifference to the victim after the lethal acts were inflicted, which also has been considered in determining intent. (See *People v. Cook* (2006) 39 Cal.4th 566 [the defendant "laughingly asked another if she would go see whether the man down the street was all right"]; *People v. Chatman*, *supra,* 38 Cal.4th at p. 390 [defendant bragged about killing and said that victim begged him to stop but he persisted because it "felt good," and that "he just kept doing it even after she got quiet"] .) Here, there is no evidence showing that Streeter was indifferent to the events that led to Buttler's death or took any enjoyment from the crime. In fact, he did not wait around and watch Buttler burn or

witness the aftermath of his actions, but ran from the scene immediately after she caught fire. (VI RT 514-515, 548, 592-594.)

The prosecutor suggested that the use of gasoline to light Buttler on fire constituted evidence of his intent to inflict pain. As the prosecutor argued: "One who tries to light a person on fire is clearly intending to inflict extreme and prolonged pain." (X RT 1085.) It is just as likely that someone who lights a person on fire intends that they die instantaneously. In any event, the means used to kill, in this case, gasoline, cannot, in and of itself, prove an intent to torture. In the few cases in which the victim's death by use of gasoline has been considered torture murder, there has existed substantial evidence of intent to inflict pain that is absent here. In those cases, there was far more evidence of a plan to inflict pain than simply the use of the liquid itself.

Recently, in *People v. Cole, supra,* 33 Cal.4th 1158, this Court found sufficient evidence of torture murder where the defendant poured gasoline on his wife in two places while she was in bed, and lit her on fire. However, the Court did not rely on the use of gasoline alone. The Court discussed the prior relationship between the defendant and the victim, which – unlike here – included prior references to burning the house down if the victim ever left him. (*Id.* at p. 1214.) According to the victim's statements made before she died, she and the defendant had argued earlier in the evening, and he had followed her around all day because he thought she was cheating on him. (*Id.* at p. 1172.) Significantly, the situation in *Cole* demonstrated a far more methodical use of gasoline. The victim was in her bed asleep when the defendant poured gasoline on her. He poured it on two distinct places, and when he ignited the fire, he said to the victim that he hoped she burned in hell, and made statements thereafter that he was

angry at her and wanted to kill her. (*Id.* at p. 1172, 1214.) He also did not flee, but brought the victim out of the house after she was burned. (*Id.* at p. 1174.)

Similarly, in other cases in which this Court has found sufficient evidence of torture murder involving the use of gasoline, there have been statements from the defendant indicating the desire for revenge, the gasoline was purchased near the time of the killing specifically for the purpose of burning the victim, and the gasoline was used immediately upon arrival at the scene.

For example, in *People v. Martinez* (1952) 38 Cal.2d 556, two weeks before the victim died, the defendant told a friend that "he was going to do something bad" to the victim, his wife. (*Id.* at p. 558.) He obtained a knife the day before the killing, and went to the victim's house intending to scare her. The day of the killing, the defendant learned that the victim had filed a complaint against him and that the police were looking for him. (*Id.* at p. 559.) The defendant went to a gas station, filled up a can of gasoline and went to the victim's house with gasoline and matches. He entered the house and chased the victim, telling her he was going to "destroy" her. He then threw gasoline on her. He tried to light one match, but failed, so he lit another and threw it on her. The defendant remained at the scene. When neighbors attempted to put out the flames, he disconnected the hose. (*Id.* at pp. 559-560.) The Court held that these facts were sufficient to uphold a verdict on a theory of premeditation and deliberate murder as well as torture murder. (*Id.* at p. 561.)

In *People v. Chavez* (1958) 50 Cal.2d 778, defendants went to a bar where the bartender refused to serve them. Later a fight broke out, and the defendants were ejected from the bar. One of the defendants threatened to

return and get even. They drove to a gasoline station and purchased five gallons of gasoline. Again, one of the defendants was heard to say that they were going back to the bar to get even. They returned to the bar, where one of the defendants threw gasoline on the floor and lit it. Another defendant was heard saying, "I'll get every one of you in there." Several people died as a result of the fire. (*Id.* at pp. 783-784.) The court held that this evidence supported a torture-murder theory of first degree murder: "As we have seen, statements were made during the trip to purchase gasoline which could be interpreted as indicating that defendants were motivated by revenge, and when the fire was set, [a defendant] said, 'I will get every one of you in there . . . .'" (*Id.* at pp. 788-789.)

Here, there was insufficient evidence that Streeter was seeking revenge or wanted to harm Buttler for some other sadistic purpose. No doubt he was distraught and angry that she had left him and took their son with her. But the evidence suggested that Streeter harbored hope that they would eventually get back together. After he initially located her, he did not seek to kill or harm her, but, on the contary hoped to reconcile. Streeter and Buttler arranged a visit with their son Howie, which took place two or three weeks before the homicide and proceeded without incident. (VIII RT 763; IX RT 885.) In subsequent conversations Streeter had with Buttler leading up to the homicide, Streeter told Buttler he wanted her back, loved her and couldn't live without her. He said he might harm himself, but never threatened her. (IX RT 887.) They agreed to meet at the Chuck E. Cheese, and before there was a physical altercation, Streeter took his son, Howie, and walked toward his own car, indicating that he desired no further interaction with Buttler at all. (VIII RT 768, 772.)

There is no evidence of any clear statement Streeter made that he

wanted to cause harm or pain to Buttler. The closest evidence is the ambiguous suicide note – but even that note did not indicate any intention to cause pain and suffering.

The prosecutor did not present evidence that the gasoline had been purchased for use against the victim. Streeter testified that he kept it in his car to use for his carburetor and there was no contrary evidence. The fact that he had to return to his car, first for the gas, and later for a lighter, further argues against any kind of premeditated plan. As discussed above, the facts far more reasonably suggest an argument that spun out of control, which escalated first to physical beating and then to the lethal acts.

The prosecution presented evidence that Streeter was controlling and abusive at times. Buttler's son testified, however, that he never saw Streeter hit his mother. (X RT 991.) Others described Streeter as having pushed Buttler around and thrown things, including one incident several months earlier, in which Streeter allegedly pulled Buttler's hair and demanded sex from her. (X RT 994-998.) These incidents reflected a troubled domestic situation, but did not show a tortuous intent.

This case is closer to *People v. Bender*, *supra,* 27 Cal.2d 164, where the defendant was convicted of killing his wife by beating and strangling her, after a history of fighting and accusations of unfaithfulness between the two. This Court held that the evidence was insufficient to support a conviction of first degree murder by torture: "The killer, who, heedless of the suffering of his victim, in hot anger and with the specific intent of killing, inflicts the severe pain which may be assumed to attend strangulation, has not in contemplation of the law the same intent as one who strangles with the intention that his victim shall suffer." (*Id.* at p. 177.) The Court held that strangling the victim was not by itself, as a matter of

law, sufficient to prove the intent to torture. (*Id.* at p. 178.) In fact, in that case, the Court inferred that the killing was the result of a quarrel, rather than a premeditated and deliberate tortuous act:

> The picture suggests reasons for and the facts of quarreling between decedent and defendant but leaves only to conjecture and surmise the conclusion that defendant either arrived at or carried out the intention to kill as the result of a concurrence of deliberation and premeditation. Overwhelmingly opposed to such conjecture or surmise, and consistently evidenced by every circumstance, is the rationale of a tempestuous quarrel, hot anger, and a violent killing.

(*Id.* at pp. 178-179.)

Streeter's first degree murder conviction cannot be upheld on the prosecution's theory of murder perpetrated by torture. As stated above, the only reasonable interpretation of the evidence is that the killing resulted from an impulsive explosion of violence.

**F. Conclusion**

Given the absence of substantial evidence to support Streeter's first degree murder conviction under any of the theories presented by the prosecution, Streeter's conviction should be reversed. To hold otherwise would violate his rights under the Sixth, Eighth and Fourteenth Amendments and their state constitutional analogs.

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## VII.

## THE TRIAL COURT FAILED TO REQUIRE THE JURY TO REACH A UNANIMOUS AGREEMENT AS TO THE THEORY OF FIRST DEGREE MURDER OF WHICH APPELLANT WAS GUILTY

### A. Introduction

The trial court instructed the jury on first degree premeditated murder (CALJIC No. 8.20; CT 211), on first degree murder perpetrated by torture (CALJIC No. 8.24; CT 213) and on first degree murder perpetrated by lying in wait. (CALJIC No. 8.25; CT 212.) However, the court did not instruct the jury that it had to agree unanimously on the same type of first degree murder before convicting appellant.

The failure to require the jury to agree unanimously on a theory of first degree murder deprived appellant of his rights under Sixth, Eighth and Fourteenth Amendments and their state constitutional analogs to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, to a verdict of a unanimous jury, and to a fair and reliable determination that he committed a capital offense.

This Court recently rejected this argument in *People v. Cole, supra,* 33 Cal.4th at p. 1221. In doing so, the Court cited to other cases which rejected claims that pertained to the relationship between malice-murder and felony murder as opposed to malice-murder, torture murder and lying-in-wait murder. (*Ibid.*, citing *People v. Kipp* (2001) 26 Cal.4th 1100, 1131; *People v. Box* (2000) 23 Cal.4th 1153, 1212; *People v. Carpenter, supra,* 15 Cal.4th at pp. 394-395.) Appellant submits the issue deserves reconsideration in light of the charges and facts of this case.

## B. Lying-in-Wait Murder and Torture Murder Do Not Have the Same Elements as Premeditated and Deliberate Murder

Due process requires that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant has been charged. (*Winship, supra,* 397 U.S. at p. 364.) Although each state has great latitude in defining what constitutes a crime, once it has set forth the elements of a crime, it may not remove from the prosecution the burden of proving every element of the offense charged. (See *Sandstrom v. Montana, supra,* 442 U.S. at p. 524; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 704.)

In *Schad v. Arizona* (1991) 501 U.S. 624, the defendant challenged his Arizona murder conviction where the jury was permitted to render its verdict based on either felony murder or premeditated and deliberate murder. The Supreme Court reaffirmed the general principle that there is no requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict. (*Id.* at p. 632, citing *McKoy v. North Carolina* (1990) 494 U.S. 433, 439.) *Schad* acknowledged, however, that due process does limit the states' capacity to define different courses of conduct or states of mind as merely alternative means of committing a single offense. In finding that Schad was not deprived of due process the Court relied on Arizona's determination that under their statutory scheme "premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element." (*Schad, supra,* 501 U.S. at p. 637.) "If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, *rather than independent elements of the crime*, we simply are not at liberty to ignore that determination and conclude that the

alternatives are, in fact, independent elements under state law." (*Id.* at p. 636, italics added.) Thus, where a state has determined that the statutory alternatives are independent elements of the crime, *Schad* suggests that due process is violated if there is not unanimity as to all the elements.

California has followed a different course than Arizona. The various forms of first degree murder are set out in Penal Code section 189. These include not only felony murder but also murder perpetrated by lying in wait, murder perpetrated by torture, as well as murder by other means.[20] While this Court has stated that there is only one crime of murder in California (see e.g., *People v. Davis* (1995) 10 Cal.4th 463, 515; but see *People v. Dillon* (1983) 34 Cal.3d 441, 476, fn. 23 [separate statutory sources for malice-murder and felony murder]), and that various forms of murder may be described as two theories of that one crime (see *People v. Pride* (1992) 3 Cal.4th 195, 249 [re malice-murder and felony murder]), the various forms and/or theories of murder have different elements. When the state seeks to convict a defendant of a particular form of murder, it cannot remove one of those elements without violating due process under *Winship* and *Schad.*

Lying-in-wait murder and torture murder under section 189 have different elements than premeditated and deliberate murder. For lying-in-wait murder, "the prosecution must prove the *elements* of concealment of

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[20] Section 189 at the time of appellant's offense read as follows: "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, kidnaping, train wrecking, or any act punishable under section 286, 288, 288a, or 289, is murder of the first degree; and all other kinds of murders are of the second degree."

purpose together with 'a substantial period of watching and waiting for an opportune time to act, and . . . immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.'" (*People v Stanley, supra,* 10 Cal.4th at p. 795, italics added, quoting *People v. Morales, supra,* 48 Cal.3d at p. 557.) While appellant argues below that this Court's construction has essentially negated the difference between the elements of lying in wait (murder and special circumstance) and premeditation and deliberation (see Claim X), a majority of this Court continues to maintain there is a distinction, recently holding that "any overlap between the premeditation element of first degree murder and the durational element of the lying in wait special circumstance does not undermine the narrowing function of the special circumstance." (*People v. Stevens, supra,* 41 Cal.4th at pp. 203-204.)

And for torture murder, "the elements of torture murder are: (1) acts causing death that involve a high degree of probability of the victim's death; and (2) a willful, deliberate, and premeditated intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose." (*People v. Cook, supra,* 39 Cal.4th at p. 602.)

For first degree malice murder the prosecution must prove premeditation *and* deliberation, whereas "the Legislature in adopting the lying-in-wait provision only required that the defendant be shown to have exhibited a state of mind which is 'equivalent to,' and not identical to, premeditation *or* deliberation." (*People v. Ruiz, supra,* 44 Cal.3d at p. 615, italics added.) Torture murder does not require a premeditated intent to kill, but requires that the intent to inflict extreme and prolonged pain be the result of calculated deliberation. (*People v. Steger, supra,* 16 Cal.3d at p. 546.)

"Calling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813, 819.) One consequence "is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." (*Ibid.*) The analysis is different for facts which are not elements in themselves but rather theories of the crime – alternative means by which elements may be established. The Supreme Court in *Richardson v. United States*, *supra*, 526 U.S. at p. 817, explained this distinction and also showed why *Schad* is inapplicable in the present case. In *Richardson*, the Court cited *Schad* as an example of a case involving *means* rather than *elements*:

> The question before us arises because a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime. *Schad v. Arizona*, 501 U.S. 624, 631-632, . . . . Where, for example, an element of robbery is force or the threat of force, some jurors may conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement -- a disagreement about means -- would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely that the defendant had threatened force.

(*Richardson v. United States*, *supra*, 526 U.S. at p. 817.)

By contrast, and as shown above, this case involves three forms of murder which California has determined are not merely separate theories of murder, but contain separate elements. Evidence of premeditation and deliberation, and evidence of concealment of purpose and watchful waiting,

and evidence to inflict extreme pain, are not simply means, or "brute facts," that may be used to establish a common element of a single crime. Rather, such evidence goes to establish separate elements of three forms of murder. The jury should not have been permitted to convict appellant of first degree murder without being unanimous as to whether the homicide was premeditated and deliberate murder or lying-in-wait murder or torture murder.

This situation violated the bedrock principle that all elements of an offense must be found beyond a reasonable doubt by the trier of fact, (*Sandstrom, supra,* 442 U.S. 510), by a unanimous jury. (See e.g., *Burch v. Louisiana* (1979) 441 U.S. 13, 139.) The United States Supreme Court recently emphasized both the due process requirement that each element of a crime be proven beyond a reasonable doubt as well as the Sixth Amendment requirement that a jury determine that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 466-477, 490.) The Supreme Court held it unconstitutional for a state to increase a defendant's penalty based on a fact that was not properly found by the jury. (*Id.* at p. 490; *Blakely v. Washington* (2004) 542 U.S. 296, 306-310.) These principles were reemphasized and expanded in *Ring v. Arizona* (2002) 536 U.S. 584, 589. (See also *United States v. Booker* (2005) 543 U.S. 220, 230-233; *Cunningham v. California* (2007) 549 U.S. 270.)

The failure to require unanimous agreement on the elements of first degree murder also violated appellant's state statutory and constitutional rights to trial by a unanimous twelve person jury that has found every element of the crime alleged to be true beyond a reasonable doubt. (See Cal. Const, art. I § 16; Pen. Code §§ 1163, 1164; see also *People v.*

*Wheeler, supra,* 22 Cal.3d at p. 265; *People v. Collins* (1976) 17 Cal.3d 687, 693.) This fundamental State right is protected under the due process and equal protection clauses of the Fourteenth Amendment. (See *Hicks v. Oklahoma, supra,* 447 U.S. 343; *Bush v. Gore* (2000) 531 U.S. 98; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295.)

### C. The Error Was Prejudicial

Because the jurors were not required to reach unanimous agreement on the elements of first degree murder, it is impossible to conduct harmless error analysis. The failure to properly instruct the jury was structural error, and reversal of the entire judgment is therefore required. (See *Sullivan v. Louisiana, supra,* 508 U.S. at p. 280.)

Furthermore, this was not simply an abstract error. There was not compelling evidence supporting any of the three forms of murder over the others, and reasonable jurors could have credited evidence supporting one form while rejecting evidence supporting the others. As argued in the previous claim, there are legitimate arguments establishing that there was insufficient evidence to find any of the three theories of murder beyond a reasonable doubt. There is nothing to suggest that the jury unanimously agreed the crimes were either premeditated murder or lying-in-wait murder or torture murder. In fact, the prosecutor specifically told the jury that they did not need to be unanimous with regard to the theory of murder:

> So there are three paths to first degree murder . . . You don't have to have all three of these by any means. You can have just one of them and get to first degree murder. So if you are uncomfortable with any one of them, the notion of premeditation or lying in wait or torture, if you don't feel we've proven that to you beyond a reasonable doubt, then disregard that and go to the other. You don't have to be unanimous in

> your agreement as to which degree it is. [sic] It does have to be unanimous to be first degree, if you choose that, but the path of getting there doesn't.

(XI RT 1068.) The prosecutor repeated this in virtually the last words of his closing argument: "If you are uncomfortable with any one of them, certainly you have one of them to choose for first degree murder . . . ." (XI RT 1106.)

The fact that the jury found the two special circumstances true – torture murder and lying-in-wait murder – does not render the failure to require unanimity for a theory of first degree murder harmless. As discussed above, the trial was marred by the introduction of highly prejudicial but irrelevant evidence that obscured the jury's factfinding process. (See Claim IV.) In addition, as argued below in Claims IX and XII, the jury's special circumstance findings were based on flawed instructions that misled the jury. The special circumstance findings should therefore not be relied upon to cure the error in failing to require unanimity of the theory of first degree murder.

The prosecution presented evidence in support of three different forms of murder, and argued each form to the jury. The court should have required the jurors to unanimously agree, if they could, on one of the three forms in order to convict appellant. Because the court failed to do so, the first degree murder conviction must be reversed.

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## VIII.

## THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE JURORS' FINDING OF THE SPECIAL CIRCUMSTANCE ALLEGATIONS OF LYING IN WAIT

### A. Introduction

As discussed above, due process requires the prosecution to prove beyond a reasonable doubt every element of the crime with which the defendant is charged. The reasonable doubt standard is fully applicable to special circumstance proceedings. In addition, a criminal defendant's rights to a fair trial and to reliable guilt and penalty determinations under the Sixth, Eighth and Fourteenth Amendments and their state constitutional analogs are also violated when criminal sanctions are imposed based on legally insufficient proof.

As this Court has held, "[i]n reviewing a claim that there was insufficient evidence of the special circumstances to find them true, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the [allegations] beyond a reasonable doubt." (*People v. Ochoa* (1998) 19 Cal.4th 353, 413-414, internal quotes and citation omitted.) Reviewed in the light most favorable to the judgment, "the record must contain reasonable and credible evidence of solid value," such that a reasonable trier of fact could find the special circumstance to be true. (*People v. Stevens, supra,* 41 Cal.4th at p. 201, quoting *People v. Johnson, supra,* 26 Cal.3d at p. 578.)

Viewing the evidence in the light most favorable to the prosecution, the facts do not support the lying-in-wait special circumstance. Streeter asked Buttler to meet him so that he could visit with their son. Once she arrived, he immediately took their son and walked toward his car. She

followed him, they argued, and a physical altercation ensued in which Streeter beat Buttler. Streeter returned to his car and retrieved a can of gasoline which he poured on her car and then on her. After further fighting he returned to his car again to get a lighter. He then chased her, caught up to her and lit her on fire.

By no stretch of the imagination can this be characterized as a murder "while" lying in wait. As discussed in Claim VI, there was no surprise attack from a position of advantage immediately preceded by a period of waiting and watching for an opportune time to act. At most, Streeter was waiting and watching for Buttler to arrive, and in asking Buttler to meet him so he could visit with their son, concealed his true purpose, which was to take his son from her. But there is no evidence that Streeter's concealed purpose was a murderous one.

Moreover, what is required for the special circumstance is that the lethal act must immediately follow the period of watchful waiting, or there must be a continuous flow of events from the time of waiting to the acts which resulted in death. That simply did not happen here, and there is no prior case in which events remotely similar to this case have resulted in the sustaining of a lying-in-wait special circumstance finding. Any construction of the lying-in-wait special circumstance that would encompass the facts of this case would render the special as applied unconstitutionally broad.

The findings must be reversed, and because, as discussed below, the other special circumstance is invalid, unconstitutional and improperly found, the death sentence must be vacated.

## B. The Evidence Was Legally Insufficient to Support the Lying-In-Wait Special Circumstance

The question whether a lying-in-wait special circumstance has occurred "is often a difficult one which must be made on a case-by-case basis, scrutinizing all of the surrounding circumstances." (*People v. Morales, supra,* 48 Cal.3d at pp. 557-558.) It requires "an intentional murder, committed under circumstances which include: (1) concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." (*Id.* at p. 557; see *People v. Carpenter, supra,* 15 Cal.4th at p. 388.)

The absence of substantial evidence for any of these elements was addressed in Claim VI above, which argued that there was insufficient evidence to support a first degree murder conviction based on lying in wait. Since the special circumstance unlike lying-in-wait murder requires intent to kill – as opposed to a wanton and reckless intent to inflict injury likely to cause death – a fortiori, there is insufficient evidence to support a finding beyond a reasonable doubt of the requisite elements for the lying-in-wait special circumstance.

Furthermore, at the time of Streeter's trial, the lying-in-wait special circumstance also required that the killing be either contemporaneous with or "follow directly on the heels of the watchful waiting." (*People v.*

*Morales*, *supra*, 48 Cal.3d at p.558.)[21] In other words, the murder must have occurred without any "cognizable interruption" following the period of lying in wait. (*Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, 1011.) Either the killing must take place during the waiting period, or the lethal acts must begin at, and flow continuously from, the moment the concealment and watchful waiting ends. (*Ibid.*)

In *Domino*, the court concluded that the lying-in-wait special circumstance could not be sustained even though immediately after the period of concealment and watchful waiting, the defendant captured, stripped, handcuffed and beat the victim, and then killed him one-to-five hours later. (*Domino v. Superior Court*, *supra*, 129 Cal.App at p. 1011.) The murder was not committed "while" lying in wait, as the Penal Code required, because there was a time gap between the ambush and the murder. (See also *People v. Merkouris* (1956) 46 Cal.3d 540 [defendant had not lain in wait even though he waited near the crime scene for several days before the crime, because he was not observed waiting on the day of the crime].)

In *Houston v. Roe* (9th Cir. 1999) 177 F.3d 901, 907-908, the Ninth Circuit found that "the temporal requirement" contained in the special circumstance of lying in wait, as explained in *Domino*, saved the circumstance from being unconstitutionally vague. Nonetheless, Proposition 18, adopted by the voters on March 7, 2000, changed the word "while" in the lying-in-wait special circumstance to "by means of," so that

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[21] At the time of this offense and until March 2000, statutory language distinguished between lying in wait as a ground rendering a murder first-degree (section 189, "murder which is perpetrated *by means of* . . . lying in wait) and lying-in-wait as a special circumstance (former section 190.2, subd. (a)(15),"[t]he defendant intentionally killed the victim *while* lying in wait."(Italics added).)

it would conform with the lying-in-wait language defining first-degree-murder, thus eliminating the immediacy requirement that *Houston* and *Domino* had placed on this special circumstance. (See Legis. Analyst's analysis of Prop. 18, Mar. 7, 2000 Ballot Pamphlet; Chief Counsel, Rep. On Sen. Bill 1878 to Assem. Comm. On Public Safety, June 23, 1998 hearing, pp. 10-11.) The analysis noted that the courts had,

> generally interpreted [while lying-in-wait] to mean that, in order to qualify as a special circumstance, a murder must have occurred immediately upon a confrontation between the murderer and the victim. The courts have generally interpreted this provision to rule out a finding of a special circumstance if the defendant waited for the victim, captured the victim, transported the victim to another location, and then committed the murder.

(*Ibid.*)

It concluded: "This change would permit the finding of a special circumstance *not only in a case in which a murder occurred immediately upon a confrontation between the murderer and the victim*, but also in a case in which the murderer waited for the victim, captured the victim, transported the victim to another location, and then committed the murder." (Analysis of Prop.18, *supra*, at pp. 10-11, italics added.)

Streeter cites this legislation without comment on its constitutionality, but to underscore the element of immediacy required to prove the lying-in-wait special circumstance at the time of Streeter's trial: The prosecution had to prove that Buttler's killing occurred "immediately upon a confrontation between the murderer and the victim." (Analysis of Prop.18, *supra*, at pp. 10-11.) Even if a juror could have found lying in wait in this case, he or she could not reasonably conclude that no cognizable

interruption separated the lying in wait from the time of the killing. Indeed, if anything, the prosecution's theory *included* a "cognizable interruption." The incident escalated from a domestic dispute over whether Streeter could take their son with him, and proceeded in several stages: (1) Streeter grabbed his son and walked away from Buttler; (2) Buttler followed him and initiated an argument which resulted in a physical altercation; (3) Streeter returned to his car to get gasoline; (4) Streeter went back to where Buttler was and poured gasoline on her car and then on her; (5) Streeter beat Buttler further; (6) Streeter pulled Buttler back toward his car, and then let her go while he retrieved a lighter from his vehicle; (7) Streeter chased Buttler, caught up with her and lit her on fire.

In *People v. Lewis*, *supra*, this Court noted several cases which have relied on the *Domino* formulation – that the murder must occur "during" the period of concealment and watchful waiting. (*People v. Lewis, supra,* 43 Cal.4th at p. 513, citing, e.g., *People v. Sims, supra,* 5 Cal.4th at p. 434, *People v. Webster*, 54 Cal.3d at p. 411, and *People v. Gutierrez, supra,* 28 Cal.4th at p. 1149.) The Court went on to find that the killings in *Lewis* did not occur during – or in the course of – the period of concealment and watchful waiting. (*Id.* at pp. 513-514.) In *Lewis,* the defendants had kidnapped the victims while lying in wait, but killed them after several intervening events. The Court held, "although the jury could have concluded that defendant and his accomplices lay in wait intending to rob and to kill thereafter, and that they began carrying out that intent to rob immediately after the lying in wait ended, there was no evidence that the defendants carried out their intent to *kill* immediately." (*Id.* at p. 514, original italics.)

The *Lewis* Court emphasized that the "concealment must be

contemporaneous with a substantial period of watching and waiting for an opportune time to act, and followed by a surprise attack on an unsuspecting victim from a position of advantage." (*Id.* at pp. 514-515.) Even though, in that case, the defendant concealed a deadly purpose, "the evidence suggests each was killed when, and only when his or her ATM withdrawal limit had been reached and the victim had been driven to a suitable location for killing." (*Id.* at p. 515.) There was no evidence in *Lewis* that while concealing a deadly purpose the defendant "watched and waited for an opportune time to kill the victims." (*Ibid.*)

Here, even under the prosecution's implausible theory of the case that Streeter watched and waited for Buttler to arrive and then concealed his purpose to kill her after the period of watchful waiting ended up until he poured gasoline on her (XI RT 1079, 1082), the lying-in-wait special circumstance must fail because the concealment and watchful waiting period were not contemporaneous.

In addition, as in *Lewis*, there was no evidence that the victim was surprised. The Court in *Lewis* held that "the evidence suggests that each victim must have been aware of being in grave danger long before getting killed." (*People v. Lewis, supra*, 43 Cal.4th at p. 515.) One of the victims was forced into a dumpster and pleaded for his life before being shot. Another tried to escape, "an indication that she feared for her life." A third victim said she knew she was going to be killed and challenged the defendant to kill her. (*Ibid.*) As discussed above, in this case, Buttler was certainly aware that she was in danger for her life. According to witnesses, she yelled for help and repeatedly tried to run away from Streeter. Buttler tried to get away before gasoline was poured on her and again when Streeter returned to his car to get a lighter. There was no evidence that the

ultimate lethal acts were a surprise.

The evidence was insufficient to prove an intentional murder, committed under circumstances that include: (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.

### C. The Lying-in-Wait Special Circumstance Cannot Be Applied to the Facts of This Case Without Making It Unconstitutionally Vague and Overbroad

As argued below, the lying-in-wait special circumstance is unconstitutional because it fails to provide the narrowing function required by the Eighth Amendment and fails to ensure that there is a meaningful basis for distinguishing those cases in which the death penalty is imposed from those which it is not. (See Claim X, *infra*.) In addition to appellant's challenge to the constitutionality of this special circumstance as written, appellant also contends that it cannot apply to the facts of this case consistent with these principles. For in order for this Court to find that there is sufficient evidence in this case to sustain the lying-in-wait special circumstance, it would have to find that the required element of concealment of purpose does not have to be a murderous one and need not be contemporaneous with watchful waiting, that the watchful waiting does not have to be for an opportune time to attack the victim and that there does not have to be a surprise attack immediately after the period of watching and waiting.

Such a construction of the lying-in-wait special circumstance would fail to "genuinely narrow the class of persons eligible for the death penalty" or "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens*

(1983) 462 U.S. 862, 876.) Thus, if this Court were to find sufficient evidence to sustain the special circumstance in this case it would violate appellant's Eighth and Fourteenth Amendment rights.

### D. Conclusion

This Court must strike the lying-in-wait special circumstance. As discussed below, the torture-murder special circumstance must also be vacated, and therefore, the death judgment must be reversed.

## IX.

## THE LYING-IN-WAIT INSTRUCTIONS OMITTED KEY ELEMENTS OF THE SPECIAL CIRCUMSTANCE, AND WERE ERRONEOUS, INTERNALLY INCONSISTENT, AND CONFUSING

### A. Introduction

The jury was given the then-standard CALJIC instruction on the lying-in-wait special circumstance.[22] This instruction was not only

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[22] CALJIC No. 8.81.15 reads as follows: To find that the special circumstance, referred to in these instructions as murder while lying in wait, is true, each of the following facts must be proved: 1. The defendant intentionally killed the victim, and 2. The murder was committed while the defendant was lying in wait. The term "while lying in wait" within the meaning of the law of special circumstances is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise [even though the victim is aware of the murderer's presence]. The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation and deliberation. Thus, for a killing to be perpetrated while lying in wait, both the concealment and watchful waiting as well as the killing must occur during the same time period, or in an uninterrupted attack commencing no later than the moment concealment ends. If there is a clear interruption separating the period of lying in wait from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the uninterrupted lethal events, the special circumstance

(continued...)

confusing and contradictory, but it failed to explain to the jury that the key elements of the special circumstance – concealment of purpose and watchful waiting for a time to act – referred to a concealed intent to kill and waiting for a time to launch a lethal attack. At the behest of the prosecutor, the jury was given additional instructions which only succeeded in further misleading and confusing the jury, as well as lightening the prosecution's burden of proof.

These instructions as applied in this case are constitutionally flawed, violating Streeter's rights to due process, a fair trial, and to an individualized, non-arbitrary and reliable sentencing determination as protected by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their state constitutional analogs.

