No. S080840
(Los Angeles Co. BA109525)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

GLEN ROGERS,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, Los Angeles County

(HONORABLE JACQUELINE A. CONNER, JUDGE, of the Superior Court)

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	No. S080840
v.	)	(Los Angeles Co. BA109525)
GLEN ROGERS,	)	
Defendant and Appellant.	)	

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

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

STATEMENT OF THE CASE

On July 9, 1997, the Los Angeles County Grand Jury returned a two-count indictment charging that on September 29, 1995, appellant Glen Rogers murdered Sandra Gallagher in violation of section 187 (Count I), and committed the crime of arson of property in violation of section 451, subdivision (d) (Count II). The indictment further alleged as to Count I that

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

appellant had previously been convicted of first degree murder in the State of Florida, within the meaning of section 190.2, subdivision (a)(2), and, as to both counts, that the charged offenses were serious felonies, within the meaning of section 1192.7, subdivision (c). (1 CT 214-215.)[2]

On January 7, 1999, the trial court ruled that the prosecution could use evidence concerning two murders appellant allegedly committed in Louisiana and Florida in November of 1995 as evidence of his intent in the instant case, because all three murders were part of a common plan. (2 CT 455; 5 RT 52-55.)

Jury selection began on June 2, 1999. (7 CT 1527.)

The jury trial began on June 9, 1999. (7 CT 1553.) On June 22, 1999, the jury returned its verdicts. On Count I, the jury found appellant guilty of first degree murder, and further found true the special circumstance allegation under section 190.2, subdivision (a)(2). On Count II, the jury found appellant guilty of violating section 451, subdivision (d). (7 CT 1606-1607.)

The penalty phase began on June 22, 1999. (7 CT 1608.) On July 6, 1999, the jury returned a verdict of death. (7 CT 1644-1645.)

On July 16, 1999, the trial court sentenced appellant to death. (7 CT 1660-1669.)

This appeal is automatic under section 1239.

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[2] All citations to the record on appeal will first identify the number of the volume of the Clerk's Transcript (abbreviated as "CT") or Reporter's Transcript (abbreviated as "RT") and then give the page number, e.g., 1 CT 1.

STATEMENT OF FACTS

I. Guilt Phase Facts

Appellant was convicted of the murder of Sandra Jonell Gallagher, which occurred in Van Nuys, California, in the early morning hours on September 29, 1995. (18 RT 2179, 2216.)[3] Ms. Gallagher was strangled to death, and her pickup truck was then set on fire with her body inside. (11 RT 1049, 1056, 1101.) Appellant denied committing the murder, and testified that Ms. Gallagher was alive and happy when he last saw her, when she left his apartment with a man named Istvan Kele at around 2:30 a.m. on the morning she died. (13 RT 1644-1645.)

The evidence against appellant was almost entirely circumstantial, consisting largely of the admitted facts that he was with Ms. Gallagher on the night she died, and left town a few days after she was killed. However, the prosecution also put on evidence that appellant murdered two other women within a few weeks of Ms. Gallagher's murder. Thus, the jury heard that appellant killed Tina Marie Cribbs in Tampa, Florida, on November 4, 1995, and killed Andy Lou Sutton in Bossier City, Louisiana, four days later. (12 RT 1325-1330, 1390-1392, 1472, 13 RT 1497.)

A. The Charged September 29, 1995 Murder of Sandra Gallagher

In September 1995, Michael Flynn and Christina Walker lived with appellant in his apartment on Woodman Avenue in Van Nuys. (9 RT 789, 881.)[4] September 28, 1995, was Mr. Flynn's birthday. (9 RT 788.)

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[3] Ms. Gallagher was also known as Sam or Sammy, and was often referred to that way at the trial. (See, e.g., 9 RT 644, 692.)

[4] Ms. Walker's maiden name is Christina Gilmore; she is referred to (continued...)

Appellant, Ms. Walker and Mr. Flynn met that evening to celebrate, and spent the night drinking at two local bars – CJ's and McRed's – with appellant acting as the host. (9 RT 793-797.)

Appellant drank steadily through the evening. A bartender at McRed's, Rein Morgan Keener, served appellant between six and eight beers, and testified that he had been drinking faster than Mr. Flynn. (9 RT 780.) Mr. Flynn testified that he consumed about 15 beers and a "couple Kamikaze's" that night. (9 RT 814.) In fact, when Mr. Flynn was arrested for driving under the influence of alcohol later that night, he was too intoxicated to take the field sobriety test. (10 RT 868-869.) Ms. Walker only recalled that they "drank a lot" that night. (10 RT 900.)

At some point in the evening the three friends met Sandra Gallagher. (9 RT 795-796, 10 RT 889-891, 13 RT 1632-1634.) Although appellant and Ms. Gallagher had never met before, they hit it off. Over the course of the evening he bought her drinks, and they danced together. (10 RT 898-899, 13 RT 1634, 1672.)

Appellant testified that he was not pursuing Ms. Gallagher that night, or trying to seduce her; he was just trying to have a good time. (14 RT 1703-1704.) Appellant, Ms. Gallagher, Ms. Walker and Mr. Flynn all left the second bar together at closing time. (9 RT 760, 803-804, 10 RT 901-902.)

Ms. Gallagher and appellant left the bar in her pickup truck, and Ms. Walker and Mr. Flynn left in Ms. Walker's car. (9 RT 804-805, 10 RT 907.) After they all stopped at a convenience store on the way to

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[4](...continued)
by both names in the record. (10 RT 884.)

appellant's apartment to buy beer, Mr. Flynn and Ms. Walker drove back to the apartment. (9 RT 805-806, 10 RT 906-909, 13 RT 1638-1640.) Outside of the apartment building, Ms. Walker felt sick and ran inside, leaving Mr. Flynn to park the car. Inside, Ms. Walker promptly fell asleep. (9 RT 807-808, 10 RT 909.) Meanwhile, Mr. Flynn was stopped by the police outside the building and arrested for driving under the influence. (9 RT 808-809, 10 RT 857-859.)

According to appellant, before he and Ms. Gallagher could leave the convenience store to follow Ms. Walker and Mr. Flynn back to the apartment, Istvan Kele drove up. (13 RT 1640.) Mr. Kele and appellant were associates and had been together earlier that day. (13 RT 1631-1632, 1635.) Appellant invited Mr. Kele back to the apartment, and he followed them there. (13 RT 1641.)

As appellant and Ms. Gallagher approached the apartment building they could see police outside arresting Mr. Flynn. (13 RT 1641-1642.) When Ms. Gallagher saw the police, she said: "I got a warrant on me. I don't want them to take my truck." (13 RT 1641.) She then stopped abruptly and parked in a nearby lot. Mr. Kele then drove Ms. Gallagher and appellant the rest of the way to the apartment. (13 RT 1641-1642.)

Appellant, Ms. Gallagher and Mr. Kele went up to the apartment; seeing that Ms. Walker was asleep in her room, appellant closed her door. (13 RT 1643.) After a brief period of conversation, Ms. Gallagher said she wanted to get a change of clothes from her truck, and Mr. Kele offered to drive her. (13 RT 1644-1645.) After Mr. Kele and Ms. Gallagher left,

appellant passed out and never saw Ms. Gallagher again. (13 RT 1645.)[5]

Ms. Walker woke up in the early morning hours on September 29th and found appellant lying on the floor beside her bed. (10 RT 910.) Appellant told her that Mr. Flynn had been arrested and that her car had been impounded by the police. (10 RT 912-913.) When Ms. Walker asked where "that girl" was, referring to Ms. Gallagher, appellant said she was dead. (10 RT 914-915.) Shortly thereafter appellant left, and Ms. Walker went back to sleep. (10 RT 917-918.)

According to appellant, he called Mr. Kele that morning before he spoke to Ms. Walker. (13 RT 1645.) When he spoke with Ms. Walker he told her that Ms. Gallagher was dead. He explained at trial that he had "heard" that Ms. Gallagher was dead, but was not sure if it was true. (13

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[5] Michael Flynn testified that appellant and Ms. Gallagher arrived back at the apartment at the same time he and Ms. Walker did. (9 RT 807.) As Mr. Flynn sat in the back of the police car after being arrested, he saw appellant and Ms. Gallagher in her truck. (9 RT 809.) He could tell from their "silhouettes" that "something was wrong," that "they were like fighting kind of thing." (9 RT 809.) Flynn testified that he told the officers who were arresting him that "something weird [was] going on" in Ms. Gallagher's pickup truck. (*Ibid.*)

The officer who arrested Mr. Flynn that night, David Hovey, testified that Flynn was "extremely drunk," and never mentioned the pickup and the people inside it. (10 RT 857, 862, 872.) If Mr. Flynn had said something about the people in the pickup, i.e., that a "woman [was] being strangled," Officer Hovey would have investigated. (10 RT 873.) Michael Coblentz, a detective who interviewed Mr. Flynn on October 18, 1995, testified that he did not recall Flynn saying anything about seeing "a struggle of any type between Sandra Gallagher and [appellant] as they sat in the pickup truck and he was being arrested." (13 RT 1625-1626.)

RT 1676-1677, 1682-1683.)[6] Appellant did not report to the police that Ms. Gallagher had been murdered, at first because he did not believe it, and later because he was too upset. (13 RT 1683.)

When Ms. Walker woke up several hours later, appellant was asleep. As she was leaving the apartment, Ms. Walker noticed in the kitchen a black purse and some keys that she recognized as Ms. Gallagher's. (10 RT 918-920, 992-993.)

Ms. Walker returned to appellant's apartment later that day to remove her possessions. When she asked appellant again what happened to "that girl," he said she "ran off with a Mexican." (10 RT 926-927.)[7] Shortly thereafter, Ms. Walker saw appellant going through Ms. Gallagher's purse. (10 RT 927.) She also saw an earring on the floor that looked like one that belonged to Ms. Gallagher. (10 RT 927-928, 937.) The police later found an earring on the floor in appellant's apartment. According to Ms. Gallagher's estranged husband, Steven Gallagher, that earring looked like one she had owned. (9 RT 638, 13 RT 1607, 1611, 1613-1614.)

At around 6:30 a.m. on September 29, 1995, Hoora Kushan arrived for work at a convalescent hospital in North Hollywood. (10 RT 999.) A pickup truck with Colorado plates was parked in the hospital parking lot, and she could see an arm, elbow and leg inside the truck through the open door. The person inside the truck was a man with longish blond hair

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[6] During his cross-examination, appellant asked the prosecutor whether he wanted to know how appellant had known that Ms. Gallagher was dead, but the prosecutor declined to ask him to provide that information. (13 RT 1683.)

[7] Appellant denied that he said anything to Ms. Walker about Ms. Gallagher running off with a Mexican. (13 RT 1682.)

wearing a blue shirt, but Ms. Kushan could not see his face. (10 RT 999-1001, 1005.)[8] A few moments later, Ms. Kushan saw smoke coming from the truck and went inside to get help. When she returned with some of her co-workers, flames were coming from the truck. (10 RT 1002-1004.)

The officers responding to the scene found Ms. Gallagher's gasoline-soaked body inside the truck. (11 RT 1064, 1068, 1095, 1100-1101.) Her body was severely burned, but the cause of her death was manual strangulation. (11 RT 1101, 1111-1112.)[9]

Appellant left Los Angeles by bus a few days after Ms. Gallagher's death, going first to Las Vegas and then to Jackson, Mississippi. (13 RT 1684-1686, 14 RT 1726.) According to appellant, he had planned to take that trip for a month before he left. (13 RT 1690.) His primary purpose in taking the trip was to renew his truck driver's licence in Mississippi. He was not hiding from the police when he left Los Angeles. (13 RT 1691, 14 RT 1722.)

B. The Uncharged November 5, 1995 Murder of Tina Marie Cribbs in Florida

On November 4, 1995, appellant checked into Room 119 at the Tampa 8 Motel in Tampa, Florida. He registered under his real name and gave an address in Jackson, Mississippi. (11 RT 1134-1135, 1138-1141.)

The next morning, appellant took a cab about eight miles to the

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[8] Ms. Keener, the bartender who waited on appellant and the others on September 29, 1995, testified that appellant's hair was "long and blond," and that he was wearing a "button-down shirt . . . with some pin stripes . . . ." (9 RT 745.)

[9] Tim Hanson, the arson investigator who worked on the case, testified that he concluded that the truck fire was intentionally set to cover up Ms. Gallagher's murder. (11 RT 1059-1061.)

Showtown Bar, "a bar where all the carnival people come in the wintertime," and met Tina Marie Cribbs there. (11 RT 1159-1160, 1176, 1178-1180, 1184-1186.) Appellant approached Ms. Cribbs and her friends, Cindy Torgerson and Jeannie Fuller, and bought them drinks. (11 RT 1185-1186, 1201-1208, 12 RT 1270-1274.) He told the women his name was Randy. (11 RT 1189-1190, 1208.) Ms. Cribbs agreed to give appellant a ride. After telling the bartender she would be back in 20 minutes, Ms. Cribbs walked out of the bar with appellant. (11 RT 1189, 1211-1213.) Ms. Cribbs was driving a white subcompact car that was described as a 1993 or 1994 Ford Festiva. (11 RT 1178, 1218-1219.)

Ms. Cribbs's mother, Mary Dicke, went to the Showtown Bar to meet her daughter between 4:00 and 5:00 p.m. on November 5, 1995. (11 RT 1220.) The bartender, Lynn Jones, told Ms. Dicke that Ms. Cribbs had given a ride to a carnival worker named Randy and would be back shortly. (11 RT 1222-1224.) Ms. Dicke waited for a while, then tried to page her daughter. She paged Ms. Cribbs 33 times over the course of that evening without getting a response. (11 RT 1224-1226.)

At around 9:00 or 9:30 p.m. on November 5, 1995, the owner of the Tampa 8 Motel, Chenden Patel, saw appellant "doing something" in a small white car in front of Room 119. (11 RT 1230-1231, 1233-1234.) She also observed that the door to Room 119 was open and that there were suitcases near the door. (11 RT 1233-1234.) Later, appellant went to the office and paid Ms. Patel his room rent for the next day, although she told him it was not due until 11:00 a.m. the next morning. Appellant also asked for a "do not disturb" sign, which Ms. Patel did not have, and said he did not want his room cleaned the following day. (11 RT 1236-1240.)

At around 9:00 a.m. on November 6, 1995, Ms. Patel saw appellant

driving away in the same white car. She never saw him again. (11 RT 1241-1242, 1244.) Approximately two hours after appellant left, Ms. Patel noticed that there was a hand-written "do not disturb" note on the doorknob to Room 119. (11 RT 1241-1243.)

At around 10:30 a.m. on November 6, 1995, a wallet containing Ms. Cribbs's identification was found in a trash can at a rest stop in Madison County, Florida. (13 RT 1525-1528, 1538-1540, 1542-1543.) That rest stop is just east of Tallahassee, Florida, and approximately 200 miles, or four to five hours driving distance, from Tampa. (12 RT 1349, 13 RT 1540, 1562.)

On November 7, 1995, a maid at the Tampa 8 Motel entered Room 119 and found a bloody body in the bath tub. (11 RT 1254-1257.) She ran out and reported what she had seen to Donald Morris, a Tampa deputy sheriff. (12 RT 1276-1279.)[10] When Deputy Morris entered Room 119 there was blood all over. (12 RT 1281, 1333-1335.) The body was that of Tina Cribbs, dead from multiple stab wounds. (12 RT 1325-1326, 1343, 13 RT 1623.) The room was registered in appellant's name. (12 RT 1339-1340.)

On May 7, 1997, appellant was convicted after a jury trial in Florida of murdering Tina Cribbs. (12 RT 1325-1327.)

C. The Uncharged November 9, 1995 Murder of Andy Lou Sutton in Louisiana

On November 2, 1995, Teresa Whiteside and her roommate and best friend, Andy Lou Sutton, met appellant at a bar, the It'll Do Lounge, in

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[10] Morris testified that these events occurred on November 5, 1995, but it seems clear from the context that the date was actually November 7, 1995.

Bossier City, Louisiana. (12 RT 1370-1374.) Ms. Whiteside had never seen appellant before. (12 RT 1376-1377.) Appellant spent the night with Ms. Sutton in the apartment she shared with Ms. Whiteside, and the next day the two women drove him to the bus station in Shreveport, Louisiana. Appellant said that he was going to Jackson, Mississippi, to retrieve his diesel truck and that he would return the following Sunday. (12 RT 1378-1383.) He left Ms. Whiteside his red truck to use while he was gone. (12 RT 1382, 1385.)

Appellant called a few days later to say he would be delayed. (12 RT 1384-1385.) When Ms. Whiteside next saw appellant, on Wednesday, November 8, 1995, he said he had a "'90 model" Ford automobile that he planned to give to Ms. Sutton. (12 RT 1384-1387.)[11]

Appellant, Ms. Sutton and Ms. Whiteside met that afternoon at the It'll Do Lounge and later went to another bar. Ms. Sutton eventually left to take appellant home for a nap, and Ms. Whiteside went to work. (12 RT 1387-1388, 1390-1392.)

Ms. Whiteside worked her regular shift as a bartender during the night and early morning of November 8-9, 1995, and returned home at around 3:00 a.m. (12 RT 1395-1396.) Appellant's truck was parked outside. (12 RT 1396.) When Ms. Whiteside went inside, she did not see either Ms. Sutton or appellant. She went to sleep on the couch because the door to the only bedroom was locked. (12 RT 1396-1399.)

Ms. Whiteside was awakened the next morning at around 10 a.m. when Ms. Sutton's ex-boyfriend, Tommy Bryant, came to the front door.

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[11] One of Ms. Whiteside's neighbors testified that he saw appellant working on a white Ford Festiva in the parking lot of their building a few days before Ms. Sutton died. (12 RT 1423-1426.)

(12 RT 1418.) She knocked on the bedroom door to rouse Ms. Sutton. When there was no response, Ms. Whiteside went in and found Ms. Sutton lying in the bed covered in blood. (12 RT 1401-1402.) Ms. Whiteside ran out and told Mr. Bryant that something was wrong and that "Glen" must have killed Ms. Sutton. (12 RT 1403-1404, 1418-1419.)

Ms. Sutton suffered a total of 14 knife wounds, including stab and defensive wounds, and died from 10 stab wounds to the torso. (12 RT 1453, 1456, 13 RT 1623.) The pillows and comforters on the bed were blood soaked and wet. (12 RT 1443.) Kenny Hamm, the officer who investigated the murder, testified that the slaying was an "overkill" situation in which the perpetrator was "definitely either in a fit of rage or anger or mad at somebody." (12 RT 1447-1448, 1459.)

D. Appellant's November 13, 1995 Arrest in Kentucky

On November 13, 1995, appellant was arrested in Kentucky after a police car chase. (12 RT 1472.) Appellant was spotted by a Kentucky State Police officer who was staking out a road he thought appellant might use to reach his aunt's house. (12 RT 1473-1475.) The chase was triggered when appellant, seeing the officer following him in a police car, began intentionally throwing beer cans at the police car. (12 RT 1477.)

Appellant was driving a white Ford Festiva with Tennessee license plates when he was arrested, and there was a Florida license plate inside the car. (13 RT 1502.) Both the Festiva and the Florida license plate were identified as belonging to Ms. Cribbs. (13 RT 1509-1510.) There were various other items inside the Festiva, including identification papers, food and blankets. (13 RT 1497-1498.) Mary Dicke testified that a number of the items, including an umbrella, a cap, sunglasses and a cassette tape, belonged either to her or to her daughter, Tina Cribbs. (13 RT 1511-1515.)

Teresa Whiteside identified some of the blankets as her property. (13 RT 1497.) No property belonging to Sandra Gallagher was found in the Festiva.

II. Penalty Phase Facts

A. Evidence in Aggravation

In addition to the foregoing evidence, the prosecution put on aggravating evidence regarding three alleged incidents of prior violent activity by appellant: (1) a murder appellant allegedly committed in Jackson, Mississippi, in October of 1995; (2) a confrontation appellant had with the police in 1991 that resulted in several misdemeanor charges; and (3) a pair of domestic assaults that allegedly occurred in 1995 in Los Angeles. The prosecution also put on "victim impact" evidence concerning Sandra Gallagher's death.

1. The November 3, 1995 Murder of Linda Price in Mississippi

Sometime in early October of 1995, appellant arrived in Jackson, Mississippi. (13 RT 1685-1686.) Kathy Carroll and her sister, Linda Price, met him at the beer tent at the Mississippi State Fair on October 9, 1995. (16 RT 2001-2004.) Ms. Price met appellant first and introduced him to her sister as Glen Rogers. Ms. Price was smitten with appellant. (16 RT 2005, 2008.) On October 12, 1995, Ms. Price introduced appellant to another of her sisters, Marilyn Peel, at their mother's house. (16 RT 2053-2056.)

Ms. Price lived with her mother, Carol Wingate, when she met appellant. But shortly thereafter, Ms. Price and appellant moved into a motel room together. (16 RT 2057, 2072-2074.) On October 16, 1995, appellant and Ms. Price left the motel and moved into an apartment together. (16 RT 2011.)

At first, appellant and Ms. Price seemed affectionate and happy together. (16 RT 2057, 2081.) However, on October 30, 1995, appellant upset Ms. Price by speaking rudely to her at Marilyn Peel's house. (16 RT 2057-2058.)

Ms. Price was supposed to come to her mother's house on October 31, 1995, but failed to appear. (16 RT 2083-2084.) Ms. Wingate was worried and went to her daughter's apartment the next day. When no one answered her knock, she called the police and filed a missing person report. (16 RT 2085-2088.) On November 3, 1995, a police officer went into the apartment and found Ms. Price dead in the bathtub. (16 RT 2087-2089, 17 RT 2119-2121, 2125.)

There were blood stains in various locations in the apartment, and blood-smeared paper towels and a mop appeared to have been used to wipe up blood. (17 RT 2121-2123.) Ms. Price's throat was cut, and she had four stab wounds in her torso. (17 RT 2126.) Several of the wounds would have been individually fatal – the stab wounds, the cut to the throat, and a blunt force trauma wound to the back of the head. (17 RT 2139-2140.)

2. The 1991 Confrontation with the Police in Ohio

Appellant was arrested for causing a disturbance in his own house in Hamilton, Ohio, on March 7, 1991. (16 RT 2031.) The police went to appellant's house twice that day. On the first occasion they found him passed out in bed. The house was in a shambles, with "holes all over the masonry or dry wall" and a hammer laying on the living room floor. (16 RT 2031-2032.) The officer who testified about the incident, Kevin Scott Flannery, said appellant appeared to have "trashed his own house." After observing the scene the police left appellant sleeping on the couch. (16 RT

2031-2032, 2040-2041.)

The police returned later that day after receiving a report that appellant had a gun and was threatening to "blow away anybody that came near the house." (16 RT 2033.) The officers tried to talk appellant into coming out. They saw through a hole in the door that appellant was holding a "small acetylene blow torch," not a gun. One officer spoke to appellant through the hole in the door, and at one point the flame from the torch was directed toward him and came very close to his face. (16 RT 2035-2037, 2045-2046.) The torch started a "very small fire contained [*sic*] to the front door." (16 RT 2037-2038.)

Felony charges were brought against appellant based on this incident. Those charges were reduced to misdemeanors. (16 RT 2051.)

3. The 1994 and 1995 Domestic Assaults in Los Angeles

Appellant lived with his ex-girlfriend, Maria Gyore, in Van Nuys and Hollywood during 1994 and 1995. According to Ms. Gyore, on two occasions he "slapped [her] around" and/or "beat [her] up." (17 RT 2149-2151.) Ms. Gyore said that appellant became angry and hit her both times because he was jealous and had been drinking. (17 RT 2150, 2159.) He was arrested after the first incident. (17 RT 2150.) After the second incident, in August of 1995, Ms. Gyore moved out of the apartment she shared with appellant. (17 RT 2154-2155.) After appellant was arrested and charged with murder in this case, Ms. Gyore wrote to him in jail. They continued to exchange letters for some time. (17 RT 2162.)

Maria Gyore's brother, Laszlo Gyore, testified that his sister had a black eye and bruises on at least one occasion while she lived with appellant. (17 RT 2168.) Mr. Gyore also testified that appellant had

threatened him around the time his sister moved out of the apartment she shared with appellant. Appellant threatened to cut his throat and the throats of Maria Gyore and her children. (17 RT 2168-2169.)

4. Victim Impact Evidence

Sandra Gallagher's sister, Jeri Vallicella, testified that Ms. Gallagher was extremely intelligent and "creative." She received "the highest score in Butte County" on the intelligence test given to Navy recruits. (17 RT 2174-2176.) The sisters were very close. Ms. Gallagher was like a mother to Ms. Vallicella while they were growing up because their mother had to work outside the home. (17 RT 2174.)

Ms. Vallicella testified that Ms. Gallagher was a Navy aviation electronics technician. After Ms. Gallagher received an honorable discharge, she "was in charge of all the electronics" for a "submarine base which was contracted through Florida Aerospace." (17 RT 2177-2178.) After leaving the submarine base, Ms. Gallagher worked for Ford Aerospace at the San Diego Naval Air Station, after which she became a program coordinator for Southern Illinois University at the same location. (17 RT 2180, 2183, 2189.)[12]

Ms. Gallagher had three sons – Garrett, Dustin and Jacob. She had been married to Steve Gallagher, who was not the father of any of her sons,

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[12] Sidney Klessinger, the assistant coordinator at the Southern Illinois University facility at the naval station in San Diego, was Ms. Gallagher's supervisor when she worked there. (19 RT 2404.) Ms. Klessinger testified that Ms. Gallagher "was terminated right before her probationary period was up" for a variety of different reasons, including "inappropriate dress" and "foul language in the office," "display of affection in inappropriate places," "arguing with her boss," tardiness, and making "multiple errors amounting to thousands of dollars" in accounts she supervised. (19 RT 2404-2406.)

for ten years. (17 RT 2179-2180, 2187.) There were problems in their marriage and periods when they were separated, but Ms. Vallicella did not consider them major problems. (17 RT 2191.) On one occasion, Ms. Gallagher came to Ms. Vallicella's house with people who were reportedly members of a motorcycle group. Ms. Vallicella described them as "wannabe" members of the Devil's Disciples motorcycle gang. (17 RT 2210.)

Ms. Gallagher sustained a serious injury to her leg about a year before she was murdered when a "girl came out of a casino drunk" and physically attacked her, shattering her right leg. That injury did not heal properly and left her "crippled where she had to walk with a cane." (17 RT 2180, 2191.) Ms. Gallagher was also hospitalized for psychiatric problems shortly before she died. (17 RT 2193.)[13]

Jan Baxter, Ms. Gallagher's mother, testified that Ms. Gallagher was her first born child and was very bright. Ms. Gallagher was her "special one" and "stole [her] heart . . . ." (17 RT 2216-2218.) Her daughter's death "totally destroyed" Ms. Baxter, because she was "very, very close" to Ms. Gallagher. When she heard about the murder Ms. Baxter "started screaming and couldn't stop." Ms. Gallagher's children were devastated by her death. (17 RT 2220-2221.)

B. Evidence in Mitigation

As mitigating evidence, appellant offered evidence that he is the

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[13] Steven Gallagher told the police after Ms. Gallagher was killed that she was being treated for "multiple personality disorder." (9 RT 646.) Mr. Gallagher testified that when his wife used the name Sammy it was because she was "acting as a different personality," and that she went by a number of other names under different personalities. The names she used included Samm, Mary, Sandra and Sandy. (9 RT 647.)

product of a chaotic and destructive upbringing in which he was abused and neglected, and that he suffers from a variety of disorders that impaired his ability to control his impulses and actions, including alcoholism, porphyria[14], and organic brain injuries.

1. Appellant's Family Life and Upbringing

Appellant's childhood was spent in Hamilton, Ohio, with his mother and father, Edna and Claude Rogers, and his siblings Claude Jr., Gary, Clay, Craig, Clint and Sue. (17 RT 2240, 2270-2271, 18 RT 2350-2351.) Sue was the first-born, followed in order by Claude, Gary, Clay, Craig, appellant and Clint. (17 RT 2242.) Edna, Claude Jr., Craig and Gary testified for the defense at the penalty phase.

Edna Rogers's father died before she was born. She only finished the eighth grade before having to drop out to care for her invalid mother. At age fifteen, Edna married Claude because he was "good-looking." (17 RT 2238-2240.) However, Claude was also a violent drunkard who terrorized Edna and their children for many years until he was finally rendered helpless by a massive heart attack. (17 RT 2244-2247, 2264-2265, 18 RT 2331-2335, 2351-2352.)

Claude beat Edna regularly for no reason, but she stayed with him out of fear because he threatened to kill her if she left. (17 RT 2245-2247.) Claude drank alcohol every day and was fired from his last good job for drinking around the time appellant was born. (17 RT 2241-2242, 18 RT 2330, 2355.) After losing that job, Claude drank so much he could not get another one, and the family plunged into poverty. The family had to move

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[14] Porphyria is a disease that involves a "metabolic disturbance of [the] porphyrins." (19 RT 2522-2523.)

to a house in the worst part of town and lived on welfare. (17 RT 2249-2251, 18 RT 2353.) That house was a big step down from the much nicer house in which the family lived before Claude lost his job. The new house was rundown and dark, with only two bedrooms for Claude, Edna and the five children. (18 RT 2295-2298.) It was also uninsulated and in terrible disrepair; the water froze in the tub in the winter, termites ate through the floor, and there was peeling paint everywhere. (18 RT 2326.)

But even in that poverty-stricken neighborhood, the Rogers family was exceptional for the amount of violence and turmoil it generated. Claude terrorized the neighbors with his violent and aggressive behavior and made his sons fight all of the neighborhood boys. (18 RT 2358, 2366.) In fact, Claude's rages and violent tirades, and his vicious abuse of his wife and children, alienated the neighbors so much that they signed a petition to "get [the Rogers family] off the block." (17 RT 2253-2255, 18 RT 2356-2358.)

Claude habitually drank until he passed out; only then could Edna relax and stop trying to quiet the children. (17 RT 2256, 18 RT 2331-2332.) When Claude was conscious he was likely to assault Edna at any time, so she was constantly fearful of his capricious violence. (17 RT 2244-2246, 18 RT 2351-2352, 2355-2356.) Claude not only beat Edna in front of the children (17 RT 2245-2246, 2253, 18 RT 2356), he also shot at her (17 RT 2247), knocked her unconscious (18 RT 2356), broke her nose (17 RT 2254), repeatedly raped her (17 RT 2252), and held her captive in a room for three days leaving their children to fend for themselves. (17 RT 2257-2258). Edna was afraid of Claude and frequently thought about killing him; she would have done it if it was feasible. (17 RT 2256.)

Claude also physically abused the children. At times he came home

drunk and simply beat the children one after the other with a belt. (18 RT 2289, 2334-2335.) Craig Rogers testified that while Claude was physically abusive to all his children, he beat appellant the most because appellant was rebellious and troubled. (18 RT 2334-2335.) On one occasion, Claude chased appellant down the street and dragged him home, then hit him 30 to 40 times while he cried and screamed. (18 RT 2344.)

Claude also abused his wife and children emotionally. He not only continually cheated on Edna with other women, he also threatened to kill her, accused her of infidelity, and called her a whore and a "crazy bitch" in front of their children. (17 RT 2244, 2247, 18 RT 2358-2360.) Claude often went into uncontrolled rages during which he stalked through the house shooting his guns and tearing up the furnishings. When Claude behaved that way, Edna and the children scattered to avoid being attacked or threatened. (18 RT 2356.)

Claude loved guns; he kept several around the house at all times and always had them out when he was drinking. (17 RT 2247, 2282, 18 RT 2333.) He also enjoyed playing vicious games with his guns. He often threatened to shoot his wife and children, and he played, or pretended to play, Russian Roulette with his sons, spinning the chamber on a revolver and pointing it at one of the boys as if to shoot him. (18 RT 2360-2361.) Claude Rogers, Jr. testified that getting drunk and playing with guns was part of the family culture, which licensed everyone to be "as nasty as they wanted to be." (18 RT 2361.) Claude also liked to eat gunpowder out of bullets, because he believed it "made him mean." (17 RT 2248.)

Claude's behavior caused enormous turmoil in the family. Edna left him numerous times, but she always came back because she could not survive on her own. (17 RT 2258, 2281.) Edna was afraid all the time and

was institutionalized on numerous occasions after mental breakdowns. (17 RT 2259, 18 RT 2360.) Her son, Craig, described Edna as a "basket case" due to her fear of Claude. (18 RT 2330-2331.)

However, when Claude became disabled after suffering a massive heart attack when appellant was about sixteen, Edna was free, and she started "running around town" and picking up men in bars. (17 RT 2264-2265, 18 RT 2374, 2377.) Claude Jr. testified that his mother only stayed with his father after that to collect his SSI checks, so she would have money to buy alcohol. (18 RT 2377.)

Edna also abused her children with inappropriate punishments. One of her favored punishments was to force the children to stand for six to eight hours in a closet; she also beat them with her hands and/or a belt. (18 RT 2289, 2374-2376.) Indeed, Edna was almost as unloving to her children as Claude. She never expressed affection for the children either verbally or physically, and the family never celebrated holidays or birthdays. (18 RT 2362.)

Appellant's siblings all suffered from their upbringing. Appellant's older brother Gary suffered from problems with alcohol and alcohol-related violence for years. He had numerous black-outs and went into alcohol-fueled rages over minor incidents. (18 RT 2299-2301.) Claude Jr. described Gary as an alcoholic and an abuser of drugs, and as the very violent type who would shoot through the door if someone knocked. (18 RT 2378.)

Sue Rogers ran away from home repeatedly over the years, beginning at age two or three, and ended up in reform school at age 12 or 13. She finally left the family for good to get married at age 15. She had been in prison and had had problems with alcohol and drug abuse. (18 RT

2324, 2378.)

Craig Rogers ran away for good at 16, after his father discovered he was gay and kicked him out of the house. (18 RT 2322-2325.) Craig also had serious alcohol-related problems in his life. He was an alcoholic who was convicted of drunken driving twice, went through three rehabilitation programs, and used to drink until he blacked out. (18 RT 2339-2340.) His life changed when he was diagnosed as suffering from major depression, began taking prescribed antidepressants, and underwent years of therapy to treat the effects of his abusive childhood. (18 RT 2340, 2347-2348.)

Claude Rogers Jr. remembered watching his father and grandfather get drunk together when he was a child and hiding when his father started drinking. (18 RT 2365.) Like his father, Claude Jr. is an alcoholic who had serious problems managing his anger. Before Claude Jr. stopped drinking in 1986, he was constantly in fights because of his rage reactions. He said he beat "every woman, cat [and] dog" he was ever around. (18 RT 2371-2372.)

Clay Rogers, who was four or five years older than appellant, was deeply troubled and had a strong influence on appellant. (17 RT 2262, 18 RT 2345, 20 RT 2610.) Clay began taking intravenous drugs when he was 12 or 13 years old, then introduced appellant to marijuana, alcohol and "shoot[ing] up" drugs when he was still a child. (17 RT 2262, 18 RT 2378-2379.) Clay also got appellant involved in committing burglaries and other crimes at a very early age. (20 RT 2610.) Clay spent his life in and out of prison and other institutions; at the time of the trial his whereabouts were unknown. (18 RT 2379.)

Appellant also had significant behavioral problems from a very early age. He was a hyperactive, "fussy" and stubborn infant with a "major" bed-

wetting problem. (17 RT 2260-2261, 18 RT 2302, 2368-2369.) Appellant started rocking and banging his head constantly at the age of about 10 months, and he was so hyperactive and headstrong that his mother began tying him in his crib at the age of 18 months. (18 RT 2303, 2368.)

All of the Rogers family members who testified gave similar accounts of appellant's troubled childhood. Edna said he was a stubborn child who would not stop eating plaster and often wet the bed. (17 RT 2260-2261.) Gary said appellant often ate paint, plaster and dirt, and banged his head for long periods of time. (18 RT 2302-2303.) Craig said appellant used to put himself to sleep by moaning and banging his head, ate paint and dirt, and once intentionally tried to burn himself on a heater. (18 RT 2340-2342.) Claude Jr. said appellant chewed on his crib, ate paint, "bang[ed] his head for hours" at a time, and had a bed-wetting problem that lasted for years. (18 RT 2368-2369.) Moreover, Claude Jr. said that Edna (1) rejected appellant when he was little because he looked like his father, and (2) often said things revealing her antipathy toward appellant. (18 RT 2370.)

Appellant had serious behavioral problems as a child and youth. He was in a class for learning disabled students in elementary school and was in "special class" in junior high school. (18 RT 2343-2344.) When appellant was put into mainstream classes his grades were mostly Ds and Fs. (19 RT 2477.) Appellant was also sent to reform school at least three times. (20 RT 2618.) Further, appellant started taking drugs at an early age, under the tutelage of his brother Clay, and nearly overdosed on drugs when he was about 14 years old. (17 RT 2263, 20 RT 2618.)

Appellant's mother and his brothers all testified that they loved him and were appearing as witnesses to support him and help him avoid the

death penalty. (17 RT 2266, 18 RT 2303, 2348, 2380.)

2. Expert Testimony

Appellant also offered expert testimony about the mental, physical and emotional problems and defects that disrupted his life and development. The experts who testified for the defense were neuropsychologist Roger Light, psychiatrist Jeffrey Wilkins, psychologist Stuart Hart, and neurologist Michael Gold.

Dr. Light is a senior clinical neuropyschologist at the Daniel Freedman Memorial Hospital and an assistant clinical professor at U.C.L.A. who specializes in head trauma. (19 RT 2419-2421.) He assessed appellant's brain functioning by administering clinical tests and reviewing pertinent medical, educational and criminal records, as well as by examining appellant's family background. (19 RT 2431-2435.) That assessment revealed that appellant has areas of "cortical dysfunction and damage," including "specific areas of problems that were borderline to deficient range of functioning . . . ." (19 RT 2436.)

The primary areas of appellant's brain that exhibited pathology were the right frontal lobes, which are the "control areas." (19 RT 2437-2438.) The frontal lobes are the portions of the brain that control planning, organizing, and learning from experience. People with injuries to their right frontal lobes tend to be impulsive and respond without thinking. (19 RT 2438.) They also have trouble recognizing their problems and what to do about them. (19 RT 2437-2438.)

Dr. Light found ample corroboration for his diagnosis that appellant suffers from right frontal lobe damage by reviewing appellant's medical history. Appellant's medical records indicated that he had suffered "quite a few hospitalizations for head trauma, alcohol intoxication, and the like,"

and had also suffered "possible birth trauma events." All of appellant's medical reports were "consistent with a brain pathology." (19 RT 2440-2441.) For example, there were numerous reports that appellant engaged in repeated and persistent head banging as a child. That behavior, which is used by disturbed children to reduce tension and inflict self-punishment, can produce a cumulative trauma that leads to "localized and diffuse brain injury." (19 RT 2441-2442.)

Appellant also sustained serious head injuries as an adult. One report Dr. Light relied on concerned a particularly significant incident in which appellant was hit on the head with a pool cue and knocked unconscious. (19 RT 2445.) The fact that appellant lost consciousness in that incident indicated that the blow he suffered was sufficiently severe to "disrupt the deeper structures of the brain." (19 RT 2446.) Moreover, "CT scans" taken at that time indicated that appellant suffered "sphenoid and maxillary sinus fractures" and intercerebral hemorrhage in that incident. (19 RT 2445-2446.)

Further, an upbringing involving "environmental malnutrition" and lack of affection, like the one appellant experienced, can also disrupt proper brain development. (19 RT 2442-2444.) Dr. Light testified that the results of growing up with such a lack of affection and human interaction can be "life-long psychological personality deficits and neuropsychological deficits . . . ." (19 RT 2444.)

Dr. Light also reviewed the results of a "PET scan" of appellant's brain performed by Dr. Michael Gold, a neurologist and clinical associate professor at U.C.L.A. who specializes in testing brain functioning. (20 RT 2651-2652.) The results of that scan were consistent with Dr. Light's findings that appellant had damage to the anterior right frontal lobe of his

brain. (19 RT 2447-2448.) Based on his findings about the damage to appellant's brain, Dr. Light testified that he would expect appellant to have "trouble with impulse control" and "severe problems with insight and self-awareness," and to have "difficulty in reading other people's behavior." People with brain injuries like appellant's often have problems with: (1) planning and making healthy life choices; (2) controlling their behavior; and (3) abstaining from alcohol. (19 RT 2448-2453.)

Dr. Gold confirmed that the PET scan he did of appellant's brain revealed scarring on the right frontal lobe, and that his findings were consistent with both Dr. Light's report and a CAT scan performed on the same area of appellant's brain after he was struck on the head in 1991. (20 RT 2656-2657, 2661.) The results of the PET scan did not indicate when the injury to appellant's brain occurred; they only indicated that he suffered an injury. (20 RT 2665-2666.) The frontal lobes control emotion and behavior, and an injury to the frontal lobe can cause a loss of control over one's emotions and behavior and can cause a change in personality. The loss of control arising from damage to the frontal lobes can be exacerbated by alcohol consumption. (20 RT 2665-2668.)

Dr. Jeffrey Wilkins is a board certified psychiatrist and neurologist, and a full professor at U.C.L.A., who specializes in the study of substance abuse and its impact on mental illness. (19 RT 2502-2504.) Dr. Wilkins testified that alcohol has a complex but significant effect on brain function. One of its primary effects is to "kill[] nerve cells in specific areas" of the brain. (19 RT 2509-2510.) Alcoholism also has a disinhibiting effect on the brain's ability to control impulses and can damage the frontal lobes; accordingly, it is associated with rage behavior and violence. (19 RT 2527-2530.)

Dr. Wilkins also testified that the disease of alcoholism is transmitted generationally, both because it has a genetic component and because the likelihood of becoming an alcoholic is much higher for children who grow up in households where alcohol is abused. (19 RT 2510-2511.) Growing up in such a household can have a wide range of other effects on children as well, including hampering their ability to "form relationships . . . ." (19 RT 2512-2513.)

Dr. Wilkins evaluated appellant, and, based on the records in this case and the reports from the other medical professionals who examined him, determined that he manifested an alcohol dependency. (19 RT 2505.) Dr. Wilkins relied in particular on the records showing that appellant was repeatedly treated for intoxication and related problems over the years. One of those records included an opinion that appellant "appeared to manifest evidence of chronic alcoholism and perhaps even late stage alcoholism." (19 RT 2507-2508.) Moreover, appellant's arrest records involved many instances of gross intoxication. For example, when his skull was fractured in an assault in 1991, his blood alcohol level was .336, which is close to a fatal level. (19 RT 2523-2524.) On many recorded occasions, appellant was either found lying unconscious and intoxicated in public or exhibited uncontrollable rage while under the influence of alcohol. (19 RT 2520-2522.) Dr. Wilkins noted that he had reviewed approximately 20 separate police reports involving appellant which referenced his abuse of alcohol. (19 RT 2423-2525.)

