IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

-vs-

GARY GALEN BRENTS,

Defendant and Appellant.

Appeal No. S093754

Sup. Ct. No. 96NF2113

APPEAL FROM JUDGMENT OF

THE SUPERIOR COURT OF ORANGE COUNTY

Honorable John J. Ryan, Judge Presiding

APPELLANT'S OPENING BRIEF

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STATEMENT OF APPEALABILITY

This appeal is from a final judgment following a jury trial, and is authorized by the provisions of Penal Code[1] section 1237.

STATEMENT OF CASE

On May 8, 2000, a first amended information was filed against appellant, Gary Brents, alleging one count of first degree murder (Pen. Code, § 187, subd. (a)), one count of kidnaping (Pen. Code, § 207, subd. (a)), and one count of assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)). (2 CT[2] 577-579.) The first amended

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[1] Unless otherwise noted, all further statutory reference is to the Penal Code.

[2] In this brief, appellant will refer to the clerk's transcript with a "CT" cite, and to the reporter's transcript with a "RT" cite. The number preceding that cite refers to the volume number (i.e., "2 CT").

information further alleged that appellant had committed the murder while he was engaged in the commission of a kidnaping offense (Pen. Code, § 190.2, subd. (a)(17)(B)), that the murder was intentional and involved the infliction of torture (Pen. Code, § 190.2, subd. (a)(18)), that appellant had three prior serious felony convictions within the meaning of the three strikes laws (Pen. Code, §§ 667, subd. (b) through (e), and 1170.12) and the five year enhancement for such prior convictions (Pen. Code, § 667, subd. (a)), and that appellant had served five prior prison terms within the meaning of section 667.5, subdivision (b). (*Ibid.*)

On May 8, 2000, appellant was arraigned on the first amended information, pleaded not guilty to the charges pending against him, and denied the special allegations. (2 CT 581-582.)

On June 20, 2000, following an eighteen day guilt phase jury trial (2 CT 688-689, 696-704, 729-734, 740-746, 749-751, 766-788; 3 CT 792-794, 848-850), appellant was found guilty of one count of first degree murder, one count of kidnaping, and one count of assault by means of force likely to produce great bodily injury. (3 CT 848-850.) The jury further found that the murder had been committed while appellant was engaged in the commission of a kidnaping offense. (*Ibid.*) The jury was unable to reach a verdict on the torture special circumstance, the trial court declared a mistrial on that allegation, and that allegation was later dismissed by the prosecution. (3 CT 848-850; 12 RT 2823-2824.)

On June 20, 2000, appellant waived his right to a jury trial on the prior conviction allegations. (3 CT 849-850.)

STATEMENT OF FACTS

I. GUILT PHASE - Prosecution

A. Background Information

In the beginning of October of 1995, appellant rented a room at the Travel Lodge motel in Anaheim for a few nights. (6 RT 1493-1497; 10 RT 2373-2374.) Michelle Savidan (hereinafter "Michelle") and Abigal Diaz (hereinafter "Abby") were acquainted with appellant, and spent time in that motel room. (6 RT 1394-1396, 1493-1497.) Victoria Myers (hereinafter "Vicki") and Anna Sara Uele (hereinafter "Sara") were friends with Michelle and Abby, and were also acquainted with appellant. (6 RT 1489-1493; 7 RT 1631-1634; 9 RT 1964-1967.) Vicki had a girlfriend named Jasmine,[3] and Jasmine worked as a prostitute in Anaheim. (7 RT 1688-1690.) Kelly Gordon (the "victim") was also a prostitute on the streets of Anaheim, and was acquainted with appellant, allegedly working for him. (6 RT 1399-1400; 7 RT 1552-1565.)

During this time, appellant had an arrangement with Michelle, whereby he would front her money to purchase controlled substances, and she would sell them at a profit. (6 RT 1388-1404.) Michelle would then give the money to appellant in exchange for a place to stay (i.e., in the motel room). (6 RT 1388-1404; 7 RT 1542-1550) Sara had a light blue Cadillac that the owner, Willie Keller, was letting her use in exchange for controlled substances. (7 RT 1634-1636; 9 RT 1964-1967, 1972-1974; 10 RT 2351-2353.)

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[3] Jasmine passed away prior to trial. (8 RT 1764.)

B. Kelly's Conflict With Appellant And Michelle

On October 3, 1995, Michelle returned to the Travel Lodge motel room with a quarter of an ounce of methamphetamine that she had purchased with money fronted to her by appellant, and Abby, Kelly and appellant were in the motel room. (6 RT 1394-1396.) Michelle was planning to sell all of the methamphetamine herself, but appellant gave Kelly two grams of the methamphetamine to sell. (6 RT 1397-1404.) That night, at about 10:30 in the evening, appellant and Kelly were stopped by Officer Chuck Presley in a gold car in Anaheim on a street where prostitutes were known to frequent. (9 RT 2160-2164, 2172-2176.) At that time, Kelly's thumb print was placed on a field identification card. (RT 2172-2176.)

On October 4, 1995, in the evening, appellant, Michelle, and Kelly were in the motel room at the Travel Lodge. (6 RT 1403-1405.) Michelle had sold the methamphetamine that she had to sell, and had given the money she received to appellant. (6 RT 1403-1405.) However, Kelly had not given any money to appellant, and she no longer had the methamphetamine. (*Ibid.*) Appellant and Michelle were angry, because it appeared that Kelly had used the methamphetamine rather than selling it, and that they might be out about one hundred dollars. (6 RT 1405-1410.)

Someone from the motel room paged Vicki, who was with Sara and Jasmine in the blue Cadillac. (7 RT 1636-1640.) Sara returned the page, and she spoke first to Michelle, and then to appellant. (9 RT 1969-1971.) They wanted her to come to the motel room, and she agreed to do so. (7 RT 1639-1640; 9 RT 1969-1971.)

and got Michelle, and they also got in the Cadillac.[5] (6 RT 1407-1410.) Sara was driving, Kelly was in the middle in the front seat, Michelle was in the front passenger seat, and Vicki, appellant and Jasmine were in the back seat. (6 RT 1410-1412; 7 RT 1643-1646; 9 RT 1983-1987.) Sara drove next door to the parking lot of a closed business, and Michelle starting asking Kelly about the money. (6 RT 1413-1417; 7 RT 1642-1646.) Kelly said she could get the money, but when Michelle asked her where, she did not respond with a location. (6 RT 1413-1417.)

At that point, Michelle hit Kelly in the face, and either Michelle or Sara pulled Kelly out of the car. (6 RT 1417-1420, 1469-1470; 7 RT 1643-1647; 9 RT 1983-1987.) Sara, Michelle, Jasmine, and Vicki then hit and kicked Kelly numerous times. (6 RT 1419-1425, 1463-1465; 7 RT 1645-1649; 9 RT 1983-1987.) Kelly was lying on the ground, and was bleeding from her nose and mouth. (*Ibid.*)

At this time, appellant pulled Michelle aside, and told her that he thought Kelly was a snitch and wanted to take her out (i.e., kill her). (6 RT 1420-1423.) Michelle testified that she tried to talk him out of it, but he kept insisting that she was a snitch. (6 RT 1420-1422.) Appellant then gave her the motel room key, and told her to go back to the room, which she did. (6 RT 1420-1423, 1502-1503; 7 RT 1653.)

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[5] Vicki stated that appellant was not with them initially, but showed up after Kelly had been beaten up. (7 RT 1642-1650.) However, both Michelle and Sara testified that he was with them all the time. (6 RT 1410-1412; 9 RT 1978-1983.)

D. Assault By Appellant

Everyone but Michelle then got back into the Cadillac in the same positions. (6 RT 1480; 7 RT 1648-1650; 9 RT 1983-1987.) Appellant, who was in the middle in the back seat right behind Kelly, put a plastic bag over Kelly's head and tightened it around her head, and Kelly ripped the bag off her head. (7 RT 1648-1652, 1725-1730; 9 RT 1987-1989, 2034-2036.) Appellant then put his arm around Kelly's neck from behind, and choked her. (7 RT 1648-1652, 1725-1732; 9 RT 1992-1999, 2034-2036.) Appellant told Sara to opened the trunk of the Cadillac, which she did from inside the Cadillac, and appellant pulled Kelly out of the Cadillac. (9 RT 1989-1991.)

Appellant then put Kelly in the trunk of the Cadillac. (7 RT 1649-1652.) Appellant took off his rings, and hit Kelly twice in the face. (9 RT 1992-1999.) Appellant shut the lid to the trunk, and Kelly was pounding from inside the trunk. (9 RT 1999-2000.) Appellant told Sara that he put Kelly in the trunk because "[s]he was going to tell" on them. (9 RT 1999-2000.) Appellant told Vicki that "we got to take her out," because she would tell about the beating and the drugs. (9 RT 1657.) Sara gave the keys to the Cadillac to appellant. (9 RT 2002-2003, 2047.)

Appellant went back to the motel room, washed his hands, and left again. (6 RT 1423-1426, 1503-1504.) Sara, Vicki and Jasmine also went back to the motel room, but soon left. (7 RT 1669-1670; 9 RT 2002-2003.) Michelle and Abby left the motel room soon after the others. (6 RT 1505-1507.) Sara and Vicki got a ride to Sharon Reed's house in Fullerton, and Misty Sinks was at Reed's house. (7 RT 1669-1672; 9 RT 2002-2003.) Sara told Sinks that she

had beaten up a girl because of a debt, and that appellant had put her in the trunk of a Cadillac and drove off. (7 RT 1670-1672; 9 RT 2068-2079.)

Michelle and Abby went to the Stage Stop, and, at some point, appellant arrived at that location. (6 RT 1505-1507.) Appellant told Michelle and Abby that he had taken her to the hospital, and that she was a snitch on whom he had the paperwork. (6 RT 1429-1432, 1508-1511.) A few minutes later, in private, appellant asked Michelle whether a fire would reach inside a trunk if he poured gasoline on the top of the trunk. (6 RT 1429-1432.)

E. Discovery Of The Body

On October 4, 1995, at about 10:48 in the evening, Ken Salmons responded to a report of a burning vehicle in an isolate area of Carson, which was about sixteen miles from the Travel Lodge. (6 RT 1343-1344; 10 RT 2390-2392.) When he arrived, he discovered a small fire in the trunk area of a Cadillac, and after the fire was extinguished, he discovered a woman's body, who was later identified as Kelly, in the trunk. (6 RT 1349-1352; 8 RT 1811; 10 RT 2370-2372.) The keys to the Cadillac were on the dashboard, and there was the smell of gasoline in and around the vehicle. (6 RT 1347-1348, 1352; 9 RT 2101-2105.) There was a blue plastic container on the street behind the car, and it had the smell of gasoline. (6 RT 1364; 9 RT 2099-2101.) A piece of carpet from the trunk was collected and tested, and it was found to have gasoline residue on it. (9 RT 2094-2098, 2182-2186.) Terry Danielson, an arson expert, later opined that gasoline had been poured in the trunk, and on top of the trunk, and ignited. (6 RT 1372-1374.)

A canvas tennis shoe was found in the trunk of the Cadillac, and a

matching tennis shoe was found on the floorboard near the front passenger seat. (9 RT 2094-2101.) There was a brown bag found under the seat, and it had a print on it that belonged to a person named Jeffrey Fitzgerald. (9 RT 2154-2158; 10 RT 2423-2425.) Prints were also found on the exterior of the Cadillac (i.e., on the fender, and outside the driver's side door), but they could not be matched to anyone involved in this case. (9 RT 2196-2200; 10 RT 2423-2425.)

Four potential blood stains were collected from the Cadillac; one from the front passenger seat, two from the rear passenger door, and one from the left rear seat. (8 RT 1829-1832, 1859-1964.) Three of these stains were consistent with Kelly's DNA, and the fourth tested negative for blood. (*Ibid.*) DNA was found on a cigarette filter collected from the Cadillac, and Sara could not be excluded as the donor of that DNA, but the other persons connected to this case were excluded as donors. (8 RT 1829-1832, 1849-1859.)

At trial, the prosecution presented evidence that appellant had previously lived about three miles from where the burning vehicle was found in Carson. (10 RT 2366-2369, 2393-2397.)

F. Autopsy

On October 8, 1995, Thomas Gill, a forensic pathologist performed an autopsy on Kelly at the central morgue facility in Los Angeles. (8 RT 1776-1777.) Gill found second and third degree burns on seventy to eighty percent of Kelly's body. (8 RT 1777-1778.) There were third degree burns on her neck, shoulder, and chest area; and there were spots on her legs that were consistent with gasoline having been poured on them. (8 RT 1786-1791.) Gill also found

blood coming from Kelly's nose, and internal head injuries consistent with blunt force trauma to the head. (8 RT 1781-1783, 1799-1801.)

Gill found no external or internal injuries to the neck that would show that Kelly had been strangled; however, Gill opined that it was still possible that she had been choked. (8 RT 1803-1806, 1813-1822.) Gill found soot in Kelly's lungs, larynx, and trachea, and he opined that this showed that she was still alive while the fire was burning. (8 RT 1807-1811.)

G. Appellant's Statement And Later Conduct

On November 23, 1995, appellant was interviewed by Officer Stephen Davis. (10 RT 2378-2379.) This interview was tape recorded, and the recording was played for the jury. (10 RT 2378-2379, 2386-2387.) During this interview, appellant denied involvement in Kelly's murder. (4 CT 1270-1301.) Appellant recognized the girl in the picture shown to him as a prostitute named Kelly, and stated that she had asked him for protection, but indicated that he did not have a close relationship with her. (*Ibid.*)

On July 10, 1996, Officer Julian Harvey was involved in the search of a room at the National Inn in Anaheim. (10 RT 2399–2406.) In that motel room, the police found a large envelope addressed to Iris Hernandez, Abby's mother, with four smaller envelopes inside of it containing letters written by appellant to Abby, Michelle, Sara and Vicki with his fingerprints on them. (10 RT 2364-2366, 2399-2412, 2417-2423.) In these letters, appellant stated that he did not want to go to court on a murder that he did not commit, and that if questioned by the police, they should simply state that they did not remember anything. (2 CT 634-637.) In addition, in the letters to Michelle and Sara,

appellant stated that, with regards to an alibi, that they should say that they kicked it together most of the night. (2 CT 634, 637.) These letters were admitted into evidence, and copies of them were given to the jury. (10 RT 2433-2435; Peo. exhs. 43A through 43E.)

