IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. **JERROLD ELWIN JOHNSON,** Defendant and Appellant.	**CAPITAL CASE** **S093235**

APPELLANT'S OPENING BRIEF

Automatic Appeal from the Superior Court of California
Lake County, Superior Court No. CR4797

THE HONORABLE ROBERT L. CRONE, JR., JUDGE

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STATEMENT OF THE CASE

By information filed on October 25, 1999 in the Superior Court of California, Lake County, appellant Jerrold E. Johnson was charged with the murder of Ellen Salling in violation of Penal Code section 187, subdivision (a)[1] (count 1). The information alleged three special circumstances: murder during commission or attempted commission of robbery (§ 190.2, subd. (a)(17)(A)), murder during the commission or attempted commission of burglary (§ 190.2, subd. (a)(17)(G)), and murder during the commission or attempted commission of carjacking (§ 190.2, subd. (a)(17)(L)). (1 CT 130-132.)

In addition to the alleged count 1 murder, the information charged appellant with burglary of an inhabited dwelling in violation of section 459 (count 2); robbery of an inhabited dwelling house in violation of section 211 (count 3); and carjacking in violation of section 215, subdivision (a) (count 4). The information alleged as to all counts that appellant personally inflicted great bodily injury (§

[1]/ Subsequent undesignated statutory references are to the Penal Code.

1203.075, subd. (a)), personally used a deadly and dangerous weapon (§12022, subd. (b)(1)), and was ineligible for probation (§§ 462, subd. (a) and 1203.085, subds. (a) & (b)). The information alleged as to counts 2 through 4 that the victim was 65 years of age or older (§ 667.9, subd. (a)). The information additionally alleged one prior serious or violent felony conviction pursuant to sections 667, subdivision (a)(1), 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i), and one prior prison term within the meaning of section 667.5, subdivision (a). (1 CT 104-111.) At initial arraignment proceedings on the same date, appellant was not represented by counsel. The prosecution announced that the death penalty would be sought. (1 CT 112-113; 1 RT 1-20.) After the appointment of counsel, appellant was arraigned on November 5, 1999 at which time he pled not guilty to all counts and denied all special allegations. (1 RT 49-61.) A preliminary notice of penalty phase evidence was filed on February 25, 2000. (1 CT 130-138.)

Appellant moved for a change of venue on May 30, 2000. (1 CT 182-207.) In a declaration and exhibits in support of appellant's change of venue motion, appellant's expert indicated that 64 percent of the venire had knowledge of this case and 42 percent had prejudged guilt. Other survey results indicated that 49 percent of potential jurors in Lake County would prejudge sentence were appellant found guilty. In the expert's opinion, there thus was a reasonable likelihood that appellant could not receive a fair trial in Lake County.[2] (1 CT 151-

[2]/ In an initial, random polling of Lakeport residents by a defense investigator,

181; 13 RT 234-243; 14 RT 339-342.) After hearings on appellant's change of venue motion, the trial court denied the motion on July 6, 2000, ruling that appellant failed to establish a reasonable likelihood that a fair and impartial trial could not be had in Lake County. (2 CT 377; 16 RT 628-641.)

On June 9, 2000, the prosecution filed a first amended notice of evidence in aggravation. (1 CT 232-237.) A second amended notice of evidence in aggravation was filed on June 28, 2000. (2 CT 371-376.)

On June 27, 2000, the Hon. Robert L. Crone was assigned to this case for all purposes. (2 CT 367.) Because of prior personal and professional ties, the court stated on the record its close ties to and relationship with the prosecutor.[3] (2 CT 378-381.) Defense counsel did not make any further inquiry; and appellant was not asked to nor did he personally waive the conflict-of-interest and appearance of or actual bias involving the court and prosecutor. (13 RT 127-131.)

On June 27, 2000, the court and parties agreed to conduct simultaneous

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every one of 20 respondents had also reported they were aware of this case and had formed some opinion about it. (See 1 CT [Confidential Sealed -- PC section 987.9 Documents] 2-4; see Argument I, *infra.*)

[3]/ On June 27, 2000, Judge Robert Crone was assigned to this case for all purposes, including trial. Judge Crone advised the parties that he was a former District Attorney of Lake County; that he had been succeeded in office by the prosecutor; that the prosecutor had served as a pallbearer at his mother's funeral; that he had urged the prosecutor to run for judge in the recently-concluded election; that he had actively helped the prosecutor in his successful election campaign for judicial office; that formerly, while still serving as District Attorney, he had placed the prosecutor in charge of the District Attorney's office in his absence while trying a change of venue case in Butte County; that he and the prosecutor had been close friends for a number of years; and that he did not intend to disqualify himself in this case. (13 RT 127-131; see Argument II, *infra.*)

guilt trial voir dire and death penalty qualification. (13 RT 132; 19 RT 1307-1319.) On the same date, defense counsel applied ex parte for an order permitting forensic psychiatrist Dr. Raymond M. Deutsch, a specialist in methamphetamine psychosis, to examine and have face-to-face interviews with appellant. (2 CT 368-370; 13 RT 140.) Appellant's motion was granted on June 30, 2000. (See 1 CT [Confidential, Sealed -- PC section 987.9 Documents] 6-8.)

Trial by jury commended July 1, 2000. (2 CT 386-426.) Defense counsel approved the use of a jury questionnaire and its language as modified. (18 RT 1034.) At the beginning of trial, defense counsel stated for the record that appellant offered to plead guilty to first degree murder with special circumstances in exchange for a sentence of life imprisonment without the possibility of parole but appellant's plea offer was rejected by the prosecutor. (21 RT 1643-1644.)

On August 15, 2000, the trial court was advised of a suicide attempt by appellant on August 12.[4] (32 RT 3807-3808.) Defense counsel declared a doubt as to appellant's competency and moved for suspension of criminal proceedings pursuant to section 1368. (32 RT 3811-3813.) The trial court suspended criminal proceedings and appointed two medical examiners to evaluate appellant and report on his competency. (2 CT 534-437 [order appointing Dr. Douglas M. Rosoff and Dr. Donald T. Apostle]; 32 RT 3846-3848.) After evaluating appellant, both examiners concluded that appellant was competent to stand trial, although one of

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[4]/ Appellant overdosed on Elavil -- (an antidepressant with an inherent risk of suicidality) -- that he had hoarded in jail. (32 RT 3807.)

the examiners indicated that appellant was still suicidal. (2 CT 438-444; 33 RT 3863-3865.) The trial court found that appellant was competent to stand trial and resumed criminal proceedings. (2 CT 420; 33 RT 3866.)

Jury selection concluded and the jury was sworn on August 22, 2000. On the same date, appellant (waiving his right to a trial by jury as to certain allegations) admitted the allegations pursuant to section 1203.85, subdivisions (a) and (b) in counts 1 through 4 and admitted the alleged prior serious or violent felony conviction[5] pursuant to sections 667, subdivision (a)(1), 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i) and one prior prison term within the meaning of section 667.5, subdivision (a). (2 CT 426; 33 RT 3947-3960.) Opening statements and the evidentiary portion of the guilty trial commenced August 23, 2000. (34 RT 3978-4039.)

Appellant moved to discharge counsel on August 29, 2000 pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. The trial court declined to relieve counsel after a hearing on the same date. (2 CT 426-433.)

The prosecution rested on September 19, 2000. The trial court denied appellant's motion for judgment of acquittal on all three special circumstances pursuant to section 1118.1. (42 RT 5258-5250, 5258.) Without presenting an affirmative defense or calling any defense witnesses, and relying on the state of the evidence presented by the prosecution, the defense rested. (42 RT 5268.)

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[5]/ Manslaughter in violation of § 192 sustained on November 8, 1993 in Sonoma County Case No. SCR20425.

Following closing argument and jury instructions (including submission of count 1 on theories of both deliberate and premeditated murder and felony murder) (2 CT 517-561; 3 CT 562-640 [jury instructions as read], 641-719 [instructions submitted to jury]), the jury began deliberations on September 21, 2000 at approximately 10:18 a.m. The jury returned verdicts at 3:25 p.m. (after 3 hours and 35 minutes of deliberations). (2 CT 433; 3 CT 720-727; 44 RT 5573.) The jury found appellant guilty of first degree murder on count 1 in violation of section 187, subdivision (a) and found true all three alleged special circumstances. The jury also found that appellant personally used a deadly or dangerous weapon within the meaning of section 12022, subdivision (b)(1). As to count 2, the jury found appellant guilty of first degree burglary in violation of section 459. On count 3, the jury found appellant of first degree robbery in violation of section 211. On count 4, the jury found appellant guilty of carjacking in violation of section 215, subdivision (a). (3 CT 720-727.) As to counts 2 through 4, the jury found that the crimes were committed against a person 65 years of age or older within meaning of section 667.9, subdivision (a) and that appellant personally used a deadly or dangerous weapon true within meaning of section 12022, subdivision (b)(1). (44 RT 5574-5578.)

The penalty trial commenced September 27, 2000. On October 11, 2000, appellant addressed the court about the react belt he was wearing and statements made by correctional officers who were holding the remote activating device. The trial court did not take any action in response to appellant's complaints. (3 CT

775.)

After closing argument and instructions to the jury (3 CT 836-858), the jury commenced deliberations at 4:05 p.m. and adjourned at 5:00 p.m. on October 19, 2000. After readback of testimony from 10:53 a.m. until 12:14 p.m., and a break for lunch between 12:17 and 1:25 p.m., the jury returned a single, consolidated verdict of death at 2:25 p.m. on October 20, 2000. (3 CT 768-779; 4 CT 1048; 54 RT 6882-6883.)

On November 9, 2000, the trial court pronounced judgment and sentence. (4 CT 1078-1079.) The court denied the automatic motion to modify the penalty.[6] (1 CT 1084-1124; 55 RT 6898-6905.) The trial court sentenced appellant to death. [4 CT 1078-1079; 1125-1127 [abstract of judgment]; 55 RT 923-6929.)

A judgment of death was signed by the court on November 9, 2000, and appellant was committed to San Quentin State Prison for execution of sentence. (4 CT 1079-1087, 1125-1127; 55 RT 6928-6929.) This appeal from a judgment of death following a trial by jury is automatic. (§§ 1237, subd. (a) and 1239, subd. (b).)

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[6]/ Refusing to file a new trial motion, defense counsel stated: "I reviewed Penal Code Section 1181 with regard to grounds for a motion for new trial, and I don't believe that any grounds for such motion lie; although, there's some -- some theory proffered by certain appellate lawyers who work in the California Appellate Project on these types of cases that where the jury recommends a sentence of death, the defense counsel should automatically file a motion for new trial regardless of the lack of grounds. [¶] I don't believe in filing frivolous motions and wasting the Court's time. We are, of course, asking the Court and applying to the Court under [Penal Code section] 1181.7, as well as [section] 190.4(e), for the modification of the jury's recommended verdict of death to life without possibility of parole." (4 CT 1089.)

STATEMENT OF FACTS

I. GUILT TRIAL

A. During Flight from Sheriff's Deputies Seeking to Arrest Him for Parole Violation, Appellant Wrecks His Van Near Kono Tayee on December 18, 1998

1. Testimony of Charles Farmer

In December 1998, Charles Farmer was staying at Starlene Parenteau's residence at 398 Schindler Street in Clearlake Oaks, Lake County. Farmer had known appellant for a couple of years and Parenteau for about seven years. At the time, appellant was also living with Parenteau. Farmer slept on the couch in Parenteau's house. Appellant and Parenteau occupied the master bedroom. (34 RT 4093-4095.)

On December 18, 1998, Farmer and appellant worked together repairing a neighbor's car. At the time, appellant drove a van which was depicted in People's Exhibit No. 139. Neither appellant nor Farmer was drinking any alcohol or using drugs. In Farmer's opinion, appellant appeared sober and was doing very good work repairing the neighbor's car. (34 RT 4096-4102.)

While he and appellant worked on the neighbor's car, Farmer observed some law enforcement officers and pointed them out to appellant. Farmer told appellant that they were probably involved in a drug bust. About 10 minutes later, appellant left in his van to get some vise grips to loosen the master cylinder that they were working on. Appellant had no trouble operating his van.

Appellant never returned after leaving to get the vise grips. After a couple of days, Farmer learned that appellant had been arrested. (34 RT 4102-4103.)

At trial, Farmer recalled that when appellant was working on the car he was wearing blue pants and black boots. In a prior statement to police, Farmer said that appellant was wearing black, lace-up boots with steel toes and a checkered flannel shirt or overcoat. (34 RT 4103-4110.)

2. Testimony of Starlene Parenteau

In December 1998, Starlene Parenteau was living in a house owned by her parents on Schindler Street in Clearlake Oaks. (36 RT 4524-4528.) She had known appellant for many years; they grew up together. For about a week in December 1998, appellant lived with Parenteau. Appellant slept with Parenteau in her bedroom. (36 RT 4524-4528.) Parenteau's son, Rick, had a small bedroom in the house. Her friend, Charlie Farmer, slept on a couch in the living room. (45 RT 4528-4531.)

At the time of trial, Parenteau was in the Lake County Jail for misdemeanor assault on a peace officer. She had been previously convicted of various misdemeanors, including hit-and-run in Sacramento, battery on a peace officer, resisting or obstructing a peace officer, and public intoxication. (36 RT 4524-4528.)

Neither Parenteau nor appellant used any drugs on December 18, 1998, although Parenteau recalled that she used methamphetamine the day before. (36

RT 4531-4534.) However, appellant was regularly using methamphetamine in the 5 to 6-day period before December 18, 1998. (37 RT 4617.)

At 8:30 a.m. on December 18, 1998, appellant and Farmer left to work on a neighbor's car on Pine Street in Clearlake Oaks. Appellant appeared normal. They did not use any drugs or alcohol that morning. (36 RT 4534-4537.) Parenteau next saw appellant and Farmer at 11:00 a.m. at her neighbor's house on Pine Street, working on the neighbor's car. (36 RT 4537-4538.)

Having done appellant's laundry, Parenteau was familiar with his clothing. While at work on the neighbor's car, appellant was wearing blue Levi's (as shown in People's Exhibit Nos. 101-B and 146) and a corduroy or terry cloth shirt. Appellant also had a blue and black or red and black shirt [People's Exhibit Nos. 102-A, 103-B, and 145]. Parenteau could not recall if appellant was wearing that shirt on December 18, 1998. (36 RT 4538.)

After seeing appellant and Farmer on Pine Street, Parenteau went to her mother's house in the same area. (37 RT 4549-4555.) Parenteau did not see appellant again until Monday, December 21, 1998, when he called and they arranged to meet at Fifth and Butler Streets near her home in Clearlake Oaks. (37 RT 4617-4619.)

3. Testimony of Law Enforcement Officers

On the afternoon of December 18, 1998, Lake County Deputy Sheriff Mike Morshed was on patrol in his marked patrol car with his police dog in the

Clearlake Oaks area of Lake County. (34 RT 4039-4041.) Among his duties, Morshed was trying to locate appellant and arrest him for parole violation. Morshed was using a color photograph to identify appellant. (34 RT 4045-4048.)

At 2:56 p.m., while parked on the shoulder of Highway 20 between Catholic Church Road and Sulphur Bank Road, Morshed spotted the brown van (People's Exhibit No. 139) that authorities believed appellant was driving. The driver of the van had a brown mustache and long hair, and he was wearing a baseball cap, sunglasses, and a multicolored shirt; he was the same person shown in his color photograph. (34 RT 4048-4052.) Although he was not sure, Morshed testified at trial that the driver was possibly wearing the clothing identified as People's Exhibit No. 102. (34 RT 4052.)

Morshed made a u-turn and followed the van westbound on Highway 20 and then onto High Valley Road. Running a license plate check, Morshed verified that van was registered to appellant's parents. Morshed radioed for assistance from other sheriff's detectives. Deputy Hall arrived in another patrol car and took a position behind Morshed's patrol car. Sergeant McMahon arrived at the turn-off to High Valley Road. Morshed attempted to stop appellant on a flat portion of High Valley Road before it entered the national forest area. Morshed activated his emergency lights, light bar, headlights, and siren. Morshed had no doubt that appellant saw his patrol car in his side mirror. (34 RT 4052-4060.)

Morshed pursued the van at speeds up to 55 mph along the gravel and dirt portions of High Valley Road. It appeared obvious to Morshed that the driver was

running and had no intention of stopping. Morshed pursued appellant for approximately 10 miles on the narrow, one-lane road. Just before the intersection with Road M-12, Morshed lost sight of the van. He believed that the van had turned off onto a side road or had gone off the road. Morshed radioed to Deputy Hall and Sergeant McMahon to continue slowly, because appellant might have gone off the road. Morshed advised the other officers that he would continue slowly toward the intersection with Road M-12. (34 RT 4068-4073.)

At approximately 3:25 p.m., Deputy Hall reported via police radio that he had located the brown van approximately 40 yards from the roadway in thick vegetation. Morshed had already driven past that location. He thus turned around and drove back to where Deputy Hall had located the van on a hillside leading down to Clearlake. Sergeant McMahon, who had been behind Deputy Hall, also arrived at the location where the van had left the road. Morshed searched the area with his canine, but the dog lost the scent in some thick vegetation. The brown van looked fairly intact. Approximately 20 other officers joined in the search for the driver along Highway 20. A Sonoma County helicopter with infrared sensors was called in to assist in the search. The search was called off at approximately 6:30 p.m. when it got dark. (34 RT 4073-4079.) Morshed remained at the crash site until the brown van was towed away. (34 RT 4081-4083.)

The crash site where the van had been located was approximately 5 miles from the home of Ellen Salling at 7963 Richard Drive in Kono Tayee. The area between the crash site and Salling's home was hilly and mountainous; there was

no development except along Highway 20. (34 RT 4080.)

B. Appellant's Familiarity with the Kono Tayee Area

Emmett Lee Smith, Jr. lived in Lucerne, Lake County. He worked as the Lake County distributor of the Santa Rosa Press Democrat. In 1996, Smith hired appellant as a paper carrier. Appellant worked for him from June 1, 1996 through July 18, 1997. During the time that appellant worked for Smith, he always had the same route in Clearlake Oaks from Kono Tayee to Spring Valley, covering approximately 100 to 160 miles. Every day, appellant delivered about 300 papers to homes and racks, including seven homes in Kono Tayee. He never collected money from customers. Ellen Salling was one of the newspaper customers on appellant's route in Kono Tayee. (35 RT 4404-4411.)

C. Ellen Salling Murdered at Home in Kono Tayee on December 19, 1988

1. Testimony of Bill Ellis

William (Bill) Ellis lived in the Kono Tayee area of Lucerne at 7921 Richard Drive. Ellis' home was five houses down the street from Ellen Salling's home at 7963 Richard Drive. Ellis was Salling's best friend and companion since both their spouses died -- hers in 1990; his in 1995.[7] Ellis visited Salling five or six times per week in the evening. Salling's home had two storeys, including a

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[7]/ It was stipulated that Ellen Salling's date of birth was March 23, 1922. (42 RT 5246-5247.)

master bedroom upstairs and two bathrooms. (34 RT 4130-4132.)

On Friday, December 18, 1998, Ellis stopped by Salling's home at approximately 5:30 p.m. to drop off some parts for repairing her dock. Ellis spent the evening with Salling. They ate dinner together. (34 RT 4128-4129.)

Ellis had a remote control for Salling's garage door. When Ellis left Salling's house on December 18, her red car was parked in the garage. Salling always parked her car on the left-hand side of the garage. (34 RT 4128-4132.)

Ellis was familiar with Salling's habits, the arrangement of her furniture, and the location of her car keys and purse. Salling kept her purse on the kitchen-dining room pass-through counter when she was about to go out. At other times, Salling kept her purse in the master bedroom or bathroom. Her keys were left in a dish next to her purse. Salling kept her wallet in her purse. (34 RT 4132-4233.)

According to Ellis, Salling's house was absolutely the neatest house in the world. Salling was an immaculate housekeeper. Nothing was out of place. In the winter, Salling used the furnace and a pellet stove for heat. The fireplace in her den was seldom used. The pellet stove was the primary source of heat. Salling did not keep firewood in her house; according to Ellis, there was no firewood in Salling's house on December 18, 1998. Indeed, Ellis could not recall when Salling last used her fireplace after installing the pellet stove. (34 RT 4132-4134.)

When Ellis left Salling's house at 10 p.m. on December 18, 1998, she was fine. She had no injuries, cuts, or bruises. (34 RT 4134-4135.) Ellis planned to return next morning, December 19, 1998, to work on Salling's dock. Ellis and

Salling planned to go together later in the day to a neighbor's open house on Cora Drive in Kono Tayee from about 5:30 to 8:00 p.m.

The next morning, Ellis arrived at Salling's home at 9:15 a.m. on Saturday, December 19, 1998. He parked his truck in driveway. On opening the garage door with his garage door opener, Ellis did not see Salling's car. Ellis thought she had gone shopping, since her daughter and son-in-law were coming for Christmas. Salling owned a 1999 Mercury Sable that she had purchased in November 1998. Ellis identified photographs of Salling's Sable (People's Exhibit Nos. 90 and 142). When Ellis last saw Salling's car, it was not damaged. (34 RT 4135-4139.)

From the garage, Ellis got the parts he had left the previous evening and took them to the back of the house near the dock. He worked on Salling's dock and gangway until 10:30 a.m. He did not see Salling and did not enter her home during the time he was working on her dock. On leaving, Ellis closed the garage door with the remote and drove home. Later that day, at approximately 4:00 p.m., Ellis called Salling to see what time she wanted to go to the open house. He called three times between 4:00 and 4:30 p.m. Thinking Salling was in the shower or getting ready, Ellis got dressed for the open house and then drove over to Salling's house at 5:30 p.m. Ellis found Salling's house dark. Her front door was locked, which was unusual. Looking in the garage, Ellis noted that her car was gone.

Thinking that something may have happened to Salling's mother-in-law who was in a nearby board and care home, Ellis went home. He drove by the neighbor's open house to see if Salling's car there. Not seeing Salling's car, Ellis

drove home and called the care home where Salling's mother-in-law lived. He inquired whether Salling was there or if there had been any problems with "grandma." Ellis was told there were no problems with the mother-in-law and that the care home had not seen Salling all day. Ellis drove back to Salling's home at 5:35-5:40 p.m. He opened the garage door, and, using the key, went into the house through the laundry room next to the garage. (34 RT 4139-4143.)

On entering laundry room and then kitchen, Ellis turned on the kitchen light. He saw a food mixer on the counter and a cookie tin half-filled with cookies. There was cookie dough was in the mixing bowl. Proceeding to the entryway, Ellis looked in the living room. He immediately saw Salling's legs in the entryway as shown in People's Exhibit No. 39. He touched Salling's body -- the back area around the hip -- to see if Salling was alive. It was obvious to Ellis that she was not alive. He picked up a cordless phone on kitchen counter, called 911, and then replaced the phone in its receiver. (34 RT 4144-4147.)

There were no lights on in Salling's home when Ellis returned at 5:35 p.m.. He did not recall seeing the mixer or cookie dough the previous night. There was no doubt in his mind that the body was that of Ellen Salling. He observed a lot of blood around the body. At trial, Ellis identified various photographs taken inside Salling's house by sheriff's deputies after Salling's body had been found. He identified the following photographs: People's Exhibit No. 47 [interior of house and entryway showing Salling's glasses on floor between entryway and kitchen]; People's Exhibit Nos. 39-A-1 and 48 [Salling's glasses]; People's Exhibit No. 49

[entryway showing piece of tree limb next to door stop]; People's Exhibit No. 50 [close-up of door stop, portion of entryway cabinet, and piece of tree limb]; People's Exhibit No. 155 [floor plan and furniture]; People's Exhibit No. 156 [photographs of interior of Salling's house]. Ellis also identified a photograph of Salling's deceased husband in his living room showing a small footstool or Ottoman with black Naugahyde and finished wood legs. Ellis last saw the footstool or Ottoman on December 18, 1998 in the hallway where the body was found the next day. At that time, the Ottoman was undamaged. Ellis also told the jury that he did not recognize the piece of tree limb near the front entry as shown in People's Exhibit Nos. 49 and 50. There had been no such object in Salling's house on December 18, 1998. (34 RT 4149-4156.)

After Ellis called 911, he was unsure whether the call had been completed. Within a minute, the telephone rang. Ellis went to another telephone in the den and took the sheriff's call in response. Ellis told a female dispatcher he was quite sure he had come upon a murder situation. The dispatcher asked Ellis to stay on the line and to keep talking to her. The dispatcher told Ellis that some officers would soon arrive. The dispatcher insisted Ellis stay on the phone. Ellis remained in the den with the phone until officers arrived. The dispatcher advised Ellis to go outside to the front of Salling's home. Ellis went outside the same way he had entered -- through the entryway, laundry, and garage. (34 RT 4143-4147.) Ellis did not disturb anything in house. Sheriff's deputies arrived just as Ellis came outside; Ellis told officers everything he knew. (34 RT 4148-4149.)

2. Time of Death

Robert Woolworth owned a vacation home at 772 Cora Drive in Kono Tayee, where he was staying on Saturday, December 19, 1998. Woolworth saw Ellen Salling at 7:00 a.m. at the intersection of Cora Drive and Richard Drive. (35 RT 4184, 4190-4191.)

At the time, Salling walking from Richard Drive to Cora Drive. Although both Woolworth and Salling acknowledged seeing the other, they did not wave to each other. Woolworth did not recall if Salling was carrying a cane or purse. No one else was on the street at the time. Woolworth recalled that Salling was wearing gray pants and a multicolored top. She was not wearing glasses. Her hair was neat. According to Woolworth, there was nothing unusual about Salling's appearance at the time, and she did not appear to be injured. Salling's clothing was not disheveled or torn. (35 RT 4184, 4190-4191.)

On December 19, 1998, Maureen Viel lived in a home at 7886 Alston Way in Kono Tayee. Viel's house was on the corner of Richard Drive and Alston Way. Viel knew Ellen Salling and was aware that Salling lived nearby on Richard Drive. Salling was about 5'4" tall and thin. (34 RT 4120-2122, 4124.)

While cleaning house shortly before 8:30 a.m. on the morning of December 19, 1998, Viel looked out one of her large windows facing the street. She saw Salling's new red Mercury driving past her house and noticed that a man was driving Salling's car. The driver was wearing a plaid jacket similar to People's Exhibit No. 102-A. No one else was in the car. (34 RT 4120-4124.)

When Viel saw Salling's car, it had not been damaged; it was in brand-new condition. Viel attention was attracted to Salling's car that morning because Salling rarely drove out of the residential area along Alston Way where Viel lived. Salling usually drove out along Richard Drive where she lived. Viel noticed that Salling's car was going very fast. It hit a drain in the middle of the street and bounced up quite high. According to Viel, Salling would never have driven that fast as the speed limit on her street was only 15 mph. (34 RT 4116-4118.)

3. Law Enforcement Investigation at Salling's Home

a. Testimony of Sgt. David Garzoli

Sergeant David Garzoli was the supervising investigator for the Lake County Sheriff's detective bureau and head of detectives on December 19, 1998. At 5:45 p.m., Garzoli responded with other deputies to Bill Ellis' 911 call from Kono Tayee. Garzoli arrived shortly after 6:00 p.m. at 7963 Richard Drive. He met Bill Ellis in the driveway. (35 RT 4168-4171.)

Bill Ellis told Garzoli that he had entered the house looking for Salling and found her in the living room. He said that Salling had been beaten or stabbed. Garzoli did a protective sweep of the residence looking for suspects and to confirm that Salling did not need medical attention. (35 RT 4171-4172.)

Garzoli entered Salling's house through the laundry area. He observed blood and other evidence in kitchen area. Garzoli located Ellen Salling's body lying face down on the floor. She was obviously deceased. There was a wooden

object by Salling's head, blood smears on the kitchen counter, and bloody footprints in kitchen area. Garzoli also saw a cookie mixer and cookies on a tray. (35 RT 4171-4180.)

b. Testimony of Det. Chris Carlisle

Det. Chris Carlisle arrived at Ellen Salling's home on the evening of December 19, 1998, shortly after 6:30 p.m. He was assigned as the lead investigator to manage the Salling homicide investigation. (35 RT 4260-4263.) Carlisle obtained a search warrant for Salling's home at 1:11 a.m. on December 20, 1998. (35 RT 4279-4288.)

After obtaining the warrant, Carlisle entered the home. There was no evidence of forced entry. Salling's body was located in the front entryway adjacent to the living room. There was bruising to Salling's head, face, left arm, and right hand. Blood and blood spatters were observed on the floor and wall next to her body. A broken piece of a tree limb was found in the entryway. A dowel, finished and unfinished wood, and some small wood chips, similar in appearance to the piece of tree limb, were also found near the body. (35 RT 4304-4310; (36 RT 4351-4361; 38 4756-4766.)

Salling's eyeglasses were found close to the front door. Small spatters of blood were noted in the front entryway, beginning near the front door and continuing to where the wood parquet floor met the living room carpet. There was a bloody shoe or boot print on Salling's back and on the parquet floor. (35 RT

4325-4328.) Carlisle observed blood and hair in the kitchen sink, blood on the handle of a water jug, a drinking glass with hair on the handle, and blood on the kitchen faucet. (35 RT 4294-4298.)

Carlisle checked views from the kitchen window. Standing at the kitchen sink, facing the kitchen window, he could see the garage, but the front door was not visible. Someone standing close to the front door would not be visible from the kitchen window. (35 RT 4323-4324.) However, a person walking up the front walkway toward the front door could be seen from the kitchen window. (35 RT 4329-4332.) There were no peepholes in the front door. Although the front door had glass panes, those were 6'1" high and were used only to allow entry of light into the house. (35 RT 4310-4311.)

Carlisle also inspected other areas of the house, including the upstairs bedrooms. There was a circle of blood around the doorknob and on the door jamb in the upstairs master bedroom. In Carlisle's opinion, the pattern of blood on the master bedroom door was consistent with a long-sleeve, bloody cuff. A nightstand in the master bedroom was pulled out and the contents dumped on the floor. (35 RT 4289.)

Carlisle removed blood-spattered wood paneling from the wall adjacent to where Salling's body was found. (37 RT 4729-4730.) Spatters in the entryway, and on the parquet floor, and a shoe print on the floor tested positive for blood. The body of Ellen Salling was placed in a sealed bag and taken to the Jones & Lewis Mortuary where it was placed in a locked refrigerator. Carlisle later

attended Salling's autopsy performed by Dr. Thomas Gill. (35 RT 4325-4328.)

Latent fingerprints were taken from various areas inside the house. There was no match between appellant's rolled fingerprints and any of the latent prints taken from Salling's residence or objects inside her home. (35 RT 4298.)

4. Cause of Death

Dr. Thomas Gill performed the autopsy on the body of Ellen Salling at the Sonoma County central morgue facility in Santa Rosa on December 21, 1998. (39 RT 5034-5040.) At the time of death, Salling was 5'5 1/2" tall and weighed 129 pounds. (39 RT 5046.) There were defensive and puncture wounds to Salling's right hand and other contusions, bruises, and lacerations on her face, head, and body. (39 RT 5041-5054, 5061-5062.) Salling's scalp was torn or ripped from her head. Multiple, superimposed lacerations and contusions on Salling's left shoulder were consistent with blunt force trauma. (39 RT 5057-5061.) Injuries to Salling's face, check, and lip were consistent with both blunt force blows by a fist and a cylindrical or rectangular type of object. (39 RT 5061-5062, 5069-5073.)

In Dr. Gill's opinion, more than one instrument could have been used to inflict the various injuries he observed on Salling's head and body. (39 RT 5052-5055; 40 RT 5091-5092, 5095, 5102.) Some of the injuries to Salling's body and head suggested that a linear instrument was used to inflict the wounds, such as a furniture leg or a cylindrical tree limb. (39 RT 5046-5050; 40 RT 5095-5097.) Other injuries to Salling's head and scalp required a shearing instrument at an

angle to the skin surface, such as a sole or heel of a boot. (39 RT 5046-5049.) Scalp injuries included semi-circles or arches, curved injuries, almost parallel to one another; the area affected was actually a skin flap as though it was coming off. There was an undermining virtually all the way around and underneath the scalp injury, signifying application of a shearing force. (39 RT 5062-5063.)

The nature of the severe head lacerations and scalp wounds suggested that Salling's head was most likely in a stationary position on the floor when they were inflicted. (39 RT 5052-5055.) In Dr. Gill's opinion, all of the injuries he observed on Salling's head and body, with the exception of the scalp injuries, could have been caused by a blunt object or objects. (39 RT 5061-5062.) Some of the injuries to Salling's face were consistent with use of footwear applied to her head coupled with the use of a blunt object and fist. (40 RT 5074-5074.) Deep lacerations to Salling's head and scalp were also consistent with the use of footwear to stomp Salling while her head was stationary on the floor. The injury to the bridge of her nose was consistent with her glasses being struck and knocked off her face. (40 RT 5074-5075.)

Dr. Gill observed "coup contra coup" brain injury or blows to one side of the head causing the brain to move to and slap against other side of the skull. (40 RT 5084-5086.) There was very noticeable brain injury to the opposite side of Salling's brain in this case. The injuries to her scalp were on left side but the injury to her brain was on the right side, signifying that significant force was exerted upon left side of the head to cause damage to right side of her brain. Dr.

Gill also noted a periorbital hemorrhage or bruising around the left eye, head, and face. (39 RT 5063-5064, 40 RT 5073-5075.)

In Dr. Gill's opinion, the cause of death was blunt force trauma to the head and rapid stopping of the heart. (40 RT 5090-5091.) In Dr. Gill's opinion, two severe injuries to the left side of Salling's head caused tearing or ripping of her scalp with contra coup injuries to the underlying brain. These injuries were sufficiently severe to be fatal. In Dr. Gill's opinion, extreme force was used to produce "this much tearing of [the] scalp." The other injuries to her head, face, and body did not demonstrate a high degree of force. (40 RT 5088-5089.)

In Dr. Gill's opinion, the head and scalp injuries, occurring while the head was semi-stationary and while Salling was lying on ground, implied that the fatal head injuries occurred at or toward the end of an assault. In Dr. Gill's opinion some of the injuries, abrasions, and contusions could have been inflicted after death. (40 RT 5100-5102.) All of the severe scalp injuries were consistent with having been caused by footwear. (40 RT 5086-5087, 5059-5100.) In Dr. Gill's opinion, Ellen Salling died within minutes. Her lung weights were extremely light without congestion, suggesting that Salling died very quickly within a few minutes after the infliction of fatal injuries. (40 RT 5087-5088.)

D. Appellant Arrested After Crashing Salling's Sable During Flight from Law Enforcement Officers on December 21, 1998

At approximately 3:00 a.m. on December 21, 1998, Lake County Deputy

Sheriff Robert Zehrung observed a red Mercury Sable going westbound on Highway 20 in Clearlake Oaks. The Sable matched the description of the vehicle reportedly taken in the Salling homicide on December 19, 1998, and the driver matched the description of the suspect being sought in the Salling murder. (37 RT 4648-4649.) Zehrung notified his dispatcher that he had spotted the Sable. He made a u-turn and started to follow the vehicle. Zehrung activated his police siren and emergency lights. The Sable accelerated up to 90 mph as it fled from Zehrung. (37 RT 4625-4632.)

Zehrung pursued the Sable on Highway 20 at speeds up to 110-115 mph. After chasing the Sable for about 13 miles, Zehrung lost sight of it in the area of New Long Valley. At this point, the road was very curvy and mountainous. Passing Cache Creek Bridge, Zehrung pointed his spotlight at an on-coming car, and saw that it was the same Sable and driver he had been chasing. The driver had a brown mustache and brown hair, and was wearing a dark jacket. Zehrung again made a u-turn, advised other units in the area that the Sable had turned around, and gave chase. Zehrung again lost sight of the Sable at it entered curves near the Double Eagle Ranch. (37 RT 4632-4638.)

Deputy Zehrung drove back to the Lake Point Lodge just outside Clearlake Oaks off Highway 20. He radioed other units in the area asking if they had seen the Sable. After five minutes, a Clearlake police car drove up and parked next to Zehrung's vehicle. Just as the other officer asked Zehrung what the suspect vehicle looked like, Zehrung spotted the Sable as it passed by where he was

parked. Zehrung again activated his emergency lights and siren, and pursued the red Sable on the same route as before at speeds up to 120 mph, and past the intersection of Highway 52 and Highway 20. Two other police cars joined Zehrung in the chase, but they were far behind. (37 RT 4638-4642.)

Deputy Zehrung pursued the Sable along Highway 20 past New Long Valley Road and the Cache Creek area, and toward Walker Ridge Road. Zehrung saw the Sable turn onto Walker Ridge Road. Zehrung saw the Sable veer off the right shoulder, strike a grassy embankment, and come to a stop. It was then about 3:40 a.m. Zehrung notified police dispatch that the suspect vehicle had crashed. He waited for other units, including a SWAT team, to arrive. Zehrung was unsure whether the driver was still in the Sable after it crashed. (37 RT 4649-4654.)

After other police vehicles arrived, Zehrung and other officers approached the Sable. Its air bags had deployed; the driver had escaped. (37 RT 4654-4656.) Zehrung checked the license plate of the Sable, confirmed that it was registered to Ellen Salling. A police perimeter was established to search for the driver. At the time, it was 5 degrees below zero. At dawn, over 100 law enforcement officers and tracking dogs began to search for the driver. Appellant was located nearby down a hillside hours after the crash at 8:50 a.m. (37 RT 4664-4666.) He was apprehended, handcuffed, and placed into Zehrung's patrol car. At trial, Zehrung identified appellant as the driver of Salling's red Sable during the police pursuit and at the time of the crash. (37 RT 4656-4660.)

At the time of his apprehension, appellant was very cold, hypothermic, and

unable to walk or move his arms or legs. He needed immediate medical attention. At 9:15 a.m., Zehrung drove appellant to the emergency room of Rosebud Community Hospital. (37 RT 4660-4661, 4664-4666.) Searching appellant before the medical examination, Zehrung found and seized two packs of cigarettes (one of which contained two glass methamphetamine smoking pipes), a set of keys, blue notebook pad, a gold brooch-type pin, and a personal check in the name of Elsie Hillyer and Shiree Hardman. (37 RT 4663-4664.) After the search, Zehrung escorted appellant into the emergency room and turned over custody of him to Deputies Hiatt and Pfann. (37 RT 4661-4663.)

Colusa County Sheriff's Sergeant Brian Tripp assisted in searching for appellant along Walker Ridge Road in Lake County on December 21, 1998. (37 RT 4667-4670.) He arrived at the crash site at 5:00 a.m. and worked with other members of the Colusa County Special Operations and Reconnaissance Team and a Colusa County search and rescue dog. He and his search dog located appellant about 100 yards from the crashed vehicle. He was found lying face-down and did not respond to Tripp's commands. As soon as appellant was lifted up, Sgt. Tripp noticed a wallet above his head.[8] A folded piece of yellow note paper fell from appellant's abdomen area when he was lifted up. Tripp retrieved and examined the items which he then turned over to Lake County investigator Paulich. At trial,

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[8]/ It was stipulated that the wallet contained California driver's license paperwork issued in the name of Jerrold Elwin Johnson [People's Exhibit No. 207]. Appellant's height was listed as 6'0" and his weight as 200 pounds. (42 RT 5245.)

Tripp identified appellant as the suspect who was detained, and he identified People's Exhibit No. 75-A as the yellow paper that fell from appellant's abdomen or stomach area as he was lifted up. (37 RT 4670-4675.)

Lake County Deputy Sheriff Christopher Rivera assisted in apprehending appellant along Walker Ridge Road on December 21, 1998. He arrived at 7:00 a.m. After appellant's arrest, Rivera was assigned to Rosebud Community Hospital where appellant had been taken for emergency treatment. At the hospital, Rivera saw appellant and arranged for a blood draw. Rivera was present when three vials of blood were drawn from appellant. (37 RT 4688-4691.)

In Rivera's opinion at trial, appellant appeared the same while at the hospital following his arrest as he did at trial. There were no noticeable differences in appellant's appearance. Appellant weighed about the same at trial as he did after arrest. Rivera did not observe any marks, cuts, or bruises on appellant while he was being treated in the emergency room. (37 RT 4695-4696.)

With other SWAT team members, Lake County Sheriff's Detective Corey Paulich also participated in searching for appellant on Walker Ridge Road on December 21, 1998. (37 RT 4697-4701.) After appellant's arrest, Paulich was directed to obtain evidence seized by Colusa County Deputy Sheriff Brian Tripp from or next to appellant at time of his arrest, including a wallet with a driver's license in the name of Jerrold Elwin Johnson, social security card, business card of parole agent Cameron L. Batchelder, and a note written on yellow paper [People's Exhibit No. 75]. (37 RT 4706-4709.)

Det. Paulich also photographed and processed Salling's Sable at the crash site for evidence. (38 RT 4752-4755.) Paulich was assisted by Department of Justice, Santa Rosa Regional Laboratory, senior criminalist Michael L. Potts. In processing the Sable, Paulich observed a ribbed pattern on the trunk which tested positive for the presence of blood. The trunk carpet and console areas also tested positive for blood. (38 RT 4753-4756.)

E. Search of Starlene Parenteau's Home; Evidence Recovered from Parenteau

After appellant's arrest, Sheriff's Sergeant Patrick McMahon drove to Starlene Parenteau's home at 398 Schindler Street on the evening of December 21, 1998 to secure the home prior to issuance of a search warrant. McMahon encountered Parenteau outside by the front door. He advised her that appellant was under arrest and that they were looking for jewelry taken in a recent homicide. Parenteau immediately became upset, started to cry, and tried to remove jewelry from around her neck and fingers. Unable to remove the necklace, Parenteau asked McMahon to "take this off of me." Parenteau handed McMahon one necklace and three rings. (37 RT 4680-4686.)

Parenteau's home was searched on the evening of December 21, 1998. (37 RT 4732-4733.) Items seized from her home included a blue corduroy shirt belonging to appellant; a bloodstained black and blue corduroy shirt belonging to appellant with "fleshy material" on the sleeves; a gold bracelet found on a dresser in the master bedroom; earrings; and a fanny pack containing a yellow daisy

brooch later identified as belonging to Ellen Salling. Various writings in appellant's name were also found in Parenteau's home. (37 RT 4714-4718; see also 37 RT 4727-4728.) Bloodstained jeans belonging to appellant were found in the laundry room. A piece of yellow paper with the names "Shiree" and "Jeff" and a telephone number was found on the kitchen table. (19A RT 1235-1246.)

F. Search of Salling's Car on December 22, 1998

Ellen Sallings's red Sable was searched pursuant to a search warrant on the morning of December 22, 1998. (37 RT 4718-4722, 4780.) Department of Justice latent print examiner Galen Nickey and criminalist Michael Potts assisted in the search. Nickey dusted the car for and collected latent fingerprints. Nickey also seized and took possession of the dome light cover, cigarette lighter, steering wheel, rear view mirror, a credit card folder, and checks in the name of Ellen Salling. Nickey brought the items back to his DOJ laboratory for testing and analysis. (37 RT 4719-4722.)

During the search of Salling's car on December 22, 1998, Det. Paulich observed the ignition key to the red Mercury in the interior of the vehicle. (38 RT 4800-4801.)

G. Other Evidence Linking Appellant to Salling's Murder

On the morning of December 22, 1998, Detectives Carlisle and Paulich met with Jeff Biddle and Shiree Hardman at their residence at the Galaxy Resort on Old Highway 53, in Clearlake. (38 RT 4780-4784.) The officers seized a

handwritten note from a letter holder in their kitchen [People's Exhibit No. 115]. Biddle and Hardman provided writing samples to the officers. (38 RT 4780-4784.)

A blue notebook found in appellant's possession at the time of his arrest contained indentations or impressions identical to the note found in the Biddle-Hardman home. (38 RT 4785-4790.) When the blue notebook was later examined, it was found to contain three or four items inside the back cardboard insert. These items included a Providian Visa gold card in Ellen Salling's name; a Citibank Visa card in Ellen Salling's name; a California driver's license in Ellen Salling's name; and a photograph of a man and a woman with writing on back stating "Henni and Ronald Ray" [daughter and son-in-law of Ellen Salling].

Salling's Citibank Visa card (found in the blue notebook in appellant's possession) was used to purchase gas at a Super Cheaper store in Lake County, as reflected on a printed receipt dated December 20, 1998 [People's Exhibit No. 81]. (38 RT 4790-4791, 4875-4883.)

H. Identification of Salling's Property

On the morning of December 20, 1998, Henni Ray, Ellen Salling's daughter, was en route with her husband to her mother's home when she learned of her mother's death. Before Henni and her husband were permitted to enter her mother's home, members of her mother's church group had cleaned up the house. (36 RT 4364-4369.)

Ray walked through her mother's home on December 20, 1998 to

determine the damage and to see what, if anything, was missing. Ray did not see any damage to the windows or doors. She told the jury that her mother's Ottoman footstool was ordinarily kept near the kitchen adjacent to the front hallway. Since her mother had a pellet stove in the living room, she did not have any firewood or tree branches in her house. (36 RT 4375-4379, 4398-4399.)

Ray prepared an inventory of missing and unrecovered items. According to Ray, her mother was missing jewelry valued at $13,600, including a gold watch, gold chain, pearls, gold piece, bracelets, earrings, and other jewelry. Ray testified that her mother kept her jewelry in the master bathroom; she never had any open drawers in her house. (36 RT 4379-4398.)

In November 1998, Ray and her husband helped her mother purchase a new red Mercury Sable from a dealership in Needles which they once owned. She and her husband delivered the car to her mother. Ray identified People's Exhibit No. 90 as a photograph of her mother's red Sable as it appeared after purchase in November 1998. Ray told the jury that her mother's car was usually parked in her garage. Her mother kept her purse, wallet, and car keys on a pass-through counter in the kitchen. She identified People's Exhibit No. 134-A as her mother's purse and People's Exhibit No. 135-D as her mother's wallet. Ray had given the purse to her mother as a gift. (36 RT 4379-4398.)

Ray also identified her mother's remote keyless entry device [People's Exhibit No. 135-A], car keys [People's Exhibit No. 135-B], and emergency key [People's Exhibit No. 135-C] for a vehicle her mother previously owned. Ray

identified items from her mother's wallet and purse, including checks, business cards, and credit cards. Ray identified a jewelry box owned by her mother [People's Exhibit No. Exhibit 105-B], a pair of earrings bought by her father and worn by her mother [People's Exhibit No. 105-B-2], and a daisy pin commemorating the birthday of the Queen of Denmark that Ray had purchased for her mother before her death [People's Exhibit No. 105-A]. (36 RT 4397-4398.)

I. Salling's Missing Property and Furniture Found in January 1999

John Jones lived with his mother, Faye Bilbrey, in Clearlake Oaks. (35 RT 4208-4211.) In late December 1998 or early 1999, Jones found a purse and wallet next to a footstool or Ottoman on a hillside near his home. He took the purse home, but left the footstool on the hillside. (35 RT 4211-4214; 35 RT 4235-4236.)

Once at home, Jones inspected the purse and found that it contained some papers, a wallet, keys, checkbook, and other items, including a remote keyless entry device [People's Exhibit No. 135-A], key [People's Exhibit No. 135-B], plastic key [People's Exhibit No. 135-C], and various cards and credit cards in a plastic holder [People's Exhibit No. 134-A-13]. (35 RT 4214-4220, 4232-4235.) Jones saw a name with the letter "S" on some of the items in the wallet and thought the purse and wallet might belong to a recent Lake County murder victim. Jones' mother had previously read some newspaper articles to him about two murders in the area. (35 RT 4221-4222.)

About two or three days after finding the purse, Jones told his friend, Ron

Oxnam, about what he had found. Oxnam lived in Nice, Lake County, and was employed by his mother, Betty Lou Romans, at her residential care home facility. Romans took care of elderly women at her facility, including Ellen Salling's mother-in-law. (35 RT 4411-4414.)

Oxnam told Jones that he thought he knew the owner of the purse. Oxnam said his mother could return the purse and its contents to the owner's family. Thus, at Oxnam's suggestion, Jones gave the purse and its contents to him. Jones retained only the keys and wallet. Jones put the keys in a bucket he kept at home. (35 RT 4222-4227.) He gave the wallet to his mother, Faye Bilbrey. Bilbrey later gave the wallet to her mother, Virginia Harding, a resident of Lucerne, Lake County. (35 RT 4194-4199.)

After Jones gave him the purse, Oxnam inspected its contents. He found a driver's license and other items in Ellen Salling's name. Seeing Salling's name on some of the items, and aware that Salling's mother-in-law was living in his mother's care home, Oxnam gave the purse to his mother, Betty Romans. Romans became very upset when she saw Salling's purse. Romans had been very close to Ellen Salling. She had known Salling for many years. Salling regularly visited her mother-in-law at Romans' care home. (35 RT 4418-4427, 4428-4429; 36 RT 4463-4465.) Romans subsequently turned Salling's purse over to Lake County Deputy Sheriff Carl Stein. (36 RT 4467-4470.)

Some time after giving the purse and contents to Oxnam, Jones also spoke with Sheriff Detective Stein. Jones told Stein where he found the purse, wallet,

and footstool. (35 RT 4236-4240.) Stein drove Jones to the hillside near his house where the purse and footstool had been found. Stein retrieved the footstool with one leg missing and a small portion of finished wood that appear to be part of the missing leg. (35 RT 4245.) Stein also observed hair, reddish material he presumed to be blood, and white spatters that appeared to be tissue or flesh on different portions of the footstool. Stein placed the items in evidence bags and brought them back to the sheriff's station. (35 RT 4240-4245, 4247-4251.)

