IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| THE PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff and Respondent,<br>vs.<br>KEVIN DARNELL PEARSON.<br>Defendant and Appellant. | No. S120750<br>(Los Angeles County Superior Court No. NA039436) |



APPEAL FROM THE SUPERIOR COURT COUNTY OF LOS ANGELES

Honorable, Thomas T. Ong, Judge

**APPELLANT'S OPENING BRIEF**

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DEATH PENALTY

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# APPELLANT'S OPENING BRIEF

## STATEMENT OF APPEALABILITY

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

## CERTIFICATE OF WORD COUNT

The brief is proportionately spaced with Times Roman typeface, point size of 13, and the total word count is 91,879, not including tables, and thus is within the limits (102,000 words) of California Rules of Court, rule 8.630, subdivision (b).

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1 All references are to the Penal Code, unless otherwise noted.

## INTRODUCTION

Appellant Kevin Pearson is a young man deeply remorseful for his role in the charged offenses. His family experience was that of the second oldest of six siblings; his first father abandoned the family when he was an infant, his first step-father was murdered, and his second step-father was a physically abusive drug addict. His mother suffered from a mental disorder that required periods of institutionalization and was otherwise described as indifferent, lazy, absent, and physically punitive toward her children. She had emotionally abandoned Kevin.

Despite this inauspicious beginning, Kevin had no prior police contact, let alone criminal history. Despite the South Central Los Angeles and Long Beach milieu where fate had placed him, he was not a gang member. He was employed, nurtured his younger siblings, loved music, and was loved by those that knew him.

Yet, inexplicably, at least from the record in this appeal, he played some role in those offenses. But, the jury's resolution of his level of culpability provides no solace as it unfortunately is premised upon, among other failings, insufficient evidence, a theory not extant at the time of the offenses, inaccurate and incomplete jury instructions, and prosecution argument that reinforced these errors.

## STATEMENT OF THE CASE

By Information filed in April 2002, Kevin was charged in eight counts, all involving the victim, Penny Sigler, also know as Penny Keptra.[2] Count One charged murder in violation of section 187, subdivision (a).

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[2] Codefendant's automatic appeals are also before this Court in *People v. Armstrong,* S126560 and *People v. Hardy*, S113421.

(CT[3] 1113.) It was alleged that the offense was committed under the following special circumstances:

> While the defendant was engaged in the commission of the crime of robbery, within the meaning of section 190.2 (a)(17)(A);
>
> While the defendant was engaged in the commission of the crime of kidnapping, within the meaning of section 190.2 (a) (17)(B);
>
> While the defendant was engaged in the commission of the crime of kidnap for purposes of rape, within the meaning of section 190.2 (a)(17)(B);
>
> While the defendant was engaged in the commission of the crime of rape, within the meaning of section 190.2 (a)(17)(C); and
>
> While the defendant was engaged in the commission of the crime of rape by foreign object, within the meaning of section 190.2(a)(17)(K).

It was further alleged that Kevin committed the murder, and the murder was intentional and involved the infliction of torture, within the meaning of section 190.2(a)(18)). The remaining counts charged are as follows:

> Count Two, second degree robbery in violation of section 211;
>
> Count Three, kidnapping to commit rape in violation of section 209, subdivision (b)(1);

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[3] The record on appeal consists of 58 volumes of Clerk's Transcripts, designated 1 through 58, and 4 volumes of Supplemental Clerk's Transcripts designated SUPPLEMENTAL II (volumes 1 through 2), SUPPLEMENTAL III, and SUPPLEMENTAL IV. These will be cited as CT and 2-58CT, as appropriate, and CT2, CT3, and CT4 respectively.

The record also includes Reporters' Transcripts consisting of 23 volumes, designated 1 through 23. These will be cited as RT and 2-23RT, as appropriate.

Count Four, forcible rape while acting in concert in violation of section 264.1;

Count Five, forcible rape in violation of section 261, subdivision (a)(2);

Count Six, sexual penetration by foreign object while acting in concert in violation of section 289, subdivision (a)(1) and 264.1;

Count Seven, sexual penetration by foreign object in violation of section 289, subdivision (a)(1); and

Count Eight, torture in violation of section 206.

The following was further alleged in regard to Counts Four through Six:

The victim was kidnapped and tortured within the meaning of section 667.61, subdivisions (a) and (d), and

The victim was kidnapped and a deadly weapon was used within the meaning of section 667.61, subdivisions (a), (b), and (e).

It was further alleged in regard to Counts One through Eight that the defendant personally used a deadly and dangerous weapon within the meaning of section 12022, subdivision (b)(1) and in regard to Counts Three through Seven the defendant used a dangerous and deadly weapon within the meaning of section 12022.3, subdivision (b) [sic].[4] [5] (4CT 1113-1122.)

Kevin pled not guilty and denied the allegations. (5RT 799-801, 4CT 1123-1125.)

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[4] The error here is that subdivision (b) of section 12022.3 enhances the sentence if the person is *armed* with a deadly weapon. Subdivision (a) of section 12022.3 should have been cited as that is the subdivision that enhances the sentence of a person who *uses* a deadly weapon.

[5] The initial complaint was filed on January 8, 1999. (CT 1-6.) Shortly thereafter it was amended to add as codefendants Warren Justin Hardy and Jamelle Edward Armstrong. (CT 63-70.) The parties eventually agreed to sever the cases so that each defendant would be tried separately. (2RT 50-51, 63, 3RT 331, 5RT 791.)

Jury selection began on August 13, 2003 and a jury was impaneled on September 4, 2003. (5CT 1422-1427, 1465-1466.) Guilt phase evidence was heard over the course of eight court days. (56CT 16089-16091, 16093-16095, 16098-16103, 16108-16114.) Jury deliberations on the guilt phase began at 2:45 p.m. on September 24, 2003. (56CT 16135-16139.) Two days later, on September 26, 2003 at 2:20 p.m., the jury found Kevin guilty as charged, found that Count One was in the first degree murder,[6] and found true all of the allegations. (21RT 4378-4379, 56CT 16144-16149, 57CT 16253-16269.)

The evidentiary portion of the penalty phase began on September 30, 2003. (57CT 16277-16279.) Penalty phase evidence was heard over the course of three court days. (57CT 16277-16279, 16281, 16284-16288.) Jury deliberations began at 5:10 p.m. on October 2, 2003. The following day, the jury informed the court that they were deadlocked and had taken four ballots with outcomes beginning at six to six and ending at eight to four. The court ordered the jury to return on October 7, 2003 and resume deliberations. On that date at 10:45 a.m., the jury fixed the penalty at death. (57CT 16287, 16291-19292, 16306-16308.)

On November 19, 2003, the court denied Kevin's motion for new trial and to modify the verdict and imposed a sentence of death on Count One (§ 190.2.) An indeterminate life sentence with a minimum term of 25 years was imposed for Count Five, forcible rape (§ 667.61, subd. (a)) and a

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[6] The jury was asked to circle one of the following two options, and they circled B:

> A. The Actual Killer, or
>
> B. An Aider and Abettor and had the intent to kill; or was a Major Participant and acted with reckless indifference to human life. (56CT 16255.)

consecutive life sentence was imposed for Count Eight, torture (§ 206.1.) (58CT 16594.) A consecutive determinate sentence of 41 years was imposed on the remaining counts and sentencing enhancements and was calculated as follows:

> Count Two, the upper term of 5 years for second degree robbery (§ 213, subd. (a)(2));
>
> Count Four, the upper term of 9 years for rape in concert with force or violence (§§ 264.1, 667.6, subd. (d));
>
> Count Six, the upper term of 8 years for the unlawful sexual penetration by foreign object while acting in concert (§ 289(a));[7]
>
> Count Seven, the upper term of 8 years for the unlawful sexual penetration by foreign object (§ 289);
>
> 1 year for the section 12022, subdivision (b)(1) allegation accompanying Count Two;
>
> 10 years for the section 12022.3, subdivision (b) [sic][8] allegation accompanying Count Four.

A life sentence on count 3, kidnapping to commit rape (§ 209, subd. (b)(1)), was stayed pursuant to section 654. Kevin was ordered to pay a restitution fine of $10,000 pursuant to section 1202.4, and an additional $10,000 that was suspended pursuant to section 1202.45. Kevin was granted total custody credits for time served of 2,050 days. (23RT 5039-5046, 58CT 16571-16595.)

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[7] No sentence was imposed in this count under section 264.1.

[8] This is a repetition of the error in identifying the correct subdivision made in the Information, noted in footnote 4, above.

## STATEMENT OF FACTS

A. Guilt Phase

*1. PROSECUTION'S CASE*

On December 30, 1998 (16RT 3258-3259, 3264, 3439), the nude body of 43 year old Ms. Penny Sigler was found at the foot of an embankment alongside the south side of the 405 Freeway and just inside a six foot, chain link fence separating the embankment from Wardlow Road within a block of the latter's intersection with Long Beach Boulevard (15RT 2976, 16RT 3439, 17RT 3626-3627, 3629-3630, 3643-3645, 18RT 3753, People's exhs. 11, 16, 33.) Blood was observed on the fabric of the fence. (17RT 3637-3639, People's exh. 16G.) A drainage ditch paralleled the foot of the embankment and nylon mesh supported by wooden stakes ran alongside to keep material out of the ditch. (17RT 3630-3631.) One of the stakes had been broken and only a stub remained. (17RT 3637, People's exh. 16F.) There was a pool of blood in the ditch. (17RT 3632, 3635-3636, 3645, 3863-3864, People's exhs. 16, 33E.) A single tennis shoe was found. (17RT 3640, People's exh. 16I.) She had been last seen by her roommate between 11:00 p.m. and midnight on the night of December 29, 1998 as she left their home and indicated that she was going to the store. (16RT 3438.) Her roommate had given her a book of food stamps containing a single five and one dollar stamp coupons. (16RT 3438.)

The victim was five feet, two inches tall and weighed 115 pounds. (17RT 3841.) She had sustained a total of 114 injuries that included multiple blunt force injuries to the head, face, and neck, which caused her death. (15RT 2928-2934, 2938-2949, 2980-2983, 2985-2990, 2995-2996, 3014-3016, 3025, People's exhs. 1, 4-5, 9-10.) The missing part of the

broken stake could have been used to inflict some of these injuries. (15RT 2950-2952, 2978-2979.) Other injuries were noted on her torso and legs, including bruising, laceration, tears around the anus and genital area consistent with the use of the stake. (15RT 2934-2938, 2952-2957, 2964, 2974-2976, 2984, 2998-2999, 3016-3017, People's exhs. 3, 6-7.) A small wood splinter, about one-sixteenth of an inch in length, was found in the vagina, near the cervix. (15RT 2955-2957, 2964, 2968-2969, 2992-2994, 3032-3033, People's exhs. 7-8.) Some of the injuries could have been inflicted very shortly after death. (17RT 3021-3022.) But, the medical examiner expressed the opinion that the sexual assaults appeared to be premortem injuries. (15RT 2996-2997.)

On December 29, 1998, Monty Gmur was living in a ground floor apartment on Cedar Avenue in Long Beach. (16RT 3212, 3265.) He was a staff accountant at Long Beach Rebar (16RT 3243-3244), but had been the director of instrumental music at El Camino College for 12 years. (16RT 3244.) He had a music room in his home with recording equipment, keyboards, microphone amplification equipment that he made available to the neighborhood young people. (16RT 3213, 3244.) This included Kevin, who was his friend and next door neighbor. (16RT 3212-3213, 3266, 3280.)

Kevin lived on the upper floor of an older home that had been turned into an apartment. (16RT 3242, 3266.) Kevin's mother, sister, and brothers occupied the residence on the lower floor. (16RT 3266-3264.) Kevin was a daily visitor to Mr. Gmur's home and used the studio, generally with Kevin's cousin Jerard and brother Harold (16RT 3213, 3244, 3249, 3262), sometimes with Kevin's sister Nicky (16RT 3249), and a few times with codefendant Jamelle Armstrong (16RT 3240-3241, 3244,

3249.) They were freestyle rappers, and Kevin was serious enough to start a journal and write down his material. (16 RT 3245-3246.) Mr. Gmur saw Jamelle fairly regularly in the vicinity of his and Kevin's homes; Kevin was not always with Jamelle, but more often than not he was and they seemed to enjoy each other's company. (16RT 3241-3242, 3283-3284.)

On the above date, Kevin came to Mr. Gmur's apartment and stayed for a while. (16RT 3213-3214, 3263-3264.) Codefendants Jamelle Armstrong and Warren Hardy, and a fourth youth, Chris, arrived a little later. Jamelle and Warren are half brothers.[9] (16RT 3249-3250, 3335-3336, People's exh. 32, p. 4.) All but Chris were members or a rap group they called Capone Thugs Soldiers (17RT 3657, 18RT 3793, People's exh. 35, pp. 6-7, 18), and Jamelle was nicknamed, June, Warren's nickname was No Good, and Kevin's was Scrappy. (16RT 3249-3250, 3313-3314, 3319, 3321, People's exh. 32, pp. 4-5.)

Warren and Chris went to the store and brought back a bottle each of Night Train, Thunderbird, and Cisco. (People's exh. 32, p. 7.) They were mixed together and shared by the four in cups. (People's exh. 32, pp. 7, 11.) Eventually they became loud and a little rowdy and asked if they could use one of the bedrooms to jump Chris into the group. (People's exh. 32, p. 8.) Mr. Gmur refused, so the four went to the park across the street. It was about 9:30 p.m. (People's exh. 32, p. 8.) They returned in 15 to 20 minutes. (People's exh. 32, p. 9.) Warren used the telephone, and Mr.

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[9] Kevin is six foot tall, and his weight was variously described as 157 and 170 pounds. (17RT 3842, 4040.) Jamelle is five feet, ten inches tall and weighed 160 pounds. (17RT 3842.) Jamelle is depicted in People's exh. 26. (18RT 3699-3701.) Warren is five feet, four inches tall, and weighed approximately 130 pounds. (16RT 3308-3309, (17RT 3842.) Warren is depicted in People's exh. 23. (18RT 3699.)

Gmur heard him say to someone called Capone that Chris was cool and they were going to call him Play Boy. (People's exh. 32, p. 10.)

When the three youths left Mr. Gmur's apartment around 10:00 p.m., Mr. Gmur described them as "stupid drunk," loud, obnoxious, boisterous, and a little unsteady on their feet. (16RT 3249-3250, People's exh. 32, pp. 11-12.) Mr. Gmur said Kevin was wearing dark brown dickies, light brown long sleeved shirt, and black working boots. (People's exh. 32, p. 13.) Jamelle was wearing blue corduroy pants, dark blue and gold University of Michigan jersey, and black Converse tennis shoes. (People's exh. 32, p. 14.) Warren was wearing dark pants, a black leather jacket, and a black fisherman-style hat. (People's exh. 32, pp. 14-15.)

Tiyarie Felix lived with Warren Hardy on West 69th Street in Los Angeles. (16RT 3307-3308, 3319-3320, 3323.) The three boys arrived at her residence at 1:00 or 2:00 a.m. (16RT 3313-3314, 3323-3324.) They all appeared to be drunk. (RT 3324, 3329, 3343.) She testified that Warren had a drinking problem. (16RT 3330.) Kevin had a blue duffle bag with him that he put in the kids' room to the rear of the kitchen. (16RT 3314-3318, 3328-3329, 3347-3349.) Warren also had a duffle bag at the house and Ms. Felix variously testified that Jamelle did or did not have a duffle bag there, although he had clothes there. (16RT 3321, 3325-3326.) She said that Kevin stayed for a day. (16RT 3324, 3329, 3345.)

The next day, December 30th, when Mr. Gmur was on his way home from work he observed and later heard about police activity alongside the 405 freeway. (16RT 3258-3259, 3264, People's exh. 32, pp. 16-17.) When he got home, he paged Kevin, but not because of what he had heard. (16RT 3214, 3259-3260, People's exh. 32, p. 17.) When Kevin returned the call, Mr. Gmur asked Kevin what they had gotten into after they left his house.

Kevin told him, "We killed a white woman." (16RT 3214-3215, 3260, People's exh. 32, pp. 17-18.) Mr. Gmur did not believe Kevin and thus did not ask him anything about it. (16RT 3260, 3262, People's exh. 32, pp. 18-19.) But, Mr. Gmur then saw a news program on television concerning the body of a woman that had been found near the 405 freeway. (16RT 3215, 3259, 3262, People's exh. 32, pp. 19-20.) He paged Kevin again. (16RT 3262-3263, People's exh. 32, p. 20.) When he spoke with Kevin, Mr. Gmur said to him, "Please tell me I'm not looking at you guys on the news." (16RT 3263, People's exh. 32, p. 20.) Kevin replied, "I'll tell you about it later." Kevin said he had a lot he wanted to talk to him about. (16RT 3263, People's exh. 32, pp. 20-21.)

The following day, December 31st, in the mid afternoon, when Mr. Gmur returned home he paged Kevin. Kevin called back and said he would be coming right over and he had a lot to talk about. Kevin arrived at Mr. Gmur's residence with Jamelle. (16RT 3264-3265, 3267, People's exh. 32, pp. 21-23.) Kevin's brothers and sister were in the music room and Kevin and Jamelle joined them. (16RT 3267, People's exh. 32, p. 23.) Kevin immediately came back out and asked if he and Mr. Gmur could go somewhere private and talk. They went out onto the front porch and had a private conservation that Mr. Gmur variously described as lasting for 15 to 20 or 30 to 45 minutes. (16RT 3215, 3267, 3236-3237, People's exh. 32, pp. 23-24.)

Mr. Gmur testified that Kevin told him that after they had left his house, the four of them took the Blue Line to Wardlow train station, because Chris lived near there. (16RT 3215, 3269, 3277, People's exh. 32, p. 25.) Chris went home. Kevin and Jamelle were walking along one side of Wardlow Road and Warren was walking on the other side. (16RT 3215,

17RT 3659, People's exh. 32, pp. 25-26.) Kevin heard Warren yelling at a woman, turned around, and saw Warren sock her. (16RT 3215-3216, People's exh. 32, p. 26.) Kevin told Mr. Gmur that he and Jamelle crossed the street and joined Warren. (People's exh. 32, p. 26.) Kevin said he saw Warren stomping on the victim, pick up a stick and beat her with it. (16RT 3216, People's exh. 32, pp. 26-27.) Kevin tried to get him to stop. (16RT 3216.) Kevin explained that Warren had asked the woman if she had any money, and she responded that she did not have any. (16RT 3237, People's exh. 32, pp. 29-30.) When Warren found food stamps on her, he became enraged because she had lied to him. (16RT 3237, People's exh. 32, pp. 26, 28-29.)

Mr. Gmur said that Kevin used "we" as he described the events and said they took off all of her clothes. (16RT 3235, 3268-3269, 3284, 3293, People's exh. 32, p. 28.) Mr. Gmur understood from Kevin's account that the victim died while in the street. (People's exh. 32, p. 33.) Kevin said he and Jamelle removed their shirts and Kevin wrapped his around the top part of her body and Jamelle wrapped his around the lower part of her body. (People's exh. 32, p. 27.) They dragged the body from the street and lifted it over a fence. (16RT 3233-3234, 3269, People's exh. 32, pp. 27, 30-31.) Mr. Gmur testified that Kevin said all of the violence that was inflicted upon the victim was done by either Jamelle or Warren. (16RT 3234-3235.) In his subsequent interview, Mr. Gmur said that Kevin had not mentioned anyone other than Warren hitting the victim. (People's exh. 32, p. 35.) Kevin told him that Warren hit her with a stick and stomped on her. (16RT 3268, 3272.) They put her clothing in a bag that they took with them and threw in the trash. (People's exh. 32, pp. 31-32, 35-37.)

In that subsequent interview, Mr. Gmur said Kevin was very sad, remorseful, and very grave as he discussed the incident. (16RT 3279, People's exh. 32, p. 37.) Kevin never mentioned necrophilia or that he had raped or stomped on the victim. (16RT 3273, People's exh. 32, p. 35.) Kevin told Mr. Gmur that he was worried that his fingerprints were on a shoe that was left behind. (16RT 3233, People's exh. 32, pp. 32, 34.) Kevin, Warren and Jamelle left the scene and walked to Long Beach Boulevard, boarded the MTA number 60 bus, which took them to Los Angeles. (People's exh. 32, pp. 34, 36.)

Kevin spent that New Year's evening at Mr. Gmur's house with Jamelle. (16RT 3278, People's exh. 32, pp. 38-39.) They left the next morning. (16RT 3278-3279.) On January 2nd or 3rd, Mr. Gmur saw Kevin, but they never again discussed the incident, other than Kevin asking him if he had seen anything else on the news about the incident. (16RT 3279, People's exh. 32, pp. 42-43.) On January 4th, during a barbecue Mr. Gmur participated in with his neighbors, including Kevin, Mr. Gmur was flipping through television channels and came upon the end of a story that the victim of the homicide had been identified. (People's exh. 32, p. 44.) Kevin was seated nearby and exchanged eye contact with Mr. Gmur, and looked down and shook his head. (People's exh. 32, p. 45.)

Mr. Gmur testified that he never discussed the incident with either Jamelle or Warren. (16RT 3238, 3240.)

Rosemary Furtado and Steven Lam lived together with her daughter Janisha Williams and five other children. Ms. Furtado had known Kevin for many years and considered him like a son. Kevin and Janisha were like brother and sister. (16RT 3442, 17RT 3493, 3495, 3505, 3508, 3526, 3531, 3535-3537, 3556-3557, 3623-3624.) Either on December 31, 1998, or

January 1, 1999, Kevin was at their house. (16RT 3442, 17RT 3511, 3527.) Kevin told Ms. Furtado something bad had happened, but she could not speak to him at the time. (17RT 3528, 3557-3558.) He seemed uptight and nervous and appeared to be crying. (17RT 3528, 3558-3559.) Later, in the bedroom of her home she unsuccessfully tried to get him to talk about it. (17RT 3559.) He was crying. (16RT 3443, 17RT 3512, 3559.) Mr. Lam testified that he heard Kevin tell Ms. Furtado that Kevin had helped his friends move a body, and he should not have. (16RT 3443, 17RT 3512, 3515-3517, 3519-3520.)

Mr. Gmur contacted the police on January 5, 1999 and told them what Kevin had told him. (16RT 3216, 3218-3219, 3270, 17RT 3546, 18RT 3776, People's exh. 32, p. 1.) A portion of his interview was recorded and played to the jury. (16RT 3216, 3218, 3227-3228 People's exhs. 30 and 32.)

A search warrant executed at Warren's residence on January 7, 1999. (16RT 3308.) The boots, size 12, depicted in People's exhibit 17D through 17F were found there. The victim's blood was found on those shoes. (17RT 3775, 3847-3850, 19RT 3902-3903.) Mr. Gmur testified that Kevin was wearing boots that looked like those boots. (16RT 3231-3233, 3255-3257.) Brown Dickies pants, size 34 by 32, were also found there in a blue gym bag. Mr. Gmur testified that Kevin was wearing brown trousers very similar to those. (16RT 3230, 3286, 3412-3414, 3418, 3426, 3429, 19RT 3902, People's exh. 12E-12G.) They and a tan long-sleeved shirt and boots were apart of Kevin's work uniform from the Conservation Corps. (16RT 3250, 3252, 3255, 3285.) It was stipulated that all of the red arrows on People's exhibits 12 and 17 indicate where blood was located. (16RT 3231-3232.) The blood found on Kevin's pants was found to have come

from the victim. (15RT 3070-3072, 3074-3075, 3086-3087, 3116-3117, 3139-3140, 3145, People's exhs. 14-15.) A bite mark found on the victim's knee contained the DNA of Warren Hardy. (15RT 3073-3074, 3093-3094, 3117-3118, People's exh. 14.)

Kevin was arrested. (17RT 3649.) His residence was searched. (17RT 3646.)

Kevin was first interviewed on January 6, 1999 beginning at 12:52 p.m., the interview lasting for almost five hours. (17RT 3652, 18RT 3778, People's exh. 35, pp. 1-2, 58.) Kevin waived his rights. (17RT 3652-3654.) At 5:46 p.m., they began recording the interview. (17RT 3674, People's exh. 35, pp. 1-2.) The recording was played to the jury. (17RT 3678-3681, 18RT 3690-3692, 3694-3695, 3781-3782, 3829-3830, People's exhs. 28, 35.) Kevin initially admitted no involvement in the offenses. After some time, he told the officers that he had been at the scene when the victim was attacked and his account was generally consistent to that provided by Mr. Gmur, with the exception that Kevin said that he and Mr. Gmur had smoked a blunt, a really large joint of marijuana, and drank a little beer before Jamelle and Warren arrived. (17RT 3655-3660, 18RT 3701, 3783-3788, 3793-3794, People's exh. 35, pp. 4-10, 17-24.)

However, Kevin told the officers that the victim broke away from Warren and climbed up the chain link fence. Warren struck her from behind with a stick and she ended up falling over the other side. (17RT 3660, 18RT 3795-3796, People's exh. 35, pp. 10-11, 24-26.) Warren went over the fence and Kevin and Jamelle followed. (17RT 3661, People's exh. 35, pp. 26-27.) Warren drug her a short distance and was stomping on her, beating her with a stick. Then he dragged her further behind a business, sat on her chest, withdrew his penis, and told her to "Suck my dick." (17RT

3661-3662, 3666-3667, 18RT 3796-3797, People's exh. 35, pp. 11-12, 27-32.) At some point, Warren pulled off her clothes. (17RT 3667, People's exh. 35, p. 12.) Kevin did not assist. (People's exh. 35, p. 44.) Kevin said he told Warren that what he was doing was disgusting, he could get AIDS because the victim's face was covered with blood. (17RT 3667, People's exh. 35, pp. 12, 45.) Warren got up, picked up the stick, and started beating her again at the neck and face. Warren then repositioned himself, spread her legs, and jabbed her vagina with the stick. (17RT 3667, 18RT 3797, People's exh. 35, pp. 12-13, 31-33, 45-46.) The stick was a rectangle about an inch and one-half wide. (People's exh. 35, pp. 46-47.) Kevin told Jamelle it was time to get out of there. (People's exh. 35, pp. 13, 33.) Jamelle joined Warren, saying "cool, cool, cool," grabbed the stick, and tried to get it out of Warren's hand. (17RT 3667-3668, People's exh. 35, pp. 13, 42.) Kevin said that neither he nor Jamelle attempted any type of sex with the victim. (People's exh. 35, pp. 40-41.) Kevin said he asked Warren, "What the heck are you doing?" (17RT 3668.) Warren stopped and said they had to clean up. (17RT 3669, People's exh. 35, pp. 13, 33-34.) At that point, Kevin decided to move her and removed his shirt. He wrapped it around the victim's arms, Jamelle wrapped his own shirt around the victim's legs, and they drug her a short distance up the embankment. (17RT 3668-3670, 18RT 3797-3798, People's exh. 35, pp. 13, 34-36.) On Warren's prompting, they collected her clothing and put them in a bag Warren had. (17RT 3670-3671, People's exh. 35, pp. 13-14, 36-38.) They missed one of her shoes. (People's exh. 35, pp. 38-39.) Jamelle looped the bag over the stick that Warren used, climbed back over the fence, and caught a bus to Los Angeles, where after one transfer, they reached the vicinity of Warren's girlfriend's residence, Tiyarie Felix. (17RT 3671-

3672, People's exh. 35, pp. 14, 16, 39, 56.) Along the way the clothes and stick were discarded.[10] (17RT 3671, People's exh. 35, pp. 14, 16, 43, 57.) At Ms. Felix's residence, Kevin said he heard Warren tell her if she told anybody, he would kill her. (People's exh. 35, p. 53.)

Kevin told the interviewing officers that the next day, they hung out there until at some point, Kevin and Warren came back to Long Beach to get some clothing. (17RT 3672-3673.) Kevin told the officers that he had been wearing a white T-shirt, a light olive colored Dickies, long sleeved shirt, a pair of brown Dickies pants, black socks, and a pair of black with gold trim Adidas shoes.[11] (17RT 3672, People's exh. 35, p. 48.) Kevin said that he saw blood on Warren's and his clothes, and Warren washed them for him. (17RT 3673-3674, People's exh. 35, pp. 47-48.) Kevin said his shirt was still at Warren's girlfriend's house. (People's exh. 35, p. 48.)

When asked why he got involved, Kevin replied that he had not wanted to at first, but felt compelled by a sense of loyalty to a friend. (People's exh. 35, p. 45.) When asked if he had been involved in any prior criminal activity, Kevin told the officers that he had done "jacks" with Jamelle in which they stole bikes and took 40 ounce bottles out of liquor stores. They did not take the bikes or any other property from people. (People's exh. 35, pp. 53-54.) Kevin said Warren had talked about "jacking with guns an' stuff." Asked about gang affiliations, Kevin told the officers that Warren claimed the Scottsdale Piru gang from Carson and Jamelle claimed Rolling 20 Crip from Long Beach. (18RT 3799-3800, 3802,

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10 They were never recovered. (18RT 3704-3706, 3708-3709, 3760.)

11 A pair of Adidas shoes matching this description was found at Kevin's residence. (18RT 3819-3820.) They were size 11 and one-half. (18RT 3869.)

People's exh. 35, pp. 54-55.) Kevin said he was just CTS (Capone Thugs Soldiers), the rap group. (18RT 3803, People's exh. 35, p. 55.)

Based upon the information Kevin had provided, search and arrest warrants were obtained for Jamelle and Warren. (18RT 3710-3711.) On January 7, 1999 at about 1:00 a.m., Warren was arrested at his girlfriend's residence on 69th Street, Los Angeles. (18RT 3712-3713.) As the result of information Warren provided the police, at 3:55 p.m. that afternoon, Kevin was again interviewed. (18RT 3713-3714, 3805.) At 5:19 p.m., they began recording the interview. (People's exhs. 39, 40, p. 2.) The recording was played to the jury. (17RT 3739, 3741.)

Without being specific, the officers told Kevin that Jamelle and Warren were providing facts that were not consistent with what Kevin had provided. (18RT 3715, People's exh. 40, p. 2.) They told him he needed to tell the truth and take responsibility for what he did. (18RT 3715.) Kevin shook his head in an affirmative manner. (18RT 3715-3716.)

Kevin told the officers that everything up to the point of the attack had been the truth. (18RT 3715, People's exh. 40, pp. 2-3.) Kevin said when they left the Wardlow Station, they were walking on the north side of Wardlow towards Long Beach Boulevard. (18RT 3716, People's exh. 40, p. 3.) They were being kind of loud and boisterous and were saying, "Happy New Year. Merry Christmas" and singing carols. (18RT 3716-3717, People's exh. 40, p. 4.) They heard a woman yell back, "Yeah, Merry Christmas. Happy New Year." (18RT 3717.) They were all talking and having fun. (People's exh. 40, pp. 5-6.) They walked across the street to where she was on the sidewalk adjacent to a triangular area with bushes and shrubs terminating in the chain link fence that separates the area from the freeway embankment. (18RT 3717-3718, People's exh. 16A.) Kevin

said things then started getting a little crazy; Warren asked her "where's the money at." (18RT 3718, People's exh. 40, p. 6.) She said it was in her jacket. (18RT 3718, People's exh. 40, p. 6.) Her jacket was removed and Kevin started going through the pockets looking for money. (18RT 3718-3719, People's exh. 40, pp. 6-7.) None was found, so they started taking her clothes off. (People's exh. 40, pp. 6-8.) Kevin and Jamelle pulled her down to the ground. (18RT 3719, People's exh. 40, p. 7.) They were between the sidewalk and the chain link fence. (People's exh. 40, pp. 8-9.) Kevin removed her underwear. (18RT 3719, People's exh. 40, p. 7.) She resisted. (People's exh. 40, p. 11.) As Kevin was searching her pockets, she tried to get away. (17RT 3719.) They all searched her clothing. (18RT 3719, People's exh. 40, p. 10.)

Kevin recounted that Jamelle and Warren began stomping on the victim's upper body and head with their feet, each stomping four times. (18RT 3720, People's exh. 40, pp. 10-14.) Warren then said, "We have to finish the job." (18RT 3720.) Kevin believed that he meant they had to hide her and leave her unconscious. (People's exh. 40, p. 11.) Kevin then grabbed her upper body under her armpits and Jamelle grabbed her by the feet and they threw her over the chain link fence. (18RT 3720, People's exh. 16A, People's exh. 40, pp. 13-14.) Then they all scaled the fence. (18RT 3721, People's exh. 40, p. 14.) Jamelle dragged her down the drainage ditch to behind the wall of a business. (18RT 3721, People's exh. 40, pp. 14-15.) Kevin followed. (18RT 3721.) Kevin said she was saying, "Help me. Help me." (18RT 3721.)

Kevin told the officers that he walked up to her, unzipped his pants, and took out his penis. (18RT 3722, People's exh. 40, pp. 15-16.) It was semi-erect. (18RT 3722, People's exh. 40, p. 16.) He got down on his

knees and grabbed her left leg to spread her legs. (18RT 3722.) He inserted his penis while Jamelle was holding her other leg. (18RT 3722, People's exh. 40, pp. 16-17, 19.) She was bleeding a little from her forehead. (18RT 3724, 2864-3865, People's exh. 40, p. 16.) Kevin thought that at this point Warren was collecting her clothes. (18RT 3722-3723.) She was fighting; trying to turn her body away from him, and telling him to stop. (18RT 3723, People's exh. 40, pp. 17, 19.) Kevin said he put his penis inside her about three quarters, and it was not clear if he was referring to three-quarters of an inch or three-quarters of the length of his penis. (18RT 3723, People's exh. 40, p. 17-18.) Kevin variously said he did this for two or three seconds and for a good minute. (18RT 3723, People's exh. 40, p. 18.) He did not ejaculate. (People's exh. 40, pp. 18-19.) Kevin said he was not into having sex with her anymore, and he got up. (18RT 3723, People's exh. 40, p. 19.) Kevin denied that he had bitten her. (People's exh. 40, pp. 34-35.)

Warren then walked over with a stick in his hand and began beating the victim over the head and neck area approximately four times. (18RT 3724-3725, People's exh. 40, pp. 19-20.) This was the first time a stake had been used on her. (18RT 3724.) Warren stomped on her and Jamelle also began stomping on her. (18RT 3725, People's exh. 40, pp. 19-21.) Kevin said he joined in and stomped on her mid to lower torso more than six times. (18RT 3725, People's exh. 40, pp. 19-22.) Kevin told the officers that he was wearing his steel-toed boots that weighed about 10 pounds. (17RT 3731, People's exh. 40, p. 22.) Kevin said she was not saying anything or moving. (18RT 3726, People's exh. 40, p. 22.)

Kevin told the officers that Jamelle took the stick away from Warren, walked over to the victim, and began jabbing the stick up her

vagina. (18RT 3726, People's exh. 40, pp. 23-24.) Warren joined him and together they shoved the stick up, back and forth several times. (18RT 3726, People's exh. 40, pp. 23-24.) The attack ended. (18RT 3726.) Kevin wrapped his shirt around her wrists and Jamelle took his shirt off and wrapped it around her ankles. (18RT 3728, People's exh. 40, p. 25.) Then they moved the body a short distance up the embankment. (18RT 3727, People's exh. 40, pp. 25-26.) Kevin did not know why they moved her. (18RT 3728.) They used their shirts because they were worried about leaving fingerprints. (18RT 3728, People's exh. 40, p. 25.) They gathered the clothing and put it into a bag that Warren had found. (18RT 3726-3727, People's exh. 40, pp. 26-28.) Then they went over the fence back out onto Wardlow Road. (18RT 3729.)

Kevin said everything he had said before from this point on was true. (18RT 3730, People's exh. 40, p. 29.) He did not recall where he left his boots, although they may be at Warren's girlfriend's residence. He had two pair. (People's exh. 40, p. 30.) He said that they were size 10; but then he changed that to size 12. (People's exh. 40, pp. 30-31.) Kevin said that Warren found a five and one dollar denomination food stamp on the victim. (18RT 3731, People's exh. 40, p. 31.) Kevin said that Warren spent them the next day at a Mexican market near his girlfriend's apartment. (17RT 3731, People's exh. 40, pp. 31-33.)

An employee of a market at 6725 South Broadway, Los Angeles, testified that he recognized Kevin and Jamelle Armstrong as someone he had seen in the neighborhood (16RT 3165-3166, 3168-3169, 3173-3175, 3182-3183, 3198-3199, People's exhs. 21-22) and he and another employee of the market recognized Warren Hardy as one of their customers (16RT 3175, 3184, 3199, People's exh. 20.) The market received two food

stamps, a one and a five. (16RT 3166, 3169-3170, 3178-3181, 3201-3203, People's exhs. 18A-18B.) These bore the same serial numbers as a food stamp book found at the crime scene. (16RT 3191-3195, 3404-3405, 3409-3412, 3437-3438, 3440, 18RT 3756, 3870-3871, 3875.)

Ms. Furtado testified that she started receiving letters from Kevin while he was awaiting trial. (16RT 3443, 17RT 3490, 3493, 3511, 3528-3529.) In one letter, he told her he had kicked the victim in the head, four or five times, after she was unconscious. (17RT 3490, 3504, 3509, 3529, 3537, 3541-3542, 3550-3553, 3565, 3583.) He wrote that the woman had been raped, but he did not remember who raped her. (17RT 3533, 3543, 3551, 3569, 3582.) She testified that in a letter to her daughter, Kevin wrote that he heard the victim's bones break or crack as she was being hit. (17RT 3491, 3504-3505, 3531, 3542-3543, 3569.) He wrote that he kicked the woman in the head. (17RT 3553-3554, 3576, 3581, 3585.) In his letters, Kevin expressed that he was sorry for what had happened. (17RT 3541, 3562.)

*2. DEFENSE'S CASE*

Kevin testified in his own behalf. (19RT 3904.) He was born on March 28, 1977. (19RT 3905.) He had training as a nurse's aid. (19RT 4064.) He had been living in the second story apartment of a house occupied by his mother, Colette Burnette, and his three siblings. (19RT 3905-3907, 3909, 3927.) His roommates were his best friend, Gannett Bland, and Gannett's stepfather, Rodney Moore. (19RT 3907.) Kevin does not or never has belonged to a Crypt or Blood gang. (19RT 3938-3939.)

Kevin testified that he had been quite close with his neighbor, Monty Gmur, and was at his house every day. (19RT 3906, 3913, 4069.) Twice he spent the night there. (19RT 3948.)

Kevin met Jamelle Armstrong in 1996 and considered him a good friend. (19RT 3909-3910, 4038-4039.) Jamelle is about three years younger than Kevin. 19RT 3928.) Warren Hardy, Jamelle's brother, was about four months older than Kevin and a member of the Scottsdale Piru Blood gang. (19RT 3939.) Jamelle is a member of the Rolling 20s Crips gang. (19RT 3939.) Warren, Jamelle, and a friend named Capone, put together a little rap group called the Capone Thugs Soldiers that Kevin joined in 1996. (19RT 3911-3913, 4040.) It was not a gang, but performed at parties. (19RT 3912-3913.)

Kevin testified that he (Kevin) and Jamelle had a falling out in October 1998 when Jamelle threatened him. (19RT 3914, 3920.) Warren was present. (19RT 3920.) After that, Kevin had not seen Warren and had not talked to Jamelle until December 29th. (19RT 3920.)

On November 3rd, Kevin moved to the Pomona and California Conservation Corps barracks in Pomona. (19RT 3942-3943.) He had the weekends off and stayed with his mother. (19RT 3943, 3947-3948.) He had a uniform for that job that included dark brown Dickie pants, light brown Dickie shirt, both short and long sleeve, and black boots with steel toes. (19RT 3944-3945.) His shoe size is 10. (19RT 3945-3946.) However, the boots in People's exhibit 17D through 17F and 29 belonged to Jamelle. (19RT 3945.) Kevin believed that Jamelle was wearing the boots depicted in People's exhibits 17D through 17F on that night. (19RT 3946.) Kevin said he (Kevin) had similar type boots and last saw them on the porch of his mother's house. (19RT 3946-3947.) The boots in People's exhibits 17A through 17C belonged to Warren. (19RT 3945-3946.)

On December 28th, Kevin stayed in a room at the Highland Motel in Long Beach. (19RT 3948.) He had planned on going back to the motel

room on the 29th. (19RT 3948.) On the latter date, Kevin spent the day around his mother's house. (19RT 3921.) It was a weekday and Kevin had the day off. (19RT 3943.) Kevin was wearing his uniform with the long sleeve shirt and his size 10 boots. (19RT 3944, 3947, 4031.) He drank a six pack of eight ounce cans of Old English 800. (19RT 3921.) He smoked a marijuana blunt, which he described as a Philly or Garcia Vega, which is about the length of a cigarette, but a little bit fatter, from which the tobacco has been discarded and repacked with marijuana. (19RT 3921-3922.) Kevin smoked two of these that he shared with Gannett Bland, his younger brother, Harold Burnett, and Keith Kendrick at Mr. Gmur's house. (19RT 3923.)

Mr. Gmur came home between 3:30 and 4:30 p.m. (19RT 3923.) He gave Kevin $10.00 and sent Kevin to the store to get another six pack of beer and a five dollar sack of weed, which Kevin did. (19RT 3923-3924.) When Kevin got back, Mr. Gmur, Keith, Gannett, and Harold were there. (19RT 3925.) They all sat in the living room and smoked a blunt and drank beer. (19RT 3925.) They got through smoking about 5:00 p.m. (19RT 3925-3926.) Kevin had not had anything to eat. (19RT 3926.)

Thereafter, Kevin and Harold were in the music studio in Mr. Gmur's house working on one of Harold's songs. (19RT 3926.) About 30 minutes later, Mr. Gmur told them that "Jamelle and them" were at the door. (19RT 3927.) "Them" included Warren and another youth, Chris. (19RT 3928.) Kevin was about to leave, but his brother asked him to stay. (19RT 3927.) Harold was friends with Jamelle, Warren, and Chris. (19RT 3927.) Kevin did not know Chris. (19RT 3928.)

Keith left at 6:00 p.m. (19RT 3932.) For the next two or three hours, all of them participated in the writing of music. (19RT 3929.) At

this point, it was about 9:00 p.m. (19RT 3929.) They had been drinking a combination of Cisco, Thunderbird, Nighttrain, and Old English, the ingredients of which Warren bought at the liquor store across the street. (19RT 3929-3930.) They were approximately 16 ounce bottles. (19RT 3930.) This mixed drink they called gasoline and drank shots of it. (19RT 3931.) The Old English was the chaser. (19RT 3930-3931.) Kevin testified that he drank six shots and was feeling drunk. (19RT 3931-3932.) He had been drinking the Old English all day and by that time had drank more than ten cans. (19RT 3931.) Kevin had five blunts of marijuana all day, one by himself and four that he shared. (19RT 3931-3932.)

Mr. Gmur told the group that he had to go to work the next morning so he was getting ready for bed. (19RT 3932.) They all left and went to the backyard of Kevin's mother's house. (19RT 3932-3933.) They initiated Chris into the Capone Thugs Soldiers by socking him in the chest ten times, but not hard enough to bruise. (19RT 3933-3934, 3938.) They had finished drinking the gasoline and Old English. (19RT 3940.) They were now drinking Thunderbird. (19RT 3941.) All of them were drunk. (19RT 3941.) They stayed in the backyard five minutes. (19RT 3941.)

Warren wanted to use the phone and they went back to Mr. Gmur's house and the latter permitted him to use his. (19RT 3941-3942.) Then Kevin, Jamelle, Warren, and Chris left together. (19RT 3942.) Gannette went the opposite way. (19RT 3942.) Kevin decided to walk Chris, Warren, and Jamelle to the bus stop on Long Beach and Anaheim, because of the way the area is, Kevin went with them to protect them. (19RT 3949, 4043.) Chris got on the bus to downtown Long Beach. (19RT 3949.) Warren asked Kevin to spend the night at his house in Los Angeles. (19RT 3949.) Jamelle was also going to Warren's house. (19RT 3949-3950.)

Kevin decided to do that. (19RT 3949.) He had no change of clothes. (19RT 3949.)

Kevin started walking with them. (19RT 3950.) They missed the train, so they walked up Long Beach to the Pacific Coast Highway. (19RT 3950, 3951.) They hoped to find a bus. (19RT 3951.) The bus did not come, but they saw the train coming, so they ran over to the Pacific Coast Station and took the train about two miles to Wardlow Road. (19RT 3951.)

They got off the train and walked east toward Long Beach Boulevard for about five minutes. (19RT 3952-3954.) They were walking in single file with Jamelle in front, Kevin in the middle, and Warren in the back. (19RT 3953.) They were not singing. (19RT 3953.) Kevin was walking with his head down. (19RT 3953.) Kevin explained that he had told the officers in his second interview that they were singing because "I was, basically, tired I just wanted to get out of there." (19RT 3953-3954.) "Just wanted to get out of the interview. I was tired." (19RT 3954.)

Kevin heard a sound from across the street and looked over. (19RT 3954-3955.) He saw Warren with the white woman about 20 feet from Kevin. (19RT 3955-3956.) Wardlow is a two lane narrow road. (19RT 3956.) Warren was holding her by the right lapel of her denim jacket with his right hand. (19RT 3956-3958.) Jamelle was on his way over there and Kevin followed. (19RT 3958.) Nobody said anything to Kevin. (19RT 3958.) Kevin testified that he did not know he was going to participate in this murder. (19RT 4049.)

When Kevin got to the other side, Warren was asking her if she had some money on her. (19RT 3959.) She said no. (19RT 3959.) Warren said, "Why are you lying to me?" (19RT 3959.) He proceeded to go through her pockets. (19RT 3959.) Jamelle started helping him. (19RT

3959.) Warren took the jacket off and searched through it. (19RT 3959.) At this time, Jamelle grabbed her hands to prevent her from leaving or hitting. (19RT 3959.) She said, "I don't have any money." (19RT 3959.) Kevin was telling them to leave her alone. (19RT 3960.) They continued to assault her. (19RT 3960.)

Warren and Jamelle continued going through her clothes. (19RT 3960, 3963-3964, 3994.) Kevin did not recall Warren finding anything in her clothing. (19RT 3994.) At some point, Warren came back towards Jamelle and the victim and said, "Why you start lying to me?" (19RT 3963.) Warren socked her in the face with his fist. (19RT 3963.) She spit on him. (19RT 3963.) Jamelle hit her on the back of the head with a fist. (19RT 3963.) Kevin told them to leave her alone. (19RT 3963.) Yet, the brothers continued attacking her. (19RT 3964.) They ended up in the triangularly shaped dirt area between the sidewalk and the chain link fence. (19RT 3964.) They got her down on the ground and started kicking her. (19RT 3964.) Kevin said he was still telling them to leave her alone. (19RT 3964.) However, Kevin did not attempt to separate them from her. (19RT 3964-3965.)

At that point, Warren and Jamelle picked her up and threw her over the chain link fence. (19RT 3965, 4045.) She landed on her shoulder and head. (19RT 4047.) She was still clothed. (19RT 3965, 3967, 4047-4048.) Just her jacket had been removed. (19RT 3965.) The three of them went over the fence; Kevin last. (19RT 3965-3966.) Kevin heard her say "help me," it was like a gurgle. (19RT 3966.) Kevin could see some blood on her forehead. (19RT 3966.)

Jamelle grabbed her by her arm and drug her down the drainage ditch to a point behind a business. (19RT 3967-3969, 4048.) Warren was

right behind Jamelle. (19RT 3967.) Kevin went to where they were and again told them to leave her alone. (19RT 3969.) Jamelle started kicking her in the head and neck. (19RT 3969.) Warren kicked her in the chest. (19RT 3969.)

As Kevin got closer, Jamelle and Warren started stripping her, throwing her clothes to the side. (19RT 3969-3970.) The brothers took all her clothes off. (19RT 3970, 4050, 4052.) Kevin testified that he did not assist, despite what he told the officers during his interview. (19RT 3970-3971, 4050.)

Jamelle and Warren proceeded to stomp and beat her with their hands and feet. (19RT 3971.) Kevin testified that he told them to leave her alone. (19RT 3971, 4022-4023.) Warren turned and looked at Kevin and said, "We have to finish the job." (19RT 3971.) Kevin was about to climb back over the fence when Warren asked him where he was going. (19RT 3971-3972.) Kevin stopped. (19RT 3972.) Warren made an advance towards Kevin. (19RT 3972.) Warren was about four feet away at the most. (19RT 3972.) Kevin stayed where he was. (19RT 3973.) Warren made "a threatening look." (19RT 3973.)

Warren went back. (19RT 3973.) Jamelle found a stick somewhere and beat her with it. (19RT 3973-3975.) Jamelle held it over his shoulder with one hand and swung it as one would swing an axe. (19RT 3975-3976.) He hit her head as she was lying face up. (19RT 3976.) Kevin heard her struggling to breath. (19RT 3976.) Warren began kicking her again. (19RT 3976.) Kevin told them to leave her alone, that it was getting out of hand., but he did not otherwise try and stop them (19RT 3976.)

When Kevin could no longer hear any sound coming from her, he knew she was dead. (19RT 3978, 3981-3982.) At some point thereafter,

Jamelle stuck the stick into her vagina six or seven times. (19RT 3977-3978, 3982, 4076A.) Warren was stomping on her neck at the same time. (19RT 3977, 3979.) Kevin saw blood all over her face and front of her body. (19RT 3978-3979.) Kevin told them to leave her alone. (19RT 3977.) Warren grabbed the stick and repeated what Jamelle had done. (19RT 3981.) At this point Jamelle was kicking her. (19RT 3981.) Kevin just stood there, did not try and stop them, and said nothing. (19RT 3981.)

Kevin testified that he did not see anyone try and have sexual intercourse with her or bite her (19RT 3977, 3979), although he acknowledged that he had told the officers that he heard Warren tell her, "Suck my dick." That did not happen. (19RT 3980-3981, 4061.) Kevin never kicked her, although he acknowledged that he told the officers and others that he had. (19RT 3979-3980.) Kevin acknowledged that he told only the detective that he attempted to have intercourse with her. (19RT 3980.)

At some point, Warren said, "We have to clean up." (19RT 3982.) Kevin took off his shirt because he did not want to touch her. (19RT 3982.) He tied his shirt around her wrist and head. (19RT 3982.) Jamelle took his shirt and tied it around her ankle. (19RT 3982-3983.) They picked her up, moved her up the embankment, and set her down. (19RT 3983.) They collected her clothes and put them in a plastic grocery bag that Warren had. (19RT 3983-3985.)

They went back over the chain link fence. (19RT 3988-3989.) Jamelle looped the bag over the stick and carried it on his shoulder. (19RT 3993.) During their walk to the bus stop on Long Beach Boulevard, Jamelle discarded the stick in a field. (19RT 3990, 3993.)

Kevin testified that he had no money, so Warren paid for their bus ride. (19RT 3991, 3994.) They were all still drunk. (19RT 3990-3991.) During the trip, Warren got into an altercation with a passenger, and Kevin negotiated with the bus driver to avoid him calling the police. (19RT 1991-1992.) They got off the bus in South Central Los Angeles, and Warren threw the bag of clothes into a public trash can. (19RT 3995.) They transferred to another bus that took them near Warren's girlfriend's home. (19RT 3996.) Kevin purchased a Black and Mild cigar with Jamelle's money. (19RT 3996-3997.) They walked through the alley to Ms. Felix's house. (19RT 3997.) It was somewhere passed midnight. (19RT 3997.) There were three or four little kids there. (19RT 3998.) That was when Kevin first met her and was the only time he had been there. (19RT 3939-3940.)

The first thing Warren said as they walked in is that if she said anything, he would kill her. (19RT 3999.) Kevin stayed in the house that night. (19RT 4000.) The next day, Kevin, Warren, Ms. Felix, and one of her female friends drove in the latter's car to Long Beach where Kevin got his blue duffle bag and a change of clothes. (19RT 4001-4002, 4005.) Then they returned to Ms. Felix's home where Kevin remained for the remainder of the day. (19RT 4006-4008.) Kevin testified that in his telephone call with Mr. Gmur that day, Kevin did not tell Mr. Gmur "We killed a white woman." (19RT 4068.) Mr. Gmur lied. (19RT 4068-4069.) At some point during the day, Kevin learned that Warren had gotten food stamps from the victim. (19RT 4011-4013, 4026, 4077A-4078A.)

Kevin testified that he initially lied to the officers on the first day of his interrogation because he was scared and they kept calling him a liar, so he told them what he knew about the crime. (19RT 4014-4015.) The

following day, Kevin said he changed his story because the officers told him they had talked to Jamelle and Warren and Kevin's story was not matching theirs. (19RT 4016.) Kevin said that what he thereafter told them was not true. (19RT 4016-4017, 4059-4062.) They told Kevin that he had raped the woman and, as Kevin explained, "I was tired, plus I didn't want to go through no more questions. So I figured if I tell them what they want to hear, I could hurry up and get out of there." (19RT 4017.) Kevin had held the vain hope that he would be released. (19RT 4017, 4020-4021.)

Kevin explained that he had done nothing to stop his friends from killing her because he was afraid of them. (19RT 4019.) Based on prior incidents he had experienced with them, he thought they would turn on him; attack him. (19RT 4019.) The only thing he did to help was move the body. (19RT 4072-4073.) Kevin denied that he had ever touched the stake, stomped on her, or raped her. (19RT 4060-4062.) Kevin explained that he wrote only one letter to Rosemary Furtado about his involvement in the crimes and he sent the same letter to her daughter. (19RT 4082A-4083A.)

Kevin testified that all the kids in their rap group, about 10 each of girls and boys, used Capone as their last name. (19RT 4082A, 4086A-4087A.)

B. Penalty Phase

*1. CASE IN AGGRAVATION*

The prosecution recalled Monty Gmur, Kevin's neighbor and mentor, who testified that he had known Kevin for approximately a year before the homicide. (21RT 4410.) As he recalled, Kevin did not bring any alcoholic beverage with him when he arrived that evening and Mr. Gmur did not recall offering Kevin anything. (21RT 4410-4411.) Kevin

appeared sober. (21RT 4411.) Mr. Gmur did not drink any beer with Kevin that day or smoke marijuana. (21RT 4438, 4441-4442.)

When Warren Hardy, Jamelle Armstrong, and Chris arrived, Kevin and his brother may have already been in the music room. (21RT 4411, 4438.) The three new arrivals did not have anything with them to drink. (21RT 4411-4412.) His visitors were at his house for about three hours. (21RT 4412.) Warren and Chris left for 15 or 20 minutes and came back with three quart bottles of alcohol. (21RT 4412-4413.) Warren mixed them together and Kevin, Warren, Jamelle, and Chris drank the mixture. (21RT 4413.) At some point, Kevin asked if they could use one of Mr. Gmur's back rooms to jump Chris into their gang; an initiation ritual. (21RT 4414-4415, 4423-4424.) Mr. Gmur's response was no. (21RT 4423-4425.) All four left his house and returned in about 15 minutes. (21RT 4424-4425.) Chris had no visible injuries and his clothes were not torn. (21RT 4437.) Warren came inside to use the phone while the others remained outside. (21RT 4426-4428.) Mr. Gmur heard Warren tell someone on the phone called Capone, "Chris is cool. We're going to call him Playboy." (21RT 4432-4433.)

The four thereafter left. (21RT 4433.) Mr. Gmur watched them walk away and noted that they had no problems walking off the porch. (21RT 4433.) Mr. Gmur testified that when he had earlier testified that they were stupid drunk when they left, he meant they were loud, boisterous, rowdy, and obnoxious. (21RT 4442.) None of them should be driving. (21RT 4442.)

Mr. Gmur testified that he did not know if Kevin was in a gang or what Capone Thugs Soldiers was. (21RT 4436.) He knew that Kevin's nickname was Scrappy. (21RT 4436.)

The prosecution called Janisha Williams, who testified that she was a good friend of Kevin; he was like a brother to her. (21RT 4445-4446.) He was older than her (21RT 4446), and she had known him for about 11 years. (21RT 4445.) Kevin and his family used to live around the corner from her. (21RT 4460.) She recounted that Kevin did not have a good relationship with his stepfather, Saleem. (21RT 4460.)

Ms. Williams testified that Jamelle was one of Kevin's friends, but not his brother Warren. (21RT 4458.) She also was a member of the Capone Thugs Soldiers; it was not a gang. The name they made up with their friends, which included Jamelle, Kevin's brothers, and others. (21RT 4446-4447, 4459.) She explained that the initiation including beating up on the new person for two or three minutes. (21RT 4448-4450.)

She testified that about seven years ago, when Kevin was 18 or 19 years old, she saw Kevin hit somebody with a stick; once or twice. (21RT 4450-4452, 4456-4457, 4459, 4461.) She recounted an incident when 10 of them jumped a teenager (21RT 4453) and when she saw Kevin kick a couple people off their bicycles (21RT 4454-4457.)

The prosecution called Teddy Keptra, the victim's 20 year old son, who identified photographs of his parents getting married, of him and his mother on his fifth birthday, another when he was about 14 years old, and a family gathering on Thanksgiving. (21RT 4477-4480, 4484, People's exhs. 43 A through E.) He was 14 years old when she died. (21RT 4479.) He testified that she did not work and was home when he returned from school. (21RT 4479.) Occasionally, she stayed overnight with an elderly woman who lived down the street. (21RT 4487-4489.) It had not been easy for him since her death. (21RT 4479-4480.) He lost motivation and dropped

out of high school and quit his job. (21RT 4480.) Only recently had he returned to work. (21RT 4482.)

*2. CASE IN MITIGATION*

Kevin's mother, Collette Burnett, testified. (21RT 4540.) For the last two years she had been homeless. (21RT 4541-4542.) With the exception of the preceding week when she "peeked" into the courtroom, she had not had not seen Kevin since his arrest (21RT 4541-4542, 23RT 4797), although at a later point in her testimony she said she twice visited him in jail (23RT 4796.) That courtroom visit was apparently only prompted by the fact that Kevin's brother was engaged in a matter in the courtroom next door. (23RT 4797.)

Kevin has five siblings, four younger, Brian, Daniel, Harold, and Kekia Burnett, and an older brother, Johnny Pearson. (21RT 4542-4543, 4545, 23RT 4798.) Johnny and Kevin share the same father, Mr. Pearson. Their parents were never married. (21RT 4542-4543.)

Kevin's mother met Kevin's step-father, Harold Burnett, when Kevin was about four months old. (21RT 4543, 4545.) They lived together for nine years, eight of them married, in South Central Los Angles on 62nd Street between Central and Compton. (21RT 4543-4544.) Ms. Burnett testified that Mr. Burnett had a good relationship with Kevin; he loved Kevin from the first moment he saw him. (21RT 4544.) He was a good man with his children. (21RT 4545.) Every night they did a group hug with all six children instead of tucking each one in. (21RT 4545.) She said that her husband told her that if she ever left him, he was going to take all six of his children. (21RT 4546.) Mr. Burnett died on November 9, 1986. (21RT 4542, 23RT 4778.) Kevin was then nine years old. (21RT 4543, 4546.)

Thereafter until May 1989, Ms. Burnett lived at 112th Street between Stanford and Avalon in South Central Los Angeles with all of her children. (23RT 4778.) In 1989, she suffered a mental breakdown and was hospitalized for seven weeks. (23RT 4778-4779.) She left her children in a motel room. (23RT 4786-4787.) Her sister-in-law, Shirley Burnett, took custody of the children. (23RT 4779, 4787.) When she was released, the children continued their stay with Shirley Burnett. (23RT 4780.)

In September 1989, after she got out of the hospital, Ms. Burnett met Saleem. (23RT 4781-4782.) She began living with him in December 1989 and married him in 1991. (21RT 4778, 4782.)

Kevin stayed with his aunt until January 1990, at which point he moved into a foster home for three weeks. (23RT 4780-4781.) Then his mother regained custody of her three oldest children, including Kevin. (23RT 4781.) In July 1990, she regained custody of her younger children on a permanent basis. (23RT 4780-4781.)

Kevin's mother testified that Saleem was abusive to her. (21RT 4782.) When Saleem hit her, Kevin would try and intervene. (23RT 4783.) The altercations between Kevin and Saleem were physical. (23RT 4783.)

Saleem was religious and practiced Islam. (23RT 4783.) Ms. Burnett converted to his faith. (23RT 4783-4784.) She testified that Kevin was Baptist initially and then on her and Saleem's invitation started practicing Islam. (23RT 4784.) When Kevin was 15 or 16 he returned to attending the Baptist church. (23RT 4784.)

Ms. Burnett testified that she spanked her children and physically punished or hit Kevin, usually with a belt, although she also hit him with a wooden spoon, broomstick, or a mop handle. (23RT 4785.) Most of the time she would have her offending child stand in the corner or ground

them. (23RT 4785.) She recounted that Kevin helped with the household chores. (23RT 4789.) She gave each of her children a weekly assignment to clean the bathroom or the kitchen. (23RT 4789.) If she had to go somewhere, she would have Kevin watch his siblings. (23RT 4789-4790.)

Ms. Burnett's longest period of employment between 1986 and 1998 was six months in 1998 when she volunteered for a congressional candidate and ran his office during his political campaign. (23RT 4790.) Her only paid employment during those years was for three months, from March 1995 to June 1995, as a nurse's assistant. (23RT 4791.) Since Kevin's arrest, her longest period of employment has been three months. (23RT 4795.)

When Kevin was arrested, she was again admitted into the hospital. (23RT 4795.) The longest period she was hospitalized was 10 to 14 days. (23RT 4795.)

Ms. Burnett testified that Kevin got his first job when he was 15 years old. A man picked Kevin up in a van and they went out and sold candy. (23RT 4787.) In 1995, Ms. Burnett had another mental breakdown and was hospitalized for three days. (23RT 4785-4786.) Kevin was still living at home at the time, but Saleem was not there. (23RT 4786.) She recounted that in 1996 Kevin worked at a grocery store. (23RT 4788.) Later that year, he went into the Job Corps and lived in Clearfield, Utah for a year and a half. (23RT 4788.) He came back in 1997 and worked in the Conservation Corps. (23RT 4788-4789.)

Ms. Burnett testified that she was not aware of Kevin's affiliation with Capone Thugs Soldiers. (23RT 4804.) As far as she knew, while growing up, Kevin never stole, robbed, kidnapped, hit, or hurt anyone. (23RT 4807-4808.) The only brush with the law that she was aware of was

when Kevin was brought home for ditching school. (23RT 4808.) She testified that Kevin had a temper, as "all of us do," but when he was mad, he would leave rather than be assaultive. (23RT 4807-4808.)

Kevin's younger brother, Harold, testified. (23RT 4843, 4857.) He was currently on probation following his January 2003 plea of no contest to making a terrorist threat. (23RT 4850.) Harold was 15 or 16 years old when Kevin was arrested. (23RT 4847.) They were close; Kevin was like a father figure to him; he loved Kevin very much. (23RT 4843, 4857.) Most of Harold's friends looked up to Kevin. (23RT 4858.) Kevin made sure that Harold and his siblings were up and ready to go to school. Kevin helped his sister with her hair and helped them all with their homework. (23RT 4843.) Harold hung out with Kevin; they had the same friends. (23RT 4843-4844, 4867-4868.)

Harold testified that Kevin helped Harold stay out of trouble. (23RT 4850-4851.) Kevin taught him to handle a problem by walking away, and to express it in his music rather than hold it in. (23RT 4865-4866.) Kevin caught him ditching, and made him go to school. (23RT 4851.) Kevin took him to a youth program at the park. (23RT 4851.)

Harold testified that their mother was not around a lot when they were growing up. (23RT 4847.) She took trips to Las Vegas. (23RT 1847.) Harold said she spanked them more than once a week. (23RT 4848.) She had her children doing all of the household work. (23RT 4848.) Kevin helped them with their chores so she would not be upset with them. (23RT 4848.) Harold recounted that their stepfather, Saleem, was on drugs. (23RT 4849.) He hit their mother numerous times. (23RT 4849.)

Harold testified that the Capone Thugs Soldiers was their rap group. (23RT 4844.) It was not a gang. (23RT 4844.) Its purpose was just

looking out for each other and rapping. (23RT 4845.) Harold never saw Kevin fight or assault anyone. (23RT 4845-4846, 4865.) Kevin never lost his temper or became violent. (23RT 4851.) Harold said he saw Jamelle Armstrong hit someone with a stick and knock someone off their bike. (23RT 4845-4846.)

Harold testified that he missed Kevin a lot. (23RT 4854-4852, 4868.) When he talks with Kevin on the telephone, they reminisce about the times when Kevin was home. (23RT 4857.) Harold said he could not contemplate Kevin being executed. (23RT 4866-4867.)

Barbara Johnson testified that she had known Kevin and his family since 1991 or 1992 when they moved within two doors of her residence. (21RT 4517.) Kevin took care of his younger brothers and sister and seemed to have a good relationship with them and his mother. (21RT 4523-4524.) Ms. Johnson recounted that Kevin and his siblings were close and they were respectful of their mother. (21RT 4518.) However, Saleem was not a good father figure. (21RT 4518, 4524.) She saw him try and hit Kevin and one or two of the other boys with a two by four, fighting them like he would another man. (21RT 4518-4519.) One of Ms. Johnson's sons went over and took the weapon away from Saleem. (21RT 4519.)

Ms. Johnson testified that she (Ms. Johnson) was raising her four grandchildren and two children of her own. (21RT 4519.) When Kevin was 14 and 15 years old, he helped her out by babysitting when she went shopping. (21RT 4520, 4530.) Kevin took her children to the local park when they had lunches and programs for the children. (21RT 4520-4521.) Kevin played basketball with them. (21RT 4520-4521.) Her grandchildren looked up to him because he was older and a leader. (21RT 4532.) She felt close to Kevin. (21RT 4524.) She never had any behavior problems with

him. (21RT 4524.) She never saw Kevin assault anyone, curse, or hang out with gangs. (21RT 4522.) He played in his yard, or he was inside watching television or "doing music." (21RT 4523.)

After three or four years, Kevin and his family moved a few blocks away. (21RT 4522.) Ms. Johnson learned from Kevin and his mother that he got into the Job Corps. (21RT 4525-4526.) She saw him in his uniform. (21RT 4526.) After he moved, they remained close, but she no longer saw him daily. (21RT 4527-4528.) Ms. Johnson testified that she loves Kevin. (21RT 4528-4529.) Her last contact with him was about a week before the murder. (21RT 4530.) She did not want him to get the death penalty. (21RT 4534, 4536.)

Kevin was assessed by Dr. Jack Rothberg, a board certified forensic psychiatrist who also held a doctorate in psychoanalysis. (22RT 4574.) He interviewed Kevin twice in April 2003, about two weeks apart. The interviews were held at the men's Central Jail. (22RT 4575, 4611, 4756-4757.) The first interview lasted about an hour, "plus or minus 15 minutes." (22RT 4611.) He had not by then read all of the background material he had been provided. (22RT 4611-4612.) The second interview was for about another hour. (22RT 4612.)

A third interview was conducted on August 18, 2003 and lasted a bit less than an hour. (22RT 4575, 4610-4614.) He wrote his report on this date. (22RT 4612.) He also met with Kevin for about 20 minutes on the first morning that he (Dr. Rothberg) testified. (22RT 4575, 4611, 4613.) On the same morning, he spoke for five or ten minutes with Kevin's mother. (22RT 4577, 4599, 4618.) Dr. Rothberg testified that he did not interview anyone else (22RT 4618-4619), but he offered that he did as much as he feasibly could under the circumstances. (22RT 4637-4639.)

Dr. Rothberg discussed with Kevin his childhood (22RT 4577) and reviewed six to eight inches of documents that he had been provided that included police reports and the murder book (22RT 4576, 4599.) He also reviewed the transcript of Kevin's trial testimony and the transcripts of law enforcements' interviews of Kevin, Warren Hardy, and Jamelle Armstrong. (22RT 4576, 4587, 4608-4610, 4629, 4651-4652.)