Dr. Wilkins also testified that appellant's medical records contained multiple references to the fact that he suffers from a disease called porphyria, which involves a "metabolic disturbance of the porphyrins" and can lead to a variety of organic phenomena including skin lesions. The

effects of porphyria are exacerbated by alcohol abuse. (19 RT 2522-2523.)

Dr. Stuart Hart, a full professor of educational psychology at Purdue University who specializes in the maltreatment and abuse of children, was asked to assess appellant's "early childhood experience and family life and dynamics." (20 RT 2583-2585, 2587.) In performing that assessment Dr. Hart relied primarily on interviews with appellant's family members. (19 RT 2587-2588.) Dr. Hart formed the opinion that appellant's home environment was "toxic or poisonous" because of the effects of poverty, negative family values, abuse and neglect. (19 RT 2590.)

Dr. Hart said appellant's home lacked positive values, as shown by the facts that holidays were not celebrated and the family seldom ate meals together. (20 RT 2592.) There was also "close to zero" positive communication within the family, and appellant's mother was a "basket case" who was unwilling or unable to protect the children from their abusive father. (20 RT 2596, 2598-2599.) Dr. Hart also noted that appellant and his siblings learned to be violent from their parents. (20 RT 2601-2602.)

Dr. Hart also relied on the facts that appellant's mother: (1) rejected him because he reminded her of Claude Sr; (2) lashed out at him with "degrading statements and threats;" and (3) neglected him, treating him like a "throw-away child" and having almost nothing to do with him "in a positive way." (20 RT 2603-2604.) In Dr. Hart's opinion, many of the characteristics appellant displayed as a child – banging his head, eating paint and dirt, being stubborn – may have been manifestations of his distress over his mother's mistreatment. (20 RT 2604-2605.)

Dr. Hart testified that appellant was born at the low point for his family, when Edna was often institutionalized for "mental treatment," and

that accordingly he was a "throw-away child." Because appellant reminded Edna so much of her husband, she "lashed out" at him with "particularly degrading statements and threats," and she rejected him and failed to give him love or sensitive care. (20 RT 2603.)

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ARGUMENT

I

THE TRIAL COURT VIOLATED STATE LAW AND APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL AND RELIABLE PENALTY VERDICT BY ADMITTING HIGHLY INFLAMMATORY EVIDENCE ABOUT UNCHARGED MURDERS HE ALLEGEDLY COMMITTED AFTER THE CHARGED CRIMES

At the guilt phase, the trial court admitted evidence over defense counsel's objection about two murders appellant allegedly committed in other states during the six weeks after Ms. Gallagher's murder to prove that appellant committed the charged murder with "premeditation, deliberation . . . [and] express malice aforethought." (11 RT 1157.) The evidence was admitted under Evidence Code section 1101, subdivision (b) ("section 1101").[15] The admission of that grossly prejudicial evidence was state law

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[15] At the time of appellant's trial, Evidence Code section 1101 read, in pertinent part, as follows:

> (a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented, other than his or her disposition to

(continued...)

error, and violated appellant's rights to due process, a fair trial and a reliable verdict that he was guilty of a capital offense under the state and federal Constitutions.

As will be demonstrated below, the uncharged murders were inadmissible to prove that appellant premeditated the charged murder because appellant did not concede that he killed Ms. Gallagher. Furthermore, given appellant's offer to stipulate that the charged killing was a premeditated first degree murder, and to defend solely on the issue of identity, intent and premeditation were not issues genuinely in dispute under section 1101. Moreover, the charged and uncharged murders were insufficiently similar for the latter to be admissible to prove premeditation. And even if the evidence of uncharged murders was technically admissible on the undisputed issue of premeditation under section 1101, its probative value was tangential at best and its prejudicial impact was enormous. It should, therefore, have been excluded under Evidence Code section 352 ("section 352"). The erroneous admission of this inflammatory evidence violated appellant's Fourteenth Amendment due process right to a fair trial.

A. Procedural History

Prior to jury selection, the prosecution moved under section 1101 for admission of evidence that appellant committed three uncharged crimes, the murders of: Linda Price, in Jackson, Mississippi, on October 31, 1995, Tina Marie Cribbs, in Tampa, Florida, on November 4, 1995, and Andy Lou Sutton, in Bossier City, Louisiana on November 8, 1995. (1 CT 231, 240.) The admissibility of that evidence was the most intensively-litigated

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[15](...continued)
commit such an act.

issue at the trial.

1. The Initial Arguments and the Trial Court's Ruling That the Evidence Was Admissible on the Issue of Mental State

The prosecution filed a written motion to admit the uncharged crimes under section 1101, and the defense filed written oppositions. (1 CT 231-245, 2 CT 411-418, 440-454.) The trial court heard and ruled on the motion on January 7, 1999. (5 RT 37.)

The prosecutor argued that the uncharged murders were admissible under section 1101 to prove appellant's intent or mental state, including premeditation. (1 CT 233-235; 5 RT 38-39.) In support of that theory of admissibility, the prosecutor argued that the charged and uncharged murders all involved these common elements:

> (1) the victims were all women of approximately the same age (31 to 37 years); (2) in each murder, [appellant] went to a bar or other venue where adult beverages were served to meet his victim; (3) [appellant] sought out a lone woman unknown to him; (4) [appellant] socialized with the woman (talked, danced and drank) in an effort to gain her trust; (5) [appellant] convinced the victims to give him a ride in their vehicle [*sic*] to his residence; (6) the murders occurred in a small enclosed area, usually belonging to the victim (cab of a truck, bathtub or waterbed); (7) [appellant] took property from each victim, including jewelry, money, handbags, keys and a car; (8) [appellant] attempted to clean up the crime scene or otherwise conceal evidence of the murder; (9) [appellant] immediately left town after the killing; [and] (10) all of the murders occurred approximately within a six week period.

(1 CT 233-234.)

Furthermore, the prosecutor offered to prove that appellant told his sister that he would "keep [murdering women] until" he was caught as

proof that the charged and uncharged murders were part of a common plan to commit premeditated murder. (5 RT 41-42.)[16] Hence, the prosecutor contended, the evidence showed that appellant did the "same thing" in each case – behaved like a "shark entering [a] tank" to "pick out his victim." (5 RT 50.)

Appellant countered that the uncharged crimes were not relevant or admissible to prove an issue in dispute under section 1101. First, he argued that intent would not be a disputed issue because it was "obvious" that whoever killed Ms. Gallagher intended to kill her since the "manner of death [was] manual strangulation." (2 CT 445-446.) Furthermore, evidence about the mental state with which the *subsequent* murders were committed was irrelevant to prove appellant's *prior* mental state in committing the charged crime. (2 CT 449-450; 5 RT 42-43.)

Second, appellant argued, the three uncharged murders were "[in]sufficiently similar" to the charged crime to meet the standards for admission of "other crimes" evidence set out in *People v. Ewoldt* (1994) 7 Cal.4th 380, and *People v. Balcom* (1994) 7 Cal.4th 414. (2 CT 440-454; 5 RT 43-45.) Even assuming that the uncharged murders were sufficiently similar to *each other* to support some inference as to appellant's intent, the charged crime lacked many, if not most, of the elements common to the uncharged murders. (2 CT 447.) The charged crime was significantly different from the uncharged murders, since all of those crimes: (1) were stabbings, while Ms. Gallagher was strangled; (2) involved efforts to clean up or conceal evidence by wiping up blood, while Ms. Gallagher's dead

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[16] The prosecution never presented any evidence that appellant made such a statement.

body was set on fire inside her truck; and (3) allegedly occurred in apartments or motel rooms, while Ms. Gallagher was strangled on a public street. (2 CT 447-448; 5 RT 43-45.)

Moreover, appellant argued, the supposed similarities the prosecution cited between the charged and uncharged crimes, and between the uncharged crimes themselves, were illusory or inconsequential. It was neither distinctive nor unusual that all the victims were between 31 and 37 years of age, since appellant was also in that age range. (2 CT 452.) Furthermore, it was not true that in all the charged and uncharged murders appellant allegedly "sought out a lone woman unknown to him." To the contrary, in the charged murder appellant first tried to "pick up" a female bartender he had pursued for about six weeks, while in the Mississippi case appellant met the victim at the State Fair with her family, and in the Louisiana case appellant had a pre-existing relationship with the victim before she died. (2 CT 453.) Appellant's opposition also pointed out that it was not distinctive that appellant allegedly "socialized with the victim[s] . . . to gain their trust," since that is something anyone initiating a relationship would do, and that in the Mississippi case appellant did not get a ride home with the victim. (2 CT 453.) Hence, appellant argued, the evidence of uncharged murders was not admissible under section 1101.

Finally, appellant argued that even assuming that intent was in issue in Ms. Gallagher's murder, and that the uncharged murders were sufficiently similar to the charged crime to be relevant under section 1101, the evidence should be excluded under section 352 because it would be "immense[ly] prejudicial" (2 CT 449-450), and would label appellant as a "serial killer of women" and a "killer by character." (5 RT 46-48.) Assuming that the subsequent murders had any probative value as to

appellant's mental state when he allegedly committed the charged murder, that evidence was minimally relevant at best. (2 CT 449-450.) Given the explosive nature of the evidence, and its minimal probative value, the jurors would be unable to perform the "mental gymnastic" required in limiting their consideration of the evidence to the issue of intent or mental state. (5 RT 46-48.) Moreover, admission of that evidence would force appellant to defend against not one, but four, murder charges, and would preclude him from testifying in the charged crime because he would be exposed to cross-examination about the uncharged murders. (2 CT 451-452; 5 RT 48-49.) For all those reasons, appellant argued that admission of the evidence would violate his state and federal constitutional rights to a fair trial and a reliable jury verdict, and to assist in and present a defense to the charges. (1 CT 411, 451-452; 5 RT 46-49.)

The trial court ruled that the Mississippi offense was insufficiently similar to be admissible under section 1101. However, the court found that there were "overwhelming factors in common" between the charged murder and the Louisiana and Florida murders, specifically that: (1) appellant met all the victims as "strangers in bars;" (2) appellant got rides, and took property, from each victim; (3) appellant made "intentional efforts to conceal and hide" each murder before "flee[ing];" and (4) all the crimes occurred within a 40-day period. (5 RT 52-53.) The court said that those common factors "show[ed] high relevance on the issue of common plan," which was relevant to the ultimate fact of premeditation – "intent." (5 RT 52, 55.)

In the alternative, defense counsel asked the trial court to stay its final ruling until just before the close of the prosecution's case-in-chief because he and appellant had not yet decided what defense to proffer.

Counsel explained that he and appellant were considering relying solely on an identity defense, and conceding the element of premeditation. (5 RT 55.) Appellant offered to elect which defense to pursue before the prosecution closed its case-in-chief, whereupon the court would be in the best position to rule on the relevance and admissibility of the evidence based upon the issues actually placed in dispute. (5 RT 55-56.) The trial court denied the request, refusing to "undo what [it had] just [done]." (5 RT 57.)

2. Appellant's Offer to Defend Solely on the Issue of Identity and to Stipulate to the Element of Premeditation and His Renewed Objections

On April 29, 1999, defense counsel informed the court that he would rely on an identity defense and would not dispute the issues of intent to kill and premeditation, the very issues the evidence of uncharged crimes was offered to prove. (6 RT 104.) Counsel stated that appellant was willing to stipulate that the charged crime was a first degree murder in order to eliminate any relevance of the "out of state murders" at the guilt phase. (6 RT 105.)

On May 26, and June 2,1999, appellant renewed his objections to the uncharged murders and asked the court to reconsider its ruling admitting that evidence on two grounds. (6 RT 197, 211.)[17] First, appellant intended to rely solely on an identity defense, and was prepared to stipulate to the element of premeditation and deliberation, thereby "eliminat[ing] the need on the part of the prosecution for proving

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[17] Defense counsel also informed the trial court that "if the evidence [of other murders] is coming in, then I do not want to have [the trial on the prior murder special circumstance allegation] bifurcated. If [that] evidence is not coming in, I would want it bifurcated." (6 RT 179.)

premeditation and deliberation." (6 RT 211.) Since the uncharged murders were offered and admitted "to show premeditation and deliberation," the stipulation would render the evidence irrelevant by removing those issues from dispute. (6 RT 212.)

Second, appellant argued that there were additional facts negating the prosecution's theory that the crimes were committed in a similar pattern of picking up "lone women unknown to him" in bars with a premeditated plan to murder them. (6 RT 184-185, 200-201.) Based on the prosecution's evidence, appellant did not pick the Louisiana victim (Ms. Sutton) up in a bar and kill her; the situation in that case "was a lot closer to the [excluded] Mississippi domestic violence live-in arrangement . . ." (6 RT 189-190; see also pp. 197-198.) Appellant had a "dating relationship [with Sutton] which was interrupted and then continued several days later." (6 RT 184-185.) Moreover, the Louisiana authorities did not intend to prosecute that killing as premeditated murder, but rather as a second degree murder with alcohol as a major contributing factor. (6 RT 200.) Nor did the charged murder fit the prosecution's pattern theory, because appellant first tried unsuccessfully to pick up the bartender, who was not a "lone woman unknown to him." (6 RT 201; see 1 CT 233-234.) Finally, exclusion of the Louisiana murder would leave only the uncharged murder in Florida, which was insufficient standing alone to demonstrate a pattern of similar murders relevant to prove appellant's intent in committing the charged murder. (6 RT 188-189.)

The prosecutor refused appellant's offer to stipulate to the element of premeditation. (6 RT 215.) Furthermore, he argued, the dissimilarities between the crimes cited by appellant did not change the "fundamental signature" common to all the crimes, which was that appellant: (1) picked

up a woman of about the same age who was "down on [her] luck;" and (2) acted "like a shark in a tank." (6 RT 204.) The trial court refused to reconsider its prior ruling that the subsequent, uncharged crimes were relevant and admissible to prove appellant's mental state in committing the charged crime. (6 RT 207.)

On June 6, 1999, at the outset of the prosecution's presentation of evidence concerning the uncharged murders, defense counsel again "renew[ed his] previous objections" to the evidence. (11 RT 1150.) He asked the trial court to reweigh the probative value of the evidence in light of the prosecution's reliance on expert testimony about the amount of time required to manually strangle a victim to show that the charged murder was premeditated. (11 RT 1150-1151.) Given that evidence of premeditation, along with appellant's offer to stipulate to that element, counsel argued that the evidence had only minimal probative value, and should be excluded under section 352 because its probative value was negligible and its potential for undue prejudice was enormous. (11 RT 1150-1151, 1153.)

The prosecutor agreed "there is some premeditation and deliberation as you look at a victim with your hands around her neck and strangle her for even 30 seconds." (11 RT 1152.) However, despite defense counsel's offer to contest only identity, and despite his offer to stipulate to the element of premeditation,[18] the prosecutor insisted that the evidence of uncharged murders was still relevant to rebut the likely defense argument that the charged murder was a "rage killing." (11 RT 1152-1153.) Once again, the trial court refused to reconsider its prior ruling. (11 RT 1153-

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[18] As used herein, "premeditation" encompasses both the premeditation and deliberation requirements of first degree murder.

1154.)

3. The Uncharged Crimes Evidence Admitted at Trial and Appellant's Motion for New Trial

At trial, the prosecution presented a series of live witnesses and other evidence to prove that appellant murdered Ms. Cribbs and Ms. Sutton.[19] As to the charged crime, the prosecutor presented alternative theories of liability: (1) first degree felony murder and (2) first degree premeditated murder.[20]

Appellant testified on his own behalf that Ms. Gallagher left his house alive with Mr. Kele on the evening she was killed, and denied that he killed her or anyone else. (13 RT 1644-1645, 14 RT 1722.) Based on that testimony, and the holes in the prosecution's case, appellant's primary defense theory was that he did not commit the killing. (15 RT 1881 [defense counsel tells the jury that appellant "did not commit this crime"].) But defense counsel argued in the alternative that if appellant did commit the killing, he did so in a rage and not with premeditation. (15 RT 1881.)

On July 16, 1999, following the verdict, defense counsel moved for a new trial based on the admission of the evidence of uncharged murders. (21 RT 2816.) Counsel argued that, in light of the events at trial, the evidence of premeditation was far less material, and the uncharged murders less probative, than the prosecutor had represented at the pretrial hearings. In addition, the prosecutor had not only refused to establish the element of

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[19] The evidence presented at trial concerning those uncharged murders is set forth in detail in the Statement of Facts, *supra*, at pages 8-12.

[20] In his guilt phase closing argument the prosecutor told the jurors that there was also a third "theor[y]" they could rely upon in convicting appellant of first degree murder and arson, relying upon CALJIC No. 2.15. (See Argument IV, *infra*.)

premeditation with an evidentiary alternative far more conclusive and far less prejudicial than the uncharged murders – the offered stipulation – he also ultimately presented evidence regarding the manner of killing that conclusively established the element of premeditation. Moreover, the prosecutor also relied on the alternative theory of first degree felony murder, which did not require proof of premeditation. For all of these reasons, the uncharged murders were unnecessary to prove first degree murder, while the prejudicial impact of that evidence was "obvious," because it painted appellant as a "serial killer." (21 RT 2816.)

The trial court ruled that the facts that came out at trial were "fairly consistent" with the prosecutor's "representation[s] or offer of proof." (21 RT 2817.) Even reconsidering its decision to admit the evidence "in hindsight," based on the evidence and arguments presented at trial, the court's ruling would be the same. (21 RT 2817.) According to the court, the evidence of uncharged murders was "consistent with modus operandi," and had "extraordinary" probative value that outweighed the "great" prejudice it engendered. (21 RT 2817.)

B. General Legal Standards

Under section 1101, "[e]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." According to a distinguished commentator:

> The reasons for exclusion are: "*First*, character evidence is of slight probative value and may be very prejudicial. *Second*, character evidence tends to distract the trier of fact from the main question of what actually happened on the particular occasion and

> permits the trier of fact to reward the good man and to punish the bad man because of their respective characters. *Third*, introduction of character evidence may result in confusion of issues and require extended collateral inquiry." [Citations.]

(1 Witkin, Evid. (4th ed. 2000) § 42, p. 375, original italics.)

The rule excluding evidence of criminal propensity is over three centuries old in the common law (1 Wigmore, Evidence (3d ed. 1940) § 194, pp. 646-647, cited in *People v. Falsetta* (1999) 21 Cal.4th 903, 913, and *People v. Alcala* (1984) 36 Cal.3d 604, 630-631), and is in effect in every jurisdiction in the United States. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 392; see also *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1380-1381 & fn. 2 [citing statutes and cases codifying or adopting the rule].)

However, section 1101 provides that evidence of uncharged misconduct is admissible when "relevant to prove some fact (such as motive, opportunity, intent, . . .) other than [the defendant's] disposition to commit such an act." (*People v. Catlin* (2001) 26 Cal.4th 81, 145-146.) "The admissibility of other crimes evidence depends on (1) the materiality of the fact sought to be proved, (2) the tendency of the uncharged crimes to prove that fact, and (3) the existence of any rule or policy requiring exclusion of the evidence." (*People v. Carpenter* (1997) 15 Cal.4th 312, 378-379; *People v. Steele* (2002) 27 Cal.4th 1230, 1243.) While a plea of not guilty technically places all elements in issue, any element that is to be proved with other crimes evidence must genuinely be in dispute. (See, e.g., *People v. Balcom*, *supra*, 7 Cal.4th at p. 426; *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 406; *People v. Bonin* (1989) 47 Cal.3d 808, 848-849; *People v. Alcala*, *supra*, 36 Cal.3d at pp. 631-632.) The critical inquiry in assessing the tendency of uncharged crimes to prove an element or other material fact

is the nature and degree of similarity between the uncharged misconduct and the charged offense. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402.)

Evidence of uncharged misconduct "'is so prejudicial that its admission requires extremely careful analysis.'" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404, quoting *People v. Smallwood* (1986) 42 Cal.3d 415, 428.) The primary focus of that analysis is to ensure that the evidence is *not* offered to prove character or propensity, and that its practical value outweighs the danger that the jury will treat it as evidence of the defendant's criminal propensity. Therefore, even other crimes evidence which is relevant under section 1101 must be excluded under section 352 when its probative value is "substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404, citing *People v. Thompson* (1988) 45 Cal.3d 86, 109.)

Trial court rulings on the admissibility of evidence under section 1101, and on the admission or exclusion of evidence under section 352, are reviewed for abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637 [§ 1101]; *People v. Ashmus* (1991) 54 Cal.3d 932, 973 [§ 352].)

C. The Uncharged Murders Were Inadmissible to Prove Premeditation Because (1) Appellant Did Not Concede That He Committed the Charged Murder, (2) Appellant Did Not Dispute That the Charged Murder Was Premeditated, and (3) the Uncharged Murders Were Insufficiently Similar to the Charged One

As discussed above, the prosecution offered, and the trial court admitted, the uncharged murders to prove that appellant committed the charged murder with premeditation. The court erred for several reasons. First, where the identity of the perpetrator is in dispute, as it was here, other

crimes evidence is inadmissible to prove intent, motive or premeditation, because those "issues presume the identity of the [perpetrator] is known." (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 166-167.) Second, whether the charged crime was premeditated was not in dispute in this case, and thus the trial court should not have admitted any evidence on that point, let alone such grossly prejudicial evidence. (See *People v. Catlin*, *supra*, 26 Cal.4th at p. 146 [the admissibility of other crimes evidence "depends on the materiality of the fact sought to be proved"].) Finally, the uncharged murders were inadmissible because they were insufficiently similar to the charged crime to support the requisite inference that appellant "'probably harbored the same intent in each instance.'" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402, quoting *People v. Robbins* (1988) 45 Cal.3d 867, 879.) In fact, the uncharged murders were inadmissible for any purpose under section 1101.

1. The Uncharged Murders Were Inadmissible to Prove Premeditation Because Identity Was Disputed

Again, identity was the primary disputed issue in this case. (6 RT 104 [defense counsel states that the defense would be "who did it"], 13 RT 1643-1644, 14 RT 1722 [appellant testifies that he did not kill Ms. Gallagher].) The trial court erred in admitting the evidence of uncharged murders on the issue of premeditation because the identity of the perpetrator of the charged crime was in dispute, and, as the prosecutor and the trial court implicitly acknowledged, the uncharged crimes were insufficiently similar to the charged crime to be admissible to prove identity.

It is fundamental that where the perpetrator's identity is in dispute, and the uncharged crimes are not similar to the charged crime in ways "so

unusual and distinctive as to be like a signature," the uncharged conduct is not admissible to prove intent, motive or lack of mistake or accident because "all of those issues presume the identity of the actor is known." (*Hassoldt v. Patrick Media Group, Inc.*, *supra*, 84 Cal.App.4th at p. 166 [citing *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2]; see *People v. Kelley* (1967) 66 Cal.2d 232, 242 ["the standard framework for admission of evidence of other crimes is if there is no doubt that defendant has committed an act, but some question as to his intent in doing so"].)

In *Ewoldt*, this Court provided the following example of when other crimes evidence might be admissible to prove intent: "[I]n a prosecution for shoplifting in which it was conceded or assumed that the defendant left the store without paying for certain merchandise, the defendant's uncharged similar acts of theft might be admitted to demonstrate that he or she did not inadvertently neglect to pay for the merchandise, but rather harbored the intent to steal it." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2.) The Court's view is consistent with Professor Wigmore's understanding: "Evidence of intent is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. 'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.' (2 Wigmore, Evidence (Chadbourn rev. ed. 1979) § 300, p. 238.)" (*Ibid.*)

Applying this well-established principle and relying on the above-quoted language from *Ewoldt*, the court in *Hassoldt*, a tort action for wrongful tree trimming, found that evidence of prior tree-trimming activity by the defendant company was not "so unusual and distinctive" as to support the inference that the company had trimmed the plaintiffs' tree. (*Hassolt v. Patrick Media Group, Inc.*, *supra*, 84 Cal.App.4th at p. 165.)

Because the identity of the tree trimmer was disputed and the uncharged conduct could not be used to prove identity, the uncharged misconduct was inadmissible to prove the other disputed issues. As the court explained, "it would make no sense to admit evidence of uncharged misconduct on the issue of intent, motive or lack of mistake or accident where the identity of the actor is not yet determined." (*Id.* at pp. 166-167.)

The same principle applies here. The uncharged murders were not offered or admitted to prove the identity of the perpetrator of the charged crime, because they lacked the high degree of similarity that is required before other crimes evidence can be used to prove identity. Uncharged crimes are only admissible as proof of identity under section 1101 if they are "highly similar" to the charged offense. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) "[T]he uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation omitted.] 'The pattern and characteristics of the crimes must be *so unusual and distinctive as to be like a signature*.'" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403, quoting 1 McCormick on Evidence (5th ed. 1999) § 190, pp. 801-803, italics added; *People v. Gray* (2005) 37 Cal.4th 168, 203; see *People v. Huber* (1986) 181 Cal.App.3d 601, 622 [the charged and uncharged crimes must be "mirror images"].)

The stringent requirement that the uncharged crimes must be nearly identical to the charged one follows from the nature of the inference the jury is asked to draw from the evidence: "that the crimes were committed by the 'same' person." (Imwinkelreid, Uncharged Misconduct Evidence (2005) § 3:11, pp. 3-51-52.) Only crimes that are both highly similar *and* highly distinctive can serve to "virtually eliminate[] the possibility that

someone other than the defendant committed the charged offense." (*People v. Balcom*, *supra*, 7 Cal.4th at p. 425; see *United States v. Luna* (9th Cir. 1994) 21 F.3d 874, 878-879, quoting *United States v. Perkins* (9th Cir. 1991) 937 F.2d 1397, 1400 [if the charged and uncharged crimes "'are similar to numerous other crimes committed by persons other than the defendant, no inference of identity can arise'"].)

The uncharged murders in this case were insufficiently similar to the charged one to be admissible to prove identity, and no one at trial ever suggested otherwise. Thus, while the charged and uncharged murders were *somewhat* similar, they also differed in highly-significant respects, most importantly in that the victim in the charged crime was strangled while the victims in the uncharged murders were stabbed. Further, the only aspect of the charged crime that came close to being a "signature" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 403) – that the perpetrator set the victim on fire – was not present in the uncharged murders.

Indeed, the prosecutor implicitly recognized that the uncharged murders *were* insufficiently similar to the charged murder to be admissible on the issue of identity by not offering them as evidence on that element of the crime. Thus, because identity was in dispute, and the uncharged murders "fail[ed] to meet the stringent 'so unusual and distinctive as to be like a signature' standard" applicable to other crimes evidence offered to prove identity (*Hassoldt*, *supra*, 84 Cal.App.4th at p. 166), the trial court erred in admitting the uncharged murders as proof of premeditation.

2. The Uncharged Murders Were Inadmissible Because Appellant Offered to Stipulate That the Charged Murder Was Premeditated

Any ultimate fact the prosecution seeks to establish with evidence of uncharged offenses must be both material and "'actually in dispute.'" (*People v. Thompson*, *supra*, 27 Cal.3d at p. 315, quoting *People v. Thomas* (1978) 20 Cal.3d 457, 467; *People v. Williams* (1988) 44 Cal.3d 883, 905; see also *People v. Sully* (1991) 53 Cal.3d 1195, 1224 ["[t]he admissibility of other-crimes evidence depends on . . . the materiality of the fact sought to be proved"]; *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404, quoting *Thompson*, *supra*, 27 Cal.3d at p. 318, original italics ["'uncharged offenses are admissible only if they have *substantial* probative value'"]; *People v. Hall* (1980) 28 Cal.3d 143, 152, overruled on another ground in *People v. Newman* (1999) 21 Cal.4th 413, 419-420 ["If a fact is not genuinely disputed, evidence offered to prove that fact is irrelevant and inadmissible"].) "Materiality concerns the fit between the evidence and the case. . . . If [] evidence is offered to help prove a proposition that is not a matter in issue, the evidence is immaterial." (McCormick on Evidence, *supra*, § 185, p. 637.) Here, whether or not the charged murder was premeditated was not disputed, primarily because appellant offered to stipulate to that element of the crime. (*People v. Hall*, *supra*, 28 Cal.3d at p. 152 [where the defendant offers to stipulate to an element of the crime, the existence of that element is not in dispute].)

To be sure, this Court has recognized that a not guilty plea generally puts all the elements of the crime in issue for the purpose of deciding the admissibility of evidence under section 1101. (*People v. Daniels* (1991) 52 Cal.3d 815, 857-858.) Importantly, however, the Court has also recognized

that an exception exists to that general rule where "the defendant [takes] some action to narrow the prosecutor's burden of proof." (*Ibid.*; accord, *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1049, fn. 4 [distinguishing *Daniels* on the ground that intent was at issue because the defendant refused to concede that issue, and "brought three dismissal motions on grounds the specific intent to rob had not been shown"].) A leading commentator on the use of evidence of uncharged misconduct in criminal cases agrees that this view is the "better and prevailing" one. (Imwinkelreid, Uncharged Misconduct Evidence, *supra*, § 8:10, pp. 8-45-46; accord, *Thompson v. United States* (D.C. 1988) 546 A.2d 414, 423 ["where intent is not controverted in any meaningful sense, evidence of other crimes is so prejudicial per se that it is inadmissible as a matter of law"]; *Thompson v. The King* (1918) A.C. 221, 232-233 ["The mere theory that a plea of not guilty puts everything material at issue" does not make evidence of lack of mistake admissible when no defense of mistake was raised; "[t]he prosecution cannot credit the accused with fancy defenses in order to rebut them at the outset with some damning piece of evidence"].)

Indeed, many courts hold that other crimes evidence should not be admitted unless and until the defendant "affirmatively contest[s]" an issue on which that evidence is relevant. (*Graves v. United States* (D.C. 1986) 515 A.2d 1136, 1141, quoting *United States v. Miller* (7th Cir. 1974) 508 F.2d 444, 450.) That rule is based on the recognition that "[i]t is only after the defense is presented that the trial judge can know if intent or knowledge or any exception to the exclusion rule is truly a disputed issue in the trial." (*United States v. Adderly* (5th Cir. 1976) 529 F.2d 1178, 1182.)

Here, appellant tried to do precisely what *Daniels* requires – narrow the scope of the issues and the prosecution's burden of proof. (*People v.*

Daniels, supra, 52 Cal.3d at pp. 857-858.) He first asked the court to stay its final ruling regarding the admissibility of the uncharged murders until he elected his defense at the close of the prosecution's case-in-chief. (5 RT 55.) When the court refused that request, appellant then offered not only to affirmatively concede the element of premeditation, but to *stipulate* that the charged crime was a premeditated and deliberate first degree murder. (6 RT 211-212.)

A stipulation is an agreement between opposing counsel that serves to obviate the need for proof and narrow the range of litigable issues and may lawfully include or limit issues or defenses to be tried (*County of Sacramento v. Worker's Compensation Appeals Board* (2000) 77 Cal.App.4th 1114, 1118), and is "conclusive with respect to the matters stated in it." (*Harris v. Spinali Auto Sales* (1966) 240 Cal.App.2d 447, 452.) While this Court has recognized that the prosecution is not required to accept a stipulation as a general matter, it has consistently acknowledged an exception to that rule when the stipulation constitutes an offer to admit completely an element of the charged crime. (*People v. Sakarias* (2000) 22 Cal.4th 596, 629.) Thus, "if the defendant offers to admit the existence of an element of the crime, the prosecutor must accept that offer, and refrain from introducing evidence to prove that element." (*People v. Hall, supra*, 28 Cal.3d at p. 152; accord, *People v. Bonin, supra*, 47 Cal.3d at p. 849 [because the defense offered to stipulate to an element, "the court should have compelled the prosecution to accept the defendant's offer and barred it from eliciting testimony on the facts covered by the proposed stipulation"]; see *People v. Roldan* (2005) 35 Cal.4th 646, 706-707, fn. 24 [where defendant *declined to stipulate* to an element, his not guilty plea placed all elements in issue for purposes of section 1101].) This exception

applies with particular force when the offered evidence is highly prejudicial uncharged crime evidence. As Professor Imwinkelried has recognized, the "well-reasoned" view of the majority of courts is that when the defendant offers to stipulate to an element of the crime to preclude the admission of evidence of uncharged misconduct, the "offer to stipulate effectively removes the material fact from dispute. . . . [and leaves] little or no bona fide prosecution need for the uncharged misconduct evidence." (Uncharged Misconduct Evidence, *supra*, § 8.11, pp. 8-54-55.)

Appellant's proposed stipulation was sufficient to require exclusion of the evidence of uncharged murders:

> To prevent the admission of bad acts evidence, the defendant's offer to concede knowledge and/or intent issues must do two things. First, the offer must express a clear and unequivocal *intention* to remove the issues such that, in effect if not in form, it constitutes an offer to stipulate. Second, notwithstanding the sincerity of defendant's offer, the concession must cover the necessary substantive ground to remove the issues from the case.

(*United States v. Garcia* (1st Cir. 1993) 983 F.2d 1160, 1174, original italics.) Here, as defense counsel argued, appellant's proposed stipulation that the charged homicide was "first degree or nothing" effectively "eliminated the need for proving intent on the part of the prosecution or proving premeditation and deliberation." (6 RT 211-212.) That stipulation would have relieved the prosecution of any burden to prove premeditation and thus to prove that the homicide was a first degree murder. (Accord, *Harris v. Spinali Auto Sales*, *supra*, 240 Cal.App.2d at p. 452.) Just as in *People v. Hall*, *supra*, 28 Cal.3d at p. 152, because appellant "offer[ed] to admit the existence of an element of the crime (premeditation and deliberation), the prosecutor [was required to] accept that offer, and refrain

from introducing evidence to prove that element."

Accordingly, this case is distinguishable from *People v. Arias* (1996) 13 Cal.4th 96, 130-131, where the defendant, after losing his "bid" to sever rape and robbery charges based on one incident from robbery and murder charges based on a subsequent incident, offered to stipulate to his commission of the rape and robbery in order to keep evidence of those crimes from the jury considering his guilt on the robbery and murder charges. (*Ibid.*) This Court held that the proposed stipulation "was not an adequate substitute" for evidence about the other crimes because: (1) the defendant refused to admit the two material issues the prosecutor sought to prove with the other crimes evidence; and (2) "the People would have lost material circumstantial evidence on [those] issues" if forced to accept the stipulation. (*Id.* at p. 131.) In contrast, accepting the proposed stipulation in this case would have cost the prosecution nothing legitimate. It would have given up only the unfair windfall of using extremely prejudicial but irrelevant uncharged crimes evidence, which permitted the jury to decide the case on the basis of appellant's alleged propensity to commit crimes like the charged murder.

This Court has said on a number of occasions that, "at least where the defense proposal does not constitute an offer to admit completely an element" of the charged crime, the prosecution is not required to accept a stipulation in lieu of conventional evidence if doing so would deprive its case of "persuasiveness and forcefulness." (*People v. Sakarias*, *supra*, 22 Cal.4th at p. 629; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1007; *People v. Schied* (1997) 16 Cal.4th 1, 16, citing *Old Chief v. United States* (1997) 519 U.S. 172; *People v. Garceau* (1993) 6 Cal.4th 140, 182.) However, the cases stating that proposition are distinguishable. None of

them involves facts like those in the instant case, where the prosecution rejected a stipulation that would have conclusively determined an element of the charged crime in favor of presenting highly prejudicial uncharged crimes evidence which had only minimal, if any, value as proof of that element.

The cases in which this Court has upheld the prosecution's refusal to stipulate to a disputed fact or issue all involve proposed stipulations that, unlike the one in this case, were deficient in at least one of four ways. First, in some cases the proposed stipulation did not amount to a concession of an element of the charge. (*People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1007 [the defendant only offered to stipulate to "bald fact[s]," not to "any element of the charge against him"]; *People v. Garceau*, *supra*, 6 Cal.4th at p. 180 [the stipulation only covered facts about the crime, not an element of that crime]; *People v. Sakarias*, *supra*, 22 Cal.4th at p. 629 ["the trial court was not obliged to force the prosecutor to accept a partial stipulation" on whether the defendant robbed the proposed witness].)

That defect is not present here. As shown above, the stipulation was intended to conclusively establish the element of premeditation, and would have done so. (6 RT 211 [defense counsel offered to stipulate to "premeditation and deliberation," and that the crime was "first degree or nothing"]; cf. *Edelbacher*, *supra*, 47 Cal.3d at p. 1007 [stipulation that defendant solicited a murder would have been less probative of consciousness of guilt of another murder than a tape recording of that solicitation, particularly since defendant refused to stipulate to consciousness of guilt or to any element of the charge against him].) And of course, the prosecutor's avowed purpose in presenting the evidence of uncharged murders in this case was precisely to prove the element of

premeditation. (1 CT 233 [prosecution motion states that the uncharged murders were offered as "evidence that the killing of Sandra Gallagher was premeditated and in the first degree. [And not] as character evidence to demonstrate a mere propensity to commit the crime"].) The proposed stipulation completely conceded that element.

Second, in some cases upholding the prosecution's refusal to stipulate to a disputed fact or issue the proposed stipulation did not encompass the full "scope" of the probative force of the challenged evidence. (*People v. Garceau*, *supra*, 6 Cal.4th at p. 182 [the probative value of the photographs and physical evidence "clearly extended beyond the scope" of the proposed stipulation such that they were relevant to the contested issue of malice]; *People v. Hall*, *supra*, 28 Cal.3d at p. 152 [a "narrow exception" to the rule that the prosecution must agree to stipulate to an element of the charged crime, and forego presenting evidence to establish it, applies where the evidence is relevant to an issue not covered by the stipulation]; see *People v. Cain* (1995) 10 Cal.4th 1, 33 [not error to refuse to compel prosecution to accept proposed stipulation as to the contents of the defendant's videotaped statements in lieu of playing the tape where defendant's demeanor was highly probative as to the truthfulness of the statements].)

That defect was also not present here. Indeed, the evidence of uncharged murders, being nothing more than circumstantial evidence supporting an *inference* that the charged crime was *probably* a premeditated murder, was far weaker than the proposed stipulation as proof of premeditation. (*People v. Robbins*, *supra*, 45 Cal.3d at p. 879 [evidence of sufficiently similar uncharged crimes supports the inference that the defendant "probably harbored" the same intent in the charged crime].)

Evidence that merely supports a permissible inference is obviously less dispositive of an issue than a stipulation by the parties definitively settling that issue. (See *Robinson v. Worker's Compensation Appeals Bd.* (1987) 194 Cal.App.3d 784, 790 [stipulations are binding on the parties and the truth of the facts contained therein cannot be contradicted].)

Accepting the proposed stipulation would not have deprived the prosecutor's case of persuasiveness concerning the alleged material fact that the charged crime was premeditated, because the evidence that appellant committed subsequent uncharged murders at most had only slight value as proof of that fact. (Sec. C(3), *infra*.) That evidence clearly had nothing like the conclusive force of an express stipulation *requiring* the jury to find that the crime was premeditated. (*Harris v. Spinali Auto Sales*, *supra*, 240 Cal.App.2d at p. 452.) The fact that the prosecutor rejected a stipulation that would have conclusively established that the charged murder was premeditated suggests that his real aim was to introduce the evidence of uncharged murders precisely *because* it would be so prejudicial, and would probably lead the jurors to (1) draw the forbidden inference that appellant had a propensity to commit such crimes, and (2) treat that inference as "circumstantial evidence that [appellant] committed the charged offense." (*People v. Karis* (1988) 46 Cal.3d 612, 636.)

Third, in some cases that uphold the prosecution's refusal to stipulate to a disputed fact or issue, the effect of accepting the proposed stipulation would have been to preclude the presentation of conventional evidence that would have given the jury a fuller picture of the charged crime. (*People v. Waidla* (2000) 22 Cal.4th 690, 721-723 [stipulation that victim did not consent to entry in charged burglary or taking in charged robbery would have been less forceful than direct testimony that the victim

feared defendant]; *People v. Schied*, *supra*, 16 Cal.4th at pp. 16-17 [photographs of the crime scene were relevant to show what happened to the victims]; *People v. Garceau*, *supra*, 6 Cal.4th at p. 180 [same]; *People v. McClellan* (1969) 71 Cal.2d 793, 802 [not error to refuse stipulation that fatal shots were fired in the course of a robbery, and that if defendant was one of the robbers he was guilty of first degree murder, where excluding testimony as to which co-defendant fired which shots would have hampered the prosecution's ability to prove "coherently what happened" at the crime scene]; see also *Old Chief v. United States*, *supra*, 519 U.S. at pp. 187-188 [prosecution may refuse a proposed stipulation in favor of presenting evidence that would "satisfy the jurors' expectations about what proper proof should be"].)

That defect was also not present in this case. The jurors' expectations about what proper proof would be in this case would not have been disappointed if the prosecutor had been required to accept the proposed stipulation in lieu of presenting the evidence of uncharged murders. (*Old Chief v. United States*, *supra*, 519 U.S. at pp. 188-189.) Thus, while a prosecutor may appropriately refuse a stipulation that would preclude him from satisfying the jury's expectations about the kind of evidence that will be presented – e.g., by keeping out of evidence the gun a defendant charged with gun possession allegedly possessed (*ibid*) – it is highly unlikely that any juror would expect the prosecution to use evidence about unrelated murders that were committed after the charged murder and in other states to prove that the charged murder was premeditated. The kind of conventional evidence reasonable jurors would expect to hear in a case like this where there were no eyewitnesses to the crime – evidence about the method of killing, and who was last seen with the victim before she died –

was all available to the prosecutor without the uncharged crimes evidence.

Fourth, in some cases the proposed stipulation would have precluded penalty phase evidence about the defendant's prior violent crimes, which, unlike guilt phase evidence about the charged crime, assists the jury in performing its normative function of deciding on the proper penalty. (*People v. Karis*, *supra*, 46 Cal.3d at pp. 639-640; *People v. Jackson* (1996) 13 Cal.4th 1164, 1230.) That defect was obviously not relevant in this case, since the uncharged Florida and Louisiana murders, like the uncharged Mississippi murder, could have been introduced at the penalty phase as other crimes evidence under section 190.3, subdivision (b).[21]

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[21] Moreover, even assuming arguendo that premeditation was technically at issue, it was not in any real sense a *disputed* issue in light of (1) appellant's offer to stipulate to that element and (2) the evidence that the murder was premeditated. (See *People v. Balcom*, *supra*, 7 Cal.4th at p. 423 [where the evidence provides "compelling evidence of defendant's intent, evidence of defendant's similar uncharged offenses" is "merely cumulative" on that issue].) The prosecutor argued below to the jury that the very manner in which Ms. Gallagher was killed established that the crime was premeditated and deliberate, because "it takes a while" to fatally strangle someone, and the attacker must continue strangling after the victim loses consciousness. (15 RT 1843-1844; see *People v. Stitely* (2005) 35 Cal.4th 514, 544 [strangulation "suggests premeditation"]; *People v. Davis* (1995) 10 Cal.4th 463, 510 [same].) Because that evidence, combined with the stipulation appellant offered that the crime was a premeditated and deliberate murder, would have conclusively settled that the killing was premeditated, premeditation was not a disputed, material issue in this case.