Jones was also contacted by Det. Carlisle in respect to the keys that he found in Salling's purse. Accompanied by Carlisle, Jones retrieved from his mother's house some of the keys he had found in Salling's purse, including a keyless entry device [People's Exhibit No. 135-A], ignition key [People's Exhibit No. 135-B], and a red plastic spare key for a Mercury [People's Exhibit No. 135-C]. (38 RT 4799-4800.) Carlisle also drove Jones to the Lucerne home of his grandmother, Virginia Harding, from whom they retrieved Salling's wallet. (35 RT 4227-4229; 35 RT 4191-4193.)

On February 12, 1999, Det. Carlisle and other officers again searched the hillside near Jones' house in Clearlake Oaks where Salling's purse and Ottoman had been previously found. During the search, two pieces from a wooden Ottoman, one 7-8" in length with an apparent bloodstain, were recovered about 12 to 15 feet from the location of the Ottoman previously found in the same area. (38 RT 4791-4797; 38 RT 4801-4802.)

In September 1999, Carlisle tested the keys he retrieved from John Jones on

Ellen Salling's red Sable. Both People's Exhibit No. 135-A [remote entry device] and People's Exhibit No. 135-B [plastic key] operated the car. (38 RT 4801-4892.)

J. Appellant's Conduct After Salling's Murder

1. Testimony of Starlene Parenteau

The police visited Starlene Parenteau at home on December 19, 1998 looking for appellant. After the police left, Parenteau walked to a pizza parlor in Clearlake Oaks. She spent time with friends and then went to a bar. (37 RT 4557-4566.) On returning home later that night, Parenteau saw a gold bracelet, gold cameo brooch, a necklace, and other jewelry on the kitchen table. She had never seen those items before. Parenteau identified People's Exhibit No. 104-A as the gold bracelet and People's Exhibit No. 105-A as the pendant Parenteau saw on her kitchen table when she returned home from the bar. (37 RT 4567.)

At approximately 3:00 a.m. on December 20, 1998, appellant telephoned Parenteau at home. Although not actually living with Parenteau at the time, appellant had been staying off and on at her house beginning around December 10, 1998. (37 RT 4611-4612.) Parenteau had known appellant for many years. (37 RT 4610-4611.) She and appellant regularly used methamphetamine together on a daily basis, several times a day. (37 RT 4612-4614.)

At the time of his early morning telephone call, appellant said he was at a nearby pay phone. He told Parenteau to meet him at the creek behind her house. He said his parole agent was looking for him, and he did not want to go to her

house. Parenteau told appellant to meet her on nearby Butler Street. Parenteau left her house about 45 minutes later and met appellant as agreed about a block away from her home. (37 RT 4570-4577, 4579-4581; 37 RT 4608-4609.)

Appellant was driving a red car. Although appellant told her that he had borrowed the car from friends, Parenteau thought the car, as well as the jewelry she had seen earlier, might have been stolen. (37 RT 4603-4604.) According to Parenteau, appellant had scratches on his face and nose. She had not seen any scratches on appellant when she last saw him the day before. Appellant said he got the scratches outrunning the cops in Clearlake Oaks. Appellant told Parenteau that he fled from the cops because he had "copped some dope from Jeff Carmak's house" and was also absconding from parole. He also said that a helicopter had been looking for him. Appellant said that he had been in the mountains hiding from the cops. He slept in the mountains to hide from the helicopter that was looking for him. (37 RT 4600-4602.)

When appellant picked up Parenteau, she noticed that all of his clothing was new. She saw other items of clothing still in their packages. Appellant was wearing new boots. Parenteau had been previously aware that appellant owned just one pair of black, steel-toed boots with waffle soles. (37 RT 4603-4604.) Appellant told Parenteau that he bought the clothes at Wal-Mart. He also said he bought a new faucet for her sink. (37 RT 4589-4591; 37 RT 4602-4603.)

After Parenteau met appellant, they drove to a motel in Middletown. (37 RT 4608-4609.) Although appellant normally was a fast driver, he drove carefully

and safely to Middletown. His memory was fine; she did not notice anything bizarre, unusual, or crazy with him. (37 RT 4605-4610.) He spoke in a normal manner and talked about events they both remembered as friends for many years. During the drive, appellant said that earlier that day he had returned to her house, took a shower, changed clothes, and left jewelry on the kitchen table. Once at the motel, Parenteau signed the registration form; appellant paid for the room. (37 RT 4570-4577, 4579-4581.)

After checking into the motel room, appellant retrieved a cardboard box from the trunk of his car. At trial, Parenteau identified the box as People's Exhibit No. 105-B. Appellant told Parenteau the box contained some rings. He told her he got it "from a dude" who owed him $300. Parenteau saw there were three gold wedding rings inside the box. Parenteau identified People's Exhibit Nos. 100-A and 100-B as two of the gold rings contained in the box appellant showed her. After looking at the rings, Parenteau and appellant left the motel and went to the nearby Middletown casino. (37 RT 4577-4579.)

While at the casino, Parenteau met Charlie Piper. Appellant played the slot machines and may have tried to cash a check. (37 RT 4584.) Leaving the casino, Parenteau and Piper walked around the corner to the home of Eddie Simon, a mutual friend. Appellant drove to Simon's home and met them there. Appellant had suggested they visit Simon in the hope of selling him the gold rings he had for methamphetamine and cash. (37 RT 4581-4582.) Simon did not have any dope to trade for the rings and was not interested in buying them. Parenteau,

Piper, and appellant returned to the casino. After a while, they all went to their Middletown motel room and smoked some dope furnished by Piper. (37 RT 4583.)

Parenteau testified that from the time appellant had picked her up near her home in the red car, neither she nor appellant used any drugs until they smoked methamphetamine in their motel room with Charlie Piper. (37 RT 4582-4587.)

The next day, Parenteau and appellant left the motel at around 10:30 a.m. and drove to Clearlake. They stopped at the Clearlake Wal-Mart at around 11:00 a.m. Parenteau returned a pair of jeans appellant had previously purchased. (37 RT 4588-4589.) Parenteau identified People's Exhibit No. 136-A as the Wal-Mart receipt she took into the store on returning appellant's jeans.[9] She received a refund of $15.94 for the jeans. (37 RT 4589-4591.)

After leaving Wal-Mart, Parenteau and appellant stopped to eat and then drove along Old Highway 53. They stopped again on encountering Charlie Piper. Parenteau talked to Piper again about trading appellant's rings to get some drugs so she and appellant could get high. Piper told Parenteau to meet him at the Galaxy Resort in half an hour. Before driving to the Galaxy Report, Parenteau and appellant ran some errands. Appellant stopped first for gas at a Super Cheaper station and then at a Taco Bell. Appellant paid for both the gas and their meal at Taco Bell. He was given receipts for these purchases including People's Exhibit No. 84 [Taco Bell receipt] and People's Exhibit No. 81 [Super Cheaper gas

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[9]/ Parenteau also testified that the receipt listed a faucet appellant said he had purchased for her home. Parenteau later turned the faucet over to the police. (37 RT 4591.)

receipt]. After these and other errands, Parenteau and appellant drove to the Galaxy Resort in search of Charlie Piper. There, they met Jeff Biddle and Shiree Hardman who lived together at the Galaxy Resort. (37 RT 4591-4594.)

Parenteau and appellant visited with Biddle and Hardman at the Galaxy Resort all afternoon. Appellant borrowed a piece of yellow note paper from Hardman and a pen from Parenteau to write a note. At trial, Parenteau identified the note appellant wrote as People's Exhibit No. 75-A [note dropped from appellant's wallet at the time of his arrest].) (37 RT 4595-4598.) Parenteau also identified People's Exhibit No. 105-E as a note she wrote at Hardman's residence before leaving. (37 RT 4599-4600.)

Later that afternoon or early evening, appellant and Parenteau went to visit the home of a friend named Ginger to see about selling some of the rings appellant had obtained. They then returned to Shiree Hardman's place until after dark. At night, appellant and Parenteau drove briefly back to the casino in Middleton in search of Charlie Piper. Appellant and Parenteau then drove back to Clearlake Oaks. Appellant dropped off Parenteau on Butler Street near her house. Taking the faucet with her that appellant had bought, Parenteau walked through the creek to her house. (37 RT 4598-4599, 4602.)

2. Testimony of Norman Myers

In 1998, Norman B. Myers worked as a caretaker and registered guests at the Middletown Motel on Calistoga Street in Middleton. (36 RT 4472-4475.)

Myers lived at motel; he was an alcoholic and drank regularly. On December 20, 1998, Myers registered a male and female guest for one night. The female gave her name as Starlene Parenteau; she paid $49.05 for the room. At trial, Myers identified appellant as the male guest who arrived with Parenteau. Myers spoke only briefly with appellant when he and Parenteau checked in. (36 RT 4487-4488.) Myers identified a motel receipt [People's Exhibit No. 117] as the receipt he gave them at the time of their stay. (36 RT 4475-4484.)

Myers identified a photograph of a red car [People's Exhibit No. 90] as the vehicle Parenteau and appellant parked outside their room. The next morning, Myers saw the guests drive away in their red car. (36 RT 4484-4487.)

3. Testimony of Shiree Hardman

Shiree Hardman had been previously convicted of drunk driving offenses, petty theft, and disturbing the peace. At the time of trial, she was in a diversion program. (36 RT 4496-4500.)

On December 20, 1998, Hardman was living with Jeff Biddle at the Galaxy Resort in Lower Lake when Charlie Piper, appellant, and Starlene Parenteau came for a visit. Hardman had not previously met appellant or Parenteau. Hardman noticed their new car, which she identified at trial as similar to the one depicted in People's Exhibit Nos. 90, 91, and 142. (36 RT 4500-4502.) During the visit, Parenteau showed Hardman several rings and asked if she were interested in buying them. Hardman declined. (36 RT 4502-4504, 4516.)

Appellant and Parenteau stayed for several hours, ate dinner, watched television, and left after 11 p.m. According to Hardman, during appellant's visit, he was calm and quiet. He was very polite, subdued, and acted like a normal individual. (36 RT 4504-4505.)

At some point during their visit, Jeff Biddle left to obtain some drugs for appellant and returned with methamphetamine. Hardman and appellant smoked methamphetamine from a pipe; Parenteau and Biddle went into the bathroom where, Hardman assumed, they injected methamphetamine. (36 RT 4505-4514.)

Appellant said they were going to the Twin Pines Casino. (36 RT 4514-4515) He gave Biddle a piece of paper with some information about a female [People's Exhibit No. 115]. Appellant asked Biddle whether Hardman would use the information on the paper to verify a credit card if someone from the casino called. Appellant said he would give them $50 to verify the credit card if the casino called. (36 RT 4515, 4517.) Hardman told Biddle that "no way" would she do so. Hardman later put the piece of paper [People's Exhibit No. 115] with her other bills and papers. Hardman never saw appellant again after he and Parenteau left on the night of December 20, 1998. About two weeks after appellant and Parenteau visited her home, Hardman gave the piece of paper [People's Exhibit No. 115] to Det. Carlisle. (36 RT 4511-4514.)

K. Fingerprint Evidence

Department of Justice criminalist Galen Nickey processed Ellen Salling's

home for latent fingerprints on the night of December 19, 1998. (38 RT 4818-4822.) None of the various latent fingerprints Nickey lifted matched appellant's rolled fingerprints. (38 RT 4822-4830.) In Nickey's opinion, appellant could not have made any of the latent fingerprints he lifted throughout Salling's house. (38 RT 4832-4836.)

Nickey also lifted latent fingerprints from the interior and exterior of Salling's red Mercury Sable after it was recovered along Walker Ridge Road on December 21, 1999. (38 RT 4836-4840.) Rolled fingerprints of appellant's index and middle fingers, left and right palms, and left thumb matched 11 latent prints lifted from the inside rear view mirror, steering wheel, radio control panel, exterior door handle, driver's door and window, hood, and top of Salling's car. (38 RT 4840-4842.)

Nickey also compared Starlene Parenteau's fingerprints on file with the DOJ with all latent and photographic fingerprints in this case. In Nickey's opinion, Parenteau was not the source of any of the fingerprints in this case and could be ruled out as the source of any of the latent lifts or photographic prints in this case. (38 RT 4847-4848.)

L. Blood and DNA Evidence

Department of Justice criminalist Michael Potts examined and typed samples of Salling's and appellant's blood. He also typed blood found on appellant's blue corduroy shirt [People's Exhibit No. 103-B] and on appellant's

jeans [People's Exhibit No. 101-B] found in Starlene Parenteau's home after appellant's arrest. (39 RT 4957-4958.)

Potts determined that Salling had ABO blood Type A, PGM 1+, ACP Type A and that appellant had ABO Type O, PGM 2-1+, ACP Type B. Potts did not run ABO testing on the bloodstains, as, in his opinion, PGM and ACP typing were more discriminating. Blood stains on the left and right knee of appellant's Wrangler jeans found in Parenteau's house revealed PGM 1+ and ACP Type A consistent with Salling's blood. Blood stains from the upper left thigh of appellant's jeans were consistent with appellant's blood and not from Salling. Stains on the left and right cuffs of appellant's blue corduroy shirt revealed PGM 1+ and ACP Type A consistent with Salling's blood; she, not appellant, could have been source of blood on the cuffs of his corduroy shirt. Because Salling's ABO, PGM, and ACP types together were consistent with four percent of the population, Potts could only conclude that Salling could have been a source of blood on appellant's pants and shirt, but not definitely the source. (39 RT 4939-4943, 4950-4951.)

Potts also determined that the patterned stain found on the trunk of Salling's Mercury Sable was blood. (39 RT 4932-4936.) Potts found blood stains inside the Mercury, as well, on the driver's seat, passenger seat, and console. Blood and human tissue were found inside the trunk. (39 RT 3936-4938.) In Pott's opinion, appellant's blue corduroy shirt [People's Exhibit No. 103-B] could have made patterned blood impressions on wood paneling in the entryway of

Salling's home and, as shown in People's Exhibit No. 94, the patterned impression on the trunk of Salling's red Sable. (39 RT 4928-4936.)

In addition, Potts had background and training in respect to blood spatters and cast-off blood. Potts examined appellant's Wrangler jeans found in Parenteau's home after his arrest. He found blood on the left thigh area, both knees, and bottom cuff area. He also found blood and blood stains on the rear of the pants, back of legs, and sides. Potts further examined photographs of dents, blood, and blood spatters on the wood paneling next to where Salling's body was found. In Potts' opinion, dent marks on the paneling were consistent with an object of sufficient force hitting the paneling, moving and distorting the wood fibers. In Pott's opinion, all blood spots and spatters on the wood paneling were consistent with medium to high velocity and with an object striking the victim's head and with blood from the object coming off in a 360 degree radius. (39 RT 4958-4971.)

In Potts' further opinion, based on his examination of the paneling next to where Salling's body was found, some blood was cast-off and some was spatter. In Pott's opinion some of the blood traveled from right to left and downward. Other blood spatters came from all directions. Except for cast-off spatters coming from a blunt object, other spatters were consistent with having originated in the head. In Potts' further opinion, some fine, high velocity, spatters could have come from cuts on the victim's lip or from coughing. Blood drops on top of blood drops indicated multiple bows and pooling of blood on the head. In Potts' further

opinion, marks and dents on the paneling revealed anywhere from six to seven separate marks, indentations, or dents on paneling, each from a separate blow consistent with a blunt force object at or near the time blood was deposited on the paneling. All of the marks or dents, their direction and size, indicated multiple, consecutive blood spatters caused by both upward and downward blunt force. (39 RT 4769-4979.) In Pott's opinion, the majority of blood spatters occurred while the victim was on the floor next to the paneling with the exception of a few cast-off spatters traveling in an upward direction from a moving object. (39 RT 4979-4980.)

It was stipulated that no two human beings, except identical twins, have the same DNA. It was further stipulated that blood samples from appellant [People's Exhibit Nos. 53-B-1], Ellen Salling [People's Exhibit No 97-A], and on various items of evidence were tested and analyzed for DNA by DOJ criminalist Armand Tcheong using the RFLP testing method. Tcheong concluded that DNA obtained from a bloodstain on the right knee area of appellant's Wrangler jeans [People's Exhibit No. 101-B] was the same as the DNA of Ellen Salling. DNA obtained from a bloodstain on the left knee area of the same jeans [People's Exhibit No. 101-B] was the same as DNA from appellant. DNA obtained from bloodstains on both the left and right cuff areas of a blue corduroy shirt [People's Exhibit No. 103-B] was the same as the DNA of Ellen Salling. DNA obtained from a blood stain on carpet found inside the trunk wheel well of Salling's Mercury Sable, was the same as DNA of Ellen Salling. DNA obtained from a piece of human tissue

from the trunk panel of the Mercury Sable was same as DNA of Ellen Salling. DNA obtained from blood on a piece of finished wood [Exhibit 176-A] was same as DNA of Ellen Salling. It was finally stipulated that these DNA RFLP testing results were estimated to occur at random among unrelated individuals in approximately 1 in 55 trillion Hispanic individuals, 1 in 140 trillion African-American individuals, and 1 in 77 trillion Caucasian individuals. (39 RT 4952-4955; 40 RT 5117; 1 CT [Court Exhibits] 9-11.)

It was stipulated that the amount of DNA obtained from a rubber seal inside the trunk of Salling's Mercury Sable was insufficient for RFLP testing. Senior DOJ criminalist Margaret Aceves thus used PM+DQA1 DNA testing and concluded that DNA obtained from the rubber seal inside the trunk was consistent with DNA of Ellen Salling. It was stipulated that DNA obtained from blood on piece of wood (portrayed as item CL-5 in People's Exhibit No. 188) and found in trunk of the Mercury Sable was consistent with DNA of Ellen Salling. DNA obtained from blood stains on the Ottoman [People's Exhibit No. 127-B] was consistent with DNA of Ellen Salling. It was stipulated that PM+DQA1 testing results are estimated to occur at random among unrelated individuals in approximately 1 in 18,000 Hispanic individuals, 1 in 520,000 African-Americans, and 1 in 9,400 Caucasians.(39 RT 4955-4957; 1 CT [Court Exhibits] 11.).)

M. Wood and Wood Reconstruction Evidence

Criminalist Michael Potts also examined wood from the Ottoman, a tree

limb [People's Exhibit No. 50-B], a piece of raw wood [People's Exhibit No. 38-A-2] and bark [People's Exhibit No. 38-A-3] recovered from inside Salling's home or car. Potts did not find any traces of blood on the tree limb, signifying that it could not have been used to beat or strike Ellen Salling. (39 RT 4957-4958, 4980-4984; see also 39 RT 4986-4991, 4992-4994.)

Potts reconstructed the missing leg of the Ottoman from pieces found at the crime scene, in the trunk of Salling's car, and the hillside where the Ottoman had been recovered. (39 RT 4915-4920.) In Potts' opinion, a corner piece of the Ottoman leg contained human head hair and blood. (39 RT 4621-4625.) Potts also found human-type hair on several broken pieces of the Ottoman [People's Exhibit No. 124-B]. (39 RT 4925-4927.)

N. Handwriting Evidence

Retired DOJ document examiner Bill Conner examined a blue note pad and other writings pertaining to this case in March 1999. (38 RT 4850-4856.) Comparing and examining known handwriting exemplars provided by appellant [People's Exhibit Nos. 179-A and 179-B], Jeff Biddle, Shiree Hardman, and Starlene Parenteau [People's Exhibit Nos. 177A-178B] with notes on yellow and white paper [People's Exhibit Nos. 75-A [yellow note] 115 [written note on white paper], and 183], Connor was of the opinion that appellant probably was the writer of the note on the yellow paper. (38 RT 4856-4859.) In Connor's further opinion, a note on white paper with credit card information (previously obtained from Jeff

Biddle [People's Exhibit No. 115]) was also written by appellant and, by virtue of matching indentations, originated from the blue notepad found on and seized from appellant at the time of his arrest. (38 RT 4859-4869; 40 RT 5117.)

II. PENALTY TRIAL -- PROSECUTION CASE

A. 1980 Burglary Conviction

It was stipulated that appellant was convicted of burglary in Arizona as referred to in People's Exhibits Z-58-A through Z-58-G. (49 RT 6240-6241; 1 CT [Court Exhibits] 49.)

B. 1988 Pamela Martin Assault

Pamela Martin and appellant lived together for three or four months in 1988 when she was 26 years old. They may have met at an Alcoholic's Anonymous (AA) meeting. (46 RT 5706-5708.) Their relationship did not work out, as appellant was pretty violent. (46 RT 5704.)

Martin told appellant that she wanted to break up. While Martin was showering, appellant entered the bathroom and started banging on the shower door. He called her names and broke the shower door. Martin got out of the shower and went into the bedroom to use the telephone. Appellant accused Martin of "prancing around" in a towel in front of other people and called her a slut and other names. At the time of this incident, Martin's cousins and a friend were staying at their home. (46 RT 5706-5708.)

Appellant ripped the telephone from the bedroom wall and grabbed Martin

by the neck. (46 RT 5706.) He pushed her against the bathroom wall, punched her in the chest, and threatened to kill her. The incident ended when appellant's stepfather, Bryant Johnson,[10] arrived and took appellant away from the house. (46 RT 5701-5706.)

Lake County Deputy Sheriff Steven Jones arrested appellant in Clearlake Oaks on August 28, 1988. (49 RT 6199-6202.) Appellant gave a statement to Jones in which he acknowledged getting upset at Martin, calling her a slut, and ripping the telephone from the wall after she told him she was going to call the police. Appellant also told Jones that he pushed Martin against the shower door, causing her to fall into the bathtub. When Martin started laughing at him, appellant grabbed her by the throat with both hands. Not wanting to hurt Martin, appellant released her. (49 RT 6202-6206.) Appellant additionally told Jones that his stepfather, who happened to be outside at the time of the incident, entered the residence and calmed appellant down. (49 RT 6205-6206.)

C. 1992 Jennifer VonSeggern Killing

It was stipulated that appellant was convicted of voluntary manslaughter in 1993 as documented by a California Department of Corrections section 969b prison packet. [People's Exhibit No. 154]. (49 RT 6240-6241; 1 CT [Court

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[10]/ Appellant's mother, Rosie Johnson, married Bryant Johnson after the death of his biological father. Appellant was about 6 months old when his biological father died; he was about 5 years old when his mother married Bryant Johnson. Bryant Johnson considered himself appellant's "natural father" as he had known appellant since he was eight months old.

Exhibits] 49.) According to Department of Corrections records, appellant was committed to state prison following his manslaughter conviction on November 8, 1993 and released on parole on May 16, 1996. (49 RT 6236-6238.)

Jennifer Lisa VonSeggern lived in an apartment in Santa Rosa, Sonoma County, in 1992. (46 RT 5725-5728.) She owned a Nissan Sentra [People's Exhibit Nos. Z-4 and Z-5]. Appellant was a frequent visitor to her apartment and often stayed overnight. (46 RT 5728-5730.) According to friends Kathleen Frank and Paul Sundquist, both VonSeggern and appellant were frequent methamphetamine users. (46 RT 5734-5735, 5742.) A few weeks before her disappearance, VonSeggern told Kathleen Frank that she was scared to death of appellant. (46 RT 5732-5734.)

According to appellant's friend, Frank Molles, appellant was using and injecting drugs in October 1992. Molles testified that appellant displayed all the symptoms of drug use, including being nervous, scared, and paranoid, and showing personality changes. (46 RT 5754-5755.) Molles told a police officer investigating Jennifer VonSeggern's disappearance that appellant was subject to severe mood swings from his use of drugs. Molles also reported that appellant would appear normal and then switch to being angry, mad, and unstable. (46 RT 5757-5759.)

James Vaughn and a girlfriend named Desiree met appellant at the Golden Penny Motel in Santa Rosa on October 1992. (46 RT 5784-5787.) At the time of trial, Vaughn was a convicted felon and on parole. In 1992, Vaughn was about 22

years old, and Desiree was about 21; both were homeless. (46 RT 5787, 5791-5794.) Needing a place to stay in October 1992, Vaughn "ran a con on appellant," telling him that he knew how to "cook" or manufacture methamphetamine in exchange for getting a place to stay. (46 RT 5791-5794, 5816-5818.) Appellant told Vaughn and Desiree that he would let them stay at his place in exchange for Vaughn's help in manufacturing methamphetamine. (46 RT 5791-5794.)

Appellant drove Vaughn and Desiree and their possessions to his residence in Santa Rosa. Appellant told them to wait in his truck in the parking lot. After short time, appellant returned and brought Vaughn and Desiree into his apartment. Appellant told Vaughn that he had to make sure his girlfriend was not at home; that was appellant's excuse for making them wait in the parking lot. (46 RT 5800-5801.)

No one else was in the apartment when Vaughn and Desiree arrived. One of the bedrooms was kept locked. Appellant said that the room belonged to his girlfriend's kids. (46 RT 5801-5804.) Appellant may also have told Vaughn that his girlfriend and her kids left to go to her mother's house. (46 RT 5811-5814.) Vaughn and Desiree lived together in appellant's apartment only for a few days. Vaughn never met Jennifer VonSeggern. (46 RT 5797-5800.)

Vaughn slept on the couch; Desiree slept in appellant's bedroom. After they arrived, appellant gave Desiree some clothes and costume jewelry. Vaughn never saw anyone else in the apartment. (46 RT 5803-5804.) On the first night Vaughn and Desiree stayed in the apartment, appellant left for a period of time.

Vaughn was unsure how long appellant was gone. Appellant did not tell Vaughn where he went. (46 RT 5806-5807.)

After a few days, Vaughn moved out, but Desiree stayed with appellant. Vaughn failed to deliver on his promise to manufacture methamphetamine; he did not know how. (46 RT 5807.) Before Vaughn left, appellant tried to sell him the Nissan. Vaughn told appellant he would buy the car after making some money from cooking methamphetamine. According to Vaughn, the Nissan appellant offered to sell him was dirty and muddy. It looked like it had been in a mud pit. (46 RT 5805-5806.) About a week after he left the apartment, Vaughn returned and stole a stereo. (46 RT 5804-5805.)

Paul Sundquist was acquainted with Jennifer VonSeggern. They had dated for a couple of years. On October 16 or 17, 1992, Sundquist went to visit VonSeggern at her apartment. (46 RT 5736-5737.) A man, who identified himself as "Jerry," answered the door. Sundquist asked if "Jenny" still lived there. Jerry told Sundquist that "Jenny" did not live there and that he never heard of a "Jenny" living there. (46 RT 5737-5739.) At trial, Sundquist identified appellant as looking similar to the man who answered the door at VonSeggern's apartment. (46 RT 5742.) Sundquist also observed a second man about 25-30 years old sitting on a couch in the apartment and crouched over a table. (46 RT 5741.)

According to Frank Molles, appellant normally drove a pickup truck. On at least three occasions in October 1992, Molles saw appellant driving a Nissan Sentra depicted in People's Exhibit Nos. Z-4 and Z-5. Appellant first told Molles

that his girlfriend had taken off with a female friend. On the next occasion, appellant said that she left with a neighbor. On the third occasion, appellant told Molles that his girlfriend was kidnapped by the Hell's Angels. (46 RT 5751-5754.) Appellant asked Molles if he wanted to buy the car. Declining the offer, Molles directed appellant to a used car lot on Santa Rosa Avenue. Later, appellant told Molles that he had sold the car. (46 RT 5755-5756.)

Don Daley owned a used car lot on Santa Rosa Avenue in Santa Rosa. On October 19, 1992, Daley bought a Nissan Sentra from a person named "Johnson" for $600. Daley identified the Nissan depicted in People's Exhibit Nos. Z-4 and Z-5 as the vehicle he purchased from appellant. As the car was registered to Jennifer VonSeggern, appellant told Daley that he needed to take the paperwork to his girlfriend for her signature. Appellant later called Daley and said that he got the paperwork signed. Appellant brought the signed title and transfer documents to Daley. In turn, Daley gave appellant a check. He also gave appellant a ride back to his apartment. (47 RT 5824-5827.) Daley never saw Jennifer VonSeggern. (47 RT 5827-5831.)

In October 1992, Rodney Wright worked as an auto detailer at American Auto Detailing in Santa Rosa. He cleaned VonSeggern's car purchased by Don Daley. On cleaning the vehicle, Wright noticed blood stains on the backseat floorboard. The stains kept coming to the surface every time he applied shampoo, stain remover, soap, and a degreaser. The stains smelled musky and foul. Wright reported the stains to Daley. (47 RT 5831-5835.)

Santa Rosa Police Officer Francis Thomas spoke with Daley about the purchase and sale of VonSeggern's car. Daley told Officer Thomas that although he issued a check to appellant and VonSeggern, appellant had first asked for cash, explaining that if he accepted a check it might interfere with her welfare checks. (47 RT 5835-5838.)

Officer Thomas also spoke with Rodney Wright who cleaned VonSeggern's car in October 1992. Wright reported to him that the car had a foul smell in the backseat. When he applied a solvent to the backseat, it turned into a color he believed was blood. Because a lot of old cars were dirty and stained, Wright did not report his observations to the police. Wright also told Thomas that the car was dirty with mud. In Wright's opinion, someone had driven the car off road and through brush. (47 RT 5838-5839.)

Thomas subsequently had a stain found in VonSeggern's car, as described by Wright, tested for blood. Because the car had been contaminated with cleaning products, the test proved inconclusive. (47 RT 5855-5856.)

In an interview with Officer Thomas, James Vaughn said that when he first arrived at his apartment, appellant said that his girlfriend was gone. (47 RT 5841-5842.) In a subsequent police interview, Vaughn reported that appellant made him and his girlfriend wait for over an hour in the parking lot until the coast was clear. Vaughn noticed that appellant had changed clothing. Appellant told Vaughn that he had gotten rid of his girlfriend. (47 RT 5842-5843.)

During this subsequent police interview, Vaughn told Thomas that when

appellant gave clothing and jewelry to Desiree, he referred to his own girlfriend and said, "she's not going to need them anymore." (47 RT 5843-5844.) Vaughn also reported to police that while staying in the apartment, appellant told him that VonSeggern was dead and that she was going to be put in a ditch. (47 RT 5844.)

On October 26, 1992, Officer Thomas and Det. Jim Miller interviewed appellant at his apartment, 966 Borden Villa Drive, Apartment 204, in Santa Rosa. Appellant explained he last saw VonSeggern on October 16, 1992 and that she told him she was going to leave. Appellant reported that VonSeggern seemed in desperate need of money. He loaned her $500 in exchange for the pink slip to her car as collateral. Appellant said he did not know where VonSeggern went and did not hear from her. When VonSeggern did not return, he sold her car at A & B Motors on Santa Rosa Avenue. (47 RT 5844-5847.)

On January 12, 1993, VonSeggern's body was found by Sonoma County Road Department employees in a creek area adjacent to Gericke Road in Sonoma County, near the Marin County line. At that location, Gericke Road was wet and muddy. (46 RT 5764-5765; see also 1 Supp CT [Court Exhibits] 38.) When found, VonSeggern's body was wrapped in a red sleeping bag and bound with several items, including Christmas tree lighting and electrical cording. (46 RT 5759-5768.) There were no obvious signs of trauma or injury to VonSeggern's body. (46 RT 5769.) Cording and lighting found during a subsequent search of VonSeggern's apartment were identical to the cording and tree lighting found on her body. (47 RT 5869-5874; 47 RT 5881-5887.) A piece of black strap also

found on VonSeggern's body was identical to a portion of a black strap missing from a purse found in her apartment. (47 RT 5874-5875.)

Appellant was evicted from VonSeggern's apartment on January 13, 1993. (47 RT 5869-5873.)

An autopsy on the body of Jennifer VonSeggern was performed by Dr. Ervin J. Jindrich in Santa Rosa on January 13, 1993. Dr. Jindrich formerly had been the Marin County Coroner and the Coroner for the City and County of San Francisco. (47 RT 5856-5860, 5887-5890.) In Dr. Jindrich's opinion, the victim had been dead for a period of time. (47 RT 5890.)

Severed electrical cording bound the victim's neck, ankles, and feet. During the autopsy, green wiring and strap-material were also removed from the victim's throat and body. (47 RT 5856-58601 47 RT 5865-5867.) There was no evidence of injuries or wounds, and Dr. Jindrich could not determine a cause of death. Specifically, it could not be determined whether either the cording around VonSeggern's neck or the plastic bag over her head had anything to do with the cause of death. Indeed, it was not possible to determine even whether the she died from some other modality (47 RT 5891-5894.)

Dr. Jindrich sent out samples of the victim's blood for toxicology testing. He was later informed that some methamphetamine was present in the victim's blood. (47 RT 5891-5894.) Because of decomposition, it was impossible to determine whether there were injection sites on the body or whether drugs contributed to the victim's death. (47 RT 5894-5896.) Given the level of

decomposition and the absence of trauma, it was not possible for Dr. Jindrich to determine whether a drug overdose may have caused her death or whether drugs played any role in her death. In Dr. Jindrich's opinion, the cause of VonSeggern's death could not be determined because of decomposition. (47 RT 5896-5897.)

Bob Stettler was a retired Orange County Sheriff's Department document examiner living in Lake County at the time of trial. At the request of the Lake County prosecutor, Stettler examined known documents signed by Jennifer VonSeggern and compared her signature with the handwriting on the documents relating to the transfer and sale of her vehicle by appellant to Don Daley in Santa Rosa [People's Exhibit Nos. Z-50 and Z-51]. In Stettler's opinion, VonSeggern's signature on the vehicle transfer documents were fictitious, nongenuine imitations of her genuine signature [People's Exhibit Nos. Z-4, Z-52, and Z-55]. (47 RT 5876-5881.)

D. Margaret Johnson Killing

Margaret Johnson lived alone in a mobile home at 9375 Leila Street (corner of Barbara Street) in Glenhaven, Lake County. (47 RT 5940-5941.) She was born on January 4, 1933. (49 RT 6217-6218.) She had been married to appellant's grandfather. (47 RT 5941-5943.) According to Bryant Johnson,[11] appellant was

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[11]/ Bryant Johnson's father married Margaret after his father's first wife (Bryant's mother) died. Bryant's father and Margaret were married for about 25 years. Bryant's father predeceased Margaret by about four years. Margaret Johnson was thus Bryant's stepmother and appellant's step-grandmother. (47 RT 5941-5943.)

absolutely welcome at her home. Bryant saw them together frequently. Appellant played bingo with her on many occasions. (47 RT 5950-5951, 957-5958.)

On the night of December 4, 1998, Johnson played bingo with her friend Mary Marsh at the Robinson Rancheria. Johnson left about 10:30 p.m. and drove home. Johnson called Marsh at about 11:10 p.m., saying that she had arrived home safely. Johnson told Marsh she was going to turn on the heat as it was cold. (47 RT 5908-5910.)

In the past, Marsh had seen appellant and some of his relatives at the casino with Margaret Johnson. According to Marsh, Margaret Johnson got along very well with appellant. (47 RT 5912-5914.)

On the morning of December 5, 1998, Doris Lent, a Glenhaven residence and close friend of Margaret Johnson's, received a call from Sunol Grayhorse, the Glenhaven postmaster. Grayhorse asked Lent to check on Johnson because she had not arrived for work at the post office that morning. (47 RT 5935-5937.) In Lent's experience, Johnson was always on time. Lent drove two blocks to where Johnson lived and saw flames shooting out of her home. She then drove to Elizabeth Childers' home nearby, and called 911. (47 RT 5914-5918.)

Lent returned to Johnson's home to await the arrival of firefighters. Childers also drove over and tried unsuccessfully to enter Johnson's home through sliding glass doors. (47 RT 5926-5928.) Both Lent and Childers observed loose change on the driveway near Margaret Johnson's car. (47 RT 5920-5921, 5928-

5929.)

Margaret Johnson always carried a cell phone and post office keys. She also owned a portable police scanner that she used to track police calls. (47 RT 5910-5912, 5921-5922, 5964-5965, 5989.)

Bryant Johnson was called to Johnson's some time during the fire and arrived while the fire was in progress. He went into her home many times after the fire had been extinguished. He was unable to find her purse or cell phone. (47 RT 5944-5946.) According to Bryant Johnson, Margaret Johnson had a lot of flammable liquids at her home. She had a kerosene heater by the front door. There were paint thinners as Johnson's husband did a lot of painting before he died, lighter fluid for barbeques, and extra gas around their home. (47 RT 5951-5952.)

Bryant Johnson tried to inventory Margaret Johnson's property after her death. Many items had been burned in the fire. Bryant himself probably removed some jewelry after the fire. Bryant's father and Margaret Johnson used to do swap meets and thus had boxes of jewelry all over their place. Bryant did not find a portable scanner after Margaret Johnson's death, only a plug-in scanner. He found several purses, all of which had been damaged by fire; there were purses everywhere. (47 RT 5952-5957.)

Raymond Jones, the Clearlake Oaks postmaster and Clearlake Oaks voluntary fire engineer and investigator, responded to the fire at Margaret Johnson's home at 9:34 a.m. on December 5, 1998. (47 RT 5968-5971.) When

Jones arrived, Johnson's mobile home was fully engulfed in fire with flames shooting out the front window and venting through the roof. (47 RT 5968-5972.)

After the fire had been extinguished, Jones and firefighter Dan Copas searched the home. They found the exterior doors locked. Margaret Johnson's charred body, as depicted in People's Exhibit Nos. Z-30-Z-34, was found by another fire team at about 10:38 a.m. The body was located in a bedroom under debris from the fire. (47 RT 5973-5978.) Johnson was found wearing a red shirt and one tennis shoe. (47 RT 5978-5979.) The other shoe was in proximity to the body and might have been dislodged during fire suppression efforts. (47 RT 5978-5979.)

Raymond Jones subsequently spent several hours investigating the cause and origin of the fire. In Jones' opinion, the fire originated at floor level in Johnson's bedroom at or adjacent to her body. (47 RT 5972-5979, 5981.) In Jones' opinion, the fire had been going anywhere from 40 minutes to 3 hours before the firefighters arrived. Because Jones did not see any indications that the fire was a slow burning fire, Jones was of the opinion that the fire likely started within 40 minutes of the firefighters' arrival. (47 RT 5990-5992, 5998.) In Jones' opinion, the door to Johnson's bedroom had been closed during the fire. At least part of the floor area under Johnson's body had been protected from the fire, signifying that the body was on the floor prior to the fire. (47 RT 5979-5981, 5992-5995.) A candle and candleholder were found on the right side next to the body. A piece of mirror from the candleholder was found protected from the fire

under Johnson's body, signifying that the candleholder and mirror must have broken before the fire. (47 RT 5982-5983.)

In Jones' opinion, the fire was not caused by an electrical problem or faulty wiring. There were no indications of arcing in the wires. The hot water heater fueled by propane was eliminated as the cause of the fire. An electric blanket cord found near Johnson's body in her bedroom was in the off position. (47 RT 5986-5988.) In Jones' opinion, the fire started as a "hot set" rather than by a "delayed device" using a candle. A candle, if lit, would have gone out prior to starting the fire. However, the candle definitely could have started the fire; indeed, Jones was unable to rule out the candle as the cause of the fire, because it was found in the vicinity of origin. (47 RT 6001-6003, 5988-5989, 5995-5998.)

On inspecting other portions of Johnson's home after the fire, Jones observed a purse on a couch in the front or living room. The contents of the purse had been dumped out and spread on the couch. Telephone lines appeared to have been pulled out of the wall and had not suffered fire damage. (47 RT 5983-5986.)

Carpeting found under Johnson's body and her red shirt were collected by Raymond Jones and Greg Smith, Supervising Investigator, California Department of Forestry and Fire Protection. (47 RT 5981-5982; 48 RT 6025-6029.) Considering that testing had confirmed the presence of an ignitable liquid in the Isoparraffin class, Jones was of the opinion that a delay device was used and that the fire was started by a hot set. (47 RT 6000-6001.) According to Jones, if someone had used a flammable liquid to start the fire and put fluid directly on the

body itself, the shirt would have been consumed in the fire. (47 RT 6001-6003.)

In Greg Smith's opinion, the fire started in Johnson's bedroom and then traveled to other areas of the home. (48 RT 6029-6036, 6049-6052.) The areas of lowest burn and most intense burning occurred around Johnson's body. Although Smith found several potential, accidental causes, including an electric blanket and candle holder, he eliminated both as the cause or source of the fire. (48 RT 6040-6043.) He also eliminated the water heater and wiring as cause of the fire. (48 RT 6054-6056.) In Smith's opinion, the electric blanket cord was in the off position, and it would have been difficult for the candle inside the glass container to cause a fire. Smith observed debris both under and on top of the candle holder indicating that it probably fell during the fire from one of the dressers. (48 RT 6032-6044, 6059-6062.)

Smith removed cloth samples from Johnson's body and from the carpet directly underneath and to the side of the body for testing and analysis. (48 RT 6047-6049.) Based on the absence of debris under the body and that fact that clothing on Johnson's back had not been burned, Smith was of the opinion that the body was on the floor at that location during the fire. (48 RT 6045-6047.) Based on his investigation without reference to test results, Smith was of the opinion that the fire was set by an unidentified person using an open flame. There was no evidence of a delay device, although that could not be ruled out with complete certainty in Smith's opinion. (48 RT 6056-6057.)

According to Smith, the laboratory results revealed the presence of an

Isoparaffin ignitable fluid, such as polish or lighter fluid, on both the clothing and carpet under Johnson's body. Smith's opinion that the fire was intentionally set was strengthened by the laboratory test results. (48 RT 6057-6059, 6062.)

Department of Justice criminalist Michael Potts tested the piece of carpeting and clothing provided to his laboratory by Greg Smith. (48 RT 6064-6069.) Potts determined that an ignitable Isoparaffin-type fluid or accelerant was present on both the carpeting and clothing. (48 RT 6064-6069.) In Potts' opinion, the test results showed that more Isoparaffin was present on the clothing than on the carpet consistent with some of the cloth material falling onto the carpet. (48 RT 6074-6076.)

In addition, Potts sent a piece of carpet and clothing to the Department of Justice Crime Laboratory in Modesto for further testing and analysis. Senior Criminalist Sarah Yoshida confirmed the presence of Isoparaffin on the carpet and clothing. (48 RT 6069-6074, 6077-6081.)

Dr. Jason Trent performed autopsies on the body of Margaret Johnson on December 7, 1998 and again on December 14, 1998. (49 RT 6256.) In Dr. Trent's opinion, there was no evidence of an assault and no evidence of injury caused by a falling object. (49 RT 6262-6266.) Dr. Trent did not find any evidence of aspirated soot in Margaret Johnson's respiratory tubes, trachea, and bronchi. The carbon monoxide level of Johnson's blood was very low -- less than 2 percent rather than the 40-80 percent it would be if she were alive during the fire -- indicating there was no aspiration of the products of combustion. The lungs

showed pulmonary edema and backup fluid as in cardiac failure. In Dr. Trent's opinion, the cause of Margaret Johnson's death was lack of blood supply to the heart due to ischemic or coronary heart disease. (49 RT 6266-6271, 6271-6274.)

In Dr. Trent's opinion, stress could have, but did not necessarily, lead to Margaret Johnson's death. Acute or sudden stress could have led to metabolic hormonal changes and spasm of coronary arteries and/or ventricular fibrillation. (49 RT 6275-6279.)

According to Dr. Trent, the stressful event occurred probably minutes prior to death. Dr. Trent also acknowledged that the fire itself could have been the stressful event causing Margaret Johnson's death. (49 RT 6290-6291.)

Dr. Whie Oh, a cardiologist, had treated Margaret for coronary heart disease in 1998. On two occasions in 1998, Dr. Oh performed an angioplasty on Margaret Johnson. (49 RT 6241-6250.) Dr. Oh's would not have expected Margaret Johnson to die of heart problems on December 5, 1998 so soon after his November 12, 1998 angioplasty procedure. In Dr. Oh's opinion, acute and severe psychological stress could have caused Margaret Johnson, suffering from coronary heart disease, to suffer ventricular fibrillation and die from sudden death syndrome, a rhythmic disturbance. (49 RT 6250-6253.) Dr. Oh was unable to determine the actual cause of Margaret Johnson's death. There was no way to measure the amount of stress needed to trigger sudden death syndrome. (49 RT 6253-6256.)

Dr. Samuel M. Sobol, a clinical professor of cardiology at the University of

California, San Francisco, reviewed Margaret Johnson's medical and autopsy records that confirmed she had coronary heart disease, with hardening of the arteries, and symptoms of angina. (49 RT 6303-6311.) Based on Margaret Johnson's records, Dr. Sobol would have been surprised by her death in December 1998 from heart disease. (49 RT 6311.)

In response to a hypothetical question, assuming Margaret Johnson's medical condition and death, considering the autopsy report, and hypothetical encounter with an individual in her home engaged in theft, described as male, 37-years old, 6' tall, 180 pounds, Dr. Sobol was of opinion that the cause of death could be attributed to a sudden surge of adrenaline, the marked increase in heart rate and blood pressure, and constriction or narrowing of coronary arteries, causing extensive ischemia or impaired blood flow to heart muscle, electrical instability (usually ventricular fibrillation), and fatal cardiac arrhythmias. (49 RT 6311-6314, 6322-6329.)

According to Dr. Sobol, the overwhelming medical evidence suggested that Margaret Johnson was not breathing when the fire began, although it was possible she was alive for a very short time after the fire began. Dr. Sobol acknowledged that the cause of death could also have been stress by being on fire. (49 RT 6314-6315.)

At the time of trial, Sandra Cramer was in state prison for felony embezzlement and welfare fraud. In early December 1998, Cramer was at Starlene Parenteau's home on Schindler Street. Also present were Cramer's

husband, Starlene Parenteau, Starlene's brother (Luther Gene Weathers), and Charlie Farmer. (48 RT 6021-6022.) Cramer was not well acquainted with appellant. On one occasion in her presence, appellant had used drugs. In Cramer's opinion, appellant was a very nice man. When she needed help with parenting classes, appellant offered to pay for her gas to allow her to get to class. (48 RT 6024.)

Parenteau asked Cramer to help her and appellant use a credit card to get money from Western Union. Appellant told Cramer that the credit card belonged to a friend; Cramer could not remember the name but thought it bore the same last name as appellant. (48 RT 6021-6022.) At trial, Cramer described the credit card as blue and white and embossed with the name "Margaret." (48 RT 6018.)

Both appellant and Parenteau told Cramer that they previously tried to use the card at the casino but appellant did not have identification with him. (48 RT 6018.) When Cramer first attempted to obtain the money order, she was informed that the wrong address had been used. She asked appellant for the address. He used a telephone book to obtain the address which she then provided to Western Union. About 20 minutes after Cramer called Western Union, appellant left Parenteau's home to pick up a money order for $250. (48 RT 6012-6018.)

Starlene Parenteau identified two pieces of jewelry with the names "Marge" and "Margie" inscribed on back that appellant had given to her in December 1998. (48 RT 6132-6134.)

A review of Parenteau's telephone bill for December 1998 showed that she

received a telephone call from appellant at 1:56 a.m. on December 5, 1998. Parenteau did not remember that call. (48 RT 6135.)

Parenteau acknowledged that she was acquainted with Sandra Cramer and that she had asked Cramer some time in December 1998 to use a credit card in a call to Western Union. Appellant had asked her if she knew how to get cash from a bank card. Parenteau in turn asked Cramer who suggested using Western Union. Parenteau did not know whose credit card was used to obtain money from Western Union. (48 RT 6134-6135.)

Parenteau's brother, Luther Gene Weathers, had been previously convicted of three felony drug offenses in 1980, 1989, and 1999. He had served time in state prison. In December 1998, Weathers moved to a residence on Plaza Street in Clearlake Oaks. Weathers had been acquainted with appellant for many years. (48 RT 6115-6117, 6126-6129.) Weathers thought he knew appellant very well. The murder of Ellen Salling struck Weathers "like it's not the person I know." (48 RT 6126-6129.)

Weathers acknowledged that while he was living on Plaza Street in December 1998 appellant gave him a police scanner, cell phone, and stereo. In return, Weathers gave appellant some cash and owed him money for the balance. Appellant assured Weathers that the items were not stolen. Weathers later turned the scanner, cell phone, and stereo over to the police. (48 RT 6121-6123.)

Weathers was arrested in late December 1998 and thereafter confined in Lake County Jail on various charges relating to his possession of the items he

obtained from appellant. He saw and spoke with appellant who was also being held in the same jail. On one occasion, Weathers got mad at appellant and told him to "kill me; I'm not an old woman." Appellant replied, "it wasn't necessary, and it wasn't right." Later, when Weather again met appellant in jail, appellant denied responsibility and "made the same statement he's always made" to him that he "didn't do it." (48 RT 6121-6123, 6125.)

Det. Chris Rivera searched Margaret Johnson's fire-damaged mobile home on December 11, 1998. He seized operating manuals for a police scanner (Bearcat model No. BC120XLT) and a cordless telephone. Rivera did not find the items to which the manuals pertained. (48 RT 6136-6138.)