Dr. Rothberg recounted Kevin's history. He grew up in a difficult environment. (22RT 4577.) His biological father was not present within months of his birth and Kevin did not see him at all after the age of four. (22RT 4577.) Kevin's mother was indifferent, lazy, absent, and a bit physically punitive. (22RT 4577.) She was unusually harsh and critical even when he was accused of something he did not do. (22RT 4577.) Emotionally she had abandoned him. (22RT 4581.) She either worked long hours or when at home she drank coffee and watched television all day and required her children to do all of the household tasks. She did not do much with them. (22RT 4581.)

Kevin was very close to his first step-father, Mr. Burnett, who was probably the most important positive roll model in his life. (22RT 4577-4578.) But, he was murdered when Kevin was only 10 or 11 years old. (22RT 4578.) That obviously had a traumatic effect on Kevin. (22RT 4578.) Dr. Rothberg explained that sometimes children his age do not have the same kind of grief reaction that older adolescents or adults do, whose feelings are expressed by acting out, being angry, or otherwise expressing their feelings indirectly. (22RT 4578-4579.) By contrast, Kevin manifested a lack of affect about the death. (22RT 4578.) That is, he was numb, did not cry, or act out. (22RT 4578-4579.) It was a complete shut down to the closest human attachment he had had. (22RT 4579.)

During Kevin's mother's two psychiatric hospitalizations after her husband's death, Kevin was removed from the home and placed in the care of an aunt and then into foster care. (22RT 4582.)

When his mother remarried when he was 13 or 14 years old, his next step-father, Saleem, was a very difficult, mean, physically abusive man. (22RT 4578, 4583.) He had altercations with Kevin and other members of the family. (22RT 4578, 4583.) There were spankings with belts and sticks, and quite a bit of fighting, tension, and hostility. (22RT 4583.) Kevin stood up to him and they physically fought. (22RT 4583-4584.) Ultimately his mother and step-father split up. (22RT 4584.)

These were the predominate influences in Kevin's life. (22RT 4578.)

Dr. Rothberg testified that Kevin generally had a good relationship with his older and younger siblings. (22RT 4579.) Kevin was a role model for and supportive of his younger siblings. (22RT 4579.) He was to some extent a stand-in parental figure. (22RT 4579.)

Kevin had some romantic relationships with women that seemed quite stable for someone his age. (22RT 4579.) He became sexually active only around 18 or 19 years old. (22RT 4579.) He had a couple of close relationships with girls, which lasted six months or a year, and tended to be marked by reasonable stability. These ended when the girl went out with someone else. (22RT 4579-4580.) Kevin remained faithful to them as long as he felt he was in a committed relationship with them. (22RT 4580.) Shortly before the homicide, Kevin had been involved with a girlfriend who was in the military and there were some plans for him to eventually join the military and perhaps join her. (22RT 4580.) Kevin told Dr. Rothberg that

he never was involved in any altercations with the women he dated. (22RT 4580.)

Dr. Rothberg recounted that through partly junior high school, Kevin was a pretty good student; went to school every day, and got pretty good grades. (22RT 4580.) As an adolescent, he started ditching school, and his grades dropped, although he passed his courses, but he did not do nearly as well as he could have. (22RT 4580.) Kevin's employment history included volunteer work at a park for a couple of hours a week working with younger kids, he obtained certification as a nurse's aide, and employment in the Conservation Corps. (22RT 4580.)

Dr. Rothberg obtained no history that Kevin had any gang involvement, and he had no prior arrests. (22RT 4584-4585.) He may have been involved in some petty theft or minor shoplifting. (22RT 4584.) Kevin was interested in rap music and belonged to a group of a few friends who tried to create music. (22RT 4585.) However, Kevin frequently drank quite heavily, consuming as much as the equivalent to 6 to 12 drinks at a time. (22RT 4585.) He also smoked marijuana on a daily basis. (22RT 4585.) There was no indication that he used any other type of drugs. (22RT 4585.)

Dr. Rothberg testified that before the murder there had been conflicts between Kevin and Warren Hardy and Jamelle Armstrong. (22RT 4585-4586.) Some months prior to the homicide, Kevin believed that Jamelle had stolen some things from him and confronted Jamelle about it. (22RT 4586, 4653-4654.) Then, either Jamelle or Jamelle and Warren together, threatened Kevin. (22RT 4586.) One of their gang friends joined them and told Kevin that he better just shut up about this or they were going to do him in. (22RT 4586.) One of them was armed with a firearm and they

threatened his life. (22RT 4586, 4654.) Consequently, Kevin thereafter stayed away from them. (22RT 4586-4587.) One of Kevin's brothers minimized the threat, and told Kevin that that was just how they are and ignore it. (22RT 4587.) The night of the homicide was the first night that Kevin had seen Jamelle and Warren. (22RT 4587.) Kevin told Dr. Rothberg that he was still afraid of them. (22RT 4587.)

Dr. Rothberg discussed with Kevin the fact that he had given the police different versions of the incident. (22RT 4587-4588, 4592.) Dr. Rothberg noted that Kevin was naïve about the police's procedures and believed that what he told the police would help him. (22RT 4592-4593, 4595.) At one point, he felt it would help Jamelle to put the blame on himself because Jamelle was either having or recently had a baby, and if he (Jamelle) was released, he would be possibly of more assistance to the baby's mother. (22RT 4592-4593, 4595.) Kevin now knew how naïve he had been. (22RT 4595.)

Dr. Rothberg provided Kevin the Minnesota Multi-Phasic Personality Inventory (MMPI) to complete. (22RT 4597, 4614-4615.) Dr. Rothberg explained that it is the most widely respected personality test and is designed to assess an individual's personal make-up and current emotional condition. (22RT 4597.) It provides validity scales to determine if there is malingering. (22RT 4597, 4615.) The results were submitted for analysis to an independent psychologist. (22RT 4614.)

Dr. Rothberg stated that three findings from the assessment stood out. (22RT 4598.) First, Kevin suffers from severe paranoia. (22RT 4598, 4616, 4666.) He tends to be suspicious or fearful of people (22RT 4598) and has a propensity for being psychotic (22RT 4616, 4666.) He projects his anger and aggressive impulses onto others. (22RT 4667.) If there is an

ambiguous situation, he would tend to see it in a more dangerous way than would the average person. (22RT 4598.) Second, there was suggestion that he suffered from difficulties with substance abuse. (22RT 4598.) Third, he had some difficulties with impulse control. (22RT 4598.) This meant that he had a potential of blowing up in certain circumstances. (22RT 4598, 4665-4566.) There was no indication what circumstances would trigger that. (22RT 4598.) However, an explosive outburst was potentially possible on the night in question. (22RT 4665.)

Otherwise, Kevin had a completely normal profile. (22RT 4599.) Dr. Rothberg was unable to produce a definitive diagnosis for Kevin. (22RT 4599.)

Kevin provided Dr. Rothberg two or three different versions of the facts of the incident (22RT 4593, 4688-4689) and further versions were provided by Jamelle and Warren (22RT 4667-4668.) It was significant to Dr. Rothberg for many reasons that Kevin told such different versions over and over. (22RT 4594-4595.) He was traumatized by the incident and set up all sorts of blocks in his mind to avoid these upsetting events. (22RT 4594-4596.) Kevin had to some degree blotted the incident out of his mind that lead to additional confusion in what the actual facts were. (22RT 4593.) Dr. Rothberg did not profess to know the truth, but believed that Kevin did not rape the victim. (22RT 4594, 4635-4636, 4653, 4691, 4727, 23RT 4761.) Yet, Dr. Rothberg stated that his report indicated that Kevin did not deny involvement in the torture, kidnap, rape, rape in concert, or murder. (22RT 4641-4643, 4650-4651.) Kevin affirmed that he helped to move the body and stomped on the victim after she was dead. (22RT 4662, 4676-4678, 23RT 4754.) Kevin blamed Warren for everything else. (22RT 4663.)

After considering Kevin's history, character, and demeanor, Dr. Rothberg testified that he was "more inclined to believe" Kevin's account given at trial rather than those portions of other accounts provided by Kevin, Jamelle, Warren, and others that were conflicting. (22RT 4630-4635, 4660, 4677-4678.) He believed that Kevin was a passive participant. (22RT 4654-4656, 4705.) Kevin did not feel he had a choice (22RT 4658), but he felt responsible for what happened because he participated in it. (22RT 4662.)

Dr. Rothberg opined that Kevin's alcohol consumption did not prevent Kevin from knowing what he was doing. (22RT 4710-4711.) Although the results from the MMPI indicated psychosis, Dr. Rothberg did not believe that Kevin was psychotic when this occurred. (22RT 4716.) Nor did Dr. Rothberg believe that Kevin was suffering from any mental illness or disorder which would have explained, excused, or predicted his conduct that night. (22RT 4766.) Kevin clearly understood what he was doing. (22RT 4716.) However, Kevin was prone to projections, so he was likely to misinterpret what other people were doing. Kevin projects his own anger onto others, and then becomes fearful of them. (22RT 4717.) Thus he held a certain amount of exaggerated fear toward Jamelle and Warren. (22RT 4717.) The violence of the incident generated a lot of conflict for Kevin that he just could not deal with. (22RT 4718.)

The parties stipulated that Kevin had no prior criminal convictions. (22RT 4722, 23RT 4869.) There had been no prior psychological evaluations of Kevin. (22RT 4722.) Dr. Rothberg concluded that Kevin's behavior that night was an aberration inconsistent with his prior history and behavior. (22RT 4721-4722, 4724.) Kevin made the choices he made as a result of a variety of reasons (22RT 4715), likely setup by something in his

development (22RT 4603.) He was somewhat intoxicated that night, which probably disinhibited him to some degree. (22RT 4715.) His conduct was also governed by his fear of Warren and Jamelle. (22RT 4599-4600. 4716.) He had not had contact with them for several months. (22RT 4716.) Kevin did not want to anger them or confront them. (22RT 4716.) Also, the horror of the event generated in Kevin its own fear; some people just cannot react in that context. (22RT 4601.) Kevin was shocked as the events unfolded and was really paralyzed to do anything about it. (22RT 4600-4601, 4716.) Dr. Rothberg observed that there was likely an underlying rage of great force, which had not been seen in any of Kevin's history. (22RT 4600.) Kevin was really unable to extricate himself from the situation. (22RT 4600.) It was as if he was on a fast moving train and he just could not get off. (22RT 4600.)

Dr. Rothberg noted that there was a certain passivity about Kevin's demeanor then, and even after the conviction, that he just really cannot do anything on his own behalf. (22RT 4600.) "It's almost as if he doesn't even care to some extent what happens." (22RT 4600.) "He doesn't seem to be fighting for himself much." (22RT 4600.) He does not feel very effective or capable of having much control over his life. (22RT 4601.) This has been a long-standing problem for him. (22RT 4601.)

The court instructed the jury that Janisha Williams was a witness that had been ordered back by the court to be a defense witness, she failed to obey the court's order, and that was something they could consider. (23RT 4842.)

## ARGUMENT

### I. FIVE PROSPECTIVE JURORS WHO WOULD LISTEN TO THE EVIDENCE, CONSIDER VOTING FOR EITHER DEATH OR LIFE IMPRISONMENT, AND COULD VOTE FOR THE DEATH PENALTY WERE IMPROPERLY EXCUSED BECAUSE THEY WOULD NOT IMPOSE IT IN ALL CIRCUMSTANCES OR HAD NOT RESOLVED WHETHER THEY FAVORED THE DEATH PENALTY, AND THEIR EXCUSAL WAS VIOLATIVE OF KEVIN'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

The trial court excused eight prospective jurors for cause pursuant to prosecution challenges. (8RT 1221-1222, 1277-1285, 11RT 2011-2013, 12RT 2196, 2218, 2276, 2395-2396, 13RT 2507, 2537.) In regard to five of these prospective jurors, the record does not support the trial court's ruling, because it does not clearly appear that the views they expressed would have prevented or substantially impaired their performance of their duties as jurors. As will be demonstrated, the excusal of these jurors thus violated Kevin's right to be tried by a fair and impartial jury and his right to due process of law under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution and under article I, sections 7, 15, 16 and 17 of the California Constitution, and reversal of Kevin's sentence is therefore required. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [83 L.Ed.2d 841, 105 S.Ct. 844]; *Gray v. Mississippi* (1987) 481 U.S. 648, 658 [95 L.Ed.2d 622, 107 S.Ct. 2045]; *People v. Mickey* (1991) 54 Cal.3d 612, 679-680 [286 Cal.Rptr. 801]; *People v. Holloway* (1990) 50 Cal.3d 1098, 1112 [269 Cal.Rptr. 530]; *People v. Wheeler* (1978) 22 Cal.3d 258, 265-266 [148 Cal.Rptr. 890].)

A. Only Those Whose Views Would Prevent or Substantially Impair Their Ability to Impose The Death Penalty Can Be Excused

Forty years ago, in *Witherspoon v. Illinois* (1968) 391 U.S. 510 [20 L.Ed.2d 776, 88 S.Ct. 1770] the Court observed that a capital jury, selected in a manner which excludes jurors who oppose capital punishment, falls "woefully short of that impartiality to which the petitioner [is] entitled under the Sixth and Fourteenth Amendments." (*Id.* at p. 518.) "[T]he jury is given broad discretion to decide whether or not death is 'the proper penalty' in a given case, and a juror's general views about capital punishment play an inevitable role in any such decision." (*Id.* at pp. 518-519.)

Indeed, "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." (*Ibid.*) Jurors who are morally opposed to the death penalty must be permitted to serve because "a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death. (*Ibid.*)

The Supreme Court held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Id.* at p. 522.)

In *Wainwright v. Witt, supra,* 469 U.S. 412 the Court clarified its decision in *Witherspoon* and held that the standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Id.* at p. 424,

reaffirming *Adams v. Texas* (1980) 448 U.S. 38, 45, [65 L.Ed.2d 581, 100 S.Ct. 2521].) The *Witt* standard was adopted by California in *People v. Ghent* (1987) 43 Cal.3d 739, 767 [239 Cal.Rptr. 82]. The *Witt* Court explained,

> [T]his standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. [Fn. omitted.] Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. ... [T]his is why deference must be paid to the trial judge who sees and hears the juror. (*Wainwright v. Witt, supra,* at pp. 424-425.)

"As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." (*Id.* at p. 423.)

A year after *Witt*, the Supreme Court reminded,

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176, [90 L.Ed. 137, 106 S.Ct. 1758].)

This Court in *People v. Kaurish* (1990) 52 Cal.3d 697 [276 Cal.Rptr. 788] affirmed that personal opposition to the death penalty is insufficient for excusal. (*Id.* at p. 699.)

> A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict. (*Ibid.*)

In *People v. Cunningham* (2001) 25 Cal.4th 926 [108 Cal.Rptr.2d 291] this Court held that a prospective juror is properly excluded on *Witt* grounds only if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. (*Id.* at p. 975.) In pursuit of this inquiry, trial courts must "proceed with great care, clarity, and patience in the examination of potential jurors" in these cases. (*People v. Heard* (2003) 31 Cal.4th 946, 951, 968 [4 Cal.Rptr.3d 131].)

On appeal, if the prospective juror's responses are equivocal, i.e., capable of multiple or conflicting inferences, the trial court's determination of that juror's state of mind is binding. (*People v. Cunningham, supra,* at p. 975; *People v. Stewart* (2004) 33 Cal.4th 425, 441 [15 Cal.Rptr.3d 656]; *People v. Mason* (1991) 52 Cal.3d 909, 953-954 [277 Cal.Rptr. 166] [conflicting responses]; *People v. Coleman* (1988) 46 Cal.3d 749, 766-767 [251 Cal.Rptr. 83] [same]; *People v. Ghent, supra,* 43 Cal.3d at p. 768 [equivocal responses].) If there is no inconsistency, the only question being whether the juror's responses in fact demonstrated an opposition to (or bias in favor of) the death penalty, the court's determination will not be set aside if it is supported by substantial evidence and hence is not clearly erroneous. (*People v. Moon* (2005) 37 Cal.4th 1, 14 [32 Cal.Rptr.3d 894]; *People v.*

*Cooper* (1991) 53 Cal.3d 771, 809 [281 Cal.Rptr. 497]; *People v. Gordon* (1990) 50 Cal.3d 1223, 1262 [270 Cal.Rptr. 451].)

B. An Overview of the Entire *Voir Dire*

Recently, the Supreme Court in *Uttecht v. Brown* (June 4, 2007) ___ U.S___ [167 L.Ed.2d 1014, 127 S.Ct. 2218] in a five to four decision, Justice Kennedy discussed the role of a reviewing court in reviewing claims or error under *Witherspoon* and *Witt.*

The Court found it instructive to consider the entire *voir dire*, before assessing the questioning of a particular juror under question. (*Uttecht, supra,* at 127 S.Ct. at p. 2225.) Indeed, that overview in the instant case provides substantial insight. Here, the trial court read a script to each new group of prospective jurors that informed them of the charges that Kevin faced, the jury selection process they would go through, and a brief outline of their task if chosen to serve. (See, e.g., 7RT 931-941, 956-971.) The charges were quite graphic. The jury was told:

> In the statement of the case it is alleged that on or about December 29th, 1998, between 11:30 p.m. and midnight, the defendant, Kevin Pearson, along with Warren Hardy and Jamelle Armstrong, were at the train station in long beach. They left the train station and while walking underneath the 405 freeway
> overpass, they confronted Penny Keptra, also known as Penny Sigler. The defendant and his cohorts demanded money from her. They took her to a bushy area near the 405 freeway overpass. Since she did not have any money, they took the food stamps she had in her possession, as well as the clothes she was wearing.
>
> Then they kidnapped her by throwing her over a fence in the bush area. They dragged her behind some closed businesses, a more secluded and dark area abutting the 405 freeway embankment, for the purpose of rape and rape in concert.

> During the course of the sexual assaults, it is also alleged that the crime of rape with a foreign object, a wooden stake from the embankment, took place.
>
> It is further alleged that the murder of Penny Keptra, also known as Penny Sigler, was as a result of being beaten and tortured to death with the wooden stake.[12] (See, e.g., 7RT 957-958.)

The formal charges as set forth in the Information were then read to the jury. (See, e.g., 7RT 958-964.)

Each group was told that they would be given a questionnaire to complete immediately after the hearing, which they would return to the court for filing. (See, e.g., 7RT 969-971.) The *Juror Questionnaire* used in this case was substantial, consisting of 49 pages, single spaced, with 237 questions. Eleven of the pages and 61 of the questions were directed toward the prospective juror's position on the death penalty. (See, e.g., 5CT 1292-1340.) Those 11 pages began with one page of explanation that included a brief summary of the charges, the trial process, and the need for the inquiry, and is set out in full in the margin.[13]

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[12] Here, and throughout this brief, where the original material is printed in all capital letters, those instances have been modified to a normal sentence-style font to make them more readable.

[13] The cited section provided:

> The law requires that whenever the District Attorney seeks death as a possible punishment for a crime, prospective jurors must be asked to express their views on both the death penalty and the penalty of life in prison without the possibility of parole. Asking about your views at this time is a routine part of the procedure to be followed in these cases.
>
> The following questions concerning the death penalty are required because it may become an issue in this case. You should understand that the appropriateness of the death penalty is not a question that will automatically be presented to the jury. Whether or not you will be asked to decide the

After the bulk of those jurors with claims of hardship had been evaluated and acted upon, seven days of the *voir dire* were devoted to determining whether the potential jurors were death qualified.[14] Generally,

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issue of punishment depends upon your decision as to the defendant's guilt or innocence.

Close to New Years 1998, the defendant along with two other people have been charged with committing robbery, kidnap, rape with a stake, and torturing to death by beating with a freeway stake, a 45 year old woman who lived in the area. These crimes occurred behind some businesses which abutted the 405 freeway embankment.

The victim's body was found by Cal Trans workers. Following a conviction of murder in the first degree and a finding that one or more special circumstance is true, a second and separate trial, known as the penalty phase, is conducted.

Additional evidence could be presented by both the prosecution and the defense on the question of penalty. Both sides are permitted to argue and the jury is instructed on the law governing penalty determination. The jury then decides punishment based upon a choice of two possibilities, death or life without the possibility of parole.

We need to inquire to your thoughts on the death penalty because they will be important in the event the jury is asked to decide the issue of punishment. It must be determined that each juror can be fair to both the prosecution and the defense. By asking these questions, the court has no way of knowing what the evidence in this case will be or whether or not you will find the defendants guilty of anything at all.

Please give careful consideration to these questions so that your answers reflect your true beliefs and views. Remember, there are no "right" or "wrong" answers. Where the space provided is inadequate, please use the Explanation Sheet attached to this questionnaire. (See, e.g., 5CT 1330.)

[14] This transpired over the period between August 19, 2003 and August 29, 2003. (6CT 1433-1443, 1447-1451, 1454.)

the jurors were scheduled for questioning in groups of six. (7RT 1168, 8RT 1191.) At the time set for each group, the parties informed the court which jurors they were jointly willing to stipulate to excuse. The court uniformly accepted these stipulations without inquiry and excused those prospective jurors. (See, e.g., 7RT 1168-1171, 1188-1189, 8RT 1225-1226, 1255, 1284, 1286.)

Each of the remaining prospective jurors was questioned individually and privately. In each instance, defense counsel began the questioning, followed by the prosecutor. The parties were then asked if they had a challenge for cause. In those instances where both parties agreed to stipulate to excuse a particular jury, the court accepted the stipulation and excused the juror. (See, e.g., 8RT 1233, 1235, 1406, 1422, 1441, 1447, 1495, 1509.) In those instances where there was not agreement, the court promptly ruled on the challenge, generally without initiating any further inquiry of the prospective juror. This is best illustrated in detail in Parts *C* through *G* that follows.

In *Uttecht v. Brown, supra,* Justice Kennedy tallied the number of challenges made and granted by the defense and prosecution during the death qualification voir dire—suggesting that evidence of disparate treatment was a relevant factor for reviewing courts to consider in deciding whether to accord deference to trial judges' rulings. In assessing the entire *voir dire* in the case before them, Justice Kennedy noted that the trial court had ruled in favor of the defense challenges for cause over the prosecution's objections with far greater frequency (11 excused out of 18 challenges or 61 percent) than it had to the prosecution's challenges for cause over the defense objections (2 excused out of 7 challenges or 29 percent). (*Id.* at 127 S.Ct. at p. 2225.)

In the instant case, the statistics are not directly comparable with those in *Uttecht* as most of the jurors that were excused here were done by the joint stipulation of the defense and prosecution. (See, e.g., 7RT 1168-1171, 1188-1189, 8RT 1225-1226, 1255, 1284, 1286.) However, in the 14 instances where the court had to resolve a conflict between the parties and excused jurors for cause, six were challenged by the defense and excused over prosecution objection,[15] and eight were challenged by the prosecution and excused either over defense objection or in the absence of the defense's expressed agreement.[16] (13RT 2588-2589.) Thus, here the prosecution had gained the advantage with 57 percent of the grants to the defense's 43

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15 Those six prospective jurors were:
William Tyra, juror 3970 (15CT 4123, 8RT 1201):
Nkik Fistes, juror 8587 (48CT 13635, 10RT 1792);
Robert Hoffman, juror 7166 (19CT 5250, 11RT 1936);
Wesley Smart, juror 6886 (18CT 5054, RT 1984);
Jose Medina, juror 8913 (51CT 14565, 11RT 2126); and
Sammye Meyer, juror 9734 (29CT 8142, 12RT 2218.)

16 Those eight prospective jurors were:
Sara Lin, juror 8177 (16CT 4270, RT 1221-1222);
Roger Boyd, juror 1633 (58CT 16522, RT 1277-1282), the subject of Part C;
Christina Oliva, juror 6619 (58CT 16473, RT 2011-2013), the subject of Part D;
Christina Rojas, juror 3806 (29CT 8191, RT 2218), the subject of Part E;
Robert Daley, juror 7384 (42CT 11970, RT 2276), the subject of Part F;
Danilo Matic, juror 0746 (58CT 16424, RT 2395-2396), the subject of Part G;
Linda Storell, juror 4349 (52CT 14761, RT 2491, 2507);
Andrew Dickson, juror 7363 (50CT 14223, RT 2518, 2537.)

percent. More notably, the court did not deny any challenges for cause by either side and thus was apparently of one mind with the challenging party.

In his majority opinion, Justice Kennedy discussed at length the discretion given the trial judge in ruling on challenges for cause, noting that the judge can not only hear the juror's answers, but also his tone of voice, and can see his demeanor, etc. As the opinion describes it, the deference due the judge's rulings strongly resembles the deference due to findings of fact and credibility of witnesses. In assessing the case before it, Justice Kennedy noted that the trial court had given careful and measured explanations for its decisions and had told the parties that it would be open to further questioning if one of the parties felt the juror's position could be clarified. (*Id.* at 127 S.Ct. at pp. 2224-2225.) By sharp contrast, in the instant case the trial court gave few and very conclusory explanations for its decisions.

In *Uttecht v. Brown,* Justice Kennedy considered defense counsel's decision not to object to the excusal of Juror Z, noting that the defense had been very vigorous, and often successful, in objecting to *Witt* challenges to other members of the panel. While noting that not objecting did not forfeit a *Witt* claim, the majority observed that the defense's silence not only left the impression that they did not want this juror, either, but also lost them the opportunity to help the reviewing court by clarifying the record about the juror's demeanor, etc., and putting some pressure on the judge to give an explanation for his ruling. "[T]he defense did not just deny a conscientious trial judge an opportunity to explain his judgment or correct an error. It also deprived reviewing courts of further factual findings that

would have helped to explain the trial court's decision."[17] (*Id.* at p 2229.) In the instant case, although defense counsel's vigor varied, never did she acquiesce, let alone stipulate, to the dismissal of the jurors addressed in the Parts that follow.

The five prospective jurors improperly excused are discussed in the order of their voir dire below.

C. The Excusal of Prospective Juror Roger Boyd

In summary, Mr. Boyd was a well educated, religious man with a variety of experience. His religion was against the death penalty, but he observed that there were cases where it was appropriate and as a result he was not for or against the death penalty. He would consider both penalty options. He thought he could impose the death penalty. The prosecutor was not satisfied and conveyed that to him. So pressured, Mr. Boyd replied

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[17] The result in *Uttecht v. Brown* is readily understood by the obduracy of the juror in question. The majority found that Juror Z, whose challenge was at issue, had no objection to imposing the death penalty in appropriate circumstances, but also said on voir dire that he thought it should be imposed if the defendant wanted it or if he would kill again if released from prison. Even though it was explained to him several times that the penalties upon conviction would include only death and LWOP, and that the defendant would never be released to reoffend, the voir dire revealed that Juror Z remained hopelessly confused about the issue of parole. At the end of the voir dire, the prosecution challenged him for cause, and defense counsel said, "No objection."

The majority held that Juror Z's intractable confusion about the law and the fact that he limited the circumstances under which he would impose death to two that would never happen in this case, was enough to justify his excusal for cause under *Witt* as someone whose views on the death penalty would prevent or substantially impair him from performing his duties as a juror, even though he was not opposed to the death penalty in principle. (*Id.* 127 S.Ct. at pp. 2228-2229.)

that if a definitive response was required, he would say no, he could not impose the death penalty.

*1. BACKGROUND*

As reflected in his questionnaire, Mr. Boyd was 41 years old, single, a Long Beach resident for six years, a college graduate with a variety of employment experience, most recently as a bartender. (58CT 16525-16530.) Although he affirmed that he had religious beliefs that would prevent him from judging the conduct of another (58CT 16532) and his mixed feelings about the death penalty (58CT 16561, 16563) might interfere with his ability to be an impartial juror (58CT 16552), he acknowledged that it was an appropriate penalty for some crimes (58CT 16561), the state should have the death penalty (58CT 16562), and he could impose it (58CT 16562-16563, 16565.) He circled "Unsure" as his response to the questions whether a person convicted of murder during the commission of a robbery, kidnap, torture, or sexual assault should be sentenced to death or life without the possibility of parole (LWOPP) without consideration of background information (58CT 16566), but he reasonably believed that imposition of the death penalty should depend on the facts (58CT 16563.) He believed that between the two possible punishments, LWOPP was worse for a defendant for he would have to think about the offense for his whole life (58CT 16563), but, nevertheless, he believed that death was a more severe punishment (58CT 16568.)

During his voir dire, defense counsel, Ms. Sperber, concluded her questioning by asking:

> MS. SPERBER: WHAT WE'RE INTERESTED IN IS WHETHER YOU'LL CONSIDER DEATH AND LIFE WITHOUT PAROLE AS BOTH OPTIONS.

PROSPECTIVE JUROR NO. 1633: I WOULD CONSIDER THEM BOTH AS OPTIONS.

MS. SPERBER: THANK YOU.

PASS FOR CAUSE.

The prosecutor, Ms. Locke-Noble, followed with the following exchange:

WHAT ARE YOUR MIXED FEELINGS?

PROSPECTIVE JUROR NO. 1633: WELL, THE MAIN --I GUESS THE MAIN THING IS THAT, YOU KNOW, I WAS RAISED CATHOLIC, SO YOU'RE TOLD CERTAIN THINGS, YOU KNOW, WHEN YOU GO TO CHURCH.

MS. LOCKE-NOBLE: I'M NOT CATHOLIC, SO YOU'LL HAVE TO TELL ME.

PROSPECTIVE JUROR NO. 1633: YOU'RE AGAINST DEATH. YOU'RE AGAINST DEATH OF ANYTHING, YOU KNOW, BASICALLY.

BUT MY MIXED FEELINGS ARE THAT IN OTHER CIRCUMSTANCES, IN OTHER THINGS THAT I'VE SEEN --NOT BEING ON A JURY, BUT IN THE NEWS OR WHATEVER, AND STUFF THAT I'VE HEARD THAT THE MEDIA HAS TOLD ME, THAT SOMETIMES THAT I FEEL IN MY MIND THAT MAYBE THAT PERSON DESERVED THE DEATH PENALTY; THAT IT WAS—HE COMMITTED A CRIME BAD ENOUGH THAT, YOU KNOW, THAT HE WAS NOT—WHAT'S THE WORD I'M LOOKING FOR—REHABILITATABLE. YOU KNOW WHAT I'M SAYING?

SO IN THOSE CASES, YOU KNOW, I THOUGHT MAYBE –

MS. LOCKE-NOBLE: WELL, IN CALIFORNIA WE DON'T HAVE REHABILITATION.

PROSPECTIVE JUROR NO. 1633: RIGHT.

MS. LOCKE-NOBLE: SO LIFE WITHOUT THE POSSIBILITY OF PAROLE, IF YOU IMPOSE THAT,

DOESN'T MEAN CALIFORNIA WILL REHABILITATE THAT PERSON AND LET THAT PERSON BACK OUT IN SOCIETY.

PROSPECTIVE JUROR NO. 1633: I UNDERSTAND THAT ALSO.

MS. LOCKE-NOBLE: YOU SAID YOU WERE RAISED CATHOLIC AND THE CHURCH IS AGAINST THE DEATH PENALTY.

PROSPECTIVE JUROR NO. 1633: UH-HUH.

MS. LOCKE-NOBLE: HOW DOES THAT FIT IN WITH YOUR VIEW?

PROSPECTIVE JUROR NO. 1633: PRETTY MUCH THE WAY I FILLED OUT MY QUESTIONNAIRE. I'M ON THE FENCE ABOUT IT. I'M NOT ONE WAY OR I'M NOT REALLY THE OTHER WAY. I'M NOT TOTALLY FOR THE DEATH PENALTY AND I DON'T THINK THAT EVERYBODY DESERVES THE DEATH PENALTY, SO THAT'S MY FEELINGS ON IT.

MS. LOCKE-NOBLE: HERE'S THE HEART OF IT, SO TO SPEAK. CAN YOU IMPOSE IT?

PROSPECTIVE JUROR NO. 1633: OH, CAN I IMPOSE IT? THAT'S A TOUGH QUESTION. I'VE NEVER HAD TO IMPOSE IT BEFORE.

I WOULD SAY SITTING HERE NOW, I WOULD SAY, I THINK I COULD. BUT NOT HAVING DONE IT BEFORE, YOU KNOW, IT'S QUITE—I THINK IT'S A—I THINK IT'S A STIFF PENALTY.

MS. LOCKE-NOBLE: IT IS. IT'S THE STIFFEST PENALTY WE HAVE IN OUR SOCIETY. AGREED?

PROSPECTIVE JUROR NO. 1633: RIGHT. BUT I ALSO THINK THAT THE SUPPOSED CRIME COMMITTED IS A VERY STIFF CRIME TOO, SO—

MS. LOCKE-NOBLE: ASSUMING THAT THE DEFENDANT HAS BEEN CONVICTED OF FIRST DEGREE MURDER WITH SPECIAL CIRCUMSTANCES,

THE SPECIAL CIRCUMSTANCES IN THIS CASE BEING RAPE, TORTURE, KIDNAPPING, ROBBERY --

... ¶¶

PROSPECTIVE JUROR NO. 1633: OKAY. YES.

... ¶¶

MS. LOCKE-NOBLE: WE'RE TO THE PENALTY PHASE AND THAT'S THE PART OF THE TRIAL WHERE THE PENALTY OR PUNISHMENT IS GOING TO BE DETERMINED BY THE JURY.

YOU, ON YOUR OWN, ARE THE JUDGE OF THE AGGRAVATING AND MITIGATING FACTORS. THE COURT IS GOING TO TELL YOU, IS GOING TO GIVE YOU A LIST AND SAY, "THESE ARE FACTORS THAT YOU CAN CONSIDER, BASED ON THE EVIDENCE THAT'S BEEN PRESENTED." HE'S NOT GOING TO TELL YOU THIS PARTICULAR FACTOR IS AGGRAVATING OR THIS PARTICULAR FACTOR IS MITIGATING, THAT'S YOUR FIRST DECISION TO MAKE FOR YOURSELF.

YOU CAN DISAGREE WITH THE OTHER 11 JURORS.

PROSPECTIVE JUROR NO. 1633: OKAY.

MS. LOCKE-NOBLE: YOU CAN SAY, "I THINK THIS
FACTOR IS AGGRAVATING, IT'S REALLY BAD, AND IT'S HIGH ON MY LIST, I GIVE IT A LOT OF WEIGHT.

AND ANOTHER JUROR MAY SAY, "WELL, I THINK IT'S MITIGATING, I'M NOT GOING TO GIVE IT MUCH WEIGHT AT ALL.

DOES THAT MAKE SENSE?

PROSPECTIVE JUROR NO. 1633: YES, IT DOES.

MS. LOCKE-NOBLE: YOU DON'T HAVE TO AGREE ON THAT.

PROSPECTIVE JUROR NO. 1633: OKAY.

MS. LOCKE-NOBLE: WHAT YOU DO HAVE TO AGREE ON, IS ALL 12 OF YOU HAVE TO AGREE ON THE PENALTY; DEATH OR LIFE WITHOUT THE POSSIBILITY OF PAROLE.

PROSPECTIVE JUROR NO. 1633: OKAY.

MS. LOCKE-NOBLE: OKAY. NOW, THIS IS THE MOMENT THAT YOU HAVE TO TELL US IF YOU KNOW WHETHER OR NOT YOU CAN IMPOSE THE DEATH PENALTY. BECAUSE IF YOU CAN'T, NOW IS THE TIME TO LET US KNOW, BECAUSE IT WOULDN'T BE FAIR TO THE PEOPLE OF THE STATE OF CALIFORNIA, IT WOULDN'T BE FAIR TO THE DEFENDANT, AND IT WOULDN'T BE FAIR TO THE OTHER JURORS THAT YOU'RE GOING TO BE IN THERE WITH.

THERE ARE LOTS OF CASES IN THIS COURTHOUSE THAT YOU CAN SIT ON, THAT DON'T INVOLVE THE DEATH PENALTY. THIS IS A REALLY IMPORTANT QUESTION, AND YOU ARE THE ONLY PERSON THAT CAN TELL US WHETHER OR NOT, YOU KNOW, IN YOUR MIND AND IN YOUR HEART, IF YOU CAN IMPOSE THE DEATH PENALTY, AND BASED ON YOUR RELIGIOUS BACKGROUND, IF THAT IS GOING TO CAUSE YOU PROBLEMS.

PROSPECTIVE JUROR NO. 1633: NO, I THINK I COULD.

MS. LOCKE-NOBLE: NOW, YOU JUST SAID "I THINK."

PROSPECTIVE JUROR NO. 1633: YES. IF YOU WANT A DEFINITE ANSWER, THEN I'M NOT GOING TO GIVE YOU ONE AND I'LL SAY NO. I'LL SAY NO, I COULDN'T, IF YOU WANT A DEFINITE ANSWER.

MS. LOCKE-NOBLE: I HAVE NO FURTHER QUESTIONS AT THIS TIME, YOUR HONOR.

THE COURT: ALL RIGHT. DO YOU WISH THE JUROR TO BE EXCUSED?

MS. SPERBER: MAY I INQUIRE?

THE COURT: OF COURSE.

MS. SPERBER: I DON'T WANT A DEFINITE ANSWER, BECAUSE YOU HAVEN'T BEEN PUT IN THAT SPOT YET.

PROSPECTIVE JUROR NO. 1633: OKAY.

MS. SPERBER: BASED ON WHAT YOU KNOW SO FAR, AND YOU'RE GIVEN THE CHOICE, WILL YOU CONSIDER BOTH OPTIONS?

PROSPECTIVE JUROR NO. 1633: YES.

MS. SPERBER: YOU'VE GOT AN OPEN MIND AND YOU DON'T KNOW WHICH WAY YOU'RE GOING TO VOTE UNTIL YOU HEAR EVERYTHING; IS THAT CORRECT?

PROSPECTIVE JUROR NO. 1633: THAT'S CORRECT. (8RT 1270-1275.)

*2. THE TRIAL COURT'S RULING*

]In seeking to excuse Mr. Boyd for cause, the prosecutor acknowledged that she had not provided him any hypothetical facts upon which to premise his response. (8RT 1276.) Yet, she argued he was equivocal, and when put to it, he said no. (8RT 1276.) In his questionnaire, he had twice stated that he could impose the death penalty. (58CT 16562-16563, 16565.) He was not opposed to the death penalty. (58CT 16561-16562.) As defense counsel noted, this was one juror who really understood the process. (8RT 1277.) He had conflicting emotions, but indicated in the appropriate circumstances he could impose the death penalty. (8RT 1278.) He was open to all options. (8RT 1278-1279.) As defense counsel observed, "[W]hat he told counsel is if you're insisting that I give you a definite answer, I'll lie on the side of caution." (8RT 1277.)

The only reason given by the court at the time it excused Mr. Boyd was his single expression of "I think." The court characterized this as "a bit equivocal, capable of conflicting and multiple inferences, in a state of mind" (8RT 1277), and granted the prosecution's motion to excuse him for cause (8RT 1281.) There was no finding of substantial impairment.

This ruling was the subject of Kevin's motion for new trial. (58CT 16356, 23RT 4977-5001.) At the hearing on that motion, over defense objection, the court was asked to explain its comments when ruling on this juror.[18] (23RT 4979-4986, 4986.) The court began its response with the conclusion, offered without explanation, that the demeanor of all three prospective jurors discussed at the motion for new trial (Boyd, Oliva, and Matic) reflected the jurors' individual state of mind. (23RT 4993.) The court continued:

> FOR CLARIFICATION, THIS JUROR WAS EQUIVOCAL IN HIS RESPONSES. HIS USE OF THE TERM "I THINK" PRECEDING HIS EQUIVOCAL RESPONSE TO WHETHER HE CAN IMPOSE THE PENALTY OF DEATH BECAUSE OF HIS RELIGION, AS EXPRESSED IN HIS ORAL VOIR DIRE AND

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[18] In the prosecutor's opposition to the defense motion for new trial, she requested:

> [T]hat this court restate its reasons for granting each of the challenges for cause and include in said statement of reasons, whether this court at the time each prospective juror was excused for cause, believed the prospective juror's views regarding the death penalty would have prevented or substantially impaired the performance of the juror's duties in this case.
>
> It is the People's position, that such finding as stated above was the intention of this court, and based thereon, the People request that the defendant's motion for new trial be denied. (57CT 16383-16384.)

THROUGHOUT HIS QUESTIONNAIRE, COUPLED WITH HIS HESITATION AND LENGTH OF TIME REQUIRED TO RESPOND TO THE INQUIRY ON WHETHER HE CAN IMPOSE THE PENALTY OF DEATH, WHICH IS ONE EVIDENCE OF HIS STATE OF MIND, LEADS THIS COURT TO FIND THAT THIS JUROR IS SUBSTANTIALLY IMPAIRED FROM PERFORMING HIS DUTIES AS A JUROR IN ACCORDANCE WITH HIS INSTRUCTIONS AND HIS OATH.

AT THE TIME OF THE COURT'S FINDINGS, THIS COURT WAS GUIDED BY A CALIFORNIA SUPREME COURT CASE, PEOPLE VERSUS MITCHAM, 1 CAL. 4TH, 1027, FOR THE PROPOSITION THAT THE USE OF THE WORDS SUCH AS QUOTE, UNQUOTE, "I THINK," DOES NOT UNDERMINE A FINDING UNDER WITT THAT THE JUROR IS SUBSTANTIALLY IMPAIRED FROM PERFORMING HIS DUTIES.

MOREOVER, THIS COURT—IT HASN'T MENTIONED BEFORE NOW—ADDS THAT SINCE THIS JUROR HAD A LENGTHY HESITATION BEFORE GIVING HIS EQUIVOCAL RESPONSE, IT SHOWS HIS STATE OF MIND THAT HE IS EQUIVOCAL IN HIS RESPONSES, CAPABLE OF MULTIPLE INFERENCES. IN FACT, THIS JUROR WAIVERED [sic] ON WHETHER HE COULD IMPOSE DEATH THROUGHOUT THE VOIR DIRE.

THIS COURT HAD THE OPPORTUNITY TO OBSERVE AND LISTEN TO THIS JUROR, AND THIS COURT'S SPECIFIC FINDINGS AS TO HIS STATE OF MIND, EXPRESSING HIS EQUIVOCATION TO THE EXTENT NOT PREVIOUSLY MENTIONED, SHOULD NOW BE NOTED.

FOR GUIDANCE ON THE STATE OF MIND ISSUE, THE REVIEWING COURT IS INVITED TO ITS PREVIOUS HOLDINGS IN PEOPLE VERSUS COOPER, 53 CAL3RD 771, A 1991 CASE, AND PEOPLE VERSUS HOLT. 15 CAL.4TH, 619, A 1997 CASE. (23RT 4994-4995.)

*3. THE TRIAL COURT'S ERROR*

The court reporter did not record that there was any hesitation, let alone "lengthy hesitation," in any of Prospective Juror Boyd's responses.

"A bit equivocal," the standard employed by the trial court, is not the standard for removal under *Witt* or *Witherspoon*, particularly where the purported equivocation was premised upon a single response in the context present here. On this record before it, the trial court should have denied the prosecutor's challenge or conducted its own follow-up voir dire. The trial court's ruling was clearly not founded on a sufficiently searching inquiry to determine *Witt* impairment. (*People v. Stewart, supra,* 33 Cal.4th 425, 445.) Mr. Boyd (juror 1633) was merely being circumspect, as one would hope any thoughtful juror would, and as his other responses during voir dire and in his questionnaire demonstrate, his views would not prevent or substantially impair the performance of his duties as a juror in this case.

The court's reliance on *People v. Mitcham* (1992) 1 Cal.4th 230 [5 Cal.Rptr.2d 230] for the proposition that the term "I think" does not undermine a finding that a juror is impaired is telling. There the term "I think" could not undermine the challenged jurors other input that included the following:

> "[Wright] stated subsequently he could never take a person's life and would not impose the death penalty. Higares could not anticipate any circumstances under which he could vote for the death penalty. McGinley stated he would never vote for the punishment of death, and Arnold believed he could not condemn anyone to death." (*Id.* at p. 1062.)

By sharp contrast, Mr. Boyd repeatedly said he could impose the death penalty, he was not opposed to it, but he would not be badgered into a commitment on the scant input he had been provided.

Equally informative by its contrast is *People v. Cooper, supra,* 53 Cal.3d 771, cited by the trial court, where the jurors' "equivocal" statements could not overcome the statement by one of the prospective jurors who stated, "'If I am being asked whether a man should or should not die, I cannot do it, I will not do it' [and another who] ... stated he would never vote for the death penalty." (*Id.* at p. 809.) Also contrast *People v. Holt* (1997) 15 Cal.4th 1385A [63 Cal.Rptr.2d 782], cited by the trial court, where the answers by the prospective juror "were not simply equivocal. She never stated that she would consider imposition of the death penalty. She repeatedly expressed inability to state whether she could vote for death. The closest she came to even implying that she might be able to impose the death penalty was an affirmative answer when asked if she would have great difficulty in doing so." (*Id.* at p. 653.)

The prosecutor had the burden of persuasion, and the record just does not satisfy the constitutional standard that Mr. Boyd was substantially impaired. Indeed, the prospective juror affirmed that he had an open mind and just did not know which way he was going to vote until he heard everything. As a result, the trial court's determination is not entitled to deference and is unsupported by substantial evidence. (*Witherspoon, supra,* at p. 515, fn. 9; *Heard, supra,* at pp. 958-959.)

D. The Excusal of Prospective Juror Christina Oliva

In summary, Ms. Oliva was a thoughtful person who had not yet formed an opinion on the death penalty, but she believed that it was the appropriate punishment for murder, depending on the facts, and she could impose it. The prosecutor wanted more than that. She wanted a juror that as well favored the death penalty.

*1. BACKGROUND*

As reflected in her questionnaire, Ms. Oliva was 29 years old, single, a high school graduate with some college education, currently employed to investigate fraud for Verizon Wireless, with aspirations of being a homicide detective, and with substantial experience serving on both criminal and civil juries, once as the foreperson. (58CT 16476, 16479, 16481, 16483, 16490, 16503.) She wanted to serve as a juror because she believed she could contribute by having an unbiased opinion. (58CT 16484, 16503, 16515, 16519.) Although she was unsure whether she approved of the death penalty, she did not think the state should abolish it, she held no conflicting religious beliefs, and she could vote for it. (58CT 16513-16514, 16516, 16519) She believed that the death penalty was an appropriate punishment for murder. (58CT 16515.)

During Ms. Sperber's voir dire of Ms. Oliva, the latter confirmed that she had an open mind about which sentence she would choose and she would be fair and impartial. (11RT 1997, 2000.)

Ms. Locke-Noble initially sought greater certainty from Ms. Oliva about her feelings about the appropriateness of the death penalty. (11RT 2003.)

> MS. LOCKE-NOBLE: NOW, THE PROBLEM I'M HAVING IS THAT YOU HAVE NOT STATED WHETHER OR NOT YOU ARE FOR OR AGAINST THE DEATH PENALTY.
>
> PROSPECTIVE JUROR NO. 6619: OKAY.
>
> MS. LOCKE-NOBLE: AND THIS IS THE TIME AND PLACE THAT WE NEED TO KNOW HOW YOU FEEL ABOUT THE DEATH PENALTY.
>
> PROSPECTIVE JUROR NO. 6619: OKAY.

MS. LOCKE-NOBLE: IT DOESN'T MEAN THAT IF YOU CAN'T SAY RIGHT NOW, THIS MOMENT, YOU CAN'T TELL US, THEN YOU CAN'T TELL US.

PROSPECTIVE JUROR NO. 6619: UH-HUH.

MS. LOCKE-NOBLE: THERE ARE OTHER CASES IN THIS BUILDING THAT DON'T INVOLVE THE DEATH PENALTY, THAT I'M SURE YOU'D BE A FABULOUS JUROR FOR.

PROSPECTIVE JUROR NO. 6619: OKAY.

MS. LOCKE-NOBLE: BUT IN THIS PARTICULAR CASE, IT WOULDN'T BE FAIR TO THE DEFENDANT OR THE PEOPLE OR THE VICTIM'S FAMILY, IF YOU TRULY, AT THIS POINT IN TIME, DON'T KNOW WHAT YOU WILL DO.

PROSPECTIVE JUROR NO. 6619: I THINK WITH THAT, I'D HAVE TO BE AN ACTUAL JUROR TO SEE WHAT'S PRESENTED FOR ME. I'M NOT SAYING THAT I CAN'T VOTE FOR IT OR THAT I WOULDN'T VOTE FOR IT, BUT I THINK THAT I HAVE TO HAVE ALL OF THE EVIDENCE BEFORE I CAN SAY ANYTHING CONCERNING THIS CASE ITSELF.

MS. LOCKE-NOBLE: OKAY. I UNDERSTAND ALL THAT. BUT THIS IS THE TIME AND PLACE, WE NEED TO KNOW WHETHER OR NOT YOU ACTUALLY CAN VOTE FOR THE DEATH PENALTY. BECAUSE THERE ARE SOME PEOPLE WHO SAY, YOU KNOW, I REALLY SUPPORT THE DEATH PENALTY, I THINK THAT WE SHOULD HAVE IT, IT SHOULDN'T BE ABOLISHED, IT SERVES ITS PURPOSE AND WE DO NEED IT, BUT I COULD NEVER VOTE FOR IT.

PROSPECTIVE JUROR NO. 6619: NO, I COULD VOTE FOR IT.

MS. LOCKE-NOBLE: OKAY. BECAUSE I JUST DON'T HAVE A FEELING THAT YOU ARE SURE THAT YOU CAN.

PROSPECTIVE JUROR NO. 6619: I AM POSITIVE THAT I COULD.

MS. LOCKE-NOBLE: OKAY. WHAT ARE YOUR FEELINGS ABOUT THE DEATH PENALTY?

PROSPECTIVE JUROR NO. 6619: I THINK I PUT IN MY QUESTIONNAIRE THAT THE CASES ARE DIFFERENT CONCERNING MURDER. AND I THINK I ALSO PUT IN THERE THAT I COULD VOTE FOR IT, IN SPECIAL CIRCUMSTANCES.

SO ARE YOU ASKING ME TO GIVE AN EXAMPLE OF WHETHER I WOULD VOTE FOR IT?

MS. LOCKE-NOBLE: NO, JUST ACTUALLY WHAT YOU SAID HERE ON QUESTION 178, "WHAT ARE YOUR GENERAL FEELINGS REGARDING THE DEATH PENALTY?"

"I KNOW THERE ARE INDIVIDUALS ON DEATH ROW, BUT I DON'T HAVE ANY FEELINGS TOWARD THE DEATH PENALTY."

SO THAT'S WHY I'M ASKING YOU, WHAT ARE YOUR FEELINGS?

PROSPECTIVE JUROR NO. 6619: I THINK IN SOME
CASES IT SHOULD BE GIVEN TO PEOPLE. A SPECIFIC CASE, I COULD JUST THROW OUT THERE. MAYBE IF A CHILD WAS MURDERED, OR CERTAIN THINGS HAPPENED TO THE CHILD, AND IT WAS BEYOND A REASONABLE DOUBT THAT THAT PERSON DID IT, THEN I WOULD FEEL CONFIDENT THAT THE DEATH PENALTY SHOULD HAVE BEEN ISSUED TO THAT PERSON.

MS. LOCKE-NOBLE: OKAY. AND THEN LET ME SEE.

AND THEN THIS WAS THE QUESTION I WAS TALKING ABOUT, QUESTION NO. 188. "SOME PEOPLE SAY THEY SUPPORT THE DEATH PENALTY,

YET COULD NOT PERSONALLY VOTE TO IMPOSE IT. DO YOU FEEL THE SAME WAY?"

YOU ANSWERED IT, "NO." AND THEN YOU SAID, "I'M NOT SURE WHERE I STAND, BUT IF I FEEL STRONGLY OR FELT STRONG ABOUT SOMETHING, I WOULD STAND BEHIND IT."

AND THAT'S WHAT WE NEED TO KNOW RIGHT NOW IS, YOU KNOW, IF YOU ARE FOR THE DEATH PENALTY AND IF YOU COULD VOTE FOR IT OR IF YOU'RE NOT AND YOU CAN'T.

PROSPECTIVE JUROR NO. 6619: ALL I CAN SAY TO THAT IS THAT I CAN VOTE FOR IT.

MS. LOCKE-NOBLE: OKAY. THE OTHER QUESTION THAT I HAVE FOR YOU, I NOTICE THAT YOU HAVE SOME TATTOOS.

PROSPECTIVE JUROR NO. 6619: YES.

MS. LOCKE-NOBLE: ARE THOSE RELATING TO ANYTHING IN PARTICULAR?

PROSPECTIVE JUROR NO. 6619: NO, JUST BEING YOUNG.

MS. LOCKE-NOBLE: WELL, OKAY. NOW, SAYING THAT YOU WERE YOUNG, I NOTICE THAT ONE OF THE ANSWERS TO YOUR QUESTIONS IN HERE IS THAT YOU WANTED TO BE A HOMICIDE DETECTIVE, BUT YOU THOUGHT YOU WERE TOO OLD.

PROSPECTIVE JUROR NO. 6619: YES. YES. BUT SEE, I THINK I WAS TOO OLD TO GET IN THE FIELD, SO --

MS. LOCKE-NOBLE: OKAY. SO DID YOU EVER TRY?

PROSPECTIVE JUROR NO. 6619: NO. BUT I DECIDED THAT I WANTED TO DO THAT OR THOUGHT I WANTED TO DO THAT WHEN I THOUGHT IT WAS TOO LATE IN THE GAME. I'M

SURE IT'S NEVER TOO LATE, BUT IT'S ON HOLD RIGHT NOW

MS. LOCKE-NOBLE: OKAY. ALL RIGHT.

THANK YOU. I HAVE NO FURTHER QUESTIONS. (11RT 2003-2012.)

*2. THE TRIAL COURT'S RULING*

The voir dire established that Ms. Oliva reasonably could not commit to vote for the death penalty without knowing the facts; she could vote for it, she was positive of that, and she was tattooed; adorned with body art.

Ms. Locke-Noble was not satisfied and sought her removal for cause. She noted that Ms. Oliva was not sure that she believed in the death penalty, which Ms. Locke-Noble sought to morph into a lack of resolve that she could impose the death penalty (11RT 2007-2009), even though Ms. Oliva had repeatedly said that she could impose the death penalty, appropriately depending on the facts (58CT 16513-16514, 16516, 11RT 2004-2006.) Ms. Locke-Noble was apparently looking for certainty, as she explained:

I THINK WHEN IT COMES RIGHT DOWN TO IT, IF THE AGGRAVATING CIRCUMSTANCES SUBSTANTIALLY OUTWEIGH THE MITIGATING, THAT SHE'S NOT GOING TO BE ABLE TO IMPOSE DEATH, THAT SHE'S—THAT IT'S A DECISION SHE'S NOT GOING TO BE ABLE TO MAKE.

SHE'S NOT SURE WHERE SHE STANDS ON THE DEATH PENALTY. SHE'S NOT—SHE SAID SHE—HER ANSWERS ARE INCONSISTENT, AND I JUST DON'T THINK THAT BASED ON EVERYTHING SHE SAID IN HER QUESTIONNAIRE, THAT SHE'S EVER GOING TO BE ABLE TO IMPOSE THE DEATH PENALTY, WHETHER IT'S AN APPROPRIATE CASE OR NOT.

SHE EVEN SAID, DURING COUNSEL'S QUESTIONING, "I'M UNCERTAIN ABOUT HOW I REALLY FEEL ABOUT THE DEATH PENALTY."

SO I DON'T THINK IT'S FAIR TO THE PEOPLE THAT SOMEONE LIKE THAT BE PLACED ON THE JURY, WHEN WE HAVE NO IDEA WHAT SHE'S GOING TO DO. I THINK THAT THE PEOPLE THAT WE ARE TRYING TO SELECT IN THIS PARTICULAR SITUATION IS THOSE PEOPLE WHO CAN EITHER IMPOSE THE DEATH PENALTY OR IMPOSE LIFE WITHOUT THE POSSIBILITY OF PAROLE, DEPENDING ON THE FACTS AND CIRCUMSTANCES THAT
ARE PRESENTED TO THEM.

SHE DOESN'T KNOW WHAT SHE CAN DO, AND SHE'S LIKE A WILD CARD, SO I'D ASK THAT SHE BE EXCUSED. (11RT 2008-2009.)

Reasonably, Ms. Sperber did not agree:

MS. SPERBER: I THINK SHE'S THE EXACT OPPOSITE. I THINK SHE SAID, IN THE ABSTRACT, SHE HAS VIEWS, BUT I BELIEVE SHE ANSWERED THIS QUESTIONNAIRE THINKING IT MEANT THE DEATH PENALTY IN THIS PARTICULAR CASE. BECAUSE SHE KEPT SAYING, "I DON'T KNOW. I HAVEN'T HEARD EVERYTHING YET. I HAVEN'T HEARD EVERYTHING." AND SHE SAID, "CERTAINLY, IF I HEAR THE FACTS AND THEY SUPPORT THE AGGRAVATING OUTWEIGHS THE MITIGATING, I DEFINITELY COULD VOTE FOR DEATH."

QUESTION 209: "CAN YOU SEE YOURSELF REJECTING LIFE AND VOTING FOR DEATH?"

SHE SAYS, "YES."

HER QUESTION 187, "SHOULD WE ABOLISH THE
DEATH PENALTY?

"IT SHOULDN'T BE ABOLISHED. IF CERTAIN PEOPLE KNOW THERE IS A DEATH PENALTY, MAYBE THEY WOULD BE LESS LIKELY TO COMMIT CRIMES."

"COULD YOU PERSONALLY VOTE TO IMPOSE IT?

SHE SAYS, "NO." SHE SAYS, "I'M NOT SURE WHERE I STAND, BUT IF I FEEL STRONGLY ABOUT SOMETHING, I WOULD STAND BEHIND IT."

AND I THINK COUNSEL QUESTIONED HER ON THAT, AND SHE SAID, NO, SHE COULD DEFINITELY IMPOSE IT IF SHE FELT THAT THE CIRCUMSTANCES WERE APPROPRIATE.

BUT SHE SAYS ALL MURDERERS ARE DIFFERENT, SHE CAN'T CATEGORIZE ANYTHING YET, AND SHE WANTS TO HEAR ALL OF THE EVIDENCE PERTAINING TO THE AGGRAVATING AND MITIGATING FACTORS. SHE INDICATED THAT SHE WASN'T SURE, INITIALLY, BEFORE QUESTIONING, WHAT THE PROCEDURE WAS, AND NOW THAT SHE KNOWS, SHE WOULD FOLLOW THE RULES AND SHE COULD DEFINITELY IMPOSE THE DEATH SENTENCE. SHE SAID THAT, I THINK, FIVE OR SIX TIMES.

I WOULD ALSO—I BELIEVE I WOULD ALSO INDICATE ON 209, SHE INDICATES SHE COULD REJECT LIFE WITHOUT PAROLE. (11RT 2009-2010.)

Ms. Locke-Noble summed up her stance:

MS. LOCKE-NOBLE: I JUST THINK THAT WHEN COUNSEL WAS ASKING HER, SHE JUST SAID, "I'M UNCERTAIN HOW I REALLY FEEL ABOUT THE DEATH PENALTY," AND I THINK THAT LACK OF CERTAINTY IS EQUIVOCAL SUCH THAT SHE DOESN'T KNOW WHAT SHE'S GOING TO DO.

AND I UNDERSTAND THAT PART OF HER PROBLEM IS THAT SHE HASN'T HEARD THE FACTS, BUT SHE CLEARLY DOESN'T HAVE A STANCE ON

THE DEATH PENALTY. AND MOST PEOPLE WHO DON'T HAVE A STANCE, USUALLY WILL NOT BE ABLE TO IMPOSE THE DEATH PENALTY. (11RT 2010-2011.)

The court granted the prosecution's challenge for cause, citing *People v. Guzman* (1988) 45 Cal.3rd 915 [248 Cal.Rptr. 467]. (11RT 2011.) The court explained:

THIS COURT RELIES ON THE GUIDANCE OF THAT CASE, WHICH INDICATES THAT THE TRIAL COURT MAY EXCUSE PROSPECTIVE JURORS DUE TO THEIR EQUIVOCAL VIEWS ON CAPITAL PUNISHMENT. IN THIS PARTICULAR CASE THERE IS AN EQUIVOCAL VIEW ON CAPITAL PUNISHMENT AND CONFLICTING RESPONSES, BASED ON THIS COURT'S DETERMINATION OF HER STATE OF MIND, JUST AS I DID WITH THE OTHER JURORS THAT I HAVE EXCUSED FOR CAUSE.

THIS COURT BELIEVES THAT BASED UPON THE INFORMATION PROVIDED, THAT THERE IS THE EQUIVOCAL RESPONSES AND, THEREFORE, SHE WOULD NOT BE AN APPROPRIATE JUROR IN THIS PARTICULAR CASE.

... ¶¶ ONE OTHER THING ABOUT JUROR NO. 6619 THAT I FORGOT TO MENTION.

IT SEEMS TO THIS COURT THAT SHE REALLY WANTS TO SERVE ON THIS CASE, 6619. YOU KNOW, SHE'S ONE OF THOSE WILLING JURORS THAT WANT TO SERVE BUT, UNFORTUNATELY, THAT'S NOT A CRITERIA [sic] FOR THIS COURT TO DETERMINE WHETHER OR NOT A JUROR SHOULD OR SHOULD NOT SERVE ON A PARTICULAR CASE. I KIND OF NOTICED THAT FROM NOT ONLY HER DEMEANOR, BUT ALSO HER RESPONSE THAT SHE HAS ALL THE TIME IN THE WORLD TO DEVOTE TO THIS CASE.

AND I CERTAINLY APPRECIATE JURORS LIKE THAT, BUT, UNFORTUNATELY, THIS IS NOT AN APPROPRIATE CASE FOR HER. (11RT 2011-2013.)

This ruling was also reviewed in Kevin's motion for new trial. (58CT 16356, 23RT 4977-5001.) At the hearing on that motion, over defense objection, the court was asked to explain its comments when ruling on this juror.[19] (23RT 4979-4986, 4986.) This juror was included with Mr. Boyd in the court's general conclusion that these jurors' demeanor reflected their individual state of mind. (23RT 4993.)

The court continued:

FOR CLARIFICATION, THIS JUROR WAS EQUIVOCAL ON HER EQUIVOCAL VIEW ON CAPITAL PUNISHMENT, AND CONFLICTING AND EQUIVOCAL RESPONSES REGARDING THE IMPOSITION OF THE PENALTY OF DEATH.

SPECIFICALLY, ON QUESTION 188 OF THE QUESTIONNAIRE, WHEN ASKED WHETHER SHE'S ONE THAT SUPPORTS THE DEATH PENALTY, BUT YET COULD NOT IMPOSE IT, THIS JUROR RESPONDED QUOTE, "I'M NOT SURE WHERE I STAND, BUT IF I FEEL STRONG ABOUT SOMETHING, I WOULD STAND BEHIND IT," CLOSE QUOTE.

WHEN ASKED ON QUESTION 186 OF THE QUESTIONNAIRE WHETHER CALIFORNIA SHOULD HAVE THE DEATH PENALTY, THIS JUROR RESPONDED, QUOTE, "I DON'T HAVE A VIEW ON THIS AS OF YET," CLOSE QUOTE.

WHEN ASKED ON QUESTION 178 OF THE QUESTIONNAIRE ABOUT HER GENERAL FEELINGS REGARDING THE DEATH PENALTY, THIS JUROR

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[19] As noted in Part C, 1, above, in regard to prospective juror Mr. Boyd, the prosecutor in her opposition to the defense motion for new trial requested that the court clarify its findings to those jurors it excused. (57CT 16383-16384.)

RESPONDED, QUOTE, "I KNOW THERE ARE INDIVIDUALS ON DEATH ROW, BUT I DON'T HAVE ANY FEELINGS TOWARD THE DEATH PENALTY," CLOSE QUOTE.

IN ANALYZING THESE RESPONSES, THIS JUROR DOES NOT KNOW ABOUT THE DEATH PENALTY, HAS NO FEELINGS TOWARD THE DEATH PENALTY, AND HAS NO VIEWS ON THE DEATH PENALTY. SHE ALSO INDICATES THAT IF SHE HAD A STRONG FEELING ABOUT SOMETHING, SHE WOULD STAND BEHIND IT.

GIVEN THAT SHE HAS NO SUCH STRONG FEELINGS ABOUT THE DEATH PENALTY, THE RESPONSE TO QUESTION 188 SEEMINGLY SUPPORTS THIS COURT'S FINDING REGARDING HER STATE OF MIND THAT SHE IS EQUIVOCAL ON HER EQUIVOCAL VIEW ON CAPITAL PUNISHMENT AND CONFLICTING AND EQUIVOCAL RESPONSES REGARDING THE IMPOSITION OF THE PENALTY OF DEATH.

LIKEWISE, HER ORAL RESPONSES TO VOIR DIRE SIMILARLY GIVE THE EQUIVOCAL RESPONSES THAT SUPPORT HER RESPONSES TO THE QUESTIONNAIRE.

THE CALIFORNIA SUPREME COURT IN PEOPLE VERSUS GUZMAN, 45 CAL.3RD 915, A 1998 CASE, HAS GUIDED TRIAL COURTS BY HOLDING THAT THE COURTS MAY PROPERLY EXCUSE PROSPECTIVE JURORS DUE TO THEIR VIEWS ON CAPITAL PUNISHMENT.

SINCE THIS JUROR HAD NO STRONG FEELINGS ON THE DEATH PENALTY, BY HER OWN STATEMENTS, SHE COULD NOT STAND BEHIND THEM. THEREFORE, WHEN ASKED WHETHER SHE'S ONE THAT SUPPORTS THE DEATH PENALTY, BUT YET COULDN'T IMPOSE IT, THIS JUROR RESPONDED QUOTE, "I'M NOT SURE WHERE I STAND," CLOSE QUOTE.

> THIS SERIES OF RESPONSES, COUPLED WITH HER AFFIRMATION OF THE RESPONSES DURING VOIR DIRE, GIVES THIS COURT A VIEW OF HER STATE OF MIND, SHOWS AN EQUIVOCAL VIEW ON THE IMPOSITION OF THE DEATH PENALTY, AND SUPPORTS THIS COURT'S GRANT OF A CHALLENGE FOR CAUSE. THE SUBSTANTIAL EVIDENCE OF THIS EQUIVOCAL VIEW WOULD PREVENT OR SUBSTANTIALLY IMPAIR THE PERFORMANCE OF HER DUTIES AS A JUROR IN ACCORDANCE WITH HER INSTRUCTIONS AND HER OATH. (23RT 4995-4997.)

*2. THE TRIAL COURT'S ERROR*

In the trial court's last effort to justify the removal of Ms. Oliva, the court's nine repetitions of the word "equivocal" did not make it so. Although, Ms. Oliva had not decided whether she favored the death penalty, she could impose it, and believed the state should have such a penalty. Her uncertainty over the propriety of the death penalty in the abstract was the prosecutor's single reason to excuse her. That was clearly not dispositive of her ability to serve. (*Witherspoon, supra,* at pp. 518-519.) A juror may not even be excluded where she has conscientious scruples about capital punishment, if she is willing to "consider all of the penalties provided by state law," and is not "irrevocably committed," before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 522 & fn. 21; *accord, Smith v. Black* (5th Cir. 1990) 904 F.2d 950, 979.) In *Darden v. Wainwright* (1986) 477 U.S. 168 [91 L.Ed.2 144, 106 S.Ct. 2464] the crucial question posed to prospective jurors was, "'Do you have any ... conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own

principles to vote to recommend the death penalty regardless of the facts?'" The Court concluded that a yes answer to this unambiguous question, by itself, did not disqualify the potential juror. (*Id.* at p. 178.)