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[22](...continued)
is not proved. [A mere concealment of purpose is not sufficient to meet the requirement of concealment set forth in this special circumstance. However, when a defendant intentionally murders another person, under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, the special circumstance of murder while lying in wait has been established.] [The word "premeditation" means considered beforehand.] [The word "deliberation" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed cause of conduct.] (CT 233-234.)

### B. The Instructions Failed To Inform the Jury That the Concealed Purpose Must Be To Kill the Victim and That the Act for Which the Defendant Was Watching and Waiting Must Be a Lethal Attack

CALJIC No. 8.81.15 contains a fatal flaw under the circumstances of this case: It did not explain that the required concealment of purpose must be an intent to kill and that the act for which the defendant is watching and waiting must be the lethal attack. While in other cases this may not have been problematic because there is often no issue as to whether or not the concealed purpose at the time of watchful waiting was to kill the victim, in this case, the failure of the instructions to clarify the nature of the defendant's concealed purpose and the act upon which the defendant was waiting requires reversal.

As discussed above, the evidence shows that Streeter indeed watched and waited for Buttler to arrive at the Chuck E. Cheese parking lot. Buttler was meeting Streeter at the location so that Streeter could see his son, and as she told her older son, she believed that they would all go to Streeter's uncle's house for the visit. (VIII RT 765, 768.) Although Streeter contended that he only took his son upon Buttler's arrival because he was angry she was late in arriving (IX RT 892), the jury could have drawn an inference from his actions that his true purpose in asking Buttler to meet him was to take his son away from her for some period of time. In addition, the jury could have found that Streeter had entertained an intent to kill only after he and Buttler engaged in a drawn out verbal and physical altercation when he went back to his car for the container of gasoline.

Based on this scenario, supported by the evidence, there was no lying in wait because Streeter did not conceal a murderous intent when he asked Buttler to meet him, and was only watching and waiting for an opportune

time to take his son, not to gain a position of advantage in order to attack Buttler by surprise. However, based on the standard CALJIC No. 8.81.15 instruction, the jury could have found Streeter guilty of the lying-in-wait special circumstance. For the same reasons, the jury was misinstructed with regard to lying in wait murder as CALJIC No. 8.25, which was given to the jury in this case (CT 212), and contains the same fundamental flaw.

CALJIC No. 8.81.15 states that each of the following facts must be true: (1) the defendant intentionally killed the victim; and (2) the murder was committed while the defendant was lying in wait. (CT 234.) Thus, at the start of the instruction, intent to kill is given as a factor independent from lying in wait. The instruction goes on to define lying in wait "as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence." (*Ibid.*) At the conclusion of the instruction, the jury is told that "when a defendant intentionally murders another person, under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, the special circumstance of murder while lying in wait has been established." (CT 234-235.)

The instruction does not explain that the "act" is one designed to kill the victim, that the concealed purpose is to kill the victim or that it is a lethal attack which must take the person by surprise by secret design. Therefore, even assuming the jury could find that Streeter intended to kill Buttler by the fact that he poured gasoline on her and lit her on fire, nothing in this instruction would tell the jury that the defendant's concealed purpose

must be to kill – rather than to take his son away – and that when he watched and waited for Buttler to arrive it had to be part of a secret design to attack her by surprise, rather than to snatch his son out of the car.

The instruction also states that the lying in wait "need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation." (CT 234.) However, the jury would not necessarily understand that the premeditation and deliberation referred to was in contemplation of a murder. Later in the instruction, premeditation is defined as "considered beforehand" and deliberation is defined as "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed cause of conduct." (CT 235.) This does nothing to inform the jury that it is the murder that must be considered beforehand or as the result of careful thought. The jury had previously been given other instructions in which premeditation and deliberation were required, including lying in wait murder (CT 212) and torture murder (CT 213), neither of which required intent to kill. Torture murder specifically referred to deliberate and premeditated intent to inflict pain. (*Ibid.*) It is only the first degree murder jury instruction which stated that for first degree murder the killing itself must be the result of premeditation and deliberation. (CT 211.) The jury, therefore could have found there was premeditation and deliberation – but for a non-murderous purpose.

The instruction also states that the concealment and watchful waiting "as well as the killing must occur during the same time period" and that a "clear interruption separating the lying in wait from the period during which the killing takes place" would result in a failure of proof of the special

circumstance. (CT 234.) A "surprise attack on an unsuspecting victim from a position of advantage" must occur "immediately" after the period of watching and waiting. (CT 234-235.) However, as the prosecution's additional instruction told the jury, "[a] brief interval of time between the killer's first appearance and the acts which cause the killing do not necessarily negate a surprise attack, so long as there is a continuous flow in the culpable state of mind between the period of watchful waiting and the homicide." (CT 233.) As discussed below, it is never explained to the jury what "culpable state of mind" is required. So, again, the jury would have no way of knowing that the defendant is required to maintain an intent to kill from the time of the period of watchful waiting.

In sum, Streeter's jury would not understand that in order to find murder while lying in wait it would have to find that Streeter's purpose in asking Buttler to meet him was part of a secret design to kill her by surprise attack, and that when he waited for her to arrive it was to secure a position of advantage in accordance with this plan. As described above, there was insufficient evidence to support such a theory. The only way the jury reasonably could find Streeter guilty beyond a reasonable doubt of first degree murder under a lying-in-wait theory and make a true finding of the lying-in-wait special circumstance was because the instructions failed to properly advise them of the required elements.

### C. The Instructions Eliminated the Element of Immediacy

As discussed above, in *Domino, supra*, the Court of Appeals construed the term "while" to mean that "the killing must take place during the period of concealment and watchful waiting or the lethal acts must begin at and flow continuously from the moment the concealment and watchful waiting ends. If a cognizable interruption separates the period of

lying in wait from the period during which the killing takes place, the circumstances calling for the ultimate penalty do not exist." (*Domino v. Superior Court*, *supra,* 129 Cal.App.3d at p. 1011.) CALJIC No. 8.81.15 essentially tracks this language and advises the jury: "[i]f there is a clear interruption separating the period of lying in wait from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the uninterrupted lethal events, the special circumstance is not proved." (CT 234.) Thus, for the lying-in-wait special circumstance to be found, there cannot be any "cognizable interruption" following the period of lying in wait. (*Domino, supra,* 129 Cal.App.3d at p. 1011.) If the killing does not occur during the period of concealment and watchful waiting, it must, at minimum flow continuously from the moment the concealment and watchful waiting ends. (*Ibid.*)

The special circumstance of lying in wait, thus, does not require that the defendant strike his blow from the place of concealment. (*People v. Hardy*, *supra*, 2 Cal.4th at p. 164.) "As long as the murder is immediately preceded by lying in wait, the defendant need not strike at the first available opportunity, but may wait to maximize his position of advantage before taking the victim by surprise." (*People v. Ceja, supra,* 4 Cal.4th at p. 1145.) The key is that there is an uninterrupted flow of events and that the lethal attack come as a surprise after the interruption.

Thus, in *Morales*, this Court found that "the defendant's lethal acts flowed continuously from the moment he commenced his surprise attack." (*People v. Morales*, 48 Cal.3d at p. 558.) In that case, no "'cognizable interruption' occurred between the period of watchful waiting and the commencement of the murderous and continuous assault which ultimately caused [the victim's] death." (*Ibid.*) In *Michaels*, the Court focused on the

"uninterrupted flow of events" from the time the defendant emerged from concealment. As the Court stated: "If the only interruption was the time required for defendant and [coperpetrator] to emerge from their hiding place, cross the apartment building's parking lot, and enter the victim's apartment, that interruption would not preclude application of the special circumstance of lying in wait. The victim's death would have followed in a continuous flow from the concealment and watchful waiting." (*People v. Michaels, supra,* 28 Cal.4th at p. 517.)

Here, the jury was told in the standard CALJIC instruction that where there is no immediate killing, the special circumstance can still be proved as long as there is an "uninterrupted attack commencing no later than the moment concealment ends" where there is a "continuous flow of the uninterrupted lethal events." The jury was also told, through the prosecutor's special instruction that "the continuous flow" only need be "the culpable mental state" regardless of the actual events that had occurred. This special instruction stated that "[a] brief interval of time between the killer's first appearance and the acts inflicted which caused the killing" would not negate the necessary elements of the special circumstance "as long as there is a continuous flow" not of the lethal events, but of "the culpable state of mind between the period of watchful waiting and the homicide." (CT 233.)

The first problem with this instruction, as noted above, is that it is not clear to what culpable state of mind the instruction refers.[23] The special

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[23] The instruction cites *People v. Carpenter, supra,* 15 Cal.4th 312, in which the necessary culpable mental state was intent to kill. In *Carpenter,* this Court rejected appellant's contention that the evidence only (continued...)

instruction merely refers to a "culpable state of mind between the period of watchful waiting and the homicide." Because the lying in wait instructions do not adequately explain what culpable mental state the defendant must have during the time prior to the lethal attack, the jury could equate culpable mental state with one that is non-lethal or merely deceitful, e.g., that Streeter's intent was to separate Buttler from her son through a ruse.

Second, unlike the cases cited above which discuss a continuous flow of events, the jury in appellant's case would not have understood that a surprise attack must still occur at the conclusion of the watchful waiting, and as *Lewis* explained, that the concealment must be contemporaneous with the watchful waiting. (*People v. Lewis*, *supra*, 43 Cal.4th at pp. 514-515.) By permitting the jury to link the lethal acts with some "culpable mental state" of appellant, the prosecutor was able to convince the jury to find lying in wait despite a cognizable interruption in events. In other words, even if the jury determined that the watchful waiting ended well before the concealment of purpose and that there was no surprise attack, the jury could still find lying in wait based on the instructions. By extending the flow to the point when the lethal acts commenced despite the break in events, the instruction negated the critical aspect of the lying in wait special circumstance – murder "while" lying in wait.

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[23](...continued)
showed intent to rape, not to kill, at the time of the lying in wait, holding that the jury reasonably could have found a dual intent at the time of lying in wait – to rape and then kill – and therefore, there was no lapse in the culpable mental state where the defendant "intending first to rape and second to kill, then immediately proceeds to carry out that intent (or attempts to rape and then kills) . . ." (*Carpenter*, *supra,* 15 Cal.4th at p. 389.)

The prosecution's special instruction on a continuous state of mind served to fill an evidentiary gap caused by several intervening events – from the period of watchful waiting to the pouring and then igniting of gasoline – during which appellant was not seeking to maximize a position of advantage before taking the victim by surprise: (1) Streeter grabbed his son and walked away from Buttler; (2) Buttler followed him and initiated an argument which resulted in a physical altercation; (3) Streeter returned to his car to get gasoline; (4) Streeter went back to where Buttler was and poured gasoline on her car and then on her; (5) Streeter beat Buttler further; (6) Streeter pulled Buttler back toward his car, and then let her go while he retrieved a lighter from his vehicle; (7) Streeter chased Buttler, caught up with her and lit her on fire. Even the prosecutor argued that the murder only happened after a series of intervals: "He takes little baby Howie out of the car . . . after he beat her to the ground, he could have stopped. But no, he went back to the trunk of his car, took the key out of his belt, unlocked the back of the trunk, opened the trunk, took the gasoline out, took the cap off the gasoline, walked back over to her, had a struggle with Mr. Jasso, and broke free of him, and still did this stuff." (XI RT 1073.)

In order to convince the jury that this constituted lying in wait, the prosecutor first quoted the standard instruction which requires a continuous flow of events, a "continuous flow in the action." (XI RT 1080.) He then transformed this to a continuous flow in the defendant's state of mind, stating: "You know, we talked about having a surprise attack. So long as there is a continuous flow in the culpable state of mind between the homicide and the period of watchful waiting." (XI RT 1082.) He went on:

> In this case we have that situation. We have
> Mr. Streeter in his lying in wait, his waiting and

> watching for a time, to be able to commit this attack, and he does certain other things before he actually finally gets the gas and does it. Always a continuous flow of what he had in mind. He started off thinking he was going to kill her. Brought the gas. Had the lighter ready to do it. Wrote the note. So his culpable state of mind is a continuous flow until he finally did this act, right?

(*Ibid.*)

While the jury may have found sufficient evidence of lying in wait based on the prosecution's theory, this would have omitted key elements of both lying-in-wait murder and the lying-in-wait special circumstance: the immediacy of attack after the watchful waiting ends and the element of surprise.

### D. The Instructional Errors Violated Appellant's Constitutional Rights and Were Prejudicial

In *People v. Castillo* (1997) 16 Cal.4th 1009, this Court recognized that misleading instructions "implicate the court's duty to give legally correct instructions. Even if the court has no *sua sponte* duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly." (*Id.* at p. 1015.) Here, the court violated that duty, and the instructions so misled and confused the jury and omitted key elements that the instructions violated appellant's federal constitutional rights under the Sixth, Eighth and Fourteenth Amendments to due process of law, a fair trial and an individualized, reliable and non-arbitrary determination of eligibility for the death penalty and the appropriate sentence.

The Fifth and Fourteenth Amendment guarantees that no one will be deprived of liberty without due process of law, and the Sixth Amendment guarantee of a trial by jury, "require[s] criminal convictions to rest upon a

jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (*United States v. Gaudin* (1995) 515 U.S. 506, 509-510, citing *Sullivan v. Louisiana, supra,* 508 U.S. at pp. 277-278; see also *People v. Flood* (1998) 18 Cal.4th 470, 491.) Thus, a jury verdict based on instructions that relieve the prosecution of its burden of proving beyond a reasonable doubt each element of the charged crime and allow the jury to convict without properly finding the facts supporting each element of that crime is federal constitutional error, and the *Chapman* test for reversible error applies. (*Sullivan, supra,* 508 U.S. at pp. 277-278; *Carella v. California* (1989) 491 U.S. 263, 265; *People v. Flood, supra*, 18 Cal.4th at pp. 479-480, 491; *People v. Kobrin* (1995) 11 Cal.4th 416, 422-423 & fn. 4.)

In addition, a vaguely worded criminal statute violates the due process clause of the Fourteenth Amendment. (*Lanzetta v. New Jersey* (1939) 306 U.S. 451, 453.) As this Court explained, "'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.'" (*People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 801, quoting *Lanzetta v. New Jersey*, *supra*, 306 U.S. at p. 453.) Furthermore, "'[a] statute must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as a standard for the ascertainment of guilty by courts called upon to apply it.'" (*Id.* at 801, quoting *People v. McCaughan* (1957) 49 Cal.2d 409, 414.) "The generally accepted criterion [for determining the existence of a due process violation] is whether the terms of the challenged statute are 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" (*Engert*, *supra,* 31 Cal.3d at p. 801 [citation].)

In addition, a failure to adequately instruct on the elements of a special circumstance allegation, as was done here, may also violate the Eighth Amendment. (*Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1319.) That amendment requires that "a jury's discretion be sufficiently channeled to allow for a principled distinction between the subset of murders for which the sentence of death may be imposed and the majority of murders which are not subject to the death penalty." (*Ibid.*, citing *Zant v. Stephens, supra,* 462 U.S. at pp. 876-877 and *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429.) Moreover, a special circumstance that is vague will fail to adequately inform the jury what it must find to impose the death penalty, and as a result, will leave the jury with the kind of open-ended discretion that leads to an arbitrary death sentence. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.) Put differently, if a jury is not adequately informed of the elements that must exist in order for it to find a special circumstance true, the special circumstance may fail to provide a principled basis for distinguishing capital murder from any other murder. (*Wade v. Calderon, supra*, 29 F.3d at pp. 1321-1322.)

The instructional errors described herein require reversal unless the errors "surely" did not contribute to the verdict. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.) Streeter argued above that there was insufficient evidence to sustain the first degree murder conviction based on lying in wait and the lying-in-wait special circumstance. Even if this Court disagrees, it certainly cannot be said that there was strong evidence of the elements of lying in wait, namely, concealment of purpose, a watchful waiting for an opportune time to attack, and the lack of a cognizable interruption in the lethal events to negate a surprise attack. Although the prosecutor posited certain theories in this regard in an effort to support his

theory of lying in wait, they were based on speculation and misconstruction of the law rather than evidence. It is at least as likely that there was an explosion of violence which ultimately resulted in the victim's death, rather than a pre-planned surprise attack. Under such a scenario, which is no more speculative or conjectural than the other one surmised by the prosecution, the jury could have found lying-in-wait murder as well as the lying-in-wait special circumstance based on the instructions even though the homicide would not have occurred by means of or while lying in wait.

In short, the People cannot establish beyond a reasonable doubt that the jury's first degree murder conviction based on lying in wait or the special circumstance finding would have been the same absent these instructional errors or that the errors "surely" did not contribute to those verdicts. (*Sullivan, supra*, 508 U.S. at p. 279).

With regard to first degree murder, because a legally erroneous theory of conviction (based on the lying-in-wait instruction) was presented to the jury, reversal is required because this Court cannot determine based on the trial record that the conviction actually, if not solely, rests on a legally proper theory. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129.)

Under any appropriate standard of review, appellant was prejudicially deprived of his Sixth, Eighth and Fourteenth Amendment rights. The first degree murder verdict, the lying-in-wait special circumstance and the death sentence must be reversed.

## X.

## THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONAL BECAUSE IT FAILS TO PERFORM THE NARROWING FUNCTION REQUIRED BY THE EIGHTH AMENDMENT AND FAILS TO ENSURE THAT THERE IS A MEANINGFUL BASIS FOR DISTINGUISHING THOSE CASES IN WHICH THE DEATH PENALTY IS IMPOSED FROM THOSE WHICH IT IS NOT

### A. Introduction

"To avoid th[e] constitutional flaw [of arbitrary and capricious sentencing], an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens, supra,* 462 U.S. at p. 876.) Under California law, the "special circumstances" enumerated in section 190.2 "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 457, 468; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 975.) The lying-in-wait special circumstance (§ 190.2, subd. (a)(15)), as interpreted by this Court, violates the Eighth Amendment by failing to narrow the class of persons eligible for the death penalty, and by failing to 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.'" (*Godfrey v. Georgia, supra,* 446 U.S. at p. 427, quoting *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).)

## B. The Lying-in-Wait Special Circumstance Does Not Narrow the Class of Death-Eligible Defendants

Murder "perpetrated by means of . . . lying in wait" is murder of the first degree. (§ 189.) A defendant convicted of first-degree murder in California is rendered death eligible if a special circumstance is found. (See § 190.2.) At the time of appellant's crime and trial, one such special circumstance was that "[t]he defendant intentionally killed the victim while lying in wait." (Former § 190.2, subd. (a)(15).) The Court has described the lying-in-wait special circumstance as only "slightly different" from lying-in-wait first-degree murder (*People v. Hillhouse, supra,* 27 Cal.4th at p. 500; *People v. Carpenter, supra,* 15 Cal.4th 312, 388; *People v. Ceja, supra,* 4 Cal.4th at p. 1140, fn. 2), with the special circumstance requiring an intentional murder that occurs during a period "which includes (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage[.]" (*People v. Gutierrez, supra,* 28 Cal.4th at pp. 1148-1149, quoting *People v. Morales, supra,* 48 Cal.3d 527, 557.)

### 1. There Is No Distinction Between the Lying-in-Wait Special Circumstance and Premeditated and Deliberate Murder

Although the second element of the lying-in-wait special circumstance – a substantial period of watching and waiting – theoretically could differentiate murder under the lying-in-wait special circumstance from simple premeditated murder, the Court's construction of this prong has precluded such a narrowing function. As this Court has held, "the lying-in-wait special circumstance requires no fixed, quantitative minimum time, but the lying in wait must continue for long enough to premeditate and

deliberate, conceal one's purpose, and wait and watch for an opportune moment to attack." (*People v. Bonilla, supra,* 41 Cal.4th at p. 333, citing *People v. Sims, supra,* 5 Cal.4th at p. 433-434.) The victim need not be the object of the "watching" in order for this special circumstance to apply, as a period of "watchful waiting" for the arrival of the victim will satisfy this requirement. (*Sims, supra,* 5 Cal.4th at p. 433.) And, this "watchful waiting" may occur in the knowing presence of the victim (see, e.g., *People v. Morales*, *supra*, 48 Cal.3d at p. 558), or where the defendant reveals his presence to the victim. (See, e.g., *People v. Carpenter, supra,* 15 Cal.4th 312, 388-389.) This Court's expansive conception of lying in wait "threatens to become so expansive as to eliminate any meaningful distinction between defendants rendered eligible for the death penalty by the special circumstance and those who have 'merely' committed first degree premeditated murder." (*People v. Stevens*, *supra,* 42 Cal.4th at p. 213 (conc. opn. of Werdegar, J.).) In particular, the Court's holding in *Sims*, that the period of watchful waiting be no more than the time required for premeditation and deliberation, undercutting the requirement that the this period be "substantial," resulted in a construction of the special circumstance that renders it indistinguishable from premeditated and deliberate first degree murder. (See *id.* at p. 219 (conc. and dis. opn. of Moreno, J.) & pp. 214-216 (conc. and dis. opn. of Kennard, J.).)

In light of this broad interpretation of the second element of the lying-in-wait special circumstance, only the first and third elements are left to differentiate a first-degree murder under the lying-in-wait special circumstance from other premeditated murders. The Court has, however, also adopted an expansive construction of the first prong of the lying-in-wait special circumstance (concealment of purpose), and its case law has

construed the meaning of lying-in-wait to include not only killing in ambush, but also murder in which the killer's purpose was concealed. (*People v. Morales*, *supra*, 48 Cal.3d at p. 555.) By requiring only a concealment of purpose, rather than physical concealment, the first prong fails to narrow the class of death-eligible premeditated murderers in any significant manner. (See, e.g., *id.* at p. 557 [noting concealment of purpose is characteristic of many "routine" murders].)

As for the final prong (a surprise attack from a position of advantage), it is hard to imagine many premeditated murders preceded by fair warning and carried out from a position disadvantageous to the murderer. As Justice Mosk noted:

> [The lying-in-wait special circumstance] is so broad in scope as to embrace virtually all intentional killings. Almost always the perpetrator waits, watches, and conceals his true purpose and intent before attacking his victim; almost never does he happen on his victim and immediately mount his attack with a declaration of his bloody aim.

(*People v. Morales*, *supra*, 48 Cal.3d at p. 575 (conc. and dis. opn. of Mosk, J).)[24]

In light of the broad interpretation that the Court has given to the

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[24] See also Osterman & Heidenreich, *Lying in Wait: A General Circumstance* (1996) 30 U.S.F. L.Rev. 1249, 1274: "Most of the time a victim is attacked when vulnerable, is unaware of the killer's intention, and is taken by surprise. How is this substantially different from other types of intentional killings? This question is particularly difficult to answer when one recalls that the actual period of lying in wait need not include 'watching,' the killing need not occur simultaneously with the lying in wait phase, and it will not matter if the defendant converses or argues with the victim, or even if there were warnings just prior to the attack."

lying-in-wait special circumstance, the class of first-degree murders to whom this special circumstance applies is enormous. (See, e.g., Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev.1283, 1320 [the lying-in-wait special circumstance makes most premeditated murders potential death penalty cases].) This special circumstance thereby creates the very risk of "wanton" and "freakish" death sentencing found unconstitutional in *Furman, supra,* 408 U.S. 238.

### 2. There Is No Difference Between Lying-in-Wait Murder and Lying-in-Wait Special Circumstance

Appellant is aware that this Court has repeatedly rejected the contention that the special circumstance of lying in wait is unconstitutional because there is no significant distinction between the theory of first degree murder by lying in wait and the special circumstance of lying in wait, and that the special circumstance therefore fails to meaningfully narrow death eligibility as required by the Eighth Amendment. (See, e.g., *People v. Gutierrez, supra,* 28 Cal.4th at p. 1148 [citations].) Appellant requests that this Court revisit the issue in light of the facts and circumstances of this case.

This Court in *People v. Moon, supra,* 37 Cal.4th 1, 22, relying on its earlier decision in *People v. Carpenter, supra,* 15 Cal.4th 312, noted the "slightly different" requirements of lying-in-wait first degree murder and the lying-in-wait special circumstance. In discussing the difference between the two, the Court has noted that there are two factors that are supposed to differentiate them: (1) the special circumstance requires an intent to kill; and (2) the murder must be done while lying in wait rather than by means of lying in wait. (See *People v. Gutierrez, supra,* 28 Cal.4th

at pp. 1148-1149.)

This Court has held that what distinguishes lying-in-wait murder from the special circumstance is that "'[m]urder by means of lying in wait requires only a wanton and reckless intent to inflict injury likely to cause death[,]" while the special circumstance requires "'an intentional murder'" that "'take[s] place during the period of concealment and watchful waiting[.]'" (*People v. Gutierrez, supra,* 28 Cal.4th at pp. 1148-1149.) California juries are not, however, instructed that "murder by means of lying in wait requires only a wanton and reckless intent to inflict injury likely to cause death." Moreover, adding intent to kill as an element of the special circumstance is an illusory distinction. If the other factors for lying in wait are met, including watchful waiting and concealment of a murderous purpose, it is hard to imagine how the killing can occur without the defendant having an intent to kill.

According to this Court, lying in wait as a theory of murder is "the functional equivalent of proof of premeditation, deliberation and intent to kill." (*People v. Ruiz, supra,* 44 Cal.3d at p. 614.) Therefore, "a showing of lying in wait obviates the necessity of separately proving premeditation and deliberation . . . ." (*People v. Gutierrez, supra*, 28 Cal.4th at p. 1149, fn. 10.) However, as pointed out by the dissenting judge in *People v. Superior Court* (*Bradway*) (2003) 105 Cal.App.4th 297, 313 (dis. opn. of McDonald, J.):

> If by definition lying in wait as a theory of murder is the equivalent of an intent to kill, and lying in wait is defined in the identical manner in the lying-in-wait special circumstance, then both must include the intent to kill and there is no meaningful distinction between them. The statement that lying-in-wait murder requires

> only implied malice appears incorrect because the concept of lying in wait is the functional equivalent of the intent to kill.

In addition, California juries instructed on lying-in-wait first degree murder are told the murder must be "immediately preceded by lying in wait" (CALJIC 8.25), thereby indicating, as does the special circumstance, that there can be no "clear interruption separating the period of lying in wait from the period during which the killing takes place[.]" (CALJIC No. 8.81.15.) Thus, while this Court may interpret the special circumstance differently than lying-in-wait first degree murder, California juries, and particularly appellant's jury, are not provided adequate guidance from which they can distinguish the class of death-eligible defendants. (See *Wade v. Calderon, supra,* 29 F.3d at pp. 1321-1322 [failure to adequately guide the jury's discretion regarding the circumstances under which it could find a defendant eligible for death violates the Eighth Amendment]; *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1444 [death penalty statutes are constitutionally defective where "they create the potential for impermissibly disparate and irrational sentencing [by] encompass[ing] a broad class of death-eligible defendants without providing guidance to the sentencing jury as to how to distinguish among them"].)

Furthermore, the element of immediacy of the killing, the purported distinguishing feature of the special circumstance, has been weakened by cases which have held that the murder need not occur while lying in wait as long as there is a continuous flow of events after the concealment and watchful waiting end. (See, e.g., *People v. Morales*, 48 Cal.3d at p. 558; *People v. Michaels, supra,* 28 Cal.4th at p. 517.) It was further weakened in this case to render it virtually indistinguishable from any other murder by

the prosecution's special instruction which permitted a finding of "while" lying in wait as long as there was the continuous flow of a culpable mental state. (CT 233.)

In sum, the lying-in-wait special circumstance is not narrower than lying-in-wait murder, and can apply to virtually any intentional first-degree murder. This special circumstance therefore violates the Eighth Amendment's narrowing requirement.

Indeed, although the vast majority of states now have capital punishment statutes, only three states other than California use lying in wait as a basis for a capital defendant's death eligibility: Colorado, Indiana and Montana. (See Osterman & Heidenreich, *supra,* 30 U.S.F. L.Rev. at p. 1276.) Notably, the construction of the Indiana provision is considerably narrower than the construction of the California statute, as it requires watching, waiting and concealment, then ambush upon the arrival of the intended victim. (*Thacker v. State* (Ind. 1990) 556 N.E.2d 1315, 1325.) Colorado similarly limits its "lying-in-wait or ambush" aggravating factor to situations where a defendant "conceals himself and waits for an opportune moment to act, such that he takes his victim by surprise." (*People v. Dunlap* (Colo. 1999) 975 P.2d 723, 751.) While there are few cases interpreting the Montana aggravating factor, its scope is necessarily limited by the state law requirement of proportionality review, which prevents imposition of death sentences on less culpable defendants. (See

Mont.Code.Ann. § 46-18-310.)[25]

### C. The Lying-in-Wait Special Circumstance Fails To Meaningfully Distinguish Death-Eligible Defendants from Those Not Death-Eligible

The Eighth Amendment demands more than mere narrowing the class of death-eligible murderers. The death-eligibility criteria must provide a meaningful basis for distinguishing between those who receive death and those who do not. For example, a death penalty statute could satisfy the Eighth Amendment narrowing requirement by restricting death eligibility to only those murderers whose victims were between the ages of 20 and 22. However, such an eligibility requirement would be unconstitutional in that it fails to meaningfully distinguish, on the basis of comparative culpability, between those who can be sentenced to death and those who cannot. "When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so." (*Arave v. Creech* (1993) 507 U.S. 463, 474; see also *United States v. Cheely*, *supra*, 36 F.3d at p. 1445 ("[n]arrowing is not an end in itself, and not just any narrowing will suffice"].)

The lying-in-wait special circumstance, as interpreted by this Court, fails to provide the requisite meaningful distinction between murderers. There is simply no reason to believe that murders committed by lying in

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[25] It is not surprising that the lying-in-wait special circumstance fails to narrow since it is not clear that it was ever meant to. It became a special circumstance as part of the Briggs Initiative which, according to the ballot proposition arguments, was intended to make the death penalty applicable to all murderers. (See Shatz & Rivkind, *supra*, 72 N.Y.U. L.Rev. at p. 1307.)

wait are more deserving of the extreme sanction of death than other premeditated killings. Indeed, members of the Court have long recognized this fundamental flaw of the lying-in-wait special circumstance. (See, e.g., *People v. Stevens, supra,* 41 Cal.4th at p. 213 (conc. opn. of Werdegar, J. ["the concept of lying in wait threatens to become so expansive as to eliminate any meaningful distinction between defendants rendered eligible for the death penalty by the special circumstance and those who have merely committed first degree premeditated murder"); *id.* at p. 224-225 (conc. and dis. opn. of Moreno, J. ["the lying-in-wait special circumstance . . . does not provide a principled basis for dividing first degree murderers eligible for the death penalty from those who are not, and is therefore not consistent with the Eighth Amendment"]; see also *People v. Morales*, *supra*, 48 Cal.3d at p. 575 (conc. and dis. opn. of Mosk, J.); *People v. Webster, supra,* 54 Cal.3d at pp. 461-462 (conc. and dis. opn. of Mosk, J.); *id.* at p. 466 (conc. and dis. opn. of Broussard, J.); *People v. Ceja*, *supra*, 4 Cal.4th at p. 1147 (conc. opn. of Kennard, J.); but see *People v. Jurado,* 38 Cal.4th at pp. 145-147 (conc. opn. of Kennard, J.).)