In early 1999, while appellant was on a jail bus going to court on this case, he showed pictures of four women to Sandra Floyd. (9 RT 2203-2214; Peo. exhs. 41 & 42.) Floyd originally told Edward Berakovick, a district attorney investigator, that appellant had stated that they were snitches, and to hurt them. (9 RT 2223-2226.) However, at trial, Floyd testified appellant had not made any threats to the women. (9 RT 2213-2214.)

On June 30, 1999, Officer Beverly Lumm searched appellant's jail cell, and found the pictures of the four women. (9 RT 2210, 2218-2222.)

On May 22, 2000, appellant met Heather Castaneda, another jail inmate, on the jail bus. (10 RT 2242-2248.) Appellant told Castaneda that Sara, who was in the county jail, was a snitch, showed Castaneda paperwork on Sara, and wanted her to get the word out. (*Ibid.*) Appellant later threatened to hurt Castaneda after he learned that she was going to testify in his case. (10 RT 2250-2256.)

II. GUILT PHASE - Defense

Appellant's defense was that he had not been involved in any offenses committed against Kelly, and that the prosecution's evidence was insufficient to establish his guilt of any of these offenses beyond a reasonable doubt. (11 RT 2639-2648, 2656-2703.) Appellant pointed out that the only evidence connecting him to these offenses was the testimony of Michelle, Sara, Vicki

and Abby, who were all close friends and disliked him. (11 RT 2656-2703.) Appellant also noted numerous inconsistencies in their testimony, which indicated that they had gotten together and fabricated a story to tell to the police. (11 RT 2656-2703.)

Appellant further pointed out that there was no physical evidence connecting him to the Cadillac, but that a cigarette butt with Sara's DNA on it that smelled of gasoline was found in the burnt Cadillac. (*Ibid.*) In addition, appellant pointed out that he could not have driven the Cadillac to Carson without someone to drive him back to Anaheim, so there must have been two persons involved in the homicide. (*Ibid.*)

Appellant argued that it was more likely that Michelle was mad at Kelly because appellant was getting her involved in the sale of controlled substances, which was her business, and Michelle decided to beat her up with a little help from her girlfriends. (11 RT 2656-2703.) The beating got out of control to the point that they thought they had killed her, so they put her in the trunk, drove the car to Carson near to where Sara had previously lived, and set the Cadillac on fire to cover up the homicide. (*Ibid.*) In support of this defense, appellant presented evidence that Sara had lived near the area where the Cadillac was found on fire. (11 RT 2577-2581.)

IV. PENALTY PHASE - Prosecution

A. Circumstances Of The Offense

In addition to the circumstances of the offenses introduced at the guilt phase, the prosecution presented victim impact evidence. Specifically, Kelly's brother, mother and step-father testified that, although Kelly had a drug

problem, they will miss her, and Kelly's son will never have a mother. (12 RT 3021-3037.)

B. Other Acts Of Violence

On a day in the summer of 1979, Pamela Lippincott came out of a store, and appellant grabbed her purse, but Lippincott would not let go of the purse. (12 RT 3013-3018.) Appellant slapped Lippincott a couple of times, and dragged her along the asphalt. (*Ibid.*) A person who was with appellant then hit Lippincott, she let go of the purse, and they ran away with it. (*Ibid.*) Lippincott suffered injuries to her arm, shoulder, knee and face. (*Ibid.*)

Sometime in 1984, appellant was in the Los Angeles County jail, and Bradford Miles was also an inmate in that jail. (12 RT 2856-2859.) On a particular day, Miles was attacked by appellant and another inmate, and they stole his property. (12 RT 2864-2873.) In addition, appellant sodomized Miles, and tried to force Miles to orally copulate him. (*Ibid.*)

Sometime in 1991, Lisa Walker met appellant in a bar, and appellant asked her to become one of his prostitutes. (12 RT 2938-2941, 2945-2949.) When Walker refused, appellant hit her with a closed fist, which broke her jaw, and her mouth had to be wired shut for about two months. (*Ibid.*) Appellant threatened to do the same to Vanessa Taylor, Walker's friend, and, a few days later, Taylor stabbed appellant while he was at a pool hall. (12 RT 2941-2944.)

In June of 1996, appellant was in the Orange County jail, and Gary Ahquin was also an inmate in that jail. (12 RT 2909-2926.) On a particular day, Ahquin was in his cell writing a letter, and appellant went into the cell and

struck Ahquin several times, giving him a bloody nose. (12 RT 2918-2926.)

In June of 1999, appellant was in the Orange County jail, and Andrew Lesky was also an inmate in that jail. (12 RT 2836-2845.) On a particular day, appellant tricked Officer David Barr into leaving appellant's left hand uncuffed by stating that he had a fractured wrist. (12 RT 2840-2845.) Appellant then struck Lesky in the head, causing him to fall and suffer an injury. (*Ibid.*)

In July or August of 1999, Officer Barr testified in court concerning the above incident, and saw appellant in court. (12 RT 2845-2846.) At that time, appellant pointed a finger at him, and acted like he was pulling the trigger. (12 RT 2845-2846.)

C. Prior Convictions

In November of 1979, appellant was convicted of attempted grand theft auto. (12 RT 3019-3021; 4 CT 1431-1446.)

In November of 1979, appellant was convicted of the robbery of Pamela Lippincott. (12 RT 3019-3021; 4 CT 1431-1446.)

In February of 1984, appellant was convicted of assault with a deadly weapon. (12 RT 3019-3021; 4 CT 1377-1385.)

In October of 1984, appellant was convicted of the robbery of Bradford Miles. (12 RT 3019-3021; 4 CT 1410-1422.)

In May of 1986, appellant was convicted of possession of heroin. (12 RT 3019-3021; 4 CT 1346-1347.)

In August of 1988, appellant was convicted of possession of cocaine for sale. (12 RT 3019-3021; 4 CT 1314-1320, 1349-1350.)

In June of 1989, appellant was convicted of possession of a firearm by a person previously convicted of a felony. (12 RT 3019-3021; 4 CT 1479-1495.)

In August of 1991, appellant was convicted of possession of marijuana in jail. (12 RT 3019-3021; 4 CT 1302-1310.)

In October of 1992, appellant was convicted of possession of a firearm by a person previously convicted of a felony. (12 RT 3019-3021; 4 CT 1457-1467.)

V. PENALTY PHASE - Defense

Appellant called many of his family members (i.e., an uncle, two aunts, three cousins, two sisters and a brother) to testify on his behalf, and they all testified that he was a very nice person as a young boy. (13 RT 3097-3104, 3114-3120, 3124-3128, 3134-3138, 3156-3168, 3172-03177, 3179-3182, 3184-3198.) Appellant's sister, Karen Brents, also testified that appellant was close with her and her three children. (13 RT 3184-3187.) Appellant's uncle, Wesley Morris, also testified that appellant had given him advice that helped him in his life. (13 RT 3097-3104.)

Further, the testimony of these family members showed that appellant and his immediately family had some difficult times during appellant's childhood. Appellant's mother, Anna Lynn Brents (hereinafter "Anna"), married Ennis Brents (hereinafter "Ennis") in Illinois, and either Ennis or another man was appellant's birth father. (13 RT 3114-3120, 3156-3158.) Ennis died in a car accident when appellant was about six years old, and Anna and her five children, which included appellant, his two older brothers, Raven

and Perry, and his two older sisters, Dana and Karen, moved to Richmond, California and lived with appellant's aunt, Eleanor Blue. (13 RT 3158-3161, 3188-3192.) They lived with Blue for about a year, and during this time, Anna married Frank Cole, who would beat Anna, appellant, and appellant's brothers and sisters. (13 RT 3158-3161.)

Anna and her children moved from Blue's house to Milwaukee, and Cole did not go with them. (13 RT 3134-3138, 3158-3161, 3188-3194.) Then, in about 1970, Anna and her children moved to Compton, California. (*Ibid.*) Anna was a single mother who was raising five children, and she worked hard as a nurse raising her children the best she could until she died in 1981 of lung cancer. (13 RT 3162-3166, 3192-3194.) After Anna died, the RN license that she had worked so hard to obtain arrived in the mail. (13 RT 3192-3194.)

Appellant also called a defense investigator, David Vacca, who had interview Bradford Miles. (13 RT 3104-3107.) Vacca testified that during this interview, Miles stated that the sodomy had not actually occurred. (*Ibid.*)

Appellant then asked the jury to consider, in mitigation, (1) the evidence about his childhood and family background, (2) the fact that the incident that led to Kelly's death had been initiated by Michelle and her friends when they beat up Kelly, and (3) any lingering doubt as to his guilt caused by the limited physical evidence connecting him to the offenses and the numerous inconsistencies in the four women's testimony. (13 RT 3262-3351.) Based on these mitigating circumstances, appellant asked the jury to impose life without the possibility of parole rather than a death sentence. (*Ibid.*)

VI. PRIOR CONVICTION ENHANCEMENTS

A. Prior Serious Felony Convictions

In November of 1979, appellant was convicted of one count of robbery. (4 CT 1431-1446.)

In February of 1984, appellant was convicted of one count of assault with a deadly weapon. (4 CT 1377-1385.)

In October of 1984, appellant was convicted of one count of robbery. (4 CT 1410-1422.)

B. Prior Prison Terms

In May of 1986, appellant was convicted of one count of possession of heroin. (4 CT 1346-1347.) Appellant was sentenced to sixteen months in prison on this conviction. (4 CT 1346.)

In June of 1989, appellant was convicted of one count of possession of a firearm by a person previously convicted of a felony. (4 CT 1479-1495.) Appellant was sentenced to three years in prison on this conviction. (4 CT 1351, 1495.)

In August of 1991, appellant was convicted of one count of possession of marijuana in jail. (4 CT 1302-1310.) Appellant was sentenced to two years in prison on this conviction. (4 CT 1356, 1466.)

In October of 1992, appellant was convicted of one count of possession of a firearm by a person previously convicted of a felony. (4 CT 1457-1467.) Appellant was sentenced to sixteen months in prison on this conviction. (4 CT 1359, 1466.)

SUMMARY OF ARGUMENTS

I. THE KIDNAPPING FELONY MURDER SPECIAL CIRCUMSTANCE MUST BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE THAT THE MURDER WAS COMMITTED IN ORDER TO CARRY OUT OR ADVANCE COMMISSION OF A KIDNAPPING OFFENSE

II. ASSUMING ARGUENDO THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE KIDNAPPING SPECIAL CIRCUMSTANCE, IT MUST STILL BE REVERSED BECAUSE THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED APPELLANT'S RIGHTS UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS WHEN IT GAVE AN INSTRUCTION THAT ERRONEOUSLY DEFINED THE ELEMENTS OF THE KIDNAPPING SPECIAL CIRCUMSTANCE

III. THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED APPELLANT'S RIGHTS UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS WHEN IT ADMITTED HEARSAY STATEMENTS MADE BY SARA TO MISTY SINKS OVER APPELLANT'S OBJECTION UNDER THE PRIOR CONSISTENT STATEMENT EXCEPTION TO THE HEARSAY RULE

IV. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S RIGHTS UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS WHEN IT ADMITTED A GRUESOME PHOTOGRAPH OF THE VICTIM'S BURNT BODY IN THE

TRUNK OF THE CADILLAC

V. APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY EXCUSED FOUR PROSPECTIVE JURORS FOR CAUSE BECAUSE THEY WOULD BE UNABLE TO VOTE FOR DEATH AS THE APPROPRIATE PUNISHMENT DUE TO RECENT EVENTS IN THE NEWS THAT CAUSED THEM TO BE CONCERNED THAT AN INNOCENT PERSON MAY BE EXECUTED, AND THEREBY VIOLATED APPELLANT'S RIGHTS UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

VI. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S RIGHTS UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS WHEN IT DENIED APPELLANT'S MOTION TO IMPANEL A NEW JURY FOR THE PENALTY PHASE OF THE TRIAL AFTER THE JURORS EXPRESSED CONCERN FOR THEIR SECURITY

VII. THE TRIAL COURT VIOLATED THE PROHIBITION AGAINST MULTIPLES SENTENCES FOR A SINGLE ACT CONTAINED IN SECTION 654, AS WELL AS APPELLANT'S RIGHTS UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS WHEN IT IMPOSED SENTENCE ON BOTH THE MURDER AND FELONY ASSAULT CONVICTIONS

VIII CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S

TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

IX. THE TRIAL COURT'S MULTIPLE ERRORS CONSIDERED TOGETHER DENIED APPELLANT DUE PROCESS AND A FAIR TRIAL UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

DISCUSSION

I

THE KIDNAPPING FELONY MURDER SPECIAL CIRCUMSTANCE MUST BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE THAT THE MURDER WAS COMMITTED IN ORDER TO CARRY OUT OR ADVANCE COMMISSION OF A KIDNAPPING OFFENSE

A. Introduction

Because there was insufficient evidence from which the jury could find beyond a reasonable doubt that the murder was committed in order to carry out or advance the commission of a kidnapping offense, imposition of a sentence of death or life without the possibility of parole based on the kidnapping felony murder special circumstance violated appellant's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, his analogous rights under the California Constitution, and his rights under state law, including, but not limited to, his rights to due process of law and a fair trial, to trial by jury, to a reliable determination of the capital charges against him, and to a fair and reliable capital sentencing determination.