Since a juror's predisposition to impose the death penalty is not determinative, "[t]he controlling principle here is that 'the most that can be demanded of a venireman ... is that [she] be willing to consider all of the penalties provided by state law, and that [she] not be irrevocably committed'" (*Gaskins v. McKellar* (4th Cir. 1990) 916 F.2d 941, 949, quoting *Witherspoon.*) Ms. Oliva's answers do not manifest such "irrevocable commitment" to either penalty.

If a juror had said, I have thought long and hard about the death enalty, and I have concluded that the pro arguments have exactly the same weight as the con arguments, so I am neither for or against it. That juror would be excused for cause under Ms. Locke Nobles's rationale, which reveals the deficiency of that rationale.

The court curiously cited *People v. Guzman* 45 Cal.3rd 915 in support of its decision to excuse Ms. Oliva. However in *Guzman*, the two jurors whose views were under scrutiny did not believe in the death penalty and would opt for LWOPP, one even if deciding Charles Manson's fate. (*Id.* at pp. 955-956.) The facts there vastly differ from this unbiased, unimpaired juror.

As a result, the court's determination here is not entitled to deference and is unsupported by substantial evidence. (*Witherspoon.* at p. 515, fn. 9; *Heard, supra,* at pp. 958-959.)

E. The Excusal of Prospective Juror Christina Rojas

In summary, Ms. Rojas was another thoughtful person that supported the death penalty, who could impose the death penalty, and whose religious

beliefs would not dictate how she would decide the appropriate penalty. But, she was confused by four poorly drafted questions in the questionnaire. The prosecutor exploited that confusion and badgered this juror into a purported conflict of the prosecutor's own making that the juror's belief that LWOPP would be the more severe punishment, made her (the juror) unsure whether she could impose the death penalty if she believed that Kevin deserved the most severe punishment.

*1. BACKGROUND*

As reflected in her questionnaire, Ms. Rojas was 32 years old, single, had lived in this country for 30 of those years, was a high school graduate, with some college education, owned her own home, and was employed by Wells Fargo Bank. (29CT 8194-8197, 8199.) She looked upon jury service as a privilege of being a citizen of this country. (29CT 8202.) She believed that this state should have the death penalty, she did not belong to a group that was opposed to it, and she could impose it. (29CT 8230-8232.) Question 197 asked that one of seven proposed responses from "strongly agree" at one end of the continuum to "no opinion" on the other end be selected for the statement, "Convicted murderers should be swiftly executed." Ms. Rojas circled "strongly agree." (29CT 8232.) She responded "No" to the question whether she "Would find it difficult to sit on a case where you will have to decide whether an individual will receive the death penalty or life without the possibility of parole." (29CT 8233.) She responded "No" to the questions whether she would vote automatically for death or LWOPP in every case regardless of the evidence presented. (29CT 8235.) She believed that both potential punishments were severe (29CT 8236), but believed that LWOPP was more severe (29CT 8237.)

She explained, "Criminal has to live out the rest of their life without freedom. Death is final and complete." (29CT 8237.)

She answered questions 189 and 190 in a manner that showed she understood the questions in a manner different than what the court and counsel intended. They asked,

> 189. Do you feel the death penalty should be mandatory in all murder cases?
>
> 190. Do you feel that life without the possibility of parole should be mandatory in all murder cases?

To each, Ms. Rojas replied, "Yes." Each question asked for an explanation. In the place provided for question 189, Ms. Rojas explained, "It is the punishment for taking the life of another human being." In the place provided for question 190, she explained, "It is also another punishment for taking the life of another." (29CT 8231.) She obviously understood the questions as asking whether both the death penalty and LWOPP should be available options in murder cases.

A second pair of confusing questions asked,

> 209. Given the fact that you will have two options available to you, can you see yourself, in the appropriate case, rejecting life in prison without the possibility of parole and voting for the death penalty?
>
> 210. Given the fact you will have two options available to you, can you see yourself, in the appropriate case, rejecting death and voting for life in prison without the possibility of parole?

Ms. Rojas checked the box for "no" for each of these two questions. (29CT 8234.) Again, this was indicative that she understood the questions in a manner different from what the court and counsel intended. The questions are ambiguous in their phrasing. The nullification issue could have been posed by simply asking, "If you conclude after hearing the evidence that

LWOPP/death penalty is the appropriate punishment, would you nonetheless reject LWOPP/death penalty and vote instead for the death penalty/LWOPP?" The problem with both of the questions employed is the fact that it is not sufficiently clear to what the phrase "the appropriate case" refers—for the punishment rejected or the punishment chosen? Ms. Rojas' confusion here was the target of the prosecutor, Ms. Locke-Noble's, questioning, as the following colloquy demonstrates:

> MS. LOCKE-NOBLE: ON QUESTION 209 AND 210, I WASN'T SURE WHAT YOU MEANT, SO I'M GOING TO READ THOSE QUESTIONS TO YOU.
>
> ON QUESTION 209, IT SAYS, "GIVEN THE FACT THAT YOU WILL HAVE TWO OPTIONS, CAN YOU SEE YOURSELF, IN THE APPROPRIATE CASE, REJECTING LIFE WITHOUT THE POSSIBILITY OF PAROLE AND VOTING FOR THE DEATH PENALTY?"
>
> YOU PUT, NO.
>
> PROSPECTIVE JUROR NO. 3806: MOST OF THE QUESTIONS THAT WERE ON THE QUESTIONNAIRE WERE, TO ME THEY SEEMED A LITTLE REPETITIVE, IN A DIFFERENT FORM. MOST OF THE QUESTIONS ON SOME, IF YOU NOTICED, I SAID, "SAME AS THE ABOVE."
>
> MS. LOCKE-NOBLE: CAN YOU TALK A LITTLE BIT LOUDER.
>
> PROSPECTIVE JUROR NO. 3806: YES. SOME OF THE QUESTIONS THAT WERE ON THERE WERE REPETITIVE, AND I SAID, "NOT APPLICABLE, OR SAME AS THE ABOVE." AND SOME QUESTIONS I HAD TO THINK ABOUT FOR A VERY LONG TIME, WHAT MY ANSWER WOULD BE. IT WAS A LITTLE OVERWHELMING FOR ME TO HAVE TO THINK ABOUT THOSE TYPES OF QUESTIONS AND I WOULD ANSWER "YES" ON THAT QUESTION.

MS. LOCKE-NOBLE: SO YOU WOULD CHANGE YOUR MIND NOW AND ANSWERED "YES.

PROSPECTIVE JUROR NO. 3806: YES.

MS. LOCKE-NOBLE: ... ¶ "GIVEN THE FACT THAT YOU WILL HAVE TWO OPTIONS AVAILABLE, CAN YOU SEE YOURSELF, IN THE APPROPRIATE CASE, REJECTING LIFE WITHOUT THE POSSIBILITY OF PAROLE AND VOTING FOR THE DEATH PENALTY?"

PROSPECTIVE JUROR NO. 3806: YES.

MS. LOCKE-NOBLE: AND THE OTHER QUESTION, "GIVEN THE FACT THAT YOU WILL HAVE TWO OPTIONS AVAILABLE TO YOU, CAN YOU SEE YOURSELF, IN THE APPROPRIATE CASE, REJECTING DEATH AND VOTING FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE?"

PROSPECTIVE JUROR NO. 3806: OKAY. THEN THE OTHER ANSWER IS NO.

MS. LOCKE-NOBLE: BOTH ANSWERS ARE "NO"?

PROSPECTIVE JUROR NO. 3806: I'M SORRY. I'M A LITTLE NERVOUS.

MS. LOCKE-NOBLE: OKAY. YOU HAVEN'T IN YOUR LIFE HAD TO THINK ABOUT THE DEATH PENALTY, IS THAT RIGHT?

PROSPECTIVE JUROR NO. 3806: YES, THAT'S CORRECT. (12RT 2202-2204.)

By this point, Ms. Locke-Noble was probably as confused as Ms. Rojas, and she continued to probe.

MS. LOCKE-NOBLE: NOW, SINCE YOU HAVEN'T THOUGHT ABOUT THE DEATH PENALTY, YOU DON'T REALLY HAVE AN OPINION ON IT ONE WAY OR THE OTHER?

PROSPECTIVE JUROR NO. 3806: WELL, I'VE THOUGHT ABOUT IT SINCE, NOW THAT I HAVE HAD THESE QUESTIONS.

MS. LOCKE-NOBLE: AND, WHAT ARE YOUR THOUGHTS?

PROSPECTIVE JUROR NO. 3806: MY—I FEEL THAT IT'S THE SAME AS HOW I ANSWERED ON THE QUESTIONNAIRE.

MS. LOCKE-NOBLE: OKAY, YOUR ANSWERS ON THE QUESTION CONCERNING THE DEATH PENALTY WAS "THAT CALIFORNIA VOTED ON IT." YOU DIDN'T VOTE. SO I DON'T KNOW WHAT YOUR THOUGHTS ARE. DOES THAT MAKE SENSE?

PROSPECTIVE JUROR NO. 3806: YES.

MS. LOCKE-NOBLE: WHAT ARE YOUR THOUGHTS? '

PROSPECTIVE JUROR NO. 3806: I WOULD HAVE TO SEE ALL THE EVIDENCE, HEAR THE FACTS, AND BASE MY OPINION ON ALL THAT INFORMATION THAT I HAVE.

MS. LOCKE-NOBLE: AT THIS MOMENT IN TIME, CAN YOU TELL US WHAT YOUR THOUGHTS ARE ON THE DEATH PENALTY? DO YOU BELIEVE IN IT? DO YOU THINK WE SHOULDN'T HAVE IT? DO YOU HAVE NO OPINION?

PROSPECTIVE JUROR NO. 3806: I BELIEVE IN IT.

MS. LOCKE-NOBLE: DO YOU KNOW, RIGHT NOW, IF THIS WERE THE APPROPRIATE CASE, AND THE DEFENDANT HAS BEEN CONVICTED OF FIRST DEGREE MURDER, AND ONE SPECIAL CIRCUMSTANCES, RAPE, TORTURE, A RAPE WITH A STAKE, KIDNAPPING, OR ROBBERY HAVE BEEN FOUND TRUE. AND THE AGGRAVATING

SUBSTANTIALLY OUTWEIGH THE MITIGATING, COULD YOU IMPOSE THE DEATH PENALTY?[20]

PROSPECTIVE JUROR NO. 3806: YES.

MS. LOCKE-NOBLE: OKAY. NOW, I'M GOING TO GO BACK TO QUESTIONS 209 AND 210 BECAUSE YOUR ANSWERS ARE "NO" TO THOSE TWO QUESTIONS. AND WHAT YOU HAVE JUST TOLD ME IS INCONSISTENT WITH THOSE TWO QUESTIONS.

PROSPECTIVE JUROR NO. 3806: OKAY.

MS. LOCKE-NOBLE: OKAY. SO, AGAIN, I'M GOING TO ASK YOU QUESTION 209.

"GIVEN THE FACT THAT YOU WILL HAVE TWO OPTIONS AVAILABLE TO YOU CAN YOU SEE YOURSELF, IN THE APPROPRIATE CASE, REJECTING LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE AND VOTING FOR THE DEATH PENALTY?"

PROSPECTIVE JUROR NO. 3806: YES.

MS. LOCKE-NOBLE: QUESTION 210, "GIVEN THE FACT THAT YOU WILL HAVE THE TWO OPTIONS AVAILABLE TO YOU, CAN YOU SEE YOURSELF IN THE APPROPRIATE CASE REJECTING DEATH AND VOTING FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE?"

PROSPECTIVE JUROR NO. 3806: YES

MS. LOCKE-NOBLE: YOU UNDERSTAND WHAT THOSE QUESTIONS MEAN?

PROSPECTIVE JUROR NO. 3806: YES.

MS. LOCKE-NOBLE: BECAUSE YOU HAVE GONE FROM NO TO YES, TO YES TO NO.

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[20] As this new question has rephrased the point Ms. Locke-Noble is trying to resolve, it has removed the ambiguity as Ms. Rojas' following responses reflect.

PROSPECTIVE JUROR NO. 3806: LET ME EXPLAIN MY UNDERSTANDING.

MS. LOCKE-NOBLE: OKAY. GOOD.

PROSPECTIVE JUROR NO. 3806: IF I HAVE TO CHOOSE BETWEEN THE DEATH PENALTY OR LIFE WITHOUT THE POSSIBILITY OF PAROLE, YES, I CAN CHOOSE THE DEATH PENALTY AND, YES, I CAN ALSO CHOOSE LIFE IMPRISONMENT WITHOUT PAROLE.

MS. LOCKE-NOBLE: OKAY. AND WHAT DO YOU NEED IN ORDER TO CHOOSE THE DEATH PENALTY?

PROSPECTIVE JUROR NO. 3806: I NEED TO SEE THE EVIDENCE OR THE FACTS AND --

MS. LOCKE-NOBLE: WHAT TYPE OF EVIDENCE WOULD YOU NEED TO IMPOSE THE DEATH PENALTY?

PROSPECTIVE JUROR NO. 3806: ALL OF THE EVIDENCE INVOLVED IN THE CASE.

MS. LOCKE-NOBLE: OKAY, BUT FOR EXAMPLE, IS THERE SOMETHING IN PARTICULAR THAT YOU HAVE IN MIND THAT IF THAT EVIDENCE WAS PRESENTED, THEN YOU WOULD VOTE FOR THE DEATH PENALTY?

PROSPECTIVE JUROR NO. 3806: I DON'T KNOW, I'M UNSURE.

MS. LOCKE-NOBLE: I COULDN'T HEAR YOU.

PROSPECTIVE JUROR NO. 3806: I DON'T KNOW.

MS. LOCKE-NOBLE: AND YOU SAID SOMETHING AFTER THAT. I COULDN'T HEAR.

PROSPECTIVE JUROR NO. 3806: I'M UNSURE.

MS. LOCKE-NOBLE: SHE IS TYPING. SO I'M GETTING THE TYPING NOISE, AND SO THAT'S WHY I

KEEP ASKING YOU TO SPEAK UP AND HE'S GOT THE RADIO OVER HERE.

PROSPECTIVE JUROR NO. 3806: OKAY, I'M SORRY. I'M A LITTLE NERVOUS.

MS. LOCKE-NOBLE: THAT'S WHY I KEEP ASKING BECAUSE I CAN'T QUITE HEAR EVERYTHING. WE ARE ALL NERVOUS.

NOW ON QUESTION 227, YOU INDICATE, "WHICH DO YOU BELIEVE IS THE MORE SEVERE PUNISHMENT?" AND YOU PUT, "LIFE WITHOUT THE POSSIBILITY OF PAROLE."

WHY DID YOU PUT THAT?

PROSPECTIVE JUROR NO. 3806: I BELIEVE THAT LIFE IMPRISONMENT WITHOUT PAROLE, IF THE PERSON HAS TO SERVE THE LIFE IMPRISONMENT, I FELT THAT THEY WERE GOING TO LIVE THE REST OF THEIR LIFE AND IF THEY HAVE A CONSCIENCE [SIC], OR IF THEY ARE GOING TO BE THERE SOONER OR LATER THAT'S GOING TO MAKE THEM BE AWARE, OR UNDERSTAND, OR LET THEM KNOW WHAT THEY DID WAS WRONG, IF THEY ARE THE GUILTY PERSON.

AND IF THE DEATH PENALTY IS CHOSEN, THEN THAT WOULD BE FINAL OR COMPLETE, THAT'S THE END OF THE TRIAL.

MS. LOCKE-NOBLE: OKAY. NOW, IF THE PERSON RECEIVES LIFE WITHOUT THE POSSIBILITY OF PAROLE, AND THEY DON'T BELIEVE THEY ARE GUILTY, DON'T YOU THINK THEY WOULD APPEAL AND WORK ON THEIR APPEAL AND WOULDN'T THINK ABOUT WHAT THEY HAVE DONE?

JUROR NO. 3806: YES.

MS. LOCKE-NOBLE: SO WOULDN'T THE MORE SEVERE PUNISHMENT BE DEATH? I MEAN YOU ARE NOT HERE ANY MORE, RIGHT? YOU CANNOT DO

ANYTHING, YOU DON'T HAVE ANY FREEDOM. YOU ARE GONE. LIFE IS OVER, THAT'S PRETTY SEVERE.

YOU DON'T AGREE WITH THAT? YOU DON'T HAVE TO AGREE WITH ME.

PROSPECTIVE JUROR NO. 3806: NO.

MS. LOCKE-NOBLE: OKAY. BASED ON THE FACT THAT YOU DON'T THINK THAT DEATH IS THE MORE SEVERE PUNISHMENT, HOW IS IT POSSIBLE THAT YOU CAN IMPOSE IT?

PROSPECTIVE JUROR NO. 3806: IF I WOULD IMPOSE THE DEATH PENALTY, THEN I WOULD HAVE TO LIVE WITH THAT ON MY CONSCIENCE [SIC].

MS. LOCKE-NOBLE: CAN YOU LIVE WITH THAT?

PROSPECTIVE JUROR NO. 3806: YES.

MS. LOCKE-NOBLE: OKAY. ARE YOU SURE, BECAUSE YOU THINKING ABOUT IT. CAN YOU REALLY IMPOSE THE DEATH PENALTY? YOU SAID YOU WOULD HAVE TO LIVE WITH IT FOR THE REST OF YOUR LIFE ON YOUR CONSCIENCE [SIC], THAT YOU KILLED SOMEONE. ¶¶

PROSPECTIVE JUROR NO. 3806: YES, I CAN LIVE WITH THAT.

MS. LOCKE-NOBLE: WHAT WERE YOU THINKING ABOUT WHEN YOU HESITATED FOR SO LONG?

PROSPECTIVE JUROR NO. 3806: I WASN'T THINKING OF ANYTHING. I WAS THINKING OF THE PROPER WAY TO ANSWER THAT QUESTION.

MS. LOCKE-NOBLE: OKAY. THERE IS NO PROPER WAY. THE COURT TOLD YOU THERE IS NO RIGHT, NO WRONG. WE ARE JUST TRYING TO FIND OUT, OKAY? SO, IF IT'S GOING TO BE ON YOUR CONSCIENCE [SIC] FOR THE REST OF YOUR LIFE,

ARE YOU TRULY GOING TO BE ABLE TO IMPOSE THE DEATH PENALTY?

PROSPECTIVE JUROR NO. 3806: I BELIEVE I WOULD.

MS. LOCKE-NOBLE: EVEN THOUGH YOU PERSONALLY BELIEVE THAT LIFE WITHOUT THE POSSIBILITY OF PAROLE IS A MORE SEVERE PUNISHMENT, YOU COULD IMPOSE THE DEATH PENALTY?

PROSPECTIVE JUROR NO. 3806: YES.

MS. LOCKE-NOBLE: DO YOU BELIEVE THAT IT'S A MORE SEVERE PUNISHMENT FOR YOURSELF OR FOR ANYONE?

PROSPECTIVE JUROR NO. 3806: FOR ANYONE, INCLUDING MYSELF, IF THAT'S YOUR QUESTION, YES.

MS. LOCKE-NOBLE: OKAY. SO, IF YOU THINK IT'S THE MOST SEVERE PUNISHMENT, HOW COULD YOU EVER IMPOSE DEATH? IF YOU THINK SOMEONE WHO IS GIVEN LIFE IN PRISON IS THE MOST SEVERE PUNISHMENT THAT WE CAN GIVE IN THIS STATE, HOW CAN YOU IMPOSE DEATH?

PROSPECTIVE JUROR NO. 3806: I DON'T UNDERSTAND THE QUESTION. IF I BELIEVE THAT DEATH IS THE MOST SEVERE.

MS. LOCKE-NOBLE: NO. IF YOU BELIEVE LIFE WITHOUT THE POSSIBILITY OF PAROLE IS THE MOST SEVERE, THAT'S WHAT YOU HAVE SAID, CORRECT?

PROSPECTIVE JUROR NO. 3806: YES.

MS. LOCKE-NOBLE: IF YOU BELIEVE THAT'S THE MOST SEVERE PUNISHMENT THAT YOU CAN EVER IMPOSE, PERSONALLY, HOW CAN YOU IMPOSE THE DEATH PENALTY? IF YOU FEEL THAT THE CASE WARRANTS THE MOST SEVERE PUNISHMENT, WHEN YOU, IN YOUR MIND, FEEL

LIFE WITHOUT THE POSSIBILITY OF PAROLE IS THE MOST SEVERE PUNISHMENT.[21]

PROSPECTIVE JUROR NO. 3806: I DON'T UNDERSTAND YOUR QUESTION. IF I DO BELIEVE THAT, I'M SORRY, COULD YOU ASK THE QUESTION AGAIN?

MS. LOCKE-NOBLE: SURE. IF YOU PERSONALLY BELIEVE THAT LIFE WITHOUT THE POSSIBILITY OF PAROLE IS THE MOST SEVERE PUNISHMENT THAT CAN BE GIVEN TO SOMEONE, HOW CAN YOU IMPOSE THE DEATH PENALTY? IF YOU BELIEVE THE FACTS IN THIS CASE WARRANT THE MOST SEVERE PUNISHMENT, THAT CAN BE GIVEN?

PROSPECTIVE JUROR NO. 3806: I DON'T KNOW HOW TO ANSWER THAT.

MS. LOCKE-NOBLE: DOES THAT MEAN THAT YOU CAN'T DO IT BECAUSE YOU DON'T KNOW HOW TO ANSWER THE QUESTION?

PROSPECTIVE JUROR NO. 3806: NO. I CAN ANSWER THE QUESTION. HOWEVER, TO ME IT SEEMS A LITTLE TWISTED.

MS. LOCKE-NOBLE: GO AHEAD, ANSWER. THERE IS NO RIGHT OR WRONG ANSWER AND WE JUST WANT TO HEAR WHAT YOUR ANSWER IS. SO, YOU KNOW, WE WANT YOU TO BE HONEST. THERE ARE LOTS OF CASES IN THIS BUILDING THAT DON'T REQUIRE YOU TO DETERMINE PENALTY OR PUNISHMENT. IT SEEMS ON YOUR QUESTIONS AND BASED ON YOUR ANSWERS AND YOUR HESITATION THAT YOU CANNOT IMPOSE THE DEATH PENALTY. THAT'S MY FEELING.

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[21] Ms. Locke-Noble may have been trying to ask, "The law views the death penalty as more severe. So, if the evidence in this case calls for the more severe penalty, which one would you vote for, death or LWOPP?"

AND THERE IS NOTHING WRONG WITH NOT BEING ABLE TO DO THAT. THERE HAVE BEEN MANY PEOPLE DURING THE COURSE OF THESE PROCEEDINGS THAT CAN'T DO IT AND SOME PEOPLE CAN. THERE IS NOTHING WRONG WITH THAT. THERE IS NOTHING RIGHT WITH IT.

PROSPECTIVE JUROR NO. 3806: BUT YOUR QUESTION WAS NOT ABOUT THE DEATH PENALTY, YOUR QUESTION WAS ABOUT LIFE WITHOUT THE POSSIBILITY OF PAROLE.

MS. LOCKE-NOBLE: MY QUESTION WAS ABOUT BOTH. MY QUESTION WAS IF YOU PERSONALLY BELIEVE THAT LIFE WITHOUT THE POSSIBILITY OF PAROLE IS THE MOST SEVERE PUNISHMENT, HOW CAN YOU IMPOSE THE DEATH PENALTY, IF YOU FEEL THIS CASE DESERVES THE MOST SEVERE PUNISHMENT?

PROSPECTIVE JUROR NO. 3806: SO I CAN GIVE THE MOST SEVERE PUNISHMENT, WHICH IN MY OPINION, IS LIFE WITHOUT THE POSSIBILITY OF PAROLE.

MS. LOCKE-NOBLE: CORRECT, THAT'S WHAT I'M ASKING.

PROSPECTIVE JUROR NO. 3806: YES.

MS. LOCKE-NOBLE: I'M ASKING, HOW CAN YOU IMPOSE THE DEATH PENALTY IF YOU, PERSONALLY, BELIEVE LIFE WITHOUT THE POSSIBILITY OF PAROLE IS THE MOST SEVERE PUNISHMENT.

AS I UNDERSTAND WHAT YOU SAID IN YOU YOUR QUESTIONNAIRE, AND WHAT YOU HAVE SAID HERE IN COURT. IS THAT, FOR YOUR [sic] PERSONALLY, LIFE WITHOUT THE POSSIBILITY OF PAROLE IS THE MOST SEVERE PUNISHMENT THAT CAN BE GIVEN IN THIS STATE, CORRECT?

PROSPECTIVE JUROR NO. 3806: YES.

MS. LOCKE-NOBLE: IF YOU BELIEVE THAT THIS CASE WARRANTS THE MOST SEVERE PUNISHMENT, THEN YOU WOULD GIVE LIFE WITHOUT THE POSSIBILITY OF PAROLE?

PROSPECTIVE JUROR NO. 3806: YES, THAT'S RIGHT.

MS. LOCKE-NOBLE: YOU WOULD NOT IMPOSE THE DEATH PENALTY?

PROSPECTIVE JUROR NO. 3806: YES.

MS. LOCKE-NOBLE: THAT'S CORRECT?

PROSPECTIVE JUROR NO. 3806: YES.

MS. LOCKE-NOBLE: AND SO WHAT I HEAR YOU SAYING IS THAT REGARDLESS OF WHETHER OR NOT THE DEATH PENALTY SHOULD BE IMPOSED, YOU ARE GOING TO IMPOSE LIFE WITHOUT THE POSSIBILITY OF PAROLE, BECAUSE YOU BELIEVE IT'S THE MOST SEVERE PUNISHMENT, IS THAT CORRECT?

PROSPECTIVE JUROR NO. 3806: YES AND NO.

MS. LOCKE-NOBLE: YOU ARE GOING TO HAVE TO EXPLAIN THAT BECAUSE I DON'T KNOW WHAT THAT MEANS.

PROSPECTIVE JUROR NO. 3806: I CAN CHOOSE THE DEATH PENALTY, YES, BUT I CAN ALSO CHOOSE LIFE IMPRISONMENT WITHOUT PAROLE.

MS. LOCKE-NOBLE: OKAY. HOW CAN YOU CHOOSE THE DEATH PENALTY WHEN YOU, PERSONALLY, BELIEVE THAT LIFE WITHOUT THE POSSIBILITY OF PAROLE IS THE MOST SEVERE PUNISHMENT? AND YOU BELIEVE THAT THIS CASE DESERVES THE MOST SEVERE PUNISHMENT, HOW CAN YOU DO THAT? THAT WOULD BE GOING AGAINST YOUR PERSONAL BELIEF, CORRECT?

PROSPECTIVE JUROR NO. 3806: NO. IF LIFE IMPRISONMENT IS THE WORST, THEN I WOULD CHOOSE LIFE IMPRISONMENT.

MS. LOCKE-NOBLE: AND, IN YOUR OPINION, LIFE WITHOUT THE POSSIBILITY OF PAROLE IN PRISON IS THE WORST, CORRECT?

PROSPECTIVE JUROR NO. 3806: YES.

MS. LOCKE-NOBLE: I HAVE NO FURTHER QUESTION.

THE COURT: MS. SPERBER.

MS. SPERBER: I'M GOING TO TRY AND UNCONFUSE, YOU.

FIRST OF ALL, THE FIRST QUESTIONS THAT WERE GIVEN THE TWO POSSIBILITIES, WOULD YOU REJECT ONE AND HERE YOU CHANGED AND SAID YES.

DO YOU BELIEVE THAT THE CHECK MARKS YOU MADE IN YOUR QUESTIONNAIRE WERE INCORRECT, WHEN YOU SAID YOU WOULD NEVER REJECT DEATH AND YOU WOULD NEVER REJECT LIFE WITHOUT THE POSSIBILITY OF PAROLE?

PROSPECTIVE JUROR NO. 3806: THAT'S RIGHT.

MS. SPERBER: BECAUSE THERE IS A CASE QUESTION NO. 214 "WOULD YOU AUTOMATICALLY VOTE FOR DEATH IN EVERY CASE?" AND YOU SAID, "NO." AND IT SAYS, "WOULD YOU AUTOMATICALLY VOTE FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE IN EVERY CASE?" AND YOU SAID "NO."

PROSPECTIVE JUROR NO. 3806: YES, THAT'S RIGHT.

MS. SPERBER: AND THEN IT SAID WOULD YOU REFUSE TO VOTE FOR GUILTY IN THE GUILT PHASE BECAUSE YOU KNEW YOU WOULD WIND UP IN THE PENALTY PHASE? YOU WOULD MAKE THE

CHOICE AND YOU SAID, "NO." YOU COULD FIND SOMEBODY GUILTY KNOWING THE THAT THERE WOULD BE A PENALTY PHASE, IS THAT CORRECT?

PROSPECTIVE JUROR NO. 3806: YES.

MS. SPERBER: QUESTION 217 SAYS, "IF 11 OTHER JURORS FOUND THE DEFENDANT GUILTY OF MURDER AND THE SPECIAL CIRCUMSTANCES BE TRUE, WOULD YOU ALWAYS VOTE AGAINST DEATH NO MATTER WHAT?" AND YOU SAID, "NO."

PROSPECTIVE JUROR NO. 3806: THAT'S RIGHT.

MS. SPERBER: AND THEN THE SAME THING, "IF THE 11 OTHER JURORS FOUND THE DEFENDANT GUILTY OF MURDER AND THE SPECIAL CIRCUMSTANCES TO BE TRUE WOULD YOU ALWAYS VOTE FOR DEATH?" AND YOU SAID, "NO."

PROSPECTIVE JUROR NO. 3806: YES, THAT'S RIGHT.

MS. SPERBER: NOW, I THINK WHAT MS. LOCKE-NOBLE WAS TRYING TO SAY, IF YOU PERSONALLY FEEL THAT LIFE WITHOUT THE POSSIBILITY OF PAROLE IS WORSE THAN THE DEATH PENALTY, THEN IF THE AGGRAVATING FACTORS SUBSTANTIALLY OUTWEIGH THE MITIGATING FACTORS, WHAT YOU SAID WAS YOU WOULD VOTE FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE, BECAUSE THAT'S THE WORST.

PROSPECTIVE JUROR NO. 3806: YES.

MS. SPERBER: AND SHE SAID, WHAT WOULD IT TAKE A DEATH SENTENCE, THE SECOND WORSE, IF THEY WERE EVEN, WOULD YOU VOTE FOR DEATH.

PROSPECTIVE JUROR NO. 3806: THAT WAS THE SECOND CHOICE? YES.

MS. SPERBER: THE JUDGE IS GOING TO TELL YOU AND I BELIEVE WE ALSO HAVE A QUESTION ON THE QUESTIONNAIRE, "ARE YOU ABLE TO PUT

YOUR PERSONAL BELIEFS ASIDE AND FOLLOW THE RULES?"

AND YOUR PERSONAL BELIEF IS THAT LIFE WITHOUT THE POSSIBILITY OF PAROLE IS WORSE THAN DEATH, BECAUSE YOU WOULD HAVE—YOU FEEL A PERSON WOULD SIT IN JAIL AND LIVE WITH THIS ON THEIR CONSCIENCE FOR THE REST OF HIS LIFE?

PROSPECTIVE JUROR NO. 3806: YES.

MS. SPERBER: DO YOU BELIEVE THAT SOME PEOPLE DON'T HAVE A CONSCIENCE [SIC]?

PROSPECTIVE JUROR NO. 3806: YES.

MS. SPERBER: AND FOR THEM LIFE WITHOUT PAROLE MIGHT NOT BE BAD.

PROSPECTIVE JUROR NO. 3806: I UNDERSTAND.

MS. SPERBER: IN THAT KIND OF CASE, IF YOU HEARD FACTS THAT INDICATE MR. PEARSON HAD NO CONSCIENCE [SIC], NO REMORSE, HAD A HISTORY OF VIOLENCE, WOULD THAT BE THE KIND OF CASE THAT YOU WOULD VOTE FOR DEATH?

PROSPECTIVE JUROR NO. 3806: YES.

MS. SPERBER: NOW, I PERSONALLY AM AFRAID OF DYING, BUT I ALSO THINK THAT LIVING IN PRISON FOR THE REST OF MY LIFE, NO MATTER HOW LONG I HAVE, IS ALSO BAD.

BUT THERE ARE PEOPLE WHO THINK THAT DEATH IS A FRIENDLY ESCAPE, THAT THERE IS AN AFTERLIFE, THEY GO TO AND LOOK FORWARD TO. AND WOULD YOU TAKE THOSE THINGS INTO CONSIDERATION IF YOU HEARD FACTS LIKE THAT PRESENTED TO YOU, ABOUT WHAT SOMEBODY'S FEELINGS ARE AND THEIR BELIEFS?

PROSPECTIVE JUROR NO. 3806: YES.

MS. SPERBER: AND THE OTHER THING THE JUDGE IS GOING TO—WE ARE ASKING YOU, KNOWING THAT YOU HAVE THIS STRONG PERSONAL FEELING THAT LIFE WITHOUT THE POSSIBILITY OF PAROLE IS WORSE THAN DEATH. CAN YOU SET THAT PERSONAL BELIEF ASIDE AND FOLLOW THE INSTRUCTIONS? AND WHAT THOSE INSTRUCTIONS SAY IS THAT IF THE BAD SUBSTANTIALLY OUTWEIGHS THE GOOD AND IT'S BAD ENOUGH TO CHOOSE DEATH, WOULD YOU CHOOSE DEATH?

PROSPECTIVE JUROR NO. 3806: YES.

MS. SPERBER: REALIZING YOU THINK LIFE WITHOUT THE POSSIBILITY OF PAROLE IS WORSE. THE VERY FACT THAT THERE IS A DEATH PENALTY IN CALIFORNIA IMPLIES THAT THE STATE OF CALIFORNIA, THE PEOPLE WHO VOTED FOR IT, THINK DEATH IS WORSE. THAT THAT'S THE WORSE OF THE PUNISHMENT, OKAY?

PROSPECTIVE JUROR NO. 3806: I UNDERSTAND.

MS. SPERBER: SO WHAT WE ARE ASKING, AND WHAT MS. LOCKE-NOBLE WAS, I THINK, ASKING YOU EVEN THOUGH YOU BELIEVE LIFE WITHOUT THE POSSIBILITY OF PAROLE IS THE WORSE, KNOWING THAT THE STATE OF CALIFORNIA FEELS DEATH IS THE WORSE. AND THE JUDGE IS GOING TO TELL YOU WILL, YOU SET ASIDE YOUR PERSONAL BELIEF? AND WE ARE ASKING IF YOU CAN SET ASIDE YOUR PERSONAL BELIEF AND FOLLOW THE LAW AND RULES THAT THE JUDGE TELLS YOU. CAN YOU DO THAT AND IMPOSE THE DEATH PENALTY IN A CASE WHERE YOU THINK, PERSONALLY, THE WORSE PUNISHMENT IS DESERVED?

PROSPECTIVE JUROR NO. 3806: YES.

MS. SPERBER: AND IN YOUR PERSONAL BELIEF THAT IT IS LIFE WITHOUT THE POSSIBILITY

OF PAROLE, BUT THE LAW THINKS IT'S DEATH, SO YOU WILL FOLLOW THE LAW?

PROSPECTIVE JUROR NO.3806: YES.

MS. SPERBER: PASS FOR CAUSE.

THE COURT: MS. LOCKE-NOBLE, ANY OTHER QUESTIONS?

MS. LOCKE-NOBLE: THANK YOU.

IF THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES WHAT WILL YOU VOTE FOR?

PROSPECTIVE JUROR NO. 3806: COULD YOU REPEAT IT?

MS. LOCKE-NOBLE: IF THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES, WHAT WILL YOU VOTE FOR?

PROSPECTIVE JUROR NO. 3806: LIFE IMPRISONMENT.

MS. LOCKE-NOBLE: IF THE MITIGATING CIRCUMSTANCES ARE EQUAL, WHAT WILL YOU VOTE FOR?

PROSPECTIVE JUROR NO. 3806: LIFE IN PRISON.

MS. LOCKE-NOBLE: IF THE AGGRAVATING FACTORS SUBSTANTIALLY OUTWEIGH THE MITIGATING CIRCUMSTANCES, WHAT WILL YOU VOTE FOR?

PROSPECTIVE JUROR NO. 3806: LIFE IN PRISON.

MS. LOCKE-NOBLE: YOU WILL NEVER VOTE FOR DEATH WILL YOU, BECAUSE YOU BELIEVE THAT LIFE WITHOUT THE POSSIBILITY OF PAROLE IS THE ABSOLUTE WORSE PUNISHMENT THAT CAN HAPPEN TO SOMEONE, CORRECT?

PROSPECTIVE JUROR NO. 3806: YES AND NO.

MS. LOCKE-NOBLE: I HAVE NO FURTHER QUESTIONS. (12RT 2204-2217.)

*2. THE TRIAL COURT'S RULING*

The court granted the prosecutions challenge for cause without explanation, other than a citation to *People v. Cox* (1991) 53 Cal.3d 618 [280 Cal.Rptr. 692] and *People v. Cooper, supra,* 53 Cal.3d 771. (12RT 2218.)

*2. THE TRIAL COURT'S ERROR*

As the above exchange demonstrates, Ms. Rojas came to the process with an open mind, believed in the death penalty, could impose the death penalty, and did not hold any of the predilections against the death penalty that so many prospective jurors have. She did believe that LWOPP was a more severe penalty than death. Ms. Locke-Noble pursued this latter point with the aim to convince Ms. Rojas that this belief should make it impossible for her to ever impose the death penalty in a case where she believed the defendant deserved the harshest sentence. Yet, Ms. Rojas did not immediately rise to this bait and Ms. Locke-Noble made repeated attempts before she thought she had convinced Ms. Rojas of the logic of it. Even once it appeared that Ms. Locke-Noble had reached that point, she could not initially shake Ms. Rojas from her equivocal "Yes and no" response to the question whether she ever would vote for the death penalty where the aggravating circumstances outweighed the mitigating circumstances. The law did not require the death penalty in such circumstances, as question 207 in the Questionnaire had informed her[22] (29CT 8233.), and she reasonably did not know the surrounding facts.

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[22] Question 207 of the jury questionnaire informed the prospective jurors, "No matter what the evidence show, the jury always has the option

Ms. Sperber readily rehabilitated Ms. Rojas by taking her back through her questionnaire and confirming all of her responses indicating her support for the death penalty and her openness to impose it. Ms. Rojas stated that she was able to set aside her personal belief and follow the court's instructions, fully understanding the implication that the voters of California believed that the death penalty was the worst punishment. Ms. Locke-Noble's followed this by asking how Ms. Rojas would vote in the three potential, nonspecific factual mixes for aggravating and mitigating circumstances confronting every penalty phase jury[23] and she responded that she would vote for life imprisonment. At this point, Ms. Rojas had not been provided any hypothetical set of compelling aggravating circumstances. Yet, when Ms. Locke-Noble attempted to close the deal by challenging Ms. Rojas that she would never vote for death because of her belief that LWOPP was the worst punishment, Ms. Rojas only replied, "Yes and no."

Ms. Locke-Noble focused solely on hypothetical questions as to what result Mr. Rojas would reach. That was a red herring. Defense counsel focused on whether Ms. Rojas would follow the law. That was the relevant issue and Mr. Rojas was clearly qualified.

The court's repeated reliance here on this Court's decision in *People v. Cooper, supra,* is as unwarranted here as it was in Part *C, 2*, above and that discussion is incorporated here. *People v. Cox, supra,* is similarly

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of choosing life without that possibility of parole as the punishment. (See, e.g., 29CT 8233.)

[23] Those three are where the mitigating factors outweigh the aggravating factors, where the mitigating and aggravating factors are in equipoise, and where the aggravating factors outweigh the mitigating factors.

unavailing for their "each of the 11 prospective jurors excused for cause unequivocally expressed in one manner or another an inability to impose the death penalty irrespective of the facts." (*Id.* at p. 647.) That is certainly not the instant case. Ms. Rojas was an unbiased prospect who the prosecutor outwitted, confused, and unsuccessfully attempted to badger into a commitment against the death penalty in a context that the death penalty was not even required. Ms. Rojas reasonably refused to commit. Her views would not have prevented or substantially impaired the performance of her duties as a juror and she was thus improperly excused. (*Wainwright v. Witt, supra*, 469 U.S. 412, 424.) As a result, the court's determination here is not entitled to deference and is unsupported by substantial evidence. (*Witherspoon, supra,* at p. 515, fn. 9; *Heard, supra,* at pp. 958-959.)

F. The Excusal of Prospective Juror Robert Daley

In summary, Mr. Daley was a man of many years of experience and accomplishment, a person with well-considered opinions who supported the death penalty, who could impose the death penalty, whose religious beliefs would not dictate how he would decide the appropriate penalty, but who was unwilling to absolutely commit to imposing the death penalty if only the special circumstances of kidnapping or robbery were found to be true. The prosecutor focused on this reasonable position and argued that it alone established adequate reason for excusing him for cause.

*1. BACKGROUND*

As reflected in his questionnaire, Mr. Daley was 72 years old, married, a father of eight children, a grandfather to nine, educated through post graduate work, a retired colonel and military pilot, a veteran of Vietnam, the owner of a business, and resident for 17 years in a home that he owned. (42CT 11973-11976, 12RT 2246.) He believed in the death

penalty in rare circumstances determined by the nature of the crime and felt that the state should have the death penalty, but not for all circumstances. (42CT 12009-12011, 12013.) He did not belong to any group opposed to the death penalty and he could impose it. (42CT 12009-12010, 12015.) He did not find it difficult to sit on a case where he would have to decide whether an individual would receive the death penalty or LWOPP. (42CT 12012.) He would not automatically vote for either the death penalty or LWOPP. (42CT 12014.) He believed that one convicted of murder during the commission of a robbery, kidnap, torture, or sexual assault, should never be sentenced to death without consideration of background information. (42CT 12014-12015.)

During defense counsel's questioning, Mr. Daley affirmed that he would keep an open mind during the penalty phase. (12RT 2249-2251.)

Under Ms. Locke-Noble's questioning, Mr. Daley acknowledged that to him the special circumstances, as they were explained to him, appeared to vary in their severity with kidnap at one end of the continuum to torture at the other. Which special circumstance was found to be true would make a difference in his decision about the appropriate sentence. (12RT 2255.) Their exchange follows.

> MS. LOCKE-NOBLE: OKAY. DO YOU BELIEVE THAT A SPECIFIC SPECIAL CIRCUMSTANCE HAS TO BE FOUND TRUE IN ORDER FOR YOU TO IMPOSE THE DEATH PENALTY?
>
> PROSPECTIVE JUROR NO. 7384: NO.
>
> MS. LOCKE-NOBLE: I DON'T UNDERSTAND WHAT YOU'RE TELLING ME THEN.
>
> PROSPECTIVE JUROR NO. 7384: I'M TELLING YOU THAT IT WOULD DEPEND ON WHICH SPECIAL CIRCUMSTANCES WOULD BE FOUND TO BE TRUE.

IF ONLY ONE WERE, AND LET'S SAY IT WERE KIDNAPPING --

MS. LOCKE-NOBLE: OKAY.

PROSPECTIVE JUROR NO. 7384: --THEN I WOULD NOT—I WOULD BE LESS LIKELY TO CONVICT OR TO FEEL THE SAME AS IF SAY ALL FIVE OF THOSE CIRCUMSTANCES WERE FOUND TO BE TRUE.

MS. LOCKE-NOBLE: OKAY.

PROSPECTIVE JUROR NO. 7384: SO I'M SAYING WITH VARYING DEGREES, DEPENDING ON WHICH CIRCUMSTANCES WERE FOUND TO BE TRUE.

MS. LOCKE-NOBLE: OKAY. AND IF KIDNAP WERE THE ONLY SPECIAL CIRCUMSTANCE TO BE TRUE, COULD YOU IMPOSE THE DEATH PENALTY?

PROSPECTIVE JUROR NO. 7384: BUT MURDER WAS STILL --

MS. LOCKE-NOBLE: RIGHT.

PROSPECTIVE JUROR NO. 7384: HE'S FOUND GUILTY
OF MURDER?

MS. LOCKE-NOBLE: MURDER HAS TO BE FOUND TRUE. HE HAS TO BE FOUND GUILTY AND IT HAS TO BE FIRST DEGREE MURDER AND ONE OF THE SPECIAL CIRCUMSTANCES, IN ORDER TO MOVE ON TO THE PENALTY PHASE.

SO WHAT WE'RE PRESUMING RIGHT HERE IS THAT HE'S BEEN FOUND GUILTY OF FIRST DEGREE MURDER AND THE KIDNAPPING SPECIAL CIRCUMSTANCE HAS BEEN FOUND TRUE, AND THAT'S IT. COULD YOU IMPOSE THE DEATH PENALTY?

PROSPECTIVE JUROR NO. 7384: I'D NEED MORE INFORMATION, MA'AM, I COULDN'T DO IT

JUST ON WHAT YOU'RE TELLING ME. IT WOULD BE DIFFICULT TO MAKE A DECISION ON THAT.

MS. LOCKE-NOBLE: OKAY. LET ME PUT IT THIS WAY.

THIS IS THE PENALTY PHASE PORTION OF THE TRIAL, AND THE COURT WILL GIVE YOU INSTRUCTIONS ABOUT AGGRAVATING AND MITIGATING CIRCUMSTANCES. THE COURT WILL GIVE YOU GUIDELINES. HE WON'T TELL YOU THESE ARE AGGRAVATING AND THESE ARE MITIGATING, THAT'S SOMETHING YOU WILL DECIDE FOR YOURSELF, AND YOU DON'T HAVE TO AGREE WITH THE OTHER ELEVEN JURORS.

AND THEN HE'LL ALSO TELL YOU TO ASSIGN A WEIGHT TO THE MITIGATING AND AGGRAVATING CIRCUMSTANCES. AND HE WON'T GIVE YOU A SCALE, HE WON'T SAY IT'S ONE TO TEN, A PERCENTAGE SCALE, OR A LETTER GRADE, YOU DECIDE THAT FOR YOURSELF. AND AGAIN, YOU DON'T HAVE TO AGREE ON WHAT THE AGGRAVATING AND MITIGATING CIRCUMSTANCES ARE OR HOW MUCH WEIGHT TO GIVE THOSE, WITH ANY OF THE OTHER JURORS.

WHAT YOU ULTIMATELY HAVE TO AGREE ON IS THE PENALTY, ALL 12 HAVE TO AGREE ON THAT.

THE LAW SAYS THAT IF THE MITIGATING CIRCUMSTANCES, THE GOOD CIRCUMSTANCES, OUTWEIGH THE BAD, YOU MUST IMPOSE LIFE WITHOUT THE POSSIBILITY OF PAROLE.

DOES THAT MAKE SENSE SO FAR?

PROSPECTIVE JUROR NO. 7384: YES, MA'AM.

MS. LOCKE-NOBLE: OKAY. IF THEY'RE EQUAL, THAT IS, THE AGGRAVATING AND MITIGATING CIRCUMSTANCES ARE EQUAL, AGAIN YOU MUST IMPOSE LIFE WITHOUT THE POSSIBILITY OF PAROLE.

IF THE AGGRAVATING CIRCUMSTANCES SUBSTANTIALLY OUTWEIGH THE MITIGATING CIRCUMSTANCES, THE LAW SAYS YOU HAVE A CHOICE, DEATH OR LIFE WITHOUT THE POSSIBILITY OF PAROLE.

DOES THAT ALL MAKE SENSE?

PROSPECTIVE JUROR NO. 7384: YES, MA'AM.

MS. LOCKE-NOBLE: NOW, TAKING THAT ALL INTO CONSIDERATION, WHAT I'VE JUST SAID, IF THE DEFENDANT IS FOUND GUILTY OF FIRST DEGREE MURDER AND THE JURY HAS FOUND THE SPECIAL CIRCUMSTANCE OF KIDNAP TO BE TRUE, COULD YOU IMPOSE THE DEATH PENALTY?

PROSPECTIVE JUROR NO. 7384: I'M TRYING TO WEIGH THAT SCALE YOU PUT IN FRONT OF ME. AND WITH WHAT YOU'RE GIVING ME, I DON'T HAVE ENOUGH, I NEED MORE INFORMATION. IF IT WAS JUST THAT, AND THE CIRCUMSTANCES OF THE CRIME ARE SAY PURE, SOMEBODY SHOT SOMEBODY AND THERE ARE NO OTHER AGGRAVATING CIRCUMSTANCES, PUT WITH KIDNAP, I THINK I WOULD HAVE TO SAY LIFE RATHER THAN DEATH.

MS. LOCKE-NOBLE: OKAY. IF THE SPECIAL CIRCUMSTANCE TO BE FOUND TRUE WAS RAPE, AND THAT WAS THE ONLY SPECIAL CIRCUMSTANCE FOUND TO BE TRUE, COULD YOU IMPOSE THE DEATH PENALTY?

PROSPECTIVE JUROR NO. 7384: AGAIN, THAT'S CLOSE, BUT PROBABLY NOT.

MS. LOCKE-NOBLE: IF THE ONLY SPECIAL CIRCUMSTANCE FOUND TO BE TRUE WAS RAPE WITH A STAKE, COULD YOU IMPOSE THE DEATH PENALTY?

PROSPECTIVE JUROR NO. 7384: YES. YES, MA'AM.

MS. LOCKE-NOBLE: IF THE ONLY SPECIAL CIRCUMSTANCE TO BE FOUND TRUE WAS ROBBERY, COULD YOU IMPOSE THE DEATH PENALTY?

PROSPECTIVE JUROR NO. 7384: MORE LIKELY NOT.

MS. LOCKE-NOBLE: AND IF THE ONLY SPECIAL CIRCUMSTANCE TO BE FOUND TRUE WAS TORTURE, COULD YOU IMPOSE THE DEATH PENALTY?

PROSPECTIVE JUROR NO. 7384: MORE LIKELY, YES.

MS. LOCKE-NOBLE: WHEN YOU SAY "MORE LIKELY," WHAT DO YOU MEAN?

PROSPECTIVE JUROR NO. 7384: WELL, I'D HAVE TO LOOK AT A LARGER PICTURE THAN WHAT YOU'RE GIVING ME, I THINK, MA'AM.

MS. LOCKE-NOBLE: OKAY. THIS IS THE POINT IN TIME THAT WE HAVE TO FIND OUT IF YOU COULD IMPOSE THE DEATH PENALTY OR LIFE WITHOUT THE POSSIBILITY OF PAROLE.

PROSPECTIVE JUROR NO. 7384: YES, MA'AM.

MS. LOCKE-NOBLE: WE ARE LIMITED IN WHAT INFORMATION WE CAN GIVE YOU. OKAY?

PROSPECTIVE JUROR NO. 7384: YES.

MS. LOCKE-NOBLE: SO I CAN'T GIVE YOU ANYMORE INFORMATION, BUT WE'RE JUST TRYING TO FIND OUT IF YOU POSSIBLY COULD DO EITHER ONE OF THESE.

DOES THAT MAKE SENSE?

PROSPECTIVE JUROR NO. 7384: YES. YES.

MS. LOCKE-NOBLE: OKAY. YOU ALSO STATED ON YOUR QUESTIONNAIRE THAT IT WOULD BE HARD TO BE OBJECTIVE, AND THAT

WAS IN RESPONSE TO, "WHICH DO YOU BELIEVE IS A MORE SEVERE PUNISHMENT?" AND YOU PUT, "HARD TO BE OBJECTIVE."

PROSPECTIVE JUROR NO. 7384: SAY THAT AGAIN, PLEASE.

MS. LOCKE-NOBLE: SURE. YOU PUT ON YOUR QUESTIONNAIRE, UNDER THE QUESTION, "WHICH DO YOU BELIEVE IS A MORE SEVERE PUNISHMENT", YOU PUT, "HARD TO BE OBJECTIVE."

PROSPECTIVE JUROR NO. 7384: MORE SEVERE PUNISHMENT MEANING DEATH OR LIFE WITHOUT THE POSSIBILITY OF PAROLE?

MS. LOCKE-NOBLE: WHAT DID YOU MEAN WHEN YOU SAID "HARD TO BE OBJECTIVE?"

PROSPECTIVE JUROR NO. 7384: WELL, I WAS LOOKING AGAIN AT THE PERSON THAT MIGHT BE CONVICTED OF THIS, AND I WAS LOOKING FROM HIS VIEWPOINT OR HER VIEWPOINT. SO IT'S HARD– IT WOULD BE HARD TO BE OBJECTIVE, BECAUSE I DON'T KNOW, I'D HAVE TO KNOW MORE ABOUT THAT PERSON.

IF IT WERE FOR ME, IF YOU'RE TALKING ABOUT ME, THEN I WOULD TAKE LIFE WITHOUT PAROLE.

MS. LOCKE-NOBLE: DID YOU EVER CONSIDER, WHEN YOU WERE READING THIS QUESTIONNAIRE, THE VIEWPOINT OF THE VICTIM?

PROSPECTIVE JUROR NO. 7384: WELL, I THINK THAT'S HOW I ANSWERED MOST OF THOSE QUESTIONS, WAS FROM THE VIEWPOINT OF THE VICTIM.

MS. LOCKE-NOBLE: OKAY. NOW THAT YOU'VE CONSIDERED THE DEFENDANT'S VIEWPOINT AND THE VICTIM'S VIEWPOINT, YOU CAN'T DO THAT ANYMORE.

PROSPECTIVE JUROR NO. 7384: OKAY.

MS. LOCKE-NOBLE: OKAY?

PROSPECTIVE JUROR NO. 7384: ALL RIGHT.

MS. LOCKE-NOBLE: BECAUSE IF YOU DO THAT, YOU'RE BECOMING AN ADVOCATE FOR ONE SIDE OR THE OTHER, AND WE NEED YOU TO BE A JUDGE. AND A JUDGE HAS TO BE NEUTRAL AND IMPARTIAL AND CANNOT BE FOR ONE SIDE OR THE OTHER. DOES THAT MAKE SENSE?

PROSPECTIVE JUROR NO. 7384: YES. BUT I DON'T KNOW HOW THAT TIES INTO THE PREVIOUS QUESTION.

MS. LOCKE-NOBLE: WHICH QUESTION WAS THAT?

PROSPECTIVE JUROR NO. 7384: WELL, I'M NOT SURE. WHEN YOU SAID AM I ANSWERING THESE QUESTIONS IN RELATION TO THE PERSON ACCUSED OR IN RELATION TO ME, I THINK SOME QUESTIONS SEEMED TO BE MORE OBJECTIVE RATHER THAN SUBJECTIVE, AND SO I ANSWERED THOSE THAT SEEMED TO ME, THEY JUST SAID LET'S—I DIDN'T NEED TO MAKE THAT JUDGMENT, BUT IT WAS AS THOUGH I WERE ANSWERING FOR THE PERSON THAT WAS CONVICTED RATHER THAN FOR ME.

MS. LOCKE-NOBLE: OKAY. AND SOME OF THE QUESTIONS DID ASK WHAT WAS YOUR OPINION WITH RESPECT TO THE PERSON THAT WAS CONVICTED, IT SPECIFICALLY ASKED THAT. ALL OF THE OTHER QUESTIONS ASKED FOR YOUR PERSONAL OPINION.

PROSPECTIVE JUROR NO. 7384: OKAY. ... ¶¶

MS. LOCKE-NOBLE: AND I WANTED TO KNOW IF YOU HAD TAKEN INTO CONSIDERATION, SINCE YOU TOOK IT INTO CONSIDERATION IN SOME OF THE QUESTIONS WE'VE ASKED HERE, THE VIEWPOINT OF THE DEFENDANT.

PROSPECTIVE JUROR NO. 7384: UH-HUH.

MS. LOCKE-NOBLE: HAVE YOU TAKEN INTO CONSIDERATION THE VIEWPOINT OF THE VICTIM? AND YOUR RESPONSE WAS THAT'S HOW YOU ANSWERED MOST OF THE QUESTIONS, CORRECT, FROM THE VIEWPOINT OF THE VICTIM?

PROSPECTIVE JUROR NO. 7384: OKAY.

MS. LOCKE-NOBLE: IS THAT CORRECT?

PROSPECTIVE JUROR NO. 7384: WELL, ALL RIGHT.

MS. LOCKE-NOBLE: IT'S NOT OKAY. I'M ASKING
YOU.

PROSPECTIVE JUROR NO. 7384: I HAD NOT EVEN THOUGHT ABOUT THE VIEWPOINT OF THE VICTIM. THE PERSON THAT WAS KILLED?

MS. LOCKE-NOBLE: YES.

PROSPECTIVE JUROR NO. 7384: THAT DIDN'T COME INTO MY MIND IN ANY OF THE ANSWERING.

MS. LOCKE-NOBLE: OKAY. SO WHEN YOU SAID THAT YOU ANSWERED THESE QUESTIONS FROM THE VIEWPOINT OF THE VICTIM, THAT WAS NOT CORRECT?

PROSPECTIVE JUROR NO. 7384: WELL, I DON'T RECALL. IS THERE A QUESTION THERE THAT SAYS FROM THE VIEWPOINT OF THE VICTIM?

MS. LOCKE-NOBLE: OKAY. NO. NO.

PROSPECTIVE JUROR NO. 7384: I DON'T RECALL THAT.

MS. LOCKE-NOBLE: NO. I'M ASKING YOU. YOU INDICATED THAT YOU ANSWERED SOME OF THESE QUESTIONS THINKING OF YOURSELF IN THE DEFENDANT'S SHOES, CORRECT?

PROSPECTIVE JUROR NO. 7384: YES.

MS. LOCKE-NOBLE: I ASKED YOU THE NEXT QUESTION. ON THE OTHER HAND, WHEN YOU ANSWERED SOME OF THESE QUESTIONS, WERE YOU ALSO THINKING OF THE VICTIM?

PROSPECTIVE JUROR NO. 7384: ONLY IN THE SENSE THAT THE VICTIM WAS EITHER TORTURED OR VIOLATED, OR WHATEVER, BUT I'M NOT SURE WHAT QUESTIONS I MIGHT HAVE THOUGHT OF THAT ON.

MS. LOCKE-NOBLE: OKAY. NOW, WHAT I'M SAYING IS, IN ORDER TO BE A JUDGE IN THIS CASE, YOU CANNOT PUT YOURSELF IN THE SHOES OF THE DEFENDANT OR IN THE SHOES OF THE VICTIM.

PROSPECTIVE JUROR NO. 7384: OKAY.

MS. LOCKE-NOBLE: DOES THAT MAKE SENSE?

PROSPECTIVE JUROR NO. 7384: YES, MA'AM.

MS. LOCKE-NOBLE: BECAUSE IF YOU PUT YOURSELF IN THE SHOES OF THE DEFENDANT, YOU'RE BECOMING HIS LAWYER, AND WE WANT YOU TO BE A JUDGE. ON THE OTHER HAND, IF YOU PUT YOURSELF IN THE SHOES OF THE VICTIM, YOU'RE BECOMING A LAWYER FOR THE VICTIM. WE WANT YOU TO BE A JUDGE. A JUDGE CANNOT PUT HIMSELF IN ANYBODY'S POSITION. A JUDGE MUST SIT BACK, LOOK AT EVERYTHING, AND BASE HIS DECISION ON EVERYTHING.

DOES THAT MAKE SENSE?

PROSPECTIVE JUROR NO. 7384: YES, MA'AM.

MS. LOCKE-NOBLE: OKAY. CAN YOU DO THAT?

PROSPECTIVE JUROR NO. 7384: I THINK SO.

MS. LOCKE-NOBLE: OKAY. YOU SAY YOU THINK SO. WE'VE GOT TO KNOW.

PROSPECTIVE JUROR NO. 7384: I CAN DO THAT.

MS. LOCKE-NOBLE: OKAY. NOW, I'M GOING TO SWITCH GEARS HERE, AND I'M LETTING YOU KNOW. OKAY?

PROSPECTIVE JUROR NO. 7384: ALL RIGHT.

MS. LOCKE-NOBLE: I'M GOING TO GO BACK TO THE FACT THAT YOU INDICATED THAT YOU NEEDED MORE INFORMATION, AND IF ONLY ONE OF A PARTICULAR SPECIAL CIRCUMSTANCE WAS FOUND TRUE, YOU WOULD NOT VOTE FOR DEATH IN THAT PARTICULAR SITUATION.

PROSPECTIVE JUROR NO. 7384: IT WOULD DEPEND ON WHICH OF THE SPECIAL CIRCUMSTANCES OR HOW MANY.

MS. LOCKE-NOBLE: OKAY. HOW MANY SPECIAL CIRCUMSTANCES, IN YOUR MIND, WOULD IT TAKE FOR YOU TO VOTE FOR DEATH?

PROSPECTIVE JUROR NO. 7384: I DON'T KNOW.

MS. LOCKE-NOBLE: OKAY. BECAUSE YOU JUST SAID IT WOULD DEPEND ON HOW MANY, SO THAT'S WHY I'M ASKING.

PROSPECTIVE JUROR NO. 7384: I'M NOT GOING TO SAY ONE, OR TWO, OR THREE. IT WOULD DEPEND ON WHICH SPECIAL CIRCUMSTANCE, IT MIGHT BE JUST ONE, IF IT WAS A MORE EGREGIOUS SPECIAL CIRCUMSTANCE.

MS. LOCKE-NOBLE: SO YOU HAVE IN YOUR MIND,
YOU'VE PUT THE SPECIAL CIRCUMSTANCES IN SOME TYPE OF ORDER?

PROSPECTIVE JUROR NO. 7384: WELL, THEY HAVE TO GO IN CONTEXT WITH THE WHOLE THING, I CAN'T JUST ISOLATE ONE CIRCUMSTANCE. BUT,

CERTAINLY, SOME ARE MORE EGREGIOUS THAN OTHERS.

MS. LOCKE-NOBLE: OKAY. WHICH ONES DO YOU THINK ARE MORE EGREGIOUS THAN OTHERS?

PROSPECTIVE JUROR NO. 7384: I THINK THE AGGRAVATED RAPE WITH A STICK IS BAD. TORTURE IS BAD. AND I'D SAY THOSE TWO ARE PROBABLY THE HIGHEST PRIORITY, OTHER THAN THE MURDER. AND THEN NEXT DOWN FROM THAT WOULD BE THE KIDNAPPING, I DON'T SEE THAT AS SERIOUS A SPECIAL CIRCUMSTANCE. AND WHAT WAS THE OTHER?

MS. LOCKE-NOBLE: ROBBERY AND RAPE.

PROSPECTIVE JUROR NO. 7384: ROBBERY I DON'T SEE AS MUCH AS A SPECIAL CIRCUMSTANCE OR AS SERIOUS A SPECIAL CIRCUMSTANCE. RAPE WOULD COME RIGHT UNDER THE TORTURE AND THE VICTIMIZING WITH A STICK.

MS. LOCKE-NOBLE: OKAY. SO IF THE JURY ONLY FOUND THE KIDNAPPING AND THE ROBBERY SPECIAL CIRCUMSTANCES TO BE TRUE, YOU WOULD NOT VOTE FOR DEATH, WOULD YOU?

PROSPECTIVE JUROR NO. 7384: NO. PROBABLY NOT.

MS. LOCKE-NOBLE: THE ONLY TIME THAT YOU WOULD VOTE FOR DEATH IS IF THE JURY CAME BACK AND FOUND THE TORTURE OR THE RAPE WITH A STAKE SPECIAL CIRCUMSTANCE TO BE TRUE; IS THAT CORRECT?

PROSPECTIVE JUROR NO. 7384: MA'AM, I THINK THERE IS SOME GRAY AREAS IN THERE, THAT YOU JUST CAN'T SAY YES OR NO, BASED ON THOSE CIRCUMSTANCES. IT WOULD BE –I'D HAVE TO KNOW MORE ABOUT IT. AND I KNOW YOU CAN'T TELL ME, BUT I'D HAVE TO KNOW MORE. SO I WOULD HAVE TO WEIGH ALL OF THE CIRCUMSTANCES.

AND I THINK IF YOU JUST SAY, "WELL, THIS OR THAT," I CAN'T SAY YES OR NO, BECAUSE THERE ARE ALWAYS MORE CIRCUMSTANCES SURROUNDING THOSE AREAS.

MS. LOCKE-NOBLE: OKAY. BUT THIS IS WHAT YOU SAID, NOT WHAT I'M SAYING. THIS IS WHAT YOU SAID EARLIER. WHEN THE QUESTIONING FIRST BEGAN, YOU STARTED TO SAY IF ONLY ONE OF THE SPECIAL CIRCUMSTANCES WAS FOUND TRUE, YOU WERE INTERRUPTED AND OTHER FACTS WERE GIVEN TO YOU, AND YOU ALSO SAID IT DEPENDS ON WHICH ONE, WHETHER OR NOT YOU WOULD VOTE FOR DEATH.

SO I AM ASKING YOU, IF ONLY THE RAPE WITH A STAKE OR THE TORTURE SPECIAL CIRCUMSTANCE WOULD BE FOUND TRUE, IF THAT'S THE ONLY TIME YOU WOULD VOTE FOR DEATH? YOU HAVE INDICATED YES; IS THAT CORRECT?

PROSPECTIVE JUROR NO. 7384: YES.

MS. LOCKE-NOBLE: AND THAT WOULD GO ALONG WITH WHAT YOU SAID IN YOUR QUESTIONNAIRE, QUESTION 178, "WHAT ARE YOUR GENERAL FEELINGS REGARDING THE DEATH PENALTY?" YOU SAID, "IT'S OKAY IN RARE CIRCUMSTANCES, NATURE OF THE CRIME," CORRECT?

PROSPECTIVE JUROR NO. 7384: UH-HUH.

MS. LOCKE-NOBLE: IS THAT YES?

PROSPECTIVE JUROR NO. 7384: MA'AM, YOU KIND OF LOWERED YOUR VOICE DURING THE END OF THAT STATEMENT.

MS. LOCKE-NOBLE: DO YOU WANT ME TO REPEAT IT?

PROSPECTIVE JUROR NO. 7384: REPEAT IT, PLEASE.

MS. LOCKE-NOBLE: SO THAT WOULD GO ALONG WITH, "WHAT ARE YOUR GENERAL FEELINGS REGARDING THE DEATH PENALTY?" AND YOU SAID, "OKAY IN RARE CIRCUMSTANCES, NATURE OF THE CRIME," CORRECT?

PROSPECTIVE JUROR NO. 7384: UH-HUH. YES, MA'AM.

MS. LOCKE-NOBLE: OKAY. I HAVE NO FURTHER QUESTIONS AT THIS TIME.

THE COURT: ANYTHING ELSE, MS. SPERBER?

MS. SPERBER: YES.

WHEN I ASKED YOU THE QUESTION ABOUT THE SPECIAL CIRCUMSTANCES, IT WAS WHEN– STARTING OUT AT THE PENALTY PHASE. AND YOU SAID IF IT WAS A MURDER CONVICTION WITH ONE OF WHAT YOU CONSIDERED TO BE THE LESS SERIOUS, THEN YOU WERE NOT PRE-DISPOSED TO DEATH AT THAT POINT.

PROSPECTIVE JUROR NO. 7384: YES.

... ¶¶

MS. SPERBER: WELL, THE DISTRICT ATTORNEY SAID IF THE DEFENDANT'S CONVICTED OF MURDER AND ROBBERY, COULD YOU VOTE FOR DEATH?

AND YOU SAID PROBABLY NOT; IS THAT CORRECT?

PROSPECTIVE JUROR NO. 7384: YES, MA'AM.