On December 18, 1998, Det. Rivera and Det. Carl Stein contacted Starlene Parenteau's brother, Luther Gene Weathers, as to appellant's whereabouts. Weathers told the officers that he had obtained property from appellant, including a Bearcat scanner, cell phone, and stereo. In a search of Weathers' home, the officers seized the items Weathers had obtained from appellant. The serial number of the scanner found in Weathers home matched the serial number on the manual Rivera previously found in Margaret Johnson's mobile home. The serial number of the cell phone matched the serial number of Margaret Johnson's cell phone as obtained from her telephone company. (48 RT 6138-6141; 49 RT 6212-6213.)

Pursuant to a search warrant, Det. Rivera searched appellant's van on June 30, 1999 at a secured storage facility in possession of the district attorney. Rivera

found and seized a Soundesign instruction manual from appellant's van and a cordless telephone. The cordless telephone matched the information in the operating manual previously seized from Margaret Johnson's mobile home on December 11, 1998. Various keys were also seized from appellant's van during the search. Rivera showed the keys to Postmaster Sonol Grayhorse who identified many of them as post office keys issued to Margaret Johnson. (48 RT 6142-6144.) At trial, Grayhorse identified 12 keys seized from appellant's van [as shown in People's Exhibit No. Z-45] as post office keys given to Margaret Johnson. (47 RT 5931-5935, 5937.)

It was stipulated that between January 10, 1997 and December 24, 1998 Margaret Johnson had cellular telephone service with U.S. Cellular Wireless Communication. Johnson did not report the loss or theft of her cell phone on or before December 5, 1998. More than 40 outgoing calls were made from Johnson's cell phone from December 5 to December 11, 1998. (49 RT 6210-6211; 1 Supp CT [Court Exhibits] 42.)

It was also stipulated that Margaret Johnson possessed a Petelco Credit Union Visa credit/debit card bearing number 4266150001073471. Her account was opened on August 6, 1997 and closed on June 14, 1999. Johnson did not report the loss or theft of the credit/debit card on or before December 5, 1998. Her credit card was used eight times between December 5 and December 15, 1998 in the total amount of $1,123.53. (49 RT 6213-6211; 1 CT [Court Exhibits] 43-44.)

According to Capital One of Richmond Virginia, Margaret Mary Johnson

possessed a Capital One Visa credit card bearing number 4121741361487395 on or before December 5, 1998. Her account was opened March 27, 1996 and closed on January 15, 1999. Margaret Johnson did not report the loss or theft of her Capital One visa credit card on or before December 5, 1998. The credit card was used at least six times between December 5 and December 18, 1998 in the total amount of $495.81. Johnson's Capital One Visa credit card was also used at an ATM machine at Bank of the West in Clearlake in the early morning hours of December 5, 1998. Her credit card could only be used at an ATM machine and with a personal identification (PIN) number. (49 RT 6213-6217; 1 CT [Court Exhibits] 45-46.)

A Bank of the West videotape [People's Exhibit No. Z-61-A] from its Clearlake branch in Lake County was admitted into evidence. The videotape showed appellant using Johnson's Capital One credit card on December 5, 1998 from 2:21 through 2:24 a.m. at the bank's ATM machine. (49 RT 6186-6190; 6223-6228; 1 CT [Court Exhibits] 51-52.)

E. Appellant's Post-Arrest Admissions

Det. Carl Stein interviewed appellant on December 23, 1998 at the Lake County Jail. (48 RT 6160-6164.) He drafted a written statement after the interview which appellant signed [People's Exhibit No. Z-59]. (48 RT 6147-6151, 6165-6168.) Stein told the jury that after being confronted during the interview with various items of evidence pertaining both to Margaret Johnson and

Ellen Salling, appellant, who was very distraught and crying, stated, "I really fucked up, I need help." (48 RT 6164, 6167.)

In his written statement, appellant acknowledged burglarizing Margaret Johnson's mobile home. He said she was not at home at the time; he left Margaret Johnson's house in the early evening. Appellant said he took a scanner, cell phone, and stereo. He denied taking any jewelry or credit cards in the burglary. (48 RT 6151-6156.)

In his statement, appellant said that he was pursued in his van by the police on December 19, 1998. After bailing out of his van, he came down hills into Lucerne and hitchhiked back to Clearlake Oaks. From there, appellant said he went to his mother's house. As no one was at home, he took a shower and changed clothes. Appellant denied ever staying overnight at Starlene Parenteau's home. (48 RT 6151-6156.)

As to the red car he was driving prior to his arrest, appellant first told Det. Stein he did not remember how he got the car. (48 RT 6158-6159.) Later, appellant told Stein that he obtained it from a friend named Scott. He did not know Scott's last name or where he lived. Appellant said he could probably find Scott around Luther Gene Weathers' house. Appellant said that Scott owned him money. On seeing him at a Super Cheaper gas station, appellant took his car. (48 RT 6156-6158.)

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F. Victim Impact Testimony

Ellen Salling's daughter, Henni Ray, offered victim impact testimony at the penalty trial. (See 50 RT 6344-6363.) Ray's penalty trial victim impact testimony covers approximately 20 pages of trial transcript. (50 RT 6344-6363.)

Ray testified about her relationship with her mother after her father died and informed the jury about the devastation she suffered after her mother was killed. (50 RT 6344-6345.) Ray regular spoke with her mother several times each week; they were best friends. She or her mother would call every Sunday, even if they spoke the day before on Saturday. (50 RT 6350.) According to Ray, her mother's close friend, Bill Ellis, and other relatives in her family were also devastated by her mother's death. (50 RT 6359-6363.)

Ray told the jury that her mother had worked hard all her life and kept her home in Lake County in immaculate condition. Her mother loved gardening and had a beautiful garden. Ray's mother was very active at her age; Ray thought of her mother as 50 years old rather than 75. (50 RT 6354-6356.) Her mother was very sociable and outgoing. She was delighted when Ray and her husband got a puppy. Ray's mother had joined a bowling league, square dance club, the Clearlake SPCA, and volunteered at the Lucerne Senior Center. (50 RT 6348.)

Ray's mother always whistled while cleaning, cooking, or making cookies. Her mother always had a fear of dying alone and not having her body discovered, as had happened to her sister. Ray's mother thought it was the most horrible thing just to be lying there without anyone aware of it. (50 RT 6358-6359.) Ray herself

said she was in the courtroom every day during trial because "my mother shouldn't be here alone" Not a day went by without Ray thinking of her mother. Her death was always in her mind, as well as the brutality, senselessness, pain, and suffering that she went through. Those feelings would be with Ray for the rest of her life. (50 RT 6359-6363.)

According to Ray, her mother regularly visited her 99 year old mother-in-law who lived in a care facility in Nice, Lake County. Ray could not bring herself to tell her grandmother that her "beloved Ellen" had died. Instead, Ray implied her mother was on vacation and would soon return. Ray's grandmother died in January 1999 shortly after her mother was killed. (50 RT 6357-6358.)

Ray and her husband sold their car dealership in Needles in 1994 and moved to Fort Bragg in order to be close to her mother. Ray and her husband also planned to move to the Clearlake area. Ray and her husband usually visited her mother at Christmas. They cooked and baked together, talked, had a wonderful time in each other's presence, and used to talk for hours about their lives and future plans. Ray, her husband, and mother always shared a three-way hug before bedtime when they visited at Christmas. (50 RT 6348-6350.) Ray had not celebrated Christmas since her mother's death; it was not the same and the memories were too painful. As Ray and her husband lived in a remote area, they usually bought presents for each other and had them shipped to her mother's home. Ray's mother played Santa's helper by keeping straight what Ray and her husband each bought for the other. Ray's mother always took pleasure in knowing

what everybody was getting and in keeping it secret. (50 RT 6350-6352.)

Ray last spoke with her mother on the day before her death on December 18, 1998 while en route to her home. She did not have the chance to tell her mother everything she wanted to tell her, and there was so much left unsaid. Ray and her husband learned of her mother's death at 2:00 a.m. while staying overnight in a motel. A sheriff's deputy pounded on their motel room door, yelling for them to open the door and saying there had been a death in Lake County. In total shock from the news, Ray and her husband packed, grabbed their dog, and drove to Lake County, arriving early in the morning at her mother's home. Ray and her husband found her mother's home blocked by yellow crime tape. She prayed that it was a mistake. (50 RT 6352-6354.)

Ray entered her mother's home on the afternoon of December 20, 1998. She inventoried the house for missing items on behalf of the sheriff. She later wrapped up her mother's estate and sold her home. (50 RT 6354-6355.) Ray tried to maintain her mother's garden after she died as long as they had the house. (50 RT 6356.)

Gerald Ohman, the father of Jennifer Lisa VonSeggern, testified that he lived in Santa Rosa for 40 years. He and his late wife had three children: James, Frederick, and Jennifer who was the oldest. Ohman identified People's Exhibit Nos. Z-2 and Z-3 as photographs of his daughter. (48 RT 6099-6100.)

Ohman testified that at the time of her death, his daughter had two small boys, although their father, not Jennifer, had been awarded custody. About six

weeks before her death, Jennifer was evicted from a trailer in which she lived and moved to an apartment. She was living in the apartment with appellant. (48 RT 6099-6100.)

At the time of her death, Jennifer was trying to get a job and get off welfare. In October 1992, Jennifer missed a custody hearing for her children and had not spoken with Ohman or his wife for about a week. Ohman called her apartment and spoke with an unknown person, not appellant. That person told Ohman that Jennifer was not at the apartment. Ohman then went to Jennifer's apartment. He spoke with two or three people who said they had no idea where Jennifer was and that somebody had rented the apartment to them. Ohman then went to the police to report his daughter missing. (48 RT 6104-6106.)

Ohman cooperated with the police in looking for his daughter and was notified in January 1993 that her body had been found. Ohman and his wife had to make arrangements about raising their daughter's children. Ohman's wife was very nervous, distraught, and withdrawn on learning that Jennifer's body had been found. Prior to Jennifer's death, Ohman's wife was very happy and outgoing; she belonged to many organizations. After Jennifer's death, Ohman's wife only involved herself in Jennifer's death and organizations involving families of murder victims. She died from cancer in 1997. Ohman was sure that his daughter's murder contributed to his wife's death in that she was reluctant to do anything about her disease, gave up looking for medical help, and essentially withdrew from outside life. The only thing on his wife's mind was the death of their

daughter. (48 RT 6106-6109.)

Ohman told the jury he was continually reminded of his daughter. When he saw people who looked liked Jennifer, it brought back memories of her. It was difficult to raise Jennifer's children or answer their questions, such as "where's mommy?" Jennifer's children were never told of the circumstances of her death. (48 RT 6109-6110.)

Ohman and his wife only obtained a few items from Jennifer's apartment after her death. Her apartment had been totally trashed; virtually nothing was left in the apartment after her death. Until the time of trial, Jennifer's death turned Ohman's life inside out and upside down. (48 RT 6110-6111.)

III. PENALTY TRIAL -- DEFENSE CASE

A. Testimony of Bryant Johnson

Bryant Johnson testified that while growing up, appellant was conscientious and "his mother and I just couldn't believe the way he took to old people and little kids." (47 RT 5958-5959.) For several years, Bryant and his wife thought appellant had been doing well. Living at times with his parents, appellant was working, and he behaved very well. Appellant was considerate, thoughtful, and did everything for his mother from cleaning house to cooking meals. Appellant worked with Bryant in his shop, whatever the job happened to be. (47 RT 5960-5962.)

Bryant was very much aware that appellant had gotten into a considerable

amount of trouble, including now his murder conviction with special circumstances. Although aware of reports that appellant had a violent nature as an adult, Bryant never saw any violence. He knew appellant had used drugs in the past, because appellant had gotten into trouble with drugs. Bryant had been aware of appellant's drug use for about 8 or 9 years. (47 RT 5959-5960.)

Bryant knew that appellant had spent time in prison. He visited appellant several times in prison. Appellant's demeanor then seemed good, and he acted appropriately. Bryant was not aware that appellant had any trouble in prison. (47 RT 5962-5964.)

B. Testimony of Appellant

Appellant's mother, Rosie Johnson, married his stepfather, Bryant Johnson, about four or five years after his biological father died of colon cancer. Before she remarried, appellant's mother and appellant lived with his grandmother. The grandmother mostly raised appellant until his mother remarried. (50 RT 6369.)

Appellant acknowledged that he completed high school, got his diploma, and was not in any type of special education while in school. He briefly attended junior college, studying the administration of justice and accounting, but did not earn any college credits. He was pretty good with accounting while in prison and did some typing. (50 RT 6467-6468.)

1. 1980 Burglary Conviction

Appellant acknowledged his 1980 burglary conviction. He explained that

he went to Arizona as a temporary worker for the U.S. Geological Survey after working in a similar capacity in Lake County. Appellant and four friends shop-lifted some beer and other items from a Circle K convenience store. They were pursued by an off-duty police officer. During the chase, appellant and a friend tossed items from their pickup to elude capture. Appellant pled guilty to third-degree burglary, spent a weekend in jail, and was released. (50 RT 6372-6377.)

2. 1988 Pamela Martin Assault

Appellant acknowledged assaulting Pamela Martin whom he had met at an AA meeting. (50 RT 6379-6381.) Appellant, Martin, and her two children lived together in Lake County for about 3 or 4 months. Appellant got into an argument with Martin after he saw her wearing just a towel in front of house guests. Appellant confronted Martin in the bathroom and pushed her against the shower door. The door broke, cutting Martin's ankle and forearm. During the incident, appellant pulled the telephone cord from the wall. He also grabbed Martin by the throat. (50 RT 6381-6382.) Martin sustained a small red bruise on her neck and bruises on her arm where appellant had grabbed her. (50 RT 6382.)

Appellant was ultimately charged with vandalism involving the telephone. He was placed on probation and ordered to pay $200 in restitution and to stay away from Martin. (50 RT 6384.)

3. 1992 Jennifer VonSeggern Killing

Appellant met Jennifer VonSeggern when he and a friend were looking for

a source of methamphetamine in December 1991. (50 RT 6388-6389.) After a few weeks, VonSeggern invited appellant to move in with her. They had a love-hate relationship; VonSeggern argued at lot. Appellant and VonSeggern lived together in her mobile home for several months. Appellant subsequently moved out but became reacquainted with VonSeggern by chance in Santa Rosa. By this time, appellant was a heavy user of methamphetamine. (50 RT 6389-6391.) Both he and VonSeggern used methamphetamine. (50 RT 6391-6392; 50 RT 6455-6457.)

In October 1992, appellant met James Vaughn and his girlfriend in Rohnert Park. After Vaughn told appellant he could cook dope but needed a place to stay, appellant invited Vaughn and his girlfriend to stay at his apartment. Appellant drove Vaughn and his girlfriend to the apartment he and VonSeggern shared. Leaving Vaughn in the parking lot, appellant went inside to speak with VonSeggern. She was "slamming dope" at the time. VonSeggern had just injected herself with methamphetamine; the needle was still on the table when appellant arrived. (50 RT 6392-6393, 6457-6460.)

Appellant and VonSeggern got into a big argument when he told her about his friends waiting in the parking lot. VonSeggern started screaming at appellant and got into a very severe "hassle" with appellant. VonSeggern hit her head on a coffee table when he pushed her down. VonSeggern stopped breathing after hitting her head. Appellant panicked. Because VonSeggern was still bleeding through her nose after she died, appellant put a plastic bag over head. He put

VonSeggern's body in a sleeping bag and tied her up with cord and wire found in their apartment. Appellant put VonSeggern's body in her car and dumped the body. (50 RT 6455-6457.) He was not exactly sure where he took the body other than it was out toward the coast. (50 RT 6483.) Appellant acknowledged "[i]t was callous" and wished he "could take it back." (50 RT 6393, 6460-6461.)

4. Margaret Johnson Killing

Appellant acknowledged that he burglarized the home of Margaret Johnson on December 5, 1998 and that she might have been home at the time. He was aware that she was home from her parked car. Appellant was also aware that she had a heart condition. Appellant was heavily using methamphetamine and had been "up straight solid." Using a key to enter her home, appellant took Johnson's scanner, two telephones, including her cell phone, and other items. He went through Johnson's purse. Appellant did not see or encounter Margaret Johnson at all. The door to her bedroom was closed. After leaving Margaret Johnson's home, appellant used her credit card at the Bank of the West to obtain some money. He then drove to Luther Weathers' home, giving him some of the stolen property in exchange for methamphetamine. (50 RT 6403-6405, 6438-6439, 6464-6465.)

Appellant insisted that he never saw his grandmother while in her home, never encountered her, and he absolutely denied setting Johnson or her home on fire. (50 RT 6405-6407, 6496.) Appellant could not have started the fire. He

would not have been able to drive up the driveway about an hour or hour and a half before the fire was discovered. Everyone would have heard his noisy van, and dogs would have barked. Appellant said he first learned of the fire a couple of days later. (50 RT 6407-6408, 6484.) He was aware that Margaret Johnson was dead when he used her credit card on December 14, 1998. (50 RT 6469-6471.)

5. Ellen Salling Murder

Appellant acknowledged killing Ellen Salling on December 19, 1998. He had been using methamphetamine constantly and heavily for several days. (50 RT 6408-6411, 6426-6428.) After wrecking his van on High Valley Road and managing to evade pursing officers, appellant walked to Kono Tayee Estates. At approximately 8:00 a.m., he knocked unsuccessfully at a couple of houses before he approached Ellen Salling's home. Appellant was holding a very light willow branch that he had used as a walking stick. (50 RT 6466-6467.) Seeing Salling in the kitchen window, appellant knocked at her door, which Salling opened almost immediately. Appellant told Salling that he had just wrecked his van and asked to use her telephone. (50 RT 6411-6417.) Appellant's only intent on entering Salling's home was to use her telephone. (50 RT 6478-6479.)

At first, Salling let appellant enter her home. As soon as Salling saw that he looked like a mess, she told him to get out of her house. Appellant then did not know exactly what happened. He got angry, started shaking and trembling, violently and uncontrollably. Appellant told the jury he then attacked Salling. (50

RT 6417-6420, 6465-6466, 6478-6479.) Appellant could not remember the details of the attack, although he conceded it was vicious. (50 RT 6418-6419.)

Appellant acknowledged killing Salling and took full responsibility for his actions. After killing Salling, appellant panicked and started running around her house. He decided to steal only after the killing. (50 RT 6479-6482, 6495-6496, 6499-6501.) He went through her drawers, although he did not know why. He washed his hands in the kitchen sink and kept asking himself "oh, my God; oh, my God; my God, what have I done." From the kitchen, appellant went upstairs into Salling's bedroom and bathroom. He took some jewelry. Back downstairs, appellant picked up the footstool that he had used to beat Salling. He also picked up pieces from the footstool that were all over. He went into the garage and saw a car. He put the footstool and other items into the trunk and then drove away. (50 RT 6419.) Except for Salling's driver's license and credit cards, appellant later dumped everything else in the hills. (50 RT 6466-6467.)

As to why he used Salling's money, went to casinos, and engaged in "rather callous behavior," appellant said his mind was "like in a dream." (50 RT 6420, 6488.) Appellant told the jury he still suffered nightmares from Salling's death and could still hear her screaming. He was able to sleep only for a few hours because of the nightmares. Appellant said he had been going to church a lot and prayed a lot for forgiveness. (50 RT 6430-6431.)

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C. Drug Use and Addiction

Appellant started using methamphetamine in high school after his family moved to Lake County. (50 RT 6371-6372.) To fuel his drug habit, appellant stole money from his parents, from his father's business, and from places where he worked. (50 RT 6402-6403.) He stole money to buy dope. (50 RT 6463-6464.)

For many years, appellant has severe cravings for methamphetamine. This craving was always running through appellant's head whenever around methamphetamine. According to appellant, methamphetamine was very prevalent in Lake County; it was everywhere. (50 RT 6472-6474.)

Methamphetamine made appellant feel really good. When using methamphetamine, appellant could never get enough, and he could not stop. (50 RT 6376.) Appellant said he functioned better with methamphetamine. He was more alert, and his senses and perceptions were better. (50 RT 6376, 6446-6448.)

In 1985, appellant was sent to live with an uncle in Los Angeles. He got a job delivering televisions and VCRs. One of his coworkers was a cocaine dealer. Appellant started using cocaine. In six months, appellant squandered everything just to get more rock cocaine. In 1987, appellant's grandmother drove him back to Lake County. Both his mother and grandmother demanded that appellant get help. He entered a short-term recovery program which did not resolve his addiction, as he continued to think about cocaine. (50 RT 6377-6379.)

In 1989, appellant started using drugs again. He quit his job in Lake County and moved to San Francisco to help in a friend's painting company and to

help rebuild his friend's home in the Marina District after the San Francisco earthquake. His friend was a big-time methamphetamine and cocaine dealer who kept appellant well supplied with drugs. Appellant used about a gram per day and was quite addicted. (50 RT 6385-6387.)

In 1990, appellant's parents demanded that he seek help for his addiction. (50 RT 6387-6388.) Appellant started a short-term Salvation Army program in Healdsburg. There, he first started attending church. The Salvation Army helped appellant obtain a commercial driver's license and hired him to drive one of their trucks. Appellant worked as a driver for the Salvation Army for nine months. (50 RT 6388-6389.)

In 1998, after being released from prison for parole violation, appellant got a job at the Sentry Market in Clearlake Oaks. Initially, he did not use methamphetamine while working at the market. However, he started using again in November 1998 after running into Starlene Parenteau at the home of a friend in Clearlake Oaks. He helped Parenteau move into her new home on Schindler Street. Parenteau was a heavy drug user. Once his addiction started again, appellant could not get enough methamphetamine. He started using again because he was around other drug users. He loved speed so much that he just could not control himself when around it. (50 RT 6397-6399.)

Appellant used between one-half and a gram of methamphetamine per day after he met Parenteau. Parenteau's brother, Luther Weathers, was his main supplier and kept him well supplied with drugs. (50 RT 6401-6402.) Appellant

was unable to stop. When using methamphetamine for long periods, appellant got edgy, angry, and would blow up at the slightest thing. He was not a nice person when under the influence. (50 RT 6428-6429.)

Appellant told the jury he was taking medication in jail to help him through nightmares. He even tried to commit suicide in jail. He acknowledged, however, that he never tried to communicate with Ellen Salling's family or friends and never wrote a letter of apology. (50 RT 6466.)

D. Testimony of Correctional Officer Robert Fogelstrom

Lake County Correctional Officer Robert Fogelstrom worked at the Lake County Correctional Facility. Although he did not have daily contact with appellant, Fogelstrom interacted with appellant several times per month over a period of 2½ years. (51 RT 6514-6516.) In Fogelstrom's opinion, appellant was a model inmate. According to Fogelstrom, appellant's model behavior was not very common among jail inmates. (51 RT 6512-6514.)

E. Testimony of Mildred Mallory

Mildred Mallory and her husband had conducted church services for 13 years at the Lake County Jail. They became acquainted with appellant who attended their services. Services were held in a locked library at the jail; no correctional officers were present during church services, although correctional officers were able to look into the services from above. (51 RT 6519-6522.) Appellant was never in restraints during church services. (51 RT 6522-6523.)

According to Mallory, appellant's behavior was always pleasant; he was never threatening in any way. (51 RT 6516-6518.) While attending services, appellant "accepted Christ as his savior." According to Mallory, "when you become a Christian, you have a new nature, I know that." (51 RT 6517-6518, 6521-6522.)

F. Testimony of Dr. Raymond Deutsch

Dr. Raymond Deutsch M.D. was at the time of trial an Assistant Clinical Professor of Psychology at the University of California at Fresno. He had worked in addiction medicine for 10 years and was involved in both the detoxification and rehabilitation of substance abusers. Dr. Deutsch had previously qualified as an expert on the effects of methamphetamine and had numerous court appearances as a medical expert on addiction and dependency issues. (51 RT 6523-6528.)

Dr. Deutsch described addiction as a neurological disease and brain disorder. He described an addict's drug seeking behavior as a pattern or constellation of actions insuring access to drugs, including theft and loss of self-control. Dr. Deutsch personally evaluated appellant at the Lake County Jail on August 4, 1998. (51 RT 6528-6531.) In Dr. Deutsch's opinion, appellant met all the criteria for drug addition and had been addicted to methamphetamine for approximately 29 years, including the period through December 1998. (51 RT 6531-6534, 6575-6584.)

In Dr. Deutsch's opinion, methamphetamine addiction caused nervousness,

changes in perception of reality, extreme mood swings, delusions, and paranoia. (51 RT 6534-6538, 6592.) According to Dr. Deutsch, the daily use of ½ to 1 gram of methamphetamine over a three-week period would disrupt and distort thinking and perceptions, cause impulsive behavior, and outbursts of rage. (51 6538-6543.) Dr. Deutsch conceded that violence and rage reaction could be the same thing. (51 RT 6585-6586.)

In Dr. Deutsch's opinion, based on the facts of this case, appellant's methamphetamine use lowered his threshold for violence and caused an explosive or rage reaction on encountering Ellen Salling, leading to her death. In Dr. Deutsch's opinion, when appellant killed Ellen Salling, his behavior was consistent with a rage reaction, not deliberative thought. (51 RT 6548-6551, 6569-6575.) According to Dr. Deutsch, appellant's behavior, ransacking Salling's home after the murder, occurred after an explosive rage reaction and was not part of a predetermined plan. (51 RT 6543-6548.) Appellant's actions after the killing, including his drug-seeking behavior, were due to his craving for more methamphetamine and toxicity. Appellant simply was unable to plan any type of getaway from the problems caused by Salling's murder. (51 RT 6546.) Dr. Deutsch conceded that by remaining in the area and using stolen property and credit cards, appellant might not have been the "smartest individual" or "out of his mind" but may have been instead a callous criminal, unconcerned about getting caught. (51 RT 6587-6589.)

IV. PENALTY TRIAL -- REBUTTAL

A. Testimony of Paul Sundquist

Paul Sundquist had an intimate relationship with Jennifer VonSeggern for several years. Although he was aware that VonSeggern used drugs, Sundquist only used methamphetamine with VonSeggern on two occasions. Sundquist never saw VonSeggern sell drugs; she was not the type. He never saw VonSeggern inject methamphetamine with a needle, never saw a needle in her home, and never saw any evidence of needle marks on VonSeggern when he slept with her. (47 RT 6650-6654, 6656-6657.)

B. Testimony of Kathleen Frank

Kathleen Frank had regular contact with Jennifer VonSeggern during the last year of her life. They saw each other often. Frank was aware that VonSeggern used methamphetamine. VonSeggern "snorted" methamphetamine. Frank never saw VonSeggern inject drugs and never saw needles or syringes around her house. Frank did not know where VonSeggern kept drugs in her house. According to Frank, VonSeggern was scared of needles and had previously spoken with Frank about how gross it was to use a needle. Frank never saw VonSeggern sell drugs. Most of the time, VonSeggern was broke; she never had extra money. Frank never saw strangers in VonSeggern's home. (47 RT 6657-6661, 664.)

A. Guilt Trial Issues and Assignments of Error

I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR CHANGE OF VENUE; DENIAL OF APPELLANT'S CHANGE OF VENUE MOTION VIOLATED HIS RIGHTS TO A FAIR TRIAL, TO DUE PROCESS, AND TO A RELIABLE PENALTY DETERMINATION GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Factual and Procedural Background

Appellant moved for a change of venue on May 30, 2000. (1 CT 182-207.) In support of his change of venue motion, appellant offered public opinion surveys, pretrial publicity, exhibits, and other evidence showing that 64% of the population in Lake County was aware of the Salling murder in this case; 42% of the population had already prejudged guilt; and 46% of the population had prejudged penalty. (See 1 CT 151-181.) Separate, more limited polling by a defense investigator of potential jurors in Lakeport, Lake County, confirmed an exceedingly high percentage of prejudgment in this case: Every single subject polled at random by a defense investigator was aware of the case and had formed some opinion about it. (See 1 CT [Confidential] 2-4.)

In light of the significant percentages of public awareness about the case and prejudgment of both guilt and penalty, appellant's expert witness, Dr. Stephen J. Schoenthaler, Professor of Criminal Justice, California State University at Stanislaus, concluded that there was a reasonable likelihood that appellant could not receive a fair trial in Lake County. (See 1 CT 151-181; see also 13 RT 234-

243 [testimony as to public opinion on penalty if appellant found guilty and Defense Exhibit Nos. E-G].)

At the change of venue hearing, Dr. Schoenthaler testified that based on his samplings and surveys of potential jurors in Lake County, a total of 49% of the population believed that appellant was probably guilty (14 RT 319, 339-342); 36% believed he should be sentenced to death if found guilty; and approximately 30% of potential jurors living in Lake County were aware of this case based on exposure to all types of media and pretrial publicity. (13 RT 207-234; 14 RT 311, 325-342.) According to Dr. Schoenthaler, the extremely high percentages of prejudgment as to both guilt and penalty in this case were far in excess of prejudgment percentages deemed acceptable by courts in other cases in which change of venue had been granted. (13 RT 234-243; see also 14 RT 303-307, 312.)

Opposing appellant's motion for change of venue, the prosecution presented an analysis of the defense survey by, and the testimony of, Dr. Ebbe B. Ebbesen, Professor, Department of Psychology, University of California, San Diego, who faulted the defense survey and the methodology of Dr. Schoenthaler. (See 2 CT 299-358.) Thoroughly pro-prosecution, Dr. Ebbesen had regularly and repeatedly testified as a prosecution witness opposing change of venue motions in other cases.[12] (14 RT 440-453.) In the present case, Dr. Ebbesen asserted that a

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[12]/ See, for example, *People v. Famalaro* (2011) 52 Cal.4th 1, 20 and *People v. Davis* (2009) 46 Cal.4th 539, 571-572.) It is of further significance that in *Davis*, after the parties were unable to agree on a new venue site, the trial court independently appointed appellant's expert in the present case, Dr. Stephen Schoenthaler, to conduct telephone surveys of the four candidate counties as well

public opinion survey was only one factor to be considered in change of venue cases. According to Dr. Ebbesen, he had never seen an adequate defense survey in respect to pretrial publicity or prejudgment of potential jurors. (See 14 RT 445; 15 RT 532.) Dr. Ebbesen was of the opinion that pretrial publicity posed very little problem in selecting a fair jury in Lake County. (15 RT 548-549.)

Based on Dr. Ebbesen's work and testimony, the prosecutor argued that voir dire would be sufficient to weed out those potential jurors who had already prejudged either guilt or penalty or both. (See 15 RT 608-610.) In opposing appellant's motion, the prosecutor focused almost exclusively on pretrial publicity, rather than on the issue of prejudgment. The prosecutor argued appellant failed to establish a reasonable likelihood that a fair and impartial trial could not be had in Lake County. (See 1 CT 242-298.) Stressing that neither the victim in this case nor appellant was prominent in community; that both were residents, not outsiders; and that the quality of defense survey was not good, the prosecutor argued that there was not much depth of prejudgment in Lake County and that juror selection and voir dire would be adequate to reveal biases and prejudgment. (15 RT 609-

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as Sonoma County (used as a basis for comparison). (See *People v. Davis, supra*, 46 Cal.4th at p. 570.)

In other cases, Dr. Ebbesen had been used exclusively by the prosecution (in non-change of venue cases) to rebut and dispute, for example, defense critiques of eyewitness reliability. (See, for example, *People v. Kogut* (2005) 10 Misc.3d 305, 309-310 [806 N.Y.S.2d 366]; *People v. Williams* (2006) 14 Misc.3d 571, 575 [830 N.Y.S.2d 452]; *People v. Legrand* (2002) 196 Misc. 179, 188 [747 N.Y.S.2d 733]; *United States v. Hines* (1999) 55 F.Supp. 62, 63, 71.) Indeed, Dr. Ebbesen appears to devote much of his time outside academia to testifying solely on behalf of the prosecution in various cases throughout the country.

610.)

On July 6, 2000, the court denied appellant's change of venue motion. The court ruled that appellant failed to meet his burden of showing a reasonable likelihood that a fair and impartial trial could not be had in Lake County. Totally ignoring the related allegations concerning the death of Margaret Johnson, the court noted that the case involved a single murder; moderate publicity which did not sensationalize the murder; and, although small, a spread-out population. The court emphasized that the victim was not prominent in the community and that there was no dispute among county officials as to the costs of prosecution. (See 1 CT 377; 16 RT 630-641.)

B. Standard of Review

State law provides that a change of venue must be granted when the defendant demonstrates a reasonable likelihood that a fair trial cannot be held in the county where the crime or crimes occurred. (§ 1033; *People v. Vieira* (2005) 35 Cal.4th 264, 278-279.) On appeal, the court's independent evaluation of the venue determination is based on a consideration of five factors: (1) the nature and gravity of the offense; (2) the nature and extent of the media coverage; (3) the size of the community; (4) the community status of the defendant; and (5) the prominence of the victim. (*People v. Sully* (1991) 53 Cal.3d 1195, 1237; *People v. Panah* (2005) 35 Cal.4th 395, 447.)

On appeal, the appellate court conducts a de novo review of the evidence

presented in the superior court to determine whether the court should have granted a change of venue. (*People v. Jenkins* (2000) 22 Cal.4th 900, 943.) In addition, the defendant must show "both that the court erred in denying the change of venue motion, i.e., that at the time of the motion it was reasonably likely that a fair trial could not be had, and that the error was prejudicial, i.e. that it [is] reasonably likely that a fair trial was not *in fact* had." (*Ibid.*)

C. The Court Erred and Abused its Discretion on Denying Appellant's Motion for Change of Venue

A trial court should grant a change of venue when the defendant demonstrates a reasonable likelihood that in the absence of such relief, he cannot obtain a fair trial. (*People v. Weaver* (2001) 26 Cal.4th 876, 905.)

According to the United States Census Bureau, Lake County had a population of 58,309 out of a total California population of 33,871,648 in the year 2000. (U.S. Census Bureau, Census 2000 Redistricting Data.) There were but 17 small towns or cities in the county in 2000, each with a relatively small population numbering in the thousands. Clearlake, Lake County's largest town, had a population of just 13,142 people in the year 2000; in the entire county, there were only 44,247 people 18 years and older. (United States Census Bureau, Census 2000, Lake County, California, DP-1. Profile of General Demographic Characteristics: 2000.)

In respect to the change of venue motion, the trial court was presented with copies of numerous newspaper articles and other print media that appeared in the

community after the two alleged murders. (See 1 CT 264-298 [press articles].) The publicity in the present case was pervasive and prejudicial to appellant. (See also 1 CT 194-196 [nature and extent of media coverage as sensational and inflammatory].) One newspaper article in the Lake County Record Bee, for example, referred to a spate of "horrendous" murders, including the killing of Ellen Salling and the death of Margaret Johnson as to both of which appellant had allegedly been linked. (See 1 CT 295-296.) In an opinion piece, for example, the Lake County Record Bee quoted readers expressing rage at the murder of Ellen Salling. (See 1 CT 279.) Other newspaper articles described the charged murder, described the victim, described appellant and his background, and recounted the fear among residents of the neighborhoods where the crimes occurred. Articles focused on the apprehension and arrest of appellant, his background and parole status, and other sordid details of this case. The articles invariably linked appellant to and alleged involvement in the death of Margaret Johnson and either explicitly or implicitly accused appellant of killing her and committing arson to cover up the crime. As further discussed *infra*, subsequent juror questionnaires confirmed that potential prejudice from the media coverage had not attenuated by the passage of time. (See *People v. Welch* (1999) 20 Cal.4th 701, 744.)

Appellant acknowledges that while strong media coverage may weigh in favor of a change of venue, this factor does not necessarily require a change of venue. For example, in *People v. Ramirez* (2006) 39 Cal.4th 398, the Court upheld the trial court's denial of a motion for change of venue by an accused serial killer,

even though the trial court itself had described the media coverage of the murders and defendant's arrest as "saturation." (*Id.* at p. 434.) Trial in the *Ramirez* case, of course, occurred in Los Angeles County with millions of potential and prospective jurors. Here, unlike the *Ramirez* case, Lake County had a vastly smaller population, venire, and jury pool.

Moreover, while the fact that prospective jurors may have been exposed to pretrial publicity about the case does not necessarily require a change of venue (*People v. Proctor* (1992) 4 Cal.4th 499, 527), here, a large percentage of both unsworn and sworn jurors knew about the case and were affected by it.[13] This information, based largely on juror questionnaire responses and trial voir dire developed after the ruling on the change of venue motion, is highly relevant in showing both prongs required in *People v. Jenkins, supra*, i.e., that it was reasonably likely that a fair trial could not be had and that it is reasonably

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[13/] Information as to jurors' relationships with Margaret Johnson and their knowledge of her alleged murder by appellant comes primarily from responses to the juror questionnaires. As subsequently noted by defense counsel during trial, the jury was not voir dired on the issue of Margaret Johnson's death. Hence, "we don't know how many of these potential jurors may have some kind of knowledge about that incident or may -- or may have already formed some type of opinion about that incident." (41 RT 5154.)

As thus confirmed by counsel's statement during trial, appellant's defense and penalty strategy had been placed in an untenable position at trial in respect to the alleged killing of Margaret Johnson: either (1) explore thoroughly during jury selection potential juror bias based on awareness and knowledge of Margaret Johnson's death, thereby running the risk of revealing prejudicial and inflammatory evidence of her death (that had otherwise been excluded from the guilt trial), or (2) avoid voir dire questioning on this subject, thereby running the risk of impaneling biased or prejudiced jurors as to penalty. The trial court previously overlooked that a change of venue would have vitiated these prejudicial, incompatible choices.

likely that a fair trial was not in fact had.

For example, during jury selection prospective juror Chalmers-Fancher noted a ripple of fear and concern in the community after the murder in this case. (See 27 RT 2968 ["Because it's a small community, and when the event took place, there was a ripple of fear and concern and every -- you know, it was the topic of conversation at the time."].) Prospective juror Catherine Hobbs noted she lived close to the Kono Tayee area: "I remember thinking that it was, you know -- it was more of interest to me than other cases because it was sort of close by. ... I was relieved to hear [defendant] was captured since, you know, we live across the lake from there." (27 RT 2910.) Prospective juror Joe Doom, as had many of the prospective jurors, had already formed an opinion about the case, largely because of press articles and through conversations with others in the community, including neighbors of the victim. (See 8 CT 2133; 24 RT 2408, 2412.)

With respect to the size of the community, this factor weighed strongly in favor of a change of venue. Lake County certainly is not a major metropolitan area with a large population. Where there is a large, diverse pool of potential jurors, the suggestion that 12 impartial individuals could not be empanelled is hard to sustain. (*Skilling v. United States* (2010) 561 U.S. ___, ___ [130 S.Ct. 2896, 2915, 177 L.Ed.2d 619].) Here, however, the population of Lake County was modest, concentrated in a few locations, and everyone seemed to know everyone else (as repeatedly stated by prospective jurors in this case). Here, too, this circumstance weighed heavily in favor of a change of venue. (*People v. Leonard*

(2007) 40 Cal.4th 1370, 1396; see also *People v. Ramirez, supra*, 39 Cal.4th at p. 434; *People v. Pride* (1992) 3 Cal.4th 195, 224.)

While certainly not dispositive, the nature of the crimes and the intensity of publicity, as present in most multiple or capital murders (see *People v. Dennis* (1998) 17 Cal.4th 468, 523), also weighed in favor of a change of venue. (*People v. Prince* (2007) 40 Cal.4th 1179, 1213).) Because of the very small population of Lake County at the time of trial, it was more likely that pretrial publicity, preconceptions, and prejudgment became imbedded in the public consciousness. Unlike larger counties, the small population of Lake County could not neutralize or dilute the impact of adverse publicity. (See *People v. Jennings* (1991) 53 Cal.3d 334, 363; *People v. Dennis, supra*, 17 Cal.4th at p. 523.) For example, prospective juror Jack Nieve heard a lot of information about this case and knew that a lot of people had already made up their minds which was probably "negative" for appellant. (See 27 RT 2833.) Prospective juror Richard Chase read about the murder, and Dorothy Woods felt, by the press coverage, that she had already prejudged the case and convicted appellant. (See 27 RT 2878, 2796.)

Although neither appellant nor Ellen Salling nor Margaret Johnson -- the penalty trial alleged arson and murder victim -- was prominent or notorious, Salling was a well respected and extremely sympathetic member of her local Kono Tayee community, and Margaret Johnson worked in the local post office in her area and was a well-known member of her community as well. The post office is the heart and soul of the local community, particularly in rural areas. Prospective

juror Patricia West worked with Margaret Johnson in the post office. (26 RT 2614, 2658.) Danny Vaars, another post office employee, was exposed to this case through the newspaper; it was difficult for him to be fair because of the pretrial publicity and the information disclosed about appellant's drug use. (23 RT 2264.) Prospective juror Antonia Ledoux was acquainted with Margaret Johnson. (30 RT 3577-3578.) Prospective juror Tyler read about crime in the local Record Bee, was aware of the facts and circumstances of the crime, and was acquainted with key prosecution witness Det. Chris Rivera. Det. Rivera lived in the same neighborhood and had opened a coffee shop with his wife near Tyler's house. (See 25 RT 2539-2541.)

The nature and gravity of the offenses involved in this case weighed heavily in favor of a change of venue. Appellant was charged with one capital murder; in the penalty phase, he was charged with another capital crime involving the arson death of his step-grandmother who also lived in Lake County. In short, the nature and gravity of the offenses involved in this case could not have been more serious. This factor, too, thus militated in favor of a change of venue, particularly in such a small community as Lake County. (See *People v. Leonard, supra,* 40 Cal.4th at pp. 1395-1396; *People v. Ramirez, supra,* 39 Cal.4th a p. 434.)

Because of the small population of Lake County, the unique features of this case gave Ellen Salling and appellant, as well as Margaret Johnson, great prominence militating in favor of a change of venue. For example, prospective

juror James Wright could not be fair or impartial because of his personal relationship with Salling over the course of 20 years. (See 23 RT 2132.) Prospective juror Gail Good was a personal friend of Salling's; she wanted to see the death penalty imposed in this case. (26 RT 2707.) A host of other prospective jurors confirmed what Dr. Schoenthaler's surveys showed -- most members of the community were exposed to inflammatory pretrial publicity as a consequence of which there was an unusually high percentage of prejudgment in the venire.

Because of the small population in Lake County, and the small communities involved, a host of prospective jurors -- far more so than in other capital cases in larger counties -- knew the people involved and had prejudged the outcome. For example, prospective juror Donald Wetmore bowled with Ellen Salling. He read many articles about the case; the impression he received from the pretrial publicity was that of a brutal crime and repugnant murder. (See 8 CT 2079; 24 RT 2356.) Prospective juror Betty Jeppesen was acquainted with Salling and many of the witnesses. (8 CT 2241; 24 RT 2475.) Prospective juror Carole Margaret had prejudged appellant's guilt prior to trial. Ellen Salling was her hair salon client; Margaret thus had a personal relationship with the victim. (24 RT 2476.)

Prospective juror Judy Haskins lived in Kono Tayee; she had been a friend of Salling's. (27 RT 2973.) Prospective juror Joe Riddle subscribed to two local newspapers and was aware of and familiar with the details of Salling's killing; he stressed that Lake County was a small community. (30 RT 3433-3435.)

Prospective juror Joseph Martinez lived about half a mile away from Ellen Salling. He followed the case closely, because it occurred near where he lived; for that reason, it was hard for him to be fair and impartial. (31 RT 3797-3803.)

Certainly, the publicity attending the killing of two elderly women in two separate Lake County communities full of retirees created bias and prejudice in favor of a change of venue. (See *People v. Williams* (1989) 48 Cal.3d 1112, 1129.) This element of possible prejudice would not necessarily have followed the case to other venues where larger populations with greater age diversity would have diluted the number of potential jurors drawn from the affected communities or with backgrounds similar to the victims in this case. (See *People v. Dennis, supra*, 17 Cal.4th at p. 523; see also *People v. Cooper* (1991) 53 Cal.3d 771, 806.)

It was also unreasonable here to conclude that the memories of prospective jurors who read these newspaper stories or listened to these television reports would have dimmed by the passage of time. (See *Patton v. Yount* (1984) 467 U.S. 1025, 1034 [104 S.Ct. 2885, 81 L.Ed.2d 847].) Indeed, a significant percentage of prospective jurors not only recalled the nature and facts of this case but also were aware of the second unadjudicated Lake County murder involving Margaret Johnson allegedly committed by appellant, evidence as to which the prosecutor intended to offer during the anticipated penalty trial.

The bulk of the pretrial publicity in this case was generated around the time of occurrence in December 1998 and following appellant's apprehension and arrest. Appellant was tried, however, only a year and a half after the killing.

While the passage of time can ordinarily blunt the prejudicial impact of widespread publicity (see *People v. Jenkins, supra*, 22 Cal.4th at p. 944; *People v. Dennis, supra,* 17 Cal.4th at p. 524; *People v. Robinson* (2005) 37 Cal.4th 592, 623), here, both the preliminary hearing and trial shortly followed the crime. Thus, even though potential and seated jurors may not have read or watched news reports concerning the case against appellant that may have been disseminated during jury selection and the ensuing trial, all of the jurors, as all Lake County, were nonetheless exposed to press and television coverage shortly before trial because the events did not long precede trial in this case. For example, prospective juror Richard Edison recalled reading about the case and learning the general facts from pretrial publicity. (31 RT 3722-3752.) Prospective juror Arthur Widdifield was aware of essential features of this case. He recalled people talking about the case when he worked at a gas station in Clearlake. He recalled learning that an elderly woman had been killed, her car stolen, and that there had been a car chase down the highway. (31 RT 3752-3776.)

Appellant acknowledges that pervasive publicity alone does not establish prejudice. (*People v. Panah, supra,* 35 Cal.4th at p. 448.) Jurors exposed to publicity still may serve. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." (*Ibid.*; see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 45.) Here, however, in denying appellant's change of venue motion, the trial court overlooked surveys that clearly showed very high percentages of both knowledge about the case

among all Lake County residents and prejudgment as to both guilt and penalty. Indeed, as expressed by prospective juror Kristina Talaugon, it would be hard for appellant to get a fair trial in such a small community as Lake County. Everyone knew everybody else and everybody knew what was happening in the community. As other Lake County residents, Talaugon was also acquainted with at least two prospective witnesses in this case. (See 23 RT 2066.)

The superior court's confidence that, despite the publicity, the venire would consist primarily of persons who had not formed an opinion as to defendant's guilt was not borne out by subsequent proceedings. As typical of a small community as Lake County, and as evidenced by the jury questionnaires and voir dire during jury selection,[14] numerous potential or prospective jurors (1) heard about and were

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[14]/ See, for example, 5 CT 1134, 1161, 1242, 1323, 1350, 1377; 6 CT 1431, 1512, 1539, 1647; 7 CT 1755, 1844; 8 CT 2079 [prospective juror acquainted with victim through bowling league; read many articles], 2133, 2154, 2187, 2241, 2268, 2322; 9 CT 2403, 2430, 2457, 2511 [prospective juror spoke with local officer day after murder; learned details of crime from officer; aware of appellant's prior prison record and that he "was one person who should never have been released from prison"], 2565; 10 CT 2673 [prospective juror acquainted with victim; shocked at her murder; believed appellant guilty according to what she read], 2727 [prospective juror aware of details through newspapers and conversations with a witness's mother], 2781, 2835 [as local resident, prospective juror knew of circumstances and acquainted with friends who knew both victim and appellant], 2941; 11 CT 2968, 3076 [street gossip as reported by prospective juror]; 3130 [prospective juror read every newspaper printed about appellant and aware of details of both Salling's murder and Margaret Johnson's killing], 3183; 12 CT 3372, 3426, 3480, 3587; 13 CT 3641, 3695, 3722, 3803, 3856, 3910; 14 CT 3937, 4019, 4126, 4153, 4203, 4230; 15 CT 4312, 4339, 4394, 4422; 16 CT 4584, 4664, 4691, 4718 [prospective juror referred to emotional impact case had on everyone involved or hearing about it], 4765, 4820 [prospective juror relieved when appellant arrested]; 17 CT 4874, 4901, 4928, 4979; 18 CT 5060, 5087, 5141, 5168, 5195, 5222, 5276; 19 CT 5303, 5501, 5573; 21 CT 5973, 6081; 22 CT 6216, 6270, 6378, 6405, 6644, 6482; 23 CT 6520, 6590, 6644, 6725, 6779; 24 CT 6833,

familiar with details of the case through local press, newspaper articles, television, and radio broadcasts; (2) were aware of "brutal" murders or appellant's prior crimes; (3) were acquainted with the victim or victims; and (4) had conversed with friends, family, or coworkers who were acquainted with the victims or family members. In light of these questionnaire responses, the denial of change of venue was prejudicial to appellant. There was strong, if not overwhelming, evidence that the jury pool in this case was comprised of Lake County residents who were both aware of the facts and circumstances of the deaths of Ellen Salling or Margaret Johnson or both, personally knew either or both of these women, were personally acquainted with witnesses at trial, and had already prejudged guilt or penalty or both. (See, in contrast, *People v. Famalaro* (2011) 52 Cal.4th 1, 24 [no evidence that potential jury pool in Orange County was comprised of persons who personally knew murder victim; factor as weighing against change of venue].)

