IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. SUSAN DIANE EUBANKS, Defendant and Appellant.	California Supreme Court No. S082915 San Diego County Superior Court No. SCN 069937

AUTOMATIC APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF SAN DIEGO COUNTY

THE HONORABLE JOAN P. WEBER

APPELLANT'S OPENING BRIEF

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Under appointment of the
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Introduction

In many ways, Susan Eubanks was a typical American parent. She loved and cared for four sons and even took in a nephew who had been sent to live with her. The evidence at trial showed she treated the boys well, and when she wasn't caring for them, she cared for others in her job as a medical assistant. Susan was what most would call a good mother. For a few years, Susan and her husband, Eric Eubanks, enjoyed a normal family life, centered around their

children. Viewed in this light, it would be hard to distinguish them from most American families.

In other ways, however, Susan was not a typical American parent. In fact, she was the product of an extremely violent, abusive and alcoholic family environment. As a child still in diapers, she was dragged around the family home by her hair, and assaulted by her mother. Her mother died in a fire when Susan was just eight years old. She was left in the care of her alcoholic father, who molested Susan and had an incestuous relationship with Susan's half-sister. Her father kept Susan in filthy living conditions that can only reasonably be described as cruel. From this background, Susan became a parent.

Susan's attempt to raise her children in a normal environment was a high achievement in light of her own upbringing. When she was no longer able to work as a medical assistant because of job-related injuries, she enrolled in nursing school, and by all accounts, performed well. Her relationship with Eric was stable for a few years but then broke down and she ultimately served as a single mother to her children.

Susan's attempts to be a good wife and mother were always undermined by her past. Abandoned by her father as a child, she was also abandoned by two husbands and various lovers as an adult. Following an injury, Susan became addicted to painkillers, repeating the cycle of addiction that started with her

father. She was well aware of her situation and its possible consequences. One can only imagine the agony she must have experienced when she was forced to swallow her pride as a parent, seeking help from a an acquaintance to save her children from her own hands.

On October 26th, 1997, her attempt to be a good parent took a horrible turn. Susan killed those who were dearest to her, her four sons. She then tried to kill herself. These were impulsive acts of desperation born from the pain of abandonment and addiction, not the calculated acts of a cold-blooded killer. She had nothing to gain from these killings, and everything to lose. Susan was keenly aware that no matter how hard she worked or tried, her dark history followed close behind. In a moment, the responsibility she had tried to shoulder as mother, father, and breadwinner turned instead to the darkest tragedy imaginable.

This tragic series of events could have been avoided. Susan could have received anger management counseling and treatment for her abuse of medication. Her husband and/or boyfriends could have realized the potential for her final, deadly breakdown. Examining her past, mental health professionals may have understood the potential for a repeat of the cycle of violence and abuse that she had suffered. Her outbursts could have been seen for what they were, cries for help. She or her family members could have realized that her courage

in the face of a lifetime of abandonment and despair was wearing thin, revealing the potential for a flashpoint leading to disaster.

In 1999, a San Diego jury convicted Susan Eubanks of the first degree murder of her four sons. The jury also found true a multiple-murder special circumstance, as well as an allegation of personal use of a firearm resulting in death.

She was sentenced to death.

Susan has been, and will be, punished for what she has done every day for the rest of her life. Her knowledge of the crimes allows no sanctuary. Her crime was not the product of unmitigated evil, but rather, a tortured mind clouded by alcohol and prescribed drugs. Her co-workers and her family doctor testified that Susan was a good mother. James Esten, a correctional consultant who reviewed the case, has concluded Susan would be a low risk for "future dangerousness" if sentenced to life without the possibility of parole.

She is not the "worst of the worst" for whom the death penalty is reserved. A fair trial would have established this. Her trial was unfair for three primary reasons. First, the jury commissioner excused any potential juror who wished to avoid service in violation of all documented standards and without any notice to the defense or opportunity to participate in the process. Next, the trial court undermined the defense case at the guilt phase by allowing an expert

witness to present junk science suggesting Susan's impairment by drugs and alcohol was far less than was actually the case. Finally, the trial court excluded critical defense evidence at the penalty phase, and admitted inflammatory and unreliable prosecution evidence which allowed the state to ask for, and obtain, a death sentence based upon an incomplete and tainted characterization of Susan Eubanks.

Statement of Appealability

This is an automatic appeal from a final judgment following a jury trial which resulted in a death verdict. It is authorized by the California Constitution (article 6, section 11) and Penal Code section 1239, subd.(b).

Statement of the Case

Appellant was charged in an information with four counts of murder in violation of Penal Code section 187, subd.(a). (2Clerk's Transcript (CT) 74-75.) As to each count it was further alleged that appellant personally used a firearm within the meaning of Penal Code section 12022.5, subd.(a)(1). (2CT 74-75.) The information further alleged the multiple murder special circumstance within the meaning of Penal Code section 190.2, subd.(a)(3). (2CT 75.)

Following a jury trial, appellant was convicted of four counts of first degree murder along with true findings on the firearm use allegations. (29RT

3397-3398; 6CT 1223-1226.) The jury further found the multiple murder special circumstance to be true. (29RT 3398; 6CT 1223-1227.)

In the subsequent penalty trial, the jury returned a verdict of death. (37RT 4804; 6CT 1249.) The trial court later denied appellant's Penal Code section 190.4 motion to modify the death sentence, and imposed a judgment of death, plus four years on each of the four gun use allegations. (38RT 4848; 6CT 1251.)

The appeal to this court is automatic pursuant to Penal Code section 1239, subd.(b).

Statement of the Facts

Guilt Phase

The Prosecution's Case

In 1997, appellant was living with her four sons and nephew in a small house in San Marcos, in North San Diego County. (23RT 2259.) Appellant's oldest son Brandon was 14 years-old. (23RT 2285.)

Brandon's father, John Armstrong, was appellant's first husband. (26RT 2962.) Appellant had married Armstrong in Texas. (26RT 2963.) The family moved to San Diego in 1987, but, following their divorce, Armstrong returned to Texas. (26RT 2963-2964.) Armstrong and Brandon remained close after the divorce, speaking on the telephone regularly. (26RT 2964.) Brandon visited his

father and grandparents in Texas two or three times each year. (25RT 2761.)

Following her divorce from John Armstrong, appellant married Eric Eubanks. (23RT 2317.) Appellant was pregnant at that time with the child of Larry Shoebridge, with whom she had previously been living. (30RT 3426.) That son, Austin, was seven years old in 1997. (23RT 2319.) Another son, Brigham, fathered by Eubanks, was six years old. (23RT 2319.) Their youngest son, Matthew, also fathered by Eubanks, was four years old. (23RT 2320.) After her brother Johnny died, appellant took custody of her nephew, Aaron, who was also six years old in 1997. (23RT 2317-2318.)

The Eubanks' marriage was stable for the first few years and the family appeared typical in many ways. Eric worked in construction and appellant worked in the medical field. (23RT 2367, 2371.) However, following two job-related injuries which ultimately required surgery, appellant began to abuse prescription medications and alcohol. (23RT 2373.) Police would later find 50 bottles of prescription medications in the house. (24RT 2632.) She soon lost her job. (23RT 2383.) She and Eric Eubanks separated and reconciled several times. (23RT 2320-2322.)

In October, 1997, appellant "evicted" her then live-in boyfriend, Rene Dodson, and Eric Eubanks moved back into the house. (23RT 2280.) After a short time, Eric Eubanks again moved out and Dodson returned. (23RT 2321.)

Events preceding the incident

On the morning of Sunday, October 26th, 1997, Dodson and appellant went to a local bar to watch a football game. (23RT 2261.) The boys remained at the house with Brandon acting as babysitter. (23RT 2286.) He often looked after his brothers. (23RT 2286.) When they arrived at the bar, they sat at a table and ordered a pitcher of beer. (23RT 2262.) They were soon joined by Dodson's friends, Ron and Kathleen Adams. (23RT 2262.) Appellant became sullen, due to a confrontation she had had with Kathleen Adams at the bar a few weeks earlier. (23RT 2262-2263.) Appellant had criticized Dodson, and Kathleen Adams told her not talk about him behind his back. (23RT 2263.) Because of appellant's attitude, Dodson decided they should go to a different bar. (23RT 2264.)

Appellant argued with Dodson when they left, saying he was siding with Kathleen. (23RT 2264.) Dodson, who had seen appellant's volatile temper many times before, did not want to argue with her in public, and decided to return home. (23RT 2265.) She became furious. (23RT 2265.) They were on the freeway off-ramp when she grabbed the steering wheel, slammed the car into the parking gear, removed the keys from the ignition and refused to return them. (23RT 2265.) After several minutes, Dodson convinced appellant to release the keys. (23RT 2265.)

When they arrived home, they went into the bedroom and continued to argue. (23RT 2265.) Dodson said that he wanted to leave, but appellant removed his keys from the belt and told him he was not leaving. (23RT 2266-2267.) In the past, when they had a serious argument, he would stay with his parents for a few days. (23RT 2263.) Eventually, appellant would call him and he would return. (23RT 2280.) Things calmed down after they talked for a while, and they eventually had sex. (23RT 2267.)

Dodson then said he was going to watch television with the boys in the living room. (23RT 2268.) When appellant moved to another part of the house, Dodson put on a pair of slip-on shoes and ran down the driveway to a nearby gas station. (23RT 2268.) There, he called the sheriff's department and asked that they send a deputy to stand by so that he could retrieve his belongings and truck from appellant's house. (23RT 2268.)

Deputy Sheriff Daniel Deese responded and Dodson explained the situation. (23RT 2269.) Deese was familiar with the Eubanks residence as he had been dispatched there before on domestic disturbance calls. (23RT 2269.) He took Dodson to the house. (23RT 2269.) As they approached, they saw appellant carrying items out of Dodson's truck. (23RT 2269.) The tires had been flattened. (23RT 2269.) Dodson told Deese that appellant was taking the tools he needed for work the next day. (23RT 2271.) The deputy told appellant

to drop the items she was carrying. (23RT 2271.) He asked for Dodson's truck keys, but she denied taking them. (23RT 2272.) She became extremely confrontational, and claimed that Dodson owed her money and that he had raped her. (23RT 2272.)

The deputy had to threaten appellant with arrest before she finally went inside the house. (23RT 2272.) Since the tires to his truck had been flattened, and the keys would do him little good, Dodson placed his tools in the patrol car and they left. (23RT 2273.) Eric Eubanks was parked in his own truck at the bottom of the hill. (23RT 2274.) They stopped and Dodson spoke to Eric Eubanks who agreed to take Dodson back to the bar where he had been earlier. (23RT 2274.) They loaded Dodson's tools into Eubanks' truck and departed. (23RT 2274.)

Back at the residence, appellant was livid. She began making telephone calls. She first called Brandon's grandfather, Curtis, and then John Armstrong, in Texas. (26RT 2964, 3008.) She told John that the police had been there investigating the incident with Dodson, and she feared that Child Protective Services would come and take the children. (26RT 2965.) (CPS had been to the residence before, but never took any action.) (26RT 2971.) She told John Armstrong that she needed Brandon to "back her up," even if it meant lying. (26RT 2965.) Armstrong could hear appellant yelling at Brandon in the

background, telling him to hang up the telephone. (26RT 2967.)

Appellant's call to Kathy Goohs

Brandon had earlier called Kathy Goohs, the mother of his best friend since grade school. (24RT 2659.) He asked her to come and get him and the other boys as his mother was in an extremely heated argument with Dodson. (24RT 2660.) Goohs knew that appellant had volatile relationships with men, but this was the first time Brandon had ever called and asked her to pick him up. (24RT 2664.) A short time later, appellant called Kathy Goohs and asked, then begged her to come and take the boys. (24RT 2661.) Goohs reluctantly agreed. (24RT 2664.) She went to her car and then realized that she did not have enough belted seats for all five boys, and she feared this might be a problem if the police were at the Eubanks' residence. (24RT 2665.) Gooh's sister was visiting and volunteered to follow Goohs in her own car. (24RT 2665.)

Goohs then told her sister that, unbeknownst to Susan, they had allowed Eric Eubanks to stay with them for the past several days until he found another place to live. (24RT 2665.) If appellant came to retrieve the boys and saw Eric there, she would likely think that the Goohs were "taking sides" and would no longer allow Brandon to visit her son. (24RT 2665.) She, therefore, never went to get the boys. (24RT 2668.)

Eric Eubanks arrived at the Goohs' residence sometime after 6:00 p.m.

(24RT 2666.) He asked Kathy to listen to a voice-mail he had just received on his pager. (24RT 2669.) It was from appellant who simply said, "Say goodbye." (23RT 2334.)

Police arrive at the home

Eric Eubanks and Kathy Goohs became concerned. (23RT 2335.) At approximately 6:30 p.m., Eubanks called the sheriff's office and asked to speak with Deputy Deese. (23RT 2335.) He was told that Deese would call him. (23RT 2335.) At approximately 7:00 p.m., Deese telephoned Eric Eubanks, who told him about the message. (27RT 3022.) Eubanks said that appellant had a handgun in the house and he was concerned. (27RT 3024.) The deputy instructed Eubanks to call 9-1-1 and request a welfare check at the Eubanks residence. (27RT 3022.)

Deputy Deese was dispatched to the Eubanks residence. (27RT 3023.) He arrived at the same time as Deputy Perry. (27RT 3024.) They saw lights on inside the house. (27RT 3026.) They knocked and received no answer. (27RT 3026.) They walked around the house and looked into the windows. (27RT 3026.) They saw televisions on in the living room and one bedroom, but no people. (27RT 3026.)

Deputy Deese called Eric Eubanks and told him that they were getting no response. (27RT 3027.) Eubanks instructed them to enter forcibly. Deese used

the public address system on his patrol vehicle to call inside the house, saying "Susan come to the door." (27RT 3031.) They initially received no response, but Deputy Perry, who was closer to the house, told Deese he thought he heard something — perhaps moaning. (23RT 2418.) They again instructed Susan to come to the door. From inside, they heard a weak reply, "I've been shot." (23RT 2419.)

Deputy Deese advised dispatch of the situation. (27RT 3031.) He and Perry then entered by forcing open a side door leading to the laundry room. (27RT 3032.) They proceeded down a hallway with their guns drawn. (27RT 3032-3033.) In the master bedroom, they saw appellant on her bed, laying on her back. (27RT 3032.) There was a revolver next to her hand. (27RT 3032.) Deputy Deese pointed his gun at appellant and instructed her not to move or touch the gun or she would be shot. (27RT 3033.) They removed the gun from the bed. (27RT 3033.) Deputy Perry removed a blood-stained towel from appellant's abdomen and saw what appeared to be a gunshot wound to her stomach. (27RT 3034.)

The deputies advised dispatch they needed paramedics to respond immediately. (27RT 3034.) Appellant was only semi-conscious, and had difficulty breathing. (27RT 3034.) Deputy Deese retrieved a CPR bag from the patrol car. (27RT 3026.) He returned, handed the bag to Perry, and proceeded

to check the rest of the house. (27RT 3026.) In one bedroom, he found six year-old Aaron Stanley, appellant's nephew. (23RT 2422; 273035.) He was in bed, unharmed, with the blankets pulled under his chin. (23RT 2422.)

In another bedroom he saw three small boys; Austin was on the top of a bunk bed, Matthew and Brigham were on the lower bed. (27RT 3026.) All had suffered gunshot wounds to the head. (27RT 3026.) He called out to Perry, "We've got kids shot in here." (27RT 3037.)

Perry ran to the bedroom and they checked each boy for a pulse. (23RT 2424.) One of the boys on the bottom bunk was still breathing. (23RT 2430.) They again called dispatch. (27RT 3037.) Perry cradled the boy in his arms and carried him outside. (23RT 2427.) The paramedics had taken the wrong road and were parked at the bottom of the long driveway. (27RT 3040.)

Deese told dispatch to tell the paramedics to stay where they were, as the deputies would carry the boy down the driveway. (27RT 3040.) At this point, Perry realized that a large portion of the back of Matthew's head had been blown away. (23RT 2429.) Deese gave him his jacket to place under Matthew. (23RT 2429.) The two of them ran down the driveway, gave Matthew to the paramedics and told them they had at least one other live gunshot victim in the house. (27RT 3041.)

Deese returned to the house with a paramedic. (27RT 3041.) The

paramedic entered the bedroom to assess appellant. (27RT 3042.) Deese began to check the rest of the house. (23RT 2431.) He saw what he thought was an adult male on the living room floor, between the couch and coffee table. (23RT 2431.) He drew his revolver and ordered the person not to move, but got no response. (23RT 2431.) As he moved closer, he saw that this was Brandon who had a gunshot wound to the back of his neck. (23RT 2431.) Brandon had no pulse. (23RT 2453.)

Matthew was first taken to Mercy Hospital, and then flown to Children's Hospital. (24RT 2490) He died shortly thereafter from the massive head wound. (25RT 2818.) Appellant was taken to Palomar Hospital where she underwent emergency surgery. (23RT 2445.) She had lost a large amount of blood and was in critical condition. (23RT 2446.) She eventually recovered.

The physical evidence

The deputies recovered not only the handgun, later determined to be the gun used to shoot herself and all four boys, but also a box containing some .38 Special live rounds. (24RT 2510, 2512.) They recovered five spent shell casings in a trash can in the boys' bedroom, suggesting that appellant had reloaded the five-shot revolver in the process of shooting her sons. (24RT 2568.) The prosecution argued that appellant committed the murders in order to exact revenge against Rene Dodson and Eric Eubanks by killing the boys they

loved. (23RT 2232, 28RT 3297.)

Deputies also found several recent handwritten notes on appellant's bedroom floor. (24RT 2520, 2523.) One was to Eric Eubanks telling him that he had betrayed her, she had lost everything she loved, and it was now time for him to do the same. (24RT 2524.) She told him he could use any money he might recover from her workers' disability case to pay for his sons' funerals. (24RT 2524.)

She had written a similar letter to Rene Dodson, berating him for betraying her. (24RT 2523.) She concluded the letter with, "Ha ha." (24RT 2524.) Appellant also wrote a letter to John Armstrong telling him that she was sorry about Brandon, but that it would be too difficult for him to live without his brothers. (24RT 2526.) She also wrote letters to her niece and sister, apologizing for her actions. (24RT 2522, 23RT 2424.)

Police also collected bullet fragments, bloody clothing and bedding, all of which were introduced at trial. (24RT 2487, 2500, 2502, 2506, 2509.)

Additional evidence showed that approximately 10 days before the killings, appellant had gone into a building supply store to buy replacement locks for her house. (25RT 2773.) She recognized a female store clerk to be a friend of Rene Dodson. (25RT 2773.) She bragged to the clerk that she had just come from the gun store where she bought ammunition. (25RT 2777.) She told the

clerk to tell Dodson that one of the bullets had his name on it. (25RT 2777.) Other testimony indicated that appellant had previously made comments that if pushed, she would kill her children and herself. (23 RT 2275.)

The Defense Case

The defense argued that, due to her intoxication from alcohol and prescription drugs, appellant was incapable of forming the premeditation and deliberation necessary for a finding of first degree murder. (28RT 3319, 29RT 3359.)

A toxicologist testified that even though testing of appellant's blood shortly after the shooting revealed that she had .09 blood alcohol content, this failed to take into account that appellant had received infusions of saline and other fluids. (27RT 3084.) He believed her actual BAC would have been approximately .19. (27RT 3091.)

The fluids similarly affected the level of Valium found in appellant's blood, which, even diluted with infusions, was twice the therapeutic dosage. (27RT 3093.)

These levels would produce a "very significant effect" on the brain, including one's emotions, perception, judgment and other "higher brain functions." (27RT 3095, 3097.)

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Penalty Phase

The Prosecution's Case

The prosecution's case at the penalty phase consisted of details regarding the shooting, evidence of a prior threat and victim impact evidence.

Details of the shooting

Rod Englert, who testified as a crime scene reconstructionist, concluded that Brandon was shot first. (31RT 3671.) He was sitting on the living room floor when shot in his left temple. (31RT 3671.) He slumped to the floor and was shot a second time, in the back of the neck. (31RT 3672.) Austin was seated on the top bunk of the bed in the boys' bedroom. (31RT 3677.) He was shot in the left eye, with his knee raised, close to his face. (31RT 3676.) There were also two bullet holes in the wall, near Matthew, which were apparent misses. (31RT 3676.) All five shots had been fired from the revolver at this point. (31RT 3677.) Appellant then reloaded the gun. (31RT 3677.)

Englert believed that Brigham, sitting on the lower bunk, was shot next. (31RT 3628.) He was shot in the head. (31RT 3678.) A second shot glanced off the right side of Brigham's head and exited through a pillow. (31RT 3685.) Matthew would have been very close to Brigham — perhaps huddling together while appellant reloaded the gun after shooting Austin. (31RT 3678.)

A shot fired between them ricocheted off the bed and lodged into the wall.

(31RT 3679.) Matthew was then shot once in the head. (31RT 3681.)

Prior Threat

In 1989, appellant became romantically involved with Larry Shoebridge. (29RT 3397.) She and Brandon moved into Shoebridge's apartment in North San Diego County. (29RT 3397.)

Appellant was an extremely jealous person. (31RT 3699.) When she discovered that an old girlfriend had contacted Shoebridge, she put a gun to his head and told him, "I could kill you right now." (31RT 3700.) Shoebridge decided to leave, but feared appellant's reaction. (31RT 3701.) One day, he packed his belongings and moved out after appellant went to work. (31RT 3701.) He left a note telling her she could stay in the apartment for two weeks. (31RT 3701.) He knew that she was pregnant with his child at the time. (31RT 3704, 3706.)

Soon thereafter, appellant found out where Shoebridge was living. (31RT 3714.) One day, she came speeding up to Shoebridge's house as he was leaving with two friends and a child. (31RT 3715.) Appellant was furious. (31RT 3715.) She began screaming and swearing. (31RT 3715.) She yelled at the woman in the group and asked who she was. (31RT 3716.) Appellant tried to attack the woman when she refused to answer. (31RT 3716.) Shoebridge and his friend blocked her way. (31RT 3716.) Appellant eventually left, screeching

her tires as she drove away. (30RT 3442.)

Victim Impact

Various teachers and counselors who instructed the Eubanks boys, and one of Brandon's friends, testified as to the impact their deaths had on them. (31RT 3720, 3745, 3753, 3762, 3791.) Sally Armstrong, Brandon's paternal grandmother, and Brandon's father, John, each testified about the loss of Brandon and the affect it had on their lives. (31RT 3811, 32RT3847.) Sally Armstrong also recounted two incidents in which she believed appellant had abused Brandon. (36RT 4500-4501.)

Appellant's sister, Linda Michelle Smith, was called by the prosecution to describe a telephone call from appellant, who said that she had once rubbed her nephew Aaron's face in a dirty diaper when she found that he had placed it behind his bed. (36RT 4534.) When Smith became alarmed, appellant told her she had only made Aaron smell the dirty diaper as punishment. (36RT 4534.) Using telephone records, the defense called into question whether the telephone call had actually occurred. (36RT 4546.)

Defense Case

The defense case at the penalty phase consisted of evidence showing that appellant grew up in the basest conditions imaginable in a dysfunctional family of alcoholics, and that she had been a good mother before her addiction to

prescription painkillers.

Susan Eubanks was born in Texas, one of four children. (33RT 4045.) Her mother, Linda Stanley, was married when she was 14 years old. (33RT 3991.) She divorced and then married Susan's father, Bill. (33RT 3991, 4040.) He had been previously married and had a daughter, Brenda. (33RT 4044.)

Linda's family had a history of alcoholism. (33RT 3981, 3987, 3991.) Linda became an alcoholic. (34RT 4215.) Bill was also a raging alcoholic. (33RT 4048.) He worked only sporadically. (33RT 3993.) He regularly stayed out drinking and womanizing. (33RT 4078.) Linda often went looking for him in bars and cheap motels. (34RT 4210, 4230.) They fought constantly. (33RT 4053.) They eventually separated when Linda admitted to Bill that she had had an affair. (33RT 4055.)

Appellant's mother physically abused her and often dragged her around the house by her hair. (33RT 4086.) She would slap appellant while she was still in diapers. (34RT 4234.) As a young child, appellant was required to perform numerous chores and seldom allowed to play. (33RT 4086.) Linda died in a house fire when appellant was eight years old. (33RT 4009, 4059.) It was suspected that the fire was set by one of Linda's boyfriends. (33RT 4122.)

Bill arrived late for Linda's funeral and was falling-down drunk. (33RT 4009, 34RT 4230.) Brenda, his daughter from the first marriage, took him and

the Stanley children home. (34RT 4247.) By this time, Brenda had become a drug addict. (34RT 4236.) That day, Brenda and her father, Bill Stanley, had sexual intercourse. (34RT 4247.)

The Stanley children were rotated among relatives. One day, Bill drove them to Florida to live with his mother and sister. (33RT 4063.) He had come unexpectedly, and the children left behind their clothes and all their belongings. (33RT 4006, 4063, 4087.) He left and rarely returned. (33RT 4064.) While in Florida, appellant and her siblings were abused by their paternal grandmother. (33RT 4088.) If the children were not in school, they were cooking or cleaning. (33RT 4088.) They stayed for a while with another relative in Florida who owned a small rundown motel. (33RT 4090.) The children were used as laborers to clean the rooms. (33RT 4090.)

Eventually, the children were returned to Texas, again living with various relatives and sometimes with Bill, in disgusting conditions. (33RT 4131.) They lived in a shabby trailer. (33RT 4131.) Bill Stanley would get drunk and urinate on himself in bed and in a living room chair. (33RT 4131, 34RT 4223.) The trailer always smelled like urine and excrement. (33RT 4151.)

Appellant eventually met and married John Armstrong. (26RT 2963.) She then gave birth to Brandon. (26RT 2963.) When the senior Armstrongs moved to California, John and appellant soon followed. (31RT 3812.) After

three years, John's parents reluctantly returned to Texas, sad to leave Brandon. (31RT 3812, 36RT 4498.) Appellant and John eventually grew apart and, following a divorce, John returned to Texas when appellant was given full custody of Brandon. (26RT 2964.) John and Brandon remained close. (32RT 3848.

Former co-workers and relatives agreed that appellant was very proud of her children, displayed their photographs, and often spoke about them. (32RT 3879, 3889.) All of the children were well cared-for, and appellant always arranged birthday parties. (35RT 4406.) In addition to being a good mother, she was an excellent employee. (31RT 3770, 32RT 3868, 3922, 3935, 33RT 3951.)

A former vocational counselor testified that appellant did well in her nursing courses at Maric College, where she made the Honor Roll. (34RT 4297, 35RT 4329.) Appellant began this training after becoming disabled from her job-related back injuries. (34RT 4296.)

Several relatives testified about appellant's horrific childhood and how she doted on her children, and asked that the jury not impose the death penalty. These witnesses included her great uncle Elvin Elrod and his wife, Dovie (33RT 3977, 4012), her maternal uncle, Donald Smith (33RT 4032), appellant's first cousin, Leslie Ardis (33RT 4083), her second cousin, Wyman Elrod (34RT

4178), a former babysitter of Brandon's, Jean McGuire (33RT 4101), a nephew, William Hayes (33RT 4128), a childhood friend, Leona Coen (33RT 4144), appellant's half-sister, Brenda Idol and her daughter, Brandi Spencer. (34RT 4200, 36RT 4472.)

The children's former pediatrician testified that appellant brought the boys in regularly for check-ups and any medical problems. (34RT 4284.) Over a 10-year period, they had approximately 170 office visits. (34RT 4284.)

Eric Eubanks testified about his marriage and early family life with appellant, and stated that he still had "love feelings" for her. (35RT 4403, 4432.)

James Esten, a correctional consultant, reviewed the case and concluded appellant would be a low risk for "future dangerousness" if sentenced to life without the possibility of parole. (35RT 4345.) His conclusion was not affected by an incident at the jail where appellant had a fight with another inmate, or another incident years earlier where appellant allegedly held a gun to Shoebridge's head. (35RT 4370.)

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Argument

I

The jury commissioner's wholesale excusal of most of the summoned prospective jurors for discretionary reasons, or no reason at all, violated appellant's Sixth Amendment rights to a jury drawn from a representative cross-section of the community, to counsel, to be present at critical stages, to a public trial, and the Eighth and Fourteenth Amendment right to heightened reliability in capital cases.

The trial court and jury commissioner agreed to a process to pre-qualify jurors who would be available for a ten week trial. The meeting took place off-the-record, and outside the presence of the defense. During the commissioner's screening process, she ignored the original plan, and effectively excused anyone who did not wish to serve on the jury. The result was that, of the 7000 people who received a summons, 219 actually appeared for voir dire. Appellant contends the wholesale excusal of prospective jurors by the commissioner violated many of her constitutional rights and denied her a fair trial.

Background

Eleven of the twelve seated jurors, and all four of the alternates were Caucasian. (7CT 1259, 1293, 1327, 1361, 1429, 1463, 8CT 1497, 1531, 1565, 1599, 1633, 1667, 1701, 9CT 1735, 1769.) The other sitting juror was Hispanic. (7CT 1395.)

The jury was selected from a panel comprised of 276 potential jurors. Of

that group, 226 were Caucasian, 25 were Hispanic, 9 were Black, and 15 were Asian or Native American. (CT Vols. 7-50.)

The trial court originally estimated that it would need to send out 7,000 juror summonses in order to find a panel that could sit for the anticipated ten week trial. (14RT 938, 43RT 5002.)

Judge Weber informed the parties that she had met privately with the jury commissioner to discuss the process of distributing the summonses. (14RT 938.) She met with the commissioner to see if they could avoid sending out an additional 7,000 summonses (following the 7,000 that were originally mailed pending jury selection in this case) because appellant's medical condition jeopardized the scheduled trial date, and the court did not wish to spend the additional $3,500 on a new summons effort. (14RT 935-938.) She informed the parties on June 2nd, 1999, of her intentions to have the commissioner "time-qualify" the panel so that voir dire could begin in July. (14RT 940.) After the panel was time-qualified, the prospective jurors would be introduced to the parties (the judge, counsel for both sides and the defendant), and the panel would then be asked to complete the juror questionnaires. (14RT 940.)

When the court was explaining the process, defense counsel noted that there was a problem in excluding appellant and counsel from the time-qualification process conducted by the commissioner. (14RT 940.) However,

the court disagreed since counsel and appellant would be present later to meet the panel before the juror questionnaires were distributed. (14RT 940.)

Thereafter, on June 9th, 1999, 700 people answered the summons and appeared before the commissioner for the time-qualification process. (60CT 13067, CT Vols. 55-58.) During that process, the commissioner excused 481 people. (CT Vols. 55-58.)

The 219 jurors who were time-qualified by the commissioner were ordered to return to court on July 21st. (15RT 960.) The court at that time indicated that it wanted a larger panel, and had instructed the commissioner to continue to time-qualify jurors from new panels that would be assembled on Mondays and Tuesdays up until July 21st. (15RT 961.) There were no records maintained regarding the addition or excusal of panel members during these sessions. (60CT 13068.)