MS. SPERBER: NOW, IF AT THE PENALTY PHASE YOU WERE GIVEN EVIDENCE THAT THE ROBBERY WAS NOT JUST GIVE ME MONEY OR TAKING A PURSE, THAT IT INVOLVED PHYSICAL HARM, THREAT OF DANGER, FOR INSTANCE, DRAGGED OUT IN FRONT OF YOUR FAMILY, CHILDREN, OR SOMETHING LIKE THAT, AND IF THOSE WERE THE FACTS OF THE ROBBERY AND

YOU HEARD AGGRAVATING FACTS DURING THE PENALTY PHASE THAT, FOR INSTANCE, MR. PEARSON HAD COMMITTED TEN OTHER ROBBERIES, WOULD YOU STILL SAY I WOULDN'T VOTE FOR DEATH?

PROSPECTIVE JUROR NO. 7384: NO.

MS. SPERBER: OKAY. THE QUESTION IS NOT WOULD YOU AUTOMATICALLY NOT VOTE FOR DEATH OR–VOTE FOR DEATH, BUT COULD YOU CONSIDER DEATH IN ALL OF THE CIRCUMSTANCES, IF THE AGGRAVATING FACTORS OUTWEIGH THE MITIGATING FACTORS?

PROSPECTIVE JUROR NO. 7384: YES, MA'AM.

MS. SPERBER: OKAY. NOW, WHEN YOU SAY YOU THINK ROBBERY IS LESS SERIOUS THAN KIDNAP, WHICH IS LESS SERIOUS THAN TORTURE, WHICH IS LESS SERIOUS THAN THE VICTIMIZATION WITH A STAKE, THAT'S JUST BASED ON THE BLACK AND WHITE READING OF THE STATEMENT; IS THAT CORRECT?

PROSPECTIVE JUROR NO. 7384: YES, MA'AM.

MS. SPERBER: SO IF YOU FOUND OUT A KIDNAPPING INVOLVED, WELL, THE CUTTING OFF OF A FINGER, THAT COULD BE CONSIDERED TO BE TORTURE; IS THAT RIGHT?

PROSPECTIVE JUROR NO. 7384: YES, MA'AM.

MS. SPERBER: SO IF YOU HEARD EVIDENCE SUCH AS THAT, AND THAT THE PERSON WAS KIDNAPPED FROM IN FRONT OF THEIR CHILDREN OR, YOU KNOW, FROM CHURCH OR SOMETHING LIKE THAT, THAT A FINGER WAS CHOPPED OFF, THAT THEY WERE BEATEN UP AND THEN RELEASED, AND KILLED OR–WELL, THEY HAVE TO WIND UP BEING DEAD, BECAUSE WE HAVE THE MURDER. OKAY.

PROSPECTIVE JUROR NO. 7384: UH-HUH.

MS. SPERBER: --AND YOU HEAR FURTHER EVIDENCE IN AGGRAVATION THAT MR. PEARSON HAS HAD VIOLENCE IN HIS PAST, NOT NECESSARILY KIDNAPPING, AND YOU HEAR EVIDENCE IN MITIGATION THAT SAYS HE'S NEVER BEEN IN TROUBLE BEFORE, AND HE WAS A BOY SCOUT FOR 12 YEARS AND MADE EAGLE SCOUT, COULD YOU CONSIDER DEATH IN THAT SITUATION?

COULD YOU, NOT WOULD YOU?

PROSPECTIVE JUROR NO. 7384: YES, I COULD. YES.

MS. SPERBER: OKAY. SO WHEN YOU SAID THERE ARE GRAY AREAS, IS WHAT YOU'RE SAYING IS, IN A VACUUM, YOU'RE NOT PRE-DISPOSED TO DEATH, IF IT'S MURDER AND ROBBERY, BEING JUST A STANDARD ROBBERY WITH NO AGGRAVATING FACTORS TO IT; IS THAT CORRECT?

PROSPECTIVE JUROR NO. 7384: YES, MA'AM.

MS. SPERBER: BUT IN ALL OF THE CIRCUMSTANCES THAT WE'VE EXPLAINED TO YOU, STARTING OUT WITH PENALTY PHASE, WOULD YOU CONSIDER, UNDER ANY OPTION, THE POSSIBILITY OF IMPOSING A DEATH SENTENCE?

PROSPECTIVE JUROR NO. 7384: OF OPPOSING?

MS. SPERBER: IMPOSING.

PROSPECTIVE JUROR NO. 7384: IMPOSING?

MS. SPERBER: OF VOTING FOR DEATH?

PROSPECTIVE JUROR NO. 7384: YES.

MS. SPERBER: YOU HAVE TO HEAR THE FACTORS IN AGGRAVATION AND THE FACTORS IN MITIGATION --

PROSPECTIVE JUROR NO. 7384: UH-HUH.

MS. SPERBER: --IN ORDER TO MAKE THAT DETERMINATION; IS THAT CORRECT?

PROSPECTIVE JUROR NO. 7384: YES, MA'AM.

MS. SPERBER: EVEN IF IT'S JUST A MURDER AND A ROBBERY?

PROSPECTIVE JUROR NO. 7384: YES, MA'AM. (12RT 2255-2271.)

*2. THE TRIAL COURT'S RULING*

The prosecutor challenged him for cause. In essence her complaint was that he was unwilling to commit to the death penalty without more facts if the special circumstances found were only kidnapping or robbery. (12RT 2271-2274.) The prosecutor argued that he had heard what was taken in the robbery, so he had been provided facts. (12RT 2273.) Defense counsel reasonably responded that it was not what was taken that was dispositive, but how it was taken. (12RT 2274-2275.) The prosecutor acknowledged that the robbery was not brutal, but complained that if it was the only special circumstance, Mr. Daley had already made up his mind. (12RT 2275.) Defense counsel rightly rejoined that Mr. Daley would base his decision on the overall circumstances. (12RT 2275.)

The court granted the challenge, stating that he was guided by *People v. Roybal* (1998) 19 Cal.4th 481 [79 Cal.Rptr.2d 487] "which teaches this trial judge that it is the juror's view about death penalty, in the abstract, and not facts of a particular case before a juror that is controlling." (12RT 2276.) The court continued:

IN ROYBAL, ...WHAT THAT JUROR DID WAS ASSIGN SITUATIONS IN WHICH HE CAN VOTE VERSUS NOT VOTE FOR DEATH PENALTY ONLY IN EXTREME CASES, AND THE EXTREME CASES WERE THERE'S MORE THAN ONE VICTIM AS OPPOSED TO A SINGLE VICTIM.

THAT CASE GUIDES ME, BECAUSE IN THIS PARTICULAR CASE, THIS JUROR ASSIGNS WEIGHT THAT IS IN VARYING SPECIAL CIRCUMSTANCES. AND BASED ON ROYBAL, AND THE GUIDANCE THAT I HAVE IN ROYBAL, I WILL GRANT THE CHALLENGE THAT HAS BEEN PROFFERED BY THE PEOPLE. ALL RIGHT. BECAUSE THIS JUROR, APPARENTLY, HAS ASSIGNED WEIGHT TO DIFFERENT SPECIAL CIRCUMSTANCES, SIMILAR TO THE JUROR IN ROYBAL, WHO HAS ASSIGNED WEIGHT
IN THE TYPE OF CASE THAT WOULD QUALIFY VERSUS THE TYPE THAT WOULD NOT, WHICH IS NOT THE LAW. (12RT 2276.)

*2. THE TRIAL COURT'S ERROR*

As the above exchange demonstrates, the prosecution sought commitments from Mr. Daley premised solely on the fact that certain individual special circumstances had been found. (12RT 2258, 2264.) Mr. Daley was reasonably unwilling to commit to a death penalty verdict with such limitations. When so limited, Mr. Daley had a well-considered response built on a very rationale perceived continuum of blameworthiness from kidnap, at the low end, through torture, at the high end. (12RT 2265.) Mr. Daley required more information about the circumstances of the offense to make such an important decision. (12RT 2257, 2265-2266.) When additional hypothetical facts were suggested, he confirmed that he could vote for the death penalty. (12RT 2268.)

*People v. Roybal, supra,* relied upon by the trial court, did not provide analogous facts to support excusing Mr. Daley. In *Roybal*, the prospective juror in question held religious beliefs that prevented her from voting for the death penalty. (*Id.* at p. 518.) The only situation in which she could envisage herself voting for the death penalty was in the most extreme case, where "that guy kills people... and he cut them up and ate

parts of their body...." She said she was unable to vote for the death penalty in the current case. (*Id.* at p. 519.) Mr. Daley, by sharp contrast, had no such self-imposed, extreme limitations. He was a well-reasoned, principled prospect would could impose the death penalty, he just was unwilling to commit without knowing more facts if the only special circumstance proved was kidnapping or robbery.

His views would not have prevented or substantially impaired the performance of his duties as a juror and he was thus improperly excused. (*Wainwright v. Witt, supra*, 469 U.S. 412, 424.) As a result, the court's determination here is not entitled to deference and is unsupported by substantial evidence. (*Witherspoon, supra,* at p. 515, fn. 9; *Heard, supra,* at pp. 958-959.)

G. The Excusal of Prospective Juror Danilo Matic

In summary, Mr. Matic was another thoughtful person that supported the death penalty and could impose it. He also stated that he would place considerable weight on whether the defendant could be rehabilitated in which case he would vote for LWOPP, or whether the defendant was beyond rehabilitation, as indicated by recidivism, etc., in which case he would vote for the death penalty. The trial court took some of his comments out of context and excused him for cause.

*1. BACKGROUND*

As reflected in his questionnaire, Mr. Matic was 48 years old, was born in the Philippines, had lived in this country for 33 years, was married, the father of two children, a resident of Long Beach for 14 years in a home that he owned, a college graduate, employed by the United States Postal Service, and had served once on a jury in a civil trial. (58CT 16427-16428, 16430, 16432, 16434.) He believed that the state should have the death

penalty, he held no religious beliefs that opposed it, he believed the sentence should be imposed for heinous offenses, he would not have difficulty sitting on a death penalty case, and he could vote for the death penalty. (58CT 16464-16466.) To the two questions that alternatively asked whether he felt that someone convicted of murder during the commission of specified special circumstances should be sentenced to death or LWOPP without consideration of background information, he circled "Possibly" at the midpoint of a continuum of choices between "Always" and "Unsure." (58CT 16468.)

Under the questioning of Ms. Sperber, Mr. Matic clarified that for him the appropriateness of the death penalty depended "on the crime committed or brutality of the crime." (12RT 2377.) Ms. Sperber explained the three potential, nonspecific factual mixes for aggravating and mitigating circumstances confronting every penalty phase jury. She then asked:

> MS. SPERBER: IF YOU CONSIDERED EVERYTHING AND YOU FELT THAT LIFE WITHOUT THE POSSIBILITY OF PAROLE WAS NOT APPROPRIATE IN THIS CASE, YOU COULD VOTE FOR DEATH?
>
> PROSPECTIVE JUROR NO. 0746: NO.
>
> MS. SPERBER: YOU WOULD NEVER VOTE FOR DEATH?
>
> PROSPECTIVE JUROR NO. 0746: NO.
>
> MS. SPERBER: IF YOU DECIDE THAT LIFE WITHOUT THE POSSIBILITY OF PAROLE WAS NOT AN APPROPRIATE SENTENCE, IN THIS CASE, COULD YOU THEN VOTE FOR DEATH?
>
> PROSPECTIVE JUROR NO. 0746: NO.
>
> MS. SPERBER: YOU COULD NEVER VOTE OR FOR DEATH?

PROSPECTIVE JUROR NO. 0746: NO.

MS. SPERBER: UNDER ANY CIRCUMSTANCES?

PROSPECTIVE JUROR NO. 0746: UNDER NO CIRCUMSTANCES.

MS. SPERBER: YOU SAID YOU BELIEVED IN THE DEATH PENALTY.

PROSPECTIVE JUROR NO. 0746: YES, I BELIEVE IN THE PENALTY, AS I HAVE SAID EARLIER IT DEPENDS ON THE KIND OF CRIME THE BRUTALITY OF THE CRIME.

MS. SPERBER: NOW IF YOU CONVICT MR. PEARSON OF FIRST DEGREE MURDER, ROBBERY OR TORTURE OR RAPE, OR KIDNAPPING, AND --

PROSPECTIVE JUROR NO. 0746: BEYOND REASONABLE DOUBT.

MS. SPERBER: BEYOND A REASONABLE DOUBT, OKAY THAT'S WHAT YOU HAVE TO DO TO REACH A VERDICT IN THE GUILT PHASE, AND THEN YOU ARE HERE NOW IT'S PENALTY PHASE AND YOU DECIDE WHETHER THE GOOD THINGS IN HIS BACKGROUND, IN HIS LIFE, YOU DECIDE WHICH IS MORE. AND IF THE GOOD IS MORE THAN THE BAD, THEN YOU HAVE TO GIVE HIM LIFE WITHOUT THE POSSIBILITY OF PAROLE.

PROSPECTIVE JUROR NO. 0746: RIGHT.

MS. SPERBER: BUT IF THE BAD SUBSTANTIALLY OUTWEIGHS THE GOOD THEN YOU GET TO CHOOSE BETWEEN DEATH AND LIFE WITHOUT THE POSSIBILITY OF PAROLE.

PROSPECTIVE JUROR NO. 0746: RIGHT.

MS. SPERBER: NOW, IF YOU DID THAT AND ASSESSED EVERYTHING AND YOU DECIDED THIS WAS THE WORSE OF ALL CASES, COULD YOU IMPOSE THE DEATH SENTENCE?

PROSPECTIVE JUROR NO. 0746: YES, MA'AM.

MS. SPERBER: NOW, IN THE PENALTY PART OF IT, YOU DON'T HAVE TO AGREE WITH THE OTHER JURORS AS TO WHAT THE FACTS ARE THAT YOU ARE CONSIDERING.

PROSPECTIVE JUROR NO. 0746: YES.

MS. SPERBER: ALL YOU HAVE TO AGREE ON IS IF ALL OF YOU AGREE ON DEATH, OR YOU ALL AGREE ON LIFE WITHOUT THE POSSIBILITY OF PAROLE.

WHAT I AM HEARING FROM YOU IS THAT YOU WILL CONSIDER BOTH OPTIONS SHOULD YOU FIND THAT THE BAD SUBSTANTIALLY OUTWEIGHS THE GOOD, YOU WILL STILL CONSIDER BOTH?

PROSPECTIVE JUROR NO. 0746: YES.

MS. SPERBER: AND YOU WILL IMPOSE EITHER ONE, DEPENDING ON WHAT YOUR DECISION IS?

PROSPECTIVE JUROR NO. 0746: YES, MA'AM. (12RT 2379-2381.)

The prosecutor began by eliciting from Mr. Matic that he was from the Philippines, that its judicial system was different from ours, and that he preferred ours because here jurors decide the outcome. (12RT 2381-2382.) He also affirmed that he did not like judging other people's conduct. (12RT 2382.) The prosecutor began to probe:

MS. LOCKE-NOBLE: AND, IN FACT, IT WOULD PREY ON YOUR MIND, THE FACT THAT THE DEATH PENALTY IS BEING REQUESTED IN THIS PARTICULAR SITUATION BECAUSE YOU PUT ON YOUR QUESTIONNAIRE THAT TAKING THE CRIMINALS LIFE DOES NOT BRING BACK THE VICTIM, CORRECT?

PROSPECTIVE JUROR NO. 0746: YES, MA'AM THAT'S TRUE.

MS. LOCKE-NOBLE: SO KNOWING ALL OF THAT, CAN YOU TRULY SAY THAT YOU CAN IMPOSE THE DEATH PENALTY?

PROSPECTIVE JUROR NO. 0746: YES, AS I HAVE SAID
EARLIER IT DEPENDS ON THE KIND OF CRIME COMMITTED AND HOW IT WAS DONE.

MS. LOCKE-NOBLE: OKAY. WHAT IN YOUR MIND WOULD BE A TYPE OF CRIME THAT THE DEATH PENALTY SHOULD BE IMPOSED?

PROSPECTIVE JUROR NO. 0746: I HAVEN'T HEARD THE CASE, YET. I MEAN– (12RT 2382.)

At this point there was a brief distraction, and then the prosecutor continued:

...WHAT TYPE OF CRIME, IN YOUR MIND, SHOULD THE DEATH PENALTY BE IMPOSED FOR?

PROSPECTIVE JUROR NO. 0746: AS I HAVE SAID EARLIER–I MEAN, HOW BRUTAL THE CRIME IS?

MS. LOCKE-NOBLE: I'M ASKING YOU.

PROSPECTIVE JUROR NO. 0746: HOW THE CRIME WAS COMMITTED.

MS. LOCKE-NOBLE: CAN YOU GIVE ME AN EXAMPLE OF WHAT YOU'RE THINKING OF WHEN YOU SAY WHAT TYPE OF CRIME, OR HOW THE CRIME WAS COMMITTED?

PROSPECTIVE JUROR NO. 0746: OH, A MASSACRE OF
THE WHOLE FAMILY.

MS. LOCKE-NOBLE: ANYTHING ELSE?

PROSPECTIVE JUROR NO. 0746: ACTUALLY, MA'AM,
I'M NOT FAMILIAR WITH DIFFERENT CRIMES, SO I DON'T KNOW HOW TO PUT IT.

MS. LOCKE-NOBLE: WHAT IF IT'S ONLY THE MURDER OF ONE PERSON?

PROSPECTIVE JUROR NO. 0746: YES. IF IT'S IN SELF DEFENSE, I DON'T THINK THAT CAN BE– COMPARED TO WHAT YOU'RE ASKING ME?

KILLING ONE PERSON, I MEAN, IT DEPENDS ON
THE EVIDENCE OF WHY DID THEY KILL THE PERSON, HOW DID THEY KILL THEM, AND WHY THEY COME TO THE POINT OF KILLING THAT PERSON; SO I HAVE TO KNOW FIRST.

MS. LOCKE-NOBLE: YOU KIND OF STARTED OUT, YOU SAID IT WAS SELF DEFENSE. WAS THAT WHAT FIRST CAME TO YOUR MIND WHEN I SAID IF IT WAS ONLY THE KILLING OF ONE PERSON; THAT PERHAPS THE PERSON ON TRIAL HAD KILLED THAT PERSON IN SELF DEFENSE?

PROSPECTIVE JUROR NO. 0746: NO, MA'AM. WHAT I HAVE IN MIND, AS I HAVE SAID–I MEAN, I'M NOT FAMILIAR WITH DIFFERENT KINDS OF CRIMES, BUT I HAVE SEEN, ON SOME INSTANCES, WHERE A PERSON WAS ABLE TO KILL SOMEBODY BECAUSE OF PROTECTING HIMSELF OR HIS FAMILY.

MS. LOCKE-NOBLE: MY QUESTION TO YOU WAS, "IN WHAT TYPES OF CASES DO YOU BELIEVE THAT THE DEATH PENALTY SHOULD BE IMPOSED?"

AND YOU SAID BRUTAL OR–AND THEN I ASKED YOU, "WELL, CAN YOU GIVE ME AN EXAMPLE?" YOUR EXAMPLE WAS, "A MASSACRE OF A WHOLE FAMILY."

PROSPECTIVE JUROR NO. 0746: YES, MA'AM.

MS. LOCKE-NOBLE: MY NEXT QUESTION WAS, "WHAT IF IT WAS ONLY ONE PERSON THAT WAS KILLED OR MURDERED?"

PROSPECTIVE JUROR NO. 0746: EVEN IF IT'S ONE

PERSON, IT DEPENDS ON HOW THAT PERSON WAS KILLED, THE MANNER THEY WERE KILLED.

MS. LOCKE-NOBLE: TELL ME, IN YOUR MIND, HOW THE PERSON HAS TO BE KILLED OR MURDERED, IN ORDER FOR YOU TO IMPOSE THE DEATH PENALTY.

PROSPECTIVE JUROR NO. 0746: MAYBE FOR FUN, YOU KNOW, FOR CHOPPING THE BODY UP, YOU KNOW–YOU KNOW, THOSE KIND OF STUFF.

MS. LOCKE-NOBLE: ANYTHING ELSE YOU CAN THINK OF?

PROSPECTIVE JUROR NO. 0746: NO, MA'AM. I'M SORRY.

MS. LOCKE-NOBLE: OKAY. NOW, THE FACT THAT YOU WROTE ON YOUR QUESTIONNAIRE ON PAGE–OR ON QUESTION NO. 227, "TAKING THE CRIMINAL'S LIFE DOES NOT BRING BACK THE LIFE HE TOOK."

HOW IS THAT GOING TO AFFECT YOU IN DETERMINING WHETHER OR NOT YOU SHOULD IMPOSE THE DEATH PENALTY, THAT STATEMENT THAT YOU WROTE?

PROSPECTIVE JUROR NO. 0746: I MEAN, I HAVE NO
IDEA. BUT TO ME, TAKING ONE'S LIFE FOR THE CRIME THAT HE COMMITTED WILL BRING BACK EVERYTHING THAT WAS TAKEN OUT.

TO ME, MAYBE THERE'S SOME WAY THAT A PERSON WHO DID THAT KIND OF CRIME CAN BE REHABILITATED.

MS. LOCKE-NOBLE: SO IN YOUR MIND, WOULD YOU VOTE FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE, BECAUSE YOU BELIEVE THE PERSON MIGHT BE ABLE TO BE REHABILITATE?

PROSPECTIVE JUROR NO. 0746: YES, MA'AM.

MS. LOCKE-NOBLE: EVEN IF IT WAS AN APPROPRIATE CASE FOR THE DEATH PENALTY?

PROSPECTIVE JUROR NO. 0746: I MEAN, I WILL VOTE FOR THE DEATH PENALTY DEPENDING ON THE BRUTALITY OF THE CRIME, AS I HAVE SAID EARLIER. BUT IF, AT SOME POINT, THERE COMES A POINT THAT–SEE, TO ME SOMETIMES THEY KILL SOMEBODY WITH A SPUR OF THE MOMENT. NOW, IF YOU DO THAT, THAT MEANS YOU DIDN'T DO IT PURPOSELY OR INTENTIONALLY.

MS. LOCKE-NOBLE: WHAT WAS THE FIRST WORD?

PROSPECTIVE JUROR NO. 0746: PURPOSELY.

MS. LOCKE-NOBLE: OKAY. GO AHEAD.

PROSPECTIVE JUROR NO. 0746: SO MAYBE THAT PERSON CAN BE–WHAT DO YOU CALL THAT–IN ONE WAY OR ANOTHER CAN BE REFORMED.

MS. LOCKE-NOBLE: OKAY. SO IF SOMEBODY KILLS
ANOTHER PERSON, PURPOSELY OR INTENTIONALLY, THEY MIGHT BE ABLE TO BE REFORMED SO, THEREFORE, YOU WOULD VOTE FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE?

PROSPECTIVE JUROR NO. 0746: YES, MA'AM.

MS. LOCKE-NOBLE: DO YOU BELIEVE THAT ALL PEOPLE CAN BE REFORMED WHO COMMIT CRIMES?

PROSPECTIVE JUROR NO. 0746: YES, MA'AM.

MS. LOCKE-NOBLE: SO WOULD IT BE ACCURATE TO SAY THAT BECAUSE YOU BELIEVE THAT ALL PEOPLE WHO COMMIT CRIMES CAN BE REFORMED, YOU WOULD ALWAYS VOTE FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE?

PROSPECTIVE JUROR NO. 0746: YES, MA'AM, THAT'S A POSSIBILITY. (12RT 2385-2389.)

At this point the prosecutor had no further questions, but defense counsel sought to clarify Mr. Matic's suitability for the task:

> MS. SPERBER: ... ¶ SIR, YOU INDICATED IT'S A POSSIBILITY, BUT ALL ALONG YOU'VE BEEN SAYING YOU COULD IMPOSE THE DEATH PENALTY.
>
> PROSPECTIVE JUROR NO. 0746: YES, MA'AM.
>
> MS. SPERBER: OKAY. NOW, IF YOUR CHOICES ARE DEATH AND LIFE WITHOUT PAROLE, A PERSON YOU THINK NEEDS TO BE REFORMED, THEY WOULD LIVE THE REST OF THEIR LIFE IN PRISON?
>
> PROSPECTIVE JUROR NO. 0746: YES, MA'AM.
>
> MS. SPERBER: BEING REFORMED.
>
> ARE YOU SAYING THAT THAT WOULD APPLY TO THE PEOPLE WHO, AFTER CONSIDERING THE FACTS, WHERE THE GOOD OUTWEIGHED THE BAD, THOSE PEOPLE MIGHT BE DESERVING OF LIFE WITHOUT PAROLE?
>
> PROSPECTIVE JUROR NO. 0746: YES, MA'AM.
>
> MS. SPERBER: BUT THE PEOPLE WHO COMMIT REALLY HORRIBLE CRIMES AND HAVE A BACKGROUND THAT'S EQUALLY AS BAD OR BAD FACTORS IN THEIR BACKGROUND, THOSE PEOPLE YOU WOULD VOTE FOR DEATH, EVEN THOUGH MAYBE THEY COULD BE REFORMED, BUT YOU FEEL THE DEATH PENALTY IS APPROPRIATE?
>
> PROSPECTIVE JUROR NO. 0746: ACTUALLY, MA'AM, WHEN YOU SAID HORRIBLE THINGS, I MEAN, WE'RE NOT TALKING ABOUT THEIR BACKGROUND ANYMORE. WHEN YOU SAID THAT WHEN HE COMMITTED OR KILLED SOMEBODY, THOSE KIND OF–I MEAN, THOSE KIND OF BRUTALITY OR WHATEVER, LIKE–
>
> MS. SPERBER: IF SOMEBODY COMMITS A BRUTAL CRIME LIKE MURDER WITH TORTURE?

PROSPECTIVE JUROR NO. 0746: YES, MA'AM.

MS. SPERBER: AND YOU ALSO HEAR THAT THEY'VE COMMITTED CRIMES IN THE PAST?

PROSPECTIVE JUROR NO. 0746: YES, MA'AM.

MS. SPERBER: WOULD YOU THINK THAT THAT PERSON COULD BE REFORMED?

PROSPECTIVE JUROR NO. 0746: IF IT'S HABITUALLY, OR IF IT KEEPS ON HAPPENING, I DON'T THINK SO.

MS. SPERBER: OKAY. SO IN THAT CASE YOU WOULD VOTE FOR DEATH; IS THAT CORRECT?

PROSPECTIVE JUROR NO. 0746: YES, MA'AM.

MS. SPERBER: BUT IF A PERSON COMMITTED A MURDER WITH TORTURE AND YOU HEARD EVIDENCE AT A PENALTY PHASE, HEARING THAT THE PERSON WAS BASICALLY GOOD, KIND TO STRANGERS, AND TOOK CARE OF NEIGHBORS' CHILDREN AND ALL OF THAT, THAT YOU WOULD CONSIDER AS LIFE WITHOUT PAROLE?

PROSPECTIVE JUROR NO. 0746: YES, MA'AM. (12RT 2389-2391.)

*2. THE TRIAL COURT'S RULING*

The prosecutor challenged Mr. Matic for cause. She argued:

MS. LOCKE-NOBLE: YES, YOUR HONOR. FIRST OF ALL, I THINK HE HAS A LANGUAGE ISSUE. I HAD DIFFICULTY UNDERSTANDING WHAT HE SAID, AND I DON'T MEAN JUST THAT HE SPEAKS SOFTLY, HIS ANSWERS TO SOME OF THE QUESTIONS DID NOT CORRESPOND, THEY WERE INCONSISTENT ANSWERS TO THE QUESTIONS THAT WERE BEING ASKED.

HE HAS INCONSISTENT ANSWERS IN THE SUBSTANCE, MEANING THAT ON THE ONE HAND HE SAYS THAT IT WOULD PREY ON HIS MIND, TAKING

THIS PERSON'S LIFE, AND ON THE OTHER HAND HE SAYS HE CAN IMPOSE THE DEATH PENALTY. THEN HE SAYS, "I DON'T LIKE JUDGING THE CONDUCT OF OTHER PEOPLE."

I THINK, DEPENDING UPON WHO WAS ASKING THE QUESTION, DEPENDED UPON WHAT ANSWER HE DECIDED TO GIVE. HE WENT BACK AND FORTH. HE WAS VERY EQUIVOCAL. AND HE GAVE AN ANSWER THAT IF A MURDER WAS PURPOSEFUL OR INTENTIONAL, THEY COULD BE REFORMED. IT JUST DIDN'T MAKE SENSE TO ME. I COULDN'T UNDERSTAND WHAT HE WAS SAYING.

AND THEN HE SAID BECAUSE IT WAS PURPOSEFUL OR INTENTIONAL AND THE PERSON COULD BE REFORMED, THEN HE WOULD VOTE FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE. I DIDN'T UNDERSTAND WHAT HE WAS SAYING, IT JUST DIDN'T MAKE ANY SENSE TO ME.

AND THEN WHEN I ASKED HIM A QUESTION HE–JUST OUT OF THE BLUE, HE STARTED TALKING ABOUT SELF DEFENSE, AND THAT WAS WHEN I WAS ASKING HIM WHAT IF THIS MURDER ONLY INVOLVED ONE PERSON, AND THEN HE STARTED TALKING ABOUT SELF DEFENSE.

I JUST DON'T THINK THAT HE'S AN APPROPRIATE JUROR. (12RT 2392-2393.)

Defense counsel responded:

MS. SPERBER: I THINK HE'S A WONDERFUL JUROR, YOUR HONOR. I THINK HE HAS A TOTAL GRASP OF WHAT'S GOING ON. AND JUST BECAUSE HE SPEAKS --ENGLISH IS PROBABLY NOT HIS FIRST LANGUAGE, WHAT I FIND INTERESTING IS COUNSEL DIDN'T UNDERSTAND HIM, BUT THE COURT REPORTER, THE COURT, AND I UNDERSTOOD HIM ENOUGH TO TELL COUNSEL WHAT HE SAID, WHENEVER SHE SAID SHE DIDN'T UNDERSTAND HIM.

AND SO THE CONCERN HERE IS NOT WHETHER COUNSEL CAN UNDERSTAND HIM, BUT WHETHER OTHER JURORS SITTING IN A ROOM CAN UNDERSTAND HIM. AND I DON'T THINK THEY'LL HAVE ANY PROBLEM WITH THIS MAN.

AND I THINK COUNSEL, IN THIS CASE, BECAUSE OF THE LANGUAGE ISSUE, IS STRETCHING THINGS. BECAUSE 90 PERCENT OF ALL THESE JURORS CAME IN HERE AND SAID PREMEDITATED MURDERS DESERVE THE DEATH PENALTY AND SELF DEFENSE DOESN'T.

OKAY. THEY'RE UNEDUCATED, SO WE EDUCATE THEM. THEY GIVE US DIFFERENT ANSWERS. THAT'S EXACTLY WHAT THIS MAN DID, AND HE HAS SAID THAT IF SOMETHING IS JUST HORRIBLY BAD AND HE WEIGHS THE FACTS, AND THE BAD OUTWEIGHS THE GOOD, HE WILL IMPOSE DEATH, OTHERWISE HE CAN SEE HIMSELF IMPOSING LIFE WITHOUT PAROLE. AND THAT'S WHAT THE LAW REQUIRES, THAT HE WILL CONSIDER DEATH, HE WILL CONSIDER LIFE WITHOUT PAROLE, AND HE'S DONE THAT, HE SAID HE WILL DO EITHER WAY. (12RT 2393-2394.)

The prosecutor ask the court to also consider Mr. Matic's responses to questions 209 and 210, but as defense counsel reminded the court, and as previously observed above (see Part *E, 1*, above), these questions were poorly drafted and ambiguous and had troubled other jurors. (12RT 2394-2395.)

The court granted the prosecution's challenge and provided the following as the basis for its decision:

ANY REVIEWING COURT IS INVITED TO A SERIES OF QUESTIONS REGARDING KILLING PURPOSELY. IF THERE IS A PURPOSEFUL KILLING, WHAT KIND OF SENTENCE WOULD HE IMPOSE? AND HE INDICATES, "LIFE WITHOUT PAROLE," BECAUSE HE

BELIEVES ALL PEOPLE COULD BE REFORMED. THOSE WERE HIS EXACT WORDS.

SO GIVEN THAT THAT IS THE CASE, HE WAS ASKED WHETHER OR NOT WOULD HE IMPOSE LIFE WITHOUT PAROLE IN ALL CASES, BECAUSE HE BELIEVED ALL PEOPLE COULD BE REFORMED?

AND HE SAID, "POSSIBLY."

AND I THINK THAT BASED UPON THAT, THAT GIVES ME THE IMPRESSION OF HIS STATE OF MIND, THAT HIS RESPONSES AND WHETHER OR NOT HE COULD IMPOSE THE DEATH PENALTY IS UNEQUIVOCAL. AND BASED ON THAT, I'M GOING TO GRANT THE CHALLENGE FOR CAUSE. (12RT 2395-2396.)

This ruling was the subject of Kevin's motion for new trial. (58CT 16356, 23RT 4977-5001.) At the hearing on that motion, over defense objection, the court was asked to explain its comments when ruling on this juror.[24] (23RT 4979-4986, 4986.) In essence, the prosecutor asked for clarification on what the court meant in the last above quoted paragraph. (23RT 4980.) The prosecutor's question built in a proposed restatement:

I WOULD INVITE THE COURT AT THIS POINT IN TIME TO EXPLAIN, WHEN THE COURT SAID THAT HIS RESPONSE WAS UNEQUIVOCAL, IF THE COURT WAS REFERRING TO THE FACT THAT THE JUROR WOULD NEVER IMPOSE THE DEATH PENALTY, BECAUSE HE FELT THAT EVERYONE COULD BE REFORMED, OR IF THE COURT HAD SOMETHING ELSE IN MIND WHEN IT SAID THE WORD "UNEQUIVOCAL." (23RT 4980.)

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[24] As noted in Part C, 1 and D,1, above, in regard to prospective jurors Boyd and Oliva, the prosecutor in her opposition to the defense motion for new trial requested that the court clarify its findings to those jurors it excused. (57CT 16383-16384.)

The court replied by referring the parties to the prosecutor's last three questions and Mr. Matic's responses quoted above (12RT 2389) and then explained:

> WHEN THIS COURT MADE THIS COMMENT ON WHETHER OR NOT HE COULD IMPOSE THE DEATH PENALTY UNEQUIVOCAL, THAT IS EXACTLY WHAT THE COURT HAD IN MIND, AND THAT IS THAT HE'S GOING TO IMPOSE LIFE WITHOUT PAROLE, BECAUSE EVERYBODY CAN BE REFORMED, AND THE RECORD CAN'T GET ANY CLEARER.
>
> I'M NOT EXPLAINING WHAT I'VE SAID HERE, BECAUSE I THINK THAT THE RECORD IS PRETTY CLEAR. WHEN I WAS MAKING THAT COMMENT, IT IS BASED ON PAGE 2389, LINES 12 THROUGH 25, AND I'LL LET THE RECORD SIT AT THAT. (23RT 4981-4982.)

This juror was included with Mr. Boyd and Ms Oliva in the court's general conclusion that these jurors' demeanor reflected their individual state of mind. (23RT 4993.) The court proffered the following additional support for his ruling:

> A REVIEWING COURT IS SPECIFICALLY INVITED TO REVIEW THIS JUROR'S RESPONSES TO THE QUESTIONNAIRE AND THE REPORTER'S TRANSCRIPT PAGES 2376 TO 2396. THIS COURT'S FINDINGS AND CITATION TO CASE LAW AT THE TIME NEED NOT BE REPEATED AND MAY BE FOUND IN THOSE PAGES OF THE REPORTER'S TRANSCRIPT.
>
> FOR CLARIFICATION, THIS JUROR'S STATE OF MIND WAS SPECIFICALLY HIGHLIGHTED IN HIS RESPONSES TO QUESTIONS BEGINNING ON PAGE 2389, LINES 12 TO 25.
>
> IT READS,
>
> (READING.)

"QUESTION: OKAY. SO IF SOMEBODY KILLS ANOTHER PERSON PURPOSELY OR INTENTIONALLY, THEY MIGHT BE ABLE TO BE REFORMED SO, THEREFORE, YOU WOULD VOTE FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE?

ANSWER: YES, MA'AM.

QUESTION. DO YOU BELIEVE THAT ALL PEOPLE CAN BE REFORMED WHO COMMIT CRIMES?

ANSWER: YES, MA'AM.

QUESTION. SO WOULD IT BE ACCURATE TO SAY THAT BECAUSE YOU BELIEVE THAT ALL PEOPLE WHO COMMIT CRIMES CAN BE REFORMED, YOU WOULD ALWAYS VOTE FOR LIFE WITHOUT THE POSSIBILITY OF PAROLE?

ANSWER: YES, MA'AM, THAT'S A POSSIBILITY."

(END OF READING.)

THIS SERIES OF QUESTIONS AND ANSWERS SUPPORT THIS JUROR'S STATE OF MIND THAT HE IS PREDISPOSED TO IMPOSE LIFE WITHOUT THE POSSIBILITY OF PAROLE, SINCE HE BELIEVES ALL PEOPLE WHO COMMIT CRIMES CAN BE REFORMED. THIS PREDISPOSITION ALONE IS SUFFICIENT FOR THE COURT TO GRANT THE CHALLENGE FOR CAUSE.

A REVIEWING COURT IS INVITED TO CONSIDER PEOPLE VERSUS LIVADITIS, 2 CAL. 4TH, 1027 [sic], A 1992 CASE, FOR THIS PROPOSITION.

THIS JUROR ALSO HAS GIVEN CONFLICTING INFORMATION REGARDING HIS WILLINGNESS TO IMPOSE THE PENALTY OF DEATH. GIVEN THESE CONFLICTING RESPONSES, THIS COURT FOUND THAT THIS JUROR'S STATE OF MIND SUPPORTS—THIS JUROR'S STATE OF MIND SUPPORTS

RESPONSES THAT ARE EQUIVOCAL AND CAPABLE OF MULTIPLE AND CONFLICTING INFERENCES, AND SHOWS AN EQUIVOCAL VIEW ON THE IMPOSITION OF THE DEATH PENALTY, WHICH SUPPORTS THIS COURT'S GRANT OF A CHALLENGE FOR CAUSE.

THE SUBSTANTIAL EVIDENCE OF THIS EQUIVOCAL VIEW WOULD PREVENT OR SUBSTANTIALLY IMPAIR THE PERFORMANCE OF HIS DUTIES AS A JUROR IN ACCORDANCE WITH HIS INSTRUCTIONS AND HIS OATH. (23RT 4997-4999.)

*3. THE TRIAL COURT'S ERROR*

Under initial questioning by defense counsel, Mr. Matic's responses indicated that he could not vote for death. (12RT 2379.) However, this seemed at odds with his responses on the questionnaire. There, his responses indicated no opposition to the death penalty, he believed the sentence should be imposed for heinous offenses, he would not have difficulty sitting on a death penalty case, and he could vote for the death penalty. (58CT 16464-16466.) Further questioning from Ms. Sperber resolved that he could impose death sentence, depending upon the brutality of the crime. (12RT 2379-2380.) He affirmed that he would consider both options and would impose either depending on his decision whether the bad substantially outweighed the good. (12RT 2379-2381.)

Under questioning by Ms. Locke-Noble, he affirmed that he could impose the death penalty, depending on how the crime was committed. (12RT 2382.) At this point, the prosecutor attempted to get Mr. Matic to commit himself to a minimum hypothetical threshold for imposing the death penalty. (12RT 2382.) He was reasonably reluctant to do so. He had not heard the case yet, but offered that the level of brutality was a factor. (12RT 2382, 2386.) She pressed for an example, and he offered a massacre of an entire family. She sought further examples. He said he had no other

examples readily at hand, explaining that he was not familiar "with different crimes." He twice affirmed that he could impose the death penalty if only one person was killed. He said he needed to know what prompted the killing. (12RT 2386-2387.) She pressed for more examples. (12RT 2387.) He suggested a killing for fun or where the victim was chopped up. (12RT 2387-2388.) She asked for more examples. He could not think of any others. (12RT 2388.)

She asked how his view that taking the criminal's life would not bring back the victim would impact his ability to impose the death penalty. He responded that the possible rehabilitation of the defendant could somehow be relevant. (12RT 2388.) She asked if his belief in rehabilitation would cause him to vote for LWOPP. He said that it would, but he would vote for death depending on the brutality of the killing. (12RT 2388-2389.) She repeated the question. He responded that was a possibility. (12RT 2389.) He did not disclaim that it depended on the manner of the killing. The prosecutor had no further questions.

Then, in response to follow-up questioning from defense counsel, he reaffirmed that he could impose the death penalty. (12RT 2390-2391.) He specifically confirmed that he could impose it in a brutal crime, like murder with torture and where the defendant had committed crimes in the past. (12RT 2390-2391.)

As it had in every other prosecution challenge for cause, the court adopted a view of the juror's ability to serve supported only by particular responses extracted by the prosecutor in her efforts to paint the juror into a corner. The court made no effort to reconcile those responses with those in the questionnaire or responsive to defense counsel's questioning. The court made no effort on its own to clarify any point. The court's conclusion that

Mr. Matic's "responses and whether or not he could impose the death penalty is unequivocal" undoubtedly was a chief motivating factor in the prosecution's request that the court clarify its ruling. The prosecutor even suggested the court's response. (23RT 4979-4986, 4986.)

In that effort, the court cited *People v. Livaditis* (1992) 2 Cal.4th 759 [9 Cal.Rptr.2d 72] in support of its decision. (12RT 4998.) There the juror had early on stated her predisposition to vote for LWOPP, having already made up her mind. Upon further questioning, she revealed that she might vote for the death penalty for an older defendant who had previously committed murder. But, she could not vote for the death penalty in this case given the absence of a prior murder. The court found it proper to excuse this juror who would automatically vote against the death penalty in the case before her. (*Id.* at p. 772.) The contrast between the *Livadits* juror and Mr. Matic is striking. The former was substantially impaired on the facts of that case. The latter, when pushed by the prosecution into offering examples for imposition of the death penalty, reasonably reserved the harshest penalty to brutal crimes, like murder and torture; that is, like the instant case.

Mr. Matic's views would not have prevented or substantially impaired the performance of his duties as a juror and he was thus improperly excused. (*Wainwright v. Witt, supra*, 469 U.S. 412, 424.) As a result, the court's determination here is not entitled to deference and is unsupported by substantial evidence. (*Witherspoon, supra,* at p. 515, fn. 9; *Heard, supra,* at pp. 958-959.)

H. None of These Five Prospective Jurors Were Impaired, Let Alone Substantially Impaired

Viewed through the prism of *Uttecht v. Brown,* the common theme here is the trial court's readiness to adopt the prosecution's claim and

theory that the juror under consideration was biased against the death penalty; the lack of adequate assessment and brevity of the court's resolution of these challenges; the lack of further inquiry by the court to any perceived conflicting input;[25] the court's conclusion, often stated, without explanation; and if reference was provided, the facts contradicting the prosecution's claim were ignored.

A review of federal and California state court decisions reveals that prospective jurors have been deemed equivocal or substantially impaired based on conflicting responses only where the juror ultimately expressed the view that he or she would not or could not impose the death penalty. (*See, e.g., Wainwright v. Witt, supra,* 469 U.S. at p. 415 [prospective juror had personal beliefs against the death penalty that she believed would interfere with her judging guilt or innocence]; *People v. Kaurish, supra,* 52 Cal.3d at pp. 697-700 [although in abstract juror would endeavor to follow judge's instructions, when confronted with prospect of voting for death penalty, repeatedly expressed an inability and unwillingness to do so]; *People v Wharton* (1991) 53 Cal.3d 522, 587-589 [280 Cal.Rptr. 631] [although juror did not unequivocally rule out voting for the death penalty, his answers showed that he held only a theoretical possibility and was skeptical about it being possible]; *People v. Frierson* (1990) 53 Cal.3d 730, 742.743 [280 Cal.Rptr. 440] [prospective juror responded, "I think so," to question about whether he would refuse to vote for death regardless of the evidence]; *People v. Breaux* (1991) 1 Cal.4th 281, 310 [3 Cal.Rptr.2d 81] [similar]; *People v. Cooper, supra,* 53 Cal.3d at pp. 809-810 ["I cannot do

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[25] In *Turner v. Bass* (4th Cir. 1985) 753 F.2d 342 it was the judge's further inquiry that resolved whether the prospective juror could impose the death penalty. (*Id.* at p. 346.)

it, I will not do it," "he would never vote for the death penalty," even where other equivocal statements]; *People v. Livaditis* (1992) 2 Cal.4th 759, 772 [9 Cal.Rptr.2d 72] [willingness to consider death penalty in other cases, although opposed to death in this case]; *People v. Hill* (1992) 3 Cal.4th 959, 1003-1005 [13 Cal.Rptr.2d 475] [after extensive questioning, prospective juror did not think he could render verdict that would put the defendant to death]; *Ellis v. Lynauh* (5th Cir. 1989) 873 F.2d 830, 833-837 [although juror hypothetically could, would not vote for death]; *United States v. Battle* (Georgia N.D. 1997) 979 F.Supp. 1442, 1447-1449 [although juror could consider death penalty in accordance with the law, ultimately would not be able to inform defendant in open court that she voted for death even if the evidence exposed a horrible crime]; *United States v. Tipton* (4th Cir. 1996) 90 F.3d 861, 880-881 [prospective juror Ellis' responses to the prosecutor and defense counsel conflicted, but her response to the judge was that she was not sure she could impose the death penalty[26]].)

These cases by their sharp contrast to the five prospective jurors in the instant case readily demonstrate the impropriety here. Here, the

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[26] In *United States v. Tipton, supra,* 90 F.3d at pp. 880-881 the court found the excusal of prospective juror Beazley proper because his first and last expressions manifested his true opinion. Prospective juror Beazley first responded to the court's question whether he would be able to impose the death penalty "disregarding any views that you might have as to what the law is or ought to be" by saying, "I doubt it," and explained, "If I get on the jury and I have to give a death sentence, I don't think I could live with it . . . I really don't." Under probing by defense counsel he later said "yes" to questions whether he could "imagine" a crime sufficiently severe that he would impose the death penalty, and whether the multiple murders charged in this case would "in your estimation justify it." But when in conclusion he was asked "what about a cold-blooded murder for profit?" his final response on the subject was, "I feel yes, but like I say, I'm just a nervous person. If I could live with it after I done it, I just wonder." (*Id.* at p. 880.)

prosecutor managed to create some appearance of equivocal or conflicting responses, but each of the jurors explained their views and ultimately affirmed their fitness to serve. The trial court erred in focusing solely on the jurors' statements elicited by the prosecutor and in failing to assess the voir dire responses as a whole.

This was not the adequate voir dire to identify an unqualified juror that was Kevin's right. (*Morgan v. Illinois* (1992) 504 U.S. 719 [119 L.Ed.2d 492, 112 S.Ct. 2222].)

As this Court affirmed in *Heard,* "The controlling decisions of the United States Supreme Court establish that, under federal constitutional principles, this type of error is not subject to harmless-error analysis, but rather must be considered reversible per se with regard to any ensuing death penalty judgment." (*People v. Heard, supra,* 31 Cal.4th 946, 951, 965, citing see *Gray v. Mississippi, supra,* 481 U.S. 648, 664-666, 668; *Davis v. Georgia* (1976) 429 U.S. 122, 123 [50 L.Ed.2d 339, 97 S.Ct. 399]; *People v. Stewart, supra,* 33 Cal.4th at p. 445.) "[T]he error is not subject to a harmless-error rule, regardless whether the prosecutor may have had remaining peremptory challenges and could have excused [the] Prospective Juror." (*Heard, supra,* at p. 966.)

Exclusion of the five prospective jurors here violated Kevin's constitutional right to a fair and impartial jury and a fair and reliable determination of penalty under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7, 15, and 17 of the California Constitution. Thus, Kevin's convictions and death verdict must be reversed.

## II. KEVIN'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, TO BE FREE FROM SELF INCRIMINATION, AND A FAIR TRIAL WERE VIOLATED BY THE ERRONEOUS DENIAL OF HIS *MIRANDA*[27] MOTION

Twenty-seven and one-half hours after being taken in custody, and twenty-seven hours after being advised of his *Miranda* rights, Kevin was subjected to a second extended interrogation without a renewed waiver of his rights. As a result, Kevin was deprived of his state and federal constitutional rights to remain silent, to counsel, to a fair trial, due process, and a reliable determination of guilt, death eligibility, and penalty in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendments; and California Constitution Article I, sections 1, 7, 15, and 17.

A. Background

The defense first raised the issue in a motion to suppress Kevin's confession filed on March 12, 2001. (3CT 590.) This was followed by the defense's ultimately unsuccessful efforts to get the interviewing officers' notes from Kevin's two days of interviews. (3CT 775-783, 2RT 134-141, 199-202.) Counsel was told that the officers had destroyed their notes after the officers prepared their reports of the interviews. (2RT 199, 202.)

The issue was finally heard two and one-half years later on September 5, 2003, after two changes of counsel and after the jury had been selected, but before the evidentiary portion of the trial began. Long Beach Officer McMahon was the only witness who testified at the Evidence Code section 402 hearing. (15RT 2883-2909.)

According to his testimony, on January 6, 1999, he brought Kevin into the Long Beach Police Department at around 12:30 p.m. (15RT 2884,

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[27] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602].

2903.) The interview began at about 1:00 p.m. (15RT 2887, 2895.) He advised Kevin of his rights by reading from the department's form.[28] (15RT 2885-2887, People's exh. 25.) They were seated across from each other at a table. (15RT 2886.) There was no testimony that Kevin waived his rights. Rather, Officer McMahon testified that he talked to Kevin about the murder for some six hours, concluding between 6:45 and 7:00 p.m. (15RT 2887, 2895.) Officer McMahon testified that a tape recorder was available, but he chose not to use it during the first several hours of questioning (15RT 2887, 2896-2897), and he took notes, but destroyed them after he wrote his report (15RT 2896.)

At 5:46 p.m., the tape-recorder was turned on. (15RT 2887, 2895.) Kevin was not re-advised of his rights, but Officer McMahon testified that he reminded Kevin that he had been advised earlier. (15RT 2897.) He did

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[28] The completed form signed by Kevin provided:

> I, Kevin Pearson, have been advised of my rights as follows:
>
> 1. I have the right to remain silent.
> 2. Anything I say can and will be used against me in a court of law.
> 3. I have the right to talk to a lawyer and have him present with me while I am being questioned.
> 4. If I cannot afford to hire a lawyer, one will be appointed to represent me before any questioning, if I wish one.
> 5. I understand each of these rights explained to me.
>
> ...
>
> 6. I wish to discuss the matter with Detective(s) B. McMahon and S. Prell. Any statements I make at this time are free and voluntary, with no promise of leniency or reward. (Exhibit 25.)

The form bore the date "1/6/99" and the time "1255 HRS."

not ask Kevin if he was still willing to talk. (15RT 2897.) This recorded interview ended at 6:40 p.m. (15RT 2897.)

In the hours thereafter, Kevin was asked where the police might find Messrs. Hardy and Armstrong. (15RT 2888-2889.) Also, Kevin was taken out for a couple of hours by other detectives to go to the crime scene and he was questioned further and provided food from McDonalds. (15RT 2889, 2891, 2902, 2904.) When he was brought back, he was returned to the interview room where he remained until about 4:30 a.m., on January 7th. (15RT 2902.) The accommodations there consisted of a hard chair, table, and "carpeted" floor. (15RT 2903-2904.) At about 5:00 a.m., Kevin was finally booked by Officer McMahon. (15RT 2888, 2891, 2894, 2902-2903.) Officer McMahon testified that that was his last contact with Kevin until the following afternoon. (15RT 2891-2892, 2903.) At 9:00 or 10:00 a.m., other officers came to Kevin's cell and photographed him. (15RT 2904-2905.)

At 3:55 p.m. that afternoon, Kevin was brought out to the interview room on the third floor. (15RT 2894, 2899-2900.) Kevin was not advised of his rights. (15RT 2894.) Instead, Officer McMahon testified that he asked Kevin if he remembered his rights from the day before. He said Kevin said yes and agreed to talk with him. (15RT 2894-2895.) Kevin was never told that he could change his mind and not talk to them. (15RT 2899-2900.) This portion of their exchange was not tape recorded. (15RT 2900.)

After additional information was obtained from Kevin, at 5:19 p.m., the tape recorder was turned on and they began to record his interview. (15RT 2894-2895, 2899-2900.)[29]

Officer McMahon testified that he prepared his report of the interviews on January 8th. (15RT 2896.)

At the conclusion of Officer McMahon's testimony, defense counsel argued that the length of time Kevin was in custody without recording an admonition cast doubt on the fact that it had been given. (15RT 2906.) Counsel continued that the form Kevin signed, People's exhibit 25,[30] was inadequate by its failure to provide the opportunity to request a lawyer, even if one could not afford an attorney, and failure to require a waiver of the right to have the lawyer present. (15RT 2885-2887, 2906, People's exh. 25.) Counsel argued that the officers were obligated at the mid-afternoon, January 7th interview to advise Kevin that he did not have to answer their questions, but if he did he could stop at any time. Defense counsel

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[29] The following is an abstract of the timeline from Kevin's arrest to the beginning of the last recorded segment of his interview:

| Date | Time | Event |
|---|---|---|
| 1/6/99 | 12:30 p.m. | Kevin arrested |
| 1/6/99 | 1:00 p.m. | Interview begins |
| 1/6/99 | 5:40 p.m. | Tape recorder turned on |
| 1/6/99 | 6:40 p.m. | Tape recorder turned off |
| 1/6/99 | Evening | Trip to crime scene |
| 1/7/99 | 5:00 a.m. | Kevin booked |
| 1/7/99 | 9:00 a.m. | Kevin photographed |
| 1/7/99 | 3:55 p.m. | Re-interview, no re-advisement |
| 1/7/99 | 5:19 p.m. | Tape recorder turned on |

[30] The text of Exhibit 25 is at footnote 28, above.

concluded that as a result, Kevin's second statement was inadmissible. (15RT 2907.)

The prosecutor argued that there was no requirement to re-advise Kevin under these circumstances where he had "been in pretty much constant contact with law enforcement officials...." (15RT 2907.) The court implicitly found that the circumstances did not require that Kevin be re-advised of his rights and his express waiver obtained. (15RT 2909.) The court found that there was "continuous law enforcement contact" and that Kevin "knowingly, intelligently, voluntarily, understandingly, expressly and explicitly understood and waived his ..." *Miranda* rights in both interviews. (15RT 2908-2909.)

The latter two premises were false. First, the contact was not continuous. Kevin had been left alone in a cell for eleven hours with the exception of when officers came to take his photograph.

Second, there is no factual basis for the court's conclusion that Kevin "expressly and explicitly understood and waived his" rights. All we have is McMahon's testimony that Kevin affirmed that he remembered his rights, notably unrecorded, and that Kevin participated in the renewed interrogation following a 21 and 1/2 hour hiatus.

Moreover, as the following discussion will demonstrate, under the protracted circumstances present here, a second advisement and waiver were required.

B. The Motion to Suppress Kevin's In-custody Statement Was Erroneously Denied

"In *Miranda v. Arizona, supra*, 384 U.S. 436, the United States Supreme Court determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the putative defendant that he has a

right to remain silent and also the right to the presence of an attorney." (*Edwards v. Arizona* (1981) 451 U.S. 477, 481-482 [68 L.Ed.2d 378, 101 S.Ct. 1880].) In order to insure the effective exercise of these rights by persons undergoing custodial interrogation the high court in *Miranda* spelled out the familiar warnings that must be given. "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." (*Miranda v. Arizona, supra*, 384 U.S. at p. 444.)

If the interrogation continues without an attorney being present and a statement is taken, the prosecution bears a heavy burden to prove that a defendant's waiver was voluntary, knowing and intelligent. (*Fare v. Michael C.* (1979) 442 U.S. 707, 724 [61 L.Ed.2d 197, 99 S.Ct. 2560]; *Miranda v. Arizona, supra,* 384 U.S. at p. 475.) The courts are to indulge every reasonable presumption against waiver of fundamental constitutional rights and must not presume acquiescence in the loss of fundamental rights. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464 [82 L.Ed. 1461, 58 S.Ct. 1019]; *United States v. Heldt* (9th Cir. 1984) 745 F.2d 1275, 1277.)

In *Mathis v. United States* (1968) 391 U.S. 1 [20 L.Ed.2d 381, 88 S.Ct. 1503] the United States Supreme Court held that the element of "in custody" had even been satisfied where the defendant was in custody on another case and where the questioning was a routine tax investigation for the purpose of civil action rather than criminal prosecution. *Miranda* is grounded in the custodial aspects of the situation and not the subject matter of the interview. (*Beckwith v. United States* (1976) 425 U.S. 341, 346-347 [48 L.Ed.2d 341, 96 S.Ct. 1612].) The *Miranda* Court had given great weight to contemporaneous police manuals and concluded that custodial

interrogation was psychologically oriented, and that the principal psychological factor contributing to successful interrogation was isolating the suspect in unfamiliar surroundings "for no purpose other than to subjugate the individual to the will of his examiner." (*Miranda v. Arizona, supra,* 384 U.S. at pp. 448, 457; *Beckwith v. United States*, supra, at p. 346 fn. 7.)

It "was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the Court to impose the *Miranda* requirements with regard to custodial questioning." (*Id.* at pp. 346-347 (internal quotation marks omitted); accord *Stansbury v. California* (1994) 511 U.S. 318, 323 [128 L.Ed.2d 293, 114 S.Ct. 1526].)

A "custodial interrogation" has been reached where "'(1) the investigation was no longer a general inquiry into an unsolved crime but had begun to focus on a particular suspect, (2) the suspect was in custody, (3) the authorities had carried out a process of interrogations that lent itself to eliciting incriminating statements, (4) the authorities had not effectively informed defendant of his right to counsel or of his absolute right to remain silent, and no evidence establishes that he had waived these rights.'" (*People v. Morse* (1969) 70 Cal.2d 723, 721-722 [76 Cal.Rptr. 391] (citation omitted).)

An officer's subjective and undisclosed view concerning whether the person being interrogated is a suspect is irrelevant to the assessment whether the person is in custody. (*Stansbury v. California, supra,* 511 U.S. at pp. 319, 324-325.) "Our cases make clear, in no uncertain terms, that any inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (assuming those suspicions

remain undisclosed) is not relevant for purposes of *Miranda*. [Citations omitted.]"[31] (*Id.* at p. 326.)

Under the circumstances presented by Kevin's prolonged custody status, there is no support for the proposition that one advisement was enough, particularly where 27 hours intervened between the first advisement and the commencement of the second interview. Defense challenged subsequent statements by a defendant without *Miranda* warnings are only admissible upon a judicial finding that a prior adequate warning was given within a "reasonably contemporaneous period of time." (*People v. Visciotti* (1992) 2 Cal.4th 1, 55 [5 Cal.Rptr.2d 495].) That did not happen here; the trial court did not even address this determinative point.

The case law construing the requirement of re-advising a detainee of his *Miranda* rights before resuming an interrogation requires consideration of the "totality of the circumstances" rather than application of a bright line rule. (*Wyrick v. Fields* (1982) 459 U.S. 42, 48-50 [74 L.Ed.2d 214, 103 S.Ct. 394].) The primary factors to consider are (1) the elapsed time between the termination of a prior interrogation and the re-initiation of a subsequent interrogation; and (2) any other change in circumstances that would lessen the effectiveness of the prior admonition. (See, e.g., *United*

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[31] In *Stansbury*, the defendant was only a possible witness to a rape when he was questioned; the police had focused on another as the leading suspect. (*Id.* at p. 320.) The police questioned Stansbury without a *Miranda* advisement until he made an incriminating statement. Stansbury sought to suppress his statements. (*Id.* at pp. 320-321.) The high court reversed the California Supreme Court's decision that Stansbury was not the subject of a custodial interrogation until he mentioned incriminating information because it appeared that the California Court's decision may have been based upon the conclusion that the officer's subjective belief was significant in resolving the issue. (*Id.* at pp. 325-326.)

*States v. Nordling* (9th Cir. 1986) 804 F.2d 1466, 1471 ["No appreciable time had elapsed between the end of the Harbor Police interrogation and the beginning of the NTF investigation"].) The type of changed circumstances that require re-advisement are those that indicate the detainee is "no longer [is] making a 'knowing and intelligent relinquishment or abandonment' of his rights." (*Wyrick, supra*, at p. 47.) This Court has identified a number of factors relevant to the "the totality of the circumstances, including the amount of time that has passed since the waiver, any change in the identity of the interrogator or the location of the interview, any official reminder of the prior advisement, the suspect's sophistication or past experience with law enforcement, and any indicia that he subjectively understands and waives his rights." (*People v. Mickle* (1991) 54 Cal.3d 140, 170 [284 Cal.Rptr. 511].)

In *Visciotti, supra,* the interval was six hours between the first interrogation with adequate warnings and a re-interview, and the defendant had agreed at the first interrogation to participate in the later reenactment. (*Id.* at pp. 54-55.) Other findings that the period was reasonably contemporaneous have been found where the interval was 30 to 40 minutes (*People v. Bynum* (1971) 4 Cal.3d 589, 600 [94 Cal.Rptr. 241]), an hour and a half (*People v. Braeseke* (1979) 25 Cal.3d 691, 701-702 [159 Cal.Rptr. 684]), nine hours (*People v. Thompson* (1992) 7 Cal.App.4th 1966, 1972-1973 [10 Cal.Rptr.2d 15]), and ten hours (*People v. Inman* (1969) 274 Cal.App.2d 704, 707-708 [79 Cal.Rptr. 290].) Three days (*People v. Quirk* (1982) 129 Cal.App.3d 618, 625-626, 632 [181 Cal.Rptr. 301]) and six weeks (*People v. Bennett* (1976) 58 Cal.App.3d 230, 237-238 [129 Cal.Rptr. 679]) are not reasonably contemporaneous periods.

In the instant case, both the prosecution and trial court found support in *People v. Thompson, supra,* 7 Cal.App.4th 1966 (15RT 2907-2908), but as previously noted, the interval there was only nine hours between the advisement and the confession. (*Id.* at pp. 1972-1973.) The trial court also found compelling this Court's decision in *People v. Mickle, supra,* 54 Cal.3d 140. (15RT 2908-2909.) There, this Court in examining the totality of the circumstances identified the "suspect's sophistication or past experience with law enforcement" as a significant factor. (*Id.* at p. 170.) The defendant there had suffered two prior felony convictions, one in 1975 and another in 1980. (*Id.* at p. 163.) His current interrogation under scrutiny was in 1983. (*Id.* at pp. 156-158.) This Court found, "[h]e was familiar with the criminal justice system and could reasonably be expected to know that any statements made at this time might be used against him in the investigation and any subsequent trial." (*Id.* at p. 171.) In addition, although 36 hours had passed, the defendant had *twice* received and *twice* waived his *Miranda* rights. (*Id.* at pp. 170-171.)

By sharp contrast, Kevin had no prior arrest record, let alone convictions, and he had no familiarity or experience in asserting or protecting his interests in the face of prolonged interrogation by determined homicide detectives, particularly as compared with Mr. Mickle. In the instant case, the interval between advisement and interrogation was approximately 27 hours, 200 percent greater than the interval in *Thompson, supra.* Kevin's second interrogation was neither following "closely" nor reasonably contemporaneous with Kevin's advisement. And, unlike Mr. Mickle, Kevin was only advised once. He had been kept up all night, being left to rest only after 5 a.m., and even then he was interrupted during the

morning to have his photograph taken. These significant differences dictate different conclusions.

Moreover, it was Kevin's in-custody status that demanded the advisement. Kevin had been sequestered in the jail for two days, before arraignment on any charge and before the appointment of counsel. Officer McMahon used Kevin from noon on January 6, 1999 for whatever he could learn from him that would assist in the resolution of the murder, building a case against the codefendants, arresting them, and executing search warrants. This is a clear example of the psychologically coercive use of isolation in unfamiliar surroundings to subjugate the individual to the will of his examiner that was the basis of the *Miranda* decision. (*Miranda v. Arizona, supra,* 384 U.S. at pp. 448, 457; *Beckwith v. United States*, supra, at p. 346 fn. 7.) In this context, an advisement was clearly required prior to the 3:55 p.m., January 7, 1999 interrogation.

When a statement is obtained without the required warnings, *Miranda* dictates that any statement obtained is presumed compelled and excluded from evidence. (*Oregon v. Elstad* (1985) 470 U.S. 298, 317 [84 L.Ed.2d 222, 105 S.Ct. 1285].) The erroneous introduction of an admission is tested under the *Chapman*[32] harmless-beyond-a-reasonable-doubt standard. (*People v. Boyer* (1989) 48 Cal.3d 247, 279-280 fn. 23 [256 Cal.Rptr. 96].)

As detailed in the *Statement of the Facts*, the prosecution's case for Kevin's involvement in the offenses, other than his mere presence at the scene and assistance after the murder in removing evidence, substantially depended upon his statements during the January 7, 1999, interrogation by

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32 *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824].

Officer McMahon. (RT 1883-1884.) As a result of the improper admission of the content of this interrogation, the prosecutor was able to exploit this evidence at length during her closing argument and build her case for Kevin's guilt of all the charges and allegations. (20RT 4195-4197, 4202, 4207-4210.) This Court should place no less value on Kevin's January 7, 1999 statement than that placed on it by the prosecutor. As made clear in her closing arguments, Kevin's statements were essential to her case.

Without Kevin's statements, Kevin's trial would have been vastly different. It cannot be said that the erroneous denial of Kevin's motion to suppress his statements was harmless beyond a reasonable doubt.

The prosecution's use of Kevin's January 7, 1999, statement deprived Kevin of his state and federal constitutional rights, including his rights to remain silent, to counsel, to a fair trial, due process, and a reliable determination of guilt, death eligibility, and penalty (Fifth, Sixth, Eighth, Fourteenth Amendments; Cal. Const. Art. I, §§ 1, 7, 15, 16, 17.) Thus, Kevin's convictions and sentence must be reversed.

## III. THE FAILURE OF LAW ENFORCEMENT TO RECORD BOTH THE *MIRANDA* ADVISEMENT AND RESPONSE AS WELL AS THE ENTIRE INTERROGATION VIOLATED KEVIN'S RIGHT TO DUE PROCESS, HIS PRIVILEGE AGAINST SELF-INCRIMINATION, AND HIS RIGHT TO COUNSEL

In two sessions, Kevin was interrogated for a combined total of 7 hours and 33 minutes in an interview room equipped with recording equipment. (15RT 2887, 2896-2897, 17RT 3652, 18RT 3713-3714, 3778, 3805.) Only 83 of those minutes or 18 percent of the interview was recorded.[33] (17RT 3674, People's exh. 35, pp. 1-2, 58; People's exh. 40,

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[33] The January 6th interview began at 1:00 p.m. and terminated at 6:40 p.m. Only the last 54 minutes (5:46 p.m. through 6:40 p.m.) were recorded.

pp. 1, 36.) The interviewing officers' notes from those unrecorded portions of the interviews were destroyed immediately after a summary report was written. (15RT 2896.) As a result, Kevin was deprived of his state and federal constitutional rights to remain silent, to counsel, to a fair trial, due process, and a reliable determination of guilt, death eligibility, and penalty in violation of his Fifth, Sixth, Eighth, Fourteenth Amendments; and California Constitution Article I, sections 1, 7, 15, 16, 17.

A. Background

Argument *II, A, Background*, above is incorporated here.

B. The Increasing Judicial and Legislative Recognition that Full Recording Is an Essential Component of Due Process

In *Stephan v. State* (Alaska 1985) 711 P.2d 1156, 1157, the Alaska Supreme Court held the due process clause of the state constitution required law enforcement to tape record the questioning of criminal suspects. The court stressed the recording must include the complete interrogation, including the advisement of Fifth Amendment rights. (*Id.* at p. 1162.) To ensure police compliance, the court held the unexcused failure to make an electronic recording would render any statement by the accused inadmissible. (*Id.* at p. 1163.)