It is particularly revealing that, as stated above, almost no other state has included lying-in-wait murder as the type of heinous killing deserving of eligibility for the ultimate sanction of death, a clear indication of the lack of "societal consensus that a murder while lying in wait is more heinous than an ordinary murder, and thus more deserving of the death penalty." (*People v. Webster*, *supra*, 54 Cal.3d at p. 467 (conc. and dis. opn. of Broussard, J.).)

The lying-in-wait special circumstance, and the death sentence predicated upon it, must be reversed.

## XI.

## THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE JURORS' FINDING OF THE SPECIAL CIRCUMSTANCE ALLEGATIONS OF TORTURE MURDER

As discussed above, the requirement that the prosecution prove beyond a reasonable doubt every element of the crime with which the defendant is charged is equally applicable to special circumstances. Appellant's Fourteenth Amendment due process rights, as well as his Sixth and Eighth Amendment rights to a fair trial and an individualized, non-arbitrary and reliable determination of death eligibility and penalty were violated because the torture-murder special circumstance finding was based on legally insufficient proof.

In Claim VI, appellant argued that there was insufficient evidence for the jury to find appellant guilty of torture murder beyond a reasonable doubt. The elements of first degree torture murder are: (1) acts causing death that involve a high degree of probability of the victim's death; and (2) a willful, deliberate, and premeditated intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose. (§ 189; *People v. Mincey, supra,* 2 Cal.4th at p. 432.) For torture murder, unlike the special circumstance, "there must be a causal relationship between the torturous act and death, as Penal Code section 189 defines the crime as murder "by means of" torture." (*People v. Proctor, supra,* 4 Cal.4th at p. 530.)

Penal Code section 190.2, subdivision (a)(18) defines the special circumstance of torture murder as one where the "murder was intentional and involved the infliction of torture." No proof is required that the defendant had a premeditated intent to inflict prolonged pain. (*People v. Cole, supra*, 33 Cal.4th at pp. 1227-1228.) This Court has concluded that

for an intentional murder to involve "the infliction of torture" under the special circumstance as amended by Proposition 115, "the requisite torturous intent is an intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose." (*People v. Elliot, supra,* 37 Cal.4th at pp. 478-479.)[26]

In this case, the jury's finding that the torture-murder special circumstance is true was not supported by substantial evidence. The absence of substantial evidence of intent to inflict torture has already been addressed by appellant in his argument that there is insufficient evidence to support a first degree murder conviction. For the same reasons, there is insufficient evidence to support a finding beyond a reasonable doubt of the requisite mens rea for a torture-murder special circumstance. To hold otherwise would violate appellant's right to due process under the state and federal constitutions. Moreover, to construe the torture-murder special circumstance in a manner which would encompass the facts of this case would result in a special circumstance that is vague and overbroad in violation of the Eighth and Fourteenth Amendments. Accordingly, the finding of the special circumstance must be set aside and the death sentence must be vacated.

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[26] As originally enacted in 1978, the special circumstance, as construed by this Court, required proof of the infliction of an extremely painful act upon a living victim. However, after the enactment of Proposition 115, which preceded the offense in this case, there is no longer such a requirement. (*People v. Elliot, supra,* 37 Cal.4th at pp. 478-479.)

## XII.

## THE TORTURE-MURDER SPECIAL CIRCUMSTANCE IS VAGUE AND OVERBROAD AND THE INSTRUCTIONS FAILED TO INFORM THE JURY ADEQUATELY OF THE ELEMENTS OF THE SPECIAL CIRCUMSTANCE

### A. Introduction

As discussed above in Claim IX, the jury must be adequately informed of all the elements of the special circumstance and those elements must be defined in a manner that is neither vague nor confusing.

In this case, the trial court instructed the jury with regard to the torture-murder special circumstance in accordance with CALJIC No. 8.81.18, as follows:

> To find that the special circumstance, referred to in these instructions as murder involving infliction of torture, is true, each of the following facts must be proved:
> 1. The murder was intentional; and
> 2. [The] defendant intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion, or for any sadistic purpose; and
> 3. The defendant did in fact inflict extreme cruel physical pain and suffering upon a human being no matter how long its duration. Awareness of pain by the deceased is not a necessary element of torture.

(CT 236.)

This instruction failed adequately to instruct the jury on the elements of the torture-murder special circumstance. As a result, the special circumstance finding as applied in this case violated appellant's rights to due process under the Fourteenth Amendment, to trial by jury under the Sixth Amendment and to a principled basis for the determination of penalty

under the Eighth Amendment, and their state constitutional analogs..

### B. The Torture-Murder Special Circumstance Is Vague and Overbroad

The torture-murder special circumstance as applied in this case was unconstitutionally vague and overbroad in at least two ways. First, the requirement of "extreme cruel physical pain" was too imprecise to provide adequate guidance to the jury. Second, instructing the jury that an element of the special circumstance was intent to inflict pain for "any sadistic purpose" was also too vague for the jury to understand.

Given that the jury was similarly instructed with regard to torture murder (CT 213 ["extreme and prolonged pain . . . for . . . any sadistic purpose"]), the arguments here apply equally to the first degree murder conviction based on torture.

Appellant is aware that this Court has previously rejected these challenges but requests that the Court reconsider these rulings in light of the instructions and facts of this case. (See *People v. Chatman*, *supra*, 38 Cal.4th at p. 394; *People v. Raley, supra,* 2 Cal.4th at pp. 899-901.)

#### 1. Extreme Cruel Physical Pain

Penal Code section 190.2, subdivision (a)(18) requires proof that the perpetrator inflicted upon a living victim acts calculated to cause "extreme physical pain." (*People v. Davenport*, 41 Cal.3d at p. 271.) The jury in this case was instructed that one of the elements of torture murder was the defendant must have intended to inflict "extreme cruel physical pain and suffering." (CT 236.) This term "extreme cruel physical pain," is open to very wide interpretation. By leaving the terms "extreme" and "cruel" undefined, however, whatever was intended by the instruction was left to the unbridled discretion of the jury, in violation of the constitutional

standards set by the United States Supreme Court.

The phrase "cruel or extreme pain or suffering" arises out of decisions of this Court from many years ago. The term "cruel suffering" appears in *People v. Tubby, supra,* 34 Cal. 3d at p. 77, as part of a definition of torture murder. The term "intent to cause cruel pain and suffering" thereafter appeared in CALJIC No. 8.24, which defined torture murder. In *People v. Wiley, supra,* 18 Cal. 3d at pp. 167-168, this language was upheld against an argument that the victim felt no pain; the *Wiley* Court held that the victim's actual awareness of pain was not an element of torture murder. (*Id.* at p. 173.)

The use of the term "cruel" was successfully challenged in the context of another special circumstance in *People v. Superior Court (Engert), supra,* 31 Cal.3d 797. The *Engert* decision held that the term "heinous, atrocious, and cruel," when used as a death penalty special circumstance, is unconstitutionally vague. The Court directed particular attention to the term cruel:

> Cruel is defined as '[d]isposed to give pain to others; willing or pleased to hurt or afflict; savage, inhuman, merciless.' . . . The terms address the emotions and subjective, idiosyncratic values. While they stimulate feelings of repugnance, they have no directive content . . . None of these terms meets the standards of precision and certainty required of statutes which render persons eligible for punishment, either as elements of a charged crime or as a charged special circumstance.

(*Id.* at p. 802.)

The language of *Engert* has yet to be reconciled with the use of the phrase "cruel pain and suffering," in the torture-murder special

circumstance. It cannot be known whether this defendant intended to cause "cruel pain," because no one knows what "cruel pain" is. Accordingly, the statute is vague and the special circumstance must be vacated.

In addition, the trial court's instruction obscured the elements of the special circumstance with contradictory language in its last two paragraphs. In the next to last paragraph, the instruction stated that the third fact that must be proven was that: defendant did in fact "inflict extreme cruel and physical pain and suffering upon a human being no matter how long its duration." (CT 236.)[27] In the last paragraph, however, the instruction declared that "[a]wareness of pain by the deceased is not a necessary element of torture." (*Ibid.*) If the victim's "awareness of pain" is not an element of the special circumstance, how then can it be established that the defendant did in fact inflict extreme cruel and physical pain? A defendant cannot inflict pain (let alone extreme pain) if no one feels it. The instruction, therefore, was nonsensical and was likely to have confused the jury. Moreover, it certainly did not convey to the jury the need to make the actus reus finding which *Davenport* construed the special circumstance to require, i.e., the infliction on a living victim of acts "calculated to cause extreme physical pain" beyond the pain of death. (*People v. Davenport, supra*, 41 Cal.3d at p. 271.)

**2. Any Sadistic Purpose**

As noted above, the jury was required to find that appellant intended to inflict extreme pain and suffering "for the purpose of revenge, extortion, persuasion or for any sadistic purpose." (CT 236.) To meet this element,

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[27] This element should not have been given since, as discussed above, the offense in this case occurred after the enactment of Proposition 115.

the prosecutor argued that the torture was for "if anything, it is a sadistic purpose." (XI RT 1085.) However, "sadistic purpose" was never defined, and left undefined, it was likely – particularly in light of the the prosecutor's argument – to be construed as a catch-all for virtually any purpose.

"Sadistic purpose" may have a settled meaning, but it is a meaning which is not commonly known and which certainly has no application to the facts of this case because it contains a strong sexual element. In *People v. Raley, supra,* 2 Cal. 4th at p. 900, this Court quoted dictionary definitions to arrive at the following settled meaning: "'love of cruelty, conceived as a manifestation of sexual desire' . . . 'the infliction of pain upon a love object as a means of obtaining sexual release' . . . 'the getting of sexual pleasure from demonstrating, mistreating, or hurting one's partner' . . . 'sexual gratification gained by causing pain or degradation to others.'"

There was no sexual aspect of this case. Moreover, as discussed above, appellant fled immediately upon igniting the victim, and therefore did not witness any pain he caused. Under the settled meaning established by the *Raley* decision, therefore, "sadistic purpose" has no relevance to the present case. However, the jury was not instructed with this meaning and was misled by the instruction and argument of the prosecutor. As a result, there is a danger in the vagueness of the term. Particularly in combination with the words "cruel or extreme pain or suffering," discussed above, a reasonable juror may have taken "sadistic purpose" to include the infliction of pain for any purpose of gratification to the perpetrator, not limited to sexual purposes. Indeed, it is commonly a synonym for cruelty or ruthlessness. (Roget's Thesaurus (4th ed. 1977) 939.11, p. 733.) Under such an interpretation, any intentional infliction of physical pain could be

considered sadistic, and thus the term is unconstitutionally vague.

Appellant could have been convicted under this broader definition of the term, which is not authorized by this Court's definition in *Raley*. The vagueness in the term creates the real possibility on these facts that the jury could not arrive at a settled meaning of the term used to convict appellant of torture. Consequently, the jury was left entirely to its own unbridled discretion to determine whether extreme cruel pain had been intended and whether there was a sadistic purpose for the infliction of torture.

### C. The Torture-Murder Instructions in This Case Violated Appellant's Constitutional Rights and Were Prejudicial

The instruction omitted and obfuscated the elements of first degree murder and the torture-murder special circumstance. As with lying-in-wait, the instructional errors violated appellant's Sixth, Eighth and Fourteenth Amendment rights and their state constitutional analogs.

Based on the misleading instruction on torture murder, the jury could have found appellant guilty of torture murder and found true the torture-murder special circumstance without finding appellant intended to inflict pain for any of the purposes required by the statute or that he intended to inflict the quality of pain sufficient to meaningfully distinguish torture murder from any other murder. Under these circumstances, the first degree murder conviction and torture-murder special circumstance must be vacated. Since the lying-in-wait special must also be vacated, the death sentence must be set aside.

## XIII.

## THE TORTURE-MURDER SPECIAL CIRCUMSTANCE FAILS TO PERFORM THE NARROWING FUNCTION REQUIRED BY THE EIGHTH AMENDMENT AND FAILS TO ENSURE THAT THERE IS A MEANINGFUL BASIS FOR DISTINGUISHING THOSE CASES IN WHICH THE DEATH PENALTY IS IMPOSED FROM THOSE IN WHICH IT IS NOT

### A. Introduction

As does the lying-in-wait special circumstance, the torture-murder special circumstance (§ 190.2, subd. (a)(18)), as interpreted by this Court, violates the Eighth Amendment by failing to genuinely narrow the class of persons eligible for the death penalty or reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. (*Zant v. Stephens, supra,* 462 U.S. at p. 876.)

### B. The Torture-Murder Special Circumstance Does Not Narrow the Class of Death-Eligible Defendants and Is Overbroad

Murder "perpetrated by means of . . . torture" is murder of the first degree. (§ 189.) A defendant convicted of first-degree murder in California is rendered death eligible if a special circumstance is found. (See § 190.2.) At the time of appellant's crime and trial, one such special circumstance was that "[t]he murder was intentional and involved the infliction of torture." (§ 190.2, subd. (a)(18).) Based on this Court's interpretation of the torture-murder special and changes made by Proposition 115, there is little, if any difference to distinguish the torture-murder special circumstance from first degree murder by torture.

Murder perpetrated by torture is "'murder committed with a willful, deliberate and premeditated intent to inflict extreme and prolonged pain.'" (*People v. Pensinger*, *supra*, 52 Cal.3d at p. 1239, quoting *People v. Steger*,

*supra,* 16 Cal.3d at p. 546.) The law requires the same proof of deliberation and premeditation for first degree torture murder as it does for other types of first degree murder. There must be "careful consideration and examination of the reasons for and against" the torturing of the victim. (*People v. Steger*, *supra*, 16 Cal.3d at p. 545.) In addition, the requisite intent to cause pain must have as its goal either "revenge, extortion, persuasion or any other sadistic purpose." (*People v. Wiley, supra,* 18 Cal.3d at p. 168.)

The torture-murder special circumstance, section 190.2, subdivision (a)(18), was enacted by initiative in 1978, making a defendant death-eligible where "the [first degree] murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration." This Court construed the special circumstance, as originally enacted, as requiring proof of first degree murder, proof that the defendant intended to kill and to torture the victim, and proof of the infliction of an extremely painful act upon a living victim. (*People v. Cole*, *supra*, 33 Cal.4th at pp. 1227-1228; *People v. Davenport*, *supra*, 41 Cal.3d at p. 271, 221.) In contrast to murder by torture, no proof is required that defendant had a premeditated intent to inflict prolonged pain. (*People v. Cole*, *supra*, 33 Cal.4th at pp. 1227-1228; *People v. Davenport*, supra, 41 Cal.3d at pp. 269-270.)

As discussed above, Proposition 115, amended the special circumstance by deleting its language regarding the infliction of extreme physical pain. (*People v. Elliot, supra,* 37 Cal.4th at p. 477.) The post-Proposition 115 special circumstance, which applied in this case, provides that "[t]he murder was intentional and involved the infliction of torture,"

without providing further explanation of what constitutes the "infliction of torture" for purposes of the special circumstance. (*Ibid.*)

In *People v. Elliot*, this Court rejected the appellant's argument that this change in the statutory provision was intended to give "torture" under the special circumstance the same meaning afforded that term for purposes of proving a murder by torture under section 189; i.e., requiring a "wil[l]ful, deliberate and premeditated intent to inflict extreme and prolonged pain for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose." (*Id.* at p. 477.) The Court held that "[c]onsistent with decisions interpreting section 190.2, subdivision (a)(18) prior to its 1990 amendment, we conclude that for an intentional murder to involve "the infliction of torture" under this section, as amended by Proposition 115, the requisite torturous intent is an intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose. A premeditated intent to inflict prolonged pain is not required." (*Id.* at p. 479.)

In *People v. Leach* (1985) 41 Cal.3d 92, 110, this Court recognized that the electorate which enacted this special circumstance intended to incorporate into it the established judicial meaning of torture. However, by not requiring a "willful, deliberate and premeditated intent to inflict extreme and prolonged pain," the special circumstance is unconstitutionally overbroad in that it encompasses essentially any murder in which the victim suffers "great bodily injury" as long as the jury infers an intent to inflict cruel and extreme pain, which as described above is itself an unconstitutionally vague term. Characterizing this special circumstance without requiring a premeditated and deliberate intent to inflict torture "redefine[s], and minimize[s], the gruesome and sadistic nature of torture,

which has long been recognized as among the most heinous of human conduct . . . ." (*People v. Jung* (1999) 71 Cal.App.4th 1036, 1049 (dis. opn. of Armstrong, J.).)

Furthermore, the only arguable difference between torture murder and the torture-murder special circumstance is an illusory one: While the special circumstance requires intent to kill (CALJIC 8.81.8), torture murder does not, although it requires that the murder be committed with a willful, premeditated and deliberate intent to inflict extreme and prolonged pain. (*People v. Steger*, 16 Cal.3d 539, 546, see CALJIC No. 8.24.) It is difficult to imagine based on the wording of CALJIC No. 8.24, how a murder can be committed with premeditated and deliberate intent to inflict torture but without an intent to kill.

Given that proof of intent to torture is already required for first degree torture murder, as a practical matter, the additional requirement of intent to kill is a narrowing factor that is almost universally only theoretical. As this Court observed in *People v. Davenport,* "a special circumstance which requires only an intentional killing in which the victim suffered extreme pain would be capable of application to virtually any intentional, first degree murder with the possible exception of those occasions on which the victim's death was instantaneous." (*People v. Davenport*, *supra*, 41 Cal.3d at p. 265.)

A capital sentencing scheme "must genuinely narrow the class of persons eligible for the death penalty." (*Zant v. Stephens, supra*, 462 U.S. at 877.) In the context of torture murder, as the jury was instructed in this case, the special circumstance did no such thing.

In appellant's case, the jury was instructed that for first degree murder by torture, the intent to torture must be premeditated while for

torture special circumstance, all that was required was that the torture be intentional. Second, the jury was told that for first degree murder, the extreme pain intended to be inflicted must be "prolonged," but that for torture special circumstance, the intent must be to inflict extreme "cruel" pain and as long as the extreme pain is inflicted its duration does not matter. (CT 213, 236.) Thus, the torture special circumstance, particularly under the facts of this case broadened, rather than narrowed, the death eligibility of those who commit murder by torture.

For example, assuming without conceding that the jury could have found under the instructions given that Streeter intended to kill the victim and intended to inflict extreme pain and suffering upon her (CALJIC No. 8.81.18, CT 236), it could have at the same time rejected a guilty verdict on torture murder by finding that the intent to inflict torture, while intentional, was not "willful, deliberate and premeditated" or there was no intent to inflict "prolonged pain." (CALJIC No. 8.24, CT 213.)

The intentionality requirement of the torture special circumstance does not, in practice, narrow the class of torture murders that are death eligible; it does not provide a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." (*Furman, supra,* 408 U .S. at p. 313.) Indeed, particularly as applied in this case, the torture-murder special circumstance instructions broadened, rather than narrowed, the class of convicted murderers who were eligible for the death penalty by making persons death eligible under the torture-murder special circumstance when they could not have been convicted of first degree torture murder. Thus, the statute, and its application to appellant's case through the CALJIC instructions cited above, violated appellant's Eighth and Fourteenth Amendment rights to a reliable

penalty determination.

Even assuming this Court has provided some theoretical distinction between the special circumstance and murder by torture, California juries, and certainly Streeter's jury have not been provided adequate guidance from which they can distinguish the class of death-eligible defendants. (See *Wade v. Calderon, supra,* 29 F.3d at pp. 1321-1322; *United States v. Cheely, supra,* 36 F.3d at p. 1444.)

The torture-murder special circumstance is unconstitutional as written and applied and must therefore be vacated.

## XIV.

## THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

### A. Introduction

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*Winship, supra,* 397 U.S. at p. 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia, supra,* 433 U.S. at p. 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*Winship, supra* at 397 U.S. at p. 363) and at the heart of the right to trial by jury. (*Sullivan, supra,* 508 U.S. at p. 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements and those of their state constitutional analogs if "there is a

reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.) The trial court in this case gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict Streeter on a lesser standard than is constitutionally required. Because the instructions violated the United States Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan, supra*, 508 U.S. at p. 275.)

### B. The Instructions on Circumstantial Evidence Undermined the Requirement of Proof Beyond a Reasonable Doubt (CALJIC Nos. 2.90, 2.01, 2.02, 8.83, and 8.83.1)

The jury was instructed that Streeter was "presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (CT 246.) These principles were supplemented by several instructions that explained the meaning of reasonable doubt. CALJIC No. 2.90 defined reasonable doubt as follows:

> It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

(CT 246.)

The terms "moral evidence" and "moral certainty" as used in the reasonable doubt instruction are not commonly understood terms. While

this same reasonable doubt instruction, standing alone, has been found to be constitutional (*Victor v. Nebraska*, *supra*, 511 U.S. at pp. 13-17), in combination with the other instructions, it was reasonably likely to have led the jury to convict Streeter on proof less than beyond a reasonable doubt in violation of his Fourteenth Amendment right to due process.

The jury was given four interrelated instructions – CALJIC Nos. 2.01, 2.02, 8.83, and 8.83.1 – that discussed the relationship between the reasonable doubt requirement and circumstantial evidence. (CT 190 [sufficiency of circumstantial evidence]; CT 245 [sufficiency of circumstantial evidence to prove specific intent or mental state]; CT 237 [special circumstances – sufficiency of circumstantial evidence]; CT 238 [special circumstances – sufficiency of circumstantial evidence to prove required mental state].) These instructions, addressing different evidentiary issues in almost identical terms, advised Streeter's jury that if one interpretation of the evidence "appears to you to be reasonable [and] the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (CT 190, 237, 238, 245.) These instructions informed the jurors that if Streeter *reasonably appeared* to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt. This four-times repeated directive undermined the reasonable doubt requirement in two separate but related ways, violating Streeter's Sixth, Eighth and Fourteenth Amendment rights to due process, trial by jury and a reliable capital trial. (See *Sullivan, supra*, 508 U.S. at p. 278; *Carella v. California, supra,* 491 U.S. at p. 265; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

First, the instructions not only allowed, but compelled, the jury to find Streeter guilty of first degree murder and to find the special

circumstances to be true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra,* 397 U.S. at p. 364.) The instructions directed the jury to find Streeter guilty and the special circumstances true based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to them to be "reasonable. An interpretation that appears to be reasonable, however, is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 315; see *Sullivan, supra*, 508 U.S. at p. 78 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty." (Italics added).) Thus, the instructions improperly required conviction on a degree of proof less than the constitutionally required standard of proof beyond a reasonable doubt.

Second, the circumstantial evidence instructions were constitutionally infirm because they required the jury to draw an incriminatory inference when such an inference appeared to be "reasonable." In this way, the instructions created an impermissible mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless Streeter rebutted the presumption by producing a reasonable exculpatory interpretation. "A mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain predicate facts." (*Francis v. Franklin* (1985) 471 U.S. 307, 314, italics added, fn. omitted.) Mandatory presumptions, even those that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an

element of the crime. (*Id.* at pp. 314-318; *Sandstrom, supra,* 442 U.S. 510.)

Here, all four instructions plainly told the jury that if only one interpretation of the evidence appeared reasonable, "you *must* accept the reasonable interpretation and reject the unreasonable." In *People v. Roder*, *supra*, 33 Cal.3d at p. 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. *A fortiori*, this Court should invalidate the instructions given in this case, which required the jury to presume *all* elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

The constitutional defects in the circumstantial evidence instructions were likely to have affected the jury's deliberations. The prosecution's case for first degree murder and the special circumstances was close and based on circumstantial evidence. However, contrary to the instructions, the jury did not have to accept the prosecution's theory – even if they believed it was reasonable. Even assuming the legal sufficiency of the prosecution's case, it was not a particularly strong one. While there was no question that Streeter caused Buttler's death, there was a serious dispute as to whether as the defense argued, it was a spontaneous act of a depressed and desperate man or, as the prosecution contended, a pre-planned attack. Given the defense concession as to identity, the prosecution's entire case rested on inferences from the circumstances leading up to the incident. In this context, the circumstantial evidence instructions, permitted and indeed encouraged the jury to convict Streeter of first degree murder and to find the two special circumstances true upon a finding that the prosecution's

theory was reasonable, rather than upon proof beyond a reasonable doubt.

The focus of the circumstantial evidence instructions on the reasonableness of evidentiary inferences also prejudiced Streeter by requiring that he prove his defense was reasonable before the jury could deem it credible. This was exacerbated in this case by the prosecutor's argument that "the defendant's explanation is simply unreasonable, isn't it?" (XI RT 1104-1105.) Of course, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur, supra,* 421 U.S. 684.) The defense case – which contended that Streeter's actions constituted an unplanned crime of passion – was undercut by the instructions which required him to prove his exculpatory interpretation to be reasonable before it could be believed.

For all these reasons, there is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find Streeter's guilt on a standard that is less than constitutionally required.

### C. Other Instructions Also Vitiated the Reasonable Doubt Standard (CALJIC Nos. 1.00, 2.21.1, 2.21.2, 2.22, 2.27, 8.20)

The trial court gave several other standard instructions that individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC No. 1.00, regarding the respective duties of the judge and jury (CT 183-184); CALJIC No. 2.21.1, regarding discrepancies in testimony (CT 196); CALJIC No. 2.21.2, regarding willfully false witnesses (CT 197); CALJIC No. 2.22, regarding weighing conflicting testimony (CT 198); CALJIC No. 2.27, regarding sufficiency of evidence of one witness (CT 199). Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side

had presented relatively stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, thus vitiating the constitutional protections that forbid convicting a capital defendant upon any lesser standard of proof. (*Sullivan, supra*, 508 U.S. 275; *Cage v. Louisiana, supra*, 498 U.S. 39.)

As a preliminary matter, CALJIC No. 1.00 violated Streeter's constitutional rights as enumerated in section A of this argument by misinforming the jurors that their duty was to decide whether Streeter was guilty or innocent, rather than whether he was guilty or not guilty beyond a reasonable doubt. This instruction told the jury that pity or prejudice for or against the defendant and the fact that he has been arrested, charged and brought to trial do not constitute evidence of guilt, "and you must not infer or assume from any or all of [these circumstances] that he is more likely to be guilty than innocent." (CT 183.) CALJIC No. 2.01 also referred to the jury's choice between "guilt" and "innocence." (CT 190.) These instructions diminished the prosecution's burden by erroneously telling the jurors they were to decide between guilt and innocence, instead of determining if guilt had been proven beyond a reasonable doubt. They encouraged jurors to find Streeter guilty because it had not been proven that he was "innocent."

Similarly, CALJIC Nos. 2.21.1 and 2.21.2 lessened the prosecution's burden of proof. They authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence, you believe the *probability of truth* favors his or her testimony in other particulars." (CT 197, italics added.) These instructions lightened the prosecution's burden of proof by allowing the jury to credit

prosecution witnesses by finding only a "mere probability of truth" in their testimony. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].)[28] The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." (See *Sullivan, supra*, 508 U.S. at p. 278; *Winship, supra*, 397 U.S. at p. 364.)

CALJIC No. 2.21.2 also improperly created and elevated Streeter's burden of proof. If the jury found some part of Streeter's testimony not to be true, he had not merely to create a reasonable doubt about the prosecution's case, but he had to establish that "the probability of truth favor[ed] his [own] testimony." This requirement violates the well-established principle that a defendant has no burden of proof, even as to his own defense. (*People v. Gonzales, supra*, 51 Cal.3d at pp. 1214-1215.) In addition, the instruction appeared to be directed at Streeter's exculpatory testimony about the circumstances surrounding Buttler's death, and, thus, improperly lessened the prosecution's burden by singling out Streeter's testimony for suspicion.

Furthermore, CALJIC No. 2.22 provided as follows:

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[28] The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157, finding no error in an instruction which arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt.

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, whic appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses [who have testified on the opposing sides]. The final test is not in the [relative] number of witnesses, but in the convincing force of the evidence.

(CT 198.) This instruction informed the jurors, in plain English, that their ultimate concern must be to determine which party has presented evidence that is comparatively more convincing than that presented by the other party. It specifically directed the jury to determine each factual issue in the case by deciding which witnesses, or which version, is more credible or more convincing than the other. In so doing, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with something that is indistinguishable from the lesser "preponderance of the evidence standard," i.e., "not in the relative number of witnesses, but in the convincing force of the evidence." As with CALJIC Nos. 2.21.1 and 2.21.2 discussed above, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan, supra*, 508 U.S. at pp. 277-278; *Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (CT 199), likewise was flawed in its

erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case; he cannot be required to establish or prove any "fact." In this case, Streeter admitted that he caused Buttler's death and gave an explanation of the circumstances of the homicide that would negate a first degree murder conviction and true findings of the special circumstances. However, CALJIC No. 2.27, by telling the jurors that "testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact" and that "[y]ou should carefully review all the evidence upon which the proof of that fact depends" – without qualifying this language to apply only to *prosecution* witnesses – permitted reasonable jurors to conclude that Streeter himself had the burden of convincing them that the homicide was not a first degree murder and that the special circumstances were not true, and that this burden was a difficult one to meet. Indeed, this Court has "agree[d] that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.) This Court's understated observation does not begin to address the unconstitutional effect of CALJIC No. 2.27, and this Court should find that it violated Streeter's Sixth and Fourteenth Amendment rights to due process and a fair jury trial and his Eighth Amendment right to a reliable determination of death eligibility.

Finally, CALJIC No. 8.20, defining premeditation and deliberation, misled the jury regarding the prosecution's burden of proof by instructing that deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition

*precluding* the idea of deliberation. . . ." (CT 211, italics added.) The use of the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation, rather than to raise a reasonable doubt about that element. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean "absolutely prevent"].)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions in this and the preceding section individually served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." Taking the instructions together, no reasonable juror could have been expected to understand – in the face of so many instructions permitting conviction upon a lesser showing – that he or she must find Streeter not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated the constitutional rights set forth in section A of this argument.

### D. The Motive Instruction Also Undermined the Burden of Proof Beyond a Reasonable Doubt

The trial court instructed the jury under CALJIC No. 2.51, as follows:

> Motive is not an element of the crimes charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the

defendant is not guilty.

(CT 200.)

This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to appellant to show an absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. As a matter of law, however, it is beyond question that motive alone, which is speculative, is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia, supra,* 443 U.S. at p. 320 [a "mere modicum"of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

The motive instruction stood out from the other standard evidentiary instructions given to the jury. Notably, other instructions that addressed an individual circumstance expressly admonished that it was insufficient to establish guilt. (See, e.g., CT 201, [CALJIC No. 2.52, stating with regard to flight that it "is not sufficient by itself to prove guilt . . ."].) The placement of the motive instruction, which was read immediately before the flight instruction, served to highlight its different standard.

Because CALJIC No. 2.51 is so obviously aberrant, it undoubtedly prejudiced appellant during deliberations. The instruction appeared to include an intentional omission that allowed the jury to determine guilt based upon motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo, supra,* 16 Cal.4th at p. 1020 (conc. opn. of Brown, J.) [deductive reasoning

underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction].)

This Court has recognized that differing standards in instructions create erroneous implications. (*People v. Dewberry* (1959) 51 Cal.2d 548, 557; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].) Here, the context highlighted the omission, so the jury would have understood that motive alone could establish guilt.

The instruction, by informing the jurors that the presence of motive could be used to establish the defendant's guilt and that the absence of motive could be used to show the defendant was not guilty, effectively placed the burden of proof on appellant to show an alternative motive to that advanced by the prosecutor. As used in this case, CALJIC No. 2.51 deprived appellant of his federal constitutional rights to due process and fundamental fairness. (*Winship*, *supra*, 397 U.S. at p. 364 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638.)