Of the 219 panel members who were originally time-qualified on June 9th, 29 failed to appear for voir dire proceedings on July 21st. (45RT 5056-5063.) These people never returned questionnaires and no efforts were made by the court to locate them. (44RT 5038.) During record correction proceedings, the trial court indicated that it is was common for jurors qualified by a commissioner to fail to appear for voir dire, and it was not practical to enforce the law that imposes consequences on prospective jurors who fail to appear.

(45RT 5062.) The court also noted it was possible that some of the jurors who had been time-qualified by the commissioner in this case (for a 10 week trial) were sent to another trial department. (45RT 5059.) Defense counsel noted the speculative nature of the court's suggestion and the fact that it was unlikely to have happened in this case where the court had gone to such great efforts to assemble a panel of prospective jurors for the present capital case. (45RT 5059-5061.) The court responded that losing time-qualified jurors who failed to appear for voir dire is frustrating, but little can be done to resolve the problem, and "We live, unfortunately, in a society where people don't follow through on their obligations, and it is not uncommon for that to happen at all." (45RT 5062-5063.)

Of the 7,000 summonses that were distributed, 700 people appeared, 481 were excused solely on the authority of the jury commissioner, and an additional 29 excused themselves, leaving only 190 in the venire when voir dire proceedings began on July 21st.

The hardship screening conducted by the jury commissioner.

On June 9th, 1999, the jury commissioner, Barbara Ewing, greeted the 700 people who responded to the summons. (60CT 13070.) She then informed the potential jurors that the trial would last approximately ten weeks. (60CT 13070; 14RT 938, 45RT 5051-5052.) Thereafter, she noted there were only

four reasons for which the commissioner could excuse potential jurors:

"1. Financial Hardship, not paid by your employer.

2. Medical appointment or procedure that cannot be canceled.

3. Prepaid vacation.

4. Full time school enrollment.

All other reasons must be taken up with the court." (60CT 13070.)

The commissioner then informed the potential jurors that, in the case of an alleged financial hardship, they were to write on the summons "the number of days the employer would compensate for jury service." (60CT 13070.)

The commissioner then granted hardship excusals for 481 of the 700 people who appeared, leaving the 219 who were time-qualified to fill out the juror questionnaires. (CT Vols. 55-58.)

However, the process used to excuse the potential jurors was flawed for a number of reasons. First, there was no record of the proceedings other than the summonses which included an affidavit the prospective jurors were to fill out describing any potential hardship. Of the 481 people who were excused for hardship, 48 either neglected to indicate a reason on the affidavit, or failed to sign it under penalty of perjury. (No signature: 55CT 12036, 12044, 12163, 12171, 12199, 12231, 56CT 12305, 12344, 12368, 57CT 12740. No box checked: 55CT 12024, 12032, 12071, 12085, 12099, 12105, 12109, 12147,

12159, 12252, 56CT 12272, 12286, 12303, 12336, 57CT 12575, 12584, 12599, 12611, 12613, 12631, 12633, 12635, 12637, 12641, 12647, 12653, 12655, 12659, 12677, 12679, 12681, 12685, 12687, 12689, 12693, 12728, 12732, 12734.) Next, the majority of those excused for a specific reason claimed a financial hardship indicating they would not be compensated by their employer for a ten week trial, but only six provided a note from their employer verifying this hardship, although the juror affidavit specifically required proof from the employer to verify this claim. (55CT 12067, 12212, 12229, 56CT 12297, 12327, 12330, CT 5712704.) The next problem with the process is that the jury commissioner excused potential jurors for discretionary reasons other than the nondiscretionary reasons she described to the jurors at the outset of the process. She informed potential jurors she could excuse them for four reasons including financial hardship where they would not be paid by their employer, a medical appointment that could not be canceled, a prepaid vacation or full time school enrollment. (60CT 13070.) The commissioner noted that all other reasons "must be taken up with the court." (60CT 13070.) However, the commissioner thereafter excused potential jurors for discretionary reasons such as language difficulty (55CT 12261, 56CT 12284), day care problems (55CT 12202, 12222, 12245, 56CT12299), general medical problems not tied to an appointment or procedure (i.e. 55CT 12165 — a 64 year-old who was taking medication for

"heart problems," 56CT 12288 — a woman who noted that she was bipolar and suffered from "chronic fatigue," and 57CT 12690 — a woman who was 71 years old and noted "memory problems."). The commissioner also excused a juror for recent jury service where the previous service was almost two years old. (55CT 12197.) Finally, the most notable error was the excusal of five potential jurors who listed no reason at all justifying a hardship excusal. (55CT 12170, 12190, 12198, 56CT12304, 12335.) This problem was qualitatively worse than the one involving the jurors who scribbled an excuse on the front page of the summons but left the affidavit blank.

Applicable law

Various Code of Civil Procedure sections and California Rules of Court apply to the excusal of jurors based on undue hardship. Code of Civil Procedure section 204, subdivision (b), states that an eligible person may be excused from jury service only for undue hardship upon himself or herself or upon the public as defined by the Judicial Council in the Rules of Court. Section 218 of the Code of Civil Procedure requires that all excuses be in writing and signed by the prospective juror. The provision requires the jury commissioner to hear excuses in accordance with the standards prescribed by the Judicial Council.

California Rules of Court, rule 860 (b),[1] defines general principles governing the granting of excuses. The rule provides that no one is automatically excluded from jury duty except as provided by law; those who have a statutory exemption may be granted it only when claimed; deferring jury service is preferred to excusal; and inconvenience is not an adequate reason to be excused.

Subpart (c) of Rule 860 states that:

> All requests to be excused from jury service shall be put in writing by the prospective juror, reduced to writing, or placed in the court's record. The prospective juror shall support the request with facts specifying the hardship and a statement why the circumstances constituting the undue hardship cannot be avoided by deferring the prospective juror's service.

In *People v. Basuta* (2001) 94 Cal.App.4th 370, 395, the court (after reversing the murder conviction on other grounds) addressed the propriety of a jury commissioner conducting the hardship screening. The court first noted there was nothing constitutionally repugnant in allowing the commissioner to conduct the hardship screening outside the presence of the defendant or counsel. (*Ibid.*) However, the court found the trial court erred in failing to require that

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[1] While significant numbering changes have recently been made to the Rules of Court, this brief will reference numbers as they appeared at the time of trial.

detailed records be kept regarding the reasons given by prospective jurors who claimed financial hardships. (*Id.* at p. 396.) Citing *People v. Wheeler* (1978) 22 Cal.3d 258, 273, the court emphasized that "excusing potential jurors for hardships is highly discretionary and the courts must be alert to possible abuses that would negatively affect the creating of juries reasonably reflecting a cross-section of the community." (*Ibid.*) (See also *Glasser v. United States* (1942) 315 U.S. 60, 86, where the Supreme Court emphasized, "Tendencies, no matter how slight toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right.")

The case law therefore recognizes that while hardship screening by a commissioner is not inappropriate, *per se*, it is important that protective measures be taken to minimize the opportunities for abuse. The *Basuta* court noted that when prospective jurors are excused by a trial judge in open court, a record exists of the numbers excused and the reasons given. (*People v. Basuta*, *supra*, 94 Cal.App.4th at p. 396.) Noting the requirements of section 218 and rule 860 that requests for excusal be in writing, signed and placed in the record, the court found the "obvious purpose is to give transparency to the process and

provide data potentially relevant to a review of the cross-sectional nature of the pool." (*Ibid.*) The court found that an inadequate record creates or increases the risk that abuse in the excusal process will not be detected. (*Ibid.*)

Improper excusal of prospective jurors may also violate a defendant's Sixth and Fourteenth Amendment rights to counsel, to be present at her proceedings, to a public trial and to due process, as well as the Eighth Amendment right to enhanced reliability in a capital case.

"Where an indictment is for a felony, the trial commences at least from the time when the work of impaneling the jury begins." (*Hopt v. Utah* (1884) 110 U.S. 574, 578; accord *Gomez v. United States* (1989) 490 U.S. 858, 873; and see *People v. Jurado* (2006) 38 Cal.4th 72, 101, where the court noted "The jury selection process in this case began with hardship screening...") A defendant has a right to counsel at all critical stages of a prosecution and voir dire is one of them. (*People v. Locklar* (1978) 84 Cal.App.3d 224, 228-229 (right to counsel at jury impanelment).) She also has a constitutional right to be present at her trial proceedings. (United States Constitution, Sixth and Eighth Amendments; California Constitution, article 1, sections 7, 15; *Snyder v. Massachusetts* (1934) 291 U.S. 97, 107-108. *Rushen v. Spain* (1983) 464 U.S. 114, 117-118 fn. 2.) A defendant also has a right to a public trial (*Waller v. Georgia* (1984) 467 U.S. 39), and that right may be violated where a jury commissioner or clerk decides on juror qualifications somewhere outside the

courtroom. (See *People v. Harris* (1993) 10 Cal.App.4th 672, 684, where the court found that conducting a portion of the voir dire proceedings in the court's chambers violated the defendant's right to a public trial and required reversal of his convictions.)

Finally, a jury commissioner's deviation from the agreed-upon procedure may violate a defendant's Fourteenth Amendment right to due process of law, as federal due process principles are implicated by the state's arbitrary denial of its own domestic rules. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

In *United States v. Bordallo* (9th Cir. 1988) 857 F.2d 519, the trial court excused potential jurors who were friends of the defendant before the defendant or defense counsel entered the courtroom. The appellate court noted that the defendant has no right to be present when a jury commissioner performs a ministerial act such as drawing names for the trial pool of jurors, but that when individual qualifications on a specific case are involved, the issues are not ministerial. (*Id.* at p. 522.) The court held that the defendant and counsel had a right to be present, but the error in that case was harmless beyond a reasonable doubt where the *existing record of the excusals* showed the jurors would have been dismissed in any event. (*Id.* at p. 522.)

Additionally, the Eighth Amendment requires heightened reliability in the procedures involved in a capital trial. (*Woodson v. North Carolina* (1976) 428

U.S. 280, 305.) This requirement applies at both the guilt and penalty phases. (*Beck v. Alabama* (1980) 447 U. S. 625, 637.)

Legal Analysis

The hardship screening procedure used by the court and jury commissioner in this case violated appellant's statutory and constitutional rights for several reasons. First, the commissioner excused five people for hardship who listed no reason whatsoever, and three of those people turned in the affidavit/summons without even signing it. Many others made some reference to an excuse but never signed the affidavit. Next, contrary to the commissioner's statement, she excused potential jurors for discretionary reasons including claimed language difficulties, medical conditions and child care problems. The commissioner also erred by excusing numerous prospective jurors for financial hardship without requiring documentation from the employer verifying the hardship or a statement from the juror acknowledging that unpaid service would in fact result in a financial hardship. The procedure was further flawed in that no steps were taken to insure those who were time-qualified would actually fill out questionnaires, so there were many potential jurors who could have served but simply chose not to, provided no reasons, and were never contacted following the abdication of their legal responsibility.

All of this happened outside the presence of appellant, defense counsel,

the prosecutor, the trial court, or a court reporter. The result of this flawed process was a skewed jury pool that did not properly represent a cross-section of the community.

A.

The issues are not forfeited.

Respondent will likely argue that appellant has forfeited the issues by failing to properly object to each violation at the trial level. However, the issues are properly cognizable on appeal for several reasons.

First, defense counsel did object to the proposed procedure as it was being outlined by the trial court. When the trial court indicated the hardship screening would be performed outside the presence of the parties, counsel stated, "I know the court noted the beauty of it, the ugly of it is that our client won't be present. That's a problem in a capital case." (14RT 940.) The court asked "Present for what?" Defense counsel responded "For the time-qualifying of the jury." (14RT 940.) The discussion then shifted to the issue of whether the parties would be present later to be introduced to the prospective jurors before the questionnaires were distributed, and the court noted that process would be done in the presence of all parties. (14RT 940.)

Counsel's statement informing the trial court of appellant's right to be present for the juror hardship screening was sufficient to preserve the present

issue for review. (See *People v. Briggs* (1962) 58 Cal.2d 385, 410, where the court suggested the defense is not necessarily required to restate an objection if it seems that the judge has ignored it.) Assuming the objection was technically deficient, this court has determined on many occasions that a defendant has preserved the right to raise an issue on appeal where the question is "close and difficult." (*People v. Champion* (1995) 9 Cal.3d 879, 908, fn. 6, citing cases; *People v. Jablonski* (2006) 37 Cal.4th 774, 813.) Moreover, assuming counsel's assertion of the right to be present for the hardship screening was not sufficient to apprise the court of his objection, or is not determined to be a close call, this court may still decide an issue for the first time on appeal if it involves a question of law. (*People v. Vera* (1997) 15 Cal.4th 269, 276.)

In the event this court is willing to entertain a claim of forfeiture, the issue must still be addressed as the forfeiture would be limited. Respondent will likely suggest counsel was required to state with precision that the trial court's delegation of the hardship screening to the jury commissioner violated appellant's constitutional rights to a jury drawn from a representative cross-section of the community, to be present at all stages of the proceedings, to counsel, to due process, to a public trial, and to heightened reliability in a capital case. However, counsel cannot have forfeited the unanticipated irregularities that occurred during the hardship screening. In fact, noteworthy here is that the

court never informed the defense that the commissioner would perform any "hardship" screening, but referred only to "time-qualifying." (14RT 940.) Without being present, counsel could not have known that the commissioner, who promised to excuse prospective jurors for only nondiscretionary reasons (no pay, medical appointment, pre-paid vacation, full-time student status), would thereafter excuse five people for no reason at all, would not require any of the verification described in the juror summons, or would excuse people for discretionary reasons such as language difficulties and medical problems where no specific appointment was scheduled. To suggest that counsel should have anticipated the jury commissioner would essentially open the door for all or most to leave, despite her promise to the contrary, would place an impossible burden on appellant. (See *People v. Reyes* (1998) 19 Cal.4th 743, 754, where this court decided an issue for the first time on appeal because it seemed "prudent to do so.") The trial court confirmed during the record correction process that the commissioner is instructed to read the areas of hardship listed on the form and "they are not permitted to say anything else to these jurors." (45RT 5043.) Trial counsel cannot be responsible for failing to object to irregularities the trial court forbid from happening.

As will be demonstrated, the trial court's delegation of the preliminary jury selection procedure to the commissioner outside the presence of all parties

functionally resulted in the excusal of any prospective juror who wanted to avoid jury duty. This resulted in fundamental constitutional violations and a jury pool that did not represent a cross-section of the community. Defense counsel's objection to not being present for the proceedings before the commissioner should preserve the issues for appeal. In the alternative, the court should review the issue in order to clarify the limits of any similar contemplated delegation in future cases.

B.

The law cannot be read to permit the jury commissioner any discretion in excusing potential jurors for undue hardship.

As noted above, state rules provide a role for the jury commissioner in granting hardship excusals for potential jurors. Code of Civil Procedure section 204 addresses the right to be excused for an undue hardship, and section 218 provides that the commissioner can accept such excuses provided they are in writing, signed and meet the standards set forth by the Judicial Council. The Judicial Council's rules are listed in former rule 860 of the California Rules of Court. Subpart (b) of the rule sets forth general principles governing the granting of excuses by the jury commissioner — no class of person is automatically excluded; an exemption must be claimed to be granted; deferral of service is preferred to excusal where the hardship is marginal or temporary; and

inconvenience is not an adequate reason to be excused. Subpart (c) of the rule states that all requests for hardship excusals must be in writing, supported by facts specifying the hardship and a statement showing why the hardship cannot be avoided by a deferral.

In the present case, the trial court and the jury commissioner met to determine the procedure for excusing potential jurors for undue hardships. This meeting occurred outside the presence of the parties and a court reporter, so there is no record of what was actually said. Nevertheless, after meeting with the court, the commissioner informed the prospective jurors who responded to the summons that she was authorized to grant hardship excusals in the four previously described circumstances.

The commissioner noted that all other reasons had to be addressed by the trial court.

While the parameters of the commissioner's authority are not clearly set forth, the law suggests that the commissioner's role in the process must be limited to nondiscretionary decisions, such as those the commissioner outlined to the prospective jurors. The commissioner can expedite the voir dire by processing nondiscretionary claims. That is, a commissioner can review letters from an employer describing the policy of nonpayment to jurors, a doctor's note detailing an appointment or procedure, an airline ticket or travel itinerary

showing the prospective juror's scheduled unavailability, or the sworn statement that the prospective juror is a full-time student.

However, the law cannot be read to allow non-judicial court personnel to excuse prospective jurors for discretionary reasons that require the exercise of judgment. As this court found in *People v. Wheeler, supra,* 22 Cal.3d 258, 273, excusing potential jurors for hardship is highly discretionary and the courts must be alert to possible abuses that would negatively affect the selection of a jury reasonably reflecting a cross-section of the community.

Jury duty is usually inconvenient, and while the process allows certain nondiscretionary excuses to be recorded by a commissioner, any decision requiring the exercise of judgment or an evaluation of credibility must be made by a judge. (See *Riley v. Deeds* (9th Cir. 1995) 56 F.3d 1118, where the court found structural error after the judge left the courtroom and the decision to allow a read-back of testimony to the deliberating jury was made by the court's law clerk.) Moreover, allowing any discretionary screening to take place outside the presence of the parties, specifically the defendant and defense counsel, violates the defendant's constitutional rights to due process, to counsel and to be present for all proceedings. (See *United States v. Bordallo, supra*, 857 F.3d at p. 523, where the court recognized the constitutional violation after the trial court excused certain prospective jurors in the defendant's absence. The court

distinguished this violation from the circumstance where the jury commissioner performed the "ministerial act" of drawing names of potential jurors — an event which does not require the defendant's presence.) Appellant's right to due process was further violated when the commissioner abandoned the established standards for excusing prospective jurors and effectively opened the door for anyone not interested in serving. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

Finally, this was a capital case which required heightened reliability in procedures adopted by the court, and any delegation of the judicial function of allowing discretionary hardship excuses by a non-judicial officer violated appellant's rights to heightened reliability in the process as well as her rights to due process, to counsel, to be present, and to a representative jury.[2]

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[2] Assuming that a jury commissioner has some discretion in excusing prospective jurors, that discretion must be extremely limited.

For instance, Code of Civil Procedure section 218 explicitly states "It shall be left to *the discretion* of the jury commissioner to accept an excuse under subdivision (b) of section 204 without a personal appearance." However, this discretion simply permits the commissioner to accept a *nondiscretionary* excuse in writing, assuming the juror has complied with the other requirements regarding a statement of reasons, supporting documentation, and a signature under penalty of perjury.

Discretion is also mentioned in rule 860, subpart (e), referring to prior jury service, where it says a person who served on or was summoned for a jury within the past 12 months shall be excused on request, although the "jury commissioner, in his or her own *discretion*, may establish a longer period of repose."

Therefore, in the event the court determines a jury commissioner may exercise some discretion in granting hardship excusals without violating a defendant's

C.

The reckless exercise of discretion in the wholesale excusal of jurors for reasons not authorized by law or the court and without supporting statements, documentation or signatures violated appellant's fundamental constitutional rights.

The record shows that the commissioner excused jurors for reasons other than those represented to the court and parties, including asserted language difficulty, general health concerns not related to a specific appointment or procedure, and child care issues. Most troubling, several people were granted excusals for no reason at all. In addition, most of the jurors who were excused based on an alleged financial hardship failed to provide letters of proof from their employers as required in the affidavit, and were not asked to comply with the requirement in rule 860, subpart (d)(3), or the statement in the affidavit requiring a detailed statement as to whether unpaid jury service would actually result in a financial hardship. Moreover, some prospective jurors jotted notes on the outside of the summons but ignored the attached affidavit. Finally, many of the jurors who were excused failed to sign the affidavit under penalty of perjury.

Therefore, while 700 people responded to the summons, 481 were

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fundamental constitutional rights, that discretion is narrowly circumscribed, and must be subject to review for abuse. Moreover, when discretion is exercised in excusal of the prospective jurors, the constitution requires that it be done in the presence of counsel and the defendant with a meaningful record of the proceedings.

excused by the commissioner in a flawed process that essentially permitted the excusal of anyone who did not wish to sit on a jury, and these excusals took place outside the presence of the defendant, counsel, the court, the clerk, and a court reporter.

A review of the record shows the problems associated with the commissioner's exercise of discretion.

(i)

Language difficulties

The jury commissioner granted hardship excusals to two potential jurors due to their asserted language difficulties.

The first was Kimiyo Nichols who checked box No. 6 on the affidavit which said she did not have sufficient knowledge of the English language to act as a juror. When asked to list her native language, she wrote "JAPANESE." (55CT 12262.)

The second potential juror excused for this reason was Pedro Padilla who wrote "SPANISH" in the space provided. (56CT 12284.)

Language difficulty is not among the hardships listed in rule 860 (d), but it is listed as a disqualifying factor in Code of Civil Procedure section 203, subdivision (a)(6) ("Persons who are not possessed of sufficient knowledge of the English language . . .")

The obvious problem is that the standard is very subjective and must require an independent evaluation as to the potential juror's language proficiency. The record in the present case indicates only that the instructions, oral or written, were provided to the prospective jurors in English, and the jurors had sufficient command of the language to identify the appropriate box, write their native language in English, and in each case sign and date the declaration. The record contains no evidence that these jurors were assisted with their affidavits, but rather suggests they were able to comprehend the language well enough to be excused, with no questioning from the commissioner to verify this important fact.

This court noted in *People v. Wheeler, supra*, 22 Cal.3d at p. 273, that excusing potential jurors for hardship was highly discretionary and "the courts must be alert for possible abuses." This is a fertile area for abuse of a highly discretionary factor, and the non-judicial officer in the present case simply granted the excuses without any scrutiny whatsoever.

This is especially important in the case of Mr. Padilla, since Hispanics were significantly under-represented on the panel, compared to their percentage in the population[3], and the court's policy of excusing Hispanic people on request

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[3] This claim will be presented in the following argument.

(and not punishing those who ignored the summons) sent a clear message that Hispanic people, regardless of their command of the language, could be excused upon request or by ignoring the summons. This is highly relevant to the claim that appellant was deprived of her right to a jury reasonably reflecting a cross-section of the community.

(ii)

Health concerns

The commissioner granted hardship excusals to three potential jurors who claimed a medical problem, but did not indicate that a scheduled appointment or procedure prevented service.

Marvin Hurst indicated on his affidavit that he was 64 years old and had "Heart Problems, Medication (Reactions)." (55CT 12165.) While the affidavit stated in the text next to box No.14 that for people under 70 years of age, a doctor's note in support of a claimed excuse may be required, none was requested or provided here, and Mr. Hurst was excused without any dialogue on the record to determine the existence or severity of a heart condition.

The next, Susan Price, failed to list her age, but indicated that she was bi-polar, and suffered from "chronic fatigue." (56CT 12288.) Again, no doctor's note was attached or requested by the commissioner, and she was summarily excused. While her noted conditions may have been severe, they may also have

been embellished or fabricated, and may not have prevented her from serving as a juror.

Beverly Rubenstein was 71 years old, and indicated on her affidavit that she had "memory problems." (57CT 12691.) Again, she failed to provide a note from her physician as described on the form. While memory problems associated with Alzheimer's disease or dementia can be difficult, and sometimes tragic, such a problem can also be insignificant and affect many qualified jurors to one degree or another.

These medical problems were highly discretionary, subject to abuse, and not tested on any level.

(iii)

Prior jury service.

Ruby Johnson was excused for prior jury service after noting that she had served on a jury in Colorado in the fall of 1997. (55CT 12197.) The affidavit was dated June 9, 1999, which meant the Colorado trial may have taken place close to two years earlier — 21 months if it was in September, the first fall month.

Rule 860 (e) provides jurors may be excused if they have served on a jury during the previous 12 months, and that time period may be expanded at the commissioner's discretion. The commissioner almost doubled the time period

without any inquiry into the details of the previous trial or any explanation.

(iv)

No explanation given.

Respondent may suggest appellant's claim is hypertechnical or overly burdensome, and that despite the absence of a record, the commissioner may have been more diligent than appellant suggests. However, such a claim can be easily dismissed in light of the fact that the jury commissioner excused five people for no reason at all.

Bonnie Harris provided no written reason on the front of the summons, checked no boxes and did not sign the affidavit, yet was excused by the commissioner. (55CT 12170-12171.) Likewise, Sean Kaufman and Tammy Randall provided no grounds for excusal on the summons or affidavit, and failed to sign the affidavit, but were excused by the commissioner. (55CT 12198-12199, 56CT12304-12305.) Sonya Jones and Margaret Skiano also failed to list a reason for hardship excusal, but they at least signed the affidavit unlike the others previously mentioned. (55CT 12188-12189, 56CT 12335-12336.)

The excusal of these jurors is the best evidence of the lack of any standards in the hardship screening process. Essentially, anyone who did not wish to serve could be excused whether or not there were legal hardship grounds.

(v)

Problems associated with the financial hardship claims.

Another significant problem is the failure of most jurors claiming financial hardship to offer any support for the claims. Of the 481 people who received hardship excusal, 193 claimed financial hardship. However, despite the requirement listed on the affidavit that those claiming a financial hardship provide proof of lost wages from their employer, only seven actually complied with this provision and provided notes from their employers. (55CT 12067,12212, 12230, 56CT 12297, 12327, 12332, 57CT 12704.)

In addition to the lack of a required note, only one person fulfilled the requirement that she state whether, despite the lack of pay, jury service would constitute a financial burden. Rule 860 (d)(3) requires consideration of whether the prospective juror has other sources of income in the household, the extent of any reimbursement, the expected length of service and whether service would compromise the juror's ability to support his or her household. While the affidavit asked potential jurors to "explain in detail" why the claimed financial hardship could not be avoided by a deferral (this was the closest mention of the factors listed in rule 860 (d)(3)), the affidavit provided two short lines to present the explanation, and made a meaningful explanation almost impossible. Only one prospective juror, Lynn McLaughlin, attached a handwritten letter that

complied with the requirement. (55CT 12229.)

Therefore, under the procedure adopted by the jury commissioner, it was impossible to consider, as she was legally required to do, whether jury service would represent a true financial hardship. The law recognizes that the loss of pay for a period of time may not have a significant impact on the ability of some jurors to provide for their families. The commissioner in the present case failed to explore this issue as required.

(vi)

Failure to sign or designate a hardship ground in the affidavit.

The jury commissioner's carelessness in the hardship excusal process was also demonstrated by the incomplete affidavits presented by those who wished to be excused. The affidavit included with the summons listed 18 separate reasons for a potential juror to list a disqualification or an excuse, and had an additional category described as "other" allowing for unique circumstances. After being asked to check a box identifying the excuse claimed (including details as to certain excuses) the potential jurors were asked to sign the affidavit under penalty of perjury.

However, 10 of the jurors checked one of the boxes seeking an excusal, but failed to sign the affidavit. (55CT 12036, 12044, 12163, 12171, 12199, 12231, 56CT 12305, 12344, 12368, 57CT 12740.) This was in addition to the

previously mentioned people who provided no excuse or signature and were excused for no apparent reason.

Moreover, 38 jurors checked no box, but nevertheless signed the affidavit. 55CT 12024, 12032, 12071, 12085, 12099, 12105, 12109, 12147, 12159, 12252, 56CT 12272, 12286, 12303, 12336, 57CT 12575, 12584, 12599, 12611, 12613, 12631, 12633, 12635, 12637, 12641, 12647, 12653, 12655, 12659, 12677, 12679, 12681, 12685, 12687, 12689, 12693, 12728, 12732, 12734.) While these potential jurors may have noted a reason on the front cover of the summons, they failed to list a reason in the affidavit section which was no doubt added to curtail the potential for abuse in seeking excusals from jury duty. Those summoned would have to identify a hardship ground in the space provided, and then swear under oath that they were telling the truth. However, the jury commissioner in the present case freely excused over four dozen prospective jurors, who failed to identify a ground for excusal in the affidavit or failed to sign the document. While there are many possible reasons why the potential jurors failed to properly complete the affidavits (including the possibility that they did not want to swear under oath because the listed excuse was bogus or overstated) there can be no legitimate reason that the commissioner did not require strict compliance before excusing the jurors. Carelessness is the only logical explanation, and this same carelessness was present throughout all

aspects of the hardship screening process which was conducted outside the parties' presence and with no court reporter or official record.

(vii)

Failure to require the attendance of prospective jurors who were not granted hardship excusals.

As demonstrated, the procedures requiring reliability in the hardship excusal process were virtually ignored by the jury commissioner. The court met with the commissioner in private, and discussed the process of hardship excusals. Thereafter, the commissioner informed those who responded to the summons that they would only be excused for four nondiscretionary reasons. However, the process broke down, for all of the reasons described, and those seeking excusal could be relieved for any reason, discretionary or otherwise, or no reason at all. The result was that 481 of 700 responding jurors were excused at this time.

The remaining 219 jurors who indicated they could sit for a 10 week trial were ordered to return on July 21st, approximately six weeks later, to fill out questionnaires. (15RT 960.) The court then instructed the jury commissioner to time-qualify additional jurors between June 9th and July 21st from the new panels she would assemble on the intervening Mondays and Tuesdays. (15RT 961.) There were no records of those proceedings, and again, they were

performed outside the presence of the parties, including appellant and defense counsel.

On July 21st, the court indicated it had a panel of 330 members, meaning the commissioner was able to time-qualify an additional 111 potential jurors after her initial effort. (16RT 975.)

The clerk swore the panel, introduced appellant and counsel, and advised the panel members that this was a death penalty prosecution. (16RT 973.) The panel members were then advised to complete the questionnaires that were distributed. (16RT 973.)

Voir dire commenced six days later, on July 27th, 1999, but the random list prepared by the clerk contained only 288 names. (60CT 13068.) Therefore, an additional 42 potential jurors, including 29 of the original 219 time-qualified people, failed to submit questionnaires or return after being informed this was a capital case.

During record correction proceedings, defense counsel sought an explanation as to the absence of these 42 potential jurors. (45RT 5059.) The court responded there was no way to recreate what happened to those people seven or eight years earlier. (45RT 5059.) The court suggested the possibility that some of those jurors, who were specifically time-qualified for appellant's 10 week trial, were sent to other departments. (45RT 5060.) After a discussion

between the court and counsel as to the unreasonableness of this suggestion (45RT 5060-5061), the court acknowledged the frustration judges often face when prescreened jurors do not appear for voir dire. (45RT 5062.) The court noted that the options were to proceed to trial with the jurors who did respond, or delay proceedings and dispatch the sheriff to gather the offending potential jurors. (45RT 5062.) The court noted the latter option was impractical, and lamented the fact that "We live, unfortunately, in a society where people don't follow through on their obligations." (45RT 5062.)