B. Factual Background

As referenced above, the first amended information charged appellant with counts of first degree murder and kidnapping, and alleged that the first degree murder offense had been committed while appellant was engaged in the commission of a kidnapping offense within the meaning of the section 190.2, subdivision (a)(17)(B) kidnapping felony murder special circumstance. (2 CT 577-579.) At the time of the victim's death in 1995, this special circumstance applied where the murder was committed while the defendant was engaged *in*

the commission of a kidnapping offense, which meant that the murder was committed in order to carry out or advance that independent felonious purpose (i.e., commission of a kidnapping offense), as opposed to the kidnapping being merely incidental to the commission of the murder.[6] (*People v. Navarette* (2003) 30 Cal.4th 458, 505; *People v. Riel* (2000) 22 Cal.4th 1153, 1201; *People v. Green* (1980) 27 Cal.3d 1, 59-62, overruled on other grounds by *People v. Hall* (1986) 41 Cal.3d 826, 734, fn. 3; *Ario v. Superior Court* (1981) 124 Cal.App.3d 285, 287-290.)

At trial, the prosecution's evidence indicated that, on the night of the homicide, Michelle, Sara, Vicki, Jasmine, Kelly and appellant were in a motel room at the Travel Lodge, and Michelle and appellant were mad at Kelly because they had given her one hundred dollars worth methamphetamine to sell for them, but she did not have either the drugs or the money. (6 RT 1403-1410.) Michelle, Sara, Vicki, Jasmine, Kelly, and appellant left the motel room, got into a Cadillac that Sara had borrowed from an acquaintance, rode to the parking lot next to the motel; and Kelly was pulled out of the Cadillac by Michelle, and hit and kicked by Michelle, Sara, and Vicki to the point that she was lying on the ground bleeding from her nose and mouth. (6 RT 1419-1425, 1463-1465; 7 RT 1645-1649; 9 RT 1983-1987.)

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[6] In 1998, the Legislature adopted section 190.2, subdivision (a)(17)(M), and it became effective when it was approved by the voters on March 7, 2000. (Leg. His. 1998 ch. 629; Prop 18 for 2000 election.) This subsection changed the elements of the kidnapping special circumstance by creating a statutory exception to the "independent purpose" requirement of *People v. Weidert* (1985) 39 Cal.3d 836 and *People v. Green* (1980) 27 Cal.3d 1, for this special circumstance where the specific intent to kill was established. (See Leg. His. 1998 ch. 629, § 1.)

At that point, appellant pulled Michelle aside, and told her that he thought Kelly was a snitch and he wanted to put her out (i.e., kill her). (6 RT 1420-1423.) Michelle tried to talk appellant out of it, but he kept on insisting that Kelly was a snitch. (6 RT 1420-1422.) Michelle then walked back to the motel room, and appellant, Sara, Vicki, Jasmine and Kelly got back into the Cadillac. (6 RT 1420-1423, 1480, 1502-1503; 7 RT 1648-1653; 9 RT 1983-1987.)

While still in the Cadillac, appellant put a plastic bag over Kelly's head and tightened it, but Kelly was able to rip the bag from her head. (7 RT 1648-1652, 1725-1730; 9 RT 1987-1989, 2034-2036.) Still attempting to "put her out," appellant then put his arm around Kelly's neck from behind and choked her. (7 RT 1648-1652, 1725-1732; 9 RT 1992-1999, 2034-2036.) Eventually, appellant pulled Kelly from the Cadillac's front seat and put her in the trunk. He hit her twice in the face and shut the trunk. (7 RT 1649-1652; 9 RT 1989-1999.) Similar to what he expressed to Michelle, appellant informed Sara and Vicki that he feared Kelly was a snitch and he had to kill her. Specifically, he told Sara he put Kelly in the trunk because "[s]he was going to tell" on them (9 RT 1999-2000), and he told Vicki "we got to take her out" because she would tell on them about the beating or the drugs. (7 RT 1657.) Appellant went back to the Travel Lodge motel room, but soon left that room with the keys to the Cadillac. (6 RT 1423-1426, 1503-1504.)

A little later that evening, Ken Salmons, a fireman, responded to a vehicle fire in an isolated area of Carson, which is in Los Angeles County about 16 miles from the Travel Lodge. (6 RT 1343-1344; 10 RT 2390-2392.)

Salmons discovered a small fire in the trunk area of a Cadillac, and after the fire was extinguished, he discovered Kelly's burnt body in the trunk of that vehicle. (6 RT 1349-1352; 8 RT 1811; 10 RT 2370-2372.)

In closing argument, the prosecutor argued appellant was guilty of first degree murder because he killed Kelly with premeditation and deliberation, or during a kidnapping, and he argued appellant was guilty of kidnapping because he transported Kelly in the Cadillac's trunk from one county to another. (11 RT 2586-2587, 2632.) The prosecutor argued that appellant's motive for killing Kelly was twofold: (1) appellant believed Kelly was going to "snitch on him;" and (2) Kelly disrespected appellant by ripping him off. (11 RT 2587.) The prosecution never put forth any evidence, theory or argument to show the jury that appellant's motive or purpose for kidnapping Kelly was something other than to kill her. (11 RT 2586-2639, 2703-2712.)

The jury found appellant guilty of first degree murder, kidnapping, and found true the kidnapping felony murder special circumstance. (3 CT 848-850.) Appellant moved to dismiss the kidnapping special circumstance based on insufficient evidence to sustain a finding that the kidnapping was not merely incidental to the murder, but the trial court denied this motion. (12 RT 2824-2825.)

After the penalty phase, appellant filed a motion for new trial again contending that there was insufficient evidence to support a finding that the murder was committed to further or advance the kidnapping offense, rather than the kidnapping being merely incidental to the murder. (3 RT 1179-1181.) The prosecutor filed a written response to this new trial motion that suggested

that appellant may have kidnapped Kelly with both an intent to kill her and some other purpose. (4 CT 1193-1195.) Pathetically, the prosecutor never stated nor explained what that other purpose may have been. (4 CT 1193-1195.)

At the hearing on the new trial motion, the prosecutor suggested, again without pointing to any evidence, that appellant may have put Kelly in the trunk of the Cadillac to show the other women what happens to someone who rips him off, or to avoid detection on the assault and battery, and then formed the intent to kill after the asportation. (13 RT 3398.) The trial court found that the jury could have reasonably inferred appellant was going to scare Kelly, and then decided to kill her while on the way to Carson. (13 RT 3399-3400.)

C. Argument

Where a defendant is found guilty of first degree murder, and one of the special circumstances set forth in section 190.2 is found true, the defendant may be sentenced to death or life without the possibility of parole. (Pen. Code, § 190.2.) One of the special circumstances that makes a defendant eligible for one of these sentences is where the murder was committed while the defendant was engaged in the commission of a kidnapping offense. (Pen. Code, § 190.2, subd. (a)(17)(B).)[7]

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[7] Penal Code section 190.2 provides in pertinent part:

"(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true:

"(17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the

To prove the kidnapping special circumstance in 1995, the year the instant crime occurred, the prosecution had to establish that the murder was committed in order to carry out or advance that independent felonious purpose (i.e., commission of a kidnapping offense), as opposed to the kidnapping being merely incidental to the commission of the murder offense. (*People v. Navarette, supra,* 30 Cal.4th at 505; *People v. Marshall* (1996) 15 Cal.4th 1, 41; *People v. Raley* (1992) 2 Cal.4th 870, 902-903; *People v. Green, supra,* 27 Cal.3d at 59-62; *Ario v. Superior Court, supra,* 124 Cal.App.3d 285, 287-290.) That is, where the defendant's primary purpose was not to kidnap but to kill, and the kidnapping was thus merely incidental to the murder, there is no independent felonious purpose and the kidnapping felony murder special circumstance cannot be sustained. (*People v. Navarette, supra,* 30 Cal.4th at 505; *People v. Riel, supra,* 22 Cal.4th at 1201; *People v. Weidert* (1985) 39 Cal.3d 836, 842; *People v. Marshall, supra,* 15 Cal.4th 1, 41.)

When a defendant's intent to kill is concurrent with his intent to commit one of the felonies listed in section 190.2, subdivision (a)(17), such as kidnapping, for some other purpose, this Court has held evidence of a concurrent intent is sufficient to support a felony murder special circumstance, and a properly instructed jury may find that special circumstance true. (*People v. Mendoza* (2000) 24 Cal.4th 130, 182-184; *People v. Barnett* (1998) 17

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immediate flight after committing, or attempting to commit, the following felonies:

"(A) Robbery in violation of Section 211 or 212.5.

"(B) Kidnapping . . ."

Cal.4th 1044, 1157-1159; *People v. Raley, supra,* 2 Cal.4th 902-903.)

A claim of insufficient evidence requires the appellate court to review the entire record in the light most favorable to the judgment below in order to determine whether it discloses substantial evidence such that a trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Joiner* (2000) 84 Cal.App.4th 946, 962; *People v. Johnson* (1980) 26 Cal.3d 557, 562.) Substantial evidence is evidence that is reasonable, credible, and of solid value, such that a reasonable trier of fact could make the finding that it made. (*In re Victoria* (1989) 207 Cal.App.3d 1317, 1326.) Thus, when this type of sufficiency claim is made, the reviewing court must determine whether substantial evidence was presented from which a rational trier of fact could find beyond a reasonable doubt that the defendant had a purpose for the kidnapping apart from the murder. (*People v. Riel, supra,* 22 Cal.4th at 1201; *People v. Raley, supra,* 2 Cal.4th at 902.)

Suspicion or speculation does <u>not</u> amount to substantial evidence. (*People v. Raley, supra,* 2 Cal.4th at 889-891.) For instance, in *People v. Raley, supra,* 2 Cal.4th 870, the defendant, a security guard at a mansion in Hillsborough, locked two teenage girls in a safe in the basement of the mansion, and told them to take off their clothes. (*Id.*, at 881-885.) He then told the girls that he wanted to "fool around" with them, and he took one of the girls (hereinafter referred to as the "first girl") into another room and committed some kind of forcible sexual attack. The defendant then brought her back into the room where the other girl was located; and took the second girl into another room, where he attempted to have her orally copulate him. (*Id.*,

at 881-891.) The defendant then took the two girls away from the mansion in his trunk, and eventually threw them down a ravine. The first girl died, and could not testify about the attack on her. (*Ibid.*) The defendant was convicted of first degree murder and attempted oral copulation of the first girl. (*Ibid.*)

On appeal, the defendant contended, among other things, that there was insufficient evidence of an attempted oral copulation on the first girl, and the *Raley* court agreed. (*Id.*, 889-891.) The *Raley* court found that although there was substantial evidence that the first girl had been sexually attacked, there was no specific information as to which type of sexual attack had occurred, so it was mere speculation to find the defendant guilty of attempted oral copulation based on the fact that this occurred to the second girl. (*Ibid.*) The *Raley* court found that a reasonable inference may not be based on suspicion, imagination, or speculation, but must be based on actual evidence. (*Ibid.*)

In this case, according to the state's presentation, there was no evidence that appellant kidnapped Kelly for any purpose other than to kill her. Prior to the kidnapping, appellant told Michelle that he thought Kelly was a snitch and he wanted to kill her; appellant put a plastic bag over Kelly's head while she was in the Cadillac and tried unsuccessfully to suffocate her; appellant, while Kelly was still in the Cadillac, choked her by putting his arm around her neck; appellant pulled Kelly out of the Cadillac, placed her in the trunk, hit her twice in the face, and closed the trunk; and appellant told Vicki and Sara that he had to kill Kelly because she would tell on them about the beating or the drugs. Thus, according to the prosecution's evidence, appellant's intent prior to the kidnapping was to kill Kelly.

Appellant then allegedly drove the Cadillac from the parking lot to a secluded location in Carson with Kelly in the trunk, and this was the movement that the prosecutor contended constituted the kidnapping offense. A short time later, the Cadillac was found on fire, and it was determined that the fire had been started with gasoline. When the fire was extinguished, Kelly's body was found in the trunk. Under these circumstances, the evidence failed to show any intent for the kidnapping other than to kill Kelly. Thus, based on the presented evidence, appellant's sole intent was to kill Kelly, and the kidnapping offense was merely incidental to the murder.

Further, the prosecutor's other suggested purposes for the kidnapping were not supported by any actual evidence. The prosecutor suggested that appellant put Kelly in the truck of the Cadillac to scare her or the other four women, and then later decided to kill her, but there was simply no actual evidence to support this theory. The prosecutor's argument in this regard was based solely on his own speculation, and this does not amount to substantial evidence. (*People v. Raley, supra,* 2 Cal.4th 889-891.)

The prosecutor also suggested that appellant kidnapped Kelly to avoid detection on the assault and battery, and then later decided to kill her; but there was simply no actual evidence to support this theory either. In addition, appellant could not avoid detection for the assault and battery by simply kidnapping and then releasing Kelly, because it would not prevent her from reporting the incident to the police, so this argument does not even make sense. Thus, the prosecutor's argument in this regard was also based solely on his own speculation, which does not amount to substantial evidence. (*People v.*

Raley, supra, 2 Cal.4th 889-891.)

Therefore, there was insufficient evidence to support a true finding on the kidnapping felony murder special circumstance, and it must be reversed.

D. Appellant May Not Be Retried On This Special Circumstance

The double jeopardy clause of the Fifth Amendment to the United States Constitution, as well as article I, section 15 of the California Constitution, are designed to protect an individual from being subjected to trial more than once for the same offense. (*Burks v. United States* (1978) 437 U.S. 1, 11; *People v. Seel* (2004) 34 Cal.4th 535, 541-542.) The double jeopardy clause bars a second prosecution for the same offense after an acquittal or a conviction. (*Grady v. Corbin* (1990) 495 U.S. 508, 516; *People v. Seel, supra,* 34 Cal.4th at 542.) An appellate court's finding that the evidence was insufficient to sustain a conviction is comparable to an acquittal, and thus bars a second trial. (*Burks v. United States, supra,* 437 U.S. at 16; *People v. Hill* (1998) 17 Cal.4th 800, 838; *Hudson v. Louisiana* (1981) 450 U.S. 40, 44.)