3. The Uncharged Murders Were Inadmissible Because They Were Insufficiently Similar to the Charged Crime to Prove Premeditation

Even assuming arguendo that premeditation was a disputed issue in this case, the evidence of uncharged murders was inadmissible to prove that issue under the standards set by this Court for evaluating the admissibility of uncharged crimes evidence. (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 402-404.) In admitting this evidence, the trial court said that "premeditation is intent" (5 RT 52), and this Court has indicated that uncharged crimes evidence offered to prove premeditation and/or intent should be weighed against the same sufficient similarity standard. (*People v. Steele*, *supra*, 27 Cal.4th at p. 443; see also *People v. Castillo* (1997) 16 Cal.4th 1009, 1017 [premeditation and deliberation are "mental states" which "refer to the quality of the intent to kill"].)[22] Accordingly, the

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[22] Appellant does not concede that either the trial court or this Court in *Steele* correctly concluded that premeditation is a form or subspecies of intent, and that the admissibility of other crimes evidence offered to prove premeditation should be evaluated under the lowest of the three standards set out in *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402. Although that conclusion may have a superficial plausibility, because both intending and premeditating are in some sense mental acts, the act of premeditating a murder is far more akin to the act of formulating a common plan than it is to the mental state of intending to kill.

Premeditation and intent are clearly not the same thing; the first is a process of decision, while the second is the mental state which results from that process. Premeditation is the process of "think[ing] on, revolv[ing] in the mind, beforehand" (*People v. Bender* (1945) 27 Cal.2d 164, 184, overruled on another ground in *People v. Lasko* (2000) 23 Cal.4th 101), through which an intent to kill is formed. Intent, on the other hand, is "the state of mind with which an act is done." (Webster's 9th New Collegiate Dict. (1988) p. 629.) One who commits a deliberate and premeditated

(continued...)

prosecution was required to show that the evidence of uncharged murders met the standard of admissibility set out in *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402, i.e., that the uncharged murders were substantially similar to the charged murder. (*People v. Carter* (1993) 19 Cal.App.4th 1236, 1246; *People v. Thompson*, *supra*, 27 Cal.3d at p. 319, fn. 23 [criticizing language from other cases indicating that substantial similarity is not required when intent is the material fact to be proved with other crimes evidence]; *People v. Guerrero* (1976) 16 Cal.3d 719, 728.)

As shown below, the evidence of uncharged murders at issue here did not meet the *Ewoldt* standard, because, as appellant argued below (2 CT

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[22](...continued)
murder first "consider[s] beforehand" whether to kill, then forms the intent to kill as a "*result* of deliberation and premeditation." (CALJIC No. 8.20, italics added.) Accordingly, in the context of a murder trial, intent is the state of mind which is the *product* of the mental process of premeditation and deliberation. (See *People v. Thomas* (1945) 27 Cal.2d 880, 900 [intent to kill must be reached with and the result of deliberation and premeditation].)

Further, as the Court has made clear, whether sufficient evidence of premeditation exists in a particular case is determined by looking at whether the facts of the crime show it to be the result of a "'deliberate judgment or plan; carried on cooly and steadily [especially] according to a preconceived design.'" (*People v. Anderson* (1968) 70 Cal.2d 15, 26, italics omitted, quoting *People v. Caldwell* (1955) 43 Cal.2d 864, 869.) Premeditation – the process of planning and determining whether to kill – is far more akin to the process of formulating a "common plan" than to intent – the "state of mind" which results from the process of premeditation. Therefore, any uncharged crimes offered to prove premeditation should be required to meet the higher standard of similarity that applies to common plan evidence.

444-448; 5 RT 43-45), the purported similarities between the charged and uncharged crimes were either overstated or illusory, and the uncharged crimes were different than the charged one in highly relevant respects. Therefore, this case is distinguishable from other cases in which this Court has upheld the use of evidence of uncharged murders to prove intent. (See *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 378-380; *People v. Steele*, *supra*, 27 Cal.4th at pp. 1245-1246; *People v. Robbins*, *supra*, 45 Cal.3d at pp. 879-880.) The evidence of uncharged murders in this case was nothing more than "mere evidence of criminal disposition." (*People v. Balcom*, *supra*, 7 Cal.4th at p. 423, fn. 2.)

a. The charged and uncharged murders were insufficiently similar

As previously noted, evidence of other crimes is only admissible to prove intent when those other crimes are sufficiently similar to the charged crime to support the inference that defendant probably harbored the same intent in each instance. (*People v. Yeoman* (2003) 31 Cal.4th 93, 121.) Here, as set forth above (Sec. A(1), *supra*, p. 35), the trial court admitted the evidence of the uncharged murders under section 1101 on the grounds that they were similar to the charged murder in some, but not all, of the respects urged by the prosecutor. However, because most of those purported similarities relied upon by the trial court were overstated, inconsequential and/or illusory, the uncharged murders were insufficiently similar to the charged crime to be admissible to prove that appellant "'probably harbor[ed] the same intent in each instance. [Citations.]'" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 403, quoting *People v. Robbins*, *supra*, 45 Cal.3d at p. 879.)

First, the trial court erred in finding that the alleged fact that in each

of the murders appellant met the victim "in a bar" was a sufficient ground of similarity. (5 RT 53.) Since appellant, like the victims, was in his thirties (5 RT 42-43), there was nothing distinctive about the fact that he "talked, danced and drank" in bars with women his own age. (1 CT 233.) Bars were probably the only places appellant could have met and socialized with women in Bossier City and/or Tampa, where he apparently had no friends or contacts. As defense counsel argued, such conduct was suggestive of no more than "pretty much human nature," rather than "a common scheme or plan." (5 RT 43.)

Second, the supposed similarity that in each case the victim gave appellant a "ride home" (5 RT 53) was not, in fact, present in all three crimes. While the trial court found that factor applied to Ms. Sutton's murder because she had *planned* to drive appellant home before changing her mind (5 RT 53), there is nothing in the record to support that assertion. The only evidence on this point came from Teresa Whiteside, Ms. Sutton's roommate, who testified that Sutton said her intention was to drive appellant to the apartment the two women shared. (12 RT 1392.) In other words, Sutton planned to give appellant a ride to *her* residence, not his.

Third, it is not true, as the prosecution contended (1 CT 234) and the trial court apparently believed (5 RT 53), that in each case appellant took property from the victim. While appellant allegedly took Ms. Cribbs's car and the miscellaneous items in it (13 RT 1509-1510, 1513-1520), and took food, clothes, a purse, and other items belonging to Teresa Whiteside (12 RT 1366-1370, 13 RT 1495-1498), there is no evidence that he took

anything belonging to Ms. Sutton.[23]

Fourth, the supposed fact that in each instance appellant made "intentional efforts to conceal and hide" the crime before "flee[ing]" (5 RT 53) also did not support the trial court's finding that the crimes were substantially similar. Thus, while the prosecution argued that appellant "attempted to clean up the crime scene or conceal evidence" in all three murders (1 CT 234), that is really only true, in any meaningful sense, of Ms. Cribbs's murder. Thus if, as the prosecutor claimed, appellant killed Ms. Sutton according to a preconceived plan, his plan does not seem to have involved any concern for actually concealing the crime, since his alleged actions ensured that: (1) the crime would be almost immediately discovered, since the victim was left dead in the single bedroom she shared with Ms. Whiteside (12 RT 1378, 1402); (2) appellant would be the obvious suspect, since Ms. Whiteside knew he had been with Ms. Sutton the previous night; and (3) appellant's identity would be easy to trace, since he left his pickup truck, registered in his name, parked at the murder scene. (12 RT 1392, 1449.)

As for Ms. Gallagher's murder, which the prosecutor contended appellant had premeditated even before he met her (5 RT 50, 6 RT 204, 20 RT 2719), there is little evidence that, if appellant committed that crime, he took *any* steps to conceal it besides setting fire to the truck containing her body. (11 RT 1059.) Thus, appellant made himself conspicuous the night of that murder by buying rounds of drinks and openly pursuing Ms. Gallagher and other women. (9 RT 754-755, 758, 796-797, 898.) And

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[23] The prosecutor conceded in his closing argument that the property appellant allegedly took from the scene of the Louisiana murder belonged to Ms. Whiteside, not Ms. Sutton. (15 RT 1830.)

appellant made no apparent effort to conceal the fact that he was going off with Ms. Gallagher at the end of the night (9 RT 804-805, 10 RT 901-903), even though he supposedly planned to kill her immediately. Finally, appellant allegedly told Christina Gilmore (Walker) on September 29, 1995, that Ms. Gallagher was "dead" (10 RT 915), which clearly did not advance his purported plan to conceal the murder.

Moreover, the steps appellant supposedly took to conceal evidence and/or "clean up the crime scene" (1 CT 234) in the charged crime were extremely different than what he allegedly did in the uncharged murders. Thus, as defense counsel argued, the evidence that appellant tried to clean up the crime scenes did not "tie" the charged and uncharged murders together. (5 RT 45.) There is a very limited similarity between covering up a murder by setting fire to a truck containing the victim, as in this murder (15 RT 1831), and either putting a homemade "do not disturb" sign on the door to the motel room containing the victim's body, wiping up blood with a towel, and putting the victim in the bathtub and closing the shower curtain, as in the Florida murder (15 RT 1831-1833), or pulling the bed clothes over the victim, cutting the telephone line, and turning up the television, as in the Louisiana murder. (15 RT 1833-1834.)

That appellant "left town" after each murder (1 CT 234) hardly amounts to a consequential similarity between the crimes, particularly since appellant was essentially a transient when he allegedly committed the uncharged murders. But that alleged similarity is particularly inconsequential given the differences in what appellant supposedly did in the charged crime and the uncharged murders. Thus, while appellant allegedly fled *immediately* by car after each of the two uncharged murders, he left Los Angeles by bus some *two days* after allegedly killing Ms.

Gallagher, on a trip he had planned for about a month and about which he had told numerous people. (13 RT 1685, 1688-1690.) The latter actions do not fit the pattern of "immediately [leaving] town after the killing" (1 CT 234) shown in the uncharged murders.

Further, the purported fact that the person or persons who committed the charged and uncharged crimes tried to conceal and/or cover up those crimes, and then fled, did not logically support the necessary inference that, assuming appellant was the perpetrator, he had the same intent each time (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 121), and that his intent was to commit premeditated murder. If appellant killed Ms. Gallagher, he would face a potential murder charge whether the crime was premeditated or not. Accordingly, if appellant did try to conceal that crime and the other killings, and did flee after he committed each of them, his actions only prove that he was aware that he faced a risk of severe punishment if the crimes were detected and he was caught, not that he acted with premeditation when he killed Ms. Gallagher. "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts . . . ." (Evid. Code, § 600.) There is no logical or reasonable basis for inferring that appellant must have premeditated the first of the killings because he tried to avoid being captured and punished afterward. (See *People* v. *Anderson* (1968) 70 Cal.2d 15, 32 [efforts to "cover up" a killing are irrelevant to whether it was premeditated and deliberate, or committed in a state of "explosive" passion]; accord, *People v. Jiminez* (1950) 95 Cal.App.2d 840, 842-843 [post-crime conduct, including flight, is insufficient to prove premeditation].)

Finally, the other fact the trial court found to be a "compelling" similarity between the charged and uncharged murders – that they all

happened over a six-week span – did not make the latter relevant to intent under section 1101. (5 RT 52.) The mere fact that dissimilar crimes occur during the same general time period does not support the inference that the defendant's intent was the same in each instance. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402.)

Moreover, none of the purported similarities urged by the prosecutor but implicitly rejected by the trial court would have established that the uncharged murders were sufficiently similar to the charged one to render them admissible to prove premeditation. First, the purported similarity that in all three cases appellant "sought out" lone women who were "unknown to him," and then socialized with them and tried to gain their trust (1 CT 233), is insignificant, because there is nothing distinctive about those alleged facts. A primary reason men and women go to bars is to meet members of the opposite sex, and it is logical that a man pursuing such a goal would approach women who are on their own, since they are more likely to be interested in companionship, and less likely to be involved in pre-existing relationships. Further, since appellant apparently did not know any women in Bossier City or Tampa in November of 1995, *any* woman with whom he socialized in those cities would have been a stranger. Moreover, it is certainly not distinctive that appellant allegedly tried to gain the trust of the women with whom he socialized; it would be surprising if *any* man approached an unfamiliar woman in a bar without trying to appear trustworthy.

Second, none of the murders actually fit the supposed fact pattern of appellant seeking out lone women who were unknown to him. (1 CT 233.) Neither Ms. Cribbs nor Ms. Sutton was alone when she met appellant; they were both with female friends. (11 RT 1203-1204, 12 RT 1373-1374.) Nor

was Ms. Sutton unknown to appellant when she died; he had known her for approximately a week at that point. (12 RT 1373, 1440.) And the first woman appellant sought out at McRed's Lounge on September 28, 1995, was someone he knew, and who was not alone – the bartender, Ms. Keener. Since the record shows that appellant had supposedly "hit on" Ms. Keener for three and a half weeks before trying unsuccessfully to "kiss[] and hug[]" her on the night he met Ms. Gallagher (9 RT 737-739, 13 RT 1655-1656), it can hardly be said that she was unknown to him. And Ms. Keener obviously was not alone that night, since she was working in a crowded bar where she knew many of the patrons.

Third, the supposedly common fact that all the murders took place in "small enclosed area[s], . . . belonging to the victim" (1 CT 233), really only applied to the charged crime. Thus, Ms. Cribbs may have been *found* dead in a bathtub, but there is no evidence she was killed there. There was blood all over the motel room where she was found, including on the wall in the foyer area (12 RT 1336), and there was no proof Ms. Cribbs was stabbed in the bathtub. Accordingly, there was no basis for the prosecutor's claim that Ms. Cribbs was killed in an enclosed area, unless by that he meant simply inside a room, which is a factor common to many, if not most, killings. Moreover, neither the bathtub nor the room belonged to Ms. Cribbs. Further, Ms. Sutton was apparently killed in the bedroom of her apartment, not in a small enclosed area. (12 RT 1401.) While that room may have been small and enclosed by walls, it was misleading to suggest that it was the equivalent of a bathtub or the cab of a truck.

Fourth, while the prosecutor argued to the jury that all three victims had "reddish hair" (15 RT 1828), only the victims from the uncharged murders appear to have actually had that hair color. (11 RT 1218 [Ms.

Cribbs had "reddish" hair], 12 RT 1371 [Ms. Sutton had "red hair"]; see also 16 RT 2002 [the victim from Mississippi, Linda Price, had "long red hair"].) In contrast, one witness testified that Ms. Gallagher's hair color was "chestnut brown," and the prosecutor eventually stipulated that it was black. (13 RT 1601.)

The uncharged murders not only differed from the supposed pattern the trial court identified and the prosecutor urged, they also differed from the charged crime in highly significant respects. This marked dissimilarity further undercuts the trial court's ruling that the uncharged crimes were admissible to prove premeditation. As this Court has said regarding crimes that are in the same class but which were committed in different manners:

> evidence that a defendant charged with rape had committed rape on another occasion in a manner different from the charged offense may tend to establish that [he] had a propensity to commit rape and, therefore, "harbored criminal sexual intent toward the current complainant," but such evidence is inadmissible under [section 1101] as mere evidence of criminal disposition.

(*People v. Balcom*, *supra*, 7 Cal.4th at p. 423, fn. 2, quoting *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393.)

The basic differences here were that in the uncharged murders the victims were stabbed and the murders occurred indoors, while in the charged crime the victim was strangled and the attack occurred outside in a truck. A further glaring difference was that the victim in the charged crime was set on fire after she was killed; nothing like that occurred in the uncharged murders. These differences between the charged and uncharged crimes should have precluded the trial court from finding that they were sufficiently similar to support *any* inference concerning appellant's mental

state as to the first crime.[24]

b. The charged and uncharged crimes here were far less similar than in other cases where this Court found that uncharged murders were relevant to prove intent

In assessing whether the charged and uncharged murders were sufficiently similar for the uncharged crimes to be relevant and admissible to prove that the charged crime was premeditated, it is helpful to compare the facts of this case with those of cases in which the charged and uncharged crimes did have the requisite degree of similarity. For instance,

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[24] The uncharged murders were clearly not admissible to prove that the charged crime was part of a common plan. Ordinarily, common plan is an ultimate issue only when (1) there is a question whether the charged crime in fact occurred, which clearly was not the case here, or (2) evidence of a common plan is used to prove by inference that appellant committed that crime. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 406.) Although the prosecutor here asserted that the uncharged murders were relevant to prove "common plan and design," "common plan or design," or "common plan" (1 CT 233-234, 236-238; 5 RT 39-40), he obviously meant that the similarities between the charged and uncharged crimes served to prove that the charged murder was premeditated. Thus, the prosecutor claimed that the common plan evidence: (1) showed that the charged crime "was premeditated and murder in the first degree" (1 CT 233); (2) established that appellant "premeditated each murder" (1 CT 235); (3) demonstrated [appellant's] intent or mental state" (*ibid*); and (4) proved that the charged crime was not a "random killing[], not [] a result of passion or anger . . . ." (15 RT 1835.) In any event, since the charged and uncharged murders here were insufficiently similar even to prove intent, they necessarily failed to meet the higher standard required of evidence of uncharged crimes offered to prove the existence of a common plan, let alone the still higher level of similarity required when such evidence is offered to prove identity. (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 402-403 [a "greater degree of similarity is required to prove the existence of a common plan" than to prove intent, and the "greatest degree of similarity is required" for such evidence to be "relevant to prove identity"].)

in *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 349, 379, in which the defendant did not dispute his identity as the killer, "the same gun was used" to commit the uncharged and the charged murders, making it "almost certain[] the same person committed" them all, and in each of the crimes "the victim was shot in the head at close range in a remote hiking area." (*Ibid.*) Given those striking similarities between the crimes, this Court held that the uncharged murders had a strong tendency to prove the material disputed facts of intent, premeditation and deliberation as to the charged murders. (*Id.* at pp. 378-380.)

Similarly, in *People v. Steele*, *supra*, 27 Cal.4th at p. 1244-1245, the uncharged and charged murders were committed in the same unusual manner – the victims were first manually strangled, then subjected to "a cluster of about eight stab wounds in the chest or abdomen;" further, the victims "resembled each other," and in each case the "defendant admitted the killing to the police shortly afterwards, but supplied an explanation." This Court held that the fact that the defendant killed two similar victims in such a "distinctive manner . . . strengthen[ed] the inference that he had a calculated design to kill precisely that way," and was "logically probative of whether the *second killing* was premeditated." (*Id.* at p. 1245, italics added.)

In *People v. Robbins*, *supra*, 45 Cal.3d at pp. 873, 879, the defendant confessed that he "lured [a] six-year-old [boy] onto his motorcycle, sexually molested him," and then strangled him to death, but contended at trial that he did not intend either to sexually molest or kill that victim. This Court upheld the admission of evidence about a prior uncharged incident where the defendant "lured [a] seven-year-old [boy] into a truck, sodomized him, and then strangled him to death" to prove intent, premeditation and

deliberation, because the crimes were substantially similar. (*Id.* at p. 880.)

This case is distinguishable from *Carpenter*, *Steele* and *Robbins* in most important respects. First, in all three of those cases the defendant either admitted the killing or did not contest identity and disputed only the mens rea element for the crimes. Moreover, in this case, not only were the charged and uncharged murders not committed with the same *weapon*, as in *Carpenter*, they were not even committed in the same *manner*, as in all three cases. Ms. Gallagher was not killed with a weapon at all, she was strangled (9 RT 657, 1101), and while both Ms. Cribbs and Ms. Sutton were stabbed, the same knife was not used in both instances. (12 RT 1451-1453 [the knife used to kill Ms. Sutton was apparently taken from her kitchen, and she was killed after Ms. Cribbs].) Further, the charged and uncharged crimes in both *Steele* and *Robbins* were almost identical – in *Steele* both victims suffered "a cluster of about eight stab wounds in the chest or abdomen" (*Steele*, *supra*, 27 Cal.4th at p. 1244), while in *Robbins* both of the victims were young boys who were first "lured" into going off with the defendant, then sodomized and strangled. (*Robbins*, *supra*, 45 Cal.3d at pp. 879-880.) Here, by contrast, the charged crime did not involve either the same method of killing or the same setting as the uncharged crimes – Ms. Gallagher was strangled in a pickup truck, while Ms. Cribbs was stabbed in a motel room and Ms. Sutton was stabbed in her apartment.

In sum, unlike *Carpenter*, *Steele* and *Robbins,* the uncharged murders in this case were insufficiently similar to the charged crime to be relevant to prove intent because the uncharged murders differed in significant respects from the charged crime, and none of the murders actually fit the template that either the trial court found or the prosecution

argued was common to all three.

D. The Trial Court Should Have Excluded the Uncharged Murders Under Section 352

Even assuming arguendo that the uncharged murders were admissible to prove that the charged murder was premeditated, the evidence should still have been excluded under section 352 because its prejudicial impact substantially outweighed its probative value. Even when other crimes evidence is admissible under section 1101 for some proper purpose, the court must exercise its discretion to exclude that evidence under section 352 because "evidence of uncharged offenses 'is so prejudicial that its admission requires extremely careful analysis. [Citations.]'" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404, quoting *People v. Smallwood*, *supra*, 42 Cal.3d at p. 428; *People v. Carter* (2005) 36 Cal.4th 1114, 1150.) Here, it was a clear abuse of discretion to permit the prosecution to present extremely prejudicial evidence of uncharged murders to prove that the charged murder was premeditated since: (1) that element of the crime could have been conclusively established if the prosecution had accepted appellant's offer to stipulate to it (see *Old Chief v. United States*, *supra*, 519 U.S. at pp. 184-185 [the "probative value" of evidence is determined by "comparing evidentiary alternatives"]); and (2) the facts of the charged crime would have permitted the jury to find that the murder was premeditated. (See *People v. Balcom*, *supra*, 7 Cal.4th at p. 423 [when the facts of the charged crimes provide "compelling evidence of [the] defendant's intent," other crimes evidence on that issue is cumulative, and subject to exclusion under section 352].)

The probative value of other crimes evidence must be balanced against four factors: (1) the inflammatory nature of the uncharged conduct;

(2) the possibility of confusion of issues; (3) the remoteness in time of the uncharged offenses; and (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405.) The principal factor in evaluating the probative value of other crimes evidence is whether it has a "strong" tendency to prove the material fact it is offered to prove. (*Id.* at p. 404; *People v. Balcom*, *supra*, 7 Cal.4th at p. 427; see *People v. Gray*, *supra*, 37 Cal.4th at p. 202 [the admissibility of evidence of uncharged offenses "depends on the materiality of the fact to be proved"].)

Under section 352, "uncharged offenses are admissible only if they have *substantial* probative value." (*People v. Thompson*, *supra*, 27 Cal.3d at p. 318, original italics, fn. omitted.) Thus, other crimes evidence must not only be relevant, it must "shed great light" on a disputed issue. (*People v. Nible* (1998) 200 Cal.App.3d 838, 848.) Courts must receive such evidence with extreme caution, and resolve all doubts about its connection to the charged crime in favor of the accused. (*People v. Alcala*, *supra*, 36 Cal.3d 604, 631; *People v. Sam* (1969) 71 Cal.2d 194, 203.) Because such evidence can be so inflammatory, it must sometimes be excluded even when relevant under a theory that does not rely on proving disposition. (*People v. Alcala*, *supra*, 36 Cal.3d at p. 631; *People v. Kipp*, *supra*, 18 Cal.4th at p. 371; *United States v. Vargas* (7th Cir. 1978) 583 F.2d 380, 387, citing *United States v. Dow* (7th Cir. 1972) 457 F.2d 246.) Moreover, such evidence must be excluded if it is merely cumulative to other evidence that could be used to prove the same issue. (*People v. Alcala*, *supra*, 36 Cal.3d at pp. 631-632; *People v. Thompson*, *supra*, 27 Cal.3d at p. 318; *People v. Stanley* (1967) 67 Cal.2d 812, 818-819.) "If there is any doubt, the evidence should be excluded." (*People v. Pitts* (1990) 223 Cal.App.3d 606,

831; accord, *People v. Alcala, supra*, at p. 631.)

Here, at least three of the four relevant factors – the inflammatory nature of the evidence, the possibility that the evidence would confuse the jury concerning the true issues in the case, and the likelihood that admitting the evidence would require undue consumption of time – weighed heavily in favor of exclusion. Because the evidence also lacked any substantial probative value on a disputed material issue, the trial court erred in refusing to exclude it under section 352. (See *People v. Carter*, *supra*, 36 Cal.4th at pp. 1149-1150 [evidence of uncharged murders had "substantial probative value" which outweighed its prejudicial effect]; *People v. Valdez* (2004) 32 Cal.4th 73, 109 [evidence with "minimal" probative value properly excluded under section 352].) Thus, because appellant offered to stipulate that the killing was premeditated, and because there was sufficient evidence upon which the jury could have found that it was premeditated without the evidence of uncharged murders, the evidence was wholly unnecessary to prove premeditation. (*People v. Balcom*, *supra*, 7 Cal.4th at p. 423 [where the trial testimony provides "compelling evidence of defendant's intent, evidence of defendant's uncharged offenses would be merely cumulative on [that] issue"].)

Further, even assuming that the charged and uncharged crimes here *were* sufficiently similar to support the inference that appellant probably harbored the same intent in each instance (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 403), they were only barely so. As shown above, each of those crimes varied from the "pattern" the prosecutor claimed was found in all of them (9 RT 609), and the charged crime was different in many respects from the uncharged crimes. (Sec. C(3), *supra*.) Since the probative value of other crimes evidence stems from the similarity between

those crimes and the charged offenses (*People v. Balcom*, *supra*, 7 Cal.4th at p. 427), and since these crimes were only minimally similar, the highly prejudicial nature of the evidence completely outweighed its probative value. Certainly, the evidence lacked any probative value on the issue of identity, the only truly disputed issue in this case, because the crimes lacked the requisite "signature" quality. (Sec. C(1), *supra*, pp. 43-46; *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 403.)

Moreover, any minimal probative value the evidence might have had was completely dwarfed by the extreme prejudice engendered by its admission. While it is inherently prejudicial to present evidence that the defendant has committed uncharged crimes (*People v. Smallwood*, *supra*, 42 Cal.3d at p. 428; *People v. Thompson*, *supra*, 27 Cal.3d at p. 318), the prejudice caused by this evidence was inordinate, and must have inflamed the jury, because it indicated that appellant is a serial killer. (See *State v. Whitfield* (Mo. 1992) 837 S.W.2d 503, 513 ["serial killer" is a "pejorative name[] associated with a small ghoulish class of homicidal sociopaths;" its use is "designed to inflame the passions of jurors"]; *State v. Hardy* (Iowa 1992) 492 N.W.2d 230, 234 [under Iowa's version of section 352, it was "unfairly prejudic[ial]" to "draw[] a not-so-subtle analogy between the defendant and a famous serial killer"].)

The prejudicial effect of other crimes evidence is heightened when the defendant's uncharged acts did not result in criminal convictions, because that circumstance increases both "the danger" that the jury will punish the defendant for the uncharged offense, and "the likelihood of 'confusing the issues.'" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405; see *People v. Falsetta*, *supra*, 21 Cal.4th at p. 917.) That factor applies to the evidence about Ms. Sutton's murder, particularly because the most

significant witness to testify about that murder, Teresa Whiteside, "f[ought] back tears" through much of her highly emotional testimony. (12 RT 1466.) Thus, her anguished testimony about finding the "very beautiful" Ms. Sutton (12 RT 1371) dead in a pool of blood with "the most horrible agonizing facial features [Whiteside] had ever seen" (12 RT 1402) had to affect the jurors, and must have increased the danger that they would try to punish appellant for committing that murder by convicting him of the charged murder.

Further, while this Court has indicated that the prejudicial impact of evidence of uncharged crimes is minimized when the presentation of that evidence is brief (*People v. Gray*, *supra*, 37 Cal.4th at p. 205 [the challenged testimony "t[ook] up just four pages of transcript"]), that was certainly not the case here. The testimony presented in the prosecution's guilt phase case takes up a total of approximately 860 transcript pages, of which 500 are devoted to the charged murder,[25] and 350 to the uncharged murders.[26] Moreover, the prosecutor devoted much of his opening statement (9 RT 609, 617-623) and closing argument (15 RT 1827-1837, 1857-1860) to a discussion of the uncharged murders. In particular, the prosecutor argued at length that, in combination, the charged and uncharged murders demonstrated "a pattern that tells you exactly what [appellant] was thinking, [and] what his state of mind was" at all times relevant to the charged murder. (15 RT 1828.)

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[25] 9 RT 630-814, 10 RT 825-995, 997-1038, 1046-1130, 13 RT 1576-1581, 1602-1603.

[26] 11 RT 1134-1149, 1159-1176, 1179-1199, 1201-1215, 1218-1261, 12 RT 1270-1298, 1323-1351, 1364-1413, 1415-1445, 1447-1463, 1470-1484, 13 RT 1148-1535, 1556-1558.

One purpose of section 352 is to preclude a "mini trial on a crime with which the defendant has not been charged," and the juror confusion and inordinate consumption of time such mini trials cause. (*People v. Vargas* (2001) 91 Cal.App.4th 506, 544.) Because much of the guilt phase of appellant's trial consisted of not just one, but two separate mini trials at which the prosecutor put on evidence that appellant committed the uncharged murders, and because the prosecutor repeatedly emphasized that evidence in his argument to the jury, it is overwhelmingly likely that the jury was confused or misled about the significance of that evidence. (See *People v. Vargas*, *supra*, at p. 544; *People v. Harris* (1998) 60 Cal.App.4th 727, 738-739 [the "probability of confusing the jury with (uncharged crimes) evidence weighs in favor of exclusion"].)

Thus, even assuming arguendo that the uncharged murders were admissible to prove that the charged murder was premeditated, despite the fact that premeditation was not truly in dispute, it is highly likely that the jury considered the evidence on the disputed issue of identity, even though the charged and uncharged crimes lacked the distinctive similarity required before other crimes evidence could be admissible on that issue. (See Sec. C(1), *supra*, at p. 46; *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 403.) It is particularly likely that the jury mistakenly believed that the evidence was relevant to prove appellant's identity as Ms. Gallagher's killer because the prosecutor said repeatedly during closing argument that the charged and uncharged murders were parts of a pattern of murderous attacks on women. (15 RT 1828, 1836, 1947-1948, 1956.) That argument suggests that the prosecutor himself misunderstood what fact or facts the uncharged murders were admitted, and admissible, to prove, because it is only when uncharged crimes are offered to prove *identity* that they and the charged crime must

exhibit a "distinctive pattern." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403; *People v. Demetrulias* (2006) 39 Cal.4th 1, 15 [uncharged crimes offered to prove intent "need not have . . . the distinctive pattern required to show identity"].) And if the "legally-trained prosecutor" was so confused about what the uncharged murders served to prove that he "was unable to limit" his argument about them to the claim that they proved premeditation, "we can safely infer" that the "lay jurors" were also confused about how they could use that evidence. (*People v. Fletcher* (1996) 13 Cal.4th 451, 471.)

Further, while the jurors were instructed to consider this evidence only on "intent, premeditation, [and] deliberation, . . . and not to show that [appellant] ha[d] a predisposition to commit the crime, not to show that he is a bad person" (9 RT 627-628, 11RT 1157, 16 RT 1782-1783), it is highly unlikely that they were able to follow those instructions. When evidence of similar uncharged offenses is admitted for some limited purpose under section 1101 there is always a concern that the jury will improperly consider it as proof of criminal propensity. (See *People v. Brown* (1993) 17 Cal.App.4th 1389, 1397 [evidence that defendant committed other, similar sexual assaults "presented a clear danger of undue prejudice;" because the uncharged acts involved the same conduct as the charged offense there was a "danger" the jury would use that evidence to draw the impermissible inference that he was criminally disposed toward such conduct]; *People v. Calderon* (1994) 9 Cal.4th 69, 80 [applying same rule].)

In some contexts the risk that jurors will not follow a limiting instruction are so high, and the consequences if they fail to do so are so vital to the defendant, that no instruction will suffice. (See *Bruton v. United States* (1968) 391 U.S. 123, 135; see also *People v. Coleman* (1985) 38

Cal.3d 69, 92 [when evidence admitted for a limited purpose suggests damning inferences that are too obvious, limiting instructions are unavailing].) The "mental gymnastics" the limiting instructions in this case required the jurors to execute – considering the evidence that appellant committed two uncharged murders within six weeks after the charged murder only as proof that he *premeditated* the first crime, and not as proof that he *committed* it – were clearly beyond the powers of any lay juror. (See *United States v. Mayfield* (9th Cir. 1999) 189 F.3d 895, 901, fn. 2; *United States v. Ward* (6th Cir. 1999) 190 F.3d 483, 489-490 [evidence of uncharged crimes, "even when properly admitted, under a properly limiting instruction, asks jurors to engage in mental gymnastics that may well be beyond their abilities and even their willingness"].)[27] Moreover, any possibility that the jurors would be able to execute those mental gymnastics was eliminated when the prosecutor told them in his guilt phase closing argument that appellant murdered Ms. Gallagher as "part of a common scheme or plan" that revealed his "state of mind" and "hatred [] of women . . ." (15 RT 1827-1828, 1835.)

Thus, the trial court abused its discretion in admitting the evidence (*People v. Lewis*, *supra*, 25 Cal.4th 610 at p. 637 [addressing a § 1101 claim]; *People v. Ashmus*, *supra*, 54 Cal.3d at p. 973 [addressing a § 352 claim],) and its admission constituted a manifest injustice. (Cal. Const., art. VI, § 13; Evid. Code, § 353.)

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[27] Further, as discussed in detail in Section E, *infra*, pp. 81-82, those instructions did little, if anything, to mitigate the prejudicial impact of the evidence.

E. The Erroneous Admission of the Uncharged Murders Resulted in a Miscarriage of Justice That Requires Reversal of Appellant's Convictions and Death Sentence

Under state law, reversal of the guilt verdict is required if there is a reasonable probability appellant would have achieved a more favorable result but for the erroneous admission of the evidence of uncharged murders (*People v. Watson* (1956) 46 Cal.2d 818, 836), or if the admission of the evidence gave rise to a miscarriage of justice within the meaning of article VI, section 13, of the California Constitution. (*People v. Green* (1980) 27 Cal.3d 1, 26.) Reversal of appellant's conviction and death judgment is required under either of those standards.

The evidence of uncharged murders was both overwhelmingly prejudicial and the lynchpin of the prosecution's case. Thus, the prosecutor: (1) began his opening statement by saying that the evidence of uncharged homicides would prove that appellant premeditated the charged crime, because it showed that crime to be "part of a plan, a common scheme" to commit premeditated murders (9 RT 609); and (2) began his closing argument by referring back to that assertion in his opening statement, and claiming that "based on the evidence that you heard in this case, those words are absolutely true." (15 RT 1827-1828.) The prosecutor obviously considered the evidence of uncharged murders extremely important to his case since he attributed such significance to it in his remarks to the jury. Given the prosecutor's reliance on that evidence, "[t]here is no reason [this Court] should treat this evidence as any less 'crucial' than the prosecutor – and so presumably the jury – treated it." (*People v. Cruz* (1964) 61 Cal.2d 861, 868; *People v. Sheldon* (1988) 48 Cal.3d 935, 967.) Accordingly, the erroneous admission of the evidence was prejudicial under *Watson*, and

amounted to a miscarriage of justice.

Further, because the primary issue in this case was whether or not appellant committed the charged murder, the admission of the evidence of uncharged murders operated to unfairly undermine the defense case. Thus, the jurors were no doubt less inclined to believe appellant's testimony that he was completely innocent, and that Istvan Kele must have committed the charged crimes, after hearing that appellant allegedly committed uncharged murders which fit perfectly in a "pattern of premeditated murders" with the charged crime. (15 RT 1827-1828.)

Moreover, as set forth above, the uncharged crimes evidence unfairly bolstered the prosecution's entirely circumstantial and relatively weak case. Unlike many murder prosecutions, there was no DNA or fingerprint evidence, or any substantial physical evidence of any kind, linking appellant to the murder. Nor were there any of the other types of evidence commonly found in criminal cases: no witnesses saw appellant commit the charged murder or enter or leave the murder scene; no jailhouse informants claimed that appellant admitted his involvement in the crimes; and no police officer testified that appellant made incriminating admissions. The prosecution's case consisted of little more than the facts that made appellant seem to be a likely suspect: (1) he was with Ms. Gallagher the night before she was found murdered; (2) things belonging to Ms. Gallagher were found in his apartment; (3) he allegedly told someone early the next morning that Ms. Gallagher was dead; and (4) he left town shortly afterward. Because that evidence was merely circumstantial, and because it was so overwhelmingly prejudicial to admit evidence suggesting that appellant committed what his own counsel called a "spree of killings" (5 RT 47), there is a reasonable chance that the erroneous admission of the uncharged murders affected the verdict. (*College*

Hospital Inc. v. Superior Court (1994) 8 Cal.4th 704, 715; *People v. Watson, supra*, 46 Cal.2d at p. 836.)

Hearing about the uncharged murders probably also led the jury to find other evidence in the case incriminating that it would otherwise have found to be at most ambiguous. For example, it was only because the jury had heard that appellant allegedly killed two other women after meeting them in bars within six weeks of the charged crime that the prosecutor could plausibly argue that the alleged facts that appellant "hit on" Ms. Gallagher at McRed's bar and "approached her, [] talked to her, [and] bought her drinks," somehow corroborated the allegation that he murdered her. (15 RT 1849-1851.)

Further, under the state law standard, the presence or absence of a limiting instruction must be considered as part of the entire record in assessing the presence or absence of prejudice. (See, e.g., *People v. Guiton* (1993) 4 Cal.4th 1116, 1130 [assessment of prejudice under state law requires examination of entire record, including jury instructions].) The limiting instructions given below concerning the jury's consideration of the uncharged murders were completely inadequate to ameliorate the prejudice caused by admission of that evidence. This additional factor precludes a finding that admission of the evidence was harmless.

The trial court gave three separate limiting instructions concerning the evidence of uncharged murders, each of which essentially told the jurors not to consider that evidence as proof that appellant had a "predisposition to commit the crime" (9 RT 627-628), or had a "bad character or [] disposition to commit crimes" (11 RT 1157, 14 RT 1782-1783), but only as proof of his "state of mind with respect to intent, premeditation, deliberation." (9 RT 627.) To be effective, and to ameliorate the prejudice engendered by admitting the uncharged murders, those limiting instructions would have had

to make it clear to the jurors "*how* the evidence might tend to show" appellant's state of mind. (*People v. Felix* (1993) 14 Cal.App.4th 997, 1009, italics added.) However, those limiting instructions, like the inadequate instruction given in *Felix*, were of little value because "a proper use of [the uncharged murders] evidence to show [premeditation] tends to elude reason." (*Ibid.*)

As shown above, the alleged fact that appellant subsequently committed two murders that were superficially similar to the charged crime, but which also differed from that crime in highly significant ways – in particular in that the victims of the uncharged crimes were stabbed, not strangled – had little value as evidence that appellant "probably harbored the same intent in each instance." (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 121; Sec. C(3), *supra*.) Further, it is "particularly unrealistic to expect" jurors to be able to follow even properly-crafted instructions that require them to consider other crimes evidence only for limited purposes. (*United States v. Daniels* (D.C. Cir. 1985) 770 F.2d. 1111, 1118; accord, *Krulevitch v. United States* (1945) 336 U.S. 440, 453 (conc. opn. of Jackson, J.).) Accordingly, the limiting instructions given below did not ameliorate the prejudicial impact of the other crimes evidence.

While there could be a case in which the evidence that the defendant had committed a premeditated, first degree murder is so overwhelming that there is no "reasonable chance, more than an abstract possibility," that even the admission of evidence that he committed other murders around the time of the charged crime could affect the verdict (*College Hospital Inc. v. Superior Court*, *supra*, 8 Cal.4th at p. 715), this is not such a case. The evidence here was far from overwhelming, both as to whether appellant actually committed the charged homicide, and, if he did, whether that crime

was a first degree murder. Appellant offered a plausible denial of guilt that was not contradicted by any direct evidence, and, as defense counsel argued, there was insufficient evidence to establish that the charged crime was either a premeditated murder or a felony murder. (15 RT 1923-1926.)

Because the error in this case went to the heart of appellant's defense – that the circumstantial evidence of his guilt was misleading, and that he was in fact innocent – it could not have been harmless. (*People v. Louie* (1984) 158 Cal.App.3d Supp. 28, 45 [instructional error going to the "heart of the defense case" cannot be harmless]; *People v. Cobas* (1970) 12 Cal.App.3d 952, 954-955 [same]; see *Francis v. Franklin* (1985) 471 U.S. 307, 325-326 [an error is not harmless if it relates to defendant's "only defense," and the trial evidence did not "overwhelmingly" disprove the facts underlying that defense].)

The evidence of uncharged murders in this case "served only to prey on the emotions of the jury, to lead them to mistrust [appellant], and to believe more easily that he was the type . . . who would kill . . . without much apparent motive." (*McKinney v. Rees*, *supra*, 993 F.2d at p. 1385.) It is precisely because other crimes evidence is so likely to have that effect on jurors that this Court has said that it is inherently prejudicial and should be admitted only after careful examination and with "extreme caution." (*People v. Alcala*, *supra*, 36 Cal.3d at p. 631.) On this record, it is more than reasonably probable that the result of the proceeding would have been different – that at least one juror would have had a reasonable doubt as to appellant's guilt and would have refused to convict – in the absence of the erroneously admitted evidence. (*People v. Watson, supra*, 46 Cal.2d at p. 836; see also *People v. Rivera* (1985) 41 Cal.3d 388, 393; *People v. Bowers* (2002) 87 Cal.App.4th 722, 736 ["a mistrial [is] a more favorable result for

defendant than conviction" under *Watson* standard].)

Accordingly appellant's convictions and death sentence must be reversed.