The failure to take any action to ensure the attendance of the 42 offending jurors is constitutionally significant. The law provides a procedure and a remedy for dealing with scofflaws. Code of Civil Procedure section 209 provides that any prospective trial juror who fails to attend as directed by the jury commissioner or court shall be arrested for contempt of court, and face incarceration or fine. Moreover, in *People v. Alexander* (1985) 163 Cal.App.3d 1189, 1203, the court, when confronted with the question of the disparity between the number of minorities who lived in the judicial district as compared to the number who responded to a jury summons, noted that trial courts should do what they can to alleviate the problem. "Courts can and should promptly undertake to comply with all statutory and rule requirements in the area of excusal from jury service." (*Ibid.*)

In the present case, the trial court did nothing to alleviate the problem simply because taking any action to correct it would be "impractical" and essentially ignored the statutory and rule requirements dealing with jurors who fail to appear.

Summary

The hardship screening process conducted by the jury commissioner was hopelessly flawed and resulted in the excusal of essentially anyone who did not wish to serve on the jury. The problem was exacerbated by the trial court's inaction following the flight of dozens of jurors who failed to appear after being informed that the case involved the death penalty.

The law provides a role for the jury commissioner to screen jurors who cannot serve due to their status as minors, noncitizens, nonresidents, etc. Moreover, the commissioner can excuse full-time students or those with previously arranged medical procedures or vacations. In the case of people claiming financial hardship, commissioners may excuse those who bring a note from their employer acknowledging the lack of payment for jury service, as well as a statement from the juror noting that unpaid service would result in a hardship to the juror and his or her family. After privately meeting with the court, the commissioner agreed to "time-qualify" prospective jurors in the present special case (7000 summons were sent specifically for this case) that

would allow hardship excusals for nondiscretionary reasons.

However, the process broke down and the commissioner excused anyone who applied. The commissioner accepted excuses for highly discretionary problems relating to alleged language deficiencies, health, and prior jury service that greatly exceeded the one-year limitation. Moreover, stunningly, five people were excused for no reason at all, while others failed to note an excuse on the affidavit, or sign it under penalty of perjury.

The problem was aggravated by the trial court's failure to respond to or sanction, as the law provides, jurors who had no hardship but failed to submit a questionnaire after being informed that the case involved the death penalty.

The result was that questionnaires were submitted by mostly Caucasian people, many of whom favored the death penalty, and wanted to sit on a jury.

(D)

The error requires reversal of the convictions and penalty.

The constitutional and statutory errors arising from the flawed pre-voir dire process are numerous and significant. The commissioner's failure to employ meaningful standards before granting hardship excusals, and the trial court's failure to sanction those time–qualified people who were absent without permission violated appellant's rights to due process, to counsel, to be present, to a public trial, to a jury comprised of a representative cross-section of the

community, and to heightened reliability in procedures in capital cases. The egregious errors noted above are not subject to the harmless error analysis of *Chapman v. California* (1967) 386 U.S. 18, 24.

In *Rose v. Clark* (1986) 478 U.S. 570, 576-578, the court found that most constitutional errors are subject to a harmless error test. In *Arizona v. Fulminante* (1991) 499 U.S. 279, 310, the court noted the sole exception to the rule announced in *Rose v. Clark* was for errors that were "structural" in nature. In order to qualify as a structural error, a constitutional deprivation must affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Ibid.*)

The errors presently described can only reasonably be considered "structural" in that the filter which was designed for the limited purpose of excluding jurors unqualified or unable to serve was abandoned, with the commissioner instead excusing anyone who was unwilling or inconvenienced. This entire screening took place outside the presence of appellant and counsel. Those who were summarily dismissed by the commissioner — several for no reason at all — should have faced direct questioning from counsel and the court if they were to be properly excused.

The dismissals by the commissioner should be compared with the subsequent dismissal for hardship of a juror following questioning from the

parties. Prospective Juror No. 22, a college professor, informed the parties during voir dire that she had a potential hardship issue in that her employer, the University of San Diego, paid for jury service, but that her department chair refused to authorize her 10 week absence. (18RT 1236-1237.) There was a lengthy discussion between the court and counsel who believed the juror might be paid if the court contacted the university. (18RT 1237-1239.) The juror was ultimately excused by the court, but the lengthy exchange showed the importance of the extensive questioning.

Comparison of that discussion to the commissioner's wholesale dismissal of anyone who checked the hardship box, or any other box, or listed no excuse at all shows the "structural" nature of the present problem.

This court has recently reversed penalty phase judgments for mistakes committed in the death-qualification process in the presence of all parties. (See *People v. Stewart* (2004) 33 Cal.4th 425, 454, where the court found a violation of the defendant's right to an impartial jury where prospective jurors were excused based upon the written answers provided in the juror questionnaires; *People v. Heard* (2003) 31 Cal.4th 946, where the trial court erred in excusing a potential juror for cause without adequately examining his statements regarding the death penalty; and *People v. Cash* (2002) 28 Cal.4th 703, where the court determined the trial court prejudicially erred by preventing defense counsel from

inquiring during voir dire about juror attitudes regarding the effect of a prior murder conviction.)

The court in *Stewart* noted that the reversal of the death judgment was automatic insofar as the error involved the process of death-qualifying the jurors, but that the error did not require reversal of the underlying conviction or special circumstance finding. (*People v. Stewart*, *supra,* at pp. 454-455.) The reversible errors in these cases involved important but subtle legal issues involved in the complicated system of selecting a jury in a capital case.

The refusal to find structural error in the guilt phase of those trials cannot apply in the present situation, where the wholesale dismissal of the jurors took place outside the presence of the court and the parties. (See *Riley v. Deeds, supra*, 56 F.3d 1118, where the court found structural error of the guilt trial when the law clerk, rather than the court, granted the jury's request to reread testimony and decided which testimony to reread; and see similarly *Waller v. Georgia*, *supra*, 467 U.S. at p. 49, and *People v. Harris*, *supra*, 10 Cal.App.4th at p. 688 where the courts found the violation of the right to a public trial under similar circumstances constituted structural error requiring an automatic reversal.)

In the present case, the trial court and counsel labored under the impression that the commissioner would properly perform her limited role.

Counsel asked that he and appellant be permitted to be present for the hardship screening since this was a capital case, but the court indicated such presence was not necessary (suggesting this was a ministerial, nondiscretionary process) but assured counsel that all parties would be present when the questionnaires were distributed following the prescreening for eligibility.

The parties could reasonably have assumed that the commissioner would confine her actions to the prepared script, which did not allow for discretionary excusals. That she ignored restrictions, and opened the gates for all disinclined to serve, is an enormous error, far more compelling than the errors committed by the court during the death qualification process in *Stewart*, *Heard*, and *Cash*.

It is inconceivable that a system which is designed to prevent any arbitrariness in the process of trying a capital defendant could permit such an egregious departure from the rules and not require a retrial of both phases. This is especially true where the evidence suggests the jurors who remained available for service did not statistically represent the race, age and perhaps beliefs of the community. (See Argument II below.)

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II

The feature in the summons allowing self-excusal by Hispanics violated appellant's Sixth Amendment right to a jury drawn from a representative cross-section of the community.

The summons mailed to prospective jurors included a feature informing people whose native language was not English that they could be excused from jury service. The result was that less than six percent of the people who appeared for voir dire were Hispanic even though Hispanics represent approximately 25 percent of the eligible population of jurors in North County San Diego where the trial took place. The feature in the summons which dissuaded Hispanics from appearing violated appellant's right to a jury drawn from a representative cross-section of the community.

Background

The trial court mailed 7000 summonses in this case, hoping to find enough jurors to sit for the anticipated 10 week trial. (11RT 857, 43RT 5002.) The court later acknowledged that the large mailing was necessary due to the low juror turnout in the North County Judicial District. (43RT 5015.)

The summons consisted of two pages. The first was a cover page with the potential juror's name, address, and reporting date. (55CT 12019.) The second provided a juror affidavit detailing the statutory exemptions, and possible excuses from jury service. (55CT 12020.) At the bottom of the affidavit, the

jurors were to date and sign under penalty of perjury. (55CT 12020.)

One of the excuses described in the affidavit, which was printed in English only, referred to those who lacked "Sufficient Knowledge of the English Language." It asked the potential jurors to identify their "native language." (55CT 12020.)

Appellant submits that this feature on the jury summons effectively informed jurors whose primary language was not English, and who may have had some difficulty with the English language, that they could excuse themselves from jury service. Therefore, many people whose command of English was more than adequate were given the opportunity to avoid jury service. This would include people who had no difficulty at all with English as long as it was not their "native language."

The statistics support this claim. First, only 700 people appeared in response to the mandatory summons that was distributed to 7000 people — a yield of 10 percent. (60CT 13068; 55CT-58CT.) Next, 481 people were granted hardship excusals by the jury commissioner — leaving 219 to complete the jury questionnaire. (60CT 13067; 55CT-58CT) While the questionnaire filled out by those who were not excused asked potential jurors to identify their race, the juror affidavit attached to the summons did not ask for race identification. (55CT 12020.)

Of the 276 people who eventually completed a questionnaire, including most of the 219 people who were not excused, and others who were time-qualified in other proceedings after the initial meeting, 25 indicated they were Hispanic.[4]

Therefore, approximately nine percent of those who completed a questionnaire were Hispanic. While the summons/juror affidavit did not call for race identification, the courts previously analyzing this issue match the names listed in the summons against the list of Hispanic surnames published in the United Stated Census Report. (*People v. Howard* (1992) 1 Cal.4th 1132, 1160, fn. 7.) Of the 700 jurors who responded to the present summons, 34, or only 4.9 percent had a last name appearing on the list.[5]

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[4] Richard Vasquez (10CT 02014); Sandra K-Voltz (10CT 02189); Micheala Aparicio (12CT 02502); John Naranjo (13CT 02892); Angelina Montalvo (14CT 03169); Maribel Gonzales (15CT 03346); Ventura DeLaRosa (15CT 03522) Henry Pena (16CT 03662) Charles Calva (18CT 04047) Doris Vignato (21CT 04848); Albert Martinez (23CT 05476); Adriana Campa (26CT 06176); Jeannie Vega (30CT 07155); Leida Perez (35CT 08239); Manuel Ramirez (35CT 08274); Laura Lozano (35CT 08063); Nancy Crowley (34CT 08099); Amanda Tobar-Toker (36CT 08483); Rhonda Joy (38CT 09111); Elizabeth Rivera (40CT 09460); Nellie Ann Hockenberry (41CT 09670); Alice Hoskins (42CT 10019); Stephen Ramos (43CT 10193); Denise Chesterton (46CT 11068); Sally McKelvy (47CT 11173).

[5] They included Pedro Padilla (56CT 12283), Sheila Santiago (56CT 12343), Rumaldo Saldana (56CT 12349), Linda Carranza (56CT 12422), Maribel Gonzalez (56CT 12434), Laura Mendoza Lozano (56CT 12482), Patricia Lovato (56CT 12484), Angelina Montalvo (56CT 12503), Michaela Aparico (58CT 12742), Franziska Gonzalez (58CT 12830), Beda Cardova Garcia (58CT 12834), Ventura De La Rosa (58CT 12874), Monte Martinez (58CT 12889), Albert Martinez (58CT 12891), Jose

The list may be nonexclusive, and in one case, the court reviewed the names and found three other possible Hispanics. (*People v. Howard*, *supra*, 1 Cal.4th at p. 1160, fn. 7.)

In the present case, appellant will present eight other names that may be Hispanic and invites respondent and the court to review the full list to arrive at the most accurate number. Using appellant's list of those with accepted Hispanic surnames, and those with possible Hispanic surnames that do not appear on the census list, the maximum number of Hispanics who appeared in response to the summons was 42. Therefore, the true number of Hispanics responding to the summons was between 34 and 42.

The number is important because census figures indicate Hispanics in the North County Judicial District represent 24.9 percent of the eligible jurors.

Also, noteworthy in support of appellant's argument that Hispanics know that the language excuse will allow them to avoid service is the fact that the

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Martinez (58CT 12893), Rudy Daniel Peña (58CT 12925), Migueta Reyes (58CT 12935), Elizabeth Rivera (58CT 12939), Jeannie L. Vega (58CT 12977), Laura Rodriguez (57CT 12525), Benigno Ruiz (57CT 12531), Cesar Arcega Almazan (57CT 12574), Jesus Mercado (57CT 12670), David Romero (57CT 12694), Guadalupe Albarez (55CT 12027), Karen Watson Cabrera (55CT 12055), Gerardo de la Cruz (55CT 12072), Dorothy M. Caspo (55CT 12074), Heather Lynn Cruz (55CT 12080), Erique Gomez (55CT 12152), Teri Lynn Heredia (55CT 12158), Hector Lopez (55CT 12206), Johanna Marie Lopez-Marine (55CT 12210), and Jaime Ibarra Marquez (55CT 12235).

commissioner summarily excused the only Hispanic juror, Pedro Padilla, who appeared but claimed a language deficiency without any questioning of that juror. Again, the form Mr. Padilla read and signed was prepared in English only, and in the space provided to list his native language, Mr. Padilla wrote the English word "Spanish." (56CT 12284)[6]

Therefore what is known is that 1) 24.9 percent of the eligible jurors in North County San Diego are Hispanic, 2) potential jurors are informed that difficulties with the English language will excuse juror service, and 3) less than six percent of those who responded to the summons were Hispanic.

Ultimately, of those selected as seated jurors or alternates, one person was Hispanic and the other 15 were Caucasian.

Applicable law

The Sixth Amendment right to a jury trial encompasses the right to a trial by an impartial jury drawn from a representative cross-section of the community. (*Duren v. Missouri* (1979) 439 U.S. 357, 358-367.) Community participation in the administration of the criminal law "is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of

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[6] A second juror was also excused without question for noting a language difficulty, but her primary language of Japanese is not part of the present claim. (55CT 12262.)

the criminal justice system." (*Taylor v. Louisiana* (1975) 419 U.S. 522, 530.) A similar and coextensive right exists under article 1, section 16 of the California Constitution. (*People v. Howard, supra*, 1 Cal.4th 1132, 1159.)

The right to an impartial jury applies at every stage of the jury selection process: the compilation of the master list of potential jurors, the selection of venires from that list, and the use of peremptory challenges to preclude potential jurors from serving. (*People v. Bell* (1989) 49 Cal.3d 502, 525.) The representative cross-section requirement mandates that the pools from which juries are drawn must not systematically exclude distinctive groups in the community. (*People v. Mattson* (1990) 50 Cal.3d 826, 842.)

In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show 1) that the group alleged to be excluded is a "distinctive" group in the community, 2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and 3) that the under-representation is due to systematic exclusion of the group in the jury selection process. (*Duren v. Missouri, supra*, 439 U.S. at p. 364.) The relevant "community" for cross-section purposes is the community of qualified jurors in the judicial district in which the case is to be tried. (*People v. Mattson, supra,* 50 Cal.3d at p. 844.) If a defendant makes a prima facie case showing that the

fair cross-section requirement is violated, the burden shifts to the prosecution to provide either a more precise statistical showing that no constitutional disparity exists or a compelling justification for the procedure that has resulted in the disparity in the jury venire. (*People v. Sanders* (1990) 51 Cal.3d 471, 491.) The defense does not have the burden of excluding all possible and permissible explanations for under-representation. (*Duren v. Missouri, supra,* 439 U.S. at pp. 368-369.)

Legal Analysis

Appellant claims a violation of the fair cross-section requirement based on the under-representation of Hispanics in the venire, following the trial court's publication in the summons that people who had difficulties with the English language could be excused from jury service.

The issue is not forfeited.

Respondent will likely argue the present claim is forfeited for lack of an objection in the trial court.

Appellant contends, as she did in the previous argument, that the issue was preserved by counsel. When describing the jury selection process, the court noted that she had met privately with the jury commissioner, and had devised a procedure for time-qualifying the jury. (14RT 938.) Under the court's proposed procedure, the commissioner would perform the initial screening, and

would present a random list of time-qualified jurors who would then receive the questionnaires and meet the parties. (14RT 939.)

Thereafter, defense counsel stated "I know the court noted the beauty of it. The ugly of it is that our client won't be present. That's a problem in a capital case." (14RT 940.) The court asked "Present for what?" Counsel responded "For the time-qualifying of the jury." (14RT 940.) Thereafter, the court noted there was no problem as long as the parties were present to meet the prospective jurors after the commissioner's hardship excusals. (14RT 940.)

The conversation took place after defense counsel stated concerns that appellant's recent back surgery might require a delay in jury selection, and the court had explored ways to proceed without spending an additional $3,500 that would be necessary to summon a new panel of 7,000 potential jurors. (14RT 935-940.)

Appellant maintains that the present issue is cognizable on appeal for several reasons.

First, defense counsel's statement that the capital defendant had a right to be present for the time-qualifying process preserved the issue. There would be no practical way for the defense to evaluate the 700 people who responded to the summons for purposes of the present issue if that process was done in the absence of the appellant and counsel. Not only would the court's procedure

have precluded the defense from viewing the potential jurors, it would, and did, prevent the defense from seeing the affidavits of the responding potential jurors. The present claim involves a feature on the affidavit implying that prospective jurors could be excused if English was not their native language. However, the procedure adopted by the court precluded any review of these affidavits and anticipated the first appearance of the parties a few weeks after the jurors were prescreened by the commissioner.

By indicating that the defense wished to be present for the hardship screening, defense counsel preserved the right to make challenges to flaws in the time-qualifying procedure.

Neither does it matter that counsel was present when the time-qualified jurors filled out the juror questionnaire. Assuming counsel noticed the lack of Hispanics present, numbers alone cannot establish a violation (*People v. Bell*, *supra*, 49 Cal.3d at p. 525) and since he did not see the flawed feature, the affidavit, his later presence did not matter.

Moreover, where, as here, the issue of a potential forfeiture is close and difficult, the appellate court will assume the defendant has preserved the issue and will address it on its merits. (*People v. Champion* (1995) 9 Cal.3d 879, 908 fn. 6, *People v. Jablonski*, *supra*, 37 Cal.4th at. p. 813.) This is especially true where the present issue involves a fundamental constitutional right. (*People v.*

Vera (1997) 15 Cal.4th 269, 276-277.)

Additionally, while respondent may argue the defense objection was technically insufficient to preserve the present issue, this court has long followed a rule in capital cases that a defendant's appellate issues should be resolved on the merits. In *People v. Frank* (1985) 38 Cal.3d 711, 729 fn. 3, the court noted that technical deficiencies in objections will be disregarded following a death judgment and the entire record will be reviewed to determine whether a miscarriage of justice resulted. This is especially true "in light of the recognition by the United States Supreme Court of the fact that death is 'profoundly different from all other penalties.' (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110 [102 S.Ct. 869, 71 L.Ed.2d 1] and its repeated holdings that a capital defendant is entitled to enhanced procedural protections against arbitrary infliction of the supreme penalty." (*Ibid.*) The court then noted that it too has reviewed errors on appeal where defense counsel failed to object at trial. (*Ibid.*, citing *People v. Easley* (1983) 34 Cal.3d 858, 864.)

Defense counsel in the present case sought to delay the jury selection process in light of appellant's recent back surgery. The court had already spent $3,500 issuing the summonses to 7000 jurors, and did not wish to duplicate that expense. It therefore met privately with the jury commissioner to devise a procedure that would allow time-qualifying of the original group. Not only

should the court have included the parties in its meeting with the commissioner, along with a court reporter pursuant to Penal Code section 190.9, but the postage costs associated with a new summons should not have been a consideration in a case in which the state sought an execution. Moreover, after indicating his interest in being present for the hardship screening, counsel could not reasonably have anticipated that the commissioner would abandon all standards and summarily excuse anyone who claimed difficulty with the English language.

Under the circumstances, the rights involved are too important to be avoided by a finding of forfeiture. The issue must be reviewed.

The violation

The first prong of the *Duren* test — that the excluded group is "distinctive" in the community — is easily met, as this court has held that Hispanics are a distinctive group for the present purposes. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1061; *People v. Howard*, *supra*, 1 Cal.4th 1132, 1160; and see e.g. *Castaneda v. Partida* (1976) 430 U.S. 482, 495, where the court found there was a prima facie case of discrimination against Hispanics in the grand jury selection in Hidalgo County, Texas.)

To satisfy the second requirement of the *Duren* test, the appellant must show that the number of Hispanics on the venire from which the jury was

selected was not fair and reasonable in relation to the number of Hispanics in the community. (*Duren v. Missouri, supra,* 439 U.S. at p. 364.) The statistics necessary to support the claim may be taken from the United States Census figures[7]. (*People v. Howard, supra,* 1 Cal.4th at p. 1160, fn. 6; *People v. Bell, supra,* 49 Cal.3d at p. 526, fn. 12.)

While the summons/affidavit that was filled out by the 700 jurors who appeared for service did not ask potential jurors to identify their race, it did provide their full names. The accepted means of identifying Hispanics from the group is to compare the names against the census list of Hispanic surnames — the most recent list having been published in 1996. (See *People v. Howard, supra,* 1 Cal.4th at p. 1160, fn. 7.)

The present case was prosecuted in San Diego's North County Judicial District. That district includes several cities, all of which were represented in the present pool. The cities include Bonsall, Carlsbad, Del Mar, Encinitas, Escondido, Fallbrook, Oceanside, Rancho Sante Fe, San Marcos, Solana Beach, Valley Center and Vista. The combined adult (juror eligible) population from these cities in 2000 was 462,483, and the adult Hispanic population was

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[7] Appellant will separately request judicial notice of the results from the 2000 federal census report.

115,131. (Census Bureau, Chart A.)[8]

Therefore, Hispanics represented 24.9 percent of the eligible voters in the North County Judicial District, according to the 2000 census which is the most accurate measure of the population statistics in late 1999 when appellant's trial took place.[9]

Of the 700 potential jurors who responded to the summons in the present case, 34 had names that were found on the 1996 Census List of Hispanic

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[8] In addition to the cities listed, one person responded from Pauma Valley (55CT 12154) and two people from Cardiff (56CT 12484, 12487) small areas where official statistics were not compiled. Moreover, 24 people responded from a "San Diego" address with a "92127" zip code. (55CT 12249, 12217, 12215, 12198, 12170, 12126, 12055, 12035, 12021, 56CT 12335, 12339, 12341, 12343, 12353, 12485, 57CT 12584, 12668, 12690, 58CT 12772, 12794, 12804, 12810, 12905, 12927.) This zip code represents an area within the City of San Diego known as "Rancho Bernardo." There is no way to generate statistics from this area of the City of San Diego. However, since the number of responding people from this area code is less than three percent of the total, it does not skew the present analysis. Finally, adding the City of San Diego to the calculation would not materially impact the analysis since Hispanics represent 21.5 percent of adults in the city. (Census Bureau, Chart B.) Likewise, the results would be similar if the analysis targeted the entire County of San Diego where Hispanic adults comprise 22.7 percent of the total population. (Census Bureau, Chart C.)

[9] The present calculations were based on the Hispanic portion of the adult population and the 700 people who responded to the summons, rather than the percentage of Hispanics who received a summons. While the ethnic distribution of those who received a summons might be of some assistance in analyzing the present issue, that information was requested by counsel but denied by the trial court. (54CT 11998, 12010; 44RT 5032-5037.) In any event, the disparity obtained by using the census data is so shockingly large that even if the actual percentage of Hispanic citizens who were summoned was much lower, it is virtually certain that the disparity would still be within the *Castaneda* threshold.

surnames. In the present case, appellant suggests there are as many as eight potentially Hispanic names that did not appear on the 1996 Census List[10]. These names are added to ensure that appellant does not overestimate the disparity. Therefore, between 34 and 42 of the 700 people who responded to the summons were Hispanic, for a range of 4.9 to 6 percent.

In *Bell*, the court addressed the issue using the "absolute disparity" test. (*People v. Bell, supra,* 49 Cal.3d at p. 527, fn. 14.) That statistical test measures the difference between the proportion of the cognizable group in the presumptively jury-eligible population and that in the jury venire under scrutiny. (*Ibid.*) In *Bell*, there was a 5 percent absolute disparity between the eligible black population and the blacks who appeared on the venire. (*Id.* at p. 527.) The court did not rule on the issue of whether the 5 percent absolute disparity satisfied the second prong of the *Duren* test because the court found the defendant failed to make a prima facie case under the third prong by showing the disparity was caused by a flawed system. (*Id.* at p. 528.) However, Justice Broussard, writing in dissent, found the 5 percent absolute disparity to be "substantial" and therefore constitutionally significant. (*Id.* at p. 566.)

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[10] These include Adriana Ramona Campo (58CT 12774), Jose Sanjuan (58CT 12963), Juan Hinotosa (57CT 12618), Roslyn Amador (55CT 12025), Rosa Federico (55CT 12124), Tomas Fausto Iriarte (55CT 12184), Fabio Antonio Mencia (55CT 12243), Carlos Abac Sabas (58CT 12949).

In the present case, the absolute disparity was 13.2 percent using the Census List of Hispanic Surnames and 12.1 using the enhanced list including additional possibly Hispanic people whose names did not appear on the census list.

The disparity between the eligible Hispanics and those who answered the summons in the present case was constitutionally significant under the second requirement of *Duren* as the absolute disparity test shows the number of Hispanics in the jury pool should have been between 302 and 370 percent greater than it was. Stated differently, the actual representation of Hispanics is between 27 and 33 percent of what would be expected.

The disparity is also demonstrated in the test used by the Supreme Court in *Castaneda v. Partida*, *supra*, 430 U.S. 482, 496, fn. 17, which in the present cases, shows the percentage of Hispanics in the venire, compared to the eligible population of the judicial district is more than 11 standard deviations from the expected representation. The probability of getting such a distribution based purely on chance is less than .01 percent.[11]

As described in *Castaneda*, the relatively simple analysis proceeds in three steps. First, the percentage of members of the cognizable group in the

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[11] While this may not be common knowledge, it is a simple fact of statistics.

relevant background population (in *Castaneda*, 79.1% Mexican-Americans in the county) is multiplied by the number of individuals in the relevant subset of that population (there, 870 total summons recipients) to calculate the expected number of group members in the subset (688). Second, the "standard deviation" value is calculated by multiplying the number in the subset, the chance of any person in the subset being a group member, and the chance of any person in the subset not being a group member (870 x 0.791 x 0.209), and then taking the square root of that result (in *Castaneda*, that value was "approximately 12"). Third, the difference between the expected number of group members in the subset calculated in step one (688) and the number actually observed (there, 339) is divided by the standard deviation to arrive at the number of standard deviations between the observed value and the expected value. If that number is greater than two, an inference of purposeful discrimination is justified. (*Castaneda v. Partida, supra*, 430 U.S. at 496 n.17.)

The record in the present case contains all the information needed to apply the *Castaneda* analysis. First, the percentage of Hispanic prospective jurors in background population — the eligible voters in the North County Judicial District — was 24.9%. The relevant subset of the population was the 700 people who responded to the summons, and the expected number of those respondents (0.249 x 700) was 174 (rounded to the nearest whole person). Second, the standard

deviation value is the square root of (700 x 0.249 x 0.751), or approximately 11.44. Third, the difference between the expected number of Hispanic respondents (174) and the observed number (42) is 135, and that number divided by the standard deviation value (11.44) is approximately 11.54.

This process shows that the difference between the expected number of Hispanics responding to the summons and the actual number is much more than the two standard deviations found in *Castaneda* to be sufficient to establish a prima facie case of discrimination.

Once appellant has shown the exclusion of Hispanics, and that the under-representation in the venire from which the jury was selected was not reasonable in relation to the numbers of such persons in the community, she must still demonstrate that the under-representation was due to a constitutionally impermissible feature in the jury selection process.

In *People v. Bell, supra,* the court found that evidence of statistical disparity that African-Americans were under-represented in the Contra Costa County venires did not satisfy the third prong of the *Duren* test. (*People v. Bell, supra*, 49 Cal.3d at p. 529.) Likewise in *People v. Currie* (2001) 87 Cal.App.4th 225, 236, the court found the county was not constitutionally required — and may have been prohibited from — taking measures such as busing prospective jurors to the courthouse to correct any under-representation.

In *Duren*, the high court found a violation of the cross-section requirement, based upon the under-representation of females on the jury venires in Jackson County, Missouri. While women comprised slightly more than half of the county's population, only 26.7% were summoned for jury service, and only 14.5% were present in the final venire stage. (*Duren v. Missouri, supra*, 439 U.S. at p. 367.) The low numbers of women present at each stage was a result of an option in the questionnaire distributed to persons randomly selected from the voter registration list. The questionnaire provided that women could be exempted from jury service upon request, and if they did not return a jury summons in the mail, they would be treated as having claimed the exemption. (*Id.* at p. 362.) The court determined the fact that less than 30% of the people summoned were women was due to the claimed exemptions on the questionnaire. (*Id.* at p. 367.) Likewise, the fact that only 14.5% of those in the final venire were women was attributable to the second opportunity women were given to exempt themselves at the "summons stage." (*Id.* at pp. 367-368.)

In the present case, the affidavit attached to the summons provided an opportunity for Hispanics and others who spoke another language to exempt themselves from jury service.

Box No. 6 in the affidavit attached to the jury summons, indicates that those who lack "sufficient knowledge" of the English language may be excused.

The form then asks the potential jurors for their native language.

The fact that only 4.9 - 6 % of those responding to the summons were Hispanic, no more than one-third of the percentage of eligible Hispanics in the judicial district, shows that they exempted themselves at a much higher rate than did other groups. The only reasonable explanation is that, like the women in Jackson County, Missouri, they interpreted the listed excuse on the summons as an excuse from jury service.

Moreover, one Hispanic potential juror, Pedro Padilla, responded to the summons, checked the box, and was excused without questioning from the commissioner. Noteworthy here is that the form was printed in English and Mr. Padilla wrote "SPANISH" clearly on the form. There was no indication that he or others had someone assisting in this task, suggesting that he could read the form and write his excuses in English without being questioned. Troubling here is that the commissioner provided jurors with the four reasons for which they could be excused, and difficulty with English was not one of those reasons.

Appellant has argued previously that commissioners should only be permitted to make nondiscretionary excusals such as the four reasons listed by the commissioner. The "sufficient knowledge of the English Language" option is highly discretionary and presents a fertile opportunity for abuse in the process, as this court warned in *People v. Wheeler*.

Moreover, the standard calling for "sufficient knowledge" is impermissibly vague. While a trial court may be equipped to voir dire a potential juror and determine whether he or she has sufficient language skills to serve on a jury, this task should not be left for self-evaluation and enforcement. While people willing to perform their civic duty may decide their English difficulties might disqualify them from service, thereby exempting themselves, others looking to avoid service are given the easiest of excuses.

The problem is aggravated by the additional line calling for their native language. This gratuitous provision may suggest to those trying to determine whether they have sufficient knowledge of the language to serve, that if English is not your first language, then you may not know enough English to perform as a juror.