Therefore, since there was insufficient evidence to support the kidnapping felony murder special circumstance, appellant may not be retried on this special circumstance.

II

ASSUMING ARGUENDO THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE KIDNAPPING SPECIAL CIRCUMSTANCE, IT MUST STILL BE REVERSED BECAUSE THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED APPELLANT'S RIGHTS UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS WHEN IT GAVE AN INSTRUCTION THAT ERRONEOUSLY DEFINED THE ELEMENTS OF THE KIDNAPPING SPECIAL CIRCUMSTANCE

A. Introduction

The trial court's erroneous instruction that allowed the jury to find the kidnapping felony murder special circumstance true without finding all of its elements violated appellant's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, his analogous rights under the California Constitution, and his rights under state law, including, but not limited to, his rights to due process of law and a fair trial, to trial by jury, to a reliable determination of the capital charges against him, and to a fair and reliable capital sentencing determination.

B. Factual Background

As referenced above, in addition to murder and kidnapping, appellant was also charged with the kidnapping special circumstance. (2 CT 577-579.) At the time of the victim's death, the kidnapping special circumstance was limited to circumstances where the murder was committed in order to carry out or advance the commission of a kidnapping offense, as opposed to the kidnapping being merely incidental to the commission of the murder. (*People v. Navarette, supra,* 30 Cal.4th at 505; *People v. Riel, supra,* 22 Cal.4th at 1201.)

Also as referenced above, the prosecution presented evidence that, prior to the kidnapping, appellant informed Michelle, Sara, and Vicki that he wanted to kill Kelly because he thought she was a snitch, and he tried unsuccessfully to kill Kelly by placing a plastic bag over her head and by choking her while in the Cadillac. (6 RT 1343-1352, 1419-1425, 1463-1465; 7 RT 1648-1653, 1725-1730; 8 RT 1811; 9 RT 1983-1987, 1989-1999, 2034-2036.) Appellant then put Kelly in the trunk of the Cadillac, and drove away in that car; and the Cadillac was soon discovered on fire in an isolated area of Carson in Los Angeles County with Kelly's burnt body locked in the burned out trunk. (*Ibid.*)

Based on this evidence, the prosecutor argued that appellant was guilty of first degree murder because he killed Kelly with premeditated and deliberation, or during a kidnapping, and that appellant was guilty of kidnapping for transporting Kelly in the trunk of the Cadillac from one county to another. (11 RT 2586-2587, 2632.)

When instructing the jury on the kidnapping special circumstance, the trial court gave an instruction, which was on page 31 of the packet of instructions (11 RT 2584; 3 CT 894), that provided:

> "To find that the special circumstance, referred to in these instructions as murder in the commission of kidnapping is true, it must be proved:
>
> "1. The murder was committed while the defendant was engaged in the commission of a kidnapping; and
>
> "2. *The murder was committed in order to carry out or advance the commission of the crime of assault by force likely to produce great bodily injury or to facilitate the escape therefrom or to avoid detection.* In other words, the special circumstance referred to in these instructions is not established if the kidnapping was merely incidental to the commission of the murder. [Italics added]" (11 RT 2737; also see 3 CT 894.)

On the third day of deliberations, in the afternoon, the jury sent a note to the trial court questioning the kidnapping special circumstance definition. The note stated:

> "Page 31 of the instructions - paragraph 2
>
> "1. Does the phrase 'facilitate escape therefrom' refer to the crime of assault by force, or the crime of kidnapping, or something other than that?
>
> "2. Does the phrase 'avoid detection' refer to the crime of assault by force, or the crime of kidnapping, or something other than that?" (3 CT 793, 797, 1022.)

Less than an hour later, the trial court returned the same note to the jury with a written response on it that stated:

> "1 & 2 both refer to the crime of assault by force." (3 CT 793, 1022.)

The next day, in the morning, the jury returned verdicts finding appellant guilty of first degree murder and kidnapping, and finding the kidnapping felony murder special circumstance true. (3 CT 848-850.)

C. Argument

If there was sufficient evidence to support the kidnapping felony murder special circumstance, which appellant believes there was not (see Arg. I, *supra*), the kidnapping felony murder special circumstance must still be reversed because the trial court prejudicially erred and violated appellant's constitutional rights by giving an instruction that erroneously defined the elements of that special circumstance. Because the evidence supported an inference that appellant intended to kill Kelly without having any independent felonious purpose to kidnapping her, the trial court had a duty to instruct the jury that, for purposes of the kidnapping felony murder special circumstance,

they had to find that the murder was committed in order to carry out or advance the commission of a *kidnapping* offense (*People v. Monterroso* (2004) 34 Cal.4th 743, 766-767), and the trial court failed to do so, but instead instructed the jury that they had to find that the murder was committed in order to carry out or advance an *assault by force* offense. Further, appellant was prejudiced by this instructional error because it allowed the jury to find that special circumstance true without finding that the murder was committed in order to carry out or advance a kidnapping offense.

The giving of an instruction may be reviewed on appeal, even in the absence of an objection, where the substantial rights of the defendant were affected. (Pen. Code, § 1259; *People v. Prieto* (2003) 30 Cal.4th 226, 247; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1199.) Substantial rights in this context is equated with reversible error. (*People v. Arredondo* (1975) 52 Cal.App.3d 973, 978.)

In criminal cases, even in the absence of a request, the trial court must instruct the jury on the general principles of law relevant to the issues raised by the evidence. (*People v. Blair* (2005) 36 Cal.4th 686, 744-745; *People v. Cummings* (1993) 4 Cal.4th 1233, 1311; *People v. Perez* (1992) 2 Cal.4th 1117, 1129.) The general principles of law raised by the evidence are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. (*People v. Cummings, supra,* 4 Cal.4th at 1311; *People v. Perez, supra,* 2 Cal.4th at 1129.) The general principles of law upon which the trial court is required to instruct *sua sponte* include the elements of the charged offenses and

enhancements, as well as the definition of any term used in an instruction that has a technical meaning peculiar to the law. (*People v. Cummings, supra,* 4 Cal.4th at 1311; *People v. Ryan* (1999) 76 Cal.App.4th 1304, 1318; *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665.)

Further, a jury instruction that relieves the prosecution of its burden of proving each element of a charged offense or enhancement beyond a reasonable doubt violates the defendant's due process rights under the Fourteenth Amendment to the United States Constitution. (*People v. Flood* (1998) 18 Cal.4th 180, 491; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; *Carella v. California* (1989) 491 U.S. 263, 265.) An erroneous instruction of this kind also violates a defendant's Sixth Amendment right to a jury trial. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *People v. Flood, supra,* 18 Cal.4th at 491.)

For offenses committed prior to March 7, 2000,[8] the kidnapping felony murder special circumstance is only shown where the murder was committed in order to carry out or advance the commission of a kidnapping offense, as opposed to the kidnapping being merely incidental to the commission of the murder offense. (*People v. Navarette, supra,* 30 Cal.4th at 505; *People v. Marshall, supra,* 15 Cal.4th at 41; *People v. Raley, supra,* 2 Cal.4th at 902-903; *People v. Green, supra,* 27 Cal.3d at 59-62; *Ario v. Superior Court, supra,* 124 Cal.App.3d 285, 287-290.) That is, where the defendant's primary purpose was not to kidnap but to kill, and the kidnapping was merely incidental to the murder, there is no independent felonious purpose and the

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[8] See footnote 6, *supra.*

kidnapping felony murder special circumstance cannot be sustained. (*People v. Navarette, supra,* 30 Cal.4th at 505; *People v. Riel, supra,* 22 Cal.4th at 1201.)

Further, where the evidence supports an inference that the defendant may have intended to murder the victim without having an independent felonious purpose to commit a kidnapping offense, the trial court has a duty to instruct the jury with the second paragraph of CALJIC No. 8.81.17,[9] which requires the jury to find that the murder was committed in order to carry out or advance the commission of the crime of kidnapping or to facilitate escape therefrom or to avoid detection on a kidnapping offense before finding that special circumstance true. (*People v. Monterroso, supra,* 34 Cal.4th at 766-767; *People v. Valdez* (2004) 32 Cal.4th 73, 112-113; *People v. Navarette, supra,* 30 Cal.4th at 505; *People v. Harden* (2003) 110 Cal.App.4th 848, 860-866; also see *Clark v. Brown* (9th Cir. 2006) 442 F.3d 708, 714-718.) In addition, where the trial court decides to instruct the jury on a particular point of law, it has a duty to do so correctly. (*People v. Mendoza* (1998) 18 Cal.4th

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[9] CALJIC 8.81.17 provides in pertinent part:

"To find that the special circumstance referred to in these instructions as murder in the commission of _____ is true, it must be proved:

"[1a.]. [The murder was committed while [the] [a] defendant was [engaged in] [or] [was an accomplice] in the [commission] [or] [attempted commission] of a _____;] [or] [and]

"[2. The murder was committed in order to carry out or advance the commission of the crime of _____ or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the [attempted] _____ was merely incidental to the commission of the murder.]"

1114, 1134; *People v. Castillo* (1997) 16 Cal.4th 1009, 1015.)

In reviewing an ambiguous instruction to determine if it violated the United States Constitution, the appellate court should inquire whether there is a reasonable likelihood that the jury misapplied that instruction. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, including fn. 4; *People v. Young* (2005) 34 Cal.4th 1149, 1202; *People v. Smithey* (1999) 20 Cal.4th 936, 964.) The correctness of a jury instruction is to be determined from the entire charge to the jury, not simply from parts of an instruction, or from a particular instruction. (*People v. Young, supra,* 34 Cal.4th at 1202.)

In this case, the evidence supported the inference that appellant intended to kill Kelly without having an independent felonious purpose to kidnap her. Prior to the kidnapping offense, appellant told Michelle that Kelly was a snitch and he wanted to kill her, and he then attempted to suffocate her with a plastic bag. Appellant also choked Kelly, put her in the trunk of the Cadillac, and told Vicki that they had to take her out because she would tell on them about the beating or drugs. Thus, prior to the kidnapping, appellant made it clear by both his statements and actions that his intent was to kill Kelly.

Appellant then allegedly kidnapped Kelly by transporting her from the parking lot near the Travel Lodge to a secluded location in Carson in the trunk of the Cadillac. A short time later, the Cadillac was found on fire, and when the fire was extinguished, Kelly's body was found in the trunk. Under these circumstances, the evidence clearly supported the inference that appellant intended to kill Kelly without having any independent felonious purpose to kidnap her. Thus, the trial court's had a duty to instruct the jury that they had

to find that the murder was committed in order to carry out or advance the commission of a kidnapping offense in order to find the kidnapping special circumstance true.

However, the trial court failed to inform the jury of this requirement. The trial court used CALJIC No. 8.81.17 to draft its instruction on the kidnapping special circumstance, and gave the second paragraph of that standard instruction; but instead of inserting *kidnapping* in the first blank of the second paragraph, it erroneously inserted assault by force likely to produce great bodily injury.[10] As incorrectly modified, this instruction failed to require the jury to find that the murder was committed in order to carry out or advance the commission of a kidnapping offense, to facilitate escape from a kidnapping offense, or avoid detection for a kidnapping offense. Thus, the trial court erroneously failed to instruct the jury that they had to find that the murder was committed in order to carry out or advance the commission of the crime of kidnapping before finding the kidnapping special circumstance true.

Further, the trial court also erred by failing to comply with its duty to give correct instructions. Once the trial court decided to instruct the jury on the principles set forth in the second paragraph of CALJIC 8.81.17, it had a duty to do so correctly. (*People v. San Nicolas, supra,* 34 Cal.4th at 669; *People v.*

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[10] The trial court was apparently trying to instruct the jury that if they found that appellant kidnaped Kelly with the independent purpose of escaping from, or avoiding detection on, the assault by force, and then later decided to kill her, the kidnapping felony murder special circumstance could be found true. (See 4 CT 1193-1195; 10 RT 2526-2527; 11 RT 2583-2586; 12 RT 2824-2825; 13 RT 3398-3400.) However, even if such a theory was supported by the evidence, which appellant believes it was not (see Arg. II, *supra*), the trial court's modification of CALJIC 8.81.17 did not accomplish this desired result.

Castillo, supra, 16 Cal.4th at 1015.) However, the inclusion of a sentence that required the jury to find that the murder was committed in order to carry out or advance the commission of an assault by force offense was clear error, because this is not a requirement of the kidnapping felony murder special circumstance. Thus, the trial court also erred in this regard.

Furthermore, the second sentence of second paragraph that stated that "[i]n other words, the special circumstance referred to in these instructions is not established if the kidnapping was merely incidental to the murder" did not correct the instructional error. The positive required finding was stated in the first sentence of that paragraph (i.e., that the murder was committed in order to carry out or advance the commission of an assault by force offense), and the second sentence was only intended to be an alternative way to restate the first sentence, which is why it started with "[i]n other words." Thus, the jury would have only considered the second sentence of this paragraph if they did not understand the first sentence, and the first sentence was not difficult to understand.

Moreover, it was clear that the jurors were focused on the portions of the first sentence of the second paragraph that concerned facilitating escape therefrom and avoiding detection, because they asked whether those terms referred to the crime of assault by force or the crime of kidnapping.[11] (3 CT 793, 797, 1022.) In answering this question, the trial court reaffirmed the error

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[11] This was obviously because the evidence did support the inference that the murder was committed to facilitate escape or avoid detection on the assault by force, since that was appellant's stated intent. (6 RT 1419-1425; 7 RT 1657; 9 RT 1999-2000.)

in the instruction, explaining to the jury that those terms referred to the crime of assault by force. (*Ibid.*) Thus, there is a reasonable and strong likelihood that the jurors used the first sentence of the second paragraph to find that this requirement had been satisfied, and did not reach the second sentence of the second paragraph.