Finally, prejudice was also manifested by the composition of the jury ultimately seated in this case. Unlike virtually every other change of venue case, here, at least one-third of the sworn jurors who actually served at trial, and, additionally, all three alternate jurors, had been exposed to pretrial publicity, were aware of the facts or circumstances of the charged murder, and many had personal acquaintance with the trial judge, parties or witnesses, suggesting emotional bias and prejudgment and confirming the results of Dr. Schoenthaler's pretrial change

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6860, 6914, 6941, 6995, 7049; 20 CT 5627, 5654, 5708, 5735, 5762, 5815, 5842; and 25 CT 7130).

of venue survey. The assurances or statements of these jurors during voir dire not to have formed an opinion concerning guilt or otherwise to have been prejudiced by publicity were "not conclusive." (*People v. Jennings, supra*, 53 Cal.3d at p. 361.)

For example, trial juror # 200002970 had seen articles about this case in local newspapers and read most of them at work. (22 RT 1884.) Juror # 200034886 knew Starlene Parenteau, taught Parenteau's son, and disapproved of the way Parenteau neglected her son; this juror also read about the case in the local Record Bee. (See 24 RT 2281-2286; see also 7 CT 1971 and 1 CT [Court Exhibits] 4-5.) Juror # 200002970 also indicated she was familiar with appellant's family. (24 RT 2281.) Juror # 200019102 disclosed that Judge Crone's mother was a tenant on property he managed and that he regularly saw the judge and his mother who also was "good friends with my wife's mother." (39 RT 3786.) This juror acknowledged during voir dire that "we're a small community, so you know a lot of people." (31 RT 3786.)

Juror # 200012964 read about the case in the newspaper as it happened. Her husband was acquainted with the victim's son-in-law as a customer. (See 7 CT 1998; 24 RT 2314-2315 [remembered headlines in the Clearlake Observer; aware of killing and general facts of case].) Juror # 200010689 not only was acquainted with witnesses in this case but had read articles about the case in the local press and was generally aware of the Kono Tayee (Salling) murder and circumstances of the crime. (See 10 CT 2700; 26 RT 2770-2773; 26 RT 2768-

2773.) In addition, juror # 200010689 had previously worked for the "only veterinarian in town" and thus knew everyone who had animals, including many prospective witnesses. (See 26 RT 2769-2770.)

Juror # 200002006 read about the case in the local newspaper and favored the death penalty. (See 15 CT 4366.) Juror # 200012964 was aware of newspaper headlines about the case and was aware that a woman had been killed in Kono Tayee and her car taken. The press headlines got her attention; although she did not buy a newspaper often, she bought the newspaper precisely because of the headlines about the murder in this case. (24 RT 2314.) Juror # 200014476 learned about the case from a coworker; this juror also provided transportation to defense counsel to and from the local airport. (See 24 RT 2450.)

Juror # 200002006 had read press articles about the case when it happened; he bought the local Observer every Wednesday and Saturday. (See 30 RT 3579-3600.) Alternate juror # 200014476 told the court after the trial had begun that she knew key prosecution guilt trial witnesses Jeff Biddle and Shiree Hardman. (See 1 CT [Court Exhibits] 2; 34 RT 4064.) This same juror also disclosed, during the trial, knowing a "Charlie Farmer" who also testified in this case. (34 RT 4064.)

In light of the entire record in this case, and considering the nature and gravity of the offenses with which appellant was charged, the nature and extent of the media coverage, the miniscule size of the community, appellant's status as an alleged double murderer in two separate, related incidents, and the relative prominence of the victims in this case, there was a reasonable likelihood that a fair

trial could not be held in Lake County. Consequently, the trial court erred and in denying appellant's motion for a change of venue, and the error was prejudicial as to both the determinations of guilt and penalty.

D. Denial of Appellant's Change of Venue Violated His Rights to a Fair Trial, Due Process of Law, and to a Reliable Penalty Determination Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

The Sixth Amendment secures to criminal defendants the right to trial by an impartial jury. By constitutional design, that trial occurs "in the State where the . . . Crimes . . . have been committed." (Art. III, § 2, cl. 3; see also Amendment VI [right to trial by "jury of the State and district wherein the crime shall have been committed"].) The Constitution's place-of-trial prescriptions, however, do not impede transfer of the proceeding to a different district at the defendant's request if extraordinary local prejudice will prevent a fair trial -- a "basic requirement of due process." (*In re Murchison* (1955) 349 U.S. 133, 136 [75 S.Ct. 623, 99 L.Ed. 942].) The theory of our trial system is that "the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." (*Patterson v. Colorado ex rel. Attorney General of Colo.* (1907) 205 U.S. 454, 462 [27 S.Ct. 556, 51 L.Ed. 879] (opinion for the Court by Holmes, J.).)

In the ultimate analysis, only the jury can strip a man of his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworne." (Co. Litt. 155b.) The verdict must be based upon the evidence developed at the

trial. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807): "The theory of the law is that a juror who has formed an opinion cannot be impartial." (*Reynolds v. United States* (1879) 98 U. S. 145, 155 [25 L.Ed. 244].)

Prejudice is presumed when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where trial is held. (See, for example, *Sheppard v. Maxwell* (1966) 384 U.S. 333 [86 S.Ct.1507, 16 L.Ed.2d 600] [defendant need only show "reasonable likelihood" that prejudicial news prior to trial will prevent fair trial]; *Coleman v. Kemp* (11th Cir. 1985) 778 F.2d 1487, 1489-1490.) The standard was clearly stated in *Mayola v. Alabama* (5th Cir. 1980) 623 F.2d 992, 997: "where a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from that community, '[jury] prejudice is presumed and there is no further duty to establish bias.'" (quoting in part from *United States v. Capo* (5th Cir. 1979) 595 F.2d 1086, 1090, cert. denied (1990) 444 U.S. 1012 [100 S.Ct. 660, 62 L.Ed.2d 641].)

A reviewing court must independently examine the exhibits containing news reports about the case for volume, content, and timing to determine if they were prejudicial. (See, e.g., *Patton v. Yount, supra,* 467 U.S. at p. 1035 [104 S.Ct. 2885, 81 L.Ed.2d 847]; *United States v. McDonald* (9th Cir. 1978) 576 F.2d 1350,

1354, cert. denied sub nom. *Besbris v. United States* (1978) 439 U.S. 927 [99 S.Ct. 312, 58 L.Ed.2d 320]; *United States v. Green* (9th Cir. 1977) 554 F.2d 372, 376.)

Even overwhelming evidence of guilt or arguments that the facts proved at trial were such that death was the only appropriate sentence are not dispositive in assessing a change of venue claim. In *Rideau v. Louisiana* (1963) 373 U.S. 723 [83 S.Ct. 1417, 10 L.Ed.2d 663], the evidence of guilt was also overwhelming; the Supreme Court nevertheless presumed prejudice. To hold otherwise would mean an obviously guilty defendant would have no right to a fair trial before an impartial jury, a holding which would be contrary to the well established and fundamental constitutional right of every defendant to a fair trial. In *Irvin v. Dowd* (1961) 366 U.S. 717, 722 [81 S.Ct. 1639, 6 L.Ed.2d 751], the Supreme Court stressed that a fair trial in a fair tribunal is a basic requirement of due process.

Here, a pattern of presumed prejudice and prejudgment present throughout Lake County was clearly reflected in the responses of prospective juror after prospective juror who expressed knowledge about the facts of the case, acquaintance with witnesses or with victim Ellen Salling or victim Margaret Johnson, opinions on appellant's guilt and penalty, and other manifestations of prejudgment. With such opinions permeating the minds of the county and venire, it would be difficult to say that jurors in this case could have excluded preconceptions of guilt or penalty from their deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man. (See *Delaney v. United*

States (1st Cir. 1952) 199 F.2d 107, 112-113.) And as stated by Mr. Justice Jackson, concurring, in *Krulewitch v. United States* (1949) 336 U.S. 440, 453 [69 S.Ct. 716, 93 L.Ed. 790]: "The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction."

The press publicity and news stories about appellant were certainly not kind, and they also contained prejudicial information of the type readers could not reasonably be expected to shut from sight. Appellant's flight from the police, references to his prior convictions, reference to the Margaret Johnson arson-murder, and other sordid details of the crimes involved in this case were likely to be indelibly imprinted in the mind of anyone exposed to this type of inflammatory information. Pretrial publicity, in a community already shocked and stirred by the crimes in this case, were highly biased against appellant and prejudicial. All of the pretrial publicity invited prejudgment of appellant's culpability and penalty.

High court decisions do not stand for the proposition that juror exposure to news accounts of the crime alone presumptively deprives the defendant of due process. (*Murphy v. Florida* (1975) 421 U.S. 794, 798-799 [95 S.Ct. 2031, 44 L.Ed.2d 589]; see also, e.g., *Patton v. Yount, supra,* 467 U.S. 1025 [104 S.Ct. 2885, 81 L.Ed.2d 847].) Prominence does not necessarily produce prejudice, and juror impartiality "does not require ignorance." (*Irvin v. Dowd, supra,* 366 U.S. at p. 722 [jurors not required to be totally ignorant of the facts and issues involved]); *Reynolds v. United States*, supra, 98 U.S. at pp. 155-156 [25 L.Ed. 244] ["every

case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits."].) Nevertheless, where a procedure employed by the state involves such a probability that prejudice will result, it is deemed inherently lacking in due process.

Such a case was *In re Murchison, supra*, 349 U. S. at p. 136, where Justice Black for the Court pointed up with his usual clarity and force: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . [T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'" And, as Chief Justice Taft said in *Tumey v. Ohio* (1927) 273 U.S. 510, 532 [47 S.Ct. 437, 71 L.Ed. 749], almost 30 years before: "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."

As this Court and other state appellate courts, the United States Supreme Court has emphasized in prior decisions the size and characteristics of the

community in which the crime occurred. In *Rideau v. Louisiana, supra,* 373 U.S. 723, for example, the high court noted that the murder was committed in a parish of only 150,000 residents. Here, even more so than in *Rideau*, appellant's crime -- and the alleged killing of Margaret Johnson -- were both committed in a much smaller community of 58,000 residents. Unlike far more populous cities and towns, there were relatively few individuals eligible for jury duty in all of Lake County. Given the very small and nondiverse pool of potential jurors in Lake County, it was questionable whether a truly impartial panel of 12 individuals could be empanelled. In contrast, in *Mu'Min v. Virginia* (1991) 500 U.S. 415, 429 [111 S.Ct. 1899, 114 L.Ed.2d 493] the potential for prejudice was mitigated by the size of the metropolitan Washington D.C. statistical area which had a population of over 3 million. In *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1044 [111 S.Ct. 2720, 115 L.Ed.2d 888], there was a reduced likelihood of prejudice where the venire, unlike here, was drawn from a pool of over 600,000 individuals.

Unlike other cases in which years elapsed between a murder and trial, here the murder of Ellen Salling, and the previous and inflammatory arson-murder of Margaret Johnson were linked together in the press. Because of the very small population of Lake County at the time of trial, it was more likely that pretrial publicity, preconceptions, and prejudgment became imbedded in the public consciousness. Unlike larger counties, the small population of Lake County could not neutralize or dilute the impact of adverse publicity.

Appellant's jury reached verdicts after but a few hours of both guilt and

penalty deliberations (see 2 CT 426-433; 44 RT 5573-5574 [length of guilt deliberations; 3:35 hours]; 3 CT 768-779; 54 RT 6881-6882 [length of penalty deliberations; slightly more than one hour]) and did not acquit him of any of the numerous charged crimes, special circumstances, or enhancements. As in other cases involving prejudgment and pretrial publicity (see *Rideau v. Louisiana, supra*; *Estes v. Texas* (1965) 381 U.S. 532 [85 S.Ct. 1628, 14 L.Ed.2d 543]; and *Sheppard v. Maxwell, supra,* 384 U.S. 333 [86 S.Ct. 1507, 16 L.Ed.2d 600]), here, the jury's verdicts did not assuage the risk of juror prejudgment or the prejudicial impact of pretrial publicity.

In *Murphy v. Florida, supra,* 421 U. S. at pp. 799-800 [95 S.Ct. 2031, 44 L.Ed.2d 589], the high court reviewed a trial in which many jurors had heard of the defendant through extensive news coverage. The court recognized that qualified jurors need not be totally ignorant of the facts and issues involved. (See also *Irvin v. Dowd, supra*, 366 U.S. at p. 722.) At the same time, the court recognized that juror assurances that they are equal to the task cannot be dispositive of an accused's rights to a fair trial by an impartial jury. (*Id.* at p. 800.) Here, however, because of the small population in Lake County, and the small communities involved, a host of prospective jurors -- far more so than in other capital cases in larger counties -- knew the people involved and had prejudged the outcome. Indeed, a significant percentage of prospective jurors not only recalled the nature and facts of this case but also were aware of the second unadjudicated Lake County murder involving Margaret Johnson allegedly committed by

appellant, evidence as to which the prosecutor intended to offer during the anticipated penalty trial.

In denying appellant's motion for change of venue, the trial court overlooked surveys that clearly showed very high percentages of both knowledge about the case among all Lake County residents and prejudgment as to both guilt and penalty. Indeed, as expressed by at least one prospective juror who knew the community well, it would be hard for appellant to get a fair trial in such a small community as Lake County. Everyone knew everybody else and everybody knew what was happening in the community.

The fact that a jury was ultimately empanelled and sworn in this case cannot overcome the extremely high indicia of prejudgment in the community as manifested by the pretrial surveys conducted in this case and the overwhelming exposure of the seated jurors to pretrial publicity and their numerous connections to the parties, their families, or witnesses. Here, two highly publicized murders of elderly women occurred in two separate areas of a small, rural county. The notion that none of the seated jurors expressed overt hostility to appellant, and were hence unaffected by the murders, must be disregarded in light of the fact that the community as a whole were not only aware of the circumstances of two murders but were actively linked to the victims by numerous strands and bonds typical of small communities. (See *Murphy v. Florida, supra*, 421 U.S. at p. 802 [indicia of impartiality during voir dire tending to indicate no overt hostility toward defendant may be disregarded where significant percentage of veniremen admit to

disqualifying prejudice; under these circumstances, it is more probable that seated jurors are part of a community deeply hostile to the accused and more likely that they may unwittingly have been influenced by it].)

In *Irvin v. Dowd, supra*, 366 U.S. 717, for example, the high court noted that a great percentage of those examined on the point were inclined to believe in the accused's guilt, and the trial court had excused for this cause 268 of the 430 veniremen. *Irvin* also held that little weight could be attached to self-serving statements or protestations of impartiality by jurors in light of their knowledge of the facts of the case and exposure to pretrial publicity in the community. (*Id.* at p. 728.)

In *Rideau*, *Irvin*, and *Stroble v. California* (1952) 343 U.S. 181 [72 S.Ct. 599, 96 L.Ed. 872], the pretrial publicity occurred outside the courtroom and could not be effectively curtailed. In *Turner v. Louisiana* (1965) 379 U.S. 466 [85 S.Ct. 546, 13 L.Ed. 424], the probability of prejudice was present through the use of deputy sheriffs, who were also witnesses in the case, as shepherds for the jury. No prejudice was shown but the circumstances were held to be inherently suspect, and, therefore, such a showing was not held to be a requisite to reversal. Likewise, in this case, the application of this principle is especially appropriate. The pretrial publicity was pervasive throughout rural Lake County.

In this case, it is even clearer that the failure to order a change of venue resulted in the denial of due process of law, denial of appellant's fair trial rights, and denial of the constitutionally compelled requirement of a reliable penalty

verdict. There was strong evidence that the jury pool in this case was comprised of people who were both aware of the facts and circumstances of the deaths of Ellen Salling or Margaret Johnson or both and personally knew either or both of these women. At least four of the regular jurors and all three alternates had been exposed to pretrial publicity and were aware of the facts or circumstances of the charged murder. Many had personal acquaintance with the parties or witnesses.[15] During voir dire these and other prospective jurors were not asked questions which were calculated to elicit the disclosure of the existence of actual prejudice, the degree to which the jurors had been exposed to prejudicial publicity, and how such exposure had affected the jurors' attitude towards the trial. (See *Calley v. Callaway* (5th Cir. 1975) 519 F.2d 184, 208-209, cert. denied (1976) 425 U.S. 911 [96 S.Ct. 1505, 47 L.Ed.2d 760.) Instead, leading questions and conclusory answers were typical of the manner in which appellant's voir dire was conducted. (See, i.e., 24 RT 2210 [where court simply asked juror # 200009114 -- who acknowledged receiving two local newspapers -- "you don't believe you've read or heard anything about this case before coming to court; is that true?"]; 24 RT 2317-2318 [where court asked juror # 200012964 whether "she could set aside anything that you feel you've read that's connected with this case or heard about this case" even though juror had previously expressed opinion to others, based on pretrial exposure to newspaper articles, that "it was horrible that someone was

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[15]/ E.g., trial jurors 200012964, 200010689, 200002006, 200034886, 200019102 [alternate], 200002970 [alternate], 200014476 [alternate].

killed"].)

Based on the entire record, including the evidence admitted at the hearing on appellant's change of venue motion and the subsequent jury selection process and voir dire, it is evident that the extent and nature of pretrial publicity in such a small county caused such a build up of prejudice that excluding the preconception of guilt and penalty from the jury's deliberations would be too difficult. (See *United States ex rel. Bloeth v. Denno* (CA2 1963) 313 F. 2d 364, 372.)

The requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. "The jury is an essential instrumentality -- an appendage -- of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law." (*Sinclair v. United States* (1929) 279 U.S. 749, 765 [49 S.Ct. 471, 73 L.Ed. 1938].) Mr. Justice Holmes stated no more than a truism when he observed that "Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere." (*Frank v. Mangum* (1915) 237 U. S. 309, 349 [35 S.Ct. 582, 59 L.Ed. 969] (dissenting opinion).)

As the high court majority itself stressed in *Mangum*, if the state, "supplying no corrective process, carries into execution a judgment of death" based upon a verdict thus produced, "the state deprives the accused of his life or liberty without due process of law." (*Id.* at p. 335.) Here, the corrective process

mandated change of venue. The risk that taint of widespread publicity regarding the odious nature of the facts of this case coupled with appellant's criminal background, known to virtually every prospective and, eventually, virtually every seated juror, infected the jury's deliberations was apparent. The court's failure to grant appellant's motion under the circumstances of this case resulted in the denial of due process of law and a fair trial, and, equally significant, denial of appellant's fundamental constitutional right to a reliable guilt and penalty verdict guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

II

THE TRIAL JUDGE'S YEARS-LONG CLOSE PERSONAL AND PROFESSIONAL RELATIONSHIP WITH THE PROSECUTOR, AND THE CONSEQUENT APPEARANCE OF BIAS, PRESUMED BIAS, AND ACTUAL BIAS, REQUIRED THE JUDGE TO DISQUALIFY HIMSELF IN THIS CASE; THE COURT'S FAILURE TO DO SO DEPRIVED APPELLANT OF HIS FUNDAMENTAL RIGHTS TO A FAIR TRIAL, DUE PROCESS OF LAW, AND TO A RELIABLE PENALTY DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; FURTHER, AS STRUCTURAL ERROR, THE FAILURE TO DISQUALIFY WAS PREJUDICIAL AND REVERSIBLE PER SE

A. Factual and Procedural Background

On June 27, 2000, Judge Robert L. Crone was assigned to preside over this case for all purposes. (2 CT 367.) Pursuant to the trial court's disclosure obligations, Judge Crone (as a former District Attorney of Lake County) advised the parties on the same date of his long-standing personal and professional relationship with prosecutor Stephen Hedstrom (also a former District Attorney of Lake County and Judge Crone's successor in office). Prosecutor Hedstrom had recently been elected as a superior court judge in Lake County. (See 13 RT 127-130.) Following his election to judicial office, Hedstrom was retained as a contract prosecutor solely to prosecute this case. As a judge-in-waiting, Hedstrom intended to remain on the prosecutorial side until conclusion of trial in this case at which time he then planned to take the oath of judicial office and thus join Judge Crone -- his friend, mentor, election advisor, and former boss -- on the bench.

Judge Crone disclosed a long-standing friendship with prosecutor

Hedstrom. Among other disclosures, Judge Crone stated that prosecutor Hedstrom had served as a pallbearer at his mother's funeral. Judge Crone had urged Hedstrom to run for judicial office. He had advised Hedstrom about running for judicial office and helped Hedstrom during his election campaign. Previously, while serving himself as District Attorney of Lake County, Crone had put Hedstrom in charge of the district attorney's office while Crone prosecuted a grueling change of venue murder case that had been transferred to Butte County.

Judge Crone disclosed that he and Hedstrom had been very close personal friends for a number of years. Judge Crone was in close and frequent contact with Hedstrom. Judge Crone stated he did not have to disqualify himself but invited parties to do so if they so chose. (13 RT 130.)

Contrary to his personal opinion, Judge Crone's disclosures gave rise to a reasonable doubt about whether he could be impartial. In light of both presumed bias based on his disclosures, and the appearance of possible bias (see Subsection D, *infra*), a reasonable person might doubt whether Judge Crone could be impartial in this capital case such that his disqualification was required.

Appellant was not personally admonished about the possibility of bias, the appearance of bias, presumed bias, or actual bias stemming from the relationship between Judge Crone and prosecutor Hedstrom. Appellant was neither asked nor did he personally waive the presumed, potential, or actual bias involving Judge Crone and prosecutor Hedstrom, or the inherent risks that such bias would pose to his defense, interests, fundamental rights, and, indeed, his very life. (See 13 RT

127-131.)

B. Standard of Review

On appeal, the focus is whether judicial bias was so prejudicial that it deprived defendant of a fair trial. (*People v. Snow* (2003) 30 Cal.4th 43, 78.) If a reasonable member of the public at large, aware of all the facts, would fairly entertain doubts concerning a judge's impartiality, disqualification is required. Actual bias is not required. (*Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 170, quoting *United Farm Workers of America v. Superior Co*urt (1985) 170 Cal.App.3d 97, 104; *People v. Brown* (1993) 6 Cal.4th 322, 336-337.)

This Court has not fully resolved the issue of which standard of review on appeal applies to judicial disqualification or to a determination involving the appearance of partiality. In *People v. Brown, supra,* 6 Cal.4th at pp. 336-337, the Court indicated, although not explicitly, that disqualification is reviewed de novo. (See *Flier v. Superior Court, supra*, 23 Cal.App.4th at p. 171.) Other appellate courts have stated that the question of whether a judge should have been disqualified because of an appearance of partiality is a question of law, reviewable de novo, where the facts are not in dispute. (See, e.g., *Briggs v. Superior Court* (2001) 87 Cal.App.4th 312, 319 ["On undisputed facts this is a question of law for independent appellate review."]; *Sincavage v. Superior Court* (1996) 42 Cal.App.4th 224, 230 ["Where, as here, the underlying events are not in dispute, disqualification becomes a question of law which this court may determine."].)

In deciding whether a trial court has manifested bias, this Court has said that a violation occurs where the judge created the impression that he was allying himself with the prosecution. (*People v. Clark* (1992) 3 Cal.4th 41, 143.) Given the Judge Crone's disclosures and the facts of this case, actual bias, presumed bias, and the appearance of bias all were inherent in the relationship between Judge Crone and prosecutor Hedstrom.

C. Waiver; Ineffective Assistance of Counsel

Defense counsel did not seek the judge's recusal or object at trial to judicial acts that could have been perceived and objected to as manifesting bias, presumed bias, or actual bias. If a judge refuses or fails to disqualify herself, a party may seek the judge's disqualification. The party must do so, however, at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification. (*People v. Scott* (1997) 15 Cal.4th 1188, 1207.) As was the case in *Scott*, defense counsel here never claimed before or during trial that the judge should recuse or disqualify himself or that appellant's constitutional rights were threatened or being violated because of judicial bias or the improper unity of interest between the court and prosecutor..

In *People v. Brown, supra,* 6 Cal.4th at p. 335, this Court held that a constitutionally based challenge asserting judicial bias could be raised on appeal and was not barred by the provisions of Code of Civil Procedure section 170.3, subdivision (d). The Court indicated that a defendant who raised a claim of

judicial bias at trial may always assert on appeal a claim of denial of the due process right to an impartial judge. As noted by the Court in *Brown*, "a defendant has a due process right to an impartial judge, and that violation of this right is a fatal defect in the trial mechanism." (*Id.* at p. 333; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 811).) Appellant's Eighth Amendment claim of unreliability in the penalty determination is also cognizable where based on the same facts as the due process claim. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 133 [due process and equal protection claims sufficiently preserved Eighth Amendment claim based on same facts].)

In *People v. Harris* (2005) 37 Cal.4th 310, 346, although the defendant failed to object to allegedly improper acts on grounds of judicial bias or seek the judge's recusal, this Court declined to decide whether the defendant forfeited his claim but, instead, addressed its merits. (See also *People v. Snow, supra,* 30 Cal.4th at p. 78; *People v. Seaton* (2001) 26 Cal.4th 598, 698; *People v. Hines* (1997) 15 Cal.4th 997, 1041; *People v. Wright* (1990) 52 Cal.3d 367, 411; Code Civ. Proc., § 170.1, subds. (a)(6)(C), (c).)

Appellant further offers that if defense counsel is deemed to have waived on appellant's behalf, or forfeited, this assignment of error, then trial counsel rendered appellant ineffective assistance of counsel under the United States and California Constitutions. (U.S. Const. Amends. 6th, 14th; Cal. Const. Art. I, §§ 15, 24; *Strickland v. Washington* (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

In assessing claims of ineffective assistance of trial counsel, the Court considers whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington, supra*, 466 U.S. at p. 694; *People v. Gamache* (2010) 48 Cal.4th 347, 391.) The reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. The defendant on appeal thus bears the burden of establishing constitutionally inadequate assistance of counsel. (*Strickland v. Washington, supra*, at p. 687; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.) If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, *or there simply could be no satisfactory explanation.* (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266, italics added; *People v. Carter* (2003) 30 Cal.4th 1166, 1211; *People v. Wilson* (1992) 3 Cal.4th 926, 936.)

In light of the very real judicial bias disclosed by Judge Crone at the commencement of trial, defense counsel rendered ineffective assistance in failing to seek the judge's disqualification. There was no possible reason for counsel to refrain from objecting to the assignment of Judge Crone to this case considering his personal and professional relationship with the prosecutor or to conclude that it

was in appellant's best interest not to raise seek his disqualification. The record affords no basis for thereby concluding that counsel's omissions were based on an informed tactical choice to permit an obviously biased judge from presiding over this death penalty case.

Strategy means a "plan, method, or series of maneuvers or stratagems for obtaining a specific goal or result." (Random House Dictionary 1298 (Rev. ed. 1975).) It need not be particularly intelligent or even one most lawyers would adopt, but it must be within the range of logical choices an ordinarily competent attorney would assess as reasonable to achieve a specific goal. (See *Cone v. Bell* (6th Cir. 2001) 243 F.3d 961, 978; see also *Washington v. Hofbauer* (6th Cir. 2000) 228 F.3d 689, 704 [court must assess whether the strategy itself was constitutionally deficient].) In short, counsel's trial strategy itself must be objectively reasonable. (See *Strickland v. Washington, supra*, 466 U.S. at p. 681.) Here, counsel's failure to seek Judge Crone's disqualification for presumed or actual bias did not reflect a reasonable strategy. Appellant had everything to gain from having an unbiased judge assigned to this case. A defense strategy that permits a judge closely tied to the prosecutor to preside over a death penalty trial is not reasonable; any effective attorney under these circumstances would seek to disqualify such a potentially or actually biased judge based on intertwined personal and professional relationships with the prosecutor.

The record in this case is noteworthy because of the relative absence of objections by defense counsel at all stages of the trial. Throughout trial, counsel

just seemed to be going through the motions of representing appellant.[16]

Any failure on trial counsel's part resulting in a biased judge over presiding over a trial where appellant's life hung in the balance thus fell below the standard of vigorous advocacy required of competent counsel. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1003 [ineffective assistance claim cognizable on appeal where no satisfactory explanation could exist to explain counsel's conduct].) The prejudice caused by counsel's error is clear, since it resulted, at least in part, in the denial of appellant's motion for change of venue (see Argument I, *supra*) and the introduction of inadmissible evidence and instructions to the jury during the

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[16]/ While the nature and magnitude of counsel's substandard performance is partially evident on the appellate record, a substantial quantum of the pertinent facts and evidence in support of such claims lie outside the record on appeal. Consequently, in deference to this Court's pronouncements that claims regarding counsel's ineffectiveness are best suited for collateral proceedings in habeas corpus (see, e.g., *People v. Lopez* (2008) 42 Cal.4th 960, 972 [except in rare instances where there is no conceivable tactical purpose for counsel's actions, claims of ineffective assistance of counsel should be raised on habeas corpus, not on direct appeal]; *People v. Mendoza Tello, supra,* 15 Cal.4th at pp. 266-267 [claim that trial counsel rendered ineffective assistance in failing to make a motion to suppress evidence was not suitable for resolution on appeal because the record did not show the reasons for counsel's failure to do so]), and, out of an abundance of caution in an effort to avoid procedural bars triggered by the failure to raise claims on appeal (see, e.g., *In re Waltreus* (1965) 62 Cal.2d 218, 225 [arguments raised and rejected on appeal may not be raised again through habeas corpus proceeding]; *In re Dixon* (1953) 41 Cal.2d 756, 759 [writ of habeas corpus will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction]), appellate counsel has limited such claims to instances where there is potentially sufficient support on the appellate record for a cognizable claim or, alternatively, has asserted ineffective assistance of counsel in anticipation of the state's routine and invariable claims of waiver or forfeiture. Habeas counsel for Mr. Johnson will present a petition for writ of habeas corpus on his behalf and will supplement appellate counsel's claims, as appropriate.

penalty trial (see Argument VI, *infra*), in violation of the clear state and federal constitutional proscriptions against double jeopardy, as well as other statutory and constitutional violations asserted by appellant. (*Strickland v. Washington, supra*, 466 U.S. at p.687 [prejudice shown where capital trial's result is unreliable].)

D. The Appearance of Impartiality, Presumed Bias, and Actual Bias Required the Court to Disqualify Itself; the Trial Court's Failure to Do So Violated Appellant's Rights to a Fair Trial and Due Process of Law Guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§ 7 and 15 of the California Constitution; the Error Was Both Prejudicial and Reversible Per Se

Under the Fifth Amendment to the United States Constitution, "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." (See also U.S. Const., 14th Amend. ["[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law"].) In almost identical words, the California Constitution likewise guarantees due process of law. (Cal. Const., art. I, §§ 7, subd. (a) ["A person may not be deprived of life, liberty, or property without due process of law"], 15 ["Persons may not . . . be deprived of life, liberty, or property without due process of law"].)

The constitutional guarantees of due process of law require a fair tribunal and a fair judge. (*Withrow v. Larkin* (1975) 421 U.S. 35, 46 [95 S.Ct. 1456, 43 L.Ed.2d 712].) At all times in this case, appellant thus had a fundamental due process right to an impartial trial judge under the state and federal Constitutions. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [111 S.Ct. 1245, 113 L.Ed.2d

302].) As alternatively stated, the entitlement of a criminal defendant to a fair trial must never be compromised. (*People v. Chatman* (2006) 38 Cal.4th 879, 364.) In every case, the judge must ensure that every litigant receives a fair trial. (*Id.*) A fair tribunal is one in which the judge is free of bias for or against a party. (*People v. Harris, supra,* 37 Cal.4th at p. 346.)

Biased decision makers are constitutionally impermissible and even the probability of unfairness is to be avoided. (*Withrow v. Larkin, supra,* 421 U.S. at p. 47 [95 S.Ct.1456, 43 L.Ed.2d 712]; *In re Murchison* (1955) 349 U.S. 133, 136 [75 S.Ct. 623, 99 L.Ed. 942].) For these reasons, the Due Process Clause of the Fourteenth Amendment requires a fair trial in a fair tribunal before a judge without bias against the defendant or an interest in the outcome of his particular case. (*Withrow v. Larkin, supra*, 421 U.S. at p. 46 [95 S.Ct. 1456, 43 L.Ed.2d 712]; see also *Aetna Life Ins. Co. v. Lavoie* (1986) 475 U.S. 813, 821-822 [106 S.Ct. 1580, 89 L.Ed.2d 823]; *Bracy v. Gramley* (1997) 520 U.S. 899, 904-905 [117 S.Ct. 1793, 138 L.Ed.2d 97].)

A structural error or defect demands automatic reversal. Structural errors are those affecting the framework within which the trial proceeds, rather than simply an error in the trial process. (See *People v. Stewart* (2004) 33 Cal.4th 425, 462.) Structural error "def[ies] analysis by 'harmless error standards'" because the error has "consequences that are necessarily unquantifiable and indeterminate." (*United States v. Gonzales-Lopez* (2006) 548 U.S. 140, 148, 150 [126 S.Ct. 2557, 165 L.Ed.2d 409].) Trial by a judge who lacks impartiality was given as an

example of structural error in *Arizona v. Fulminante, supra,* 499 U.S. at p. 309 [111 S.Ct. 1246, 113 L.Ed.2d 302] (citing *Tumey v. Ohio, supra,* 273 U.S. 510 [47 S.Ct. 437, 71 L.Ed. 749] [judicial conflict of interest]; see also *People v. Vasquez* (2006) 39 Cal.4th 47, 69, fn. 12.)

In *Withrow v. Larkin, supra,* 421 U.S. at p. 47, the United States Supreme Court additionally noted: "Not only is a biased decision-maker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" As also stressed by the high court in *In re Murchison, supra,* 349 U.S. at p. 136, "[f]airness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man . . . is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. *Circumstances and relationships must be considered.*" (Italics added.)

Earlier, the United States Supreme Court stressed that "[e]very procedure which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." (*Tumey v. Ohio, supra,* 273 U.S. at p. 532 [47 S.Ct. 437, 71 L.Ed. 749].) "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" (*Offutt v. United States* (1954) 348 U. S. 11, 14.)

This Court in the past has declined to fix rigid procedures for the protection of fair procedure rights. (See *Ezekial v. Winkley* (1977) 20 Cal.3d 267, 278.) But, as noted in *Applebaum v. Board of Directors of Barton Memorial Hospital* (1980) 104 Cal.App.3d 648, 658, "it is inconceivable . . . that such rights would not include impartiality of the adjudicators." Indeed, the court in *Applebaum* discussed that where potential conflicts are revealed, impartiality cannot be presumed and the risk of risk of prejudgment or bias is too high to maintain the guarantee of fair procedure. (*Id.* at p. 660, citing *Withrow v. Larkin, supra*, 421 U.S. 35.)

In *Hambarian v. Superior Court* (2002) 27 Cal.4th 826, the Court reiterated relevant disqualification principles: Where the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial, the trial judge should be disqualified.

In *People v. Eubanks* (1996) 14 Cal.4th 580, the Court explained that a conflict exists whenever the circumstances of a case present a reasonable possibility that the functions of office may not be exercised in an evenhanded manner. (*Id.* at p. 592; see also *People v. Conner* (1983) 34 Cal.3d 141, 148.) A conflict is disabling if it is so grave as to render it unlikely that the defendant will receive fair treatment during all portions of the criminal proceedings. (*People v. Eubanks, supra*, 14 Cal.4th at p. 594.)

Appellant acknowledges that an adverse or erroneous ruling, especially those that are subject to review, do not necessarily establish as well a charge of

judicial bias. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1112.) In this case, however, Judge Crone was evidently biased and had a clearly manifested and pervasive unity of interest with the prosecutor, his dear friend and associate. This unity of interest was so severe as to disqualify him from presiding over the trial in this case. Aside from his close personal and family relationship with the prosecutor, Judge Crone was selected to preside over this capital trial having just served as the same prosecutor's closest advisor and mentor in a recently-concluded and successful race for judicial office. Under these circumstances there was such a strong appearance of bias, and actual bias, such that Judge Crone had a responsibility to disqualify himself. In view of his long-standing, on-going professional and close personal relationship with the prosecutor, Judge Crone overlooked that fair hearing and due process were not matters of discretion but were required by law. Judge Crone's ties to the prosecutor in this case posed such a risk of actual bias or prejudgment that he should not have presided over this case "if the guarantee of due process [were] to be adequately implemented." (*Withrow v. Larkin, supra*, 421 U.S. at p. 47.)

This is not a case where the judge simply had been a former prosecutor at some time in the past or was simply acquainted with the prosecutor. While virtually all judges are drawn from the ranks of the legal profession, prior relationships are neither unusual nor dispositive. (*People v. Carter* (2005) 36 Cal.4th 1215, 1242; see also *United Farm Workers of America v. Superior Court,* 170 Cal.App.3d at p. 100 [proper performance of judicial duties does not require

a judge "to withdraw from society and live an ascetic, antiseptic and socially sterile life. Judicial responsibility does not require shrinking every time an advocate asserts the objective and fair judge appears to be biased."].)

Neither does this case simply involve so-called institutional bias against defendants, or the bias of a judge and former prosecutor toward his successor, or even the bias of a judge who was succeeded in office by the prosecutor and who also has been recently elected judge and is about to assume judicial office. (See *People v. Panah* (2005) 35 Cal.4th 395, 466 [dismissing mere institutional bias].)

In *Bracy v. Gramley, supra,* 520 U.S. 899 [117 S.Ct. 1793,138 L.Ed.2d 97], the United States Supreme Court explained that most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard. However, the floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case. (*Id.* at pp. 904-905.)

In *Richardson v. Quarterman* (5th Cir. 2008) 537 F.3d 466, the wife of the judge in a murder case was simply a friend of the victim. The Court of Appeals for the Fifth Circuit determined that the judge "did not face a significant temptation to be biased against Richardson. He did not stand to gain personally or professionally if Richardson were sentenced more harshly by the jury. It may have pleased his wife or her friends and acquaintances . . . if Richardson received

a harsh sentence, but this is not the type of 'possible temptation' that would lead the average judge 'not to hold the balance nice, clear and true.'" (*Richardson v. Quarterman, supra*, 537 F.3d at p. 476.)

In contrast to the relatively benign relationship that existed in *Richardson*, in *Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. 868 [129 S.Ct. 2252, 173 L.Ed.2d 1208], a West Virginia appellate court justice refused to recuse himself in an appeal of a $50 million damage award against a company in which the largest individual contributor to the justice's election campaign was the chairman, chief executive officer, and president. The Supreme Court, in holding recusal was required, reviewed its precedent on the issue of bias. The Supreme Court held that actual bias is not the pertinent inquiry because "the Due Process Clause [of the Fourteenth Amendment] has been implemented by objective standards that do not require proof of actual bias. [Citations.] In defining these standards, the Court has asked whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.' [Citation.]" (*Caperton v. A.T. Massey Coal Co., supra*, 556 U.S. at pp. 883-884.)

The *Caperton* court noted that it had previously concluded that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has a direct, personal, substantial, pecuniary interest in a case. (*Caperton v. A.T. Massey Coal Co., supra,* 556 U.S. at p. 876.) However, at the

same time, the *Caperton* court also observed that it was concerned with more than the traditional prohibition on direct pecuniary interest. It was concerned with a more general concept of interests that tempt adjudicators to disregard neutrality. (*Id.* at p. 878.)

In *Aetna Life Insurance Co. v. Lavoie* (1986) 475 U.S. 813 [106 S.Ct. 1580, 89 L.Ed.2d 823], the high court further clarified the reach of the Due Process Clause vis-à-vis a judge's interest in a case. The Court stressed that it was not required to decide whether in fact the justice was influenced. The proper constitutional inquiry is "whether sitting on the case then before the [court] 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" (*Id.* at p. 822.)

In *People v. Chatman* (2006) 38 Cal.4th 344, the mere fact that the judge's daughter had been the victim of a knifepoint robbery at a photograph store many years before did not disqualify him from presiding over a murder trial with allegations of robbery and a robbery-murder special circumstance. (*Id.* at pp. 353, 362-363.)

Here, unlike *Chatman*, for example, in addition to a strong risk of an appearance of bias or partiality in this case [see *Aetna Life Insurance Co. v. Lavoie, supra,* 475 U.S. at p. 825 [Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'"]), the

actions of the prosecutor and Judge Crone also support a finding of actual bias and prejudgment.

In the present case, the record discloses that the prosecutor, assisted by Judge Crone, had been recently successful in his campaign for election to judicial office; he was only waiting for the conclusion of this case before assuming judicial office. (See 2 RT [May 3, 1999] 20-24 [showing eagerness of prosecutor Hedstrom to proceed to trial as he had been elected judge and could not assume judicial office until conclusion of trial].) For this reason, as the record further discloses, the prosecutor did everything possible to speed trial. (See 2 RT 26-46 [prosecutor Hedstrom objected to appointment of defense counsel through preliminary hearing only since appointment of new defense counsel after preliminary hearing would cause delay of trial]; 5 RT 56-63 [prosecutor interferes with appointment of defense counsel in order to speed trial]; 10 RT 119 [prosecutor objects to *Marsden* [*People v. Marsden* (1970) 2 Cal.3d 118] procedure as causing delay of trial]; 2 RT 23-30 [prosecutor expresses concern that financial considerations as to the appointment of defense counsel interfere with appellant's rights to representation and to a speedy trial and to People's right to a speedy trial]; 3 RT 29, 36-39 [at hearing on appointment of defense counsel, prosecutor invokes People's right to a speedy trial; invokes defendant's right to a speedy disposition, and pushes for appointment of counsel to speed trial]; 9 RT 101 [prosecutor invokes People's speedy trial rights] 10 RT 91-94, 122 [in response to appellant's *Marsden* motion, prosecutor expresses desire to push case

to trial and complains of preliminary hearing delay]; 12 RT 113-122 [prosecutor pushes for early trial, asks court to continue case on day-to-day basis]; and 15A RT 617 [prosecutor complains about defense questioning during preliminary hearing, so that "we could be here forever"].)

A change of venue, if granted, would necessarily have resulted in the delay of trial in this case. In that event, the prosecutor either would have been obligated to transfer prosecution responsibilities to another member of the district attorney's office in order to assume the judicial office to which he had been recently elected, or the prosecutor would have been forced to delay his assumption of judicial office in order to try this case in another county after change of venue.

At the heart of *Caperton* is the circumstance that the judge in that case was aware of his significant connection to the appellant, yet did not disqualify or recuse himself. Those circumstances are also present in this case; the circumstances of this case, both subjectively and objectively, reveal an "interest" that would result or actually resulted in bias.

Unlike the situation, for example, in *Richardson v. Quarterman, supra*, 537 F.3d 466, or in *People v. Williams* (1997) 16 Cal.4th 636, 651-653 [no due process violation where nephew of judge's son-in-law was both a witness and the grandson of the victim in a murder case], here, the record discloses that, because of his close personal and professional ties to the prosecutor, Judge Crone had a personal interest and motive -- apart from the merits of the matter -- to deny appellant's change of venue motion.

Denial of change of venue directly furthered and benefited the prosecutor's career. Indeed, the record shows that even before the change of venue motion had been fully heard or argued, Judge Crone had already decided the issue and fully intended to deny change of venue to benefit the prosecutor. For example, prior to the hearing on the change of venue motion, Judge Crone was already discussing with counsel a trial schedule in Lake County, implying that he already had decided the issue before it was heard or submitted and intended to deny a change of venue. (See 11 RT 97-110.) At the end of a hearing before the hearing on the change of venue motion, Judge Crone again commented as to trial scheduling, further indicating he had prejudged appellant's motion and intended to deny change of venue prior to any evidentiary hearing. (See 13 RT 234-290-294.) Still again, before considering and ruling on change of venue, the judge discusses with counsel trial scheduling, the use of jury questionnaires, and other trial matters confirming prejudgment in order to benefit the prosecutor's interests. (See 14 RT 375-376.) Prior to conclusion of the evidentiary portion of appellant's change of venue motion, the judge again discussed trial scheduling and inquired of defense counsel his availability for trial in Lake County. (See 14 RT 423.)

Prejudgment of appellant's change of venue motion in order to benefit the prosecutor's personal and professional interests is a manifestation of unconstitutional judicial bias in violation of the constitutional guarantees of due process of law and the right to a fair trial. The entitlement of a criminal defendant to a fair trial should never be compromised. (*People v. Chatman, supra,* 38 Cal.4th

at p. 364.) Any reasonable person, aware of the facts in this case would certainly entertain a doubt as to the judge's impartiality in this case.

In California, the law tracks the high court's ruling in *Caperton*: a public perception of partiality, that is, the appearance of bias, is an explicit ground for judicial disqualification is. (See (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii); *Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 776 ["Disqualification is mandated if a reasonable person would entertain doubts concerning the judge's impartiality."].)

Here, the record reveals more than the appearance of partiality. The record affirmatively shows that the judge assigned to this case -- because of his present and continuing close personal and professional ties to the prosecutor -- was not able to be impartial in hearing and ruling on appellant's change of venue motion. Because such impartiality and conflicted interests constituted grounds for disqualification, appellant's state and federal due process and fair trial rights to an impartial judge were violated. (*Caperton v. A.T. Massey Coal Co., supra*, 556 U.S. at pp. 883-884; *People v. Brown, supra,* 6 Cal.4th at pp. 334, 336.)

E. The Denial of Appellant's Right's to a Fair Trial in a Fair Tribunal Before an Impartial Judge Also Rendered the Guilt and Penalty Determinations Unreliable in Violation of the Eighth and Fourteenth Amendments to the United States Constitution

While due process is an elusive concept, its exact boundaries indefinable, and its content varies according to specific factual contexts (*Hannah v. Larche*

(1960) 363 U.S. 420, 442 [80 S.Ct. 1502, 4 L.Ed.2d 1307]), at its very core is the notion of fair play and trial before an impartial judge tribunal. (*Larson v. Palmateer* (9th Cir. 2007) 515 F.3d 1057, 1067.) Indeed, the source of judicial power is the faith of the citizenry in the ability to have a fair hearing. (*Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 253.)

The floor established by the Due Process Clause of the Fourteenth Amendment clearly requires a fair trial in a fair tribunal before an impartial judge without bias toward or against the defendant or an interest in the outcome of his particular case. (*Withrow v. Larkin, supra,* 421 U.S. at p. 46 [95 S.Ct. 1456, 43 L.Ed.2d 712].) Appellant was constitutionally entitled to a fair trial before an impartial trial judge. (*Arizona v. Fulminante, supra,* 499 U.S. at p. 309 [111 S.Ct. 1246, 113 L.Ed.2d 302].)

Appellant was not required to make Eighth and Fourteenth Amendment cruel and/or unusual punishment arguments in the trial court in order to preserve them on appeal. As this Court has previously ruled, an Eighth Amendment appellate claim is of a kind that required no objection to preserve it. The claim involves no facts or legal standards different from those involving constitutional due process of law and fair trial standards also raised on appeal but additionally asserts that these errors had the additional legal consequences of violating the state and federal proscriptions against cruel and/or unusual punishment. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1233, fn. 4; *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.) In these circumstances, appellant's constitutional arguments are not

forfeited on appeal. (See *People v. Partida* (2005) 37 Cal.4th 428, 433-439.)

The essence of due process and fair trial is the protection of the individual against arbitrary action. (*Ohio Bell Telephone Co. v. Public Utilities Com.* (1937) 301 U.S. 292, 302 [57 S.Ct. 524, 81 L.Ed. 1093].) The extent to which these rights must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss." (*Joint Anti-Fascist Refugee Committee v. McGrath* (1951) 341 U.S. 123, 168 [71 S.Ct 624, 95 L.Ed. 817] (Frankfurter, J., concurring).) The greater the potential loss, the greater the process due.

Because a capital trial inherently potentially entails the most serious type of "grievous loss" -- deprivation of life by the state -- due process and fair trial invariably have been constitutionally compelled. The consequences of a capital trial are so severe to invoke the basic requisites of due process and fair trial. What is being protected not only is life itself but the right to a fair determination of the facts upon which the state would deprive a person of life and liberty.

In the present case, given the constitutional impact of a trial with an impartial or biased judge contrary to fundamental constitutional due process and fair trial precepts, the jury's verdict as to both guilt and penalty cannot, as well, be considered reliable and therefore cannot stand in the face of the Eighth Amendment prohibition against cruel and unusual punishment.

III

THE EVIDENCE WAS INSUFFICIENT UNDER THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CALIFORNIA CONSTITUTION (ART. I, § 15) TO SUPPORT APPELLANT'S CONVICTION OF CARJACKING ON COUNT 4 (§ 215, SUBD. (a) AND FIRST DEGREE FELONY-MURDER ON COUNT 1 (§ 187) PREDICATED ON THE COMMISSION OR ATTEMPTED COMMISSION OF A CARJACKING

A. Factual and Procedural Background

As set forth in the Statement of the Case, *supra*, appellant was charged on count 1 with the first degree murder of Ellen Salling in violation of Penal Code section 187, subdivision (a). He was also charged with burglary and robbery in counts 2 and 3. Further, the information charged appellant on count 4 with carjacking in violation of section 215, subdivision (a).

In addition to first degree murder instructions based on premeditation and deliberation in the language of CALJIC No. 8.20 (3 CT 597), the court gave instructions on felony-murder, including an unlawful killing during the commission or attempted commission of carjacking in the language of CALJIC No. 8.21. (See 3 CT 602; 43 RT 5427-5428 [where prosecutor discusses four first degree murder theories, including carjacking-felony murder]; 44 RT 5522.) The court also instructed the jury on carjacking in the language of CALJIC No. 9.46. (See 3 CT 621; 42 RT 5331; 44 RT 5535-5538.) During the conference on jury instructions, appellant argued there was no evidence of any taking of property prior to the killing. (See 42 RT 5317-5319.) During closing argument, the

prosecutor acknowledged that appellant did not take any property before the killing. (See 43 RT 5386-5391.) The prosecutor stressed that appellant "ransacked" Salling's house only after the killing. (See 43 RT 5398-5401.) As to the carjacking, the prosecutor stressed that the fact that Salling's car was located in her garage adjacent to her residence satisfied the immediate presence requirement of carjacking as charged in count 4 in violation of section 215. (See 43 RT 5412-5414.)