The constitutional flaw arising from this feature was magnified by the trial court's decision to not enforce the law that calls for sanctions for summoned jurors who fail to appear. Code of Civil Procedure section 209 provides that:

> Any prospective trial juror who has been summoned for service, and who fails to attend upon the court as directed or to respond to the court or jury commissioner and to be excused from attendance, may be attached and compelled to attend, and following an order to show cause hearing, the court may find the prospective juror in contempt of court punishable by fine, incarceration or both, as otherwise provided by law.

However, during record correction proceedings, the trial judge, who had served on the local jury committee for years, and lamented the problem of low juror turnout, rejected the suggestion that the court impose the statutory sanctions on potential jurors who do not respond to a summons. (44RT 5037-5038.) The court agreed that enforcement efforts might improve juror yield for a few months, "but six months or a year from that date and time, it has no effect." (44RT 5038.) The court suggested public service announcements as an alternative but concluded "The numbers are not good. That's all I can say about it." (44RT 5038.) Therefore, to the extent that juror turnout is low, with Hispanic juror turnout being particularly low, and the superior court has decided not to enforce the statutory sanctions for noncompliance with a summons, the court has aggravated the problem. The court's acknowledgment that imposing sanctions would improve the yield initially suggests a sustained enforcement effort would be effective in the long term. If the "public service" announcements included meaningful warnings regarding the practice of arresting and fining scofflaws, the juror yield, and therefore the Hispanic juror yield, would improve.

Conclusion

The jury selection process in San Diego's North County Judicial District is constitutionally flawed by informing potential Hispanic jurors that if they lack

"sufficient knowledge" of the English language, they may be excused from jury service. This is especially true where English is not their "native language." While juror turnout is low and Hispanic juror turnout is especially low, the jury commissioner in this case accepted at face value any claim that language was a problem. This was contrary to her message to the jurors that only four categories of excuses (not including language) would be recognized by the commissioner. Finally, the court made no attempt to enforce the statutory procedures for noncompliance with a jury summons, increasing the impact of low Hispanic turnout.

Prospective Hispanic jurors are therefore informed that they need not appear if English is not their first language, if they do appear they will be dismissed without question, and if they do not appear, the statutory enforcement mechanism will be ignored. A defendant making the present claim need not show there was any intent to discriminate. (*Duren v. Missouri, supra*, 439 U.S. at p. 368, fn. 26.)

The result in the present case was that somewhere between 4.9% (going by the census list of Hispanic surnames) and 6 % (if the group is enlarged by a less reliable filter of conjecture based on attempted name recognition) of the people who filled out questionnaires were Hispanic. Only one Hispanic person sat on the jury along with 11 Caucasians.

The right to a jury drawn from a representative cross-section of the community demands the result that venires be truly representative of the community, at least to the extent that practical reality permits. This fundamental right was violated in the present case.

III

The provision in the summons allowing the excusal of prospective jurors with English language deficiencies violated appellant's rights to due process and equal protection as it was vague and created a classification which made an accommodation for deaf but not language-challenged jurors.

In addition to the constitutional violation noted in Argument II, the provision which allows for the excusal of prospective jurors with English deficiencies is unconstitutionally vague, and because it seeks to accommodate jurors with vision or hearing impairments, it violates due process and equal protection principles as guaranteed by the Fourteenth Amendment.

Background

Statutory authority for the potential "excuse" from jury service for those with language difficulties is found in Code of Civil Procedure, section 203, subdivision (a), which lists the factors that disqualify a person from eligibility for jury service. Subdivision (a)(6) refers to "Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree

or other disability to communicate or which impairs or interferes with the person's mobility."

Appellant contends that publication to potential jurors of this vague standard reasonably explains the low Hispanic turnout because it provided an excuse for Hispanic people to ignore the summons. This is especially true where the affidavit added the request to identify the juror's native language, implying that non-native English speakers necessarily lack sufficient knowledge of the language to function as jurors. Another relevant factor is the court's stated policy of refusing to enforce the statutory sanctions for those who ignore the summons and fail to appear or send a deferment request. The final factor in the present claim involves the provision's willingness to accommodate potential jurors with vision and hearing impairments but not jurors for whom English is a second language.

Section 203, subd.(a)(6), as applied in the present case (enhanced and published to prospective jurors in a jurisdiction where there was no consequence for ignoring the summons) violated appellant's right to equal protection of the laws and due process as guaranteed by the Fourteenth Amendment.

Applicable Law

The Equal Protection Clause of the Fourteenth Amendment requires that the process of selecting jurors be performed in a nondiscriminatory manner.

(*Strauder v. West Virginia* (1880) 100 U.S. 303, 305.) A petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by a prosecutor or judge. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 156.) For a jury to perform its intended function as a check on official power, it must be a body drawn from the community. (*Ibid.*) Since the Fourteenth Amendment protects an accused throughout the proceedings, the state may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at other stages in the selection process. (*Batson v. Kentucky* (1986) 476 U.S. 79, 88, citing *Avery v. Georgia* (1953) 345 U.S. 559, 562.)

A criminal defendant may object to the race-based exclusion of jurors whether or not the defendant and the excluded jurors share the same race. (*Powers v. Ohio* (1991) 499 U.S. 400, 401.)

Moreover, a criminal defendant has standing to raise the equal protection rights of the juror excluded from service in violation of these principles. (*Id.* at p. 415; See also *Campbell v. Louisiana* (1998) 523 U.S. 392, 394, where the court held that a white criminal defendant has standing to assert equal protection and due process claims to object to discrimination against black persons in the selection of grand juries.)

Equal protection claims based on race, even when "benign," must be

analyzed under a standard of strict scrutiny. (*Johnson v. California* (2005) 543 U.S. 499, 505.) Under the strict scrutiny standard, the government has the burden of proving that racial classifications are narrowly tailored measures that further compelling governmental interests. (*Ibid.*)

Discrimination in the selection of jurors similarly violates a defendant's right to due process under the Fourteenth Amendment. In *Peters v. Kiff* (1972) 407 U.S. 493, the court addressed the due process question although a majority of the Justices could not agree on a comprehensive statement of the rule or an appropriate remedy for a violation. Justice Marshall noted that a system used to select grand jurors that arbitrarily excludes members of any race denies a defendant due process of law. (*Id.* at p. 504.) Justice White, who was joined by Justices Powell and Brennan, also noted the importance of the Fourteenth Amendment to a defendant alleging discrimination in the grand jury selection. (*Id.* at p. 507; see also *Hobby v. United States* (1984) 468 U.S. 339, 345-346, where the court found that discrimination in selecting the grand jury foreperson did not violate the defendant's due process rights because the foreperson's duties were "ministerial.")

Legal Analysis

Code of Civil Procedure section 203, subd.(a)(6), as applied in the present case, violated appellant's rights to equal protection and due process. The

provision violated equal protection principles in two ways — first by effectively excluding Hispanics from the venire, and second, by creating a classification whereby the state would accommodate hearing and vision impaired jurors but not jurors who needed an English translator. The provision, as applied, also violated due process by arbitrarily excluding Hispanics from the venire using a vague standard, i.e., "sufficient knowledge of the English language."

A.

Section 203, subd. (a)(6) violated appellant's right to equal protection by excluding Hispanics.

The process of assembling a venire in the present case violated appellant's right to equal protection because it excluded a disproportionate number of Hispanics from the process.

The notice that accompanied the jury summons indicated that anyone who had difficulty with the English language could be excused from jury service. This provision was taken directly from Code of Civil Procedure section 203, subd.(a)(6).

The first problem with the provision is that it contains no standards or definition for determining the lack of "sufficient knowledge of the English language." The lack of standards resulted here in the winnowing of Hispanic jurors beyond any legitimate rationale for an English language requirement.

Presumably, the Legislature trusted that trial courts conducting voir dire would be capable of questioning potential jurors and determining whether a person could understand the testimony of the English-speaking witnesses. However, under the system in place in San Diego's North County Judicial District, the determination as to whether a person had sufficient command of the language was made by the prospective jurors themselves. Due to the lack of standards, the provision was overinclusive.

Hispanics made up 24.9 percent of the population of eligible voters in North County yet, only 4.9 percent (or somewhere between 4.9 and 6 percent) responded to the juror summons.

There are a number of reasons why jurors might use this provision to excuse themselves. First, jury duty is inconvenient for everyone and requires sacrifice. Next, because of their language difficulties, Hispanic jurors may feel insecure about their ability to perform the juror function. They may also feel the classification subjugates them to second class citizen status. The absence of any published standard as to what constitutes "sufficient knowledge" by a prospective juror performing a self-analysis is a constitutional problem.

The problem is exacerbated by the added question asking for the prospective juror's "native language." This factor is not included in section 203, subd.(a)(6), but was added by the superior court or jury commissioner who

designed the summons. Inclusion of this question was unnecessary since the response was not reviewed by anyone. It served no real purpose other than to equate non-native English with insufficient knowledge of the English language to serve as jurors. It validated the Hispanic jurors' decision not to appear in response to the summons. Since there is no apparent connection between native language and jury service, the effect of equating non-native English with insufficient English has to be judged in the absence of any apparent, let alone compelling, government interest.

The impact of the problem is further demonstrated by the fact that the summons was published in English only. Therefore, people excusing themselves for this reason, had sufficient knowledge of the language to read the form, but could excuse themselves nevertheless. The problem is best demonstrated by Pedro Padilla, who responded to the summons, but excused himself without any questions from the commissioner when he checked box No. 6 and wrote "Spanish" as his native language. (56CT 12283.) Therefore, he could read and understand the form, and write his native language in English, but was excused for lack of knowledge of the English language without any questions from the commissioner.

The result of section 203, subd.(a)(6), as it was featured in the process of assembling the venire, is that Hispanics were disproportionately under-

represented.

Respondent may suggest that requiring English speaking jurors is appropriate and not related to race. However, while the provision is not specifically directed toward Hispanics, the numbers speak for themselves. The equal protection claim, unlike the representative cross-section of the community claim requires a showing of discriminatory purpose. (*Duren v. Missouri*, *supra*, 439 U.S. at p. 368, fn. 26.) However, the purpose may be established by a statistical showing of disparity which requires the state to show either that a discriminatory purpose was not involved or that such a purpose did not have a determinative effect. (*Ibid.*, citing *Castaneda v. Partida*, *supra*, 430 U.S. at pp. 493-495.) Assuming respondent will claim a compelling state purpose in having jurors who understand English, the summons is not sufficiently narrow to accomplish the goal in that it effectively disqualifies many Hispanics who are sufficiently competent in English. Moreover, the fact that jurors whose communication is impaired by physical disabilities are not excluded undermines both the purpose (whether the standard is "compelling" or just "important") and the method prongs. Presumably, the court will provide accommodations for the hearing impaired as they should for jurors who need assistance with English. (This is explicit in the summons where it refers to "Physically Challenged Prospective Jurors" in connection with "Trial Juror Information.")

Hispanics were under-represented in the venire by between 302 and 370 percent. Hispanics comprise 24.9 percent of the eligible jurors in North County. The connection to race in the present context is plain. That others whose "native language" was not English could also excuse themselves from jury duty using this feature does not reduce the impact of the violation. The only practical effect of the additional excusals by other minorities would be to further reduce the diversity on the disproportionately Caucasian jury.

If this process was done in the presence of counsel and the court, the excusal process would have been subjected to more rigorous standards. Prospective jurors would have to look the judge in the eye and discuss or attempt to discuss language related problems. However, this process, likely contemplated by the Legislature in enacting section 203, subd.(a)(6), could not have taken place in North County, where the superior court made the conscious decision to ignore the self-excusal of jurors who did not respond to the summons. When asked about applying the statutory consequences to those who failed to appear as required, the court noted that it was not practical, and while it might work for a short period, the impact would eventually decrease. (44RT 5038.)

Therefore, the message to North County jurors is clear. Jurors whose primary language is not English may excuse themselves from jury service, and

there will be no consequences for this decision. The result of the court's policy is a low response to the summons, and a disproportionately low percentage of North County's largest minority — Hispanics.

The situation is similar to the one noted in *Alexander v. Louisiana* (1972) 405 U.S. 625, where the court found appellant established a prima facie case of invidious discrimination for purposes of equal protection and due process. In that case, census statistics showed that blacks comprised 21 percent of the voter eligible population in a Louisiana parish, but only 14 percent of the grand jury questionnaires returned were from blacks. After two culling procedures where race was identified on the form, the percentage of blacks remaining was reduced to seven. On the petitioner's grand jury venire, one was black, but there were no blacks on the grand jury that indicted him. In finding that the petitioner demonstrated a prima facie case of racial discrimination, the court noted the "the progressive decimation of potential Negro grand jurors is indeed striking." (*Id.* at p. 630.)

This is a discriminatory jury selection process where the problem is subtle but very real.

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B.

The distinction between language-impaired and hearing or vision-impaired jurors also violated equal protection.

Section 203, subd.(a)(6) violates equal protection principles for a second reason — it creates a classification which requires an accommodation for jurors who have a vision or hearing-related impairment, but requires exclusion of those who may need help with their English. In this case, the law impacts the county's largest minority who have immigrated in substantial numbers from neighboring Mexico.

While the law may be facially neutral in a racial sense, its enforcement is discriminatory in that the courts allow prospective jurors, who can obviously read the summons, to excuse themselves, thus substantially reducing the number of Hispanics on the venire. A legislative classification that is applied in an arbitrary or discriminatory way violates the Equal Protection Clause. (*Jones v. Helms* (1981) 452 U.S. 412, 424, citing *Yick Wo v. Hopkins* (1885) 118 U.S. 356, 376.)

Inasmuch as the present classification impacts Hispanic potential jurors, the strict scrutiny standard must apply. (*Johnson v. California*, *supra*, 543 U.S. at p. 505.) This requires the state to show the classification in section 203, subd.(a)(6) that hearing-impaired jurors must be accommodated, but English-

impaired jurors may be excused, is a narrowly tailored classification that furthers a compelling governmental interest.

The government has an interest in the effective functioning of our criminal justice system, and the jury, which is intended to function as a check on the abuse of official power, must be drawn from the entire community. (*Duncan v. Louisiana*, *supra*, 391 U.S. at p. 156.)

Of course jurors need to hear and understand the witnesses, but no legitimate argument can be made that would justify an accommodation for hearing-impaired jurors such as sign language or sound amplification, but not for those whose English is imperfect.

While the classification which accommodates the deaf, but excludes language-challenged jurors, cannot be constitutionally justified, the problem is aggravated where the classification is used as a device for self-excusal of summoned Hispanic jurors with the court's tacit approval. By failing to enforce the sanctions for not responding to a summons, the court is complicit in the system which results in the under-representation of Hispanics on the venire.

Under the present circumstances, appellant's equal protection rights were violated by the classification in section 203, subd.(a)(6), which was implemented by the court in a way that reduced the number of Hispanics on the venire.

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C.

The classification, as implemented by the county, also violated appellant's Fourteenth Amendment right to due process.

Discrimination in the selection of jurors and grand jurors also violates a criminal defendant's right to due process. (*Peters v. Kiff*, *supra*, 407 U.S. at pp. 504, 507; *Hobby v. United States*, *supra*, 468 U.S. at pp. 345-346.) In *Hobby*, the court rejected the claimed violation after finding the grand jury foreperson's role was "ministerial."

In the present case, the discrimination involved juror selection in a capital murder prosecution. For the reasons previously stated, the discriminatory process also violated appellant's due process rights.

The implementation of section 203, subd.(a)(6) violated due process for a separate reason — that it was unconstitutionally vague on its face and as applied. Due process requires that statutes be reasonably definite. (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.) A statute is facially vague if its language is not sufficiently definite to describe the conduct in question or if it lacks guidelines necessary to prevent arbitrary and discriminatory enforcement. (*People v. Heitzman* (1994) 9 Cal.4th 189, 199.) The problem with section 203, subd.(a)(6), as applied in the present case, is the lack of guidelines. The statute was likely intended to be used as a voir dire tool, where the trial court could

question prospective jurors to determine whether they would be able to understand the testimony. However, the self-excusal on this basis by Pedro Padilla (who responded to the summons) and the under-representation of responding Hispanic jurors (less than one-third of what would be expected) shows the device was used as a justification for not responding or self-excusal. This is especially troubling where the provision was printed in English only which means that it was understood before it was applied thereby defeating the premise. In the case of Mr. Padilla, he went further and wrote his native language (Spanish) in English, thereby demonstrating some command of the English language.

Absent any standards on the issue, allowing self-excusal for those who lacked "sufficient knowledge" of the English language violated appellant's right to due process in that the provision was vague on its face and as applied.

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IV

The off-the-record communications between the trial court and jury commissioner, and the lack of a record of various portions of the hardship screening process, violated the capital appellant's due process and jury trial rights under the Fifth, Sixth, Eighth and Fourteenth Amendments as well as the relevant statutory procedures.

Background

On June 1st, 1999, without notifying counsel, the trial court met privately with the jury commissioner to discuss the time-qualifying procedure. (14RT 938.) There were "no notes, transcripts, or recordings" memorializing the discussions. (43RT 5001.) The meeting was necessary because the court had already mailed 7,000 summons at a cost of $3,500, and appellant's medical condition put the trial date in jeopardy. (14RT 935-938.) The court and the commissioner agreed on a procedure that would avoid a duplication of the expense, but would result in the loss of many prospective jurors. (14RT 938.) The court indicated that if the original summons did not yield 300 time-qualified jurors, then additional jurors would be supplemented with time-qualified jurors from the normal Monday and Tuesday jury pools. (14RT 938.)

However, the procedure adopted by the court was flawed for three reasons. First, the dialogue between the court and the jury commissioner discussing the time-qualification procedure, a process which resulted in the

excusal of a majority of the potential jurors who responded to the summons, should have taken place in open court in the presence of the parties and a court reporter. Next, the time-qualification process by the commissioner should have been reported and the returned summonses do not provide a sufficient record of the proceedings. Finally, there is no record of the process that followed the initial hardship screening where potential jurors were added through the court's normal Monday and Tuesday juror screening.

Applicable Law

Under the due process clauses of the Fifth and Fourteenth Amendments, the record of proceedings must be sufficient to permit adequate and effective appellate review. (*Griffin v. Illinois* (1956) 351 U.S. 12, 20; *Hardy v. United States* (1964) 375 U.S. 277, 279-282; *United States v. Carillo* (9th Cir. 1990) 902 F.2d 1405, 1409; *People v. Howard*, *supra*, 1 Cal.4th at p. 1166; *People v. Alvarez* (1996) 14 Cal.4th 155, 196, fn.8.) Furthermore, under the Eighth Amendment, the record must be sufficient to ensure that there is no substantial risk that the death sentence has been arbitrarily imposed. (*Stephens v. Zant* (5th Cir. 1980) 631 F.2d 397, 402-404; *Dobbs v. Kemp* (11th Cir. 1986) 790 F.2d 1499, 1514; *People v. Howard*, *supra*.) And again, the Sixth Amendment guarantees the right to an impartial jury drawn from a representative cross-section of the community. (*Duren v. Missouri*, *supra*, 439 U.S. at p. 358.)

The record on appeal is inadequate where the challenged deficiency is prejudicial to the defendant's ability to prosecute his appeal. (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 196, fn. 8.)

Morever, Penal Code section 190.9, subd.(a)(11), expressly provides that "In any case in which a death sentence may be imposed, all proceedings conducted in the superior court, including all conferences and proceedings, whether in open court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present." This provision was enacted to assure reliability in cases where the state seeks the death penalty because the sentence of death is qualitatively different from any other sentence. (*Dustin v. Superior Court* (2002) 90 Cal.App.4th 1311, 1323.) In *Dustin*, the court ruled that the reference in section 190.9 to "all proceedings" should be interpreted liberally "under the plain meaning rule." (*Id.* at p. 1322.)

The Legislature and Judicial Council have determined that the jury commissioner must keep a record of the hardship screening process. California Rules of Court, rule 860(c), provides that "All requests to be excused from jury service that are granted for undue hardship" must be included in the record. Code of Civil Procedure section 207, subd.(a), requires that "the jury commissioner shall maintain records regarding selection, qualification and assignment of prospective jurors." Finally, section 218 provides that all

hardship excuses granted by a jury commissioner "shall be in writing setting forth the basis of the request and shall be signed by the juror."

Legal Analysis

A.

The issue is not forfeited.

Respondent may suggest the issues regarding the lack of a record are forfeited for lack of an objection in the trial court.

Appellant will note, as in previous issues, that the trial court denied counsel's request to be present during the commissioner's time-qualifying of the jurors. Following this ruling, defense counsel could reasonably believe the commissioner would observe all legal obligations and could not have been expected to object to the commissioner's failure to keep the required records. Moreover, the conversation between the trial court and the commissioner regarding the procedures to be employed in the process had already taken place without notice to counsel and without any opportunity to object.

The irregularities and constitutional and statutory violations that occurred during the hardship screening process were discovered for the first time during the record correction process. All proper objections were made at that time. (60CT 13065.)

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B.

The private conversation between the court and the jury commissioner

The conversation between the jury commissioner and the court regarding procedures to follow in the hardship screening process should have taken place in the presence of the parties, and recorded by the court reporter. This was a critical portion of the jury selection process which resulted in the qualifying of only 219 of the 700 jurors who responded to the summons. While any discussion of routine procedure should have been memorialized for later review, there was an additional and unique fact that requires special consideration. That is, the primary reason for the conversation was the court's interest in saving the summons that had already been distributed before discovering that appellant's surgery might require an additional delay. (14RT 938.) The court noted its interest in saving "the taxpayers - - I think it was $3,500 bucks to summon this panel." (14RT 938.)

While the court was no doubt well-intended, there can be no justifying an off-the-record discussion on such an important matter. The state sought a death sentence against appellant which placed this case in a different category — one requiring heightened reliability with the most careful attention to due process.

That the hopelessly flawed hardship screening process was planned outside the presence of counsel or a reporter to save the cost of postage for

another summons only aggravates the violation.

The statutes and constitutional provisions previously noted cannot possibly contemplate that the planning stage of the hardship screening process be carried out in a non-record process beyond judicial review. Given that hardship excusals have frequently been the subject of appellate challenges, it would be wrong to permit secret proceedings with non-judicial personnel who would later liberally use discretion to excuse jurors from service.

C.

The record of the time-qualification process was insufficient

During record correction proceedings, the trial court noted that the returned summonses and affidavits provided appellant with a sufficient record for purposes of reviewing the jury commissioner's excusals. (44RT 5044.) Moreover, the trial court obtained a note from the jury commissioner describing the text of the commissioner's initial comments to the potential jurors. (60CT 13070; 45RT 5052.)

While this provides some assistance in reviewing the present issue, and has been used in the previously briefed issues, appellant maintains that the absence of a court reporter to record the entire proceeding violated her constitutional and statutory rights to a complete record. The returned summonses, which were flawed for all the reasons noted in Argument I, and the

text of the commissioner's comments to the jurors (which the record showed the commissioner routinely ignored in excusing jurors) simply do not provide a reviewing court with an adequate record to assess the present claims.

D.

There was no record of the process used to obtain the additional venire members.

Because of the low response to the juror summons and the high rate of excusals for the 700 jurors who did appear, it was necessary to add to the venire. While 219 jurors were time-qualified (and many of them never returned a questionnaire), the court decided that approximately 300 would be necessary. (15RT 960.) The court determined that the additional jurors would come from the Monday and Tuesday panels that would be assembled between the initial case-specific hardship screening and the start of the official voir dire process with the questionnaires and introduction of the parties. (15RT 961.)

However, there were no records preserved of any potential jurors that were excused during this process. (43RT 5018-5019.) The violations in this regard are therefore substantial.

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E.

The lack of an adequate record is reversible per se.

The lack of an adequate record-constitutes a structural error which is reversible per se. The error is structural because the record is the fundamental tool used to show harm. "Harmless-error analysis thus presupposes a trial-type proceeding, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury." (*Rose v. Clark* (1986) 478 U.S. 570, 578.) While preliminary venire formation is part of the whole case leading to the conviction, it does not result in the type of outcome that can be evaluated in a harmless error analysis.

In the present case, we have no ability to conduct such an analysis. We are left to guess what may have been said by the court and the commissioner, and more importantly, between the commissioner and the many potential jurors who were excused in the hardship process. The problem is greatly aggravated by the fact that the proceedings, and discussions regarding the proceedings, took place outside the presence of the defendant and counsel. This critical portion of the capital prosecution therefore occurred with no participation by the defense and no possibility of review.

This court has emphasized "that excusing potential jurors for hardship is highly discretionary and the courts must be alert to the possible abuses that

would negatively affect the creating of juries reasonably reflecting a cross-section of the community." (*People v. Wheeler*, *supra*, 22 Cal.3d 258, 273.)

In *People v. Basuta*, *supra*, 94 Cal.App.4th 370, 396, the court (after reversing the conviction on other grounds) noted the problems with the lack of an adequate record of the hardship screening process. The court noted that when jurors are excused in open court by a judge, a record exists of the numbers excused and the reasons given. "The obvious purpose is to give transparency to the process and provide data potentially relevant to a review of the cross-sectional nature of the pool." (*Ibid.*)

In the present case, the earlier arguments show the process was flawed in that the commissioner abused her discretion by excusing for hardship essentially anyone who asked to be excused. Some of the excuses were for highly discretionary reasons and some for no reason at all. We can tell this much from the limited record that exists. The result was a jury that did not reflect the cross-section of the community — 15 out of the 16 jurors and alternates were Caucasian. We are left to guess precisely how and why many of the jurors were excused leading up to this result. This error must be considered structural for the present purposes.

As stated in *People v. Bradford* (1997) 15 Cal.4th 1229, 1381, the test on appeal is "whether in light of all the circumstances it appears that the lost portion

of the record is 'substantial' in that it affects the ability of the reviewing court to conduct a meaningful review and the ability of the defendant to properly perfect his appeal."

Reversal of the convictions and death sentence is required here given the inability to meaningfully review the wholesale process of the dismissal of jurors which resulted in a statistically skewed jury.

V

The searches of appellant's residence based on two separate warrants violated the Fourth Amendment, as the warrants were overbroad, unnecessarily including the seizure of "dominion and control" evidence, and the affiant recklessly omitted material evidence.

Introduction

On the night of the shootings, police forced entry into appellant's residence, where they found her lying in bed, shot. Deputies also found appellant's four sons fatally shot and a nephew in one of the bedrooms, unhurt.

A few hours later, detectives obtained a telephonic search warrant, seeking "dominion and control" evidence, omitting from the warrant affidavit the fact that the sheriff's department knew appellant had lived in the house for years. Five days later, deputies obtained a second warrant, again omitting the fact they knew appellant lived in the house.

The fruits of these searches should have been suppressed as violating the

Fourth Amendment.

Background[12]

The initial entry into the residence

On October 26th, 1997, at approximately 7:34 p.m., the San Diego Sheriff's Department responded to Eric Eubank's request for a "welfare check" at 226 South Twin Oaks Boulevard, in San Marcos. Appellant, Susan Eubanks, had been living continuously at that address since signing a lease on October 31st, 1991. One of the responding deputies, Daniel Deese, had been called to the home earlier that day in regard to a domestic disturbance and had previously responded to similar calls at the address. Each time, he had made contact with appellant. When Deputies Deese and Brian Perry arrived, they shouted to the occupants inside the home, but received no response. After conducting a perimeter sweep of the home, Deputy Deese heard a call for help coming from inside. Deputies Deese and Perry forced entry into the house and discovered appellant laying on the bed in the master bedroom with an apparently self-inflicted gunshot wound to her abdomen. A subsequent search of the home revealed that four children had also been shot. Three were pronounced dead at the scene, and a fourth was air-lifted to Children's Hospital, but died shortly

[12] The facts set forth are those proffered by the defense in its moving papers. (3CT 297.) While refusing a traverse hearing, the trial court acknowledged that the facts surrounding the motion were not in dispute by the parties. (8RT 682.)

thereafter. A fifth child, appellant's nephew, was discovered unharmed inside the home.

Detective Ray Rawlins, who first received a telephone call concerning the shootings at 8:50 p.m., arrived at the scene at 9:40 p.m. He discussed the status of the investigation with Sergeants S. Wood, Don Crist and William Donohue. Detective Rawlins was subsequently briefed by Deputy Deese at 10:00 p.m.

The First Search Warrant

At 11:08 p.m. on October 26th, Detective Rawlins initiated the sequence of events resulting in the first search warrant (referenced as Index No. 23432) being issued at 11:15 p.m., by Superior Court Judge Philip Sharp. The warrant authorized the seizure of firearms and related materials, measurements and photographs of the crime scene, the collection of blood and blood stains, and the seizure of "*dominion and control*" evidence. (3CT 339.)

At 11:47 p.m., the search warrant was executed by Detectives Rawlins and Donohue, Deputy Wigand, and Criminalists Milton and Beckman. The actual items seized were listed on a "Receipt and Inventory" sheet. (3CT 348.) Among those items were several letters written by appellant at the time of the shooting. These letters would later be used to establish that the killings were premeditated, and as aggravating evidence supporting imposition of the death penalty.

The affidavit filed by Detective Rawlins failed to include relevant facts regarding the extensive prior contacts between the sheriff's department and appellant, including the call to which Deputy Deese had responded earlier that day.

On June 16th, 1997 and June 18th, 1997, the sheriff's department records indicate deputies had contacted appellant at her home after receiving domestic violence calls. Similarly, on July 7th, 1997, Deputy A. Noble submitted a report in conjunction with his investigation of alleged child abuse, indicating that appellant lived at 226 South Twin Oaks Road, San Marcos. Sheriff's department records also showed that on October 6th, 1997, October 12th, 1997, and October 24th, 1997, deputies were dispatched to the residence to resolve disputes. In fact, the telephone number of Deputy Don Williams, one of the responding officers on October 24th, 1997, was found in appellant's Rolodex.

The sheriff department's own dispatch transcript of radio traffic the night of the shootings acknowledged that appellant lived at 226 South Twin Oaks Valley Road.

The Second Search Warrant

On October 30th, 1997, Detective Rawlins completed a second affidavit. His justification for the warrant request was the discrepancy between the number of projectiles and number of bullet shells collected from the crime scene. A

second warrant (No. 314-97) was then issued by Municipal Court Judge Timothy Casserly at 2:55 p.m. (3CT 361, 368.) The warrant language was almost identical to that contained in the first affidavit and essentially authorized the seizure of similar evidence. The actual items seized were listed in the "Receipt and Inventory" sheet. (3CT 370.)

This affidavit also omitted relevant information about the prior search conducted pursuant to the first warrant and the extensive history of prior contacts between appellant and the sheriff's department.

Warrants on File with the Municipal Court

In support of the Penal Code section 1538.5, motion, the defense reviewed one hundred affidavits and corresponding warrants on file with the Municipal Court to determine the frequency with which the San Diego County Sheriff's Department included a request for the seizure of "dominion and control" evidence. The defense found:

- Thirty-six warrants were requested by the sheriff's department;
- Thirty of those thirty-six requested seizure of dominion and control evidence;
- Twenty-one of those thirty warrants articulated the need for seizing such evidence.