### E. The Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions

Although each one of the challenged instructions violated Streeter's federal constitutional rights by lessening the prosecution's burden and by operating as a mandatory conclusive presumption of guilt, this Court has

repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [CALJIC Nos. 2.22, 2.51; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [addressing false testimony and circumstantial evidence instructions]; *People v. Crittenden, supra,* 9 Cal.4th at p. 144 [addressing circumstantial evidence instructions]; *People v. Noguera, supra,* 4 Cal.4th at pp. 633-634 [addressing CALJIC Nos. 2.01, 2.02, 2.21, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [addressing circumstantial evidence instructions].) While recognizing the shortcomings of some of the instructions, this Court consistently has concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that jurors are not misled when they also are instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court has characterized as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire, supra,* 502 U.S. at p. 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions were "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a

reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin*, *supra,* 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075 [citation] [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the circumstantial evidence instructions given in this case explicitly informed the jury that those instructions were qualified by the reasonable doubt instruction. It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions which contain their own independent references to reasonable doubt.

Even assuming that the language of a lawful instruction somehow can cancel out the language of an erroneous one – rather than vice-versa – the principle does not apply in this case. The allegedly curative instruction was overwhelmed by the unconstitutional ones. Streeter's jury heard several separate instructions, each of which contained plain language that was antithetical to the reasonable doubt standard. Yet the charge as a whole contained only one countervailing expression of the reasonable doubt standard: the oft-criticized and confusing language of Penal Code Section 1096 as set out in former CALJIC No. 2.90. (See, e.g., *People v. Freeman*

(1994) 8 Cal.4th 450, 503 [statutory language with its references to "moral evidence" and "moral certainty" is problematic].) In combination with the instructions discussed in this argument, it is reasonably likely that CALJIC No. 2.90 allowed the jurors to convict Streeter on proof less than beyond a reasonable doubt in violation of his right to due process. (*Winship*, *supra*, 397 U.S. 358.) This Court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson* (1996) 3 Cal.4th 926, 943 [citations].) Under this principle, it cannot seriously be maintained that a single, quite imperfect instruction such as CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

**F. Reversal Is Required**

Because the erroneous circumstantial evidence instructions permitted conviction on a standard of proof less than proof beyond a reasonable doubt, delivery of the instructions was structural error and is reversible per se. (*Sullivan, supra*, 508 U.S. at pp. 280-282.) At the very least, because all of the instructions violated appellant's federal constitutional rights, reversal is required unless the prosecution can show that the errors were harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.)

Here, that showing cannot be made. Streeter testified regarding the disputed facts to which the instructions directly related – whether his actions were part of a pre-planned attack or the spontaneous actions of a

desperate and disturbed individual. The questions of guilt of first degree murder and the truth of the two special circumstances were so demonstrably close (assuming there even was legally sufficient evidence to support the verdicts on these charges) that the dilution of the reasonable-doubt requirement, particularly when considered cumulatively with the other instructional errors set forth in Claims IX, XII, and XV, must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan, supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra,* 33 Cal.3d at p. 505.)

Further, CALJIC No. 2.51 permitted the prosecution to prove motive alone in order to establish guilt. The instructional error was particularly prejudicial in this case. Although Streeter admitted his guilt in the homicide, whether the crime was murder or manslaughter and, if murder, whether it was first or second degree was very much at issue. The crucial question in this case was whether he intentionally lured Buttler to the area in order to enact a plan to kill her by setting her on fire rather than committing a spontaneous act borne of frustration and desperation. Streeter's intent was the crux of the case. The prosecutor was able to exploit the confusion created by the motive instruction by equating Streeter's admitted anger at Buttler for moving away and taking their son – ostensibly the motive for the homicide – with the intent element for torture murder. (RT 1085.) The motive instruction erroneously encouraged the jury to find appellant guilty, despite the lack of evidence of intent because appellant allegedly had the motive to commit the crime. Accordingly, this error, alone or considered in conjunction with all the other instructional errors set forth in this brief, requires reversal of appellant's conviction.

Accordingly, the judgment of conviction, the special circumstance

findings and sentence must be reversed.

## XV.

## THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY TO FOCUS ON APPELLANT'S FLIGHT AS EVIDENCE OF HIS CONSCIOUSNESS OF GUILT

### A. Introduction

The trial court gave an instruction that permitted the jury to infer consciousness of guilt by Streeter. The instruction, pursuant to CALJIC No. 2.52, related to flight after the commission of a crime:

> The flight of a person immediately after the commission of a crime, or after [he] is accused of a crime, is not sufficient in itself to establish [his] guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilt or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

(CT 201.)

This instruction was erroneously given. It was an unnecessary, argumentative instruction. Moreover, it permitted the jury to draw irrational inferences against Streeter. The instructional error deprived Streeter of his Sixth, Eighth and Fourteenth Amendment rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt and special circumstances. Accordingly, reversal is required.

### B. The Consciousness-of-Guilt Instruction Improperly Duplicated the Circumstantial Evidence Instructions

The giving of CALJIC No. 2.52 was unnecessary. This Court has held that specific instructions relating to the consideration of evidence that simply reiterate a general principle upon which the jury already has been

instructed should not be given. (See *People v. Lewis* (2001) 26 Cal.4th 334, 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 454-455; *People v. Berryman* (1993) 6 Cal.4th 1048, 1079-1080, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800.) In this case, the trial court instructed the jury on circumstantial evidence with the standard CALJIC Nos. 2.00, 2.01 and 2.02. These instructions informed the jury that it may draw inferences from the circumstantial evidence, i.e. that it could infer facts tending to show Streeter's guilt – including his state of mind – from the circumstances of the alleged crimes. There was no need to repeat this general principle in the guise of a permissive inference of consciousness of guilt, particularly since the trial court did not similarly instruct the jury on permissive inferences of reasonable doubt about guilt. This unnecessary benefit to the prosecution violated both the due process and equal protection clauses of the Fourteenth Amendment. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 479 [holding that state rule that defendant must reveal his alibi defense without providing discovery of prosecution's rebuttal witnesses gives unfair advantage to prosecution in violation of due process]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [holding that arbitrary preference to particular litigants violates equal protection].)

### C. The Consciousness-of-Guilt Instruction Was Unfairly Partisan and Argumentative

The consciousness-of-guilt instruction was not just unnecessary, it was impermissibly argumentative. The trial court must refuse to deliver any instructions that are argumentative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) The vice of argumentative instructions is that they present the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.)

Such instructions unfairly highlight "isolated facts favorable to one party, thereby, in effect, intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as those that "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]" (*People v. Mincey, supra,* 2 Cal.4th at p. 437.) Even if they are neutrally phrased, instructions that "ask the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871) or "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9) are argumentative and hence must be refused. (*Ibid.*)

Judged by this standard, CALJIC No. 2.52 is impermissibly argumentative. Structurally, it is almost identical to the instruction reviewed in *People v. Mincey*, *supra*, 2 Cal.4th at p. 437, fn. 5, which read as follows:

> If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may conclude that they were not in a criminal sense wilful, deliberate, or premeditated.

The instruction here tells the jury, "[i]f you find" certain facts (flight in this case and a misguided and unjustified attempt at discipline in *Mincey*), then "you may" consider that evidence for a specific purpose (showing consciousness of guilt in this case and concluding that the murder was not premeditated in *Mincey*). This Court found the instruction in *Mincey* to be argumentative (*id.* at p. 437), and it also should hold CALJIC. No. 2.52 to be impermissibly argumentative as well.

In *People v. Nakahara, supra,* 30 Cal.4th at p. 713, this Court rejected a challenge to consciousness-of-guilt instructions based on analogy to *Mincey, supra*, holding that *Mincey* was "inapposite for it involved no consciousness of guilt instruction" but rather a proposed defense instruction that "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense.' [Citation.]" However, this holding does not explain why two instructions that are identical in structure should be analyzed differently or why instructions that highlight the prosecution's version of the facts are permissible while those that highlight the defendant's version are not.

"There should be absolute impartiality as between the People and defendant in the matter of instructions . . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527 [citation]; accord, *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon, supra,* 412 U.S. at p. 474), and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law (*Lindsay v. Normet, supra*, 405 U.S. at p. 77). Moreover, the prosecution-slanted instruction violated due process by lessening the prosecution's burden of proof. (*Winship, supra,* 397 U.S. at p. 364.)

To insure fairness and equal treatment, this Court should reconsider the cases that have found California's consciousness-of-guilt instructions not to be argumentative. Except for the party benefitted by the instructions, there is no discernable difference between the instructions this Court has upheld (see, e.g., *People v. Nakahara, supra*, 30 Cal.4th 705, 713; *People v. Bacigalupo, supra,* 1 Cal.4th at p. 123 [CALJIC No. 2.03 "properly advised

the jury of inferences that could rationally be drawn from the evidence"]) and a defense instruction held to be argumentative because it "improperly implies certain conclusions from specified evidence." (*People v. Wright, supra*, 45 Cal.3d at p. 1137.)

Finding that a flight instruction unduly emphasizes a single piece of circumstantial evidence, the Supreme Court of Wyoming held that giving such an instruction always will be reversible error. (*Haddan v. State* (Wyo. 2002) 42 P.3d 495, 508.) In so doing, it joined a number of other state courts that have found similar flaws in the flight instruction. Courts in at least eight other states have held that flight instructions should not be given because they unfairly highlight isolated evidence. (*Dill v. State* (Ind. 2001) 741 N.E.2d, 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d 939, 949-950; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686; *State v. Grant* (S.C. 1980) 272 S.E.2d 169, 171; *State v. Wrenn* (Idaho 1978) 584 P.2d 1231, 1233-1234; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749; *State v. Reed* (Wash.App.1979) 604 P.2d 1330, 1333; see also *State v. Bone* (Iowa 1988) 429 N.W.2d 123, 125 [flight instructions should rarely be given]; *People v. Larson* (Colo. 1978) 572 P.2d 815, 817-818 [same].)[29]

The reasoning of two of these cases is particularly instructive. In *Dill v. State, supra*, 741 N.E. 2d 1230, the Indiana Supreme Court relied on that state's established ban on argumentative instructions to disapprove flight instructions:

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[29] Other state courts also have held that flight instructions should not be given, but their reasoning was either unclear or not clearly relevant to the instant discussion. (See, e.g., *State v. Stilling* (Or. 1979) 590 P.2d 1223, 1230.)

> Flight and related conduct may be considered by a jury in determining a defendant's guilt. [Citation.] However, although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such evidence. To the contrary, instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. [Citations.] We find no reasonable grounds in this case to justify focusing the jury's attention on the evidence of flight.

(*Id.* at p. 1232, fn. omitted.)

In *State v. Cathey*, *supra*, 741 P.2d 738, the Kansas Supreme Court cited a prior case which had disapproved a flight instruction (*id.* at p. 748) and extended its reasoning to cover all similar consciousness-of-guilt instructions:

> It is clearly erroneous for a judge to instruct the jury on a defendant's consciousness of guilt by flight, concealment, fabrication of evidence, or the giving of false information. Such an instruction singles out and particularly emphasizes the weight to be given to that evidence by the jury.

(*Id.* at p. 749; accord, *State v. Nelson* (Mont. 2002) 48 P.3d 739, 745 [reasons for the disapproval of flight instructions also applied to an instruction on the defendant's false statements].)

The argumentative consciousness-of-guilt instruction in this case invaded the province of the jury, focusing the jury's attention on evidence favorable to the prosecution, placing the trial court's imprimatur on the

prosecution's theory of the case, and lessening the prosecution's burden of proof. It therefore violated appellant's Fourteenth Amendment due process rights to a fair trial and equal protection, his Sixth and Fourteenth Amendment right to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury, and his Eighth and Fourteenth Amendment right to a fair and reliable capital trial.

### D. The Consciousness-of-Guilt Instruction Permitted the Jury To Draw an Irrational Permissive Inference about Streeter's Guilt

The consciousness-of-guilt instruction suffers from an additional constitutional defect – it embodies improper permissive inferences. The instruction permits the jury to infer one fact, such as Streeter's consciousness of guilt, from other facts, i.e., flight. (See *People v. Ashmus* (1991) 54 Cal.3d, 932, 977.) A permissive inference instruction can intrude improperly upon a jury's exclusive role as fact finder. (See *United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899.) By focusing on a few isolated facts, such an instruction also may cause jurors to overlook exculpatory evidence and lead them to convict without considering all relevant evidence. (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300 (en banc).) A passing reference to consider all evidence will not cure this defect. (*United States v. Warren, supra*, 25 F.3d at p. 899.) These and other considerations have prompted the Ninth Circuit to "question the effectiveness of permissive inference instructions." (*Ibid*; see also *id.*, at p. 900 (conc. opn. Rymer, J.) ["I must say that inference instructions in general are a bad idea. There is normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for that possible inference to be considered by the jury"].)

For a permissive inference to be constitutional, there must be a

rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67; *United States v. Rubio-Villareal*, *supra*, 967 F.2d at p. 926.) The due process clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313.) In this context, a rational connection is not merely a logical or reasonable one; rather, it is a connection that is "more likely than not." (*Ulster County v. Allen*, *supra*, 442 U.S. at pp. 165-167, and fn. 28; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313 [noting that the Supreme Court has required "'substantial assurance' that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend'"].) This test is applied to judge the inference as it operates under the facts of each specific case. (*Ulster County v. Allen*, *supra*, at pp. 157, 162-163.)

In this case, there was no dispute that Streeter caused Buttler's death. His guilt was a foregone conclusion. The only issue was guilt for which homicidal crime: first degree murder (under either a premeditation theory, lying-in-wait theory or torture-murder theory), second degree murder, or manslaughter. Under the facts here, irrational inferences were permitted.

The irrational inference concerned Streeter's mental state at the time the charged crimes allegedly were committed. The improper instruction permitted the jury to use the consciousness-of-guilt evidence – the undisputed evidence that Streeter fled the scene – to infer, not only that Streeter killed Buttler, but that he did so while harboring the intents or mental states required for conviction of first degree murder. Although the

consciousness-of-guilt evidence in a murder case may bear on a defendant's state of mind after the killing, it is *not* probative of his state of mind immediately prior to or during the killing. (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 32-33.) Professor LaFave makes the same point: "Conduct by the defendant *after* the killing in an effort to avoid detection and punishment is obviously not relevant for purposes of showing premeditation and deliberation as it only goes to show the defendant's state of mind at the time and not before or during the killing." (LaFave, Substantive Criminal Law (2nd ed. 2003), vol. 2, § 14.7(a), pp. 481-482, original italics.)

Therefore, Streeter's flight after the crime, upon which the consciousness-of-guilt inference was based – was not probative of whether he harbored the mental states for first degree murder at the time he poured gasoline on Buttler and lit her on fire. There was no rational connection – much less a link more likely than not – between Streeter's flight and consciousness by him of having committed the homicide with (1) premeditation, (2) deliberation, (3) malice aforethought, (4) a concealment by ambush or by some other secret design to take the other person by surprise, or (5) an intent to inflict extreme and prolonged pain.

Given Streeter's admission that he was criminally culpable for homicide, the consciousness-of-guilt instruction was completely irrelevant. His flight cannot reasonably be deemed to support an inference that he had the requisite mental state for first degree murder, as opposed to second degree murder or manslaughter.

This Court has previously rejected the claim that the consciousness-of-guilt instructions permit irrational inferences concerning the defendant's mental state. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 348 [CALJIC No. 2.03]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579

[CALJIC Nos. 2.03 & 2.52]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03, 2.06 & 2.52].) However, Streeter respectfully asks this Court to reconsider and overrule these holdings and to hold that in this case delivery of the consciousness-of-guilt instruction was reversible constitutional error.

Because the consciousness-of-guilt instruction permitted the jury to draw an irrational inference of guilt against Streeter, use of the instruction undermined the reasonable doubt requirement and lightened the prosecution's burden of proof, thereby denying appellant his Fourteenth Amendment rights to a fair trial and due process of law. The instruction also violated Streeter's Sixth and Fourteenth Amendment rights to have a properly instructed jury find that all the elements of the charged crime had been proven beyond a reasonable doubt, and, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, the instructions violated his Eighth and Fourteenth Amendment rights to a fair and reliable capital trial.

**E. Reversal Is Required**

Giving the consciousness-of-guilt instruction was an error of federal constitutional magnitude as well as a violation of state law. Accordingly, Streeter's murder conviction and the special circumstance findings must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24; see *Schwendeman v. Wallenstein, supra*, 971 F.2d at p. 316 ["A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt"].)

The error in this case was not harmless beyond a reasonable doubt. As discussed above, the evidence establishing first degree murder was not

strong. Since flight was not disputed, it was almost certain that the jury found the instruction applicable. Moreover, the error affected the only contested issue in the case, i.e., the nature and degree of the homicide. The effect of the consciousness-of-guilt instruction was to tell the jury that Streeter's own conduct showed he was aware of his guilt for the very charge he disputed. In the context of this case, this instruction was not harmless beyond a reasonable doubt. Therefore, the judgment on the murder conviction and the special circumstance allegations must be reversed.

## PENALTY PHASE ISSUES

## XVI.

## THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE FUNDAMENTAL PRINCIPLES NECESSARY FOR DETERMINING THE APPROPRIATE PENALTY

### A. Introduction

CALJIC No. 8.88 [Penalty Trial – Concluding Instruction], formerly known as CALJIC No. 8.84.2, has been given at the close of the penalty phase in death penalty cases in California since 1986. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060; CALJIC No. 8.88 (1988).) This Court repeatedly has held that this instruction properly defines the sentencing process the jury is to undertake. (See, e.g., *People v. Gutierrez, supra,* 28 Cal.4th at p. 1161; *People v. Jackson* (1996)13 Cal.4th 1164, 1244; *People v. Johnson* (1992) 3 Cal.4th 1183, 1250; *People v. Duncan* (1991) 53 Cal.3d 955, 978.) After defining the meaning of aggravating and mitigating factors, the instruction explains how those factors are to be considered and how the jury is to arrive at the appropriate penalty as follows:

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical

> counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(CALJIC No. 8.88.)

Inexplicably, Streeter's penalty phase jurors were not given this instruction – or any instruction that explained the process for considering or weighing aggravating and mitigating factors.[30] As a result, other than being told that they were not to decide the case "by the flip of a coin, or by any other chance determination" (CALJIC No. 17.40; XXIV RT 2633; CT 455), the jurors were not informed about how to undertake the fundamental task of determining which penalty should be imposed. They were given the list of statutory factors to consider (CALJIC No. 8.85; XXIV RT 26302631; CT 448), but not instructed how to consider the factors. They were not told that there *was* a weighing process, much less that the weighing of factors was not a mechanical process, or that each juror must make a personal decision with regard to the appropriate penalty after assigning moral or sympathetic

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[30] During the instructional conference, the trial court stated that the instruction was "stricken" without further discussion. (XXII RT 2380.)

value to the factors as that juror deems appropriate. Nor was the jury told that it could only vote to impose death if each juror was persuaded that the aggravating circumstances were "so substantial" in comparison with the mitigating circumstances that they warranted death.

The jurors' utter confusion about the process was reflected in the note they submitted during deliberations in which they asked two questions. First, they asked if they could reach a sentence of life without possibility of parole even if they determined that aggravation "significantly" outweighed mitigation. (CT 465.) Their second question was whether the determination that "the circumstances presented in this case do not meet the minimum standards for the sentence of death" could be considered as a "mitigating circumstance." (*Ibid.*) The trial court's response, that they could "reach any verdict you wish as to the appropriate penalty," (*ibid*) failed to come close to giving the jurors the guidance they required.

Since the jury was not instructed by the court on how to reach an appropriate sentence, there is no way to discern how it ultimately made the decision to sentence appellant to death. Indeed, it is reasonably likely that the lack of proper instructions misled the jury as to the nature and scope of its fundamental task. Such a result cannot stand without violating California law and appellant's Sixth, Eighth and Fourteenth Amendment rights. Reversal of the death sentence is therefore required.

### B. The Constitution Requires That the State Provide Sufficient Guidance to Capital Juries So That Their Decisions Are Not Arbitrary, Capricious or Unreliable

Because the "penalty of death is qualitatively different from a sentence of imprisonment," there is a heightened need "for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304, 305 (plur. opn.).)

To ensure such reliability, "sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses. The Constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." (*California v. Brown* (1987) 479 U.S. 538, 541, citing *Gregg v. Georgia* (1976) 428 U.S. 153 and *Furman, supra,* 408 U.S. 238.) Thus, a capital sentencing scheme must "suitably direc[t] and limi[t]" the sentencer's discretion "so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg, supra,* 428 U.S. at p. 189 (joint opn. of Stewart, J., Powell, J., and Stevens, J.).) The State must "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." (*Godfrey v. Georgia,* 446 U.S. at p. 428 (plur. opn.).)

Accordingly, "[t]he Supreme Court has required states to adopt capital punishment procedures that assure reliability in sentencing determinations." (*Ceja v. Stewart* (9th Cir. 1996) 97 F.3d 1246, 1260, citing *Barclay v. Florida* (1983) 463 U.S. 939, 958-59 (conc. opn. of Stevens, J.).) As stated in *Barclay*, "[s]tates may impose this ultimate sentence only if they follow procedures that are designed to assure reliability in sentencing determinations." (*Barclay v. Florida, supra,* 463 U.S. at pp. 958-959 (conc. opn. of Stevens, J.).) Part of this reliability requirement 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." (*Id.* at p. 954 (plurality opn.), quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251 (opn. of Stewart, J., Powell, J. and Stevens, J.).)

Moreover, once a state has implemented sentencing standards, it must comply with those standards or risk violating the defendant's due

process rights. (*Hicks v. Oklahoma, supra,* 447 U.S. 343.) When a state has provided a specific method for determining whether a certain sentence shall be imposed, therefore, "it is not correct to say that the defendant's interest in having that method adhered to 'is merely a matter of state procedural law.'" (*Fetterly v. Paskett, supra,* 997 F.2d at p. 1300, citing *Hicks, supra,* 447 U.S. at p. 346; see *id.* at p. 1300 ["[T]he failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state"].)

### C. This Court Has Approved CALJIC No. 8.88 as the Vehicle for Explaining to the Jury the Process for Determining the Appropriate Penalty

California's death penalty statute provides that the "trier of fact . . . shall impose a sentence of death if . . . aggravating circumstances outweigh mitigating circumstances." (§ 190.3.) This Court has explained that this language – with which Streeter's jury was not instructed – "should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances." (*People v. Brown* (1985) 40 Cal.3d 512, 541.) This Court has made clear that "[t]he jury is not simply to determine whether aggravating factors outweigh mitigating factors and then impose the death penalty as a result of that determination, but rather it is to determine, after consideration of the relevant factors, whether under all the circumstances 'death is the appropriate penalty' for the defendant before it." (*People v. Myers* (1987) 43 Cal. 3d 250, 276.)

This Court has stressed that the "weighing" language of section 190.3 is a metaphor for a difficult-to-describe mental process by which each juror, after considering all relevant evidence, is to reach a personal

judgment as to whether death is the appropriate punishment. (*People v. Brown, supra,* 40 Cal. 3d at p. 541; see also *People v. Edelbacher, supra,* 47 Cal. 3d at p. 1037 ["the jury exercises an essentially normative task, acting as the community's representative, that it may apply its own moral standards to the aggravating and mitigating evidence presented, and that it has ultimate responsibility for determining if death is the appropriate penalty for the particular offense and offender"]; *People v. Bonin* (1989) 47 Cal. 3d 808, 856 [the jury is required "to make a moral assessment on the basis of the character of the individual defendant and the circumstances of the crime and thereby decide which penalty is appropriate in the particular case"].) Because the sentencing function is "inherently moral and normative [citation] . . . the weight or importance to be assigned to any particular factor or item of evidence involves a moral judgment to be made by each juror individually." (*People v. Crandell* (1988) 46 Cal.3d 833, 883.)

When the jury is not instructed on these fundamental principles, there is a danger that it will be misled as to the true nature of its role in the sentencing process. In *People v. Allen* (1986) 42 Cal.3d 1222, 1277, this Court noted that an instruction in the unadorned language of the statute quoted above could be erroneously interpreted to require the jury "to determine whether 'the aggravating circumstances outweigh the mitigating circumstances' without regard to the juror's personal view as to the appropriate sentence and then [] to impose a sentence of death if aggravation outweighs mitigation even if the juror does not personally believe death is the appropriate sentence under all the circumstances."

As this Court has made clear, however, no one is to be sentenced to die in California unless the jury ultimately decides that death is the

appropriate penalty: "[O]ur statute . . . give[s] the jury broad discretion to decide the appropriate penalty by weighing all the relevant evidence. The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death." (*People v. Duncan, supra,* 53 Cal.3d at p. 979.) Moreover, this Court has repeatedly indicated that one mitigating factor, standing alone, may be sufficient to outweigh all other factors. (*People v. Grant* (1988) 45 Cal.3d 829, 857, fn. 5; *People v. Hayes* (1990) 52 Cal.3d 577, 642; *People v. Cooper* (1991) 53 Cal.3d 771, 845.)

To ensure that the jury understands the process for determining the appropriate sentence, this Court has approved what is now the pattern jury instruction, CALJIC No. 8.88. (*People v. Duncan, supra,* 53 Cal.3d at pp. 978-979.) According to this Court, the instruction conveys that the weighing process is "merely a metaphor for the juror's personal determination that death is the appropriate penalty under all of the circumstances." (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1250.) The instruction explains that rather than a "mere mechanical counting of factors on each side of the imaginary 'scale,' or the arbitrary assignment of 'weights' to any of them[,] [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." (*People v. Brown*, *supra,* 40 Cal.3d at p. 532; see *People v. Cooper*, *supra*, 53 Cal.3d at p. 845 [citations]["when jurors are informed that they have discretion to assign whatever value they deem appropriate to the factors listed, they necessarily understand they have discretion to determine the appropriate penalty"].)

As this Court has stated, this instruction "adequately guide[s] selection of the appropriate punishment" by specifically informing the

jurors "that in order "[t]o return a judgment of death, each of you must be persuaded that the aggravating [evidence is] so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (*People v. Ray* (1996) 13 Cal.4th 313, 355, citing *People v. Duncan*, *supra*, 53 Cal.3d at pp. 978-979.) Furthermore, "[b]y stating that death can be imposed in only one circumstance – where aggravation substantially outweighs mitigation – the instruction clearly implies that a sentence less than death may be imposed in all other circumstances." (*People v. Ray*, *supra*, 13 Cal.4th at p. 355; see also *People v. Coddington, supra,* 23 Cal.4th at p. 642 [an instruction that informs the jury that to return a judgment of death, "each of you" must be persuaded that aggravation is so substantial in comparison with mitigation is adequate to ensure reliability of a death verdict as it makes clear to the jurors that each must reach an individual decision that aggravating factors outweigh mitigating factors].) In addition, requiring the imposition of a death sentence only where the aggravation is "so substantial" in comparison with the mitigation, the instruction "plainly convey[s] the importance of the jury's decision and emphasize[s] that a high degree of certainty is required for a death verdict." (*People v. McPeters* (1992) 2 Cal.4th 1148, 1194.) This language thus reflects "the gravity of the jury's task, which included the choice of death as a penalty." (*Ibid.*)

When a truncated version of this instruction has been given, this Court has found no error as long as the jury had been adequately informed that the weighing process was not mechanical, that the jurors were free to weigh the circumstances in aggravation and mitigation as they each saw fit, that they were to each personally determine the appropriate penalty, and that they understood they had discretion to vote for life in prison rather than

death unless they were to conclude death is the appropriate penalty. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1062-1063; *People v. Monterroso* (2004) 34 Cal.4th 743, 792.) In appellant's case, as explained below, the jury was not given any part of CALJIC No. 8.88, and therefore was not informed of these critical requirements for determining the appropriate sentence.

### D. Appellant's Jury Was Not Instructed About the Process for Reaching the Appropriate Verdict

Because the jurors were not given CALJIC No. 8.88, they were not informed by the court how to reach the appropriate penalty or informed of the essential sentencing principles outlined above. Nothing cured this fatal omission.

Prior to the start of trial, the judge read CALJIC No. 8.85 to the jury, which enumerated the various factors for the jury to consider. (XIX RT 1911-1913.) The court then stated that "those are the things that you're going to be hearing about in this case" and "those are the ones you're going to be weighing when we finally get around to that part of your function in this case." (XIX RT 1913.) Making matters worse, the court, rather than explain that to reach a death verdict the aggravation must be "so substantial" in comparison to the mitigation, informed the jurors prior to trial and in the instructions at the close of the case with regard to the two penalties, life without possibility of parole and the death penalty, that the law does not favor one over the other. (XVII RT 1625-1626; VII RT 1689; see XXIV RT 2629.)

Based on a review of the penalty phase instructions given to the jurors, this is the sum total of what they were told about the process for reaching a verdict:

- The jury must determine which of two penalties – death or life without possibility of parole – shall be imposed. (CT 445; XXIV RT 2629.)
- The jury shall consider, take into account and be guided by 11 factors – (a) through (k) – if applicable. (CT 448-449; XXIV RT 2630-2631.)
- The jurors must decide the case for themselves after discussing the evidence and instructions with other jurors, and must not decide any issue by the "flip of a coin, or by any other chance determination." (CT 455; XXIV RT 2633.)
- In order to make a determination as to penalty, the decision must be unanimous. (CT 461; XXIV RT 2635.)

No instruction telling the jury about the weighing process or even that there was a weighing process was given. Thus, the jurors were told what factors they could take into account, but were not instructed that they were to each assign sympathetic or moral weight to those factors, how to do so, or how to weigh the factors against each other. Nor were the jurors told that they each had discretion to vote for life if, after weighing the totality of aggravating circumstances against the totality of mitigating circumstances, they determined that death was not the appropriate penalty. In addition, diminishing their sense of responsibility, the jury was erroneously instructed, as explained in Claim XXI, that they must "reach a just verdict regardless of the consequences." (CT 432; XIX RT 2624.)

The jury's lack of understanding about the process was made clear by its question on the second day of deliberations. (CT 465.) The note it

submitted to the court referenced CALJIC No. 8.84,[31] beginning with the second paragraph, and then asked: "Assume the aggravating circumstances in the case, as stated in 8.85, significantly outway [*sic*] the mitigating circumstances, may we still select life without possibility of parole? [¶] Is the opinion of the juror[s] that the circumstances presented in this case do not meet the minimum standards for the sentence of death allowed as a mitigating circumstance?" (CT 465.)

As discussed above, this Court's long line of cases regarding the nature and scope of the jury's responsibilities make clear that the jury may vote for life without possibility of parole if the jury determined that death was not the appropriate penalty, after each juror assigned whatever moral or sympathetic weight he or she deemed appropriate to the aggravating and mitigating circumstances, and considering the totality of aggravating and mitigating circumstances. The jury's note reflected that the jurors did not believe that death was the appropriate penalty but were unsure whether this merely constituted a mitigating circumstance that should be weighed against aggravating circumstances or whether their belief that death was not the appropriate penalty was sufficient to vote for life even if aggravation outweighed mitigation.