F. The Erroneous Admission of the Uncharged Murders Rendered Appellant's Trial Fundamentally Unfair in Violation of the Due Process Clause of the Fourteenth Amendment

In addition to resulting in a miscarriage of justice under state law, the erroneous admission of the evidence of uncharged murders also violated appellant's rights to a fair trial under the due process clause of the Fourteenth Amendment to the United States Constitution.[28] The high court has recognized that the introduction of irrelevant but inflammatory evidence may deprive the defendant of his federal constitutional right to a fair trial. (See

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[28] Defense counsel invoked the federal Constitution at various points in his written and oral opposition to the evidence, arguing that its admission would violate appellant's rights to a "fair trial and due process of law" and a reliable "penalty trial verdict," expressly citing the 5th Amendment, and at least implicitly citing the 6th, 8th and 14th Amendments. (2 CT 411, 441 [arguing that admitting the evidence would "deprive [appellant] of any chance to a fair trial and due process of law, pursuant to the Constitutions of the United States and the State of California"], 451[arguing that admitting the other crimes evidence at the guilt phase would "tarnish the reliability of any penalty phase verdict]; 5 RT 47, 49.) Thus, counsel preserved all of the federal constitutional claims raised herein. Moreover, his trial objections based on sections 352 and 1101 (2 CT 444-454; 65 RT 49) also preserved those claims. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6 [defendant's trial objection under sections 352 and 1101 preserved both a due process claim and an Eighth Amendment reliability claim regarding the admission of evidence of prior cohabitant abuse]; *People v. Partida* (2005) 37 Cal.4th 428, 433-439 [defendant's trial objection under section 352 rendered cognizable on appeal his claim that admission of gang evidence violated his due process rights].)

Duncan v. Henry (1995) 513 U.S. 364, 366; *Estelle v. McGuire* (1991) 502 U.S. 62, 67.) The question is whether the inadmissible evidence "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 180, quoting *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.) The answer requires an "examination of the entire proceedings in [the] case." (*DeChristoforo, supra*, at p. 643; see *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72 [judging challenged instruction in the context of the instructions as a whole and the entire trial record]; *Darden v. Wainwright*, *supra*, 477 U.S. at p. 182 [considering prosecutor's improper argument in the context of defense counsel's argument, the trial court's instructions and the overwhelming evidence of guilt on all charges].) This comprehensive review is necessary because the conclusion that the challenged error rendered the trial so unfair as to violate due process is a finding of reversible constitutional error. If the error so corrupts the trial that it is fundamentally unfair, it cannot be deemed harmless. In this way, proof of the due process violation incorporates an assessment that the error mattered, i.e., that the error likely affected the verdict.

Certainly, "not every trial error or infirmity . . . constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice.'" (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 642, quoting *Lisenba v. California* (1941) 314 U.S. 219, 236.) But this case does not involve run-of-the-mill trial error. The uncharged murders were both exceedingly prejudicial to appellant and absolutely pivotal to the prosecution's otherwise less than robust case. All the factors discussed in Section E, *supra*, that made the error a miscarriage of justice also made it a due process violation. Viewed in the context of the entire trial, the evidence of the uncharged

murders completely tainted appellant's trial and erased any sense of fairness. This showing requires that the entire judgment be reversed. Appellant need not make any further showing of prejudice. However, even assuming arguendo that the federal harmless error test applied to this due process violation, the state cannot show that the error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 24, for all the reasons that establish prejudice under the state harmless error standard.

In *McKinney v. Rees*, *supra*, 993 F.2d at pp. 1381-1382, 1385-1386, the Ninth Circuit held that the erroneous admission of "other crimes evidence violate[s] due process where: (1) the balance of the prosecution's case against the defendant was 'solely circumstantial;' (2) the other crimes evidence . . . was similar to the [crimes] for which he was on trial; (3) the prosecutor relied on the other crimes evidence at several points during the trial; and (4) the other crimes evidence was 'emotionally charged.'" (*Ibid;* see *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 775, rev'd on another ground by *Woodford v. Garceau* (2003) 538 U.S. 202.) As shown above, the uncharged murders evidence constituted irrelevant character evidence. Thus, under *McKinney*, the admission of that evidence violated appellant's Fourteenth Amendment right to due process.

As to the first of the *McKinney* factors, the erroneous admission of the evidence was particularly damaging because the unchallenged prosecution evidence of appellant's guilt was not compelling, and was almost entirely circumstantial. That evidence essentially amounted to the following: (1) appellant was the last person seen with Ms. Gallagher on the night she died (9 RT 699-700, 807-808, 10 RT 907-909); (2) appellant told Christina Walker early the next morning that Ms. Gallagher was dead (10 RT 914-915, 13 RT

1676-1677); (3) Ms. Gallagher's earring was found in appellant's apartment (13 RT 1607-1611); and (4) appellant left Los Angeles a few days after Ms. Gallagher was killed. (13 RT 1683-1686.) There was no direct evidence that appellant killed Ms. Gallagher, and the supposedly incriminating circumstantial evidence was consistent with appellant's exculpatory testimony that Ms. Gallagher left his apartment with Istvan Kele, and that appellant told Ms. Gilmore the next morning that Ms. Gallagher was dead because that was what Mr. Kele had told him. (13 RT 1640-1641, 1644-1645, 1677-1678, 1699.) Because that evidence of guilt was entirely circumstantial, the admission of this highly inflammatory evidence must have been prejudicial.

The second *McKinney* factor – that the uncharged crimes were similar to the charged one – weighs particularly heavily here, and strongly supports the conclusion that the admission of the evidence deprived appellant of a fair trial. Thus, as evidenced by the prosecutor's arguments to the trial court in support of the admission of the evidence, and by the court's ruling admitting that evidence (1 CT 233-234; 5 RT 50, 52-53), the charged and uncharged murders, although insufficiently similar for admission under section 1101, were similar enough that the prosecutor could plausibly but misleadingly tell the jury that the "pattern and [] plan" was exactly the same in each of them. (15 RT 1948.)

As to the third *McKinney* factor, the prosecutor relied on the evidence of uncharged murders both as a significant part of his case-in-chief and as an important focus of his argument to the jury. Thus, the prosecutor argued that the jurors knew that appellant must have killed Ms. Gallagher because the similarity between the charged and uncharged murders showed that appellant had a premeditated plan to carry out a spree of murders of women. (15 RT

1827-1828; see *People v. Quartermain* (1997) 16 Cal.4th 600, 622 [due process violation involved in using defendant's statement was exacerbated by prosecutor's argument that contradictions between that statement and defendant's trial testimony showed him to be a liar, because that argument "struck at the heart of [the] defense"]; *Johnson v. Mississippi* (1988) 486 U.S. 578, 586 [that the "prosecutor repeatedly urged the jury" to consider an invalid prior conviction improperly admitted as aggravating evidence supported finding that the erroneous admission of that statement was prejudicial].) Indeed, the prosecutor began his opening statement by saying that the alleged fact that appellant murdered two other women proved that the charged crime "was not a random isolated killing . . . . [But rather] part of a plan, a common scheme, a pattern of murders that [appellant] committed." (9 RT 609.) And at the outset of his closing argument the prosecutor said that the charged and the uncharged murders were parts of a "plan, a common scheme," the existence of which proved that appellant "killed Sandra Gallagher. . . . in a premeditated, deliberate" fashion. (15 RT 1827-1828.)

As to the fourth *McKinney* factor, the uncharged murders evidence was clearly emotionally charged and inherently inflammatory. Indeed, that evidence was so inflammatory that it must have both impaired the jury's ability to properly assess the relative weakness of the remaining evidence, and unfairly bolstered the prosecution's otherwise weak case. Thus, even if the jurors did not find the evidence sufficient to prove beyond a reasonable doubt that appellant killed Ms. Gallagher, they probably believed he committed at least one of the uncharged murders. And after hearing the prosecutor argue that appellant had a pattern of seeking out and killing women (15 RT 1956), the jury probably felt that the only way to adequately punish him for that pattern of behavior was to convict and sentence him to

death in this case. It is precisely because other crimes evidence so often amounts to "character" or "propensity" evidence that can lead jurors to convict despite a lack of sufficient evidence, either because they decide that the defendant is the "type" to commit such crimes, or because they want to punish him for the other crimes, that such evidence has historically been held inadmissible in criminal trials. (See, e.g., 1 Wigmore, Evidence, *supra*, § 194, pp. 646-647.) Accordingly, the admission of the uncharged murders violated appellant's right to due process under the federal Constitution.

Appellant's convictions and death sentence must therefore be reversed.

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II

THE TRIAL COURT'S ERRONEOUS EXCLUSION FOR CAUSE OF A PROSPECTIVE JUROR REQUIRES REVERSAL OF THE DEATH SENTENCE

Over appellant's objection, the trial court granted the prosecution's challenge for cause against a prospective juror who first stated that he could not "conceive of anything that might cause him to vote" for either death or life without the possibility of parole, but later clarified that it would only be "hard," not "impossible," for him to make that penalty decision. Because the record does not show that the juror's feelings about the death penalty substantially impaired his ability to sit as an impartial juror, his dismissal violated appellant's rights to an impartial jury, a fair capital sentencing hearing, and due process of law under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16, and 17 of the California Constitution. Reversal of appellant's death judgment is required.

A. Factual Background

The prospective jurors in this case filled out jury questionnaires prior to the commencement of voir dire which asked them a series of questions about their "Attitudes Toward Capital Punishment." (See, e.g., 4 CT 735-737.) The prospective jurors were then subjected to voir dire, first by the trial court and then by counsel.

Prospective Juror No. 13 was a 26-year-old single male with one small child who had lived his whole life in California and worked as a hotel concierge. (4 CT 981-982, 989.)[29] Juror No. 13 wrote in his questionnaire

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[29] The prospective juror is identified in the reporter's transcript as (continued...)

that he did not "know what to think about capital punishment," because "a lot" of people had been executed who "did not deserve" it, while "there were others who did." (4 CT 989.) Juror No. 13 did not consider either capital punishment or life in prison without the possibility of parole to be more severe than the other punishment, because "you lose your life either way it goes." (4 CT 989.) He also wrote that he would not automatically vote for either penalty for someone convicted of first degree murder with special circumstances. (4 CT 989.)

In response to the questions about attitudes toward capital punishment, Juror No. 13 wrote that he: (1) would listen to all the facts and circumstances, including those about the appellant and his background, before deciding which penalty to impose; (2) did not know in which type of cases the death penalty should be imposed; (3) did not know whether the death penalty was imposed too often, too seldom, or otherwise; (4) did not belong to any group opposing capital punishment; (5) did not have any religious beliefs related to capital punishment; and 6) would "want to do what is right by law" if selected as a juror. (4 CT 990-991.)

During voir dire, the trial court probed into Juror No. 13's statement that "some people who receive capital punishment [] did not deserve it," and "others that did" deserve it "didn't get it." (8 RT 546.) Juror No. 13 responded that he had grown up "knowing about the few people" that "didn't get a fair chance." (8 RT 546.) When asked about his feelings about the

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[29](...continued)
Juror No. 13 because he was placed in seat 13 in the jury box. (See, e.g., 8 RT 543-544.) His juror identification number was 3156 (4 CT 982, 8 RT 543), and his name was David Mitchell. (4 CT 981B.) He is referred to as Juror No. 13 here to be consistent with the reporter's transcript.

death penalty, Juror No. 13 responded that he did not "know too much about [it and so was] not for it or against it. Well, I'm not for it." (*Ibid.*) When asked whether his "inclination would be against" the death penalty, Juror No. 13 responded: "yeah, against it." (8 RT 546-547.)

The trial court and Juror No. 13 then engaged in the following colloquy, with the court asking the questions:

Q: To the extent that you cannot vote for it [death] unless you feel that the aggravation outweighs the mitigation . . . . [¶] . . . that would be easy for you, wouldn't it?

A. Yes.

Q: Actually it is easy for anybody because there's no choice.

A: Right.

Q: Can you see yourself actually voting for live [*sic*] if the aggravation outweighed the mitigation, it was so substantial compared to the mitigation?

A: I can't.

Q: You can or can't?

A: I can't.

Q. Can you conceive of anything that might cause you to vote for death?

A. No.

Q. Under any circumstances?

A. Not at any [*sic*].

Q. That is a lot stronger that what you felt when you filled this [questionnaire] out.

A. I had time to think about it, to really think about it. . . .

[¶] . . . But to actually have to make that decision, I couldn't do it.

Q. [What if] it is a Jeffrey Dahmer or Richard Ramirez?

A. It would still be hard to make that decision.

Q. It would be hard?

A. Yes.

Q. Would it be impossible, or would it be hard?

A. It would be hard.

Q. . . . Would your vote for life be automatic even with the aggravation outweighing the mitigation?

A. I still couldn't vote for life.

Q. You could not vote for life?

A. No. I mean I just don't feel like I'm in a position to really make a decision on what punishment one should get for their crime. . . . [¶] . . . I couldn't see myself voting for life or the death penalty.

Q. . . . So what would you do? You don't have any other choices.

A. It would be a hard decision to make.

(8 RT 547-549.)

The prosecutor then made a cause challenge and defense counsel submitted the issue. (8 RT 568-569.) The trial court excused Juror No. 13, on the basis that "[h]e wouldn't do either one." (8 RT 569.)

B. The Trial Court Committed Reversible Error In Excusing Prospective Juror No. 13 for Cause, Because His Voir Dire Did Not Establish That His Views About The Death Penalty Would Prevent or Substantially Impair His Ability to Follow the Law, Obey His Oath, or Impose a Death Sentence

1. Applicable Legal Standards

The Sixth and Fourteenth Amendments guarantee a criminal defendant a fair trial by a panel of impartial jurors. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149-150; *Irvin v. Dowd* (1961) 366 U.S. 717, 722.) In capital cases, that right applies to both the guilt and penalty determinations. (*Morgan v. Illinois* (1992) 504 U.S. 719, 727-728; *Turner v. Murray* (1986) 476 U.S. 28, 36, fn. 9.) This right also is protected by the California Constitution. (See Cal. Const., art. I, § 16.)

The United States Supreme Court has enacted a process of "death qualification" for capital cases. (See *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522; *Wainwright v. Witt* (1985) 469 U.S. 412, 421.) Even with a death qualification process, the Supreme Court has held that prospective jurors do not lack impartiality, and thus may not be excused for cause, "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 520-523, fns. omitted.) Such an exclusion violates the defendant's rights to due process and an impartial jury "and subjects the defendant to trial by a jury 'uncommonly willing to condemn a man to die.'" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1285, quoting *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 521.)

Rather, under the federal Constitution, "[a] juror may not be challenged for cause based on his views about capital punishment unless

those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." (*Wainwright v. Witt*, *supra,* 469 U.S. at 420, quoting *Adams v. Texas* (1980) 448 U.S. 38, 45.) The focus on a prospective juror's ability to honor his or her oath as a juror is important:

> [T]hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

(*Lockhart v. McCree* (1986) 476 U.S. 162, 176; see also *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 514, fn. 7 [recognizing that a juror with conscientious scruples against capital punishment "could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a jury and to obey the law of the State."].) Thus, all the State may demand is "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) The same standard is applicable under the California Constitution. (See, e.g., *People v. Guzman* (1988) 45 Cal.3d. 915, 955; *People v. Ghent* (1987) 43 Cal.3d 739, 767.)

In applying the *Adams-Witt* standard, an appellate court determines whether the trial court's decision to exclude a prospective juror is supported by substantial evidence. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962; see also *Wainwright v. Witt*, *supra*, 469 U.S. at p. 433 [ruling that the question is whether the trial court's finding that the substantial impairment standard was met is fairly supported by the record considered as a whole].) As this Court has explained:

> On appeal, we will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's

> determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous.

(*People v. Heard* (2003) 31 Cal.4th 946, 958, quoting *People v. Cunningham* (2001) 25 Cal.4th 926, 975, citations omitted.) The burden of proof in challenging a juror for anti-death penalty views rests with the prosecution. "As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." (*Witt*, *supra*, 469 U.S. at p. 423; accord, *Morgan v. Illinois*, *supra*, 504 U.S. at p. 733.) The exclusion of even a single prospective juror in violation of *Witherspoon* and *Witt* requires automatic reversal of a death sentence. (*Gray v. Mississippi* (1987) 481 U.S. 648, 668.)

2. Juror No. 13 Was Qualified for Jury Service

The prosecutor failed to carry his burden to show that Juror No. 13 was not qualified to serve on appellant's jury. (See *Gray v. Mississippi*, *supra*, 481 U.S. at p. 652, fn. 3 ["A motion to excuse a venire member for cause of course must be supported by specified causes or reasons that demonstrate that, as a matter of law, the venire member is not qualified to serve."].) Juror No. 13's questionnaire responses, and his responses during the trial court's voir dire,[30] demonstrated that although he would understandably find it "hard" to sentence appellant to death *or* life (8 RT 548), he was impartial with regard to capital punishment. Thus, while Juror No. 13 did say that he could not (1) "see" himself voting for life or (2) "conceive of anything" that might lead him to vote for death (8 RT 547), his

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[30] Juror No. 13 was not questioned by either the prosecutor or defense counsel.

subsequent responses that he would find it "hard," but not "impossible," to vote for death rehabilitated him as a death-qualified juror. (See *Johnson v. State* (Ala. 2000) 820 So.2d 842, 855 ["Jurors who give responses that would support a challenge for cause may be rehabilitated by subsequent questioning by the prosecutor or the court."]; cf. *People v. Roldan* (2005) 35 Cal.4th 646, 699 [juror who said several times that she "did not know" if she would automatically vote one way, but finally said she would "probably never" vote for death, was properly excused].)

Juror No. 13's questionnaire responses indicated that he: (1) "didn't know what to think" about capital punishment; (2) did not consider the death penalty worse than life imprisonment without the possibility of parole; (3) would not automatically vote for either penalty; (4) would listen to all the facts and circumstance before deciding which penalty to impose; (5) did not know in what types of cases the death penalty should be imposed, or how it was being used currently; and 6) would "do what is right by the law" if selected to serve. (4 CT 989-991.) Those responses indicated that Juror No. 13 was uninformed about the death penalty but willing to follow the law, not that he held fixed views on the appropriateness of either penalty that would "prevent or substantially impair" him from performing his duties as a juror in the case. (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.)

The same is true of Juror No. 13's voir dire responses that he: (1) was "inclin[ed] . . . against" the death penalty; (2) would find it "hard," but not "impossible," to return a death sentence and/or to make the penalty decision; (3) "couldn't see [himself] voting for life or the death penalty;" and (4) "could not conceive of anything that might cause [him] to vote for death." (8 RT 547-550.) Those responses, when considered in combination with all of Juror No. 13's other questionnaire and voir dire responses,

indicated that he was reluctant to make a decision on what punishment to impose (8 RT 549), and did not know "much about" the death penalty (4 CT 989; 8 RT 546), not that he rejected the possibility of imposing a death sentence.

Prospective jurors are not required to approve of the death penalty to be qualified to serve in a capital trial; "those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in a capital case so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree*, *supra*, 476 U.S. at p. 176.) Juror No. 13's responses that he could not see himself voting for either penalty, and "could not conceive of anything that might cause" him to vote for death, were compatible with a willingness to "consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) Juror No. 13 never said explicitly that he could not or would not impose a death sentence, and he cannot reasonably be understood to have said so implicitly based on his voir dire responses.

Thus, Juror No. 13 wrote in his questionnaire responses that he did not "know what to think about capital punishment," had no fixed views that would lead him to "always vote" for either penalty, and "just want[ed] to do what [was] right by law" (4 CT 989-991), and responded in voir dire that he did not know much about the death penalty or feel that he was in a position to decide what punishment to impose. (8 RT 546, 549.) Given those responses, and the fact that Juror No. 13 had not heard any evidence about the charged crime or about appellant, and had not been instructed on the law governing the penalty determination, it was perfectly reasonable for him to say that he "couldn't see" himself voting for either penalty or "conceive of

anything" that might lead him to vote for death. Those were simply different ways of saying what he had already said: that he was not "in the position" to make a meaningful decision on penalty because he did not have enough information.

Interpreting Juror No. 13's responses as admissions that he lacked knowledge and/or expertise about capital sentencing, rather than as assertions that he could or would not follow the law, is consistent with the import of his responses that: (1) it would be "hard," but not "impossible," to choose between life and death (8 RT 548, 560); (2) he did not have views on the death penalty that would lead him to automatically vote for either penalty; and (3) he "want[ed] to do what is right by law." (4 CT 989-991.) Thus, while Juror No. 13 responded "no" when asked a vague question about whether he could "conceive of anything that might cause [him] to vote for death" (8 RT 547), when he was asked directly if he would find it "impossible" to vote for the death penalty he said he would not. (8 RT 548.) And although Juror No. 13 was never asked directly whether his feelings about the death penalty would prevent him from following the law, his questionnaire responses showed unequivocally that they would not have done so. (4 CT 989-991.)

In sum, while the trial court found that Juror No. 13 was subject to exclusion for cause because he indicated that "wouldn't do either one" [vote for either life or death] (8 RT 569), the true import of his questionnaire and voir dire responses was that he did not have enough information to vote for either penalty, would find it hard to make the penalty decision, but would try to do "what [was] right by law." (4 CT 990-991.) Thus, Juror No. 13 was qualified to serve as an impartial juror.

3. Juror No. 13 Did Not Meet the *Adams-Witt* Substantial Impairment Standard

The trial court dismissed Juror No. 13 based on a single purported fact – that he "wouldn't do either one [vote for either penalty]." (8 RT 568-569.) This finding is inadequate under *Adams* and *Witt*, since the record does not fairly support the court's conclusion that Juror No. 13 would not have been able or willing to vote for either penalty. Based on Juror No. 13's entire voir dire, there was insufficient evidence that his ability to serve as an impartial juror was substantially impaired.

The trial court misconstrued the voir dire testimony in finding that Juror No. 13 had indicated that he "wouldn't" impose either penalty. (8 RT 569.) Juror No. 13 did not say he would not make a sentencing decision. Rather, he stated that (1) he could not "see" himself voting for life (8 RT 547) or "conceive of anything that might cause him to" (*ibid.*), and (2) it would be "hard" to make the penalty decision, and he "d[idn't] want to" participate. (8 RT 547-549.) Because the trial court erroneously attributed to Juror No. 13 a position he never took, the court's implicit finding that the juror's views on the death penalty rendered him subject to excusal for cause is not supported by substantial evidence.

Moreover, the trial court erroneously focused solely on Juror No. 13's expressions of reluctance to participate in the penalty determination, and did not assess his qualifications on the basis of his voir dire "as a whole." (See *Witt*, *supra*, 469 U.S. at p. 433.) In reviewing Juror No. 13's exclusion, this Court must consider the entire voir dire, not merely isolated answers. (*Id.* at pp. 433-435; see *Darden v. Wainwright* (1986) 477 U.S. 168, 178 [evaluating voir dire in its entirety to decide *Witherspoon-Witt* claim]; *People v. Carpenter* (1997) 15 Cal.4th 312, 358 [same]; *People v. Cox* (1991) 53

Cal.3d 618, 647-648 [evaluating voir dire in its entirety to decide *Witherspoon/Witt* claim and criticizing defendant's attempts to use excerpts of voir dire and take particular answers out of context].) As this Court instructed long ago: "[I]n our probing of the juror's state of mind, we cannot fasten our attention upon a particular word or phrase to the exclusion of the entire context of the examination and the full setting in which it was conducted." (*People v. Varnum* (1969) 70 Cal.2d 480, 493.) The same admonition is relevant to the trial court's assessment of juror impartiality.

Considered as a whole, Juror No. 13's voir dire indicated that he was reluctant to participate in the penalty determination because it would be "hard" (8 RT 548), not because he had fixed views on the death penalty. (4 CT 989 [the juror "didn't know what to think about" the death penalty, and had no views that would always lead him to vote one way]; 8 RT 546, 549 [after hearing and thinking more about it since filling out his questionnaire, he still did not "know too much about" the death penalty or feel "in the position to really make" the penalty decision].) Because the trial court excluded Juror No. 13 on the basis of an isolated statement rather than his answers as a whole, its decision is not fairly supported by the record.[31]

Furthermore, the trial court did not demonstrate the required "special care and clarity in conducting voir dire in death penalty trials." (*People v. Heard*, *supra*, 31 Cal.4th at p. 967.) Thus, the trial court did not (1) ask Juror No. 13 whether he could follow the juror's oath and the court's instructions,

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[31] A trial court's determinations about a prospective juror's "demeanor and credibility . . . are peculiarly within a trial judge's province" and thus "are entitled to deference even on direct review." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 428.) That rule does not apply in this the case, because the trial court made no findings about Juror No. 13's credibility.

or (2) offer him any additional information concerning the basic law governing the penalty determination. If the court had told Juror No. 13 that he was required to put aside his personal feelings and follow the law in making the penalty decision, and had asked whether he could follow that requirement, it would be clear whether his ability to serve as a juror was, in fact, substantially impaired. However, those questions were not asked. Thus, deference cannot be accorded to the trial court's judgment about Juror No. 13's impartiality because the court failed to conduct an adequate inquiry using the proper legal standard. (*People v. Avila*, *supra*, 38 Cal.4th at p. 529; *People v. Stewart* (2004) 33 Cal.4th 425, 446-447; compare *Adams v. Texas*, *supra*, 448 U.S. at p. 49 [granting relief where "the touchstone of the inquiry . . . was not whether putative jurors could and would follow their instructions and answer the posited questions in the affirmative if they honestly believed the evidence warranted it beyond a reasonable doubt"].)

The entire record of Juror No. 13's voir dire shows that he would and could have voted for either penalty, although it might have been "hard." Because the trial court never asked the correct questions, it failed to develop the facts necessary to meet the substantial-impairment standard under *Adams* and *Witt*. Thus, just as a prospective juror's views about psychological factors were inadequate to support his exclusion in *People v. Heard*, *supra*, 31 Cal.4th at pp. 965-968, the record fails to establish that Juror No. 13's disinclination to decide which penalty to impose would have substantially impaired his ability "to follow the law or abide by [his] oath[]." (*Adams v. Texas*, *supra*, 448 U.S. at pp. 48.)

When Juror No. 13's responses that he "could not conceive of anything" that would lead him to vote for death or "see himself" voting for either penalty are read in the context of the entire record of his voir dire, they

establish only that he would have found it "hard" to determine appellant's sentence. However, nothing in the United States Supreme Court's jurisprudence suggests that only prospective jurors who would find it easy to condemn another human being to death or sentence him to life in prison without the possibility of parole are sufficiently impartial to serve on a capital jury. On the contrary, the United States Supreme Court has held that a prospective juror's reluctance to sit in judgment in a capital case is *not* an adequate ground for excluding her for cause. In *Witherspoon*, the Court held that it was error to exclude a prospective juror who repeatedly stated that "she would not 'like to be responsible for . . . deciding somebody should be put to death.'" (*Witherspoon*, *supra*, 391 U.S. at p. 515.) Such reluctance is normal: "'[e]very right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow-man.'" (*Id.* at p. 515, fn. 8, quoting *Smith v. State* (1877) 55 Miss. 410, 413-414.)

This case is distinguishable from other, superficially similar cases in which this Court upheld the exclusion of jurors who indicated that they would find it "hard" to vote for death. Thus, in *People v. Pinholster* (1992) 1 Cal.4th 865, 916-917, the excluded juror said that he would: (1) have a "'hard time' imposing [the death penalty] in a case involving a burglar who stabbed an adult victim;'" and (2) "'find it very difficult to find a defendant *guilty* if the penalty would be death' in a case" involving such facts. (Italics added.) And in *People v. Roldan*, *supra*, 35 Cal.4th at p. 697, which relies on *Pinholster*, the excluded juror said first that she did not "know" whether she would "automatically vote one way or the other," but, when pressed by the trial court, said she would "probably never" vote for death.

Those cases involve far stronger evidence of impairment than this one. The responses of the juror in *Pinholster* showed that he was

substantially impaired because he (1) would have had a "hard time" voting for death in a case like the one at bar, which this Court called an "unequivocal[] state[ment]" that he could not follow the law, and (2) "could not [have] return[ed] a guilt verdict" in such a case, which amounted to a declaration that he also could not follow the law at the guilt phase. (*Pinholster*, *supra*, 1 Cal.4th. at p. 917.) Juror No. 13 did not make any such statement that he could not follow the law; he simply said it would be hard for him to serve as a penalty phase juror. As for the prospective juror in *Roldan*, she did not merely say that she would find it hard to vote for death; she said she would probably never vote that way. That is also a far more unequivocal declaration of impairment than anything Juror No. 13 said.

The relevant question here was whether Juror No. 13 could perform his duties as a juror in accordance with the law notwithstanding his reluctance to serve. (*Witt*, *supra*, 469 U.S. at p. 424.) Even a prospective juror who is opposed to capital punishment – and thus potentially much more biased than Juror No. 13 – may be capable of subordinating her sense of conscience to her legal oath. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 658, quoting *Lockhart v. McCree*, *supra*, 476 U.S. at p. 176 ["those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law."]; *People v. Kaurish* (1990) 52 Cal.3d 648, 699 ["A prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law."].) The record in this case fails to demonstrate that Juror No. 13's reluctance to serve as a penalty juror would have prevented or substantially impaired his ability to consider and vote for a life or a death sentence.

In the end, Juror No. 13 was excluded from jury service because he

said he "couldn't see himself voting for life or the death penalty" because it would be "hard." (8 RT 549.) However, the right to a fair trial by an impartial jury in a capital case does not countenance excluding jurors whose feelings make them reluctant to become involved in the capital sentencing process. To exclude all prospective jurors for whom voting for a death sentence would pose a moral or psychological dilemma would produce a "hanging jury," i.e., one "uncommonly willing to condemn a man to die," something the Sixth and Fourteenth Amendments prohibit. (*Witherspoon*, *supra*, 391 U.S. at p. 521; see also, *Adams*, *supra*, 448 U.S. at p. 44; *Witt*, *supra*, 469 U.S. at p. 418.) In this case, Juror No. 13 was not "unable or unwilling to impose the death penalty" (*People v. Holt* (1997) 15 Cal.4th 619, 652), because his responses that it would be "hard" to decide what penalty to impose, and that he "couldn't see" himself voting for either penalty, did not amount to substantial evidence that he was too substantially impaired to sit as an impartial juror. Juror No. 13's exclusion violated *Witherspoon, Adams* and *Witt*, and requires reversal of appellant's death sentence.

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III

THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY THAT IT COULD INFER APPELLANT'S CONSCIOUSNESS OF GUILT AS TO THE CHARGED CRIMES BASED ON HIS FLIGHT FROM THE POLICE AFTER BOTH THE CHARGED CRIMES AND TWO UNCHARGED MURDERS, IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS, EQUAL PROTECTION, AND FAIR AND RELIABLE DETERMINATIONS ON GUILT AND PENALTY

As previously stated, appellant (1) allegedly committed three uncharged murders after he left Los Angeles in September 1995, and (2) was arrested in Kentucky on November 13, 1995, while driving a car that belonged to a victim from of one of those murders, Tina Marie Cribbs. (See Statement of Facts, *supra*, at pp. 8-12.) At trial, the prosecution requested (7 CT 1597), and the trial court gave (14 RT 1784), CALJIC No. 2.52, which permitted the jury to infer appellant's consciousness of guilt of the charged crime based on his 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 light of all the other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

(7 CT 1579; 14 RT 1784.)[32] In his guilt phase closing argument, the

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[32] The instruction erroneously referred to flight after being "accused of a crime" (7 CT 1579; 14 RT 1784), although there was no evidence to support this part of the instruction. The trial court had a sua sponte duty to delete that irrelevant reference. (Cf. *People v. Lang* (1989) 49 Cal.3d 991, 1025-1026 [instruction on willfully false testimony under CALJIC No.

(continued...)

prosecutor told the jurors that, under CALJIC No. 2.52, they could consider the evidence that appellant fled after each of the charged and uncharged crimes in deciding whether he committed the charged crimes. (15 RT 1859-1861.)

Giving CALJIC No. 2.52 is usually error, because it is an unnecessary and argumentative instruction which permits the jury to draw irrational inferences of guilt against the defendant. The provision of that instruction was particularly improper and prejudicial in this case because it permitted the jury to infer that appellant was conscious of his guilt of the charged crimes based on alleged circumstances that did not reasonably support such an inference – that he fled from the police six weeks after the charged crimes, and immediately after committing two uncharged murders.

This instructional error deprived appellant of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstance and penalty. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.) Accordingly, reversal of the murder and arson convictions, the prior-murder-conviction special circumstance finding, and the death judgment is required.[33]

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[32](...continued)
2.21 was appropriate where supported by sufficient evidence].)

[33] Although appellant's trial counsel did not object to the flight instruction, the claimed error is cognizable on appeal. Section 1127 and case law mandate that the trial court instruct on flight when it believes the evidence warrants such an instruction, and this Court has held that under these circumstances a claim of error is preserved even in the absence of an objection. (See *People v. Bradford* (1997) 14 Cal.4th 1005, 1055; *People v. Visciotti* (1992) 2 Cal.4th 1, 60.) Moreover, instructional errors are reviewable even without objection if they affect a defendant's substantive
(continued...)

A. It Is Error to Give CALJIC No. 2.52 Because It Is Unnecessary and Argumentative, and Permits the Jury to Draw Irrational Permissive Inferences of Guilt

It is almost always error to give CALJIC No. 2.52 because it: (1) is unnecessary, since it duplicates the standard circumstantial evidence instructions; (2) is unfairly partisan and argumentative, since it highlights the prosecution's version of the facts; and (3) permits the jury to draw irrational inferences of guilt, i.e., that because the defendant fled after committing a homicide, he must have premeditated that killing.

1. The Instruction Is Unnecessary Because It Improperly Duplicates the Circumstantial Evidence Instructions

CALJIC No. 2.52 is unnecessary because it duplicates the standard circumstantial evidence instructions. This Court has held that trial courts should not give specific instructions relating to the consideration of evidence that simply reiterate a general principle upon which the jury already has been instructed. (See *People v. Lewis* (2001) 26 Cal.4th 334, 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 454-455.) In this case, the trial court instructed the jury on circumstantial evidence with the standard CALJIC Nos. 2.00 and 2.01. (7 CT 1574-1575; 14 RT 1772-1773.) These instructions informed the jury that it could draw inferences from the circumstantial evidence, i.e., that it could infer facts tending to show appellant's guilt – including his state of

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[33](...continued)
rights. (§§ 1259 & 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.) Merely acceding to an erroneous instruction does not constitute invited error; nor must a defendant request modification or amplification when the error consists of a breach of the trial court's fundamental instructional duty. (*People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.)

mind – from the circumstances of the alleged crimes. There was no need to repeat that general principle in the guise of permissive inferences of consciousness of guilt, particularly since the trial court did not similarly instruct the jury on permissive inferences it could draw as to reasonable doubt about guilt. That 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 [state rule that defendant must reveal his alibi defense without providing discovery of prosecution's rebuttal witnesses unfairly advantaged prosecution in violation of due process]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [arbitrary preference to particular litigants violates equal protection].)

2. The Instruction Is Unfairly Partisan and Argumentative

CALJIC No. 2.52 is not just unnecessary, it is also impermissibly argumentative. The trial court must refuse to deliver argumentative instructions (*People v. Sanders* (1995) 11 Cal.4th 475, 560), because 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.)

An argumentative instruction is one that "'invite[s] the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) Even if 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 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 408, 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.

(*Id.* at p. 437, fn. 5.) CALJIC No. 2.52, like the instruction at issue in *Mincey*, tells the jury that "[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 (as showing consciousness of guilt in this case and to support the conclusion that the murder was unpremeditated in *Mincey*). Because this Court found that the instruction in *Mincey* was argumentative (*id.* at p. 437) it should hold that CALJIC No. 2.52 is impermissibly argumentative as well.

In *People v. Nakahara* (2003) 30 Cal.4th 705, 713, this Court rejected a challenge to consciousness-of-guilt instructions based on analogy to *People v. Mincey*, *supra*, 2 Cal.4th, 408, on the basis 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, quoting *People v. Hatchett* (1944) 63 Cal.App.2d 144, 158; 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 instructions given in this case also violated due process by lessening the prosecution's burden of proof. (*In re Winship* (1970) 397 U.S. 358, 364.)

To insure fairness and equal treatment, this Court should reconsider the cases that have found that California's consciousness-of-guilt instructions are not 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 at p. 713; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 123 [CALJIC No. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"]) and a defense instruction that was held to be argumentative because it "improperly implie[d] certain conclusions from specified evidence." (*People v. Wright*, *supra*, 45 Cal.3d at p. 1137.)

The alternate rationale this Court employed in *People v. Kelly* (1992) 1 Cal.4th. 495, 531-532, and several subsequent cases (see, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 142), is equally flawed. In *Kelly*, the Court focused on the allegedly protective nature of consciousness-of-guilt instructions, noting that they tell the jury that the consciousness-of-guilt evidence is not sufficient by itself to prove guilt. From this fact, the *Kelly* Court concluded: "If the court tells the jury that certain evidence is not alone

sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence." (*People v. Kelly*, *supra*, at p. 532.)

More recently, this Court abandoned the *Kelly* rationale when it held that the erroneous failure to give a consciousness-of-guilt instruction was harmless because the instruction "would have benefitted the prosecution, not the defense." (*People v. Seaton* (2001) 26 Cal.4th, 598, 673.) However, the allegedly protective aspect of consciousness-of-guilt instructions is weak at best, and often entirely illusory. The instructions do not specify what else is required before the jury can find that guilt has been established beyond a reasonable doubt. Thus, they permit the jury to seize upon one isolated piece of evidence, perhaps nothing more than evidence establishing the only undisputed element of the crime, and use that *in combination* with consciousness-of-guilt evidence to conclude that the defendant is guilty.

The courts of at least nine states have held that instructions which tell the jury it may infer consciousness of guilt from evidence of flight should not be given because they unfairly highlight isolated evidence. (*Haddan v. State* (Wyo. 2002) 42 P.3d 495, 508; *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].)[34]

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:

> 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.)

The argumentative instruction invades the province of the jury by

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[34] At least one other state court has also held that the significance of flight should be addressed only in argument and not in jury instructions. (See, *State v. Stilling* (Or. 1979) 590 P.2d 1223, 1230.)

focusing the jury's attention on evidence favorable to the prosecution, places the trial court's imprimatur on the prosecution's theory of the case, and lessens the prosecution's burden of proof. Giving that instruction therefore violates a defendant's due process right to a fair trial and his right to equal protection of the laws (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15), his right to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

3. The Instruction Permits the Jury to Draw Irrational Permissive Inferences of Guilt

CALJIC No. 2.52 suffers from the additional constitutional defect that it embodies improper permissive inferences – i.e., it permits the jury to infer one fact, the defendant's consciousness of guilt, from another set of facts, his or her acts that supposedly constituted flight. (See *People v. Ashmus* (1991) 54 Cal.3d, 932, 977.) A permissive inference instruction can intrude improperly upon the 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 may also 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 the need to consider all the 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. of Rymer, J.) ["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, but rather one that is "more likely than not." (*Ulster County Court 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 Court v. Allen*, *supra*, at pp. 157, 162-163.)

Second, as in this case, while consciousness-of-guilt evidence in a murder case may bear on the 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 p. 32.) As this Court explained,

> evidence of defendant's cleaning up and false stories . . . is highly probative of whether defendant committed the crime, but it does not bear upon the state of the defendant's mind at the time of the commission of the crime.

(*Id.* at p. 33.)[35] The defendant's actions after committing a crime, upon which the consciousness-of-guilt inferences embodied in CALJIC No. 2.52 are based, simply are not probative of whether, assuming the defendant committed the charged crime, he or she harbored the mental state required for that crime. There is no rational connection – much less a link making the inferred fact more likely than not – between a defendant's flight after committing a murder and the conclusion that he or she committed the charged killing with premeditation and deliberation.

This Court has previously rejected the claim that 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]; *People v. Benavides* (2005) 35 Cal.4th 69, 100 [CALJIC No. 2.03].) However, appellant respectfully asks this Court to reconsider and overrule these holdings and to hold that delivery of CALJIC 2.52 is reversible constitutional error.

The foundation for those rulings is the opinion in *People v. Crandell* (1988) 46 Cal.3d 833, which noted that the consciousness-of-guilt instructions do not specifically mention mental state and concluded that:

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[35] 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, fn. omitted.)

> A reasonable juror would understand "consciousness of guilt" to mean 'consciousness of some wrongdoing" rather than "consciousness of having committed the specific offense charged."

(*Id.* at p. 871.) However, the *Crandell* analysis is mistaken for at least three reasons.

First, the instructions do not speak of "consciousness of some wrongdoing" but of "consciousness of guilt," and *Crandell* does not explain why the jury would interpret the instructions to mean something they do not say. Elsewhere in the standard instructions given to the jury the term "guilt" is used to mean "guilt of the crimes charged." (See, e.g., 7 CT 1580 [CALJIC No. 2.90, stating that the defendant is entitled to a verdict of not guilty "in case of a reasonable doubt whether his [or] her guilt is satisfactorily shown."].) It would be a violation of due process if the jury could reasonably interpret that instruction to mean that a defendant is entitled to a verdict of not guilty only if the jury had a reasonable doubt as to whether his "commission of some wrongdoing" had been satisfactorily shown. (*In re Winship*, *supra*, 397 U.S. at p. 364; see *Jackson v. Virginia* (1979) 443 U.S. 307, 323-324.)

Second, although the consciousness-of-guilt instructions do not specifically mention the defendant's mental state, they likewise do not specifically exclude it from the purview of permitted inferences, or otherwise hint that there are any limits on the jury's use of the evidence. On the contrary, those instructions suggest that the scope of the permitted inferences is very broad. They expressly advise the jury that the "weight and significance" of the consciousness-of-guilt evidence "if any, are matters for

your" determination.[36]

Third, this Court has itself drawn the very inference that *Crandell* asserts no reasonable juror would draw. In *People v. Hayes* (1990) 52 Cal.3d 577, this Court reviewed the evidence of the defendant's mental state at the time of the killing, and expressly relied on consciousness-of-guilt evidence, among other facts, to find an intent to rob. (*Id.* at p. 608.)[37] Since this Court has considered consciousness-of-guilt evidence to find substantial evidence that a defendant killed with the intent to rob, it should acknowledge that lay jurors might also rely on such evidence in drawing conclusions about a defendant's mental state.

Because CALJIC No. 2.52 permits the jury to draw irrational

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[36] In a different context, this Court has repeatedly held that an instruction referring only to "guilt" will be understood by the jury as applying to intent or mental state as well. It has ruled that a trial court need not deliver CALJIC No. 2.02, which deals specifically with the use of circumstantial evidence to prove intent or mental state, if the court has also delivered CALJIC No. 2.01, the allegedly "more inclusive" instruction, which deals with the use of circumstantial evidence to prove guilt and does not mention intent, mental state, or any similar term. (*People v. Marshall* (1996) 13 Cal.4th 799, 849; *People v. Bloyd* (1987) 43 Cal.3d 333, 352.)

[37] In *Hayes*, this Court wrote:

> There was also substantial evidence, apart from James's testimony, that defendant killed Patel *with the intent to rob him* and then proceeded to ransack the motel's office and the manager's living quarters. *Defendant demonstrated consciousness of guilt by fleeing the area and giving a false statement when arrested*, the knife that killed Patel was found in the manager's living quarters, defendant was seen carrying a box from the office to James' car, and four days later defendant committed similar crimes against James Cross.

(*People v. Hayes*, *supra*, 52 Cal.3d at p. 608, italics added.)

inferences of guilt, its provision undermines the reasonable doubt requirement and denies a defendant a fair trial and due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15.) The instruction also violates a defendant's right to have a properly instructed jury find that all the elements of all the charged crimes had been proven beyond a reasonable doubt (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, violates his or her right to a fair and reliable capital trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17.)