In addition to first degree murder in violation of section 187, subdivision (a) on count 1, the jury found appellant guilty of carjacking in violation of section 215, subdivision (a) on count 4. (3 CT 720-721, 726-727; 44 RT 5574-5578.)

Appellant contends that the evidence was insufficient to support the judgment of conviction of both the count 4 carjacking and the count 1 murder to the extent that it was predicated in whole or in part on a carjacking felony-murder theory.

B. Standard of Review

In evaluating a criminal conviction challenged as lacking evidentiary support, a reviewing court must consider the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Nelson* (2011) 51 Cal.5th 198, 210; *People v. Hillhouse* (2002) 27

Cal.4th 469, 496.) The reviewing court does not reweigh evidence or reevaluate a witness's credibility. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129.) A judgment should be upheld if, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. (*People v. Miranda* (1987) 44 Cal.3d 57, 86.)

The same standard of review applies to cases in which the prosecution has relied mainly on circumstantial evidence (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) In addition, the reviewing court must accept logical inferences that the jury might have drawn from the circumstantial evidence. (*Id.* at p. 11.) However, the judgment must be supported by "substantial evidence," which has been defined as evidence that reasonably inspires confidence and is of solid value. (*People v. Bassett* (1968) 69 Cal.2d 122, 139; *People v. Javier A.* (1985) 38 Cal.3d 811, 819.)

C. Constitutional Due Process Standards

A conviction or other finding which is not supported by sufficient evidence constitutes not just an error of California law, but also a denial of due process and a violation of federal constitutional rights, particularly the Fourteenth Amendment to the United States Constitution. (*Jackson v. Virginia* (1979) 443 U.S. 307, 309 [99 S.Ct. 2781, 61 L.Ed.2d 560].) The federal constitutional standard for determining the sufficiency of the evidence is identical to the standard under

California law. (*People v. Staten* (2000) 24 Cal.4th 434, 460.) Under both, reversal is required if one of the essential elements of the crime is not supported by substantial evidence. (*People v. Hernandez* (1988) 47 Cal.3d 315, 345-346.)

D. Insufficiency of the Evidence of Carjacking and Felony-Murder

Penal Code section 189 provides in relevant part that "[a]ll murder . . . which is committed in the perpetration of, or attempt to perpetrate, . . . carjacking . . . is murder of the first degree." As this Court recently reiterated, "[i]t is the duty of this court in construing a statute to ascertain and give effect to the intent of the Legislature." (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1048.)

Penal Code section 215, subdivision (a) defines carjacking as "the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." The typical carjacking involves the active taking of a motor vehicle driven or occupied by the carjacking victim. (See, e.g., *People v. Grandy* (2006) 144 Cal.App.4th 33, 37 [victim driving Cadillac when confronted by armed carjacker who demanded car and money]; *People v. Ramirez* (2006) 141 Cal.App.4th 1501, 1504 [armed carjacker approached victims in car demanding purse and car keys; second carjacker drives away in victims' car]; *People v. Fish* (2005) 131 Cal.App.4th 1210 [victim

approached by armed gunman and ordered out of his car at gunpoint; carjacker drives away in victim's car].)

The use of force or fear as an essential element of carjacking must be motivated by an intent to steal. (See *People v. Green* (1980) 27 Cal.3d 1, 54 [the act of force or intimidation by which the taking is accomplished must be motivated by the intent to steal; if the larcenous purpose does not arise until after the force has been used against the victim, there is no joint operation of act and intent], overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.) The requisite intent -- to deprive the possessor of possession -- must exist before or during the use of force or fear. (Pen. Code § 20; *People v. Marshall* (1997) 15 Cal.4th 1, 34 [to support robbery conviction evidence must show that the requisite intent to steal arose either before or during the commission of the act of force].)

In *People v. Lopez* (2003) 31 Cal.4th 1051, the Court analyzed the legislative history of section 215 to ascertain the Legislature's intent in making carjacking a separate offense. "The legislative history reveals the underlying purpose for creating the new crime of carjacking: 'According to the author [of the legislative bill]: [¶] There has been considerable increase in the number of persons who have been abducted, many have been subjected to the violent taking of their automobile and some have had a gun used in the taking of the car. This relatively "new" crime appears to be as much thrill-seeking as theft of a car. If all the thief wanted was the car, it would be simpler to hot-wire the automobile without

running the risk of confronting the driver. People have been killed, seriously injured, and placed in great fear, and this calls for a strong message to discourage these crimes. Additionally law enforcement is reporting this new crime is becoming the initiating rite for aspiring gang members and the incidents are drastically increasing. [¶] Under current law there is no carjacking crime per se and many carjackings cannot be charged as robbery because it is difficult to prove the intent required of a robbery offense (to permanently deprive one of the car) since many of these gang carjackings are thrill seeking thefts. There is a need to prosecute this crime.' (Assem. Com. on Pub. Safety, Analysis of Sen. Bill No. 60 (1993-1994 Reg. Sess.) July 13, 1993, p. 1.)" (*People v. Lopez, supra*, 31 Cal.4th at p. 1057.)

In further significant discussion and analysis, this Court also stressed in *Lopez* that the legislative history of carjacking indicates that it was specifically concerned with the considerable increase in the number of persons who have been abducted in their vehicles and the associated danger to the driver or passenger. Thus, in its *Lopez* decision, the Court analogized the crime of carjacking with kidnapping. (*People v. Lopez, supra*, 31 Cal.4th at p. 1062; see also *People v. Hill* (2000) 23 Cal.4th 853, 859-860.) As the Court succinctly stated in *Lopez*, "section 215, subdivision (a), requires 'the felonious taking of a motor vehicle . . . *from* . . . [the] person or immediate presence' of the possessor or passenger." (*People v. Lopez, supra*, 31 Cal.4th at p. 1063.)

In *People v. Antoine* (1996) 48 Cal.App.4th 489, the Court of Appeal

similarly observed that the Legislature's reason for enacting a special statute with a penalty greater than that for second degree robbery was that "carjacking is a particularly serious crime that victimizes persons in vulnerable settings" and, because of the nature of the offense, creates the great potential for harm not only to the victim and perpetrator but also the public at large. (*Id.* at p. 495; see also *People v. Hamilton* (1995) 40 Cal.App.4th 1137, 1144 [victim forced to surrender his place in the vehicle and suffer loss of transportation]; Assem. Com. on Pub. Safety Analysis of Sen. Bill No. 60 (1993-1994 Reg. Sess.) Feb. 23, 1993, p. 5 [discussing the bill's penalty provision and noting that "opening a car door and pushing out the driver would subject the perpetrator to a maximum 15-year penalty"].)

Legislative history therefore strongly indicates that the carjacking statute was enacted to address a specific problem -- the forcible taking of a motor vehicle directly from its driver or occupants. The Legislature sought to impose a severe penalty on those who created a specific risk by directly confronting a vehicle's occupants. (*People v. Lopez, supra*, 31 Cal.4th at p. 1057; *People v. Antoine, supra*, 48 Cal.App.4th at p. 495.)

From evidence that a defendant killed another person, and at the time of the killing took a car from that person, a jury ordinarily may reasonably infer that the defendant killed the victim to accomplish the taking and thus committed the offense of carjacking. (See *People v. Hughes* (2002) 27 Cal.4th 287, 357; *People v. Kipp* (2001) 26 Cal.4th 1100, 1128.) Here, however, the evidence in the

present case was insufficient to establish that the intent to deprive Ellen Salling of her car existed at the same time as the use of force or fear. The prosecutor acknowledged that appellant did not take any property before the killing and that appellant ransacked Salling's house only after the killing. There was no evidence at trial that appellant even took Salling's keys before her death or carried out the killing in order to take the car itself. (See, in contrast, *People v. Nelson, supra,* 51 Cal.4th at p. 211 [jury entitled to conclude that defendant, having taken victim's car keys, would then take the car itself].)

Moreover, Salling was not going to her car when she was killed and was not in her car or anywhere near her car at the time of the homicide. Unlike every other reported carjacking decision, Salling was cooking or baking in her kitchen when killed. Her car was parked in her garage. There was no evidence that the garage door was open or that appellant even knew Salling had a car when he entered her home and killed her.

Virtually every carjacking involves a victim driving his or her car at the time of the crime, a victim next to or around his or her vehicle, or a victim in some manner closely associated with the vehicle and its use at the time of the crime. (See, for example, *People v. Hamilton, supra,* 40 Cal.App.4th at p. 1144 [usual case of carjacking involves occupant or multiple occupants of motor vehicles all subjected to threats of violence]; *People v. Palacios* (2007) 41 Cal.4th 720, 723 [victim driving his car and stopped at gas station when carjacked]; see also *People v. Hill, supra,* 23 Cal.4th at p. 859; *People v. Alvarado* (1999) 76 Cal.App.4th

156.) In this case, there was no evidence that Salling was holding her car keys when the killing occurred or that her car keys were taken directly from her as in *People v. Gomez* (2011) 192 Cal.App.4th 609, 614 [victim assault was sufficient evidence to support inference that defendant took car keys directly from carjacking victim].) Indeed, the evidence was to the contrary: Salling was in the middle of an activity in her home; she was not about to go anywhere when the homicide and purported carjacking occurred.

A review of the entire record thus does not reveal an intent to take possession of Salling's car before or during appellant's assault on her. Nor was there strong circumstantial evidence of appellant's specific intent to take Salling's car prior to her death. (See *People v. Beeman* (1984) 35 Cal.3d 547, 558-559 [specific intent must often be inferred from circumstantial evidence as "[d]irect evidence of the mental state of the accused is rarely available except through his or her testimony"].)

There is nothing in the record showing that appellant was even aware of Salling's car in her garage. There was no evidence, beyond pure speculation and conjecture, that appellant knew that Salling had car keys or where they were kept. There is simply no solid or credible evidence of any action of any kind prior to the killing in this case that suggests any intent by appellant to take Salling's car before the killing.

When appellant entered Salling's home, she was in the kitchen cooking or baking. Her work in the kitchen did not suggest that she was on her way to or

from a vehicle. The evidence rather suggests that after a brief verbal exchange between Salling and appellant, unrelated to her car, appellant in a rage began hitting, beating, and kicking the victim, actions that caused her death.

The fact that appellant did not take any property before the killing, as the prosecutor conceded, also tended to imply the absence of an intent to take either Salling's car keys or her car before the killing. (See *People v. Gomez, supra*, 192 Cal.App.4th at p. 622 [act of taking a car by one who steals the keys can imply that the key thief intended to steal the car when he took the keys; the failure to take, mention, ask about, or look for the vehicle when the keys are taken implies the absence of an intent to take the car].) An inference that appellant intended to take Salling's car because he was in flight from law enforcement authorities founders on a total lack of evidence or proof that appellant knew of the existence of the vehicle when he approached her home and saw her working in the kitchen. Proof of the requisite specific intent to deprive Salling of her vehicle surely required some evidence that appellant knew she had a car, knew where it was kept, or knew of the existence of car keys before her death.

In addition, the evidence was insufficient to establish that Salling's vehicle was taken from her immediate presence. Carjacking is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear. (§ 215, subd. (a).) The crime

of carjacking, like the crime of robbery, may thus be established not only when the defendant has taken property out of physical presence of the victim, but also when the defendant exercises dominion and control over the victim's property through force or fear. (*People v. Hoard* (2002) 103 Cal.App.4th 599, 608.)

Presence depends upon the circumstances of each case and implies an area with no metes and bounds. (*People v. Belenger* (1963) 222 Cal.App.2d 159, 168.) The broad meaning of "immediate" has been defined in Webster's New International Dictionary (Third edition): "Being near at hand; not far apart or distant." (See also *People v. Lavender* (1934) 137 Cal.App. 582, 585; *People v. Hayes* (1990) 52 Cal.3d 577, 515, 519.) In *Hayes*, the Court disapproved an expansive interpretation of "'immediate presence' for purposes of robbery." As the Court explained, "to ignore the distance between the act of taking and the application of 'force or fear' would deny meaning to the separate requirement of robbery that the property be 'tak[en]' from the victim's person or "immediate presence." (*Id.* at p. 628.)

Here, there was no evidence that appellant exercised dominion or control of Salling's car through force or fear or while she was alive. At the same time, the evidence did not establish that Salling's vehicle was taken from her immediate or physical presence. The purpose of the carjacking statute is not served in this case, where the victim's car was in her garage, the victim was killed before the car was taken, the victim was not entering or leaving her car, and her only connection to her stolen automobile at the time of the killing was that the car keys were

somewhere in her home.

Section 215 was designed to address "a particularly serious crime that victimizes persons in vulnerable settings and, because of the nature of the taking, raises a serious potential for harm to the victim, the perpetrator and the public at large." (*People v. Antoine, supra,* 48 Cal.App.4th at p. 495.) Because the nature of the taking here did not involve the type of harm that section 215 was designed to address, it would be an unwarranted extension of the statute to conclude that appellant's actions against a woman at home in her kitchen baking constituted carjacking under section 215.

In *People v. Hayes, supra,* 52 Cal.3d 577, this Court discussed the immediate presence requirement. According to the Court, "[a] thing is in the [immediate] presence of a person . . . which is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it." (*Id.* at pp. 626-627.)

A vehicle is within a person's immediate presence for purposes of carjacking if it is thus sufficiently within his control so that he could retain possession of it if not prevented by force or fear. (*People v. Medina* (1995) 39 Cal.App.4th 643, 648.) In *Medina*, the victim was lured into a motel room by an accomplice of the defendant. There, the defendant and accomplices bound the victim, took his car keys, then took his car. (*Id.* at pp. 646-647.) The defendant challenged his conviction for carjacking, arguing that actual physical proximity of the victim to the vehicle is required. (*Id.* at p. 649.) The Court of Appeal

disagreed, explaining that the "only reason [the victim] was not in the car when it was taken and this was not a 'classic' carjacking, was because he had been lured away from it by trick or device." (*Id.* at pp. 651-652.)

In *People v. Hoard, supra,* 103 Cal.App.4th 599, the defendant entered a jewelry store and ordered two employees to give him the keys to the jewelry cases and to the car belonging to one of the employees. (*Id.* at p. 602.) The employees complied and were then directed into a back room and bound. (*Ibid.*) The defendant took jewelry from the cases and the employee's car. (*Ibid.*) Relying on *Medina*, the court in *Hoard* affirmed the defendant's carjacking conviction by explaining: "Although [the employee] was not physically present in the parking lot when [the defendant] drove the car away, *she had been forced to relinquish her car keys*. Otherwise, she could have kept possession and control of the keys and her car." (*People v. Hoard, supra*, 103 Cal.App.4th at p. 609 (italics added).)

In *People v. Coleman* (2007) 146 Cal.App.4th 1363, the owner of a glass shop drove his Chevrolet Silverado to the shop in the morning, put the keys to the Silverado in a back work area of the shop, then drove away in a truck he used in his business. (*Id.* at p. 1366.) While the owner was away, the defendant entered the shop, pointed a gun at the office manager, and told her to give him the keys to the Silverado. (*Ibid.*) The office manager walked to the back of the shop, grabbed the keys to the Silverado, and gave them to the defendant. (*Ibid.*) The defendant was convicted of robbery and carjacking. (*Id.* at pp. 1365, 1367, fn. 2.)

The Court of Appeal reversed the conviction for carjacking in *Coleman.*

(*Id.* at p. 1374.) Although the court acknowledged that a carjacking may occur where neither the possessor nor the passenger is inside or adjacent to the vehicle, it nevertheless concluded that the circumstances of the case *"were simply too far removed from the type of conduct that [the carjacking statute] was designed to address*." (*Id.* at p. 1373 (italics added).)

The construction and application of section 215, coupled with its legislative history, demonstrate that the statute was designed to address the serious problems and risks arising primarily from the theft of vehicles from living drivers or occupants of vehicles contemporaneously or near in time with their use or possession of the vehicle. As repeatedly emphasized by this Court in *People v. Lopez, supra*, 31 Cal.4th at page 1061, "the legislative history indicates that the Legislature was specifically concerned with the 'considerable increase in the number of persons who have been abducted' while in their vehicles and the associated danger to the driver or passenger." (Accord, *People v. Duran* (2001) 88 Cal.App.4th 1371, 1376 [section 215 "was passed in 1993 to address what was then an increasingly dangerous problem of people being abducted from their cars, sometimes at gunpoint"].)

Appellant acknowledges that a carjacking may occur where the owner or occupant is not inside or immediately adjacent to the vehicle. (See, e.g., *People v. Coryell* (2003) 110 Cal.App.4th 1299, 1302-1303 [evidence supported carjacking conviction where the driver was in a phone booth next to the vehicle and the knife-wielding defendant chased him away, and the passenger who witnessed the

confrontation then ran from the vehicle].) In *Coryell*, the driver was not in or near the car, but was actively using his vehicle and clearly associated with it at the time of the carjacking.

Here, it cannot be concluded beyond a reasonable doubt under any scenario that a carjacking had been committed, where there was no evidence that appellant was aware prior to the killing that the victim owned a car; where the victim was killed while working in the kitchen in her home; where the car was located in a closed garage at the time of the killing and could not be seen from the street at the time of appellant's approach; where there was no evidence that Salling was actively using or about to drive or use her car; and where there was no evidence that appellant was aware of car keys, looked for them, or made any effort to take the victim's keys before her death.

The circumstances of the present case are simply too far removed from the type of conduct that section 215 was designed to address. To find that appellant's actions amounted to a carjacking would be to disregard both the language of section 215, cautioning that the statute must not be construed to supersede the offense of robbery,[17] and legislative intent demonstrating that the statute was designed to address the violent nature of vehicle takings committed against drivers and occupants. (*People v. Hill, supra*, 23 Cal.4th at pp. 859-860; *People v. Duran, supra*, 88 Cal.App.4th at p. 1376.) For these reasons, the evidence cannot support

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[17]/ Section 215, subd. (c) provides in part: "This section shall not be construed to supersede or affect Section 211.

appellant's conviction of carjacking on count 4 in violation of section 215, subdivision (a).

Moreover, the evidence also failed to support the jury's verdict of first degree murder on count 1 to the extent that it was predicated on a carjacking-felony-murder theory of liability. Considered as a whole, the evidence of carjacking and felony-murder predicated on the commission of a carjacking is nether strong nor substantial. As discussed above, no rational trier of fact could have found that appellant perpetrated a carjacking within the meaning of section 215, subdivision (a), where the victim was baking cookies in her kitchen and her car was taken from an enclosed garage after her death.

Although reasonable inferences must be drawn in support of the judgment, an appellate court may not "go beyond inference and into the realm of speculation in order to find support for a judgment. A finding of first degree murder which is merely the product of conjecture and surmise may not be affirmed." (*People v. Memro* (1985) 38 Cal.3d 658, 695-696.)

Because the jury considered legally insufficient evidence in rendering its verdicts, appellant's rights to due process of law and a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution were also violated. (*Jackson v. Virginia, supra*, 443 U.S. at pp. 319, 324 [99 S.Ct. 2781, 61 L.Ed.2d 560].)

The primary concern in the Eighth Amendment context has been that the sentencing decision be based on the facts and circumstances of the defendant, his

background, and his crime. See, e. g., *Spaziano v. Florida* (1984) 468 U.S. 447, 460 [104 S.Ct. 3154, 82 L.Ed.2d 340]; *Zant v. Stephens* (1983) 462 U. S. 862, 879 [103 S.Ct. 2733, 77 L.Ed.2d 235]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110-112 [102 S.Ct. 869, 71 L.Ed.2d 1] *Lockett v. Ohio* (1978) 438 U. S. 586, 601-605 [98 S.Ct. 2954, 57 L.Ed.2d 973] (plurality opinion). In scrutinizing death penalty procedures under the Eighth Amendment, the Court has emphasized the "twin objectives" of "measured consistent application and fairness to the accused." *Eddings v. Oklahoma, supra*, 455 U.S. at 110-111; see also *Lockett v. Ohio, supra*, 438 U.S. at p. 604 [emphasizing the importance of reliability].) Here, absent sufficient evidence to support appellant's conviction on count 4 and his conviction on count 1 predicated on a killing in the course of a carjacking, the penalty of death returned by the jury based at least in part on those crimes also violated the Eighth Amendment requirement of a reliable determination of both guilt and penalty. (*Lockett v. Ohio, supra*; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-330 [105 S.Ct. 2633, 86 L.Ed.2d 231].)

IV

THE EVIDENCE WAS INSUFFICIENT UNDER THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CALIFORNIA CONSTITUTION (ART. I, § 15) TO SUPPORT THE SPECIAL CIRCUMSTANCE FINDING IN COUNT 1 OF CARJACKING-MURDER PURSUANT TO § 190.2, SUBDIVISION (a)(17)(L); INSUFFICIENCY OF THE EVIDENCE ALSO RENDERED THE SPECIAL CIRCUMSTANCE FINDING AND DEATH SENTENCE UNRELIABLE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Factual and Procedural Background

As set forth in the Statement of the Case, *supra*, appellant was charged on count 1 with the first degree murder of Ellen Salling in violation of section 187, subdivision (a). In addition to the alleged count 1 murder, the information charged appellant on count 4 with carjacking in violation of section 215, subdivision (a). The information further alleged the special circumstance of murder during the commission or attempted commission of carjacking pursuant to section 190.2, subdivision (a)(17)(L). (1 CT 130-132.)

In addition to first degree murder instructions based on premeditation and deliberation, the court gave instructions on felony-murder in the modified language of CALJIC No. 8.21 which included carjacking. (See 3 CT 602 [jury instruction], 681 [jury copy]; see also 43 RT 5427-5428 [where prosecutor discusses four first degree murder theories, including carjacking-felony murder].) The court instructed the jury on carjacking in the language of CALJIC No. 9.46 (see 3 CT 621, 700; 42 RT 5331; 44 RT 5535-5536), and, at the prosecutor's

request, the court instructed the jury on the special circumstance of murder in the commission of a carjacking in the modified language of CALJIC No. 8.81.17, requiring proof that the murder was committed while the defendant was engaged in the commission of a carjacking.[18] (See 3 CT 613 [modification of CALJIC No. 8.81.17], 692 [jury copy]; 42 RT 5311-5317, 5324-5335; see also 43 RT 5356-5372 [jury instructions], 5421-5423 [argument of counsel as to carjacking special circumstance]; 44 RT 5528, 5530-5531.)

During the conference on jury instructions, appellant argued there was no evidence of any taking of property prior to the killing. (See 42 RT 5317-5319.) During closing argument, the prosecutor acknowledged that appellant did not take any property before the killing. (See 43 RT 5386-5391.) The prosecutor stressed that appellant "ransacked" Salling's house only after the killing. (See 43 RT 5398-5401.) As to the carjacking, the prosecutor stressed that the fact that Salling's car was located in her garage adjacent to her residence satisfied the immediate presence required of carjacking as charged in count 4 in violation of section 215. (See 43 RT 5412-5414.) The prosecutor urged the jury not to construe the instructions in a "hypertechnical" manner. (43 RT 5428-5432.)

In argument to the jury, defense counsel conceded that appellant killed Ellen Salling. Defense counsel also conceded that the circumstantial evidence of

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[18]/ In light of modifications and additions to CALJIC No. 8.81.17, the prosecutor withdrew, with appellant's assent, CALJIC No. 8.80.1 [standard special circumstances introductory instruction] as already revised and included in CALJIC No. 8.81.17. (See 42 RT 5327-5328.)

guilt was overwhelming and further conceded sufficient evidence to support at least one theory of first-degree murder, i.e., the "premeditated deliberation theory of first-degree murder." Defense counsel, however, contested the sufficiency of the evidence to prove carjacking. (See 43 RT 5440-5444; see also 43 RT 5451-5463 [defense argument as to why murder was not committed during or to advance burglary, robbery or carjacking].)

The jury found appellant guilty of first degree murder in violation of section 187, subdivision (a) on count 1. The jury also found appellant guilty of carjacking in violation of section 215, subdivision (a) on count 4. (3 CT 726-727.) The jury found all three special circumstances true, including murder while engaged in the commission or attempted commission of carjacking pursuant to section 190.2, subdivision (a)(17)(L). (3 CT 720-721; 44 RT 5574-5578.)

B. Sufficiency of Evidence, Generally

Substantial evidence must support a special circumstance finding. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1022; *People v. Lewis* (2001) 26 Cal.4th 334, 366.) In reviewing the sufficiency of evidence for a special circumstance, a reviewing court asks whether, after viewing the evidence in the light most favorable to the People, any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt. (*People v. Mickey* (1991) 54 Cal.3d 612, 678.) Here, the record does not contain substantial evidence that appellant murdered Ellen Salling while engaged in the commission or attempted

commission of carjacking. Specifically, as there is no indication in the entire record that appellant was even aware of the existence of the victim's car or its presence in the victim's closed garage before the killing, he could not have formed the requisite intent to commit a carjacking before attacking and killing her.

C. Insufficiency of the Evidence to Support the Special Circumstance Finding that the Murder Occurred in the Commission or Attempted Commission of a Carjacking

In light of the entire record in this case, the evidence is not sufficient to support the special circumstance finding that the murder occurred while appellant was engaged in the commission or attempted commission of carjacking. The evidence is also insufficient to establish that appellant's intent to steal arose prior to the use of force.

The special circumstance of murder while engaged in the commission or attempted commission of a carjacking requires that the murder be committed in order to advance the independent felonious purpose of carjacking. The existence of a logical nexus between the felony and the murder in the felony-murder context, like the relationship between a robbery, for example, and the murder in the context of the felony-murder special circumstance, is not a separate element of the charged crime but, rather, a clarification of the scope of an element. (*People v. Kimble* (1988) 44 Cal.3d 480, 501.) As the Court stressed in *People v. Hernandez* (1988) 47 Cal.3d 315, 348, whether a killing occurred during the commission of a felony is not "a matter of semantics or simple chronology." Instead, "the focus is on the

relationship between the underlying felony and the killing."(*Id.* at p. 348.) In *People v. Guzman* (1988) 45 Cal.3d 915, 950-951, the Court concluded that the statutory phrase "while engaged in the commission of" in section 190.2, subdivision (a)(17), carries the same meaning as "during the commission of" under section 190.2, former subdivision (c)(3). (See also *People v. Jones* (2001) 25 Cal.4th 98, 108, fn. 6.)

Here, both appellant's intent and the requisite nexus between the carjacking and the homicidal act are at issue. The carjacking-felony-murder special circumstance is not established if the carjacking is merely incidental to the murder. (*People v. Green* (1980) 27 Cal.3d 1, 61; see also *People v. Davis* (2005) 36 Cal.4th 510, 568; *People v. Horning* (2004) 34 Cal.4th 871, 907-908.) In *Green*, the Court examined former section 190.2, subdivision (c)(3) -- which defined the felony-murder special circumstance -- and held that the special circumstance did not exist if the felony was "merely incidental to the murder." (*People v. Green, supra*, 27 Cal. 3d at pp. 59-61, construing Pen. Code, former § 190.2, subd. (c)(3), Stats. 1977, ch. 316, § 9, pp. 1257-1258.) The Court narrowly construed "during the commission or attempted commission of", because the provision was supposed to distinguish "between those murderers who deserve to be considered for the death penalty and those who do not." (*Id.* at p. 61, fn. omitted).

In the present case, this rule was reflected in CALJIC No. 8.81.17, which stated, as relevant here, that in order to find the carjacking felony-murder special

circumstance true, the jury must find that "[t]he murder was committed while the defendant was engaged in the commission of a carjacking." As CALJIC No. 8.81.17 further provided, "In other words, the special circumstance referred to in these instructions is not established if the carjacking was merely incidental to the commission of the murder." (3 RT 613.)

In any given case, one may speculate about any number of scenarios that may have occurred. A reasonable inference, however, may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. A finding of fact must be an inference drawn from evidence rather than mere speculation as to probabilities without evidence. (*People v. Perez* (1992) 2 Cal.4th 1117, 1133.)

Section 215, subdivision (a) defines carjacking "the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." The requisite intent -- to deprive the possessor of possession -- must exist before or during the use or act of force or fear. (Pen. Code § 20; *People v. Marshall* (1997) 15 Cal.4th 1, 34 [to support a robbery conviction, evidence must show that the requisite intent to steal arose either before or during the commission of the act of force]; see also *People v. Wallace* (2008) 44 Cal.4th 1032, 1077.)

Here, the evidence was insufficient to establish that the intent to deprive Ellen Salling of her car existed at the same time as the use of force. The prosecutor acknowledged that appellant did not take any property before the killing and that appellant ransacked Salling's house only after the killing. There was no evidence at trial that appellant even took Salling's keys before her death or carried out the killing precisely in order to take her car. (See, in contrast, *People v. Nelson* (2011) 51 Cal.4th 198, 211 [jury entitled to conclude that defendant, having taken victim's car keys, would then take the car itself].) Nor was there strong circumstantial evidence of an intent to take Salling's car prior to her death. (See *People v. Beeman* (1984) 35 Cal.3d 547, 558-559 [specific intent must often be inferred from circumstantial evidence as "[d]irect evidence of the mental state of the accused is rarely available except through his or her testimony"].)

Salling was not going to her car when she was killed and was not in her car or anywhere near her car at the time of the homicide. Unlike every other reported carjacking decision, Salling was cooking or baking in her kitchen when killed. There was no evidence that the garage door was open or that appellant even knew Salling had a car when he entered her home and killed her.

Virtually every carjacking involves a victim driving his or her car at the time of the crime, a victim next to or around his or her vehicle, or a victim in some manner closely associated with the vehicle and its use at the time of the crime. (See, for example, *People v. Hamilton* (1995) 40 Cal.App.4th 1137, 1144 [usual case of carjacking involves occupant or multiple occupants of motor vehicles all

subjected to threats of violence]; *People v. Palacios* ((2007) 41 Cal.4th 720, 723 [victim driving his car and stopped at gas station when carjacked].) In this case, there was no evidence that Salling was holding her car keys when the killing occurred or that her car keys were taken directly from her as in *People v. Gomez* (2011) 192 Cal.App.4th 609, 614 [victim assault was sufficient evidence to support inference that defendant took car keys directly from carjacking victim].)

There is nothing in the record showing that appellant was aware of Salling's car in her garage. There was no evidence that appellant was even aware that Salling had car keys or where they were kept. There is no evidence of any action of any kind prior to the killing in this case that suggest any intent by appellant to take Salling's car before the killing. When appellant entered Salling's home, she was in the kitchen cooking or baking. Her work in the kitchen did not suggest that she was on her way to or from a vehicle. The evidence rather suggests that after a brief verbal exchange between Salling and appellant, unrelated to her car, appellant began hitting and beating her with the Ottoman.

The fact that appellant did not take any property before the killing tended to imply the absence of an intent to take either Salling's car keys or her car before the killing. (See *People v. Gomez, supra*, 192 Cal.App.4th at p. 622 [act of taking a car by one who steals the keys can imply that the key thief intended to steal the car when he took the keys; the failure to take, mention, ask about, or look for the vehicle when the keys are taken implies the absence of an intent to take the car].)

An inference that appellant intended to take Salling's car because he was in

flight from law enforcement authorities founders on a total lack of evidence or proof that appellant knew of the existence of the vehicle when he approached her home and saw her working in the kitchen. Proof of the requisite specific intent to deprive Salling of her vehicle surely required some evidence that appellant knew she had a car, knew where it was kept, or knew of the existence of car keys before her death.

The statutory proscriptions against carjacking, carjacking-felony-murder, and the special circumstance of murder while engaged in the commission or attempted commission of a carjacking were designed to address serious criminal conduct involving the use and operation of motor vehicles. (See *People v. Antoine* (1996) 48 Cal.App.4th 489, 495.) Here, it cannot be concluded beyond a reasonable doubt under any scenario that the evidence was sufficient to prove the special circumstance of murder while engaged in the commission of a carjacking within the meaning of section 190.2, subdivision (a)(17)(L).

Although reasonable inferences must be drawn in support of the judgment, an appellate court may not "go beyond inference and into the realm of speculation in order to find support for a judgment. A finding of first degree murder which is merely the product of conjecture and surmise may not be affirmed." (*People v. Memro* (1985) 38 Cal.3d 658, 695-696.) Because the jury considered legally insufficient evidence in finding the carjacking special circumstance true in this case, appellant's rights to due process of law and a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution were also violated.

(*Jackson v. Virginia, supra*, 443 U.S. at pp. 319, 324 [99 S.Ct. 2781, 61 L.Ed.2d 560].)

D. Insufficiency of the Evidence to Support the Special Circumstance Finding Also Led to an Unreliable Penalty Determination in Violation of Appellant's Fundamental Rights Guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provision is applicable to the states through the Fourteenth Amendment. (*Furman v. Georgia* (1972) 408 U. S. 238, 239 [92 S.Ct. 2726, 33 L.Ed.2d 346] (per curiam); *Robinson v. California* (1962) 370 U.S. 660, 666-667 [82 S.Ct. 1417, 8 L.Ed.2d 758].) The high court has discussed the concept of enhanced reliability as a foundational prerequisite for imposition of the death penalty. Due to the unique nature of the death penalty, the Eighth Amendment demands "heightened reliability" in the determination whether the death penalty is appropriate in a particular case. (*Sumner v. Shuman* (1987) 483 U.S. 66, 72 [107 S.Ct. 2716, 97 L.Ed.2d 56].)

By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons. Not only were appellant's fundamental due process rights violated by the lack of sufficient evidence to support the carjacking-felony-murder special circumstance in this case (Subsection C, *supra*), but the constitutional proscription

against cruel and unusual punishment was also violated for the same reasons.

The primary concern in the Eighth Amendment context has been that the sentencing decision be based on the facts and circumstances of the defendant, his background, and his crime. See, e. g., *Spaziano v. Florida* (1984) 468 U.S. 447, 460 [104 S.Ct. 3154, 82 L.Ed.2d 340]; *Zant v. Stephens* (1983) 462 U. S. 862, 879 [103 S.Ct. 2733, 77 L.Ed.2d 235]; *Eddings v. Oklahoma* (1982) 455 U. S. 104, 110-112 [102 S.Ct. 869, 71 L.Ed.2d 1] *Lockett v. Ohio* (1978) 438 U. S. 586, 601-605 [98 S.Ct. 2954, 57 L.Ed.2d 973] (plurality opinion). In scrutinizing death penalty procedures under the Eighth Amendment, the high court has emphasized the "twin objectives" of "measured consistent application and fairness to the accused." (*Eddings v. Oklahoma, supra*, 455 U.S. at 110-111; see also *Lockett v. Ohio, supra*, 438 U.S. at p. 604 [emphasizing the importance of reliability].)

Here, absent sufficient evidence to support appellant's conviction on count 4, his conviction on count 1 predicated on a killing in the course of a carjacking, and the special circumstance of murder while engaged in the commission or attempted commission of a carjacking, the penalty of death returned by the jury predicated at least in part on those crimes also violated the Eighth Amendment requirement of a reliable determination of both guilt and penalty. (*Lockett v. Ohio, supra*; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-330 [105 S.Ct. 2633, 86 L.Ed.2d 231].)

B. Penalty Trial Issues and Assignments of Error

V

THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY FAILED TO INSTRUCT THE JURY ON THE APPROPRIATE USE OF VICTIM IMPACT EVIDENCE IN VIOLATION OF APPELLANT'S RIGHTS TO A FAIR TRIAL, DUE PROCESS, AND TO A RELIABLE DETERMINATION OF PENALTY GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; THE ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT

A. Factual and Procedural Background

As set forth in the penalty trial statement of facts, *supra*, pursuant to section 190.3 (45 RT 5619-5620), the prosecutor offered two types of victim impact evidence in this case: the testimony of Henni Ray -- Ellen Salling's daughter -- and the testimony of Gerald Ohman, the father of the 1993 victim, Jennifer VonSeggern. (See 48 RT 6081-6083.) The testimony of Henni Ray is reported in approximately 20 pages of penalty trial transcript; the testimony of Gerald Ohman occupies about 16 pages of transcript. (59 RT 6099-6015.)

The testimony offered thus entailed two distinct types of victim impact evidence. Pursuant to section 190.3, subdivision (a), the daughter of 1998 capital murder victim Ellen Salling offered testimony as to the direct impact of her mother's death on her and her family. Unlike Henni Ray, however, Gerald Ohman could not and did not testify as to the impact of the capital murder victim's death on him or his family. Ohman was unrelated to Salling, and there was no evidence that he had ever been acquainted with her. Rather, pursuant to section

190.3, subdivision (b), Ohman testified as to the impact on him and his family of the killing of his daughter, Lisa VonSeggern, appellant's 1992 manslaughter victim.

In closing argument to the jury, the prosecutor stressed that victim impact evidence could be used and evaluated in the sound judgment of the jury and that such evidence stood in contrast to impact of the death verdict on appellant. According to the prosecutor, victim impact evidence was simply another method of informing the jury about the specific harm appellant caused by his crime, so that the jury could meaningfully assess his moral culpability and blameworthiness. (See, generally, 53 RT 6740-6745.) The prosecutor also stressed that both Ellen Salling's mother-in-law and Jennifer VonSeggern's mother died shortly after their deaths: "And you've got to wonder what his activity had to do with that." (53 RT 6788-6789.) Appellant was thus blamed in the victim impact testimony and by the prosecutor for two additional deaths, which the jury thereby was permitted to consider.

The court instructed the jury, inter alia, with CALJIC No. 8.84.1, specifying the duties of penalty jurors (see 4 CT 927); CALJIC No. 8.85, listing factors for the jury's consideration in determining penalty (4 CT 928-929); modified CALJIC Nos. 8.86 and 8.87, requiring proof beyond a reasonable doubt of a prior conviction or prior criminal activity offered in aggravation (see 3 CT 996, 1018); and CALJIC No. 8.88, setting forth the concluding instructions for the penalty phase. (4 CT 986.)

Paragraph (a) of CALJIC No. 8.85 informed the jury that in determining penalty, it must consider, take into account and be guided by "(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances[s] found to be true." (4 CT 989; 53 RT 6821.) Paragraph (b) of CALJIC No. 8.85 provided that in determining penalty, the jury must consider, take into account, and be guided by "[t]he presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence . . . ." (4 CT 989; 53 RT 6821 .)

B. Admissibility of Victim Impact Evidence, Generally; Jury Instructions

In *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L. Ed.2d 720], the United States Supreme Court held that victim impact evidence is not inadmissible per se under the United States Constitution because it "is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question . . . ." As noted by this Court following *Payne*, such evidence "of course" must conform to established limits on emotional evidence and argument. "[T]he jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*People v. Edwards* (1991) 54 Cal.3d 787, 835.)

The Eighth Amendment to the United States Constitution thus permits the

introduction of victim impact evidence, or evidence of the specific harm caused by the defendant, when admitted in order for the jury to assess meaningfully the defendant's moral culpability and blameworthiness. (*Payne v. Tennessee, supra*, 501 U.S. at p. 825.) Such evidence violates the Fourteenth Amendment's due process clause when it is so unduly prejudicial that it renders the trial fundamentally unfair. (*Ibid.*)

Evidence of the effect of a capital murder on the victim's loved ones and the larger community is admissible under section 190.3, factor (a) as a circumstance of the crime. (*People v. Brady* (2010) 50 Cal.4th 547, 574; *People v. Burney* (2009) 47 Cal.4th 203, 258; *People v. Bramit* (2009) 46 Cal.4th 1221, 1240.) In *Burney*, members of the victim's family and his fiancée testified about the "deleterious impact of the victim's murder on themselves and others, how much they missed the victim, and the victim's sweet and peaceful nature." (*Id.* at p. 258.) In *People v. Boyette* (2002) 29 Cal.4th 381, "[f]amily members spoke of their love of the victims and how they missed having the victims in their lives." (*Id.* at p. 444.)

Victim impact witnesses are not limited to expressions of grief. This Court's prior decisions permit a showing of the specific harm caused by the defendant (*People v. Edwards, supra,* 54 Cal.3d at p. 835), which encompasses the spectrum of human responses, including anger and aggressiveness, fear, and an inability to work. (*People v. Ervine* (2009) 47 Cal.4th 745, 793.) Victim impact evidence is commonly provided by family members, colleagues, or friends. There

is no requirement that family members confine their testimony about the impact of the victim's death to themselves, omitting mention of other family members. (*People v. Panah* (2005) 35 Cal.4th 395, 495.)

As discussed in Subsection A, *supra*, the prosecutor not only introduced the victim impact testimony of Henni Ray pertaining to the "circumstances of the crime" of which appellant "was convicted in the present proceeding" (section 190.3, subd. (a); CALJIC No. 8.85), but also introduced victim impact testimony by George Ohman, the father of 1992 victim Jennifer VonSeggern pursuant to section 190.3, subdivision (b) pertaining to other criminal activity by the defendant, other than the crime for which he has been tried in the present proceedings, which involved the use of force or violence.

In *People v. Virgil* (2011) 51 Cal.4th 1210, the prosecutor offered evidence during the penalty phase of a capital trial pertaining to an uncharged assault and robbery on a motel maid. The defendant had stayed at that same motel five days after the charged murder.

The maid testified in *Virgil* that the defendant seriously cut her finger with a knife during the assault. She testified that subsequent to the assault she underwent three surgeries to treat other injuries to her stomach and intestines. As a result of the defendant's attack, the maid suffered persistent digestive problems and could eat only once a day. The attack left her face disfigured. Her left eye drooped partially closed, impairing her vision. She had difficulty sleeping and was afraid to be alone. (*Id.* at pp. 1231-1232.)

On appeal to this Court, the defendant argued that the trial court erred in failing to limit victim impact evidence to the capital offense. He claimed his state and federal constitutional rights were violated by admission of testimony concerning the effects of his unrelated assault on the maid. Rejecting the defendant's contention, the Court noted that the admission of evidence about the impacts of a capital defendant's other violent criminal activity does not violate the state or federal Constitutions. (*Id.* at pp. 1275-1276.) The Court further ruled that "[t]he circumstances of uncharged violent crimes, including the impact on victims of those crimes, are made expressly admissible by section 190.3, factor (b)." (*Id.* at p. 1276; see also *People v. Davis* (2009) 46 Cal.4th 539, 618 [admissibility of victim impact evidence pertaining to a defendant's prior crimes].)

Here, the issue is not the admissibility of the two types of victim impact evidence in this case. Rather, appellant asserts that the trial court's instructions were constitutionally defective under the Fifth, Sixth, Eighth, and Fourteenth Amendments precisely because the jury was not given any guidance as to how the two types of victim impact evidence should be evaluated in determining penalty. Instead, the jury was permitted to consider victim impact evidence in a purely discretionary and arbitrary manner, untethered to any statutory and constitutional mandates or requirements.

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C. The Court Failed to Instruct the Jury on the Proper Use of Victim-Impact Evidence; the Error Was Not Harmless Beyond a Reasonable Doubt

The Fifth, Sixth, and Eighth Amendments of the Constitution require that a capital sentencing scheme "suitably direct" and limit a sentencing jury's discretion "so as to minimize the risk of wholly arbitrary and capricious action." (*Lewis v. Jeffers* (1990) 497 U.S. 764, 774 [110 S.Ct. 3092, 111 L.Ed.2d 606] (quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 189 [96 S.Ct. 2909, 49 L.Ed.2d 859]). Pursuant to these protections, the high court will not permit the jury to consider aggravating factors that are impermissibly vague, overbroad, or otherwise fail to "genuinely narrow the class of persons eligible for the death penalty." (*Arave v. Creech* (1993) 507 U.S. 463, 474 [113 S.Ct. 1534, 123 L.Ed.2d 188] (quoting *Zant v. Stephens* (1983) 462 U.S. 862, 877 [103 S.Ct. 2733, 77 L.Ed.2d 235]; accord *Maynard v. Cartwright* (1988) 486 U.S. 356, 364 [108 S.Ct. 1853, 100 L.Ed.2d 372] [invalidating an aggravating factor that "an ordinary person could honestly believe" applied to every eligible defendant). In sum, every court must ensure that aggravating factors put before a sentencing jury permit it "to make a principled distinction between those who deserve the death penalty and those who do not." (*Lewis v. Jeffers, supra*, 497 U.S. at p. 776.)

In the present case, the trial court did not give any instruction on the use, consideration, or evaluation of victim impact evidence. The jury was not instructed that such evidence was to be considered within the meaning of factors (a) and (b) of CALJIC No. 8.85, nor instructed that victim impact evidence did not

constitute separate aggravating circumstances, as in *People v. Harris* (2005) 37 Cal.4th 310, 358-359. No instructions were given that in any way informed the jury of the law regarding the proper consideration of victim-impact evidence.

Appellant acknowledges that the Court has previously rejected, and continues to reject, various claims of error in respect to victim impact evidence, the scope and nature of victim impact testimony, and the need for clarifying instructions. (See, e.g., *People v. Brady* (2010) 50 Cal.4th 547, 574, fn. 11; *People v. Famalaro* (2011) 52 Cal.4th 1, 38.) Thus, the Court has rejected claims that victim impact evidence deprives defendants of a state-created liberty interest (e.g., *People v. Boyette* (2002) 29 Cal.4th 381, 445, fn. 12) and that "circumstances of the crime," as used in Penal Code section 190.3, factor (a), is unconstitutionally vague, overbroad, subject to arbitrary decision-making, or fails to provide adequate notice. (E.g., *People v. Carrington* (2009) 47 Cal.4th 145, 197; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1057.) The Court has also rejected claims that victim impact evidence must be limited to the circumstances known to the defendant or foreseeable at the time of the commission of the crime. (See, e.g., *People v. Hartsch* (2010) 49 Cal.4th 472, 508; *People v. Pollock* (2004) 32 Cal.4th 1153, 1183.) Further, the Court has rejected claims that the trial court must give, on its own initiative, a precisely-worded clarifying instruction concerning the consideration and use of victim impact evidence in respect to the specific harm caused by the defendant's crimes, or claims that the court failed to give a defense-proffered clarifying instruction deemed duplicative and argumentative. (See, e.g.,

People v. Famalaro, supra, 52 Cal.4th at pp. 38-39; *People v. Virgil* (2011) 51 Cal.4th 1210, 1280; *People v. Murtishaw* (2011) 51 Cal.4th 574, 595.)

Under well-settled California law, the trial court is responsible for ensuring that the jury is correctly instructed on the law. (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1022.) "In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.) The court must instruct sua sponte on those principles which are openly and closely connected with the evidence presented and are necessary for the jury's proper understanding of the case. (*People v. Breverman* (1988) 19 Cal.4th 142, 154.)

Because of the importance of the jury's decision in the sentencing phase of a death penalty trial, it is imperative that the jury be guided by proper legal principles in reaching its decision. Allowing victim impact evidence to be placed before the jury without proper instructions on the jury's use and consideration of that evidence has the clear capacity to taint the jury's decision on whether to impose death.

This Court addressed proposed victim impact limiting instructions in *People v. Famalaro, supra*, 52 Cal.4th at p. 38-39 and *People v. Ochoa* (2001) 26 Cal.4th 398, 445, for example, and held that the trial court properly refused such instructions because they was covered by the language of CALJIC No. 8.84.1, an

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instruction which was also given in this case.[19] (53 RT 6820-6821.) In *Ochoa* and again in *People v. Hartsch, supra,* 49 Cal.4th at pp. 510-511, the Court reasoned that "[t]he proposed instruction would not have provided the jury with any information it had not otherwise learned from CALJIC No. 8.84.1." (*People v. Ochoa, supra,* 26 Cal.4th at p. 455; accord, *People v. Hartsch, supra*, 49 Cal.4th at p. 511.)

The Court's reliance on the language of CALJIC No. 8.84.1 in *Ochoa, Hartsch*, and other similar decisions is unsound. Above all, the Court has failed to consider that CALJIC No. 8.84.1 does not refer specifically to victim impact evidence. It does not tell the jurors why victim-impact evidence was introduced either in respect to the circumstances of the charged capital crime or in respect to

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[19]/ The modified version of CALJIC No. 8.84.1 given to appellant's jury read as follows:

> "You will now be instructed as to all of the law that applies to the penalty phase of this trial.
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> "You must determine what the facts are from the evidence received during both the guilt and penalty phases of the trial. If the attorneys have stipulated or agreed to a fact during either the guilt or penalty phase of this trial, you must regard that fact as proven. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in the other phase of this trial.
>
> "You must neither be influenced by bias or prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the Defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict."
>
> (4 CT 988; 53 RT 6820.)

criminal activity other than the crime or crimes for which the defendant was being tried. It does not caution the jurors against an irrational decision or warn the jurors not to consider what they may perceive to be the opinions of the victim-impact witnesses -- a clearly improper factor. (See *Payne v. Tennessee, supra,* 501 U.S. at p. 830, fn. 2; *People v. Pollock, supra,* 32 Cal.4th at p. 1180; *People v. Smith* (2003) 30 Cal.4th 581, 622.) Nor does it admonish them not to employ the improper factor of vengeance in their penalty determination.