The trial court should have told the jury in response to the two

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[31] This instruction, which provided the jury with no guidance with regard to how to reach a verdict, stated as follows: "It is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstances are alleged in this case have been specially found to be true. [¶] Under the law of this state, you must now determine which of these penalties shall be imposed on the defendant." (CT 445; XXIV RT 2629.)

questions that: (1) yes, they could vote to impose a life without possibility of parole sentence even if they determined that aggravating circumstances outweighed mitigating circumstances, (see *People v. Brown, supra,* 40 Cal.3d at p. 542, fn. 13; *People v. Duncan, supra,* 53 Cal.3d at p. 979); and (2) the belief that the circumstances do not meet the minimum standards for death, i.e., that death is not appropriate, should not be considered merely as a "mitigating circumstance" to be compared to the aggravating circumstances, but is itself a basis for a life sentence. Thus, if a juror determined that death is not the appropriate sentence, after considering and giving weight to the aggravating and mitigating circumstances, he or she has the discretion to vote for life without possibility of parole. (See *People v. Brown, supra,* 40 Cal.3d at p. 541.)

Instead, the judge responded as follows: "Under the law you are permitted to reach any verdict you wish as to the appropriate penalty." (CT 465.) This answer was legally incorrect. The jury had been instructed that there were two appropriate penalties: death and life without possibility of parole, and that the law did not favor one over the other. (CT 445; XVII RT 1625-1626; VII RT 1689.) The judge's answer to the jury left the unmistakable impression that either penalty was appropriate, and that they could choose either one they wished. This is not at all the same as being told that each juror must personally decide which of these two penalties is appropriate.

In addition, the court never explained that a juror's determination that death is not appropriate under the circumstances is not merely one mitigating factor to be weighed against aggravation, but is in and of itself a valid basis for reaching a life verdict. Furthermore, by informing the jury they could reach "any verdict you wish" without being provided any

guidance on how to determine which penalty is appropriate left the jury without the kind of specific and detailed guidance required by California law and the federal Constitution. Since the jury was never informed as to the proper mechanism for reaching an appropriate penalty, being told to simply reach it failed to provide the guided discretion required by due process and the Eighth Amendment. This would be akin at the guilt phase to telling a jury that there were two possible verdicts, guilty and not guilty, and that they could reach either one they wished without informing them of the burden of proof.

The jury's continued difficulty in understanding the sentencing process was made clear eight minutes after the court's response to the jurors' note when they informed the court that they were unable to reach a verdict. (CT 462, 466.) It was only when the jury returned, after the court had recessed the jury and ordered them to resume deliberations one week later, that a verdict was reached. (CT 466-468.)

### E. No Other Instructions or Comments Provided the Requisite Guidance

This Court has reversed the death sentence in several cases which were tried before the *Brown* decision led to a change in the standard instruction. In each of these cases, the Court found that where an instruction was given in the unadorned language of the statute there was a substantial danger that the jury would fail to understand its role in determining the appropriate sentence. (See *People v. Edelbacher*, *supra,* 47 Cal.3d at 1035-1041; *People v. Farmer* (1989) 47 Cal.3d 888, 924-931; *People v. Crandell, supra,* 46 Cal.3d at pp. 883-885; *People v. Milner* (1988) 45 Cal.3d 227, 253-257; *People v. Myers*, *supra,* 43 Cal.3d at pp. 273-276; *People v. Burgener* (1986) 41 Cal. 3d 505, 541-542.)

Even though appellant's case was tried a dozen years after *People v.*

*Brown*, *supra*, 40 Cal.3d 512, like these cases, appellant's jury did not have the benefit of the post-*Brown* instruction. While the juries in those *pre-Brown* cases were given potentially misleading instructions on the sentencing process, appellant's jury was given no instruction whatsoever.[32] However, as with the pre-*Brown* cases, it is reasonably likely that appellant's jury was misled as to the scope of their sentencing discretion and responsibility.

In *Edelbacher*, the jury was given the pre-*Brown* instruction without elaboration, i.e., that the jury shall impose the death penalty if aggravating circumstances outweigh mitigating circumstances. (*People v. Edelbacher, supra,* 47 Cal.3d at p. 1035.) The Court found that the jury was adequately informed with regard to the non-quantitative role of the weighing process in light of the supplementary instructions and arguments of counsel. It found, however, that the jury was not properly instructed on each juror's role to determine the appropriate penalty based on an individualized assessment of moral and sympathetic value of the factors. (*Id.* at p. 1036.) *Edelbacher* is instructive in showing how appellant's jury was uninformed about both of these critical aspects of the sentencing process.

While appellant's jury was given *no* instruction regarding the weighing process, the jury in *Edelbacher*, in addition to the unadorned instruction was given a supplemental instruction that the jury "may not decide the effect of [aggravating and mitigating] circumstances by the

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[32] Appellant submits, as discussed below in section "H," that because no instruction was given, as opposed to a potentially misleading one, reversal is required without having to undertake a harmless error analysis which would include the parsing of counsels' arguments to determine whether the jurors had been adequately informed as to how to reach a verdict in conformity with California law despite the lack of instruction.

simple process of counting the number of circumstances on each side. The particular weight of such opposing circumstances is not determined by their relative number, but rather by their relative convincing force on the ultimate question of punishment." (*Id.* at p. 1036.) Furthermore, unlike appellant's case, the prosecutor, as well as defense counsel, "correctly stated in argument that the weighing process was qualitative and that the sheer number of factors in aggravation or mitigation was not determinative." (*Ibid.*) The prosecutor in appellant's case, by contrast, never made this clear, and to the contrary, implied a mechanical weighing of factors. (See XIX RT 1930; XXIV RT 2580, 2581, 2605.) Thus, while the Court found that the jury in *Edelbacher* was given sufficient instruction regarding the non-mechanical nature of the weighing process (*Edelbacher, supra,* 47 Cal.3d at p. 1036), the same cannot be said here.

In *Edelbacher*, the Court did find a "substantial danger the jury was misled with respect to the proper context of the weighing process and the nature of the determination it was intended to achieve." (*Edelbacher, supra,* 47 Cal.3d at p. 1036.) First it noted that "[n]o instruction was given which informed the jury 'about its sole responsibility to determine, based on its individualized weighing discretion, whether death is appropriate in this case.'" (*Id.* at p. 1036, quoting *People v. Allen, supra,* 42 Cal.3d at p. 1278.) There, as here, no "equivalent ameliorative instruction [was] given." (*Ibid.*) As the Court noted, "'when jurors are informed that they have discretion to assign whatever value they deem appropriate to the factors listed, they necessarily understand they have discretion to determine the appropriate penalty.'" (*Id.* at pp. 1036-1037, quoting *People v. Boyde* (1988) 46 Cal.3d 212, 253.) In *Edelbacher*, as in appellant's case, the jury was not informed "that the weight to be given any factor was to be decided

by each juror individually." (*Id.* at p. 1037.) There was therefore a "failure to give any sufficient clarifying instruction on this crucial aspect of the penalty determination process." (*Ibid.*) Similarly, appellant's jury would not have understood that each juror was required to personally and individually assign moral or sympathetic value to each factor.

Because the jury in *Edlebacher* had been given potentially misleading instructions – as opposed to no instruction – this Court looked to the arguments of counsel, particularly that of the prosecutor, to determine whether the jury would have understood its role: consisting of "an essentially normative task, acting as the community's representative, that it may apply its own moral standards to the aggravating and mitigating evidence presented, and that it has ultimate responsibility for determining if death is the appropriate penalty for the particular offense and offender." (*Id.* at p. 1037, citing *People v. Allen, supra*, 42 Cal.3d at p. 1287; *People v. Williams* (1988) 44 Cal.3d 883, 960; *People v. Brown, supra,* 40 Cal.3d at p. 448; *People v. Karis* (1988) 46 Cal.3d 612, 639.) In *Edelbacher,* as here, the prosecutor stated that the jury's function was to weigh aggravating circumstances against mitigating circumstances, and stressed that the death penalty must be imposed if aggravation preponderated. (*People v. Edelbacher*, *supra,* 47 Cal.3d at p. 1307; see, e.g., XXIV RT 2581 [the crime itself is so "heinous, so wicked, so mean spirited that it requires the death penalty"]; XXIV RT 2605 ["if the aggravating outweighs the mitigating" the jury must find for death; "And if the aggravating substantially outweighs the mitigating, death penalty. That's the way our

law is. And that's what you must follow"].)[33]

Such comments were potentially misleading "without an explanation that the weighing process is the method by which the jury determines from the relevant evidence which of two penalties – death or life without possibility of parole – is most appropriate under all the circumstances and without some express or implied recognition that the process requires the jurors individually to make a difficult moral decision on the appropriateness of the chosen punishment." (*Edelbacher, supra,* 47 Cal.3d at p. 1038.)

While the prosecutor's remarks about the sentencing process in appellant's case were exceedingly brief, it is noteworthy that, as in *Edelbacher*, "[n]ot once did the prosecutor use the word 'appropriate' or state in substance that the jurors were to exercise moral judgment in deciding whether death was the appropriate penalty for this defendant. He never discusssed the penalty of life without parole or attempted to demonstrate why it would not be appropriate." (*Id.* at p. 1039.) In the absence of adequate instructions, as the Court concluded in *Edelbacher*, "the jury in this case may well have been persuaded to adopt the view that its responsibility was merely to weigh aggravating and mitigating factors without regard to the appropriateness of the alternative penalties and that it was required to return a sentence of death if aggravating factors

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[33] The few times the prosecutor in appellant's case actually touched on the process he stated it in different ways, each progressively closer to mandating death if aggravating circumstances outweighed mitigation circumstances: (1) if aggravation substantially outweighs mitigation and the jury believes this is the proper verdict they should vote for death (XXIV RT 2580); (2) if aggravation substantially outweighs mitigation the death penalty is required (XXIV 2581); and (3) if aggravation outweighs mitigation or substantially outweighs mitigation, the jury must find for death. (XXIV RT 2605.)

preponderated without each juror making a personal conclusion from the evidence that death was appropriate under the circumstances for the offense and the offender." (*Id.* at pp. 1040-1041.)

Another helpful case is *People v. Myers, supra,* 43 Cal.3d 250. In that case, the jury was given an instruction in the unadorned language of the statute. (*Id.* at p. 273.) No supplementary instructions were given. However, as in *Edelbacher,* the jury was found not to have been misled into believing the weighing process consisted of a "mechanical counting" because, unlike in appellant's case, *both* counsel explained to the jury that it was free to "attach whatever weight was appropriate" to each relevant factor and the prosecutor did not suggest the weighing process "was a mechanical or arithmetic operation." (*Id.* at p. 275.) Again, here, by contrast, while defense counsel did tell the jury they were free to assign their own value to the factors (XXIV RT 2615, 2622), the prosecutor certainly did not. Rather, the prosecutor in his opening statement and closing argument misleadingly implied that the process was indeed a quantitative weighing of factors. (See XIX RT 1930 ["you will end up . . . balancing what he did against whatever the defense chooses to show you . . .]; XXIV RT 2580 [the jurors need to "weigh all these various factors"].) Without the necessary instructions, the jury would have been misinformed as to the weighing process.

In *Myers*, this Court did find, as in *Edelbacher*, that the jury was misled with regard to the "ultimate question which the jury must answer in determining which sentence to impose." (*People v. Myers, supra,* 43 Cal.3d at p. 275.) Together, the prosecutor's argument and the lack of clarifying instructions misled the jury into believing that it must simply weigh aggravating circumstances against mitigating circumstances and vote to

impose death if aggravation outweighed mitigation. (*Ibid.*) Similarly, in appellant's case, the prosecutor's brief discussion of the sentencing process – without the benefit of proper instructions – was reasonably likely to have misled appellant's jury to believe that the law required the death penalty if aggravation outweighed – or substantially outweighed – mitigation. (See XXIV RT 2581 ["the law says we give the death penalty where the aggravating factors substantially outweigh the mitigating factors;" "if you go over that line . . . then you've done a crime that requires the death penalty]; XXIV RT 2605 ["if the aggravating outweighs the mitigating" the jury must find for death;" "And if the aggravating substantially outweighs the mitigating, death penalty. That's the way our law is. And that's what you must follow"].)

As stated in *Myers*, "[t]he jury is not simply to determine whether aggravating factors outweigh mitigating factors and then impose the death penalty as a result of that determination, but rather it is to determine after consideration of the relevant factors, whether under all the circumstances 'death is the appropriate penalty' for the defendant before it." (*Id.* at p. 276.) Here, as in *Myers*, "there is clearly a reasonable possibility that the jury was misled as to the nature of its ultimate duty at the penalty phase." (*Ibid.*)

### F. The Failure To Adequately Instruct the Jury at the Penalty Phase Violated Appellant's Constitutional Rights

A trial court has a sua sponte duty to correctly instruct the jury on the general principles of law governing the case before it. (*People v. Hernandez* (1988) 47 Cal.3d 315, 353; *People v. Avalos* (1984) 37 Cal.3d 216, 229.) The court also has a sua sponte duty to define terms which have a "technical meaning peculiar to the law." (*People v. McElheny* (1982) 137 Cal.App.3d 396.) Failure to do so denies a criminal defendant his federal

constitutional right to have the jury decide every material issue presented by the evidence. (*People v. Reynolds* (1988) 205 Cal.App.3d 775, 779, citing *People v. Mayberry* (1975) 15 Cal.3d 143, 157.) Here, the court failed to explain the weighing process, failed to define aggravating or mitigating circumstances or explain the importance of each juror assigning moral or sympathetic value it deemed appropriate to these circumstances, and never told the jury what was required in order to make an appropriate determination of death.

Without such guidance, the jury would not know that each juror was required to make his or her own determination of appropriateness of the penalty by assigning its own moral or sympathetic value to the factors. They were *not* "to determine whether 'the aggravating circumstances outweigh the mitigating circumstances' without regard to the juror's personal view as to the appropriate sentence and then [] impose a sentence of death if aggravation outweighs mitigation even if the juror does not personally believe death is the appropriate sentence under all the circumstances." (*People v. Allen, supra,* 42 Cal.3d at p. 1277.) Without proper instruction, however, they would not know this. Nor did they understand – as evidenced by the note to the court – that they had "broad discretion" and "may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death." (*People v. Duncan, supra,* 53 Cal.3d at p. 979.)

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate. (*Zant v. Stephens, supra*, 462 U.S. at p. 879). The ultimate question in the penalty phase of a capital case is whether death is the

appropriate penalty. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) The failure to instruct the jury on how to reach an appropriate penalty violated the Eighth and Fourteenth Amendments because the jury was left with instructions that were vague and directionless. (See *Maynard v. Cartwright, supra,* 486 U.S. at p. 362.)

The failure to provide the jury with "clear and objective standards that provide specific and detailed guidance" (*Godfrey v. Georgia, supra,* 446 U.S. at p. 428), violated appellant's Eighth and Fourteenth Amendment rights to a reliable, non-arbitrary and non-capricious sentencing determination. The failure to give an instruction which informed each juror to assign whatever moral or sympathetic weight it deemed appropriate to each of the factors prevented the jury from giving effect to all the constitutionally relevant mitigating evidence presented at the penalty phase in violation of the Eighth Amendment. (See *Tennard v. Dretke* (2004) 542 U.S. 274, 283-285.) In addition, because the jury was not told that they could only vote to impose death if each juror determined that death was the appropriate penalty and that aggravation was "so substantial" in comparison with mitigation, the gravity of the jury's task was not conveyed to them, which, particularly in combination with the giving of CALJIC No. 1.00 (Claim XXI) undermined the jury's sense of responsibility. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 330.)

Appellant was further denied his Sixth and Fourteenth Amendment rights by the impermissible lowering of the prosecution's burden in obtaining a death sentence. (*Winship, supra,* 397 U.S. 358; *Carella v. California, supra,* 491 U.S. at p. 265.)

Appellant was also denied his Fourteenth Amendment right to equal protection given that all persons similarly situated are guaranteed a jury trial

in which the jury is instructed with the standard instruction on how to reach a sentencing verdict. (*Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.) Furthermore, the failure to give this instruction deprived appellant of a state-created liberty interest protected by due process to a sentence that was reached based on sentencing standards required by state law. (*Hicks v. Oklahoma*, *supra,* 447 U.S. 343.)

### G. The Trial Court's Erroneous Response to the Jury's Questions Violated Appellant's Constitutional Rights

As discussed in detail above, the trial court not only failed to clear up the jury's confusion about the sentencing process, but its answer was legally erroneous. In the face of the jury's explicit confusion, the court failed to explain that it had the discretion to vote to impose a life without parole sentence even if aggravation outweighed mitigation, and that the standard in weighing aggravation against mitigation was not whether aggravation "significantly" outweighed mitigation, but whether it was "so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88.) Furthermore, the court failed to answer the jury's question whether a finding that "the circumstances presented in this case do not meet the minimum standards for the sentence of death" could be considered a mitigating circumstance by explaining that such a finding was not merely a mitigating circumstance but, standing alone was a basis for the jury to choose life over death.

The trial judge's failure to provide a meaningful response to the jury's questions in and of itself violated due process. (*Bollenbach v. United States* (1946) 326 U.S. 607, 612 ["[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy"].) It also deprived appellant of his Sixth, Eighth and Fourteenth Amendment rights to a trial by jury, fundamental fairness and an individualized, reliable

and non-arbitrary sentencing determination.

### H. Reversal Is Required

The standard penalty phase instruction, which informs the jury of the process for reaching the appropriate penalty, is as fundamental at the penalty phase as is the reasonable doubt instruction at the guilt phase. In *Sullivan v. Louisiana, supra,* 508 U.S. 275, the Supreme Court held that where a jury instruction "consists of a misdescription of the burden of proof, [it] vitiates *all* the jury's findings." (*Id.* at p. at 281, original italics.) *Sullivan* held that the giving of a defective reasonable doubt instruction was thus reversible per se. The Court reasoned that, essentially, there had been no jury verdict within the meaning of the Sixth Amendment:

> There being no jury verdict of guilty-beyond -a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt – not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough.

(*Id.* at pp. 279-280.) *Sullivan* teaches that certain errors, "whose precise effects are unmeasurable but without which a criminal trial cannot reliably serve its function" are reversible per se. (*Id.* at p. 281; see also *Jackson v. Virginia, supra,* 443 U.S. at p. 320, fn. 14 ["Our cases have indicated that failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error"].)

This Court has held that there is no burden of proof at the penalty

phase, and instead, the process for determining penalty is a moral and normative one. (See *People v. Holt* (1997) 15 Cal.4th 619, 684.) However, the jury must be informed of this. Because the jury was not told how to reach an appropriate verdict – or even that its decision was a normative one – there was in essence no determination of the appropriate penalty. This is a structural error that is reversible per se. As with the lack of a proper reasonable doubt instruction at the guilt phase, the most a reviewing court can conclude is that a jury would have reached a death verdict, not that the jury's death verdict in this case would surely have been different absent the error.

An "essential corollary" of the "reasonable-doubt standard in criminal proceedings [is] that a conviction, capital or otherwise, cannot stand if the jury's verdict could have rested on unconstitutional grounds." (*Boyde v. California* (1990) 494 U.S. 370, 389 (dis. opn. of Marshall, J., joined by Brennan, J., Blackmun, J., and Stevens, J.), citing *Stromberg v. California* (1931) 283 U.S. 359, 367-368 [other citations omitted].)

Reversal is required without the need for harmless error analysis because there is no way of knowing whether the jury applied a constitutionally correct standard in determining appellant's sentence. For example, because of the lack of proper instructions, the jury very well may have determined the weight of aggravating and mitigating circumstances collectively, rather than according to each individual juror's personal assignment of moral or sympathetic weight. Or, as the jury note indicates, the jury could have found that death was not appropriate under the circumstances but voted for death because it found that aggravating circumstances outweighed mitigating circumstances. It is extremely unlikely that the jury would have arrived at the proper process on its own.

In *Sandstrom v. Montana, supra,* 442 U.S. 510, 526, the Supreme Court recognized that "it has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." *Sandstrom* involved the issue of whether the jury instructions unconstitutionally shifted the burden of proof regarding the defendant's intent at the time of the crime. The Court held that "whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." (*Id.* at p. 514.) Because the Court had "no way of knowing that Sandstrom was not convicted on the basis of the unconstitutional instruction," the conviction was set aside. (*Id.* at p. at 526; see also *Keating v. Hood* (9th Cir. 1999) 191 F.3d 1053, 1062, overruled on other grounds by *Payton v. Woodford* (9th Cir. 2003) 346 F.3d 1204 (en banc) ["when a jury delivers a general verdict that may rest either on a legally valid or legally invalid ground[,] . . . the verdict may not stand when there is no way to determine its basis"]; *United States v. Fulbright* (9th Cir. 1997) 105 F.3d 443, 451 ["Where a jury returns a general verdict that is potentially based on a theory that was *legally impermissible* or *unconstitutional*, the conviction cannot be sustained," original italics].)

In such situations, "the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." (*Yates v. United States* (1957) 354 U.S. 298, 312, overruled on other grounds, *Burks v. United States* (1978) 437 U.S. 1; *Stromberg v. California, supra,* 283 U.S. at p. 368 ["if any of the clauses [of the statute] in question is invalid under the Federal Constitution, the conviction cannot be upheld"].) Similarly, where it is impossible to tell whether the jury

rested its verdict on a legally proper ground, the sentence must be reversed.

Even assuming that the *Chapman* harmless error standard is applied, this Court cannot find that the error was harmless beyond a reasonable doubt. First, it is important to note that the first jury, which was unable to reach a verdict, was, in fact, given the pattern instruction omitted in the second trial. (CT 282.) Thus, a jury that was informed of the parameters for reaching an appropriate sentence was unable to reach a death verdict; a jury that was not given such guidance did reach a death verdict.

Second, given the mistrial at the first trial and the temporary deadlock at the second trial, this was a very close case.

Third, as discussed above, the arguments of both counsel failed to cure the error. While both prosecutor and defense counsel provided the jury with some explanation about the process, this did not ameliorate the failure of the court to give proper instructions. As a preliminary matter, the jury was given instructions which would have minimized the jury's consideration of either counsel's explanations of the law. They were informed by the court at the onset of the reading of instructions that they were about to be instructed "on the law that applies to this case," that their duty is to "apply the law that I state to you" in order to arrive at a verdict, and that they "must accept and follow the law as I state to you, whether or not you agree with the law." (CT 431.) The jury was further told that if "anything concerning the law said by the attorneys in their arguments or at any time during the trial conflicts with my instructions on the law, you must follow my instructions." (CT 431.) The jury was given another instruction that it must "accept and follow the law that I shall state to you." (CT 447.)

Moreover, it is well established that the arguments of counsel cannot cure the harm of the court's failure to instruct on such a fundamental

principle. As the United States Supreme Court has recognized, "arguments 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, we have often recognized, are viewed as definitive and binding statements of the law." (*Boyde v. California, supra,* 494 U.S. at p. 384, citing *Carter v. Kentucky* (1981) 450 U.S. 288, 302-304 & fn. 20; *Quercia v. United States* (1933) 289 U.S. 466, 470; *Starr v. United States* (1894) 153 U.S. 614, 626.) "The arguments of counsel are not a substitute for instructions by the court." (*Parker v. Atchison T. & S.F. Ry. Co.* (1968) 263 Cal.App.2d 675, 680; see also, *People v. Vann* (1974) 12 Cal.3d 220, 227, fn. 6.) Indeed, it is the court – not counsel – who must explain to the jury the rules of law that apply to the case. (*People v. Baldwin* (1954) 42 Cal.2d 858, 871; *People v. Davenport* (1966) 240 Cal.App.2d 341, 347.)

In any event, as set forth above, the prosecutor's discussion of the sentencing process was quite brief, and at best misleading. The prosecutor's explanations of how the jury was to arrive at a sentence (XXIV RT 2580-2581, 2605) were likely to mislead the jury into believing that the death penalty was required where aggravating factors outweighed mitigating factors even if they believed that death was not the appropriate penalty. (See *People v. Duncan, supra,* 53 Cal. 3d at p. 979.) Moreover, the prosecutor undermined the notion that the jury could give moral or sympathetic value to the various factors, by arguing that the crime itself was so "heinous, so wicked, so mean spirited that it requires the death penalty." (XXIV RT 2581; see *id.* ["Even if you find some sympathy for Mr. Streeter for one reason or another, your job is to act as the conscience of the community and to exercise your own conscience and say, 'I'm sorry, Mr.

Streeter. I might feel sorry for you for this reason or that, but you crossed the line, you went too far. You committed this most heinous of murders"].)

Defense counsel attempted to provide some of the guidance set forth in the instruction. He told the jury, "[n]ow you are free to assign your own sympathetic or moral value to each one of these factors. The law doesn't – doesn't require you to set certain values. You do this on your own set of values." (XXIV RT 2615.) He argued that the jurors should give each factor the weight they felt it deserved. (XXIV RT 2622.) He also stated that to return a judgment of death the jurors must be persuaded that "the aggravated [sic] circumstances . . . are so substantial in comparison to the mitigating circumstances it warrants death instead of life without possibility of parole. So the factors in aggravation have to be so substantial in your mind in comparison to the mitigating factors that you are going to kill this man." (XXIV RT 2621.) However, it is highly unlikely that in the absence of instructions by the court or comparable prosecutorial argument that the jury would follow the defense counsel's articulation of the sentencing standard. Even assuming that defense counsel provided an accurate model of the sentencing process, the prosecutor "failed to incorporate features which [this Court ] held in *Brown*, *supra,* 40 Cal.3d 512, to be essential components for valid imposition of the death penalty." (*People v. Edelbacher, supra*, 47 Cal.3d at p. 1040.) There is no way of "knowing which model the jurors adopted in reaching their penalty verdict, and there appears to be a reasonable possibility that the jury was misled as to the nature of its ultimate duty at the penalty phase." (*Ibid.*)

Further, it is clear that neither explanation of the process provided by the prosecutor and defense counsel clarified the issue for the jury in light of their note which demonstrated that the jury did not understand the

sentencing process in the absence of the instruction. (See *Kelly v. South Carolina* (2002) 524 U.S. 246, 257.) As discussed above, the trial court's cryptic response that the jury was free to choose whatever verdict they wished failed to cure their lack of understanding.

Thus reversal is required under any standard of prejudice.

## XVII.

## THE INTRODUCTION OF IRRELEVANT BUT EXTREMELY PREJUDICIAL EVIDENCE AT THE PENALTY PHASE RETRIAL VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

### A. Introduction

As discussed above in Claim IV, incorporated herein by reference, the gruesome hospital and autopsy photographs and the tape recording of the victim's screams in the ambulance when she was being transported from the scene were erroneously introduced at the guilt phase. The photographs and tape were also erroneously admitted at the penalty phase retrial. This evidence had no relevance to the issues in dispute at the penalty phase and given its intensely graphic nature, it undoubtedly diverted the jurors from their task of determining the appropriate penalty.

### B. Summary of Proceedings

Before the penalty retrial, the defense filed a motion to preclude the introduction of the hospital and autopsy photographs and the tape recording of the victim's screams in the ambulance. (CT 310-317.) Appellant argued that this evidence was not relevant to any disputed fact at the penalty phase where, as at the guilt phase, the cause of death of the victim and appellant's role in her death were conceded. (*Id.* at pp. 313-314.) As defense counsel argued, the evidence was cumulative, irrelevant, inflammatory, its probative value was outweighed by its prejudicial effect, and its admission violated appellant's state law and state and federal constitutional rights. (*Id.* at pp.

310-314.)

Defense counsel argued the motion, reiterating that whatever rationale existed for admitting this evidence at the guilt phase no longer existed at the penalty phase retrial, and that it was being presented solely to prejudice the jurors. (XIV RT 1371.) The prosecutor responded that the evidence was relevant to the circumstances of the crime, and argued that the jury "must be told what happened and the degree to which pain was inflicted and so on and so forth." (*Id.* at p. 1372; see also XVIII RT 1896-1897.) Defense counsel contended that the prosecutor could present "all the other evidence he wants, even the doctor at the hospital at the burn ward," but that there was no longer any reason to admit this prejudicial evidence. (IV RT 1372; see also XVIII 1897-1898.)

With regard to the photographs, the trial court denied the motion, holding that "in every trial of this type, the jury is allowed to consider the evidence that they heard during the [guilt] phases, that includes the photographs that were shown." (*Id.* at pp. 1372-1373.) The court stated that a new jury that did not hear the guilt phase evidence was entitled to hear evidence regarding the circumstances of the crime. (*Id.* at p. 1373.) The court took under submission the matter of which photographs would be permitted. (*Id.* at pp. 1373-1374.)

The court expressed reservations about the admissibility of the ambulance tape. (*Id.* at p. 1374.) The prosecutor argued: "How else is the jury going to know what kind of pain she was going through and the state of mind she was experiencing at that time?" (*Ibid.*) The trial court responded that the issue of whether or not "torture" was inflicted was no longer at issue. (*Ibid.*) The prosecutor disagreed, stating that there may be lingering doubt regarding such issues, and therefore, he believed he was required to

"re-prove all the previous elements of torture, because of his lingering doubt argument, along with the other reasons I have to prove just Factor A period. And also, the effect that that tape had on the victim's family members who heard it." (XIV RT 1374-1375.)

Despite the fact that it was the prosecutor himself who had played the tape in court during the guilt phase, he argued that it was appropriate to play the tape again at the penalty phase to show the jury the impact hearing the tape had on the victim's family members when it was played at the guilt phase: "You recall there was some mention of it by Victor and Rallin, I believe, and perhaps Lucinda, but they talked about how that was one of the reasons they have been so traumatized, is that that was the last time they were able to hear their loved one's voice and so on." (XIV RT 1375.) The court then agreed to take the matter under submission. (*Ibid.*)

Before the penalty phase began, the defense renewed its motion. (XVIII RT 1895.) Again the prosecutor argued that the new jury was entitled to be informed about "the nature and extent of the injuries inflicted by Mr. Streeter." He further argued: "They need to see and understand what horrible pain he caused her in terms of the torture issue so as to understand what kind of penalty should be given." (*Ibid.*) According to the prosecutor, "without that evidence, it would be extremely difficult for them to really get a full understanding." (*Ibid.*) The defense disputed the notion that at the penalty phase the jury was entitled to consider the results of the defendant's conduct through photographs and the ambulance tape. (XVIIII RT 1898.)

The trial court ruled, with regard to the photographs, that the circumstances of the crime under factor (a) include evidence "broader than merely what happened and an elementary description of what happened,

which resulted in an allegation of finding of torture, that the jury that was going to decide the verdict should also be made aware of that additional aggravating, if you will, conduct on the part of the defendant in really determining whether that individual is worthy of death or something else, something less, if it's less." (XVIII RT 1900.)

The court, however, did not believe that the victim's screams on the tape were relevant in the same way. It expressed doubt as to the admissibility of the ambulance tape: "My hypothetical falls down a bit when I get to that point because that then is not really an issue before this jury to decide the penalty. Once they see the damage and once they see what happened, then the victim's reaction to that is not totally relevant." (XVIII RT 1900.)

The prosecutor then argued that the tape was relevant to victim impact evidence, i.e., "the effect of that tape on the victim's family members who sat here in court and heard it when they testified regarding victim impact evidence." (*Id.* at p. 1901.) The prosecutor argued that "the last thing they heard out of their loved one's mouth before she died was her screaming on that tape, and it was profoundly influential on their feelings about what's happened and the impact it has had on them." (*Ibid.*)

The trial court "conceded" that the tape was admissible as victim impact evidence but expressed concern that the screaming by the victim on the tape will inflame the jury and as a result they are "going to get mad at Mr. Streeter." (*Id.* at p. 1902.)