The court explained its decision was "a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self-incrimination, and, ultimately, his right to a fair trial." (*Stephan v. State, supra*, 71 1 P.2d 1156, 1159-1160.) In addition to protecting the rights of the criminal suspect, a verbatim

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The January 7th interview began at 3:55 p.m. and terminated at 5:48 p.m. Only the last 29 minutes (5:19 p.m. through 5:48 p.m.) were recorded. (*Ibid.*) Thus, the combined time of the interviews was 7 hours and 33 minutes, but only 83 minutes were recorded.

recording "protects the public's interest in honest and effective law enforcement, and the individual interests of police officers wrongfully accused of improper tactics." (*Id.* at p. 1161.) Finally, the recording requirement protected the integrity of the judiciary, for judges would no longer have to rule on the admissibility of a challenged confession on the basis of the testimony of an interested witness. (*Id.* at p. 1164.)

In *State v. Scales* (Minn. 1995) 518 N.W.2d 587, 592, the Minnesota Supreme Court agreed with the reasoning of *Stephan* and held as a judicially declared rule of criminal procedure that "a custodial interrogation, including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention."

In *Commonwealth v. DiGiambattista* (2004) 442 Mass. 423 [813 N.E.2d 516] the Supreme Judicial Court of Massachusetts described the many benefits which flow from making a complete recording of interrogations, most of which inure to the government rather than the accused. (*Id.* at pp. 442-443.) These benefits include a deterrent effect on police misconduct, reduction in the number and length of motions to suppress custodial interrogations, and an accurate record for the fact finder at trial. (*Id.* at p. 442.) Rather than adopt a rule of exclusion, the court determined to encourage verbatim recording of complete interrogations by holding the defendant is entitled to a cautionary instruction whenever the government fails to make an electronic recording of his interrogation. (*Id.* at pp. 447-448.)

In addition to court decisions, the national trend towards mandatory recording of interrogations can be seen in the actions of legislatures. Illinois, Texas, Maine, and the District of Columbia have all passed statutes

requiring the recording of interrogations under certain circumstances. (Iraola, *The Electronic Recording of Criminal Interrogations* (2006) 40 U. Rich. L.Rev. 463, 475.) The Uniform Rules of Criminal Procedure and the Model Code of Pre-Arraignment Procedures both contain a recording requirement. (*State v. Scales, supra*, 518 N.W.2d 587, 591.) Finally, the common law nations of Great Britain, Canada, and Australia require a verbatim record of custodial interrogations. (Donovan & Rhodes, *The Case for Recording Interrogations* (2002) 26 Champion 12, 13- 14.)

Kevin recognizes this Court has in the past rejected a similar argument grounded upon the *Stephan* decision. (*People v. Holt, supra,* 15 Cal.4th 619, 664.) Events in the decade since *Holt* justify a reexamination of the issue. On March 4, 2000, former Illinois Governor George H. Ryan appointed a commission to study how the state's capital punishment system could be reformed. (*Report of the Governor's Commission on Capital Punishment*, Chapter 1—Introduction and Background at p. 1, http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf [as of October 31, 2007] [hereafter Commission Report].) Two years later, the commission issued a report containing 85 recommendations for corrections to how the death penalty was enforced in the state. (Sanger, *Comparison of the Illinois Commission Report on Capital Punishment With The Capital Punishment System in California* (2003) 44 Santa Clara L.Rev. 101, 104 [hereafter Comparison].) Recommendation number four stated, "Custodial interrogations of a suspect in a homicide case occurring at a police facility should be videotaped. Videotaping should not include merely the statement made by the suspect after the interrogation, but the entire interrogation process." (Commission Report, *supra,* Chapter 2-Police And Pretrial Investigation at p. 24.)

Legislative efforts to require recording have been vetoed by the governor for reasons of law enforcement practicality, even while expressing agreement with the legislative goal of reducing false and unreliable confessions. (Veto Message of Governor Arnold Schwarzenegger, http://gov.ca.gov/pdf/press/sb_171_veto.pdf [as of October 31, 2007].) It is up to this Court to break this Sacramento logjam pursuant to its mandate to ensure due process.

In summary, there is a nationwide movement towards a general requirement for verbatim recordings of interrogations in homicide cases. This trend, beginning with *Stephan v. State, supra*, 711 P.2d 11 56, has reached California and been endorsed by the California Commission on the Fair Administration of Justice, the Legislature, and, initially, in general terms, the governor.

An exact record of interrogations is desirable for myriad reasons. As seen above, an electronic record of interrogations protects the suspect's Fifth Amendment rights against self-incrimination and to the assistance of counsel, as well as the Sixth Amendment right to a fair trial. (*Stephan v. State, supra*, 711 P.2d 1156, 1159-1160.) A verbatim recording protects police officers against unfounded claims of misconduct. (*Commonwealth v. DiGiambattista, supra*, 813 N.E.2d 516, 530.) An electronic recording benefits the courts by reducing the number and length of motions to exclude confessions (*ibid.*), and permits judges to decide admissibility issues on the basis of an accurate record rather than a "swearing contest" between the police and the defendant (*The Electronic Recording of Criminal Interrogations, supra*, 40 U. Rich. L.Rev. 463, 477). Perhaps most importantly, an accurate record assists the fact finder at trial. (*Commonwealth v. DiGiambattista, supra*, 813 N.E.2d 516,530.)

In his testimony at the 402 hearing, Officer McMahon acknowledged the failure to record the complete interrogation of Kevin and explained that on one hand detainees "have a tendency to clam up" when the interrogator begins questioning, but that the detainees "make the decision whether it's taped or not, basically." (15RT 2901.) That is patently disingenuous, there is no evidence that Kevin was every consulted or provided any input on whether the interrogation would be recorded or not recorded. Detective McMahon called the shots throughout. The prosecutor and McMahon had early on acknowledged that the officers' notes from the interview were destroyed after the officers' report was written. (2RT 199-200, 202.)

As far as Detective McMahon's concern that plopping a tape recorder in front of a detainee inhibits self incrimination, there are two observations. First, a detainee who clams up at the sight of a tape recorder may well have not made a truly voluntary *Miranda* waiver. Second, many, if not most, law enforcement agencies avoid this altogether by installing hidden recorders in the interrogation rooms that are activated automatically or operated by a fellow officer outside the room.

The detectives could easily have made a complete verbatim record of the interrogation. It was not that a recorder was unavailable. (15RT 2896-2897.) The officers deliberately chose not to use it from the outset of either interrogation. (15RT 2897, 2901.) The recorder remained off until the real interrogation was over and McMahon was satisfied he could memorialize damaging admissions by Kevin. A verbatim record was not made simply because McMahon chose not to make one.

McMahon's policy against making a complete record of interrogation worked to the prosecution's benefit. Without a recording,

McMahon was able to deny making any threats or promises to Kevin without fear of possible contradiction by an objective record. Without a complete recording, the district attorney could disparage as false anything Kevin said which did not conform to the government's theory of the case. Finally, lacking a record of Kevin's demeanor during interrogation, the prosecutor was able to sneer at his testimony that his confession was false, the result of fatigue and inability to go through more questioning; a mere expedient to end the ordeal. (19RT 4016-4017, 4059-4062.) Kevin had held the fallacious hope that he would be released. (19RT 4017, 4020-4021.) The government, then, had everything to gain from stage-managing the interrogation and, without any threat of sanction from the court, nothing to lose by failure to make a verbatim record of the proceeding.

For generations the high court has held that a jury trial is a search for the truth. (*Banks v. Dretke* (2004) 540 U.S. 668, 696 [157 L.Ed.2d 1166, 124 S.Ct 1256].) By means of the trial motion, the subject of *Argument II*, the defense provided the court with an opportunity to redress the due process violation that was a consequence of the government's manipulation of the interrogation. Denial of the motion permitted the district attorney to introduce selected statements by Kevin ripped out of context and stripped of emotional content. Unable to see or, at a minimum, hear the complete interrogation, the jury was left to determine important facts in a vacuum. The unreliability of the interrogation process employed here provides compelling reason for this Court to set due process guidelines for law enforcement interrogations.

C. The Deliberate Destruction of Exculpatory Evidence Violated the Fifth and Fourteen Amendments Right to Due Process

The deliberate, bad faith failure to record the interrogation resulted in the irretrievable loss of exculpatory evidence. Here that evidence would

have shown the pressures that had been brought to bear and the manipulative tactics employed to obtain his confession. It would have provided corroboration for Kevin's testimony that he was tired and broken, and spoke out of a vain hope to get out of there, and that he would be released. (19RT 4016-4017, 4020-4021, 4059-4062; see *Crane v. Kentucky* (1986) 476 U.S. 683 [90 L.Ed.2d 636, 106 S.Ct. 2142].) The high court first considered the government's duty to preserve evidence on behalf of the accused in *California v. Trombetta* (1984) 467 U.S. 479 [81 L.Ed.2d 413, 104 S.Ct. 2528]. The court held the duty to preserve evidence was "limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality [citation], evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Id.* at pp. 488489 (fn. omitted).)

The court further narrowed the duty to preserve evidence in *Arizona v. Youngblood* (1988) 488 U.S. 51 [102 L.Ed.2d 281, 109 S.Ct. 333] by holding the failure to maintain potentially useful evidence does not violate due process in the absence of a showing of bad faith on the part of law enforcement. "Under these federal decisions, a defendant claiming a due process violation based on the failure to preserve evidence must show the exculpatory value of the evidence at issue was apparent before it was destroyed, and that the defendant could not obtain comparable evidence by other reasonable means. [Citation.] The defendant must also show bad faith on the part of the police in failing to preserve potentially useful evidence. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 942-943 [77 Cal.Rptr.2d 25].)

Here, the deliberate failure to record the entire interrogation resulted in the irretrievable loss of material evidence essential to Kevin's defense that his confession was involuntary and false. As to the guilt phase, the failure to make an electronic record resulted in the loss of material evidence relevant to all the issues the jury was required to resolve. For a non-killer to be eligible for capital punishment, the individual must have either a specific intent to kill or be a major participant who acts with reckless indifference to human life. (*Tison v. Arizona* (1987) 481 U.S. 137, 158 [95 L.Ed.2d 127, 107 S.Ct. 1676].) In this case, in the unrecorded majority of the second day's interrogation, Kevin continued to deny his involvement in the acts of Warren and Jamelle, other than in helping to move the body of the deceased victim. It was not until his will to resist had been overborne that he confessed any greater involvement. A verbatim record of the hour and 24 minutes that preceded the recording of the second interview was a critical portion of the interrogation and provided compelling evidence of the building pressure that could cause a young man to take such a self-destructive course. The result was the permanent loss of the context for Kevin's admissions.

These facts demonstrate a due process violation consistent with the requirements of *California* v. *Trombetta, supra,* 467 U.S. 479, and *Arizona v. Youngblood, supra*, 488 U.S. 51. The loss of context, questions, and Kevin's exact statements deprived Kevin of material exculpatory evidence as to both guilt and penalty. The exculpatory value of this information was known to law enforcement before it was allowed to disappear. The lower court erred in denying the motion to exclude Kevin's January seventh statements.

D. The Constitutional Violation Requires Reversal of the Judgment

Because the trial court's denial of Kevin's motion to exclude his post-arrest admissions was constitutional error, reversal of the judgment is required unless the government can demonstrate the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. 18, 24.) The attorney general cannot satisfy this burden.

Kevin's admissions were critical to the outcome of the guilt and penalty phases of the trial. The statements contained in the taped portion of the January seventh interrogation were essential to the convictions and to the true findings on the felony-murder special circumstances. Failure to make a verbatim record of the preceding interrogation robbed Kevin of confirming evidence that his confession was false and equally vital to the penalty phase defense. In short, the judgment must be reversed, for the convictions and sentence are contrary to the right against self-incrimination (*Miranda v. Arizona, supra*, 384 U.S. 436), right to a fair trial (U.S. Const., 6th Amend.), due process (U.S. Const., 5th & 14th Amends.), and right to a reliable penalty determination (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [49 L.Ed.2d 944, 96 S.Ct. 2978]; U.S. Const., 8th Amend.)

## IV. KEVIN WAS DEPRIVED OF DUE PROCESS BY THE FINDINGS OF PERSONAL USE OF A DEADLY WEAPON IN THE ABSENCE OF CONSTITUTIONALLY SUFFICIENT EVIDENCE

The prosecution proffered no direct or circumstantial evidence that Kevin *personally* used the deadly weapon, defined here as a stake or stick, in the commission of any of the offenses.

As a result, Kevin was denied his Fifth and Fourteenth Amendment rights to due process and a fair trial by findings based on insufficient evidence that it was true that Kevin *personally* used a deadly weapon at any point during the commission of the charged offenses.

A. Background

Evidence of the deadly weapon use principally came from only two sources. The coroner was one of these, and he concluded that some of the victim's wounds, including the tears around the anus and genital area, were consistent with having been made by a wooden stake, like those stakes observed at the scene employed to support a nylon mesh fence that paralleled the foot of the freeway embankment. It was observed by officers at the scene that one of the stakes in that fence had been broken and only a stub remained. (17RT 2934-2938, 2950-2957, 2964, 2968-2969, 2974-2976, 2978-2979, 2984, 2992-2994, 2998-2999, 3016-3017, 3032-3033, 3630-3631, 3637, People's exhs. 3. 6-8, 16F.) The missing portion of that stake was never found. (18RT 3704-3706, 3708-3709, 3761.)

The only other source was Kevin, which came in through the testimony of Mr. Gmur, recounts of Kevin's statements on January 6 and 7, 1999, and Kevin's own testimony. All were consistent on the point that Kevin never used or even handled the stake during the offenses. It was only used by Warren and Jamelle. (16RT 3216, 17RT 3655-3662, 3666-3668, 18RT 3724-3726, 3795-3797, 19RT 3973-3978, 3981-3982, 4076A, People's exh. 32, pp. 26-27, People's exh. 35, pp. 10-13, 24-33, 42, 45-46; People's exh. 40, pp. 19-21, 23-24.)

No evidence was proffered that at any point Kevin had even handled the stake, let alone wielded it against the victim.

Yet, during her closing argument, the prosecutor argued that Kevin fell as they were stomping on the victim and he fell on the stake. She continued:

> ... AND WHEN HE GETS UP, HE'S MAD. HE'S REALLY MAD AND HE'S GOING TO TAKE THIS STAKE AND HE'S GOING TO USE IT AND HE STARTS TO HIT HER WITH IT. (20RT 4196-4197.)

Thereafter, the prosecutor made no specific claims about which of the defendants was using the stake at any particular point in time, as illustrated by the following two examples made during her argument.

> SOMEONE ELSE, I DON'T KNOW WHO, WE DON'T KNOW WHETHER IT WAS JUNE OR NO GOOD, BUT IT'S THEIR TURN WITH THE STAKE AND THEY BEAT HER. THEY BEAT HER TO A BLOODY PULP WITH THAT STAKE. (20RT 4197.) ¶¶
>
> ... I CAN'T TELL YOU WHICH ONE, LADIES AND GENTLEMEN, BUT ONE OF THEM TAKES THIS STAKE, A STAKE LIKE THIS, AND RAMS IT UP HER VAGINA. (20RT 4198.)

The prosecutor repeatedly affirmed that the weapon use allegations accompanying the eight counts involved the wooden stake. (20RT 4223, 4239, 4241-4242, 4244.)

Deadly weapon use allegations submitted to the jury accompanied, in one form or more, all eight counts.[34] (57CT 16233-16234.) The

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[34] The jury was instructed using the language of CALJIC17.16 and 17.19.1:

> It is alleged in Counts 1-8 that in the commission or attempted commission of the crime charged, the defendant personally used a deadly or dangerous weapon.
>
> If you find the defendant guilty of the crime[s] thus charged, you must determine whether the defendant personally used a deadly or dangerous weapon in the commission or attempted commission of the crime[s].
>
> "A deadly or dangerous weapon" means any weapon, instrument or object that is capable of being used to inflict great bodily injury or death.
>
> The term "'personally used a deadly or dangerous weapon," as used in this instruction, means the defendant must have intentionally displayed a weapon in a menacing manner or intentionally struck or hit a human being with it.

allegations were premised on one or more of three Penal Code sections, 12022, subdivision (b)(1),[35] section 12022.3, subdivisions (a) and (b),[36] and

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The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.

Include a special finding on that question in your verdict, using a form that will be supplied for that purpose.

It is alleged in Counts 3-7 that the defendant personally used a deadly weapon during the commission of one or more of the following crimes: kidnap for rape, rape in concert, rape, sexual penetration by a foreign object, such as a stake or sexual penetration by a foreign object, such as a stake.

If you find the defendant guilty of one or more of the following crimes: kidnap for rape, rape in concert, rape, sexual penetration by a foreign object, such as a stake or sexual penetration by a foreign object, such as a stake, [repetition in the original] you must determine whether the defendant personally used a deadly weapon in the commission of any of those crimes.

A "deadly weapon" is any object, instrument, or weapon which is used in such a manner as to be capable of producing, and likely to produce, death or great bodily harm.

The term "personally used a deadly weapon," as used in this instruction, means that the defendant must have intentionally displayed a deadly weapon in a menacing manner, or intentionally struck or hit a human being with it.

You must decide separately whether the defendant personally used a deadly weapon as to each of the crimes. You must all agree as to which crime or crimes the defendant personally used a deadly weapon.

The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.

Include a special finding on that question in your verdict, using a form that will be supplied for that purpose. (57CT 16233-16234.)

[35] Section 12022, subdivision (b)(1) provides:

section 667.61, subdivision (a), (b), and (e).[37] Sections 12022, subdivision (b)(1) and 667.61, subdivision (e)(4) expressly require that the defendant

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(b)(1) Any person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense.

[36] Section 12022.3 provides:

For each violation or attempted violation of Section 261, 262, 264.1, 286, 288, 288a, or 289, and in addition to the sentence provided, any person shall receive the following:

(a) A 3-, 4-, or 10-year enhancement if the person uses a firearm or a deadly weapon in the commission of the violation.

(b) A one-, two-, or five-year enhancement if the person is armed with a firearm or a deadly weapon. The court shall order the middle term unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its enhancement choice on the record at the time of the sentence.

[37] Section 667.61 provides in pertinent part:

(a) Any person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 25 years to life.

(b) Except as provided in subdivision (a), any person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 15 years to life.

(c) This section shall apply to any of the following offenses:

(1) Rape, in violation of paragraph (2) or (6) of subdivision (a) of Section 261. ¶

*personally* use the deadly weapon for their provisions to be applicable. Section 12022.3 does not expressly require *personal* use, but case law has found that requirement in the section. (*People v. Rener* (1994) 24 Cal.App.4th 258, 261-267 [29 Cal.Rptr.2d 392] [enhancement cannot rest on vicarious rather than personal arming or use]; *People v. Ramirez* (1987) 189 Cal.App.3d 603 [236 Cal.Rptr. 404]; *People v. Piper* (1986) 42 Cal.3d 471 [229 Cal.Rptr. 125].)

During their deliberations, the jury asked, "What is the meaning of Penal Code Section 12022.3(a) as to the use of a dangerous and deadly weapon, to wit; STAKE/STICK. (56CT 16140.) The jury was provided the following written response:

> A deadly weapon is one likely to produce death or great bodily injury. Whether a particular weapon fits this description is a question of fact. Even where the instrumentality used is not a "weapon" in the strict sense of the word, nevertheless if it is capable of being used in a dangerous or deadly manner and it is so used or it may be inferred from the evidence concerning its use, the character as a dangerous or deadly weapon may be established. (56CT 16141.)

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(3) Rape.... or sexual penetration, in concert, in violation of Section 264.1. ¶

(5) Sexual penetration, in violation of subdivision (a) of Section 289. ¶¶

(e) The following circumstances shall apply to the offenses specified in subdivision (c):

(1) ... [T]he defendant kidnapped the victim of the present offense in violation of Section 207, 209, or 209.5. ¶¶

(4) The defendant personally used a dangerous or deadly weapon or a firearm in the commission of the present offense in violation of Section 12022, 12022.3, 12022.5, or 12022.53.

Within an hour of their first question, the jury asked, "Please explain the difference between the allegations in Penal Code sections 12022.3(b) and 12022(b)(1), as well as Penal Code sections 12022.3(a) and 12022.3 (b), is this restating the same question or are there distinct differences?" (21RT 4372, 56CT 16142.) The court provided the jury with the following written response:

> There are no differences between the statutory allegations. Each requires that you find that the defendant "personally used" the stake.
>
> As to all these allegations in order to find them true you must find beyond a reasonable doubt that the defendant personally used, the stake as defined in 17.16 and 17.19.1. If you so find, in addition to writing the word "true," you must write the words "personal use." (21RT 4372-4373, 56CT 16143.)

The following day, the jury reported that they were confused and asked the following questions:

> In the allegations that do not say "personally used" are we free to find true as an aider/abettor/Major Participant or does any time Penal Code Section 12022 is used regardless of subsection, mean "personal use"? AND
>
> In any allegation that states use of a "deadly weapon" but does not delineate the "object" used as a STAKE or STICK, are we free to use our judgement [sic] of the facts to determine that a "deadly weapon" was used & that items identify as per jury instructions 17.16 & 17.19.1 or must we only consider use of STAKE/STICK in any & all questions? (57CT 16251-16252.)

The court provided the following written responses:

> Any time Penal Code Section 12022 is used regardless of subsection means "personal use."
>
> You must only consider use of STAKE/STICK in any and all questions to the allegations. (57CT 16252.)

That afternoon, the jury rendered their verdicts. (57CT 16266-16275.) "True, 'personal use'" was handwritten in the space provided at the end of the paragraph accompanying the verdicts on Counts One through Eight that provided, "We, the jury, find the allegation that defendant, KEVIN DARNELL PERSON, while engaged in the commission of the above offense, personally used a dangerous and deadly weapon, within the meaning of Penal Code Section 12022(b)(1) to be ...." (56CT 16144, 57CT 16253-16265.)

The same handwritten insertion was made in the space provided at the end of the paragraph accompanying the verdict on Count Three that provided, "We the Jury, find the allegation that the defendant, KEVIN DARNELL PEARSON, while engaged in the commission of the above offense, used a dangerous and deadly weapon, to wit: STAKE/STICK within the meaning of Penal Code Section 12022.3(a) to be ...." (57CT 16253-16254.)

The same handwritten insertion was made in the space provided at the end of the paragraph accompanying the verdicts on Counts Three and Five through Seven that provided, "We, the Jury, find the allegation that the defendant, KEVIN DARNELL PEARSON, while engaged in the commission of the above offense, used a dangerous and deadly weapon, within the meaning of Penal Code Section 10222.3(b) to be ...." (57CT 16253-16254, 16257-16564.)

And, the same handwritten insertion was made in the space provided at the end of the paragraph accompanying the verdicts on Counts Four through Seven that provided, "We the Jury, find the allegation that as to the defendant, KEVIN DARNELL PEARSON, while engaged in the commission of the offense, the following apply: 1. Kidnapped the victim,

and 2. Used a deadly weapon in violation of Penal Code Section 12022(b)(1) and 12022.3 and pursuant to Penal Code Section 667.61(a)(b) and (e) to be ...." (57CT 16257-16264.)

B. Standard of Review

The constitutionally mandated test to determine a claim of insufficiency of the evidence in a criminal case is whether, on the entire record, a rational trier of fact could find a defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-578 [162 Cal.Rptr. 431]; *Jackson v. Virginia* (1979) 433 U.S. 307, 318-319 [61 L.Ed.2d 560, 99 S.Ct. 2781].) In making this determination the reviewing court must view the evidence in the light most favorable to the prosecution and presume in support of the judgment of conviction the existence of every fact the trier of fact could reasonably deduce from the evidence. However, the court must resolve the issue of sufficiency of the evidence in light of the *whole* record. Furthermore, the reviewing court must judge whether the evidence of each of the essential elements of the offense of which the defendant stands convicted is *substantial* and of *solid value.* (*People v. Johnson, supra; People v. Barnes* (1986) 42 Cal.3d 284, 303 [228 Cal.Rptr. 228]; *People v. Hernandez* (1988) 47 Cal.3d 315, 345-346 [253 Cal.Rptr. 199]; *People v. Ochoa* (1994) 6 Cal.4th 1199, 1206 [26 Cal.Rptr.2d 23].) That is, the evidence must reasonably inspire confidence and be of solid value. (*People v. Bassett* (1968) 69 Cal.2d 122, 139 [70 Cal.Rptr. 193].)

Furthermore, the evidence must be capable of supporting a finding as to every fact required for conviction *beyond a reasonable doubt.* "[T]he trier of fact must be reasonably persuaded to a near certainty" (*People v. Hall* (1964) 62 Cal.2d 104, 112 [41 Cal.Rptr. 284]) or "evidentiary

certainty" (*Cage v. Louisiana* (1990) 498 U.S. 39, 41 [112 L.Ed. 2d 339, 111 S.C. 328].) It is therefore *not* enough that there is *some* evidence based upon which a trier of fact might *speculate* that the defendant is in fact guilty. (*People v. Thomas* (1992) 2 Cal.4th 489, 545 [7 Cal.Rptr.2d 199] Mosk, J. dissenting.)

C. There Was No Evidence that Kevin *Personally* Used the Stake, the Designated Deadly or Dangerous Weapon

The prosecution introduced substantial evidence that a deadly or dangerous weapon had been employed, but they introduced no evidence that Kevin had employed it and no evidence that more than one stake had been employed. As detailed in the *Statement of the Facts*, during his January 7th interrogation, Kevin admitted that he had sexual intercourse with the victim and that he participated in the stomping on her. After such concessions, inclusion of personal involvement in the use of the stake would not have come at much psychological cost, providing further support that for the deadly or dangerous weapon allegations, Kevin was not responsible.

The state had the burden of establishing Kevin's *personal* use beyond a reasonable doubt. (*People v. Allen* (1985) 165 Cal.App.3d 616, 626 [211 Cal.Rptr. 837], citing *People v. Federico* (1981) 127 Cal.App.3d 20, 31 [179 Cal.Rptr. 315].) In *Allen* there were two defendants and evidence of only one gun involved in the shooting. (*Id.* at p. 626.) The Court reasoned:

> Since the evidence of what happened in the kitchen proved at most a 50 percent probability that he was the user, the state's burden was not met: "We ... have a case belonging to that class of cases where proven facts given equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining

one of these inferences as against the other...'" (*Ibid.*, quoting *Pennsylvania R. Co. v. Chamberlain* (1933) 288 U.S. 333, 339 [77 L.Ed. 819, 53 S.Ct. 391].)

Similarly in *People v. Rener, supra,* 24 Cal.App.4th 258, there were two defendants, but only one gun was seen and it was in the possession of the codefendant. The court found that the prosecution had not met its burden of proof that Rener had personally used the firearm even where he had threatened to shoot one of the victims. (*Id.* at pp. 260-262.)

From a review of the entire record, a rational trier of fact could not have found Kevin guilty beyond a reasonable doubt of personally using the stake. As a result, all of the deadly weapon use allegations must be reversed and the case remanded for resentencing. (*People v. Johnson, supra,* 26 Cal.3d 557, 576-578; *Jackson v. Virginia, supra,* 433 U.S. 307, 318-319.) Furthermore, since double jeopardy considerations bar a retrial (*Burks v. United States* (1978) 437 U.S. 1 [57 L.Ed.2d 1, 98 S.Ct. 2141]), the trial court should be directed to dismiss these allegations from the accusatory pleading with prejudice and resentence Kevin.

## V. THE JURY INSTRUCTIONS ON TORTURE, MURDER BY TORTURE, AND ON THE SPECIAL CIRCUMSTANCE ALLEGATION OF TORTURE WERE CONSTITUTIONALLY FLAWED BY PERMITTING CONVICTION ON A CRIMINAL THEORY NOT EXTANT AT THE TIME OF THE OFFENSES AND THEIR FAILURE TO REQUIRE THAT THE JURY FIND THE REQUISITE INTENT FOR THESE CHARGES THAT WERE AT THE HEART OF THE PROSECUTION'S CASE

Correct and adequate definitions for and the requisite findings for the offense of torture, the special circumstance of torture, as well as murder by torture were essential to the jury's ability to properly resolve the level of Kevin's criminal liability for the charged offenses and the accompanying

allegations. In this task the trial court failed; first, by permitting the jury to return a first degree murder verdict based on an 192

expanded version of torture murder enacted after the charged offenses and, second, by failing to require that the jury find the requisite intent for these charges.

The result improperly reduced the prosecution's burden of proof and denied Kevin due process of the law, a fair trial, the right to present a defense, a trial free from improper lessening of the prosecution's burden of proof, and a reliable and non-arbitrary determination of guilt, death eligibility, and penalty in violation of his rights under Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the analogous provisions of the California Constitution. (Cal. Const., Art. I, §§ 1, 7, 15, 16, 17; see, *United States v. Unruh* (9th Cir. 1987) 855 F.2d 1363, 1372, *cert. den.* (1988) 488 U.S. 974 [102 L.Ed.2d 548, 109 S.Ct. 513]; *Bennett v. Scroggy* (6th Cir. 1986) 793 F.2d 772, 777-779; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F2d 1196, 1201-1202.)

A. Background

In Argument IV, it was demonstrated that there was no evidence that Kevin touched the stake, let alone personally used it. There was evidence that Kevin participated in stomping on the victim's mid to lower torso (18RT 3725) and had raped her (18RT 3723.)

In any event, the charge of torture played a substantial role in Kevin's trial. Kevin was charged in Count Eight with the substantive offense of torture (§ 206).[38] (4CT 1121.) The jury also had to resolve the

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[38] Section 206 provides:

Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts

special circumstance charge accompanying Count One that the murder was intentional and involved the infliction of torture, within the meaning of Section 190.2, subdivision (a)(18).[39] (4CT 1116, 57CT 16209-16212.) The prosecution also advanced alternative theories for first degree murder that included murder by means of torture and felony-murder, within the meaning of section 189.[40] The jury was told that they need not agree on which theory they adopt for first degree murder.[41]

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great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture.

The crime of torture does not require any proof that the victim suffered pain.

[39] 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: ¶¶

(18) The murder was intentional and involved the infliction of torture.

[40] The text of section 189 is set out in Part *B*, below.

[41] The jury was told:

In this case the defendant is charged with murder. The jury must unanimously agree that the defendant is guilty of first degree murder.

However, the jury need not unanimously agree on the theory of first degree murder. In other words, the jury need not agree as to whether the murder was deliberate and premeditated or if the murder was committed during the commission of one or more, of the following crimes or which crime was committed: robbery, kidnap for rape, rape in concert, rape, sexual penetration by a foreign object in concert, sexual penetration by a foreign object, or torture, in

In counsel's discussion with the court about the jury instructions to be provided in this context, there was no substantial disagreement raised. (19RT 4076-4136, 20RT 4137-4139, 4189, 4212-4214.)

To address these substantial tasks, the court began by instructing the jury on the concept of "principals" in a crime that included those who committed the act that constituted the offense, as well as those who aid and abet the commission of the crime.[42] Aiding and abetting was then defined.[43] Then, using the language of CALJIC 4.21.2, as it was provided in its written form to the jury, the jury was told:

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order to find the defendant guilty of first degree murder. (57 CT 16201, 20RT 4164.)

Defense counsel objected on the grounds that this instruction was not needed and was not language provided by CALJIC. (19RT 4084.)

[42] CALJIC 3.00, as it was provided in its written form to the jury, instructed, instructed:

> Persons who are involved in [committing] a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals include:
>
> 1. Those who directly and actively [commit] the act constituting the crime, or
>
> 2. Those who aid and abet the [commission] of the crime. (57CT 16182, 20RT 4151.)

[43] CALJIC 3.01, as it was provided in its written form to the jury, instructed:

> A person aids and abets the [commission] of a crime when he or she,
>
> 1. With knowledge of the unlawful purpose of the perpetrator and
>
> 2. With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and
>
> 3. By act or advice aids, promotes, encourages or instigates the commission of the crime. (57CT 16183, 20RT4151.)

> In deciding whether a defendant is guilty as an aider and abettor, you may consider voluntary intoxication in determining whether a defendant tried as an aider and abettor had the required mental state. However, intoxication evidence is irrelevant on the question whether a charged crime was a natural and probable consequence of the target or originally contemplated crime. (57CT 16185, 20RT 4152.)

This was followed with an explanation of the natural and probable consequences doctrine. In that explanation, the jury was only told that it could apply that doctrine to the crimes charged in Counts One through Seven; the instruction did not authorize its use for Count Eight, torture.[44]

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[44] CALJIC 3.02, as it was provided in its written form to the jury, instructed:

> One who aids and abets another in the commission of a crime [or crimes] is not only guilty of that crime or those crimes, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime[s] originally aided and abetted.
>
> In order to find the defendant guilty of any one of the following crime[s] of murder, or robbery, or kidnap for rape, or rape in concert, or rape, or sexual penetration/rape by a foreign object—a wooden stake in concert, or sexual penetration/rape by a foreign object—a wooden stake, as charged in Count[s] 1-7, you must be satisfied beyond a reasonable doubt that:
>
> 1. The crime or any one of the following crimes of: murder, or robbery, or kidnap for rape, or rape in concert, or rape, or sexual penetration/rape by a foreign object—a wooden stake in concert, or sexual penetration/rape by a foreign object—a wooden stake were committed;
>
> 2. That the defendant aided and abetted any one of those crime[s];
>
> 3. That a co-principal in that crime committed any one of the following crimes of: murder, or robbery, or kidnap for rape, or rape in concert, or rape, or sexual penetration/rape by a foreign object—a wooden stake in concert, or sexual penetration/rape by a foreign object—a wooden stake; and

The jury was then introduced to the parallel theory for vicarious liability premised on a finding of a criminal conspiracy[45] and, once again,

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4. That any one of the following crimes of: murder, robbery, or kidnap for rape, or rape in concert, or rape, or sexual penetration/rape by a foreign object—a wooden stake in concert, or sexual penetration/rape by a foreign object—a wooden stake were a natural and probable consequence of the commission of any one of the crime[s] of: robbery, or kidnap for rape, or rape in concert, or rape, or sexual penetration/rape by a foreign object-a wooden stake in concert, or sexual penetration/rape by a foreign object-a wooden stake.

You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted, so long as you are satisfied beyond a reasonable doubt and unanimously agree that the defendant aided and abetted the commission of any of the identified and defined target crimes of: murder, or robbery, or kidnap for rape, or rape in concert, or rape, or sexual penetration/rape by a foreign object—a wooden stake in concert, or sexual penetration/rape by a foreign object—a wooden stake and that any one of those crimes were a natural and probable consequence of the commission of any of the target crimes.

Whether a consequence is "natural and probable" is an objective test based not on what the defendant actually intended but on what a person of reasonable and ordinary prudence would have expected would be likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A "natural consequence" is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. "Probable" means likely to happen. (57CT 16186-16187, 20RT 4154-4155.)

[45] The language of CALJIC 6.10.5 was used to define conspiracy. As it was provided in its written form to the jury, it instructed:

A conspiracy is an agreement between two or more persons with the specific intent to agree to commit any of the crimes of murder, robbery, kidnap for rape, rape in concert, rape, sexual penetration by a foreign object—a wooden stake

the natural and probable consequences doctrine. They were told that a member of a conspiracy was liable for any crime he agreed to as well as the natural and probable consequences of that crime or crimes.[46]

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in concert, sexual penetration by a foreign object—a wooden stake, or torture, and with the further specific intent to commit that crime, followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime, but is not charged as such in this case.

In order to find a defendant to be a member of a conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the commission of at least one overt act. It is not necessary to such a finding as to any particular defendant that defendant personally committed the overt act, if he was one of the conspirators when the alleged overt act was committed.

The term "overt act" means any step taken or act committed by one or more of the conspirators which goes beyond mere planning or agreement to commit a crime and which step or act is done in furtherance of the accomplishment of the object of the conspiracy.

To be an "overt act," the step taken or act committed need not, in and of itself, constitute the crime or even an attempt to commit the crime which is the ultimate object of the conspiracy. Nor is it required that the step or act, in and of itself, be a criminal or unlawful act. (57CT 16188, 20RT 4157.)

[46] CALJIC 6.11 and 6.12, as they were provided in their written form to the jury, instructed:

Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if that act or declaration is in furtherance of the object of the conspiracy.

The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators.

[A member of a conspiracy is not only guilty of the particular crime that to [his] knowledge [his] confederates

Shortly thereafter, murder was defined. Using the language of CALJIC 8.10, as it was provided in its written form to the jury, the jury was told:

> [Defendant is accused in [Count 1 of having committed the crime of murder, a violation of Penal Code section 187.] [Bracket error in the org.]
>
> Every person who unlawfully kills a [human being] [with malice aforethought] [or] [during the commission of any of the following crimes: robbery, kidnap for rape, rape in concert, rape, sexual penetration by a foreign object-a wooden stake in concert, sexual penetration by a foreign object-a wooden stake, or torture [a felony inherently dangerous to human life], is guilty of the crime of murder in violation of section 187 of the Penal Code.
>
> In order to prove this crime, each of the following elements must be proved:

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agreed to and did commit, but is also liable for the natural and probable consequences of any [crime] of a co-conspirator to further the object of the conspiracy, even though that [crime] was not intended as a part of the agreed upon objective and even though [he] was not present at the time of the commission of that [crime].

You must determine whether the defendant is guilty as a member of a conspiracy to commit the originally agreed upon crime or crimes[, and, if so, whether the crime alleged was perpetrated by [a] co-conspirator[s] in furtherance of that conspiracy and was a natural and probable consequence of the agreed upon criminal objective of that conspiracy].]

The formation and existence of a conspiracy may be inferred from all circumstances tending to show the common intent and may be proved in the same way as any other fact may be proved, either by direct testimony of the fact or by circumstantial evidence, or by both direct and circumstantial evidence. It is not necessary to show a meeting of the alleged conspirators or the making of an express or formal agreement. (57CT 16189-16190, 20RT 4157-4158.)

1. A human being was killed;

2. The killing was unlawful; and

3. The killing [was done with malice aforethought] [or] [occurred during the commission of any of the following crimes: robbery, kidnap for rape, rape in concert, rape, sexual penetration by a foreign object-a wooden stake in concert, sexual penetration by a foreign object-a wooden stake, or torture, a felony inherently dangerous to human life. (57CT 16196, 20RT 4161-4162.)

Malice aforethought was thereafter defined, which was followed by an explanation of deliberate and premeditated murder.[47] [48]

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[47] CALJIC 8.11, as it was provided in its written form to the jury, instructed:

"Malice" may be either express or implied.

[Malice is express when there is manifested an intention unlawfully to kill a human being.]

[Malice is implied when:

1. The killing resulted from an intentional act,

2. The natural consequences of the act are dangerous to human life, and

3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.]

[When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought.]

The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

The word "aforethought" does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act. (57CT 16197, 20RT 4162.)

[48] CALJIC 8.20, as it was provided in its written form to the jury, instructed:

CALJIC 8.21 was then used to explain first degree felony-murder. The instruction, as it was provided in its written form to the jury, instructed:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs [during the commission of any of the following crimes: robbery,

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> All murder which is perpetrated by any kind of willfull, deliberate and premeditated killing with express malice aforethought is murder of the first degree.
>
> The word "willfull," as used in this instruction, means intentional.
>
> The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word "premeditated" means considered beforehand.
>
> If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.
>
> The law does not undertake to measure in units of time the length-of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.
>
> The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.
>
> To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, [he] decides to and does kill. (57CT 16198-16199, 20RT 4162-4163.)

kidnap for rape, rape in concert, rape, sexual penetration by a foreign object-a wooden stake in concert, sexual penetration by a foreign object-a wooden stake, or torture, is murder of the first degree when the perpetrator had the specific intent to commit that crime.

The specific intent to commit any of the following crimes: robbery, kidnap for rape, rape in concert, rape, sexual penetration by a foreign object-a wooden stake in concert, sexual penetration by a foreign object-a wooden stake, or torture and the commission of any such crime must be proved beyond a reasonable doubt. (57CT 16200, 20RT 4163-4164.)

The trial court instructed on the elements of murder by torture in the language of CALJIC 8.24 as follows:

Murder which is perpetrated by torture is murder of the first degree.

The essential elements of murder by torture are:

1. One person murdered another person;

2. The perpetrator committed the murder with a willfull, [sic] deliberate, and premeditated intent to inflict extreme and prolonged pain upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose; and

3. The acts or actions taken by the perpetrator to inflict extreme and prolonged pain were [the] cause of the victim's death.

The crime of murder by torture does not require any proof that the perpetrator intended to kill his victim, or any proof that the victim was aware of pain or suffering.

The word "willful" as used in this instruction means intentional.

The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.

The word "premeditated" means considered beforehand. (57CT 16203, 20RT 4165.)

Using the language of CALJIC 8.26,[49] the jury was told that if there was a conspiracy to commit torture, all of the co-conspirators were equally guilty of murder of the first degree, whether the killing was intentional, unintentional, or accidental. Using CALJIC 8.27,[50] they were similarly told if one or more persons committed torture, all persons who aided, promoted,

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[49] CALJIC 8.26, as it was provided in its written form to the jury, instructed:

> If a number of persons conspire together to commit robbery, kidnap for rape, rape, rape in concert, sexual penetration by a foreign object-a wooden stake in concert, sexual penetration by a foreign object-a wooden stake or torture, and if the life of another person is taken by one or more of them in the perpetration of, or an attempt to commit that crime, and if the killing is done in furtherance of the common design and to further that common purpose, or is an ordinary and probable result of the pursuit of that purpose, all of the co-conspirators are equally guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental. (57CT 16204, 20RT 4166.)

[50] CALJIC 8.27, as it was provided in its written form to the jury, instructed:

> If a human being is killed by any one of several persons engaged in the commission of one or more of the following the crimes: robbery, kidnap for rape, rape in concert, rape, sexual penetration by a foreign object-a wooden stake in concert, sexual penetration by a foreign object-a wooden stake or torture, all persons, who either directly and actively commit the act constituting that crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental. (57CT 16205, 20RT 4166.)

encouraged, or facilitated the act with knowledge of the unlawful purpose of the perpetrator with the purpose of committing, encouraging, or facilitating the offense were guilty of murder of the first degree whether the killing was intentional, unintentional, or accidental. (57CT 16205, 20RT 4166.)

Shortly thereafter, the topic of special circumstances was addressed. As pertinent here, using the language of CALJIC 8.80.1,[51] the jury was

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[51] CALJIC 8.80.1, as it was provided in its written form to the jury, instructed:

> If you find [the] defendant in this case guilty of murder of the first degree, you must then determine if [one or more of] the following special circumstance[s]: [are] true or not true: robbery, kidnapping, kidnapping for rape, rape, rape by a foreign object-a wooden stake, or torture.
>
> The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.
>
> Unless an intent to kill is an element of a special circumstance, if you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true.
>
> If you find that a defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer or an aider and abettor or co-conspirator, you cannot find the special circumstance to be true unless you are satisfied beyond a reasonable doubt that the defendant with the intent to kill [aided,] [abetted,] [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] any actor in the commission of the murder in the first degree], or with reckless indifference to human life and as a major participant, [aided,] [abetted,] [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] in the commission one or more of the following crimes: robbery, kidnapping, kidnapping for rape, rape, rape

instructed that to find the special circumstances true, including torture, the jury need not find that the defendant intended to kill the victim if the defendant was the actual killer, unless an intent to kill was an element of a special circumstance. The instruction explained that if the defendant was not the actual killer, they could not find the special circumstance true unless they found beyond a reasonable doubt that the defendant with the intent to kill aided and abetted any actor in the commission of the murder or with reckless indifference to human life and as a major participant, conspired or aided and abetted specified crimes including torture which resulted in the death of the victim. (57CT 16209-16210, 20RT 4167-4168.)

After instructing further on the other special circumstances, the court returned to the special circumstance of torture. Using the language of CALJIC 8.81.18, as it was provided in its written form to the jury, told the jury:

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by a foreign object-a wooden stake, or torture pursuant to Penal Code, § 190,2(a)(17) which resulted in the death of a human being, namely Penny Keprta also known as Penny Sigler.

A defendant acts with reckless indifference to human life when that defendant knows or is aware that [his] acts involve a grave risk of death to an innocent human being.

You must decide separately each special circumstance alleged in this case. If you cannot agree as to all of the special circumstances, but can agree as to one or more of them, you must make your finding as to the one or more upon which you do agree.

In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously.

You will state your special finding as to whether this special circumstance is or is not true on the form that will be supplied. (57CT 16209-16210, 20RT 4167-4168.)

To find that the special circumstance, referred to in these instructions as murder involving infliction of torture, is true, each of the following facts must be proved:

1. The murder was intentional; and

2. The defendant intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose.

Awareness of pain by the deceased is not a necessary element of torture. (57CT 16212, 20RT 4169-4170.)

After the offenses charged in Counts Two through Seven were explained, the court instructed on the substantive offense of torture, as charged in Count Eight. Using the language of CALJIC 9.90, as it was provided in its written form to the jury, instructed:

Defendant is accused in Count 8 of having commited [sic] the crime of torture in violation of Penal Code section 206.1.

Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury upon the person of another, is guilty of the crime of torture in violation of section 206 of the Penal Code.

"Great bodily injury" means a significant or substantial physical injury.

The crime of torture does not require any proof that the perpetrator intended to kill the other person or the person upon whom the injury was inflicted suffered pain.

In order to prove this crime, each of the following elements must be proved:

1. A person inflicted great bodily injury upon the person of another; and

2. The person inflicting the injury did so with specific intent to cause cruel or extreme pain and suffering for any sadistic purpose. (57CT 16231, 20RT 4182.)

During her closing and rebuttal arguments at the guilt phase, the prosecutor, Ms. Locke-Noble, mentioned "torture" 25 times. (20RT 4219, 4222, 4225-4230, 4239-4240, 4244-4245, 4336, 4350-4352, 4354, 4356-4357.) The defense did not mention it once. At the penalty phase closing arguments, Ms. Locke-Noble mentioned "torture" 8 times. (23RT 4886, 4896-4899, 4901.) The defense mentioned it 3 times. (23RT 4905, 4907.)

Ms. Locke-Noble began on this topic by telling the jury that Kevin was guilty of torture as the natural and probable consequences of the crimes he originally aided and abetted.[52] (20RT 4219, 4221-4222, 4228.) She continued, "I don't have to prove that [there is] physical contact between the victim and the aider and abettor. I don't have to prove to you that he ever touched her. He does admit that he moved her body, that's the only thing he admits to besides picking up her clothes; that's what he admitted to on the stand. That's the only thing he did. That makes him guilty of every single crime under the law." (20RT 4222.) She explained that felony murder included a killing during the commission of torture. (20RT 4225-4226.) It did not matter which participant did the actual killing. (20RT 4226.) It did not matter whether the killing was intentional or accidental, although she argued that this was an intentional killing. (20RT 4226.) She explained that murder by torture required an additional element. (20RT 4227.) As she explained it:

> A PERSON MURDERED ANOTHER PERSON, AND THE *PERPETRATOR* [emphasis added] COMMITTED THE MURDER WITH WILLFUL, DELIBERATE, AND PREMEDITATED INTENT. AND

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[52] However, the jury instructions did not authorize the jury to use the natural and probable consequences doctrine to find Kevin guilty of torture, as will be discussed further in Part C. (57CT 16186-16187, 20RT 4154-4155.)

THE INTENT IS TO INFLICT EXTREME AND PROLONGED PAIN UPON A LIVING HUMAN BEING FOR THE PURPOSE OF REVENGE, EXTORTION, PERSUASION, OR FOR ANY SADISTIC PURPOSE.

THE INTENT HERE IS TO INFLICT EXTREME AND PROLONGED PAIN. AND CLEARLY, THAT'S WHAT THEY INTENDED TO DO, BECAUSE THEY INTENDED TO TORTURE HER.

THE CORONER TESTIFIED THAT ALL OF THE SEXUAL ASSAULTS OCCURRED WHILE SHE WAS ALIVE. THE CRIME OF MURDER BY TORTURE DOES NOT REQUIRE ANY PROOF THAT THE PERPETRATOR INTENDED TO KILL HIS VICTIM, OR ANY PROOF THAT THE VICTIM WAS AWARE OF THE PAIN OR SUFFERING. I DON'T HAVE TO PROVE TO YOU THAT SHE WAS IN PAIN, BUT, LADIES AND GENTLEMEN, CLEARLY, SHE WAS.

THIS HAS BEEN PROVED TO YOU BEYOND A REASONABLE DOUBT. THE DEFENDANT IS GUILTY OF THE CRIME OF MURDER BY TORTURE. (20RT 4227.)

Ms. Locke-Noble argued that Kevin had the intent to commit or aid and abet the commission of each of the underlying felonies, including torture. (20RT 4228.) She conceded that she could not prove that Kevin was the actual killer, although that option was provided the jury on the verdict form for Count One. (20RT 4228-4229.) She conceded that she could not prove who hit the victim or which blow caused her death. (20RT 4229.) She argued that she had proved that Kevin had the intent to kill or was a major participant and acted with reckless indifference to human life. (20RT 4229.) After first addressing all of the special circumstances other than torture, she continued:

THE DEFENDANT *OR* [emphasis added] HIS ACCOMPLICES TORTURED THE VICTIM. CLEARLY, SHE WAS TORTURED. ¶ THIS ALLEGATION HAS

BEEN PROVED TO YOU BEYOND A REASONABLE DOUBT. ON YOUR VERDICT FORM IT WILL SAY TO INSERT THE WORD "TRUE" OR "NOT TRUE." THIS IS TRUE. (20RT 4239.)

Ms. Locke-Noble then addressed the substantive offense of torture:

> THE LAST COUNT IS TORTURE. THIS IS COUNT 8.
>
> 1. INFLICTION OF GREAT BODILY INJURY. ¶ LADIES AND GENTLEMEN, 114 WOUNDS.... 90 EXTERNAL, 24 INTERNAL. THAT'S BEEN PROVEN TO YOU BEYOND A REASONABLE DOUBT.
>
> 2. DONE WITH THE SPECIFIC INTENT TO CAUSE CRUEL OR EXTREME PAIN AND SUFFERING FOR THE PURPOSE OF REVENGE OR ANY SADISTIC PURPOSE. ¶ BEATING HER OVER AND OVER AND OVER AGAIN, CLEARLY THEY INTENDED -- AND THE DEFENDANT, SPECIFICALLY, INTENDED TO CAUSE HER EXTREME PAIN OR SUFFERING. AND IT'S NOT THAT THE VICTIM–GREAT BODILY INJURY, GBI, THAT STANDS FOR GREAT BODILY INJURY, IT MEANS SIGNIFICANT OR SUBSTANTIAL PHYSICAL INJURY. THAT'S SIGNIFICANT BODILY INJURY.
>
> THERE'S NO REQUIREMENT THAT THE INJURED SUFFERED PAIN. I DON'T HAVE TO PROVE TO YOU THAT THE VICTIM WAS IN PAIN. BUT, LADIES AND GENTLEMEN, YOU KNOW SHE WAS.
>
> THIS HAS BEEN PROVED TO YOU BEYOND A REASONABLE DOUBT. THE DEFENDANT IS GUILTY OF THE CRIME OF TORTURE. (20RT 4239-4240.)

In her rebuttal argument, Ms. Locke-Noble pressed that Kevin was a "Major participant, he aided and abetted." (20RT 4350-4351.) In regard to the special circumstance of torture, she argued:

> TORTURE, THE MURDER HAS TO BE INTENTIONAL AND *EITHER* [emphasis added] THE DEFENDANT OR AN ACCOMPLICE HARDY OR

ARMSTRONG INTENDED TO INFLICT EXTREME CRUEL PHYSICAL PAIN UPON A LIVING HUMAN BEING FOR PURPOSES OF REVENGE, EXTORTION, PERSUASION AND ANY SADISTIC PURPOSE. (20RT 4351.)

She continued:

> IF YOU BELIEVE THAT THE ONLY THING HE DID WAS HELP MOVE THE BODY AND COLLECT HER CLOTHES, HE IS STILL AN AIDER AND ABETTER. [Sic] WHEN I KEEP SAYING "THEY DID THIS" AND "THEY DID THAT" THAT'S AIDING AND ABETTING THAT MAKES HIM A PRINCIPAL, THAT MAKES HIM EQUALLY GUILTY.
>
> YESTERDAY WHEN I GAVE YOU THE ILLUSTRATION OR THE EXAMPLE OF THE BANK ROBBERY, HE IS THE GUY WAITING OUT IN THE CAR. HE IS THE GUY STANDING AT THE DOOR, IF ALL YOU BELIEVE IS HE STOOD THERE AND WATCHED AND THEN MOVED THE BODY AND PICKED UP THE CLOTHES, THEN HE IS STILL GUILTY OF ALL OF THESE CRIMES. (20RT 4352.) ¶¶
>
> THE LAST COUNT TORTURE THERE IS LIABILITY OF A PRINCIPAL, OR AIDER AND ABETTER, ALL OF THE ELEMENTS HAVE BEEN PROVED BEYOND A REASONABLE DOUBT.
>
> INTENT IS THAT THE DEFENDANT *OR HIS ACCOMPLICES* [emphasis added] HAD THE SPECIFIC INTENT TO CAUSE PAIN OR SUFFERING, THE VICTIM NEED NOT FEEL OR BE AWARE OF ANY PAIN. (20RT 4354.)

The jury found in Count One that Kevin was guilty of murder, that it was in the first degree, and the special circumstance of torture was true. (56CT 16255-16256.) On the verdict form for Count One, the jury was asked to circle one of the following two options, and they circled B:

> A. The Actual Killer, or

B. An Aider and Abettor and had the intent to kill; or was a Major Participant and acted with reckless indifference to human life. (56CT 16255.)

The jury found in Count Eight that Kevin was guilty of torture. (56CT 16265.)

B. The Jury Was Unconstitutionally Permitted to Return a First Degree Murder Verdict Based upon a Theory for First Degree Murder Enacted after the Charged Offenses that Eliminated Requisite Elements that Had Been Required at the Time of the Charged Offenses

This issue juxtaposes two versions of first degree murder as defined by section 189. In 1998, section 189 included murder by means of torture as one of the specified forms of first degree murder. In 1999, the section was amended. It still included murder by means of torture, but the amendment added felony murder by torture. As will be demonstrated, the latter provided a shortcut to first degree murder when torture was involved; an improper shortcut to first degree murder for a homicide committed in 1998.

Count One charged Kevin with murder. As demonstrated in the *Statement of the Facts*, the offenses were committed on December 30, 1998. In 1998, section 189 provided the statutory distinction between first and second degree murder:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict

death, is murder of the first degree. All other kinds of murders are of the second degree. (§ 189.)

First degree murder by means of torture under section 189, as drafted above, required of the perpetrator and defendant a willful, deliberate and premeditated intent to inflict extreme and prolonged pain. (*People v. Steger* (1976) 16 Cal.3d 539, 545-547 [128 Cal.Rptr. 161]; *People v. Tubby* (1949) 34 Cal.2d 72, 76-77 [207 P.2d 51]; *People v. Wiley* (1976) 18 Cal.3d 162, 168-173 [133 Cal.Rptr. 135]; *People v. Davenport* (1985) 41 Cal.3d 247, 267, 269 [221 Cal.Rptr. 794]; *People v. Morales* (1989) 48 Cal.3d 527, 559-560 [257 Cal.Rptr. 64]; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1100-1101 [259 Cal.Rptr. 630]; *People v. Elliot* (2005) 37 Cal.4th 453, 468 [35 Cal.Rptr.3d 759].) "[T]he Legislature requires the same proof of deliberation and premeditation for first degree torture murder that it does for other types of first degree murder."[53] (*People v. Steger, supra,* at pp. 545-547; accord *People v. Elliot, supra,* 37 Cal.4th 453, 469.) The section also required that the torture, in murder by torture, was the cause of death. (*People v. Cole* (2004) 33 Cal.4th 1158, 1207-1208 [17 Cal.Rptr.3d 532].)

The list of felonies in section 189 provides an alternative predicate for first degree murder. (*People v. Patterson* (1989) 49 Cal.3d 615, 626 [262 Cal.Rptr. 195]; *People v. Dillon* (1983) 34 Cal.3d 441, 474-476 [194 Cal.Rptr. 390].) It provides a simplified route to first degree murder that requires only the intent to commit one of the listed dangerous felonies as a substitute for the otherwise more stringent elements of the section, set forth

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53 "'When a killing is perpetrated by means of torture, the means used is conclusive evidence of malice and premeditation, and the crime is murder of the first degree.'" (*People v. Steger, supra,* at p. 546, fn. 2, quoting *People v. Turville* (1959) 51 Cal.2d 620, 632 [335 P.2d 678].)

in the paragraph above. (*People v. Randle* (2005) 35 Cal.4th 987, 995, fn. 3 [28 Cal.Rptr.3d 725].)

In 1999, section 189 was amended. The amendment added torture (§ 206) to that list of felonies. (*Stats. 1999*, c. 694 (A.B. 1374), § 1.) The Senate Committee on Public Safety, in their *1999 Bill Summary*, stated, "**This bill** expands the felony murder rule to include torture and thereby provides that a murder, which occurs when a person had the intent to torture, but no premeditation to kill, is first-degree murder. [Emphasis in orig.]"
(http://www.sen.ca.gov/ftp/sen/committee/standing/publicsafety/bills/billsummary1999.pdf [as of November 4, 2007].)

Notably, in the 1999 amendment the Legislature did not remove from section 189 murder by means of torture. But, by including the felony of torture (§ 206) within the list of felonies authorized for felony-murder, the amendment provided an alternative theory where a homicide occurs during torture. This alternative unquestionably lowers the prosecution's burden of proof in this context by eliminating all the ordinary elements of first degree murder and requiring merely the intent to commit torture. (1 Witkin, *Cal. Crim. Law, Crimes Against the Person* (3d ed. 2000) § 134; *People v. Coefield* (1951) 37 Cal.2d 865, 868 [236 P.2d 570].) This alternative removes the intent to kill, let alone premeditation to kill, and the requirement that torture be the cause of death. (*People v. Cook* (2006) 39 Cal.4th 566, 602 [47 Cal.Rptr.3d 22]; *People v. Mincey* (1992) 2 Cal.4th 408, 432 [6 Cal.Rptr.2d 822].)

Thus, the 1999 version of section 189 has added a streamlined path to first degree murder—felony murder torture—that did not exist under the 1998 version of the statute, and thus may not be applied against Kevin as

that would violate Article I, Section 9, clause 3, and Section 10, clause 1 of the United States Constitution as an *ex post facto* determination of criminal liability (*Collins v. Youngblood* (1990) 497 U.S. 37, 42 [111 L.Ed.2d 30, 110 S.Ct. 2715]) as well as their California counterpart, Article I, Section 9 of the state Constitution (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 295 [279 Cal.Rptr. 592]; 1 Witkin, *Cal. Crim. Law, Introduction to Crimes* (3d ed. 2000) § 10.)[54]

Yet, this streamlined option was precisely the option provided Kevin's jury and provided them a ready shortcut to first degree murder. (57CT 16200, 20RT 4163-4164.) If the jury had parsed the difference between murder by means of torture and felony murder perpetrated by torture, which presumably they did, they would have been led to the inevitable conclusion that it was a lot easier to find Kevin guilty of first degree murder under the latter theory than the former. The latter theory eliminated three elements required at the time of the murder: (1) the torture was willful, deliberate, and premeditated; (2) there was the intent to inflict *prolonged* pain; and (3) the means of torture was the cause of death.

It was constitutional error to provide the jury with the option of such a shortcut. This option did not exist at the time the offense occurred. The prejudice that flowed from this error will be discussed in Part *G*, below, as well as the cumulative error section of the guilt and penalty phase issues.

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[54] Failure of trial counsel below to raise this issue is no bar to its consideration on appeal. (See, e.g., *People v. Easley* (1983) 34 Cal.3d 858, 883-884 [196 Cal.Rptr. 309]; *Murtishaw v. Woodford* (9th Cir. 2001) 255 F..3d 926, 961-967; *Williams v. Roe* (9th Cir. 2005) 421 F.3d 883, 885-887; *Lindsey v. Washington* (1937) 301 U.S. 397 [81 L.Ed. 1182, 57 S.Ct. 797].)

C. The Jury Instructions For the Crime of Torture Failed to Require that *Kevin* Had the Specific Intent to Cause Cruel or Extreme Pain and Suffering; the Mental State Could Not Be Premised Upon Vicarious Liability

Count Eight charged Kevin with the crime of torture (§ 206).[55] The crime was added by the voters' passage of Proposition 115 in 1990. (*People v. Cole, supra,* Cal.4th 1158, 1219.) A defendant can be convicted of violating this statute on an aiding and abetting theory where the defendant did not directly or indirectly inflict great bodily injury on the victim (*People v. Lewis* (2004) 120 Cal.App.4th 882, 888 [16 Cal.Rptr.3d 498], but, he cannot be held vicariously liable where he did not personally harbor the "intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose" (*Cf. Ibid.; People v. Wiley, supra,* 18 Cal.3d 162, 168.) It will be recalled, that here the crime of torture was not prosecuted under the natural and probable consequences doctrine. (57CT 16186-16187, 20RT 4154-4155.) Thus, here the "aider and abettor must do something *and* have a certain mental state. [Emphasis in the orig.]" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117 [108 Cal.Rptr.2d 188].) The *McCoy* Court instructed:

> [O]utside of the natural and probable consequences doctrine, an aider and abettor's mental state must be at least that required of the direct perpetrator. "To prove that a defendant is an accomplice ... the prosecution must show that the defendant acted 'with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.] When the offense charged is a specific intent crime, the accomplice must 'share the specific intent of the perpetrator'; this occurs when the accomplice 'knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of

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55 The section is set forth at footnote 38, at page 170, above.

facilitating the perpetrator's commission of the crime.' [Citation.]" (*Id.* at p. 1118, quoting *People v. Prettyman* (1996) 14 Cal.4th 248, 259 [58 Cal.Rptr.2d 827].)

According to the prosecution's theory of the case, the actions of Warren, Jamelle, and Kevin were closely intertwined, and, other than what might be inferred from Kevin's statements, the specifics of each of the three defendants' actions are unknown.

The instructional flaw in the instant case is that the instructions authorized the jury to find Kevin guilty of torture without finding that it was specifically Kevin who harbored the requisite specific intent for the offense. As noted in Part *A*, above, the language of CALJIC 9.90 as given only required that "The *person* [emphasis added] inflicting the injury did so with [the requisite] specific intent...." (57CT 16231, 20RT 4182.) The prosecutor's closing argument further assured that the jury was not focused on which one or more of the three boys held the requisite specific intent, and the jury certainly could not be expected to discern from these extremely complicated and conflicting instructions that they had to find that it was Kevin who harbored the requisite intent. Indeed, the prosecutor began by telling the jury that Kevin was guilty of torture as the natural and probable consequences of the crimes he originally aided and abetted (20RT 4219, 4221-4222, 4228); as noted above, this was a theory not authorized by the jury instructions (57CT 16186-16187, 20RT 4154-4155.) Although at one point, as she was discussing the crime of torture, she mentioned, "the defendant, specifically, intended to cause her extreme pain (20RT 4239-4240), this was shortly followed by her assertion that "*either* [emphasis added] the defendant or an accomplice Hardy or Armstrong intended to inflict extreme cruel physical pain..." (20RT 4351.) As she wrapped it up, "if all you believe is he stood there and watched and then moved the body

and picked up the clothes, then he is still guilty of all of these crimes." (20RT 4352.) "[T]he defendant *or his accomplices* [emphasis added] had the specific intent to cause pain or suffering...." (20RT 5354.)

That is not the law. As will be demonstrated in Part *G*, below, Kevin's conviction on Count Eight for torture must be reversed. The prejudice that flowed from this error will also be discussed in Part *G*, below, as well as the cumulative error section of the guilt and penalty phase issues.

D. The Jury Instructions for the Crime of Murder by Means of Torture Failed to Require that *Kevin* Had the Specific Intent to Inflict Extreme and Prolonged Pain; the Mental State Could Not Be Premised Upon Vicarious Liability

Count One was charged on several theories including that the murder was perpetrated by means of torture within the meaning of section 189 (as that section provided in 1998).[56] In *People v. Steger, supra,* 16 Cal.3d 539 this Court held that first degree torture murder under section 189 requires of the perpetrator *and* defendant a willful, deliberate and premeditated intent to inflict extreme and prolonged pain. (*Id.* at pp. 545-547; *People v. Tubby, supra,* 34 Cal.2d 72, 76-77; *People v. Wiley, supra,* 18 Cal.3d 162, 168-173; *People v. Davenport, supra,* 41 Cal.3d 247, 267, 269; *People v. Morales, supra,* 48 Cal.3d 527, 559-560; *People v. Bittaker, supra,* 48 Cal.3d 1046, 1100-1101; *People v. Elliot, supra,* 37 Cal.4th 453, 468.) "[I]t is the state of mind of the torturer...which society condemns." (*People v. Steger, supra,* at p. 546.) The defendant must have the defined intent to inflict pain. (*Ibid.*) [T]he Legislature requires the same proof of deliberation and premeditation for first degree torture murder that it does

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56 The section is set forth in Part *B*, above, at pages 188 through 191.

for other types of first degree murder."[57] (*People v. Steger, supra,* at pp. 545-547; accord *People v. Elliot, supra,* 37 Cal.4th 453, 469.) Murder by means of torture cannot be inferred solely from the condition of the victim's body or from the mode of assault or injury. (*People v. Wiley, supra,* 18 Cal.3d 162, 168.)

The instructional flaw in this Part, as in the preceding Part *C*, is that the instructions authorized the jury to find Kevin guilty of murder by torture without finding that it was specifically Kevin who harbored the requisite specific intent. Instead, the jury was only told that among the requisite elements they must find that the "*perpetrator* [emphasis added] committed the murder with a [willful], deliberate, and premeditated intent to inflict extreme and prolonged pain ...."[58] [59] (57CT 16203, 20RT 4165.)

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[57] "'When a killing is perpetrated by means of torture, the means used is conclusive evidence of malice and premeditation, and the crime is murder of the first degree.'" (*People v. Steger, supra,* at p. 546, fn. 2, quoting *People v. Turville* (1959) 51 Cal.2d 620, 632 [335 P.2d 678].)

[58] Again, as noted in Part *C*, above, the crime of torture was not prosecuted under the natural and probable consequences doctrine. (57CT 16186-16187, 20RT 4154-4155.) Thus, here the "aider and abettor must do something *and* have a certain mental state. [Emphasis in the orig.]" (*People v. McCoy, supra,* 25 Cal.4th 1111, 1117.)

[59] CALCRIM 521 as well as Forecite 8.24b (James Publishing) avoid the problem here by identifying the "defendant" as the perpetrator. CALCRIM 521 provides in pertinent part:

> <B. Torture>
>
> [The defendant is guilty of first degree murder if the People have proved that the defendant murdered by torture. The defendant murdered by torture if:
>
> 1 (He/She) willfully, deliberately, and with premeditation intended to inflict extreme and prolonged pain on the person killed while that person was still alive;

This error was exacerbated by the prosecutor's argument that who held the intent was not important. As in the preceding Part *C*, her closing argument further assured that the jury was not focused on which one or more of the three boys held the requisite specific intent. She in essence told the jury that for the charge of a killing during the commission of torture, they need not determine which participant intended to inflict torture. The jury only had to find that the *perpetrator* committed the murder with the requisite intent to inflict torture. (20RT 4227.) In her rebuttal she reinforced the error when she told the jury that "*either* [emphasis added] the

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2 (He/She) intended to inflict such pain on the person killed for the calculated purpose of revenge, extortion, persuasion, or any other sadistic reason;

3 The acts causing death involved a high degree of probability of death;

AND

The torture was a cause of death.]