Although CALJIC No. 8.84.1 does admonish the jury that, "You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings" (4 CT 988; 53 RT 6820), nothing in the instruction's language explicitly refers to victim impact evidence. Arguably, the sorrowful testimony of family does not fall within the ambit of the "public opinion or public feelings" language recited in the instruction. Given the common-sense meaning of these terms, it would be reasonable for jurors to conclude that the victim impact evidence was not covered by this language. Similarly, the jurors would reason that the admonition against being swayed by "public opinion or public feeling" (4 CT 988; 53 RT 6820) did not apply to the private opinions of the victims' relatives (i.e., that appellant also indirectly caused at least two other deaths), or to any exhortation by the District Attorney to seek vengeance on behalf of the victims' families or society as a whole.

In every capital case, "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over

reason." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) Here, there was nothing in the instructions to dissuade the jury from incorporating these considerations into the sentencing calculus, including vengeance and the wishes or opinions of the victims' families. The failure to deliver an appropriate victim impact instruction violated appellant's right to a decision by an impartial and properly-instructed jury, his due process right to a fair trial, and his right to a fair and reliable capital penalty determination. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

The violations of appellant's federal constitutional rights require reversal unless the state can show that they were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) The violations of appellant's comparable or equivalent state rights also require reversal if there is any reasonable possibility that the errors affected the penalty verdict. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1232; *People v. Brown* (1988) 46 Cal.3d 432, 447-448.)

The United States Supreme Court has recognized the substantial equivalency of the reasonable possibility and reasonable doubt formulations. In a pre-*Chapman* opinion, the high court stated the harmless error test this way: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (*Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87 [84 S.Ct. 229, 11 L.Ed.2d 171].) In *Chapman*, the high court noted that "[t]here is little, if any, difference between our statements in *Fahy v.*

Connecticut about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California, supra*, 386 U.S. at p. 24.) Accordingly, the high court said it did "no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (*Ibid.*)

Although the reasonable possibility standard has been considered the same, in substance and effect, as the harmless beyond a reasonable doubt standard of *Chapman v. California, supra,* 386 U.S. 18, 24 (*People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11; *People v. Wallace* (2008) 44 Cal.4th 1032, 1092), in *People v. Brown, supra*, this Court stressed the applicability of an even more exacting standard of review when assessing the prejudicial effect of constitutional or state-law errors at the penalty phase of a capital trial. (*People v. Brown, supra*, 46 Cal.3d at pp. 447-448.) The reason for the heightened standard is the different level of responsibility and discretion held by the sentencer in the penalty phase. (See also *People v. Clark* (2011) 52 Cal.4th 856 [because error occurred at penalty phase of a capital trial more exacting standard applies].)

In *People v. Ashmus* (1991) 52 Cal.3d 932, 983-984, for example, the Court invoked *Brown,* explaining that the prejudice standard required the reviewing court to reverse based on even the possibility that a hypothetical juror might have

reached a different decision absent the error. "We must ascertain how a hypothetical 'reasonable juror' would have, or at least could have, been affected." (*Id.*)

Given *Brown* and *Chapman,* which equate the reasonable possibility standard under state law with the federal harmless beyond a reasonable doubt standard, and the more exacting standard of error applicable at the penalty phase of a capital trial, the trial court's instructional error in respect to victim impact evidence cannot be considered harmless. Here, it was reasonably possible that without proper instructional guidance, the purely emotional and excessively inflammatory victim-impact evidence presented in this case in respect to the deaths of both Ellen Salling's mother-in-law and Jennifer VonSeggern's mother, attributed somehow to appellant as further consequences of his crimes, and the prosecutor's effective and extensive use of that evidence during his closing argument, unfairly infected the jury's penalty deliberations and sentencing process. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642 [94 S.Ct. 1868, 40 L.Ed.2d 431].) Consequently, reversal of the death judgment is required.

VI

THE TRIAL COURT ERRED BY PERMITTING THE STATE TO RETRY THE VONSEGGERN KILLING AND APPELLANT'S PRIOR 1993 MANSLAUGHTER CONVICTION, AND BY GIVING MURDER INSTRUCTIONS IN THE LANGUAGE OF CALJIC NOS. 8.00-8.21 AND ON AGGRAVATING FACTORS IN THE MODIFIED LANGUAGE OF CALJIC NO. 8.87, THEREBY ALLOWING THE STATE TO ELEVATE THE PRIOR KILLING AND ADJUDICATED MANSLAUGHTER TO MURDER IN VIOLATION OF THE "PROSECUTED AND ACQUITTED" PROHIBITION OF PENAL CODE SECTION 190.3, THE DOCTRINE OF COLLATERAL ESTOPPEL, THE CONSTITUTIONAL PROSCRIPTION AGAINST DOUBLE JEOPARDY, AND APPELLANT'S RIGHTS TO DUE PROCESS OF LAW, FAIR TRIAL, AND A RELIABLE PENALTY DETERMINATION GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Factual and Procedural Background

As set forth in the Statement of the Facts, *supra*, appellant was convicted by guilty (no contest) plea in 1993 of the manslaughter of Lisa VonSeggern in Santa Rosa, Sonoma County. At the penalty trial, the prosecutor called 16 witnesses and introduced other documentary evidence in order to prove that appellant's crime was not actually manslaughter but the greater crime of first degree murder, despite the charges and nature of the prosecution in that case, appellant's prior plea, his manslaughter conviction, and that he had been actually prosecuted for and acquitted of murder. Whereas murder -- the greater crime -- is an unlawful killing with malice aforethought (§ 187), manslaughter -- the lesser included crime -- is an unlawful killing without malice. (§ 192.)

In arguing the admissibility of the evidence of the VonSeggern killing, the

prosecutor stressed that he intended to introduce evidence of conduct to show that it was "more serious than what the defendant admitted to in the prior case. ... And we would be asking that the jury be instructed concerning the elements of murder with respect to his killing of Jennifer [VonSeggern]." (45 RT 5607.) Despite doubts expressed by the trial court whether the prosecutor could seek to "recharacterize" the killing "in a legal framework" (46 RT 5650), and despite the fact that appellant had only been convicted of manslaughter, an unlawful killing without malice, the prosecutor nevertheless argued that in addition to testimonial evidence in the VonSeggern case, photographic evidence and physical evidence would be offered as well to prove murder with malice. (See 45 RT 5607-5609; see also 45 RT 5628 [court verifies that prosecutor wanted instructions on both manslaughter and murder]; see also 46 RT 5637-5638 [arguing prosecutor permitted to elevate prior manslaughter conviction to murder during penalty trial]; 46 RT 5648-5651 [prosecutor further arguing that although appellant had been previously convicted of manslaughter, prosecution not precluded from introducing evidence showing that killing of VonSeggern was something more than voluntary manslaughter and that prosecution was entitled to murder instructions].)

The prosecutor's relitigation of appellant's prior manslaughter conviction covered 150 pages of penalty trial transcript and 40 pages of a police interview transcript with appellant regarding VonSeggern's death that was also admitted into evidence and provided to the penalty jury. (See 46 RT 5707-5720, 5725-5743, 5751-5779; 47 RT 5824-5899; 52 RT 6650-6664; 3 CT 794-835 [People's Exhibit

Z-56].) The prosecutor's efforts to retry appellant for the VonSeggern killing was central to the state's case in aggravation against appellant. (See 46 RT 5672-5677 [prosecutor's penalty trial opening argument].) At the prosecutor's request, the trial court instructed the jury on both manslaughter and murder and permitted the prosecutor, in his argument, to seek to elevate appellant's prior manslaughter conviction to murder. (See 4 CT 959, 1020 [jury instruction, including prosecutor's modifications of CALJIC No. 8.87 with revised references to the "murder or voluntary manslaughter or involuntary manslaughter of Jennifer Lisa VonSeggern."], 1022 [murder instruction]; see also 51 RT 6607-6608-6609 [arguing recharacterization of killing was "issue for the jury"].)

In his closing argument, prosecutor Hedstrom argued that the killing of Jennifer VonSeggern "really was a murder," not manslaughter. (53 RT 6719.) Further, in seeking to elevate the VonSeggern manslaughter to murder, prosecutor Hedstrom also stressed during closing argument that appellant's manslaughter conviction was an aggravating circumstance which could and should be considered by the jury separate and distinct from the circumstances of the same crime alleged to be murder. (See 53 RT 6730-6733 [prosecutor's closing argument emphasizing appellant's voluntary manslaughter conviction as a factor (c) aggravating circumstance and, if murder, as a separate circumstance under factor (b)]; see also 53 RT 6839 [modification of CALJIC No. 8.87 given by court to refer to the "murder or voluntary manslaughter or involuntary manslaughter of Jennifer Lisa VonSeggern"].)

Clearly aware of the distinction between unadjudicated prior crimes and adjudicated prior crimes (see 51 RT 6608-6616 [where court distinguishes prior unadjudicated crimes, such as Pamela Martin incident requiring instructions on elements, from prior manslaughter conviction permitting only evidence of "underlying activity"], the court nevertheless in its instructions to the jury permitted the jury newly to find appellant guilty of the murder of Jennifer VonSeggern and then to use that newly-found murder as a separate and additional factor in aggravation in its penalty deliberations. Specifically, the court instructed the jury in the modified language of CALJIC No. 8.87 in relevant part as follows: "Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts: . . . murder . . . of Jennifer Lisa VonSeggern . . . . If any juror is convinced beyond a reasonable doubt that the criminal act occurred, that juror may consider that act as a fact in aggravation." (4 CT 959, 1020.)

By the instructions given, the jury was thus not only permitted to consider appellant's prior manslaughter conviction as an aggravating factor but to newly decide that he was actually guilty of murder for that prior crime and then use its new finding of murder as an additional factor in aggravation. (See CALJIC No. 8.86 [permitting jury to consider prior manslaughter conviction as aggravating circumstance] and CALJIC No. 8.87 [permitting jury to consider as well murder of Jennifer Lisa VonSeggern as other criminal activity and additional fact in aggravation].) (See 4 CT 957-959; 53 RT 6838-6839.)

B. Retrial of Appellant for the Murder of VonSeggern as a Separate and Additional Factor in Aggravation, Was Prohibited by the "Prosecuted and Acquitted" Provision of Section 190.3

By felony complaint filed on February 11, 1993, in the Municipal Court of California, Sonoma County, appellant was charged with the murder of Jennifer Lisa VonSeggern in violation of section 187, subdivision (a).[20] After a preliminary hearing on March 24, 1993, appellant was held to answer on count 1 (murder in violation of section 187, subd. (a)), as charged in the felony complaint. By subsequent information, filed on April 7, 1993, in the Superior Court of California, Sonoma County, appellant was again charged with the murder of Jennifer Lisa VonSeggern in violation of section 187, subdivision (a). At his arraignment for murder on April 7, 1993, and again on April 15, 1993, appellant pleaded not guilty to count 1. By first amended information, filed on October 12, 1993, in the Superior Court of California, Sonoma County, appellant was again charged in count 1 with the murder of Jennifer Lisa VonSeggern in violation of section 187, subdivision (a) and in count 2 with the lesser included crime of manslaughter of VonSeggern in violation of section 192, subdivision (a). On the

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[20]/ Appellant requests that the court take judicial notice of the court files of *People v. Jerrold Elwin Johnson* (Super. Ct. Sonoma County, 1993, No. 20425). See Evid. Code §§ 452, subd. (d) [judicial notice may be taken of the records of any court of this state], 452.5 [pertaining to court records relating to criminal convictions]; 453 [judicial notice shall be taken of any matter specified in section 452 if the party requesting judicial notice (1) provides notice to the adverse party, and (2) furnishes the court with sufficient information to enable it to take judicial notice]; see also *People v. Lawley* (2002) 27 Cal.4th 102, 163, fn. 24.)

same date, appellant pleaded no contest to count 2 in violation of section 192, subdivision (a); the People's moved to dismiss the alleged count 1 murder at time of sentencing. On November 8, 1993, appellant was sentenced to state prison on count 2. The trial court dismissed the alleged count 1 murder.

At trial, it was stipulated that appellant was convicted of voluntary manslaughter in 1993 [Sonoma County Case No. SCR20425], as documented by a California Department of Corrections section 969b prison packet. [People's Exhibit No. 154]. (49 RT 6240-6241; see also 1 CT [Court Exhibits] 49; 3 CT 786-793 [prison packet including abstract of judgment in Sonoma County Case No. SCR20425 reflecting appellant's conviction by plea of voluntary manslaughter in violation of section 192, subdivision (a)].)

As set forth in Subsection (A), *supra*, the trial court instructed the jury on both manslaughter and murder and permitted the prosecutor, in his argument, to seek to elevate appellant's prior manslaughter conviction to murder. The court instructed the jury in relevant part: "Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts: . . . murder . . . of Jennifer Lisa VonSeggern . . . . If any juror is convinced beyond a reasonable doubt that the criminal act occurred, that juror may consider that act as a fact in aggravation." (4 CT 959, 1020.) Pursuant to the court's instructions, the jury was permitted not only to consider appellant's prior manslaughter conviction as an aggravating factor but to newly decide that he was actually guilty of murder for that prior crime and then use its new finding of murder as an additional factor

in aggravation. (See CALJIC No. 8.86 [permitting jury to consider prior manslaughter conviction as aggravating circumstance] and CALJIC No. 8.87 [permitting jury to consider as well murder of Jennifer Lisa VonSeggern as other criminal activity and additional fact in aggravation].) (See 4 CT 957-959; 53 RT 6838-6839 .)

Under both federal and California law, greater and lesser included offenses constitute the "same offense" for purposes of double jeopardy. (*People v. Bright* (1996) 12 Cal.4th 652, 660-661, overruled on other grounds in *People v. Seel* (2004) 34 Cal.4th 535, 550, fn. 6.) In California, a conviction of a lesser included crime or on a lesser degree of an offense is generally considered to be an implied acquittal of the greater crime. (See *People v. Fields* (1996) 13 Cal.4th 289, 299 [completed conviction on lesser offense barred subsequent conviction of greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 511, fn. 5 ["This court recognized the notion of implied acquittal as early as 1854"]; see also *People v. Gilmore* (1854) 4 Cal. 376 [conviction for manslaughter is an acquittal of the charge of murder; the conviction "must, by legal operation, amount to an acquittal of every higher offense charged in the indictment than the particular one of which the prisoner is found guilty."].)

Like most jurisdictions, California recognizes that an offense expressly alleged in an accusatory pleading may necessarily include one or more lesser offenses. For example, section 1023 includes "an offense necessarily included therein, of which [the defendant] might have been convicted under that accusatory

pleading" within the protection against subsequent prosecution after a conviction or acquittal. Under section 1023, as construed in *People v. Greer* (1947) 30 Cal.2d 589, 596-597, when an defendant is convicted of a lesser included offense, the conviction bars a subsequent prosecution for the greater offense.

A lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. (*People v. Valladares* (2009) 173 Cal.App.4th 1388, 1395.)

Manslaughter, an unlawful killing without malice, is a lesser included offense of murder. (§ 192; *People v. Ochoa* (1998) 19 Cal.4th 353, 422; *People v. Koontz* (2002) 27 Cal.4th 1041, 1086; *People v. Lewis* (2001) 25 Cal.4th 610, 645 [manslaughter, both voluntary and involuntary manslaughter, is a lesser included offenses of murder].) Malice is presumptively absent when a defendant kills "upon a sudden quarrel or heat of passion" (§ 192, subd. (a)), provided that provocation is sufficient to cause an ordinarily reasonable person to act rashly and without deliberation, and from passion rather than judgment. (*People v. Berry* (1976) 18 Cal.3d 509, 515.)

In capital cases, section 190.3 permits the prosecution to present evidence of the facts surrounding a capital defendant's prior felony convictions and violent criminal activity as part of its case-in-aggravation at the penalty phase. (*People v. Stanley* (1995) 10 Cal.4th 764, 818-820; *People v. Benson* (1990) 52 Cal.3d 754,

788; *People v. Melton* (1988) 44 Cal.3d 713, 754.) However, the statute also expressly provides that evidence of prior criminal activity for an offense for which the defendant was prosecuted and acquitted is not admissible. (§ 190.3.)

In *People v. Bradford* (1997) 15 Cal.4th 1229, the defendant in a capital case had been originally charged in a prior case with 11 different counts in connection with an incident that occurred in 1983. The charged offenses for that 1983 incident included two counts of forcible rape, two counts of sexual battery, two counts of penetration with a foreign object, and five counts of oral copulation. As a condition of defendant's plea of no contest to one count of forcible rape, the prosecution dismissed the remaining ten counts.

At the penalty phase of the later capital case in *Bradford*, the defendant unsuccessfully sought to exclude all evidence pertaining to the 1983 incident underlying the dismissed counts on the grounds of implied acquittal. The defendant contended that the doctrine of implied acquittal precluded the prosecution from introducing any aspect of the 1983 incident. The Court rejected the argument. (*Id.* at p. 1375.) The Court agreed that section 190.3 provides that "in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted." The Court also recognized that pursuant to the doctrine of implied acquittal, a defendant's conviction of a lesser degree or lesser included offense of that charged constitutes an implied acquittal of the greater offense. Nonetheless, the Court held that the dismissal of the other charges in 1983, whether or not pursuant to a plea agreement, was not

the equivalent of, and did not constitute, an acquittal pursuant to section 190.3. (*Ibid.*)

The Court's ruling in *Bradford* is clearly distinguishable from appellant's case and does not preclude the application of the implied acquittal doctrine here. According to the Court's factual and procedural summary, none of the crimes previously dismissed in *Bradford* was charged as, or constituted, a greater or lesser included crime of any other crime involved or charged in that incident. Each of the dismissed counts in *Bradford* was separate from the act constituting the convicted count.

In appellant's case in contrast, the killing of VonSeggern constituted a single act -- a single crime. The greater offense of murder and the lesser included offense of manslaughter constituted the same offense. (*Brown v. Ohio* (1977) 432 U.S. 161, 164-169 [97 S.Ct. 2221, 53 L.Ed.2d 187].) Appellant was charged with and prosecuted for both the greater and lesser crimes for the single act of killing VonSeggern. Thus, his conviction for manslaughter necessarily constituted an implied acquittal of the greater crime, even though his eventual conviction was by guilty (no contest) plea and the greater crime was dismissed on the People's motion. (See § 1016, subd. 3 [no contest plea same as guilty plea for all purposes]; *People v. Statum* (2002) 28 Cal.4th 682, 688, fn. 2 [guilty plea as legal equivalent of guilty verdict reached by a jury and tantamount to a finding]; *People v. Chadd* (1981) 28 Cal.3d 739, 748 [guilty plea "ipso facto supplies both evidence and verdict."].)

In *People v. Johnson* (1992) 3 Cal.4th 1183, during the penalty phase of a capital case, the prosecution introduced evidence of facts underlying the defendant's prior conviction of voluntary manslaughter The defendant contended on appeal that admission of the evidence violated section 190.3. On appeal, the Court rejected that the prior conviction of voluntary manslaughter constituted an implied acquittal of murder. The Court noted that the information filed in the earlier proceeding charged only manslaughter, not murder. The Court also stressed that the prosecutor in *Johnson* never suggested that the jury should consider the prior killing as the equivalent of murder, nor was the jury instructed it could do so. (*Id.* at pp. 1240-1241.)

Here, unlike *Johnson*, appellant was originally charged only with murder and, later, with both murder and manslaughter for killing VonSeggern in the same information. Unlike *Johnson*, the prosecutor argued and urged the jury to find that the prior killing was "really" murder. And, again, unlike *Johnson*, the jury here was explicitly instructed that it could find appellant guilty of murder and then use that determination as a separate, additional factor in aggravation.

By reason of the foregoing, appellant's 1993 prosecution for first degree murder in the VonSeggern killing, resolved by subsequent conviction of the lesser included crime of voluntary manslaughter in violation of section 192, subdivision (a), constituted an implied acquittal the greater offense of murder. Therefore, retrial of the VonSeggern killing, and the elevation of appellant's prior manslaughter conviction to murder by evidence, argument, and jury instructions

during the penalty trial in this case, was barred by the explicit "prosecuted and acquitted" provisions of section 190.3.

C. Principles of Collateral Estoppel and Res Judicata Barred the State From Retrying Appellant's 1992 Manslaughter Conviction During the Penalty Trial in Order to Elevate the Crime to Murder

Collateral estoppel is a distinct aspect of the doctrine of res judicata. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 985.) The doctrine of res judicata gives conclusive effect to a former judgment in subsequent litigation between the same parties. A prior judgment on the same cause of action is a complete bar to the new action. (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1178; see also *Ashe v. Swenson* (1970) 397 U.S. 436, 444-445 [90 S.Ct. 1189, 25 L.Ed.2d 469] [federal constitutional basis of collateral estoppel doctrine]; *People v. Catlin* (2001) 26 Cal.4th 81, 123 [collateral estoppel doctrine "is a component of the Fifth Amendment's double jeopardy clause."].)

Collateral estoppel involves a second action between the same parties on a different cause of action. The first action is not a complete merger or bar, but operates as an estoppel or conclusive adjudication as to such issues in the second action which were actually litigated and determined in the first action. (*Preciado v. County of Ventura* (1982) 143 Cal.App.3d 783, 786-787, fn. 2; *Rymer v. Hagler, supra*, 211 Cal.App.3d at p. 1178.) As elsewhere stated by the Court in *Arias v. Superior Court, supra*, 46 Cal.4th 969, "[c]ollateral estoppel precludes relitigation of issues that were necessarily decided in prior litigation, but it operates only

against those who were parties, or in privity with parties, to that prior litigation and who are thus bound by the resulting judgment." (*Id.* at p. 985.)

The doctrine of collateral estoppel, or issue preclusion, is firmly embedded in both federal and California common law. It is grounded on the premise that once an issue has been resolved in a prior proceeding, there is no further fact-finding function to be performed. (*Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 336, fn. 23 [99 S.Ct. 645, 58 L.Ed.2d 552]; *Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 861.) Collateral estoppel thus both promotes judicial economy and protects persons or litigants from the burden of relitigating an identical issue with the same party or his privy. (*Parklane Hosiery Co. v. Shore, supra*, 439 U.S. at p. 326, fn. omitted.)

In *People v. Steele* (2002) 27 Cal.4th 1230, the prosecutor sought to admit evidence during the guilt phase of a capital trial of a prior killing for which the defendant had been convicted of second degree murder. In her dissent as to the admissibility of the evidence of the prior killing, Justice Kennard, in language pertinent to the present case, discussed collateral estoppel as the basis for excluding such evidence: "A second theory might be that the verdict in the prior [murder] case was wrong -- that the [prior second-degree] murder was actually a premeditated murder, from which the jury here could infer the [present] murder was also premeditated. The prosecutor's argument at trial hinted at this theory. But defendant's conviction of second degree murder in the [prior] case is an acquittal of first degree murder, and principles of collateral estoppel and double

jeopardy prevent the state from relitigating the issue of premeditation in the [prior] case. (See *Ashe v. Swenson* (1970) 397 U.S. 436, 444-445 [90 S.Ct. 1189, 1194-1195, 25 L.Ed.2d 469]; *People v. Santamaria* (1994) 8 Cal.4th 903, 912.)" (*People v. Steele, supra*, 27 Cal.4th at p. 1284.)

In answer to Justice Kennard's concerns in her dissent, the majority opinion in *Steele* conceded the issue: "In response to the dissent's collateral estoppel and double jeopardy argument (dis. opn., post, at p. 1284), no one is seeking to relitigate the [prior] murder. That conviction was and remains second degree murder." (*People v. Steele, supra*, 27 Cal.4th at p. 1245, fn. 2.)

In *People v. Koontz* (2002) 27 Cal.4th 1041, the defendant challenged, on due process, double jeopardy, and collateral estoppel grounds, penalty phase evidence that he had sexually assaulted a previous victim in 1983. The defendant argued that the charges against him in 1983 had been dismissed on the prosecutor's motion for insufficient evidence. The defendant argued that the dismissal was thus tantamount to an acquittal and that evidence of prior charges of which a defendant was acquitted may not be presented to the jury as part of the prosecutor's case in aggravation. This Court disagreed with the defendant's premise, holding instead that dismissal of the charges did not constitute an acquittal and thus did not dictate exclusion of the evidence of the underlying incident. (*Id.* at p. 1087.) The Court further explained that the defendant was not previously placed in jeopardy on the dismissed charges, and the lack of any findings on the prior charges rendered the collateral estoppel doctrine inapplicable

in that case. (*Ibid.*)

The Court's holding in *Koontz*, of course, is readily distinguishable. Here, unlike *Koontz*, appellant was charged with murder for killing VonSeggern. In pleading guilty to the lesser included crime of manslaughter, he was necessarily acquitted of murder under the doctrine of implied acquittal. Unlike *Koontz*, the prosecutor here relitigated the underlying crime and retried appellant for murder despite his acquittal. The trial court instructed the jury on murder and permitted the jury newly to find that appellant's previously adjudicated and lesser crime of manslaughter was now the greater crime murder of which he had been acquitted. As Justice Kennard correctly noted in her dissent in *Steele*, appellant's manslaughter conviction constituted an acquittal of murder -- whether of the first or second degree. In contrast to *Koontz*, the doctrine of collateral estoppel was therefore fully applicable and precluded the prosecutor from retrying that crime in the penalty phase of trial.

The prerequisite elements for applying the doctrine of collateral estoppel to either an entire cause of action or one or more issues are the same: (1) the claim or issue to be precluded must be identical to that decided in the prior proceeding; (2) the issue must have been actually litigated at that time; (3) the issue must have been necessarily decided; (4) the decision in the prior proceeding must be final and on the merits; and (5) the party against whom preclusion is sought must be in privity with the party to the former proceeding. (*People v. Barragan* (2004) 32 Cal.4th 236, 252-253; *People v. Ochoa* (2011) 191 Cal.App.4th 664, 668-669;

Brinton v. Bankers Pension Services, Inc. (1999) 76 Cal.App.4th 550, 556.)

The party asserting collateral estoppel bears the burden of establishing these threshold requirements. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) Here, all of the threshold requirements for application of res judicata-finality of the prior decision are present. The first element of collateral estoppel requires that the issue sought to be precluded be identical to one litigated in the prior adjudication; i.e., it asks whether "identical factual allegations" were at stake in the two proceedings. (*Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 481.) In order for the determination of an issue to be given preclusive effect, it must have been necessary to a judgment. This requirement prevents the incidental or collateral determination of a nonessential issue from precluding reconsideration of that issue in later litigation. The requirement is necessary in the name of procedural fairness, if not due process itself, so that parties to litigation have sufficient notice and incentive to litigate matters in earlier proceedings which may bind them in subsequent matters. (*McMillin Development, Inc. v. Home Buyers Warranty* (1998) 68 Cal.App.4th 896, 906-907, quoting *Sandberg v. Virginia Bankshares, Inc.* (4th Cir. 1992) 979 F.2d 332, 346.)

The "necessarily decided" requirement generally means only that the resolution of the issue was not "entirely unnecessary" to the judgment in the initial proceeding. (*Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76, 83.) The final judgment prerequisite requires that the time for seeking a new trial or appealing the judgment has expired and any appeal is final. In other words, the judgment is

not final and preclusive if it is still subject to direct attack. (*People v. Summersville* (1995) 34 Cal.App.4th 1062, 1067-1068; *Abelson v. National Union Fire Ins. Co.* (1994) 28 Cal.App.4th 776, 787.) The concept of "privity" is highly dependent upon the facts and circumstances in each case, but generally "involves a person so identified in interest with another that he represents the same legal right." (*Zaragosa v. Craven* (1949) 33 Cal.2d 315, 318.)

Appellant's culpability for killing Jennifer VonSeggern in the original manslaughter case was identical to the issue raised and litigated by the prosecutor during the penalty trial of appellant's current case. The two actions involved the same alleged wrong. The contexts of the two cases are also identical in that both adjudicated appellant's criminal culpability for killing Jennifer VonSeggern. The standard of proof applicable to the prior manslaughter case and in relitigating appellant's manslaughter conviction to murder in the present case are identical.

The doctrine of collateral estoppel requires that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. (*Ashe v. Swenson, supra*, 397 U.S. at pp. 443, 445.) Appellant was tried in 1993 for killing Jennifer VonSeggern; unlike *People v. Johnson* (2006) 142 Cal.App.4th 776, 788, for example, a "mélange" of issues was not present in appellant's 1992 murder case. Appellant's culpability for the death of Jennifer VonSeggern was established by his guilty plea and conviction. (See *People v. Vogel* (2007) 148 Cal.App.4th 131, 136 [applicability of collateral estoppel where all requirements

and criteria present for applying doctrine].) It was inherently unfair to require appellant to relitigate in the penalty phase of trial the criminal event previously resolved in the prior proceedings involving the same act and parties.

In the 1993 case, charged with murder, appellant pleaded no contest to manslaughter; by his plea and conviction, appellant was necessarily found not guilty of the greater crime of murder. At the penalty trial, however, the prosecutor retried appellant's culpability and by evidence, argument, and jury instructions sought to convict appellant of the greater crime of murder for the same killing. Appellant's prior manslaughter conviction was a final judgment on the merits. It was not subject to direct attack. Finally, as in appellant's manslaughter case, the parties in the present case are identical -- appellant and the People of the State of California.

Appellant's plea to manslaughter necessarily included an admission that there was a factual basis for the plea. (See § 1192.5; *People v. Holmes* (2004) 32 Cal.4th 432, 438; *People v. Hoffard* (1995) 10 Cal.4th 1170, 1181.) Appellant's plea, whether no contest or guilty, had the same legal effect for all purposes. (§ 1016, subd. 3.) His plea admitted every element of the crime charged (*People v. Thomas* (1986) 41 Cal.3d 837, 844, fn. 6) and was the legal equivalent of a verdict and tantamount to a finding. (*People v. Statum* (2002) 28 Cal.4th 682, 688, fn. 2.)

Given thus the collateral estoppel bar operative because of appellant's prior manslaughter conviction for killing Jennifer VonSeggern, the penalty jury in the present case should not have been instructed on murder as to that crime or to have

been newly allowed to find appellant guilty of the murder of Jennifer VonSeggern when he had been previously convicted of manslaughter for that very same crime.

Moreover, to give preclusive effect to a prior conviction is consistent with section 190.3 which permits introduction of evidence during the penalty trial of both prior adjudicated and unadjudicated criminal conduct. The death penalty law in respect to aggravating factors only permits introduction of evidence showing prior convictions and evidence as to underlying conduct, not the retrial or relitigation of prior crimes or convictions.

While a court may not give preclusive effect to the decision in a prior proceeding if doing so is contrary to the intent of the legislative body that established the proceeding in which res judicata or collateral estoppel is urged (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 326), here, there is nothing in the statutory death penalty scheme permitting evidence of adjudicated and unadjudicated crimes showing that the Legislature contemplated as well the retrial of prior adjudicated crimes as evidence in aggravation.

This Court has repeatedly looked to public policies underlying the doctrine of collateral estoppel before concluding that it should be applied in a particular setting. (*Lucido v. Superior Court, supra*, 51 Cal.3d at pp. 342-343.) Here, the doctrine of collateral estoppel will best be served by applying the doctrine to the particular factual setting of this case. Those policies include conserving judicial resources and promoting judicial economy by minimizing repetitive criminal litigation, the policy favoring the finality of criminal judgments, and the

prevention of inconsistent judgments which undermine the integrity of the judicial system, and avoiding burdening all parties in capital cases with repeated litigation or challenges to prior final judgments of conviction. (*Allen v. McCurry* (1980) 449 U.S. 90, 94 [101 S.Ct. 411, 66 L. Ed.2d 308]; *Montana v. United States* (1979) 440 U.S. 147, 153-154 [99 S.Ct. 970, 59 L.Ed.2d 210].)

Fundamental due process fairness also strongly militates in the finality of prior convictions at the penalty trial in a death penalty case. For example, if defendants are precluded, generally, from introducing evidence and arguing in a subsequent proceeding that a prior conviction is actually a lesser crime than as reflected in the abstract of judgment, fundamental fairness dictates that the People as well should be estopped in a death penalty case from showing that the prior conviction is actually a greater crime than as reflected in the abstract of judgment. (See, e.g., *People v. Wallace* (2004) 33 Cal.4th 738, 750-751 [defendant who enters into a negotiated disposition gains benefits that, assuming the plea meets various requirements, bar him or her from asserting at a later date that there was insufficient evidence of guilt to support the ensuing conviction].)

Here, the People's relitigation of the prior crime to appears to violate the principles and holding of *Wallace*. Just as *Wallace* precludes a defendant from attacking or undermining a prior judgment of conviction, that decision, collateral estoppel, and principles of due process should have barred the prosecution from doing the same as well here by elevating appellant's prior manslaughter conviction to murder.

In *Ohio v. Johnson* (1984) 467 U.S. 493 [104 S.Ct. 2536, 81 L.Ed.2d 425], the United States Supreme Court explained that due process and double jeopardy principles protect against (1) a second prosecution for the same offense after conviction and (2) multiple punishment for the same offense. (*Id.* at p. 498.) The bar against a subsequent prosecution after conviction ensures that the state does not make repeated attempts to convict an individual, while increasing the risk of an impermissibly enhanced sentence. (*Ibid.*) Here, by virtue of the doctrine of collateral estoppel as a component of due process and double jeopardy, the trial court was obligated during the penalty trial to give preclusive effect to appellant's prior 1992 manslaughter conviction. Consistent with these fundamental principles, the court should not have permitted the prosecutor to relitigate appellant's prior manslaughter conviction or, by its instructions, to have allowed the jury to elevate appellant's manslaughter conviction to murder.

D. Retrial of Appellant's Manslaughter Conviction Was Barred by the Proscription Against Double Jeopardy Embodied in the Fifth and Fourteenth Amendments to the United States Constitution and California Constitution, Article I, Section 15

A guilty plea is the "legal equivalent" of a "verdict" (e.g., *People v. Valladoli* (1996) 13 Cal.4th 590, 601) and is "tantamount" to a "finding" (*People v. Statum* (2002) 28 Cal.4th 682, 688, fn. 2; *People v. Gaines* (1980) 112 Cal.App.3d 508, 514; see also *In re Yurko* (1974) 10 Cal.3d 857, 863). A guilty plea concedes that the prosecution possesses legally admissible evidence sufficient

to prove defendant's guilt beyond a reasonable doubt. (*People v. Thurman* (2007) 157 Cal.App.4th 36, 43.) In respect to double jeopardy, a plea of guilty is the equivalent of a verdict of guilty for purposes of the defense of former jeopardy in a subsequent proceeding. (*People v. Mims* (1955) 136 Cal.App.2d 828, 830.)

The Fifth Amendment to the United States Constitution provides: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." This federal protection is enforceable against the states through the Fourteenth Amendment. (*Benton v. Maryland* (1969) 395 U.S. 784, 794 [89 S.Ct. 2056, 23 L.Ed.2d 707] [federal double jeopardy clause applicable to the states]; see also § 1023.) The policy underlying the double jeopardy clause is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense. (*Serfass v. United States* (1975) 420 U.S. 377, 387-388 [95 S.Ct. 1055, 43 L.Ed.2d 265]; *Green v. United States* (1957) 355 U.S. 184, 187 [78 S.Ct. 221, 2 L.Ed.2d 199].) The purpose of the double jeopardy clause "would be negated were we to afford the government the opportunity for the proverbial 'second bite at the apple.'" (*People v. Salgado* (2001) 88 Cal.App.4th 5, 13.)

Protection against double jeopardy is also embodied in article I, section 15 of the California Constitution, which declares that "[p]ersons may not twice be put in jeopardy for the same offense." "[T]he California Constitution is a document of independent force and effect that may be interpreted in a manner more protective of defendants' rights than that extended by the federal Constitution, as construed

by the United States Supreme Court." (*People v. Fields* (1996) 13 Cal.4th 289, 297-298.) Penal Code, section 1023 implements the protections of the state constitutional prohibition against double jeopardy, and, more specifically, the doctrine of included offenses. (*Id.* at pp. 305-306.)

Section 1023 provides: "When the defendant is convicted or acquitted or has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal, or jeopardy is a bar to another prosecution for the offense charged in such accusatory pleading, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that accusatory pleading." Under section 1023, as construed in *People v. Greer* (1947) 30 Cal.2d 589, 596-597, for example, when an accused is convicted of a lesser included offense, the conviction bars a subsequent prosecution for the greater offense. (See also *People v. Fields, supra*, 13 Cal.4th at p. 306; *Porter v. Superior Court* (2007) 148 Cal.App.4th 899, 906 [California's constitutional protection against double jeopardy as implemented by section 1023 bars further prosecution of greater offenses].)

The constitutional protection against double jeopardy affords a defendant three basic protections: "[¶] [It] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." (*Brown v. Ohio* (1977) 432 U. S. 161, 165 [97 S.Ct. 2221, 53 L.Ed.2d 187], quoting *North Carolina v. Pearce* (1969) 395 U.S. 711, 717 [89

S.Ct. 2072, 23 L.Ed.2d 656]; see also *Ohio v. Johnson* (1984) 467 U.S. 493, 498 [104 S.Ct. 2536, 81 L.Ed.2d 425].) In respect to protecting against further prosecution for the same offense after conviction (*Brown v. Ohio, supra*, 432 U.S. at p. 165), the federal double jeopardy clause also prohibits "*attempts to secure additional punishment after a prior conviction and sentence.*" (*Id* at p. 166, italics added.)

The high court in *Brown v. Ohio, supra*, 432 U.S. 161 established the general rule that the double jeopardy clause prohibits a state or the federal government from trying a defendant for a greater offense after it has convicted him of a lesser included offense. [*Id.* at pp. 168-169; see also *Jeffers v. United States* (1977) 432 U.S. 137, 150 [97 S.Ct. 2207, 53 L.Ed.2d 168] (plur. opn.).) Here, having originally convicted appellant of manslaughter, the state was simply precluded by fundamental principles of double jeopardy (e.g., *Blackledge v. Perry* (1974) 417 U.S. 21, 30-31[94 S.Ct. 2098, 40 L.Ed.2d 628]) from retrying appellant on the more serious and greater crime of murder for the same act and incident. (See also *Illinois v. Vitale* (1980) 447 U.S. 410, 421 [100 S.Ct. 2260, 65 L.Ed.2d 228] ["a person who has been convicted of a crime . . . may not subsequently be tried for a lesser-included offense . . . . [T]he reverse is also true; a conviction on a lesser-included offense bars subsequent trial on the greater offense."].)

This Court has repeatedly has distinguished between the admissibility of facts and circumstances of a prior crime during the penalty phase of trial from the

relitigation of those facts and circumstances to show a greater or different crime. In *People v. Monterroso* (2004) 34 Cal.4th 743, for example, the defendant was convicted of fighting in public arising from the assault on a rival gang member in 1989 and was convicted of battery and vandalism arising from an attack in 1990. The facts and circumstances underlying those convictions were offered as factors in aggravation at the defendant's penalty trial.

The defendant in *Monterroso* argued on appeal that the trial court erred in admitting the facts and circumstances underlying those convictions to the extent those facts tended to show that his conduct was more egregious than is revealed by the bare fact of conviction. In the defendant's view, reliance on facts and circumstances beyond the conviction itself or those minimally necessary to establish a conviction of those crimes violated the federal constitutional prohibition against double jeopardy. The Court rejected the claim in *Monterroso* (*id.* at p. 774), as it had repeatedly done in the past. (See, e.g., *People v. Hart* (1999) 20 Cal.4th 546, 641-642; *People v. Osband* (1996) 13 Cal.4th 622, 710-711) "The facts presented to the jury, in each instance, constituted merely the circumstances of the crime of which defendant was convicted. (*People v. Monterroso, supra*, 34 Cal.4th at p. 774; see also *People v. Seaton* (2001) 26 Cal.4th 598, 678.)

In *People v. Lewis* (2001) 25 Cal.4th 610, the defendant in a capital case contended that he was placed twice in jeopardy within the meaning of the federal Constitution's double jeopardy clause by the presentation during the penalty trial

of evidence relating to the facts underlying a prior felony conviction, characterizing such evidence as a retrial of the prior offense. The Court noted that it had previously considered and rejected this contention, finding no double jeopardy bar to the presentation of the details underlying a prior conviction at a later proceeding on the separate issue of penalty for a subsequent offense. (*Id.* at p. 660.) Significantly, the Court also stressed that it had previously considered and rejected a more specific argument that *Bullington v. Missouri* (1981) 451 U.S. 430 [101 S.Ct. 1852, 68 L.Ed.2d 270] compels the conclusion that the defendant was again placed in jeopardy when the jury was permitted to consider evidence of the his prior robbery. In rejecting the defendant's contention, the Court noted that in *Bullington*, the United States Supreme Court held that double jeopardy protections prohibit the state from seeking the death penalty on retrial after a trial court's granting of a new trial motion where the jury had set the penalty at life imprisonment rather than death. As the Court concluded: "Here, by contrast, *no attempt has been made to prosecute or punish defendant anew for the crime he committed in 1980.*" (*People v. Lewis, supra*, 25 Cal.4th at p. 661, italics added.)

In *People v. Melton* (1988) 44 Cal.3d 713, the defendant in a capital case argued that evidence of prior criminal activity that previously had been subject to a plea bargain should not have been admitted at the penalty phase. The *Melton* Court concluded, however, that "one is not placed 'twice in jeopardy for the same offense' when the details of misconduct which has already resulted in conviction and punishment, or in dismissal pursuant to a plea bargain or for witness

unavailability, are presented in a later proceeding on the separate issue of the appropriate penalty for a subsequent offense." (*Id.* at p. 756, fn. 17.) *Melton* is readily distinguishable. In the present case, unlike *Melton*, the prosecutor not only introduced evidence of the circumstances of appellant's prior manslaughter but sought to retry appellant for that crime, arguing that his criminal culpability was greater than established by the prior manslaughter conviction.

Citing *People v. Melton, supra*, the Court in *People v. Sheldon* (1989) 48 Cal.3d 935, 951, acknowledged "that double jeopardy and due process principles would bar retrial of 'final verdicts of guilt or innocence (including lesser included and greater inclusive offenses).'"

In *People v. Stanley* (1995) 10 Cal.4th 764, the defendant contended that the trial court erred prejudicially in permitting introduction in evidence of the facts and circumstances underlying his prior conviction for the second degree murder of his second wife. The defendant argued additionally that permitting evidence of the circumstances surrounding the prior conviction, including evidence suggesting defendant had premeditated and deliberated that murder, allowed the prosecutor to imply, and the jury to infer, that the offense actually was of the first degree. The defendant asserted that because he had been previously convicted of second degree murder for that crime, the introduction of evidence suggesting the defendant in fact had premeditated and deliberated his wife's murder violated his constitutional protection against double jeopardy.

The Court in *Stanley* rejected the argument, noting that the record did not

support his contention. Of relevance to the present case, the Court emphasized that the prosecution neither presented evidence nor argued that the defendant was actually guilty of the first degree murder of his second wife. The court instructed the jury only on the elements of second degree murder in relation to the defendant's prior conviction for killing his wife and specifically told the jury deliberation and premeditation were not elements of the offense. (*Id.* at p.

In the present case, unlike *Melton*, *Lewis*, and *Stanley*, appellant's prior manslaughter conviction was actually relitigated; he was retried for the prior VonSeggern killing during the penalty phase of this case, violating not only the double jeopardy prosecution against a second prosecution for the same offense after conviction but also the equally fundamental proscription against multiple punishment for the same offense. (See also *People v. Guerrero* (1988) 44 Cal.3d 343, 355 [to allow the trier of fact to look to the entire record of the conviction is reasonable and fair: "it effectively bars the prosecution from relitigating the circumstances of a crime committed years ago and thereby threatening the defendant with harm akin to double jeopardy"].) Unlike *Stanley*, the prosecutor here argued that appellant's prior manslaughter was actually murder, and the court instructed the jury on first degree murder, thereby permitting the jury to elevate appellant's adjudicated criminal culpability for that prior crime.

Under both the federal and state constitutions, the double jeopardy clause serves as a restraint on courts and prosecutors. (*People v. Fields, supra,* 13 Cal.4th at p. 298.) The proscription against double jeopardy forbids a second trial for the

purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. (*Burks v. United States* (1978) 437 U.S. 1, 11 [98 S.Ct. 2141, 57 L.Ed.2d 1]; see also *Schiro v. Farley* (1994) 510 U. S. 222, 231-232 [114 S.Ct. 783, 127 L.Ed.2d 47] ["The state is entitled to 'one fair opportunity' to prosecute a defendant, . . . and that opportunity extends not only to prosecution at the guilt phase, but also to present evidence at an ensuing sentencing proceeding."].)

Here, that constitutional restraint on the court and prosecutor did not occur. With superior resources, the prosecutor was allowed to overbear justice in this case. Appellant was tried twice for the killing of Jennifer VonSeggern, and the jury was permitted to use its second determination of guilt as an additional factor for imposing the death penalty in this case. Because the burden and expense in defending a penalty phase trial is as great as in defending a substantive criminal charge, and because the risk -- a death sentence -- is uniquely important, the trial of a death penalty proceeding is in practical terms akin to a substantive criminal trial. A proceeding which more literally places an accused in "jeopardy of life and limb" can hardly be imagined. Indeed, as stated by the United States Supreme Court in *Louisiana ex rel. Francis v. Resweber* (1947) 329 U.S. 459, 462 [67 S.Ct. 374, 91 L.Ed. 422]: "Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense."

By any measure or standard, the state and federal proscriptions against double jeopardy were violated in this case. The error requires reversal of the

penalty imposed by the jury in this case. (See *Price v. Georgia* (1970) 398 U.S. 323, 331-332 [90 S.Ct. 1757, 26 L.Ed.2d 674] [Double Jeopardy Clause is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict; thus, *Chapman* harmless error analysis does not apply].) However, even if the *Chapman* standard were to apply to the double jeopardy violation in this case, the error could not have been harmless, as discussed in Subsection E, *infra*.

E. Appellant Did Not Waive or Forfeit the Claims of Error; Ineffective Assistance of Counsel

Appellant did not object during the penalty trial to the prosecutor's relitigation of his prior manslaughter conviction, did not object to argument that the prior crime was "really" murder rather than manslaughter, did not raise the "prosecuted and acquitted" prohibition of section 190.3, and did not object to the trial court's instructions permitting the jury to revisit the prior manslaughter conviction and newly find that appellant was actually guilty of murder. Appellant also did not raise collateral estoppel as a bar or the fundamental state and federal proscriptions against double jeopardy, or object on due process grounds to the retrial of his prior manslaughter conviction.

The question of an effective waiver of a federal constitutional right in a proceeding is governed by federal standards. (*Boykin v. Alabama* (1969) 395 U.S. 238, 243 [89 S.Ct. 1709, 23 L.Ed.2d 274].) Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient

awareness of the relevant circumstances and likely consequences. (*Brady v. United States* (1970) 397 U.S. 742, 748 [90 S.Ct. 1463, 25 L.Ed.2d 747].)

Here, the record on appeal does not affirmatively show that appellant, with sufficient awareness of the relevant circumstances, intelligently and voluntarily waived the fundamental constitutional proscription against double jeopardy. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464 [58 S.Ct. 1019, 82 L.Ed. 461] [courts indulge every reasonable presumption against waiver of fundamental constitutional rights and do not presume acquiescence in the loss of fundamental rights; a waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege]; *Patton v. United States* (1930) 281 U.S. 276, 312 [50 S.Ct. 253, 74 L.Ed. 854] [waiver of fundamental constitutional rights requires the express and intelligent consent of the defendant.].)

Appellant further offers that if defense counsel is deemed to have waived on appellant's behalf, or forfeited, any of the statutory and constitutional assignments of error asserted herein, then trial counsel rendered appellant ineffective assistance of counsel under the United States and California Constitutions. (U.S. Const. Amends. 6th, 14th; Cal. Const. Art. I, §§ 15, 24; *Strickland v. Washington* (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)

In *People v. Scott* (1997) 15 Cal.4th 1188, 1201, the Court held that a plea of once in jeopardy cannot be raised for the first time on appeal except in the context of a claim of ineffective assistance of counsel. (See also *People v. Catlin,*

supra, 26 Cal.4th at p. 129-130.)

In *People v. Marshall* (1996) 13 Cal.4th 799, the defendant raised a double jeopardy claim for the first time on appeal. The Court rejected the Attorney General's waiver and forfeiture argument as follows: "Defendant raises his double jeopardy claim for the first time on appeal, and the Attorney General argues the argument is therefore waived and should not be considered on appeal. If, however, a plea of former jeopardy had merit and trial counsel's failure to raise the plea resulted in the withdrawal of a crucial defense, then defendant would have been denied the effective assistance of counsel to which he was entitled. (*People v. Belcher* (1974) 11 Cal.3d 91, 96 [acknowledging general rule of waiver, but addressing double jeopardy argument on direct appeal and concluding trial counsel's failure to timely raise plea of former jeopardy constituted a denial of effective assistance of counsel]; see *Strickland v. Washington* (1984) 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674].) Consequently, although the Attorney General is technically correct in arguing the issue was waived, as in *Belcher* we nevertheless must determine whether such a plea would have had merit." (*People v. Marshall, supra*, 13 Cal.4th at p. 824, fn. 1.).)