B. The Trial Court Erred in Giving CALJIC No. 2.52 Because It Allowed the Jury to Draw the Irrational Inference That Appellant Was Guilty of First Degree Murder and Arson Because He Fled After Committing Uncharged Murders Six Weeks Later

Even assuming arguendo that a consciousness of guilt instruction based on flight under CALJIC No. 2.52 is generally permissible, it was not constitutional under the facts of this case. The prosecution charged that appellant committed the first degree murder of Sandra Gallagher (under both a felony-murder theory and a premeditation theory) and set the arson fire to cover up the crime. At trial, appellant denied committing the crimes. (13 RT 1654-1655.) To prove the charges, the prosecution relied on CALJIC No. 2.52. The instruction was based explicitly not only on the evidence that appellant left Los Angeles following Ms. Gallagher's murder, but on evidence that he (1) fled after committing the murders in Florida and Louisiana, (2) changed the license plate on Ms. Cribbs's car after leaving Florida and (3) led the police on a long chase before being arrested in Kentucky. (12 RT 1359-1360, 15 RT 1823-1824, 1861-1862.) The

instruction permitted the jury to consider those actions "as a circumstance tending to show a consciousness of guilt." (14 RT 1784.) Under the facts here, the provision of CALJIC No. 2.52 permitted the jury to draw irrational inferences of guilt.

There was no rational basis upon which the jury could have inferred that: (1) appellant killed Ms. Gallagher; (2) her killing was either premeditated and deliberate or committed in the course of a robbery; or (3) appellant committed arson, from the evidence that he fled from the police in Kentucky six weeks later after allegedly committing several uncharged murders. As defense counsel argued in seeking to exclude evidence concerning appellant's purported attempt to evade arrest in Kentucky, while that alleged conduct may have "show[ed] consciousness of guilt [as to] the Florida case and the Louisiana case," since that supposed flight occurred "six weeks after the Los Angeles case [] it's kind of hard to say" that it showed appellant's consciousness of his guilt as to the charged crimes rather than as to the uncharged murders which had allegedly occurred much more recently. (12 RT 1361.)

The same is true as to most of the evidence that the prosecutor cited as showing appellant's consciousness of guilt based on flight, such as the alleged facts that he: (1) stole Ms. Cribbs's car; (2) replaced the Florida license plate on her car with one from Tennessee; and (3) abandoned his truck in Louisiana because it was registered in his name. (15 RT 1860-1861.) That evidence of flight at most may have demonstrated appellant's consciousness of guilt as to the uncharged murders, which he allegedly committed only days before he changed that license plate, but was too attenuated to prove that he was conscious of his guilt of the charged crimes that occurred six weeks earlier. To appellant's knowledge, none of the many

cases in which this Court has upheld the propriety of giving CALJIC No. 2.52 involve a factual scenario like the one in this case; i.e., where the purported flight that is used to support the inference that the defendant is conscious of his guilt as to the charged crime occurred weeks after the commission of that crime, but shortly after the defendant allegedly committed unrelated crimes. (See, e.g., *People v. Jurado* (2006) 38 Cal.4th 72, 126 ["departure from the scene of [the capital] murder"]; *People v. Moon* (2005) 37 Cal.4th 1, 28 [flight from the [capital] crime scene]; *People v. Crew* (2003) 31 Cal.4th 822, 849 [flight from the state after the charged murder]; *People v. Boyette* (2002) 29 Cal.4th 381, 439 [flight "after the [charged] killings"]; *People v. Mendoza* (2000) 24 Cal.4th 130, 181 [flight "immediately after" the capital crime]; *People v. Smithey* (1999) 20 Cal.4th 936, 982 [flight from the capital crime scene]; *People v. Bolin* (1998) 18 Cal.4th 297, 326 [flight after the capital crime].)

To determine if the sweeping inferences permitted by CALJIC No. 2.52 were constitutional in this case, the Court must ask: If appellant left Los Angeles several days after Ms. Gallagher was killed, and then six weeks later, after fleeing the scene of two other homicides, tried to escape from the police, is it more likely than not that he: (1) premeditated the charged murder; (2) committed that homicide in the course of committing a robbery; and/or (3) committed an arson in connection with that homicide? Because each of those questions must be answered no, the inferences permitted by the consciousness-of-guilt instruction given in this case are constitutionally infirm. (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167.)

C. Reversal Is Required

Giving CALJIC No. 2.52 was an error of federal constitutional magnitude as well as a violation of state law. Accordingly, appellant's

murder and arson convictions and the special circumstance finding must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 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 because it involved the only contested issues in the case, i.e., whether appellant committed the charged crimes, and, if so, whether the homicide was a premeditated and deliberate murder. The evidence on those issues was either weak or closely balanced (see Argmt. I, *supra*, pp. 78-81, 85-86), and the jury's murder verdict revolved around appellant's credibility. If the jurors had believed appellant's testimony, they could not have convicted him of any crime, let alone first degree murder. The effect of instructing the jury on consciousness of guilt as shown by flight was to tell it that appellant's own conduct showed his awareness that he was guilty and contradicted his denial of guilt.

Further, pursuant to CALJIC No. 2.52 the jury was permitted to consider the evidence that appellant allegedly attempted to disguise Ms. Cribbs's car and evade arrest in Kentucky after leaving the scene of the Louisiana murder "in deciding whether [appellant was] guilty or not guilty" of the charged crime. (7 CT 1578; 14 RT 1784.) However, as set forth above, that evidence of appellant's actions six weeks after the charged crime had little, if any, value as proof that he was conscious of his guilt as to that crime. (See Sec. B, *supra*, pp. 118-119.) Thus, giving CALJIC No. 2.52 unfairly lowered the prosecution's burden of proof and allowed the jury to convict appellant of first degree murder based on evidence with little or no

probative value.[38]

In the context of this case, the provision of the instruction was not harmless beyond a reasonable doubt. Therefore, the guilt judgments, the special circumstance allegation and the death judgment must be reversed.

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[38] Moreover, instructing the jury that it could infer that appellant was conscious of his guilt of the charged crimes based on evidence that he allegedly fled after committing the uncharged murders also exacerbated the enormously prejudicial effect of the erroneous admission of evidence concerning those uncharged crimes. (See Argument I, *supra.*)

IV

REVERSAL IS REQUIRED BECAUSE THE PROVISION OF CALJIC NO. 2.15 CREATED AN UNCONSTITUTIONAL PERMISSIVE INFERENCE WHICH LIGHTENED THE STATE'S BURDEN OF PROOF AND PROVIDED THE JURY WITH AN INCORRECT LEGAL THEORY OF GUILT, BY TELLING THE JURY IT COULD FIND APPELLANT GUILTY OF MURDER OR ARSON BASED SOLELY ON HIS POSSESSION OF STOLEN PROPERTY PROVIDED THERE WAS SOME "SLIGHT" CORROBORATING EVIDENCE

Appellant's jury was erroneously instructed that it could find him "guilty of the crime of murder or arson" based solely on the alleged fact that he was "in conscious possession of recently stolen property" – Ms. Gallagher's purse and earring – provided there was "slight" corroborating evidence "tending to prove his guilt." (7 CT 1576; 14 RT 1776-1777.) The prosecutor then argued to the jury that the instruction set out an additional "theory" under which it could convict appellant of first degree murder and/or arson. (15 RT 1841-1842, 1845.) Giving that instruction was error because a defendant's possession of stolen property does not "logically" support the conclusion that he is guilty of non-theft crimes. (*People v. Prieto* (2003) 30 Cal.4th 226, 249.) The error requires reversal of appellant's first degree murder and arson convictions because the instruction: (1) permitted the jury to draw an irrational permissive inference that improperly lightened the state's burden of proof; and (2) gave the jury a fundamentally incorrect theory of culpability.

A. Factual Background

The trial court instructed the jury with CALJIC No. 2.15 (Possession of Stolen Property), which read as follows:

> If you find that [appellant] was in conscious possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that [he] is guilty of the crime of murder or arson. Before guilt may be inferred, there must be corroborating evidence tending to prove his guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt. ¶ As corroboration, you may consider the attributes of possession – time, place and manner, that [appellant] had the opportunity to commit the crime charged, [appellant's] conduct, or any other evidence which tends to connect him with the crime charged.

(7 CT 1576; 14 RT 1776-1777.)

In his guilt phase closing argument, the prosecutor told the jurors that they did not need to agree upon a particular theory of first degree murder to convict appellant of that crime. (15 RT 1841.) He told them there were "two or three different theories [on which they could] decide [that] this [crime] is a first degree murder," the first two of which were premeditated murder and felony murder. (15 RT 1841-1842, 1845.) Then the prosecutor reminded the jurors about CALJIC No. 2.15, which told them they could draw inferences of guilt from "conscious possession of recently stolen property," and reread that instruction to them in its entirety. (15 RT 1849.)

The prosecutor then pointed to the testimony that appellant had Ms. Gallagher's "purse [and] earring on the floor of his apartment the same morning she was murdered," and argued that there was a "a lot more than slight" corroborating evidence of appellant's guilt of the charged murder and arson. (15 RT 1849-1850.) Specifically, he argued that Christina Walker's testimony that appellant told her that Ms. Gallagher was dead on the morning her body was found corroborated the inference, arising from appellant's possession of Ms. Gallagher's purse and the earring, that he was guilty of her

murder. (15 RT 1850-1851.)

At the close of the prosecutor's argument, defense counsel objected outside the jury's presence that CALJIC No. 2.15 was "an improper instruction," and that the prosecutor's heavy reliance on it in arguing that "all [the jury] need[ed was] slight corroboration to go from being in possession of some stolen property . . . to murder and arson. . . . [was] a wrong statement of law." (15 RT 1868-1869.)[39] The trial court ruled that the instruction was properly given and that the prosecutor's argument concerning it was "appropriate." (15 RT 1869.)

B. The Trial Court Erred in Instructing That Appellant Could Be Convicted Of Murder and/or Arson Based Solely on Possession of Stolen Property and Slight Corroborating Evidence

In theft cases, CALJIC No. 2.15 permits a jury to infer guilt from the fact that the defendant "is in possession of recently stolen property when coupled with slight corroboration by other inculpatory circumstances." (*People v. Barker* (2001) 91 Cal.App.4th 1166, 1173; *People v. Snyder* (2003) 112 Cal.App.4th 1200, 1225-1228.) That instruction is predicated on the principle that a defendant's possession of recently stolen property is by itself sufficiently incriminating to warrant conviction of theft offenses provided that even slight corroboration of his or her guilt exists. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 249; *People v. Barker*, *supra*, 91 Cal.App.4th

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[39] Assuming arguendo that counsel's objection to the provision of CALJIC No. 2.15 was insufficient to preserve the issue for appellate review, the claimed error is nonetheless cognizable on appeal. Instructional errors are reviewable even without objection if they affect a defendant's substantive rights. (§§ 1259 & 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.)

at p. 1173; *People v. Snyder*, *supra*, 112 Cal.App.4th at p. 1226.)

However, there is no similar connection permitting a jury to infer that a defendant is guilty of *murder*, *arson* or other non-theft crimes based merely on his or her possession of stolen property and other slight inculpatory evidence otherwise insufficient to prove guilt beyond a reasonable doubt. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 249, quoting *People v. Barker*, *supra*, 91 Cal.App.4th at p. 1176 ["'[p]roof a defendant was in conscious possession of recently stolen property simply does not lead naturally and logically to the conclusion the defendant committed' a rape or murder.'"].) Thus, it is error to instruct the jury that it may find a defendant guilty of murder or other non-theft crimes based on those two elements. (*People v. Prieto*, *supra*, 30 Cal.4th at pp. 248-249; accord, *People v. Coffman* (2004) 34 Cal.4th 1, 101-102.) Pursuant to *Prieto*, *Coffman* and *Barker*, the trial court erred in this case in instructing the jury that it could convict appellant of first degree murder and/or arson upon finding that he possessed recently stolen property, and that there was some other, slight corroborating evidence, "which need not by itself be sufficient to warrant an inference of guilt."

C. The Error Requires Reversal

The question then becomes whether the error requires reversal of appellant's murder and arson convictions. As discussed below, there are two distinct ways of looking at the error in this case. Reversal is required under either of those approaches.

1. Reversal Is Required Because the Instruction Permitted the Jury to Draw an Irrational Permissive Inference That Allowed It to Convict Appellant of Murder and/or Arson Based on Proof Less Than Beyond a Reasonable Doubt

The erroneous use of CALJIC No. 2.15 as to the murder and arson

charges allowed the jury to draw an irrational permissive inference as to those two charges, and to convict appellant based on proof less than beyond a reasonable doubt. Because the state cannot establish that the jury did not do exactly what it was told it could do – rely solely on the predicate facts of possession of stolen property plus slight corroboration in convicting on those charges – reversal is required.

Jury instructions which relieve the state of the burden to prove every element of a charged crime violate the federal Constitution. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524; accord, *Carella v. California* (1989) 491 U.S. 263, 265; *Francis v. Franklin* (1985) 471 U.S. 307, 313.) Accordingly, a state may not make certain facts elements of a criminal offense and then impose a mandatory presumption or allow an irrational permissive inference as to the existence of those facts based on proof of other, predicate facts. (*Carella v. California*, *supra*, 491 U.S. at p. 265; *Sandstrom v. Montana*, *supra*, 442 U.S. at p. 515; *Ulster County Court v. Allen*, *supra*, 442 U.S. at p. 167.)[40]

Permissive inferences "tend to take the focus away from the elements that must be proved" (*United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 900 (conc. opn. of Rymer, J.)), and are constitutional only if it can be said "with substantial assurance" that the inferred fact is "more likely than not to flow from the proved fact on which it is made to depend." (*Ulster County*

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[40] Before *Sandstrom* was decided, several courts had found that instructions which permit a conviction on the basis of proof of some fact that is insufficient to establish guilt, plus other "slight" evidence, violate due process. (See *United States v. Partin* (5th Cir. 1977) 552 F.2d 621, 628-629, cert. denied, 434 U.S. 903; *United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; *United States v. Gray* (5th Cir. 1980) 626 F.2d 494, 500-501.)

Court v. Allen, *supra*, 442 U.S. at p. 166, fn. 28.) A permissive inference violates due process when "the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (*Francis v. Franklin*, *supra*, 471 U.S. at p. 316.)

Here, as to the murder charge, the prosecution was required to prove that appellant either committed a premeditated and deliberate murder or an unlawful killing during the course of a robbery; as to the arson charge, the prosecution was required to prove that he willfully and maliciously set fire to property. Yet, as given in this case, CALJIC No. 2.15 told the jurors that they could convict appellant of first degree murder and/or arson if they found that he was in conscious possession of recently stolen property, and that there was slight corroborating evidence of guilt, even if that evidence was insufficient to prove the elements of those crimes. In other words, the instruction told the jury that once those two predicate facts were established, it could infer that appellant was guilty of both murder and arson. (14 RT 1776.) Thus, the instruction allowed the jury to use a permissive inference not just to infer a *single* element of murder or arson, but to infer *every* element of those crimes. And as this Court has held, the permissive inference of guilt set out in CALJIC No. 2.15 cannot be reasonably applied in the case of "nontheft offenses like murder . . ." (*Prieto*, *supra*, 30 Cal.4th at p. 249.)

Schwendeman v. Wallenstein (9th Cir. 1992) 971 F.2d 313, dealt with the issue of an instruction creating a permissive inference in an analogous situation. In *Schwendeman*, the defendant was charged with vehicular assault, which required proof that he drove in a reckless manner. The jury was instructed that it could infer that the defendant had driven in a reckless manner solely from evidence that he had been speeding. The appellate court found that while "it is certainly true that excessive speed is probative of a

jury's determination of recklessness, here we cannot say with substantial assurance that the inferred fact of reckless driving more likely than not flowed from the proved fact of excessive speed." (*Id.* at p. 316.) Accordingly, the instruction was constitutionally deficient and the conviction was reversed. (*Ibid.*)

This case cannot be meaningfully distinguished from *Schwendeman.* Thus, as one court said in addressing the propriety of giving CALJIC No. 2.15 as to non-theft crimes, "[p]roof a defendant was in conscious possession of stolen property simply does not lead naturally and logically to the conclusion that the defendant committed a murder to obtain the property." (*People v. Barker*, *supra*, 91 Cal.App.4th at p. 1176.) Nor does such proof lead naturally and logically to the conclusion that the defendant committed a felony murder.

In short, the permissive presumption given to the jury in this case violated due process because the suggested conclusion – that appellant was guilty of first degree murder and/or arson – "is not one that reason and common sense justify" in light of the predicate facts on which the presumption was based – appellant's possession of stolen property plus slight corroboration. (*Francis v. Franklin*, *supra*, 471 U.S. at p. 316; see *People v. Prieto*, *supra*, 30 Cal.4th at p. 249 [the inference of guilt flowing naturally in theft offenses from evidence that the defendant possessed stolen property, plus slight corroboration, does not apply in "nontheft offenses"].) Because the error violated the federal Constitution the state is required "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24; see *Schwendeman v. Wallenstein*, *supra*, 971 F.2d at p. 316 [applying *Chapman* to improper permissive presumption].)

Further, while the trial court gave a general instruction correctly describing the state's burden of proof (7 CT 1580; 14 RT 1786-1787), a correct instruction does not remedy a constitutionally infirm instruction if the jury could have applied either instruction in arriving at its verdict. (*Francis v. Franklin*, *supra*, 471 U.S. at pp. 319-320.) That is just the situation here, and this Court has no way of knowing whether appellant was convicted on the basis of CALJIC No. 2.15.

In assessing whether the error was harmless, the question is *not* whether there is sufficient evidence from which the jury could have found the ultimate fact under other instructions. (See, e.g., *Hanna v. Riveland* (9th Cir. 1996) 87 F.3d 1034, 1038 [applying *Brecht* test]; *Schwendeman v. Wallenstein*, *supra*, 971 F.2d at p. 316 [applying *Chapman* test].) Rather, the question is whether the state can prove beyond a reasonable doubt that the jury did not rely solely on the predicate fact – thereby ignoring other evidence – in deciding the ultimate fact. (*Ibid.*)

Here, the jury was told that possession of recently stolen property is not alone sufficient to prove the charged crime of murder. (14 RT 1776.) That statement of the law is manifestly correct since, as discussed above, the charged offenses of murder and arson contain elements, such as premeditation and willful and malicious burning, that cannot logically be proven by mere possession of stolen property. But the jury was then effectively told that it could infer every element of those charges from the predicate facts of possession of recently stolen property with slight corroboration. As in *Schwendeman*, "[b]y focusing the jury on the evidence of [possession of stolen property] alone, the challenged instruction erroneously permitted the jury to find an element of the crime of which [appellant] was convicted without considering all the evidence presented at

trial." (*Schwendeman v. Wallenstein*, *supra*, 971 F.2d at p. 316.) Thus, the instruction may have caused the jury to overlook the lack of any significant evidence to support a guilt verdict under either of the prosecution's theories of first degree murder, or as to the arson charge, because such concerns were also rendered irrelevant by CALJIC No. 2.15.

Under the deferential standards of appellate review, there may have been sufficient evidence from which a jury could have found: (1) either premeditation and deliberation or felony murder; and (2) willful and malicious burning. Nonetheless, because the irrational inference deriving from CALJIC No. 2.15 "permitted the jury to find [all] element[s] of the crime[s] of which [appellant] was convicted without considering all the evidence presented at trial," the state cannot show there is "no reasonable probability that the instruction did not materially affect the verdict." (*Schwendeman v. Wallenstein*, *supra*, 971 F.2d at p. 316.)

Moreover, the reduction of the government's burden of proof involved in giving CALJIC No. 2.15 is "inconsistent with the 'constitutionally rooted presumption of innocence.'" (*United States v. Hall*, *supra*, 525 F.2d at 1256, fn. 2, quoting *Cool v. United States* (1972) 409 U.S. 100; accord, *United States v. Partin*, *supra*, 552 F.2d at p. 629.) An error which lessens the prosecution's burden is structural and requires automatic reversal because when the jurors receive instructions permitting them to convict without applying the reasonable doubt burden of proof, "there has been no jury verdict within the meaning of the Sixth Amendment [and] the entire premise of [*Chapman* harmless error] review is simply absent." (*Sullivan v. Louisiana* (2003) 508 U.S. 275, 279-280.)

Reversal of the guilt verdicts is therefore required.

2. Reversal Is Required Because the Prosecutor Told the Jury That CALJIC No. 2.15 Gave It a "Third" Theory of Culpability Under Which It Could Convict Appellant of Murder and/or Arson, and It Is Impossible to Determine Whether the Jury Relied on That Incorrect Theory

This Court has held that reversal is required where the jury in a criminal case is given both legally correct and incorrect theories of culpability, and the verdict does not indicate that the jurors *unanimously* relied on the correct theory in convicting the defendant. (See, e.g., *People v. Smith* (1984) 35 Cal.3d 798, 808 [reversal required where jury is instructed on both legally correct and incorrect theories of murder, and "the People cannot show that no juror relied on the erroneous instruction as the sole basis for finding defendant guilty of murder"]; *People v. Perez* (2005) 35 Cal.4th 1219, 1233-1234 [applying same rule]; accord, *People v. Guiton* (1993) 4 Cal.4th 1116, 1130 [error in giving factually inapplicable, but legally correct, instruction reviewed under *Watson* standard].) As this Court has stated:

> In these circumstances the governing rule on appeal is both settled and clear: when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand.

(*People v. Green* (1980) 27 Cal.3d 1, 69.)

This case involves precisely that type of error. The jury was told on the one hand that it could convict appellant of first degree murder, by finding that he killed Ms. Gallagher in a "willful, deliberate and premeditated" manner or during the commission of a robbery (7 CT 1584-1585; 14 RT 1794-1797), and arson, by finding that he "willfully and maliciously set[] fire" to her truck. (7 CT 1588; 14 RT 1805.) However, as set forth above (See Sec. A, *supra*, pp. 123-124), the prosecutor told the jury that it could

convict appellant of first degree murder and/or arson under any one of "three different theories," the third of which was based explicitly on CALJIC No. 2.15. (15 RT 1841, 1848-1849.) Indeed, the prosecutor read the instruction to the jurors to underline his argument that it provided them with a separate theory of culpability.[41] That "theory," as enunciated by the prosecutor, was that appellant could be found guilty of murder and/or arson based solely on the evidence that "he had [Ms. Gallagher's] purse, her earring on the floor of his apartment the same morning she was murdered" if there was some slight corroborating evidence of his guilt. (15 RT 1849-1850.) The corroborating evidence cited by the prosecutor as more than sufficient to meet the standard set by CALJIC No. 2.15 included the alleged facts that appellant told Ms. Walker that morning that Ms. Gallagher was "dead," and that appellant "hit on" (flirted with) Ms. Gallagher the previous night "exactly" as he had the victims of the uncharged murders. (15 RT 1850-1851.)

That theory of culpability had no basis in state law, as this Court has held. (*Prieto*, *supra*, 30 Cal.4th at p. 248, quoting *Barker*, *supra*, 91 Cal.App.4th at p. 1176 ["'[p]roof a defendant was in conscious possession of recently stolen property does not lead naturally and logically to the conclusion the defendant committed' a rape or murder."].) Accordingly, the provision of that theory to the jury was error. (See *Suniga v. Bunnell* (9th Cir. 1994) 998 F.2d 664, 670 [presenting the jury with two theories of culpability, only one of which has a basis in state law, violates due process].)

Furthermore, the jurors were not instructed that they needed to unanimously agree on a theory of first degree murder before they could

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[41] CALJIC No. 2.15 was the *only* instruction the prosecutor read to the jury during his guilt phase closing argument.

convict appellant (See Argmt. VI, *infra*), and the prosecutor expressly told them they did not need to reach unanimous agreement on that issue. (15 RT 1841.) And because the jury returned a general verdict, it is impossible to determine that no juror relied on the patently incorrect theory of first degree murder. Accordingly, reversal of the murder and arson convictions is required.

D. *Prieto* Does Not Bar Relief On This Claim

Although this Court has recognized the error in applying the permissive inference set out in CALJIC No. 2.15 to non-theft offenses, it held that the error was not prejudicial in *People v. Prieto*, *supra*, 30 Cal.4th at p. 247. *Prieto* analyzed that error under the state standard of prejudice, and concluded that since the instruction did not "lower[] the prosecution's burden of proof" there was "no reasonable likelihood the jury would have reached a different result if the court had limited the permissive inference described in CALJIC 2.15 to theft offenses." (*Id.* at pp. 248-249, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) The Court based that conclusion on the determinations that: (1) CALJIC No. 2.15 does not "directly or indirectly address the burden of proof" or "absolve[] the prosecution of its burden of establishing guilt" beyond a reasonable doubt; (2) the jury in that case received other, proper instructions on the burden of proof; and (3) there was overwhelming evidence of the defendant's guilt of the non-theft offenses to which the instruction applied. (*Id.* at pp. 248-249.) Because those reasons either do not withstand scrutiny or do not apply here, and because the Court did not address the other theory of error set forth above, *Prieto* does not

control the determination as to whether the error was prejudicial here.[42]

First, with all due respect, the fact that CALJIC No. 2.15 does not "directly or indirectly address the burden of proof" or expressly "absolve[] the prosecution of its burden of establishing guilt beyond a reasonable doubt" (*Prieto*, *supra*, 30 Cal.4th at p. 248) is irrelevant. The high court has made it clear that instructions need not "directly or indirectly address" the state's burden of proof in order to improperly lighten that burden, if that is their actual impact. (See *Cool v. United States*, *supra*, 409 U.S. at p. 104 [instruction suggesting that jury could reject defense evidence if not proven beyond a reasonable doubt lightened the state's burden of proof even though it did not address that burden].) And, as noted above, courts have uniformly held that instructions analytically identical to CALJIC No. 2.15 violate the federal Constitution precisely because they undercut the state's burden of proof, even if they do not do so "directly or indirectly." (*United States v. Partin*, *supra*, 552 F.2d at pp. 628-629; *United States v. Hall*, *supra*, 525 F.2d at p. 1256; *United States v. Gray*, 626 F.2d at pp. 500-501.)

Second, the Court in *Prieto* mistakenly relied on the presence of other instructions correctly defining the burden of proof. As discussed in the preceding section, where a jury is given instructions which lighten the state's burden of proof, giving an instruction providing a correct definition of the

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[42] *People v. Coffman*, *supra*, 34 Cal.4th at pp. 101-102, also found that it was harmless to give CALJIC No. 2.15. However, *Coffman* does not explain which, if any, of the arguments discussed above were considered. Instead, *Coffman* analyzed the facts of the case, applied *Watson*'s "reasonable likelihood" test for state law error, and found the error harmless. (*Ibid.*) The Court's use of the *Watson* standard in *Coffman* suggests that it was presented with *neither* of the claims made here, both of which are based on the federal Constitution.

burden does not render the improper instruction harmless. (*Cool v. United States*, *supra*, 409 U.S. at p. 104 [instruction lightening the state's burden of proof required reversal even though a correct instruction on reasonable doubt was also given]; *United States v. Hall*, *supra*, 525 F.2d at 1256; accord, *Francis v. Franklin*, *supra*, 471 U.S. at pp. 319-320 [correct instruction does not remedy constitutionally infirm instruction if the jury could apply either instruction to arrive at a verdict].) With all due respect, the Court should reconsider this aspect of *Prieto*.

Finally, here, unlike in *Prieto*, the state of the evidence was such that it is "reasonably likely the jury would have reached a different result if the court had limited the permissive inference described in CALJIC No. 2.15 to theft offenses." (*Prieto*, *supra*, 30 Cal.4th at p. 249, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 836; *People v. Brown* (1988) 46 Cal.3d 432, 446-447.) Because there was relatively slim evidence that appellant committed either premeditated murder or arson, "there is a reasonable likelihood that the jury misinterpreted the law in a way potentially unfavorable to the defense." (*People v. Barker*, *supra*, 91 Cal.App.4th at p. 1176; *Estelle v. McGuire* (1991) 502 U.S. 62, 72, 73, fn. 4; *People v. Kelly* (1992) 1 Cal.4th 495, 526-527.)

In *Prieto,* there was "overwhelming evidence of defendant's guilt on the nontheft offenses" because the "unrebutted testimony" of surviving victims established (1) his commission of the charged sexual assault and murder, and (2) that "the murder was committed in the course of the robberies, kidnaping, and rapes." (30 Cal.4th at p. 249; see *People v. Coffman*, *supra*, 34 Cal.4th at p. 101 [error in giving CALJIC No. 2.15 was harmless, given overwhelming evidence of guilt].) In this case, unlike *Prieto* and *Coffman*, there was no overwhelming evidence that appellant committed

first degree premeditated murder, felony murder, or arson.

It is presumably because there was little solid evidence establishing that appellant committed the charged non-theft offenses that the prosecutor relied so heavily on CALJIC No. 2.15 in his guilt phase closing argument. (15 RT 1849-1851.) The prosecutor's reliance on an improper instruction in closing argument "increase[s] the harmful potential of the improper instruction." (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 876 [where court should not have instructed on contributory negligence, counsel's argument that the plaintiff was responsible for her injuries may have confused the jury as to the issues]; see also *People v. Coria* (1999) 21 Cal.4th 868, 881 [provision of erroneous instruction was prejudicial because prosecutor's closing argument "placed great emphasis" on it]; *People v. Lewis* (2006) 139 Cal.App.4th 874, 892 [given the "absence of instructions as to a valid theory of murder and the prosecutor's emphasis" on erroneous instruction, the provision of that instruction clearly contributed to the verdict].) Here, the prosecutor's reliance on the incorrect instruction constitutes compelling evidence that there is a "reasonable likelihood the jury would have reached a different result if the court had limited the permissive inference described in CALJIC No. 2.15 to theft offenses." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 249.)

E. Conclusion

Based on the foregoing arguments, appellant's convictions, special circumstance finding and death sentence must be reversed.

V

THE JUDGMENT MUST BE REVERSED BECAUSE CALJIC NOS. 2.50 AND 2.50.1 TOGETHER PERMITTED THE JURY TO FIND APPELLANT GUILTY OF FIRST DEGREE MURDER, AND TO FIND THE PRIOR-MURDER-CONVICTION SPECIAL CIRCUMSTANCE ALLEGATION TRUE, BY A MERE PREPONDERANCE OF THE EVIDENCE, IN VIOLATION OF DUE PROCESS

The guilt phase verdicts, special circumstance finding and death verdict must be reversed due to the structural error involved in giving CALJIC Nos. 2.50 and 2.50.1. (7 CT 1579 [CALJIC No. 2.50 (evidence of other crimes)]; *ibid.* [CALJIC No. 2.50.1 (other crimes need be proven only by a preponderance of the evidence)].)[43] Those instructions lessened the burden of proof required to convict in violation of appellant's right to due process. (*In re Winship* (1970) 397 U.S. 358, 364; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278.) Reversal is automatic where, as here,

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[43] The errors discussed in this argument are cognizable on appeal even though there is no record that defense counsel objected to any of the instructions discussed in this argument. Instructional errors are reviewable even without objection if they affect a defendant's substantial rights. (§§ 1259, 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312; *People v. St. Martin* (1970) 1 Cal.3d 524, 531.) Merely acceding to an erroneous instruction does not constitute invited error; nor must a defendant request amplification or modification when the error consists of a breach of the trial court's fundamental instructional duty. (*People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.) Because the trial court bears the ultimate responsibility for instructing the jury correctly, the request for erroneous instructions will not constitute invited error unless defense counsel both (1) induced the trial court to commit the error, and (2) did so for an express tactical purpose which appears on the record. (*People v. Wickersham* (1982) 32 Cal.3d 307, 332-335, disapproved on another ground by *People v. Barton* (1995) 12 Cal.4th 186, 201; *People v. Perez* (1979) 23 Cal.3d 545, 549, fn. 3.) Here, neither condition for invited error has been met.

"structural error" occurs, because the error permeates "[t]he entire conduct of the trial from beginning to end" and "affect[s] the framework within which the trial proceeds." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310.)

A. Legal Standards

When the jury is not properly instructed that the defendant is presumed innocent until proven guilty beyond a reasonable doubt, the defendant is deprived of due process. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280; *People v. Flood*, *supra*, 18 Cal.4th at pp. 479-482.) Any jury instruction that "reduce[s] the level of proof necessary for the Government to carry its burden . . . is plainly inconsistent with the constitutionally rooted presumption of innocence." (*Cool v. United States* (1972) 409 U.S. 100, 104.)

"[T]he essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281, original italics.) Such instructional errors are considered structural and thus are not subject to harmless error review. (*Id.* at pp. 280-282.) Under *Sullivan*, giving instructions which permit the jury to convict based on a mere preponderance of the evidence is structural error. (*Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 820.)

B. CALJIC Nos. 2.50 And 2.50.1 Undermined the Presumption of Innocence by Lowering the Prosecution's Burden of Proof

In appellant's case, the trial court instructed the jury with a modified version of CALJIC No. 2.50 which read as follows:

> Evidence has been introduced for the purpose of showing that [appellant] committed crimes other than that for which he is on trial. [¶] Except as you will otherwise be instructed, this

> evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show whether [appellant] committed the murder alleged in Count 1 with express malice aforethought and with premeditation and deliberation, and not as a result of rage or provocation or other heat of passion. [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider this evidence for any other purpose.

(7 CT 1579; 14 RT 1782-1783.) The jurors were then instructed with a modified version of CALJIC No. 2.50.1 which read as follows:

> Within the meaning of the preceding instruction, the prosecution has the burden of proving by a preponderance of the evidence that the defendant committed the homicides other than that for which he is on trial. [¶] You must not consider such evidence for any purpose unless you find by a preponderance of the evidence that the defendant committed the other homicides.

(7 CT 1579; 14 RT 1783-1784.) Finally, the "preponderance of the evidence" standard was defined in CALJIC No. 2.50.2. (7 CT 1579; 14 RT 1784.) As demonstrated below, the interplay of CALJIC Nos. 2.50 and 2.50.1 in this case prejudicially lowered the prosecution's burden of proof.[44]

In *Gibson v. Ortiz*, *supra*, 387 F.3d 812, the Ninth Circuit held that giving CALJIC No. 2.50.01 together with CALJIC No. 2.50.1 constituted structural error because the instructions permitted the jury to find the defendant guilty of the charged offenses by relying on facts found only by a preponderance of the evidence. There, the defendant was charged with

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[44] The effect of this error was exacerbated by the fact that other jury instructions given by the trial court also operated to lower the prosecution's burden of proof. (See Argmts. III and IV, *supra*.)

several sexual offenses against his spouse and a child. Evidence of prior uncharged sexual assaults he had allegedly committed against his spouse was admitted under Evidence Code section 1108. Accordingly, the trial court instructed the jury pursuant to CALJIC Nos. 2.50.01[45] and 2.50.1.[46] (*Id.* at pp. 817-818.)

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[45] As given at Mr. Gibson's trial, CALJIC No. 2.50.01 read in pertinent part:

> Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in the case. . . . [¶] If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused. [¶] Unless you are otherwise instructed, you must not consider this evidence for any other purpose.

(*Gibson v. Ortiz*, *supra*, 387 F.3d at p. 817.)

[46] The modified version of CALJIC No. 2.50.1 given at Mr. Gibson's trial read as follows:

> Within the meaning of the preceding instructions, the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed sexual offenses and/or domestic violence other than those for which he is on trial. [¶] You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that a defendant committed the other sexual offenses and/or domestic violence.

(*Gibson v. Ortiz*, *supra*, 387 F.3d at pp. 817-818.)

The jury in *Gibson* "received only a general instruction regarding circumstantial evidence [CALJIC No. 2.01], which required proof beyond a reasonable doubt, and a specific, independent instruction [CALJIC No. 2.50.1] relating to previous sexual abuse and domestic violence, which required only proof by a preponderance of the evidence." (*Gibson*, *supra*, 387 F.3d at p. 823.) CALJIC No. 2.50.1 "carve[d] out" a specific exception to the general reasonable doubt standard for other crimes evidence, "which carries only a preponderance burden." (*Ibid.*)

The Ninth Circuit held that the interplay of the two instructions allowed the jury to find that the defendant "committed the uncharged sexual offenses by a preponderance of the evidence and thus to infer that he had committed the *charged* acts based upon facts found not beyond a reasonable doubt, but by a preponderance of the evidence." (*Gibson*, *supra*, 387 F.3d at p. 822, original italics.) Because the instructions provided "no explanation harmonizing the two burdens of proof discussed in the jury instructions," the jury "was presented with two routes of conviction, one by a constitutionally sufficient standard and one by a constitutionally deficient one." (*Id.* at p. 823.)

Indeed, CALJIC Nos. 2.50.01 and 2.50.1 "told the jury exactly which burden of proof to apply. However, contrary to the Supreme Court's clearly established law, the burden of proof the instructions supplied for the permissive inference was unconstitutional." (*Gibson*, *supra*, 387 F.3d at p. 823.) The inference that CALJIC No. 2.50.01 created an exception to the reasonable doubt burden was exacerbated by the prosecutor's argument that the defendant was "[t]hat kind of guy," and therefore "did in fact commit [the charged sex] crimes." (*Id.* at p. 824.) Moreover, the jury was instructed *without* the addition of that cautionary language added to CALJIC No.

2.50.01 in 1999, which was intended "to clarify how jurors were required to evaluate the defendant's guilt relating to the charged offense if they found that he had committed a prior sexual offense." (*Id.* at p. 818.)[47]

In *People v. Orellano* (2000) 79 Cal.App.4th 179, the Court of Appeal reversed the defendant's convictions based upon a similar analysis. Specifically, the court held that, when given without the cautionary language of the 1999 revision to CALJIC No. 2.50.01, CALJIC Nos. 2.50.01, 2.50.1, and 2.50.2 unconstitutionally allow the jury "to find by a preponderance of the evidence that appellant committed the prior crimes, [and] to infer from such commission of the prior crimes that appellant . . . 'did commit' the charged crimes, without necessarily being convinced beyond a reasonable doubt that appellant committed the charged crimes." (*Id.* at p. 184.) The court recognized that "there [was] a reasonable likelihood the jurors were misled by the incomplete instruction. Since we have no way of knowing whether the jury applied the correct burden of proof, the convictions must be reversed." (*Id.* at p. 186, citing *Sullivan v. Louisiana*, *supra*, 508 U.S. at p.

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[47] The language that was not given in *Gibson* that was added to CALJIC No. 2.50.01 in 1999 reads as follows:

> However, if you find by a preponderance of the evidence that the defendant committed [a] prior sexual offense[s], that is not sufficient by itself to prove beyond a reasonable doubt that [he] [she] committed the charged crime[s]. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime.

(*Gibson v. Ortiz*, *supra*, 387 F.3d at p. 818, quoting CALJIC No. 2.50.01 (7th ed. 1999).)

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Although *Gibson* and *Orellano* involved the interplay of CALJIC Nos. 2.50.01 and 2.50.1, the interplay of CALJIC Nos. 2.50 and 2.50.1 in this case resulted in structural error for essentially the same reasons. Thus, while CALJIC No. 2.50.01, unlike CALJIC 2.50, tells the jury it may "infer" that the defendant "had a disposition to commit" a certain type of offense based on his or her prior commission of such offenses, the effect of giving the combined instructions is the same in both cases. In both instances the instructions provide no "explanation harmonizing the . . . burdens of proof." (*Gibson v. Ortiz*, *supra*, 387 F.3d at p. 823.) Thus, just as in *Gibson* and *Orellano*, the jurors in the instant case were instructed that they could use the other crimes evidence, which only had to be proved by a preponderance of the evidence, to infer that appellant possessed the intent which is a necessary element of the charged crime, i.e., that he killed Ms. Gallagher "with express malice aforethought and with premeditation and deliberation, and not as a result of rage or provocation or other heat of passion." (7 CT 1579; 14 RT 1783.) It is reasonably likely that the jury believed that CALJIC No. 2.50.1 carved out an exception to the general reasonable doubt standard; at the very least, appellant's jury "was presented with two routes of conviction, one by a constitutionally sufficient standard and one by a constitutionally deficient one." (*Gibson*, *supra*, 387 F.3d at pp. 823-824.) Under these circumstances, if the jury found evidence that appellant had committed "other crimes," they were permitted to convict him of first degree murder based on a finding by a preponderance of the evidence that the charged killing was done with "express malice aforethought and with premeditation and deliberation . . . ." (*Gibson v. Ortiz*, *supra*, 387 F.3d at pp. 822-824; *People v. Orellano*, *supra*, 79 Cal.App.4th at p. 186.)

The prosecutor's argument in this case was at least as devastating as the one made by the prosecutor in *Gibson*, *supra*. The prosecutor here argued that the jury could be certain that appellant committed the charged murder, and that he acted with premeditation and deliberation, because:

> [That crime] was not a random killing, but [] part of a pattern of premeditated murders. It was part of a common scheme and plan. . . . [¶] [The charged murder] was part of a plan, a common scheme. [Appellant] killed women across the country . . . . [The charged murder] was in fact part of a pattern, a pattern that tells you exactly what the defendant was thinking, what his state of mind was [when he committed it].

(15 RT 1827-1828.) The clear implication of this argument was that appellant was a serial killer of women who was motivated by a hatred of the entire gender. In essence, the prosecutor was arguing that because appellant was the "kind of guy" who would commit the uncharged homicides, he "did in fact commit [the charged murder]." (See *Gibson v. Ortiz*, *supra*, 387 F.3d at p. 824.)

And again, the jurors here were not instructed with the cautionary language added to CALJIC No. 2.50.1 in 1999, which would have "reminded" them "that before a defendant can be found guilty of any crime, . . . the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime." This cautionary language might have preserved the constitutionality of appellant's convictions. (See *Gibson v. Ortiz, supra*, 387 F.3d at p. 819 [noting that this Court upheld the constitutionality of Evidence Code section 1108 by relying in part upon the cautionary language that was added to CALJIC No. 2.50.01].) However, no such language was included in the instructions given in this case.

C. Appellant's Murder Conviction, Special Circumstance Finding and Death Judgment Must Be Reversed

In the instant case, the instructions given permitted the jury to find appellant guilty of the charged first degree murder by merely a preponderance of the evidence, and therefore constituted structural error within the meaning of *Sullivan.* (*Gibson v. Ortiz, supra*, 387 F.3d at p. 820, citing *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 281-282.) *Sullivan* error precludes harmless error review because no verdict within the meaning of the Sixth Amendment has been rendered (*id.* at p. 280), and also because the consequences of the deprivation of the right to a jury trial are "necessarily unquantifiable and indeterminate." (*Id.* at pp. 281-282; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 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"].) A structural error standard is appropriate in this case because, since there was never a "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." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280.) Accordingly, this Court must reverse appellant's murder conviction, the special circumstance finding, and the penalty verdict.