[A person commits an act *willfully* when he or she does it willingly or on purpose. A person *deliberates* if he or she carefully weighs the considerations for and against his or her choice and, knowing the consequences, decides to act. An act is done with *premeditation* if the decision to commit the act is made before the act is done.]

[There is no requirement that the person killed be aware of the pain.]

[A finding of torture does not require that the defendant intended to kill.] ¶¶ [Emphasis in the original.]

Forecite 8.24b provides:

If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the *defendant* to inflict extreme and prolonged pain upon the victim, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree. [Emphasis added.] (F.8.24b.)

defendant or an accomplice Hardy or Armstrong intended to inflict extreme cruel physical pain ...." (20RT 4351.)

Thus, this theory for murder is also without legal support. The prejudice that flowed from this error will be discussed in Part *G*, below, as well as the cumulative error section of the guilt and penalty phase issues.

E. The Jury Instructions for a True Finding on the Torture Special Circumstance Allegation Failed to Require that *Kevin* Intended to Inflict Extreme and Prolonged Pain; the True finding Could Not Be Premised Upon Vicarious Liability

As demonstrated in Part *A*, Kevin's admission of sexual intercourse and stomping the victim six times to her mid and lower torso during his January 7th interrogation provided the prosecution's only direct evidence of Kevin's personal involvement in the incident. That was the prosecution's most incriminating evidence against Kevin. At the other end of the culpability continuum, and more fully detailed in the *Statement of the Facts*, was Kevin's testimony that his only involvement had been to move the victim's dead body and collect and remove her clothes from the scene. (19RT 3982-3985.)

As the offenses discussed in Parts *C* and *D*, above, the special circumstance of murder by torture under section 190.2, subdivision (a)(18) also required the specific intent to torture and that intent, as well as the torturous conduct itself, cannot be a derivative liability, but must be premised upon the defendant's state of mind and conduct, respectively. (*People v. Ross* (1979) 92 Cal.App.3d 391, 402, 404 [154 Cal.Rptr. 783]; *People v. Davenport, supra,* 41 Cal.3d 247, 267, 269; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1254-1255 [278 Cal.Rptr. 640]; *People v. Petznick* (2003) 114 Cal.App.4th 663, 686 [7 Cal.Rptr.3d 726]; *People v. Elliot, supra,* 37 Cal.4th at p. 468; *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312,

1320; *Morales v. Woodford* (9th Cir. 2004) 388 F.3d 1159, 1169.) That was also true if the finding was premised on a theory of aiding and abetting. (*People v. McCoy, supra,* 25 Cal.4th 1111, 1117-1118.) The severity of a victim's wounds is not necessarily determinative of an intent to torture. (*People v. Mincey,* 2 Cal.4th 408, 432-433.)

The torture-murder special circumstance is distinguished from murder by torture under section 189 by the fact that the former, under section 190.2, subdivision (a)(18), requires that the defendant have acted with the intent to kill. (*People v. Davenport, supra,* at p. 271; *People v. Cole, supra,* 33 Cal.4th at p. 1226.)

The flaw here is the same as that in Parts *C* and *D*, above. The jury was permitted to find true this special circumstance without an unambiguous finding that Kevin had to harbor the specific intent to inflict torture; it could not be premised vicariously on Warren's and/or Jamelle's intent. Although the specific instruction on the requisite elements for the special circumstance of murder involving the infliction of torture provided included the requirement that the "defendant intended to inflict extreme cruel physical pain and suffering ...," that requirement was negated by three factors. (57CT 16212, 20RT 4169-4170.) First, the flawed instructions discussed in Parts *C* and *D,* discussed above, had erroneously removed from jury consideration whether *Kevin* harbored the requisite intent for torture and thus setup for the jury a similar misunderstanding for its task for a finding on this special circumstance. At no point was the jury specifically told why the elements for the special circumstance of torture were different. Second, this error was reinforced by the prosecutor during her closing argument, as well be demonstrated below. And third, the

verdict form executed by the jury for this special circumstance insured that misunderstanding.

In regard to murder by torture, the jury was told that "the perpetrator" who committed the murder had to have the specific intent to inflict extreme and prolonged pain. (57CT 16203, 20RT 4165.) But, the jury was not instructed as to what act and intent they had to find if they did not believe Kevin was the actual killer, which they did *not.* (56CT 16255.) The big flaw in the special circumstance torture instruction is that the trial court erroneously tacked it on the list of 190.2, subdivision (a)(17) felony murder specials under CALJIC 8.80.1. (See fn. 51, above, 57CT 16209.) The torture special circumstance is separate and had its own intent element, which CALJIC 8.80.1, as employed here, omitted. (§ 190.2, subd. (a)(18.)

Ms. Locke-Noble in her closing argument compounded the problem by telling the jury that Kevin's admission of moving the body and picking up her clothes made "him guilty of every single crime under the law." (20RT 4222.) She further compounded the error when she explained, "A person murdered another person, and the *perpetrator* [emphasis added] committed the murder [with the intent to commit torture.]" (20RT 4227.) She acknowledged that she could not prove Kevin was the actual killer. (20RT 4228-4229.) She argued that "the defendant or his accomplices tortured the victim." (20RT 4239.) As she neared the conclusion of her argument, she repeated the error and told the jury that "*either* the defendant or an accomplice Hardy or Armstrong intended to inflict extreme cruel physical pain [on the victim]." (20RT 4351.)

The jury's verdict added to the confusion. They were asked to insert "True" or "Not True" to the statement:

> We, the jury, find the allegation that the defendant, KEVIN DARNELL PEARSON, committed the murder of

> PENNY SIGLER [sic] was intentional and involved the infliction of torture, within the meaning of Penal Code Section 190.2(a)(18). (57CT 16256.)

This incomprehensible language sheds no light on whether the jury believed that *Kevin* harbored the specific intent to inflict torture or intent to kill. In fact, the language employed by the verdict made the clear point that *Kevin's* specific intent was not an issue for their resolution.

Where a jury instruction omits a necessary element of a special circumstance, constitutional error has occurred. (See *Walton v. Arizona* (1990) 497 U.S. 653 [111 L.Ed.2d 511, 110 S.Ct. 3047].) If a factor used to determine whether a defendant is eligible for the death penalty fails to narrow adequately the class of capital crimes, a reviewing court may affirm the death sentence only by finding that consideration of the improper aggravating factor was harmless or by reweighing the evidence without considering the factor. (*Sochor v. Florida* (1992) 504 U.S. 527, 539-541 [119 L.Ed.2d 326, 112 S.Ct. 2114].) The error in this case was not harmless, because it necessarily had a "substantial and injurious effect or influence in determining the jury's verdict" in imposing a sentence of death. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 623, 637-638 [123 L.Ed.2d 353, 113 S.Ct. 1710, 1722].)

In determining whether an error is harmless, "the question is *not* 'were they [the jurors] right in their judgment, regardless of the error or its effect on the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision.'" (*Brecht v. Abrahamson, supra,* (1993) 507 U.S. 619, 642-643 [123 L.Ed.2d 353, 113 S.Ct. 1710, 1724].) The prejudice that flowed from this error will be discussed in Part *G*, below, as well as the cumulative error section of the guilt and penalty phase issues.

F. The Jury Instructions for a True Finding on the Torture Special Circumstance Allegation Failed to Require that *Kevin* Had the Specific Intent to Kill; the True Finding Could Not Be Premised Upon Vicarious Liability

The first paragraph of Part *E*, above, is incorporated herein.

The special circumstance of murder by torture under section 190.2, subdivision (a)(18) requires the specific intent to kill. (*People v. Wade* (1988) 44 Cal.3d 975, 993-994 [244 Cal.Rptr. 905]; *People v. Davenport, supra,* 41 Cal.3d 247, 262; *People v. Minichilli* (1984) 161 Cal.App.3d 660, 675 [207 Cal.Rptr. 766].) This is also a requirement when the murder is prosecuted on a theory of conspiracy. (*People v. Petznick, supra,* 114 Cal.App.4th 663, 680-681.) That specific intent is required of *the* defendant, not *a* defendant. (*Id.* at pp. 685-686.)

Section 190.2, subdivisions (c) and (d) provide the authority for imposing special circumstances to aider and abettors. Subdivision (c) expressly requires that the aider and abettor harbor the specific intent to kill.[60] (§ 190.2, subd. (c).) Subdivision (d) provides an exception to subdivision (c), but restricts that exception to the crimes enumerated in paragraph (17) of subdivision (a), which do not include the crime of torture.[61] (§ 190.2, subd. (d).)

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60 Subdivision (c) of section 190.2 provides:

> Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4

61 Subdivision (d) of section 190.2 provides:

> Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands,

The flaw in the instant case is in the manner in which the specific intent for torture special circumstance was explained to the jury. Using the text of CALJIC 8.81.18[62], the jury was instructed that a requisite intent for this allegation was that "The murder was intentional," without informing the jury that it must be Kevin that harbored that intent, not merely a codefendant or coconspirator. (57CT 16212, 20RT 4169-4170.) As given, the instruction may well be sufficient in a single defendant case, but where codefendants are involved, the trial court must instruct regarding the section 190.2, subdivision (c) requirement that the aider and abettor also must personally harbor the intent to kill. (§ 190.2, subd. (c).)

The error was compounded during the prosecution's closing argument when Ms. Locke-Noble told the jury that it did not "matter which one of the participants did the actual killing ... it [did] not matter whether the killing was intentional or accidental." (20RT 4226.) She continued, "Murder by torture does not require any proof that the perpetrator intended to kill his victim...." (20RT 4227.) She was here confounding the lack of an intent to kill for those felonies included in section 190.2, subdivision (a)(17) with subdivision (a)(18) murder involving the infliction of torture which expressly requires that that the murder is intentional.

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induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under

62 The instruction is set out in full at pp. 167-168.

She admitted that she could not prove that Kevin was the actual killer. (20RT 4228-4229.) In discussing the special circumstances, she did not distinguish between the requirements for murder by torture under section 190.2, subdivision (a)(18) and the other alleged special circumstances section 190.2, subdivision (a)(17). Instead, she guided the jurors only to the *mens rea* required for the latter felonies. She told the jury that "the defendant was either, (A) the actual killer ... [acknowledging that she could not prove that], (B) had the intent to kill, or (C) was a major participant and acted with reckless indifference to human life." (20RT 4228-4229.) Yet, alternative qualifiers (A) or (C) had no relevancy to section 190.2, subdivision (a)(18) since it required that the murder was intentional. (*People v. Wade, supra,* 44 Cal.3d 975, 993-994; *People v. Davenport, supra,* 41 Cal.3d 247, 262; *People v. Minichilli, supra,* 161 Cal.App.3d 660, 675.)

As mentioned in Part *C*, above, as she summarized her argument, "if all you believe is he [Kevin] stood there and watched and then moved the body and picked up the clothes, then he is still guilty of all of these crimes." (20RT 4352.) Thus, the jury was left to resolve whether the special circumstance of murder by torture was true on the misunderstanding that they could reach that conclusion without finding that Kevin had harbored the specific intent to kill.

As in Part *E*, above, the jury's verdict added to the confusion. They were asked to insert "True" or "Not True" to the statement:

> We, the jury, find the allegation that the defendant, KEVIN DARNELL PEARSON, committed the murder of PENNY SIGLER was intentional and involved the infliction of torture, within the meaning of Penal Code Section 190.2(a)(18). (57CT 16255-16256.)

Once again, this language does not parse at all. It sheds no light on whether the jury believed that *Kevin* harbored the specific intent to kill. In fact, the language employed by the verdict made the clear point that *Kevin's* specific intent was not an issue for their resolution.

The prejudice that flowed from this error will be discussed in Part *G*, below, as well as the cumulative error section of the guilt and penalty phase issues.

G. The Trial Court's Failed Efforts to Adequately Instruct on Elements of the Offenses and Accompanying Allegations Were Constitutionally Flawed and Prejudiced Kevin

"It is settled that, even in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047 [31 Cal.Rptr.2d 128].) "The trial court is charged with instructing upon every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant's theory of the case." (*Ibid.*) In light of the number and complexity of the charges brought compounded by the variety of theories proffered for murder, and the competing theories for criminal liability, these all gave rise to a *sua sponte* duty on the part of the trial court to furnish as well as provide instructions that were not inadequate to the task, but moreover correctly stated the law. (See, e.g., *id.* at pp. 1048, 1050.)

The failure to adequately instruct upon an element of the offense violates the Sixth Amendment right to trial by jury as applied to the states through the Fourteenth Amendment and the Fourteenth Amendment right to due process. (See *Rose v. Clark* (1986) 478 U.S. 570, 580-581 [92 L.Ed.2d 460, 106 S.Ct. 3101]; *People v. Hernandez* (1988) 46 Cal.3d 194,

208-210 [249 Cal.Rptr. 850]; see also *People v. Macedo* (1989) 213 Cal.App.3d 554, 561 [261 Cal.Rptr. 754] ["Conflicting or inadequate instructions on intent are closely related to instructions that completely remove the issue of intent from the jury's consideration ... they constitute federal constitutional error [citation]".) The due process, compulsory process, confrontation, and trial by jury clauses of the Fifth, Sixth, and Fourteenth Amendments to the federal constitution mandate that "as a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Mathews v. United States* (1988) 485 U.S. 58, 63 [99 L.Ed.2d 54, 108 S.Ct. 883], citing *Stevenson v. United States* (1896) 162 U.S. 313 [40 L.Ed. 980, 16 S.Ct. 839] [refusal of voluntary manslaughter instruction in murder case where self defense was primary defense constituted reversible error]; *United States v. Unruh, supra,* 855 F.2d 1363, 1372.)

If the jury was not misled by Ms. Locke-Nobel's erroneous, oral explanations of the legal principles the jury had to resolve, they would certainly be misled by the court's equally erroneous oral and written instructions. The court's guilt phase instructions produced a trial on these issues that was fundamentally unfair. It is reasonably likely that some or all of the jurors thought that the alleged stick inserted in the victim's vagina was the torturous act and yet had a reasonable doubt as to whether the act of inserting the stick was either premeditated or accompanied by an intention to inflict *prolonged* main, not merely extreme transitory pain, or was the cause of death. It is more than likely that some or all of the jurors had a reasonable doubt that Kevin either harbored the intent to kill or torture,

particularly since they were repeatedly invited to premise these findings on the acts of the *perpetrator*.

Erroneous and contradictory instructions defining elements of a crime violate the due process clause, where, as here, they are "likely to cause an imprecise, arbitrary or insupportable finding of guilt." (*Baldwin v. Blackburn* (5th Cir. 1981) 653 F.2d 942, 949; accord, *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [238 Cal.Rptr. 406].) Since the court's omissions removed from the jury's consideration viable and complete defenses to torture, murder by torture, and the special circumstance of torture, the prosecution cannot demonstrate that these errors were harmless beyond a reasonable doubt. (*Arizona v. Fulminante, supra,* 499 U.S. 279, 306-307 [the *Chapman*[63] standard applies to "ordinary trial errors" implicating the federal constitution].)

The commonality among the errors detailed in Parts *B* through *F*, is that the prosecution's burden to prove torture in the multiple contexts that it was presented to the jury was unconstitutionally lowered. Torture was a recurrent theme throughout the trial; beginning during voir dire and concluding with closing arguments at the end of the penalty phase, it was mentioned 316 times. (RT 947-4931.) As noted in Part *A*, above, Ms. Locke, during her closing and rebuttal arguments at the guilt phase, mentioned "torture" 25 times. (20RT 4219, 4222, 4225-4230, 4239-4240, 4244-4245, 4336, 4350-4352, 4354, 4356-4357.) The defense did not mention it once. At the penalty phase closing arguments, Ms. Locke-Noble mentioned "torture" 8 times. (23RT 4886, 4896-4899, 4901.) The defense mentioned it 3 times. (23RT 4905, 4907.)

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63 *Chapman* v. *California, supra,* 386 U.S. 18.

Although torture was but one of the routes to first degree murder and one of the special circumstances, it clearly would dominate all aspects of the jury's penalty phase deliberations. One hundred and fourteen injuries suffered by the victim had been described to the jury. (15RT 2928-2934, 2938-2949, 2980-2983, 2985-2990, 2995-2996, 3014-3016, 3025, People's exhs. 1, 4-5, 9-10.) Cumulatively, these injuries were the basis of the multiple resolutions required of the jury at the guilt phase in the multiple contexts of whether the victim had been tortured. Some of the injuries also provided the factual bases for the four counts involving sexual assault. Once these bases for torture are removed to assess whether Kevin was prejudiced by these constitutional errors, as indeed they must, what is left untainted by the errors is a robbery and a kidnapping. This vastly changes the milieu the jury faced. Respondent cannot show beyond a reasonable doubt that Kevin was not prejudiced by these many errors.

The requisite remedy is to reverse the convictions for murder in Count One, torture in Count Eight, set aside the torture-murder special circumstance finding, and vacate the death sentence, and remand for resentencing on the remaining counts.

## VI. KEVIN WAS PROSECUTED ON A THEORY THAT KEVIN WAS NOT THE ACTUAL KILLER AND THE JURY INSTRUCTIONS FOR THE SPECIAL CIRCUMSTANCES ALLEGATIONS WERE CONSTITUTIONALLY FLAWED BY PERMITTING TRUE FINDINGS WITHOUT UNEQUIVOCALLY REQUIRING A FINDING THAT KEVIN HAD THE REQUISITE INTENT AND INVOLVEMENT IN THE UNDERLYING FELONIES[64]

Torture was the focus of the preceding argument. Here, the focus is on all of the special circumstances. As demonstrated in Argument V, the prosecution had no evidence that Kevin was the actual killer. And, the jury explicitly rejected the proposed finding that Kevin was the actual killer. (20CT 16255.) As will be demonstrated below, the legislative scheme for imposing a sentence of life without the possibility of parole or death for first degree murder does encompass one who was not the actual killer, provided that there are "special" circumstances.[65] (§ 190.2, subds. (c) &

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[64] Argument *V, F* addressed a related flaw in the context of the torture special circumstance.

[65] Section 190.2 provides in pertinent part:

> (c) Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4.
>
> (d) Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefore, shall be

(d).) Among those circumstances is the requirement that the victim was killed during circumstances enumerated in section 190.2, subdivision (a), which included the felonies charged against Kevin in Counts Two through Seven (§ 190.2, subd. (a)(17)) and included an intentional murder involving the infliction of torture (§ 190.2, subd. (a)(18.) Once over this threshold in the assessment of a defendant's liability to application of special circumstances, there are two alternative thresholds for liability, at least one of which must be crossed.

The first alternative encompasses the defendant who, with the intent to kill, merely aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of the murder. Such circumstances satisfy as a special circumstance under section 190.2, subdivision (c). This provision, by requiring an intent to kill, essentially codifies the rule of *People v. Anderson* (1987) 43 Cal.3d 1104 [240 Cal.Rptr. 585] that held that when the defendant is an aider and abetter rather than the actual killer, the intent to kill must be proved for felony-murder special circumstances under 190.2, subdivision (a)(17). (*Id.* at pp. 1138-1139, 1147; 3 Witkin, *Cal. Crim. Law, Punishment* (3d ed. 2000), §§ 453, p. 606 & 460, p. 613.)

The second alternative threshold is provided for in section 190.2, subdivision (d). It provides an alternative to a finding of the intent to kill for those felonies enumerated in section 190.2, subdivision (a)(17). Subdivision 17 does not include torture. This second alternative substitutes the lesser *mens rea* requirement that the defendant act with reckless

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punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4

indifference to human life. At the same time, it requires a greater degree of participation in the acts of the perpetrator than that required in section 190.2, subdivision (c). It requires that the defendant be *a major participant*, who aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of one of specified felonies that included Counts Two through Seven. (§ 190.2, subd. (a)(17), subd. (d); 3 Witkin, *Cal. Crim. Law, Punishment* (3d ed. 2000), § 423, pp. 564-566.) The United States Supreme Court in *Tison v. Arizona, supra,* 481 U.S. 137 held that these were the minimum constitutional requirements for the imposition of the death penalty to an aider and abetter for this lesser involvement of the defendant. (*Id.* at pp. 157-158.)

Here, the trial court failed to instruct clearly and comprehensibly on these essential elements applicable to all of the special circumstances.

The result here improperly reduced the prosecution's burden of proof and denied Kevin due process of the law, a fair trial, the right to present a defense, a trial free from improper lessening of the prosecution's burden of proof, and a reliable and non-arbitrary determination of guilt, death eligibility, and penalty in violation of his rights under Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the analogous provisions of the California Constitution. (Cal. Const., Art. I, §§ 1, 7, 15, 16, 17; see, *United States v. Unruh, supra,* 855 F.2d 1363, 1372, *cert. den.* (1988) 488 U.S. 974 [102 L.Ed.2d 548, 109 S.Ct. 513]; *Bennett v. Scroggy, supra,* 793 F.2d 772, 777-779; *United States v. Escobar de Bright, supra,* 742 F2d 1196, 1201-1202.)

A. Background

The flaw here is that with what one hand provided in a most convoluted, obfuscated manner, the other took swiftly away by offering a

vastly simpler and more understandable alternative. But, this metaphor does not adequately convey the gravity of the errors. First, the jury was provided an excessively convoluted, albeit technically correct instruction that was all too likely to be regarded as gibberish, followed by an apparently simple, clearly understandable, but wrongly truncated alternative that was all to likely to mislead.

The jury was introduced to special circumstances using the language of CALJIC 8.80.1 (1997 revision). (57CT 16209-16210, 20RT 4167-4168.) As relevant here, the heart of the instruction, its fourth paragraph, contained a single sentence with 150 words and 25 commas. Such a profusion of words and concepts strung together in a single sentence was quite likely completely unintelligible to an ordinary juror. This virtually impenetrable instruction described the requisite circumstances for a finding of special circumstances when the defendant was not the actual killer, as required by section 190.2, subdivisions (c) and (d).[66] However, it was immediately followed by a misleadingly truncated version of CALJIC 8.81.17 that would have neutralized any adequate understanding that a juror might have gleaned from the preceding instruction. This latter instruction provided:

> To find that any of the special circumstances, referred to in these instructions as murder in the commission of robbery, kidnap, kidnapping for rape, rape, or rape by a foreign object-a wooden stake, is true, it must be proved:
>
> 1. The murder was committed while [the] defendant was [engaged in] [or] [was an accomplice] in the [commission] of one or more of the following crimes: robbery, kidnap, kidnapping for rape, rape, or rape by a

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[66] The instruction is set out in full at footnote 51, pages 181 through 182, above in Argument V, A.

foreign object-a wooden stake. [No paragraph 2 was provided.] (57CT 16211, 20RT 4169.)

As can be seen, the instruction clearly conveys that the defendant under consideration by the jury need *not* be the actual killer in order for the special circumstance to be proven. It did *not* require any finding that the defendant harbor the intent to kill coupled with aiding and abetting the murder. It did *not* alternatively require that the defendant act with reckless indifference to human life coupled with the requirement that he was a major participant in aiding and abetting one or more of the charged felonies. The principle attribute of the instruction was that, unlike the instruction that preceded it, it would be understandable to the average juror.

The prosecutor compounded this conflict in the instructions in her closing argument. She told the jury that Kevin when he moved the body, he aided and abetted (20RT 4218) "and he's guilty of all these crimes." (20RT 4221-4222.) She argued that she did not need to prove that he ever touched her. (20RT 4222.) As she explained to the jury "the special circumstance rule:"

> 1. A HUMAN BEING WAS KILL. [sic]
>
> THAT'S BEEN PROVEN TO YOU BEYOND A REASONABLE DOUBT.
>
> DURING THE COMMISSION OR ATTEMPTED COMMISSION OF A FELONY.
>
> THAT'S BEEN PROVEN TO YOU BEYOND A REASONABLE DOUBT.
>
> THEY COMMITTED THE CRIME OF ROBBERY, KIDNAP, KIDNAP FOR RAPE, RAPE, AND RAPE BY THE FOREIGN OBJECT.
>
> THE DEFENDANT HAD THE INTENT TO COMMIT OR AID AND ABET THE COMMISSION OR ATTEMPTED COMMISSION OF THE UNDERLYING FELONY; ROBBERY, KIDNAP FOR RAPE, RAPE IN

CONCERT, RAPE, RAPE WITH THE WOODEN STAKE IN CONCERT, RAPE WITH THE WOODEN STAKE, OR TORTURE.

THEY INTENDED TO ROB HER RIGHT FROM THE GIT-GO. THE DEFENDANT WENT THROUGH HER CLOTHING. HE WAS RIGHT THERE IN IT, HE WAS A MAJOR PARTICIPANT.

AND THE DEFENDANT WAS EITHER,

(A) THE ACTUAL KILLER.

I CAN'T PROVE THAT TO YOU. YOU HAVE THE OPTION OF SAYING, YES, I BELIEVE HE WAS THE ACTUAL KILLER. I DON'T THINK I CAN PROVE THAT TO YOU. I CAN'T TELL YOU WHO HIT PENNY IN THE HEAD WITH WHAT BLOW AND WHICH BLOW CAUSED HER DEATH. I HAVEN'T PROVED THAT TO YOU.

(B) HAD THE INTENT TO KILL, OR

(C) WAS A MAJOR PARTICIPANT AND ACTED WITH RECKLESS INDIFFERENCE TO HUMAN LIFE.

I PROVED THAT TO YOU. I PROVED TO YOU THAT HE WAS AN AIDER AND ABETTOR, AND THAT HE WAS A MAJOR PARTICIPANT. HIS OWN STATEMENT ON JANUARY 7TH, 1999, THAT HE RAPED HER, SHOWED THAT HE WAS A MAJOR PARTICIPANT AND HE AIDED AND ABETTED ALL OF THE OTHER CRIMES.

A SPECIAL CIRCUMSTANCE FINDING IS AN ALLEGATION CONTAINED WITHIN THE MURDER VERDICT. IF YOU FIND THE DEFENDANT GUILTY OF MURDER OF THE FIRST DEGREE, YOU MUST DETERMINE IF THE FOLLOWING SPECIAL CIRCUMSTANCES ARE TRUE OR NOT TRUE.

THE DEFENDANT MURDERED THE VICTIM DURING THE COMMISSION OR ATTEMPTED COMMISSION OF A ROBBERY, KIDNAP FOR RAPE,

RAPE, KIDNAPPING, RAPE BY A WOODEN STAKE, OR TORTURE.

ON YOUR JURY VERDICT FORM IT WILL TELL YOU TO INSERT THE WORD "TRUE" OR "NOT TRUE." THIS IS TRUE, AS TO ALL OF THEM. (20RT 4228-4229.)

She concluded her argument by telling the jurors, without further explanation, that Kevin had committed all of the special circumstances. (20RT 4244.)

During her rebuttal argument, she argued:

THERE ARE SIX SPECIAL CIRCUMSTANCES ATTACHED TO THE CRIME OF MURDER, ROBBERY, KIDNAP FOR RAPE, RAPE, OR SEXUAL PENETRATION BY A FOREIGN OBJECT THE WOODEN STAKE OR TORTURE.

ALL OF THESE ARE TRUE. THESE ARE THE SIX SPECIAL CIRCUMSTANCES THE MURDER OF PENNY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN OR AN ACCOMPLICE TO THE CRIME OF ROBBERY, ACTUAL KILLER, AIDER AND ABETTER OR MAJOR PARTICIPANT.

THE PEOPLE HAVE PROVED HE IS GUILTY OF THE CRIME OF MURDER AND THE SPECIAL CIRCUMSTANCE IS TRUE. KIDNAP, AIDER AND ABETTER AND A MAJOR PARTICIPANT. HE IS GUILTY OF THE MURDER AND THE SPECIAL CIRCUMSTANCE IS TRUE.

KIDNAP FOR RAPE, THE MURDER OCCURRED WHILE HE WAS ENGAGED OR THE DEFENDANT ACCOMPLISHED WAS ENGAGED IN THE COMMISSION OF THE CRIME OF RAPE. AIDER OR ABETTER OR MAJOR PARTICIPANT IS GUILTY OF THE CRIME OF MURDER IN THE FIRST DEGREE AND SPECIAL CIRCUMSTANCES ARE TRUE.

RAPE WAS COMMITTED WHILE THE DEFENDANT WAS ACCOMPLISHED OR ENGAGED IN THE CRIME OF RAPE. THAT'S AIDER, ABETTER

MAJOR PARTICIPANT, GUILTY OF FIRST DEGREE MURDER. THE SPECIAL CIRCUMSTANCE IS TRUE.

RAPE BY A FOREIGN OBJECT THE WOODEN STAKE, WHILE HE WAS ENGAGED IN OR WAS AN ACCOMPLICE, RAPE OR SEXUAL PENETRATION BY A FOREIGN OBJECT, THE WOODEN STAKE, AS AN AIDER OR ABETTER OR MAJOR PARTICIPANT GUILTY OF FIRST DEGREE MURDER AND THE SPECIAL CIRCUMSTANCE IS TRUE.

TORTURE, THE MURDER HAS TO BE INTENTIONAL AND EITHER THE DEFENDANT OR AN ACCOMPLICE HARDY OR ARMSTRONG INTENDED TO INFLICT EXTREME CRUEL PHYSICAL PAIN UPON A LIVING HUMAN BEING FOR PURPOSES OF REVENGE, EXTORTION, PERSUASION AND ANY SADISTIC PURPOSE.

LADIES AND GENTLEMEN, SHE DIDN'T HAVE MONEY SO SHE WAS GOING TO PAY ANOTHER WAY, AND THAT WAS WITH HER LIFE. AIDER AND ABBETER, MAJOR PARTICIPANT GUILTY OF FIRST DEGREE MURDER UNDER THE THEORY OF TORTURE. THE SPECIAL CIRCUMSTANCE IS TRUE.

THE CRIME OF ROBBERY, COUNT 2 THEORIES OF LIABILITY HE IS A EITHER PRINCIPAL OR AIDER AND ABETTER WITH THE KNOWLEDGE OF THE UNLAWFUL PURPOSES OF PERPETRATORS, HARDY AND ARMSTRONG, WITH THE INTENT OR PURPOSE OF COMMITTING ENCOURAGING FACILITATING THE COMMISSION OF THE CRIME OR BY ACT, AIDS OR ADVISES, PROMOTES, ENCOURAGES, OR INSTIGATES THE COMMISSION OF THE CRIME.

IF YOU BELIEVE THAT THE ONLY THING HE DID WAS HELP MOVE THE BODY AND COLLECT HER CLOTHES, HE IS STILL AN AIDER AND ABETTER. WHEN I KEEP SAYING "THEY DID THIS" AND "THEY DID THAT" THAT'S AIDING AND ABETTING THAT MAKES HIM A PRINCIPAL, THAT MAKES HIM EQUALLY GUILTY. ¶ ... IF ALL YOU BELIEVE IS HE

STOOD THERE AND WATCHED AND THEN MOVED THE BODY AND PICKED UP THE CLOTHES, THEN HE IS STILL GUILTY OF ALL OF THESE CRIMES. (20 RT 4350-4352.)

B. The Jury Was Provided Conflicting Instructions Which, Compounded by Prosecution Argument, Unconstitutionally Reduced the Prosecution's Burden of Proof for the Special Circumstances Allegations

As demonstrated above, the jury was left to resolve the conflicting language of CALJIC 8.80.1 and 8.81.17, the former unintelligible and the latter intelligible, but wrong. The former provided a convoluted, unintelligible, overly-complex maze of 150 words for the jury to sort out. The latter provided a very simplified alternative that required only that Kevin was an accomplice in one or more of the underlying felonies, thereby removing the requisite elements for an aiding and abetting special circumstance finding.

Ms. Locke-Noble's argument repeatedly reinforced this simplified alternative and thereby compounded the instructions' defects. (*Garceau v. Woodford* (9th Cir. 2001) 275 F3d 769, 777.) She told the jury that she had proved he was an aider and abettor and a major participant, but she did not mention the requisite *mens rea* of reckless indifference to human life of section 190.2, subdivision (d). (20RT 4229.) During her rebuttal argument, she told the jury six times, once for each alleged special circumstances (other than torture) and twice for robbery, that she had proved he was an aider and abetter and a major participant, and again she did not once mention the requisite *mens rea* of reckless indifference to human life of section 190.2, subdivision (d). (20RT 4350-4352.)

It was the trial court's duty to instruct on the general principles of law that were closely and openly connected to the facts before the court and that were necessary for the jury's understanding of the case." (*People v.*

*Montoya, supra,* 7 Cal.4th 1027, 1047.) As in Part *V, G*, above, in light of the number and complexity of the charges brought compounded by the variety of theories proffered for murder, and the competing theories for criminal liability, it was the trial court's *sua sponte* duty to give clear and concise instructions on the elements of the special circumstances that were comprehensible to both the jury and to counsel. (See, e.g., *id.* at pp. 1048, 1050.)

The failure to adequately instruct upon the elements for the special circumstances violated the Sixth Amendment right to trial by jury as applied to the states through the Fourteenth Amendment and the Fourteenth Amendment right to due process. (See *Rose v. Clark, supra,* 478 U.S. 570, 580-581; *People v. Hernandez, supra,* 46 Cal.3d 194, 208-210; see also *People v. Macedo, supra,* 213 Cal.App.3d 554, 561 ["Conflicting or inadequate instructions on intent are closely related to instructions that completely remove the issue of intent from the jury's consideration ... they constitute federal constitutional error [citation]".) The due process, compulsory process, confrontation, and trial by jury clauses of the Fifth, Sixth, and Fourteenth Amendments to the federal constitution mandate that "as a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Mathews v. United States, supra,* 485 U.S. 58, 63, citing *Stevenson v. United States, supra,* 162 U.S. 313 [refusal of voluntary manslaughter instruction in murder case where self defense was primary defense constituted reversible error]; *United States v. Unruh, supra,* 855 F.2d 1363, 1372.)

The court's instructions produced a trial on the special circumstances that was fundamentally unfair. The instructions given here were

unintelligible, confusing, conflicting, and ambiguous, in violation of Kevin's state and federal due process rights to fundamental fairness and a reliable determination of penalty. Where, as here, the jury was very likely misled about the proof of intent required of one who was not the actual killer, a violation of federal due process has resulted from this misunderstanding. The high likelihood that the jury was misled is an unavoidable inference from the indisputable fact that the prosecutor was misled. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 520, 526 [61 L.Ed.2d 39, 99 S.Ct. 2450]; *Francis v. Franklin* (1985) 471 U.S. 307, 322 [85 L.Ed.2d 344, 105 S.Ct. 1965] ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"] *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [238 Cal.Rptr. 406] ["conflicting or contradictory instructions on the subject of intent may constitute federal constitutional error"]; *People v. Garcia* (1984) 36 Cal.3d 539, 554 [205 Cal.Rptr. 265] [special circumstance might have been found based only on "intent to aid in a robbery"]; *Baldwin v. Blackburn, supra,* 653 F.2d 942, 949 [Erroneous and contradictory instructions defining elements of a crime violate the due process clause, where they are "likely to cause an imprecise, arbitrary or insupportable finding of guilt"].)

Since the court's omissions relieved the jury from its obligation to find each element of the special circumstances beyond a reasonable doubt, the prosecution cannot demonstrate that these errors were harmless beyond a reasonable doubt. (*Arizona v. Fulminante, supra,* 499 U.S. 279, 306-307 [the *Chapman*[67] standard applies to "ordinary trial errors" implicating the federal constitution].)

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67 *Chapman* v. *California, supra,* 386 U.S. 18.

The requisite remedy is to reverse all the special circumstances and remand for resentencing.

## VII. THE JURY'S INSTRUCTIONS FAILED TO INCLUDE TORTURE WITH THE OTHER SPECIFIC INTENT OFFENSES FOR WHICH THE JURY WAS AUTHORIZED TO CONSIDER KEVIN'S INTOXICATION AND SPECIFIC INTENT IN RESOLVING WHETHER HE HAD THE REQUISITE INTENT FOR TORTURE

This argument illustrates further flaws in the court's instructions on the charge of torture; a charge that dominated the prosecution's presentation throughout Kevin's trial. Correct and adequate definitions for the offense of torture were essential to the jury's ability to properly resolve Kevin's criminal liability for this offense. In this task the trial court failed; first, by not including torture in the court's litany of charges for which its cautionary instruction on the use of circumstantial evidence applied; second, by not including torture among those charges for which the requirement of a confluence of act and a certain specific intent applied; and, even more egregiously, by precluding the jury from considering Kevin's intoxication as a factor militating against a finding of intent for torture.

The result here improperly reduced the prosecution's burden of proof and denied Kevin due process of the law, a fair trial, the right to present a defense, a trial free from improper lessening of the prosecution's burden of proof, and a reliable and non-arbitrary determination of guilt, death eligibility, and penalty in violation of his rights under Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the analogous provisions of the California Constitution. (Cal. Const., Art. I, §§ 1, 7, 15, 16, 17; see, *United States v. Unruh, supra,* 855 F.2d 1363, 1372, *cert. den.* (1988) 488 U.S. 974 [102 L.Ed.2d 548, 109 S.Ct. 513];

*Bennett v. Scroggy, supra,* 793 F.2d 772, 777-779; *United States v. Escobar de Bright, supra,* 742 F2d 1196, 1201-1202.)

A. Background

Kevin, Warren, and Jamelle were well inebriated as they left Monty Gmur's residence at 10:00 p.m. on that December 29th evening. The three and their friend Chris had collectively consumed a large quantity of an alcoholic beverage they called gasoline that consisted of 16 ounce bottles each of Night Train, Thunderbird, and Cisco.[68] (19RT 3929-3931, 3940, People's exh. 32, pp. 7, 11.) This concoction they chased with Old English.[69] (19RT 3930-3931.) Mr. Gmur described them as "stupid drunk," loud, obnoxious, boisterous, and a little unsteady on their feet. (16RT 3249-3250, People's exh. 32, pp. 11-12.)

Kevin testified that this consumption had been preceded by a really large joint of marijuana and beer that he had consumed with Mr. Gmur before the others had arrived. (17RT 3655-3660, 18RT 3701, 3783-3788, 3793-3794, 19RT 3921-3925, People's exh. 35, pp. 4-10, 17-24.) Kevin had also drunk a six-pack of eight ounce cans of beer that afternoon before he went to Mr. Gmur's residence. (19RT 3921, 3931.) This was in addition to five blunts of marijuana that day, one by himself and four that he shared. (19RT 3931-3932.) Kevin reported that he had not had anything to eat. (19RT 3926.)

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[68] These are fortified wines with alcohol content between 13 and 18 percent. (http://en.wikipedia.org/wiki/Thunderbird_(wine); www.ftc.gov/opa/predawn/F93/cisco.txt [both as of December 24, 2007].)

[69] This is a beer with an alcohol content of 7.5 percent. (http://en.wikipedia.org/wiki/Olde_English_800 [as of December 24, 2007].)

By the time they left Mr. Gmur's house, Kevin testified that he was feeling drunk. (19RT 3931-3932, 3941.) Three or so hours later when Kevin, Warren, and Jamelle arrived at Warren's girlfriend's residence, she testified that they all appeared drunk. (16RT 3307-3308, 3313-3314, 3319-3320, 3323-3324, 3329, 3343.)

In the court's instructions to the jury, voluntary intoxication was defined,[70] followed by an explanation of its use in the context of an aider and abettor.[71] This was followed by instructions on a principal's liability and instructions on conspiracy. (57CT 16186-16190, 20RT 4154-4158.) At this point, the sufficiency of circumstantial evidence to prove specific intent or mental state was explained. (57CT 16191, 20RT 4158.) CALJIC 2.02, as it was provided in its written form to the jury, instructed:

> The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the

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[70] CALJIC 4.22, as it was provided in its written form to the jury, instructed:

> Intoxication of a person is voluntary if it results from the willing use of any intoxicating liquor, drug, or other substance, knowing that it is capable of an intoxicating effect or when he willingly assumes the risk of that effect.
>
> Voluntary intoxication includes the voluntary ingestion, injecting or taking by any other means of any intoxicating liquor, drug or other substance. (57CT 16184, 20RT 4151.)

[71] CALJIC 4.21.2, as it was provided in its written form to the jury, instructed:

> In deciding whether a defendant is guilty as an aider and abettor, you may consider voluntary intoxication in determining whether a defendant tried as an aider and abettor had the required mental state. However, intoxication evidence is irrelevant on the question whether a charged crime was a natural and probable consequence of the target or originally contemplated crime. (57CT 16185, 20RT 4152.)

commission of the act. However, you may not find the defendant guilty of the crime charged in Counts 1, 2, and 3 or find the allegation pursuant to Penal Code section 667.61(a),(b),(d), and (e) to be true, unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required specific intent or mental state but (2) cannot be reconciled with any other rational conclusion.

Also, if the evidence as to any specific intent or mental state permits two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable. (57CT 16191, 20RT 4158.)

As can be seen, the instruction did not include Count 8, torture, as one of the counts to which the instruction was applicable.[72]

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[72] CALJIC 2.01, which explains the sufficiency of circumstantial evidence in general, had been given earlier as the eighth instruction in the 100 pages of instructions provided the jury. (57CT 16163, RT 4143.) This was contrary to the *USE NOTE* to both CALJIC 2.01 and 2.02 that specifically instructed, "CALJIC 2.01 and 2.02 should never be given together," explaining:

> This is because CALJIC 2.01 is inclusive of all issues, including mental state and/or specific intent, whereas CALJIC 2.02 is limited to just mental state and/or specific intent. Therefore, they are alternative instructions. If the only circumstantial evidence relates to specific intent or mental state, CALJIC 2.02 should be given. If the circumstantial evidence relates to other matters, or relates to other matters as well as specific intent or mental state, CALJIC 2.01 should be given and not CALJIC 2.02. (See *People v. Honig* [1996] 48 Cal.App.4th 289, 340-341 [55 Cal.Rptr. 2d 555]; *People v. Marshall* [1996] 13 Cal.4th 799, 849 [55 Cal.Rptr.2d 347].)

The next instruction that explained the requisite concurrence of act and specific intent contained the same omission. CALJIC 3.31, as it was provided in its written form to the jury, instructed:

> In the [crime[s]] [and] [allegation[s]] charged in Count[s] 1, 2, 3, namely, murder, robbery, or kidnap for rape, and the special allegations pursuant to Penal code section 667.61(a), (b), (d), and (e), there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless this specific intent exists the [crime[s] [or] [allegation] to which it relates [is not committed] [or] [is not true].
>
> [The specific intent required is included in the definition[s] of the [crime[s]] [or] [allegation[s]] set forth elsewhere in these instructions.] (57CT 16192, 20RT 4159.)

As can be seen again, the instruction did not include Count 8, torture, as one of the counts to which the instruction was applicable.

Following an instruction on the requisite mental state for Count One, murder (57CT 19193, 20RT 4160), the use that was authorized of evidence of intoxication was explained. CALJIC 4.21.1, as it was provided in its written form to the jury, advised:

> It is the general rule that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition.
>
> Thus, in the crimes of murder, robbery, kidnap for rape, rape in concert, rape, sexual penetration/rape with a foreign object—a wooden stake in concert, sexual penetration/rape with a foreign object –a wooden stake, or torture charged in Counts 1, 2, 3, 4, 5, 6, 7, and 8, the fact that the defendant was voluntarily intoxicated is not a defense and does not relieve defendant of responsibility for the crime.
>
> However, there is an exception to this general rule, namely, where a specific intent or mental state is an essential element of a crime. In that event, you should consider the defendant's voluntary intoxication in deciding whether the

> defendant possessed the required specific intent or mental state at the time of the commission of the alleged crime.
>
> Thus, in the crimes of murder, robbery, and kidnap for rape, charged in Counts 1, 2, and 3 and the special allegation, a necessary element is the existence in the mind of the defendant of a certain specific intent or mental state which is included in the definition of the crimes and special allegations set forth elsewhere in these instructions.
>
> If the evidence shows that a defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether or not the defendant had the required specific intent or mental state. If from all the evidence you have a reasonable doubt whether the defendant had that specific intent or mental state, you must find that defendant did not have that specific intent or mental state. (57CT 16194-16195, 20RT 4160.)

As can be seen in its fourth paragraph, this instruction also omitted Count Eight, torture, from its application.

B. Voluntary Intoxication Is a Proper Consideration In Resolving Whether a Defendant Intended to Inflict Torture

Count Eight charged torture that is defined by section 206[73] The offense requires an intent to inflict cruel or extreme pain and suffering. (*People v. Massie* (2006) 142 Cal.App.4th 365, 372 [48 Cal.Rptr.3d 304].) The intent required differs from the intent required for murder by torture since the offense of torture does not require that the defendant act with premeditation or deliberation or that the defendant have an intent to inflict *prolonged* pain. (*People v. Pre* (2004) 117 Cal.App.4th 413, 420 [11 Cal.Rptr.3d 739].) Thus, where thought processes have been dulled or otherwise disabled by extrinsic forces, like intoxication, the jury may conclude the defendant did not harbor the intent to inflict injury. (See, e.g.,

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[73] The section is set forth in Argument *V*, Part *A*, above, at page 170, footnote 38.

*People v. Massie, supra,* at p. 372.) The focus is on the mental state of the perpetrator and not the actual pain inflicted. (*People v. Hale* (1999) 75 Cal.App.4th 94, 108 [88 Cal.Rptr.2d 904].)

This Court in *People v. Pensinger, supra,* 52 Cal.3d 1210 has explained that when intoxication is relevant to the formation of specific intent, an instruction on intoxication should be related to the specific intent involved in torture. (*Id.* at p. 1243.) "[I]ntoxication is relevant to the requisite specific intent to inflict cruel suffering." (*Id* at p. 1242.) "Penal Code section 22 makes evidence of voluntary intoxication relevant on the issue of whether the defendant actually formed any required specific intent." (*Id.* at pp. 1242-1243.)

Although the trial court has no sua sponte duty to instruct on the relevance of intoxication, but if it does instruct, as the court here did, it has to do so correctly. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1014-1015 [68 Cal.Rptr.2d 648].)

In regard to CALJIC 3.31, it applies to all counts where the charge involves a specific intent, as does the crime of torture. (*People v. Massie, supra,* 142 Cal.App.4th at p. 372.) The trial court had a *sua sponte* obligation to include torture among the charges to which the instruction applied. (*People v. Ford* (1964) 60 Cal.2d 772, 792-793 [36 Cal.Rptr. 620]; *People v. Turner* (1971) 22 Cal.App.3d 174, 184 [99 Cal.Rptr. 186]; *USE NOTE*, CALJIC 3.31.) This is equally true in regard to CALJIC 2.02. (*People v. Bender* (1945) 27 Cal.2d 164, 175 [163 P.2d 8]; 3 Witkin, *California Evidence, Presentation at Trial,* (4th Ed.2000) §§ 142-143, pp. 203-204.)

C. Each of These Errors Precluded the Jury from Considering Intoxication as a Defense to Torture and Removed Torture from the Scrutiny Required Under CALJIC 3.31 and 2.02

The task for the reviewing court is to review the instructions as a whole to determine whether it is reasonably likely the jury misconstrued the instructions as precluding it from considering the intoxication evidence in deciding Kevin's culpability, even as an aider and abettor. (*People v. Castillo, supra,* at p. 1017.) Here, it is not only reasonably likely, but certain that the jury could not have discerned that Kevin's intoxication could be considered in resolving whether his specific intent had been to inflict cruel or extreme pain and suffering, a requisite for the crime of torture. After all, every doorway that had to be passed through to reach such a conclusion had been sealed. They had been told that CALJIC 2.02 was not applicable. (57CT 16191, 20RT 4158.) They had been told that CALJIC 3.31 was not applicable. (57CT 16192, 20RT 4159.) And, they had been told that CALJIC 4.21.1 was not applicable. (57CT 16194-16195, 20RT 4160.)

The acts committed that night were completely out of character for Kevin. His rather extraordinary consumption of intoxicants over the course of that evening was certainly warranted for consideration in the weighing process of whether he had harbored the specific intent to inflict cruel or extreme pain and suffering, as required for a finding of the crime of torture. His intoxication was the very hub of his defense. (19RT 4114-4118, 20RT 4263-4266.)

At this point, Kevin incorporates Part *G,* pages 204-207, from *Argument V* for support for the conclusion that the compelled, requisite remedy is to reverse the convictions for murder in Count One, torture in Count Eight, set aside the torture-murder special circumstance finding, and

vacate the death sentence, and remand for resentencing on the remaining counts.

## VIII. THE JURY INSTRUCTIONS IMPERMISSIBLY UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364 [25 L.Ed.2d 368, 90 S.Ct. 1068]; accord, *Cage v. Louisiana, supra,* 498 U.S. at pp. 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497 [189 Cal.Rptr. 501].) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia, supra,* 433 U.S. at p. 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship, supra,* 317 U.S. at p. 363) and at the heart of the right to trial by jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 [124 L.Ed.2d 182, 113 S.Ct. 2078] ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6 [127 L.Ed.2d 583, 114 S.Ct. 1239].) The trial court in this case gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict Kevin on a lesser standard than is constitutionally required. Because the instructions violated the United

States Constitution in a manner that can never be "harmless," the judgment must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

A. The Instructions On Circumstantial Evidence (CALJIC 2.90, 2.01, 2.02, 8.83, and 8.83.1) Undermined The Requirement Of Proof Beyond A Reasonable Doubt

The jury was instructed that Kevin was "presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (RT 2379; CT3 62.) These principles were supplemented by several instructions that explained the meaning of reasonable doubt. CALJIC 2.90 defined reasonable doubt as follows:

> It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is the state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge. (57CT 16180, 20RT 4150.)

The jury was given four interrelated instructions - CALJIC 2.01, 2.02, 8.83, and 8.83.1 - that discussed the relationship between the reasonable doubt requirement and circumstantial evidence.[74] They were directed at different evidentiary points, and advised Kevin's jury that if one interpretation of the evidence "appears to you to be reasonable and the other interpretation to be unreasonable, you *must* accept the reasonable

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[74] CALJIC 2.01 [sufficiency of circumstantial evidence – generally] (57CT 16163, 20RT 4143); CALJIC 2.02 [sufficiency of circumstantial evidence to prove specific intent or mental state] (57CT 16191, 20RT 4158); CALJIC 8.83 [special circumstances – sufficiency of circumstantial evidence – generally] (57CT 16213, 20RT 4170); and CALJIC 8.83.1 [special circumstances – sufficiency of circumstantial evidence to prove required mental state] (57CT 16214, 20RT 4171).

interpretation and reject the unreasonable. [Emphasis added.]" (57CT 16163, 16191, 16213-16214, 20RT 4143, 4159, 4170-4171.) These instructions essentially informed the jurors that if Kevin *reasonably appeared* to be guilty, they could find him guilty - even if they entertained a reasonable doubt as to guilt. This four times-repeated directive undermined the reasonable doubt requirement in two separate but related ways, violating Kevin's constitutional rights to due process (U.S. Const., Amend. XIV; Cal. Const., art. I, 7 & 15), trial by jury (U.S. Const., Amends. VI and XIV; Cal. Const., art. I, 16), and a reliable capital trial (U.S. Const., Amends. VIII and XIV; Cal. Const., art. I, 17). (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265 [105 L.Ed.2d 218, 109 S.Ct. 2419]; *Beck v. Alabama* (1980) 447 U.S. 625, 638 [65 L.Ed.2d 392, 100 S.Ct. 2382].)

First, the instructions not only allowed, but compelled, the jury to find Kevin guilty of murder and to find the special circumstance to be true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship, supra,* 397 U.S. at p. 364.) The instructions directed the jury to find Kevin guilty and the special circumstance true based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to them to be "reasonable." An interpretation that appears to be reasonable, however, is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. (*Jackson v. Virginia, supra,* 443 U.S. at p. 315; see *Sullivan v. Louisiana, supra,* 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty" [italics added].)

Thus, the instructions improperly required conviction on a degree of proof less than the constitutionally required standard of proof beyond a reasonable doubt.

Second, the circumstantial evidence instructions were constitutionally infirm because they required the jury to draw an incriminatory inference when such an inference appeared to be "reasonable." In this way, the instructions created an impermissible mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless Kevin rebutted the presumption by producing a reasonable exculpatory interpretation. "A mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain predicate facts." (*Francis v. Franklin, supra,* 471 U.S. 307, 314 [italics added, fn. omitted].) Mandatory presumptions, even those that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Id.* at pp. 314-318; *Sandstrom v. Montana, supra,* 442 U.S. at p. 524.)

Here, the instructions plainly told the jury that if only one interpretation of the evidence appeared reasonable, "you *must* accept the reasonable interpretation and reject the unreasonable." (57CT 16163, 16191, 16213-16214, 20RT 4143, 4159, 4170-4171.) In *People v. Roder, supra,* 33 Cal.3d at p. 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. All the more, this Court should invalidate the instructions given in this case, which required the jury to presume *all* elements of the crime supported by a reasonable interpretation of the circumstantial evidence

unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

These instructions had the effect of reversing the burden of proof, since it required the jury to find Kevin guilty unless he came forward with evidence explaining the incriminatory evidence put forward by the prosecution. Further, the instructions were prejudicial with regard to guilt in that they required the jury to convict Kevin if he "reasonably appeared" guilty, even if the jurors still entertained a reasonable doubt of his guilt. This is the equivalent of allowing the jury to convict Kevin because he likely intended to commit the offenses engaged in by Warren and Jamelle, rather than because they believed in his guilt or that the special circumstances allegations were true beyond a reasonable doubt. In addition, the constitutional defects in the circumstantial evidence instructions were particularly likely to have affected the jury's deliberations in this case, since there was no direct evidence of Kevin's intentions or involvement. As defense counseled noted during her closing, unlike Warren and Jamelle, Kevin's DNA was not on the victim's body. (20RT 4303-4304.)

The focus of the circumstantial evidence instructions on the reasonableness of evidentiary inferences also prejudiced Kevin by requiring that he prove his defense was reasonable before the jury could deem it credible. Of course, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215 [275 Cal.Rptr. 729], citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684 [44 L.Ed.2d 508, 95 S.Ct. 1881]; accord, *People v. Allison* (1989) 48 Cal.3d 879, 893 [258 Cal.Rptr. 208].)

For all these reasons, there is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find Kevin's guilt on a standard that is less than constitutionally required.

B. Other Instructions (CALJIC 1.00, 2.21.1, 2.21.2, 2.22, 2.27, 2.51 and 8.20) Also Vitiated The Reasonable Doubt Standard

The trial court gave seven other standard instructions that individually and collectively further diluted the constitutionally mandated reasonable doubt standard: CALJIC 1.00, regarding the respective duties of the judge and jury (57CT 16156 20RT 4140); CALJIC 2.21.1, regarding discrepancies in testimony (57CT 16170, 20RT 4146); CALJIC 2.21.2, regarding willfully false witnesses (57CT 16171, 20RT 4147); CALJIC 2.22, regarding weighing conflicting testimony (57CT 16172, 20RT 4147); CALJIC 2.27, regarding sufficiency of evidence of one witness (57CT 16173, 20RT 4147); CALJIC 2.51, regarding motive (57CT 16174, 20RT 4148); and CALJIC 8.20, defining premeditation and deliberation (57CT 16198, 20RT 4162.) Each of these instructions, in one way or another, urged the jury to decide material issues merely by determining which side had presented the relatively stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, thus vitiating the constitutional protections that forbid convicting a capital defendant on any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275; *Cage v. Louisiana*, *supra*, 498 U.S. 39; *In re Winship*, *supra*, 397 U.S. 358.)

As a preliminary matter, several instructions violated Kevin's constitutional rights as enumerated at the beginning of this argument by misinforming the jurors that their duty was to decide whether Kevin was guilty or innocent, rather than whether he was guilty beyond a reasonable doubt, or not guilty. Additionally, CALJIC No. 1.00 told the jury that pity

or prejudice for or against the defendant and the fact that he has been arrested, charged and brought to trial do not constitute evidence of guilt, "and you must not infer or assume from any or all of [these circumstances] that he is more likely to be guilty than innocent." (57CT 16156 20RT 4140.) CALJIC 2.01, discussed previously in Part *A* of this argument, also referred to the jury's choice between "guilt" and "innocence." (57CT 16163, 20RT 4143.)

In addition, the jury was instructed under former CALJIC No. 2.51 (5th ed.):

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. (57CT 16174, 20RT 4148.)

This instruction allowed the jury to determine guilt based on the presence of alleged motive alone and shifted the burden of proof to Kevin to show absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. As a matter of law, however, motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320 [a "mere modicum" of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

Further, CALJIC No. 2.51 informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. The instruction effectively placed the burden of proof on Kevin to show an alternative motive to that advanced by

the prosecutor. As used in this case, CALJIC No. 2.51 deprived Kevin of his federal constitutional rights to due process and fundamental fairness. The instruction also violated the Eighth Amendment's requirement for reliability in a capital case by allowing Kevin to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638 [reliability concerns extend to guilt phase].)

Similarly, CALJIC Nos. 2.21.1 and 2.21.2 lessened the prosecution's burden of proof. They authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence, you believe the *probability of truth* favors his or her testimony in other particulars." (57CT 16170-16171, 20RT 4146-4147 [italics added].) These instructions lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a "mere probability of truth" in their testimony. (See *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 822-825 [CALJIC 2.50.01 contrary to *Winship* and *Sullivan* and, under *Boyde v. California* (1990) 494 U.S. 370, 384-385 [108 L.Ed.2d 316, 110 S.Ct. 1190], error not cured by correct reasonable doubt and presumption of innocence instructions]; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [25 Cal.Rptr.2d 602] [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"];.)[75] The essential mandate

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[75] The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157 [123 Cal.Rptr. 903], wherein the court found no error in an instruction which arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt. (But see *Gibson v. Ortiz,*

of *Winship* and its progeny - that each specific fact necessary to prove the prosecution's case be proven beyond a reasonable doubt - is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." (See *Sullivan v. Louisiana, supra*, 508 U.S. at p. 278; *In re Winship, supra*, 397 U.S. at p. 364.)

Furthermore, CALJIC 2.22 provided as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence. (57CT 16172, 20RT 4147)

This instruction informed the jurors, in plain English, that their ultimate concern must be to determine which party has presented evidence that is comparatively more convincing than that presented by the other party. It specifically directed the jury to determine each factual issue in the case by deciding which witnesses, or which version, is more credible or more convincing than the other. In so doing, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with something that is indistinguishable from the lesser "preponderance of the evidence standard," i.e., "not in the relative number of witnesses, but in the convincing force of the evidence." As with CALJIC Nos. 2.21.1 and

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*supra,* at p. 822-825 ["'the unconstitutionality of any of the theories requires that the convictions be set aside.'")

2.21.2 discussed above, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (57CT 16173, 20RT 4147), likewise was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant is required only to raise a reasonable doubt about the prosecution's case; he cannot be required to establish or prove any "fact." Indeed, this Court has "agree[d] that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." (*People v. Turner, supra,* 50 Cal.3d 668, 697.) This Court's understated observation does not begin to address the unconstitutional effect of CALJIC No. 2.27, and this Court should find that it violated Kevin's Sixth and Fourteenth Amendment rights to due process and a fair jury trial.

Finally, CALJIC No. 8.20, defining premeditation and deliberation, misled the jury regarding the prosecution's burden of proof by instructing that deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition *precluding* the idea of deliberation ...." (57CT 16198, 20RT 4162 [italics added].) Jurors would reasonably interpret "precluding" to require the defendant to absolutely eliminate the possibility of premeditation, rather than to raise a reasonable doubt about that element. (See *People v.*

*Williams* (1969) 71 Cal.2d 614, 631-632 [79 Cal.Rptr. 65] [recognizing that "preclude" can be understood to mean "absolutely prevent"].)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." Taking the instructions together, no reasonable juror could have been expected to understand - in the face of so many instructions permitting conviction on a lesser showing - that he or she must find Kevin not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated the constitutional rights set forth at the beginning of this argument.

C. The Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions.

Although each one of the challenged instructions violated Kevin's federal constitutional rights by lessening the prosecution's burden and by operating as a mandatory conclusive presumption of guilt, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See, e.g., *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [96 Cal.Rptr.2d 1] [addressing false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [36 Cal.Rptr.2d 474] [addressing circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [15 Cal.Rptr.2d 400] [addressing CALJIC

2.01, 2.02, 2.21, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [279

Cal.Rptr. 780] [addressing circumstantial evidence instructions].)[76] While recognizing the shortcomings of some of the instructions, this Court consistently has concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that jurors are not misled when they also are instructed with CALJIC 2.90 regarding the presumption of innocence. There are several reasons that the Court's analysis should be reassessed.

First, what this Court has characterized as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 [116 L.Ed.2d 385, 112 S.Ct. 475].) There certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale - that the flawed instructions were "saved" by the language of CALJIC No. 2.90 - requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An

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[76] Although this Court has not specifically addressed the implications of the constitutional error contained in CALJIC Nos. 2.22 and 2.51, the courts of appeal have echoed the pronouncements by this Court on related instructions. (See *People v. Salas*, *supra*, 51 Cal.App.3d at pp. 155-157 [challenge to former version of CALJIC 2.22 "would have considerable weight if this instruction stood alone," but the trial court properly gave CALJIC 2.90]; *People v. Estep* (1996) 42 Cal.App.4th 733, 738-739 [citing *People v. Wilson* (1992) 3 Cal.4th 926, 943] [CALJIC 2.51 had to be viewed in the context of the entire charge, particularly the language of the reasonable doubt standard set out in CALJIC 2.90].)

instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin*, *supra,* 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075 [53 Cal.Rptr.2d 207] [citing *People v. Westlake* (1899) 124 Cal. 452, 457] [57 P. 465] [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [193 Cal.Rptr. 799] [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395 [70 Cal.Rptr.2d 427].)

Furthermore, nothing in the circumstantial evidence instructions given in this case explicitly informed the jury that those instructions were qualified by the reasonable doubt instruction.[77] It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions that contain their own independent references to reasonable doubt.

Even assuming that the language of a lawful instruction somehow can cancel out the language of an erroneous one - rather than the opposite - the principle does not apply in this case. The allegedly curative instruction

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[77] A reasonable doubt instruction also was given in *People v. Roder*, *supra*, 33 Cal.3d at p. 495, but it was held not to cure the harm created by the impermissible mandatory presumption.

was overwhelmed by the unconstitutional ones. Kevin's jury heard seven separate instructions, each of which contained plain language that was antithetical to the reasonable doubt standard. Yet the charge as a whole contained only one countervailing expression of the reasonable doubt standard: Penal Code Section 1096 as set out in CALJIC 2.90. This Court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson* (1992) 3 Cal.4th 926, 943 [13 Cal.Rptr.2d 259], citations omitted.) Under this principle, it cannot be maintained that a single instruction such as CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

Most recently, the Ninth Circuit Court of Appeals agreed with the foregoing analysis. In *Gibson v. Ortiz, supra,* 387 F.3d 812 the Court found in the context of CALJIC 2.50.01 (governing the use of other crimes by the defendant) that the instruction violated *Winship* and *Sullivan*, and further held that under *Boyde v. California, supra,* 494 U.S. at pp. 379-380, the error was not cured by CALJIC 2.90, because "[w]hen a court gives the jury instructions that allow it to convict a defendant on an impermissible legal theory, as well as a theory that meets constitutional requirements, 'the unconstitutionality of any of the theories requires that the convictions be set aside.'" (*Gibson v. Ortiz, supra,* at p. 825 [citation].)

D. Reversal Is Required.

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was structural error that is reversible per se. (*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 280-282; *Gibson v. Ortiz, supra*, 387 F.3d 812.)

Even if the erroneous instructions are viewed as only burden-shifting, the error is reversible unless the prosecution can show that the giving of the instructions was harmless beyond a reasonable doubt. (*Carella v. California, supra*, 491 U.S. at pp. 266-267.) Here, as set forth above, that showing cannot be made. Further, under CALJIC No. 2.51, the prosecutor was relieved of proving an element of first degree premeditated murder. Rather, the instructions permitted the prosecution to only establish motive in order for the jury to conclude that Kevin was guilty.

The dilution of the reasonable-doubt requirement by the guilt-phase instructions must be deemed per se reversible error. (See *Sullivan v. Louisiana, supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana, supra*, 498 U.S. at p. 41; *People v. Roder, supra,* 33 Cal.3d at p. 505.) The instructions also violated the Eighth Amendment's requirement for reliability in a capital case by allowing Kevin to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638 [reliability concerns extend to guilt phase].) Accordingly, Kevin's conviction and death sentence must be reversed.

## IX. THE CUMULATIVE EFFECT OF THE MULTIPLE ERRORS AT TRIAL RESULTED IN A TRIAL THAT WAS FUNDAMENTALLY UNFAIR, AND CONSTITUTIONALLY FLAWED

Reversal is mandated on each of the errors alleged above. Assuming arguendo that this Court finds each error individually harmless, the cumulative effect of all these errors demonstrates that a miscarriage of justice occurred. Reversal may be based on grounds of cumulative error, even where no single error standing alone would necessitate such a result. (*See People v. Ramos* (1982) 30 Cal.3d 553, 581 [180 Cal.Rptr. 266], revd. on other grounds in *California v. Ramos* (1985) 463 U.S. 992 [77 L. Ed. 2d 1171, 103 S.Ct. 3446]; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470 [174 Cal.Rptr. 67]; *People v. Vindiola* (1979) 96 Cal.App.3d 370, 388 [158 Cal.Rptr. 6]; *People v. Buffum* (1953) 40 Cal.2d 719, 726 [256 P.2d 317]; *Parle v. Runnels* (9th Cir. 2007) 505 F3d 922; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *United States v. McLister* (9th Cir. 1979) 608 F.2d 785, 791 see also *People* v. *Hill* (1998) 17 Cal.4th 800, 845-847 [72 Cal.Rptr.2d 656] [cumulative effect of multiple errors resulted in miscarriage of justice, requiring reversal under California Constitution].)

When errors of federal magnitude combine with non-constitutional errors, all errors should be reviewed together under a *Chapman* standard. In *People v. Williams* (1971) 22 Cal.App.3d 34, 50 [99 Cal.Rptr. 103] the court summarized the multiple errors committed at the trial level and concluded:

> Some of the errors reviewed are of constitutional dimension. Although they are not of the type calling for automatic reversal, we are not satisfied beyond a reasonable doubt that the totality of error we have analyzed did not contribute to the guilty verdict, or was not harmless error .... [Citations.] (*Id.* at pp. 58-59.)

Kevin has demonstrated that a number of errors of federal constitutional dimension occurred during or related to the guilt phase and that each such error mandates reversal. Kevin's confession was inadmissible because Kevin's *Miranda* warnings were not renewed, after a 26 hour hiatus between the first advisement and the commencement of his second interview. (Arg. II.) The gravity of the error and reliability of Kevin's statements have been forever masked by the failure of law enforcement to record the entire interrogation, rather than merely 83 minutes out of interviews lasting 7 hour and 33 minutes. (Arg. III.) Jury instructions were bungled, a theory for murder advanced without applicable statutory support, requisite elements were removed or mis-defined for the charged offenses and special circumstances, the jurors' task vastly oversimplified, and the jury left with an irreconcilable morass of 100 pages of instructions to sort through that clearly their drafters had not even understood. (Args. V-VIII.) With the prosecution's burden thus lessened, this case was presented to a jury whose selection had been skewed toward a death verdict. (Arg. I).