In assessing claims of ineffective assistance of trial counsel, the reviewing court considers whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington, supra*, 466 U.S.

at p. 694; *People v. Gamache* (2010) 48 Cal.4th 347, 391.) The reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. The defendant on appeal thus bears the burden of establishing constitutionally inadequate assistance of counsel. (*Strickland v. Washington, supra*, at p. 687; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.) If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, *or there simply could be no satisfactory explanation.* (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266, italics added; *People v. Carter* (2003) 30 Cal.4th 1166, 1211; *People v. Wilson* (1992) 3 Cal.4th 926, 936.)

Here, in light of strong and viable collateral estoppel and double jeopardy claims that could have been asserted in respect to relitigation of appellant's prior manslaughter conviction, defense counsel rendered ineffective assistance in failing to object or raise the absolute constitutional bar that existed in this case. There was no possible reason for counsel to refrain from invoking the doctrine of collateral estoppel or the constitutional bar of double jeopardy.

In *People v. Morales* (2003) 112 Cal.App.4th 1176, the defendant raised the doctrine of collateral estoppel for the first time on appeal. Noting, correctly, that collateral estoppel is a component of the double jeopardy clause of the Fifth Amendment, the court addressed the Attorney General's argument that the

defendant waived the conviction by failing to raise it in the trial court. The court summarily rejected the argument: "If, indeed, double jeopardy applied, we can conceive of no legitimate tactical reason for failing to raise it." (*Id.* at p. 1185.)

Here, the record does not afford any basis for concluding, or even inferring, that counsel's omissions were based on an informed tactical choice. Strategy means a "plan, method, or series of maneuvers or stratagems for obtaining a specific goal or result." (Random House Dictionary 1298 (Rev. ed. 1975).) It need not be particularly intelligent or even one most lawyers would adopt, but it must be within the range of logical choices an ordinarily competent attorney would assess as reasonable to achieve a specific goal. (See *Cone v. Bell* (6th Cir. 2001) 243 F.3d 961, 978; see also *Washington v. Hofbauer* (6th Cir. 2000) 228 F.3d 689, 704 [court must assess whether the strategy itself was constitutionally deficient].) In short, counsel's trial strategy itself must be objectively reasonable. (See *Strickland v. Washington, supra*, 466 U.S. at p. 681.)

As in *Morales*, counsel's actions in failing to raise the doctrine of collateral estoppel or double jeopardy served no conceivable or reasonable strategy or tactical purpose. Appellant had everything to lose and nothing to gain from relitigating his prior manslaughter conviction and from having the VonSeggern killing elevated to murder, and considered by the jury as such, in its penalty deliberations on appellant's fate.

Any failure on trial counsel's part thus fell below the standard of vigorous advocacy required of competent counsel. (See *People v. Cunningham* (2001) 25

Cal.4th 926, 1003 [ineffective assistance claim cognizable on appeal where no satisfactory explanation could exist to explain counsel's conduct].) The prejudice caused by counsel's error is clear. In light of the trial court's instructions, any one juror could have found appellant guilty of murdering VonSeggern despite his prior manslaughter conviction for that crime. Any one juror easily would have concluded, on newly finding appellant guilty of murder as urged by the prosecutor, that appellant previously had literally and figuratively gotten away with murder and thus was far more deserving of death as the appropriate penalty. Because the prosecutor's retrial of appellant's VonSeggern manslaughter conviction violated appellant's fundamental constitutional rights and, at the same time, played such a prominent role in the factors in aggravation offered by the prosecutor, the jury's death penalty verdict was necessarily unreliable to appellant's prejudice. (See *Strickland v. Washington, supra*, 466 U.S. at p.687 [prejudice shown where capital trial's result is unreliable].)

F. Retrial of Appellant's Manslaughter Conviction Violated Appellant's Fundamental Constitutional Rights to a Fair Trial, Due Process, and to a Reliable Penalty Determination Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "It is of vital importance" that the decisions made in that context "be, and

appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida*, supra, 430 U. S. at p. 358.) The United States Supreme Court has also repeatedly said that under the Eighth Amendment "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." (*California v. Ramos* (1983) 463 U. S. 992, 998-999 [103 S.Ct. 3446, 77 L.Ed.2d 1171].)

Because the death penalty is unique "in both its severity and its finality," (*Gardner v. Florida, supra*, 430 U.S. at p. 357), the high court has required an acute need for reliability in capital sentencing proceedings. (See *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973] (opinion of Burger, C. J.) [stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"]; see also *Strickland v. Washington, supra*, 466 U.S. at p. 704 (Brennan, J., concurring in part and dissenting in part) ["[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of fact finding").]

That need for reliability in the penalty phase of a capital case accords with one of the central concerns animating the constitutional prohibition against double jeopardy. As the high court explained in *Green v. United States, supra,* 355 U.S. 184, the double jeopardy clause prevents states from "mak[ing] repeated attempts to convict an individual for an alleged offense . . . ." (*Id.* at pp. 187-188.) In *Bullington v. Missouri, supra,* the high court cited the heightened interest in

accuracy in the capital context. The high court noted that in 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, supra,* 451 U.S. at p. 441.)

In this state's death penalty jurisprudence, the nature and consequences of capital sentencing proceedings are intertwined. Each jury in every capital penalty determination must make an individualized moral assessment on the basis of the character of the defendant and the circumstances of the crime, including his prior adjudicated and unadjudicated criminal acts, and thereby decide which penalty is appropriate in the particular case. Indeed, 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. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [96 S.Ct. 2978, 49 L.Ed.2d 944] (plurality opinion).)

Relitigation of the prior VonSeggern killing during the penalty trial created a very real and present danger that the jury would punish appellant twice or more severely for that crime on finding that he was guilty of murder as urged by the prosecutor. That is the very reason why the prosecutor insisted on retrying appellant for and relitigating that crime and in seeking to elevate the prior manslaughter to murder. The prosecutor was acutely aware that the jury's penalty

determination would be skewed toward death if appellant were guilty of murder, and not the lesser manslaughter, for killing VonSeggern, and if the jury could use her killing as both factors (b) and (c) in aggravation.

California's constitutional prohibition against double jeopardy precludes the imposition of more severe punishment on resentencing. (*People v. Hanson* (2000) 23 Cal.4th 355, 357.) The rule protecting defendants from receiving a greater sentence is one instance where the courts have interpreted the state double jeopardy clause more broadly than the federal clause. (*Id.* at p. 364; see also *People v. Bolton* (2011) 192 Cal.App.4th 541, 548.)

As to the VonSeggern killing, we simply do not and cannot know the extent to which the jury's death penalty verdict may have been based on its determination, as urged by the prosecutor and permitted by the court's instructions, that appellant was guilty of a crime far more serious than manslaughter of which he had been previously convicted. We do know that the prosecutor called 16 witnesses and devoted more than 150 pages of transcript to prove that the VonSeggern killing was murder. It constituted a significant portion of the prosecution's penalty case in aggravation. We also know that the prosecutor devoted page after page of closing argument during the penalty trial to convince the jury that appellant was more deserving of death because he murdered Jennifer VonSeggern. (See *People v. Powell* (1967) 67 Cal.2d 32, 55-57 [prosecutor's reliance on evidence during closing argument as strong indication of how crucial the prosecutor and so presumably the jury treated the evidence].)

Moreover, a finding, as permitted by the prosecutor's argument and the court's instructions, that appellant was actually guilty of the more serious crime of murder for killing VonSeggern, and not merely manslaughter, was likely to provoke a strong emotional bias against appellant and cause the jury to weigh penalty upon the basis of extraneous, and unconstitutional, factors in aggravation. (See *People v. Minifie* (1996) 13 Cal. 4th 1055, 1070-1071.)

Because of the uniquely harmful aspects of the double jeopardy violation in this case, overemphasis of appellant's culpability for the murder of Jennifer VonSeggern, as urged by the prosecutor, constituted reversible error even when the underlying evidence was also admitted for a proper purpose. (See *United States v. Vargas* (7th Cir. 1978) 583 F.2d 380, 387.) Given the fundamental constitutional violation involved, the fundamental unfairness of retrying appellant for murder despite his prior manslaughter conviction, and the undue emphasis assigned to it by the prosecutor as a strong factor in aggravation during closing argument, the jury's capital verdict in this case was likely affected. (See *People v. Thompson* (1980) 27 Cal.3d 303, 317 & fn. 18 [such evidence "breeds" a tendency to condemn because defendant escaped punishment from other offenses]; *People v. Bean* (1988) 46 Cal.3d 919, 938 [such evidence "tempt[s] the jury to condemn defendant because he has escaped adequate punishment in the past"].)

Many of the limits that the both United States Supreme Court and this Court have placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise

of sentencing discretion. (*Caldwell v. Mississippi, supra*, 472 U.S. at p. 329.) The finality of the death penalty requires a greater degree of reliability when it is imposed. (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9 [109 S.Ct. 2765, 106 L.Ed.2d 1]; see also *Monge v. California* (1998) 524 U.S. 721, 732 [118 S.Ct. 2246, 141 L.Ed.2d 615] [observing that there is an "acute need for reliability in capital sentencing proceedings"]; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [96 S.Ct. 2978, 49 L.Ed.2d 944] (plurality opinion) ["Because of the qualitative difference [between a death sentence and life imprisonment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."].) As the high court observed in *California v. Ramos, supra,* 463 U.S. at p. 999, "[i]n ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the procedure by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death . . . ."

In the same vein, in *People v. Bloom* (1989) 48 Cal.3d 1194, 1228, the Court explained that the required reliability of the Eighth Amendment is attained "when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures . . . . A judgment of death entered in conformity with these rigorous standards does not violate the Eighth Amendment

reliability requirements." (See also *People v. Clark* (1992) 3 Cal.4th 41, 109.)

A finding of murder by one or more jurors in this case, as permitted by the trial court's instructions, allowed each juror to conclude, in an unreliable exercise of sentencing discretion, that appellant was more deserving of death because he had been insufficiently punished for the VonSeggern killing at the time of his manslaughter conviction. There is thus a very real likelihood that appellant's death sentence was predicated on a fundamentally unreliable and unfair process in violation of the Fifth, Sixth, and Fourteenth Amendments (*Beck v. Alabama* (1980) 447 U.S. 625, 638 [100 S.Ct. 2382, 65 L.Ed.2d 392]), and on a crime, the conviction and punishment for which was barred by the Fifth and Fourteenth Amendments to the United States Constitution.

In addition, relitigation of the prior VonSeggern killing, coupled with the likely determination by one or more jurors, as permitted by the trial court's instructions, that appellant was actually guilty of murder, had the further consequence of lessening the jury's responsibility in this case for determining whether the death penalty should be imposed.

Relitigation of the VonSeggern killing impermissibly allowed the jury to revisit the punishment appellant received for manslaughter following his prior conviction and to view the death penalty in this case as somehow ensuring that appellant would be not again "get away with murder" as he did in the past. The likelihood thus that the death penalty was also being imposed for a prior crime -- newly determined by the jury to be murder -- that had been insufficiently punished

in the past -- thoroughly undermined the sentencing jury's sense of responsibility in this case as required in *Caldwell v. Mississippi, supra*, 472 U. S. 320, 336 (plurality opinion). Such a diminution in the jury's sense of responsibility precluded the jury from properly performing its constitutional responsibility to make an individualized determination of the appropriateness of the death penalty. (*Id.* at 330-331 (O'Connor, J., concurring in part and concurring in judgment); see also *Romano v. Oklahoma* (1994) 512 U.S. 1, 9 [114 S.Ct. 2004, 129 L.Ed.2d 1].)

In the present case, the very real possibility, indeed likelihood, of a death sentence based on fundamental constitutional violations is patently unfair and unreliable. Appellant should not have been retried for the VonSeggern killing; his culpability for that crime was fixed at manslaughter at the time of his conviction. When punishment, as here, is based -- at least in part -- on a retrial of a prior crime that could not have been retried without violating double jeopardy and due process principles, all of the goals and policies of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitutions were undermined and violated.

VII

THE JURY INSTRUCTIONS ON THE MITIGATING AND AGGRAVATING FACTORS IN SECTION 190.3, AND THE JURORS' APPLICATION OF THESE SENTENCING FACTORS, RENDERED APPELLANT'S DEATH SENTENCE CAPRICIOUS AND ARBITRARY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Factual and Procedural Background

The trial court instructed the jury on the sentencing factors in section 190.3 in the language of CALJIC No. 8.85, the standard instruction regarding the statutory factors to be considered by the jury in determining whether to impose a sentence of death or life without the possibility of parole. (4 CT 928-929; 53 RT 6820-6822.) The jury was also instructed in the language of CALJIC No. 8.88, the standard instruction on aggravating and mitigating factors, in relevant part as follows:

> It is now your duty to determine which of the two penalties, death or imprisonment in the state prison for life without the possibility of parole, shall be imposed on the defendant.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> 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. A mitigating circumstance is any fact, condition or event which

> does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.
>
> * * *

(4 CT 986; 53 RT 6858-6860.)

Appellant here asserts a systemic challenge that section 190.3, the implementing instructions, and the jurors' application of the sentencing factors, violate the narrowing requirement because its "eligibility" provisions (which include all of the ways in which first degree murder may be committed), plus all of the special circumstances under section 190.2, viewed cumulatively, make virtually every murderer death-eligible.

California's death penalty statute and implementing instructions, as given in this case, make virtually every murder death-eligible, allow any conceivable circumstance of a crime to justify a verdict of death, and allow the decision to be

made without critical reliability safeguards taken for granted in non-capital trials. The result is a "wanton and freakish" system (*Furman v. Georgia* (1972) 408 U.S. 238, 320 [92 S.Ct. 2726, 33 L.Ed.2d 346] (conc. opn. of Stewart, J.)) that, because it arbitrarily determines the relatively few offenders subjected to capital punishment, violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Appellant acknowledges that this Court has consistently held that section 190.3, factor (a) [CALJIC No. 8.85(a)], which permits the jury to consider the circumstances of the crime in deciding whether to impose the death penalty, adequately narrows the class of persons eligible for the death penalty (i.e., *People v. Griffin* (2004) 33 Cal.4th 536, 596; *People v. Morrison* (2004) 34 Cal.4th 698, 730; *People v. Frye* (1998) 18 Cal.4th 894, 1029; *People v. Ray* (1996) 13 Cal.4th 313, 356) and does not license the arbitrary and capricious imposition of the death penalty. (See, i.e., *People v. Cruz* (2008) 44 Cal.4th 636, 680; *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 333.) More specifically, the Court has rejected arguments that section 190.3 is applied in an unconstitutionally arbitrary and capricious manner because prosecutors in different cases may argue that seemingly disparate circumstances, or circumstances present in almost any murder, are aggravating under factor (a). (*People v. Brown* (2004) 33 Cal.4th 382, 401; *People v. Carrington* (2009) 47 Cal.4th 145, 200; *People v. Watson* (2008) 43 Cal.4th 652, 703.) For the reasons set forth below, the Court's analysis and reasoning are unsound and should be reevaluated.

B. The Instruction on Section 190.3, Subdivision (a) and Application of that Sentencing Factor Resulted in the Arbitrary and Capricious Imposition of the Death Penalty

Section 190.3, subdivision (a) permits a jury deciding whether a defendant will live or die to consider the "circumstances of the crime." Accordingly, the jury in this case was instructed pursuant to CALJIC No. 8.85 to consider, take into account and be guided by "[t]he circumstances of the crimes of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true." (4 CT 928; 53 RT 6820-6821.)

In *Furman v. Georgia, supra,* 408 U.S. 238, the United Supreme Court struck down capital sentencing schemes that gave juries unfettered discretion in determining whether to impose a death sentence. The Court held that the Constitution requires states to channel the discretion of sentencing juries so as to avoid arbitrary and capricious imposition of the death penalty. (See also *id.* at p. 213 (White, J., concurring) [invalidating capital punishment statute where there is no meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not]; see also *Johnson v. Texas* (1993) 509 U.S. 350 [113 S.Ct. 2658, 125 L.Ed.2d 290].) This standard thus requires a state to genuinely narrow the class of defendants eligible for a death sentence. (*Id.* at pp. 360-361; *Zant v. Stephens* (1983) 462 U.S. 862, 877 [103 S.Ct. 2733, 77 L.Ed.2d 235].

In 1994, the United States Supreme Court rejected a facial Eighth

Amendment vagueness attack on this section, concluding that -- at least in the abstract -- it had a "common sense core of meaning" that juries could understand and apply. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975 [114 S.Ct. 2630, 129 L.Ed.2d 750].) This Court has consistently relied on *Tuilaepa* as the underpinning of its holdings that section 190.3, factor (a) [CALJIC No. 8.85(a)] does not license the arbitrary and capricious imposition of the death penalty. (See, i.e., *People v. Panah, supra,* 35 Cal.4th at p. 499; *People v. D'Arcy* (2010) 48 Cal.4th 257, 308.)

Appellant offers that an analysis of how section 190.3, subdivision (a) is actually used by prosecutors in capital cases shows that the essence of the Court's judgment in, and this Court's reliance on, *Tuilaepa* , is incorrect. In fact, there is an extraordinarily disparate use of the circumstances-of-the-crime factor. Beyond question, whatever "common sense core of meaning" subdivision (a) once may have had is long gone. As applied, the California statute thus leads to the precise type of arbitrary and capricious decision-making that the Eighth Amendment condemns.

The governing principles are clear. When a state chooses to impose capital punishment, the Eighth Amendment requires the adoption of "procedural safeguards against arbitrary and capricious imposition of the death penalty." (*Sawyer v. Whitley* (1992) 505 U.S. 333, 341 [112 S.Ct. 2514, 120 L.Ed.2d 268].) A state capital punishment scheme must comply with the Eighth Amendment's "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" in imposing the death penalty. (*Maynard v.*

Cartwright (1988) 486 U.S. 356, 362 [108 S.Ct. 1853, 100 L.Ed.2d 372].)

As applied in California, however, section 190.3, subdivision (a) not only fails to "minimiz[e] the risk of wholly arbitrary and capricious action" in the death process, it affirmatively institutionalizes such a risk. Prosecutors throughout California have argued that the penalty jury weigh aggravation in almost every conceivable circumstance of the crime, even those that -- from case to case -- reflect starkly opposite circumstances. For example, records in other capital cases before the Court[21] reveal that prosecutors have argued that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale because:

1. The defendant struck many blows and inflicted multiple wounds;[22]

2. The defendant killed with a single execution-style wound;[23]

3. The defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification);[24]

4. The defendant killed the victim without any motive at all;[25]

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[21]/ Evid. Code § 452, subd. (d) authorizes the Court to take judicial notice of the records of any court of this state.

[22]/ See, e.g., *People v. Morales* (1989) 48 Cal.3d 527 -- RT 3094-3095 [defendant inflicted many blows]; *People v. Lucas* (1995) 12 Cal.4th 415 -- RT 2997-2998 [same]; *People v. Carrera* (1989) 49 Cal.3d 291 -- RT 160-161 [same].

[23]/ See, e.g., *People v. Freeman* (1994) 8 Cal.4th 450 -- RT 3674, 3709 [defendant killed with single wound]; *People v. Frierson* (1991) 53 Cal.3d 730 -- RT 3026-3027 [same].

[24]/ See, e.g., *People v. Allison* (1989) 48 Cal.3d 879 -- RT 968-969 [money]; *People v. Belmontes* (1988) 45 Cal.3d 744 -- RT 2466 [eliminate a witness]; *People v. Coddington* (2000) 23 Cal.4th 529 -- RT 6759-6760 [sexual gratification].

5. The defendant killed the victim in cold blood;[26]

6. The defendant killed the victim during a savage frenzy;[27]

7. The defendant engaged in a cover-up to conceal his crime;[28]

8. The defendant did not engage in a cover-up and so must have been proud of it;[29]

9. The defendant made the victim endure the terror of anticipating a violent death;[30]

10. The defendant killed instantly without any warning;[31]

11. The victim had children;[32]

12. The victim had not yet had a chance to have children;[33]

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[25]/ See, e.g., *People v. Edwards* (1991) 54 Cal.3d 787 -- RT 10544 [defendant killed for no reason]; *People v. Osband* (1996) 13 Cal.4th 622 -- RT 3650 [same]); *People v. Hawkins* (1995) 10 Cal.4th 920 -- RT 6801 [same].

[26]/ See, e.g., *People v. Visciotti* (1992) 2 Cal.4th 1 -- RT 3296-3297 [defendant killed in cold blood].

[27]/ See, e.g., *People v. Jennings* (1991) 53 Cal.3d 334 -- RT 6755 [defendant killed victim in savage frenzy (trial court finding)].

[28]/ See, e.g., *People v. Stewart* (2004) 33 Cal.4th 425 -- RT 1741-1742 [defendant attempted to influence witnesses]; *People v. Benson* (1990) 52 Cal.3d 754 -- RT 1141 [defendant lied to police].

[29]/ See, e.g., *People v. Adcox* (1988) 47 Cal.3d 207-- RT 4607 [defendant freely informs others about crime]; *People v. Morales, supra,* 48 Cal.3d 527 -- RT 3093 [defendant failed to engage in a cover-up].

[30]/ See, e.g., *People v. Webb* (1993) 6 Cal.4th 494 -- RT 5302.

[31]/ See, e.g., *People v. Freeman, supra,* 8 Cal.4th 450 -- RT 3674 [defendant killed victim instantly]; *People v. Livaditis* (1992) 2 Cal.4th 759 -- RT 2959 [same].

[32]/ See, e.g., *People v. Zapien* (1993) 4 Cal.4th 929 -- RT 37 (January 23, 1987) [victim had children].

[33]/ See, e.g., *People v. Carpenter* (1997) 15 Cal.4th 312 -- RT 16752 [victim had not yet had children].

13. The victim struggled prior to death;[34]

14. The victim did not struggle;[35]

15. The defendant had a prior relationship with the victim;[36] and

16. The victim was a complete stranger to the defendant.[37]

The above examples show that although a plausible argument can be made that the circumstances-of-the-crime aggravating factor once may have had a "common sense core of meaning," that position can be maintained only by ignoring how the term actually is now being used in California. In fact, as the above-referenced cases indicate, prosecutors urge juries to find this aggravating factor and place it on death's side of the scale based on diametrically-opposed or squarely-conflicting circumstances. This demonstrates that the term has no common or core meaning or significance but is so malleable that it can be applied or invoked in virtually every case. It therefore cannot withstand Eighth and Fourteenth Amendment scrutiny.

Of equal importance to the arbitrary and capricious use of the circumstances-of-the-crime factors to support a penalty of death is the fact that it

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[34]/ See, e.g., *People v. Dunkle* (2005) 36 Cal.4th 861 -- RT 3812 [victim struggled]; *People v. Webb, supra,* 6 Cal.4th 494 -- RT 5302 [same]; *People v. Lucas* (1995) 12 Cal.4th 415 -- RT 2998 [same].

[35]/ See, e.g., *People v. Fauber* (1992) 2 Cal.4th 792 -- RT 5546-5547 [no evidence of a struggle].

[36]/ See, e.g., *People v. Padilla* (1995) 11 Cal.4th 891 -- RT 4604 [prior relationship]; *People v. Waidla* (2000) 22 Cal.4th 690 -- RT 3066-3067 [same]; *People v. Kaurish* (1990) 52 Cal.3d 648, 717 [same].

[37]/ See, e.g., *People v. McPeters* (1992) 2 Cal.4th 1148 -- RT 4264 [no prior relationship].

is applied so broadly as to subsume the entire spectrum of circumstances invariably present in every homicide, including age of victim, method of killing, motive, and location of crime. For example, prosecutors have argued, and juries have been permitted to find, that factor (a) [CALJIC No. 8.85(a)] is an aggravating circumstance because:

1. The victim was a child, an adolescent, a young adult, in the prime of life, or elderly;[38]

2. The victim was strangled, bludgeoned, shot, stabbed, or consumed by fire;[39]

3. The defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all;[40]

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[38]/ See, e.g., *People v. Deere* (1991) 53 Cal.3d 705 -- RT 155-156 [victims were young, ages 2 and 6]; *People v. Bonin* (1988) 46 Cal.3d 659 -- RT 10,075 [victims were adolescents, ages 14, 15, and 17]; *People v. Kipp* (2001) 26 Cal.4th 1100 -- RT 5164 [victim was a young adult, age 18]; *People v. Carpenter, supra,* 15 Cal.4th 312 -- RT 16752 [victim was 20], *People v. Phillips* (1985) 41 Cal.3d 29, 63 [26-year-old victim was "in the prime of his life"]; *People v. Samayoa* (1997) 15 Cal.4th 795 -- 40 RT 49 [victim was an adult "in her prime"]; *People v. Bean* (1988) 46 Cal.3d 919 -- RT 4715-4716 [victim was "elderly"].

[39]/ See, e.g., *People v. Clair* (1992) 2 Cal.4th 692 -- RT 2474-2475 [strangulation]; *People v. Kipp, supra,* 26 Cal.4th 1100 -- RT 2246 [same]; *People v. Fauber, supra,* 2 Cal.4th 792 -- RT 5546 [use of an axe]; *People v. Benson* (1990) 52 Cal.3d 754 -- RT 1149 [use of a hammer]; *People v. Cain* (1995) 10 Cal.4th 1 -- RT 6786-6787 [use of a club]; *People v. Jackson* (1996) 13 Cal.4th 1164 -- RT 8075-8076 [use of a gun]; *People v. Scott* (1997) 15 Cal.4th 1188 -- RT 847 [fire].

[40]/ See, e.g., *People v. Howard* (1992) 1 Cal.4th 1132 -- RT 6772 [money]; *People v. Allison, supra,* 48 Cal.3d 879 -- RT 969-970 [same]); *People v. Belmontes, supra,* 45 Cal.3d 744 -- RT 2466 [eliminate a witness]; *People v. Coddington* (2000) 23 Cal.4th 529 -- RT 6759-6761 [sexual gratification]; *People v. McLain* (1988) 46 Cal.3d 97 -- RT 31 [revenge]; *People v. Edwards* (1991) 54 Cal.3d 787 -- RT 10544 [no motive at all].

4. The victim was killed in the middle of the night, late at night, early in the morning, or in the middle of the day;[41] and

5. The victim was killed in her own home, in a public bar, in a city park, or in a remote location.[42]

The foregoing examples illustrate how the factor (a) circumstances-of-the-crime aggravator actually is being applied and demonstrate beyond doubt that it is applicable and used in *every* case regardless of the facts or circumstances, by *every* prosecutor, without any limitation whatsoever. As a consequence, from case to case, prosecutors turn entirely opposite facts -- or facts that are inevitable variations of every homicide -- into aggravating factors that are offered to every jury as unique factors weighing on death's side of the scale. This is precisely the kind of arbitrariness and capriciousness proscribed by Eighth and Fourteenth Amendment reliability and due process principles.

Each of the concurring opinions in *Tuilaepa* clearly stated -- in varying degrees of explicitness -- that the high court was making no judgment whether California's special circumstances "collectively perform sufficient, meaningful narrowing" to pass muster under the Eighth Amendment. (See, i.e., *Tuilaepa v.*

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[41]/ See, e.g., *People v. Fauber, supra,* 2 Cal.4th 792 -- RT 5777 [early morning]; *People v. Bean* (1988) 46 Cal.3d 919 -- RT 4715 [middle of the night]; *People v. Avena* (1996) 13 Cal.4th 394 -- RT 2603-2604 [late at night]; *People v. Lucero* (2000) 23 Cal.4th 692 -- RT 4125-4126 [middle of the day].

[42]/ See, e.g., *People v. Cain* (1995) 10 Cal.4th 1 -- RT 6787 [same]; *People v. Freeman* (1994) 8 Cal.4th 450 -- RT 3674, 3710-3711 [public bar]; *People v. Ashmus* (1991) 54 Cal.3d 932 -- RT 7340-7341 [city park]; *People v. Carpenter, supra,* 15 Cal.4th 312 -- RT 16,749-16,750 [forested area].

California, supra, 512 U.S. at pp. 975 [majority opn. of Kennedy, J.] and 984 [concurring opn. of Stevens, J.]; see also *id.* at pp. 994-995 [dissenting opn., Blackmun, J.].)

As a prelude to resolving the vagueness claim at issue in *Tuilaepa*, Justice Kennedy's majority opinion made a general statement about "two different aspects of the capital decision-making process: the eligibility and the selection decision." The opinion stated that the "aggravating circumstances" that make a defendant "eligible for the death penalty" -- which, as the high court recognized, is a "special circumstance" under the California statute -- must meet two requirements. First, "the circumstance may not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder." Second, the aggravating circumstances may not be unconstitutionally vague. (*Tuilaepa v. California, supra*, 512 U.S. at p. 972.)

All of the opinions in *Tuilaepa* make clear, a death penalty statutory scheme passes constitutional muster as long as all of the eligibility factors, viewed cumulatively, make fewer than "all murderers" death eligible. (See *Tuilaepa v. California, supra*, 512 U.S. at pp. 975, 980, 985, 994-995.)

As authority for the phrase used in *Tuilaepa* -- "may not apply to every defendant convicted of a murder" -- Justice Kennedy quoted language in *Arave v. Creech* (1993) 507 U.S. 463 [113 S.Ct. 1534, 123 L.Ed.2d 188] that "[i]f the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally

infirm." (*Arave v. Creech, supra*, 507 U.S. at p. 474.) As the quoted statement indicates, *Creech* involved a challenge to the single eligibility factor of which the defendant was convicted. (See *id.* at p. 478.) *Creech,* however, did not involve the kind of systemic challenge raised by appellant in this case.

Third, the sentence in *Creech* that Justice Kennedy quoted in *Tuilaepa* originated in turn in two other high court cases that struck down eligibility factors that were so vague a sentencer could interpret them as applying to all or almost all murders. (See *Arave v. Creech, supra*, 507 U.S. at p. 474, citing the holdings in *Maynard v. Cartwright* (1988) 486 U.S. 356, 364 [108 S.Ct. 1853, 100 L.Ed.2d 372] and *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429 [100 S.Ct. 1759, 64 L.Ed.2d 398].) It is one thing, in striking down an eligibility factor, for the Supreme Court to describe just how overbroad the factor is, as was the case in *Cartwright* and *Godfrey*. It is quite another to turn that description into a limitation on the "constitutionally required narrowing function" to which this Court referred to in *People v. Beames* (2007) 40 Cal.4th 907, 934, for example. (See also *People v. Jurado* (2006) 38 Cal.4th 72, 146 (conc. opinion by Kennard, J.).) The United States Supreme Court did not do so in *Cartwright* or *Godfrey*, nor did it do so in *Creech*. To the contrary, the Supreme Court in *Creech* found the "utter disregard" eligibility factor at issue there constitutional because, in its construction of the factor, the Supreme Court of Idaho had "narrowed in a meaningful way" the category of defendants upon whom capital punishment may be imposed. (*Arave v. Creech, supra*, 507 U.S. at p. 476.)

Thus, to comply with the Eighth Amendment, even single eligibility factors still must narrow in a meaningful way the category of defendants upon whom capital punishment may be imposed. The Court's suggestion that this principle is no longer the case (*People v. Beames, supra*, 40 Cal.4th at p. 934) is incorrect and contrary to high court jurisprudence. Consequently, it also necessarily follows that an entire statutory scheme, viewed cumulatively, must do so. (*Kansas v. Marsh* (2006) 548 U.S.163 [126 S.Ct. 2516, 2527, fn. 6, 165 L.Ed.2d 429].)

C. The Instruction on Penal Code Section 190.3, Subdivision (b) and the Jurors' Application of that Sentencing Factor Violated Appellant's Constitutional Rights to a Fair Penalty Trial, Due Process, Equal Protection, Trial by Jury and a Reliable Penalty Determination

1. Introduction

In addition to CALJIC Nos. 8.85(a) and 8.88, as discussed in Subsection B, *supra*, the trial court instructed the jury in the language of CALJIC Nos. 8.85(b) and modified 8.87 that, as aggravating factors under section 190.3, subdivision (b), the jury could consider "[t]he presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (4 CT 928; 53 RT 6821.) As modified, CALJIC No. 8.87 instructed the jury in relevant part as follows:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts: battery upon Pamela Braden

> also known as Pamela Martin, murder or voluntary manslaughter or involuntary manslaughter of Jennifer Lisa Von Seggern, burglary at the residence of Margaret Mary Johnson, arson at the residence of Margaret Mary Johnson, and murder of Margaret Mary Johnson, which involved the express or implied use of force or violence or the threat of force or violence. Before a juror may consider any criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal acts. A juror may not consider any evidence of any other criminal acts as an aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal act occurred, that juror may consider that act as an fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.
>
> (4 CT 959; 53 RT 6839.)

The jury was told it could rely on these aggravating factors in the weighing process to determine if appellant should be executed. As quoted above, the jury was also told that it was not necessary for all jurors to agree. Indeed, the jury was explicitly instructed that unanimity as to factor (b) was not required. Thus, the sentencing instructions contrasted sharply with those given at the guilt phase, where the jurors were told they had to agree unanimously on appellant's guilt and the special circumstances allegations. This aspect of section 190.3, subdivision (b) and CALJIC No. 8.87, permitting the jury to sentence appellant to death by relying on evidence on which it did not necessarily agree unanimously, violated both the Sixth Amendment right to a jury trial and the Eighth Amendment's ban on

unreliable penalty phase procedures.

2. The Use of Unadjudicated Criminal Activity as Aggravation Renders Appellant's Death Sentence Unconstitutional

Appellant acknowledges that the Court has consistently ruled that the jury may properly consider evidence of unadjudicated crimes under section 190.3, factor (b) [CALJIC Nos. 8.85(b) and 8.87]. (*People v. Friend* (2009) 47 Cal.4th 1, 90; *People v. Panah, supra*, 35 Cal.4th at p. 499 .) The Court's reasoning and analysis in this regard are unsound and should be reevaluated.

The instruction on factor (b) aggravation was upheld against an Eighth Amendment vagueness challenge in *Tuilaepa v. California, supra*, 512 U.S. at p. 977. However, the instructions and evidence in this case violated the Eighth Amendment, because they permitted the jury to consider unreliable evidence of appellant's alleged unadjudicated criminal conduct.

The admission into evidence of unadjudicated criminal conduct as aggravation violated appellant's rights to due process under the Fourteenth Amendment, trial by an impartial jury under the Sixth Amendment, and a reliable determination of penalty under the Eighth Amendment. (*State v. McCormick* (Ind. 1979) 397 N.E.2d 276 [prohibiting use of unadjudicated crimes as aggravating circumstances under Eighth and Fourteenth Amendments]; *see also State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955 [prohibiting use of unadjudicated crimes as aggravating circumstance based on state constitution with due process and

impartial jury provisions comparable to United States and California Constitutions].) Thus, the trial court's instructions in this case that expressly permitted the jury to consider such evidence in aggravation violated those same constitutional rights.

In addition, because California does not allow unadjudicated offenses to be used in noncapital sentencing, the use of this evidence in a capital proceeding violated appellant's equal protection rights under the California and United States Constitutions. (*Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.) Further, because the state applies its law in an irrational manner by providing more sentencing rights in non-capital cases, the use of this evidence in a capital sentencing proceeding also violated appellant's California and United States constitutional rights to due process and equal protection of the laws. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175]; U.S. Const., 6th & 14th Amendments; Cal. Const., art. I, §§ 7 and 15.)

3. The Failure to Require a Unanimous Jury Finding on the Unadjudicated Acts of Violence Denied Appellant His Right to a Jury Trial Guaranteed by the Sixth and Fourteenth Amendments and Requires Reversal of His Death Sentence

Even assuming for purposes of argument that the evidence of alleged prior and subsequent unadjudicated acts was constitutionally admissible at the penalty trial, the failure of the trial court's instructions pursuant to section 190.3, subdivision (b) [CALJIC Nos. 8.85(b) and 8.87] to require juror unanimity on the

allegations that appellant committed prior, unadjudicated acts of violence renders his death sentence unconstitutional.[43]

Appellant acknowledges that the Court has previously and consistently rejected the argument that the California sentencing scheme is constitutionally flawed because it does not require the penalty jury to agree unanimously that a particular aggravating circumstance exists. (*People v. Burney* (2009) 47 Cal.4th 203, 268; *People v. Carrington* (2009) 47 Cal.4th 145, 199-200.) The Court's constitutional analysis and reasoning in this regard are unsound and should be reevaluated.

The Sixth Amendment guarantees the right to a jury trial in all criminal cases. The United States Supreme Court has held, however, that the application of the Sixth Amendment to the states through the Fourteenth Amendment does not require that the jury be unanimous in non-capital cases. (*Apodaca v. Oregon* (1972) 406 U.S. 404, 406 [92 S.Ct. 1628, 32 L.Ed.2d 184] [upholding conviction by a 10-2 vote in non-capital case]; *Johnson v. Louisiana* (1972) 406 U.S. 356, 362, 364 [92 S.Ct. 1620, 32 L.Ed.2d 152], [upholding a conviction obtained by a 9-3 vote in non-capital case].) Nor does it require the states to empanel 12 jurors in all non-capital criminal cases. (*Williams v. Florida* (1970) 399 U.S. 78, 102-103

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[43]/ Argument VIII, *infra*, discusses the constitutional burden of proof requirements, jury unanimity, and fact-finding determinations made by a capital sentencing jury in California. This argument addresses solely the use of unadjudicated acts under factor (b) [CALJIC No. 8.85(b)], including the absence of jury unanimity as to unadjudicated acts under factor (b) [CALJIC No. 8.87 as modified].

[90 S.Ct. 1893, 26 L.Ed.2d 446] [approving the use of six-person juries in criminal cases].)

The United States Supreme Court also has made clear, however, that even in non-capital cases, when the Sixth Amendment does apply, there are limits beyond which the states may not go. For example, in *Ballew v. Georgia* (1978) 435 U.S. 223 [98 S.Ct. 1029, 55 L.Ed.2d 234], the Court struck down a Georgia law allowing criminal convictions with a five-person jury. Moreover, the Court also has held that the Sixth Amendment does not permit a conviction based on the vote of five of six seated jurors. (*Brown v. Louisiana* (1979) 447 U.S. 323 [100 S.Ct. 2214, 65 L.Ed.2d 159]; *Burch v. Louisiana* (1978) 441 U.S. 130, 139 [99 S.Ct. 1623, 60 L.Ed.2d 96].) Thus, when the Sixth Amendment applies to a factual finding -- at least in a non-capital case -- although jurors need not be unanimous as to the finding, there must at a minimum be significant agreement among the jurors.[44]

Prior to June of 2002, the United States Supreme Court's law on the Sixth Amendment did not apply to the aggravating factors set forth in section 190.3.

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[44]/ The United States Supreme Court often has recognized that because death is a unique punishment, there is a corresponding need for procedures in death penalty cases that increase the reliability of the process. (See, e.g., *Beck v. Alabama, supra*, 447 U.S. 625; *Gardner v. Florida, supra,* 430 U.S. at p. 357.) It is arguable, therefore, that where the state seeks to impose a death sentence, the Sixth Amendment does not permit even a super-majority verdict, but requires true unanimity. Because the instructions in this case did not even require a super-majority of jurors to agree that appellant committed the alleged prior and subsequent unadjudicated acts of violence, there is no need to reach this question here.

Prior to that date, the Sixth Amendment right to jury trial did not apply to aggravating factors on which a sentencer could rely to impose a sentence of death in a state capital proceeding. (*Walton v. Arizona* (1988) 497 U.S. 639, 649 [110 S.Ct. 3047, 111 L. Ed. 2d 511].) In light of *Walton*, it is not surprising that this Court had, on many occasions, specifically rejected the argument that a capital defendant had a Sixth Amendment right to a unanimous jury in connection with the jury's findings as to aggravating evidence. (See, e.g., *People v. Taylor* (2002) 26 Cal.4th 1155, 1178; *People v. Hines* (1997) 15 Cal.4th 997, 1077; *People v. Ghent* (1987) 43 Cal.3d 739, 773.) In *Ghent* for example, the Court held that such a requirement was unnecessary under "existing law." (*People v. Ghent, supra*, 43 Cal.3d at p. 773.)

On June 24, 2002, however, the "existing law" changed. In *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], the United States Supreme Court overruled *Walton* and held that the Sixth Amendment right to a jury trial applied to "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at p. 609; accord *id.* at p. 610 (conc. opn. of Scalia, J.) [noting that the Sixth Amendment right to a jury trial applies to "the existence of the fact that an aggravating factor exist[s]"].)

In other words, absent juror unanimity in connection with the aggravating factor set forth in section 190.3, subdivision (b), this section violates the Sixth Amendment as applied in *Ring*. This Court's conclusion to the contrary (*People v. Verdugo* (2010) 50 Cal.4th 263, 304-305; *People v. D'Arcy, supra*, 48 Cal.4th at p.

308; *People v. Carrington, supra*, 47 Cal.4th at p. 200; *People v. Mendoza* (2007) 42 Cal.4th 686, 707), that *Ring* did not alter California death penalty jurisprudence is unsound and should be reevaluated. In light of the high court's other related decisions in *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]; *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], this Court's rejection of the applicability of *Ring* is untenable.

Finally, the error here cannot be deemed harmless. On this record, there is no way to tell if all 12 jurors agreed that appellant murdered Jennifer VonSeggern (see also Argument VI, *supra*), committed arson at the residence of Margaret Johnson, or murdered Margaret Johnson with which he was never charged and about which there had been no prior proceedings or testimony. (See *People v. Crawford* (1982) 131 Cal.App.3d 591, 599 [instructional failure which raises possibility that jury was not unanimous requires reversal unless the reviewing court can tell that all 12 jurors necessarily would have reached a unanimous agreement on the factual point in question]; *People v. Dellinger* (1985) 163 Cal.App.3d 284, 302 [same].)

4. Absent a Requirement of Jury Unanimity in Respect to the Alleged Unadjudicated Acts of Violence, the Instructions on Section 190.3, Subdivision (b) Allowed Jurors to Impose the Death Penalty on Appellant Based on Unreliable Factual Findings That Were Never Deliberated, Debated, or Discussed

The United States Supreme Court has recognized that "death is a different

kind of punishment from any other which may be imposed in this country." (*Gardner v. Florida* (1977) 430 U.S. 349, 357 [97 S.Ct. 1197, 51 L.Ed.2d 393].) Because death is such a qualitatively different punishment, the Eighth and Fourteenth Amendments require "a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973].) For this reason, the high court has not hesitated to strike down penalty phase procedures that increase the risk that the fact-finder will make an unreliable determination. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-330 [105 S.Ct. 2633, 86 L.Ed.2d 231]; *Green v. Georgia* (1979) 442 U.S. 95 [99 S.Ct. 2150, 60 L.Ed.2d 738]; *Lockett v. Ohio*, *supra*, 438 U.S. at pp. 605-606; *Gardner v. Florida*, *supra*, 430 U.S. at pp. 360-362.) The Supreme Court has made clear that defendants have "a legitimate interest in the character of the procedure which leads to the imposition of sentence even if [they] may have no right to object to a particular result of the sentencing process." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358.)

The California Legislature has provided that evidence of a defendant's act which involved the use or attempted use of force or violence can be presented during the penalty phase. (§ 190.3, subd. (b).) Before the fact-finder may consider such evidence, it must find that the state has proven the act beyond a reasonable doubt. The jurors also are instructed, however, in the language of CALJIC No. 8.87 that they need not agree on this, and that as long as any one juror believes the act has been proven, that one juror may consider the act in aggravation. This

instruction was given here. (1 CT 959; 53 RT 6839-6840.) Thus, as noted above, any juror individually could have relied on any one or more aggravating factor each juror deemed proper, as long as the jurors all agreed on the ultimate punishment. Because this procedure totally eliminates the deliberative function of the jury as a whole that guards against unreliable factual determinations, it is inconsistent with the Eighth Amendment's requirement of enhanced reliability in capital cases. (See *Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 388-389 (dis. opn. of Douglas, J.); *Ballew v. Georgia*, *supra*, 435 U.S. 223; *Brown v. Louisiana*, *supra*, 447 U.S. 323.)

In *Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 362, 364, a plurality of the United States Supreme Court held that the Sixth Amendment right to jury trial that applied to the states through the Fourteenth Amendment did not require jury unanimity in state criminal trials, but permitted a conviction based on a vote of 9 to 3. In dissent, Justice Douglas pointed out that permitting jury verdicts on less than unanimous verdicts reduced deliberation between the jurors and thereby substantially diminished the reliability of the jury's decision. This occurs, he explained, because "nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required . . . even though the dissident jurors might, if given the chance, be able to convince the majority." (*Id.* at pp. 388-389 (dis. opn. of Douglas).)

The high court subsequently embraced Justice Douglas's observations

about the relationship between jury deliberation and reliable fact-finding. In striking down a Georgia law allowing criminal convictions with a five-person jury, the Court observed that such a jury was less likely "to foster effective group deliberation. At some point this decline [in jury number] leads to inaccurate fact-finding . . .." (*Ballew v. Georgia*, *supra*, 435 U.S. at p. 232.) Similarly, in precluding a criminal conviction on the vote of five out of six jurors, the Supreme Court has recognized that "relinquishment of the unanimity requirement removes any guarantee that the minority voices will actually be heard." (*Brown v. Louisiana*, *supra*, 447 U.S. at p. 333; see also *Allen v. United States* (1896) 164 U.S. 492, 501 [17 S.Ct. 154, 41 L.Ed. 528] ["The very object of the jury system is to secure uniformity by a comparison of views, and by arguments among the jurors themselves."].)

The United States Supreme Court's observations about the effect of jury unanimity on group deliberation and fact-finding reliability are even more applicable in this case for two reasons. First, since this is a capital case, the need for reliable fact-finding determinations is substantially greater. Second, unlike the Louisiana schemes at issue in *Johnson*, *Ballew*, and *Brown*, the California scheme embodied in CALJIC No. 8.87, as modified in this case, does not require even a majority of jurors to agree on factor (b) evidence before relying on such unadjudicated conduct to impose a death penalty. Consequently, "no deliberation at all is required" on this critical factual issue, which was relied upon by the jurors to sentence appellant to death. (*Johnson v. Louisiana*, *supra*, 406 U.S. at p. 388,

(dis. opn. of Douglas, J.).)

Given the constitutionally significant purpose served by jury deliberation on factual issues and the enhanced need for reliability in capital sentencing, a procedure that allows individual jurors to impose death on the basis of less than unanimous factual findings that they have neither debated, deliberated nor even discussed is unreliable and, therefore, constitutionally impermissible. A new penalty trial is required. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 586 [108 S.Ct. 1981, 100 L.Ed.2d 575] [harmless error analysis inappropriate when trial court introduces evidence that violates Eighth Amendment's reliability requirements at defendant's capital sentencing hearing].)

D. The Failure to Require the Jury to Base a Death Sentence on Written Findings Regarding the Aggravating Factors Violates Appellant's Constitutional Rights to Meaningful Appellate Review and Equal Protection of the Law

The instructions given in this case under CALJIC No. 8.85 and No. 8.88 did not require the jury to make written or other specific findings about the aggravating factors they found and considered in imposing a death sentence. The failure to require such express findings deprived appellant of his Fourteenth Amendment due process and Eighth Amendment rights to meaningful appellate review as well as his Fourteenth Amendment right to equal protection of the law. (*California v. Brown* (1987) 479 U.S. 538, 543 [107 S.Ct. 837, 93 L.Ed.2d 934]; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) California juries have total, unguided discretion on how to weigh aggravating and mitigating circumstances

(*Tuilaepa v. California, supra,* 512 U.S. at pp. 979-980). There can be no meaningful appellate review unless juries make written findings regarding those factors, because it is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 373 U.S. 293, 313-316 [88 S.Ct. 745, 9 L.Ed.2d 770].) Indeed, written findings are essential for a meaningful review of the sentence imposed. Thus, in *Mills v. Maryland* (1988) 486 U.S. 367 [108 S.Ct. 1860, 100 L.Ed.2d 384], the requirement of written findings applied in Maryland death cases enabled the Supreme Court to identify the error committed under the prior state procedure and to gauge the beneficial effect of the newly-implemented state procedure. (*Id.* at p. 383, fn. 15.)

Appellant acknowledges that the Court has previously held that nothing in the United States Constitution requires the penalty phase jury to make written findings of the factors it finds in aggravation and mitigation. (See, i.e., *People v. Enraca* (2012) 53 Cal.4th 735, 769; *People v. Burney* (2009) 47 Cal.4th 203, 267-268.) For the reasons set forth below, the Court's reasoning in this regard is unsound and should be reevaluated.

While this Court has held that the 1978 death penalty scheme is not unconstitutional in failing to require express jury findings (*People v. Fauber* (1999) 2 Cal.4th 792, 859), it has treated such findings as so fundamental to due process as to be required at parole suitability hearings. A convicted prisoner who alleges that he was improperly denied parole must proceed by a petition for writ of habeas corpus and must allege the state's wrongful conduct with particularity. (*In*

re Sturm (1974) 11 Cal.3d 258.) Accordingly, the parole board is required to state its reasons for denying parole, because "[i]t 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.) By parity of reason, the same requirement must apply to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

Further, in noncapital cases the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; § 1170, subd. (c); Cal. Rules of Court, rule 4.420(e).) Under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, capital defendants are entitled to more rigorous protections than noncapital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [111 S.Ct. 2680, 115 L.Ed.2d 836].) Since providing greater protection to noncapital than to capital defendants under similar circumstances violates the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst, supra,* 897 F.2d at p. 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found upon which he bases the decision to impose death.