Defense counsel reviewed warrants from two distinct time periods. The

first period began with warrant number 208-98, which was issued on August 12th, 1998 and included the fifty warrants filed immediately preceding that warrant. This was an arbitrary time period based on the date the research was initiated. The second time period was "bracketed" around the date the first warrant in this case was filed, i.e., October 26th, 1997. The defense findings were summarized in an exhibit filed with the trial court. (3CT 375.)

Appellant filed a written motion attacking the warrants and seizure of items from inside her residence. (3CT 297.)

The Trial Court's Ruling

The court was reluctant to conduct a lengthy evidentiary hearing under *Franks v. Delaware* (1978) 434 U.S. 1044, believing that the allegations contained in appellant's moving papers were largely undisputed by the parties. (8RT 682.) Defense counsel argued that there were material omissions in the warrant affidavits. (8RT 685.) Prior to taking testimony, the court indicated that it was inclined to deny the motion.

> The Court: I think the defense knows where I'm going with this. You'd really have the laboring oar in this issue, because I just do not see this [omitting in the affidavit that deputies knew appellant lived in the residence, yet still requested to search for and seize dominion and control evidence] as information that would have any effect whatsoever on the issuance of the warrant.

(8RT 686.)

Based on the court's position, the prosecution argued that there was no basis to proceed with any evidence as, under *Franks*, even if the defense proved its allegations, the court had already reached the legal conclusion that it would have no effect on the warrants. (8RT 687.)

After speaking to the detective, the prosecutor indicated that Rawlins claimed he had no knowledge that appellant lived in the house prior to requesting the first warrant, but did know before requesting the second warrant; the prosecutor offered to stipulate to that fact. (8RT 697.) The defense refused the stipulation and maintained its position that Rawlins must have known before requesting issuance of the first warrant. (8RT 697.)

> The Court: Again, my ruling is that even assuming for purposes of argument that Detective Rawlins had the information prior to issuance of the first warrant, I do not find that that would have been a material omission, so again, I think for purposes of my ruling, it really doesn't have an effect in my mind whether he had the information or not.

(8RT 697.)

During additional argument regarding overbroad language in the warrant, the court acknowledged that "*the warrant authorized a search for virtually everything known to mankind* and properly [sic: property], ammunition, et cetera, which could be located in any single drawer, under any bed . . ." (8RT 700.) The court further indicated that "I do not think this was a carefully tailored warrant. I think there should have been language in there as to

specifically why the officers felt it was necessary to seize dominion and control evidence." (8RT 712.) Nonetheless, the court denied the motion in its entirety, adding that suppression would in any case be denied under the good faith exception of *United States v. Leon* (1984) 468 U.S. 897. (8RT 713, 717, 719.)

Applicable Law

Warrant requirement

The Fourth Amendment protects against unreasonable searches and seizures. A warrantless entry into an occupied residence is unreasonable per se. (*Payton v. New York* (1980) 445 U.S. 573, 583; *People v. Ramey* (1976) 16 Cal.3d 263, 276.)

> The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions."

(*Mincey v. Arizona* (1978) 437 U.S. 385, 390, quoting, *Katz v. United States* (1967) 389 U.S. 347, 357 (footnotes omitted); see also *Coolidge v. New Hampshire* (1971) 403 U.S. 443, 481; and *Vale v. Louisiana* (1970) 399 U.S. 30, 34.)

In *Flippo v. West Virginia* (1999) 528 U.S. 11 (*per curiam*), the Supreme Court affirmed its holding in *Mincey v. Arizona, supra,* 437 U.S. 385, that there is no "murder scene exception" to the warrant requirement.

An officer may execute a warrantless entry into a residence if justified by

exigent circumstances, e.g., a reasonable belief by the officer that an occupant inside is in imminent danger. (*Ibid.; People v. Hill* (1974) 12 Cal.3d 731, 753-757; *People v. Sutton* (1976) 65 Cal.App.3d 341, 352. See also *Michigan v. Tyler* (1978) 436 U.S. 499, 509-510 (arson investigation, initial entry made to fight fire).) Once inside a residence following a warrantless forced entry based on an exigent circumstance, officers may secure the scene pending receipt of a search warrant. (*Segura v. United States* (1984) 468 U.S. 796, 812; *People v. Bennett* (1998) 17 Cal.4th 373, 387.)

The Fourth Amendment also specifies that, "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." (See also Penal Code sections 1525 through 1527 [restating the substance of the constitutional requirements].)

Before issuing a search warrant, a magistrate must examine the affiant, under oath, causing him or her to subscribe to the affidavit. (Penal Code section 1526, subd.(a).) A sworn oral statement may be used in place of a written affidavit. (Penal Code section 1526, subd.(b).) Such a statement may be taken by the magistrate over the telephone or by electronic mail. (Penal Code section 1526, subd.(b)(2); *People v. Peck* (1974) 38 Cal.App.3d 993.)

The appropriate test for evaluating the existence of the required probable

cause is the "totality of the circumstances" approach, by which the reviewing court assesses the totality of the circumstances under which the warrant issued. (*Illinois v. Gates* (1983) 462 U.S. 213, 238-239; *People v. Frank* (1985) 38 Cal.3d 711, 722; *People v. Ulloa* (2002) 101 Cal.App.4th 1000, 1007 [finding supporting affidavit sufficient under *Illinois v. Gates*].)

Even if it is determined that probable cause to issue the warrant did not exist, the search may nonetheless be upheld if the prosecution can establish that the officer(s) executing the warrant objectively relied in good faith upon the warrant issued by a neutral and detached magistrate, and acted within the scope of the warrant. (*United States v. Leon, supra*, 468 U.S. 897.)

A defendant may challenge a supporting affidavit by showing that the affiant made misstatements, or material omissions, with a reckless disregard for the truth. If a reckless misstatement is alleged, the court excises that statement from the affidavit and retests for probable cause. (*Franks v. Delaware* (1978) 438 U.S. 154, 170-172.) If a reckless omission is alleged, the reviewing court adds that material to the affidavit and retests for probable cause. (*People v. Huston* (1989) 210 Cal.App.3d 192, 219.)

Plain sight doctrine

While awaiting receipt of a search warrant, evidence in "plain sight" may be seized. (*People v. Hill, supra,* 12 Cal.3d 731, 755; *Minnesota v. Dickerson*

(1993) 508 U.S. 366, 373; *Michigan v. Long* (1983) 463 U.S. 1032, 1049, 152, fn.2.) However, before an item in plain view may be seized, there must be probable cause to connect it with criminal activity. (*North v. Superior Court* (1972) 8 Cal.3d 301, 306; *Texas v. Brown* (1983) 460 U.S. 730.) Moreover, the incriminating character of the evidence must be "immediately apparent." (*People v. Lenart* (2004) 32 Cal.4th 1107, 1119, citing *Horton v. California* (1990) 496 U.S. 128, 136.)

Standard of Review

On appeal, a reviewing court is bound to view the evidence in the light most favorable to the respondent. Its responsibility is simply to measure the facts, as found by the lower court, against the constitutional standard of reasonableness. (*People v. Brisendine* (1975) 13 Cal.3d 528, 535-536.) The trial court's findings, both express and implied, must be upheld if supported by substantial evidence. (*People v. James* (1977) 19 Cal.3d 99, 107.) A reviewing court is not bound by the findings bearing on the legality of the search if the facts are undisputed. (*People v. Medina* (1972) 26 Cal.App.3d 809, 815.) The same is true if the trial court based its decision on an erroneous legal theory without which it is unlikely that it would have reached the conclusion it did, or if the findings are not supported by substantial evidence. (*People v. Manning* (1973) 33 Cal.App.3d 586, 603.)

The ultimate question of whether a search was reasonable within the meaning of the Fourth Amendment is a question of law. It is the appellate court's responsibility to measure the facts, as found by the trial court, against the constitutional standard of reasonableness. On this issue, the reviewing court must exercise its independent judgment. (*People v. Leyba* (1981) 29 Cal.3d 591, 596-598.)

Legal Analysis

The initial entry into the residence was proper

Pursuant to Eric Eubank's request, deputies were dispatched to appellant's residence to conduct a "welfare check" on the occupants. When they arrived, no one responded to their knocks on the door or calls inside the house. After several minutes, they heard someone moaning and saying, "I've been shot." They then entered forcibly. Appellant acknowledges that this initial, warrantless entry by officers into the residence was appropriate under the "imminent danger-to-person" exigent circumstance exception. (*People v. Hill, supra,* 12 Cal.3d 731, 753-757.)

Overly broad warrant language

Appellant's first challenge to the searches of her home is that the "dominion and control" warrant language is overly broad and non-particular so as to render that aspect of the warrant invalid. This language was relied upon to

seize the letters found on, and next to, appellant's bed. Those letters, written by appellant, were devastating to the defense at both the guilt and penalty trials.

In the first affidavit, the officer requested, and the warrant authorized, seizure of "handwritings . . . documents and effects which tend to show possession, dominion and control over said residence, including keys, photographs, taped voice or video images, computer equipment, disks or tapes, pagers, anything bearing a person's name, social security number or other forms of identification, and the interception of calls." (3CT 339.)

The particularity requirement is designed to prevent general, exploratory searches which infringe upon a person's right to privacy. (*Marron v. United States* (1927) 275 U.S. 192, 196; *Burrows v. Superior Court* (1974) 13 Cal.3d 238, 249.) This requirement also "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." (*Groh v. Ramirez* (2004) 540 U.S. 551, 561, quoting *United States v. Chadwick* (1977) 433 U.S. 1, 9.)

This requirement is generally held to be satisfied if the warrant imposes meaningful restrictions on the objects to be seized. (*People v. Tenny* (1972) 25 Cal.App.3d 16, 22; *People v. Alvarado* (1967) 255 Cal.App.2d 385, 291.) In essence, the warrant should leave nothing to the discretion of the officer executing it in terms of what items may be seized. (*Stanford v. Texas* (1965)

379 U.S. 476, 485; *Andresen v. Maryland* (1976) 427 U.S. 463, 480; *People v. Dumas* (1973) 9 Cal.3d 871, 880.)

Here, both warrants used identical "dominion and control evidence" language which provided no meaningful restrictions over what could be searched or seized, leaving that decision *entirely* within the discretion of the executing officers, who were then able to stay within the broad parameters of the warrant and nevertheless conduct an exploratory search of appellant's residence.

The courts have been decisive in crafting the boundaries of constitutionally acceptable warrant language. In *Burrows v. Superior Court, supra*, 13 Cal.3d 238, a case involving the theft of client funds, the warrant language "all books, records, accounts and bank statements and canceled checks of the receipt and disbursement of money and any file or documents referring to . . ." was held to be constitutionally invalid because it permitted the seizure of all of the petitioner's financial records without regard to the circumstances surrounding the case. (*Id.* at pp. 249-250.)

In an earlier case involving obscene materials, the warrant language "any and all other records and paraphernalia" connected with the business of the corporate petitioners was held to be constitutionally void. As this court stated:

> Articles of the type listed in general terms in the warrant are ordinarily innocuous and are not necessarily connected with the crime. The various categories, when taken together, were so

> sweeping as to include virtually all personal business property on the premises and *placed no meaningful restriction on the things seized.* Such a warrant is similar to the general warrant permitting an unlimited search, which has long been condemned.

(*Aday v. Superior Court* (1961) 55 Cal.2d 789, 795-796 [emphasis added].)

In *People v. Frank* (1985) 38 Cal.3d 711, a murder case, the warrant included three clauses, one giving a broad description of dominion and control-type evidence, another containing boilerplate lists routinely included without regard to the evidence, and the last authorizing the police to search and seize a wide variety of evidence. While not expressly condemning the dominion and control evidence clause, this court found that it lacked the necessary particularity and provided no meaningful restriction on the objects to be seized. (*Id.* at p. 726.)

> The Constitution commands, however, that the warrant specify the things to be seized not merely enough of the seizable things to persuade that magistrate to allow the police to enter and search for more. No court in the land should countenance a scheme that reduces the high office of a search warrant to the level of a mere ticket of admission.

(*Id.* at p. 727, citing *People v. Superior Court (Meyers)* (1979) 25 Cal.3d 67, 82.)

Subsequent decisions have refined the applicability of this language. In *People v. Holmsen* (1985) 173 Cal.App.3d 1045, 1048, a drug possession case, the warrant authorized the seizure of "papers to show control of the residence."

The *Holmsen* court held that this phrase was similar to the clauses condemned in *Frank* and would permit the seizure of virtually any document because it placed no meaningful restriction on what could be seized. (*Ibid.*)

In a burglary case, *People v. Superior Court (Williams)* (1978) 77 Cal.App.3d 69, 76 (overruled on other grounds in *People v. Superior Court (Meyers)* (1979) 25 Cal.3d 67), the warrant authorized the seizure of "bills and receipts." The court held that the papers found in a briefcase, box and filing container, which were seized under the apparent authority of "bills and receipts," had to be suppressed because the officers could have seized any piece of paper in the house regardless of its relevance. (*Id.* at p. 78.)

In *Griffin v. Superior Court* (1972) 26 Cal.App.3d 672, 692-693, the warrant authorized the seizure of "evidence of indebtedness," "telephone bills showing calls between said Griffin and other persons," and "any papers showing names and addresses of associates of said Griffin." The court held that these clauses violated federal and state constitutional and statutory provisions prohibiting such general exploratory searches. (*Id.* at p. 694.)

In *Bay v. Superior Court* (1992) 7 Cal.App.4th 1022, 1026, a case involving the practice of law without a license, the warrant authorized the seizure of "personal property tending to show the identity of person's ownership, dominion, or control of said premises." The entire warrant was condemned

because it left too much discretion to the executing officers. (*Id.* at p. 1028.)

A generic description of the items to be seized is permissible under the limited circumstance where the issuing authorities are unable to identify the items more particularly. (*People v. Tockgo* (1983) 145 Cal.App.3d 635, 642-643.) However,

> Where the procuring authorities' ability to describe the goods to be seized is too minimal to provide a description specific enough to safeguard against a "general search" or the sweeping seizure of innocuous and unlawful objects alike, that lack of knowledge *will not* save the warrant from invalidity under the overriding constitutional command of particularity, which derives from the very aim of avoiding such general searches.

(*Id.* at p. 643 fn. 3 [emphasis added].)

The federal courts also recognize that "[s]earch warrants for documents are generally deserving of somewhat closer scrutiny with respect to the particularity requirement because of the potential they carry for a very serious intrusion into personal privacy." (See 2 Lafave, *Search and Seizure, A Treatise on the Fourth Amendment*, 3rd Ed., (1996) section 4.6(d), pp. 569-570.) Thus, the Supreme Court noted in *Andresen v. Maryland, supra,* 427 U.S. 463, that,

> [T]here are grave dangers inherent in executing a search warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a search warrant to search for physical objects whose relevance is more easily ascertainable. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized. Similar dangers, of

> course, are present in executing a warrant for the seizure of telephone conversations. In both kinds of searches, responsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimize unwarranted intrusions upon privacy.

(*Id.* at p. 482.)

Relying on particularity requirements as defined in numerous federal court decisions, the Hawaii Supreme Court found that the language "[any] property tending to establish the identity of persons in control . . . of the premises . . ." was far too broad to pass this requirement. (*State v. Kealoha* (1980) 62 Haw. 166, 613 P.2d 645.) That court found that the language "too closely resembles the wording of a forbidden 'general warrant'" and invited a strong intrusion into the defendant's private papers and other personal effects. (*Id.* at p. 171, citing *Aday v. Superior Court, supra*, 55 Cal.2d 789, 795.)

In the trial court, respondent argued the controlling case on this issue was *People v. Nicolaus* (1991) 54 Cal.3d 551. In that case, the warrant contained language authorizing the seizure of "letters, papers, bills, tending to show the occupants" of the residence. (*Id.* at pp. 574-575.) A folder containing personal papers was in "plain view" on a desk in the defendant's apartment. (*Id.* at p. 574.) Respondent emphasized that this court upheld the search. (3CT 438.) However, *Nicolaus* is distinguishable. Moreover, appellant submits that *Nicolaus* was wrongly decided and conflicts with United States Supreme Court

precedent.

This case is distinguishable because of the substantial difference in the language used. In *Nicolaus*, the warrant authorized the seizure of "Letters, papers, bills tending to show the occupants of 2335 Erickson St. #1." (*Id.* at p. 574.) Here, the affidavit requested and the warrant authorized the seizure of, "handwritings, documents and effects which tend to show possession, dominion and control over said residence, including keys, photographs, taped voice or video images, computer equipment, disks or tapes, pagers, anything bearing a person's name, social security number or other forms of identification, and the interception of calls." (3CT 339.) So while the language in *Nicolaus* was specific and placed significant restrictions on what the officers could seize, the language here was a virtual shopping list of items commonly found in any household. In this respect, *Nicolaus* actually supports appellant's position. Moreover, the court relied on two other cases for its conclusion, *People v. Rogers* (1986) 187 Cal.App.3d 1001, and *United States v. Whitten* (9th Cir. 1983) 706 F.2d 1000.

In *People v. Rogers*, the appellate court rejected a particularity challenge to language in the warrant, which authorized the seizure of dominion and control evidence "including, but not limited to, utility company receipts, rent receipts, canceled mail, envelopes and keys." (*Id.* at p. 1004, fn. 1.) Again, this is in

stark contrast to the broad language contained in the present warrant.

In the other case cited in *Nicolaus*, *United States v. Whitten*, the court was likewise faced with a challenge to language that was far more restrictive than that in the present warrant. In *Whitten*, the warrant authorized the seizure of "telephone books, diaries, photographs, utility bills, telephone bills, and any other papers indicating the ownership or occupancy of said residence." (*Id.* at pp. 1007-1008.) The court noted that had the warrant authorized the seizure of *all* photographs or *any* diaries, then the court's conclusion may well have been different. (*Id.* at p. 1009.)

Therefore, in light of the differences noted, *Nicolaus, Rogers* and *Whitten* actually support appellant's argument. The warrant in this case was overly broad.

Reading appellant's letters exceeded the scope of the warrant.

Even if the officers were properly authorized to search the letters for evidence of dominion and control, once they first examined the letters and saw that they were merely appellant's personal writings, having no relevance to dominion and control, they had no cause to read further, and no authorization to seize them under the guise of "dominion and control." The court rejected a similar argument in *Nicolaus*, holding that:

"[W]hen conditions justify an agent in examining a ledger, notebook,

> journal or similar, he or she may briefly peruse writing contained therein. [Citations.] The justification may arise from 'a reasonable suspicion" to believe that the discovered item is evidence,' [citation] . . .; or it may arise from the authority conferred by a warrant to search for certain items which might reasonably be expected to be found within such a book . . . In either case, the plain view doctrine would permit brief perusal of the book's contents and, consequently, its seizure if such perusal gives the examining agent probable cause to believe that the book constitutes evidence."

(*Nicolaus* at p. 575, quoting *United States v. Issacs* (1983) 708 F.2d 1365, 1370, cert. den. 464 U.S. 852 (1983).)

Initially, *Issacs* endorses only a "brief perusal" of any written material to determine whether it constitutes evidence described by the warrant. Here, officers saw personal handwritten notes on, and next to, appellant's bed. It would take only a brief glance to see the letters were *not* evidence of dominion and control.

Next, the holding in *Nicolaus* is in conflict with the well-established principle that the incriminating nature of the writing must be "immediately apparent" to the reader in order to justify any closer examination. (*People v. Lenart, supra,* 32 Cal.4th 1107, 1119, citing *Horton v. California, supra,* 496 U.S. 128, 136.) Here, a brief perusal of the letters would have led the reader to the immediate conclusion that these handwritten papers were not dominion and control evidence.

More importantly, *Issacs* was decided well before the Supreme Court

decision in *Arizona v. Hicks* (1987) 480 U.S. 321, and the *Nicolaus* court failed to mention *Hicks*. In *Hicks,* police entered an apartment after a gunshot had been fired through the floor into an apartment below, injuring an occupant. (*Id.* at p. 323.) Once inside, officers observed, in "plain view," an expensive stereo which they concluded was "out of place" in the modest apartment, and therefore suspected it may have been stolen. On this basis alone, an officer moved the stereo so that he could observe and record the serial number. Police later determined that the stereo was, in fact, stolen. (*Ibid.*)

Writing for the majority, Justice Scalia first noted the officers were justified in entering the apartment and that the stereo itself was in "plain view." (*Id.* at p. 324.) However, the officer's actions in moving the stereo so that he could view the serial number constituted an unauthorized search. (*Id.* at pp. 324-325.) The doctrine of "plain view" was defined to encompass items which are, in fact, in the plain sight of the observer, with no action being taken by the officer. (*Id.* at p. 325.) The court rejected any distinction between "looking" at an object in plain view, and moving it, even a few inches. It mattered not that the search uncovered nothing of great personal value, "*rather than letters* or photographs. A search is a search, even if it happens to disclose nothing but the bottom of a turntable." (*Id.* at p. 325. [emphasis added].)

In this case, even if the language of the warrant was sufficiently

particular, the officer was authorized to seize *only* those items related to dominion and control of the residence. Even a cursory examination of the papers on and near appellant's bed would have immediately revealed that they were personal writings, not utility bills or similar type documents. The officer's full reading of the letters cannot be justified under the plain view doctrine. Instead, the officer was conducting the kind of unauthorized search that was expressly prohibited in *Hicks*.

Appellant's argument is further supported by *People v. Bullock* (1990) 226 Cal.App.3d 380. In that case, an officer examined an electronic pager which was in plain view. However, the officer then activated the pager and read the text messages which were displayed. Based on *Hicks,* the appellate court held the act of reading the text message constituted an additional, unauthorized search. (*Id.* at p. 384.) By continuing to read appellant's letters, which were clearly *not* authorized under the warrant, the officers in this case conducted an additional, unauthorized search. *Nicolaus* should be disapproved to the extent that it is inconsistent with *Hicks*, and the other authorities concerning the examination of writings cited above.

The warrants should have been traversed.

Finally, appellant submits that the warrants should have been traversed due to the material omissions made by the affiant. The trial court denied a

hearing on this issue under *Franks v. Delaware, supra,* 438 U.S. 154, 170-172. (8RT 697.)

A defendant may traverse a facially sufficient warrant affidavit on grounds that it is incomplete. (*People v. Kurland* (1980) 28 Cal.3d 376, 384.) If a defendant makes a showing that the affiant made such material omissions with a reckless disregard for the truth, then the court must conduct a hearing on the allegations. If found to be true, the court adds the omitted material and retests the affidavit for sufficiency. (*People v. Huston* (1988) 210 Cal.App.3d 192, 210.)

The defense claimed there could be no question in the minds of the officers that appellant lived at the house. They had been there *numerous* times investigating reports of domestic disturbances. One of the two deputies to first arrive on scene, Deputy Deese, had been at the residence a few hours earlier and spoken with appellant. Deputy Deese also briefed the affiant, Detective Rawlins, on the status of the case approximately one hour before Rawlins executed the warrant affidavit. (See warrant affidavit, 3CT 342:11.) In fact, when Deputies Deese and Perry first arrived at the residence that evening and got no response after knocking on the door, they began to call out to appellant *by name*. (27RT 3031.) Nonetheless, Rawlins requested, in the broadest language imaginable, evidence of appellant's dominion and control of the premises.

In his affidavit, Rawlins omitted the sheriff's department's previous contacts with appellant at that residence, including the one that occurred earlier that day. If that information was noted by the affiant, the need to search for dominion and control evidence no longer existed[13]. The omitted facts establish that appellant had unquestioned dominion and control over 226 South Twin Oaks Road, and the sheriff's department was undeniably aware of this.

The defense supported its argument by offering evidence establishing that the sheriff's department, when requesting search warrants from this same trial court, routinely included this boilerplate "dominion and control" language in its affidavits. (See 3CT 306, 375.)

In this case, the department went so far as to include a request to search for dominion and control evidence in the *second* warrant, which was executed on

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[13] It is certainly noteworthy that in upholding the dominion and control language of the warrant in *Nicolaus*, this court noted "the record reflects that one police report indicated defendant may have had several addresses. Nor was there any evidence presented at the hearing to suggest the police knew defendant lived alone." (*People v. Nicolaus, supra,* 54 Cal.3d at 575.) In the vast majority of cases upholding the particularity of language associated with dominion and control evidence, two factors are present. First, these cases, almost always exception, involve possessory crimes, and, secondly, those cases lacked evidence that police already knew that the suspect lived at the premises to be searched. (See, e.g., *People v. Senkir* (1972) 26 Cal.App.3d 411, 421; and, *People v. Howard* (1976) 55 Cal.App.3d 373, 376; *United States v. Whitten, supra,* 706 F.2d 1000, 1008-1009; *United States v. Rettig* (9th Cir. 1978) 589 F.2d 418, 421; *United States v. Honore* (9th Cir. 1971) 450 F.2d 31, 33; and, *United States v. Marques* (9th Cir. 1979) 600 F.2d 742, 751.)

October 30, 1997 — four days after the shootings. This affidavit also omitted all information regarding the prior contacts with appellant at her residence. From this, and the survey of other warrants obtained by the sheriff's department from the trial court, it becomes glaringly apparent that the police viewed a warrant affidavit as little more than a standard form to be completed using boilerplate language, with little regard for the circumstances of the particular case. Unfortunately, the superior court encouraged this practice by abandoning its role as a neutral and detached magistrate, instead issuing warrants based on bare bones applications. This court has observed that:

> The requirement of probable cause interposes the magistrate between the police officer's zealous pursuit of suspects and evidence and the citizen's pursuit of privacy and freedom from unreasonable interference. The magistrate's function in this scheme is to render a neutral and detached judgment, not to serve as a perfunctory rubber stamp for the police.

(*Alexander v. Superior Court* (1973) 9 Cal.3d 387, 388, citing *Aguilar v. Texas* (1964) 378 U.S. 108.)

Whenever a warrant fails to describe with sufficient particularity the items to be seized, the courts have invalidated the warrant and suppressed the seized property. Specificity is the default mode and the law demands the affiant justify broad language whenever used.

Here, there was neither specificity nor justification. Phrases such as

"documents and effects which tend to show dominion and control" including "anything bearing a person's name, social security number, or other form of identification" did not meaningfully identify the boundaries of searchable areas or assist the officers in identifying, before viewing, reading and seizing, innocuous documents otherwise not subject to seizure. They were instead authorized to read *every* document in appellant's home under the pretext that it might be evidence of dominion and control. Sanctioning this practice would do great violence to the Fourth Amendment.

And in the second warrant, the affidavit states that the justification for the search was to resolve discrepancies between the number of empty shell casings seized from the property and the number of projectiles recovered from the victims and the residence.

The affidavit and warrant had obvious problems. First, the affidavit asks for, and the warrant authorizes, the seizure of evidence completely unrelated to the asserted basis for the search and contains the same overbroad language as the first affidavit and warrant. Detective Rawlins swore, under oath, that the property described in the warrant is "necessary to identify the perpetrator of the crime" and that he "does not contemplate making an arrest under the facts as they presently exist." However, the record shows that appellant had been arrested for these crimes on October 26th, 1997, four days before he signed and

attested this affidavit.

Next, Detective Rawlins further swore that "the results of such inspections may be probative in associating the perpetrator with the scene of the crime," something the sheriff's department had already established.

Perhaps most revealing is the list of items seized during the second search. In trying to reconcile the discrepancy between the number of shells and number of projectiles, Detectives Rawlins and Donohue seized other unrelated evidence including photographs, photo albums, backpacks, videotapes, books, calendars, clipboards, notebooks, file cabinet contents, prescription medication bottles, bags, a suitcase, and a hat box.

The seizure of this evidence cannot be justified by the "sworn" reason for re-entering the residence. Rather, police seized these items because the overbroad boilerplate language included in the affidavit and warrants granted them *unlimited* discretion to take anything they wanted. This is precisely what the Fourth Amendment prohibits.

While the initial warrantless entry into the residence was justified under the facts, the warrants and searches that followed were not. Police intentionally withheld from the magistrate critical evidence that appellant had lived there for years, in order to obtain warrants closely resembling the hated writs of assistance in which the concepts of the Fourth Amendment are founded. Such writs are the

"worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that was ever found on the English law books, because they placed the liberty of every man in the hands of every petty officer." (*Stanford v. Texas, supra,* 379 U.S. 476, 489.)

For these reasons, the court should find that the warrants were overbroad, that the affiants recklessly omitted material information, and that both affidavits lacked the necessary facts and details upon which to find the existence of probable cause for the seizure of dominion and control evidence.

The constitutional violations were prejudicial.

If the reviewing court finds that the trial court erred by not excluding the seized evidence, the conviction must be reversed unless the respondent can establish, beyond a reasonable doubt, that the error was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The *Chapman* rule requires that an appellate court examine the entire record to determine whether it appears reasonably possible that the error may have materially influenced the jury in arriving at its verdict; if it appears reasonably possible, then the conviction must be reversed. (*People v. Perry* (1972) 7 Cal.3d 756, 776 [overruled on other grounds in *People v. Green* (1980) 27 Cal.3d 1, 27].)

The illegal seizure and introduction of appellant's handwritten letters was devastating. They were written when appellant was heavily sedated. The

prosecution used the letters to support its theory that appellant killed her children as revenge against the two men in her life who she believed had betrayed and were conspiring against her. The same theme was used in the guilt phase to show premeditation and in the penalty phase as an aggravating factor. Without the letters, appellant may well have been able to obtain second degree murder verdicts eliminating the special circumstance allegation.

The search warrants were not supported by probable cause. The resulting searches violated the Fourth Amendment. The fruits of those searches should have been suppressed. The introduction of this illegally obtained evidence became the centerpiece of the prosecution's case in both the guilt and penalty phases. The judgment must be reversed.

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VI

The trial court denied appellant a fair trial by permitting a forensic toxicologist to testify regarding her own informal, undocumented and unpublished "experiments" to support an opinion that intravenous-infusion of fluids into the human bloodstream did not affect the blood alcohol content or other drug levels in appellant's body.

Introduction

Appellant's sole defense at the guilt phase was that because of her intoxication from drugs and alcohol, she was not able to form the mental state necessary for premeditation, and the killings were therefore second degree murder. The trial court erred by allowing a prosecution expert to undermine this defense using incompetent testimony to minimize the evidence of intoxication.

Background

On the night of the incident, appellant shot herself in the stomach and bled profusely. (27RT 3034.) The paramedics treating her at the scene administered two intravenous lines and began to infuse a saline solution. (23RT 2456.)

Two vials of blood were drawn from appellant at the hospital approximately two hours later. (26RT 2906.) One was submitted to a lab for analysis. (26RT 2911.) The results showed that appellant had a blood alcohol content (BAC) of .07 percent. (29RT 2911.) She also had 376 nanograms per liter of Prozac (fluoxetine) in her system. (26RT 2912.) The accepted

therapeutic level for this drug is 250 to 1200 nanograms. (26RT 2914.) Finally, appellant had .9 micrograms per liter of Valium (diazepam) in her blood, and the accepted therapeutic level for this drug is .1 to 1.3 micrograms. (26RT 2915.)