The prosecutor offered to use only one of the three photographs admitted at the guilt phase (Exhibits 8, 9 and 10), if the court would allow him to also introduce the tape. (*Id.* at pp. 1902-1903.) When the court expressed surprise that the prosecutor would try to bargain with the

evidence, the prosecutor stressed how "very important" it was to be able to use "both the tape and photographs." (*Id.* at p. 1904.)

The court then held that it would allow the prosecutor to choose two of the three photographs. (*Id.* at p. 1904.)[34] The court also agreed to allow admission of the tape, noting that this was a close call. The court reasoned that it was admissible "under the theory that it is part of the circumstances of the crime because it evidenced further the degree of severity of the conduct of the defendant on the victim." (*Ibid.*) The court further held that it was "concerned about some degree of inflaming the jury, but the relevance under which the evidence is admissible, in my opinion, exceeds the prejudice that might result therefrom under the theory that it's inflaming the jury." Finally, the court agreed that "it does make sense that the consequences of Mr. Streeter's act, the jury's allowed to determine the impact of that act upon the family members, that the consequences included the pain the victim was going through and can properly be considered by the jury." (*Id.* at p. 1905.)

The prosecutor showed the jury the photographs in his opening statement. (XIX RT 1917.) He also referred to the ambulance tape "which you're going to hear this afternoon, about the agony that she was in, screaming in pain . . . ." (*Id.* at p. 1926.) The prosecutor stated that "the last words that the family members ever heard is they heard this tape, this ambulance tape last time we were in trial, words from that ambulance." (*Ibid.*)

The two photographs (Exhibits 8 and 10) were utilized and shown to the jury during the testimony of Dr. Vannix, the doctor at the burn ward

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[34] The prosecutor subsequently decided to introduce Exhibits 8 and 10. (XIX RT 1935.)

who treated Buttler. (XX RT 2102.) Dr. Vannix explained in detail the burns suffered by Buttler, the pain she would have felt, and the treatment that was administered. (*Id.* at pp. 2103-2117.)

Boyles, the paramedic who testified in the guilt trial, testified again. He described Buttler as being scared, in an excruciating state, and screaming in pain. (XIX RT 1990.) These were the worst burns he had ever seen and the worst call he had ever been on. (XIX RT 1989, 1992.) He described how Buttler continued to scream on the way to the hospital. (XIX RT 1992.) Boyles described the inability to give her pain medication because of her condition, and how they poured water on her in an attempt to relieve the pain. Every time they stopped, she screamed in agony, and asked to be killed, to be put out of her misery. (XIX RT 1993-1994.) The tape was then played for the jury. (XIX RT 1997; Exhibits 20 & 20A.)

Buttler's brother Victor was permitted to testify that the last time he heard his sister's voice was on the tape. (XX RT 2021.)

**C. Applicable Law and Standard of Review**

Appellant challenged the admission of the disputed evidence under Evidence Code section 352 as well as under the provisions of the state and federal Constitutions. As previously noted, when proposed testimony is subject to an objection grounded in section 352, the trial court's scrutiny must involve a thorough weighing of the probative value of the testimony and an assessment of its potential to prejudice the jury. (*People v. Jackson*, supra, 18 Cal.App.3d at p. 509.)

The trial court here failed to exercise its discretion appropriately in evaluating both the relevance of the evidence and the potential for undue prejudice which its admission would produce. Even assuming the court did engage in some balancing process, an examination of the record

demonstrates that any probative value the photographs and tape might possess "clearly is outweighed by [its] prejudicial effect." (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 134.)

This Court has held that: "the discretion to exclude photographs under Evidence Code section 352 is much narrower at the penalty phase than at the guilt phase. This is so because the prosecution has the right to establish the circumstances of the crime, including its gruesome consequences (§ 190.3, factor (a)), and because the risk of an improper guilt finding based on visceral reactions is no longer present." (*People v. Bonilla, supra,* 41 Cal.4th at p. 353, citing *People v. Moon*, *supra*, 37 Cal.4th 1, 35; see also *People v. Anderson* (2001) 25 Cal.4th 543, 591-592 [prosecution is entitled to show circumstances of crime "in a bad moral light].") While an improper guilt finding based on "visceral reactions" is no longer present, an improper penalty verdict can certainly stem from overly emotional reactions to gruesome yet irrelevant guilt phase evidence.

Admission of evidence at the penalty phase that is irrelevant, cumulative and unduly gruesome and which is intended to arouse revulsion and anger rather than a reasoned moral response from the jury regarding penalty violates a defendant's rights under the Sixth, Eighth, and Fourteenth Amendments. (See *People v. Coddington, supra,* 23 Cal.4th at pp. 632-633; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305 [the Eighth Amendment requires reliability in the determination that death is the appropriate punishment].)

### D. The Photographs and Ambulance Tape Were Not Relevant

For the reasons argued in Claim IV, the photographs and tape were not relevant to any disputed issue at the guilt phase and therefore their admissibility at the penalty phase on the ground that they constituted appropriate and relevant guilt phase evidence is equally erroneous. While the prosecutor argued that the evidence was necessary in order to rebut any lingering doubt argument (see, e.g., XVI 1374-1375), as explained above, the nature and extent of the victim's pain was not relevant to the issue of murder or torture murder. Furthermore, as discussed in Claim XVIII below, the trial court's comments and instructions to the jury regarding the impact of the prior verdict foreclosed the possibility of any lingering doubt argument the defense might make.

This Court has observed that trial courts should be alert to how gruesome evidence plays on a jury's emotions, especially in a capital trial. (*People v. Weaver* (2001) 26 Cal.4th 876, 934 [considering whether admission of gruesome photographs denied appellant a fair penalty phase determination].) Even in cases which uphold the admission of graphic evidence that seemingly relate only to the circumstances of the offense at issue, the evidence usually derives its probative value from the fact that it is able to uniquely demonstrate some aspect of the crime warranting consideration that cannot be demonstrated in another manner. (See, e.g., *People v. Thompson* (1990) 50 Cal.3d 134, 182 [manner in which 12-year-old victim was hogtied was "indescribable in mere words"].)

Here, there was ample testimony regarding the extreme pain and suffering Buttler experienced. The photographs and tape had no probative value to the underlying crime, as explained in Claim IV. The victim's pain in the ambulance – due to the inability of paramedics to administer pain

medication – was not so foreseeable a consequence of appellant's actions that it should have been used by the jury in determining whether appellant should live or die. In sum, the tape and photographs had no probative value to the only issue before the jury: whether appellant should be sentenced to death or to life without the possibility of parole.

### E. The Ambulance Tape Was Not Proper Victim Impact Evidence

As discussed above, the prosecutor convinced the court to admit the ambulance tape on the ground that it was relevant as victim impact evidence: "You'll recall that they testified that the last thing they heard out of their loved one's mouth before she died was her screaming on that tape, and it was profoundly influential on their feelings about what's happened and the impact it had on them." (XVIII RT 1901.) Despite the fact that it was the prosecutor who played the tape at the guilt phase without alerting or excusing the victim's family from the courtroom, the trial court agreed that the tape was appropriate victim impact evidence based on the prosecutor's victim impact theory. (XVII RT 1904-1905.)

As explained above in Claim IV, the tape should not have been admitted at the guilt phase in the first instance, and appellant should not have been blamed for the family hearing it at that time. Furthermore, the prosecutor should not have been permitted to introduce inflammatory evidence at the guilt phase in the presence of the victim's family and then argue at the penalty phase that the introduction of this evidence was so traumatizing to the family that the penalty jury should consider this impact in determining sentence. Victim impact evidence has to do with the impact of the crime on the family – not the impact of the introduction of evidence by the prosecution at trial.

In *People v. Edwards, supra,* 54 Cal.3d at p. 834, this Court

determined that some victim impact evidence may be admissible under section 190.3, factor (a) as "circumstances of the crime of which the defendant was convicted in the present proceeding. . . ." The holding is limited to "evidence that logically shows the harm caused by the defendant." (*Ibid.*) The purpose of allowing victim character evidence is to show each victim's uniqueness as an individual human being. (*Payne v. Tennessee* (1991) 501 U.S. 808, 823.) To this end, evidence of the effect of a capital crime on loved ones is relevant and admissible as a circumstance of the crime under factor (a) "[u]nless it invites a purely irrational response from the jury." (*People v. Lewis* (2006) 39 Cal.4th 970, 1056-1057; see also *People v. Haskett* (1982) 30 Cal.3d 841, 864.) Such evidence can be "so unduly prejudicial that it renders the trial fundamentally unfair" under the Fourteenth Amendment. (*Payne v. Tennessee, supra,* 501 U.S. at p. 825.)

This Court has recently suggested that there are outer limits to the admission of victim impact evidence beyond which due process is violated. In *People v. Robinson* (2005) 37 Cal.4th 592, the victim impact evidence came from four witnesses whose testimony filled 37 pages of reporters transcript and focused on the attributes of each victim and the effects of the murders on the witnesses and their families. The prosecutor also introduced 22 photographs of the victims in life. (*Id.* at 644-649.) While declining to reach the merits of the issue because there was no objection to the victim impact evidence at trial, the Court suggested that the prosecutor may have exceeded the limits on emotional evidence and argument about which *Edwards* cautioned. (*Id.* at pp. 651-652.) Citing it as an "extreme example" of excessive victim impact evidence violating due process, the *Robinson* Court favorably quoted *Salazar v. State* (Tex.Crim.App. 2002) 90

S.W.3d 330:

> . . .*we caution that victim impact and character evidence may become unfairly prejudicial through sheer volume*. Even if not technically cumulative, an undue amount of this type of evidence can result in unfair prejudice. . . . Hence, *we encourage trial courts to place appropriate limits upon the amount, kind, and source of victim impact and character evidence.*

(*Id.* at p. 336, original italics.)

In *People v. Harris* (2005) 37 Cal.4th 310, evidence was admitted of an event at the victim's funeral in which the lid to the closed casket was mistakenly opened as it was being put into the hearse at the end of the service, which caused several attendees to scream in horror and two people to faint, including one who fainted on top of the partially opened casket. (*Id.* at p. 352.) There was no objection to the admission of this evidence, but this Court noted that if challenged, the trial court should have excluded it because it "was too remote from any act by defendant to be relevant to his moral culpability." (*Ibid.*) Family members hearing the victim's screams from the ambulance on the tape played by the prosecution at appellant's trial is similarly far too remote from appellant's actions to be relevant to appellant's moral culpability.

In *People v. Prince* (2007) 40 Cal.4th 1179, this Court discussed the appropriateness of using videotapes of the victim, "in light of a general understanding that the prosecution may present evidence for the purpose of 'reminding the sentencer . . . [that] the victim is an individual whose death represents a unique loss to society.'" (*Id.* at p. 1288, quoting *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.) The Court cautioned that "the prosecution may not introduce irrelevant or inflammatory material that 'diverts the jury's attention from its proper role or invites an irrational,

purely subjective response.'" (*Id.*, quoting *People v. Edwards, supra,* 54 Cal.3d at p. 836.) In *Prince*, as well as *People v. Kelly* (2007) 42 Cal.4th 763, the Court did not find error in admitting videotaped tributes of the victim, but urged trial courts to be "very cautious" about admitting such evidence. (*People v. Kelly*, *supra*, 42 Cal.4th at p. 798.)

This case did not involve a sanitized videotape of the victim but an intensely graphic audiotape of the victim's screams in the ambulance on the way to the hospital after suffering severe injuries. Testimony about the victim's pain and suffering, however, had already been presented. The relevance as victim impact was purportedly the impact on the family hearing the tape at the guilt phase. Thus, the alleged harm to the victim's family was caused by the prosecution – in playing the tape at the guilt phase without suggesting to the family that they leave the courtroom so as not to subject themselves to it. Indeed, the defendant left during the playing of the tape. (XIX RT 1997.) To tell the jury that they should consider as an aggravating circumstance the fact that the family heard the tape in court because the prosecution played it at the guilt phase is far beyond the legitimate scope of victim impact evidence and would lead to the unseemly spectacle of prosecutors exposing family members of the victim to horrific evidence at the guilt phase in order to use the impact of that evidence on the family at the penalty phase.

### F. Introduction of the Evidence Was Prejudicial

Jurors' decisions at the penalty phase are far more discretionary and less constrained by law than their decisions at the guilt phase. (See *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1044 ["The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts"].) Thus, a

jury's sentencing determination in a death penalty case is much more likely to be affected by gruesome photographs and tape recordings of a victim screaming in pain, evidence that would create a strong emotional reaction in almost any person. It is therefore likely that jurors – given their wide latitude in considering aggravating and mitigating circumstances would minimize or ignore mitigating evidence presented on the ultimate question of whether the defendant should live or die.

The belief that the introduction of gruesome and graphic evidence causes jurors to ignore other evidence is supported by empirical study. It has been demonstrated that after viewing graphic photographs, jurors tend to prematurely reach a determination that the defendant should be sentenced to death. (Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-trial Experience, and Premature Decision Making* (1999) 83 Cornell L.Rev 1476, 1497-1499 [noting jurors said autopsy photographs played prominent role in shaping death-sentencing decision that was reached prior to the conclusion of the trial].)

It is likely that the jurors at appellant's penalty retrial were greatly affected by the disputed photographs and tape, and may have shut their minds to the defense evidence in deciding to sentence appellant to death. Indeed, the prosecutor acknowledged how critical this evidence was to his argument in favor of a death judgment: "If the Court now takes away my ability to present to them in a visual and audio fashion the nature of the injuries inflicted by Mr. Streeter, the, quote, 'facts and circumstances of the crime,' the People's case is put at great jeopardy in terms of letting them understand what they really should do in terms of punishment." (XVIII RT 1897.)

In his closing argument, the prosecutor urged the jurors to consider

the fact that:

> [T]he last time this victim's family was able to hear the voice of their loved one, Yolanda, was on the ambulance tape when she's screaming in agony and having to go through these procedures where they're trying to find some skin – some veins to put the painkiller in and they can't because the flesh is melting and they were trying to use needles into her femur to try to give her some relief from the pain, and they couldn't even accomplish that. She's asking the EMT to "please kill me," she's under such pain. That's the last time they heard her voice. They never got the chance to say good-by to her.

(XXIV RT 2591-92.)

The prosecutor also talked about the photographs in terms of victim impact:

> I'm not going to pull that horrible picture out. But you know what she looked like and what he did to her. That's what they had to look at for 10 days while she lay in agony in the hospital. And those pictures in their minds, from watching her lay like they are depicted in those two photographs, and they're [Exhibits] 8 and 10, I believe, are what they have to remember for the rest of their lives as to their loved one, Yolanda. That's impact on the victim's family members, and that's something you can consider as to how heinous what he did to her was.

(XXIV RT 2592.)

The harm in this case was exacerbated by the delivery of a specific instruction which told the jury that as part of the circumstances of the crime it "may consider the impact of the defendant's crime on the victim and on the victim's family members." (CT 450.)

The error in admitting graphic, disturbing evidence at appellant's retrial was not harmless beyond a reasonable doubt. The facts of this case hardly render a death verdict inevitable, as was demonstrated by the fact that the first jury in this case could not reach a verdict regarding sentence and the second jury was temporarily deadlocked. Under these circumstances, the State cannot demonstrate beyond a reasonable doubt that admission of the evidence was harmless error. Appellant's sentence of death should be reversed.

**G. Conclusion**

The admission of gruesome photographs and a tape of the victim's screams violated state law, as well as appellant's rights under the Sixth, Eighth, and Fourteenth Amendment to a fair trial and a reliable capital sentencing proceeding and their state constitutional analogs.

"In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the due process clause of the Fourteenth Amendment provides a mechanism for relief." (*Payne v. Tennessee, supra,* 501 U.S. at p. 825.) Admitting photographs and tape recording as graphic as the ones at issue in this case under circumstances where they had little probative value to the determination of the appropriate sentence resulted in a fundamentally unfair trial.

Moreover, the admission of this evidence violated appellant's right to a reliable capital-sentencing determination. (See *Woodson, supra,* 428 U.S. at p. 305.) "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.)

The admission of the photographs and tape was so inflammatory that

it diverted the jury from its task, and skewed its sentencing determination, which was already badly compromised by the lack of proper instructions. Given the closeness of the case, reversal is required.

## XVIII.

## THE TRIAL COURT ERRED IN REMOVING THE CONCEPT OF LINGERING DOUBT FROM THE JURY'S CONSIDERATION

### A. Introduction

Streeter did not deny that he caused Buttler's death, but the question of whether or not this was a first degree murder and whether or not the special circumstances were true was subject to great dispute. Nevertheless, before the jurors at the penalty retrial heard any evidence regarding the circumstances of the crime, and again at the conclusion of the case, the issue of lingering doubt was removed from their consideration.

The jury was told during voir dire that the earlier jury's verdict of first degree murder with special circumstances was conclusive and must be accepted. (See, e.g., XIV RT 1349-1350, XVII RT 1625, 1649, 1688-1689.) At the close of the case, the court refused proposed defense instructions which would have informed the jury of the elements of the capital crimes and also would have told them that lingering doubt of the defendant's guilt of first degree murder and the special circumstance findings could be considered as a mitigating factor. Instead, the jury was instructed that it "must accept the previous jury's verdicts as having been proved beyond a reasonable doubt." (CT 446.)

The court's statements left no room for the jury's consideration of potentially mitigating aspects of the crime – specifically, residual doubt that appellant was guilty of lying in wait, or had intended to inflict torture or whether the murder was premeditated and deliberate. Such considerations were decisively removed from the case, and the evidence supporting them

was characterized as irrelevant to the jury's sentencing decision. The jury was thus told that a critical aspect of the penalty phase defense, one repeatedly authorized by decisions of this Court, was totally foreclosed to appellant by the decision of the prior jury and could not be considered.

**B. Summary of Proceedings**

As discussed above in Claims VI,VIII and XI, the evidence establishing murder based on the three theories put forward by the prosecutor – premeditation and deliberation, torture murder and lying in wait – was not at all substantial. Based on this evidence, a truncated version of which was presented at the penalty phase, the jury at the penalty phase retrial could very likely have entertained lingering doubt as to Streeter's guilt of first degree murder and the truth of the special circumstances.

In his opening statement at the penalty phase retrial, defense counsel attempted to inform the jury about the concept of lingering doubt:

> There is another issue in the law that you will be provided. It's called lingering doubt. Whether or not he really did lay in wait and whether or not he did intend to kill Yolanda and whether or not he did intend to inflict torture, that is, that painful death, is an issue that you will be considering, is that lingering doubt. And that lingering doubt gives you the right to vote any way you want to vote.

(XIX RT 1933.)

The trial court, however, had already removed the issue of lingering doubt from the jury's consideration. During jury selection, the judge told prospective jurors that Streeter had been convicted and the special circumstances had been found true, and that they should accept the verdict and findings as conclusive. (XIV RT 1349 ["That's been done . . . so Mr.

Streeter stands before you a convicted man: First degree murder with two special circumstances having been found true"]; see also XIV RT 1350.) The judge further explained:

> The unique thing about your service in this case is that Mr. Streeter has already been tried and found guilty of the first degree murder charge and the allegation that the murder was committed under circumstances of while lying in wait has been found to be true and the allegation that the murder involved the infliction of torture has been found to be true. So those items have already been litigated and resolved. They will not be something that you will have to concern yourself with.

(XVII RT 1625; see also XVII RT 1649; 1688-1689.)

The judge thus informed the jurors of the prior verdicts and findings, and told them that there was nothing further for them to consider in that regard.

Defense counsel sought to have the jury instructed on the elements of premeditated and deliberate murder (CALJIC No. 8.20), torture murder (CALJIC No. 8.24) and lying-in-wait murder (CALJIC No. 8.25), as well as a modified version of CALJIC No. 8.85, which would have informed the jury that it could consider lingering or residual doubt as mitigating the circumstances of the crime. (XXII RT 2381-2384.)[35] The court refused to give these instructions "because of the fact that the former jury has made the decisions that it did." (XXII RT 2382.) The court reasoned that to raise lingering doubt as to the defendant's intent is "not relevant to this jury since

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[35] The lingering doubt instruction would have informed the jury that if a juror has a "lingering or residual doubt" as to the defendant's guilt, this may be considered as a mitigating factor. (See, e.g., CT 228 [instruction refused at first penalty trial].)

the question of guilt and truth of special circumstances has already been established." (*Ibid.*) Moreover, the court told counsel, to the contrary, that it would "instruct the jury that they are to consider those things as having been proved beyond a reasonable doubt and there's nothing that indicates that they should or it would be proper to start reinstructing them as to the elements of the crime." (*Ibid.*) The court did, in fact, give an instruction that the jury "must accept the previous jury's verdicts as having been proved beyond a reasonable doubt." (CT 446.)

### C. The Trial Court Should Not Have Told the Jury To Accept the Previous Jury's Verdicts as Having Been Proved

#### 1. The Trial Court Misstated the Law on an Issue Vital to the Defense

"It is of course virtually axiomatic that a court may give only such instructions as are correct statements of the law. [Citation.]" (*People v. Gordon* (1990) 50 Cal.3d 1223, 1275.) The instruction in this case was not. It did not merely advise the penalty jurors that appellant had been proven guilty to the satisfaction of the jurors at the prior guilt trial or that he had been proven guilty beyond a reasonable doubt. Instead, it advised them that they must "accept" the previous jury's verdicts as having been proven beyond a reasonable doubt.

In *People v. DeSantis* (1992) 2 Cal.4th 1198, the Court held:

> to the extent the court's rulings and the prosecutor's comments merely reminded the jury that it was not to redetermine guilt, those actions did not remove the issue of lingering doubt from the jury but merely told it the truth: that in the penalty phase defendant's guilt was to be *conclusively presumed as a matter of law* because the trier of fact had so found in the guilt phase.

(*Id.* at p. 1238, italics added.)

However, there is a crucial difference between this case and *DeSantis*. The trial court in this case did not say that appellant was "conclusively presumed" guilty "as a matter of law;" it told the jury that it must accept the jury's verdict as having been proved. "Presumed" suggests a tentative legal conclusion, an unexceptional reference to the legal effect to be accorded to the decision of the prior jury. "Proven," on the other hand, suggests an indisputable factual determination. Appellant may have been proven guilty by the jury at the original guilt trial, but that does not mean this jury was required to ignore any lingering doubt – which is precisely what the court's pre-trial comments and instruction in this case implied. The penalty jury was misinstructed on a vital issue in the case.

### 2. Delivery of the Erroneous Instruction and Refusal To Give Defense Instructions Violated Appellant's Right To Present a Defense

Under the due process, compulsory process, and confrontation clauses of the state and federal Constitutions, the defendant in every criminal case is guaranteed the right to present a defense. (U.S. Const., Amends. 6 and 14; Cal. Const., art. I, §§ 7 and 15; *Chambers v. Mississippi* (1973) 410 U.S. 284, 298-303.) "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' [Citations.]" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.)

This Court recently reiterated the "legitimacy of a lingering-doubt defense at the penalty phase of a capital trial" – that "evidence of the circumstances of the offense, including evidence creating a lingering doubt as to the defendant's guilt of the offense, is admissible at a penalty retrial under Penal Code section 190.3 . . ." (*People v. Gay* (2008) 42 Cal.4th 1195, 1221.) Such a defense was well-established under state law at the

time of appellant's trial. (*People v. Sanchez*, *supra*, 12 Cal.4th at pp. 77-78; *People v. Terry* (1964) 61 Cal.2d 137, 153.)

This Court has recognized the principle that lingering doubt can play a part in the penalty determination and that defense counsel has a right to argue lingering doubt to the jury as a consideration in determining punishment. (See *People v. Cox* (1991) 53 Cal.3d 618, 677-678.) The Court has acknowledged that "in many circumstances evidence related to guilt or innocence, and properly designed to raise a lingering doubt, will be relevant and admissible." (*People v. Blair* (2005) 36 Cal.4th 686, 750 [citations].) While the Court has also found that a lingering doubt instruction is not required by either the state or federal Constitutions (*People v. Berryman, supra,* 6 Cal.4th at p. 1104), it has held that such an instruction may be called for by the evidence in any particular case. (See *People v. Fauber* (1992) 2 Cal.4th 792, 863-865; *People v. Cox*, *supra*, 53 Cal.3d at p. 678, fn. 20.)

Instructing the jury it must "accept" the first jury's verdicts and refusing to inform the jury that it could consider lingering doubt as a mitigating factor ensured that the jury would conclusively accept the previous jury's verdicts and left no room for consideration of lingering doubt. The instruction given in this case is indistinguishable from the instruction this Court found erroneous in *People v. Gay*, which told the jury at the penalty retrial that it had been "conclusively proven" by the prior jury's verdict that the defendant had shot and killed the victim. (*People v. Gay*, *supra,* 42 Cal.4th at p. 1224.) This instruction in *Gay* was not cured by an additional instruction which told the jury it was appropriate to consider lingering doubt in mitigation. (*Id.* at p. 1225.) Here, as noted above, the court not only gave an erroneous instruction but refused to give a

lingering doubt instruction, thus creating an "intolerable risk" (*id.* at p. 1226), that the jury did not consider appellant's lingering doubt defense.

Where, as here, the evidence of guilt and special circumstances was close, the trial court's instruction and refusal to give the proposed defense instructions prevented the jury from considering lingering doubt, thereby denying appellant his right to present a defense. (*Crane v. Kentucky*, *supra*, 476 U.S. at p. 690.)

### 3. Delivery of the Erroneous Instruction and Refusal to Give the Defense Instructions Prevented the Jury from Considering Relevant Mitigating Evidence

Under the Eighth and Fourteenth Amendments to the United States Constitution, the defendant in a capital case is guaranteed the right to have relevant mitigating evidence considered by the penalty jury. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) This right may be violated even if the defendant's related right to *introduce* relevant mitigating evidence is not. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319.) Not only are capital-sentencing schemes required to "permit the defendant to present any relevant mitigating evidence, but '*Lockett* requires the sentencer to listen.'" (*Sumner v. Shuman* (1987) 483 U.S. 66, 76, quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115, fn. 10.)

In *Eddings*, *supra*, 455 U.S. at p. 114, the Supreme Court disapproved the sentencing judge's failure to consider evidence of the defendant's troubled background and commented that, "[i]n this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf." In this case, the trial court *did* instruct the jury to disregard the evidence of residual doubt by telling them that they must accept the prior verdicts.

The same type of instructional error was involved in *People v. Terry*, *supra*, 61 Cal.2d 136, the case which established the permissible use of lingering doubt as a mitigating circumstance under California law. *Terry* found that the trial court had erred by stating, in response to the defendant's query as to whether the jury could take his theory of events into consideration, "[t]his is something they cannot take into consideration. They start from that premise." (*Id.* at p. 147.) That error, *Terry* found, "removed an important issue from [the jury's] deliberations." (*Ibid.*)

Any barrier which precludes a jury, or any of its members, from considering relevant mitigating evidence constitutes federal constitutional error. (*Mills v. Maryland* (1988) 486 U.S. 367, 375; *People v. Mickey* (1991) 54 Cal.3d 612, 693.) The erroneous instruction given in this case erected an insurmountable barrier to the jury's consideration of appellant's mitigating evidence of lingering doubt and thereby violated appellant's constitutional rights.

The court's pretrial comments, delivery of the erroneous instruction and refusal to give the defense instructions also violated appellant's state and federal constitutional right to trial by jury (U.S. Const., Amends. 6 and 14; Cal. Const., art. I, § 16) and the state statute which governs the respective functions of judge and jury. An essential feature of trial by jury is that the jurors shall be "under the superintendence of a judge having power to instruct them as to the law." (*Patton v. United States* (1931) 281 U.S. 276, overruled on other grounds in *Williams v. Florida* (1970) 399 U.S. 78, 92.) Implicit in the requirement that the judge instruct the jury is the requirement that the judge instruct correctly. "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;

accord, *Bollenbach v. United States, supra,* 326 U.S. at p. 612; *McDowell v. Calderon* (9th Cir. 1997)(en banc) 130 F.3d 833, 836.) Delivery of the erroneous instruction challenged here (CT 446) which misstated the law to appellant's detriment, violated this essential element of appellant's right to trial by jury.

Moreover, just as the judge has the duty to instruct the jury correctly as to the law, the judge has the duty to refrain from instructing the jury as to the facts. "In a trial for any offense, questions of law are to be decided by the court, and questions of fact by the jury." (§ 1125.) The court's instructions should indicate "no opinion of the court as to any fact in issue.' [Citation.]" (*People v. Wright, supra,* 45 Cal.3d at p. 1135.) "The trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused." (*United States v. Martin Linen Supply Co.* (1977) 430 U.S. 564, 573.)

Therefore, even a judge's comments on the evidence, which carry less potential for prejudice because, unlike instructions, they are not binding on the jury, "must be accurate, temperate, nonargumentative, and scrupulously fair." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 766.) The comments should not mislead the jury and especially "should not be one-sided." (*Querica v. United States* (1932) 289 U.S. 466, 470.) The trial court may not "withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate fact-finding power." (*People v. Rodriguez, supra,* 42 Cal.3d at p. 766.)

In this case, the court's pre-trial comments and erroneous instruction were inaccurate, misleading, and unfair. They withdrew material mitigating

evidence from the jury's consideration, expressly directed a verdict against appellant on the issues of innocence and lingering doubt, and prohibited the jury from exercising its ultimate fact-finding power to find that appellant's guilt had been satisfactorily shown. The court refused defense instructions which would have correctly informed the jury that it could consider lingering doubt in mitigation. For all of these reasons, the instructions given, together with the refusal to give the proposed defense instructions, violated appellant's right to trial by jury, to a fundamentally fair trial, and to an individualized, reliable and non-arbitrary sentencing determination. The death verdict returned by such an impaired jury cannot stand.

#### 4. The Court's Refusal To Instruct the Jury on Lingering Doubt as a Circumstance of the Crime While Specifically Instructing the Jury That the Verdicts Were Proven and Must Be Accepted Was Erroneous and Unfair

Appellant was entitled to have the jury consider lingering doubt as a mitigating circumstance of the crime. The trial court committed prejudicial error by refusing to grant the specially requested instruction while at the same time making comments to the jury and instructing them in a manner that precluded the consideration of lingering doubt.

A capital defendant has the right to have the penalty phase jurors consider any residual or lingering doubt as to his guilt. (See, e.g., *People v. DeSantis, supra,* 2 Cal.4th at p. 1238; *People v. Coleman* (1969) 71 Cal.2d 1159, 1168; *People v. Terry, supra,* 61 Cal.2d at pp. 145-147.) As discussed above, the defense can argue lingering doubt as a mitigating factor at the penalty phase of a capital case. It should make no difference whether the penalty phase is a retrial. Indeed it would implicate an appellant's right to equal protection and render a death sentence arbitrary and unreliable for a jury to be permitted to consider a defendant's lingering

doubt in a unitary trial but not at a retrial.

California law recognizes that a lingering doubt instruction should be given when pertinent to the case. All appellant was seeking in this instance was an instruction "intended to supplement or amplify more general instructions." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 257; see *Carter v. Kentucky, supra,* 450 U.S. at p. 302 ["Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law."].) California law authorizes this type of instruction and other capitally charged defendants across the state have received this type of instruction. Appellant should have been accorded the same protection.