The mere fact that a capital-sentencing decision is "normative" (*People v. Hayes* (1990) 52 Cal.3d 577, 643), and "moral" (*People v. Hawthorne* (1992) 4

Cal.4th 43, 79), does not mean its basis cannot be articulated in written findings. In fact, the importance of written findings in capital sentencing is recognized throughout this country. Of the post-*Furman* state capital sentencing systems, over 20 require some form of written findings specifying the aggravating factors the jury relied on in reaching a death judgment. Nineteen of those states require written findings regarding all penalty aggravating factors found true, while the remaining seven require a written finding as to at least one aggravating factor relied on to impose death.[45] California's failure to require such findings renders its death penalty procedures unconstitutional in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

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[45]/ See Ala. Code, §§ 13A-5-46(f) and 47(d) (1982); Ariz. Rev. Stat. Ann., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1993); Colo. Rev. Stat., § 18-1.3-1201(2)(b)(II) and § 18-1.3-1201(2)(c) (2002); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann., § 921.141(3) (West 1985); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(8)(a)-(b) (2003); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann., art. 905.7 (West 1993); Md. Ann. Code art 27, § 413(i) (1993); Miss. Code Ann., § 99-19-103 (1993); Mont. Code Ann., § 46-18-305 (1993); Neb. Rev. Stat. § 29-2521(2) and § 29-2522 (2002); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann., § 630.5 (IV) (1992); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711 (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann., § 37.07(c) (West 1993); Va. Code Ann., § 19.2-264(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

E. Even if the Absence of the Previously Addressed Procedural Safeguards Does Not Render California's Death Penalty Scheme Constitutionally Inadequate to Ensure Reliable Capital Sentencing, Denying Them to Capital Defendants Such as Appellant Nevertheless Violates Equal Protection Requirements of the Fourteenth Amendment to the United States Constitution

As noted above (Subsections C and D, *supra*), the United States Supreme Court repeatedly has asserted that a heightened standard or heightened reliability is required in capital cases and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [96 S.Ct. 2978, 49 L.Ed.2d 944] (plurality opinion of Stewart, Powell, and Stevens, JJ.); see also *Godfrey v. Georgia, supra*, 446 U. S. at pp. 427-428 (1980); *Monge v. California* (1998) 524 U.S. 721, 731-732 [118 S.Ct. 2246, 141 L.Ed.2d 615].) Despite this directive of the high court, California's death penalty scheme affords significantly fewer procedural protections to defendants facing death sentences than to those charged with noncapital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws under the Fourteenth Amendment.

Equal protection analysis begins with identifying the interest at stake. In California, Chief Justice Wright wrote for a unanimous Court that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) "Aside from its prominent place in the Due Process Clause, the right to life is the basis of all other rights. . . . It encompasses, in a

sense, 'the right to have rights' (*Trop v. Dulles* (1958) 356 U.S. 86, 102 [78 S.Ct. 590, 2 L.Ed.2d 630])." (*Commonwealth v. O'Neal* (Mass. 1975.) 327 N.E.2d 662, 668.)

In the case of interests identified as "fundamental," this Court and others 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 affecting a fundamental interest without showing that a compelling interest 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 [62 S.Ct. 1110, 86 L.Ed. 1655].)

California cannot meet that burden here. In the context of capital punishment, the equal protection guarantees of the California and United States Constitutions must apply with greater force, the scrutiny of the challenged classification must be strict, and any purported justification of the discrepant treatment must be even more compelling, because the interest at stake is not simply liberty, but life itself. The differences between capital defendants and noncapital felony defendants justify more, not fewer, procedural protections in order to make death sentences more reliable.

F. Conclusion

For the reasons set forth above, both separately and in the aggregate,

appellant's death sentence violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and their California counterparts, and must therefore be reversed.

VIII

PENAL CODE SECTION 190.3 AND IMPLEMENTING JURY INSTRUCTIONS (CALJIC NOS. 8.84-8.88) ARE UNCONSTITUTIONAL, BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF OR CONTAIN OTHER CONSTITUTIONALLY COMPELLED SAFEGUARDS AND PROTECTIONS REQUIRED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Introduction

The California death penalty statute and the instructions given in this case (CALJIC Nos. 8.84-8.88) fail to assign a burden of proof with regard to the jury's choice between the sentences of life without possibility of parole and death. (See 4 CT 926 [CALJIC No. 8.84]; 927 [CALJIC No. 8.84.1]; 928 [CALJIC No. 8.85]; 957 [CALJIC No. 8.86]; 959 [CALJIC No. 8.87]; 986 [CALJIC No. 8.88]; see also 53 RT 6819-6860 [penalty instructions].) The instructions do not delineate a burden of proof either with respect to the preliminary findings that a jury must make before it may impose a death sentence or the ultimate sentencing decision. Neither the statute nor the instructions require jury unanimity as to the existence of aggravating factors utilized by the jury as the basis for imposing a sentence of death. As shown below, these and other critical omissions in the California capital sentencing scheme embodied in section 190.3 and CALJIC Nos. 8.84-8.88 violated appellant's rights to trial by jury, fair trial, unanimous verdict, reliable penalty determination, due process, and equal protection of the laws guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States

Constitution.

B. The Statute and Instructions Unconstitutionally Fail to Assign to the State the Burden of Proving Beyond a Reasonable Doubt the Existence of an Aggravating Factor, that the Aggravating Factors Outweigh the Mitigating Factors, and that Death is the Appropriate Penalty

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (§ 190.3), that "the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death" (4 CT 986; 53 RT 6860), and that "death is the appropriate penalty under all the circumstances." (*People v. Brown* (1985) 40 Cal.3d 512, 541, *rev'd on other grounds, California v. Brown* (1987) 479 U.S. 538 [107 S.Ct. 837, 93 L.Ed.2d 934]; *see also People v. Cudjo* (1993) 6 Cal.4th 585, 634. Under the California scheme, however, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof.[46]

Here, the jury was specifically instructed in the language of CALJIC No. 8.84 and No. 8.88 that it must determine whether the death penalty or "imprisonment in the state prison for life without possibility of parole" shall be imposed. (4 CT 926, 986; 53 RT 6858.) No burden of proof was specified or

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[46]/ There is one exception to this lack of a burden of proof. The aggravating factor of unadjudicated violent criminal activity (§ 190.3, subd. (b)) must be proved beyond a reasonable doubt. Appellant further discusses the defects in § 190.3, subd. (b), *infra*, as well as in Argument VII, *supra*.

required by the trial court to guide the jury in determining penalty. The failure to assign or impose a burden of proof as a prerequisite for a jury's sentence of death renders both the California death penalty scheme and implementing instructions unconstitutional, and, in this case, renders appellant's death sentence unconstitutional and unreliable in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

In recent death penalty cases, this Court has consistently ruled that the failure to require that the jury unanimously find the aggravating circumstances true beyond a reasonable doubt, to find unanimously and beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances, or to require a unanimous finding beyond a reasonable doubt that death is the appropriate penalty does not violate the Fifth, Eighth, or Fourteenth Amendment guarantees of due process and a reliable penalty determination. (See, i.e., *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 333; *People v. Prince* (2007) 40 Cal.4th 1179, 1297-1298; *People v. Morrison, supra,* 34 Cal.4th at p. 731.) The Court has also repeatedly ruled that neither *Apprendi v. New Jersey, supra,* 530 U.S. 466, *Ring v. Arizona, supra,* 536 U.S. 584, *Blakely v. Washington, supra,* 542 U.S. 296, nor, more recently, *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], applies to the penalty phase of a capital trial under California's death penalty law. (See *People v. Lee* (2011) 51 Cal.4th 620, 651-652; *People v. Thomas* (2011) 51 Cal.4th 449, 506; *People v. Friend* (2009) 47 Cal.4th 1, 89; *People v. Salcido* (2008) 44 Cal.4th 93, 167.)

The Court's reasoning for this determination was set forth in *People v. Cox* (2003) 30 Cal.4th 916, 971. The Court in *Cox* overlooked that in *Cunningham v. California, supra*, the United States Supreme 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*, 127 S.Ct. at pp. 868-873.) In so doing, it explicitly rejected the reasoning used by this Court in such cases as *Cox* to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

In *Cunningham*, the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to the California's DSL. The high court examined whether or not the circumstances in aggravation were factual in nature and concluded they were. (*Id.* at p. 863.) As the Supreme Court held, "[e]xcept 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.'" (*Cunningham v. California, supra*, 127 S.Ct. at p. 868.) In the wake of *Cunningham*, it is 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 resisting the mandate of *Apprendi*, this Court has held that since the

maximum penalty for one convicted of first degree murder with a special circumstance is death (see Pen. Code § 190, subd. (a)), *Apprendi* does not apply. (See *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* (2003) 30 Cal.4th 226, 263; see also *People v. Prince*, supra, 40 Cal.4th at pp. 1297-1298.)

The Court's interpretation is wrong. As section 190.2, subdivision (a) 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 v. California, supra*, 127 S.Ct. at p. 862.)

Even with the finding of factual aggravating factors that were required to support a death sentence in *Ring*, the judicial sentencing choice between life and death remained discretionary, because the statute specified that a life sentence

should be imposed, if there were "mitigating circumstances sufficiently substantial to call for leniency." (*Ring v. Arizona, supra*, 536 U.S. at p. 593.) *Ring* nevertheless held the state statute unconstitutional, because the finding of aggravating circumstances was not made by a unanimous jury. (*Id.* at p. 609.) Instead, *Ring* held that the Sixth and Fourteenth Amendment required a unanimous jury finding of any "aggravating circumstance necessary for imposition of the death penalty." (*Ibid.*)

Contrary to the United States Supreme Court's pronouncement in *Williams v. New York* (1949) 337 U.S. 241 [69 S.Ct. 1079, 93 L.Ed. 1337], a California death sentence cannot be imposed for "no reason at all." *Apprendi* makes clear that the distinction is between sentencing schemes requiring a factual finding and those which allow a judge to impose an increased sentence as a discretionary choice, as long as the increased sentence is still within the maximum range permitted based on the facts admitted by defendant's guilty plea, or necessarily established by the guilty verdict. (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 487.) Thus, under *Apprendi's* reasoning, findings of aggravating circumstances are necessary under California law to increase a sentence for special circumstances murder from life imprisonment without the possibility of parole to death. This requirement is evident for several reasons.

First, in order to return a death sentence, both section 190.3 and CALJIC No. 8.88 require the jury to find that the aggravating circumstances outweigh mitigating circumstances. (See, e.g., CALJIC No. 8.88 ["To return a judgment of

death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole."]; see 4 CT 986; 53 RT 6860.) Manifestly, before substantial aggravating circumstances can outweigh mitigating circumstances, there must first be aggravating circumstances to consider. The mere finding of guilt on special circumstances murder is insufficient, because this Court has repeatedly recognized that Penal Code section 190.3, factor (a) -- the circumstances of the crime -- may be mitigating as opposed to aggravating in any given case. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1189; *People v. Smith* (2003) 30 Cal.4th 581, 639; *People v. Haskett* (1990) 52 Cal.3d 210, 229, fn. 5.) Thus, the jury must first find something that is truly aggravating which is defined as "a circumstance above and beyond the essential constituents of a crime which increases its guilt or enormity or adds to its injurious consequences." (*People v. Davenport* (1985) 41 Cal.3d 247, 289; accord, CALJIC No. 8.88.)

Second, as explained above, not only must the jury find the presence of aggravating circumstances, it must also find that they are so substantial in comparison to mitigation that death is warranted. As the Court recognized in *People v. Murtishaw* (1989) 49 Cal.3d 1001, 1027, in order to vote for the death penalty, a jury "must believe aggravation is so relatively great, and mitigation so comparatively minor, that the defendant deserves death rather than society's next most serious punishment, life in prison without parole." (See also *People v. Breaux* (1991) 1 Cal.4th 281, 318 [a jury can "return a death verdict, only if

aggravating circumstances predominated and death is the appropriate verdict"].)

Third, the California requirement that a death sentence cannot be returned unless there is not only aggravation but it is so substantial in comparison to mitigation that it warrants death, is similar to the Arizona standard found unconstitutional in *Ring* because of the failure to honor the Arizona defendant's Sixth and Fourteenth Amendment rights to a jury finding on any aggravating circumstance necessary to support a death sentence. As observed by the United States Supreme Court in *Ring*, the Arizona statute permitted a defendant to be sentenced "to death, only if there is at least one aggravating circumstance and 'there are no mitigating circumstances sufficiently substantial to call for leniency.'" (*Ring v. Arizona, supra*, 536 U.S. at p. 593.)

Of course, a California capital defendant does have the right to have a unanimous jury decide the ultimate question of life or death. The Sixth Amendment, however, requires more than the mere right to a jury trial; the right to jury trial is meaningless without the corollary requirements of a unanimous finding, beyond a reasonable doubt, on each fact essential to a death sentence. Indeed, *Ring* specifically holds that "[i]f 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.* at p. 602.) Further, both *Apprendi v. New Jersey, supra*, 530 U.S. at p. 483 and *Blakely v. Washington, supra*, 542 U.S. at p. 313, expressly require those findings to be made by a unanimous jury.

Lest there be any doubt whether aggravating factors constitute the type of finding covered by the Sixth Amendment, Justice Scalia, concurring in *Ring v. Arizona, supra*, 536 U.S. at p. 610, stressed "that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be found by the jury beyond a reasonable doubt." Justice Scalia also concluded his analysis by stating that "wherever factors [required for a death sentence] exist, they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution in criminal cases: they must be found by the jury beyond a reasonable doubt." (*Id.* at p. 612.)

Therefore, *Apprendi*, *Ring*, *Blakely*, and *Cunningham* all apply to the California death penalty statute. While, as this Court has stated (*People v. Hayes* (1990) 52 Cal.3d 577, 643; *People v. Lennart* (2004) 32 Cal.4th 1107, 1136-1137), a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, this does not make the finding any less subject to *Apprendi*, *Ring*, *Blakely*, and *Cunningham*. Indeed, this Court has overlooked that in *Blakely* itself, the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his or her own -- a finding which, appellant submits, must

inevitably involve both normative and factual elements. The United States Supreme Court in *Blakely* rejected the State's contention, finding *Ring* and *Apprendi* fully applicable, even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely v. Washington, supra*, 542 U.S. at pp. 304-305.) Consequently, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's normative determination that the aggravating factors substantially outweigh the mitigating factors, the findings must be made by a jury and must be made beyond a reasonable doubt.

As discussed above, absent additional findings of fact at the penalty phase of a capital trial in California, the maximum sentence that can be imposed is life without the possibility of parole. (§ 190.4, subd. (b).) The only way that a death sentence can be imposed is if jurors first find the existence of one or more aggravating circumstances and then find that they are so substantial in comparison with the mitigating circumstances that death is the warranted penalty instead of life imprisonment without the possibility of parole. (CALJIC No. 8.88; 4 CT 986; 53 RT 6860.) Additional factual findings -- beyond "substantiality" -- are clearly required at the penalty phase to justify imposition of a death sentence in this state; those findings must be found by a unanimous jury beyond a reasonable doubt.

For the foregoing reasons, the Court should reconsider its rejection of claims that the California death penalty statutory scheme and sentencing

instructions are unconstitutional to the extent that they (1) fail to require proof beyond a reasonable doubt as to any finding that an aggravating factor exists; (2) fail to require proof beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors, and (3) fail to require that any aggravating factor relied upon as basis for death be found by a unanimous jury.

C. The California and United States Constitutions Require an Instruction That the Jury May Impose a Sentence of Death Only if Persuaded Beyond a Reasonable Doubt that the Aggravating Factors Outweigh the Mitigating Factors and That Death is the Appropriate Penalty

Appellant acknowledges that this Court has consistently held that the California and United States Constitutions doe not require that the jury must be persuaded beyond a reasonable doubt that aggravating factors outweigh mitigating factors and that death is the appropriate penalty section. (See, i.e., *People v. Bivert* (2011) 52 Cal.4th 96, 124 [death penalty statutes do not require that the jury find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors or that death is the appropriate penalty]; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 208 *People v. Blair* (2005) 36 Cal.4th 686, 753; *People v. Griffin* (2004) 33 Cal.4th 536, 593; and *People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) For the reasons set forth below, the Court's analysis and reasoning are unsound and should be reevaluated.

1. 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 [78 S.Ct. 1332, 2 L.Ed.2d 1460].)

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 clauses of the Fifth and Fourteenth Amendments to the United States Constitution. (*In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368].) In capital cases, "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida, supra,* 430 U.S. at p. 358; *see also Presnell v. Georgia* (1978) 439 U.S. 14, 16-17 [99 S.Ct. 235, 58 L.Ed.2d 207] [fundamental due process principles and procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial].) 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 clauses of the Fifth and Fourteenth Amendments as well as the Eighth Amendment

to the United States Constitution.

2. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship, supra*, 397 U.S. at pp. 363-364; *see also Addington v. Texas* (1979) 441 U.S. 418, 423 [99 S.Ct. 1804, 60 L.Ed.2d 323].) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*In re Winship, supra,* 397 U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755 [102 S.Ct. 1388, 71 L.Ed.2d 599]; *see also Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335 [96 S.Ct. 893, 47 L.Ed.2d 18].)

On examining the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value" (*Speiser v. Randall, supra,* 375 U.S.

at p. 525), how much more transcendent is human life itself? Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (*See In re Winship, supra,* 397 U.S. p. 364 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment of mentally disordered sex offender]; *People v. Burnick* (1975) 14 Cal.3d 306 [same]; *People v. Thomas* (1977) 19 Cal.3d 630 [commitment of narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the state the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure," (*Santosky v. Kramer, supra,* 455 U.S. at p. 755), the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. ... When the State brings a criminal action to deny a defendant liberty or life, ... "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation]. The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the

> private interest affected [citation], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."
>
> (*Santosky v. Kentucky, supra,* 455 U.S. at p. 755 (quoting A*ddington v. Texas, supra*, 441 U.S. at pp. 423, 424, 427).)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky v. Kentucky, supra,* 455 U.S. at p. 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*In re Winship, supra,* 397 U.S. at p. 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the state of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [96 S.Ct. 2978, 49 L.Ed.2d 944].)

The need for reliability is especially compelling in capital cases. (*Beck v.*

Alabama (1980) 447 U.S. 625, 637-638 [100 S.Ct. 2382, 65 L.Ed.2d 392].) No greater interest is ever at stake. (*See Monge v. California, supra,* 524 U.S. at p. 732.) In *Monge*, the 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.'" (*Monge v. California, supra*, 524 U.S. at p. 732 (quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441 [101 S.Ct. 1852, 68 L.Ed.2d 270] (quoting *Addington v. Texas, supra*, 441 U.S. at pp. 423-424)) [italics 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 that the factual bases for its decision are true, but that death is the appropriate sentence.

This Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (*See e.g., People v. Griffin, supra,* 33 Cal.4th at p. 595.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This conclusion follows because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision. As the Supreme Court of

Connecticut recently explained on rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.
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> *(State v. Rizzo* (Conn. 2003) 833 A.2d 363, 408, fn. 37.)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama, supra,* 447 U.S. at pp. 625, 637-638; *Monge v. California, supra*, 524 U.S. at p. 732.) Under the Eighth and Fourteenth Amendments to the United States Constitution, a sentence of death may not be imposed unless the

sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

D. The Fifth, Sixth, Eighth, and Fourteenth Amendments Require that the State Bear Some Burden of Persuasion at the Penalty Phase

In addition to failing to impose a reasonable doubt standard on the prosecution, the trial court in its penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues," (see,. i.e., *People v. Murtishaw* (2011) 51 Cal.4th 574, 596; *People v. Superior Court (Mitchell)* (1993) 5Cal.4th 1229, 1236), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (See, i.e., *People v. Gonzales* (2011) 51 Cal.4th 894, 956; *People v. Mendoza* (2007) 42 Cal.4th 686, 707 [jury need not find aggravating factors true beyond a reasonable doubt, and no instruction on burden of proof is required]; *People v. Hayes, supra,* 52 Cal.3d at p. 643.) Appellant urges the Court to reconsider that ruling because it is constitutionally unsound under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at

all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112 [102 S.Ct. 869, 71 L.Ed.2d 1].) When a single, consistent standard of proof is not articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Even if it were not constitutionally necessary to impose on the prosecution such a heightened burden of persuasion as reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case.

It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the state while another assigns it to the accused, or because one juror applied a lower standard and found in favor of the state and another applied a higher standard and found in favor of the defendant. (*See Proffitt v Florida* (1976) 428 U.S. 242, 260 [96 S.Ct. 2969, 49 L.Ed.2d 913] [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland, supra*, 486 U.S. at p. 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the current scheme fails to set forth a burden of proof for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors. This necessarily follows because a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has found at least one special circumstance true. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (*see* §190.3), and may impose such a sentence even if no mitigating evidence was presented. (See *People v. Duncan* (1991) 53 Cal.3d 995, 979.)

Third, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Section 190.4, subdivision (e) requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[47]

A fact cannot be established -- i.e., a fact finder could not make a finding -- without imposing some sort of burden on the parties presenting the evidence

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[47]/ As discussed below, in requiring reliability in capital sentencing proceedings (*Monge v. California, supra,* 524 U.S. at p. 732; *Johnson v. Mississippi, supra,* 486 U.S. at p. 584; *Gardner v. Florida, supra,* 430 U.S. at p. 359), the United States Supreme Court has consistently held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant.

upon which the finding is based. The failure to inform the jury of how to make factual findings and the failure to articulate a proper burden of proof is thus constitutional error in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

It is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking a defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors -- and the juries on which they sit -- respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra,* 455 U.S. at p. 112.) It is unacceptable -- indeed "wanton" and "freakish" (*Proffitt v. Florida, supra*, 428 U.S. at p. 260) -- the "height of arbitrariness" (*Mills v. Maryland, supra*, 486 U.S. at p. 374) -- that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the state on the same facts, with no uniformly applicable standards to guide either.

Similarly, in the alternative, were it permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury. The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277 [113 S.Ct. 2078, 124 L.Ed.2d 182] [reasonable-doubt instructional error not subject to harmless

error review].) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof and the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation at the penalty phase would continue to believe that. Such jurors do exist. This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of an allegedly nonexistent burden of proof. The failure to give any instruction at all on the subject violates the Fifth, Sixth, Eighth, and Fourteenth Amendments because the instructions given fail to provide the jury with the guidance required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on the proper burden of proof, or the lack of such a burden, is reversible per se. (*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 275, 281-282.)

E. The Instructions Violated the Sixth, Eighth, and Fourteenth Amendments by Failing to Require Juror Unanimity on Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. Indeed, as to unadjudicated criminal activity, the trial court instructed the jury that

"it is not necessary for all jurors to agree." (4 CT 959; 53 RT 6839.) As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, it is impossible to determine precisely on what factors the jury relied in imposing death. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (*See, e.g., Schad v. Arizona* (1991) 501 U.S. 624, 632-633 [111 S.Ct. 2491, 115 L.Ed.2d 555].)

Appellant recognizes that this Court has previously held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (See, i.e., *People v. Taylor* (1990) 52 Cal.3d 719, 749 275 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"]; *People v. Prieto* (2003) 30 Cal.4th 226; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 147.) Nevertheless, appellant asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors in appellant's case to act in an arbitrary, capricious, and unreviewable manner, slanting the sentencing process in favor of death. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (*See Ballew v. Georgia, supra,* 435 U.S. at pp. 232-

234; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305.[48])

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* -- particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640 [109 S.Ct. 2055, 104 L.Ed.2d 728] -- should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the United States Supreme Court's holdings in previously-discussed *Ring* and *Blakely* make the reasoning in *Hildwin* highly questionable and constitutionally suspect, undercutting as well the constitutional underpinnings of this Court's analysis and ruling in *Bacigalupo*.

Applying the *Ring* and *Blakely* reasoning here, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 [110 S.Ct. 1227, 108 L.Ed.2d 369] (Kennedy, J., concurring).) Indeed, the Supreme Court has held that the verdict of even a six-

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[48]/ The absence of historical authority to support such a practice is an additional reason why the absence of jury unanimity violates of the Sixth, Eighth, and Fourteenth Amendments. (*See, e.g., Murray's Lessee v. Hoboken Land & Improvement Co.* (1855) 59 U.S. 272, 276 [18 How. 272]; *Griffin v. United States* (1991) 502 U.S. 46, 51-52 [112 S.Ct. 466, 116 L.Ed.2d 371].)

person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana, supra,* 447 U.S. at p. 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at p. 732; accord *Johnson v. Mississippi, supra,* 486 U.S. at p. 584; *Gardner v. Florida, supra*, 430 U.S. at p. 359; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital sentencing jury.

In addition, the California Constitution assumes -- indeed, is fundamentally predicated on -- jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (*See also People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to noncapital cases.[49] For example, in cases where a criminal defendant has been charged with

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[49]/ Significantly, the federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848(k).) In addition, numerous death penalty statutes require that the jury unanimously agree on the aggravating factors proven. See Ariz. Rev. Stat., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1993); Colo. Rev. Stat. Ann. § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); La. Code Crim. Proc. Ann., art. 905.6 (West 1993); Md. Ann. Code art. 27, § 413(i) (1993); Miss. Code Ann. § 99-19-103 (1993); Neb. Rev. Stat., § 29-2520(4)(f) (2002); N.H. Rev. Stat. Ann. §

special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (*See, e.g.*, § 1158, subd. (a).) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (*see Monge v. California, supra*, 524 U.S. at p. 732; *Harmelin v. Michigan, supra,* 501 U.S. at p. 994), and since the provision of greater protections to a noncapital defendant than to a capital defendant would violate the equal protection clause of the Fourteenth Amendment (*see, e.g., Myers v. Ylst, supra*, 897 F.2d at p. 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement of unanimity to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the fundamental constitutional requirement of equal protection, and by its irrationality violate both the due process and cruel and unusual punishment clauses of the California and United States Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816 [119 S.Ct. 707, 143 L.Ed.2d 985], the United States Supreme Court interpreted 21 U.S.C.

630:5(IV) (1992); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).

section 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. ... At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.
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> (*Id.* at p. 819.)

These reasons are doubly applicable when the issue is life or death. Where a statute permits a wide range of possible aggravators, as in California, and the prosecutor offers up multiple theories or instances of alleged aggravation, as here, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and did not do and (b) that the jurors, not being forced to

do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne, supra*, 4 Cal.4th at p. 79; *People v. Hayes, supra,* 52 Cal.3d at p. 643.) However, *Ring* and *Blakely* make clear that the findings of one or more aggravating circumstances and that the aggravating circumstances outweigh mitigating circumstances are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

F. The Penalty Jury Should Have Been Instructed on the Presumption of Life

In noncapital cases, where only guilt is at issue, the presumption of innocence is a basic component of a fair trial, a core constitutional and adjudicative value that is essential to protect the accused. (*See Estelle v. Williams* (1976) 425 U.S. 501, 503 [96 S.Ct. 1691, 48 L.Ed.2d 126].) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the

presumption of life. (*See* Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing*, 94 Yale L.J. 351 (1984); cf. *Delo v. Lashley* (1983) 507 U.S. 272 [113 S.Ct. 1222, 122 L.Ed.2d 620].)

Appellant acknowledges that without analysis this Court has held that the California and United States Constitutions do not require that the jury must be instructed on the presumption of life. (See, i.e., *People v. Loy* (2011) 52 Cal.4th 46, 78; *People v. Gonzales* (2011) 51 Cal.4th 894, 958; *People v. Rundle* (2008) 43 Cal.4th 76, 199; *People v. Jones* (2003) 29 Cal.4th 1229, 1267.) For the reasons set forth below, the Court's conclusions are unsound and should be reevaluated.

Appellant submits that the trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., 14th Amendment; Cal. Const. art. I, §§ 7 & 15), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const.. 8th and 14th Amendments; Cal. Const. art. I, § 17), and his right to the equal protection of the laws. (U.S. Const., 14th Amendment; Cal. Const., art. I, § 7.)

In *People v. Arias* (1996) 13 Cal.4th 92 (1996), this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law

properly limits death eligibility. (*Id.* at p. 190; see also *People v. Dunkle* (2005) 36 Cal.4th 861, 940.) However, as the other subsections of this argument, as well as Arguments VII and IX, demonstrate, California's death penalty law is remarkably deficient in the protections needed to ensure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally compelled or required.

G. Conclusion

As set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their California constitutional counterparts. Therefore, appellant's death sentence must be reversed.

IX

THE USE OF CALJIC NO. 8.88, DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS, VIOLATED APPELLANT'S FUNDAMENTAL RIGHTS TO A FAIR TRIAL, DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE DETERMINATION OF PENALTY GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

As discussed in Arguments VII and VIII, *supra*, the trial court instructed the jury in the language of CALJIC No. 8.88. (See 4 CT 986; 53 RT 6858-6860.) The use of CALJIC No. 8.88 was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles and was misleading and vague in crucial respects. Whether considered singly or together, the flaws violated appellant's fundamental rights to due process, fair trial by jury, and a reliable penalty determination guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and require reversal of the sentence. (See, e.g., *Mills v. Maryland, supra,* 486 U.S. at pp. 383-384.)

Appellant acknowledges that this Court has consistently held that the use of CALJIC No. 8.88 defining the jury's sentencing discretion and its deliberative process does not violate appellant's rights to a fair trial, due process, equal protection, and a reliable penalty determination under the United States Constitution. (See, i.e., *People v. Lee* (2011) 51 Cal.4th 620, 652; *People v. Russell* (2010) 50 Cal.4th 1228, 1272-1273; *People v. Moon* (2005) 37 Cal.4th 1, 42; *People v. Lomax* (2010) 49 Cal.4th 530, 595.) For the reasons set forth below,

however, the Court's analysis and reasoning are unsound and should be reevaluated.

A. The Use CALJIC No. 8.88 Caused the Jury's Penalty Choice to Turn on an Impermissibly Vague and Ambiguous Standard that Failed to Provide Adequate Guidance

Under CALJIC No. 8.88, the decision to impose a death sentence on appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (1 CT 986; 53 RT 6860.) The words "so substantial," however, provided the jurors with no guidance as to "what they have to find in order to impose the death penalty . . . ." (*Maynard v. Cartwright, supra,* 486 U.S. at pp. 361-362.) The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless, and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia* . . . ." (*Id.* at p. 362.) Indeed, CALJIC No. 8.88 here permitted the jury in its discretion to create its own capital sentencing rules untethered to a statutory base or constitutional mandate.

It is noteworthy that the Supreme Court of Georgia has found that the word "substantial" causes vagueness problems when used to describe the type of prior

criminal history jurors may consider as an aggravating circumstance in a capital case. Indeed, the Georgia Supreme Court in *Arnold v. State* (1976) 236 Ga. 534 [224 S.E.2d 386], held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391; see also *Zant v. Stephens* (1983) 462 U.S. 862, 867, fn. 5.) As to the word "substantial," the *Arnold* court stressed:

> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result.
>
> (*Arnold v. State, supra*, 224 S.E.2d at p. 392 [footnote omitted].)[50]

Appellant acknowledges that this Court has distinguished *Arnold* based on the "context of its usage." (*People v. Foster* (2010) 50 Cal.4th 1301, 1366; *People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14; see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 123, 124.) Nevertheless, the Court's dismissal of *Arnold* does not specify what those "differences" are, or how they impact the

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[50]/ The United States Supreme Court has specifically recognized the portion of the *Arnold* decision that invalidated the "substantial history" factor on vagueness grounds. (*Gregg v. Georgia, supra*, 428 U.S. at p. 202.)

validity of *Arnold*'s analysis. Of course, *Foster, Breaux, Arnold*, and this case, as all cases, are factually different; their differences are not constitutionally significant, and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold v. State, supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance that used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.*, italics added), while the instruction here, as the one in *Foster* and *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while *Arnold* and the California cases using CALJIC No. 8.88 are indeed different, they have at least one common characteristic -- they all involve penalty-phase instructions that fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)

Moreover, the Court in *Foster* and *Breaux*, for example, failed to consider that the use of the "substantial" language in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. Even this Court's continuing explanation and approval of CALJIC No. 8.88 in such cases as *People v. Smith* (2005) 35 Cal.4th 334 that the instruction does not compel the jury to find that death is the only is the only appropriate sentence if aggravation is so "substantial" in comparison with the

mitigating circumstances, the "substantial" language used in CALJIC No. 8.88, or words of similar breadth, do not serve to avoid "reducing the penalty decision to a mere mechanical calculation." (*Id.* at p. 370.) Indeed, there is nothing about the language of CALJIC No. 8.88 that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black* (1992) 503 U.S. 222 [112 S.Ct. 1130, 117 L.Ed.2d 367].) Because the instruction rendered the penalty determination unreliable (U.S. Const., 8th & 14th Amendments), the judgment of death must be reversed.

B. CALJIC No. 8.88 Failed to Inform the Jurors that the Central Determination is Whether the Death Penalty is the Appropriate Punishment, Not Simply an Authorized Penalty

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown* (1985) 40 Cal.3d 512, 541, *rev'd on other grounds*, *California v. Brown* (1987) 479 U.S. 538 [107 S.Ct. 837, 93 L.Ed.2d 934] [jurors not required to vote for the death penalty unless, on weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion* (1995) 9 Cal.4th 879, 948; *People*

v. Milner (1988) 45 Cal.3d 227, 256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962, cert. den. 535 U.S. 935.) Nevertheless, CALJIC No. 8.88 did not make this standard of appropriateness clear. By telling jurors that they could return a judgment of death if the aggravating evidence "warrants death instead of life without parole" (1 CT 986; 53 RT 6860), the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

The Court has upheld the "warranted" language of CALJIC No. 8.88 (see, e.g., *People v. Nelson* (2011) 51 Cal.4th 198, 217; *People v. Bramit* (2009) 46 Cal.4th 1221, 1249) and that the pattern instruction "adequately explains the circumstances in which the jury may return a verdict of death." (*People v. Lewis* (2009) 46 Cal.4th 1255, 1315; *People v. Moon* (2005) 37 Cal.4th 1, 42-44.) In so doing, the Court has failed to consider that whether death is "warranted" is far different in meaning and significance than whether death is the "appropriate" penalty. These two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" to mean "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warranted" might mean simply that the jurors found, on weighing the relevant factors, that such a sentence

was permitted. That is a far different than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the United States Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307 [110 S.Ct. 1078, 108 L.Ed.2d 255]), the punishment must fit the offender and the offense; i.e., it must be appropriate.

To say that death must be warranted is essentially to return to the standards of the phase of the capital trial in which death eligibility is established. Jurors decide whether death is "warranted" by finding, in the first phase of the trial, the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) Thus, to say that death may be warranted or authorized is not the same as to say that it is also appropriate. Although this Court has previously ruled otherwise (see *People v. Breaux, supra,* 1 Cal.4th at p. 316 [rejecting claim that the term "warrants" is too overbroad and permissive]; *People v. Griffin* (2004) 33 Cal.4th 536, 593 [rejecting Eighth and Fourteenth Amendment vagueness attacks based on asserted operation of the word "warrants"]), use of the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction

between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The instructional error involved in using the term "warrants" in CALJIC No. 8.88 here was not cured by the trial court's reference to a "justified and appropriate" penalty. (1 CT 986; 53 RT 6859-6860 ["In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances"].) That instruction did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the "justified and appropriate" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence appellant to death if they found it "warrant[ed]." Indeed, by referring to the "totality" of the circumstances, the instruction also conflicted with other instructions which sought to inform the jury that even in the absence of mitigating circumstances the death penalty would not necessarily be appropriate. (1 CT 986; 53 RT 6859-6860.)

This crucial sentencing instruction violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining, as required by state law, that death was the appropriate penalty. The death judgment is thus constitutionally unreliable (U.S. Const., 8th & 14th

Amends.), denies due process (U.S. Const., 5th & 14th Amends.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175]), and must be reversed.

C. CALJIC No. 8.88 Failed to Inform the Jurors that if They Determined that Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Section 190.3 directs, that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (§ 190.3.)[51] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 376-377 [110 S.Ct. 1190, 108 L.Ed.2d 316]; see also *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [96 S.Ct. 2978, 49 L.Ed.2d 944] [in 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] (plurality opinion of Stewart, Powell, and Stevens,

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[51]/ The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed the jury regarding its role, and disallowed it. (See *People v. Brown, supra,* 40 Cal.3d at p. 544, fn. 17.)

JJ.); *Jurek v. Texas* (1976) 428 U.S. 262, 272 [96 S.Ct. 2950, 49 L.Ed.2d 929] [individualized sentencing determination required by Eighth Amendment].)

This mandatory statutory language, however, was not included in the text of CALJIC No. 8.88 as read to the jury in this case. This instruction only addresses directly the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. (1 CT 986; 53 RT 6860.) While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances. By failing to conform to the specific mandate of section 190.3, the instruction given to appellant's jury violated the Fourteenth Amendment to the United States Constitution. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281 [113 S.Ct. 2078, 124 L.Ed.2d 182] (italics in original).)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed

only if the jury found that the aggravating circumstances outweighed [the] mitigating." (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and appellant respectfully offers that the Court's ruling conflicts with numerous other opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955)133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310 [15 S.Ct. 610, 39 L.Ed.709].)[52]

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[52]/ There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6 [93 S.Ct. 2208, 37 L.Ed.2d 82], the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14, 22 [87 S.Ct. 1920, 18 L.Ed.2d 1019]; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344 [83 S.Ct. 792, 9 L.Ed.2d 799]; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the due process clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that in the absence of a strong showing of state interests to the contrary, "there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon, supra,* 412 U.S. at p. 474.) Though *Wardius*

The Court's decision in *People v. Moore* (1954) 43 Cal.2d 517 is instructive on this point. There, the Court stated the following about a set of one-sided instructions on self-defense:

> It is true that the . . . instructions . . . do not incorrectly state the law . . . , but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. ... There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.
>
> (*Id.* at pp. 526-527 [*internal quotation marks omitted*].)

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming it was a correct statement of law, the instruction at issue here stated only the conditions under which a death verdict could be returned and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any

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involved reciprocal discovery rights, the same principle should apply to jury instructions.

defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in appellant's case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401 [105 S.Ct. 830, 83 L.Ed.2d 821]; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) Moreover, CALJIC No. 8.88 is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the equal protection clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants -- if not more so -- to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (See U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217 [102 S.Ct. 2382, 72 L.Ed.2d 786] ["it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest."].)

Moreover, the slighting of a defense theory in instructions to the jury has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted,

Zemina v. Solem (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States* (1972) 409 U.S. 100, 101-104 [93 S.Ct. 354, 34 L.Ed.2d 335] [disapproving instruction placing unauthorized burden on defense].) Accordingly, the defective CALJIC No. 8.88 instruction violated appellant's Sixth Amendment rights as well. For these further reasons, reversal of his death sentence is required.

D. Conclusion

As set forth above, the trial court's main sentencing instruction, CALJIC No. 8.88, was impermissibly vague in crucial respects; denied appellant fundamental rights to a fair penalty trial by jury; failed to comply with the requirements of the due process and equal protection; and failed to assure a reliable determination of penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Therefore, appellant's sentence of death must be reversed.

X

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW, WHICH IS BINDING ON THIS COURT, AS WELL AS THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

To the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, and because international treaties ratified by the United States are binding on state courts, the death penalty as administered in California, and specifically in appellant's case, is invalid.

Appellant acknowledges that the Court has repeatedly rejected arguments that the use of the death penalty violates international law, evolving international norms, and the Eighth Amendment to the United States Constitution. (See, i.e., *People v. Nelson* (2011) 51 Cal.4th 198, 227; *People v. Lee* (2011) 51 Cal.4th 620, 654; *People v. Thomas* (2011) 51 Cal.4th 449, 507; *People v. Moore* (2011) 51 Cal.4th 386, 417; *People v. Perry* (2006) 38 Cal.4th 302, 322.) For the reasons set forth below, the Court's analysis and reasoning are unsound and should be reevaluated.

The Eighth Amendment, applicable to the states through the Fourteenth Amendment, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Amendment proscribes "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." (*Atkins v. Virginia* (2002) 536 U.S. 304, 311,

fn. 7 [122 S.Ct. 2242, 153 L.Ed.2d 335].) The High Court explained in *Atkins* (*id.* at p. 311) that the Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic "precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense." (*Weems v. United States* (1910) 217 U.S. 349, 367 [30 S.Ct. 544, 54 L.Ed. 793].)

Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted but by the norms that "currently prevail." (*Atkins v. Virginia, supra*, 536 U.S. at p. 311; see also *Sosa v. Alvarez-Machain* (2004) 541 U.S. 692, 729 [124 S.Ct. 2739, 159 L.Ed.2d 718] ["For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."].) The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100-101 [78 S.Ct. 590, 2 L.Ed.2d 630] (plurality opinion).) This is because "[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." (*Furman v. Georgia* (1972) 408 U.S. 238, 382 [92 S.Ct. 2726, 33 L.Ed.2d 346] (Burger, C. J., dissenting).)

Currently, in American jurisprudence, there is an ongoing debate on the propriety and desirability of United States courts learning from what foreign courts are doing in general and especially in constitutional matters. (See generally David J. Seipp, *Our Law, Their Law, History, and the Citation of Foreign Law*, 86

B.U.L.Rev. 1417 (2006) [describing this debate]; Justices Antonin Scalia & Stephen Breyer, *Discussion at the American University Washington College of Law: Constitutional Relevance of Foreign Court Decisions* (Jan. 13, 2005) [engaging in this debate]; Steven G. Calabresi, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 Ohio St. L.J. 1283, 1288-97 (2004) [comparing expository, empirical, and substantive uses of foreign law and approving of the first two while disapproving of the third].)

In addition, recent developments in Eighth Amendment jurisprudence and evolving standards of decency, however, undermine the Court's conclusions and support appellant's claims. Appellant notes the following, significant developments in the evolution of international norms in respect to the death penalty:

1. The United States Supreme Court affirmed that it has looked and will continued to look to the laws of other countries and to international authorities as instructive for its interpretations of the Eighth Amendment's prohibition of cruel and unusual punishments and in determining whether a punishment is cruel and unusual. (*Roper v. Simmons* (2005) 543 U.S. 551, 567, 575-577 [125 S.Ct. 1183, 161 L.Ed.2d 1].)

2. Every nation on the European continent has now abolished the death penalty in law except for the Russian Federation, which is "abolitionist in practice." (Amnesty International, *Abolitionist and Retentionist Countries* [as

updated], at http://web//amnesty.org.

3. The United States Constitution and Supreme Court jurisprudence recognize that international law is part of the law of this land, and that international treaties have supremacy in this country. (U.S. Const., art. VI, § 2.) Customary international law, or the "law of nations," is equated with federal common law. (Restatement Third of the Foreign Relations Law of the United States (1987), pp. 145, 1058; U.S. Const., art. I, § 8 [Congress has authority to define offenses against the law of nations].)

This Court has the authority and obligation to consider possible violations of international law, even where the conduct complained of is not currently a violation of domestic law. Most particularly, this Court should enforce international law where that law provides more protections for individuals than does domestic law.

Evolving standards of decency embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule. Punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution. (See *Harmelin v. Michigan* (1991) 501 U.S. 957, 999 [111 S.Ct. 2680, 115 L.Ed.2d 836] (Kennedy, J., concurring in part and concurring in judgment).) The natural response to heinous crimes is a "thirst for vengeance." (*Baze v. Rees* (2008) 553 U.S. 35 [128 S.Ct. 1520, 1548, 170 L.Ed.2d 420] (Stevens, J., concurring opn.).) When the law punishes by death, the law descends into brutality, transgressing the Eighth Amendment proscription

against cruel and unusual punishment, applicable to the states through the Due Process Clause of the Fourteenth Amendment (see *Robinson v. California* (1962) 370 U.S. 660, 666 [82 S.Ct. 1417, 8 L.Ed.2d 758]); constitutes "gratuitous infliction of suffering" (*Gregg v. Georgia* (1976) 428 U.S. 153, 183 [96 S.Ct. 2909, 49 L.Ed.2d 859]); and violates the commitment to decency and restraint embodied in the California and United States Constitutions.

Appellant, therefore, asks the Court to reconsider its position on this issue and, accordingly, to reverse the judgment of death imposed on appellant in this case as incompatible with current and evolving standards of international law as applied to or as binding on the laws of the United States and those of the several states, including California, and as contrary to the Eighth Amendment to the United States Constitution.

XI

THE CUMULATIVE EFFECT OF ERRORS UNDERMINED THE FUNDAMENTAL FAIRNESS OF TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Even if no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [94 S.Ct. 1868, 40 L.Ed.2d 431]; [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764 [107 S.Ct. 3102, 97 L.Ed.2d 618].) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.

Where the Court finds more than one error, it must carefully review not only the impact of each individual error, but the combined impact of all errors found. (See, e.g., *People v. Catlin* (2001) 26 Cal.4th 81, 180; *People v. Jones* (2003) 29 Cal.4th 1229, 1268; see also *United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381 [cautioning against a "balkanized" harmless error analytical approach].)

The guilt phase errors included the trial court's error in denying appellant's motion for a change of venue (Argument I); the trial court's conflict of interest involving his close and professional relationship with the prosecutor, and the consequent appearance of bias and actual bias, required the trial judge to disqualify himself (Argument II); insufficiency of the evidence to support appellant's conviction of carjacking and to support first-degree felony murder predicated on the commission or attempted commission of a carjacking (Argument III); and insufficiency of the evidence to support the special circumstance of carjacking-murder (Argument IV). The cumulative effect of these guilt-phase errors infected appellant's trial so as to render the proceedings fundamentally unfair and a denial of due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643), and appellant's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill* 1(1998) 17 Cal.4th 800, 844-845 [reversing guilt and penalty phases of capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative

error].)

The death judgment must also be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase]; *People v. Brown, supra,* 46 Cal.3d at p. 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase]; see also *Taylor v. Kentucky* (1978) 436 U.S. 478, 487-488 [98 S.Ct. 1930, 56 L.Ed.2d 468] [reviewing court is obliged to consider cumulative effect of multiple errors on sentencing outcome].)

The errors committed at the penalty phase trial of appellant's case included the trial court's error in failing to instruct the jury on the appropriate use of victim-impact evidence (Argument V); the trial court's error in permitting the state to retry appellant's prior manslaughter conviction and elevate the previously adjudicated crime to murder in violation of the principles of collateral estoppel and res judicata, the constitutional proscription against double jeopardy, and appellant's rights to due process, fair trial, and a reliable penalty determination (Argument VI); the trial court's erroneous instructions on the mitigating and aggravating factors in section 190.3 and the unconstitutional application of these sentencing factors at appellant's penalty trial (Argument VII); the

unconstitutionality of section 190.3 and implementing jury instructions owing to the failure to set out the appropriate burden of proof, as well as other constitutional infirmities (Argument VIII); the use of CALJIC No. 8.88 defining the scope of the jury's sentencing discretion and the nature of its deliberative process additionally contain other constitutional defects (Argument IX); and the fact that appellant's death sentence violates international law (Argument X).

The combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence. The cumulative effect of these errors infected appellant's trial and resulted in a conviction fundamentally and inherently unfair, a denial of due process, and a constitutionally unreliable judgment of death. (U.S. Const., 5th, 6th, 8th & 14th Amendments; Cal. Const. art. I, §§ 7 & 15.)

While appellant did not expect a perfect trial, he did expect, and was entitled to, a fair one. (*Schneble v. Florida* (1972) 405 U.S. 427, 432 [92 S.Ct. 1056, 31 L.Ed.2d 340]; *Lutwak v. United States* (1953) 344 U.S. 604, 619 [73 S.Ct. 481, 97 L.Ed.2d 593].) Accordingly, the combined and cumulative impact of the various errors in this case requires reversal of appellant's conviction on all counts, and reversal of the special circumstances. (*People v. Hill, supra*, 17 Cal.4th at p. 847.) Reversal of appellant's death judgment is also mandated precisely because it cannot be shown that the penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393,

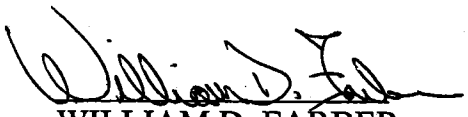
399 [107 S.Ct. 1821, 95 L.Ed.2d 347]; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8 [106 S.Ct. 1669, 90 L.Ed.2d 1]; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341 [105 S.Ct. 2633, 86 L.Ed.2d 231].)

CONCLUSION

By reason of the foregoing, appellant Jerrold Johnson respectfully requests that the judgment of conviction on all counts, the special circumstances, and the sentence of death in this case be reversed.

DATED: May 25, 2012.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I certify that the attached Appellant's Opening Brief uses a 13-point Times New Roman font and contains 77,965 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: May 25, 2012.

WILLIAM D. FARBER

PROOF OF SERVICE

RE: **PEOPLE v. JOHNSON**
Supreme Court No. S093235

I, WILLIAM D. FARBER, declare under penalty of perjury under the laws of the State of California that I am counsel of record for defendant and appellant **Jerrold E. Johnson** in this case, and further that my business address is William D. Farber, Attorney at Law, 369-B Third Street # 164, San Rafael, CA 94901. On May 25, 2012, I served **APPELLANT'S OPENING BRIEF**, by depositing each copy in a sealed envelope with postage thereon fully prepaid, in the United States Postal Service, at Henderson, NV, addressed respectively as follows:

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