Even if the focus is limited to error during the course of the guilt phase trial, the cumulative impact clearly prejudiced Kevin. The question the jury had to resolve was the level of Kevin's culpability for the crimes. All it took was a single theory for murder, out of numerous theories proffered by the prosecution. The most repeated, in fact the dominant prosecution theme was premised upon torture—the substantive offense of torture, murder by torture, and torture special circumstances. Yet, this theory was riddled with flaws on every front in which it was presented. Of course, one or more jurors would have taken the prosecution's bait and rested his/her/their verdict for murder here. So simplifying the route to

murder assured that Kevin's account of being merely present and an involvement only after the crimes had been completed would not withstand the easy way out the jurors had been provided.

Respondent can not show these errors to have been harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) These errors variously deprived Kevin of his rights to liberty, fair trial, an unbiased jury, effective assistance of counsel, due process, heightened capital case due process and equal protection under the law, all in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. Taken together, these errors undoubtedly produced a fundamentally unfair trial setting and a new trial is required, due to the cumulative error. (*See Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6; *Derden v. McNeel* (5th Cir. (1992) 978 F.2d 1453; *cf. Taylor v. Kennedy* (1978) 436 U.S. 478 [56 L.Ed.2d 468, 98 S.Ct. 1930] [several flaws in state court proceedings combine to create reversible federal constitutional error].)

Assuming, arguendo, that this Court determines there was no constitutional error, it is reasonably probable that a result more favorable to Kevin would have been reached, absent the above errors. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].) These errors mandate reversal.

Moreover, the effect of each and all of these guilt phase errors must be added to the subsequent penalty phase errors in the evaluation of cumulative error in both guilt and penalty phases. (*See People v. Hayes* (1990) 52 Cal.3d 577, 644 [276 Cal.Rptr. 874] [court weighs prejudice of guilt phase instructional error against prejudice in penalty phase].) The jury was instructed at the penalty phase to consider all of the evidence that had been received during any part of the trial. (57CT 162696.) However,

because the issues resolved at the guilt phase are fundamentally different from the question resolved at the penalty phase, the possibility exists that an error might be harmless as to the guilt determination, but still prejudicial to the penalty determination. (*Smith v. Zant* (11 Cir. 1988) 855 F.2d 712, 721-722 [admission of confession harmless as to guilt but prejudicial as to sentence].)

## X. THE USE OF THREE UNADJUDICATED OFFENSES AS EVIDENCE IN AGGRAVATION VIOLATED KEVIN'S EIGHTH AMENDMENT AND DUE PROCESS RIGHTS

As detailed in the *Statement of the Facts*, Penalty Phase, and incorporated herein, Kevin was not a hardened criminal with a string of prior convictions; he had *no* criminal record. Thus, the prosecution was reduced to arguing from the testimony of a single childhood friend of Kevin, Janisha Williams, that three relatively minor incidents equated to a history of menacing violence.[78]

The use of these unadjudicated alleged offenses deprived Kevin of a fair penalty phase hearing and undermined the reliability of the death penalty determination. Their admission into evidence at the penalty phase of his trial violated his right to due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, as well as his Eighth and Fourteenth Amendment rights to a reliable penalty phase determination. In *Gardner v. Florida* (1977) 430 U.S. 349 [51 L.Ed.2d 393, 97 S.Ct. 1197] the United States Supreme Court stated in relevant part:

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[78] The incidents purportedly occurred in about 1996. Ms. Williams testified that she saw Kevin hit somebody once or twice with a stick; he was with a group of 10 that "jumped" a teenager; and she saw him kick a couple people off their bicycles. (21RT 4450-4457, 4461.)

> [D]eath is a different kind of punishment from any other which may be imposed in this country. [Citations.] From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion. [I]t is now clear that the sentencing process ... must satisfy the requirements of the Due Process Clause. (*Id.* at pp. 357-358.)

Thus, for a death decision to be based on reason, due process requires that it be based on accurate and reliable information. (*Id.* at p. 359.) Moreover, the death penalty "may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 427 [64 L.Ed. 2d 398, 100 S.Ct. 1759] [plur. opn.].)

In the instant case, the prosecution will be unable to establish beyond a reasonable doubt that Kevin's death verdict was not based in substantial part on inadmissible evidence of the unadjudicated "crimes" which never even resulted in an arrest. Although California required individual jurors to find beyond a reasonable doubt that Kevin committed these unadjudicated crimes before the jurors could consider them as aggravating evidence,[79] the beyond a reasonable doubt requirement does not go far enough to eliminate undue prejudice. Kevin was still required to defend himself on these matters before a jury which had just convicted him

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[79] The jury instructions did not require juror unanimity as to alleged unadjudicated crimes before individual jurors could consider such alleged crimes as aggravating factors. The failure to require juror unanimity further undermined the reliability of the sentencing determination, and, as argued below in Argument *XV, D*, violated Kevin's Sixth Amendment right to trial by jury.

of capital murder. Such a procedure was inherently unfair and prejudicial to Kevin.

In *Ake v. Oklahoma* (1985) 470 U.S. 68 [84 L.Ed.2d 53, 105 S.Ct. 1087], the Supreme Court stated "a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." (*Id.* at p. 79.) The unreliability and unfair prejudice inherent in a system that allows the prosecution to introduce evidence about unadjudicated encounters to persuade the jury to vote for a death sentence creates a "strategic disadvantage" of the type condemned in *Ake*. Such a system places defendant at a disadvantage by creating a presumption that the allegations are true (rather than vice versa) and by forcing the defendant to "try" his alleged crimes before a biased jury on unrelated charges.

Finally, allowing the jury to consider evidence of unadjudicated "crimes" eroded the presumption of innocence to which Kevin was entitled. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 585 [100 L.Ed.2d 575, 108 S.Ct.2d 1981].) When Kevin was convicted of the capital murder charges in the instant case, his convictions only removed the presumption of innocence as to those murder charges. (*Herrera v. Collins* (1993) 506 U.S. 390, 399 [122 L.Ed.2d 206, 113 S.Ct. 853].) As a matter of law, Kevin retained a presumption of innocence with regard to the unadjudicated crimes because the State failed to adjudicate and prove his guilt as to those crimes. Here, because they had just found Kevin guilty of a capital murder, it is likely that the jurors were primed to presume that Kevin was guilty of the unadjudicated offenses presented in the penalty phase. In *People v. Earp* (1999) 20 Cal.4th 826 [85 Cal.Rptr.2d 857], this court observed:

> In a state such as California that in capital cases provides for a sentencing verdict by a jury, "the due process

> clause of the Fourteenth Amendment of the federal constitution requires the sentencing jury to be impartial to the same extent that the Sixth Amendment requires jury impartiality at the guilt phase of the trial." (*Id.* at p. 852, quoting *People v. Williams* (1997) 16 Cal.4 635, 666 [66 Cal.Rptr.2d 573].)

A jury which believes itself well-acquainted with Kevin's ability to commit a capital murder would be more predisposed to believe in his ability to commit other crimes than would a new jury untainted by prior knowledge. (*State v. Bartholomew* (Wash. 1984) 683 P.2d 1079, 1086 [a jury which has convicted a defendant of a capital crime is unlikely to fairly and impartially weigh evidence of prior alleged offenses].) In the instant case, jurors who just convicted Kevin of first degree murder could not remain impartial with regard to the unadjudicated offenses.

Because the ultimate penalty of death is irreversible, the Constitution requires that a state seeking to execute one of its citizens take every step to ensure that its process is free from inaccurate and unreliable results. The use of inadmissible evidence of unadjudicated crimes in the penalty phase of Kevin's trial was inherently flawed and does not comport with the Eighth and Fourteenth Amendments' mandate of accuracy and reliability. (See *Cook v. State* (Ala. 1979) 369 So.2d 1251, 1257 [the presumption of innocence "prohibits use against an individual of unproven charges in this life or death situation"]; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276, 281 ["the risk that the previously tainted jury will react in an arbitrary manner [when unadjudicated offenses are introduced] is infinitely greater" than when such offenses are "presented to an impartial, untainted jury"]; *Commonwealth v. Hoss* (Pa. 1971) 283 A.2d 58, 69 ["it is imperative that the death penalty be imposed only on the most reliable evidence ...; piecemeal testimony about other crimes for which Kevin has not yet been

tried or convicted can never satisfy this standard"]; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 952-953 ["to permit the State to present evidence [of unadjudicated offenses] ... before the very jury that has just returned a guilty verdict for first degree murder, violates the concept of fundamental fairness embodied in due process of law"]; *Scott v. State* (Md. 1983) 465 A.2d 1126, 1135 [state law permits admission of prior convictions only, not evidence of unadjudicated offenses]; *Provence v. State* (Fla. 1976) 337 So.2d 783, 786 [same]; *United States v. Carranza* (1st Cir. 1978) 583 F.2d 25, 27 [when separate non-capital charges are at issue, "a defendant has a constitutional right not to be tried by any jurors who participated in his conviction in a prior case. [Citations.]]"; see also *Leonard v. United States* (1964) 378 U.S. 544, 545 [12 L.Ed.2d 1028, 84 S.Ct. 1696] [*per curiam*]; *United States v. McIver* (11th Cir. 1982) 688 F.2d 726, 728-731.)[80]

Allowing the jury to consider evidence of three unadjudicated crimes as factors in aggravation violated both the state and federal constitutions. It bolstered the prosecution's theme that Kevin was a violent and threatening person. And, because the prosecutor heavily relied upon that evidence during jury argument, (23RT ), these violations cannot be deemed harmless beyond a reasonable doubt. (*Johnson v. Mississippi, supra*, 486 U.S. at p.

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[80] This Court apparently did not consider the principles announced in these cases when it decided *People v. Balderas* (1985) 41 Cal.3d 144 [222 Cal.Rptr. 184]. It, therefore, should not have rejected the defendant's argument on the ground that the argument would "of course" also prohibit "all efforts to try more than one crime to the same jury." (*Id.* at p. 204.) The constitutional prohibition recognized in the federal cases is not a prohibition against two charges being tried together; it is a prohibition against a second charge being tried by biased jurors who have already made up their minds that the defendant is guilty of an earlier charge. (See e.g., *Virgin Islands v. Parrott* (3d Cir. 1977) 551 F.2d 553, 554 ["A juror who has made up his mind that a defendant has committed an offense cannot be open-minded in another case involving a similar charge when the trials are near in time"].)

586; *Chapman v. California, supra*, 386 U.S. at p. 24.) Therefore, Kevin's death sentence should be vacated.

## XI. CALIFORNIA'S DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO CONTAIN ADEQUATE SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVE DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH

California's death penalty statute failed to provide any of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make—whether or not to condemn a fellow human to death.

These omissions in the California capital-sentencing scheme, individually and collectively, run afoul of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

A. The Statute And Instructions Unconstitutionally Failed To Assign To The State The Burden Of Proving Beyond A Reasonable Doubt The Existence Of An Aggravating Factor, That The Aggravating Factors Outweigh The Mitigating Factors, And That Death Is The Appropriate Penalty

Except as to prior criminality, Kevin'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. As a result, Kevin's constitutional right to a jury determination beyond a reasonable doubt of all facts essential to the imposition of a death penalty was violated.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255 [69 Cal.Rptr.2d 784], this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors ...." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435, 120 S.Ct. 2348] [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [153 L.Ed.2d 556, 122 S.Ct. 2428] [hereinafter *Ring*]; *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403, 124 S.Ct. 2531] [hereinafter *Blakely*]; and *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856. 127 S.Ct. 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. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at p. 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona, supra,* 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Ring, supra,* at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. *Any* factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

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

In reaching this holding, the supreme court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be

submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at p. 304; 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 [160 L.Ed.2d 621, 125 S.Ct. 738], the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*Id.* at p. 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (*Cunningham v. California, supra*, Section III.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

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

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a

defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance—and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [14 Cal.Rptr.2d 133] [penalty phase determinations are "moral and ... not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[81] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177 [121 Cal.Rptr.2d 106]), which was read to Kevin's jury (57CT 16300, 23RT 4929-4930),"an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; 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

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[81] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also—and most important—to render an individualized, normative determination about the penalty appropriate for the particular defendant....." (*People v. Brown* (1988) 46 Cal.3d 432, 448 [250 Cal.Rptr. 604].)

substantially outweigh mitigating factors.[82] 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.[83]

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 41 [45 Cal.Rptr.3d 407]; *People v. Dickey* (2005) 35 Cal.4th 884, 930 [28 Cal.Rptr.3d 647]; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32 [132 Cal.Rptr.2d 271]; *People v. Prieto* (2003) 30 Cal.4th 226, 275 [133 Cal.Rptr.2d 18].)

It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases. In *People v. Black* (2005) 35 Cal.4th 1238, 1254 [29 Cal.Rptr.2d 740], this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury

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82 In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.'" (*Id.* at p. 460.)

83 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 [232 Cal.Rptr. 849]; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541 [230 Cal.Rptr. 834].)

finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (*Id* at p. 1254.)

The United States Supreme Court explicitly rejected this reasoning in *Cunningham.*[84] 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. (*Id.* pp. 6-7.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." (*Cunningham, supra,* p. 13.)

*Cunningham* then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.* p. 14.)

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[84] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black, supra,* 35 Cal.4th at p. 1253; *Cunningham, supra,* at p.8.)

> 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 by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740... (stating, remarkably, that "[t]he high court precedents do not draw a bright line"). (*Cunningham, supra,* at p. 13.)

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

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589 [106 Cal.Rptr.2d 575].) After Ring, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto, supra*, 30 Cal.4th at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[85] indicates, the maximum penalty for any first degree murder conviction is death. The

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[85] Section 190, subd. (a) provides: "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."

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 jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151. (*Ring*, 124 S.Ct. at p. 2431.)

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

penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (§ 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 p. 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 p. 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.

*2. 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* (Az. 2003) 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People,* 64 P.3d 256 (Colo.2003); *Johnson v. State* (Nev. 2002) 59 P.3d 450.[86])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 [141 L.Ed.2d 615, 118 S.Ct. 2246] ["the death penalty is unique in its severity and its finality"].)[87] As the high court stated in *Ring, supra*:

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[86] 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).

[87] 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 [71 L.Ed.2d 599. 102 S.Ct. 1388] rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri,*] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California, supra*, 524 U.S. at p. 732 (emphasis added).)

> 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. (*Id.* at 122 S.Ct. at p. 2432.)
>
> 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. (*Id.* at 122 S.Ct. at p. 2443.)

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.

B. The Proper Allocation and Degree of the Burden of Proof Are Essential Requisites of the Due Process and Cruel and Unusual Punishment Clauses of the State and Federal Constitution

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 [2 L.Ed.2d 1460, 78 S.Ct. 1332].)

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 [25 L.Ed.2d 368, 90 S.Ct. 1068].) 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 [51 L.Ed.2d 393, 97 S.Ct. 1197]; see also *Presnell v. Georgia* (1978) 439 U.S. 14 [58 L.Ed.2d 207, 99 S.Ct. 235].) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423 [60 L.Ed.2d 323, 99 S.Ct. 1804]; *Santosky v. Kramer* (1982) 455 U.S. 745, 755 [71 L.Ed.2d 599, 102 S.Ct. 1388].)

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 [121 Cal.Rptr. 509] (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 [121 Cal.Rptr. 488] (same); *People v. Thomas* (1977) 19 Cal.3d 630 [139 Cal.Rptr. 594] (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal..3d 219 [152 Cal.Rptr. 425] (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." (*Id.* 455 U.S. at p. 755.)

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

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina, supra,* 428

U.S. 280, 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* (1981) 451 U.S. 430, 441 [68 L.Ed.2d 270, 101 S.Ct. 1852]] (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.

C. California Law Violates 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 Kevin of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543 [93 L.Ed.2d 934, 107 S.Ct. 837]; *Gregg v. Georgia* (1976) 428 U.S. 153, 195 [49 L.Ed.2d 859, 96 S.Ct. 2909].) And 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 at least 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 [9 L.Ed.2d 770, 83 S.Ct. 745].)

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859 [9 Cal.Rptr.2d 24].)

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 [113 Cal.Rptr. 361].) 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 therefore." (*Id.* at p. 267.)[88] The same analysis applies to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [229 Cal.Rptr. 131] [statement of reasons essential to meaningful appellate review].)

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

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [115 L.Ed.2d 836, 111 S.Ct. 2680].) 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*), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15 [100 L.Ed.2d 384, 108 S.Ct. 1860].) Even where the decision to impose death is "normative" (*People v. Demetrulias, supra,* 39 Cal.4th 1, 41-42; *People v. Hayes* (1990) 52 Cal.3d 577, 643 [276 Cal.Rptr. 874]) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79) its basis can be, and should be, articulated.

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

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* (2006) ___ U.S. ___ [165

L.Ed.2d 429, 126 S.Ct. 2516] [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.

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

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review—a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51 [79 L.Ed.2d 29, 104 S.Ct. 871] 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*." (*Ibid.* [emphasis added].)

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

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia* (1972) 408 U.S. 238 [33 L.Ed 346, 92 S.Ct. 2726]. (See Argument *XIII, A*, below.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Arguments *XI, C*, above, and *XII,* below), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Argument *XI, E*, below, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh* (2006) ___ U.S. ___ [165 L.Ed.2d 429, 126 S.Ct. 2516, 2527, fn. 6]), this absence renders that scheme unconstitutional.

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed.

(See *Gregg v. Georgia, supra,* 428 U.S. 153, 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate—even cases from outside the United States. (See *Atkins v. Virginia* (2002) 536 U.S. 304 [153 L.Ed.2d 335, 122 S.Ct. 2242, 2248-2249]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, 830-831 [101 L.Ed.2d 702, 108 S.Ct. 2687]; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22 [73 L.Ed.2d 1140, 102 S.Ct. 3368]; *Coker v. Georgia* (1977) 433 U.S. 584, 596 [53 L.Ed.2d 982, 97 S.Ct. 2861].)

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* (1991) 1 Cal.4th 173, 253 [3 Cal.Rptr.2d 426].) 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 [269 Cal.Rptr. 269].) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

E. The Death Penalty Statute Is Invalid As Applied Because it Allows Arbitrary and Capricious Imposition of Death in Violation of the United States Constitution.

Section 190.3, factor (a), violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed

supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[89] 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,[90] or having had a "hatred of religion,"[91] or threatened witnesses after his arrest,[92] or disposed of the victim's body in a manner that precluded its recovery.[93] 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 [36 Cal.Rptr.3d 760].)

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*

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[89] *People v. Dyer* (1988) 45 Cal.3d 26, 78 [246 Cal.Rptr. 209]; *People v. Adcox* (1988) 47 Cal.3d 207, 270 [253 Cal.Rptr. 55]; see also CALJIC No. 8.88 (2006), par. 3.

[90] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10 [253 Cal.Rptr. 863], *cert. den.*, 494 U.S. 1038 (1990).

[91] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582 [286 Cal.Rptr. 628], *cert. den.*, 112 S. Ct. 3040 (1992).

[92] *People v. Hardy* (1992) 2 Cal.4th 86, 204 [5 Cal.Rptr.2d 796], *cert. den.*, 113 S. Ct. 498.

[93] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35 [259 Cal.Rptr. 630], *cert. den.* 496 U.S. 931 (1990).

(1994) 512 U.S. 967 [129 L.Ed.2d 750, 114 S.Ct. 2630]), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

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

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder... were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [100 L.Ed.2d 372, 108 S.Ct. 1853] [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420 [64 L.Ed.2d 398, 100 S.Ct. 1759]].) 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.

F 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 during the sentencing phase, as outlined in section 190.3, subdivision (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi, supra,* 486 U.S. 578; *State v. Bobo, supra,* 727 S.W.2d 945.) Here, as explained in detail in Argument *X*, above, the prosecution presented evidence of unadjudicated misconduct. Indeed, a significant portion of the prosecution's case in aggravation consisted of this unadjudicated misconduct as did their closing argument.

The U.S. Supreme Court's recent decisions in *U. S. 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. Kevin'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.

G. The Use of a Restrictive Adjective in the List of Potential Mitigating Factors Impermissibly Acted as a Barrier to Consideration of Mitigation by Kevin'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 [57 L.Ed.2d 973, 98 S.Ct. 2954].)

H. 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.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors utilized here introduced by a prefatory "whether or not" – factors (d) and (h) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184 [259 Cal.Rptr. 701]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034 [254 Cal.Rptr. 586]; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031, fn.15 [245 Cal.Rptr. 185]; *People v. Melton* (1988) 44 Cal.3d 713, 769-770 [244 Cal.Rptr. 867]; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289 [221 Cal.Rptr. 794].) 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. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879 [77 L.Ed.2d 235, 103 S.Ct. 2733]; *Johnson v. Mississippi, supra,* 486 U.S. 578, 584-585.)

It is thus likely that Kevin'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 Kevin "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 [117 L.Ed.2d 367, 112 S.Ct. 1130].)

The impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d) or (h) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d) or (h) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal

standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" (*Tuilaepa v. California, supra,* 512 U.S. 967, 973 quoting *Gregg v. Georgia, supra,* 428 U.S. 153, 189 [joint opinion of Stewart, Powell, and Stevens, J.]) and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112 [71 L.Ed.2d 1, 102 S.Ct. 869].)

I. Conclusion

As set forth above, the trial court violated Kevin's federal constitutional rights by failing to set out the appropriate burden of proof and unanimity requirements regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

## XII. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS

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

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that

"personal liberty is a fundamental interest, *second only to life itself*, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 [131 Cal.Rptr. 55] (emphasis added).) If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784-785 [87 Cal.Rptr. 839].) 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 [86 L.Ed. 1655, 62 S.Ct. 1110].)

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. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections designed to make a sentence more reliable.

In *Prieto v. Prieto, supra*,[94] as in *People v. Snow, supra*,[95] this Court analogized the process of determining whether to impose death to a

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[94] "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*, 30 Cal.4th at p. 275.)

[95] "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,

sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrlias, supra,* 39 Cal.4th 1, 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 is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.420, 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." [96]

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. (See Argument *XI, A,* above.) And unlike most states where death is a sentencing option and all persons being sentenced to non-capital crimes in California, no reasons for a death sentence need be provided. (See Argument *XI, C,* above.) These discrepancies on basic procedural protections are skewed against persons subject to the loss of their life; they

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impose one prison sentence rather than another." (*Snow*, 30 Cal.4th at p. 126, fn. 32.)

[96] 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.

violate equal protection of the laws.[97] (*Bush v. Gore* (2000) 531 U.S. 98, 104-106 [148 L.Ed.2d 388, 121 S.Ct. 525].)

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

## XIII. THERE ARE NUMEROUS OTHER FEDERAL CONSTITUTIONAL FLAWS IN CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED AND APPLIED AT KEVIN'S TRIAL

Many features of this state'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, Kevin 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. Individually and collectively, these various constitutional defects require that Kevin's sentence be set aside.

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[97] 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 p. 609.)

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, supra,* ___ U.S. ___ [165 L.Ed.2d 429, 126 S.Ct. 2516, 2527, fn. 6];[98] see also, *Pulley v. Harris, supra,* 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].)

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

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

unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability. (See Part *A*, below.)

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 of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 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. The Death Penalty Is Invalid Because Section 190.2 Fails to Narrow Eligibility for the Death Penalty

California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3, factor (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. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. As this Court has recognized:

> 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." (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 [conc. opn. of White, J.]; *accord*, *Godfrey v. Georgia*, (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 [plur. opn.].) (*People v. Edelbacher, supra,* 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:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. (*Zant v. Stephens, supra,* 462 U.S. 862, 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required

'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 468 [24 Cal.Rptr.2d 808].)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. 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 Kevin, the statute contained 31 special circumstances[99] 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 the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*" (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].)

Section 190.2's all-embracing special circumstances were created with intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons

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[99] 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 [183 Cal.Rptr. 800]. The number of special circumstances has continued to grow and is now thirty-three.

eligible for the death penalty. 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, under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1983) 34 Cal.3d 441 [194 Cal.Rptr. 390].) 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 intentional murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515 [117 Cal.Rptr.2d 45]; *People v. Morales* (1989) 48 Cal.3d 527, 557-558, 575 [257 Cal.Rptr. 64].) These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283, 1324-1326.)[100] It is quite clear that these theoretically possible noncapital first

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[100] The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," i.e., a premeditated murder not falling under one of section 190.2's many special circumstance provisions. (Shatz and Rivkind, *supra*, 72 N.Y.U. L.Rev. at 1325.) This would be a premeditated murder committed by a defendant not convicted of another murder and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to

degree murders represent a small subset of the universe of first degree murders (*Ibid.*). Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. In *People v. Stanley* (1995) 10 Cal.4th 764, 842 [42 Cal.Rptr.2d 543], this Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris, supra,* 465 U.S. 37, 53. Not so. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which Kevin was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Pulley*, *supra*, 465 U.S. at p. 52, fn. 14.)

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

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be a premeditated murder not committed by means of lying in wait, i.e., a planned murder in which the killer simply confronted and immediately killed the victim or, even more unlikely, advised the victim in advance of the lethal assault of his intent to kill—a distinctly improbable form of premeditated murder. (*Ibid.*)

Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.

B. The Administration Of California's Death Penalty Is So Arbitrary As To Constitute Cruel And Unusual Punishment

The circumstances of California's administration of the death penalty, especially as they exist at this time, are strikingly similar to those in Arizona discussed in Judge Noonan's dissenting opinion in *Jeffers v. Lewis* (9th Cir. 1994) 38 F.3d 411, 425-428. The ultimate selection of who lives and who dies is arbitrary for numerous reasons—the rarity and unpredictable order in which the death penalty is carried out, the necessary lengthy and multi-tiered review process, the lack of any viable solution to expedite or make more orderly the review process, and the simply symbolic role the death verdict has become. (*Ibid.*) Compounding the problem is the increasing backlog of death cases in state courts, which can only serve to truncate the review eventually provided the cases caught in the backlog (and this is one). (*See id.* at p. 426.) In any event, a death penalty so irrationally applied is an Eighth and Fourteenth Amendment violation. (*See id.* at p. 428.)

C. The Death Penalty Statutes Unconstitutionally Permits Unbounded Prosecutorial Discretion

In this State, the prosecutor has sole authority to make what is literally a life or death decision, without any legal standards to be used as guidance. Irrespective of whether prosecutorial discretion in charging is constitutional in other situations, the difference between life and death is

not at all analogous to the usual prosecutorial discretion situation, *e.g.*, the difference between charging something as a burglary or a theft.

As it stands, an *individual prosecutor* has complete discretion to determine whether a penalty hearing will be held to determine if the death penalty will be imposed. As Justice Broussard noted in his dissenting opinion in *People v. Adcox, supra,* 47 Cal.3d 207, 275-276, this creates a substantial risk of county-by-county arbitrariness. Under this statutory scheme, some offenders will be chosen as candidates for the death penalty by one prosecutor, while other offenders with similar qualifications in different counties will not be singled out for the ultimate penalty. Moreover, the absence of standards to guide the prosecutor's discretion permits reliance on constitutionally irrelevant and impermissible considerations, or simple arbitrariness.

The arbitrary and wanton prosecutorial discretion allowed by the California scheme—in charging, prosecuting and submitting a case to the jury as a capital crime—merely compounds, in application, the effects of vagueness and arbitrariness inherent on the face of the California statutory scheme. (See Part *A*, above, illustrating the vast discretion permitted prosecutors by the failure of California's death penalty statute to meaningfully narrow the pool of murderers eligible for the death penalty.) Just like the "arbitrary and wanton" discretion condemned in *Woodson v. North Carolina, supra,* 428 U.S. at p. 303, such unprincipled discretion is contrary to the principled decision-making mandated by the Sixth, Eighth and Fourteenth Amendments. (*Furman v. Georgia, supra,* 408 U.S. 238.)

In general, state action that is bereft of standards, without anything to guide the actor and nothing to prevent the decision from being completely arbitrary, is a violation of a person's right to due process of law.

(*Kolender v. Lawson* (1983) 461 U.S. 352, 358 [75 L.Ed.2d 903, 103 S.Ct. 1855].) This standard applies to prosecutors as much as other state actors. (*Ibid.*)

Here, the offense with which Kevin was charged, a single count of murder, was certainly an awful offense. So is any charge that is potentially capital. However, prosecutors sometimes do not seek the death penalty for capital offenses even those including multiple murders. (*See, e.g., People v. Walker* (1993) 17 Cal.App.4th 1189 [21 Cal.Rptr.2d 880] [negotiated plea bargain to two counts of first-degree murder, with sentence of 25 years to life]; *People v. Bobo* (1990) 229 Cal.App.3d 1417, 1421-1422 [3 Cal.Rptr.2d 747] [defendant convicted of arson and three counts of first-degree murder (by stabbing); death penalty not sought]; *People v. Moreno* (1991) 228 Cal.App.3d 564, 567-568 [279 Cal.Rptr. 140] [defendant convicted of two counts of first-degree murder, burglary and attempted robbery; death penalty waived].) The absence of standards to guide such decisions falls under *Kolender* and other vagueness cases.

For these reasons as well, Kevin's death sentence violates the Sixth, Eighth and Fourteenth Amendments.

D. Inability Of Postconviction Relief To Balance Considerations Essential In Imposition Of Death Penalty

The limitations of the federal postconviction administration of the death penalty are "fraught with arbitrariness, discrimination, caprice, and mistake." (*Callins v. Collins* (1994) 510 U.S. 1141 [127 L.Ed.2d 435, 114 S.Ct. 1127] [opn. of Blackmun, J., dissenting from denial of cert.].) "Experience has taught ... that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death [citation] can never be achieved without compromising an equally essential component of fundamental fairness-individualized sentencing. [Citation.]"

(*Ibid.*) Searching appellate review of this process has been sacrificed by substituting constitutional requirements with mere esthetics. (*Id.* at p. 1145.) "The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution. [Fn. Omitted.]" (*Id.* at pp. 1145-1146.)

The limitations of California's postconviction administration of the death penalty, especially as they exist at this time, are strikingly similar to those cited by Justice Blackmun.

E. Insufficiency Of Available Postconviction Relief In Federal And State Courts

Kevin incorporates by reference Justice Blackmun's concurrence in *Sawyer v. Whitley* (1992) 505 U.S. 333, 357-360 [120 L.Ed.2d 269, 112 S.Ct. 2514], in which he grappled with the likely reality that the ever-increasing procedural barriers to meaningful federal habeas corpus relief "undermine[] the very legitimacy of capital punishment itself." However, the procedural barriers have continued to mount since *Sawyer*. Furthermore, they have now been joined by an ever-growing set of procedural barriers in state court as well. (*See, e.g., In re Clark* (1993) 5 Cal.4th 750 [21 Cal.Rptr.2d 509].) The severe diminution of the availability of federal habeas corpus relief and the labyrinth a petitioner must navigate to try to obtain it, as well as the ever-increasing creation of new procedural barriers in California and the combination of the two, operate to render the system of review of capital convictions and sentences more arbitrary and less reliable than was contemplated when capital punishment was resumed in 1976 (*Gregg v. Georgia, supra,* 428 U.S. 153), and more arbitrary and less reliable than is necessary for there to be meaningful post-conviction review.

In this context, it is highly noteworthy that federal habeas corpus relief was much more readily available in 1976, the year *Gregg v. Georgia, supra,* was decided, than it is now; the federal system as it existed then was adequate to guard against arbitrary or capricious imposition of the ultimate sentence in violation of federal constitutional law. (*See Sawyer v. Whitley, supra,* 505 U.S. at pp. 357-360 [conc. opn. of Blackmun, J.].) With its severe compression, it is not any more.

F. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and as a Result Violates 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 [106 L.Ed.2d 306, 109 S.Ct. 2969] [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* (1895) 159 U.S. 113, 227 [40 L.Ed. 95, 16 S.Ct. 139]; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292 [31 L.Ed. 430, 8 S.Ct. 461]; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

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

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes—as opposed to extraordinary punishment for extraordinary crimes—is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra*, 536 U.S. at p. 315-316.) 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, supra,* 159 U.S. 113, 227; see also *Jecker, Torre*

*& Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311]; see Argument *XIV*, below.)

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."[101] 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 [91 L.Ed.2d 335, 106 S.Ct. 2595]; *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. Kevin's death sentence should be set aside.

## XIV. THE VIOLATIONS OF STATE AND FEDERAL LAW ARTICULATED ABOVE LIKEWISE CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, AND KEVIN'S CONVICTION AND SENTENCE OF DEATH MUST BE SET ASIDE

Kevin was denied his right to a fair trial by an independent tribunal and his right to minimum guarantees for the defense under principles established by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration of the Rights and Duties of Man (American Declaration). For reasons set forth previously, Kevin contends that his rights under the state and federal constitutions have been violated. However, he further submits

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

that these errors also violate principles of international law and provisions of treaties which are co-equal with the United States Constitution and binding upon the judges of the courts of all the states pursuant to the Supremacy Clause. (U.S. Const., art. VI, cl. 2.) In addition, these contentions are being raised here as the first step in exhausting administrative remedies in order to bring Kevin's claim in front of the Inter-American Commission on Human Rights on the grounds that the defects in the judgment are violations of the American Declaration of the Rights and Duties of Man.

A. The United States and this State Are Bound by Treaties and by Customary International Law

*1. BACKGROUND*

The two principal sources of international human rights law are treaties and customary international law. The United States Constitution accords treaties equal rank with the constitution and federal statutes as the supreme law of the land.[102] Customary international law is equated with federal common law.[103] International law must be considered and administered in United States courts whenever questions of a right which depends upon it are presented for determination. (*The Paquete Habana* (1900) 175 U.S. 677, 700 [44 L.Ed. 320, 20 S.Ct. 290].) To the extent

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[102] Article VI, section 1, clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[103] Restatement Third of the Foreign Relations Law of the United States (1987), p. 145, 1058; see also *Eyde v. Robertson* (1884) 112 U.S. 580, 597-600 [28 L.Ed. 798, 5 S.Ct. 247].

possible, courts must construe American law so as to avoid violating principles of international law. (*Murray v. The Schooner, Charming Betsy* (1804) 6 U.S. (2 Cranch) 64, 102, 118 [2 L.Ed 208].) When a court interprets a state or federal statute, the statute "ought never to be construed to violate the law of nations, if any possible construction remains...." (*Weinberger v. Rossi* (1982) 456 U.S. 25, 33 [71 L.Ed.2d 715, 102 S.Ct. 1510].) The United States Constitution also authorizes Congress to "define and punish ... offenses against the law of nations," thus recognizing the existence and force of international law. (U.S. Const. Article I, section 8.) Courts within the United States have responded to this mandate by looking to international legal obligations, both customary international law and conventional treaties, in interpreting domestic law. (*Trans World Airlines, Inc. v. Franklin Mint Corporation* (1984) 466 U.S. 243, 252 [80 L.Ed 2d 273, 104 S.Ct. 1776].)[104]

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[104] See also *Oyama v. California* (1948) 332 U.S. 633 [92 L.Ed 249, 68 S.Ct. 269], which involved a California Alien Land Law that prevented an alien ineligible for citizenship from obtaining land and created a presumption of intent to avoid escheat when such an alien pays for land and then transfers it to a U.S. citizen. The court held that the law violated the equal protection clause of the United States Constitution. Justice Murphy, in a concurring opinion stating that the UN Charter was a federal law that outlawed racial discrimination, noted "Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. [The Alien Land Law's] inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned." (*Id.* At 673.) See also *Namba v. McCourt* (1949) 185 Or. 579 [204 P.2d 569], invalidating an Oregon Alien Land Law. "The American people have an increasing consciousness that, since we are a heterogeneous people, we must not discriminate against any one on account of his race, color or creed.... When our nation signed the Charter of the United Nations we thereby became bound to the following principles (Article 55, subd. C, and see Article 56): 'Universal respect for, and observance of human rights and fundamental freedoms for all without

International human rights law has its historical underpinnings in the doctrine of humanitarian intervention, which was an exception to the general rule that international law governed regulations between nations and did not govern rights of individuals within those nations.[105] The humanitarian intervention doctrine recognized intervention by states into a nation committing brutal maltreatment of its nationals, and as such was the first expression of a limit on the freedoms of action states enjoyed with respect to their own nationals.[106]

This doctrine was further developed in the Covenant of the League of Nations. The Covenant contained a provision relating to "fair and human conditions of labor for men, women and children." The League of Nations was also instrumental in developing an international system for the protection of minorities.[107] Additionally, early in the development of international law, countries recognized the obligation to treat foreign nationals in a manner that conformed with minimum standards of justice. As the law of responsibility for injury to aliens began to refer to violations of "fundamental human rights," what had been seen as the rights of a nation eventually began to reflect the individual human rights of nationals as well.[108] It soon became an established principle of international law that a country, by committing a certain subject-matter to a treaty, internationalized that subject-matter, even if the subject-matter dealt with

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distinction as to race, sex, language, or religion.' (59 Stat. 1031, 1046.)" (*Id.* at p. 604.)

105 See generally, Sohn and Buergenthal, International Protection of Human Rights (1973), p. 137.

106 Buergenthal, International Human Rights (1988), p. 3

107 *Id.* at pp. 7-9.

108 Restatement Third of the Foreign Relations Law of the United States. (1987), Note to Part VII, vol. 2 at p. 1058.

individual rights of nationals, such that each party could no longer assert that such subject-matter fell exclusively within domestic jurisdictions.[109]

*2. TREATY DEVELOPMENT*

The monstrous violations of human rights during World War II furthered the internationalization of human rights protections. The first modern international human rights provisions are seen in the United Nations Charter which entered into force on October 24, 1945. The UN Charter proclaimed that member states of the United Nations were obligated to promote "respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[110] By adhering to this multilateral treaty, state parties recognize that human rights are a subject of international concern.

In 1948, the UN drafted and adopted both the Universal Declaration of Human Rights[111] and the Convention on the Prevention and Punishment of the Crime of Genocide.[112] The Universal Declaration is part of the

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[109] *Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco* (1923) P.C.I.J., Ser. B, No. 4

[110] Article 1(3) of the UN Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, became effective October 24, 1945. In his closing speech to the San Francisco United Nations conference, President Truman emphasized that:

> The Charter is dedicated to the achievement and observance of fundamental freedoms. Unless we can attain those objectives for all men and women everywhere -- without regard to race, language or religion -- we cannot have permanent peace and security in the world. (Robertson, Human Rights in Europe, (1985) 22, n.22 (quoting President Truman).)

[111] Universal Declaration of Human Rights, adopted December 10, 1948, UN Gen.Ass.Res. 217A (III). It is the first comprehensive human rights resolution to be proclaimed by a universal international organization (hereinafter Universal Declaration).

[112] Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, 78 U.N.T.S. 277, became effective

International Bill of Human Rights,[113] which also includes the International Covenant on Civil and Political Rights,[114] the Optional Protocol to the ICCPR,[115] the International Covenant on Economic, Social and Cultural Rights,[116] and the human rights provisions of the UN charter. These instruments enumerate specific human rights and duties of state parties and illustrate the multilateral commitment to enforcing human rights through international obligations. Additionally, the United Nations has sought to enforce the obligations of member states through the Commission on Human Rights, an organ of the United Nations consisting of forty-three member states, which reviews allegations of human rights violations.

The Organization of American States, which consists of thirty-two member states, was established to promote and protect human rights. The OAS Charter, a multilateral treaty which serves as the Constitution of the OAS, entered into force in 1951. It was amended by the Protocol of Buenos Aires which came into effect in 1970. Article 5(j) of the OAS Charter provides, "[t]he American States proclaim the fundamental rights

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January 12, 1951 (hereinafter Genocide Convention). Over 90 countries have ratified the Genocide Convention, which declares that genocide, whether committed in time of peace or time of war, is a crime under international law. (See generally, Buergenthal, International Human Rights, *supra*, p. 48.)

[113] See generally Newman, *Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills"* (1991) 40 Emory L.J. 731.

[114] International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 717, became effective March 23, 1976.

[115] Optional Protocol to the International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 302, became effective March 23, 1976.

[116] International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, 993 U.N.T.S. 3, took effect January 3, 1976.

of the individual without distinction as to race, nationality, creed or sex."[117] In 1948 the Ninth International Conference of American States proclaimed the American Declaration of the Rights and Duties of Man, a resolution adopted by the OAS, and thus, its member states. The American Declaration is today the normative instrument that embodies the authoritative interpretation of the fundamental rights of individuals in this hemisphere.[118]

The OAS also established the Inter-American Commission on Human Rights, a formal organ of the OAS which is charged with observing and protecting human rights in its member states. Article 1(2)(b) of the Commission Statute defines human rights as the rights set forth in the American Declaration, in relation to member States of the OAS who, like the United States, are not party to the American Convention on Human Rights. In practice, the OAS conducts country studies, on-site investigations, and has the power to receive and act on individual petitions which charge OAS member states with violations of any rights set out in the American Declaration.[119] Because the Inter-American Commission, which relies on the American Declaration, is recognized as an OAS Charter

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[117] OAS Charter, 119 U.N.T.S. 3, took effect December 13, 1951, amended 721 U.N.T.S. 324, took effect February 27, 1970.

[118] OAS Charter, 119 U.N.T.S. 3, took effect December 13, 1951, amended 721 U.N.T.S. 324, took effect February 27, 1970.

[119] Buergenthal, International Human Rights, *supra*. As previously indicated, this appeal is a necessary step in exhausting Kevin's administrative remedies in order to bring his claim in front of the Inter-American Commission on the basis that the violations Kevin has suffered are violations of the American Declaration of the Rights and Duties of Man.

organ charged with protecting human rights, the necessary implication is to reinforce the normative effect of the American Declaration.[120]

The United States has acknowledged international human rights law and has committed itself to pursuing international human rights protections by becoming a member state of the United Nations and of the Organization of American States. As an important player in the drafting of the UN Charter's human rights provisions, the United States was one of the first and strongest advocates of a treaty-based international system for the protection of human rights.[121] Though the 1950s was a period of isolationism, the United States renewed its commitment in the late 1960s and through the 1970s by becoming a signatory to numerous international human rights agreements and implementing human rights-specific foreign policy legislation.[122]

Recently, the United States stepped up its commitment to international human rights by ratifying three comprehensive multilateral human rights treaties.

The Senate gave its advice and consent to the International Covenant on Civil and Political Rights; President Bush deposited the instruments of ratification on June 8, 1992. The International Convention Against All Forms of Racial Discrimination,[123] and the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

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120 Buergenthal, International Human Rights, *supra.*

121 Sohn and Buergenthal, International Protection of Human Rights (1973), pp. 506-509.

122 Buergenthal, International Human Rights, *supra*, p. 230.

123 International Convention Against All Forms of Racial Discrimination, 660 U.N.T.S. 195, took effect January 4, 1969 (hereinafter Race Convention). The United States deposited instruments of ratification on October 20, 1994. (See, http://www.hri.ca/

Punishment[124] were ratified on October 20, 1994. These instruments are now binding international obligations for the United States. It is a well established principle of international law that a country, through commitment to a treaty, becomes bound by international law.[125] All of these treaties were ratified and in effect at the time of Kevin's trial and comprise part of "the supreme Law of the Land" which is binding upon "the Judges of every State." (U.S. Const, art. VI.)

*3. CUSTOMARY INTERNATIONAL LAW*

Customary international law arises out of a general and consistent practice of nations acting in a particular manner out of a sense of legal obligation.[126] The United States, through signing and ratifying the ICCPR, the Race Convention, and the Torture Convention, as well as being a member state of the OAS and thus being bound by the OAS Charter and the American Declaration, recognizes the force of customary international human rights law. The substantive clauses of these treaties articulate customary international law and thus bind our government. When the United States has signed or ratified a treaty it cannot ignore this codification of customary international law and has no basis for refusing to

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[124] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 UN GAOR Supp. (No. 51) at 197, became effective on June 26, 1987. The Senate gave its advice and consent on October 27, 1990, 101st Cong. 2d Sess., 136 *Cong. Rev.* 17, 486 (October 27, 1990) (hereinafter Torture Convention). The United States deposited instruments of ratification on October 21, 1994. (See http://www.un.org/Depts/Treaty/ final/ ts2/newfiles/part_boo/iv_boo/iv_9.html.)

[125] Buergenthal, International Human Rights, *supra*, p. 4.

[126] Restatement Third of the Foreign Relations Law of the United States, section 102. This practice may be deduced from treaties, national constitutions, declarations and resolutions of intergovernmental bodies, public pronouncements by heads of state and empirical evidence of the extent to which the customary law rule is observed.

extend the protection of human rights beyond the terms of the U.S. Constitution.[127]

Customary international law is "part of our law." (*The Paquete Habana, supra*, 175 U.S., at p. 700.) According to 22 U.S.C. section 2304(a)(1), "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries."[128] Moreover, the International Court of Justice, the principal judicial organ of the United Nations, lists international custom as one of the sources of international law to apply when deciding disputes.[129] These sources confirm the validity of custom as a source of international law.

The provisions of the Universal Declaration are accepted by United States courts as customary international law. In *Filartiga* v. *Pena-Irala* (2d Cir. 1980) 630 F.2d 876, the court held that the right to be free from torture "has become part of customary international law as evidenced and defined by the Universal Declaration of Human Rights ...." (*Id.* at p. 882.) The United States, as a member state of the OAS, has international obligations under the OAS Charter and the American Declaration. The American Declaration, which has become incorporated by reference within the OAS Charter by the 1970 Protocol of Buenos Aires, contains a comprehensive list of recognized human rights which includes the right to life, liberty and security of person, the right to equality before the law, and the right to due

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127 Newman, Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills" (1991) 40 Emory L.J. 731, 737.

128 22 U.S.C. section 2304(a)(1).

129 *Statute of the International Court of Justice*, art. 38, 1947 I.C.J. Acts and Docs 46. This statute is generally considered to be an authoritative list of the sources of international law.

process of the law.[130] Although the American Declaration is not a treaty, the United States voted its approval of this normative instrument and as a member of the OAS, is bound to recognize its authority over human rights issues.[131]

The United States has acknowledged the force of international human rights law on other countries. Indeed, in 1991 and 1992 Congress passed legislation that would have ended China's Most Favored Nation (MFN) trade status with the United States unless China improved its record on human rights. Though President Bush vetoed this legislation,[132] in May 1993 President Clinton tied renewal of China's MFN status to progress on specific human rights issues in compliance with the Universal Declaration.[133]

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130 American Declaration of the Rights and Duties of Man, Resolution XXX, Ninth International Conference of American States, reprinted in the Inter-American Commission of Human Rights, Handbook of Existing Duties Pertaining to Human Rights, OEA/Ser. L/V/II.50, doc. 6 (1980).

131 Case 9647 (United States) Res. 3/87 of 27 March 1987 OEA/Ser. L/V/II.52, doc. 17, para. 48 (1987).

132 See Michael Wines, "Bush, This Time in Election Year, Vetoes Trade Curbs Against China," *N.Y. Times*, September 29, 1992, at A1.

133 President Clinton's executive order of May 28, 1993 required the Secretary of State to recommend to the President by June 3, 1994 whether to extend China's MFN status for another year. The order imposed several conditions upon the extension including a showing by China of adherence to the Universal Declaration of Human Rights, an acceptable accounting of those imprisoned or detained for non-violent expression of political and religious beliefs, humane treatment of prisoners including access to Chinese prisons by international humanitarian and human rights organizations, and promoting freedom of emigration, and compliance with the U.S. memorandum of understanding on prison labor. See Orentlicher and Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China* (1993) 14 Nw. J. Int'l L. & Bus. 66, 79. Though President Clinton decided on May 26, 1994 to sever human rights

The International Covenant on Civil and Political Rights, to which the United States is bound, incorporates the protections of the Universal Declaration. Where other nations are criticized and sanctioned for consistent violations of internationally recognized human rights, the United States may not say: "Your government is bound by certain clauses of the covenant though we in the United States are not bound."[134]

B. The Numerous Due Process Violations and Other Errors which Occurred in this Case Are also Violations of International Law

Further, Article 4(2) of the ICCPR makes clear that no derogation from Article 6 ("no one shall be arbitrarily deprived of his life") is allowed.[135] An Advisory Opinion issued by the Inter-American Court on Human Rights concerning the Guatemalan death penalty reservation to the American Convention on Human Rights noted "[i]t would follow therefore that a reservation which was designed to enable the State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it."[136] Implicit in the court's opinion linking non-derogability

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conditions from China's MFN status, it cannot be ignored that the principal practice of the United States for several years was to use MFN status to influence China's compliance with recognized international human rights. (See Kent, *China and the International Human Rights Regime: a Case Study of Multilateral Monitoring, 1989-1994* (1995) 17 H. R. Quarterly, 1.)

[134] Newman, *United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures* (1993) 42 DePaul L.Rev. 1241, 1242. Newman discusses the United States' resistance to treatment of human rights treaties as U.S. law.

[135] International Covenant on Civil and Political Rights, *supra*, 999 U.N.T.S. 717.

[136] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion No. OC-3/83 of September 8, 1983, Inter-Amer.Ct.H.R., ser. A: Judgments and Opinions, No. 3 (1983), reprinted in 23 I.L.M. 320, 341 (1984).

and incompatibility is the view that the compatibility requirement has greater importance in human rights treaties, where reciprocity provides no protection for the individual against a reserving state.[137]

Kevin's rights under customary international law, as codified in the above-mentioned provisions of the ICCPR and the American Declaration and customary international law, were violated throughout his trial and sentencing phase. For example, Kevin's convictions premised on insufficient evidence, and the other due process violations enumerated herein, all violated petitioner's right to a fair hearing as guaranteed by Article 10 of the Universal Declaration, Article 14(1) of the ICCPR, Article 6(1) of the European Convention, Article XXVI of the American Declaration, and Article 8 of the American Convention.

Accordingly, Kevin is entitled to relief not only pursuant to individual provisions of the United States and California Constitutions, but also pursuant to international treaties which are co-equal with the United

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137 Edward F. Sherman, Jr. *The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation* (1994) 29 Tex. Int'l L.J. 69. In a separate opinion concerning two Barbadian death penalty reservations, the court further noted that the object and purpose of modern human rights treaties is the "protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations not in relation to other States, but towards all individuals within their jurisdiction." (Advisory Opinion No. OC-2/82 of September 24, 1982, Inter-Am. Ct.H.R., ser. A: Judgments and Opinions, No. 2, para. 29 (1982), reprinted in 22 I.L.M. 37, 47 (1983).) These opinions are an indicator of emerging general principles of treaty law, and strengthen the argument that the United States death penalty reservation is impermissible because it is incompatible.

States Constitution and binding upon the judges of this state through the Supremacy Clause. The United States must honor its role in the international community by recognizing the human rights standards in our own country to which we hold other countries accountable.

## XV. THE TRIAL COURT'S INSTRUCTIONS ON SECTION 190.3, SUBDIVISION (B) AND APPLICATION OF THAT SENTENCING FACTOR RENDERED KEVIN'S DEATH SENTENCE UNCONSTITUTIONAL

### A. Introduction

Factor (b), as defined in 190.3, permitted the jury to consider in aggravation "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." Pursuant to that factor, the prosecution in this case presented evidence of three purported prior acts of alleged violence. (See Statement of Facts, Part *B, 1,* above.)

The jurors were told they could rely on this aggravating factor in the weighing process necessary to determine if Kevin should be executed. (23RT 4880-4881, 57CT 16296.) The jurors properly were told that before they could rely on this evidence, they had to find beyond a reasonable doubt that Kevin did in fact commit the criminal acts alleged. (23RT 4882-4883; 57CT 16299.) Although the jurors were told that all 12 must agree on the final sentence (23RT 4930, 57CT 16300-16301), they were not told that during the weighing process, before they could rely on the alleged unadjudicated crimes as aggravating evidence, they had to unanimously agree that, in fact, Kevin committed those crimes. On the contrary, the jurors were explicitly instructed that such unanimity was not required:

> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal

activity occurred, that juror may consider that activity as a factor in aggravation. (23RT 4883; 57CT 16299.)

Thus, the sentencing instructions contrasted sharply with those received at the guilt phase, where the jurors were told they had to unanimously agree on Kevin's guilt, the degree of the homicide, if any, and the special circumstance allegation.

As set forth below, the unadjudicated crimes evidence should not have been admitted. But even assuming the evidence was constitutionally permissible, the aspect of section 190.3, factor (b), which allows a jury to sentence a defendant to death by relying on evidence on which it has not agreed unanimously violates both the Sixth Amendment right to a jury trial and the Eighth Amendment's ban on unreliable penalty phase procedures.

B. The Use Of Unadjudicated Criminal Activity As Aggravation Renders Kevin's Death Sentence Unconstitutional

The admission of evidence of previously unadjudicated criminal conduct as aggravation violated Kevin's rights to due process under the Fourteenth Amendment, trial by an impartial jury under the Sixth Amendment and a reliable determination of penalty under the Eighth Amendment. (See, e.g., *Johnson v. Mississippi, supra,* 486 U.S. at pp. 584-587; *State v. Bobo, supra,* 727 S.W.2d 945, 954-955 [prohibiting use of unadjudicated crimes as aggravating circumstance under state constitution including rights to due process and impartial jury]; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276 [prohibiting use of unadjudicated crimes as aggravating circumstances under Eighth and Fourteenth Amendments].) Thus, expressly instructing the jurors to consider such evidence in aggravation violated those same constitutional rights.

In addition, because California does not allow unadjudicated offenses to be used in noncapital sentencing, using this evidence in a capital

proceeding violated Kevin's equal protection rights under the state and federal Constitutions. (*Myers v. Ylst, supra*, 897 F.2d at p. 421.) And because the State applies its law in an irrational manner, using this evidence in a capital sentencing proceeding also violated Kevin's state and federal rights to due process of law. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [65 L.Ed.2d 175, 100 S.Ct. 2227]; U.S. Const., Amend. VI; Cal. Const., art. I, §§ 7 and 15.)

C. The Failure To Require A Unanimous Jury Finding on the Unadjudicated Acts Of Violence Renders Kevin's Death Sentence Unconstitutional

Even assuming, arguendo, that the evidence of the prior unadjudicated offenses was constitutionally admissible at the penalty phase, the failure of the instructions pursuant to section 190.3, factor (b) to require juror unanimity on the allegations that Kevin committed prior acts of violence renders his death sentence unconstitutional. The Sixth Amendment guarantees the right to a jury trial in all criminal cases. The Supreme Court has held, however, that the Sixth Amendment applied to the states through the Fourteenth Amendment does not require that the jury be unanimous in non-capital cases. (*Apodaca v. Oregon* (1972) 406 U.S. 404 [32 L.Ed.2d 184, 92 S.Ct. 1628] [upholding conviction by a 10-2 vote in non-capital case]; *Johnson v. Louisiana* (1972) 406 U.S. 356, 362, 364 [32 L.Ed.2d 152, 92 S.Ct. 1620] [upholding a conviction obtained by a 9-3 vote in non-capital case].) Nor does it require the states to empanel 12 jurors in all non-capital criminal cases. (*Williams v. Florida* (1970) 399 U.S. 78 [26 L.Ed.2d 446, 90 S.Ct. 1893] [approving the use of six-person juries in criminal cases].)

The United States Supreme Court also has made clear, however, that even in non-capital cases, when the Sixth Amendment does apply, there are

limits beyond which the states may not go. For example, in *Ballew v. Georgia* (1978) 435 U.S. 223 [55 L.Ed.2d 234, 98 S.Ct. 1029], the Court struck down a Georgia law allowing criminal convictions with a five-person jury. Moreover, the Court also has held that the Sixth Amendment does not permit a conviction based on the vote of five of six seated jurors. (*Brown v. Louisiana* (1980) 447 U.S. 323 [65 L.Ed.2d 159, 100 S.Ct. 2214]; *Burch v. Louisiana* (1978) 441 U.S. 130 [60 L.Ed.2d 96, 99 S.Ct. 1623].) Thus, when the Sixth Amendment applies to a factual finding at least in a non-capital case – although jurors need not be unanimous as to the finding, there must at a minimum be significant agreement among the jurors.[138]

Prior to June of 2002, none of the United States Supreme Court's law on the Sixth Amendment applied to the aggravating factors set forth in section 190.3. Prior to that date, the Sixth Amendment right to jury trial did not apply to aggravating factors on which a sentencer could rely to impose a sentence of death in a state capital proceeding. (*Walton v. Arizona*, *supra,* 497 U.S. at p. 649.) In light of *Walton*, it is not surprising that this Court had, on many occasions, specifically rejected the argument that a capital defendant had a Sixth Amendment right to a unanimous jury in connection with the jury's findings as to aggravating evidence. (See, e.g., *People v.*

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[138] The Supreme Court often has recognized that because death is a unique punishment, there is a corresponding need for procedures in death penalty cases that increase the reliability of the process. (See, e.g., *Beck v. Alabama*, *supra*, 447 U.S. 625; *Gardner v. Florida, supra,* 430 U.S. at p. 357.) It is arguable, therefore, that where the State seeks to impose a death sentence, the Sixth Amendment does not permit even a super-majority verdict, but requires true unanimity. Because the instructions in this case did not even require a super-majority of jurors to agree that Kevin committed an alleged act or acts of violence, there is no need to reach this question here.

*Taylor* (2002) 26 Cal.4th 1155, 1178 [113 Cal.Rptr.2d 827]; *People v. Lines* (1997) 15 Cal.4th 997, 1077 [64 Cal.Rptr.2d 594]; *People v. Ghent* (1987) 43 Cal.3d 739, 773 [239 Cal.Rptr. 82].) In *Ghent* for example, the Court held that such a requirement was unnecessary under "existing law." (*People v. Ghent, supra*, 43 Cal.3d at p. 773.)

On June 24, 2002, however, the "existing law" changed. In *Ring v. Arizona, supra*, 536 U.S. 584, the United States Supreme Court overruled *Walton* and held that the Sixth Amendment right to a jury trial applied to "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at p. 609; accord *id.* at p. 610 (conc. opn. of Scalia, J.) [noting that the Sixth Amendment right to a jury trial applies to "the existence of the fact that an aggravating factor exists"].) In other words, absent a numerical requirement of agreement in connection with the aggravating factor set forth in section 190.3, factor (b), this section violates the Sixth Amendment as applied in *Ring*.

Here, the error cannot be deemed harmless because, on this record, there is no way to determine if all 12 jurors would have agreed that Kevin committed the alleged prior offenses. (See *People v. Crawford* (1982) 131 Cal.App.3d 591, 599 [182 Cal.Rptr. 536] [instructional failure which raises possibility that jury was not unanimous requires reversal unless the reviewing court can tell that all 12 jurors necessarily would have reached a unanimous agreement on the factual point in question]; *People v. Decliner* (1985) 163 Cal.App.3d 284, 302 [209 Cal.Rptr. 503] [same].)[139]

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[139] This assumes that a harmless error analysis can apply to *Ring* error. In *Ring*, the Supreme Court did not reach this question, but simply remanded the case. Because the error is not harmless here under *Chapman v. California, supra,* 386 U.S. at p. 24, there is no need to decide whether *Ring* errors are structural in nature.

D. Absent A Requirement Of Jury Unanimity On The Unadjudicated Acts Of Violence, The Instructions On Section 190.3, Factor (b) Allowed Jurors To Impose The Death Penalty On Kevin Based On Unreliable Factual Findings That Were Never Deliberated, Debated, Or Discussed

The United States Supreme Court has recognized that "death is a different kind of punishment from any other which may be imposed in this country." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 357.) Because death is such a qualitatively different punishment, the Eighth and Fourteenth Amendments require "a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio*, *supra,* 438 U.S. at p. 604.) For this reason, the Court has not hesitated to strike down penalty phase procedures that increase the risk that the factfinder will make an unreliable determination. (*Caldwell v. Mississippi*, (1985) 472 U.S. 320, 328-330 [86 L.Ed.2d 231, 105 S.Ct. 2633]; *Green v. Georgia* (1979) 442 U.S. 95 [60 L.Ed.2d 738, 99 S.Ct. 2150]; *Lockett v. Ohio*, *supra*, 438 U.S. at pp. 605-606; *Gardner v. Florida*, *supra*, 430 U.S. at pp. 360-362.) The Court has made clear that defendants have "a legitimate interest in the character of the procedure which leads to the imposition of sentence even if [they] may have no right to object to a particular result of the sentencing process." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358.)

The California Legislature has provided that evidence of a defendant's act which involved the use or attempted use of force or violence can be presented during the penalty phase. (§ 190.3, factor (b).) Before the factfinder may consider such evidence, it must find that the State has proven the act beyond a reasonable doubt. The jurors also are instructed, however, that they need not agree on this, and that as long as any one juror believes the act has been proven, that one juror may consider

the act in aggravation. (CALJIC No. 8.87.) This instruction was given here.[140] (23RT 4883, 57CT 16299.)

Thus, as noted above, members of Kevin's jury were permitted individually to rely on this—and any other—aggravating factor any one of

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[140] In addition, the point was highlighted in the prosecutor's closing argument:

> EVIDENCE HAS BEEN INTRODUCED FOR PURPOSE OF SHOWING THAT THE DEFENDANT HAS COMMITTED FOLLOWING CRIMINAL ACTS WHICH INVOLVE EXPRESS APPLIED USE OF FORCE OR VIOLENCE. BEFORE YOU MAY CONSIDER ANY CRIMINAL ACT AS AN AGGRAVATING CIRCUMSTANCES IN THIS CASE, YOU, THE JURY, MUST FIRST BE SATISFIED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT DID, IN FACT, COMMIT THE CRIMINAL ACTS.
>
> YOU DON'T HAVE TO AGREE. SOME OF YOU MAY BELIEVE THAT JANISHA WILLIAMS1 TESTIMONY CONCERNING THE BEATING OF OTHER PEOPLE WITH STICKS WAS TRUE. THAT'S ENOUGH EVIDENCE TO PROVE IT TO YOU BEYOND A REASONABLE DOUBT. SOME OF YOU MAY NOT BELIEVE IT.
>
> SOME OF YOU MAY BELIEVE THE FACT THAT THEY JUMPED PEOPLE ON THEIR BICYCLES OR BEAT THEM OFF OR KNOCKED THEM OFF THEIR BICYCLES AND SOME OF YOU MAY NOT. THAT'S UP TO YOU EACH INDIVIDUALLY. YOU DON'T ALL HAVE TO AGREE ON THAT.
>
> IT IS NOT NECESSARY FOR ALL JURORS TO AGREE. IF ANY JUROR IS CONVINCED BEYOND A REASONABLE DOUBT THAT THE CRIMINAL ACTIVITY OCCURRED, THAT JUROR MAY CONSIDER THAT ACTIVITY AS A FACTOR IN AGGRAVATION.
>
> IF A JUROR OR IS NOT SO CONVINCED, THAT JUROR MUST NOT CONSIDER THAT EVIDENCE FOR ANY PURPOSE. (23RT 4888.)

them deemed proper as long as all the jurors agreed on the ultimate punishment. Because this procedure totally eliminated the deliberative function of the jury that guards against unreliable factual determinations, it is inconsistent with the Eighth Amendment's requirement of enhanced reliability in capital cases. (See *Johnson v. Louisiana, supra*, 406 U.S. at pp. 388-389 (dis. opn. of Douglas, J.); *Ballew v. Georgia, supra*, 435 U.S. 223; *Brown v. Louisiana, supra*, 447 U.S. 323.)

In *Johnson v. Louisiana, supra*, 406 U.S. at pp. 362, 364, a plurality of the United States Supreme Court held that the jury trial right of the Sixth Amendment that applied to the states through the Fourteenth Amendment did not require jury unanimity in state criminal trials, but permitted a conviction based on a vote of 9 to 3. In dissent, Justice Douglas pointed out that permitting jury verdicts on less than unanimous agreement reduced deliberation between the jurors and thereby substantially diminished the reliability of the jury's decision. This occurs, he explained, because "nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required ... even though the dissident jurors might, if given the chance, be able to convince the majority." (*Id.* at pp. 388-389 (dis. opn. of Douglas, J.).)

The Supreme Court subsequently embraced Justice Douglas' observations about the relationship between jury deliberation and reliable factfinding. In striking down a Georgia law allowing criminal convictions with a five-person jury, the Court observed that such a jury was less likely "to foster effective group deliberation. At some point this decline [in jury number] leads to inaccurate factfinding ...." (*Ballew v. Georgia, supra*, 435 U.S. at p. 232.) Similarly, in precluding a criminal conviction on the

vote of five out of six jurors, the Court has recognized that "relinquishment of the unanimity requirement removes any guarantee that the minority voices will actually be heard." (*Brown v. Louisiana*, *supra*, 447 U.S. at p. 333; see also *Allen v. United States* (1896) 164 U.S. 492, 501 [41 L.Ed. 528, 17 S.Ct. 154] ["The very object of the jury system is to secure uniformity by a comparison of views, and by arguments among the jurors themselves."].)

The Supreme Court's observations about the effect of jury unanimity on group deliberation and factfinding reliability are even more applicable in this case for two reasons. First, since this is a capital case, the need for reliable factfinding determinations is substantially greater. Second, unlike the Louisiana schemes at issue in *Johnson*, *Ballew*, and *Brown*, the California scheme does not require even a majority of jurors to agree that an act which involved the use or attempted use of force or violence occurred before relying on such conduct to impose a death penalty. Consequently, "no deliberation at all is required" on this factual issue. (*Johnson v. Louisiana*, *supra*, 406 U.S. at p. 388, (dis. opn. of Douglas, J.)

Given the constitutionally significant purpose served by jury deliberation on factual issues and the enhanced need for reliability in capital sentencing, a procedure that allows individual jurors to impose death on the basis of factual findings that they have not debated, deliberated or even discussed is unreliable and, therefore, constitutionally impermissible. A new penalty trial is required. (See *Johnson v. Mississippi, supra,* 486 U.S. at p. 586 [harmless error analysis inappropriate when trial court introduces evidence that violates Eighth Amendment's reliability requirements at defendant's capital sentencing hearing].)

E. Conclusion

For all the reasons set forth above, Kevin's death sentence must be reversed.

## XVI. THE TRIAL COURT'S INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS RENDERED KEVIN'S DEATH SENTENCE UNCONSTITUTIONAL

A. Introduction

At Kevin's penalty trial, the trial court committed prejudicial error in the jury instructions it gave. (23RT 4880-4883, 4929-4931, 57CT 16294-16302.) The instructions misinformed the jury about its central task in deciding Kevin's fate. They misled the jury about their sentencing discretion and the applicability and inter-relation of the sentencing factors. In addition, the instructions contained several procedural and substantive defects. These errors and deficiencies taken individually or in combination, rendered Kevin's death sentence unconstitutional.

Most penalty phase errors implicate a defendant's federal constitutional rights. (1) The Eighth Amendment and the due process clause of the Fourteenth Amendment require reliability and an absence of arbitrariness in the death sentencing process, both in the abstract and in each individual case. (*Johnson v. Mississippi, supra,* 486 U.S. 578, 584-585 [8th Amendment]; *Zant v. Stephens, supra,* 462 U.S. 862, 885 [14th Amendment due process].) (2) The due process clause of the Fourteenth Amendment also protects a defendant's interest in the proper operation of the procedural sentencing mechanisms established by state statutory and decisional law. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 344.) *Hicks* refers to a state-created "liberty interest" (*ibid.*), but in death penalty cases an even more compelling interest is at stake: the right not to be deprived of

life without due process. (3) Moreover, a violation of the *Hicks v. Oklahoma* rule in a capital case necessarily manifests a violation of the Eighth Amendment. Just as the rule of *Hicks* guards against "arbitrary" deprivations of liberty (or life), so the Eighth Amendment prohibits the arbitrary imposition of the death penalty. (*Parker v. Dugger* (1991) 498 U.S. 308, 321 [112 L.Ed.2d 812, 111 S.Ct. 731].) (4) Separate from any consideration of state law, the Fourteenth Amendment due process clause is also violated by errors that taint the fairness of the trial and present an "unacceptable risk ... of impermissible factors coming into play." (*Estelle v. Williams* (1976) 425 U.S. 501, 505 [48 L.Ed.2d 126, 96 S.Ct. 1691]; accord *Holbrook v. Flynn* (1986) 475 U.S. 560 [89 L.Ed.2d 525, 106 S.Ct. 1340]; *Norris v. Risley* (9th Cir. 1990) 918 F.2d 828.)