Therefore, the trial court clearly erred and violated appellant's rights under the United States Constitution when it gave an instruction that incorrectly stated the elements of the kidnapping felony murder special circumstance.

D. Prejudice

Where a trial court erroneously instructs the jury on the elements of a special circumstance, that special circumstance must be reversed unless the state can establish that the error was harmless beyond a reasonable doubt. (*People v. Prieto, supra,* 30 Cal.4th at 253; *People v. Hurtado* (2002) 28 Cal.4th 1179, 1194; *People v. Flood, supra,* 18 Cal.4th 503-504; *Chapman v. California* (1967) 386 U.S. 18, 36.) This requires the People to prove beyond a reasonable doubt that the error did not contribute to the verdict. (*People v. Huggins* (2006) 38 Cal.4th 175, 212; *People v. Flood, supra,* 18 Cal.4th at 504; *People v. Lewis* (2006) 139 Cal.App.4th 874, 884-891; *Sullivan v. Louisiana, supra,* 508 U.S. at 279.)

In this case, the instructional error clearly contributed to the true finding on the kidnapping felony murder special circumstance. As referenced above, prior to the kidnapping, appellant told Michelle that Kelly was a snitch and he wanted to kill her, and he then attempted to suffocate her with a plastic bag.

In addition, prior to the kidnapping, appellant put Kelly in the trunk of the Cadillac, and told Vicki that they had to take her out because she would tell on them about the beating or drugs. A short time later, the Cadillac was found on fire, and when the fire was extinguished, Kelly's burnt body was found in the trunk. Thus, the evidence indicated that appellant killed Kelly in order to avoid detection on the assault by force and/or his sale of controlled substances, and that the kidnapping was merely incidental to the murder.

Under this backdrop, the trial court gave an instruction on the kidnapping felony murder special circumstance that did not require the jury to find that the murder had been committed in order to carry out or advance commission of a kidnapping offense. Instead, it allowed jurors to find the kidnapping special circumstance true if they found that the murder was committed in order to carry our or advance commission of an assault by force offenses, which was likely shown by the evidence. Thus, this instructional error certainly contributed to the true finding on the kidnapping felony murder special circumstance.

Therefore, the state cannot establish that the instructional error was harmless beyond a reasonable doubt, and the kidnapping special circumstance must be reversed.

III

THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED APPELLANT'S RIGHTS UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS WHEN IT ADMITTED HEARSAY STATEMENTS MADE BY SARA TO MISTY SINKS OVER APPELLANT'S OBJECTION UNDER THE PRIOR CONSISTENT STATEMENT EXCEPTION TO THE HEARSAY RULE

A. Introduction

The admission of hearsay evidence over appellant's objection under the prior consistent statement exception to the hearsay rule violated appellant's constitutional rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, his analogous rights under the California Constitution, and his rights under state law, including, but not limited to, his rights to due process of law and a fair trial, to trial by jury, to a reliable determination of the capital charges against him, and to a fair and reliable capital sentencing determination.

B. Factual Background

At trial, Sara testified for the prosecution, and admitted involvement in the assault and battery on Kelly that occurred in the parking lot next to the Travel Lodge, but denied any involvement in a homicide. (9 RT 1978-1990.) Instead, she placed blame for the homicide on appellant, stating that she saw him attempt to suffocate Kelly, then choked her, and then put her in the trunk of the Cadillac. (9 RT 1987-1999.) Sara further stated that after appellant left, she and Vicki got a ride to Sharon Reed's house, and Misty Sinks was at that house. (9 RT 2002-2003.)

On cross-examination, appellant's trial counsel brought out the fact that

Sara had previously made statements about her involvement in the incident to the police and in court that conflicted with her trial testimony, such as, she previously stated that she did not open the trunk of the Cadillac, but at trial she testified that she opened the trunk from inside the vehicle. (RT 2006-2012, 2042-2044, 2056-2057.) Appellant also brought out the fact that there were many inconsistencies between her testimony and that given by the other state's witnesses, Michelle, Abby and Vicki. (9 RT 2020, 2025-2026.)

Following this cross-examination, the prosecutor sought to have Misty Sinks testify concerning statements Sara allegedly made to her when Sara and Vicki arrived at Sharon Reed's house on the night of the homicide. (9 RT 2062-2064.) Specifically, the prosecutor wanted Sinks to testify that Sara told her they beat up a girl that night, and that appellant stepped in, put her in the trunk of the Cadillac, and drove off in the vehicle. (*Ibid.*)

Appellant objected to these statements based on hearsay. The prosecutor argued the statements were admissible under the Evidence Code section 791, subdivision (b) exception to the hearsay rule, because there was an implied charge made that Sara's trial testimony was recently fabricated or influenced by bias or other improper motive. (9 RT 2059-2067.) In response, appellant argued that the motive to fabricate or improper bias arose at the time of the incident, or in the motel room immediately thereafter when the women discussed how to get their stories straight, and as such, the statements did not fit within the claimed hearsay exception because the statements were not made before the motive to fabricate arose. (7 RT 179 RT 2059-2061, 2065-2066.)

The trial court overruled appellant's hearsay objection and admitted

these statements under Evidence Code section 791, subdivision (b), stating that it believed the law allowed "rehabilitation when a witness has been impeached" in this way. (9 RT 2067.) The trial court suggested that the improper motive or influencing factor that caused Sara to testify in the manner in which she did was the fact that she had been granted use immunity. (8 RT 1921-1922, 1927; 9 RT 2066.)

Following this ruling, the prosecutor called Sinks to testify. Consequently, she testified that when she got home sometime between 10:00 and 12:00 in the evening on the night of the homicide, Sara and a young white girl were waiting there, and Sara's shorts and top had blood on them. (9 RT 2068-2073.) Sara told her that she and the other girls beat up a girl over a debt, and that appellant had then put the girl in the trunk of a Cadillac and drove off in the vehicle. (9 RT 2074-2079.)

During their deliberations, the jury asked that Sinks' testimony be read back to them, and her testimony was read to them by the court reporter. (2 CT 787-788.) A couple of days later, the jury returned verdicts finding appellant guilty of first degree murder, kidnapping and felony assault. (3 CT 848-850.)

C. Argument

A criminal defendant has a due process right to have the state follow its own statutes, particularly in proceedings that may lead to imposition of a death sentence. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347; *Fetterly v. Paskett* (1991) 997 F.2d 1295, 1296-1303.) Thus, if the state does not follow its own statutory provisions, it has deprived the defendant of his due process rights which are guaranteed by the Fourteenth Amendment to the United States

Constitution. (*Hicks v. Oklahoma, supra,* 447 U.S. at 346-347.)

Hearsay evidence, which is defined as a statement not made while testifying that is offered for the truth of the matter stated, is inadmissible unless it falls within a statutory exception. (Evid. Code, § 1200.)[12] Evidence Code section 1236 authorizes the admission of hearsay if the statement is consistent with a witness' trial testimony, and it is offered in compliance with the provisions of Evidence Code section 791. Evidence Code section 791, subdivision (b)[13] provides that a prior consistent statement may be admitted if it is offered after there has been an express or implied charge that the witness' testimony has been recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.

This section allows a party to admit a statement over a hearsay

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[12] Evidence Code section 1200 provides:

"(a) 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

"(b) Except as provided by law, hearsay evidence is inadmissible.

"(c) This section shall be known and may be cited as the hearsay rule."

[13] Evidence Code section 791 provides in pertinent part:

"Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:

"(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen. [Emphasis added]"

objection that is consistent with a witness' trial testimony if there is a charge that the witness' trial testimony is fabricated based on a motive for such fabrication that arose after the prior consistent statement. For instance, in *People v. Bolin* (1998) 18 Cal.4th 297, the defendant allegedly shot three people, two of whom died as a result, in a secluded area of Kern County, and Eloy Ramirez, one of the defendant's friends, witnessed the shootings. (*Id.*, at 309-310.) The defendant and Ramirez left the scene of the shootings, and went to the home of Ramirez's girlfriend, Patricia Islas. (*Id.*, at 309-310, 320.) The defendant left Ramirez at that home, and Ramirez told Islas that the defendant had shot three people. (*Id.*, at 320-321.) The defendant was later arrested and charged with two counts of murder, and one count of attempted murder. (*Id.*, at 309-310.)

At trial, Ramirez testified that he had seen the defendant shoot the three people, and on cross-examination, the defendant's attorney elicited testimony that Ramirez had only given his account of the incident to the police after he himself was charged with two counts of murder and had spoken to an attorney; and that those charges were then dropped. (*Id.*, at 320-321.) Over the defendant's hearsay objection, the prosecution was allowed to have Islas testify that Ramirez had told her that the defendant had shot the three men pursuant to the provisions of Evidence Code section 791, subdivision (b). (*Ibid.*)

On appeal, the defendant contended that the trial court erred in overruling his hearsay objection, and this Court rejected that contention. (*Id.*, at 320-321.) This Court found that the defendant attempted to undermine

Ramirez's credibility by implying that his attorney encouraged him to fabricate accusations against the defendant to get the charges against himself dropped, and since the prior statements to Islas were made before that motive arose, they were properly admitted under Evidence Code sections 1236 and 791. (*Id.*, at 321; also see *People v. Hichings* (1997) 59 Cal.App.4th 915, 920-921 [statements made after the motive for fabrication arose are not admissible under Evidence Code section 791, subdivision (b)].)

In this case, appellant made an implied charge that Sara fabricated her testimony to implicate appellant in order to remove suspicion from herself, but appellant did not imply that this testimony was recently fabricated. Instead, appellant made this implied charge to support his defense that Sara, Michelle, and Vicki got carried away while beating up Kelly, and then killed her; and that these women then created a story to implicate appellant in the motel room immediately after the incident. That is, appellant alleged that the motive for Sara to fabricate testimony that implicated him arose at the time of the incident, which was prior to the time Sara allegedly made these statements to Sinks. Thus, these statements were not admissible under Evidence Code section 791, subdivision (b). (*People v. Hichings, supra,* 59 Cal.App.4th at 920-921.)

Further, contrary to the trial court's ruling, the grant of use immunity did not create an improper motive or influencing factor for Sara to fabricate trial testimony that implicated appellant in the offenses. The grant of use immunity may well have influence Sara to admit more involvement in the homicide than she had in previous statements, but it did not created a motive

for Sara to fabricate testimony implicating appellant.

Therefore, the trial court's admission of these hearsay statements over appellant's objection was in error and violated appellant's constitutional rights.

D. Prejudice

When the trial court erroneously admits evidence under state law, the judgment must be reversed if it is reasonably probable that a result more favorable to the defendant would have been reached had that evidence not been admitted. (Evid. Code, § 353; *People v. Watson* (1956) 46 Cal.2d 818, 836.) When the erroneous admission of evidence violates the defendant's rights under the United States Constitution, the error requires reversal unless the state can establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at 24.)

In this case, the erroneous admission of the hearsay statements allegedly made by Sara to Sinks was prejudicial under either prejudice standard. The prosecution's evidence connecting appellant to the offenses was limited, and the evidence that did connect him to the offenses was unreliable. Kelly's body was found in the trunk of a Cadillac that had been set on fire in Carson, but no physical evidence was found that connected appellant to either the Cadillac or the homicide. Appellant was only connected to the charged offenses by the testimony of Michelle, Sara, Vicki and Abby, and appellant's defense was that these women had actually killed Kelly and then made up a story that placed the blame for the homicide on him.

Moreover, the testimony of these four women was not reliable. Michelle, Sara and Vicki admitted attacking Kelly in the parking lot next to the

Travel Lodge, and hitting and kicking her numerous times, so they were accomplices to offenses committed against Kelly and likely to lie to protect themselves from prosecution. (See *People v. Box* (2000) 23 Cal.4th 1153, 1208-1210 [accomplice testimony should be viewed with distrust]; Pen. Code, § 1111 [accomplice testimony must be corroborated].) In addition, because Michelle, Sara, Vicki, and Abby were all close friends, they were likely to protect each other, by placing the blame for any offenses they committed on appellant. Further, the many inconsistencies between the four women's testimony makes it likely they fabricated a story but could not keep the details straight. Thus, the testimony of Michelle, Sara, Vicki and Abby was unreliable, and because the other evidence connecting appellant to the offenses was limited, this was a close case on the evidence.

Furthermore, the jury deliberated for about seventeen hours over four days, and asked a number of questions before returning their verdicts. (2 CT 786-788; 3 CT 792-799, 848-849.) In particular, the jury considered Sinks' testimony important, as shown by the fact that they asked that her testimony be reread to them; further evidence appellant was prejudiced by admission of these hearsay statements. Additionally, this showed that the jury considered this a close case. (See *In re Martin* (1987) 44 Cal.3d 1, 51; *People v. Cardenas* (1982) 31 Cal.3d 897, 907.)

Therefore, it is reasonably probable that a result more favorable to appellant would have been reached had the prejudicial evidence not been admitted. Further, the state cannot establish that the error was harmless beyond a reasonable doubt. Appellant's convictions and death sentence must thus be

reversed.

IV

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S RIGHTS UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS WHEN IT ADMITTED A GRUESOME PHOTOGRAPH OF THE VICTIM'S BURNT BODY IN THE TRUNK OF THE CADILLAC

A. Introduction

The admission of a gruesome photograph of the victim's burnt body in the trunk of the Cadillac violated appellant's constitutional rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, his analogous rights under the California Constitution, and his rights under state law, including, but not limited to, his rights to due process of law and a fair trial, to trial by jury, to a reliable determination of the capital charges against him, and to a fair and reliable capital sentencing determination.