The trial court's comments, instructions and refusal to give the defense instruction not only was error under state law, it also violated appellant's Sixth, Eighth and Fourteenth Amendment rights to due process, equal protection, a fair trial by jury and a reliable and non-arbitrary penalty determination. By instructing the jury to disregard any questions about the first jury's verdicts and refusing to specifically instruct on lingering doubt, the trial court failed to give guidance to the jury with respect to all potential mitigating factors presented at trial, in violation of the Eighth and Fourteenth Amendments. (See, e.g., *Eddings v. Oklahoma, supra,* 455 U.S. at p. 110; *Lockett v. Ohio, supra,* 438 U.S. at p. 604.)

The trial court's refusal to instruct appellant's jury concerning the concept of lingering doubt also violated the due process clause of the Fourteenth Amendment by arbitrarily depriving him of his state-created liberty interest not to be sentenced to death by a jury that did not consider lingering doubt under appropriate instructions as a basis for a lesser sentence. (See *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Fetterly v.*

*Paskett, supra,* 997 F.2d at pp. 1300-1301.) California law mandates that lingering doubt be considered as mitigation when warranted by the evidence. (*People v. Terry*, *supra*, 61 Cal.3d at pp. 145-147; see also *People v. Cox*, *supra*, 53 Cal.3d at pp. 677-678; *People v. Thompson* (1988) 45 Cal.3d 86, 134.) The denial of a state-created right granted to other capital defendants further violated the equal protection clause of the Fourteenth Amendment. (Cf. *Myers v. Ylst, supra,* 897 F.2d at p. 425.)

**D. The Trial Court's Errors Require Reversal**

Appellant was prejudiced by the court's comments and instructions, and its failure to provide the jury with the defense instruction. This was a close case, evidenced by the mistrial at the first penalty trial and the temporary deadlock at the retrial. As argued above, the evidence of guilt with regard to premeditation and deliberation, torture, lying in wait and the two special circumstances was far from substantial. However, the penalty phase jury was not given any legal vehicle through which to take this into account.

This is not a case where the trial court found that the concept of lingering doubt was not present. Rather, the trial court ruled that lingering doubt was irrelevant because the first jury had found him guilty. In addition, while the court refused to inform the jury that lingering doubt could mitigate the crime, it gave the jury an instruction that impact of the crime on the victim's family could aggravate the circumstances of the crime. (CT 450.) Thus, the jury was informed in essence that it could only consider aggravating aspects of the circumstances of the crime but not mitigating aspects. The trial court was wrong that lingering doubt was irrelevant, and its refusal to instruct the jury that it could consider lingering doubt as mitigation of the crime cannot be deemed harmless under any

appropriate standard of review.

The prosecutor capitalized on the court's comments and its refusal to instruct the jury on the concept of lingering doubt, telling the jury that it must follow instructions "that the previous jury verdicts are to be honored as having been proved beyond a reasonable doubt . . . You must accept those verdicts that the prior jury did as having been proved beyond a reasonable doubt. You can't go back and undo those. You're honor bound to accept those." (XXIV RT 2582.) He went on to emphasize that the first degree murder with two special circumstance findings were found by the first jury and "so you must honor those verdicts." (XXIV RT 2583.) In the face of the court's instructions and the prosecutor's argument, defense counsel feebly attempted to explain to the jury the concept of lingering doubt. (XXIV RT 2616 ["The jury found beyond a reasonable doubt that he did this, but there might be something that makes you wonder to yourself whether or not it is true, but you have enough reasonable doubt to believe it is true"].) However, if the jury followed the court's instructions – as stressed by the prosecutor – they would have to discount this argument.

This Court recently stressed that, "[a]s other courts have noted, 'residual doubt is perhaps the most effective strategy to employ at sentencing.'" (*People v. Gay, supra*, 42 Cal.4th at p. 1227, quoting *Chandler v. United States* (11th Cir. 2000) 218 F.3d 130, 1320, fn. 28, and citing *Williams v. Woodford* (9th Cir. 2002) 384 F.3d 567, 624; Garvey, *Aggravation and Mitigating in Capital Cases: What Do Jurors Think?* (1998) 98 Colum.L.Rev. 1538, 1563.) In this case, the jury could have certainly harbored a lingering doubt of appellant's guilt of first degree murder and of the special circumstances. The court, however, removed this factor from the jury's consideration in what was a very close case. The

court's errors were not harmless beyond a reasonable doubt.

## XIX.

## THE TRIAL COURT IMPROPERLY DIRECTED THE JURY TO PRESUME THAT STREETER'S CONDUCT WHEN HE WAS TRYING TO LOCATE HIS FAMILY CONSTITUTED THE USE OR THREAT TO USE FORCE OR VIOLENCE

### A. Introduction

Section 190.3, subdivision (b), allows a jury to consider as an aggravating factor any criminal activity that involves "the use or attempted use of force or violence or the express or implied threat to use force or violence." In support of this factor, the prosecution presented evidence that appellant made threats against Buttler's siblings when he was trying to find Buttler and his son after they left him without notice. Assuming, for the purposes of this claim, that this evidence was admissible under factor (b), the ultimate issue of whether the incidents constituted the use or threat of force or violence or were simply idle threats made in desperation was one for the jury to decide. Here, the trial court took the issue out of the jurors' hands by erroneously instructing them that if they found the acts themselves occurred they were to presume that the incidents constituted "criminal acts which involved the express or implied use of force or violence or the threat of force or violence." (CT 451; also CALJIC No. 8.87.)

By defining the alleged criminal activity as one that involves an actual threat or the express or implied use of force or violence, the instruction removed this issue from the jury's consideration. Moreover, the trial court impermissibly increased the weight of the evidence by escalating the defined level of force by delivering an instruction which altered the statutory language from "the use or attempted use of force or violence or the express or implied threats to use force or violence" to "the express or

implied use of force or violence or the threat of force or violence." Moreover, as discussed in Claim XVI, above, the meaning of aggravating circumstances was never defined because of the omission of CALJIC No. 8.88. Accordingly, the error violated appellant's right to due process of law and compromised the reliability of the penalty verdict in violation of Eighth Amendment standards.

**B. Summary of Proceedings**

The prosecution presented evidence of the circumstances surrounding appellant's search for his family after they left him, which it characterized as threats and violence admissible under factor (b).[36] Three of Buttler's siblings testified that Streeter threatened them when they would not tell him where Buttler and his son were staying. Rallin Buttler testified that Streeter called him after his sister and her children moved away from Streeter without telling him where they were. Buttler characterized the calls as threatening, stating that Streeter said he would kill him and his family if he did not tell him where Buttler was. (XIX RT 1964-1965.) Rallin testified that Streeter later came to his residence, banged on the door and demanded entry. Although Streeter broke a glass window in the front of the house when no one let him in, he then drove away without further incident. (XIX RT 1968.) Rallin claimed that after Streeter was arrested for these acts and released from jail, there were more calls, during which Streeter said he was going to kill them all. (XIX RT 1970.)

Buttler's sister, Lucinda, testified that Streeter came to her house and hollered at her window, demanding to know where Buttler was and threatening to kill her and her family. (XIX RT 2128-2129.)

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[36] The underlying conviction for assault with a firearm was introduced under factor (c). (CT 452.)

Another of Buttler's brothers, Victor Buttler, testified that Streeter came to his house looking for Buttler, and broke the window of his car. (XIX RT 2008.) He further claimed that Streeter returned with a gun and threatened him. (XIX RT 2013.) It was at that time that Streeter was arrested. (XIX RT 2015.) No gun was found on Streeter's person, and on cross-examination, Victor was far more equivocal about when Streeter actually displayed a gun. (XIX RT 2026, 2036-2039.)

Streeter testified in his own defense, and denied that he made any threats to the Buttler family. He claimed that he did not threaten to hurt or kill anyone, and did not have a gun. (XIX RT 2340.) He was merely trying to find out where Buttler and his family had gone. (XIX RT 2335-2342.)

The jury was instructed with CALJIC No. 8.87:

> Evidence has been introduced for the purpose of showing that the defendant has committed the criminal acts which involved the express or implied use of force or violence or the threat of force or violence. Before a juror may consider any criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did, in fact, commit the criminal acts as an aggravating circumstance. It is not necessary for all jurors to agree. If any individual juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(CT 451; also CALJIC No. 8.87.)

### C. The Instruction Created a Mandatory Presumption

The prosecution must prove beyond a reasonable doubt criminal activity offered as aggravation under Penal Code section 190.3, subdivision (b). (*People v. Robertson* (1982) 33 Cal.3d 21, 54.) Before this evidence is considered in aggravation, under the plain language of factor (b), the jury must also find that the acts involved force or violence. This is a question of fact rather than law: "[W]hether a particular instance of criminal activity 'involved . . . the express or implied threat to use force or violence' (§ 190.3, subd. (b)) can only be determined by looking to the facts of the particular case." (*People v. Mason* (1991) 52 Cal.3d 909, 955.) Accordingly, the jury must determine both that a particular act occurred and that the act involved the requisite force or violence. (See *People v. Figueroa* (1986) 41 Cal.3d 714, 734 [factual determinations are for the jury to decide].)

Appellant was denied his due process right to be sentenced under California's statutory guidelines that require the jury to determine the applicable aggravating and mitigating factors. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Fetterly v. Paskett, supra,* 997 F.2d at p. 1300.) The instruction also violated due process by creating a mandatory presumption that the evidence constituted an actual threat or implied use of force or violence. Once the jury found the underlying facts to be true, they were to presume that it constituted an implied use or actual threat of force or violence and apply the aggravating factor against appellant. (See *Francis v. Franklin, supra,* 471 U.S. at p. 314 ["mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts"]; *People v. Figueroa, supra*, 41 Cal.3d at p. 724 [instruction effectively directed verdict by removing other relevant considerations if the

jury finds one fact to be true].) This foreclosed any independent consideration of the required elements of the aggravating factor. (*Carella v. California, supra,* 492 U.S. at p. 266.)

There was evidence from Streeter himself that he did not threaten anyone with violence while he was seeking to find where Buttler and his son had gone. (XXII RT 2335-2342.) Further, even if the events occurred as testified to by Buttler's siblings, the jury could have determined that they were mere idle threats of a man who was desperately trying to find his son, and that the family did not take Streeter seriously. Indeed, as the evidence showed, Streeter may have broken a car window and the window of a residence, but he then ran off without doing any further harm. (XIX RT 1968, 2008.) According to Victor Rallin, when Streeter was in his yard yelling at Victor to come out and purportedly waving a gun and threatening him, Victor's response was to stall him until the police could come. (XIX RT 2013-2014.) Ultimately, Victor tricked Streeter by falsely telling him that he had his son Howie and Streeter should come and get him. When Streeter arrived, he was arrested. (XIX 2026.)

The jury instruction precluded any defense that the alleged acts did not involve either a threat or an implied use of force or violence. Accordingly, the instruction improperly removed the key factual issue from the jury's consideration in violation of appellant's statutory rights, as well as his Sixth, Eighth and Fourteenth Amendment rights and their state constitutional analogs.

### D. The Instruction Improperly Escalated the Seriousness of the Incident by Defining the Incident as an Actual, Express Threat or Implied Use of Force or Violence

The instruction was particularly damaging to the defense in the present case because it allowed the jury not simply to conclude that

Streeter's conduct constituted an implied threat of violence (§ 190.3, subd. (b)), but that it was an express threat or implied use of force. Even assuming that Buttler's siblings' testimony established an implied threat of violence, an instruction that directs the jury to find that the evidence was an actual threat or implied use of force or violence goes far beyond anything that this Court has sanctioned. (See. e.g., *People v. Tuilaepa* (1992) 4 Cal.4th 569, 589 [evidence admissible only as implied threat]; *People v. Ramirez* (1990) 50 Cal.3d 1158, [same].)

The difference between an express or implied threat is enormous. An actual threat "must express an intention of being carried out." (*People v. Bolin, supra,* 18 Cal.4th at p. 339.) An implied threat is far less immediate, and far more capable of being rebutted. The trial court's instruction that allowed the jury to consider the incident to be an express threat made it far more serious than the evidence warranted.

Moreover, the instruction erred by defining the criminal act as involving the "implied use" of force or violence, rather than the "implied threat" of such use. (See § 190.3, subd. (b); *People v. Tuilaepa, supra*, 4 Cal.4th at p. 589.) As discussed above, a threat involves an intention to use force or violence when such force has not actually been used. Even after issuing a threat, an offender may retreat or decide not to follow through on the threat. Threats do not necessarily lead to violence. Here, the instruction escalated the level of force by telling the jury that mere words to harm the victim's siblings implied actual violence. This misinstructed the jury on the statutory requirements. It also permitted the jury to consider Streeter's conduct to be much more serious than the evidence warranted. Accordingly, the resulting verdict violated appellant's due process rights and was unreliable in violation of Eighth Amendment standards. (*Beck v.*

*Alabama, supra,* 447 U.S. at p. 637.)

**E. The Instruction was Prejudicial**

As noted above this was a close case. The first jury was unable to reach a verdict on penalty and the second jury was temporarily deadlocked. Because the error here violated appellant's federal constitutional rights, reversal is required unless it can be shown to be harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. at p. 24.) Under these standards, the judgment must be reversed.

The incidents involving the so-called threats were a pivotal part of the prosecution's penalty phase because they refuted the notion that Streeter was essentially a decent, non-violent person seeking to get his family back together, and that the murder was simply the product of an altercation that spun out of control. (See, e.g., XXIV RT 2587-2588.) Although the efforts Streeter made to locate his son were desperate and involved threatening-type acts, they did not necessarily constitute actual threats or violent conduct.

The prosecutor, however, used these incidents to argue that Streeter engaged in a "continuing pattern of escalating activity . . . ." (XXIV RT 2599.) The instruction directed the jury to consider that the activity constituted actual threats of violence. Moreover, the seriousness of the incidents was increased by the instruction's direction to the jury to find that they involved either actual threats or implied use of force or violence. Because the instruction told the jury to consider the evidence as being far more serious than the incidents warranted, it would have weighed especially heavy during the penalty deliberations.

Given how close the jury's sentencing determination was in this case, this Court cannot find that the error was harmless. The penalty verdict

must be reversed.

## XX.

## THE JURY WAS IMPROPERLY INFORMED THAT IT COULD CONSIDER A MISDEMEANOR CONVICTION IN AGGRAVATION AS A PRIOR CONVICTION UNDER FACTOR (C)

### A. Summary of Proceedings

Evidence was presented by the prosecution at the penalty phase that Streeter had shot a gun into a residence after an altercation with Paul Triplett, a man who lived there. Triplett's mother, Earline Mayfield, testified that in 1982, she came home and was told that her son, Paul, had been in a fight with somebody. A man she identified in court as Streeter was in a car parked in front of her home, and Mayfield noticed a shotgun in the front seat. The man shot the gun into the house, breaking a window. (XXI RT 2165-2169.) There were children and adults at house and in the doorway when the shots were fired. (XXI RT 2172.)

Triplett testified that he had been dating a woman who was the mother of Streeter's child. He and Streeter first talked, and then engaged in a scuffle related to the woman. According to Triplett, Streeter left but returned, and fired a shot through the window of the house. No one was hurt. (XXI RT 2192-2193.)

Streeter testified in his own defense that after he was beaten up by two or three men, one of whom was Triplett, he became angry, went home, obtained a shotgun, returned and fired it out of his car window. He did not intend to hurt anyone but shot the gun in the air. (XXIII RT 2520-2521.) Streeter admitted that he was convicted for this offense. (XXIII RT 2431.) It was agreed by both defense counsel and the prosecutor that this was a misdemeanor conviction. (XXIII RT 2576.)

The prosecutor did not attempt to argue this incident – a shooting at

a dwelling – should be considered under factor (b), as criminal activity which "involved the use or attempted use of force or violence or the express or implied threat to use force of violence." Instead, he supplied the court with a jury instruction which included it under factor (c), even though it was a misdemeanor conviction that cannot be considered under factor (c). (XXIII RT 2575-2576.)

CALJIC No. 8.86, as modified, told the jury to consider Streeter's misdemeanor conviction for shooting at an inhabited dwelling as an aggravating circumstance:

> Evidence has been introduced for the purpose of showing that the defendant has been convicted of the crimes of assault with firearm [P.C. 245 (a)(2)] and shooting at inhabited dwelling [P.C. 246 – misdemeanor] prior to the offense of murder in the first degree of which he has been found guilty in this case. [¶] Before you may consider any of such alleged crimes as an aggravating circumstance, you must first be satisfied beyond a reasonable doubt that the defendant was in fact convicted of the prior crimes. . . .

(CT 452.)[37]

Thus, the jury was told it could consider the conviction of the shooting as an aggravating circumstance as long as it was satisfied beyond a reasonable doubt that the defendant had been convicted of the crime – which was not in dispute. The crime, however, was not a felony, and thus the conviction should not have been considered.

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[37] At the first penalty trial, which deadlocked, the jury was instructed that only the assault with firearm conviction, and not this misdemeanor conviction, was an aggravating circumstance. (CT 280.)

## B. Instructing the Jury It Could Consider a Misdemeanor Conviction Under Factor (c) Was Prejudicial Error

It is without question that a misdemeanor conviction may not be considered as an aggravating factor. (*People v. Osband* (1996) 13 Cal.4th 622, 735.) Nevertheless, the jury was instructed to consider this conviction in aggravation, an error exacerbated by the fact that by failing to instruct the jury with CALJIC No. 8.88 (see Claim XVI), the meaning of aggravating circumstances was never defined. Informing the jury that it could consider the misdemeanor conviction in aggravation was not only a violation of state law, but also violated appellant's federal constitutional rights to due process and a reliable penalty determination under the Eighth and Fourteenth Amendments and their state constitutional analogs.

The discretion of a capital case penalty jury must be suitably directed and limited "so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia, supra,* 428 U.S. at p. 189.) A death sentence "must be tailored to the [defendant's] personal responsibility and moral guilt." (*Enmund v. Florida* (1982) 458 U.S. 782, 801.) Improper consideration of aggravating factors "has a tendency to skew the weighing process and creates the risk that the death penalty will be imposed arbitrarily and thus, unconstitutionally." (*United States v. McCullah* (10th Cir. 1996) 76 F.3d 1087, 1111; cf. *Stringer v. Black* (1992) 503 U.S. 222.) In addition, since California law bars the use of non-statutory aggravation, the arbitrary deprivation of appellant's right to have his sentence determined without consideration of such evidence deprived him of a state-created liberty interest in violation of due process. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

Given the closeness of the case, the prosecution cannot show beyond a reasonable doubt that the jury's consideration of this incident under factor

(c) did not effect the jury's penalty verdict.

## XXI.

## INSTRUCTING THE JURY THAT IT SHOULD REACH A VERDICT ON PENALTY "REGARDLESS OF THE CONSEQUENCES" DIMINISHED THEIR SENSE OF RESPONSIBILITY

The first instruction the judge gave to the jury at the close of the penalty phase was CALJIC No. 1.00, which concluded with the following admonishment: "Both the People and a defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences." (CT 432; XIX RT 2624.)

This instruction was given despite the repeated holdings of this Court that such an instruction is inappropriate and should not be given at the penalty phase. (See, e.g., *People v. Ray, supra,* 13 Cal.4th at p. 354; *People v. Jennings* (1988) 46 Cal.3d 963, 991; *People v. Keenan* (1988) 46 Cal.3d 478, 517; *People v. Wade* (1988) 44 Cal.3d 975, 998; *People v. Brown, supra,* 40 Cal.3d at p. 537, fn. 7.) As the Court recognized: "Our disapproval of the instruction lay in its potential to diminish the jury's sense of responsibility for the penalty decision . . . since the precise issue before the jury – whether the penalty shall be death or life imprisonment without possibility of parole – is the 'consequence' of the verdict." (*People v. Jennings*, *supra*, 46 Cal.3d 963, 991.) And "[i]nstructions which lead a jury to believe that responsibility lies elsewhere for determining that death is the appropriate penalty are constitutionally impermissible." (*Id.*, citing *Caldwell v. Mississippi, supra,* 472 U.S. at pp. 328-329; *People v. Milner, supra,* 45 Cal.3d at pp. 253-254.)

The phraseology in CALJIC No. 1.00 "was designed for guilt trials,

at which 'defendant's possible punishment is not . . . a proper matter for juror consideration. . . .'" (*People v. Brown*, *supra*, 40 Cal.3d at p. 537, fn. 7 [citation].) At the penalty phase, however, "the 'consequences' – the choice between the two most extreme punishments the law exacts – are precisely the issue the jury must decide," and therefore, "this portion of CALJIC No. 1.00 should never be given in a capital penalty trial." (*Ibid.*)

In other cases, this Court has held the giving of the instruction to be harmless when all the instructions given to the jury are viewed as a whole. (See, e.g., *People v. Ray, supra,* 13 Cal.4th at p. 354.) However, as explained in Claim XVI, unlike these other cases, here the trial court omitted the critical penalty phase instruction, CALJIC No. 8.88, which would have directed the jury to consider and weigh the various factors in aggravation and mitigation and to select the appropriate penalty under the totality of the circumstances. (*Ibid.*) Thus, unlike *People v. Keenan*, *supra*, 46 Cal.3d 478, for example, the instructions did *not* "adequately apprise[] the jury of its duty to consider all mitigating evidence, and to impose death only if that was deemed the appropriate penalty under all the circumstances." (*Id.* at p. 518.) To the contrary, the court informed the jury that with regard to the two penalties, life without possibility of parole and the death penalty, the law does not favor one over the other. (XVII RT 1625-1626; VII RT 1689.)

The diminishment of the jury's responsibility in this case was exacerbated by the fact that this was a penalty retrial in which the court informed the jurors at the commencement of the case that this case is "unique" in that the defendant's guilt had already been decided. In this regard, the jury's responsibility was already curtailed by being informed that they could not consider lingering doubt, and must simply accept the

guilt phase verdicts. (See Claim XVIII; CT 446.) In addition, the court told the jury prior to trial that this phase of the case will be not a "long drawn-out trial," but will be "really rather short" because it is not a "complicated case." (XVII RT 1626, 1650, 1689.) As the court explained to one set of prospective jurors: "The evidence is straightforward. And it is for you to interpret that evidence and [it's] not going to take long to do it." (XVII RT 1689.)

Finally, the jury was informed that there had been a prior penalty phase trial. (XVII RT 1629, 1650, 1689.) This was irrelevant information (see *People v. Thompson, supra,* 50 Cal.3d at p. 178) that was reasonably likely to lessen the jurors' sense of their responsibility. The fact that the jury was informed that the process upon which they were embarking had been performed by a prior jury would likely leave the jurors with the impression that another jury could likewise follow them. (Cf. *Caldwell v. Mississippi, supra,* 472 U.S. 320 [informing jury that appellate court would review sentence for correctness diminishes jury's sense of responsibility].)

The Eighth Amendment requires that "jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision." (*McGautha v. California* (1971) 402 U.S. 183, 208; *Caldwell v. Mississippi, supra,* 472 U.S. at pp. 329-330.) Instructing jurors in a capital case that they should reach a penalty verdict "regardless of the consequences" – particularly when they were never instructed to reach an appropriate verdict based on their moral assessment of the sentencing factors – undoubtedly violates this principle. The jury is presumed to have followed the instructions. (See *Francis v. Franklin, supra,* 471 U.S. at p.. 324-325, fn. 9; *Bollenbach v. United States, supra,* 326 U.S. 607, 613-614.) Especially in light of the

other instructional errors in this case, it cannot be said that this error was harmless beyond a reasonable doubt.

## XXII.

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

### A. Introduction

Many features of California's capital sentencing scheme violate the United States Constitution.[38] This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

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[38] The instructional errors delineated below were exacerbated by the failure of the court to give guidance on how to consider and weigh the aggravating and mitigating circumstances and on the means for reaching an appropriate sentence. (See Claim XVI.)

## B. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*Edelbacher, supra,* 47 Cal.3d at p. 1023, citing *Furman, supra,* 408 U.S. at p. 313 (conc. opn. of White, J.).) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens, supra,* 462 U.S. at p. 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, Penal Code section 190.2 contained 32 special circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley, supra,* 10 Cal.4th at pp. 842-843.) This Court should reconsider *Stanley* and strike down section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

## C. The Broad Application of Section 190.3(a) Violated Appellant's Constitutional Rights

Section 190.3, subdivision (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; CT 448.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances.

Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

In this case, the prosecutor argued that under factor (a) the jurors should "relive, through the eyes of the various witnesses and the victims, what happened there that day . . ." (XXIV RT 2583.) The jury was told to "imagine" what it was like for the victim and "how you would feel if that had been you." (*Ibid.*) According to the prosecutor, factor (a) encompassed how Buttler felt when her child was taken by Streeter, how her son, Patrick felt, when he tried to help his mother, how the other child, Shavonda felt, when gasoline was being poured on the car she was in, and how the children felt seeing their mother being beaten and lit on fire. (XXIV RT 2584.) The prosecutor even told the jury they should consider how other witnesses felt: "Imagine all this in your minds when you're trying to figure out how heinous this crime was." (XXIV RT 2585.) The jury was also told by the prosecutor and instructed by the judge that victim impact evidence could be considered under factor (a). (XXIV RT 2590-2592; CT 446.) Such victim impact evidence included the impact on the victim's family of hearing a tape of the victim's screams, which was played in court during the guilt phase. (See Claim XVII.)

This Court has never applied any limiting construction to factor (a). (*People v. Blair, supra,* 36 Cal.4th at p. 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner almost all features of every murder can be and have been

characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright, supra,* 486 U.S. at p. 363; but see *Tuilaepa v. California, supra,* 512 U.S. at pp. 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges the court to reconsider this holding.

### D. The Death Penalty Statute and Accompanying Jury Instructions Fail To Set Forth the Appropriate Burden of Proof

#### 1. Appellant's Death Sentence Is Unconstitutional Because It Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson, supra,* 25 Cal.4th at p. 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that death was the appropriate penalty or

that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. Indeed, as discussed in Claim XVI, the jury was not provided any guidance on how to reach a death sentence.

*Apprendi v. New Jersey, supra,* 530 U.S. at p. 478, *Blakely v. Washington, supra,* 542 U.S. at pp. 303-305, and *Ring v. Arizona, supra,* 536 U.S. at p. 604, now require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. Although not in this case due to the omission of CALJIC No. 8.88, but in virtually all other cases in California, juries are instructed that in order to impose the death penalty, the jury had to find that aggravating factors were present; that the aggravating factors outweighed the mitigating factors; and that the aggravating factors were so substantial as to make death an appropriate punishment. Assuming without conceding that the jury in appellant's case somehow gleaned that this was their task, these additional findings were required before the jury could impose the death sentence. *Apprendi, supra,* 530 U.S. 466, *Ring, supra,* 536 U.S. 584, *Blakely, supra,* 542 U.S. 296, and, most recently, *Cunningham v. California, supra,* 549 U.S. 270, require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky, supra,* 450 U.S. at p. 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* and its progeny (*People v. Anderson, supra,* 25 Cal.4th at p. 589, fn. 14), and does not require factual findings. (*People v.*

*Griffin* (2004) 33 Cal.4th 536, 595.) The Court has rejected the argument that the *Apprendi* line of cases impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected appellant's claim that either the due process clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair, supra,* 36 Cal.4th at p. 753.) Appellant requests that the Court reconsider this holding.

### 2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346 [defendant constitutionally entitled to procedural protections afforded by state law].)

Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

Appellant's jury – particularly because it was not given the minimum guidance of CALJIC No. 8.88, but even if it had – was not provided with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams, supra,* 44 Cal.3d at p. 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law ].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

### 3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

#### a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra,* 536 U.S. 584. (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and applicaiton of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan*

(1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Y1st, supra,* 897 F.2d at p. 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

**b. Unadjudicated Criminal Activity**

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87; CT 451.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), 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 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson, supra,* 25 Cal.4th at pp 543, 584-585.)

The United States Supreme Court's recent decisions in *Cunningham v. California*, *supra*, 549 U.S. 270, *Blakely, supra*, 542 U.S. 296, *Ring, supra*, 536 U.S. 584, and *Apprendi, Jersey, supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider this holding.

**4. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing To Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances**

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) ___ U.S. ___ ,127 S.Ct. 1706, 1712-1724; *Mills v. Maryland, supra,* 486 U.S. 367, 374; *Lockett v. Ohio, supra,* 438 U.S. at p. 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity

was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. This problem was magnified in this case where the term "mitigation" was not defined, and where CALJIC No. 8.88 was not given. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments.

### 5. The Penalty Jury Should Be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of*

*Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence, and, on the contrary, the court's statement to the jurors that with regard to the two penalties, the law does not favor one over the other (XVII RT 1625-1626; VII T 1689), violated appellant's right to due process of law (U.S. Const., 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th & 14th Amends.), and his right to the equal protection of the laws. (U.S. Const., 14th Amend.)

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

### E. Failing to Require That the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right

to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia, supra,* 428 U.S. at p. 195.) This Court has rejected these contentions. (*People v. Cook, supra,* 39 Cal.4th at p. 619.) Appellant urges the Court to reconsider its decisions on the necessity of written findings, particularly in the context of this case where the absence of the standard instruction on how the jury should consider aggravating and mitigating circumstances and reach an appropriate sentence (Claim XVI) has left the reviewing court with no ability to discern how the jury reached its verdict.

### F. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

#### 1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; Pen. Code, § 190.3, factors (d) and (g); CT 448) 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. at p. 384; *Lockett v. Ohio, supra,* 438 U.S. at p. 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

#### 2. The Failure to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. This included factors (e), (f), (g), and (j). The trial court failed to omit those factors from the jury instructions (CT 448-449), likely confusing the jury and – particularly where, as here, the court failed to define the terms "aggravating" and "mitigating" – preventing

the jurors from making any reliable determination of the appropriate penalty, in violation of appellant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook, supra,* 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

### 3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (CT 448-449.) The Court has upheld this practice. (*People v. Hillhouse, supra,* 27 Cal.4th at p. 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport, supra,* 41 Cal.3d at pp. 288-289). Appellant's 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. This is particularly true because the court did not define the terms "aggravating" and "mitigating." Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black, supra,* 503 U.S. at pp. 230-236.) As such, appellant asks the Court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

## G. The Prohibition Against Inter-case Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the Court to reconsider its failure to require inter-case proportionality review in capital cases.

## H. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the equal protection clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.42, (b) & (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances

apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that the Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider.

### I. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms

This Court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook, supra,* 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the U.S. Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions.

## XXIII.

## REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF THE ERRORS

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction, special circumstances and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1987)

586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

This is a case that was particularly close at both phases of the trial. As described in Claims VI, VIII, and XI, the evidence in support of any of the three theories of murder and the special circumstances was far from substantial. As a result, the erroneous introduction of irrelevant inflammatory evidence of the victim's pain and suffering (Claim IV) and the victim's testimonial hearsay statements (Claim V), as well as the serious instructional errors (Claims VII, IX, XII, XIV, and XV) combined to obscure the relevant facts and mislead the jury as to the appropriate law in deciding appellant's culpability and eligibility for the death penalty. The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. (U.S. Const., 14th amend.; Cal. Const., art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643.) Appellant's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439

[holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644.) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

As with the guilt phase, the sentencing decision was a very close one. Indeed, the first jury was unable to reach a verdict at the penalty phase and a mistrial was declared. At the retrial of penalty, the jury was temporarily deadlocked before ultimately reaching a verdict of death. In this light, the errors at the penalty phase – even if individually not found to be prejudicial – cannot be considered harmless when viewed in combination.