At trial, the defense called Dr. Clark Smith, a psychiatrist and medical director of an alcohol and drug treatment hospital in San Diego. (27RT 3077.)

Dr. Smith testified that infusing fluids into the body would affect subsequent blood analysis for the presence of drugs or alcohol. (27RT 3085.) Prior to the blood draw, appellant received three liters of fluids, and had a total of approximately five liters of blood in her body. (27RT 3085.) A hematocrit comparison (which measures red blood cells) showed evidence of dilution in addition to the direct evidence of the infusion. (27RT 3086.) Dr. Smith reviewed appellant's medical records and determined that, prior to October 26th, 1997, she consistently had a red blood cell percentage of approximately 43.3 percent. (27RT 3087, 3117.) The blood drawn from her on that night showed a red blood cell percentage of 20.7 percent. (27RT 3087.) This showed a dilution factor, due to the infusion of fluids into her bloodstream, of approximately 2.1. (27RT 3089.) This would impact any analysis of drugs or alcohol in appellant's blood prior to the infusion of fluids. (27RT 3090.)

The level of drugs and alcohol in appellant's system, determined by the prosecution's expert failed to account for dilution and time factors. (27RT

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3087.) Appellant's blood sample was taken approximately one and one-half hours after the shooting. (27RT 3091.) The average female burns off alcohol at a rate of about .015 per hour. (27RT 3091.) The "burn off" in this case was determined to be approximately .02. (27RT 3091.) To be accurate, this would have to be added to the .07 reading, for an alcohol level of .09. (27RT 3091.) Figuring in the 2.1 dilution factor, appellant's alcohol level at 7:15 p.m. on October 26th, was actually .19. (27RT 3092.) Correcting for dilution, appellant's level of Valium was actually 1.89. (27RT 3093.) This was well-above the maximum accepted therapeutic level of 1.3 micrograms. (26RT 2915.)

Alcohol is a sedative, acting mainly on the central nervous system. (27RT 3094.) At a level of .19, there would be a "very significant" effect on the brain, including emotions, perception, judgment and other "higher brain functions." (27RT 3095-3096, 3098.) Valium, a tranquilizer, has similar effects. (27RT 3098.) Valium impairs the ability of a person to "make choices," and for "associative reasoning." (27RT 3106.)

The combination of alcohol and Valium would double or even redouble the effects each would have separately. (27RT 3109.) Even with these effects, a person might be able to perform a complex operation, such as drive a car, but have no memory of doing so — the person would suffer a "blackout." (27RT

3110, 3121, 3123.)

The prosecution's "expert"

The prosecution called Vina Spiehler in rebuttal to refute Dr. Smith's conclusions. (28RT 3167.) Spiehler was a board certified forensic pharmacologist. (28RT 3167.) The trial court ordered an Evidence Code section 402 hearing to determine whether to allow her testimony. (28RT 3167.)

Spiehler would testify there was "no relationship between blood concentrations of ethanol and the infusion of fluids." (28RT 3168.) Her conclusions were supported by independent testing she had done when employed at the Orange County Medical Examiner's office, and "recognized literature in the field." (28RT 3169-3170.) The "study" she had conducted consisted of "informal comparisons" of 10 or 15 samples, and she could not supply case names or any data to confirm the results. (28RT 3171.) The "recognized literature" to which she had previously referred was a medical text, "Medical - Legal Aspects of Alcohol" written by James C. Garriott. (28RT 3179.) While she had relied upon information published in the second edition of the text, that information was subsequently removed from the third edition. (28RT 3179.)

Defense counsel objected, on foundation grounds, to any testimony pertaining to Spiehler's tests regarding blood alcohol levels and the infusion of fluids. (28RT 3190.)

The trial court ruled that Spiehler could discuss the informal testing she had done since it verified what she had read in the literature. (28RT 3191.) The court found it was "part of her training and experience working in the field" and would allow testimony on the topic. (28RT 3192.)

Spiehler thereafter testified at trial that she disagreed with Dr. Smith's findings regarding the dilution factor as it related to drugs and alcohol in a person's system. (28RT 3202.) She said the factor might apply to experiments done in a test tube, but not in the human body where drugs and alcohol are absorbed into the fat cells, including those in the brain. (28RT 3202, 3209.) She found the infusion of saline may have lowered the BAC results by as much as 10 percent. (28RT 3207.)

She based her findings on personal experiences in the coroner's office which included her experiments. (28RT 3213.)

On cross-examination, she acknowledged that she was not a medical doctor and never treated a living person. (28RT 3213.) She conceded that she relied on the second edition of the Garriott text to support her conclusions regarding the dilution factor. (28RT 3217.) She then said she could not recall whether she relied on the second or third edition. (28RT 3217.) The court sustained the prosecutor's "beyond the scope" objections to questions regarding the impact on a person's critical judgment of a blood alcohol content between .09

to .25. (28RT 3218-3219.)

Spiehler acknowledged that while she disagreed with Dr. Smith's conclusions, she had only read two pages of his 17 page report. (28RT 3219.)

Dr. Smith then testified on surrebuttal that Spiehler's testimony did not change his opinion. (28RT 3229.) He explained her theory about drugs and alcohol being absorbed into the fat cells was flawed, and that his theory was widely accepted in the scientific literature. (28RT 3223.) He also testified the Garriott text book has a section on the "dilution effect" and the effects of a patient suffering from a gunshot wound. (28RT 3237.) Dr. Smith also testified that shock, including that following a gunshot wound, would have on the absorption of drugs and alcohol. (28RT 3232.) He suggested that factor may have applied to appellant, who at one time had no measurable blood pressure or pulse. (28RT 3232.)

The prosecution asked no further questions of Dr. Smith.

Applicable Law

A qualified expert may offer an opinion on a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. (Evidence Code section 801 subd. (a).)

Such an opinion must be,

Based on matter (including his special knowledge, skill, experience,

> training and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that may be reasonably relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is preluded by law from using such matter as a basis for his opinion.

(Evidence Code section 801, subd.(b).)

Expert opinion must not only be on a proper subject, but must be based on reliable "matter," i.e., facts, data, and such matters as a witness's knowledge, experience, and other intangibles upon which an opinion may be based. (See *People v. Collins* (1968) 68 Cal.2d 319, 328.)

Generally, opinion evidence is not subject to the requirements for "new scientific techniques" set forth in *People v. Kelly* (1976) 17 Cal.3d 24, i.e., that the technique at issue must have gained general acceptance in the scientific community. (*People v. Stoll* (1989) 49 Cal.3d 1136, 1153, 1157.) The opinion must, however, be based on *reliable* factors, utilizing sound reasoning. (*Pacific Gas & Electric Co. v. Zukerman* (1987) 189 Cal.App.3d 1113, 1136.)

Legal Analysis

<u>*Kelly* Standard</u>

As noted, opinion evidence is not generally subject to the *Kelly* criteria for admissibility. (*People v. Stoll, supra,* 49 Cal.3d 1136, 1153, 1157.) However, in reaching its conclusion, this court in *Stoll* noted that the opinion rendered by

the psychologist was based upon standardized tests, rather than "new scientific techniques." The court held that such testimony raised none of the concerns addressed by the *Kelly* opinion. (*Id.* at p. 1157.) "[N]o reasonable juror would mistake an expert's reliance on standardized tests as a source of infallible 'truth' on issues of personality, predisposition, or criminal guilt." (*Id.* at p. 1159.)

The present situation is distinguishable from *Stoll,* first, because it deals not with "a learned professional art [psychology], rather than the purported exact 'science' with which *Kelly/Frye* is concerned." (*Ibid.*) Spiehler offered a medical conclusion based upon what was essentially a "hard science" rather than a "learned professional art." Her opinion was based, not on standardized tests or methods widely accepted in the medical community, but upon (a) outdated medical literature which had been removed — presumably because it had been discredited — from a later edition of the same work; and (b) her own highly questionable "experiments" for which she could not verify the sources of her samples, the conditions under which the samples were obtained, the names of the deputies who supplied the samples, the names of the patients, or even the approximate dates the "experiments" were performed. No published work recognizes the "experiments" conducted by Speihler which she claimed corroborated her opinion regarding the effect of dilution upon alcohol and drug levels in the human body.

When a medical opinion is offered under such circumstances, appellant submits that the trial court *must* analyze the basis of the opinion, i.e., the data, literature and other information, under the *Kelly* criteria. Failure to do so invites the admission of "junk science," which accurately describes Spiehler's testimony.

Subsequent cases have recognized that if a case has some "special feature which effectively blind sides the jury," then *Kelly/Frye* may apply to expert opinion evidence. (*People v. Ruiz* (1990) 222 Cal.App.3d 1241, 1245 [under *Stoll*, an expert could opine that the defendant did not fit the profile of a pedophile, *if it was first established that the scientific community had developed such a profile*].) In *People v. Parnell* (1993) 16 Cal.App.4th 862, the court held that where a psychologist had viewed video tapes of the defendant making a statement under hypnosis to another psychotherapist, he could testify about posttraumatic stress disorder generally, but not to the defendant's mental state based on the hypnotized statements, because there was no showing that use of hypnotized statements had gained scientific acceptance. (*Id.* at p. 869.)

This case is distinguishable from decisions such as *People v. Bui* (2001) 86 Cal.App.4th 1187, where the court held that a forensic toxicologist was properly permitted to testify about the effect of methamphetamine on human behavior. This is because that expert's opinion was based upon epidemiological

studies he conducted and involved no new process or scientific technique. His studies had been published as scientific literature and subjected to peer review. (*Id.* at p. 1195.)

The *basis* of Spiehler's opinion should have been subjected to review under *People v. Kelly*. As shown above, it does not and cannot meet that standard and therefore should have been excluded.

Evidence Code section 801, subd.(b)

Spiehler's testimony should also have been excluded in that it was not admissible under Evidence Code section 801, subd.(b). As quoted above, the statute requires that expert opinion evidence be based upon reliable matter. Neither Spiehler's "experiments" nor her reliance on outdated medical literature meet that criteria. Her "experiments" should have been excluded as lacking a foundation for admission. (See *People v. Willis* (2004) 115 Cal.App.4th 379, 385 [dog scent evidence was improperly admitted because it lacked foundation and scientific proof of reliability].)

A medical expert may rely on published medical works as the basis for his or her opinion. (*Mann v. Cracchiolo* (1985) 38 Cal.3d 639, 644.) However, such material must itself be reliable:

> The value of the opinion evidence rests not in the conclusion reached, but in the factors considered and the reasoning employed . . . Where an expert bases his conclusion upon assumptions which are

> not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value . . . When a trial court has accepted an expert's ultimate conclusion without critical consideration of his reasoning, and it appears the conclusion was based upon improper or unwarranted matters, then the judgment must be reversed for lack of substantial evidence.

(*Pacific Gas & Electric Co. v. Zukerman*, *supra,* 189 Cal.App.3d 1113, 1136.)

Similarly, this court has held:

> Expert testimony may also be premised on material that is not admitted into evidence so long as it is material of a type relied upon by experts in the particular field in forming their opinions. [Citations.] Of course, any material that forms the basis of an expert's opinion testimony must be reliable. [Citation.] For "the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based."
>
> [Citation.]

(*People v. Gardeley* (1996) 14 Cal.4th 605, 618. See, similarly, *Kelly v. Trunk* (1998) 66 Cal.App.4th 519, 524 [expert failed to make a showing that the basis of the opinion rested on matters of a type reasonably relied upon by other experts in the field].)

The opinion offered by Spiehler was truly a "house built on sand." It should have been excluded as unreliable under Evidence Code section 801, subd.(b).

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Heightened Reliability Requirement.

Spiehler's testimony should have also been excluded in that it failed to meet the "heightened reliability" requirement in capital cases imposed by the Eighth and Fourteenth Amendments. A primary justification for upholding the death penalty against an Eighth Amendment challenge is that it is administered in recognition of the principle that death is different from all other punishment, and there is a need for heightened reliability in the evidence presented in a capital case. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) The requirement is applicable to both the guilt and penalty phases. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637 [requiring instruction on lesser included offenses supported by the evidence in guilt phase of capital trial]; *Riggins v. Nevada* (1992) 504 U.S. 127, 133 [involuntary administration of anti-psychotic medication to capital defendant without proper showing violates due process and the Eighth Amendment].)

Speihler's testimony was based on material which failed to meet the reliability requirements of *Kelly* or Evidence Code section 801, subd.(b). It cannot reasonably be argued that such evidence nevertheless met the enhanced reliability requirement of the Eighth and Fourteenth Amendments.

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The error was prejudicial.

The evidence that appellant shot and killed each of her sons was as overwhelming as it was shocking. The *only* defense raised by appellant in the guilt phase of her trial was that she was so intoxicated by the combined effects of alcohol and prescription drugs that she could not have formed the premeditation to kill, distinguishing first from second degree murder.

This question turned *entirely* upon the evidence of her intoxication at the time of the shootings. Dr. Smith's testimony was coherent, thoughtful, reasonable and based on widely-accepted scientific principles set forth in established medical and legal publications. The trial court permitted the prosecution to rebut Dr. Smith's conclusions by admitting Speihers testimony. Her contrary conclusions were based upon specious personal "experiments" and outdated medical literature.

Her testimony had an undeniable impact on the jury in deciding the degree of murder. The prosecutor repeatedly referred to Spiehler's testimony during closing argument and suggested the jurors could reject the testimony of both experts, that Dr. Smith's conclusions were "absurd" and that "all that scientific testimony nearly put me to sleep." (32RT 3864, 3366, 3383.) Without Spiehler's testimony, the jury would have been presented with uncontradicted evidence regarding the levels of appellant's alcohol and drug intoxication. That

is, they would have known appellant's blood alcohol content of .19 was well over twice the legal limit and her Valium level was substantially greater than the maximum therapeutic level of 1.3. The intoxication level is also exponentially higher when alcohol and Valium are combined. The jurors would have had uncontradicted evidence that at these levels, appellant's brain function and reasoning were significantly impaired which was highly relevant to the issue of her ability to premeditate the killings.

The guilty verdict for special circumstance murder resulting in a death judgment cannot be sustained where it was based upon the state's presentation of incompetent evidence.

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VII

Admitting evidence at the penalty phase that appellant allegedly smeared feces on the face of her nephew violated Evidence Code section 352, as well as appellant's Fourteenth Amendment right to due process and Eighth Amendment right to heightened reliability in a capital case.

Background

During the prosecution's guilt phase case-in-chief, the following exchange took place between the prosecutor and Eric Eubanks:

> Q. [Prosecutor]: Were you aware of an incident wherein the defendant smeared feces on Aaron's face after she had found his pants that he had dirtied and he put them — put it between the wall and the bed?
> A. [Eubanks]: No.
> Q. You've never heard that before?
> A. Oh, I've heard it. I wasn't — I'm not a witness to it.

(23RT 2410.)

During the prosecutor's subsequent examination of appellant's sister, Linda Smith, the following occurred:

> Q. [Prosecutor]: All right. Did you have any concerns about Aaron living in that household?
> A. [Smith]: Originally? No.
> Q. At some point in time did you?
> A. Yes, I did.
> Q. And when was that?
> A. I cannot give you a date. It was probably sometime in either late '96 or '97 — or early — probably '97 I got a little worried.
> Q. Okay. Was there ever any — statement made regarding feces?

(25RT 2731-2732.)

After the defense objected, the court heard argument and ruled that the evidence was highly inflammatory and therefore more prejudicial than probative as to the prosecution's "motive theory." The court excluded it under Evidence Code section 352. (25RT 2737.)

During argument regarding evidence to be presented during the penalty phase, the court indicated it would probably admit evidence regarding the alleged "feces incident." (27RT 2996.) The court ruled that evidence admissible after finding other evidence of appellant's conduct toward her children to be inadmissible. (27RT 2995-2996.)

During the penalty phase, the prosecution introduced the testimony of Linda Smith regarding the alleged "feces incident" with Aaron. Smith said she was speaking to appellant on the telephone, when appellant, who is a fastidious housekeeper, told her she had found a soiled "pull up" diaper that Aaron had stuffed between his bed and the bedroom wall. (36RT 4533.) Appellant first told her that she became angry with Aaron, made him smell the soiled diaper, and then rubbed it in his face. (36RT 4534.) When Smith became alarmed at hearing this, appellant told her she did not actually rub the soiled diaper in Aaron's face, but only made him smell it. (36RT 4534.) Smith said she did not really believe appellant's partial retraction — her subsequent denial that she

smeared the diaper in Aaron's face — but said nothing further about it. (36RT 4534.)

In her penalty phase argument, the prosecutor emphasized that this incident disproved the defense theory that appellant was a good mother prior to the shootings. (37RT 4721.)

Applicable Law

Under Evidence Code section 352, a court must examine proffered evidence to determine whether its probative value outweighs any prejudicial effect such evidence may have on the jury.

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

(Evidence Code section 352.)

When an objection to evidence is raised under Evidence Code section 352, the trial court is required to weigh its probative value against the dangers of prejudice, confusion, and the undue time consumption.[14] The objection must be

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[14] While a specific objection was not lodged at the penalty phase, the court had ruled in the guilt phase, that this evidence was admissible as "directly relevant" to the issue of whether appellant was a good mother. (27RT 2996.) Generally, once made, a defendant does not have to renew an objection in order to preserve it for appeal. Defense counsel reminded the court he had objected to this evidence in his trial memorandum. (25RT 2732.) (*People v. Morris* (1991) 53 Cal.3d 152, 189 [objection

sustained when these dangers substantially outweigh the claimed probative value. On appeal, the ruling is reviewed for abuse of discretion. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.) This review is especially important when the evidence is likely to provoke an emotional bias against a party or cause the jury to prejudge the issues using extraneous factors. (See *People v. Minifie* (1996) 13 Cal.4th 1055, 1070-1071 [in the context of Evidence Code section 352, unduly prejudicial evidence is evidence that would evoke an emotional bias against one party]; *People v. Zapien* (1993) 4 Cal.4th 929, 958 ["prejudice" as used in Evidence Code section 352 refers to the harm of prejudging on the basis of extraneous factors]. See also *People v. Jenkins* (2000) 22 Cal.4th 900, 1008.)

The introduction of inflammatory, prejudicial evidence may also violate the Fourteenth Amendment by depriving a defendant of a fair trial. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378; *Kealohapauole v. Shimoda* (9th Cir. 1986) 800 F.2d 1463.) In a capital case, the Eighth Amendment imposes a "heightened reliability" requirement as to evidence introduced, especially that admitted at the penalty phase. (*Beck v. Alabama* (1980) 447 U.S. 625, 637.)

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made *in limine* need not be renewed during trial]; *accord, People v. Rowland* (1992) 4 Cal.4th 238, 264 fn. 3.) And an objection made on state law grounds is suffcient to preserve any parallel federal constitutional claim. (*People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.) See similarly, *People v. Gibson* (1976) 56 Cal.App.3d 119, 137.)

Legal Analysis

The jury learned of the "feces incident" at the guilt phase when the prosecutor asked Eric Eubanks whether he had knowledge of it, and then asked Linda Smith the same question. And while the court found this evidence to be highly inflammatory under section 352, and excluded any further mention of the incident, the prosecutor nevertheless informed the jury of the allegation, and jurors were then left to speculate as to the details. The prosecutor observed "I think that's already come out through other testimony, also." (25RT 2736.)

In the penalty phase, the court ruled that the prosecution could fully explore this incident via the testimony of Linda Smith. The court made this ruling despite its previous conclusion that the evidence was more prejudicial than probative after characterizing it as "very disturbing testimony, obviously, that a woman would spread feces on a child." (25RT 2737.) The court made no further comments. The most logical explanation for the court's reversal of its earlier decision was that it was excluding other evidence and felt the need to balance its ruling by allowing the admission of the feces incident.

The trial court's ruling was erroneous. The evidence was properly excluded under section 352 at the guilt phase even though the jury had been made aware of it. For the same reason, the evidence should have been excluded at the penalty phase. While a trial court has no discretion under section 352 to

exclude otherwise admissible evidence under Penal Code section 190.3, factor (b), the court otherwise retains its discretion to exclude evidence which it determines would evoke an emotional response. (*People v. Karis* (1988) 46 Cal.3d 612, 640.)

Moreover, the Eighth Amendment and the due process clause of the Fourteenth Amendment entitle a capital defendant to a "tribunal free of prejudice [and] passion . . ." (*Chambers v. Florida* (1940) 309 U.S. 227, 236-237). Because capital trials require an especially high degree of reliability (*Beck v. Alabama, supra,* 447 U.S. 625, 637), courts must take extra precautions to ensure that a juror's decisions are not influenced by "irrelevant" considerations (*Zant v. Stephens* (1983) 462 U.S. 862, 885), or are the product of an "unguided emotional response" to evidence. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328.)

Accordingly, in a capital case, "[e]vidence that serves primarily to inflame the passions of the jurors must . . . be excluded . . ." (*People v. Love* (1960) 63 Cal.2d 843, 856) . "[T]he Constitution will not permit" evidence "aimed at inflaming the jury's passions" and designed to "goad . . . it into an emotional state more receptive to a call for imposition of death . . ." (*Tucker v. Zant* (11th Cir. 1984) 724 F.2d 882, 888). The admission of such evidence "so infect[s] the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." (*Spears v. Mullin* (10th

Cir. 2003) 343 F.3d 1215, 1226, quoting and applying the standard enunciated in *Romano v. Oklahoma* (1994) 512 U.S. 1, 12.)

"[T]o ensure that" inflammatory evidence is "excluded, the probative value and the inflammatory effect of the proffered evidence must be carefully weighed." (*People v. Love, supra,* 53 Cal.2d 843, 856.) The trial court did not simply abuse its discretion in admitting the evidence at the penalty trial, it failed to exercise any discretion when discussing its admissibility as being "relevant" to the issue of whether appellant was a good mother.

The court's ruling also violated the heightened reliability requirement of the Eighth Amendment since Linda Smith did not witness the alleged incident. She had no knowledge of it other than being told by appellant, who then denied having smeared the soiled diaper in Aaron's face, and was not even clear whether she believed the incident had occurred.

The court abused its discretion in admitting the highly inflammatory and unreliable evidence.

The error was prejudicial.

The trial court's error in admitting it at the penalty phase after excluding it at the guilt phase was prejudicial. In *People v. Love, supra,* 53 Cal.2d 843, this court, after finding that the admission of gruesome photographs was "designed to appeal to the passion of the jury . . ." reversed the imposition of

death using the "miscarriage of justice" standard set forth in *People v. Watson* (1956) 46 Cal.2d 818. Reversal of the death judgment is similarly required in the present case.

This was a heartbreaking case where a mother shot and killed her four sons. The circumstances were arguably mitigated by the fact that appellant was highly intoxicated from alcohol and prescription drugs. Aaron, the nephew appellant was raising along with her sons, was left unharmed. The prosecution was allowed to stoke the fires of passion by introducing evidence that appellant also abused Aaron by way of this unsupported, shocking allegation as "rebuttal" to the defense evidence showing that appellant was a good mother. While the prosecutor informed the jury it could not use this evidence as a factor in aggravation, she nevertheless told the jury that it "diminished" the value of the mitigating evidence presented by appellant. (37RT 4721.)

Essentially, the jury's function at this stage was to determine whether appellant was an evil person who murdered her sons to exact revenge against two men who abandoned her, or whether she was a dysfunctional person from a tortured background, who, while heavily sedated, essentially "snapped." In the former situation, the jury would likely be more easily persuaded that death was appropriate. By emphasizing this disgusting allegation of smearing a young child with human excrement, the prosecutor could, and did, effectively argue the

charged killings were committed by a cold-blooded and evil person who represents the worst of the worst. This could well have tipped the delicate scale in favor of death. The admission of this evidence deprived appellant of a fair penalty phase trial. (*Penry v. Lynaugh, supra,* 492 U.S. 302, 328.)

The evidence also failed the heightened reliability requirement of the Eighth Amendment since there were serious doubts as to whether it actually happened. (*Beck v. Alabama, supra,* 447 U.S. 625, 637.) The law protects against an execution based on such insubstantial yet provocative evidence. The improper admission of this evidence at the penalty phase requires reversal of the death judgment.

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VIII

The trial court erred in finding the testimony of the crime scene reconstructionist was admissible to demonstrate the circumstances of the crime, and the introduction of the testimony violated Evidence Code section 352, as well as the Eighth and Fourteenth Amendments

Background

Rod Englert, a crime scene reconstructionist, testified for the prosecution at the penalty phase. Defense counsel objected, noting that the prosecution originally indicated Englert would be testifying at the guilt phase to establish appellant's intent to kill, which was no longer in issue. (30RT 3466.)[15]

The prosecutor argued, and the court agreed, that Englert's testimony would show the "circumstances of the crime" pursuant to Penal Code section 190.3, factor (a). (30RT 3467.) Englert outlined his testimony at an Evidence Code section 402 hearing. (30RT 3468-3516.)

Defense counsel objected to Englert's proposed testimony, arguing that he would be "assuming the role of a juror," making conclusions that are properly left to a jury. (30RT 3518.) Moreover, Englert indicated that he did not have a "solid opinion" on the sequence of the shootings. (30RT 3518.) Counsel also argued that the jury would be "double counting" the evidence in aggravation and

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[15] Englert did not testify at the guilt phase because he was unavailable at the time.

the special circumstance based on the number of victims. (30RT 3519.) Defense counsel finally claimed that the testimony would be unconstitutional under the Fifth, Eighth and Fourteenth Amendments, as being vague and overbroad. (30RT 3519.)

While the court agreed that Englert's testimony was "somewhat cumulative" with the medical examiner's, it found he was nevertheless "well qualified" to render "some helpful information" regarding the bullets that were fired in the bedroom. (30RT 3520.) In support of its ruling that the evidence was admissible as a circumstance of the crime, the trial court cited *People v. Hovey* (1988) 44 Cal.3d 543, 576, where the court upheld the admission of a pornographic magazine found in the defendant's bedroom, and evidence concerning the surgical and autopsy protocols used on one of the victims. (30RT 3521.)

In the guilt phase, when addressing the issue of whether the court would grant the prosecution a continuance to accommodate Englert's testimony, the court characterized him as a non-essential witness:

> The Court: This is an expert witness that's going to propound theories on the evidence taking a look at things and making a reconstruction based on his evaluation of the crime scene.

* * *

And . . under no circumstances could I find that this is an essential witness based upon the state of the evidence at this time. (27RT 2975.)

Englert was the first witness called by the prosecution at the penalty phase. (31RT 3654.) He had reviewed the police reports, autopsies and almost 400 photographs. (31RT 3667.) He had also examined the bedding from the boys' bedroom. (31RT 3668.) Over defense objection, Englert was permitted to use mannequins and wooden rods to demonstrate bullet trajectory, and each boy's position when shot by appellant. (31RT 3682.)

He postulated as to how the shooting of each boy occurred, the sequence and their relative positions when shot. He believed that fourteen year-old Brandon, who was in the living room, was shot first. (31RT 3671.) He surmised that appellant walked up behind Brandon and shot him in the left temple. (31RT 3671.) He stated that, as Brandon lay slumped over on his side, appellant fired a second shot in the back of his neck. (31RT 3672.)

He gave a detailed, chilling account of the other killings which occurred in the younger boys' bedroom. Seven year-old Austin was on the top bunk. (31RT 3676.) There were two bullet holes in the wall behind him. (31RT 3676.) Englert believed appellant fired twice and missed, whereupon Austin raised his knee in a defensive position and was then shot in the left eye. (31RT

3676.) Five shots had been fired at this point, so Englert believed appellant emptied the shell casings in a trash can in the boys' room and reloaded, while the other two boys cowered on the lower bunk. (31RT 3677.)

Six year-old Brigham was shot in the back of his head, probably while huddling next to Matthew. (31RT 3678, 3684.) Matthew, who was four years old, would have been pulled back, creating an opening between him and Brigham. (31RT 3679.) Appellant fired a shot between them, which went through the bed, ricocheted off the floor and lodged in the wall. (31RT 3679.) Matthew was then shot in the top of his head, after scrambling to the other end of the bed. (31RT 3681, 3686.)

Englert believed that his conclusions were "within a reasonable degree of scientific certainty as to what occurred in that residence and the sequence it occurred in." (31RT 3687.)

Applicable Law

Penal Code section 190.3, factor (a) authorizes the introduction of evidence regarding "The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1."

"Whatever the outer boundaries of that concept may be, the 'circumstances of the crime' must include the events that make up the crime

itself and facts about the victim known to the defendant at the time of the crime." (*People v. Edwards* (1991) 54 Cal.3d 787, 849, Kennard, J., concurring.) Circumstances of the crime is a proper aggravating circumstance, evidence of which is properly admitted at a penalty trial. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1163; *People v. Medina* (1995) 11 Cal.4th 694, 776.)

"Victim impact" evidence is also admissible under the "circumstances of the crime" factor. (*People v. Harris* (2005) 37 Cal.4th 310, 351; *People v. Boyette* (2002) 29 Cal.4th 381, 443-444; *People v. Stanley* (1995) 10 Cal.4th 764, 832.)

However, there are limits on emotional evidence and argument which may be presented as circumstances of the crime at a penalty trial. (*People v. Edwards, supra,* 54 Cal.3d 787, 831 ["The question thus remains whether the testimony was relevant, and whether its probative value outweighed any prejudicial effect." (Citation omitted)]; *People v. Haskett* (1982) 30 Cal.3d 841, 864.)

Moreover, all the evidence must meet the heightened reliability requirement of the Eighth Amendment. (*Beck v. Alabama* (1980) 447 U.S. 625, 637.)

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Legal Analysis

The introduction of the crime scene reconstructionist's testimony in this case as "circumstances of the crime" was improper for several reasons. First, this court has never directly approved the use of such speculative evidence as a circumstance of the crime under Penal Code section 190.3, factor (a). Next, because of its highly speculative nature, it violated the heightened reliability requirement of the Eighth Amendment. Finally, because the speculative evidence was highly emotional, it violated Evidence Code section 352, and the due process clause of the Fourteenth Amendment.

Circumstances-of-the-crime evidence is ordinarily presented by eyewitnesses, or by physical evidence, the foundation of which is provided by live testimony or other direct or reliable circumstantial evidence. (See, e.g., *People v. Nicolaus* (1991) 54 Cal.3d 551, 577 [defendant's hatred of religion, particularly the fundamentalist Christian sect to which his murder-victim wife belonged]; *People v. Carrera* (1989) 49 Cal.3d 291, 329 [testimony of defendant's mother to establish that victims did not resist the robbery and fatal attack]; *People v. Lucero* (2000) 23 Cal.4th 692, 722, 732 [father's identification of his daughter's necklace, which may have been used to strangle her, and defendant's method of disposing of the victims' bodies]; *People v. Cole* (2004) 33 Cal.4th 1158, 1196 [defendant's torture of victim by setting her on fire];

People v. Michaels (2002) 28 Cal.4th 486, 532 [admission of paper entitled "hit list" found on defendant at time of his arrest admitted to demonstrate defendant's motive in the murder, i.e. to establish a reputation as a contract killer]; and, *People v. Osband* (1996) 13 Cal.4th 622, 708 [motive as part of circumstances of the crime].)