B. Factual Background

In a motion in limine, prior to the guilt phase of appellant's trial, the prosecution sought to introduce three pictures of the victim's burnt body found in the trunk of the Cadillac, alleging they were relevant to show torture, premeditation, deliberation, and malice aforethought. (3 RT 540-555; CT 604-611.) Appellant objected to the relevance of these pictures, arguing that the defense did not contest the fact that the victim was burned in the trunk of the Cadillac, and further that the pictures were not evidence of the mental states claimed by the prosecution. (3 RT 546-548.) The trial court reviewed the pictures, and admitted one picture of the victim's burnt body lying in the trunk of the Cadillac, finding the picture was relevant to establishing premeditation, deliberation, malice aforethought and specific intent. (3 RT 555; Peo. exh 2.)

Following deliberations, the jury returned verdicts finding appellant guilty of first degree murder, kidnapping and felony assault. (3 CT 848-850.)

C. Argument

Where the probative value of evidence is so conspicuously outweighed by its inflammatory content, so as to undermine a defendant's right to a fair trial, the admission of such evidence violates a defendant's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution. (*Lesko v. Owens* (3rd Cir. 1989) 881 F.2d 44, 50-52 (and cases cited therein).) In a capital case, the admission of such evidence also undermines the reliability required by the Eighth and Fourteenth Amendments for a conviction of a capital offense (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638), and deprives the defendant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.)

A criminal defendant also has a due process right to have the state follow its own statutes, particularly when imposing the death penalty. (*Hicks v. Oklahoma, supra,* 447 U.S. at 346-347; *Fetterly v. Paskett, supra,* 997 F.2d 1295, 1296-1303.) Thus, if the state does not follow its own statutory provisions, it has deprived the defendant of his due process rights which are guaranteed by the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma, supra,* 447 U.S. at 346-347.)

Under Evidence Code section 350, only relevant evidence is admissible. "Under this section, irrelevant evidence must be excluded and a trial court has

no discretion to admit it. [Citations.] Relevant evidence is defined as evidence which has 'any tendency in reason to prove or disprove any disputed fact that is of consequence to the ... action.'" (*People v. Hall* (1980) 28 Cal.3d 143, 152.) "If a fact is not genuinely disputed, evidence offered to prove that fact is irrelevant and inadmissable under Evidence Code sections 210 and 350, respectfully. [Citations.]" (*Ibid*; also see *People v. Poggi* (1988) 45 Cal.3d 306, 322-323.)

Even if evidence is relevant to a fact in dispute, "[t]he court in its discretion may exclude [such] evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

"Where the inevitable effect of introducing a [gruesome] photograph is to arouse the sympathy or prejudice of the jury, and the fact in proof of which it is offered is not denied, or where its introduction serves no purpose other than to inflame the jurors' emotions, it is not admissible." (*People v. Redston* (1956) 139 Cal.App.2d 485, 490.) "Unnecessary admission of gruesome photographs can deprive a defendant of a fair trial and require reversal of a judgment." (*People v. Marsh* (1985) 175 Cal.App.3d 987, 997-998.)

In *People v. Burns* (1952) 109 Cal.App.2d 524, the trial court allowed three post autopsy photographs of the face, neck, and torso of the victim to be admitted into evidence that were particularly horrible because the head was completely shaved. (*Id.*, at 541.) These pictures were admitted to show bruises

and abrasions on the body, however, no one contested that there were bruises, and they could have been adequately described by oral testimony.

On appeal, the defendant claimed that the trial court had abused its discretion in admitting these pictures, and the appellate court agreed. (*Id.*, at 541-542.) The appellate court found that in view of the fact that no question was raised as to the murder victim's bruises and abrasions, and the fact that a view of them was of no particular value to the jury, it was obvious that the only purpose of exhibiting them was to inflame the jury's emotions against defendant. (*Id.*, at 541-542; also see *People v. Marsh, supra,* 175 Cal.App.3d at 998.)

In this case, the picture of the victim's burnt body was not relevant to any contested issue at trial. Whether the homicide was premeditated, deliberated, or committed with malice aforethought had to be determined based on the testimony of the arson investigator concerning how the fire was started, and the testimony of the coroner about whether Kelly was alive or not when the fire was started. While the results of the fire was shown by the picture of Kelly's burnt body, the picture simply did not show any evidence of why or with what intent the fire was ignited (i.e., whether it was premeditated, deliberated, or committed with malice aforethought).

Further, both a fireman and a police officer testified concerning the condition of Kelly's body in the trunk, and appellant did not contest the fact that the victim had been burned in the trunk of the Cadillac. (3 RT 546-548; 6 RT 1349-1352, 1362-1364.) Thus, this picture was totally unnecessary to the prosecution's case.

Furthermore, this picture of the victim's burnt body served to inflame the jury's emotion. This picture would outrage most people and cause them to want someone punished. Thus, assuming arguendo that this picture held some kind of relevance, its prejudicial effect clearly outweighed any probative value. (See *People v. Chavez* (1958) 50 Cal.2d 778, 792 [photographs should be excluded where their principal effect would be to inflame the jurors against the defendant because of the horror of the crime].)

Therefore, the trial court abused its discretion and violated appellant's constitutional rights to due process and a fair trial, and to a fair and reliable guilt and sentencing determination, when it admitted the picture of Kelly's burnt body in the trunk of the Cadillac.

D. Prejudice

When the trial court erroneously admits evidence under state law, the judgment must be reversed if it is reasonably probable that a result more favorable to the defendant would have been reached had that evidence not been admitted. (Evid. Code, § 353; *People v. Watson, supra,* 46 Cal.2d at 836.) When the erroneous admission of evidence violates the defendant's rights under the United States Constitution, the error requires reversal unless the state can establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at 24.)

In this case, the erroneous admission of the gruesome photograph was prejudicial under either prejudice standard. As referenced above, this was a close case on the evidence, and the length of the jury deliberation show that the jurors considered this a close case. (See pp. 49-50, *supra.*)

Under this backdrop, the prosecution was erroneously allowed to introduce a picture of the victim's burnt body in the trunk of the Cadillac. (Peo. exh. 2.) Because the introduction of this picture was totally unnecessary, as referenced above, the principal effect of its admission was to inflame the jurors against appellant. This evidence was extremely prejudicial, and would have caused jurors to find appellant guilty of all charges offenses.

Therefore, it is reasonably probable that a result more favorable to appellant would have been reached had this prejudicial evidence been excluded, in that appellant would have been found not guilty of first degree murder, kidnapping and felony assault. Further, the state cannot establish that the error was harmless beyond a reasonable doubt. Appellant's convictions and death sentence must thus be reversed.

V

APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY EXCUSED FOUR PROSPECTIVE JURORS FOR CAUSE BECAUSE THEY WOULD BE UNABLE TO VOTE FOR DEATH AS THE APPROPRIATE PUNISHMENT DUE TO RECENT EVENTS IN THE NEWS THAT CAUSED THEM TO BE CONCERNED THAT AN INNOCENT PERSON MAY BE EXECUTED, AND THEREBY VIOLATED APPELLANT'S RIGHTS UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

A. Introduction

By excusing four prospective jurors for cause because they stated that they would be unable to vote for death as the appropriate punishment due to recent events in the news that caused them to be concerned that an innocent person may be executed, the trial court violated appellant's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, his analogous rights under the California Constitution, and his rights under state law, including, but not limited to, his rights to due process of law and a fair trial, to equal protection of the laws, to trial by a fair and impartial jury, to a reliable determination of the capital charges against him, and to a fair and reliable capital sentencing determination.

B. Factual Background

During jury selection, four prospective jurors, Brian Z., Kathy S., Paul J., and David B. each wrote on their questionnaires that they would be unable to vote for death as the appropriate punishment due to recent events in the news that caused then to be concerned that an innocent person may be

executed. (3 CTJQ[14] 982-1001; 6 CTJQ 2022-2041; 9 CTJQ 3282-3301, 3482-3501.) In explaining these views, Brian Z. referred to the recent news about police corruption and the mistakes made in Illinois; David B. referred to news about persons determined to be innocent after having been convicted by a jury; Paul J. wrote that mistakes had been made, and that it would be better to sentence ten persons to life without parole than to execute one innocent man; and Kathy S. referred to the recent cases in the news about persons who had been convicted of murder and put to death, but later discovered evidence showed that they were actually innocent. (3 CTJQ 987-993; 6 CTJQ 2027-2031; 9 CTJQ 3286-3291, 3489-3491.)

These four prospective jurors were also questioned in open court by the attorneys and judge about their views on the death penalty. Paul J. (#190) stated that he was concerned that an innocent person may be executed because of (1) publicity about the moratorium on executions in Illinois due to the number of persons on death row who had been exonerated, and (2) the fifty-six cases nationwide where persons on death row had been released after it was determined that they had been wrongfully convicted of murder. (3 RT 620-630; 3 CT 1029.) Paul J. stated that his concerns would not affect his determination of guilt, but would likely affect his ability to give equal consideration to death as an appropriate punishment at the penalty phase. (3 RT 629-630.) Paul J. further stated that, in his present state of mind, he could not foresee himself voting for the penalty of death. (3 RT 630.)

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[14] There is a separate clerk's transcript that contains the jury questionnaires. In this brief, appellant will use CTJQ to refer to that clerk's transcript.

At that point, the prosecutor made a motion to excuse Paul J. for cause, arguing that he was opposed to the death penalty, and that he would be unable to vote for the penalty of death. (3 RT 630-631.) Appellant objected, and argued that Paul J. did not have any religious or moral scruples that prevented him from imposing the death penalty, but that his main concern was the fallibility of the criminal justice system, which had become apparent by the events in Illinois and the convicted persons who had been exonerated nationwide based mostly on DNA evidence. (3 RT 631.) The trial court granted the prosecutor's motion to excuse Paul J. for cause, finding that he stated that he would not be able to vote for the penalty of death. (3 RT 631-632.)

David B. (#114) also stated that he could not vote for the penalty of death due to concern that an innocent person may be executed. (3 RT 768-775; 3 CT 1027.) David B. stated that he could have voted for death previously, but that his views had changed in recent years due to events in the news, and that he now believed that the criminal justice system was not sufficiently reliable. (3 RT 768-775.) David B. referred to a recent 60 minutes show that had aired two or three weeks earlier that chronicled how twelve persons had been taken off of death row after it was discovered that they had been wrongly convicted of murder and sentenced to death, as well as recent news about police corruption. (3 RT 768-773.)

At that point, the prosecutor made a motion to excuse David B. for cause, and appellant objected, arguing that David B. did not have any religious or moral scruples against the death penalty, but that his concern was the

fallibility of the system. (3 RT 773-774.) The trial court granted the prosecutor's motion to excuse David B. for cause, finding that he stated that he would not follow the law when he stated that he could not vote for death as the appropriate punishment. (3 RT 774-775.)

Brian Z. (# 315) also stated that he could not impose a death sentence because he was concerned that an innocent person may be executed based on recent information in the news about police corruption, the moratorium on execution in Illinois, and the 60 minutes show. (4 RT 913-918; 3 CT 1033.) On the prosecutor's motion, Brian Z. was excused from the jury for cause over appellant's objection. (*Ibid.*)

Kathy S. (#275) also stated that she could not impose a sentence of death because of concern that an innocent person may be executed based on her lack of faith in the criminal justice system. (4 RT 960-967; 3 CT 1032.) On the prosecutor's motion, Kathy S. was excused from the jury for cause over appellant's objection. (*Ibid.*)

At the conclusion of jury voir dire, appellant moved to dismiss the jury panel because these four jurors had been excused for cause. (6 RT 1275-1277.) The trial court denied this motion. (6 RT 1275-1277.)

C. Argument

Appellant's death sentence must be reversed because the trial court excused four prospective jurors for cause on an improper basis. The law provides that a prospective juror may be excused for cause from serving on a capital jury if that juror's moral views about capital punishment would prevent or substantially impair that juror's ability to perform his or her duties in

accordance with the trial court's instructions and his or her oath. (*Wainwright v. Witt* (1985) 469 U.S. 412, 425; *People v. Avila* (2006) 38 Cal.4th 491, 529.) However, a juror's belief that the defendant could be innocent is not a moral view on capital punishment that prevents him or her from voting for the penalty of death, but an informed view of the fallibility of our criminal justice system, and because lingering doubt about a defendant's guilt is a proper factor to consider in mitigation in determining the appropriate punishment at the penalty phase of the trial (*People v. Terry* (1964) 61 Cal.2d 137, 145-146), a juror's belief that the defendant could be innocent does not prevent or substantially impair that juror's ability to act in accordance with the trial court's instructions or his or her oath.

A criminal defendant has a right to trial by a fair and impartial jury under the Sixth Amendment to the United States Constitution, as well as under article I, section 16 of the California Constitution. (U.S. Const., Amend. 6; *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522; *People v. Griffin* (2004) 33 Cal.4th 536, 558; *People v. Ghent* (1987) 43 Cal.3d 739, 767.) A criminal defendant also has a right to a jury drawn from a representative cross-section of the community under the equal protection clause of the Fourteenth Amendment to the United States Constitution, as well as under article I, section 16 of the California Constitution. (U.S. Const., Amend 14; *Batson v. Kentucky* (1986) 476 U.S. 79, 88; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1008.)

Based on a criminal defendant's Sixth Amendment right to trial by an impartial jury, the United States Supreme Court has held that a defendant

cannot be sentenced to death by a jury that was chosen by excluding prospective jurors for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *(Witherspoon v. Illinois, supra,* 391 U.S. at 522.) That is, persons who oppose the death penalty may serve as jurors in a capital case as long as they state clearly that they are willing to temporarily set aside their own beliefs and follow the law. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176; accord, *People v. Avila, supra,* 38 Cal.4th at 529.)