The combined impact of the evidentiary and instructional errors at the penalty phase preclude any possibility that the jury reached an appropriate verdict in accordance with the state death penalty statute or with the federal constitutional requirements of a fundamentally fair, reliable,

non-arbitrary and individualized sentencing determination. The jury was not given the most fundamental penalty phase instruction, CALJIC No. 8.88, which would have informed them how to consider aggravating and mitigating circumstances and the manner in which to reach an appropriate penalty, and was told to reach a verdict regardless of the consequences. (Claims XVI, XXI.) The jury's sentencing determination was further skewed by instructions and evidentiary errors which misled and misinformed the jury on the quantity and quality of aggravating circumstances (Claims XVII, XIX, XX) and restricted the consideration of mitigating circumstances (Claims XVIII, XXI).

The cumulative effect of the errors relating to the penalty phase of the trial undermine the reliability of the death sentence. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina, supra,* 476 U.S. at p. 8; *Caldwell v. Mississippi, supra,* 472 U.S. at p. 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

\\

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## CONCLUSION

For all of the reasons stated above, the judgment of conviction, special circumstance findings and sentence of death in this case must be reversed.

DATED: June 30, 2008

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

ANDREW S. LOVE
Assistant State Public Defender

Attorneys for Appellant
HOWARD LARCELL STREETER

## CERTIFICATE OF COUNSEL

**(Cal. Rules of Court, Rule 8.630(b)(2))**

I, Andrew S. Love, am the Assistant State Public Defender assigned to represent appellant Howard Larcell Streeter, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that the brief is 92,974 words in length.

Dated: June 30, 2008

ANDREW S. LOVE
Attorney for Appellant

## DECLARATION OF SERVICE

Re: *PEOPLE v. HOWARD LARCELL STREETER* No. S078027

I, Glenice Fuller, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; I served a true copy of the attached:

**APPELLANT'S OPENING BRIEF**

on each of the following, by placing same in an envelope addressed respectively as follows:

MELISSA MANDEL
Deputy Attorney General
Office of the Attorney General
110 W. A Street 14th Floor
San Diego, CA 92101

San Bernardino Superior Court
ATTN: Clerk of the Court
401 North Arrowhead Ave
San Bernardino, CA 92415-0063

HOWARD STREETER
P.O. Box P-36000
San Quentin State Prison
San Quentin, CA 94974

Bethany O'Neill
Habeas Corpus Resource Center
303 Second Street, Suite 400 South
San Francisco, CA 94107

Each said envelope was then, on June 30, 2008, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 30, 2008, at San Francisco, California.

Glenice Fuller
DECLARANT

# APPENDIX A

(State Bar Court Case No. 99-O-10680; 99-O-11363)

S099500

SUPREME COURT
FILED

OCT 1 0 2001

Frederick K. Ohlrich Clerk

DEPUTY

**IN THE SUPREME COURT OF CALIFORNIA**

**EN BANC**

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IN RE **JULIAN I. DUCRE** ON DISCIPLINE

---

It is ordered that **JULIAN I. DUCRE, State Bar No. 113923**, be suspended from the practice of law for one year, that execution of the suspension be stayed, and that he be placed on probation for two years subject to the conditions of probation recommended by the Hearing Department of the State Bar Court in its order approving stipulation filed on May 30, 2001. It is further ordered that he take and pass the Multistate Professional Responsibility Examination within one year after the effective date of this order. (See *Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.) Costs are awarded to the State Bar in accordance with Business & Professions Code section 6086.10 and payable in accordance with Business & Professions Code section 6140.7.

George
Chief Justice

I, Frederick K. Ohlrich, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court as shown by the records of my office.
Witness my hand and the seal of the Court this
10 day of OCTOBER 2001
Clerk
By: Deputy

Bar Court of the State Bar of Ca... Hearing ...ment ☒ Los Angeles ☐ ...Francisco ORIGINAL

| Counsel for the State Bar | Case number(s) | (for Court's use) |
|---|---|---|
| THE STATE BAR OF CALIFORNIA<br>OFFICE OF THE CHIEF TRIAL<br>COUNSEL, ENFORCEMENT<br>DJINNA M. GOCHIS, NO. 108360<br>1149 South Hill Street<br>Los Angeles, CA 90015<br>(213) 765-1000 | 99-O-10680<br>99-O-11363 | FILED<br>MAY 30 2001<br>STATE BAR COURT<br>CLERK'S OFFICE<br>LOS ANGELES |
| Counsel for Respondent<br>JoAnne Robbins<br>9200 Sunset Boulevard<br>Penthouse 7<br>Los Angeles, CA 90069<br>(310) 887-3900 | | |
| In the Matter of<br>JULIAN I. DUCRE<br>Bar # 113923<br>A Member of the State Bar of California<br>(Respondent) | Submitted to ☐ assigned judge ☒ settlement judge<br>STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING<br>STAYED SUSPENSION; NO ACTUAL SUSPENSION<br>☐ PREVIOUS STIPULATION REJECTED | |

A. Parties' Acknowledgments:

(1) Respondent is a member of the State Bar of California, admitted May 25, 1984 (date).

(2) The parties agree to be bound by the factual stipulations contained herein even if conclusions of law or disposition are rejected or changed by the Supreme Court.

(3) All investigations or proceedings listed by case number in the caption of this stipulation are entirely resolved by this stipulation, and are deemed consolidated. Dismissed charge(s)/count(s) are listed under "Dismissals." The stipulation and order consist of ~~14~~ 16 pages. JER ds

(4) A statement of acts or omissions acknowledged by Respondent as cause or causes for discipline is included under "Facts."

(5) Conclusions of law, drawn from and specifically referring to the facts are also included under "Conclusions of Law."

(6) No more than 30 days prior to the filing of this stipulation, Respondent has been advised in writing of any pending investigation/proceeding not resolved by this stipulation, except for criminal investigations.

(7) Payment of Disciplinary Costs—Respondent acknowledges the provisions of Bus. & Prof. Code §§6086.10 & 6140.7. (Check one option only):
- ☒ costs added to membership fee for calendar year following effective date of discipline
- ☐ costs to be paid in equal amounts prior to February 1 for the following membership years:

  _____
  (hardship, special circumstances or other good cause per rule 284, Rules of Procedure)
- ☐ costs waived in part as set forth under "Partial Waiver of Costs"
- ☐ costs entirely waived

Note: All information required by this form and any additional information which cannot be provided in the space provided, shall be set forth in the text component of this stipulation under specific headings, i.e. "Facts," "Dismissals," "Conclusions of Law."

B. Aggravating Circumstances (for definition, see Standards for Attorney Sanctions for Professional Misconduct, standard 1.2(b).) Facts supporting aggravating circumstances are required.

(1) ☐ Prior record of discipline [see standard 1.2(f)]

(a) ☐ State Bar Court case # of prior case _____

(b) ☐ date prior discipline effective _____

(c) ☐ Rules of Professional Conduct/ State Bar Act violations: _____

_____

_____

(d) ☐ degree of prior discipline _____

(e) ☐ If Respondent has two or more incidents of prior discipline, use space provided below or under "Prior Discipline".

(2) ☐ Dishonesty: Respondent's misconduct was surrounded by or followed by bad faith, dishonesty, concealment, overreaching or other violations of the State Bar Act or Rules of Professional Conduct.

(3) ☐ Trust Violation: Trust funds or property were involved and Respondent refused or was unable to account to the client or person who was the object of the misconduct for improper conduct toward said funds or property.

(4) ☐ Harm: Respondent's misconduct harmed significantly a client, the public or the administration of justice.

(5) ☐ Indifference: Respondent demonstrated indifference toward rectification of or atonement for the consequences of his or her misconduct.

(6) ☐ Lack of Cooperation: Respondent displayed a lack of candor and cooperation to victims of his/her misconduct or to the State Bar during disciplinary investigation or proceedings.

(7) ☐ Multiple/Pattern of Misconduct: Respondent's current misconduct evidences multiple acts of wrongdoing or demonstrates a pattern of misconduct.

(8) ☐ No aggravating circumstances are involved.

Additional aggravating circumstances:

If the medical providers had not made direct contact with the clients/patients, Respondent would not have paid the sums owed and, apparently, would never have rectified the problem. It was only when the State Bar intervened that Respondent DID pay out the sum owed in one of the matters.

C.[4] Mitigating Circumstances [see ...ndard 1.2(e).] Facts supporting mitiga...g circumstances are required.

(1) ☐ No Prior Discipline: Respondent has no prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious.

(2) ☐ No Harm: Respondent did not harm the client or person who was the object of the misconduct.

(3) ☐ Candor/Cooperation: Respondent displayed spontaneous candor and cooperation to the victims of his/her misconduct and to the State Bar during disciplinary investigation and proceedings.

(4) ☐ Remorse: Respondent promptly took objective steps spontaneously demonstrating remorse and recognition of the wrongdoing, which steps were designed to timely atone for any consequences of his/her misconduct.

(5) ☐ Restitution: Respondent paid $ _____ on _____ in restitution to _____ without the threat or force of disciplinary, civil or criminal proceedings.

(6) ☐ Delay: These disciplinary proceedings were excessively delayed. The delay is not attributable to Respondent and the delay prejudiced him/her.

(7) ☐ Good Faith: Respondent acted in good faith.

(8) ☐ Emotional/Physical Difficulties: At the time of the stipulated act or acts of professional misconduct Respondent suffered extreme emotional difficulties or physical disabilities which expert testimony would establish was directly responsible for the misconduct. The difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug or substance abuse, and Respondent no longer suffers from such difficulties or disabilities.

(9) ☒ Family Problems: At the time of the misconduct, Respondent suffered extreme difficulties in his/her personal life which were other than emotional or physical in nature.

(10) ☐ Severe Financial Stress: At the time of the misconduct, Respondent suffered from severe financial stress which resulted from circumstances not reasonably foreseeable or which were beyond his/her control and which were directly responsible for the misconduct.

(11) ☐ Good Character: Respondent's good character is attested to by a wide range of references in the legal and general communities who are aware of the full extent of his/her misconduct.

(12) ☐ Rehabilitation: Considerable time has passed since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation.

(13) ☐ No mitigating circumstances are involved.

Additional mitigating circumstances:

Respondent has practiced since 1984 without prior discipline. See page 10-11 for additional discussion.

D. Discipline

1. Stayed Suspension.

A. Respondent shall be suspended from the practice of law for a period of one (1) year

☐ i. and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and present fitness to practice and present learning and ability in the law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct

☐ ii. and until Respondent pays restitution to _____ [payee(s)] (or the Client Security Fund, if appropriate), in the amount of _____, plus 10% per annum accruing from _____, and provides proof thereof to the Probation Unit, Office of the Chief Trial Counsel

☐ iii. and until Respondent does the following: _____.

B. The above-referenced suspension shall be stayed.

2. Probation.

Respondent shall be placed on probation for a period of two (2) years, which shall commence upon the effective date of the Supreme Court order herein. (See rule 953, California Rules of Court.)

E. Additional Conditions of Probation:

(1) ☒ During the probation period, Respondent shall comply with the provisions of the State Bar Act and Rules of Professional Conduct.

(2) ☒ Within ten (10) days of any change, Respondent shall report to the Membership Records Office of the State Bar and to the Probation Unit, all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code.

(3) ☒ Respondent shall submit written quarterly reports to the Probation Unit on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent shall state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report would cover less than 30 days, that report shall be submitted on the next quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the period of probation and no later than the last day of probation.

(4) ☐ Respondent shall be assigned a probation monitor. Respondent shall promptly review the terms and conditions of probation with the probation monitor to establish a manner and schedule of compliance. During the period of probation, respondent shall furnish to the monitor such reports as may be requested, in addition to the quarterly reports required to be submitted to the Probation Unit. Respondent shall cooperate fully with the probation monitor.

(5) ☒ Subject to assertion of applicable privileges, Respondent shall answer fully, promptly and truthfully any inquiries of the Probation Unit of the Office of the Chief Trial Counsel and any probation monitor assigned under these conditions which are directed to Respondent personally or in writing relating to whether Respondent is complying or has complied with the probation conditions.

(6) ☒ Within one (1) y[illegible] e effective date of the discipline respondent shall provide to the Probation Unit satisfactory proof of attendance at a session of the Ethics School, and passage of the test given at the end of that session.

☐ No Ethics School recommended.

(7) ☐ Respondent shall comply with all conditions of probation imposed in the underlying criminal matter and shall so declare under penalty of perjury in conjunction with any quarterly report to be filed with the Probation Unit.

(8) ☐ The following conditions are attached hereto and incorporated:

☐ Substance Abuse Conditions ☒ Law Office Management Conditions

☐ Medical Conditions ☒ Financial Conditions

(9) ☐ Other conditions negotiated by the parties:

☒ Multistate Professional Responsibility Examination: Respondent shall provide proof of passage of the Multistate Professional Responsibility Examination ("MPRE"), administered by the National Conference of Bar Examiners, to the Probation Unit of the Office of the Chief Trial Counsel within one year. Failure to pass the MPRE results in actual suspension without further hearing until passage. But see rule 951(b), California Rules of Court, and rule 321(a)(1) & (c), Rules of Procedure.

☐ No MPRE recommended.

| In the Matter of | Case Number(s): |
|---|---|
| JULIAN I. DUCRE | 99-O-10680<br>99-O-11363 |
| A Member of the State Bar | |

Financial Conditions

a. ☐ Respondent shall pay restitution to _____ [payee(s)] (or the Client Security Fund, if appropriate), in the amount(s) of _____, plus 10% interest per annum accruing from _____, and provide proof thereof to the Probation Unit, Office of the Chief Trial Counsel.

☐ no later than _____

or

☐ on the payment schedule set forth on the attachment under "Financial Conditions, Restitution."

b. ☒ 1. If respondent possesses client funds at any time during the period covered by a required quarterly report, respondent shall file with each required report a certificate from respondent and/or a certified public accountant or other financial professional approved by the Probation Unit, certifying that:

a. respondent has maintained a bank account in a bank authorized to do business in the State of California, at a branch located within the State of California, and that such account is designated as a "Trust Account" or "Clients' Funds Account";

b. respondent has kept and maintained the following:

i. a written ledger for each client on whose behalf funds are held that sets forth:
1. the name of such client;
2. the date, amount and source of all funds received on behalf of such client;
3. the date, amount, payee and purpose of each disbursement made on behalf of such client; and,
4. the current balance for such client.

ii. a written journal for each client trust fund account that sets forth:
1. the name of such account;
2. the date, amount and client affected by each debit and credit; and,
3. the current balance in such account.

iii. all bank statements and cancelled checks for each client trust account; and,

iv. each monthly reconciliation (balancing) of (i), (ii), and (iii), above, and if there are any differences between the monthly total balances reflected in (i), (ii), and (iii), above, the reasons for the differences.

c. respondent has maintained a written journal of securities or other properties held for clients that specifies:

i. each item of security and property held;
ii. the person on whose behalf the security or property is held;
iii. the date of receipt of the security or property;
iv. the date of distribution of the security or property; and,
v. the person to whom the security or property was distributed.

2. If respondent does not possess any client funds, property or securities during the entire period covered by a report, respondent must so state under penalty of perjury in the report filed with the Probation Unit for that reporting period. In this circumstance, respondent need not file the accountant's certificate described above.

3. The requirements of this condition are in addition to those set forth in rule 4-100, Rules of Professional Conduct.

c. ☒ Within one (1) year of the effective date of the discipline herein, respondent shall supply to the Probation Unit satisfactory proof of attendance at a session of the Ethics School Client Trust Accounting School, within the same period of time, and passage of the test given at the end of that session.

| In the Matter of | Case Number(s): |
|---|---|
| JULIAN I. DUCRE<br>A Member of the State Bar | 99-O-10680<br>99-O-11363 |

Law Office Management Conditions

a. ☐ Within ____ days/ _____months/ _____years of the effective date of the discipline herein, Respondent shall develop a law office management/ organization plan, which must be approved by respondent's probation monitor, or, if no monitor is assigned, by the Probation Unit. This plan must include procedures to send periodic reports to clients; the documentation of telephone messages received and sent; file maintenance; the meeting of deadlines; the establishment of procedures to withdraw as attorney, whether of record or not, when clients cannot be contacted or located; and, for the training and supervision of support personnel.

b. ☒ Within _____ days/ _____months __1__ years of the effective date of the discipline herein, respondent shall submit to the Probation Unit satisfactory evidence of completion of no less than _____ hours of MCLE approved courses in law office management, attorney client relations and/ or general legal ethics. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent shall not receive MCLE credit for attending these courses (Rule 3201, Rules of Procedure of the State Bar.)

c. ☒ Within 30 days of the effective date of the discipline, respondent shall join the Law Practice Management and Technology Section of the State Bar of California and pay the dues and costs of enrollment for __1__ year(s). Respondent shall furnish satisfactory evidence of membership in the section to the Probation Unit of the Office of Chief Trial Counsel in the first report required.

**ATTACHMENT TO**
**STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION**

IN THE MATTER OF: JULIAN I. DUCRE
CASE NUMBERS: 99-0-10680 AND 99-0-11363

**FACTS AND CONCLUSIONS OF LAW**

COUNT ONE

Case No. 99-0-10680 (Jarnagin)
Rules of Professional Conduct, rule 4-100(B)(4)
[Failure to Pay Client Funds Promptly]

1. On or about September 5, 1994, Lovette Jarnagin ("Jarnagin") employed the Respondent to represent her on a personal injury claim. Respondent and Jarnagin agreed that Respondent would be compensated by a contingency fee of 40% if the matter went to trial or arbitration. Jarnagin's claim was resolved through arbitration.

2. In October 1996, Respondent received $13,250 in settlement funds on behalf of Jarnagin which he deposited into his client trust account at Sumitomo Bank, account number 076093202 ("client trust account") on or about October 18, 1996.

3. On November 5, 1996, Respondent disbursed to Jarnagin $5,198.50, along with a "Cost and Distribution Statement", dated November 4, 1996, which reflected costs advanced by Respondent in the amount of $255, attorney's fees in the amount of $5,300, and acknowledged "Funds to be Paid on Behalf of Client" to "Kaiser Permenante [sic] Medical Clinic" ("Kaiser") in the amount of $2,496.50 as payment of a lien against Jarnagin's settlement funds for medical services provided to her.

4. By client trust account check number 5505, dated October 21, 1996, Respondent paid himself partial attorney's fees for the Jarnagin matter in the amount of $2,500. By client trust account check number 5522, dated November 14, 1996, in the amount of $3,000, Respondent paid himself the remainder of his attorney's fees ($2,800), plus $200 toward reimbursement of the $255 advanced costs.

5. In April 1998, Jarnagin received notice from Kaiser that it had not

received any funds from Respondent. Jarnagin left several messages for Respondent on his answering machine, but he did not respond. On April 23, 1998, Jarnagin sent a letter to the Respondent requesting that he pay Kaiser the $2,496.50. Respondent did not respond to Jarnagin's letter. There is no dispute that Respondent received the letter. On March 29, 1999, Jarnagin filed her complaint with the State Bar.

6. Respondent did not pay Kaiser any funds on behalf of Jarnagin until after he was contacted by the State Bar in connection with Jarnagin's complaint. By check dated September 12, 1999, Respondent paid Kaiser $1,497.90, Respondent having negotiated a reduction in the amount of the lien with Kaiser on August 11, 1999.

7. By failing to pay a medical service provider for almost two years after settlement funds were received, Respondent failed to promptly deliver funds in his possession, as requested by a client, which the client was entitled to receive.

COUNT TWO

Case No. 99-O-10680
Rules of Professional Conduct, rule 4-100(A)
[Failure to Maintain Client Funds in Trust Account]

8. Paragraphs 1 through 6 of these Stipulated facts are incorporated herein as if set forth in full.

9. On April 18, 1997, the account balance of Respondent's client trust account fell to $1,361.12, less than the $2,496.50 amount of the Kaiser lien. From April 18, 1997 until July 20, 1998, the Respondent's client trust account fell to $176.91.

10. By not maintaining the $2,496.50 received on behalf of his client in his client trust account, Respondent wilfully failed to maintain client funds in a trust account.

COUNT THREE

Case No. 99-O-11363
Rules of Professional Conduct, rule 4-100(B)(4)
[Failure to Pay Client Funds Promptly]

11. On May 25, 1995, Ella Ruth Jones ("Jones") hired Respondent to

represent her on a personal injury claim. Respondent and Jones agreed that Respondent would be compensated by a contingency fee of 33 1/3% if the matter was settled without going to trial or arbitration.

12. On May 25, 1995, in connection with his representation of Jones, Respondent executed medical liens on behalf of two of Jones' medical service providers, Maltby Chiropractic ("Maltby") and Carreon Health Care ("Carreon"), which liens Jones had previously executed. Therefore, Jones' claim was resolved without trial or arbitration.

13. In early February 1996, Respondent received an invoice from Maltby notifying him that its lien amounted to $2,570.25 as of the date. There is no dispute that Respondent did in fact receive the invoice.

14. On March 22, 1996, Respondent deposited into his client trust account $8,000 in settlement funds on behalf of Jones.

15. On April 1, 1996, Respondent disbursed to Jones $3,262.05, along with a "Settlement Breakdown", dated March 14, 1996, reflecting attorney's fees in the amount of $2,667.67, and acknowledged "Payments for Medical Bills, Liens, and Insurance Reimbursement Liens" to Carreon in the amount of $548.61 ("$731.46 reduced 25%) and to Maltby in the amount of $1,522.68 ("$2030.25 reduced 25%).

16. By client trust account check number 5435, dated March 22, 1996, Respondent paid himself partial attorney's fees for the Jones matter in the amount of $1,666.67. By client trust account check number 5437, dated April 1, 1996, in the amount of $1,000, Respondent paid himself the remainder of his attorney's fees.

17. In December 1997, Jones was notified by Carreon that their lien had not been paid. Jones telephoned Respondent and requested that he pay the Carreon lien. In May 1999, Jones was notified by Maltby that their lien had not been paid. Jones visited Respondent at his home and requested that he pay the lien.

18. By checks dated June 15, 1999, Respondent paid Carreon $731.46, and Maltby $2,570.25. Respondent had not negotiated any reduction in the lien amount. (The figure in the disbursement sheet was erroneously taken from a prior bill)

19. By failing to pay medical providers for over three years after settlement funds were received, Respondent failed to promptly deliver funds in which the client was entitled to receive.

COUNT FOUR

Case No. 99-O-11363
Rules of Professional Conduct, rule 4-100(A)
[Failure to Maintain Client Funds in Trust Account]

20. Paragraph 11 through 18 of these Stipulated facts are incorporated herein by this reference as if set forth in full.

21. On June 26, 1996, the account balance of Respondent's client trust account fell to $2,029.10, less than the $3,301.71 total of the Maltby and Carreon liens. From and after June 26, 1996 until July 20, 1998 the client trust account fell to $176.91.

22. By not maintaining the $3,301.71 received on behalf of his client in his client trust account, Respondent wilfully failed to maintain client funds in a trust account.

**Statement Regarding Moral Turpitude**

The mitigation hereinafter detailed allows the parties to give the Respondent the benefit of the doubt that the deficiencies in his client trust account were not grossly negligent because he was regularly attempting to rectify an ongoing problem with his accounting program. However, in that the Respondent was initially unresponsive to attempts by either the clients or the provider(s) to obtain payment, and in that it was only after the State Bar's intervention that the Jarnagin matter was addressed, there is a basis for a finding of gross negligence rising to moral turpitude in his failure to pay the providers in wilful violation of Section 6106 of the California Business and Professions Code.

As stated in Palomo v. State Bar (1984) 36 Cal.3d 785, 795: "There is no indication that [Respondent] would have remedied the irregularities if not pressed by the interested parties. . ."

**Additional Mitigating Circumstances**

It is accepted as true that a combination of repeated failures of a computer trust account program (see attachment 1), a copy of the Declaration of Stephen White, difficulties with office staff, psychological, personal and family issues mitigate the conduct which resulted in the failure to maintain the funds and the delays in payment. During the period of the misconduct in which he was a solo practitioner, Respondent was experiencing, and then recovering from, a series of familial stresses, including a separation and divorce from his wife and dealing with the significant difficulties of his son. He sought

both counseling for the ongoing personal problems and medication for a diagnosed clinical depression which helped him address them.

In 1996 and 1997, Respondent had an office staff that consisted of one secretary. One secretary was succeeded by another who was less experienced and required additional supervision, which, at that time, Respondent had little reserve to provide. He closed the office completely in June 1998-which provided the additional difficulty of his being successfully reachable by clients with residual problems or needs. Respondent fully understands that he had the responsibility to assure his accessibility to both Jarnagin and Jones.

Respondent is not presently in private practice. As of the date of this disposition, he has been working as ~~an employee~~ a subcontractor attorney on a flat salary per month. per DR

**Authorities Supporting Disposition**

Although Respondent did not take the same or as spontaneous steps to rectify his conduct, Respondent's mitigation, but most of all, his remorse, bear some comparison to Waysman v. State Bar (1986) 41 Cal.3d 452. Although disbarment may well be the appropriate response to misappropriation of/failure to maintain the funds due to the providers, there is no "fixed formula" for a disposition. Respondent Ducre is an attorney with no prior record in 16 years of practice. As of the time of this disposition, he has arranged to pay and paid the difference between the original bill on behalf of Jarnagin and the reduced amount given to the medical care provider, to Jarnagin. Given the totality of circumstances, including the unlikelihood of similar behavior in the future, the protection of the public, the preservation of confidence in the profession and the maintenance of the standards for attorneys would, **in this case,** appear to be satisfied by a disposition that does not include actual suspension.

**Costs of disciplinary Proceedings**

Respondent acknowledges that the Office of the Chief Trial Counsel has informed him that as of February 27, 2001, the estimated prosecution costs in this matter are approximately $1,682.00. Respondent acknowledges that this figure is an estimate only and that it does not include State Bar Court costs which will be included in any final cost assessment. Respondent further acknowledges that should this stipulation be rejected or should relief from the stipulation be granted, the costs in this matter may increase due to the costs of further proceedings.

**Pending Proceedings**

The disclosure date referred to on page one, paragraph A.(6) is May 2, 2001.

5-17-01
Date

Respondent's signature

JULIAN I. DUCRE
print name

May 17, 2001
Date

Respondent's Counsel's signature

JOANNE ROBBINS EARLS
print name

5-22-01
Date

Deputy Trial Counsel's signature

DJINNA M. GOCHIS
print name

## ORDER

Finding the stipulation to be fair to the parties and that it adequately protects the public, IT IS ORDERED that the requested dismissal of counts/charges, if any, is GRANTED without prejudice, and:

☒ The stipulated facts and disposition are APPROVED and the DISCIPLINE RECOMMENDED to the Supreme Court.

☐ The stipulated facts and disposition are APPROVED AS MODIFIED as set forth below, and the DISCIPLINE IS RECOMMENDED to the Supreme Court.

The parties are bound by the stipulation as approved unless: 1) a motion to withdraw or modify the stipulation, filed within 15 days after service of this order, is granted; or 2) this court modifies or further modifies the approved stipulation. (See rule 135(b), Rules of Procedure.) The effective date of this disposition is the effective date of the Supreme Court order herein, normally 30 days after file date. (See rule 953(a), California Rules of Court.)

5-25-01
Date

Judge of the State Bar Court

HLS 000421

# DECLARATION OF STEPHEN H. WHITE

I, Stephen H. White, declare as follows:

1. I am Fifty Eight years old. Except as otherwise stated, the facts set forth in this Declaration are of my own personal knowledge. If called as a witness, I could and would competently testify to these facts.

2. I am an accountant and business consultant. I have been an accountant since 1968. I have been a controller for a personal injury law firm of about 30 people, and I am familiar with the records required for settlements, disbursements and client ledgers. Many clients that I work with have their accounting and financial systems on their computers. Although computer systems are not my primary area of expertise, I am familiar with and work with a variety of computer programs regarding financial records. I have have presented training classes for the employees of my clients regarding those systems.

3. I began working with Julian Ducre in about 1996. At first I would go into his office anywhere from once a week to once a month. The input to his system was done by Mr. Ducre or one of his employees, and I would double-check it and reconcile records. Mr. Ducre seemed to be very careful and conscientious about his financial records.

4. Not too long after I began working with Mr. Ducre, he bought a new financial computer software program. At first it appeared to be an excellent

program. It was self-reconciling and efficient. After a short testing period, Mr. Ducre began relying on it for their records of the settlements and disbursements.

5. Several months after the new program was installed, it crashed and some records were lost. At first, it did not seem out of the ordinary to encounter some glitches in a new system. After some effort, they were able to get it up and running again. Unfortunately, the system began to have more and more problems. It continued to crash and we were unable to get all the information back, and were unable to find the problem. Finally, the program died completely.

6. Mr. Ducre tried in several ways to retrieve the information. He called the people who created the system, but they could not fix it. I tried to transfer or download the files, but it was a proprietary system so it was not transferable. It had codes unique to that system, and could not be opened. There may have been an exporting feature in the system, but we could not access it. It did not use a universally accepted file, but had different codes using different logarithms. We were never able to find the export function.

7. I tried for at least three months to repair the problems. Mr. Ducre had several other people come in to retrieve or access the information, and I worked personally with two of them. We tried to "brainstorm" any method of getting the information back, but they were unsuccessful. These efforts continued for

several months. Finally, after very extensive efforts to repair and reinstitute his computer program, Mr. Ducre had to abandon the system.

8. At that point, Mr. Ducre asked me to help him reconstruct all the financial records from other data and documents that he had. We tried to recapture as much information as possible from other sources. We took data from any other source we had and tried to work back from there. Mr. Ducre worked very hard on trying to reconstruct all the information and we tried everything that we could think of to rebuild the lost information. After working on recapturing the data for two or three months, we thought that we had found everything. I told Mr. Ducre that we had done everything that we could. Apparently I was incorrect, since these cases that the State Bar is investigating slipped through the crack. After attempting to reconstruct every client ledger, and to reconcile them with the trust account balances, we thought we had detected all the information that we had lost. We tried to maintain the records as accurately as possible. However, we were simply unable to detect every file that had been in the system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 20th day of December, 2000, at Cancun, Mex.

Stephen H. White

# CERTIFICATE OF SERVICE

**[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]**

I am a Case Administrator of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on May 30, 2001, I deposited a true copy of the following document(s):

**STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING STAYED SUSPENSION; NO ACTUAL SUSPENSION, filed May 30, 2001**

in a sealed envelope for collection and mailing on that date as follows:

[X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

**JOANNE ROBBINS, A/L**
**KARPMAN & ASSOCIATES**
**9200 SUNSET BLVD PH #7**
**LOS ANGELES, CA 90069**

[X] by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

**DJINNA GOCHIS, A/L, Enforcement, Los Angeles**

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **May 30, 2001**.

Rose M. Luthi

**Rose M. Luthi**
Case Administrator
State Bar Court

The document to which this certificate is affixed is a full, true and correct copy of the original on file and of record in the State Bar Court.

ATTEST **February 21, 2008**
State Bar Court, State Bar of California, Los Angeles

By _____
Cristina Potter, Deputy Court Clerk