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VI

THE TRIAL COURT ERRED IN FAILING TO REQUIRE THE JURY TO AGREE UNANIMOUSLY ON WHETHER APPELLANT HAD COMMITTED A PREMEDITATED MURDER OR A FELONY MURDER BEFORE RETURNING A VERDICT FINDING HIM GUILTY OF MURDER IN THE FIRST DEGREE

As previously noted, the trial court instructed the jury on first degree premeditated murder (7 CT 1584; 14 RT 1794-1796 [CALJIC No. 8.20]), and on first degree felony murder predicated on the commission or attempted commission of robbery. (7 CT 1585; 14 RT 1796-1797 [CALJIC No. 8.21].) The trial court also instructed the jury that if it found that appellant had committed murder, it had to state in its verdict whether the murder was of the first or second degree. (7 CT 1585; 14 RT 1798 [CALJIC No. 8.70].) However, the court did not instruct the jury that, if it found that the murder was of the first degree, it had to agree unanimously on the type of first degree murder.

The failure to require the jury to agree unanimously as to whether appellant had committed a premeditated murder or a first degree felony murder was error.[48] That error deprived appellant of his rights to have all elements of the crime of which he was convicted proved beyond a reasonable

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[48] As set out in Argument IV, *supra*, the jury was erroneously instructed, pursuant to CALJIC No. 2.15, that it could find appellant guilty of murder based solely on proof that he was in "conscious possession of recently stolen property" if there was even slight "corroborating evidence tending to prove his guilt." (7 CT 1576; 14 RT 1776-1777.) The provision of that incorrect theory of guilt did not cure, but rather compounded, the harm arising from the trial court's erroneous failure to instruct that the jury had to agree unanimously on a theory of first degree murder. That confusing instruction only increased the likelihood that the jurors relied on different and incompatible theories in reaching its verdict.

doubt, to the verdict of a unanimous jury, and to a fair and reliable determination that he committed a capital offense. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

Appellant acknowledges that this Court has rejected the claim that the jury cannot return a valid verdict of first degree murder without first agreeing unanimously as to whether the defendant committed a premeditated murder or a felony murder. (See, e.g., *People v. Benavides* (2005) 35 Cal.4th 69, 100-101; *People v. Nakahara* (2003) 30 Cal.4th 705, 712-713; *People v. Kipp* (2001) 26 Cal.4th 1100, 1132; *People v. Carpenter* (1997) 15 Cal.4th 312, 394-395.) However, appellant submits that this conclusion should be reconsidered, particularly in light of United States Supreme Court decisions.

This Court has consistently held that the elements of first degree premeditated murder and first degree felony murder are not the same. In the watershed case of *People v. Dillon* (1983) 34 Cal.3d 441, this Court first acknowledged that "[i]n every case of murder other than felony murder the prosecution undoubtedly has the burden of proving malice as an element of the crime. [Citations.]" (*Id.* at p. 475.) Then it declared that "in this state the two kinds of murder [felony murder and malice murder] are not the 'same' crimes and malice is not an element of felony murder." (*Id.* at p. 476, fn. 23; see also *id.* at pp. 476-477.)[49]

In subsequent cases, this Court retreated from the conclusion that

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[49] "[T]he two kinds of first degree murder in this state differ in a fundamental respect: in the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all. . . . [That is a] profound legal difference . . . ." (*People v. Dillon*, *supra*, at pp. 476-477, fn. omitted.)

felony murder and premeditated murder are not the same crime (see, e.g., *People v. Nakahara*, *supra*, 30 Cal.4th at p. 712 [holding that "[f]elony murder and premeditated murder are not distinct crimes]"), but it has continued to hold that the elements of those crimes are not the same. Thus, in *People v. Carpenter*, *supra*, 15 Cal.4th at p. 394, this Court explained that the language from footnote 23 of *People v. Dillon*, *supra*, 34 Cal.3d 441, quoted above, "meant that the elements of the two types of murder are not the same." Similarly, the Court has declared that "the elements of the two kinds of murder differ" (*People v. Silva* (2001) 25 Cal.4th 345, 367), and that "the two forms of murder [premeditated murder and felony murder] have different elements." (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 712; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1131.)

"Calling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813, 817.) Examination of the elements of the crimes at issue is the method used both to determine whether crimes that carry the same title are in reality different and distinct offenses (see *People v. Henderson* (1963) 60 Cal.2d 482, 502-503 (dis. opn. of Schauer, J.)), and to determine to which facts the constitutional requirements of trial by jury and proof beyond a reasonable doubt apply. (See *Jones v. United States* (1999) 526 U.S. 227, 232.) Both of those determinations are relevant to the issue of whether the jury must find those facts by a unanimous verdict.

Comparison of the elements of the crimes at issue is the traditional method used by the United States Supreme Court to determine if those crimes are different. The question first arose as an issue of statutory construction in *Blockberger v. United States* (1932) 284 U.S. 299, where the issue was whether two sections of the Harrison Narcotic Act created one offense or

two. The Court concluded that the two sections described different crimes, and explained its holding as follows:

> Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact that the other does not.

(*Id.* at p. 304, citing *Gavieres v. United States* (1911) 220 U.S. 338, 342.)

The "elements" test announced in *Blockberger* was later elevated to a rule of constitutional dimension. It is now used to determine what constitutes the "same offense" for purposes of the double jeopardy clause of the Fifth Amendment (*United States v. Dixon* (1993) 509 U.S. 688, 696-697), the Sixth Amendment rights to counsel (*Texas v. Cobb* (2001) 532 U.S. 162, 173) and trial by jury, and the Fifth and Fourteenth Amendment right to proof beyond a reasonable doubt. (*Monge v. California* (1998) 524 U.S. 721, 738 (dis. opn. of Scalia, J.); see also *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111 (lead opn. of Scalia, J.).)

Malice murder and felony murder are defined by separate statutes, and "each . . . requires proof of an additional fact that the other does not." (*Blockberger v. United States*, *supra*, 284 U.S. at p. 304.) Malice murder requires proof of malice and, in the case of murder in the first degree, premeditation and deliberation; felony murder does not. Felony murder requires the commission or attempted commission of a felony listed in section 189 and the specific intent to commit that felony; malice murder does not. (§§ 187, 189; *People v. Hart* (1999) 20 Cal.4th 546, 608-609.)

Therefore, it is incongruous to say, as this Court did in *People v. Carpenter*, *supra*, 15 Cal.4th 312, that the language on which appellant relies

from *People v. Dillon*, *supra*, 34 Cal.3d 441, "*only* meant that the *elements* of the two types of murder are not the same." (*People v. Carpenter*, *supra*, at p. 394, first italics added.) If malice murder and felony murder have different elements, as *Carpenter* acknowledges they do, then they are different crimes. (*United States v. Dixon*, *supra*, 509 U.S. at p. 696.)

Examination of the elements of a crime is also the method used to determine which facts must be proved to a jury beyond a reasonable doubt. (*Monge v. California*, *supra,* 524 U.S. at p. 738 (dis. opn. of Scalia, J.); see *People v. Sakarias* (2000) 22 Cal.4th 596, 623.) Moreover, the right to trial by jury attaches even to facts that are not "elements" in the traditional sense if finding those facts true will increase the maximum sentence that can be imposed. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 476 ["[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."].)

When the right to jury trial applies, the jury's verdict must be unanimous. In California, the right to a unanimous verdict in criminal cases is secured by the state Constitution and state statutes (Cal. Const., art. I, § 16; §§ 1163 & 1164; *People v. Collins* (1976) 17 Cal.3d 687, 693), and protected from arbitrary infringement by the due process clause of the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488.)

Because this is a capital case, the right to a unanimous verdict is also guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (See *Schad v. Arizona* (1991) 501 U.S. 624, 630-631 (plur. opn.) [leaving the question open].) The purpose of the unanimity requirement is to insure the accuracy and reliability of the verdict (*Brown v.*

Louisiana (1980) 447 U.S. 323, 331-334; *People v. Feagley* (1975) 14 Cal.3d 338, 352), and there is a heightened need for reliability in the procedures leading to the conviction of a capital offense. (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9; *Beck v. Alabama* (1980) 447 U.S. 625, 638.) Therefore, jury unanimity is required in capital cases.

In this case, there were two possible mental states alleged to support a conviction for first degree murder – premeditation and the specific intent to commit robbery. The absence of an instruction requiring unanimity on the elements of first degree murder created the possibility that the jurors divided on which mental state had been proven.

This conclusion cannot be avoided by recharacterizing premeditation and the facts necessary to invoke the felony murder rule as "theories" rather than "elements" of first degree murder. (See, e.g., *People v. Millwee* (1998) 18 Cal.4th 96, 160, citing *Schad v. Arizona*, *supra*, 501 U.S. 624.) There are three reasons why this is so.

First, in contrast to the situation in *Schad*, where the Arizona courts had determined that "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 v. Arizona*, *supra*, 501 U.S. at p. 637), California's courts have repeatedly characterized premeditation as an element of first degree premeditated murder. (See, e.g., *People v. Thomas* (1945) 25 Cal.2d 880, 899 [premeditation and deliberation are essential elements of premeditated first degree murder]; *People v. Gibson* (1895) 106 Cal. 458, 473-474 [premeditation and deliberation are necessary elements of first degree murder].) The specific intent to commit the underlying felony has likewise been characterized as an element of first degree felony murder. (*People v. Jones* (2003) 29 Cal.4th 1229, 1257-1258; *id.* at p. 1268 (conc.

opn. of Kennard, J.).)

Moreover, this Court has recognized that the Legislature intended to make premeditation an element of first degree murder. In *People v. Stegner* (1976) 16 Cal.3d 539, it declared:

> We have held, "By conjoining the words 'willful, deliberate, and premeditated' in its definition and limitation of the character of killings falling within murder of the first degree, the Legislature apparently emphasized its intention to require *as an element of such crime* substantially more reflection than may be involved in the mere formation of a specific intent to kill." [Citation.]

(*Id.* at p. 545, italics added, quoting *People v. Thomas*, *supra*, 25 Cal.2d at p. 900.) As this Court has said, "'The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense "element."'" (*People v. Seel* (2004) 34 Cal.4th 535, 549, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 493.)[50]

As the United States Supreme Court has explained, *Schad* held only

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[50] The specific intent to commit the underlying felony, the mens rea element of first degree felony murder, is not specifically mentioned in section 189. However, ever since *People v. Coefield* (1951) 37 Cal.2d 865, 869, this Court has held that such intent is required (see, e.g., *People v. Hernandez* (1988) 47 Cal.3d 315, 346, and cases there cited; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), and that authoritative judicial construction "has become as much a part of the statute as if it had written by the Legislature." (*People v. Honig* (1996) 48 Cal.App.4th 289, 328; accord, *Winters v. New York* (1948) 333 U.S. 507, 514; *People v. Guthrie* (1983) 144 Cal.App.3d 832, 839.) Furthermore, section 189 has been amended and reenacted several times in the interim, but none of the changes purported to delete the requirement of specific intent, and there "is a strong presumption that when the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts." (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 433, citations and internal quotation marks omitted.)

that jurors need not agree on the particular means used by the defendant to commit the crime or the "underlying brute facts" that "make up a particular element," such as whether the element of force or fear in a robbery case was established by the evidence that the defendant used a knife or by the evidence that he used a gun. (*Richardson v. United States*, *supra*, 526 U.S. at p. 817.) This case involves the elements specified in the statute defining first degree murder (§ 189), not the means or "brute facts" which may be used at times to establish those elements.

Second, no matter how they are labeled, premeditation and the facts necessary to support a conviction for first degree felony murder are facts that operate as the functional equivalent of "elements" of the crime of first degree murder and, if found, increase the maximum sentence beyond the penalty that could be imposed on a conviction for second degree murder. (§§ 189 & 190, subd. (a).) Therefore, those facts must be found by procedures that comply with the constitutional right to trial by jury (*Ring v. Arizona* (2002) 536 U.S. 584, 603-605; *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 494-495); for the reasons previously stated, that right includes the right to a unanimous verdict.

Third, at least one indisputable "element" is involved. First degree premeditated murder does not differ from first degree felony murder only in that the former requires premeditation while the latter does not. The two crimes also differ because first degree premeditated murder requires malice while felony murder does not. "'The mental state required [for first degree premeditated murder] is, of course, a deliberate and premeditated intent to kill with malice aforethought. (See . . . §§ 187, subd. (a), 189.)'" (*People v. Hart*, *supra*, 20 Cal.4th at p. 608; accord, *People v. Visciotti* (1992) 2 Cal.4th 1, 61.) Malice is certainly a true "element" of murder.

Accordingly, it was error for the trial court to fail to instruct the jury that it had to agree unanimously on whether appellant had committed a premeditated murder or a felony murder. Because the jurors were not required to reach unanimous agreement on the elements of first degree murder, there is no valid jury verdict on which harmless error analysis can operate. The failure to instruct was a structural error and therefore reversal is required. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

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VII

THE PROVISION OF CALJIC NO. 17.41.1 VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND TRIAL BY A FAIR AND IMPARTIAL JURY, REQUIRING REVERSAL

Over appellant's objection, the jury was instructed at the guilt phase with CALJIC No. 17.41.1. (14 RT 1817-1818.) As delivered below, the instruction read as follows:

> The integrity of a trial requires that jurors at all times during their deliberations conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the court of the situation.

(7 CT 1589; 14 RT 1806-1807.)

Defense counsel objected that CALJIC No. 17.41.1 directed the jurors to "rat off other jurors," and said he had "only seen it used where [] eleven people who want to vote guilty [] are snitching off the one" who "think[s] the other way." (14 RT 1818-1820.) The scenario predicted by defense counsel apparently came to pass in this case. During penalty phase deliberations, the jury declared itself at an "impasse." (7 CT 1628, 20 RT 2789-2790.) The trial court directed the jurors to continue deliberating, and after only another hour and a half of deliberations they returned a death verdict. (20 RT 2797-2798.) In moving for a new trial, defense counsel argued that his impression after speaking with members of the jury was that a "holdout" juror had been pressured to join in voting for death. (21 RT 2811-2812.)

In *People v. Engelman* (2002) 28 Cal.4th 436, this Court disapproved CALJIC No. 17.41.1, but also concluded that its provision does not violate

the federal Constitution. Appellant respectfully submits that its provision in this case did violate his rights under the Sixth and Fourteenth Amendments, and therefore raises the issue here in order for this Court to reconsider its decision in *Engelman* and to preserve the error for review in federal court if necessary.

Private and secret deliberations are essential features of the jury trial guaranteed by the Sixth Amendment. (See, e.g., *Tanner v. United States* (1987) 483 U.S. 107, 127; *United States v. Brown* (D.C. Cir. 1987) 823 Fd.2d 591, 596.) However, CALJIC No. 17.41.1 pointedly tells the jurors that they are *not* guaranteed privacy or secrecy. At any time, their deliberations may be interrupted and one juror may repeat another's words to the judge and allege that some impropriety occurred in the jury room.

The instruction, in short, assures the jurors that their words might be used against them and that candor in the jury room could be punished. The instruction therefore chills speech and free discourse in a forum where "free and uninhibited discourse" is most needed. (*Attridge v. Cencorp* (2d Cir. 1987) 836 F.2d 113, 116.) The instruction virtually assures "the destruction of all frankness and freedom of discussion" in the jury room. (*McDonald v. Pless* (1915) 238 U.S. 264, 268.) Accordingly, the instruction improperly inhibits the free expression and interaction among the jurors which is so important to the deliberative process. (See, e.g., *People v. Collins* (1976) 17 Cal.3d 687, 693.)

Where jurors find it necessary or advisable to conceal concerns from one another, they will not interact and try to persuade others to accept their viewpoints. "Juror privacy is a prerequisite of free debate, without which the decisionmaking process would be crippled." (*United States v. Symington* (9th Cir. 1999) 195 F.3d 1080, 1086 citing Note, *Public Disclosures of Jury*

Deliberations (1983) 96 Harv. L. Rev. 886, 889.) Long ago, Justice Cardozo noted, "[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." (*Clark v. United States* (1933) 289 U.S. 1, 13.)

The free discourse of the jury has been found to be so important that, as a matter of policy, post-verdict inquiry into the internal deliberative process has been precluded even in the face of allegations of serious improprieties. (See, e.g., *Tanner v. United States* (1987) 483 U.S. 107, 120-121, 127 [inquiry into juror intoxication during deliberations not permitted]; *United States v. Marques* (9th Cir. 1979) 600 F.2d 742, 747 [no evidence permitted as to juror compromise].) Under Evidence Code section 1150, "[n]o evidence is admissible to show the effect of [a] statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." These same policy considerations should bar CALJIC No. 17.41.1 so that it may not be allowed to chill free exchange and discourse during deliberations.

Jury trial is a fundamental constitutional right. The federal right to trial by jury is secured by the Sixth and Fourteenth Amendments to the federal Constitution. (*Ring v. Arizona* (2002) 536 U.S. 584, 597; *Duncan v. Louisiana* (1968) 391 U.S. 145, 149.) The state right to trial by jury, which also includes the requirement that the jury in felony prosecutions consist of 12 persons and that its verdict be unanimous, is secured by article I, section 16, of the California Constitution (*People v. Collins* (1976) 17 Cal.3d 687, 693), and protected from arbitrary infringement by the due process clause of the Fourteenth Amendment to the federal Constitution. (*Hicks v. Oklahoma*

(1980) 447 U.S. 343, 346.) CALJIC No. 17.41.1 abridges that right because it coerces potential holdout jurors into agreeing with the majority. (See, e.g., *Perez v. Marshall* (9th Cir. 1997) 119 F.3d 1422, 1426-1428.)

It is not a satisfactory answer to say that the matter is moot because no juror in this case called any such problem to the trial court's attention. Such an answer ignores the likelihood that a juror would hold fast to an unpopular decision if he knew that he could not be hauled before the court to account for it, but might be unwilling to do so if he knew his fellow jurors could report him to the judge. The likelihood of such a "chilling effect" is a strong reason not to give an instruction such as CALJIC No. 17.41.1 in the first place. There is no way to assess how much the instruction chilled speech in the jury room, or to determine what thoughts and arguments were squelched by jurors who feared and wished to avoid punishment by the trial court.

The right to trial by jury is eviscerated if jurors are denied the right to apply the facts of the case to the law in a manner consistent with their own individual judgments, and free from the fear of being reported to the judge because their views differ from those of the majority. As Judge Rosen of the Third Circuit Court of Appeals has observed: "[w]e must bear in mind that the confidentiality of the thought processes of jurors, their privileged exchange of views, and the freedom to be candid in their deliberations are the soul of the jury system." (*United States v. Antar* (3d Cir. 1994) 38 F.3d 1348, 1367 (conc. opn. of Rosen, J.).)

The giving of the instruction on "the integrity of a trial" amounted to a "structural" defect in the trial mechanism, much like a complete denial of a jury. (*Rose v. Clark* (1986) 478 U.S. 570, 579; *Arizona v. Fulminante* (1991) 499 U.S. 279, 309.) Automatic reversal of the judgment is the appropriate remedy because where this novel and threatening instruction is

given, "there has been no jury verdict within the meaning of the Sixth Amendment." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280; *People v. Cahill* (1993) 5 Cal.4th 478, 502.)

To be sure, appellant recognizes that the appellate courts of this state have followed the decision in *People v. Molina* (2000) 82 Cal.App.4th 1329, which held that the provision of CALJIC No. 17.41.1 does not require automatic reversal, but is rather subject to harmless error analysis. (*Id.* at pp. 1331-1332.) In *Molina*, the appellate court held that giving CALJIC No. 17.41.1 was harmless beyond a reasonable doubt because the jury deliberated less than an hour with no indication of deadlock or holdout jurors. (*Ibid.*)

As a preliminary matter, the *Molina* court's holding that the error is subject to harmless error analysis is incorrect for the reasons set forth above. Furthermore, if the error were subject to harmless error analysis, the *Molina* court's application of the harmless error test was erroneous. Because the instruction abridges the federal Constitution, if a harmless error analysis applies, the state bears the burden of proving that its provision was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Therefore, the question is not whether there is any indication that the use of the instruction affected the verdict in any way, as the *Molina* Court held, but rather whether the state can prove beyond a reasonable doubt that it did *not* affect the verdict in any way. In this regard, it is not a satisfactory answer to say that the instruction did not affect the verdict because, at the guilt phase, there was no indication of deadlock or a holdout juror, and no juror reported any "misconduct." (See *People v. Molina*, *supra*, 82 Cal.App.4th at pp. 1331-1332.) Such an answer ignores that the fundamental vice in the instruction is that it deters minority or holdout jurors from adhering to their positions for fear of punishment or removal.

In any event, even if the test used in *Molina* is applied to this case, the error cannot be deemed harmless as to the death judgment. As set forth above, the jurors in this case *did* inform the trial court that they had reached an "impasse" in their penalty phase deliberations, the record strongly suggests that there was a holdout juror (7 CT 1628; 20 RT 2790), and, unlike *Molina*, this case involved lengthy deliberations and the "jury did [] communicate with the court during [those] deliberations." (*People v. Molina*, *supra*, 82 Cal.App.4th at p. 1336.) In fact, the jury announced that it was at an impasse on the *fourth day* of deliberations (7 CT 1621-1626, 1628), and the great majority of the jurors said at that time that they did not believe continued deliberations would be fruitful. (20 RT 2793 [the court polled the jurors on whether to continue deliberating; only two said yes].) Further, in telling the trial court that they were at an impasse the foreperson said in open court that "somebody" on the jury "perhaps [] can't be swayed at all" by further deliberations. (20 RT 2790.)

Moreover, unlike in *Molina*, it is more than a speculative possibility in this case that CALJIC No. 17.41.1 "had a chilling effect on the jurors' deliberations, [and] inhibit[ed] the kind of free expression and interaction among jurors that is so important to the deliberative process." (82 Cal.App.4th at p. 1336.) Thus, even though eight jurors told the trial court they did not believe the jury could reach a verdict if it continued deliberating, they returned a verdict after only "an hour and a half" of deliberation after the trial court directed them to resume deliberating. That sequence of events led defense counsel to think that some of the jurors might want to "express [] hesitation" about the verdict. (20 RT 2798.) After speaking to the jurors, counsel indicated that "somebody" on the jury must have "made a flip-flop decision from life to death" after being subjected to "some pressure" by other

jurors. (21 RT 2812.) Counsel then stated that the juror he "read" as being the holdout sat "in the corner crying [when he spoke to the jurors] and [did] not participat[e] in the limited discussion. . . ." (21 RT 2813.)

Given the facts of the jury deliberations in this case – lengthy deliberations leading to an impasse that eight jurors thought could not be resolved, but which was then immediately resolved upon the resumption of deliberations – and defense counsel's report of suspicious circumstances in the jury room, which suggested that the juror the foreperson earlier said could not be "swayed" had abandoned a "holdout" position, it cannot be said that giving CALJIC No. 17.41.1 was harmless beyond a reasonable doubt. The judgment must be therefore be reversed.

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VIII

THE CONVICTION, SPECIAL CIRCUMSTANCE FINDING AND DEATH SENTENCE MUST BE REVERSED BECAUSE THE PRIOR-MURDER-CONVICTION SPECIAL CIRCUMSTANCE WAS INVALID AND ITS USE TO RENDER APPELLANT DEATH-ELIGIBLE VIOLATED HIS RIGHT TO A FAIR AND RELIABLE PENALTY DETERMINATION

A. Introduction

As fully set forth in Argument I above, the prosecution claimed that appellant committed three uncharged, out-of-state murders. (1 CT 233-234.) Appellant was tried in Florida on one of those uncharged murders, and a jury convicted him on May 7, 1997. (12 RT 1336-1338.) That conviction was not final on appeal at the time of trial in this case. (6 RT 153-154.) The allegation that appellant had been "convicted previously of first degree murder" in Florida in 1997 formed the basis for the only special circumstance charged at trial, the "prior-murder-conviction special circumstance." (1 CT 214; § 190.2, subd. (a)(2).) Appellant moved before trial to strike that special circumstance on the basis that "numerous errors of federal constitutional dimension render[ed the Florida murder] conviction invalid . . . ." (3 CT 471-472.) The trial court erred in refusing to strike the prior-murder-conviction special circumstance.

That special circumstance was invalid as applied in this case because: (1) there was not yet a prior conviction at the time of trial, and (2) the murder upon which the purported prior conviction was based occurred after the charged crime. That error violated both state law and appellant's Eighth Amendment right to be free from the infliction of an arbitrary and capricious death sentence. (*Gregg v. Georgia* (1976) 428 U.S. 153, 189; *Spaziano v. Florida* (1984) 468 U.S. 447, 460, fn. 20 [capital sentencing schemes must be designed to "minimize the risk that the penalty will be imposed in error or in

an arbitrary and capricious manner"].) An interpretation of the prior-murder-conviction special circumstance which allows the jury to find that special circumstance true based on a "previous" conviction that was not final at the time of trial, and was itself based on a crime that had not occurred when the charged crime was allegedly committed, violates a capital defendant's due process rights to fair notice and fundamental fairness and creates the risk that capital punishment will be imposed in an arbitrary and capricious manner. The jury's consideration of that invalid special circumstance in this case requires reversal of appellant's convictions, special circumstance finding, and death sentence.

B. Factual Background

Appellant's motion to strike the prior-murder-conviction special circumstance allegation argued that "numerous errors of federal constitutional dimension render[ed appellant's Florida murder] conviction invalid . . . ." (3 CT 471-472.) The trial court and counsel had previously discussed the possibility that the murder conviction appellant suffered in Florida in 1997 might be reversed on appeal, and the prosecutor had suggested that "it might make sense to wait" until that appeal was decided before going forward with the trial. (6 RT 99-101.) Defense counsel responded that he had discussed the matter with appellant, who was determined to insist on his speedy trial right to go forward "sooner rather than later." (6 RT 102.) Appellant's position, as defense counsel explained it, was consistent with his previously-expressed insistence on moving the case forward. In fact, appellant had earlier asked the trial court to remove defense counsel when he sought a continuance in order to complete his trial preparations. (6A RT 72-76.)

At the hearing on the motion to strike the prior-murder-conviction special circumstance, defense counsel argued that it should be struck because

the Florida conviction and/or death sentence were not final and would likely be reversed on appeal. (6 RT 158-159.)[51] Counsel argued that it would be a violation of appellant's right to a "fair trial on [] guilt" to go forward with the trial before the Florida appeal was decided, because he would be tried before "death qualified jurors" who were "more likely vote for guilt" if the court did not strike the special circumstance. (6 RT 158.) Counsel also argued that the Florida conviction was still pending on appeal and "the doubts raised by appellant's opening briefs [*sic*] in Florida" could render a penalty phase trial in this case "for naught." (*Ibid.*)[52]

The prosecutor responded that none of the alleged errors from the Florida appeal were fundamental constitutional flaws or required the trial court to strike the prior-murder-conviction special circumstance. (6 RT 159-160.) He agreed that the Florida conviction and/or sentence might be overturned on appeal, but suggested that the better course would be to continue the trial until the Florida appeal was decided rather than striking the special circumstance allegation, and urged the trial court to order such a continuance even if appellant objected. (6 RT 167, 173-174.) The trial court found that it would be inappropriate to order such an open-ended continuance over appellant's objection. (6 RT 174-175.)

The trial court refused to strike the prior-murder-conviction special

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[51] The Florida Supreme Court affirmed appellant's conviction and death sentence on March 1, 2001. (*Rogers v. State* (2001) 783 So.2d 980, 1004.)

[52] Defense counsel also pointed out that the fact that appellant was tried first in Florida was "the basis of the special circumstance," and that "what makes [appellant] death eligible is the timing of the trials, had he been tried in California first, he would not be facing the death penalty . . . ." (6 RT 154.)

circumstance based on "a guess as to what" would happen in the Florida appeal, and asked appellant to agree to a continuance until that appeal was decided. (6 RT 168-169.) The court said appellant was "risking . . . prejudice" by going forward with the trial, because he might obtain "a retrial of the penalty phase only." (6 RT 169.) In the court's view, if appellant was convicted of the pending charges, and that conviction was later reversed, his refusal to agree to a continuance would "be a factor the appellate court" would "consider" in deciding whether the case should be retried only as to penalty, or as to both guilt and penalty. (6 RT 175-176.) Appellant indicated that he understood the court's view. (6 RT 177.)

C. The Prior-Murder-Conviction Special Circumstance Was Invalid

Under section 190.2, subdivision (a)(2), a defendant is eligible for the death penalty if he or she "was convicted previously of murder in the first or second degree." Here, when Ms. Gallagher was killed in September of 1995, appellant had not been tried or convicted of any prior murders, nor had he allegedly committed any prior murders. Because (1) appellant's Florida conviction was not final when this case was tried, and (2) the alleged homicide upon which appellant's Florida conviction for first degree murder was based occurred after the charged crimes, it was improper to apply the prior-murder-conviction special circumstance in this case.

The trial court's interpretation of the prior-murder-conviction special circumstance as applicable even though the prior murder "conviction" was not final on appeal, and the "prior" murder upon which that conviction was based did not predate the charged one, was erroneous as a matter of state law and violated appellant's due process rights to fair notice and fundamental fairness, and his rights to be free from arbitrary and capricious infliction of the death

penalty and to a reliable penalty determination, in contravention of the Eighth and Fourteenth Amendments to the federal Constitution and article1, sections 7, 15, 16 and 17 of the state Constitution.

1. The Special Circumstance Was Invalid Because Appellant Did Not Have a Prior Murder Conviction at the Time of Trial

Because appellant's Florida conviction for first degree murder was not final on appeal at the time the jury found the prior-murder-conviction special circumstance true, that conviction was not a proper basis for finding that he had been "convicted previously" of murder under section 190.2, subdivision (a)(2). As used in that statute, the ambiguous term "convicted" should be construed to mean a judgment of guilt which either has not been appealed or has been affirmed on appeal as of the time the jury finds the special circumstance true. While this Court has held that "prior" murders alleged under section 190.2, subdivision (a)(2), need not have *occurred* before the date of the charged murder (*People v. Hendricks*, *supra*, 43 Cal.3d at p. 595; but see Section D(2), *infra*), it has never decided whether the prior murder conviction required under that section must be "final" – i.e., already affirmed on appeal or no longer subject to appeal. The Court should now hold that appellate finality is required in that situation because any other reading of the statute would violate fundamental principles of statutory construction and reduce the reliability of California's death penalty scheme.

In *Hendricks*, this Court noted that section 190.2, subdivision (a)(2), "refers simply and unambiguously to previous convictions." (*People v. Hendricks*, *supra*, 43 Cal.3d at p. 595.) However, that statement overlooks the facts that, in California, "the term 'conviction' has no fixed meaning and has been interpreted by the courts to have various meanings depending upon the context" (*People v. Rhoads* (1990) 221 Cal.App.3d 56, 60; *People v. Floyd*

(2003) 31 Cal.4th 179, 194-195 (dis. opn. of Brown, J.); see also *Helena Rubenstein Inter. v. Younger* (1977) 71 Cal.App.3d 406, 415), and that for over 120 years this Court has defined the term "conviction" in some contexts as requiring a judgment that is final on appeal. (See *People v. Treadwell* (1885) 66 Cal. 400, 401 [concerning use of felony conviction for purposes of disbarment]; *In re Riccardi* (1920) 182 Cal. 675, 676 [same]; *Stephens v. Toomey* (1959) 51 Cal.2d 864, 869 [for purposes of a statute barring those "convicted" of certain crimes from voting, "the finality of the judgment must await the results of an appeal"]; see also *People v. Summerville* (1995) 34 Cal.App.4th 1062, 1068 [for collateral estoppel purposes, there is no "final judgment on the merits" while the "appeal is still pending"]; *In re Sonia G* (1984) 158 Cal.App.3d 18, 22 [for purposes of terminating parental rights based on conviction of a felony, a pending appeal "suspends the effect of the judgment"].)[53] Because section 190.2, subdivision (a)(2), "establishes [a

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[53] Admittedly, California courts have in other contexts construed the term "conviction" as used in various penal statutes as requiring only "a verdict or guilty plea" or a "jury verdict (or guilty plea) *and* the judgment pronounced thereon." (*Boyll v. State Personnel Board* (1983) 146 Cal.App.3d 1070, 1073-1074, 1076, original italics.) Thus, this Court has held that for the purposes of the "three strikes" law (section 667), a defendant suffers a prior felony conviction "'when guilt is established, either by plea or verdict. . . .'" (*People v. Laino* (2004) 32 Cal.4th 878, 898, quoting *People v. Rhoads*, *supra*, 221 Cal.App.3d at p. 60.) However, the holding in *Laino* relied on two provisions of the three strikes law which are inapplicable in this context, that: (1) section 667, subdivision (d)(1)(A), "specifically provides that the suspension of imposition of sentence does not affect the determination that such prior conviction constitutes a strike;" and (2) the three strikes law is "focus[ed]" on determining whether "the defendant commit[ed] a felony after having previously committed one or more serious or violent felonies." (*People v. Laino*, *supra*, 32 Cal.4th at p. 898.) Neither of those factors applies in this context. Unlike section 667,

(continued...)

defendant's] eligibility for the death penalty," the term "convicted" as used in that statute must be construed as favorably to defendants as possible. (*People v. Weidert* (1985) 39 Cal.3d 836, 848, citing *Beck v. Alabama* (1980) 447 U.S. 635, 637-638.)

Fundamental principles of statutory construction support appellant's interpretation that section 190.2, subdivision (a)(2), applies only where the defendant's prior murder conviction has been affirmed on appeal. (See *Bell v. United States* (1955) 349 U.S. 81, 84 [a statutory intention to create, add, or increase a penalty must be clear and unambiguous]; *People v. Taylor* (2004) 32 Cal.4th 863, 870 [penal statutes must be strictly construed in favor of the defendant]; *People v. Simon* (1995) 9 Cal.4th 493, 517-518 [the defendant is entitled to the benefit of every reasonable doubt as to the construction of statutory language]; *People v. Weidert, supra*, 39 Cal.3d at p. 848 [applying the same rule to initiative measures].) In light of those principles, this Court should construe the term "convicted" as used in section 190.2, subdivision (a)(2), in the sense most favorable to appellant.

Moreover, because "the degree of strictness in construing penal statutes should vary in direct relation to the severity of the punishment" (*People v. Weidert, supra*, 39 Cal.3d at p. 848; Singer, *Sutherland Statutes and Statutory Construction* (2005) § 59:3), and execution is the most severe punishment possible (*Monge v. California* (1998) 524 U.S. 721, 732; *Lockett v. Ohio*

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[53](...continued)
section 190.2, subdivision (a)(2), does not indicate that a prior "conviction" on which imposition of the sentence has been suspended is sufficient. Moreover, the "focus and purpose" of section 190.2, subdivision (a)(2), is to determine whether the defendant is eligible to be executed. For that most consequential of purposes, nothing less than a judgment that is final on appeal can suffice.

(1978) 438 U.S. 586, 604), death penalty statutes are subject to the strictest construction. (See *People v. Weidert*, *supra*, 39 Cal.3d at p. 848; see also, e.g., *United States v. Pitera* (E.D.N.Y. 1992) 795 F. Supp. 571, 577 [given the severity and irrevocable nature of the death penalty, "strict adherence to the rule of lenity" is required in construing death penalty statutes]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 856 (conc. opn. of O'Connor, J.) [noting the "need for special care and deliberation" arising from the "gravity and finality" of the death penalty].) Those principles also support construing "convicted" as requiring a conviction that is final on appeal.

Additionally, the voters are "deemed to have been aware of existing laws and judicial constructions in effect at the time" they approved the initiative containing what ultimately became section 190.2, subdivision (a)(2). (*People v. Weidert*, *supra*, 39 Cal.3d at p. 844.) Thus, the voters knew that any conviction used for such purposes as (1) disbarring an attorney who had suffered a felony conviction (*Riccardi*, *supra*,182 Cal. at p. 676), or (2) barring anyone convicted of "infamous crimes" from voting (*Stephens*, *supra*, 51 Cal.2d at p. 869), has to be "final," and is "not final if there still remains some means of setting it aside." (*Ibid.*) Obviously, being found death-eligible based on having suffered a prior conviction for murder is a far graver consequence than being deprived of either the right to practice law (as in *Riccardi*) or the right to vote (as in *Stephens*). Accordingly, this Court should find that when the electorate approved the enactment of section 190.2, subdivision (a)(2), it intended that the term "convicted" would be defined as requiring a judgment that is final on appeal.

Further, this Court must consider the "wider historical circumstances" of the enactment of the 1978 death penalty initiative in assessing the voters' intent as to that initiative. (*People v. Hernandez* (2003) 30 Cal.4th 835, 866.)

Thus, the fact that only two years before the approval of the initiative the high court held that all procedures used in imposing the death penalty must meet a standard of "heightened reliability" (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305) further supports appellant's argument. This Court should assume that the electorate intended for the term "convicted" to be construed in a way that would guarantee the highest degree of reliability in death sentences, and thus that they intended that it would be defined as requiring a conviction that was final on appeal.

Finally, statutes should not be given meanings that would lead to "absurd consequences." (*In re Michelle D.* (2002) 29 Cal.4th 600, 606; *People v. Ledesma* (1997) 16 Cal.4th 90, 95.) In this context, construing the term "convicted" so broadly as to include a conviction that is not final on appeal could lead to the "absurd consequence" of a defendant being sentenced to death and perhaps even executed based solely on a prior conviction that is later invalidated on appeal. That would be both an "absurd consequence" and a particularly drastic and lamentable failure to provide the procedural protections mandated by the standard of heightened reliability imposed by the Eighth Amendment in capital cases. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638; *People v. Horton* (1995) 11 Cal. 4th 1068, 1134.)

2. The Special Circumstance Was Invalid Because the "Previous" Murder Upon Which It Relied Occurred After the Charged Murder

Section 190.2, subdivision (a)(2), as interpreted by this Court, applies even when the murder resulting in the previous conviction was committed *after* the charged murder. (*People v. Hendricks*, *supra*, 43 Cal.3d at pp. 595-596.) As the Court has ruled, the "convicted previously" phrase simply requires that the conviction be rendered before the trial on the charged murder. (*Ibid.*) Thus, the prior-murder-conviction special circumstance

premises death-eligibility on a fact that arises after the commission of the charged murder for which the State seeks to execute the defendant. This Court has rejected both state law and federal constitutional challenges to the subdivision (a)(2) special circumstance. (*People v. Hinton* (2006) 37 Cal.4th 839, 879; *People v. Gurule* (2002) 28 Cal.4th 555, 634-638; *People v. McLain* (1988) 46 Cal.3d 97, 107-108; *People v. Grant* (1988) 45 Cal.3d 829, 848.) Although appellant disagrees with the Court's construction of the "convicted previously" language of the special circumstance, there is no point in seeking reconsideration of a ruling the Court has repeatedly reaffirmed. Instead, appellant asserts his federal constitutional claims in order to preserve them for federal habeas corpus review in the event he does not obtain an order for a new trial in this Court. As shown below, use of the prior-murder-conviction special circumstance to make a defendant death-eligible on the basis of a crime that had not happened at the time of the charged murder violates the notice and fundamental fairness requirements of the due process clause of the Fourteenth Amendment, as well as the cruel and unusual punishment clause of the Eighth Amendment.[54]

The due process clause requires that penal statutes define criminal offenses with sufficient definiteness that ordinary people have notice of and can understand what conduct is prohibited. (*Papachristou v. City of Jacksonville* (1972) 405 U.S. 156, 162; *Lanzetta New Jersey* (1939) 306 U.S. 451, 453.) The purpose of the notice requirement is self-evident: the parameters of the criminal prohibition must be defined in advance so a

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[54] Appellant's claim here challenges the use of a murder occurring after the capitally-charged murder for the purpose of establishing his death eligibility under section 190.2, which must be distinguished from the very different purpose of selecting the appropriate sentence under section 190.3 for a defendant who has been found to be death eligible.

potential offender has an opportunity to decide whether to risk or avoid the criminal liability *and* the penal consequences that attach to its violation. (See *United States v. Batchelder* (1979) 442 U.S. 114, 123 [fair notice problems arise if a criminal statute does not state with sufficient clarity the consequences of its violation].) Accordingly, the sufficiency of the notice provided by a criminal statute must be judged at the time the defendant commits the offense.

The special circumstances in section 190.2, subdivision (a), define which murders are death-eligible. (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 467; *People v. Green* (1980) 27 Cal.3d 1, 49.) Those special circumstances distinguish death-eligible murders from all other first degree murders by establishing specific facts that must be proved before the penalty for first degree murder – 25 years to life in prison – is replaced by the most severe penalties possible – life in prison without parole or death. In effect, the special circumstances operate like an element to define the separate homicide offense of capital murder. (See *Ring v. Arizona* (2002) 536 U.S. 584, 605 [a sentence enhancement used to increase punishment beyond the maximum authorized statutory sentence is the functional equivalent of an element of a greater offense]; *People v. Superior Court* (*Engert*) (1982) 31 Cal.3d 797, 803 [the special circumstance "is no less crucial . . . than the elements of the underlying crime"].)

The use of section 190.2, subdivision (a)(2), in this case violated appellant's due process right to fair notice. When appellant purportedly killed Sandra Gallagher, he had notice that his conduct – killing – was prohibited. However, he had no notice that his conduct could subject him to the death penalty. Nothing about that murder supported a special circumstance finding, as ultimately shown by the prosecution's decision not to allege any special

circumstance other than the prior-murder-conviction charge. At the time that Ms. Gallagher was killed, the subdivision (a)(2) special circumstance could not apply because appellant had committed no other murder and thus there could have been no prior murder conviction. In short, at the time of the Gallagher homicide, appellant had no notice whatsoever that he would be liable for a special circumstances murder and could be sentenced to death.[55] (See *Bouie v. City of Columbia* (1964) 378 U.S. 347, 350, citing *United States v. Harriss* (1954) 347 U.S. 612, 617 ["The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has often been recognized by this Court."].) Under the due process clause there can be no retroactive remedy for defective notice. Appellant's purported commission of the Cribbs murder six weeks after the Gallagher homicide could not reach back in time to compensate for the lack of contemporaneous notice that the latter crime was a special circumstances murder.

Appellant is aware of no case in which the United States Supreme Court has affirmed death-eligibility based on facts about the circumstances of the crime or the criminal record of the defendant that did not arise until *after* the commission of the capitally-charged murder. The very notion of predicating death-eligibility on events that have not occurred at the time of the

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[55] This due process problem does not arise when the prior-murder-conviction special circumstance is premised on a murder conviction rendered before the capitally-charged offense. As in all habitual offender statutes, in that situation the predicate facts for application of the special circumstance exist and the defendant therefore has notice that a subsequent murder may subject him to the death penalty. (See *People v. Stanley* (1873) 47 Cal. 113, 116 [where defendant has a previous conviction before committing a subsequent offense, the increased penalty imposed for the latter offense is a consequence "'which being fully apprised of in advance, the offender was left free to brave or avoid.'"].)

murder offends the due process guarantee of basic fairness in criminal adjudication. (See *United States v. Lanier* (1997) 520 U.S. 259, 266 ["due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope"]; *La Grand v. Stewart* (9th Cir. 1998) 133 F.3d 1253, 1260 ["the Due Process Clause . . . protects criminal defendants against novel developments in judicial doctrine."]) This Court's unreasonable application of the prior-murder-conviction special circumstance to convictions for murders that post-date the charged crime violates that due process clause requirement of basic fairness.