Here, the prosecution supplemented the substantial evidence regarding the circumstances of the crime presented at the guilt phase, with the "expert testimony" of a crime scene reconstructionist.

In *People v. Robinson* (2005) 37 Cal.4th 592, a medical examiner testified at the guilt and penalty phases that the victim was more than likely shot in the head "execution style" while kneeling in front of the shooter. (*Id.* at p. 643.) The defendant claimed that such evidence was irrelevant. The court disagreed, stating that "[e]vidence suggesting that at least one of the victims could have been kneeling was relevant to aggravation under section 190.3, factor (a)." (*Id.* at pp. 643-644.) The defendant also challenged the evidence as more prejudicial than probative under Evidence Code section 352. The court rejected this argument, stating:

> As we have explained, evidence is not "unduly prejudicial" under the Evidence Code merely because it strongly implicates a defendant and casts him or her in a bad light or merely because the defendant contests the evidence and points to allegedly contrary evidence. Here, the challenged evidence was highly relevant to the

> prosecution's theory of premeditated and deliberated murder, and to corroboration of the testimony of the three prosecution witnesses who recounted defendant's stated intention to execute witnesses and his boasts of having shot the victims in the head. And, as noted, the evidence was also relevant in aggravation of penalty as a circumstance of the crime. The trial court acted within its discretion in concluding that the challenged evidence was more probative than prejudicial. [Citation omitted.]

(*Id.* at pp. 643-644.)

However, the "prejudice" referred to by section 352 means evidence which uniquely tends to evoke an emotional bias against the defendant as an individual, and has little or no probative value. (*People v. Coddington* (2000) 23 Cal.4th 529, 588; *People v. Bolin* (1998) 18 Cal.4th 297, 320.) Evidence should be excluded as unduly prejudicial where it is of such a nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an improper purpose. (*People v. Branch* (2001) 91 Cal.App.4th 274, 285.) The improper admission of such evidence also offends the due process clause of the Fourteenth Amendment if it is so prejudicial as to render the defendant's trial fundamentally unfair. (*People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095; *People v. Falsetta* (1999) 21 Cal.4th 903, 913; *Estelle v. McGuire* (1991) 502

U.S. 62, 70.)

While, under Penal Code section 190.3, a court may not exclude *all* evidence of the circumstances of the crime by finding that it is more prejudicial than probative, the statute does not deprive a trial court of its traditional discretion to exclude particular evidence that is misleading, cumulative, or unduly inflammatory. (*People v. Box* (2000) 23 Cal.4th 1153, 1201; *People v. Davenport* (1995) 11 Cal.4th 1171, 1206, overruled on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555 fn. 5; *People v. Karis* (1988) 46 Cal.3d 612, 641-642 fn. 21.)

Returning to *Robinson,* it is noteworthy that this court did not evaluate the testimony of the forensic pathologist to be the equivalent of a crime scene reconstructionist.

> Contrary to defendant's suggestions that such testimony could be given only by one qualified as a crime-scene reconstructionist, the opinion evidence here at issue did not require that the witness have expertise beyond that which was shown--that is, that he was an experienced pathologist who possessed extensive familiarity with gunshot wounds.

(*People v. Robinson*, *supra*, 37 Cal.4th at p. 632.)

Unlike *Robinson,* the evidence here was not brief, straightforward, clinical or based on common-sense opinions of a forensic physician who drew his conclusions from the wounds suffered by the victims. Instead, the jury was

presented with the lengthy testimony of an alleged expert who provided shocking, painful details, including the positions of the victims, the sequence of the killings, and that appellant calmly reloaded her gun after killing two of her sons, while the younger boys huddled together a few feet away, cowering, knowing they were about to be slain by their mother.

This was not evidence from a percipient witness or someone having firsthand knowledge of the incident. Rather, it was the opinion of the witness — extrapolations based on a "cold" examination of photographs, medical reports and some of the physical evidence — made nearly two years after the event. As defense counsel emphasized following the section 402 hearing, Englert admitted that he did not have a "solid opinion" regarding the sequence of the shootings. (30RT 3518.) It was nevertheless presented to the jury as "expert evidence" of what actually occurred.

The circumstances of this case presented an emotional mine field. Even veteran sheriff's deputies were overcome with emotion while testifying about the details involving the dead or dying children found at the house. (See 23RT 2424.) The jury had already heard detailed descriptions of the crime scene by responding deputies and investigators, as well as descriptions by the medical examiners regarding the wounds suffered by each child. Englert's testimony was unnecessary and was nothing more than "piling on" by the prosecutor. The jury

could not help but be overwhelmed by this "evidence." As noted by this court in *People v. Edwards, supra,* 54 Cal.3d 787, "'irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.'" (*Id.* at 836, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 864, cited and quoted in *People v. Harris* (2005) 37 Cal.4th 310, 351.)

This was not evidence the jurors would rationally use to determine the appropriate punishment. Instead, it was emotional dynamite that was too volatile for the jurors to handle. While the penalty decision is *always* a subjective one made by each juror, it should not be tainted by the unnecessary introduction of evidence which is inflammatory in the extreme.

The court's finding that such testimony may provide the jury with "some helpful information" cannot reasonably be considered the type of probative evidence that would outweigh or even equal the emotional prejudice visited upon the deliberation process. This evidence is qualitatively different from graphic crime scene photographs which give the jury a dispassionate, objective depiction of the circumstances of the crime. (See, e.g., *People v. Box, supra,* 23 Cal.4th 1153, 1200; and, *People v. Hart* (1999) 20 Cal.4th 546, 643.) In essence, the photographs "speak for themselves." Conversely, the evidence here was a hypothetical version of events, peppered with the witness's unsupported

conclusions regarding the demeanor and state of mind of the parties. The court abused its discretion under Evidence Code section 352 in admitting the "expert testimony."

The evidence also fails to meet the "heightened reliability" requirement of the Eighth Amendment as described in *Beck v. Alabama, supra,* 447 U.S. 625, 637, and its progeny. It fails under this test both because of its highly speculative – i.e., unreliable – nature, and because of its dubious probative value in assisting the jury in properly reaching its decision as to whether Susan Eubanks should live or die.

For the same reasons, the evidence violated the due process clause of the Fourteenth Amendment by depriving appellant of a fair penalty trial. (*People v. Escobar, supra,* 82 Cal.App.4th 1085, 1095; *People v. Falsetta, supra,* 21 Cal.4th 903, 913; *Estelle v. McGuire, supra,* 502 U.S. 62, 70.) The jury's challenge in this case was to reach a rational verdict in light of the most extreme emotional circumstances imaginable. The introduction of Rod Englert's testimony unnecessarily enhanced the challenge.

The error was prejudicial.

Both this court and the United States Supreme Court have recognized that in any criminal case, the circumstances of a capital crime of which the defendant stands convicted is the *single most important sentencing consideration.*

> Indeed, by directing the sentencer to consider the circumstances of the capital crime, factor (a) of section 190.3 embodies a consideration that the United States Supreme Court has identified as ' "a constitutionally indispensable part of the process of inflicting the penalty of death." (*Johnson v. Texas* (1993) 509 U.S. 350, 360; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 594; *People v. Proctor* (1993) 4 Cal.4th 499, 551.)

(*People v. Bacigalupo* (1993) 6 Cal.4th 457, 479.)

By having this penalty jury consider the circumstances of the crime through the highly inflammatory and unreliable hypotheses of Rod Englert, the court tainted this critical factor with a heavy cloak of emotional prejudice against appellant.

Admission of this testimony violated Evidence Code section 352 in that it was more prejudicial than probative. State-law error at the penalty phase of a capital trial is prejudicial if there is a "reasonable possibility" that the error affected the verdict. (*People v. Jackson* (1998) 13 Cal.4th 1164, 1232; *People v. Brown* (1988) 46 Cal.3d 432, 448; *People v. Kaurish, supra,* 52 Cal.3d 648, 703.) Appellant submits that there is more than a "reasonably possibility" that the inflammatory evidence affected the jury's death verdict. Violation of Evidence Code section 352 in this context also violates the Fourteenth Amendment by depriving appellant of a state-created liberty interest affecting her substantial rights. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

Since the trial court's error also violated the heightened reliability

requirement of the Eighth Amendment and the due process clause of the Fourteenth Amendment, the errors must be judged under the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California*. For the reasons stated, there was nothing harmless about Rod Englert's inadmissible testimony. The judgment of death must be reversed, especially when viewed in conjunction with the other penalty phase evidentiary errors described in the brief. (*People v. Hill* (1998) 17 Cal.4th 800, 844-846.)

IX

Excluding evidence of the living conditions for a life without parole inmate violated appellant's rights under Penal Code section 190.3, as well as the Eighth and Fourteenth Amendments.

Background

At the penalty phase, appellant sought to introduce the testimony of James Esten, a former veteran administrator with the California Department of Corrections. Mr. Esten's proposed testimony included photographs of the exercise yard and cells in the administrative segregation section of the women's prison at Chowchilla. Due to the nature of her crime, appellant would be housed in this area whether sentenced to death or, at least initially, life without parole. (35RT 4311.) The court ruled this testimony was inadmissible under *People v. Fudge* (1994) 7 Cal.4th 1075, and *People v. Quartermaine* (1997) 16 Cal.4th

600. (35RT 4314.)

Esten's testimony was thereafter limited to his review of appellant's jail records, some background information and an interview with appellant. (35RT 4336.) Evaluating this information in the context of his training and extensive experience within the Department of Corrections, he concluded that appellant would pose no significant threat of dangerousness if sentenced to life without the possibility of parole. (35RT 4345.) He reached this conclusion using the criteria set forth in the applicable Department of Corrections guidelines and regulations. (35RT 4350.)

Esten was subjected to vigorous cross-examination by the prosecutor as to his conclusion. (35RT 4346.) At the automatic motion to modify the death judgment, Judge Weber indicated that she gave no weight to Esten's testimony. (38RT 4815.)

Applicable Law

Penal Code section 190.3 sets forth the type of evidence a defendant and the prosecutor may present to a jury in a capital penalty trial. The statute holds, in pertinent part:

> In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, *and sentence* including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or

> convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

(Penal Code section 190.3 [emphasis added].)

The provision lists the various factors the jury should take into account (subsections (a) through (k)). The statute further states that the jury:

> shall impose a sentence of death if the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

In *People v. Thompson* (1988) 45 Cal.3d 86, 139, and again in *People v. Grant* (1988) 45 Cal.3d 829, 860, this court held that evidence demonstrating the conditions under which a prisoner serving life without parole would be "speculative" and inadmissible in a penalty trial. This ruling has been followed in numerous cases where the court has refused to reconsider its holding and, in most cases, the court merely cites to *Thompson* and *Grant*. (See, e.g. *People v. Gordon* (1990) 50 Cal.3d 1223; *People v. Fudge, supra,* 7 Cal.4th 1075, 1116; *People v. Daniels* (1991) 52 Cal.3d 815, 877-878; *People v. Quatermaine, supra,* 16 Cal.4th 600, 632-633; *People v. Majors* (1998) 18 Cal.4th 385, 416; and, *People v. Ervin* (2000) 22 Cal.4th 48, 98.)

In contrast, the United States Supreme Court has repeatedly held that in capital cases:

> [S]tates cannot limit the sentencer's consideration of *any* relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider *any* relevant information offered by the defendant.

(*McClesky v. Zant* (1987) 481 U.S. 279, 306 [emphasis added].)

Legal Analysis

In *People v. Fudge*, this court affirmed its previous holdings in *People v. Grant*, *supra*, 45 Cal.3d 829, 860, and *People v. Thompson, supra*, 45 Cal.3d 86, 139, that testimony involving the conditions of confinement, i.e., "a day in the life of a life prisoner," was irrelevant and speculative "as to what future officials in another branch of government will or will not do." (*People v. Fudge, supra*, 7 Cal.4th at p. 1117, quoting *People v. Thompson, supra,* 45 Cal.3d at 139.)

Appellant is requesting that the court do what it has declined to do in *People v. Fudge*, and several other cases, i.e., reconsider its decisions in the cases cited which exclude evidence describing living conditions on death row, and contrast that with the conditions of confinement for prisoners serving a life term with no possibility of parole. The evidence is relevant in order to permit the jury to make an informed decision as to the severity of a sentence of life with

no chance of parole, and in order to make an informed assessment of a defendant's "future dangerousness" if sentenced to a life term.

Appellant's argument is based upon a close examination of the reasoning of the contrary decisions, and upon decisions of the United States Supreme Court regarding the type of evidence the Constitution requires a defendant be allowed to present in a penalty trial. The court, however, has never addressed the specific issue concerning evidence of "a day in the life" of a prisoner serving a life without parole term.

Penal Code section 190.3

Appellant first argues that the evidence must be admitted under the plain language of Penal Code section 190.3, the statute governing aggravating and mitigating evidence presented at a penalty trial.

As noted above, that section provides that "evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, *and sentence* . . ." (emphasis added.) Simply put, in a penalty trial, the jury must decide between two alternative sentences, execution, or life in prison. (*People v. Brown* (1985) 40 Cal.3d 512, 544.)

In examining this statutory language, the court has previously found that,

Defendant's reliance on certain language in section 190.3 does not

> lead to a contrary conclusion. Reducing section 190.3 to an unfair minimum, defendant quotes it to say he may present evidence "as to any matter relevant to ... sentence ...." What it says, of course, is: "... In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to ..." a listing of factors, all related to the circumstances of the crime or the defendant and his background. The reference to "sentence" then would appear to mean no more than that evidence must be relevant to the factors properly considered in imposing one of the sentences available to the jury at this point. It does not expand what those factors may be.

(*People v. Thompson, supra,* 45 Cal.3d at p. 139.)

Appellant disagrees for two reasons. To hold the term "sentence" "does not expand what those factors may be," ignores the language used in the statute which says, "In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter related to aggravation, mitigation *and sentence including, but not limited to . . .*" (Penal Code section 190.3.) The interpretation given by this court in *Thompson* can be easily drawn if one eliminates the term "sentence," so the statute reads, "aggravation and mitigation, including but not limited to . . ." In other words, the court has assigned no meaning to the word "sentence," making it surplusage.

> In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, *or to omit what has been inserted*; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

(Code of Civil Procedure section 1858.)

"A statutory construction making some words surplusage should be avoided." (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1010 [preference against construction that makes statutory language useless or meaningless]; *City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 55 ["In reviewing the statutory language, we reject an interpretation that would render particular terms mere surplusage, and instead seek to give significance to every word."]) The court recently affirmed this principle in *Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 68.) The *Thompson* court's interpretation of section 190.3 violates a fundamental rule of statutory construction, i.e., rendering a key term of that statute as surplusage.

Next, given the somewhat ambiguous statutory language as to whether the Legislature intended that a capital defendant may present evidence concerning the sentence itself, the "rule of lenity" must be applied.

> When language which is susceptible of two constructions is used in a penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of a statute. (*People v. Snyder* (2000) 22 Cal.4th 304, 314, quoting *People v. Overstreet* (1986) 42 Cal.3d 891, 896.) This policy applies as well when statutory language is ambiguous. (*People v. Weidert* (1985) 39 Cal.3d 836.)

(*People v. Bolter* (2001) 90 Cal.App.4th 240, 245.)

The "venerable rule of lenity," as characterized by the United States Supreme Court, may also be considered a facet of the fair notice requirement of the due process clause of the Fourteenth Amendment. (See language used in *United States v. R.L.C.* (1992) 503 U.S. 291, 305; see also, *Chapman v. United States* (1991) 500 U.S. 453, 462; and, *United States v. Lanier* (1997) 520 U.S. 259, 266.) Accordingly, evidence concerning the sentence is admissible under the terms of Penal Code section 190.3, when that statute is given a fair, common sense meaning, and not one which renders a key term surplusage as the court did in *Thompson*. The rule of lenity supports appellant's interpretation of the statute.

A capital defendant may also present a wide variety of evidence under Penal Code section 190.3, factor (k), which makes admissible, "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The United States Supreme Court has found that under factor (k), evidence of virtually *any* mitigating value may be presented to the jury. (*Boyde v. California* (1990) 494 U.S. 370, 372, 377-386.) The court reasoned that factor (k) does not, "limit the jury's consideration to 'any other circumstance of the crime which extenuates the gravity of the crime.'" (*Id.* at p. 382 [citation omitted, italics in original].) Instead, the factor directs the jury "to consider any other circumstance that might excuse the crime, which certainly includes a defendant's background and character." (*Ibid.*) The court found its

conclusion is reinforced by the other sentencing factors, which "allow for consideration of mitigating evidence not associated with the crime itself, such as the absence of prior criminal activity by a defendant, the absence of prior felony convictions, and youth. When factor (k) is viewed together with those instructions, it seems even more improbable that jurors would arrive at an interpretation that precludes consideration of all non-crime related evidence." (*Id.*, at p. 383. And see similarly, *People v. Payton* (1993) 3 Cal.4th 1050, 1069.)

Given the "catch all" nature of factor (k), appellant submits that even though such evidence is "non-crime related," it nevertheless provides information which the jury may use to impose a sentence less than death, and therefore is admissible under Penal Code section 190.3, factor (k).

By denying appellant the right to present this evidence to the jury under Penal Code section 190.3, the state also violates appellant's state-created statutory liberty interest in presenting such evidence, which is protected by the due process clause of the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

Under Penal Code section 190.3, defendants must be permitted to present evidence regarding the living conditions for a person sentenced to life without parole.

"Relevancy" and "Speculation"

This court has so far held that "prison condition" evidence is inadmissible both because it is irrelevant to the jury's penalty determination, and because it is "speculative" in that it addresses something another branch of government, i.e., the executive, might do in the future. (*People v. Grant*, *supra*, 45 Cal.3d 829, 860; *People v. Thompson, supra*, 45 Cal.3d 86, 139.)

Evidence Code section 210 defines relevant evidence as evidence "having a tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*Ibid.*)

When a penalty phase jury considers the life option, nothing could be more relevant than a description of life in prison. The jurors should know exactly what they would be imposing if they selected this option. The nature of life behind prison walls is not something most people understand. Moreover, the prison environment experienced by an inmate serving life without parole is in all likelihood very different from that of a prisoner serving a determinate term. Jurors likely have many misconceptions regarding prison life. And yet, this court has determined evidence of prison life to be "irrelevant."

The court has recognized that Penal Code section 190.3,

> requires *at a minimum* that [the defendant] suffer the penalty of life imprisonment without parole. It permits the jury to decide only whether he should instead incur the law's single more severe penalty – extinction

> of life itself. It follows that the weighing of aggravating and mitigating circumstances must occur within the context of *those two punishments*; the balance is not between good and bad but between life and death.

(*People v. Brown* (1985) 40 Cal.3d 512, 542 fn. 13 [emphasis in original].)

In determining which punishment to impose "within the context of those two [available] punishments," the jury must understand what each penalty entails. One option is easy to understand – the defendant will be put to death, either by lethal injection or execution in the gas chamber. (Penal Code section 3604.) Imposition of the life option is not so clear. An uninformed or misinformed juror may well reject the lesser sentence based upon misconceptions of that sentence. *People v. Brown* requires that the penalty decision be based upon an understanding and appreciation of each alternative. Without accurate information as to what "life-in-prison" means for the defendant, a jury cannot make an informed decision. This evidence is relevant both in informing the jury of the severity of sentencing a defendant to spend the remainder of her life in prison, and for the jury to determine the "future dangerousness" of a defendant serving such a sentence.

Both the California and the United States Supreme Courts have recognized the importance of the jury understanding the full breadth of their "truly awesome responsibility" in making the decision between life and death for a capital defendant. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 329; *People v. Linden*

(1959) 52 Cal.2d 1, 26.)

That jurors may speculate about the meaning of life in prison when considering penalty is demonstrated by the discussion in *People v. Majors* (1998) 18 Cal.4th 385. During penalty phase deliberations, the jury sent a note asking "to view a life without parole cell and environment with the normal people who live there." (*Id.* at p. 415.) The trial court refused this request and this court affirmed the judgment finding the issue was not relevant to defendant and his background or to the nature and circumstances of his crime. (*Id.* at p. 416.)

In upholding a trial court's exclusion of prison condition evidence as it relates to future dangerousness, this court nevertheless recognized, "While the defendant might have an interest in telling the jurors of the horrors of execution or the rigors of confinement in order to impress upon them the gravity of their responsibility, that interest could be satisfied in his argument." (*People v. Daniels, supra,* 52 Cal.3d 815, 877-878; See similarly, *People v. Grant, supra,* 45 Cal.3d 829, 860.) In other words, the court recognizes the *relevancy* of this information, yet would limit it to argument, with no evidentiary basis. This is improper since counsel may not argue matters that are not in evidence. (*People v. Bolton* (1979) 23 Cal.3d 208, 212; *People v. Kirkes* (1952) 39 Cal.2d 719, 724; *People v. Villa* (1980) 109 Cal.App.3d 360, 364.)

In the present case, the jury heard evidence of a physical confrontation

between appellant and another jail inmate, and an alleged threat by appellant toward a staff member. (35RT 4343.) This was used by the prosecutor as evidence of appellant's future dangerousness, even if incarcerated. (37RT 4729.) Had the jury been presented with accurate evidence regarding the conditions under which appellant would be confined if sentenced to life in prison, it would have learned that a maximum security unit of a state prison is qualitatively different than a county jail. Yet, it was only the local jail setting that was described to the jury. If evidence of defendant's behavior in a county jail is relevant in determining a person's "future dangerousness," why not evidence concerning the actual conditions under which she would be permanently confined?

This court has also upheld the exclusion of such evidence as "speculative." "Describing future conditions of confinement for a person serving life without the possibility of parole involves speculation as to what future officials will or will not do." (*People v. Majors, supra,* 18 Cal.4th at p. 416, quoting *People v. Thompson, supra*, 45 Cal.3d at p. 139, relying on *People v. Ramos* (1984) 37 Cal.3d 136, 156-158.) However, *Ramos* is no longer controlling on the point relied upon in *Thompson*.

In *People v. Ramos (I), supra,* 30 Cal.3d 553, this court found the so-called "Briggs Instruction," advising a jury of the Governor's power to commute

an inmate's life-without-parole sentence, violated the Eighth and Fourteenth Amendments as being both irrelevant and speculative. This court believed that penalty phase evidence should be limited to "consideration of the character and record of the individual offender and the circumstances of the particular offense." (*Id.* at p. 593, citing *Woodson v. North Carolina* (1976) 428 U.S. 280, 304.)

The United States Supreme Court reversed this holding, finding that the instruction did not interject an irrelevant matter into the deliberation process, nor was it unconstitutionally speculative for the jury's consideration. (*California v. Ramos* (1983) 463 U.S. 992.)[16] Relying on *Jurek v. Texas* (1976) 428 U.S. 262, the court found that some speculation is traditionally involved in administering various facets of the criminal justice system, such as that exercised by parole and pardon boards. (*Id.* at p. 1004.) The court noted that the "Briggs instruction" "invites the jury to predict not so much what some future Governor might do, but more what the defendant himself might do if released into society." (*Id.* at p. 1005.)

Similarly, presentation of evidence as to the conditions of confinement for

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[16] On remand, this court held that its former conclusion, based upon the Eighth and Fourteenth Amendments, was equally compelled under the independent force of the California Constitution. (*People v. Ramos (II), supra,* 37 Cal.3d 156-158. The Briggs Instruction is mandated by California Penal Code section 190.3.

a life prisoner gives the jurors a context to view the severity of the life sentence they are considering, as well as the defendant's capacity for future dangerousness while living in the described prison environment. That these conditions *may* change at some time in the future does not justify the exclusion of the evidence. A defendant would present the jury with living conditions as they currently exist in prison and have existed for many years without significant change. These conditions are not subject to whimsical variations, but are governed, in detail, by state administrative regulations. (See California Code of Regulations, title 15, Rules of the Director of Corrections.)

It is also speculative to conclude that conditions *may* change to the defendant's advantage in the future.

Evidence demonstrating the living conditions for a prisoner serving a life without parole term is necessary to properly explain the alternative to death, and to assess future dangerousness. It is not too speculative for admission into evidence.

Exclusion of the evidence violates the Eighth and Fourteenth Amendments.

While upholding the exclusion of evidence concerning the living conditions of a prisoner serving a life without parole term, the court in *People v. Fudge* nevertheless found that an expert's testimony which "would have

described him as being a likely candidate to lead a productive and nonviolent life in prison," was relevant and admissible as mitigating evidence. (*People v. Fudge, supra,* 7 Cal.4th at p. 1116.) The court believed "such evidence may not be excluded from the sentencer's consideration" based on the Eighth and Fourteenth Amendments. (*Id.* at p. 1117, quoting *Skipper v. South Carolina* (1986) 476 U.S. 1, 5, and citing *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110.)

This court has given an unduly narrow reading of United States Supreme Court precedent describing the type of mitigating evidence a defendant may present at a capital penalty trial.

In *Lockett v. Ohio* (1978) 438 U.S. 586, the court found that Ohio's death penalty statute violated the Eighth and Fourteenth Amendments in that it unfairly prevented the defendant from presenting mitigating evidence regarding her character, prior record, age, lack of specific intent to cause death, and her relatively minor role in the robbery and murder. (*Id.* at p. 597.) In reaching its decision, the court quoted *Williams v. Oklahoma* (1959) 358 U.S. 576, 585, where it previously observed that, "In discharging his duty of imposing a proper sentence, the sentencing judge is authorized, *if not required*, to consider all of the mitigating and aggravating circumstances involved in the crime." (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 603 [emphasis added by *Lockett* court].)

Lockett also referred to *Woodson v. North Carolina* (1976) 428 U.S. 280, 304, where the court stated:

> [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

(*Ibid.*)

The *Lockett* court concluded,

> [T]hat the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a 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. 604 [emphasis in original].)

The court did observe, in a footnote, that nothing in the opinion would limit the authority of a court to exclude irrelevant evidence not bearing on a defendant's character, prior record, or the circumstances of the offense. (*Id.* at p. 605, fn.12.)

In *Eddings v. Oklahoma, supra,* 455 U.S. 104, the lower courts held that evidence of Edding's background was irrelevant because it did not provide a legal excuse from criminal responsibility. The court rejected this approach, "By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency

produced by ignoring individual differences is a false consistency." (*Id.* at p. 875.) "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." (*Id.* at pp. 876-877.)

The *Eddings* court concluded, "the state courts must consider *all relevant mitigating evidence* and weigh it against the evidence of aggravating circumstances." (*Id.* at p. 878 [emphasis added].)

In *Jurek v. Texas*, *supra*, 428 U.S. 262, the court examined the Texas death penalty statute. In doing so, the court considered the provision which required the sentencer to predict the defendant's possible future dangerousness based on in-custody behavior.

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. *What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.*

(*Id.* at p. 274 [emphasis added].)

Similarly, in *Skipper v. South Carolina* (1986) 476 U.S. 1, 5, the court held that exclusion from the sentencing hearing of the testimony of jailers and a regular visitor regarding defendant's good behavior during the seven months he spent in jail awaiting trial deprived him of his right to present relevant mitigating evidence. The court based its decision, in large part, on the principles announced in *Lockett* and *Eddings*.

And, again in *Hitchcock v. Dugger* (1987) 481 U.S. 393, 398, the court struck down a Florida statute which limited the mitigating evidence a capital defendant could present to that enumerated in a state statute. The court found relevant, non-statutory mitigating evidence must also be admitted. (*Ibid.*)

In each case, the Supreme Court has recognized the importance of permitting a capital defendant to introduce mitigating evidence which may persuade a jury to impose a sentence less than death. And this includes evidence of in-custody behavior as a predictor of future dangerousness which California law also recognizes. (*People v. Fudge, supra,* 7 Cal.4th at p. 1116; *People v. Medina* (1995) 11 Cal.4th 694.)

When a state raises the issue of a capital defendant's "future dangerousness," due process considerations entitle the defendant to an instruction informing the jury that life in prison means life without the possibility of parole. (*Simmons v. South Carolina* (1994) 512 U.S. 154.)

> In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole. The trial court's refusal to apprise the jury of information so crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled with our well-established precedents interpreting the Due Process Clause.

(*Id.* at p. 163.)

What California has failed to recognize is that by making "future dangerousness" a valid consideration, and then preventing a capital defendant from introducing evidence relevant to this factor, i.e. the living conditions and environment for a defendant sentenced to life in prison, it deprives a defendant of the opportunity to introduce relevant evidence needed by the jury to make an informed decision as to this factor. "Future dangerousness" of a person living in free society, or even in a local detention facility, is very different than for a person subjected to a maximum security prison facility.

Such evidence is also "mitigating" in that jurors may well reject the death sentence after learning about the harsh and secure conditions of a maximum security prison.

By excluding such evidence, California courts deprive capital defendants of a fair penalty trial, in violation of Penal Code section 190.3, and the Eighth

and Fourteenth Amendments to the United States Constitution.

The error was prejudicial.

> Exclusion of this mitigating evidence thus violates the constitutional requirement that a capital defendant must be allowed to present all relevant evidence to demonstrate he deserves a sentence of life rather than death. (*Skipper, supra*, 476 U.S. at p. 5; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Exclusion of such evidence, called *Skipper* error, does not automatically require reversal, but is instead subject to the standard of review announced in *Chapman v. California, supra*, 386 U.S. 18, that is, the error is reversible unless it is harmless beyond a reasonable doubt. (*People v. Robertson* (1989) 48 Cal.3d 18, 55; *People v. McLain, supra*, 46 Cal.3d at p. 109; *Lucero, supra*, 44 Cal.3d at p. 1032.)

(*People v. Fudge, supra*, 7 Cal.4th at p. 1116.)

The prosecution's penalty phase case was based largely on its portrayal of appellant as a violent and evil person. She had never before been convicted of a crime and had, prior to the incident, been a good mother and provider as a single parent. Evidence was introduced that she had been involved in an altercation with another inmate at the jail. This was the only evidence that the jury received regarding appellant's possible future dangerousness while in custody.

Having successfully argued to exclude evidence regarding appellant's likely living conditions if sentenced to a life term, the prosecutor then gave her own inaccurate portrayal of such living conditions. In her closing argument, she told the jury that appellant would enjoy three meals a day, perhaps have a loving

relationship, would enjoy sunrises and sunsets, would "have hope" and participate in activities such as watching television. (37RT 4698.) So the jury was not only left uninformed, but rather, misinformed as to the context in which to judge this factor. Had the jury understood the full nature and severity of a life-without-possibility-of-parole sentence, as well as the secure environment in which such a prisoner is confined, it may well have decided that penalty would adequately punish appellant and provide for the protection of society, including future prison contacts.