However, a prospective juror may be excluded for cause because of his or her moral views on capital punishment if those views will prevent or substantially impair the performance of that juror's duties in accordance with the trial court's instructions and his or her oath. (*Wainwright v. Witt, supra,* 469 U.S. at 424; *Morgan v. Illinois* (1992) 504 U.S. 719, 726-728; *People v. Avila, supra,* 38 Cal.4th at 528; *People v. Griffin, supra,* 33 Cal.4th at 558.) As this Court has stated, the real question is whether the juror's views about capital punishment would prevent or impair that juror's ability to return either a verdict of death, or a verdict of life without the parole, in the case before the juror. (*People v. Cash* (2002) 28 Cal.4th 703, 720-721; *People v. Ochoa* (2001) 26 Cal.4th 398, 431; *People v. Bradford* (1997) 15 Cal.4th 1229, 1318.)

In this case, the four prospective jurors were not excused for cause because of their moral or religious views on capital punishment. Instead, these jurors were excused for cause because, prior to hearing any of the evidence, they stated that they could not vote for death as the appropriate punishment due to recent events in the news (police corruption in California, mistakes in

trials in Illinois, and mistakes in other states that resulted in innocent persons being sentenced to death) that caused them to be concerned that an innocent person may be executed. A juror's refusal to vote for death as the appropriate punishment because that juror believes that the defendant could be innocent is not a moral view on capital punishment, but an informed view of the fallibility of our criminal justice system that may change during the trial.

Further, the views expressed by these four prospective jurors would not prevent or substantially impair the performance of their duties in accordance with the trial court's instructions or their oath. At the penalty phase of a capital trial, the trial court should instruct the jurors, as it did in this case (see 3 CT 928-929), that any lingering doubt as to the defendant's guilt may be considered in mitigation. (*People v. Jones* (2003) 30 Cal.4th 1084, 1125; *People v. Cox* (1991) 53 Cal.3d 618, 675-677; *People v. Terry, supra,* 61 Cal.2d at 145-146.) Since a juror may consider his or her doubts about the defendant's guilt in determining the appropriate penalty, a juror's refusal to vote for death as the appropriate punishment because he or she believes that the defendant may be innocent does not prevent or substantially impair that juror's ability to act in accordance with the trial court's instructions or his or her oath. Thus, because the record did not establish that these four jurors' moral views on capital punishment substantially impaired their ability to perform their duties in accordance with the trial court's instructions, they were erroneously excused for cause under the governing legal standards. (See *Wainwright v. Witt, supra,* 469 U.S. at 424)

Therefore, the trial court erred when it excused these four prospective

jurors for cause over appellant's objections.

D. Prejudice

Where the trial court erroneously excuses prospective jurors for cause under the governing legal standard in a capital trial, the defendant's death sentence must be reversed without an inquiry into prejudice. (*Davis v. Georgia* (1976) 429 U.S. 122, 123; *Gray v. Mississippi* (1986) 481 U.S. 648, 659-667 (opn. of the court); *id.*, at 667-668 (plur. opn.); *id.*, at 672 (conc. opn. of Powell, J.); *People v. Stewart* (2004) 33 Cal.4th 425, 454-455; also see *People v. Allen* (2004) 115 Cal.App.4th 542, 553.) Thus, the trial court's error in excusing these four prospective jurors on an improper basis requires reversal of appellant's death sentence.

Therefore, appellant's death sentence should be reversed, and the case remanded to the trial court for resentencing.

VI

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S RIGHTS UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS WHEN IT DENIED APPELLANT'S MOTION TO IMPANEL A NEW JURY FOR THE PENALTY PHASE OF THE TRIAL AFTER THE JURORS EXPRESSED CONCERN FOR THEIR SECURITY

A. Introduction

When the trial court denied appellant's motion to impanel a new jury for the penalty phase of the trial, it violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, his analogous rights under the California Constitution, and his rights under state law, including, but not limited to, his rights to due process of law and a fair trial, to equal protection of the laws, to trial by a fair and impartial jury, to a reliable determination of the capital charges against him, and to a fair and reliable capital sentencing determination.

B. Factual Background

Following the guilt phase of the trial in which appellant was found guilty of first degree murder and the kidnapping special circumstance was found true, the jury sent a note to the trial court that stated they were concerned about their personal security in light of the fact appellant had access to pictures of the witnesses, and he had threatened those witnesses; and the jury asked what personal information appellant had about them. (3 CT 802.) In response, the trial court told the jurors that they were known to appellant by a number only, and that their names and addresses were not of public record. (12 RT 2804-2809.) The trial court further stated that, although the attorneys had

known their names, they had probably forgotten that information. (*Ibid.*)

Prior to the commencement of penalty phase, appellant made a motion to have the jury discharged, and a new jury impaneled to hear the penalty phase of the trial. (12 RT 2828-2831.) Appellant argued that the jury's concern for their personal security, based on their determination that appellant had obtained pictures of the witnesses and threatened those witnesses, made it so they could not act impartially in determining the appropriate penalty to impose on appellant. (12 RT 2828-2831.) The trial court denied this motion, finding that even a newly impaneled jury would hear evidence about appellant's threats to those witnesses, as a circumstance of the crime. (*Ibid.*)

C. Argument

The trial court abused its discretion and violated appellant's constitutional rights when it denied the motion to discharge the jury based on their concern for their security and safety. A criminal defendant has the right to a fair and impartial jury at the penalty phase of a capital trial, and a jury composed of jurors who are concerned about their own personal safety and fearful of the defendant will not be able to act fairly and impartially in determining the appropriate penalty.

Section 190.4, subdivision (c),[15] provides that the same jury that

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[15] Section 190.4, subdivision (c), provides in pertinent part:

"If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider ... the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes."

determined guilt at a capital trial shall also determine the appropriate penalty, unless for good cause shown, the trial court discharges that jury. (*People v. Earp* (1999) 20 Cal.4th 826, 890.) This section expresses the long-standing preference for a single jury to decide both the guilt and penalty phases of a capital trial. (*People v. Earp, supra,* 20 Cal.4th at 890; *People v. Bradford, supra,* 15 Cal.4th at 1354; *People v. Lucas* (1995) 12 Cal.4th 415, 483.)

Good cause to discharge the jury and impanel a new jury for the penalty phase must be based on facts that appear in the record, and must show that the jury has an inability to perform its function. (*People v. Bradford, supra,* 15 Cal.4th at 1353-1354; *People v. Earp, supra,* 20 Cal.4th at 891; *People v. Gates* (1987) 43 Cal.3d 1168, 1199.) A criminal defendant has a right to trial by a fair and impartial jury under the Sixth Amendment to the United States Constitution, as well as under article I, section 16 of the California Constitution. (U.S. Const., Amend. 6; *Witherspoon v. Illinois, supra,* 391 U.S. at 522; *People v. Griffin, supra,* 33 Cal.4th at 558; *People v. Ghent, supra,* 43 Cal.3d at 767.) Thus, where facts in the record show that the jury cannot be fair and impartial to the defendant, that jury is unable to perform its function, and this shows good cause to discharge that jury and impanel a new jury.

A trial court's decision not to discharge the jury and impanel a new jury for the penalty phase of a capital trial is subject to reversal only upon an abuse of discretion. (*People v. Bradford, supra,* 15 Cal.4th at 1353; *People v. Rowland* (1992) 4 Cal.4th 238, 268.) The appropriate test for an abuse of discretion is whether the trial court exceeded the bounds of reason, considering all of the facts and circumstances. (*People v. Weaver* (2007) 149 Cal.App.4th

1301, 1311; *People v. Mullens* (2004) 119 Cal.App.4th 648, 658.) An abuse of discretion is shown where the trial court makes a determination that is not supported by the trial record. (*People v. Carmony* (2004) 33 Cal.4th 367, 379; *People v. Cluff* (2001) 87 Cal.App.4th 991, 1003-1004.)

In this case, the jury's concern that appellant would threaten or harm them as they believed he had threatened the witnesses as reflected in their note to the court, illustrates its inability to act fairly and impartially in reaching a penalty determination. The jury's determination of the appropriate penalty they would impose on appellant undoubtedly was influenced by their personal interest in protecting themselves from threats and other harmful actions by appellant. That is, the jury's note showed its state of mind would prevent them from acting with entire impartiality, and demonstrated actual bias against appellant. (Code Civ. Proc., § 225.[16]) Thus, this note established good cause to discharge this jury and impaneled a new jury.

Further, there was no contrary evidence to support a finding that the

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[16] Code of Civil Procedure section 225 provides in pertinent part:.

"A challenge is an objection made to the trial jurors that may be taken by any party to the action, and is of the following classes and types: . .

"(b) A challenge to a prospective juror by either:

"(1) A challenge for cause, for one of the following reasons: . . .

"(B) Implied bias--as, when the existence of the facts as ascertained, in judgment of law disqualifies the juror.

"(C) Actual bias--the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party. [Emphasis added]"

jurors could act fairly and impartially in determining the appropriate penalty. First, the trial court's statement to the jury did not ease the jurors' minds about the security of their personal information. The trial court told the jury that appellant's attorneys had known their names, but, essentially, they should not worry because the attorneys had probably forgotten those names. Since the jurors could reasonably assume appellant obtained the threatened witnesses' pictures from his attorneys or investigator (see 3 RT 572-573), they could also reasonably expect that appellant's attorneys shared the jurors' names with appellant at some point during their representation of him. Thus, the jury's concern for their security and safety was not dissipated by the trial court's comments.

Secondly, this Court in *People v. Navarette, supra,* 30 Cal.4th at 499-500, held that jurors will not be deemed biased, under these type of circumstances, when the trial court encourages the jurors to let it know in writing if they felt unable to be fair and unbiased. Accordingly, in *Navarette, supra*, because the court did not receive any notes from the jurors, their actions were deemed to be carried out in an unbiased and fair manner. In the present case, contrary to the dictates of *Navarette, supra*, the trial court did not question the jury about their impartiality, or encourage them to let the court know if they could not act fairly and without bias in determining penalty. The only evidence in the record at the time of appellant's motion to discharge the jury was the jury's note wherein it indicated the jury was influenced and motivated by its personal interest in protection from appellant. Thus, the only evidence in the record in this regard shows that the jury could not act with

entire impartiality and that they were biased against appellant. Hence, the trial court's decision to deny appellant's motion to discharge the jury was not supported by substantial evidence.

Therefore, the trial court abused its discretion when it denied appellant's motion to discharged the jury and impanel a new jury for the penalty phase, and this resulted in appellant being denied his constitutional right to a fair and impartial jury to determine penalty.

D. Prejudice

Where a criminal defendant has been denied his constitutional right to an impartial jury, the judgment must be reversed without an inquiry into prejudice. (*People v. Vasquez* (2006) 39 Cal.4th 47, 69, fn. 12; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1087-1088; *Arizona v. Fulminante* (1999) 499 U.S. 2769, 309.) Thus, the trial court's error in failing to discharge the jury and impanel a new jury, which resulted in the penalty phase being held before an impartial jury, requires reversal of appellant's death sentence.

Therefore, appellant's death sentence should be reversed, and the case remanded for a new penalty trial.

VII

THE TRIAL COURT VIOLATED THE PROHIBITION AGAINST MULTIPLES SENTENCES FOR A SINGLE ACT CONTAINED IN SECTION 654, AS WELL AS APPELLANT'S RIGHTS UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS WHEN IT IMPOSED SENTENCE ON BOTH THE MURDER AND FELONY ASSAULT CONVICTIONS

A. Introduction

The imposition of sentence on both the murder and felony assault convictions violated the prohibition against multiple sentences for a single act contained in section 654 and appellant's constitutional rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, his analogous rights under the California Constitution, and his rights under state law, including, but not limited to, his rights to due process of law and a fair trial, to trial by jury, to a reliable determination of the capital charges against him, and to a fair and reliable capital sentencing determination.

B. Factual Background

As referenced above, the amended information charged appellant with counts of first degree murder and assault likely to produce great bodily injury, alleged that the murder was committed during commission of a kidnapping offense within the meaning of the felony murder special circumstance, and alleged that appellant had three prior serious felony convictions within the meaning of the three strikes laws. (2 CT 577-579.)

At trial, the prosecution's evidence indicated that Kelly was pulled out of the Cadillac in a parking lot next to the Travel Lodge, and beaten by Michelle, Sara, and Vicki. (6 RT 1419-1425; 7 RT 1645-1649; 9 RT 1983-

1987.) After this beating, appellant pulled Michelle aside and told her that he wanted to kill Kelly because he thought she was a snitch. (6 RT 1419-1425, 1463-1465.) Appellant then tried to kill Kelly by putting a plastic bag over her head, choking her, and placing her in the trunk of the Cadillac and hitting her. (6 RT 1343-1352; 7 RT 1648-1653, 1725-1730; 8 RT 1811; 9 RT 1983-1987, 1989-1999, 2034-2036; 10 RT 2370-2372, 2390-2392.) A short time later, the Cadillac was found on fire in another county about 16 miles away, and when the fire was extinguished, Kelly's burnt body was found in the trunk. (6 RT 1343-1352; 8 RT 1811; 10 RT 2370-2372, 2390-2392.)

Based on this evidence, the prosecutor argued appellant was guilty of first degree murder because he killed Kelly with premeditation and deliberation, or during a kidnapping. (11 RT 2586-2587, 2632.) With regard to the assault likely to produce great bodily injury, the prosecutor never suggested appellant was vicariously liability for the assault committed by the women,[17] but instead argued that the count three felony assault charge was for "[t]hose acts that he inflicted upon Kelly prior to the killing." (11 RT 2636.)

Following their deliberations, the jury found appellant guilty of one count of first degree murder with a special circumstance, and one count of assault likely to produce great bodily injury. (3 CT 848-850.) The trial court further found that appellant had three prior serious felony convictions within the meaning of the three strikes laws. (3 CT 923-924.)