In addition to violating the due process requirements of fair notice and fundamental fairness, use of the prior-murder-conviction special circumstance violated appellant's right to be free from the risk of arbitrary and capricious capital sentencing under the Eighth and Fourteenth Amendments. The "central mandate" of the high court's Eighth Amendment jurisprudence is that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Zant v. Stephens* (1983) 462 U.S. 862, 874, quoting *Gregg v. Georgia*, *supra*, 428 U.S. at p. 189.) To this end, state death penalty statutes "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*, *supra* at p. 877.) In short, there must be a meaningful basis for defining death-eligibility. (See *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).)

A conviction for an offense that is not transactionally related to the

alleged capital murder, and which was committed after that alleged murder, does not rationally distinguish between murders that are and are not deserving of death. Instead, fortuity determines death-eligibility. Appellant's prosecution is a case in point. The Gallagher murder did not become a capital crime as a result of any fact inherent in the crime or in appellant's criminal record at the time he allegedly committed it. Rather, it became a capital case solely because the prosecutor in Florida obtained a conviction in the Cribbs case before this case was tried in California. Such chance timing is the type of capriciousness *Furman* forbids. (*Furman v. Georgia*, *supra*, 408 U.S. at pp. 309-310 (conc. opn. of Stewart, J.).) It certainly does not provide a meaningful basis for identifying which murderers should be eligible for execution.[56]

The irrationality of the Court's construction of section 190.2, subdivision (a)(2), is also reflected in the failure of the prior-murder-conviction special circumstance to serve the accepted penological

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[56] Under the Court's construction of section 190.2, subdivision (a)(2), chance timing is not the only source of arbitrariness. There is also the possibility that prosecutors may manipulate the order of trials in unrelated murder cases to maximize the chance of obtaining a death sentence. In *Hendricks*, this Court rejected this risk as unproven. (*People v. Hendricks*, *supra*, 43 Cal.3d at p. 596, fn. 2.) Nevertheless, the risk exists. In much the same way that a prosecutor may join offenses in order to bolster a weak case with a stronger one (see, e.g., *People v. Smallwood* (1986) 42 Cal.3d 415, 429-430; *Williams v. Superior Court* (1982) 36 Cal.3d 441, 453), prosecutors may decide to prosecute and obtain a conviction for a subsequent murder with stronger evidence first, and to then use that conviction as a prior-murder-conviction special circumstance in order to seek a death sentence on a prior murder with less certain evidence. The facts of this case suggest as much. Premising death-eligibility on such post-crime litigation tactics impermissibly injects arbitrariness into capital-sentencing in violation of the Eighth Amendment.

justifications for capital punishment. Appellant's death-eligibility under section 190.2, subdivision (a)(2), attached to the first alleged murder – the Gallagher murder – only. Certainly, a special circumstance that makes a defendant death-eligible if he commits a murder *after* already having committed and been convicted of another murder may serve the goals of deterrence and retribution. In that situation, the defendant is on notice when he kills the first time that committing another murder may result in execution, and when he kills again he shows that he is undeterred by his previous penal censure. Thus, his moral culpability has increased as a result of his repeat offense. The same cannot be said about the prior-murder-conviction special circumstance, which, as construed by this Court, permits executing a defendant for his first murder. Plainly put, at the time of the crime, a death sentence was no more warranted for the Gallagher murder, appellant's first murder, than for any other first degree murder.

Thus, the prior-murder-conviction special circumstance finding against appellant violated the federal Constitution. That finding violated the due process clause of the Fourteenth Amendment, and rendered the death-eligibility determination fundamentally unfair, because (1) appellant did not have fair notice that the murder of Ms. Gallagher could be a capital crime, and (2) the application of that special circumstance to murders committed after the charged crime is unreasonable. That finding also violated the Eighth and Fourteenth Amendments because there was no rational basis for using a conviction for a subsequent murder to establish death-eligibility in this case, and the use of the Florida murder conviction for that purpose injected arbitrariness into the death-eligibility determination.

D. The Error in Improperly Applying the Prior-Murder-Conviction Special Circumstance Is Cognizable on Appeal

As set forth above, appellant moved to strike the prior-murder-conviction special circumstance allegation based "on the arguments set forth in the attached brief filed in the pending Florida appeal of [the alleged] prior conviction . . . and upon such other and further arguments as may be presented . . . at the hearing of the motion." (3 CT 471-472; 6 RT 153-178.) At the hearing on the motion, defense counsel argued that because appellant had not yet filed his opening brief in the pending appeal of the Florida conviction that conviction "doesn't have the stamp of approval of an appellate court as you have in most situations." (6 RT 165.) The "purpose of the general doctrine of waiver is to encourage a defendant to bring problems to the attention of the trial court, so they may be corrected or avoided . . ." (*People v. Saunders* (1993) 5 Cal.4th 580, 590.) In this case, defense counsel did bring the problem that the prior-murder-conviction special circumstance was invalid because the alleged prior conviction was not final and/or did not exist to the trial court's attention. That argument was sufficient to preserve for appeal the claims asserted herein.

However, assuming arguendo that appellant failed to preserve any of the grounds upon which he now asserts that the prior-murder-conviction special circumstance was invalid, the Court should still consider whether the application of section 190.2, subdivision (a)(2), in this case violated appellant's rights under the state and federal Constitutions and the applicable principles of statutory construction, for several reasons. First, this Court has consistently considered "as applied" challenges to California's death penalty law like this one on their merits even when the precise challenge asserted on appeal was not raised at trial. (*People v. Hernandez* (2003) 30 Cal.4th 835,

863; see also *People v. Seaton* (2001) 26 Cal.4th 598, 691; *People v. Davenport* (1995) 11 Cal.4th 1171, 1225; *People v. Garceau* (1993) 6 Cal.4th 140, 207; *People v. Roberts* (1992) 2 Cal.4th 271, 323.)

Second, because the prior-murder-conviction special circumstance found true in this case was invalid, the death sentence imposed based on that special circumstance is unauthorized. Under section 1260, no specific objection is required to challenge an unauthorized sentence on appeal. (*People v. Lawley* (2002) 27 Cal.4th 102, 171-172 [sentence imposed on invalid special circumstance is unauthorized]; *People v. Scott* (1994) 9 Cal.4th 331, 354 [unauthorized sentence may be challenged on appeal notwithstanding lack of objection].)

Third, whether or not the previous conviction in this case was properly used as the basis for finding the prior-murder-conviction special circumstance true is cognizable on appeal under "the well-established principle that a reviewing court may consider a claim raising a pure question of law on undisputed facts. [Citations.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 118, 133; accord, *People v. Hines* (1997) 15 Cal.4th 997, 1061; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.)

Fourth, in light of this Court's holding in *People v. Hendricks*, *supra*, 43 Cal.3d at pp. 595-596, it would have been futile for defense counsel to argue that section 190.2, subdivision (a)(2), did not apply in this case because the murder upon which the purported prior conviction was based occurred after the charged crime. A claim is not waived for failure to object where an objection would be futile. (*People v. Hill* (1998) 17 Cal.4th 800, 821; *People v. Welch* (1993) 5 Cal.4th 228, 237-238 ["Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law"].

Finally, it cannot plausibly be argued that appellant somehow "invited" the erroneous application of the prior-murder-conviction special circumstance in this case by declining the trial court's offer to continue the trial until his appeal of the not-yet-final Florida conviction was decided. (6 RT 175-178.) "The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest." (*People v. Wickersham* (1982) 32 Cal.3d 307, 330, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 201; *People v. Coffman* (2004) 34 Cal.4th 1, 49.) As this Court has said, the invited error doctrine only applies if the defense had a "clearly implied tactical purpose" for committing the act which purportedly invited the court to commit the error the defendant subsequently seeks to raise on appeal. (*Ibid.*) This case does not fit that paradigm, because appellant, not his counsel, rejected the proposed continuance, and did not do so for the tactical purpose of gaining a reversal on that ground.

Appellant's refusal to agree to a continuance was not motivated by a desire to create error by inducing the trial court to allow the prosecution to rely on the not-yet-final Florida conviction as the basis for a prior-murder-conviction special circumstance allegation. Appellant was solely concerned about moving the trial forward, as he had been throughout the pre-trial proceedings in the case. Thus, appellant had objected to continuances that were requested by his own counsel before the question arose of continuing the trial until the Florida appeal was decided. (5 RT 29-30, 63-64.) In fact, appellant had earlier asked the trial court to appoint him new counsel because he was upset that his counsel had asked for a continuance in order to complete his trial preparations. Defense counsel informed the trial court at that time that if appellant "had his choice, he would . . . skip all the penalty phase

preparation and, do or die, [] go on with the guilt phase." (6A RT 76.) Because appellant did not refuse to agree to a continuance for the "tactical purpose" of inviting the error of which he now complains, this is not an instance of invited error.

For all the foregoing reasons, the error is cognizable on appeal.

E. The Consideration of an Invalid Special Circumstance Requires Reversal of the Guilt and Penalty Judgments

1. The Penalty Should Be Reversed

The judgment of death must be reversed because the jury made its decision to impose a death judgment based on finding that the prior-murder-conviction special circumstances was true. If this Court reverses that special circumstance finding, there can be no valid death judgment. (See § 190.2, subd. (a); *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1322 ["Without a valid special circumstance finding, (the defendant) is ineligible for the death penalty."]; *People v. Hayes* (1985) 38 Cal.3d 780, 788 [where an invalid special circumstance was "the sole basis for conducting the (penalty phase) proceeding, the verdict as to penalty . . . must be set aside."]; *People v. Martinez* (2003) 31 Cal.4th 673, 708 (dis. opn. of Kennard, J.) ["Imposing the death penalty on a defendant for a killing without a qualifying special circumstance is a 'substantial injustice' under our law, which requires at least one special circumstance before death can even be considered."].)

2. The Guilt Verdicts Should Be Reversed

Reversal of the guilt verdicts is also required because, as trial counsel argued below, the effect of the trial court's erroneous refusal to strike the prior-murder-conviction special circumstance was that appellant was unfairly tried by a "death qualified" jury, i.e., one that was "'slanted' [] in favor of conviction." (6 RT 158; see *Lockhart v. McCree* (1986) 476 U.S. 162, 177.)

Appellant recognizes that the underlying basis of this argument – the claim that the use of death-qualified jurors at the guilt phase violates the Sixth and Fourteenth Amendments because such jurors are more likely to vote for guilt – was rejected by the high court in *Lockhart v. McCree*, *supra,* and that this Court has rejected similar challenges. (*People v. Hovey* (1980) 28 Cal.3d 1, 68-69; *People v. Lenart* (2004) 32 Cal.4th 1101, 1120; *People v. Jackson* (1996) 13 Cal.4th 1164, 1198-1199.) However, those holdings are wrong and appellant urges their reconsideration.

Recent research into the attitudes and behavior of jurors supports the view that the death-qualification process creates juries that are less fair and impartial at the guilt phase. The results of that research show that death-qualified jurors are: (1) more likely to vote for guilt; (2) more likely to find the prosecutor and the prosecution witnesses more believable; (3) less likely to think that it is preferable to let some guilty people go free than to convict an innocent person; (4) more likely to believe that a defendant's failure to testify supports an inference of guilt; and (5) likely to trust the prosecutor and the prosecution witnesses more than the defense attorneys and the defense witnesses.[57] In short, the research shows that "death qualification

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[57] See Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation* (1984) 8 L. & Hum. Behv. 53-79; Fitzgerald & Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes* (1984) 8 L. & Hum. Behv. 31-51; see Gross, *Lost Lives: Miscarriages of Justice in Capital Cases* (1998) 61 Law & Contemp. Probs. 125, 147; Sunby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony* (1997) 83 Va. L.R. 1109, 1127; see also Allen, Mabry & McKelton, *Impact of Juror Attitudes About the Death Penalty On Juror Evaluations of Guilt and Punishment: A Meta-Analysis* (1998) 22 L. & Hum. Behv. 715-721 [meta-analysis of fourteen studies

(continued...)

systematically distorts the attitudes of the jury in a direction that discriminates against the defendant and undermines the protections of due process." (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at p. 48.) In light of this new research, this Court should revisit the issue and find that the trial court's erroneous failure to strike the invalid special circumstance allegation in this case requires reversal of the guilt phase verdicts.

Further, this case is distinguishable from *People v. Horton*, *supra*, in which this Court found that the prosecution's reliance on an invalid prior-murder-conviction special circumstance did not require reversal of the guilt verdict because the defendant failed to raise a challenge to that special circumstance until "shortly before the completion of the defense [guilt phase] case . . . ." (*Horton*, *supra*, 11 Cal.4th at p. 1140.) Here, because appellant's motion to strike the prior-murder-conviction special circumstance was decided at the outset of the trial, it is almost certain that, unlike the defendant in *Horton*, appellant "would have been able to present a []more effective" defense (*ibid*) before a less-biased jury if that motion had been granted.

F. Conclusion

Reversal of the convictions, special circumstance finding and death sentence is mandated here because the only special circumstance alleged at trial was invalid.

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[57](...continued)
showed that the more an individual favored the death penalty the more likely he or she was to favor conviction, regardless of the evidence].

IX

REVERSAL OF APPELLANT'S DEATH SENTENCE IS REQUIRED BECAUSE THE TRIAL COURT ERRONEOUSLY EXCLUDED RELEVANT EVIDENCE ABOUT THE UNIQUE NATURE OF THE VICTIM, IN VIOLATION OF APPELLANT'S RIGHTS TO CONFRONTATION AND CROSS-EXAMINATION, DUE PROCESS, A FAIR PENALTY TRIAL AND A FAIR AND RELIABLE PENALTY DETERMINATION

A. Introduction

At the penalty phase of the trial, the prosecution presented extensive victim impact testimony from members of Sandra Gallagher's family about her exemplary life and fine character which defense counsel complained gave a misleading portrait of her. (17 RT 2108, 2112.) Accordingly, counsel attempted to counter the "false impression" created by that evidence (17 RT 2110) by cross-examining one of the prosecution's witnesses, and proffering the testimony of his own witnesses about other, less savory aspects of Ms. Gallagher's life. Specifically, he sought to elicit evidence that Ms. Gallagher: (1) had been involved with a motorcycle gang; (2) was convicted and/or arrested several times; (3) was on felony probation for firearm possession at the time of her death; (4) was a less-than-perfect mother and spouse; and (5) on several occasions came to work with black eyes after "moonlighting at a biker bar . . . ." (17 RT 2194-2200, 2211-2213, 18 RT 2284-2291, 19 RT 2397-2398.) The trial court precluded the defense from presenting most of that "negative victim impact" evidence to "dirty up" the victim. (18 RT 2291.)

The Eighth Amendment "erects no per se bar" to the introduction at a capital penalty trial of evidence which shows either the specific harm caused by the capital crime or the unique nature of the victim. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825-827.) A state may conclude, as California has, that

such evidence "is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Id.* at p. 827; see *People v. Edwards* (1991) 54 Cal.3d 787, 835-836.) It is well-known that victim impact evidence can have a powerful affect on that determination. (See, e.g., *People v. Roldan* (2005) 35 Cal.4th 646, 725 [noting that the victim impact evidence admitted at trial was "powerful"].) Therefore, the admission of evidence that portrays the victim in falsely glowing terms is not only prejudicial but extremely unfair, because it forces the defendant to choose between: (1) presenting negative evidence about the victim that provides the jury with a more complete and truthful portrayal; or (2) letting the false image pass unchallenged and become part of the calculus of death.

The trial court erred in excluding negative, but accurate, evidence about Ms. Gallagher's "unique[ly] human" qualities that was offered to correct and complete the misleading portrayal created by the prosecution and help insure a more reliable penalty verdict. That error deprived appellant of his constitutional right "not to be sentenced to death 'on the basis of information which he had no opportunity to explain or deny.' [Citation.]" (*Skipper v. South Carolina* (1986) 476 U.S. 1, 5.) The error also violated appellant's rights to due process, confrontation and cross-examination, compulsory process, a fair trial by an impartial jury, and a reliable, individualized and non-arbitrary penalty determination. (U.S. Const., 6th, 8th & 14th Amends.)

B. Factual Background

1. The Victim Impact Evidence Presented at Trial

During pretrial proceedings, defense counsel and the trial court discussed whether the prosecution was likely to put on victim impact evidence if the case reached the penalty phase. (6A RT 91-92.) Defense counsel said

he would be "surprised if [the prosecutor] ended up putting on" any such evidence because the defense had "days and days of rebuttal" evidence. (6A RT 91.) Nonetheless, the prosecution did present extensive victim impact evidence from Ms. Gallagher's mother, Jan Baxter, and sister, Linda Vallicella.

Subsequently, defense counsel sought a mistrial based in part on the prosecutor's failure to provide adequate notice concerning Ms. Vallicella's testimony. (18 RT 2390.) In arguing that a mistrial should be granted, counsel pointed out that the prosecution's victim impact evidence

> put [him] in the position of either asking no questions [about] evidence that I believed to be misleading or . . . attacking the [victim] . . . . [I was put] in a position where I [had] to accept false evidence or challenge it, and I chose to challenge it.

(18 RT 2390-2392.) The trial court denied the motion. (18 RT 2392.)

Ms. Baxter testified that Ms. Gallagher was the oldest and most special of her four children and was extremely bright. (17 RT 2216-2218.) Ms. Baxter had a "very, very close" relationship with her daughter throughout their lives. (17 RT 2220.)

Ms. Vallicella was also very close to Ms. Gallagher. (17 RT 2174.) When they were children Ms. Gallagher was "basically [a] mama" to Ms. Vallicella and their brothers Duane and Robert because their mother was divorced and had to work. (17 RT 2174.) Ms. Baxter confirmed that (1) her daughters had a special relationship, (2) Ms. Vallicella looked up to Ms. Gallagher, and (3) Ms. Gallagher was like a second mother to her siblings. (17 RT 2219.)

According to Ms. Vallicella, her sister was "extremely" intelligent and very good with people, and received "the highest score in Butte County" on the standard intelligence test administered to Navy recruits. (17 RT 2175-

2176.) Ms. Gallagher's test score was so high that she was trained as an aviation electronics technician. (17 RT 2177.) In the Navy, she was so skilled at electronics that she was sent "from her shop to other shops to help with some of the equipment because she was really good." (17 RT 2177.) Ms. Gallagher was also "very military." (17 RT 2183.)

After her honorable discharge from the Navy, Ms. Gallagher went to work at a submarine base "contracted through [Ford] Aerospace" where she was "in charge of all the electronics . . . ." (17 RT 2178.) Ms. Gallagher next worked for Southern Illinois University on the base in San Diego. (17 RT 2180.)

Ms. Gallagher had three sons – Dustin, Garrett and Jacob – who were born in 1980, 1984 and 1986, respectively. (17 RT 2177, 2179.) Ms. Vallicella had a daughter, Brenna, who was nine months younger than Garrett and five months older than Jacob. Ms. Vallicella and Ms. Gallagher were "both mom" to each other's children. (17 RT 2177-2178.)

Ms. Vallicella and her sister remained in close contact throughout their lives. (17 RT 2176-2177.) Ms. Gallagher was her best friend and her "other half." (17 RT 2184.) Since Ms. Gallagher's death, Ms. Vallicella had been "really really lonely." (17 RT 2183-2184.)

Ms. Gallagher's death "completely devastated her whole family" and turned Ms. Vallicella's life upside down. (17 RT 2183.) Ms. Baxter was "totally destroyed" by her daughter's death. (17 RT 2220.) When she heard about it she started screaming and could not stop; she kept moaning and reaching out for her daughter for weeks. (17 RT 2220.) Ms. Gallagher's children were particularly devastated by her death, and were no longer "lucky smiling little boys . . . ." (17 RT 2183, 2220.) The eldest boy went through his most difficult years without his mother, who had been the only person to

whom he could talk, and the younger two boys simply "never had a mother." (17 RT 2220-2221.)

2. The Trial Court's Rulings on Appellant's Proffered Rebuttal Evidence

a. Ms. Vallicella's cross-examination

During Ms. Vallicella's cross-examination, the trial court first precluded defense counsel from cross-examining her about Ms. Gallagher's involvement with the Devil's Disciples motorcycle gang. (17 RT 2195.) The trial court sustained objections to counsel's questions to Ms. Vallicella about whether: (1) she had worried that her sister was hanging out with the "wrong crowd" before she died; (2) she had known that her sister was "hanging around" with a motorcycle gang; (3) she worried about her sister hanging out with a motorcycle gang; and (4) her sister had "h[ung] out with Devils Disciples motorcycle gang." (17 RT 2195.)[58]

Outside the jury's presence, the trial court said defense counsel needed "a little more foundation" before he could question Ms. Vallicella about Ms. Gallagher's relations with the motorcycle gang, because Ms. Vallicella "wasn't quite as close to" her sister at that time, and did not know all her sister's friends. (17 RT 2196.) Defense counsel argued that there was a sufficient foundation for the questions because Ms. Vallicella had (1) testified that she had a "very tight" relationship with her sister, and (2) told the police

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[58] Earlier, after defense counsel had objected that the prosecution's failure to identify Ms. Vallicella as a witness in a timely fashion led him to not subpoena witnesses who "might [have been] able to verify that [Ms. Gallagher] was a member of the Devil's Disciples and was in trouble with them," the prosecutor said he would "have no objection" if defense counsel "pursu[ed]" a "line of questioning" with Ms. Vallicella concerning whether her sister "was a member of the Devil's Society." (18 RT 2106-2107.)

investigating Ms. Gallagher's slaying to "check [her] connection with a motorcycle gang." (17 RT 2196.) The court asked the prosecutor to find out what Ms. Valicella knew about those matters. (17 RT 2197.)

The prosecutor reported that Ms. Valicella was aware that Ms. Gallagher knew motorcycle gang members, but he also objected that any questions on that topic would be irrelevant. (17 RT 2198.) The trial court ruled that defense counsel could ask whether Ms. Gallagher knew gang members, but not whether she was in the gang. (17 RT 2198.) Defense counsel argued that there was sufficient evidence to support asking about the latter issue. He proffered an investigator's report stating that Ms. Vallicella had said that Ms. Gallagher (1) came to her home in "Apple Valley with [] a Devil's Disciple gang member named Fingers," and (2) had been "marked as a narc" by that gang. (17 RT 2198-2199.) The court found that because Ms. Vallicella was not reported to have said that Ms. Gallagher "was in a gang" counsel could only "dirty [Ms. Gallagher] up with the fact that she [had associated] with gang members . . . ." (17 RT 2199-2200.)

Defense counsel responded that he had reports from other witnesses that Ms. Gallagher frequented "biker bars," which "paint[ed] a whole different picture of" her. (17 RT 2200.) The court ruled that counsel could argue that Ms. Gallagher had spent some time with "biker guys," but did not have enough information to cross-examine Ms. Vallicella further on whether her sister was a "member of the gang or h[ung] around with the gang members . . . ." (17 RT 2201.) Counsel then offered to relate additional "good faith information" indicating that Ms. Vallicella knew that her sister was involved with the Devil's Disciples, but the court refused to hear it. (17 RT 2202.)

When defense counsel subsequently asked Ms. Vallicella whether she was aware that Ms. Gallagher had "associat[ed] . . . with any motorcycle

groups," she responded that Ms. Gallagher once came to her house with people who claimed to be members of the Devil's Disciples. (17 RT 2209-2210.) However, she testified that those people were "wannabe's [*sic*]" who "claim[ed] fame," not real Devil's Disciples. (17 RT 2210.)

Defense counsel then informed the trial court outside the jury's presence that he planned to ask Ms. Vallicella about her sister's criminal record, including "a felony conviction for illegal gun possession." (17 RT 2211.) When the prosecutor objected that Ms. Gallagher's criminal record was irrelevant, defense counsel responded that the prosecution's evidence had put her "life as an adult [] in question," and that evidence that she was "on felony probation at the time [of the murder would] paint[] a different picture" and "give[] the jury the true balance" concerning her life. (17 RT 2212.)

Defense counsel's offer of proof was that Ms. Gallagher had been convicted of a misdemeanor "for a DUI with a gun in the car" in 1994, and six months later was charged with a felony after being "arrest[ed] for gun in a car [*sic*] in a DUI situation." (17 RT 2212.) The trial court ruled that because the jurors already knew that Ms. Gallagher drank alcohol, went to bars and "play[ed] around on her husband," and because the prosecution had not portrayed her as a "goody two-shoes," it was irrelevant that "she ha[d] a gun in her car and a DUI." (17 RT 2213.)

Defense counsel then informed the trial court that he wanted to question Ms. Vallicella about whether Ms. Gallagher had (1) been arrested for "sexual battery," and (2) committed "batteries on [her] husband." (17 RT 2213.) Although the prosecution did not object to that proposed questioning, the trial court precluded it on the grounds that the jury already knew that Ms. Gallagher and her husband did not have a "perfect relationship" based on the testimony that "there was difficulty between them," and that they had a

"custody battle," and did not "need additional details about who did what." (17 RT 2214.)[59]

b. Steven Gallagher's proposed testimony

Defense counsel also sought to present evidence about Ms. Gallagher through the testimony of her husband, Steven Gallagher. (18 RT 2285.) Outside the jury's presence, the prosecutor requested an offer of proof concerning Mr. Gallagher's proposed testimony, to which he planned to object to on the grounds of "352 and relevancy . . . ." (18 RT 2284.) In response, defense counsel indicated that Mr. Gallagher would testify on a number of topics regarding victim impact. (18 RT 2285-2291.) They included the following: (1) Ms. Gallagher's relationship with the witness (18 RT 2285); (2) that Ms. Gallagher's children did not live with her (18 RT 2286); (3) that Ms Gallagher was hospitalized for "multiple personality disorder" (18 RT 2287); (4) an incident where Ms. Gallagher "went off partying" overnight with the Devil's Disciples (18 RT 2288-2289); (5) that Ms. Gallagher used "coke" with people at McRed's bar (18 RT 2290); and 6) that Ms. Gallagher "stalk[ed]" Mr. Gallagher's girlfriend. (18 RT 2291.)

The trial court only permitted defense counsel to inquire into one of those topics – where Ms. Gallagher's children were living. (18 RT 2226.) Concerning Mr. Gallagher's proposed testimony about his relationship with the victim, the trial judge simply said that she would not allow the testimony

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[59] The prosecutor later noted for the record that a juror had sent a note complaining that defense counsel had been "trashing the victim" when he questioned Ms. Vallicella. (18 RT 2286-2287.) The prosecutor suggested that defense counsel's cross-examination of Ms. Vallicella was a "tactic or setup" designed to lay the groundwork for a subsequent claim that appellant had received ineffective representation, because it was "almost unheard of" to rebut victim impact testimony. (18 RT 2287.)

because she was "uncomfortable" with the idea of Mr. Gallagher being "kind of cross-examine[d] about how he did not really care for his wife." (18 RT 2285-2286.) The judge then: (1) excluded Mr. Gallagher's proposed testimony that Ms. Gallagher went "off partying" with the Devil's Disciples and was not heard from all weekend on the ground that it was irrelevant (18 RT 2288-2289); (2) excluded Mr. Gallagher's proposed testimony that Ms. Gallagher used drugs ("coke") on the ground that it would be "unfair" for him to "mak[e] accusations" against her since they had been estranged (18 RT 2290); and (3) excluded Mr. Gallagher's proposed testimony that Ms. Gallagher had stalked his girlfriend on the ground that, under Evidence Code section 352 ("section 352"), it would be inappropriate to get into a "mini soap opera" about the Gallaghers' "fractured" marriage. (18 RT 2291.)

In light of the trial court's ruling that he could only ask Mr. Gallagher about where the children were, defense counsel did not call him. (18 RT 2292.)

c. Sidney Klessinger's proposed testimony

Defense counsel made an offer of proof outside the presence of the jury that Sidney Klessinger, Ms. Gallagher's former Southern Illinois University supervisor at the naval station in San Diego, would testify about Ms. Gallagher's problems at work, including that she came in "with black eyes and talking about problems she was having and the fact that she was working a moonlighting job at a biker bar . . . ." (19 RT 2396-2398, 2404.) Although the prosecutor did not object to that proposed testimony, the trial court precluded defense counsel from eliciting testimony from Ms. Klessinger about any of those matters under section 352. (19 RT 2397-2398.)

C. The Trial Court Violated the Federal Constitution and State Law By Excluding Evidence Offered to Give the Jury a More Correct and Complete View of the Victim

As shown by defense counsel's offers of proof, the carefully constructed image of Sandra Gallagher presented by the prosecution – as a highly intelligent and skilled aerospace technician who devoted her life to serving her country, and a model mother who was devoted to her family and children – was far from complete or accurate. Appellant should have been allowed to present a fuller portrait by showing that Ms. Gallagher: (1) abused drugs and alcohol; (2) was heavily involved with and possibly a member of an outlaw motorcycle gang; (3) was arrested at least twice for driving under the influence while in illegal possession of a firearm; and (4) engaged in various other types of dangerous and/or disreputable behavior, such as committing sexual battery. If the trial court had admitted that evidence the jury would have seen a very different "glimpse" of Ms. Gallagher's "uniqueness as a human being." (*Payne v. Tennesee*, *supra*, 501 U.S. at p. 823.)

Although Ms. Gallagher's death was undoubtedly a tragedy for her family, regardless of the life she led or her human failings, the false saintly picture of her presented at trial only served to mislead the jury in its assessment of the relative weight of the aggravating and mitigating evidence. The trial court's refusal to allow appellant to present evidence that would have corrected that false picture violated his rights to confront and cross-examine the witnesses and evidence presented by the prosecution, to present evidence in his own defense, to compulsory process, to due process, and to a reliable and individualized penalty determination, under the Sixth, Eighth and Fourteenth Amendments.

1. Appellant Had a Constitutional Right to Present Evidence Giving a More Complete and Accurate Picture of the Victim

Under *Payne v. Tennesee*, *supra*, 501 U.S. 808, victim impact evidence is admissible under the Eighth Amendment provided it is not "so unduly prejudicial" as to render the penalty trial fundamentally unfair. (*Id.* at p. 825; accord, *People v. Lewis* (2006) 39 Cal.4th 970, 1056; see *People v. Pollock* (2004) 32 Cal.4th 1153, 1180 [victim impact evidence should be excluded when it is "so inflammatory as to elicit from the jury an irrational or emotional response."].) In approving victim impact evidence, the high court ruled that "[t]here is no reason to treat such evidence differently than other relevant evidence is treated." (*Payne*, *supra*, at p. 827.) Under *Payne*, this Court has permitted the almost unlimited use of victim impact evidence in capital trials. (See *People v. Lewis*, *supra*, 39 Cal.4th at pp. 987, 1056-1057 [videotaped tributes to the victims]; *People v. Huggins* (2006) 38 Cal.4th 175, 238-239 [testimony about the victim's "charitable contributions," and that a bronze statue of her was erected after the murder, "fell far short" of violating the proper limits on such evidence]; *People v. Pollock*, *supra*, 32 Cal.4th at pp. 1180-1181 [testimony that the victim attended Bible classes].)

Of course, appellant, like all capital defendants, has a due process right under the Fourteenth Amendment to respond to the aggravating evidence used by the prosecution in its quest for a death sentence. (*Gardner v. Florida* (1977) 430 U.S. 349, 356, 362; *Skipper v. South Carolina*, *supra*, 476 U.S. at p. 5; *id.* at p. 9 (conc. opn. of Powell, J., Burger, C.J. and Rehnquist, J.) [capital defendant had due process right to present evidence of his good behavior in prison to rebut prosecution evidence suggesting he would commit violent crimes if incarcerated]); *Simmons v. South Carolina* (1994) 512 U.S. 154, 161-163 [capital defendant had due process right to present evidence he

would be ineligible for parole if sentenced to a life term to rebut claim of future dangerousness]; *Green v. Georgia* (1979) 442 U.S. 95, 97 (per curiam) [where prosecution's theory was that defendant was the actual killer, exclusion of evidence that a co-participant was the actual killer violated federal due process]; see *People v. Clark* (1965) 63 Cal.2d 503, 505.) This right extends to the prosecution's victim impact evidence. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 823.) Thus, appellant, like any capital defendant, is entitled to correct a false or misleading picture of the victim as portrayed by the prosecution's witnesses. (*Ibid.* [in weighing victim impact evidence, like weighing the question of future dangerousness, the sentencer will "have the benefit of cross-examination and contrary evidence by the opposing party."].)

As this Court has explained, the purpose of rebuttal evidence is to present a balanced picture. (*In re Ross* (1995) 10 Cal.4th 184, 208.) The high court's approval of victim impact evidence rests, at least in part, on a constitutional sense of balance: allowing the prosecution to counterpose the "human cost of the crime" against the mitigating evidence of the defendant's "individual personality" helps "'keep the balance true'" in capital cases. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 827, quoting *Snyder v. Massachusetts* (1934) 291 U.S. 97, 122.) In other words, the presentation of victim impact evidence is an appropriate "symmetrical response" to the defendant's presentation of mitigating evidence. (Mandery, *Notions of Symmetry and Self In Death Penalty Jurisprudence* (2004) 15 Stan. Law and Policy Rev. 471, 473.) The same concerns for symmetry and maintaining a true balance between the aggravating and mitigating evidence require that capital defendants be allowed to respond to inaccurate victim impact evidence by presenting evidence that gives a more accurate and complete picture of the victim's unique qualities.

In addition to a due process right to counter any aggravating evidence offered at the penalty phase, including evidence about the victim's character and background, appellant has the right under the confrontation clause of the Sixth Amendment to cross-examine and impeach the witnesses against him (*Davis v. Alaska* (1974) 415 U.S. 308, 315-316); the right under the due process clause of the Fourteenth Amendment to compulsory process and to present witnesses in his own defense (*Washington v. Texas* (1967) 388 U.S. 14, 18-19); and the right under the Eighth Amendment to a reliable, non-arbitrary penalty determination. (*Caldwell v. Mississippi* (1985) 428 U.S. 280, 305.) All these separate guarantees conferred on appellant the right to cross-examine the prosecution's witnesses about Ms. Gallagher's character and accomplishments, and to present evidence in response.

To be sure, a defendant who presents negative, but accurate, victim impact evidence may risk alienating the jury. (See *Payne v. Tennessee*, *supra*, 501 U.S. at p. 823 ["for tactical reasons it might not be prudent for the defense to rebut victim impact evidence"].) Several commentators have noted the difficulty of subjecting victim impact evidence to such adversarial testing. (Anderson, *Will the Punishment Fit the Victims? The Case for Pre-trial Disclosure, and the Uncharted Future of Victim Impact Information in Capital Jury Sentencing* (1997) 28 Rutgers L. J. 367, 408-412 [while capital defendants must try to rebut victim impact evidence, the "battle [may] not [be] worth winning" since it may anger the jury]; Fahey, *Payne v. Tennessee*: *An Eye for An Eye and Then Some* (1992) 25 Conn. L. Rev. 205, 255 ["By attempting to impeach the testimony relating to the victim or impugn the victim's character, the offender will only incense the jury"]; Mandery, *supra*, 15 Stan. Law and Policy Rev. at pp. 504-505 [victim impact evidence can "[t]heoretically . . . be rebutted," but few defense attorneys "would dare to . . .

offer rebuttal evidence that the victim was a bad person"]; Mosteller, *Victim Impact Evidence: Hard to Find the Real Rules* (2003) 88 Corn. L. Rev. 543, 546-547 [the use of negative victim evidence in rebuttal is "incredibly distasteful"].)

However, given *Payne*'s approval and this Court's acceptance of virtually unrestricted victim impact evidence, appellant was faced with a "Hobson's Choice" when the prosecution put on falsely positive evidence about Ms. Gallagher. He could respond to that evidence by informing the jury about the negative aspects of Ms. Gallagher's life and character, at the risk of offending the jury, or he could let the false image of Ms. Gallagher stand and become part of the jury's penalty determination. (Anderson, *supra,* 28 Rutgers L. J. at p. 409.) Defense counsel here chose to contest the misleading evidence. And appellant had a constitutional right to test that evidence by rebuttal and cross-examination, the "greatest legal engine ever invented for the discovery of truth." (5 Wigmore on Evidence (Chadbourne rev. ed.1974) § 1367, p. 32; *People v. Chatman* (2006) 38 Cal.4th 344, 384.) By erroneously precluding appellant from presenting a truer picture of Ms. Gallagher, the trial court violated his rights to rights to confront and cross-examine the witnesses and evidence presented by the prosecution, to present evidence in his own defense, to compulsory process, to due process, and to a reliable and individualized penalty determination, under the Sixth, Eighth and Fourteenth Amendments, and state evidentiary law.

2. There Were No Valid State Law Grounds for Excluding the Evidence Offered to Correct the Misleading Portrayal of the Victim's Character and Background

The trial court erroneously ruled that almost all of the evidence appellant sought to present about the more negative aspects of Ms.

Gallagher's life was irrelevant or otherwise inadmissible under section 352. While the court gave various reasons for excluding the different items of evidence, it is clear from its rulings that the court was "uncomfortable" with permitting what it viewed as an attempt to impugn the victim's character. (16 RT 2021-2022 [trial court precludes proposed defense argument that would "tarnish the victims"], 18 RT 2286 [trial court is "uncomfortable" with allowing Mr. Gallagher to testify "about how he really did not care about his wife"], 18 RT 2290 [trial court calls it "unfair" for Mr. Gallagher to testify that he told his wife not to go to McRed's because she "got into coke there," because she was not present to "give her side"].) In light of appellant's constitutional right to counter the aggravating evidence used against him, the trial court's apparent discomfort was not a valid ground for excluding the evidence appellant offered to counter the misleading victim impact evidence. As shown below, the evidence appellant sought to introduce was relevant and admissible under Evidence Code sections 210 and 352, and the trial court abused its discretion in prohibiting both the proposed cross-examination and rebuttal evidence.

a. The trial court erroneously excluded the proposed cross-examination of Ms. Vallicella about Ms. Gallagher's criminal record and association with motorcycle gang members

As set forth above in section B(2)(a), *supra*, the trial court precluded defense counsel from questioning Ms. Vallicella on Ms. Gallagher's: (1) involvement with a violent motorcycle gang (17 RT 2194-2195, 2198-2202); (2) record of arrests and convictions, including for driving under the influence while in illegal possession of firearms; and (3) other violent criminal conduct, such as batteries on her husband. (17 RT 2211-2214.) The trial court erred in precluding that questioning as irrelevant. (17 RT 2199-2200, 2213.)

"'Relevant evidence' means evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*People v. Ramirez* (2006) 39 Cal.4th 398, 453; Evid. Code, § 210.) This definition applies to evidence presented at the penalty phase of a capital case. (*People v. Frye* (1998) 18 Cal.4th 894, 1015-1016 ["[T]he concept of relevance as it pertains to mitigation evidence is no different from the definition of relevance as the term is understood generally."].) The evidence about Ms. Gallagher's questionable and criminal behavior was clearly and constitutionally relevant, in light of the prosecution's reliance on evidence of her good character. (See *Payne*, *supra*, 501 U.S. at p. 823 [while it may be "difficult" for defendants to rebut victim impact evidence, "the mere fact that for tactical reasons it might not be prudent for the defense to rebut victim impact evidence makes the case no different than others in which a party is faced with this sort of a dilemma."]; see also *Skipper v. South Carolina, supra*, 476 U.S. at p. 5, fn.1 [even if future adjustment to prison was not otherwise relevant, where prosecution argues future dangerousness, adjustment becomes relevant and defendant has right to present evidence of adjustment to rebut prosecution's theory]; accord, *Simmons v. South Carolina*, *supra*, 512 U.S. at pp. 161-163 [where prosecution argued future dangerousness, exclusion of evidence that defendant would never be granted parole violated due process even if it would not otherwise be relevant to penalty determination]; *Green v. Georgia*, *supra*, 442 U.S. at p. 97 [where prosecution's theory was that defendant was the actual killer, evidence that a co-participant was the actual killer was "highly relevant to a critical issue"]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622-623 [even if evidence of third party's role in crime was otherwise irrelevant, prosecutor's argument that defendant was the ringleader made it relevant].)

This Court has recognized that even in a guilt phase trial, evidence about a murder victim's character traits is relevant if that character is placed in issue by the prosecution. (Cf. *People v. Gurule* (2002) 28 Cal.4th 557, 623 [error to admit evidence of murder victim's peaceful nature where defendant did not offer any evidence that victim acted in an "aggressive or confrontational manner"]; *People v. Hoffman* (1925) 195 Cal. 295, 301-302 [same].) No less is true at the penalty phase. The prosecution places the victim's character in issue when it offers aggravating evidence showing that the victim's good qualities weigh in favor of a death sentence, as the prosecution did here. (*People v. Harris*, *supra*, 37 Cal.4th at pp. 374-375 (conc. and dis. opn. of Kennard., J.) [evidence that murder victim had lived with a drug dealer, and had knowingly "benefitted financially from" his criminal activity, was relevant to rebut the evidence that she was a "cheerleader who was on the debate team and loved to dance."].) Evidence about Ms. Gallagher's bad character traits was relevant because it had a "tendency in reason" to undermine the prosecution's good character evidence. (*People v. Ramirez*, *supra,* 39 Cal.4th at p. 453.)

As defense counsel argued, the prosecution put the nature of Ms. Gallagher's "life as an adult" in dispute by presenting evidence purporting to demonstrate her sterling qualities. (17 RT 2212.) And defense counsel certainly made a substantial proffer with information from multiple sources about Ms. Vallicella's knowledge that her sister had associated with the Devil's Disciples. (Sec. B(2)(a), *supra*, pp. 188-189.) That evidence that in the years immediately prior to the capital crime Ms. Gallagher had not only "associated with" members of the Devil's Disciples, but had been a member of the gang who was "marked as a narc" by other members, combined with the additional evidence that she had been arrested/and or convicted at least

twice for driving under the influence while in possession of firearms and had committed battery and/or sexual battery, clearly would have had a "tendency in reason" both to undermine the prosecution's claim in penalty closing argument that she "was a good person" (20 RT 2732), and to make her less of a "'faceless stranger'" in the eyes of the jury. (*Payne*, *supra*, 501 U.S. at p. 825, quoting *South Carolina v. Gathers* (1989) 490 U.S. 805, 821.)