The trial court's ruling violated section 190.3 as well as appellant's Eighth and Fourteenth Amendment rights to present relevant mitigating evidence which may have persuaded the jury to impose the life option. The judgment of death must be reversed.

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The exclusion of powerful mitigating evidence as hearsay, and the admission of unreliable hearsay evidence in aggravation violated appellant's rights to a fair penalty phase trial and the heightened reliability requirement of the Eighth and Fourteenth Amendments.

Introduction

At the penalty trial, appellant sought to introduce mitigating evidence concerning an event at the jail where she sought and ultimately obtained needed medical attention for another inmate. This was excluded as being "hearsay." Appellant also sought to introduce evidence that she was sexually molested by her cousin, as well as her father, while an adolescent. This too was excluded. In contrast, the court admitted evidence of an alleged incident at the jail where appellant supposedly became angry during an organized game, and walked out after making threats. The court's rulings lacked balance allowing inflammatory hearsay in aggravation and denying, as unreliable, important mitigating evidence.

Background

The medical treatment incident.

Appellant attempted to introduce the testimony and written report of Dr. Bart Jarvis, who worked at the county jail where appellant was confined after her arrest and release from the hospital. (32RT 3903.) The report detailed an

incident where another inmate was refused medical treatment by a nurse. Appellant intervened and helped get the inmate the medical attention she needed. The nurse who had denied the inmate medical attention was later discharged from her duties at the jail. (32RT 3901.)

After hearing argument regarding the prosecutor's objection, the court ruled as follows:

> The Court: Yeah. I am not in -- I mean, it just would be too many levels of hearsay to be admissible.
>
> I think we talked at sidebar about how I am inclined to allow other types of hearsay that I find to be reliable to be admitted. And of course, with the last witness, the court allowed that.
>
> But I -- I just find that this type of hearsay without anyone even being present to recount what occurred – I don't even know when this incident took place, if it was several -- almost several years ago, now, or when it was.
>
> But --.
>
> So if you want to talk to him out in the hallway
>
> And modify your offer of proof, that's fine.
>
> Do you want to just file this as court's exhibit
>
> Next in order?

Mr. Garcia: Yes, please.

The Court: Okay.

* * *

Mr. Garcia: and just to complete the record, the idea behind even attempting to admit this type of evidence would be good acts of the defendant while in custody.

The Court: Yes.

Mr. Garcia: Thank you.

The Court: I understand the relevancy.

(32RT 3907-3908.)

The defense offered no evidence of this incident.

The sexual molestation of appellant by her cousin

Appellant's uncle, Don Smith, was asked during direct examination, if his son, Greg, had an "inappropriate relationship" with appellant when she was living with the Smith family as a young teenager. (33RT 4074.) The prosecutor objected as to lack of foundation, and the objection was sustained. (33RT 4074.) The following took place at sidebar:

Mr. Rafael: Your honor, under Green versus Pennsylvania [sic: Georgia], there is a certain level of hearsay which is permitted at the penalty phase of this trial.

As we know, our best witness for this particular incident has cancer and is unavailable. We did have her under subpoena. I think this gentleman learned of the relationship both from Greg and from Susan and from Rose [his former wife, and Greg's mother].

And it -- what it demonstrates is that when Susan was a young girl, age 15, she, of course, did not receive the proper structure or supervision in her childhood, and that's the point of the story.

Sure, it's hearsay, but —

The Court: So he heard from Rose who heard from Susan?

Mr. Rafael: No.

The court: Who did he hear from?

Mr. Rafael: From Rose, Susan and Greg, all three of them.

The Court: Susan talked to him about this?

Mr. Rafael: I believe she did. I know Greg did, and I know Rose did.

Ms. Howard-Regan: Greg is dead. Rose isn't here.

The Court: Right.

Ms. Howard-Regan: I realize that hearsay is admissible.

However, I don't see this as being reliable hearsay.

He has already indicated that he was not involved with what was

going on there at the time that the defendant lived with Rose. He was already divorced from Rose, and I believe his testimony -- I don't recall his exact words, but he said he was not involved with what was going on there at the time.

The Court: Right; that's what he said.

I think it's just too -- I don't find it to be reliable based upon the witness' own statements, so I -- I've allowed in an extensive amount of hearsay through every single defense witness, I think, but at some point in time, it frankly just becomes a joke.

I mean, this would be at least a couple layers of hearsay, so I'm going to sustain an objection on hearsay grounds.

(The following proceedings were held in open court in the presence of the jury:)

Q By Mr. Rafael: Sir, is your son Greg available as a witness?

A He's deceased. He died a year ago May 9th.

(33RT 4074-4075.)

Molestation of appellant by her father

The defense called Debbie Burdette, a career counselor at Maric College at the time of appellant's enrollment at the school. (35RT 4388, 4390.) Appellant and Ms. Burdette often discussed appellant's "bad background."

(35RT 4391.)

During Ms. Burdette's testimony, the prosecutor made a "preemptive objection" and asked for a sidebar conference. (35RT 4393.) The prosecutor stated that she was aware that appellant had told Ms. Burdette that she and her sister had been molested by their father. (35RT 4394.) Defense counsel intended to solicit the testimony regarding appellant having been molested by her father. (35RT 4394.) The prosecutor complained that appellant had never mentioned this to other mental health care professionals and stated that she may have to bring in other witnesses to rebut the claim. (34RT 4304.) After verifying with defense counsel that appellant had not mentioned this to "other mental health care professionals," the court found this to be "inadmissible hearsay," and excluded the testimony. (35RT 4394.)

Incidents at the jail and hospital

Appellant was confined in the county jail during trial. During cross-examination of James Esten, the prosecutor referred to a report by a nurse and asked if Esten had read the report. (35RT 4361.) The defense objected and the lengthy discussion at the sidebar conference is worthy of repeating here in its entirety.

Mr. Rafael: First of all, this is -- this is hearsay. No foundation has been laid that he relied upon these notes for any specific

purpose. He said notes overall. Is he an expert that can rely on medical opinion? I don't think so.

The Court: What are you showing him?

Ms. Howard-Regan: These are not medical opinions.

These are entries -- things indicating "she's vindictive, cursing generously in all directions, full of loathing." And I can't make out that word. Then it says "antisocial from" -- and I can't make that out.

The Court: Who is this a note from?

Ms. Howard-Regan: This is just notes that -- he says he relied on all the notes that -- all the records that were provided from the jail. While she's in custody March 26th, 1993 --

The Court: 1998.

Ms. Howard-Regan: I mean 1998.

This is also a nurse's notes where she indicates she tells the night -- the nurse that she was shown a picture of Eric when she woke up from her coma at the funeral. It was in the paper. Eric with this bitch and her cunt sister at the kids' funeral with her hand on his leg, and she said her preliminary hearing was coming up and Eric better not bring her because he knows I'll go off.

She smiled and stated: I'll kill both there -- both right there. And I've never thought about killing, but I will.

The Court: Okay.

Ms. Howard-Regan: And then there is, also: during a game that was being played, patient became very angry towards -- I don't know what o-t stands for -- staff during the game. Immediately patient insisted that she --

The Court: Be returned to her room.

Ms. Howard-Regan: And she said, "I may hit the bitch."

Here I think that's referring to the same incident where there's an entry indicating: middle of the game she became argumentative over a call regarding which team won the round. Patient's level of aggression escalated to a threat to hit the staff person. This writing over her petty issue.

The Court: Okay.

Ms. Howard-Regan: These are all things that occurred while in custody. He's indicating that he relied on reports that were submitted to him while in custody. Even if he was not provided these, I'm entitled to ask him if this would change his opinion. He said that his opinion is based entirely on conduct in jail, not

outside of jail. And these are statements, threats made while defendant is in jail.

The Court: I think it's admissible impeachment of this witness.

Mr. Rafael: Well, first --

The Court: It's part of the jail file. Its conduct which occurred.

Mr. Rafael: First of all, Judge, I think a foundation has to be laid that he's reviewed them and that he relied on them, number one.

The Court: Well, sir --

Mr. Rafael: Number two, this is different from a --

The Court: I'm sorry, Mr. Rafael. If he wasn't provided with this material and you think that you get to call him to review part of the record and then there are other incidents while in custody that other jail officials have reported that go to this issue of dangerousness and you think that she isn't allowed to use that when he is saying his entire opinion is based upon her conduct while in custody with inmates and staff, I'm sorry, but it goes directly to the basis for this witness' opinion.

Mr. Rafael: These are not jail staff. These are not inmates. This is a hospital.

The Court: I'm sorry.

Ms. Howard-Regan: He said --

The Court: I thought that was Las Colinas.

Ms. Howard-Regan: He said he reviewed medical records, psych records, everything while she's been in custody.

The Court: Right. And these occurred while at Las Colinas.

Ms. Howard-Regan: And some of them while she was in the psych ward.

The Court: Where, while in custody; right?

Ms. Howard-Regan: While in custody.

Mr. Rafael: At UCSD.

This is staff from UCSD. This is not jail staff.

The Court: I don't understand. When did she go to UCSD?

Ms. Howard-Regan: When she was suicidal. This was early on. So they put her in the psych ward, and she made statements while she was -- but she's in custody, and he testified that he reviewed --

The Court: Eric Eubanks' statement was made in UCSD or Las Colinas, just so the record's clear?

Ms. Howard-Regan: It's under department of services, mental health services. This would have been 12-15-97, which was -- let's see. She was admitted into the psychiatric security unit.

The Court: Okay. Again, you can show them to the witness. You can ask him if he reviewed it, and you can ask him if it would change his opinion. I think it is all while she is in custody. It goes directly to the basis of the witness' opinion. Overruled.

Mr. Rafael: I would ask the court that the records be delineated for the jury that these are in fact psychiatric records while she was being hospitalized in a psychiatric ward, that we don't know what medication she was under, if any, we don't know who the people are who were making the notes.

The Court: You can cover that all, sir, in redirect.

That's all fair game.

Ms. Howard-Regan: This one appears to be -- it says sheriff's department mental health division. So this appears to be at Las Colinas.

The Court: You don't know that for sure. She could still -- they -- they consider her still in custody when she's in that psych ward.

Mr. Rafael: I will indicate to this court that in fact she was not at Las Colinas on that date. She was -- she had a gunshot wound. She was at UCSD.

Ms. Howard-Regan: This is '98, March 26th, '98.

The Court: She was in Las Colinas in March of '98.

Ms. Howard-Regan: "Patient has been in a housing by her civil [sic] for a week now. She resents the placement, reports both deputies and trustees" --

The Court: Again, whether she's in the psych ward or she's in Las Colinas, she's in custody for purposes of sheriff designation. You can verify that with the witness, but this is fair game in light of the -- the testimony tendered on direct. Overruled.

Ms. Howard-Regan: Thank you.

The following proceedings were held in open court in the presence of the jury:

Q By Ms. Howard-Regan: Mr. Esten, I'm showing you a page that -- that's labeled "progress note," and it's dated March 26, 1998, and I would ask you if you -- if you recognize that document as something --.if you could just read it over to yourself and see if that's something that you were provided.

A I have looked for a March 26th entry, and I do not have one.

Q Okay.

A So I have not seen it.

Q Now, on this entry by -- and again, it's illegible as to -- I

cannot read the handwriting, but it indicates "County of San Diego Sheriff's Department medical and mental health division," and it appears to be an interview at Las Colinas, because it indicates a housing --

Mr. Rafael: Your honor, I would object: hearsay.

The Court: Overruled.

(35RT 4363 - 36RT4466.)

The prosecutor then used these reports to impeach Esten's conclusion regarding appellant's future dangerousness. She referred to the details in the reports including an observation by an unidentified person that appellant was "anti-social" and had "increasing aggressiveness" (35RT 4366), that at the jail appellant had allegedly made a statement to the affect that, "I may hit the bitch" (35RT 4369), and that appellant allegedly threatened a staff member. (35RT 4371.)

Applicable Law

The authorities outlining a capital defendant's right to present almost *any* type of evidence which may cause the jury to impose the lesser sentence of life-without-parole are set forth in the previous argument.

Such mitigating evidence may include hearsay which would not be admissible during the guilt phase, if it is "highly relevant." (*Greene v. Georgia*

(1979) 442 U.S. 95, 96-97; *People v. Phillips* (2000) 22 Cal.4th 226, 238 ["[e]xclusion of hearsay testimony at a penalty phase may violate a defendant's due process rights if the excluded testimony is highly relevant to an issue critical to punishment and substantial reasons exist to assume the evidence is reliable."])

Evidence Code section 1310 *et seq.* provides an exception to the hearsay rule for information concerning "family history," and that statute has been interpreted liberally. (See, e.g., *Estate of Flood* (1933) 217 Cal. 763, 782; *Estate of Berg* (1964) 225 Cal.App.2d 423, 431; and, *Estate of Stevenson* (1992) 11 Cal.App.4th 852, 863.) It has been utilized in criminal and civil cases. (See, e.g. *People v. Vogel* (1956) 46 Cal.2d 798, 805; and, *People v. Bailey* (1961) 55 Cal.2d 514, 517.)

In order to introduce evidence under *any* theory, the proponent must first lay a foundation for admissibility. (Evidence Code section 400 *et seq.*; See gen., *People v. Dunlap* (1993) 18 Cal.App.4th 1468, 1476; and, *People v. Zunis* (2005) 134 Cal.App.4th Supp. 1.) Moreover, in a capital trial, there is a "heightened reliability" requirement imposed by the Eighth Amendment as to evidence offered by the prosecution. (*Beck v. Alabama*, *supra*, 447 U.S. at p. 637.)

Legal Analysis

A review of the court's rulings regarding the admissibility of evidence

offered by the parties demonstrates a lack of balance by the court, tilting in each instance in favor of the prosecution.

Medical treatment incident at the jail

The court excluded evidence that appellant successfully obtained medical treatment for another inmate when such treatment was improperly denied by staff, after finding the evidence contained "just too many levels of hearsay."

This evidence was clearly admissible under section 190.3 factor (k), and to offset the prosecution's claim regarding appellant's future dangerousness in prison. While the evidence may have included some hearsay, it was reliable in that it had been contemporaneously recorded by jail staff. And while the doctor who prepared the report lacked a precise recollection as to certain details, the record shows he could have laid the foundation for admission of the report itself under the official records exception to the hearsay rule. (Evidence Code section 1280 *et seq.*; *People v. Parker* (1992) 8 Cal.App.4th 110, 117.) The record shows the doctor arrived at the jail within 30 minutes of the incident and, following an investigation, recorded his findings in the report. (32RT 3905-3906.) Clearly then, the writing was made "at or near the time of the act, condition, or event" (Evidence Code section 1280, subd.(b)), and "[t]he sources of information and method and time of preparation" were sufficient "to indicate its trustworthiness." (Evidence Code section 1280, subd.(c).)

Moreover, this incident was *precisely* the type appellant needed to offset the prosecution's hearsay evidence regarding the alleged misconduct in the jail. Accordingly, in spite of the hearsay considerations, its exclusion was fundamentally unfair and violated the due process clause of the Fourteenth Amendment. (*Greene v. Georgia, supra,* 442 U.S. 95, 96-97; *People v. Phillips, supra,* 22 Cal.4th 226, 238.) Further, improper exclusion of evidence demonstrating good behavior by a capital defendant while in custody violates the Eighth and Fourteenth Amendments. (*Skipper v. South Carolina, supra,* 476 U.S. 1, 5; *People v. Fudge, supra,* 7 Cal.4th 1075, 1116.)

Molestation of appellant by her father and cousin

The court excluded, on hearsay grounds, testimony from appellant's uncle that, at age 15, she was molested by her cousin, and from appellant's former vocational counselor that both she and her sister had been molested by their father.

Evidence of appellant's status as a victim of incest and child molestation is undoubtedly contemplated as background evidence under Penal Code section 190.3 factor (k). (*In re Jackson* (1992) 3 Cal.4th 578, 611, overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 544 fn.6; *Wiggins v. Smith* (2003) 539 U.S. 510.)

While the evidence involved hearsay, the family history exception

(Evidence Code section 1310 *et seq.*,) permitted its introduction. Evidence Code section 1311, holds that a statement of a declarant concerning birth, marriage, divorce, etc., "or other similar facts of family history is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness," and the declarant is related by blood or marriage or is otherwise "intimately related" to the family and the statement was not made under circumstances so as to indicate its lack of trustworthiness.

The allegation that appellant was molested by her cousin was made by her uncle, an attorney, against his own son. The incident was reported by his former wife, appellant, and by his son, who died approximately one year before the trial. There was nothing to indicate any degree of untrustworthiness. The cousin had died and the wife was on that very day undergoing cancer surgery in Texas. Appellant was "unavailable" in that she elected not to testify. (Evidence Code section 240 subd. (a)(1); and see gen., *People v. Cudjo* (1993) 6 Cal.4th 585, 605; and, *People v. Duarte* (2000) 24 Cal.4th 603, 609.)

The testimony of the vocational counselor, Debbie Burdette, that appellant had been molested by her father was also admissible under the family history exception. She testified that she and appellant had discussed appellant's background at length on many occasions. (35RT 4392.) She was, therefore, "intimately" familiar with appellant's family history. The statement was also

trustworthy as it was made by appellant, in confidence, years before the shootings. Appellant had also told Ms. Burdette that her father had molested her sister. Appellant's half-sister, Brenda Idol, testified that she had sex with the girls' father, Bill Stanley, after returning home from appellant's mother's funeral. There was nothing to indicate a lack of trustworthiness as to this statement. Ms. Burdette's testimony, and that of appellant's uncle, each met the criteria for admission set forth in *Ohio v. Roberts* (1980) 448 U.S. 56, and *California v. Green* (1970) 399 U.S. 149.

Moreover, as in the case of appellant's molestation by her cousin, the evidence was relevant and powerful mitigating evidence to present the jury considering a death sentence. Appellant's alleged hatred of the men who she felt betrayed her is more understandable in light of her history of sexual abuse by the men in her own family, including her father. (Compare argument of prosecutor at RT 3291, regarding appellant's alleged "hatred of dateable men.") This evidence should also have been admitted under the due process clause to ensure a fair penalty trial for appellant.

The alleged incidents of in-custody misconduct

Under the guise of impeaching the expert testimony of James Esten as to appellant's future dangerousness, the prosecutor was allowed to introduce inflammatory statements contained in unauthenticated, illegible reports and notes

made by unknown persons. The reports should have been excluded under Evidence Code section 352, and for a lack of foundation.

The prosecutor could not offer any degree of certainty as to the authors of the report that appellant, while still in the hospital, was observed to be increasingly agitated and aggressive, and made threats towards Eric Eubanks and a female who accompanied him to the childrens' funeral. Much of the report was illegible. The same was true of the report prepared by jail staff, noting that, while playing some type of organized game, appellant became belligerent, referred to another inmate by saying "I may hit the bitch," followed by a threat to a jail staff member. Neither of these reports met the requirements of the official records exception, and there is no applicable exception for admitting them as impeachment evidence. Admission of this inflammatory evidence to "impeach" James Esten was a windfall for the prosecutor. That the evidence fails miserably under the "heightened reliability" requirement of the Eighth Amendment is self-evident.

The court's erroneous rulings were prejudicial.

Appellant's right to a fair penalty trial is fundamental. The strongest evidence in support of a death sentence involved the horrible circumstances of the crime itself. At the penalty phase, the prosecution introduced the lengthy testimony of crime scene reconstructionist, Rod Engert. (30RT 3468.) He

provided, in excruciating and gut-wrenching detail, his version of the killings. This was supplemented by character-assassination evidence presented by the prosecution alleging that appellant was *not* previously a good mother as the defense claimed, but was instead, neglectful and abusive towards her children. According to the prosecutor, appellant was a violent, abusive, manipulative and vulgar woman who committed these horrible crimes for a selfishly evil purpose. In support of this theme, the prosecution was able to exclude evidence of appellant's good Samaritan acts, as well as critical background information which could help the jury understand what led her to commit this atrocity. This court has recognized the powerful impact evidence of a capital defendant's childhood abuse can have on a penalty trial jury. (See *In re Jackson, supra,* 3 Cal.4th 578, 611 [reversing death verdict where defense counsel failed to investigate and present as mitigating evidence, defendant's history of childhood abuse]; and, see similiarly, *Wiggins v. Smith* (2003) 539 U.S. 510, and, *Boyde v. Brown* (9th Cir. 2005) 404 F.3d 1159.)

Moreover, these issues must be considered with the other penalty phase errors, including the improper admission of the alleged "feces incident" concerning Aaron, the inflammatory testimony of the crime scene reconstructionist and the exclusion of key evidence regarding appellant's potential for "future dangerousness" in prison if given a life sentence. The

exclusion of the medical treatment incident and admission of appellant's alleged statements and threats at the hospital and in jail certainly enhanced the prosecution's case.

The prosecution cannot demonstrate that, but for these errors, appellant would not have obtained a more favorable result at her penalty trial. (*People v. Watson, supra,* 46 Cal.2d 818.) And the state cannot prove beyond a reasonable doubt that these constitutional errors did not contribute to the jury's death verdict. (*Chapman v. California, supra*, 386 U.S. 18.) The judgment of death must be reversed.

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XI

The cumulative impact of the errors deprived appellant of her right to a fair trial and requires a reversal of her convictions and death sentence.

Appellant was entitled by due process clauses of the state and federal constitutions to a fair trial. (*Estes v. Texas* (1965) 381 U.S. 532; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 470.)

Her right to a fair trial in the present case was violated for all of the reasons previously mentioned. The trial court allowed the state to present incompetent evidence on the only contested issue in the guilty phase — appellant's intoxication. The police lied to the magistrate in order to obtain the search warrants which produced the notes used to establish premeditation. The trial court admitted inflammatory evidence at the penalty phase including evidence that appellant smeared feces on the face of her nephew, and the manner of killing the boys. In each case, the reliability of the prejudicial evidence was in question. The court admitted further prejudicial hearsay evidence in aggravation including the incidents involving misconduct in custody, but excluded reliable hearsay evidence in mitigation including acts of kindness by appellant in the jail, and the fact that she had been molested by relatives as a child.

In the end, the jury charged with deciding life or death was given a

version of the evidence which tilted strongly in favor of the prosecution. And, perhaps most importantly, this situation was aggravated by the system of selecting the jurors which, allowed for the self-excusal of any juror not inclined to serve, and a seated jury which did not reflect the community in terms of racial composition, and perhaps attitude toward the death penalty.

XII

California's death penalty statute, as interpreted by this court and applied at appellant's trial, violates the United States Constitution.

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that

system in context." (*Kansas v. Marsh* (2006) 126 S.Ct. 2516, 2527, fn. 6.)[17] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

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[17] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (126 S.Ct. at p. 2527.)

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime — even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) — to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code section 190.2, the "special circumstances" section of the statute — but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

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

A.

Appellant's death penalty is invalid because Penal Code section 190.2 is impermissibly broad.

To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)"

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v. Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained 26 special circumstances purporting to narrow the category of

first degree murders to those murders most deserving of the death penalty.[18] These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a

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

challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law. (See Section E. of this Argument.)

B.

Appellant's death penalty is invalid because Penal Code section 190.3(a) as applied allows arbitrary and capricious imposition of death in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

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

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor

based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[19] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[20] or having had a "hatred of religion,"[21] or threatened witnesses after his arrest,[22] or disposed of the victim's body in a manner that precluded its recovery.[23] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has

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[19] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

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

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

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

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

survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa v. California*, *supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts — or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

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

sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C.

California's death penalty statute contains no safeguards to avoid arbitrary and capricious sentencing and deprives defendants of the right to a jury determination of each factual prerequisite to a sentence of death; it therefore violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" (section 190.2) or in its sentencing guidelines (section 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating

circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make — whether or not to condemn a fellow human to death.

1.

Appellant's death verdict was not premised on findings beyond a reasonable doubt by a unanimous jury that one or more aggravating factors existed and that these factors outweighed mitigating factors; her constitutional right to jury determination beyond a reasonable doubt of all facts essential to the imposition of a death penalty was thereby violated.

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

All this was consistent with this Court's previous interpretations of

California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [hereinafter *Blakely*]; and *Cunningham v. California* (2007) 2007 WL 135687 [hereinafter *Cunningham*].

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

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at p. 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and

not elements of the offense. (*Id.*, at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington*, *supra*, 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 313.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the

maximum he may impose without any additional findings." (*Id.* at p. 304.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*United States v. Booker*, *supra*, 543 U.S. at p. 244.)

In *Cunningham*, the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (*Cunningham v. California*, *supra*, Section III.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

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a.

In the wake of Apprendi, Ring, Blakely, and Cunningham, any jury finding necessary to the imposition of death must be found true beyond a reasonable doubt.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[24] As set forth in California's "principal sentencing

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

instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[25] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[26]

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[25] In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that Ring requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at p. 460.)

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

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi*, *Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at p. 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham*.[27] In *Cunningham*, the principle that any fact which exposed a

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[27] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi*, *Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at p. 1253;

defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (*Id.*, pp. 6-7.) That was the end of the matter: Black's interpretation of the DSL "violates *Apprendi's* bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." (*Cunningham*, supra, p. 13.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.* p. 14.)

The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic

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Cunningham, supra, at p.8.)

jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line"). (*Cunningham*, supra, at p. 13.)

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[28] indicates, the maximum penalty for any first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the middle rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts — whether related to the offense or the offender — beyond the elements of the charged offense." (*Cunningham*, supra, at p. 6.)

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

This argument overlooks *Apprendi's* instruction that "the relevant

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

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

(*Ring*, 124 S.Ct. at 2431.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 530 U.S. at 604.) Section 190, subd.(a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury

must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the way in which the offender carried out that crime." (*Id.*, 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

b.

Whether aggravating factors outweigh mitigating factors is a factual question that must be resolved beyond a reasonable doubt.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors — a prerequisite to imposition of the death sentence — is the functional equivalent of an element of

capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring*, *supra*, 65 P.3d 915, 943; accord, *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003); *State v. Ring*, 65 P.3d 915 (Az. 2003); *Woldt v. People*, 64 P.3d 256 (Colo.2003); *Johnson v. State*, 59 P.3d 450 (Nev. 2002).[29])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U2.S. 721, 732 ["the death penalty is unique in its severity and its finality"].[30]) As the high court stated in *Ring*, *supra*, 122 S.Ct. at pp. 2432, 2443:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which

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

[30] In its *Monge* opinion, the U.S. Supreme Court foreshadowed Ring, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).)

> the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

2.

The due process and the cruel and unusual punishment clauses of the state and federal constitution require that the jury in a capital case be instructed that they may impose a sentence of death only if they are persuaded beyond a reasonable doubt that the aggravating factors exist and outweigh the mitigating factors and that death is the appropriate penalty.

a. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important

must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at pp.

363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Ca1.3d 306 (same); *People v. Thomas* (1977) 19 Ca1.3d 630 (commitment as narcotic addict); C*onservatorship of Roulet* (1979) 23 Ca1.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at p. 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as

possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

3.

California law violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by failing to require that the jury base any death sentence on written findings regarding aggravating factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of her federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, *supra*, 479 U.S. at p. 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, at p. 267.)[31] The same analysis applies to the far graver decision to put someone to death.

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[31] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*; Section D, post), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-Furman state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, ante.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh*, *supra* [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4.

California's death penalty statute as interpreted by the California Supreme Court forbids inter-case proportionality review, thereby guaranteeing arbitrary, discriminatory, or disproportionate impositions of the death penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is

comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51 (emphasis added), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can not be charged with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See Section A of this Argument, ante.) The statute lacks numerous

other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, ante), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, ante). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5.

The use of restrictive adjectives in the list of potential mitigating factors impermissibly acted as barriers to consideration of mitigation by appellant's jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as

barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

6.

The failure to instruct that statutory mitigating factors were relevant solely as potential mitigators precluded a fair, reliable, and evenhanded administration of the capital sanction.

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) — were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an affirmative answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental

illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors." (*People v. Arias*, supra, 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

(*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way.

(See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)

The very real possibility that appellant's jury aggravated her sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest — the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) — and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].

It is thus likely that appellant's jury aggravated her sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State — as represented by the trial court — had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise

be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings*, *supra*, 455 U.S. at p. 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D.

The California sentencing scheme violates the equal protection clause of the federal constitution by denying procedural safeguards to capital defendants which are afforded to non-capital defendants.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides

significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[32] as in *Snow*, this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."[33]

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[32] "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto*, *supra*, 30 Cal.4th at p. 275; emphasis added.)

[33] In light of the supreme court's decision in *Cunningham*, *supra*, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, ante.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, ante.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws. (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

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California's use of the death penalty as a regular form of punishment falls short of international norms of humanity and decency and violates the Eighth and Fourteenth Amendments; imposition of the death penalty now violates the Eighth and Fourteenth Amendments to the United States Constitution.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom*: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" — as opposed to its use as regular punishment — is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they

became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot*, *supra*, 159 U.S. at p. 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fn. 21, citing the Brief for The European Union as Amicus Curiae in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming arguendo capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes — as opposed to extraordinary punishment for extraordinary crimes — is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Furthermore,

inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311]

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[34] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia*, *supra*.)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

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[34] See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

Conclusion

Appellant shot and killed her four sons. The challenge for the trial court was to see that, when on trial for her life, she received a fair trial.

By allowing the jury commissioner to conduct a significant portion of the voir dire excusing anyone who did not wish to serve, functionally excluding Hispanic jurors and by making erroneous evidentiary rulings consistently in the prosecution's favor, the court failed in its challenge to provide fairness in this capital trial.

There was no commitment to fairness in the present case and appellant's entitlement to a new trial is compelling. The errors require reversal of all convictions and the death judgment.

Dated: 3/10/07

Respectfully submitted,

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Certificate of Compliance

I, Patrick Morgan Ford, counsel for appellant, hereby certify that the word count for this brief is 60,445 words, excluding tables, as counted by WordPerfect 8.0, the computer program used to prepare this document. (California Rules of Court, rule 8.630(b)(1)(A).)

Dated: 3/10/07

Patrick Morgan Ford
PATRICK MORGAN FORD

People v. Susan Diane Eubanks CASE N0.s. SCN 069937/S082915

DECLARATION OF SERVICE

I, Esther F. Rowe, say: I am a citizen of the United States, over 18 years of age, and employed in the County of San Diego, California, in which county the within-mentioned delivery occurred, and not a party to the subject case. My business address is 1901 First Avenue, Suite 400, San Diego, CA 92101. I served an *Appellant's Opening Brief*, of which a true and correct copy of the document filed in the case is affixed, by placing a copy thereof in a separate envelope for each addressee respectively as follows:

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I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on March 12, 2007, at San Diego, California.

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