At the sentencing hearing, the trial court impose a death sentence on the

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[17] The prosecutor could not have made such an argument, because the jury was not instructed on aiding and abetting or conspiracy principles.

first degree murder conviction, and imposed a consecutive 25 years to life term on the felony assault conviction under the three strikes laws. (4 CT 1230-1239.) In imposing the term on the felony assault, the trial court stated "that actually is a separate incident. It was before the kidnapping and before the homicide." (13 RT 3420.)

C. Argument

Penal Code section 654[18] provides that where an act is punishable in different ways by different penal provisions, the defendant may only be punished under one of those penal provisions, and that should be the one that provides for the longest potential term of imprisonment. Section 654 literally applies only where such punishment arises out of multiple statutory violations produced by the same act or omission; however, because the statute is intended to ensure that the defendant is punished commensurate with his culpability, its protection against multiple punishment has been extended to cases in which there are several offenses committed during a course of conduct deemed to be indivisible in time. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) Thus, if all of the offenses were merely incidental to, or were a means of accomplishing or facilitating one objective, the defendant should be found to have harbored a single intent and therefore may be punished only once. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1216; *Neal v. State of California*

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[18] Penal Code section 654 provides in pertinent part:

"An act or omission that is made punishable in different ways by different provisions of the law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . . ."

(1960) 55 Cal.2d 11, 19; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1032-1035.)

For instance, in *Neal v. State of California, supra,* 55 Cal.2d 11, the defendant threw gasoline into the bedroom of his victims and ignited it; they were severely burned. He was convicted of arson and attempted murder and sentenced on both convictions. Writing for the majority, Justice Traynor concluded that punishing the defendant for both crimes violated the provisions of section 654 because they were incident to one objective, i.e., the arson was "merely incidental to the primary objective" of killing the victims. (*Id.*, at 20; also see *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1345-1346 [where the appellate court found that the sentence on a terrorist threats conviction (Pen. Code, § 422) had to be stayed where the defendant had used terrorist threats to attempt to dissuade a witness from testifying, and he was also convicted and sentence on that offense (Pen. Code, § 136.1)]; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1135 [concurrent sentences for two convictions of conspiracy to murder were proper because each conspiracy involved a separate victim; however, separate punishment for offense of carrying a silencer could not stand where the objective of the crime was the successful completion of the conspiracies].)

In this case, Kelly was first pulled from the Cadillac and hit and kicked by Michelle, Sara, and Vicki, to the point that she was lying on the ground bleeding. Appellant was <u>not</u> prosecuted for felony assault based on the actions of these three women, as shown by the facts that (1) the jury was not instructed on aiding and abetting or conspiracy principles, and (2) the prosecutor told the

jury that the felony assault charge was based on acts appellant himself inflicted upon Kelly. (11 RT 2636.)

Instead, appellant was prosecuted for felony assault based on the acts that he himself inflicted on Kelly prior to the killing. (11 RT 2636.) This included his attempt to suffocate Kelly, choke her, put her in the trunk of the Cadillac, hit her twice in the face, and set the Cadillac on fire. These were the same acts that were the basis of the murder charge, and were all committed after appellant pulled Michelle aside and told her that he wanted to kill Kelly because she was a snitch. Thus, both the felony assault and murder were a means of accomplishing a single intent and objective (i.e. appellant's stated intent to kill Kelly), and the provisions of section 654 prohibited multiple sentences on these two convictions.

Therefore, the trial court erred in imposing sentence on both of these convictions.

D. Remedy

"The proper remedy for failing to apply section 654 is to stay the execution of the sentence imposed on the lesser offenses, the stay to become permanent upon completion of the sentence for the greater offense. [Citations.]" (*People v. Galvan* (1986) 187 Cal.App.3d 1205, 1219; also see *In re Adams* (1975) 14 Cal.3d 629, 637-638.) First degree murder with a special circumstance carried a sentence of either death or life without the possibility of parole, and the felony assault with strike priors carried a sentence of 25 years to life. (Pen. Code, §§ 190, subd. (a), 190.2 & 667, subd. (e).) Thus, this Court should order the sentence on the felony assault conviction

stayed.

VIII

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

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 126 S.Ct. 2516, 2527, fn. 6.)[19] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in

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[19] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (126 S.Ct. at 2527.)

other checks on arbitrariness that it would not pass constitutional muster without such review).

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code section 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are

not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

A. Appellant's Death Penalty is Invalid Because Penal Code Section 190.2 is Impermissibly Broad

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)"

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the

statute contained twenty-eight special circumstances[20] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the Legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

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

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.[21] (See Section E. of this Argument, *infra.*)

B. Appellant's Death Penalty is Invalid Because Section 190.3(a) as Applied Allows Arbitrary and Capricious Imposition of Death in Violation of The Fifth, Sixth, Eighth And Fourteenth Amendments to the United States Constitution

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

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating

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[21] In a habeas petition to be filed after the completion of appellate briefing, appellant expects to present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant expects to present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[22] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[23] or having had a "hatred of religion,"[24] or threatened witnesses after his arrest,[25] or disposed of the victim's body in a manner that precluded its recovery.[26] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

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

Prosecutors throughout California have argued that the jury could weigh

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[22] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

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

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

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

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

in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa*, *supra*, 512 U.S. at 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing and Deprives Defendants of the Right to a Jury Determination of Each Factual Prerequisite to a Sentence of Death; it Therefore Violates The Sixth, Eighth and Fourteenth Amendments to the United States Constitution

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

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

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

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

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But these interpretations have been rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey, supra,* 530 U.S. 466 [hereinafter *Apprendi*], *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*], *Blakely v. Washington* (2004) 542 U.S. 296 [hereinafter *Blakely*], and *Cunningham v. California* (2007) 549 U.S. __, 127 S.Ct. 856, 166 L.Ed.2d 856 [hereinafter *Cunningham*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts

supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Apprendi v. New Jersey, supra,* 530 U.S. at 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Ring v. Arizona, supra,* 536 U.S. at 602-609.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 487 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.*, at 598-599.) The court found that in light of *Apprendi*, *Walton* no longer controlled, and that factual findings necessary to impose the death penalty must be found by the jury unanimously and beyond a reasonable doubt. (*Ring v. Arizona, supra,* 536 U.S. at 589-603.)

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra,* 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former of which was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The United State Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.*, at 312-313.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that, other than a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; and that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.*, at 303-304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into two majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. (*Id.*, at 226-244.) *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*United States v. Booker, supra,* 543 U.S. at 244.)

In *Cunningham*, the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle term spelled out by the Legislature. (*Cunningham v. California, supra,* 166 L.Ed.2d at 865-877.) In doing so, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no

application to the penalty phase of a capital trial. (*Ibid.*)

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

California law, as interpreted by this Court, does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*, 16 Cal.4th at 1255; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) outweigh any and all mitigating factors.[27] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (13 RT 3363), "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or*

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

adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors outweigh mitigating factors.[28] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[29]

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* to the penalty phase of a capital trial by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35

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[28] In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at 460)

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

Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32, *People v. Prieto, supra,* 30 Cal.4th at 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Ring* in noncapital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely* and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper term sentence; the DSL "simply authorizes a sentencing court to engage in a type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (*Id.*, at 1254.)

The United States Supreme Court explicitly rejected this reasoning in *Cunningham.*[30] 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 California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (*Cunningham v. California, supra,* 166 L.Ed.2d at 873-877.) The *Cunningham* court then found that *Black's* interpretation of the DSL violated *Apprendi's* bright-line rule that except for a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory

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[30] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has bee performed by a judge.'" (*People v. Black, supra,* 35 Cal.4th at 1253; *Cunningham v. California, supra,* 166 L.Ed.2d at 873.)

maximum must be submitted to a jury, and found beyond a reasonable doubt. (*Id.*, at 873.)

Cunningham examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based findings of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.*, at 875-876.) The *Cunningham* court stated:

> "The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination for the judge, we have said, is the very inquiry *Apprendi's* 'bright-line rule' was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S,Ct. 2531. But see Black, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that '[t]he high court precedents do not draw a bright line')." (*Cunningham v. California, supra,* 166 L.Ed.2d at 874.)

In the wake of *Cunningham*, it is crystal clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual finding be made before a death penalty can be imposed.*

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the

prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto, supra,* 30 Cal.4th at 263.)

This holding is simply wrong. As section 190, subdivision (a)[31] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, at p. 6.)

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

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the

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

jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151. (*Ring*, 530 U.S. at 603-604.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (Pen. code, § 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Pen. Code, § 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the

penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

b. Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring*, 65 P.3d 915, 943 (Az. 2003); accord, *State v. Whitfield,* 107 S.W.3d 253 (Mo. 2003); *Woldt v. People,* 64 P.3d 256 (Colo.2003); *Johnson v. State,* 59 P.3d 450 (Nev. 2002).[32])

No greater interest is ever at stake than in the penalty phase of a capital

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

case. (*Monge v. California* (1998) 524 U2.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[33] As the high court stated in *Ring*, *supra*, 530 U.S. at 604-609:

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

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

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[33] In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at 732 (emphasis added).)

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

a. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond

a reasonable doubt.

b. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests

> together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-

424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

3. California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole

suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at 267.)[34] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Pen. Code, § 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan*, *supra,* 501 U.S. at 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra;* Section D, *post*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating

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[34] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th at 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *ante*.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra* [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris, supra,* 465 U.S. at 51 (emphasis added), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review*."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See Section A of this Argument, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), this absence renders that scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

5. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant, and devoted a considerable portion of its closing argument to arguing these alleged offenses. (12 RT 2864-2873, 2909-2926, 2938-2941, 2945-2949; 13 RT 3240-3255.)

The Supreme Court's recent decisions in *United States v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

6. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland, supra,* 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

7. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra,* 428 U.S. at 304; *Zant v. Stephens, supra,* 462 U.S. at 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental

illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors*." (*People v. Arias, supra,* 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

(*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 32 Cal.4th at 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important

state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma, supra,* 447 U.S. 343; Fetterly v. Paskett, supra, 997 F.2d 1295, (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable

consistency, or not at all." (*Eddings*, *supra*, 455 U.S. at p. 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. The California Sentencing Scheme Violates The Equal Protection Clause Of The Federal Constitution By Denying Procedural Safeguards To Capital Defendants Which Are Afforded To Non-Capital Defendants.

As noted in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme

which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[35] as in *Snow*,[36] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., Pen. Code, §§

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[35] "As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (*Prieto*, *supra*, 30 Cal.4th at p. 275; emphasis added.)

[36] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 3; emphasis added.)

1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."[37]

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, *ante*.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, *ante*.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[38] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

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[37] In light of the supreme court's decision in *Cunningham*, *supra*, if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

[38] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at 609.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

E. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms Of Humanity And Decency And Violates The Eighth And Fourteenth Amendments; Imposition Of The Death Penalty Now Violates The Eighth And Fourteenth Amendments To The United States Constitution

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty

in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot, supra*, 159 U.S. at 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 536 U.S. at 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital

punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[39] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia*, *supra*.)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

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[39] See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

IX

THE TRIAL COURT'S MULTIPLE ERRORS CONSIDERED TOGETHER DENIED APPELLANT DUE PROCESS AND A FAIR TRIAL UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

"Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." (*Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 963; *People v. Hill* (1998) 17 Cal.4th 800, 844 ["a series of trial errors, through independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"]; *People v. Herring* (1993) 20 Cal.App.4th 1066, 1074; *People v. Pitts* (1990) 223 Cal.App.3d 606, 815.)

In such cases, an issue-by-issue harmless error review is far less effective than analyzing the overall effect of the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381.)

Here, appellant has identified numerous errors that occurred during the guilt and penalty phases of his trial. Each of these errors individually, and all the more clearly when considered cumulatively, deprived appellant of due process, of a fair trial, of the right to trial by jury, of the right to present a defense, of fair and reliable guilt and penalty determinations, and of the benefit of important state law procedural safeguards and the guided sentencing scheme prescribed by the California statutes and generally applied in California capital cases, in violation of appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Further, each error, by itself, is sufficiently prejudicial to warrant reversal of appellant's convictions and death sentence.

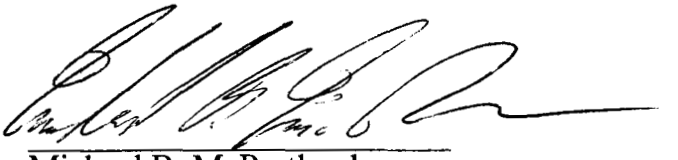
Even if that were not the case, however, reversal would be required because of the substantial prejudice flowing from the cumulative impact of the errors.

CONCLUSION

For the reason stated above, appellant respectfully requests that this Court grant him the relief requested herein.

Dated: March 14, 2008

Respectfully submitted,



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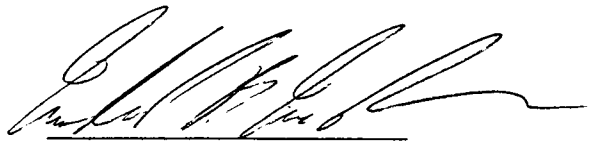
CERTIFICATION OF WORD COUNT

I, Michael McPartland, attorney for appellant, certify that the text of this opening brief, including footnotes, consists of 32,150 words, as counted by the Word Perfect version 9 word-processing program that was used to generate that brief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this certificate of word count was executed within the State of California on March 10, 2008.

Dated: March 14, 2008



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PROOF OF SERVICE BY MAIL

I declare that:

I am (a resident of/employed in) the County of Riverside, California. I am over the age of eighteen years and not a party to the within cause. On March 15, 2008, I served the within Appellant's Opening Brief on the parties listed below by placing a copy thereof in sealed envelope, with postage thereon prepaid, and depositing such in the United States mail at Palm Desert, California, addressed as follows:

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