The trial court ruled that since the jury "already kn[ew]" that Ms. Gallagher drank, went to bars, and had "apparently play[ed] around on her husband," it was irrelevant to their evaluation of Ms. Gallagher's "uniqueness as a human being" that, for example, she had been arrested twice in the year prior to her death for driving under the influence while in illegal possession of firearms. (18 RT 2213.) However, there is certainly a significant difference between engaging in quotidian misbehavior like drinking in bars and "play[ing] around" on one's estranged spouse, and committing self-destructive and reprehensible acts like drunken driving and possession of illegal firearms. The jury was entitled to see both sides of Ms. Gallagher's life and character in order to meaningfully assess appellant's moral culpability. (See *Payne*, *supra*, 501 U.S. at p. 825.)

The trial court's ruling was both unfounded and unfair. It was neither fair nor evenhanded first to permit the prosecutor to play on the jurors' emotions with heart-wrenching, but misleading, evidence about Ms. Gallagher's fine qualities in order to secure a death sentence, and then to preclude the defense from responding to that evidence in an effort to *save* appellant's life.

b. The trial court abused its discretion by excluding the proposed testimony by Ms. Gallagher's ex-husband, Steven Gallagher, that she used drugs, neglected her children and stalked his girlfriend

As set forth above in Section B(2)(b), *supra*, the trial court also sustained the prosecutor's objection to Steven Gallagher's proposed testimony that would have covered various negative aspects of Ms. Gallagher's life – that she used drugs, neglected her children, stalked Mr. Gallagher's girlfriend, and went on overnight parties with the Devil's Disciples. (18 RT 2285-2291.) The trial court precluded that testimony on the grounds that testimony that Ms. Gallagher had "partied" with the Devil's Disciples would be irrelevant (18 RT 2288), and that testimony that she used "coke" and stalked Mr. Gallagher's girlfriend would be unduly prejudicial. (18 RT 2290 [testimony about using coke was "unfair"], 2291-2292 [testimony about stalking "push[ed] beyond what" section 352 allows].) The court erred in excluding the proposed testimony on either ground.

As set forth above, the proffered evidence about Ms. Gallagher was clearly relevant. (Sec. C(2)(a), *supra*, pp. 200-201.) The evidence about her wild and irresponsible behavior had a tendency in reason to undermine the prosecution's evidence that portrayed her as: (1) being a devoted mother; (2) having "very military" values; and (3) being an extremely intelligent and highly-skilled aerospace worker. (17 RT 2175-2178, 2183-2184 2219; *People v. Ramirez*, *supra,* 39 Cal.4th at p. 453.) Moreover, the excluded evidence was clearly relevant to the jury's assessment of her uniqueness as a human being. (*Payne*, *supra*, 501 U.S. at p. 823.)

Further, while Mr. Gallagher's proposed testimony about the negative aspects of Ms. Gallagher's life would certainly have been unpleasant for the

victim's family, it would not have been unduly prejudicial. Under section 352, evidence is substantially more prejudicial than probative when it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Waidla* (2000) 22 Cal.4th 690, 724, quoting *People v. Alvarez* (1996) 14 Cal.4th 155, 204, fn. 14.) The proposed testimony would not have had such an effect. To the contrary, because the testimony would have given the jurors a fuller and more accurate picture of Ms. Gallagher, it would have enhanced the fairness of the proceedings and the reliability of their penalty verdict.

c. The trial court abused its discretion by excluding the proposed testimony by Sidney Klessinger about Ms. Gallagher's problems at work

As set forth above in Section B(2)(c), the trial court precluded the defense from presenting Sidney Klessinger's proposed testimony about Ms. Gallagher coming in to work with black eyes after working "a moonlighting job at a biker bar" on section 352 grounds. (19 RT 2396-2398.) This ruling also was erroneous. Just as with the evidence defense counsel sought to elicit from Ms. Vallicella and Mr. Gallagher, the proposed testimony by Ms. Klessinger would have been relevant to the jury's penalty determination because it would have contradicted and supplemented the image of Ms. Gallagher conveyed by the prosecution's evidence. It would have shown that she had not merely associated with "wannabe" motorcycle gang members on one occasion, as Ms. Vallicella's testimony indicated (17 RT 2209-2210), but rather had such intimate involvement with the violent gang that it affected her job and personal safety. That testimony would also have undermined the prosecution's evidence suggesting that Ms. Gallagher had achieved such notable success in her post-military career in aerospace. (17 RT 2178-2180.)

And like Mr. Gallagher's proposed testimony, this testimony would not have been so unduly prejudicial that it posed an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Waidla, supra,* 22 Cal.4th at p. 724.)

D. The Erroneous Exclusion of Evidence About the Victim's Character and Background Requires Reversal of Appellant's Death Sentence

State law violations that occur at the penalty phase of a capital trial require reversal if the appellant can show that a "reasonable possibility" exists that they affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 447.) Federal constitutional violations require reversal unless the State can prove them harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Reversal is required under either of those standards.

Victim impact evidence is "perhaps the most compelling evidence available to prosecutors – highly emotional, frequently tearful testimony coming directly from the hearts and mouths of the survivors . . . [which] arrives at the precise time when the balance is at its most delicate and the stakes are highest." (Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence* (1999) 41 Ariz. L. Rev. 143, 178.) This Court has recognized the powerful nature of victim impact evidence. (See *People v. Roldan, supra,* 35 Cal.4th at p. 725; see also *State v. Allen* (N.M.1999) 994 P.2d 728, 769 (conc. & dis. opn. of Franchini, J.) [victim impact evidence "is unquestionably powerful emotional evidence that appeals to the sympathies or emotions of the jurors"].) Empirical studies have shown that victim impact evidence has a strong impact on jurors' decisionmaking. (See, e.g., Platania & Moran, *Due Process and the Death Penalty: The Role of Prosecutorial Misconduct in Closing Argument in Capital Trials* (1999) 23 L.

& Hum. Behv. 471, 478-479, 481 [mock jurors exposed to straightforward prosecutorial arguments based on victim impact found them more persuasive than even highly inflammatory arguments on other aspects of the prosecution's case in aggravation]; Eisenberg, et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases* (2003) 88 Corn. L. Rev. 306, 317 [mock jurors shown a written victim impact statement were two and one-half times more likely to vote for death]; Nadler & Rose, *Victim Impact Testimony and the Psychology of Punishment* (2003) 88 Corn. L. Rev. 419, 430-431 [studies reviewed are consistent with the general principle that victim impact statements which communicate greater harm produce more severe punishment judgments].) In short, victim impact evidence can have a devastating effect on a capital defendant's chance for a life-without-parole verdict.

Respondent cannot prove that the exclusion of the evidence appellant offered in response to the prosecution's emotionally-charged victim impact testimony did not contribute to the jurors' close and difficult verdict. (*Yates v. Evatt* (1991) 500 U.S. 391, 403-404, disapproved on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62.) "'[T]his is not a case in which a death sentence was inevitable because of the enormity of the aggravating circumstances.'" (*Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849, quoting *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1081.) Admittedly, the evidence that appellant had been convicted of two murders, and may have committed two others, weighed in favor of a death sentence. However, the possibility for a verdict of less than death was real here because that aggravating evidence was countered by ample evidence that the crimes appellant allegedly committed were the products of a number of mitigating factors: (1) his grossly deprived and dysfunctional childhood and family life;

(2) the family legacy of substance abuse he inherited and carried on; and (3) his brain injuries that were the result of substance abuse and traumatic head injuries.

The mitigating evidence presented at trial, which was neither rebutted nor seriously impeached by the prosecution, showed that appellant grew up in a massively dysfunctional family, with a violent, raving drunkard for a father, a "basket case" for a mother, and six neglected, terrified and damaged siblings. (17 RT 2244-2247, 18 RT 2330-2336, 2351-2352.) Appellant's father capriciously beat and tormented all the children (17 RT 2247-2248, 2282, 18 RT 2333, 2356, 2360), but treated appellant the most harshly. (18 RT 2333-2334.) Appellant's mother was neglectful and abusive, both depriving her children of maternal love and inflicting severe punishments. After appellant's father was paralyzed by a heart attack, his mother left her children to fend for themselves while spending all of her time, and the family's only income, drinking and "running around town" with men. (17 RT 2264-2265, 18 RT 2374-2375.)

So appellant grew up in abject poverty – first because his father was an unemployable alcoholic (17 RT 2241, 2249-2251, 18 RT 2352-2353), and later because his mother squandered the family's income – and lived in terror of abuse from his parents. Unsurprisingly, he was a very troubled child, and exhibited serious behavioral problems from infancy – banging his head on the side of his crib, wetting his bed into adolescence, and eating dirt and paint. (17 RT 2260-2261, 18 RT 2302-2303, 2368-2369.) An expert who studied appellant's upbringing said it was "toxic or poisonous." (19 RT 2590.)

It is also unsurprising, given his family background, that appellant struggled with substance abuse. (19 RT 2510-2511.) His older brother taught him to smoke marijuana, drink alcohol and "shoot" drugs while he was still a

child, and also introduced appellant to committing crimes before he even reached his teenage years. (17 RT 2262, 18 RT 2378-2379.) Appellant was a life-long alcoholic, and was repeatedly arrested and/or injured while grossly intoxicated. (19 RT 2423-2425, 2521-2522.) On one occasion when his skull was fractured with a pool cue his blood alcohol level was an astounding .336 percent. (19 RT 2523-2524.)

The defense expert witnesses described appellant's many physical and psychological problems. (19 RT 2436-2438, 20 RT 2665-2666.) For example, he has damage to his anterior right frontal brain lobe of a kind that causes trouble with impulse control, and that could have been caused when his skull was fractured. (19 RT 2436-2438, 2445-2453, 20 RT 2661, 2665-2668.) Thus, even though appellant's crimes made him eligible for the death penalty, they were clearly the products of his blighted childhood and mental impairments.

Moreover, the fact that the jury foreman declared that the jury was at an impasse after four days of penalty deliberations (20 RT 2789-2790) is strong evidence that a death sentence was not a "foregone conclusion" in this case. (*Silva v. Woodford, supra*, 279 F.3d at pp. 849-850.) Given the closeness of the penalty determination, respondent cannot show beyond a reasonable doubt that the trial court's erroneous exclusion of appellant's proposed evidence about the victim's background and character did not contribute to the judgment of death. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *Stringer v. Black* (1992) 503 U.S. 222, 230-232.)

The trial court's refusal to permit the defense to present a more complete and accurate portrayal of the victim must have affected the jury's penalty determination. After it heard the prosecution's misleading and inflated victim impact evidence it was almost inevitable that the jury would

attempt to balance the "value" of Ms. Gallagher's life against appellant's. (See Berger, *Payne and Suffering: A Personal Reflection and Victim-Centered Critique* (1992) 20 Fla. St. U. L. Rev. 21, 46 ["if paeans to the deceased's virtues are not aimed at inviting jurors to make some sort of comparative judgments [between victims and defendants] why do prosecutors never dwell on the [victim's] vices?"].) The court's exclusion of evidence about the less-savory aspects of the victim's life and character unfairly tipped that balance in favor of death. On this record, respondent cannot prove that the jurors' close and difficult penalty verdict was surely unattributable to the trial court's erroneous exclusion of this evidence. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) And even under the state law *Brown* standard (*People v. Brown*, *supra*, 46 Cal.3d at p. 448), the jury's impasse, in light of all the evidence, establishes a reasonable possibility that the exclusion of relevant and probative evidence about the victim's life and character affected the jury's verdict. Accordingly, reversal of appellant's death sentence is required.

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THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED APPELLANT'S FUNDAMENTAL CONSTITUTIONAL RIGHTS BY REFUSING TO INSTRUCT THE JURORS THAT THEY COULD CONSIDER ANY LINGERING DOUBTS AS TO APPELLANT'S GUILT IN MAKING THEIR PENALTY DETERMINATION

Appellant requested, and the trial court refused to give, an instruction that would have told the jury it could consider "lingering doubt" in its penalty determination. As demonstrated below, the trial court's refusal to give the requested instruction violated state law, denied appellant his constitutional rights to due process, a fair trial, and a reliable penalty determination (U.S. Const., 5th, 6th, 8th & 14th Amends.), and requires reversal of the death judgment.

A. Factual Background

As previously stated (Argmt. I, Sec. A(3), *supra*, at p. 39), appellant testified at the guilt phase that (1) he did not commit the charged crime (13 RT 1655, 1678, 1683), and (2) Istvan Kele must have. (13 RT 1644-1645, 1699.) In his guilt phase closing argument, defense counsel told the jury that he was not "caving in or giving up on the theme that the evidence doesn't show that [appellant] did this crime," but also argued the "alternative theory" that the "evidence does not support the [] contention that [the crime] is a first degree murder." (13 RT 1881-1982.)

At the penalty phase, appellant presented extensive testimony about his horrific childhood and upbringing, and about various conditions – including alcoholism and brain damage – that impaired his ability to control his emotions and behavior. (18 RT 2436-2438, 19 RT 2436-2438, 2445-2453, 2661, 2665-2668.)

Appellant asked the trial court to modify CALJIC No. 8.85 to "add as a factor . . . lingering doubt." (19 RT 2568.) The trial court refused to so modify the instruction on the basis that "20 cases [] say that is improper [to instruct on lingering doubt] . . . . It's totally improper. There is case after case that says we are not to instruct it [*sic*] . . . ." (19 RT 2568.)[60] This ruling is reviewed for abuse of discretion. (*People v. Jurado* (2006) 38 Cal.4th 72, 125-126.)

In his penalty phase closing argument, defense counsel told the jurors he accepted their verdict that appellant committed the charged homicide, but argued that: (1) the crime was a "rage killing" that was the product of appellant's alcoholism and "brain damage;" and (2) the jury should find, "despite [their] verdict," that appellant did not deserve the death penalty because he was guilty of "nothing more than" second degree murder. (20 RT 2735, 2738.) Counsel also argued that the guilt phase evidence about the manner of the killing (strangulation), and the penalty phase evidence that appellant's alcoholism and brain damage caused him to erupt in "rage reaction[s]," weighed in favor of a life verdict. (20 RT 2737-2741.)

On the third day of penalty deliberations, an ill juror was replaced by an alternate. (20 RT 2782-2783.) Over defense objection, the trial court instructed the jury, pursuant to CALJIC No. 17.51.1, that the alternate juror was required to "accept as having been proved beyond a reasonable doubt,

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[60] The trial court's statement was, of course, incorrect. (See Sec. B, *infra*.) Moreover, the court further demonstrated that it did not understand the issue of lingering doubt when it refused to permit defense counsel to cross-examine two of the prosecution's penalty phase witnesses concerning facts that arguably could have supported such a doubt, based at least in part on the court's belief that evidence going to lingering doubt is "irrelevant" and/or "not allow[ed]" in capital trials. (17 RT 2170-2172, 2199-2200.)

those guilty verdicts and true findings rendered by the jury in the guilt phase of [the] trial." (20 RT 2779-2781, 2785-2786.)

On the fourth day of penalty phase deliberations, the foreperson sent a note indicating that the jury "m[ight] be at an impasse." (20 RT 2789-2790.) After speaking with the jurors, the trial court directed them to resume deliberations at the next court session. (20 RT 2790-2793, 2795.)

B. The Trial Court Abused Its Discretion in Refusing the Requested Instruction

This Court has long recognized that a capital defendant has a state law right to have the penalty phase jury consider any residual or lingering doubt as to his guilt. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1238; *People v. Coleman* (1969) 71 Cal.2d 1159, 1168; *People v. Terry* (1964) 61 Cal.2d 137, 145-147.) Both factors (a) and (k) of section 190.3 authorize a sentencing jury to consider any such lingering doubts about a capital defendant's guilt. (*People v. Sanchez* (1995) 12 Cal.4th 1, 77; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1272.) Thus, a jury which determines both guilt and penalty may properly conclude that the prosecution has discharged its burden of proving the defendant's guilt beyond a reasonable doubt, but may still demand a greater degree of certainty of guilt before imposing the death penalty. (See *People v. Terry, supra*, 61 Cal.2d at pp. 145-146.)

A trial court "may be required to give a properly formulated lingering doubt instruction when warranted by the evidence." (*People v. Cox* (1991) 53 Cal.3d 618, 678, fn. 20; see also *People v. Thompson* (1988) 45 Cal.3d 86, 134-135 [recognizing the propriety of an appropriately phrased instruction to considering lingering doubt regarding defendant's intent to kill]; *People v. Kaurish* (1990) 52 Cal.3d 648, 705-706 [rejecting claim that court should have given defense instruction where court's instruction that jurors could consider

lingering doubt was sufficient].) A number of trial courts in this state have found that a lingering doubt instruction was warranted by the evidence. (See, e.g., *People v. Cain* (1995) 10 Cal.4th 1, 66, fn. 23 [jury instructed on lingering doubt as mitigating circumstance]; *People v. Kaurish, supra*, 52 Cal.3d at p. 706-707 [jury given lingering doubt instruction].) Further, giving this type of instruction is in accord with section 1093, subdivision (f), and section 1127, both of which direct trial courts to charge the jury on the points of law that are correct and pertinent to the issues.

A lingering doubt instruction was warranted and appropriate here, and the trial court committed an abuse of discretion in refusing to so instruct. The premise of appellant's penalty phase defense was that while the jury had rejected appellant's claim that he did not commit the charged murder (see 13 RT 1643-1644, 14 RT 1722 [appellant denies that he killed Ms. Gallagher], 15 RT 1881 [defense counsel tells the jury that appellant "did not commit this crime"]), they should still consider the evidence that his commission of that crime was the "product of rage, the product of a lifelong use of alcohol, [and] the product of [his] childhood." (20 RT 2737-2738.) Accordingly, counsel asked the jurors to consider any "lingering doubt" they had about whether the crime was actually a first degree murder in "decid[ing] if death is appropriate . . . ." (20 RT 2742.)

Yet, under the trial court's instructions, any juror convinced that *some* doubt existed as to appellant's guilt would have had no legal basis for applying such doubt to his or her penalty determination. (See *Carter v. Kentucky* (1981) 450 U.S. 288, 302 ["Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law"].) Each juror in this case was required to make a moral and normative decision whether appellant deserved to live or die (see *People v. Brown* (1988)

46 Cal.3d 432, 448), and, in making that determination, the question of lingering doubt can be of great consequence. (See Koosed, *Averting Executions By Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt* (2001) 21 N. Ill. U.L. Rev. 41, 54-60 [discussing studies that establish the primacy of lingering doubt as the reason juries return life sentences rather than death verdicts].)

This Court has held that instructions on lingering doubt are not required on the theory that section 190.3, factors (a) and (k), adequately alert the jury that it can consider lingering doubt in reaching its penalty determination. (*People v. Osband* (1996) 13 Cal.4th 622, 716.) However, that conclusion is mistaken. The instructions on those factors would not lead a reasonable juror to understand that they permit the weighing of any residual doubt as to guilt in the penalty calculation.

Factor (a) directs itself to the circumstances of the crime, not to any mitigating evidence introduced by the defendant, and a sentencing juror is not likely to believe that it relates to whether the crime was a first degree murder since that issue has already been resolved against the defendant in the guilt phase. Accordingly, factor (a) does not lend itself to the consideration of the type of lingering doubt evidence appellant relied on here: evidence that the crime was a rage reaction that was the product of appellant's alcohol abuse, deprived upbringing and brain damage. (20 RT 2737-2738.)

Further, while factor (k) directs the jury to consider any circumstance extenuating the gravity of the crime, it focuses on "sympathetic" aspects of the defendant's character and background. (*People v. Hughes* (2002) 27 Cal.4th 287, 405, fn. 33.) Thus, the jury in this case was specifically directed to consider "any sympathetic or other aspect of the defendant's character or record . . . , whether or not related to the offense for which he is on trial." (7

CT 1633; 20 RT 2709-2710; CALJIC No. 8.85.) Based on that instruction, the jurors no doubt believed that the matters they were to consider under factor (k) were limited to sympathy for appellant based on his childhood deprivation and brain injuries. The instruction did not make it clear that factor (k) relates at all to residual doubt about whether the charged crime was actually a first degree murder.

Thus, factors (a) and (k) do not give the jury a ready way to address lingering doubts regarding the defendant's guilt of the offense. Because appellant's requested instruction would have provided a method for the jury to give effect to such residual doubt, it should have been given by the trial court.

Moreover, appellant's requested instruction was appropriately phrased. (See *People v. Thompson, supra*, 45 Cal.3d at p. 134.) Unlike the instruction proposed in *Thompson, supra*, appellant did not request a lingering doubt instruction that would have "invit[ed] readjudication of matters resolved at the guilt phase." (*Id.* at p. 135.) The instruction appellant requested would simply have added lingering doubt as an additional factor among the other listed factors the jurors could consider, if applicable, in determining the appropriate penalty. (19 RT 2568; CALJIC No. 8.85 [telling the jury it "shall consider" the listed factors, "if applicable," in determining the appropriate penalty].) Thus, the proposed instruction was effectively no different than the court-approved consciousness of guilt and confession or admission instructions at the guilt phase, which read: "If you find . . . , you may consider. . . ." (CALJIC Nos. 2.03, 2.70, 2.71; see also CALJIC Nos. 2.04, 2.06, 2.52.)

In short, even if it is assumed that the trial court has discretion to refuse to give a requested lingering doubt instruction in some cases, it was an abuse of discretion to refuse to so instruct in the instant case, because the instruction was not just "warranted by the evidence" (*People v. Cox, supra*, 53 Cal.3d at

p. 678, fn. 20), but was rather *required* so the jury could give effect to this important mitigating circumstance. Thus, the trial court erred in concluding that it lacked discretion to give the requested instruction.

Moreover, even assuming the trial court *could* have reasonably exercised its discretion by refusing the requested instruction on lingering doubt, the court erred in concluding that it did not have the discretionary authority to give that instruction. (See, e.g., *People v. Bigelow* (1983) 37 Cal.3d 731, 743 [court's failure to exercise discretion because it erroneously believed it had no discretion was "itself serious error"]; *In re Carmaleta B.* (1978) 21 Cal.3d 482, 496 ["where fundamental rights are affected by the exercise of discretion of the trial court . . . such discretion can only truly be exercised if there is no misconception by the trial court as to the legal bases for its action"]; *People v. Davis* (1984) 161 Cal.App.3d 796, 802 [court abused its discretion where it was "misguided as to the appropriate legal standard to guide the exercise of this discretion"].) The court's response to appellant's request for an instruction on lingering doubt – that "case after case . . . says that we are not to instruct" on that theory of mitigation (19 RT 2568) – clearly reveals that the court did not understand that it had discretion to instruct on lingering doubt "when warranted by the evidence." (*People v. Cox*, *supra*, 53 Cal.3d at p. 678, fn. 20.) Thus, the court abused its discretion in refusing the instruction.

C. The Trial Court's Refusal to Give the Requested Instruction Violated Appellant's Federal Constitutional Rights

The trial court's refusal to give the instruction was not only error under state law, it also violated appellant's federal constitutional rights to due process, equal protection, a fair trial by jury, and a reliable and non-arbitrary penalty determination, under the Sixth, Eighth and Fourteenth Amendments.

By refusing to specifically instruct on lingering doubt, the court failed to give the jury guidance with respect to all potential mitigating factors presented at trial, in violation of the Eighth and Fourteenth Amendments. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.)

The United States Supreme Court recently addressed the issue of lingering doubt in *Oregon v. Guzek* (2006) 546 U.S. 517, 126 S.Ct. 1226, which decided a "narrow" federal question. (*Id.* at p. 1230.) The Court held that the Eighth and Fourteenth Amendments do not prohibit a state from excluding *new* alibi evidence at a penalty *retrial* under specified circumstances. (*Id.* at p. 1231.) Thus, *Guzek*'s holding is about the state's "authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted." (*Id.* at p. 1232.)

In announcing *Guzek*'s limited rule, the high court clarified that its previous cases do not hold that a defendant at a capital sentencing hearing has an Eighth Amendment right to introduce "*new* evidence that shows he was not present at the scene of the crime." (*Id.* at pp. 1231-1232, original italics.) However, the decision also recognizes that a defendant's alibi claim (or other claim of innocence) at the guilt phase would be relevant mitigation evidence at sentencing. (*Id.* at p. 1233 ["The legitimacy of these trial management and evidentiary considerations, along with the typically minimal adverse impact that a restriction would have on a defendant's ability to present his alibi claim at resentencing convinces us that the Eighth Amendment does not protect defendant's right to present the evidence at issue here."].) Thus, under the Eighth Amendment, the identity of the perpetrator of the murder falls within the rule that "'the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any

aspect of the defendant's character or record and *any of the circumstances of the offense that the defendant proffers* as a basis for a sentence less than death.'" (*Id.* at p. 1229, original italics, quoting *Lockett v. Ohio*, *supra,* 438 U.S. at p. 604.)

In rejecting appellant's proposed instruction, the trial court violated the Eighth and Fourteenth Amendments. Without the lingering doubt instruction, there is a reasonable likelihood that the jury was precluded from considering and giving effect to constitutionally relevant mitigating evidence. (*Boyde v. California* (1990) 494 U.S. 370, 380.) As explained in Section A, *supra*, and incorporated by reference here, the penalty phase instructions that were given did not enable the jury to utilize any residual doubt they had about appellant's guilt as a reason for returning a sentence less than death.[61]

The trial court's refusal to give appellant's lingering doubt instruction also violated the due process clause of the Fourteenth Amendment, by arbitrarily depriving appellant of his state-created liberty interest not to be sentenced to death by a jury that was not adequately instructed on its ability to give effect to its lingering doubt as a mitigating factor in determining the appropriate penalty. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterley v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300-1301.) California law mandates that penalty phase jurors should be instructed that they may

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[61] The high court's assertion in *Franklin v. Lynaugh* (1988) 487 U.S. 164, 173, fn. 6, that it was "doubtful" that capital defendants have an Eighth Amendment right to have the sentencing jury instructed to consider residual doubt does not undermine appellant's federal constitutional claim. As noted previously, *Guzek* recognizes that evidence supporting a defendant's innocence is relevant mitigation evidence. (126 S.Ct. at p. 1233.) And as set forth above, merely instructing the sentencing jurors in the bare language of factors (a) and (k) is not sufficient to allow them to give mitigating effect to such evidence. (See Sec. A, *supra*.)

consider lingering doubt as mitigation when warranted by the evidence. (*People v. Terry, supra*, 61 Cal.3d at pp. 145-147; see *People v. Cox, supra*, 53 Cal.3d at pp. 677-678; *People v. Thompson, supra*, 45 Cal.3d at p. 134.) Denying appellant a state-created right granted to other capital defendants whose juries were given a lingering doubt instruction violated the equal protection clause of the Fourteenth Amendment. (See *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 425.)

D. The Error Requires Reversal of Appellant's Death Sentence

The refusal to instruct the jury on the concept of lingering doubt was prejudicial under either the state law or federal constitutional harmless error standards. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown, supra,* 46 Cal.3d 432, 448; *People v. Gonzalez* (2006) 38 Cal.4th 932, 961.) While the aggravating evidence offered at trial was extensive (see Stmt. of Facts, *supra*, pp. 8-16), the mitigating evidence concerning appellant's background and character was both extensive and compelling, and could have led the jurors to return a life verdict if they had been instructed that they could consider evidence of lingering doubt. (*People v. Gonzalez, supra*, 38 Cal.4th at p. 962 [despite "egregious" nature of current double murder, along with prior assaults on inmates and possession of shank in jail, "a death verdict was not a foregone conclusion"]; *People v. Sturm* (2006) 37 Cal.4th 1218, 1244 [under either *Chapman* or *Watson*, penalty phase errors required reversal "although the crime committed was undeniably heinous, [because] a death sentence in this case was by no means a foregone conclusion"]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 619-622 [reasonable probability defendant would have received a life sentence but for counsel's deficient performance despite his conviction of thirteen counts of aggravated first degree murder].)

Appellant's mitigating evidence concerning his family background – that he was brutalized as an infant and a young child by his alcoholic father and neglected by his traumatized mother, that his family life was chaotic, destructive and "toxic," and that he struggled throughout his life with the legacy of alcohol abuse he inherited (See Argmt. IX, *supra*, pp. 206-207) – was of a type that has been recognized as compelling. (See, e.g., *Wiggins v. Smith* (2003) 539 U.S. 510, 534 [difficult childhood and "alcoholic, absentee mother" part of "powerful" mitigating evidence]; *Williams v. Taylor* (2000) 529 U.S. 363, 397-398 ["graphic description of (appellant's) childhood, filled with abuse and privation" was sufficiently mitigating to require reversal due to counsel's failure to present it]; *In re Lucas* (2004) 33 Cal.4th 682, 734 ["childhood abandonment" and abuse is "forceful" mitigation]; *Jackson v. Calderon* (9th Cir. 2000) 211 F.3d 1148, 1163 [evidence of defendant's childhood marked by neglect and instability was sufficiently mitigating to require reversal for counsel's failure to present it].) It is reasonably possible that if the jurors had been instructed on lingering doubt the "powerful mitigating" effect of a lingering doubt that the charged crime was a premeditated murder would have led them to accept defense counsel's argument that the capital crime was the "product" of appellant's blighted childhood, heritage of alcohol abuse, and brain injuries. (20 RT 2755-2758, 2760-2764; see *Taylor v. Kentucky* (1978) 436 U.S. 478, 488-489 ["arguments of counsel cannot substitute for instructions by the court."]; see also *Tarver v. Hopper* (11th Cir. 1999) 169 F.3d 710, 715-716 [lingering doubt has "'powerful mitigating'" effect, as demonstrated by results of comprehensive studies]; *Chandler v. United States* (11th Cir. 2000) 218 F.3d 1305, 1320, fn. 28 ["residual doubt is perhaps the most effective strategy to employ at sentencing"].)

Given the tension between the aggravating and mitigating evidence in this case, it is entirely possible that the jury might have returned a life verdict if instructed to consider lingering doubt. That is particularly true since the jury declared itself at an "impasse," and unable to reach a unanimous verdict, on its fourth day of penalty deliberations. (7 CT 1628; 20 RT 2790; see, e.g. *People v. Hernandez* (1988) 47 Cal.3d 315, 352-353 [expression of deadlock indicates close case]; *United States v. Harbor* (9th Cir. 1995) 53 F.3d 236, 243 [same].) Clearly, the jurors did not find the penalty determination to be a simple or cut-and-dried matter even without judicial authorization to consider lingering doubt.

Moreover, the prosecutor exacerbated the impact of the erroneous refusal to instruct on the considerable evidence of lingering doubt by telling the jury in his penalty phase closing argument to ignore any argument by defense counsel that appellant had brain damage, and/or that appellant committed the charged crimes because he "couldn't help himself." (20 RT 2727-2728.) In the absence of the requested instruction, that argument severely reduced, if it did not completely eliminate, the effectiveness of defense counsel's subsequent argument that the jury should impose a life sentence because the charged homicide was really a second degree murder that was "the product of rage, . . . a lifelong use of alcohol," and appellant's blighted childhood. (20 RT 2735, 2738.) That the prosecutor took advantage in closing argument of the trial court's erroneous refusal to give the requested instruction amounts to compelling proof that the error was not harmless. "Evidence matters; closing argument matters; statements from the prosecutor matter a great deal." (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323; see *Kyles v. Whitley* (1995) 514 U.S. 419, 444.)

Finally, the fact the trial court instructed that the jurors that the

alternate juror who joined the jury during penalty deliberations had to "accept" the guilt phase verdicts and special circumstance findings "as having been proved beyond a reasonable doubt" (20 RT 2786) further undercut any possibility that the jury would have understood its right to consider lingering doubt in deciding the appropriate penalty. Of course, the jury's prior verdicts were conclusive. But telling the jurors they had to accept those verdicts, without also telling them they *could* consider evidence going to lingering doubt, likely led the jurors to believe that their guilt phase and special circumstance phase verdicts had to be viewed as infallible and to ignore any evidence that tended to raise any question about them.

For all these reasons, whether judged under the state or the federal constitutional harmless error test, the refusal to instruct on lingering doubt was clearly prejudicial. Had the jurors understood that they could consider any lingering doubts they might have about appellant's guilt in deciding which penalty to impose, it is reasonably possible they would have chosen to be merciful. Therefore, because the trial court erred in refusing to instruct the jurors that they could consider any such lingering doubts, the death judgment must be reversed.

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XI

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

Many features of California's capital sentencing scheme violate the United States Constitution. 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.

A. The Broad Application of Section 190.3, Subdivision (a), Violated Appellant's Constitutional Rights

Section 190.3, subdivision (a), directs the jury to consider in aggravation the "circumstances of the crime." (CALJIC No. 8.85; 7 CT 1633.) 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 the instant case, the prosecutor argued that both the method of killing (strangulation) (20 RT 2723, 2733), and appellant's alleged motivation for the killings (that he is "serial killer" who hates women (20 RT 2718-2719, 2725, 2733-2734)), were aggravating factors.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].) This Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of 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.

B. 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* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that the aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (7 CT 1633-1634, 1636.)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 530 U.S. 584, 604, and *Cunningham v. California* (2007) ___ U.S. ___, 127 S.Ct. 856, 863-864, now require any fact used to support an increased sentence (other than a prior conviction) to be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 20 CT 1636.) Because these additional findings were required before the jury could impose the death sentence, *Ring*, *Apprendi*, *Blakely* and *Cunningham* require each of them to be

made beyond a reasonable doubt. The trial 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.)

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* (*People v. Anderson* (2001) 25 Cal.4th 543, 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 *Apprendi*, *Blakely*, and *Ring* 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 in capital cases the sentencer 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 the 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* (2005) 36 Cal.4th 686, 753.) Appellant requests that the Court reconsider this holding.

2. Either Some Burden of Proof Is Required, or the Jury Should Be Instructed That No Burden of Proof Applies

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Because Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, appellant is constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant entitled under due process clause to procedural sentencing 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.

CALJIC Nos. 8.85 and 8.88, both of which were given in this case (7 CT 1633, 1636), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (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 assuming it is permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that principle to the jury.

(Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of 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* (1976) 428 U.S. 290, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*, 530 U.S. 584. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided and that application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." *McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require the jury to unanimously find the aggravating factors true also violates the equal protection guaranty 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 providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required.

To apply that requirement to an enhancement finding that carries only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the Fourteenth Amendment and by its irrationality violate both the due process clause of the Fourteenth Amendment and the cruel and unusual punishment clause of the Eighth Amendment to the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury. Appellant asks 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; 7 CT 1636.) Consequently,

any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in section 190.3, subdivision (b), violates due process and the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, 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* (2001) 25 Cal.4th 543, 584-585.) Here, aside from the uncharged murders that formed the centerpiece of the prosecution's guilt phase case (11 RT 1134-1261, 12 RT 1269-1463, 13 RT 1487-1564), the prosecutor presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant (16 RT 2000-2094, 17 RT 2117-2170), and devoted a considerable portion of his closing argument to arguing about those alleged offenses. (See, e.g., 20 RT 2718-2720.)

The United States Supreme Court's recent decisions in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Cunningham v. California*, *supra*, 127 S.Ct. 856, 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), but asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (7 CT 1636.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14), but appellant asks the Court to reconsider that opinion.

5. The Instructions Failed to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs that they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be

appropriate. On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

This Court previously has rejected this claim (*People v. Arias*, *supra*, 13 Cal.4th at p. 171), but appellant urges the Court to reconsider that ruling.

6. The Instructions Failed to Inform the Jurors That if They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jurors of the circumstances that permit them to render a death verdict. By failing to conform to the mandate of section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that it can impose death only if it finds that the aggravation outweighs the mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See

People v. Moore (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an life verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Instructions Failed to Inform the Jurors That Even if They Determined That Aggravation Outweighed Mitigation, They Still Could Return a Sentence of Life Without the Possibility of Parole

Pursuant to CALJIC No. 8.88, the jury was directed that a death judgment cannot be returned unless the jury unanimously finds "that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (20 CT 1636.) Although this finding is a prerequisite for a death sentence, it does not preclude a sentence of life without possibility of parole. Under *People v. Brown* (1985) 40 Cal.3d 512, 541, the jury retains the discretion to return a sentence of life without the possibility of parole even if it concludes that the aggravating circumstances are "so substantial" in comparison with the mitigating circumstances. Indeed, under California law, a jury may return a sentence of life without the possibility of parole even in the complete absence of mitigation. (*People v. Duncan* (1991) 53 Cal.3d 955, 979.) The instructions failed to inform the jury of this option and thereby arbitrarily deprived appellant of a state-created liberty and life interest in violation of the due process clause of the Fourteenth Amendment. (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346).

The decisions in *Boyde v. California*, *supra*, 494 U.S. at pp. 376-377, and *Blystone v. Pennsylvania*, *supra*, 494 U.S. at p. 307, do not foreclose this claim. In those cases, the high court upheld, over Eighth Amendment challenges, capital sentencing schemes that mandate death upon a finding that the aggravating circumstances outweigh the mitigating circumstances. However, that is *not* the 1978 California capital sentencing standard under which appellant was condemned. Rather, in *People v. Brown*, *supra*, 40 Cal.3d at p. 541, this Court held that the ultimate standard in California is the appropriateness of the penalty. After *Boyde*, this Court has continued to apply, and has refused to revisit, the *Brown* capital sentencing standard. (See, e.g., *People v. Champion* (1995) 9 Cal.4th 879, 949, fn. 33; *People v. Hardy* (1992) 2 Cal.4th 86, 203; *People v. Sanders* (1990) 51 Cal.3d 471, 524, fn. 21.)

This Court has repeatedly rejected this claim (see *People v. Smith* (2005) 35 Cal.4th 334, 370; *People v. Arias*, *supra*, 13 Cal.4th at p. 170), but appellant urges the Court to reconsider these rulings.

8. The Instructions Failed 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 *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 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 an 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 to 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 required here. 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 to the federal Constitution.

9. 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 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.

C. Failing to Require the Jury to Make Written Findings Violated 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* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions (*People v. Cook* (2006) 39 Cal.4th 566, 619), but appellant urges the Court to reconsider its decisions on the necessity of written findings.

D. 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, factors (d) and (g); 7 CT 1633) acted as barriers to the consideration of mitigation in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. (*Mills v. Maryland* (1988) 486 U.S. 367, 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) The Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but appellant urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Some of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. The trial court failed to omit those factors from the jury instructions (7 CT 1633), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant'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. (7 CT 1633-1634.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 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* (1985) 41 Cal.3d 247, 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. 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. As such, appellant asks the Court to reconsider its holding that the trial court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

E. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary and Disproportionate Imposition 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

Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings that are 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.

F. 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 of the Fourteenth Amendment to the federal Constitution. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.42, subds. (b), (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on which aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. This Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but appellant asks the Court to reconsider that ruling.

G. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms

On numerous occasions, this Court has rejected the claim that the use of the death penalty at all, or, alternatively, the regular use of the death penalty, violates international law, the Eighth and Fourteenth Amendments to the federal Constitution, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook*, *supra*, 39 Cal.4th at pp. 619-620; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment, and the United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who commit their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions.

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XII

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

As this Court has stated, a series of errors that may individually be harmless may nevertheless "rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844; citing *People v. Purvis* (1963) 60 Cal.2d 323, 348, 353; see *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"].)[62] Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1282 [combined effect of errors of federal constitutional magnitude and non-constitutional errors should be reviewed under federal harmless beyond a reasonable doubt standard]; *People v. Archer* (2000) 82 Cal.App.4th 1380, 1394-1397; *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].) Where "'the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors.' [Citation.]" (*Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 883.) This is just such a case.

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[62] Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 8 F.2d 1464, 1476.)

Aside from the erroneous excusal for cause of a potential juror (Argmt. II), which requires per se reversal (*Gray v. Mississippi* (1987) 481 U.S. 648, 668), the combination of the trial court's errors in admitting grossly prejudicial and irrelevant evidence that appellant allegedly committed two uncharged murders within weeks of the charged crimes (Argmt. I), and giving improper and erroneous jury instructions which (1) lowered the prosecution's burden of proof (Argmt. III and V), (2) allowed the jury to convict appellant of murder and/or arson based on his possession of stolen property belonging to Ms. Gallagher (Argmt. IV), and (3) directed the jurors to report any juror who "refuse[d] to deliberate[]" (Argmt. VII), denied appellant his right to a fair trial on guilt. Because the prosecution did not present overwhelming evidence of appellant's guilt of the charged crimes (see Argmt. I, § E, pp. 79-80), the jury's verdict turned on appellant's credibility when he testified that he did not commit those crimes. (13 RT 1644-1645, 14 RT 1722.) The trial court's fundamental error in admitting the uncharged murders evidence completely undermined appellant's credibility with the jury, and, combined with the court's instructional errors, made it almost inevitable that the jury would convict appellant of murder and arson despite the relative weakness of the prosecution's case, which relied almost entirely on circumstantial evidence.

After the jury heard evidence indicating that appellant killed two other women within six weeks of Ms. Gallagher's murder, and was instructed both that it could consider the evidence that he fled from the police after committing those uncharged crimes as proof of his consciousness of guilt as to the charged murder (Argmt. III), and could convict him of killing Ms. Gallagher and burning her body based only on proof that he had possessed her property if there was some slight corroborating evidence of guilt (Argmt. V), conviction was a foregone conclusion. The erroneous admission of the

evidence of uncharged murders alone eliminated any possibility of appellant receiving a fair trial, particularly in light of the prosecutor's argument that the evidence showed that he killed Ms. Gallagher as part of a common plan to commit such murders because he hated women. (Argmt. I, *supra*, p. 66, fn. 24, 15 RT 1835.) But even if it did not, in combination with the erroneous instructions, the admission of that inadmissible and inordinately prejudicial evidence rendered the trial a miscarriage of justice.

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.) Therefore, appellant's conviction 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*, *supra*, 848 F.2d at pp. 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 [court considers prejudice of guilt phase instructional error in assessing effect of penalty phase errors].) 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. (*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137.) Reversal of the death judgment is mandated here because it cannot be shown

that these errors had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

Moreover, even leaving aside the impact of the guilt phase errors enumerated above, the penalty verdict must be reversed in this case because: (1) the only special circumstance allegation alleged against appellant was invalid (Argmt. VIII); (2) the trial court erroneously precluded appellant from presenting evidence to contradict and complete the misleading portrayal of the victim created by the prosecution's evidence (Argmt. IX); and (3) the trial court erroneously refused to instruct that the jurors could consider any lingering doubts about appellant's guilt in making their penalty determination. (Argmt. X.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's judgment and death sentence.

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CONCLUSION

For all of the reasons stated above, the convictions, special circumstance finding and sentence of death in this case must be reversed.

DATED: APRIL 4, 2007

Respectfully submitted,

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Attorneys for Appellant

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 36(b)(e))

I, WILLIAM HASSLER, am the Deputy State Public Defender assigned to represent appellant GLEN RODGERS in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 71,404 words in length.

ATTORNEY'S NAME

Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Glen Rogers* No. S080840

I, GLENICE D. FULLER, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. A true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Office of the Attorney General
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Each said envelope was then, on April 4, 2007, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 4, 2007, at San Francisco, California.

Glenice D. Fuller
DECLARANT