This Court has rejected some of the claims Kevin asserts below. However, the federal courts have not explicitly resolved those arguments. Kevin asserts these claims to give this Court an opportunity to reconsider its prior rulings in light of the facts of Kevin's case and to permit him to preserve the claims for federal review. Given the extensive briefing which has been submitted to this Court on some of these issues in other cases and the Court's rulings, Kevin will not offer detailed argument on them at this time. However, should the Court desire further briefing or conclude that Kevin's arguments are insufficient to preserve these claims for federal review, Kevin requests the opportunity to submit further written argument in a supplemental brief.

B. CALJIC 8.88 As Given Defining the Scope of the Jury's Sentencing Discretion and the Nature of Its Deliberative Process Violated Kevin's Constitutional Rights[141]

The jury was instructed on its sentencing discretion pursuant to CALJIC No. 8.88.[142] (23RT 4929-4930, 57CT 16300.)

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141 This Court has rejected similar claims to those asserted here. (*People v. Ochoa* (2003) 26 Cal.4th 398, 452 [110 Cal.Rptr.2d 324]; *People v. Johnson* (1993) 6 Cal.4th 1, 52 [23 Cal.Rptr.2d 593].)

142 The instruction provided:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on each defendant.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you

*1. THE INSTRUCTION ON THE JURY'S SENTENCING DISCRETION WAS IMPERMISSIBLY VAGUE AND MISLEADING*

CALJIC 8.88, which offered the core guidance for the penalty deliberations, was defective in several ways. First, it failed to inform the jurors that unless they found that the factors in aggravation outweighed the factors in mitigation, they could not impose a sentence of death. (*People v. Easley* (1983) 34 Cal.3d 858, 883-884 [196 Cal.Rptr. 309].) Thus, Kevin's jury was not adequately informed of "what they must find to impose the death penalty." (*Maynard v. Cartwright, supra,* 486 U.S. 356, 361-362.) Second, the penalty charge failed to give any instruction at all on returning a life sentence. (§ 190.3.) This error arbitrarily deprived Kevin of a state-created liberty interest in violation of the due process clause of the Fourteenth Amendment (*Hicks v. Oklahoma, supra,* 447 U.S. 343) and his right to a reliable penalty determination under the Eighth Amendment (*Maynard v. Cartwright, supra*). Reversal of his death sentence is required.

As the following parts demonstrate, CALJIC 8.88 was defective in numerous other ways.

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must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

You shall now retire to deliberate on the penalty. The foreperson previously selected may preside over your deliberations or you may choose a new foreperson. In order to make a determination as to the penalty, all twelve jurors must agree.

Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom. (23RT 4929-4930, 57CT 16300.)

*2. THE INSTRUCTIONS FAILED TO INFORM THE JURORS THAT IF THEY DETERMINED THAT MITIGATION OUTWEIGHED AGGRAVATION, THEY WERE REQUIRED TO RETURN A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE*

California Penal Code section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (§ 190.3.)[143] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (*See Boyde v. California* (1990) 494 U.S. 370, 377 [108 L.Ed.2d 316, 110 S.Ct. 1190].)

This mandatory language is not included in CALJIC No. 8.88, which directly addresses only the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances.

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143 The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction misinformed the jury regarding its role, and has disallowed it. (See *People v. Brown, supra,* 40 Cal.3d at p. 544, fn. 17.)

By failing to conform to the specific mandate of Penal Code section 190.3, the instruction violated the Fourteenth Amendment. (*See Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by Penal Code section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281 [124 L.Ed.2d 182, 113 S.Ct. 2078], original italics.)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." (*People v. Duncan* (1991) 53 Cal.3d 955, 978 [281 Cal.Rptr. 273].) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and Kevin respectfully asserts that it conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529 [275 P.2d 485]; *People v. Costello* (1943) 21 Cal.2d 760 [115 P.2d 164]; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014 [170 Cal.Rptr. 392]; *People v. Mata* (1955) 133 Cal.App.2d 18, 21 [283 P.2d 372]; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [131 Cal.Rptr. 330] [instructions required on "every aspect" of case, and should

avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310 [39 L.Ed. 709, 15 S.Ct. 610].)[144]

*People v. Moore, supra,* 43 Cal.2d 517, is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

> It is true that the ... instructions ... do not incorrectly state the law ..., but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. ... There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles. (*Id.* at pp. 526-527, internal quotation marks omitted.)

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144 There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6 [37 L.Ed.2d 82, 93 S.Ct. 2208], the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14, 22 [18 L.Ed.2d 1019, 87 S.Ct. 1920]; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344 [9 L.Ed.2d 799, 83 S.Ct. 792]; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377 [285 Cal.Rptr. 231]; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 YALE L.J. 1149, 1180-1192.) Noting that the due process clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" ... there □must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon, supra,* 412 U.S. at p. 474.) *Wardius* involved reciprocal discovery rights, and the same principle should apply to jury instructions.

In other words, contrary to the apparent assumption in *Duncan, supra,* the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming they were a correct statement of law, the instructions at issue here stated only the conditions under which a death verdict could be returned and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465 [280 Cal.Rptr. 609]; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in Kevin's case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401 [83 L.Ed.2d 821, 105 S.Ct. 830]; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) Moreover, the instruction given here is not saved by the fact that it is a sentencing instruction and not one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the equal protection clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants—if not more entitled—to the protections the law affords in relation to prosecution-slanted instructions. Indeed, Kevin can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (*See* U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217 [72 L.Ed.2d 786, 102 S.Ct. 2382].)

Moreover, the slighting of a defense theory in the instructions has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States* (1972) 409 U.S. 100 [34 L.Ed.2d 335, 93 S.Ct. 354] [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated Kevin's Sixth Amendment rights as well, and reversal of his death sentence is required.

*3. THE "SO SUBSTANTIAL" STANDARD CREATED A PRESUMPTION IN FAVOR OF DEATH*

The error detailed above was compounded by the additional error of using the "so substantial" standard of CALJIC 8.88 that provides,

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. (23RT 4929-4930, 57CT 16300.)

The term is purely subjective, and so unconstitutionally vague that it invited each juror to engage in the standardless, arbitrary and unreliable decision-making condemned under the Eighth and Fourteenth Amendments in *Furman v. Georgia, supra,* 408 U.S. 238, 288-289. (*Maynard v. Cartwright, supra,* 486 U.S. at pp. 361-362; s*ee, Stringer v. Black, supra,* 503 U.S. 222, 230-231.)

Irrespective of the meaning jurors might have given to "so substantial," the standard does not convey the threshold requirement that aggravation outweigh mitigation. Additionally, by juxtaposing the substantiality of the aggravating evidence against mitigating circumstances, the instruction impermissibly skewed the jury's penalty decision in favor of

death; that is, it effectively told the jury that the aggravating factors were *substantial.* As recognized by this Court, a defendant at the penalty phase has already been convicted of first degree murder with at least one special circumstance. (*People v. Brown* (1985) 40 Cal.3d 512, 541, fn. 13 [230 Cal.Rptr. 834].) Both the circumstances of the murder and the existence of the special circumstance will count in aggravation in the weighing process. Under these circumstances, the "aggravating evidence" will always remain substantial. From the starting point, then, it "would be rare indeed to find mitigating evidence which could redeem such an offender or excuse his conduct in the abstract." (*Ibid.*)

Penalty phase mitigating evidence is therefore unlikely to make the aggravating evidence appear *unsubstantial,* particularly in light of the instruction's implied skew toward death discussed above. This is particularly true when, as here, by some juror or jurors' interpretation, much mitigating evidence may be unrelated to the circumstances of the crime and to the existence of the special circumstance, according to section 190.3, factor (a). Consequently, merely being found death eligible gives rise to an imbalance in which pre-existing aggravating factors will necessarily, from the outset, appear *substantial* in comparison to all but the most extreme showing of mitigating evidence. (*But see, People v. McPeters* (1992) 2 Cal.4th 1148, 1193-1194 [9 Cal.Rptr.2d 834].)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, held that a statutory aggravating circumstance that asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal

convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (*See Zant v. Stephens, supra,* 462 U.S. at p. 867, fn. 5.)

In analyzing the word "substantial," the *Arnold* court concluded:

> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result. (*Arnold, supra,* 224 S.E.2d at p. 392, fn. omitted.)[145]

Kevin acknowledges that this Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux, supra,* 1 Cal.4th 281, 316, fn. 14.) However, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. While *Breaux*, *Arnold*, and this case, like all cases, are factually different, their differences are not constitutionally significant and do not undercut the correctness of this Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold, supra,* 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance that used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.*, italics

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145 The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (*See Gregg v. Georgia, supra,* 428 U.S. at p. 202.)

added), while the instant instruction, like the one in *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold.* The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance, and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In summary, CALJIC 8.88 unconstitutionally misled the jury to conclude that Kevin bore the burden of proof that death was not appropriate and that aggravation was insubstantial in comparison to mitigation. This instructional defect created an impermissible presumption in favor of death and the imposition of a mandatory death sentence. There is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia, supra,* 446 U.S. 420, 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black, supra,* 503 U.S. at p. 222.)

Therefore, the resulting death judgment violated Kevin's rights to due process, a fair trial, an impartial jury, and an individualized and reliable penalty determination, in violation of the Fifth, Six, Eighth and Fourteenth

Amendments and the California Constitution's analogous provisions (Art. 1, §§ 1, 7, 15, 16, 17) and must be reversed. (*Adamson v. Ricketts* (9th Cir. 1988) (en banc) 865 F.2d 1011, 1041-1044 [Eighth Amendment]; *Jackson v. Dugger* (11th Cir. 1988) 837 F.2d 1469, 1473-1474 [same].)

*4. THE INSTRUCTIONS FAILED TO INFORM THE JURORS THAT THE CENTRAL DETERMINATION IS WHETHER THE DEATH PENALTY IS THE APPROPRIATE PUNISHMENT, NOT SIMPLY AN AUTHORIZED PENALTY, FOR KEVIN*

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305; *People v. Edelbacher, supra,* 47 Cal.3d 983, 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown, supra,* 40 Cal.3d at p. 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion* (1995) 9 Cal.4th 879, 948 [39 Cal.Rptr.2d 547]; *People v. Milner* (1988) 45 Cal.3d 227, 256-257 [246 Cal.Rptr. 713]; see also, *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962.) However, CALJIC No. 8.88 did not make clear this standard of appropriateness. By telling the jurors that they could return a judgment of death if the aggravating evidence "warrants" death instead of life without parole, the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001)

defines the verb "warrant" as, *inter alia*, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death was "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was permissible. That is far different from the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307 [108 L.Ed.2d 255, 110 S.Ct. 1078]), the punishment must fit the offender and the offense; i.e., it must be appropriate. To say that death must be warranted is essentially to return to the standards of the previous phase of the California capital-sentencing scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo, supra,* 6 Cal.4th 457, 462, 464.) Using the term "warranted" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The instructional error involved in using the term "warranted" here was not cured by the trial court's earlier reference to the appropriateness of the death penalty. (23RT 4929-4930, 57CT 16300.) That sentence did not tell the jurors they could return a death verdict only if they found it appropriate. Moreover, the sentence containing the "appropriateness of the death penalty" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence Kevin to death if they found it "warrant[ed]."

The crucial sentencing instructions violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty, as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const., Amends. VIII and XIV) denies due process (U.S. Const., Amend. XIV; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346) and must be reversed.

*5. THE TERMS "AGGRAVATING" AND "MITIGATING" CIRCUMSTANCES ARE VAGUE AND AMBIGUOUS*

The terms "aggravating" and "mitigating" are not commonly understood terms, and they are not adequately defined for jurors. This presents a serious constitutional issue because the terms "aggravating" and "mitigating" are an integral part of the instructions given jurors to make a penalty determination. The penalty determination is unreliable if jurors may not understand what the terms are supposed to mean, or if there is a reasonable possibility the terms will confuse jurors or fail to dispel fundamental misconceptions they bring to their jury services.

A substantial body of literature establishes that jurors are very likely not to know what those terms mean or how to apply them, and are confused by those terms. (*See, e.g.,* Haney, Sontag and Costanzo, *Deciding To Take*

*a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* (1994) 50 J. Social Issues 149, 168-168; Haney and Lynch, "*Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*" (1994) 18 L. Hum. Beh. 411, *passim.*)

The trial court's attempts to define "aggravating factor" and "mitigating circumstance" were even more confusing than not attempting definitions. In particular, the trial court defined "mitigating circumstance" as "any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." (23RT 4929-4930, 57CT 16300.) The court did not, however, define an "extenuating circumstance in determining the appropriateness of the death penalty", and did not tell the jurors what "may be considered" as such, leaving them to guess at that—assuming they could decipher all the terms. These are lawyers' terms, not lay terms, and they are unclear on their face for purposes of a lay jury determining matters of life and death.

As a matter of fundamental law, jury instructions should be clear and not create the possibility of confusion or fundamental misconception, since jury instructions are the only guidance jurors will ever get on the law. California law requires jurors to make their determinations based on aggravating and mitigating circumstances. (§ 190.3, last paragraph.[146])

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146 The applicable section of 190.3 provides:

> After having heard and received all of the evidence and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating

Because it is highly probable that the instructions given in Kevin's case led to juror confusion about the terms "aggravating" and "mitigating" circumstances, and because those terms are an integral part of California's capital sentencing scheme, this sentencing scheme, on its face and as applied to Kevin is unreliable and ambiguous, violates Kevin's rights to due process, a fair trial, an impartial jury, and an individualized and reliable penalty determination in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments and violates the California Constitution's analogous provisions (Art. I, §§ 1, 7, 15, 16, 17.) Reversal of his death sentence is thus required.

*6. CONCLUSION*

As set forth above, the trial court's main sentencing instruction, CALJIC 8.88, failed to comply with the requirements of the due process clause of the Fourteenth Amendment and with the cruel and unusual punishment clause of the Eighth Amendment. Therefore, Kevin's death judgment must be reversed.

C. These Multiple Errors Individually and Collectively Influenced the Outcome

To determine whether a jury may have been misled by improper or inadequate instructions to a defendant's prejudice, this Court examines the entire record. (*People v. Cooper, supra,* 53 Cal.3d 771, 845.) In *Boyde v. California, supra,* 494 U.S. 370, 380 the Court held that where a jury instruction is ambiguous and therefore subject to an erroneous

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circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole. (§ 190.3.)

interpretation, the proper inquiry is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. The Court added,

> Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition. This "reasonable likelihood" standard, we think, better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical "reasonable" juror could or might have interpreted the instruction. There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation. [Fn. omitted.] Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting. (*Id.* at pp. 380-381.)

However, where the disputed instruction is erroneous on its face, the court is not free to assume that the jurors inferred the missing element from their general experience or from other instructions, for the law presumes that jurors carefully follow the instructions given to them. (*Wade v. Calderon* (9th Cir. 1994) 29 F3d 1312, 1320-1321, cert den. 513 U.S. 1120.)

This latter context is more analogous to the instant case. The very import of the instructions is premised on the fact that it could not be assumed that a juror would have inferred their content without the court's

guidance. Thus, without these instructions the jury had inadequate direction, or no direction at all.

Kevin incorporates here Part *B, 2* of the *Statement of the Facts*, above, which summarizes the detailed and compelling mitigating evidence proffered by the defense through lay and expert witnesses. However, because the court failed to provide adequate instructions on how this evidence, if found true, could be used in mitigation, or its proper weight and use as mitigation, the jurors had no framework for considering this compelling evidence. This failure biased Kevin's penalty phase in favor of a death sentence, and rendered the result arbitrary and unreliable. These errors individually and collectively resulted in a fundamentally unfair and unreliable death sentence.

In a close case any error of a substantial nature requires a reversal, and any doubt as to its prejudicial character should be resolved in favor of the Kevin. (*People v. Zemavasky* (1942) 20 Cal.2d 56, 62 [123 P.2d 478]; *People v. Von Villas* (1992) 11 Cal.App.4th 175, 249 [15 Cal.Rptr.2d 112].) In these circumstances neither *People v. Watson* (1956) 46 Cal.2d 818 [299 P.2d 243] nor *Chapman v. California, supra,* 686 U.S. 18 standard for harmless error can be satisfied. (*People v. Filson* (1994) 22 Cal.App.4th 1841, 1852 [28 Cal.Rptr.2d 335].) Kevin's sentence of death must be reversed.

Even if there is some doubt or uncertainty as to the prejudice suffered by Kevin due to these errors, such uncertainty or doubt must be resolved in his favor. (See *Eddings v. Oklahoma, supra,* 455 U.S. at p. 119 [O'Connor, J., concurring].) The precise point which prompts the death penalty in the mind of any one juror is not only unknowable to the reviewing court, but may even be unknown by the juror. (*People v. Hines*

(1964) 61 Cal.2d 164, 169 [37 Cal.Rptr. 622].) "Thus *any* substantial error in the penalty [phase] of the trial ... must be deemed to have been prejudicial." (*Id.* at pp. 169-170.)

## XVII. THE CUMULATIVE EFFECT OF THE NUMEROUS ERRORS WHICH OCCURRED DURING THE GUILT AND PENALTY PHASES OF TRIAL COMPELS REVERSAL OF THE DEATH SENTENCE EVEN IF NO SINGLE ISSUE, STANDING ALONE, WOULD DO SO.

The cumulative impact of the numerous penalty phase errors requires reversal of the death penalty even if no single error does so independently. (*Taylor v. Kentucky, supra,* 436 U.S. 478, 487 & fn. 15]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [208 Cal.Rptr. 547]; *Mak v. Blodgett, supra,* 970 F.2d 614, 622.) In addition, a number of guilt-phase errors also had a considerable impact on the penalty determination and the impact of these errors must also be assessed in evaluating the prejudice resulting from the penalty phase errors.[147]

Kevin has identified numerous errors that occurred at each phase of the trial proceedings. Each of these errors individually, and all the more clearly when considered cumulatively, deprived Kevin of due process, of a fair trial, of a conviction based on sufficient evidence, of his right to confront the witnesses against him, of his right to trial by a fair and impartial jury and to a unanimous jury verdict, and of his right to fair and reliable guilt and penalty determinations, in violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. Further, each error, by itself is

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147 An error may be harmless at the guilt phase but prejudicial at the penalty phase. (*In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [3 Cal.Rptr.2d 727].) Indeed, the effect of guilt phase errors on the penalty phase must be considered. (§ 190.4, subd. (d)); *Magill v. Dugger* (11th Cir. 1987) 824 F.2d 879, 888.

sufficiently prejudicial to warrant reversal of Kevin's convictions and death sentence; but even if that were not the case, reversal would be required because of the substantial prejudice flowing from the cumulative impact of the errors.

A. Introduction

Kevin's mitigating evidence was compelling, as detailed in the *Statement of the Facts, Penalty Phase, Case in Mitigation*, pages 34-46, and incorporated here. The prosecution's case for death rested on the circumstances of the offense and three minor, unajudicated acts.

The penalty phase of Kevin's trial was tainted by the errors, set forth in Arguments *X* through *XVI*. The discussion of each error briefly identifies the way in which the error prejudiced Kevin and so requires reversal of the death judgment. "Although the guilt and penalty phases are considered 'separate' proceedings, we cannot ignore the effect of events occurring during the former upon the jury's decision in the latter." (*Magill v. Dugger, supra,* 824 F.2d 879, 888; *see generally* Goodpaster, *The Trial For Life: Effective Assistance Of Counsel In Death Penalty Cases* (1983) 58 N.Y.U.L. Rev. 299, 328-334 [section entitled "Guilt Phase Defenses And Their Penalty Phase Effects"].)

The Court must also assess the combined effect of all the errors, since the jury's consideration of all the penalty factors results in a single general verdict of death or life without parole. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. (*Mak v. Blodgett, supra,* 970 F.2d 614, 622; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476; *People v. Holt, supra,* 37 Cal.3d 436, 459; *People v. Buffum, supra,* 40 Cal.2d 709, 729; *People v. Zerillo* (1950) 36 Cal.2d 222, 233 [223 P.2d 223]; *People v.*

*Jackson* (1991) 235 Cal.App.3d 1670, 1681 [1 Cal.Rptr.2d 778]; *In re Rodriguez, supra,* 119 Cal.App.3d 457, 469-470; *see also People v. Phillips* (1985) 41 Cal.3d 29, 83 [222 Cal.Rptr. 127] (lead opn.); *People v. Pitts* (1990) 223 Cal.App.3d 606, 815 [273 Cal.Rptr. 757].) Moreover, "the death penalty is qualitatively different from all other punishments and that the severity of the death sentence mandates heightened scrutiny in the review of any colorable claim of error." (*Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585 (citing *Ford v. Wainwright* (1986) 477 U.S. 399, 411 [91 L.Ed.2d 335, 106 S.Ct. 2595]; *Zant v. Stephens, supra,* 462 U.S. 862, 885; *Gardner v. Florida, supra,* 430 U.S. 349, 358.)

B. Prejudicial Federal Constitutional errors

Most penalty phase errors implicate a defendant's federal constitutional rights. (1) The Eighth Amendment and the due process clause of the Fourteenth Amendment require reliability and an absence of arbitrariness in the death sentencing process, both in the abstract and in each individual case. (*Johnson v. Mississippi, supra,* 486 U.S. 578, 584-585 (Eighth Amendment); *Zant v. Stephens, supra,* 462 U.S. 862, 885, (Fourteenth Amendment due process).) (2) The due process clause of the Fourteenth Amendment also protects a defendant's interest in the proper operation of the procedural sentencing mechanisms established by state statutory and decisional law. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 344.) *Hicks* refers to a state-created "liberty interest" (*ibid.*), but in death penalty cases an even more compelling interest is at stake: the right not to be deprived of life without due process. (3) Moreover, a violation of the *Hicks v. Oklahoma* rule in a capital case necessarily manifests a violation of the Eighth Amendment. Just as the rule of *Hicks* guards against "arbitrary" deprivations of liberty (or life), so the Eighth Amendment prohibits the

arbitrary imposition of the death penalty. (*Parker v. Dugger, supra,* 498 U.S. 308, 321, citing other cases.) (4) Separate from any consideration of state law, the Fourteenth Amendment due process clause is also violated by errors which taint the fairness of the trial and present an "unacceptable risk, ... of impermissible factors coming into play." (*Estelle v. Williams* (1976) 425 U.S. 501, 505 [48 L.Ed.2d 126, 96 S.Ct. 1691]; *accord, Holbrook v. Flynn, supra,* 475 U.S. 560; *Norris v. Risley, supra,* 918 F.2d 828.)

The test for prejudice from federal constitutional errors is familiar: reversal is required unless the prosecution is able to demonstrate "beyond a reasonable doubt that the error [or errors] complained of did not contribute to the verdict obtained." (*Chapman v. California, supra,* 386 U.S. 18, 24; *see generally Yates v. Evatt* (1991) 500 U.S. 391, 402-406 [114 L.Ed.2d 432, 111 S.Ct. 1884]; *see also Clemons v. Mississippi, supra,* 494 U.S. 738, 754 [noting that state appellate courts are not required to consider the possibility that penalty phase error may be harmless, and recognizing that harmless error analysis will in some cases be "extremely speculative or impossible"].) "The inquiry ... is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana, supra,* 508 U.S. 275, 279 (Scalia, for a unanimous Court).) When any of the errors is a federal constitutional violation, an appellate court must reverse unless it is satisfied beyond a reasonable doubt that the combined effect of all the errors, constitutional and otherwise, was harmless. (*People v. Williams, supra,* 22 Cal.App.3d 34, 58-59.)

C. Prejudicial Errors-Under-State Law

The errors in this case also compel reversal of the penalty on the basis of the state-law prejudice test for non-constitutional errors at the penalty phase.

In *People v. Brown (John)* (1988) 46 Cal.3d 432, 446-448 [250 Cal.Rptr. 604], this Court reaffirmed the "reasonable possibility" harmless error standard articulated in *People v. Hines, supra,* 61 Cal.2d 164, 168-170, disapproved on another ground in *People v. Murtishaw* (1981) 29 Cal.3d 733, 774-775, fn. 40 [175 Cal.Rptr. 738] and *People v. Hamilton* (1963) 60 Cal.2d 105, 135-137 [32 Cal.Rptr. 4]. This is an extremely high standard under which it is very difficult for the prosecution to establish that any error, let alone a combination of errors, was harmless with respect to the penalty verdict. It is "the same in substance and effect" as the "reasonable doubt" standard of *Chapman v. California.* (*People v. Ashmus* (1991) 54 Cal.3d 932, 965 [2 Cal.Rptr.2d 112]; *see People v. Brown, supra,* 46 Cal.3d at p. 467 (conc. opn. of Mosk, J.).) It is a "more exacting standard" than the standard of *People v. Watson, supra,* 46 Cal.2d 818, 836, used for assessing guilt phase error. (*People v. Brown, supra,* 46 Cal.3d at p. 447.) While a trivial or hypertechnical possibility that an error affected the outcome is insufficient for reversal (*id.* at p. 448), only in an "extraordinary" case can a death sentence be affirmed under this test if penalty phase error has occurred. (*People v. Hines, supra,* 61 Cal.2d at p. 170.)

Given the nature of the decision entrusted to the jury at penalty phase, the standard for assessing prejudice could not be otherwise. The decision at penalty phase is different not in degree but in kind from the decision whether or not the defendant has been proven guilty; this difference significantly reduces the basis for a reasoned appellate judgment

about the effect of errors. (*See* White, *The Death Penalty in the Nineties* (1991) pp. 74-76 (U. Michigan Press).) "Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record." (*Caldwell v. Mississippi, supra,* 472 U.S. 320, 330.) "Individual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.'" (*McCleskey v. Kemp* (1987) 481 U.S. 279, 311 [95 L.Ed.2d 262, 107 S.Ct. 1756].) At the same time the need for reliability is heightened, because of the consequences of a judgment of death. As this Court stated in *People v. Hamilton, supra*:

> [I]n determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or the other by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence, the misconduct and other errors directly related in the character of appellant, the appellate court by no reasoning process can ascertain whether there is a "reasonable probability" that a different result would have been reached in the absence of error. If only one of the twelve jurors was swayed by the inadmissible evidence or error, then, in the absence of that evidence or error, the death penalty would not have been imposed. What may affect one juror might not affect another. The facts that the evidence of guilt is overwhelming ... or that the crime involved was ... particularly revolting, are not controlling. This being so it necessarily follows that any substantial error occurring during the penalty phase of the trial, that results in the death penalty, since it reasonably may have swayed a juror, must be deemed to have been prejudicial. (*People v. Hamilton, supra*, 60 Cal.2d at pp. 136-137; *accord, People.v. Hines, supra,* 61 Cal.2d at p. 169; *see generally Mills v. Maryland, supra,* 486 U.S. 367; R. Traynor, *The Riddle of Harmless Error* (1970) pp. 72-73.)

To police the integrity of the statutory requirement for sentencing by unanimous verdict of a jury, this Court has recognized that reversal must be the rule and affirmance the extraordinary exception when error infects the penalty phase. (*People v. Hamilton, supra*, 60 Cal.2d at p. 138.) If the test of penalty phase prejudice were any less stringent, the Court could not have confidence that its judgment necessarily would reflect the judgment of all twelve jurors at an error-free penalty trial. The Court would run the risk of consigning Kevin to his death based on the conjecture of an appellate court that was not present at trial. (*See Carella v. California, supra,* 491 U.S. 263, 268-269 (conc. opn. of Scalia, I.).) As the Supreme Court put it, "No one on this Court was a member of the jury that sentenced [defendant], or of any similarly instructed jury." (*Mills v. Maryland, supra*, 486 U.S. at p. 383.)

Also apropos are the words of Justice Cardozo that this Court has quoted in evaluating the prejudice from guilt phase error in a death penalty case:

> "The springs of conduct are subtle and varied. One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others." (*People v. Spencer* (1967) 66 Cal.2d 158, 169 [57 Cal.Rptr. 163], quoting *DeCicco v. Schweizer* (1917) 221 N.Y. 431,438 [117 N.E. 807]..)

In assessing prejudice, errors must be viewed through a juror's eyes, not the Court's. This conclusion is an implicit part of the rationale for the strict standard adopted in *Hines* and *Hamilton*. The Court necessarily brings to each case what it has learned about murder cases generally from the dozens of others it has seen (even if it does not conduct "proportionality review" of the type engaged in by many state appellate courts). A juror has no equivalent perspective. A juror's exposure to the dynamics of murder is

limited to the single case on which he or she serves.[148] Virtually any error or combination of errors which affects what the jurors learn about the case or the defendant therefore affects a sizeable part of the limited pool of information upon which they must act. Virtually any error or combination of errors therefore presents the reasonable possibility of significantly altering their individual weighing of aggravation and mitigation, even errors that might appear trivial from the Court's very different perspective.

As the language quoted from *People v. Hamilton* makes clear, a reasonable possibility that an error may have affected any single juror's view of the case compels reversal. (*See also Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664, 669; *Mak v. Blodgett, supra,* 970 F.2d at pp. 620-621; *Kubat v. Thleret* (7th Cir. 1989) 867 F.2d 351,371; 2 LaFave & Israel, Criminal Procedure (1984) § 19.5(a), p. 535.) The decision to be made at penalty phase requires the personal moral judgment of each juror. (*People v. Brown, supra,* 40 Cal.3d 512, 541 [220 Cal.Rptr. 637], revd. on other grounds (1987) 479 U.S. 538.) The United States Supreme Court's decisions in *McKoy v. North Carolina, supra,* 494 U.S. 433, 442-443, and *Mills v. Maryland, supra,* 486 U.S. 367, are predicated on the fact that different jurors will assign different weights to the same evidence. (*See also Stone v. United States* (6th Cir. 1940) 113 F.2d 70, 77 ["If a single juror is improperly influenced, the verdict is as unfair as if all were"], quoted in *United States v. Shapiro* (9th Cir. 1982) 669 F.2d 593, 603; *People v. Cato* (1988) 46 Cal.3d 1035, 1057 [251 Cal.Rptr. 757] [no unanimity requirement for prior criminal activity under aggravating factor

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[148] In a related context, a Court of Appeal has spoke of jurors as "well meaning but temporary visitors in a foreign country attempting to comprehend a foreign language." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 250 [240 Cal.Rptr. 516].)

(b); some jurors may find and consider a particular incident which others do not]; *People v. Holloway, supra,* 50 Cal.3d 1098, 1111-1112 [exposure of a single juror to prejudicial extrajudicial information requires reversal].)

Intrusion of improper considerations into a discretionary sentencing decision usually requires reversal of the sentence, even in noncapital sentencing by a judge. (E.g., *People v. Morton* (1953) 41 Cal.2d 536, 545 [261 P.2d 523]; *see* also *United States v. Tucker* (1972) 404 U.S. 443, 447-449 [30 L.Ed.2d 592, 92 S.Ct. 589]; *People v. Smith* (1980) 101 Cal.App.3d 964, 967-968 [161 Cal.Rptr. 787]; *People v. Lawson* (1980) 107 Cal.App.3d 748, 758 [165 Cal.Rptr. 764]; *People v. Brown* (1980) 110 Cal.App.3d 24, 41 [167 Cal.Rptr. 557].) These cases recognize that determining whether improper considerations affect the sentencing decision is impossible. The resultant uncertainty compels reversal. A fortiori, a conclusion of harmlessness is far less appropriate, and less likely, in a capital case in which the jury imposes sentence.

Use of a standard more forgiving of error than the one adopted in *People v. Hamilton, supra,* 60 Cal.2d at pp. 135-137, would also violate a defendant's federal due process rights under *Hicks v. Oklahoma, supra,* 447 U.S. 343. The *Hamilton* rule itself is part of the procedural scheme created by California law for judicial deprivation of life, so under the doctrine of *Hicks*, a California defendant's right to the benefit and protection of the *Hamilton* rule is protected by the federal due process clause.

*Hicks* dictates this result for a second reason as well. Although *Hicks* does not use the phrase "harmless error," its holding is that an excessively speculative harmless error analysis, or one which relies on the mere fact that the result could have been the same in the absence of error, establishes a federal due process violation. *Hicks* rose out of a jury

sentencing scheme for non-capital cases. Hicks' jury was instructed that the mandatory sentence for his offense was 40 years, so that was the term they imposed. A subsequent decision held that the jury was entitled to impose any sentence of ten or more years. The state appellate court held that Hicks was not prejudiced by the mandatory-40-years instruction, because a properly instructed jury could have fixed the sentence at 40 years. The United States Supreme Court reversed, saying:

> In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury might have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law. (*Id.* at p. 346; *see also Fetterly v. Paskett* (9th Cir. 1994) 15 F.3d 1472, 1479-1480 (conc. opn. of Trott, J.).)

*People v. Hines* and *People v. Hamilton* teach that a conclusion of harmless penalty phase error in any but an "extraordinary" case would be what *Hicks* calls a "frail conjecture." *Hicks* teaches that such a lax harmless error standard violates the Fourteenth Amendment due process clause. The narrow holding of *Hicks*, as well as its broader principle concerning state-created liberty interests, dictates as a matter of federal constitutional law the extremely strict standard for assessing penalty phase prejudice which this Court adopted in *People v. Hamilton* and *People v. Hines*.

*Clemons v. Mississippi, supra*, 494 U.S. at pp. 753-754, makes a different but related point: Affirmance on the basis that penalty phase error is harmless requires a "detailed explanation" from the reviewing court, not merely an

unexplained assertion that the error was harmless.[149] (*See also Sochor v. Florida, supra,* 504 U.S. 527, 541 (conc. opn. of O'Connor, J.); *Pensinger v. California* (1991) 502 U.S. 930 [116 L.Ed.2d 290, 112 S.Ct. 351] (dis. opn. of O'Connor and Kennedy, J.)

D. This Court's Assessment of the Strength of the Evidence in Aggravation Cannot be Relied Upon to Conclude that Penalty Phase Error is Harmless

By its very terms, *Chapman* precludes a court from finding harmlessness based simply "upon [its own] view of 'overwhelming evidence.'" (*People v. Sims* (1993) 5 Cal.4th 405, 476 [20 Cal.Rptr.2d 537] (dis. opn. of Mosk, J.), quoting *Chapman v. California, supra,* 386 U.S. at p. 23.)

A conclusion by this Court that the strength of the evidence in aggravation renders the penalty phase errors harmless would violate federal constitutional principles. Such a result would essentially be a mandatory death penalty: It would amount to a conclusion that any trier of fact presented with this aggravating evidence would necessarily return a verdict of death. It would have the same effect as the statutory scheme held invalid in *Sumner v. Shuman* (1987) 483 U.S. 66 [97 L.Ed.2d 56, 107 S.Ct. 2716], providing for a mandatory death penalty for murder when committed by a life-term prisoner. In *Sumner* the Court held that under the Eighth and Fourteenth Amendments, no aggravating fact or combination of aggravating facts justifies a refusal to consider mitigating evidence. Very significant mitigating evidence was presented to the jury in this case. If

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[149] The principal holding of *Clemons*, that a state may, consistent with the Constitution, authorize appellate courts to reweigh aggravating and mitigating circumstances, has no application to California cases since California law makes no provision for such reweighing.

penalty phase error could nevertheless be found harmless on a theory of overwhelming aggravating evidence, then, a fortiori, the invalidity of the statute in *Sumner* could have been found to be harmless error based on the aggravating force of perhaps the most powerful aggravating evidence imaginable: that the defendant was a life-term prisoner when he committed murder.

Even apart from the legal considerations, this was a close case at penalty phase. This was not a case in which the relative strength of the evidence in aggravation would warrant a conclusion that errors were harmless. This case was particularly close because there was significant affirmative evidence in mitigation, as discussed in Part *A*.

The jury plainly considered the case a close one. The deliberations lasted over the course of a portion of three days, at one point reaching a deadlock, for a penalty phase tried over the course of three days. (57CT 16277-16279, 16281, 16284-16288, 16291-19292, 16306-16308; see *People v. Murtishaw, supra,* 29 Cal.3d 773, 775; *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1163; *Mak v. Blodgett, supra*, 970 F.2d at pp. 620-622.)

E. Summary

"The attempt to gauge prejudice at the penalty phase is always a hazardous task." (*People v. Easley, supra,* 34 Cal.3d 858, 885.) Here, commencing at the case's inception, the prosecution's case was built on sand being premised on (1) insufficient evidence that Kevin personally used a deadly weapon in the commission of any of the offenses; (2) a theory for murder not authorized by statute at the time of the offenses; (3) jury instructions that removed from the requirement for the crime of torture that Kevin had the specific intent to cause cruel or extreme pain and suffering;

(4) jury instructions that removed from the crime of murder by torture the requirement that Kevin had the specific intent to inflict extreme and prolonged pain; (5) jury instructions that removed from the torture special circumstance allegation the requirement that Kevin intended to inflict extreme and prolonged pain and had the specific intent to kill; (6) jury instructions that failed to require for all the special circumstances allegations that Kevin had the requisite intent and involvement in the underlying felonies; (7) jury instructions that removed from jury consideration Kevin's intoxication in determining his liability for the offense of torture; and (8) numerous other instructional errors that collectively reduced the prosecution's burden of proof.

These errors were compounded in the penalty phase by the improper introduction of three unadjudicated offenses as evidence in aggravation as well as the numerous systemic deficiencies in California's death penalty process which violate not only the state and federal constitutions, but also the provisions of numerous treaties and customary international law. The cumulative effect of these errors rendered the judgment here highly suspect and unreliable.

These errors variously deprived Kevin of his rights to liberty, a fair trial, an unbiased jury, effective assistance of counsel, due process, present a defense, heightened capital case due process, a reliable and non-arbitrary determination of penalty, and equal protection under the law, all in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments and the analogous provisions of the California Constitution (Art. I, §§ 1, 7, 15, 16, 17). Taken together, these errors undoubtedly produced a fundamentally unfair trial setting and a new trial is required, due to the cumulative error. (*See Lincoln v. Sunn, supra,* 807 F.2d 805, 814, fn. 6; *Derden v. McNeel*

(5th Cir. 1992) 978 F.2d 1453; *cf. Taylor v. Kennedy, supra,* 436 U.S. 478 [several flaws in state court proceedings combine to create reversible federal constitutional error].) Certainly it cannot be said that the errors had "no effect" on the penalty verdict. (*Caldwell v. Mississippi, supra,* 472 U.S. 320, 341.)

For reasons of both fact and law, the numerous errors committed during Kevin's trial cannot be concluded to be harmless. Because the jury made no findings in the penalty phase, it is impossible to tell whether the verdict in the present case was based on the statutory factors listed in the Penal Code, or on the improper conclusion that no mitigation or a single factor in mitigation were insufficient to preclude death as the sentencing option. Because "the jury may conceivably [have] rest[ed] the death penalty upon any piece of introduced data or any one factor in this welter of matter," (*People v. Hines, supra,* at p. 169), this Court can neither know nor evaluate "[t]he precise point which prompt[ed] the penalty in the mind of any one juror," and "this dark ignorance must be compounded 12 times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner." (*Ibid.*) Furthermore, as the Eleventh Circuit stated in *Proffitt v. Wainwright* (11th Cir. 1982) 685 F.2d 1227, 1269,

> [T]he rational appellate review of capital sentencing decisions contemplated by *Furman* and its progeny requires more than mere speculation or conjecture as to what the sentencing tribunal would have decided had it correctly applied the law. Such post hoc justification of a sentencing decision, which depends on a rationale distinct from that relied on by the sentencer, cannot fulfill the appellate court's constitutional responsibilities. (*Ibid.*)

The cumulative effect of the foregoing errors and others detailed in this brief were prejudicial to Kevin and require reversal of the penalty judgment.

On the second day of jury deliberations, the jury declared that they were deadlocked after having taken four ballots with outcomes beginning at six to six and ending at eight to four. (23RT 4936-4946.) This readily demonstrates that this was a very close case. In a close case any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the Kevin. (*People v. Zemavasky, supra,* 20 Cal.2d 56, 62; *People v. Von Villas, supra,* 11 Cal.App.4th 175, 249].) In these circumstances *Chapman v. California, supra,* 386 U.S. 18 can not be satisfied. (*People v. Filson, supra,* 22 CA4th 1841, 1852.) The state cannot prove beyond a reasonable doubt that the error did not contribute to the jury's sentencing decision and Kevin's sentence of death must be reversed.

Thus, in the event that this court does not overturn the guilty verdict, the judgment of death must be reversed.

## XVIII. MULTIPLE PUNISHMENT WAS IMPROPERLY IMPOSED FOR THE SAME ACTS IN VIOLATION OF SECTION 654

Section 654 provides in pertinent part:

> (a) An act or omission that is punishable in different ways by different provisions of 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. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.

There are multiple violations of these provisions in the determinant portion of Kevin's sentence.

A. In the Charged Offenses There Was Only a Single Use of a Deadly Weapon for Which Only A Single Sentence May Be Imposed

As more fully detailed in the *Statement of the Case*, the Information alleged in Counts One through Eight that the defendant personally used a deadly and dangerous weapon within the meaning of section 12022, subdivision (b)(1) and in Counts Three through Seven the defendant used a dangerous and deadly weapon within the meaning of section 12022.3, subdivision (b) [sic].[150] (4CT 1113-1122.) The jury found these allegations to be true. The court imposed 1 year for the 12022, subdivision (b)(1) allegation and a consecutive sentence of 10 years for the 12022.3 subdivision (b) [sic] allegation. The jury had been instructed that the stick/stake was the only weapon they were to consider. (57CT 16252.).

It was demonstrated in Argument *IV* that there was insufficient evidence that Kevin personally used a deadly weapon in the commission of

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[150] As noted in the *Statement of the Case,* the error here is that subdivision (b) of section 12022.3 enhances the sentence if the person is *armed* with a deadly weapon. Subdivision (a) of section 12022.3 should have been cited as that is the subdivision that enhances the sentence of a person who *uses* a deadly weapon.

any of the offenses. In any event, section 654 proscribed multiple enhancements for the use of this single deadly weapon. (*People v. Moringlane* (1982) 127 Cal.App.3d 811, 817 [179 Cal.Rptr. 726] [imposition of multiple enhancements for single act of inflicting great bodily injury on one person was improper; cases collected]; *People v. Reeves* (2001) 91 Cal.App.4th 14, 54 [109 Cal.Rptr.2d 728] [where both burglary and assault were committed against single victim on single occasion, section 654 prohibited imposition of two enhancements for infliction of great bodily injury]; *People v. Cobb* (2004) 124 Cal.App.4th 1051, 1056 [21 Cal.Rptr.3d 869] [where defendant personally used firearm, causing great bodily injury or death, and companion also fired gun causing great bodily injury or death to the same single victim, defendant was subject to only one section 12022.53 enhancement and not for both personal and vicarious liability; situation is distinguishable from group shooting with multiple victims].)

B. There Were Two Sex Offenses Each Charged Under Two Theories, But for Which Only a Single Sentence May Be Imposed

The Information charged the following four sex offenses:

> Count Four, forcible rape while acting in concert in violation of section 264.1;
>
> Count Five, forcible rape in violation of section 261, subdivision (a)(2);
>
> Count Six, sexual penetration by foreign object while acting in concert in violation of section 289, subdivision (a)(1) and 264.1; and
>
> Count Seven, sexual penetration by foreign object in violation of section 289, subdivision (a)(1).

As more fully detailed in the *Statement of the Facts* these were premised upon Kevin's second in-custody interrogation and supporting physical

evidence that the stick/stake had been employed. As manifest by the prosecutor's closing argument, these four counts were premised upon Kevin's statement that he committed a single act of sexual intercourse and that Jamelle and Warren had inserted the "foreign object." (20RT 4195-4198, 4331-4335.)

Since Kevin's codefendants would have arguably been aiding in the rape and Kevin was arguably aiding in the sexual penetration by a foreign object, these two acts each supported double conviction, but not double punishment. "Section 654 ... prohibits the imposition of double punishment if either a single act or a course of criminal conduct engaged in with a single objective is charged as the basis of multiple convictions. Under such circumstances, the defendant can be punished only for the more serious offense." (*In re Ward* (1966) 64 Cal.2d 672, 675-676 [51 Cal.Rptr. 272]; accord *People v. Beasley* (1970) 5 Cal.App.3d 617, 638 [85 Cal.Rptr. 501].)

Here, there were only two acts of sexual assault, and they had been charged in the alternative as forcible rape and sexual penetration by foreign object and forcible rape and sexual penetration by foreign object in concert. Only the more serious offenses could be punished. (*Ibid.*)

C. Only the Sentence for Murder May Be Imposed As It Was Indivisibly Intertwined With the Other Felonies

According to the prosecution's theory, and acknowledged by the court, the opportunistic robbery expanded to a kidnapping, sexual offenses, and ultimately an attempt to cover-up by killing the victim. (23RT 5020-5021.) In turn, the act of torture was indivisibly intertwined with the counts involving sexual penetration by foreign object and the killing. The act of murder was the culmination of and indivisible from all of the other charged felonies. Thus, section 654 precludes punishment for all of the felonies but

the murder. (*People v. Price* (1991) 1 Cal.4th 324, 492 [3 Cal.Rptr.2d 106]; *People v. Harris* (1989) 47 Cal.3d 1047, 1102-1103 [255 Cal.Rptr. 352]; *People v. Milan* (1973) 9 Cal.3d 185, 196-197 [107 Cal.Rptr. 68]; *People v. Carter* (1961) 56 Cal.3d 549, 565 [15 Cal.Rptr. 645].) This was the position taken by defense counsel below. (23RT 5017-5018.)

D. The Remedy

The appropriate procedure on appeal is to eliminate the effect of the judgment on Counts Two through Eight as the penalty alone is concerned. (*In re Ward, supra,* at p. 403.)

## XIX. THE TRIAL COURT'S IMPOSITION OF UPPER TERM SENTENCES VIOLATED KEVIN'S FEDERAL CONSTITUTIONAL RIGHTS TO A JURY TRIAL, PROOF BEYOND A REASONABLE DOUBT, AND DUE PROCESS

A. Introduction

Kevin was sentenced to state prison for a term of 41 years. The court imposed the upper term for Counts Two, Four, Six, and Seven. (23RT 5039-5046, 58CT 16571-16595.) The imposition of these upper term sentences violated his Fifth, Sixth, and Fourteenth Amendment rights to jury trial, proof beyond a reasonable doubt, and due process as set forth in *Cunningham v. California, supra,* 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856]) (hereafter "*Cunningham*)", *Blakely v. Washington, supra,* 542 U.S. 296 (hereafter "*Blakely*"), and *Apprendi v. New Jersey, supra,* 530 U.S. 466 (hereafter "*Apprendi*"), because none of the aggravating factors relied on by the court to impose the upper term were found true by a jury beyond a reasonable doubt nor admitted by Kevin.

B. The November 19, 2003 Probation and Sentencing Hearing

At the sentencing hearing, the court made five findings in support of its sentencing decision to impose the upper terms: (1) the offenses involved

a high degree of cruelty; (2) the victim was vulnerable; (3) subsequent to the homicide, "there was a certain level of sophistication"; (4) "there [was] some indicia of planning, however slight, to go rob her"; and (5) the violent conduct indicated that Kevin was a danger to society. (23RT 5018-5021.)

C. Federal Case Law Establishes That Kevin's Upper Term Sentence Violates His Federal Constitutional Rights to a Jury Trial, Proof Beyond a Reasonable Doubt, and Due Process

In *Blakely v. Washington, supra*, 542 U.S. 296, the United States Supreme Court held that Washington's sentencing scheme, which provides for one maximum sentence for the usual case, and a higher maximum sentence in cases in which the sentencing court finds aggravating factors by a preponderance of the evidence, was unconstitutional. The court reached this conclusion by applying the rule from *Apprendi v. New Jersey, supra*, 530 U.S. 466, 490, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (See *Blakely v. Washington, supra*, 542 U.S. at p. 301.)

The Court explained in *Blakely*:

> 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. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," [Citation], and the judge exceeds his proper authority. (*Blakely v. Washington, supra*, 542 U.S. at pp. 303-304.)

The *Blakely* court held that where state law establishes a presumptive sentence for a particular offense, and authorizes a greater term only if certain additional facts are found, the Sixth Amendment entitles the defendant to a jury determination of those additional facts by the beyond a

reasonable doubt standard of proof. It is thus evident that portions of the California Determinate Sentencing Law violate the holding in *Blakely*, because the middle term is the presumptive sentence, and a defendant may not be sentenced to the upper term unless the court determines by a preponderance of the evidence that there are circumstances in aggravation of the crime. (§ 1170; Cal. Rules of Court, rule 4.420.)

In *Cunningham v. California, supra*, 549 U.S. ___ [127 S. Ct. 856; 166 L. Ed. 2d 856], the majority recognized that because an upper term sentence in California requires findings of additional aggravating circumstances beyond the minimum elements of the offense, "the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum" for *Apprendi-Blakely* purposes. (*Cunningham, supra*, 166 L.Ed.2d at p. 873.) "Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt [citation], the DSL violates *Apprendi's* bright-line rule." (*Ibid.*) "Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent. [Fn.]" (*Id.* at p. 876.) *Cunningham* confirmed that the sentencing judge's determination of aggravating factors and his reliance on those factors to impose the upper term violated Kevin's constitutional rights to a jury trial and due process.[2]

Here the sentencing court found the following four aggravating factors: (1) the crime involved great violence and threat of great bodily injury; (2) Kevin's conduct renders him dangerous; (3) Kevin's prior

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[2] Kevin was sentenced on November 19, 2003, prior to *Cunningham v. California, supra.*

convictions are numerous; and (4) Kevin's performance on probation was unsatisfactory. The court acknowledged that there had been no jury findings on the first two factors. However, it indicated that in its judgment, the last two factors justified the upper term. (3RT 732.)

These two factors are recidivist based sentencing factors, and the United States Supreme Court has not yet applied *Apprendi* to such factors, even when the fact of such prior convictions is used to increase the statutory maximum sentence for an offense. (*Almendarez-Torres v. U.S.* (1998) 523 U.S. 224 [140 L.Ed.2d 350, 118 S.Ct. 1219] (hereinafter "*Almendarez-Torres.*") However, Kevin submits that if an exception applies to the *Apprendi/Blakely* rule, it should apply to the actual "fact of a prior conviction," rather than to other recidivist based aggravating factors. In *Apprendi v. New Jersey, supra*, 530 U.S. 466, the high court stated:

> Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as *a narrow exception* to the general rule we recalled at the outset. (*Id.* at p. 490 [Emphasis added.])

Almost five years after *Apprendi*, in *Shepard v. United States* (2005) 544 U.S. 13, 24 [161 L.Ed.2d 205, 125 S.Ct. 1254], the court stated, "A fact about a prior conviction, ... is too far removed from the conclusive significance of a prior judicial record, ... to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute. In *Jones v. United States* (1999) 526 U.S. 227, the high court noted the critical distinction between the fact of a prior conviction and other facts that prompt increased punishment. It stated, "unlike virtually any other consideration used to enlarge the possible penalty for an offense ... a prior conviction must itself

have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees. (*Id.* at p. 249.) Therefore the exception to the *Apprendi/Blakely* rule should applies, if at all, *only to the actual fact of a prior conviction*, rather than to other recidivist based sentencing factors.

The arguably recidivism-related factors present in this case fall outside of the *Almendarez-Torres* exception because they go beyond the mere fact of a prior conviction. First, they are among the enumerated "aggravating circumstances" in California Rules of Court, rule 4.421 (b) "relating to the defendant." Such factors consist entirely of conduct-related facts that go beyond the mere fact of status. The rule must be construed accordingly. (See *People v. Gordon* (2001) 90 Cal.App.4th 1409, 1412 [109 Cal.Rptr.2d 725].)

In *Almendarez-Torres, supra,* the defendant did not make any separate, subsidiary standard of proof claims because he had admitted his recidivism at the time he pleaded guilty. (*Id.* at pp. 247-248.) Therefore the United States Supreme Court did not consider any issue regarding the standard of proof that might apply to those sentencing determinations. (*Ibid.*) The Due Process Clause of the federal Constitution requires that those facts be found beyond a reasonable doubt. (U.S. Const. 14th Amend.; see *Almendarez-Torres, supra,* 523 U.S. at pp. 247-248.)

Even if prior convictions are deemed different from other facts that might be used at sentencing because a finding of guilt has previously been made beyond a reasonable doubt by a jury -- or by a valid guilty or no contest plea -- and the determination of whether a particular defendant suffered a particular prior conviction usually depends on documentary rather than testimonial evidence, that determination should nonetheless be

made by the standard of proof of beyond a reasonable doubt before it can be used as a basis to increase the defendant's current sentence beyond the statutory maximum. (See *Blakely, supra,* 542 U.S. at p. 301; *Almendarez-Torres, supra,* 523 U.S. at pp. 247-248.) In *Almendarez-Torres,* the court acknowledged but did not consider "whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of sentence." (*Id.*, at p. 348.) However, in considering which factfinder –a judge or jury --must determine the truth of any facts that are used to increase the sentence beyond the statutory limit, *Blakely* concluded that a "manipulable standard," such as one encompassing only factors that "bear significantly on the severity of sentence," was unworkable for the judiciary. (*Blakely, supra*, 542 U.S. at pp. 306-308.)

By analogy, a manipulable standard for determining when the Due Process Clause requires the higher standard of proof of beyond a reasonable doubt to increase a defendant's sentence beyond the statutory maximum based upon a criminal history is untenable. Just as *Blakely's* analysis led to the conclusion that, regardless of the magnitude of the increase in the sentence, the jury must always be the factfinder under the Sixth Amendment, similar reasoning leads to the conclusion that the standard of proof for determining past criminal convictions should always be beyond a reasonable doubt under the due process guarantee of the Fourteenth Amendment. (See *Ibid.*)

The sentencing range for an assault with a semiautomatic firearm on a peace officer is five, seven or nine years. (§ 245, subd. (d)(2).) The presumptive term -- the term which must be imposed absent a jury finding of aggravating factors -- is seven years. In Kevin's case, there was no fact-finding by the jury, and the trial court explicitly found the aggravating

factors "to have been proven by a preponderance of the evidence." (3RT 732.) Therefore the maximum permissible sentence on count 2 was the presumptive middle term of seven years. Instead, the court imposed the upper term of nine years, a term two years longer than the presumptive term, based on aggravating factors found true by the court, not by the jury, by applying the preponderance of evidence standard. In light of *Blakely*, Kevin's upper term sentence is unconstitutional and in violation of his federal constitutional rights to a jury trial and to due process. (U. S. Const., 5th, 6th, 14th Amends.)

D. *Apprendi, Blakely* and *Cunningham* Have Been Incorrectly Interpreted by the California Supreme Court

*1. THIS ISSUE IS BEING RAISED FOR THE PURPOSE OF EXHAUSTING KEVIN'S STATE REMEDIES*

On July 19, 2007, the this Court issued two opinions addressing the constitutionality of California's determinate sentencing law in light of *Apprendi, Blakely*, and *Cunningham*: *People v. Black* (2007) 41 Cal.4th 799 [62 Cal.Rptr.3d 569] (*Black II*), and *People v. Sandoval* (2007) 41 Cal.4th 825 [62 Cal.Rptr.3d 588]. Kevin is challenging these decisions in anticipation of exhausting his state remedies and preserving the issues for federal review, as the matter here is one of federal constitutional dimension.[3]

*2. THIS COURT INCORRECTLY HELD THAT THE UPPER TERM BECOMES THE "STATUTORY MAXIMUM" IF ONE AGGRAVATING CIRCUMSTANCE HAS BEEN ESTABLISHED IN ACCORDANCE WITH THE CONSTITUTIONAL REQUIREMENT SET FORTH IN BLAKELY*

In *Black II, supra,* this Court held that:

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[3] In *Black II*, a petition for writ of certiorari was filed in the United States Supreme Court on August 24, 2007, and placed on the docket August 28, 2007 as No. 07-6140.

> Under California's determinate sentencing system, the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728 [55 Cal.Rptr.2d 26].) Therefore, if one aggravating circumstance has been established in accordance with the constitutional requirements set forth in *Blakely*, the defendant is not 'legally entitled' to the middle term sentence, and the upper term sentence is the "statutory maximum. (*Black II* at p. 813.)

*Black II* thus drew a distinction between "two functions" served by aggravating factors within the State's determinate sentencing scheme: first, to raise the maximum sentence from the midterm to the upper term, and second, to "serve as a consideration" in the trial court's discretionary selection among the available terms. This parsing of the sentencing process means the Sixth Amendment attaches to the first function – the question of non-midterm eligibility – but not to the second – the process of term selection, within which the court retains wholesale discretion. (*Id.*, at pp. 815-816].)

> Accordingly, so long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with *Sixth Amendment* principles, the federal Constitution permits the trial court to rely on any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found true by a jury. (*Id.* at p. 813 [emphasis in the original].)

Kevin submits that *Black II* wrongly decided that the upper term becomes the "statutory maximum" upon the existence of a single aggravating factor such as the fact of a prior conviction, as that conclusion is in direct contravention of the express ruling in *Cunningham*. Further, it is an untenable interpretation of the Determinate Sentencing Law (DSL) in light of the express wording of section 1170, rule 4.420 of the California

Rules of Court, and a consistently contrary interpretation of the DSL by California courts. (§ 1170, subds. (a), (b); Cal. Rules of Court, rule 4.420, subds. (a) and (b); *People v. Scott* (1994) 9 Cal.4th 331, 350 [36 Cal.Rptr.2d 627]; *People v. Hall* (1994) 8 Cal.4th 950, 957-958 [35 Cal.Rptr.2d 432]; *People v. Wright* (1982) 30 Cal.3d 705, 709-710, 720 [180 Cal.Rptr. 196].)

The United States Supreme Court in *Cunningham* held that the middle term in the DSL was the statutory maximum. That statutory maximum can be exceeded, but is not changed. (*Cunningham v. California, supra*, 549 U.S. ___ [166 L.Ed.2d 856, 873].) Thus, the holding in *Black II* that one constitutional aggravating factor makes the upper term the statutory maximum is in direct conflict with United States Supreme Court authority.

Further, *Black II*'s bifurcation scheme runs counter to the spirit and letter of the DSL and therefore counter to *Blakely*. Parsing the sentencing decision into a two-step analysis vitiates what should be a global process, as the bottom-line determination is whether this particular defendant deserves an aggravated term for this particular offense. This is done by considering whether there are factors in aggravation and whether those factors outweigh any factors in mitigation—the conjunctive is not a second prong in the analysis, but rather the second half of an equation. For only if the answer to both variables is yes, is this defendant then, using *Black II*'s terminology, *eligible* for the aggravated sentence. Contrarily if the answer to the first "function" is yes, and the second no, the defendant is not, as a matter of law, eligible for the upper term. (See § 1170, subds. (a), (b); Cal. Rules of Court, rule 4.420, subds. (a) and (b) *People v. Hall, supra,* 8

Cal.4th 950, 957-958; *People v. Wright, supra*, 30 Cal.3d 750, 7019-710, 720.)

It is true that a single factor in aggravation can be sufficient to justify the imposition of the upper term. (See *People v. Osband, supra*, 13 Cal.4th 622, 728.) But this does not mean that any given factor in aggravation will necessarily justify the upper term in any given case. *Black II*'s reliance on *Osband* to support that principle was misplaced.

In *Osband*, the Court held that the trial court had improperly used one fact twice, once to impose an upper term and again to impose a full consecutive term under an enhancement statute, in violation of former rule 441(c) of the California Rules of Court. (*People v. Osband, supra,* 13 Cal.4th at p.728.) The Court held that resentencing was not required, however, as it was not reasonably probable that a more favorable sentence would have been imposed absent the error. (*Ibid.*)

It was in the context of determining whether resentencing was necessary that the court stated that "only a single aggravating factor is required to impose the upper term." (*Ibid.*) The trial court had relied on the viciousness of the crime to impose consecutive sentences. In imposing the upper term, the court had relied on that factor and on the additional facts of the victim's vulnerability and the defendant's dangerousness, criminal record, and probationary status. The Court concluded that the dual use of one factor was harmless because the trial court needed only one factor each to impose the upper term and consecutive sentences, respectively, and could have relied on disparate factors to make those sentences choices; based on the record before it, the Court saw no reasonable probability that the trial court would not have done so. (*Ibid.*) The analysis in *Osband* is

not logically equivalent to finding that one aggravating factor is always automatically sufficient to impose the upper term.

Moreover, if sentencing determinations are to now be made serially, this is another sea-change, and as such, this Court cannot assume that the sentencing court below determined eligibility first, and only afterwards choosing between available terms, in accordance with *Black II*'s bifurcated system. (See, e.g., *People v. Hall, supra*, 8 Cal.4th 950, 957-958; *People v. Wright, supra*, 30 Cal.3d 705, 709-710,720; Pen. Code, § 1170; Cal. Rules of Court, rule 4.408 (a); 4.420; see also *Black II, supra*, 41 Cal.4th at p. 816 ["Although the DSL does not distinguish between these two functions...."].) Thus, even if this Court finds one or some of the factors used here constitutional, it should remand for resentencing if it cannot determine beyond a reasonable doubt that the trial court would have imposed the upper term based only on those factors. (See *People v. Jackson* (1987) 196 Cal.App.3d 380, 388-389 [242 Cal.Rptr. 1], overruled on other grounds in *People v. Rodriguez* (1990) 51 Cal.3d 437, 444, fn. 3 [272 Cal.Rptr. 613] [sentencing error not harmless where one of two factors relied on was improper dual use of facts] *People v. Jardine* (1981) 116 Cal.App.3d 907, 923 [172 Cal.Rptr. 408] [resentencing ordered where one of three factors relied on for the upper term was improper dual use], disapproved on other grounds in *People v. Cooper, supra,* 53 Cal.3d 1158, 1167, *People v. Holt, supra,* 37 Cal.3d 436, 452-453, and *Donaldson v. Superior Court* (1983) 35 Cal.3d 24, 33 [196 Cal.Rptr. 704].)

E. The Error Here Was Not Harmless

In *Washington v. Recuenco* (2006) 548 U.S. __ [165 L.Ed.2d 466, 126 S.Ct. 2546, 2553], the United States Supreme Court held that *Apprendi/Blakely* error is subject to harmless error analysis under *Chapman*

*v. California, supra,* 386 U.S. 18, 24. The *Recuenco* court relied in large part on *Neder v. United States* (1999) 527 U.S. 1 [144 L.Ed.2d 35, 119 S.Ct. 1827] wherein the court held that the trial court's failure to instruct the jury on an element of the crime was harmless because the omitted element was uncontested and supported by overwhelming evidence, such that jury certainly would have found it true beyond a reasonable doubt. (*Id.*, at pp. 16-17.)

In *People v. Sandoval, supra,* 41 Cal.4th 825, this Court held that the harmless beyond a reasonable doubt standard applies in determining whether unconstitutional judicial fact-finding at sentencing requires resentencing. The court explained that the reviewing court must determine, "whether, if the question of the existence of an aggravating circumstance or circumstances had been submitted to the jury, the jury's verdict would have authorized the upper term sentence." (*Id.* at p. 838.) If it can be determined that the jury would necessarily have found at least one of the aggravating factors to be true, the error is harmless, and there is no inquiry into whether the other aggravating factors for which there was constitutional error, affected the judge's selection of the upper term. (*Id.* at pp. 839.) However in *Sandoval, supra,* this Court cautioned that the reviewing court cannot necessarily assume that the record reflects all of the evidence or arguments that would have been presented had the aggravating circumstances been submitted to the jury. (*Ibid.*) Therefore under *Sandoval*, it is difficult for a reviewing court to conclude beyond a reasonable doubt that the jury would have found all the aggravating factors true beyond a reasonable doubt.

Here, under the harmless error analysis, reversal is required because the government cannot show beyond a reasonable doubt that the error did

not contribute to the result. (See also *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324 [109 Cal.Rptr.2d 851].) It cannot be concluded that without the error the decision would have been the same. Although the trial court found that there were five aggravating factors, and no mitigating factors, a jury considering the evidence of the aggravating factors in Kevin's case is likely to have viewed the evidence differently.

The court's five factual findings where hardly compelling. Indeed, the offenses involved a high degree of cruelty, that is the very nature of these sex offenses and torture. The "indicia of planning" to commit a robbery was nonexistent, other than whatever mental processing was required to commit the act. So too, the purported "certain level of sophistication" subsequent to the homicide, where Kevin's remorse drove him to tell nearly everyone he met that he had been involved in the incident. It is likely that the jury would have also not found the remaining aggravating factors to be true beyond a reasonable doubt, because for the most part they were necessarily part of the offenses committed.

Based on the reasons discussed above, it cannot be determined that a jury would have found at least one of the aggravating factors to be true beyond a reasonable doubt. Accordingly, the error cannot be found to be harmless beyond a reasonable doubt, and Kevin's sentence must be vacated.

F. *Sandoval's* Resentencing Regime Violates the State and Federal Constitutional Prohibitions Against Ex Post Facto Laws and Guarantees of Equal Protection

In *People v. Sandoval, supra*, 41Cal.4th 825, the Court adopted the procedures set forth in Senate Bill 40 reforming section 1170, subdivision (b), and in the related amendments to the California Rules of Court. It directed that sentencing proceedings remanded due to *Cunningham* error

"are to be conducted in a manner consistent with the amendments to the DSL adopted by the Legislature." (*Id.* at p. 846.) The court found that doing so did not deny the defendant due process of law, nor did it violate the prohibition against ex post facto laws. (*Id.* at pp. 853-857.) Appellant disagrees. As illustrated below, this approach violates both the prohibitions against both *ex post facto* laws (U.S. Const., art I, § 9, Cl. 3; Cal. Const., art. I, § 9) and the constitutional guarantees of equal protection (U.S. Const., 5th, 14th Amends.; Cal. Const., art. I, §7.)

In *Miller v. Florida* (1987) 482 U.S. 423 [96 L.Ed.2d 351, 107 S.Ct. 2446], the United States Supreme Court explained that to constitute an *ex post facto* violation, a law must be (1) retrospective, meaning that it applies to events occurring before its enactment, and (2) "it must disadvantage the offender affected by it." (*Id.,* at p. 430-431.) The reviewing court must compare the practical operation of the two statutes as applied to petitioner's offense. (*Lindsey v. Washington* (1937) 301 U.S. 397, 399 [81 L.Ed. 1182, 57 S.Ct. 797].) The *ex post facto* clause looks to the standard of punishment prescribed, rather than to the sentence actually imposed. (*Id.,* at p. 401.)

Here, because the application of SB 40 removes mandatory limits on the judge's ability to impose the upper term, *Sandoval* disadvantages Kevin at resentencing and violates the *ex post facto* prohibition. (*Miller v. Florida, supra,* at pp. 432-433, 435-436; *Lindsey v. Washington, supra,* at p. 400.) The violation is the same whether it is the Court or the legislature that imposes the revised procedures. "If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." (*Bouie v. Columbia*

(1964) 378 U.S. 347, 353-354 [12 L.Ed.2d 894, 84 S.Ct. 1697]; see also *People v. Martinez* (1999) 20 Cal.4th 225, 238 [83 Cal.Rptr.2d 533]; *People v. Weidert* (1985) 39 Cal.3d 836, 850 [218 Cal.Rptr. 57]; *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 634-635 [87 Cal.Rptr. 481]; *In re Baert* (1988) 205 Cal.App.3d 514, 518 [252 Cal.Rptr. 418].)

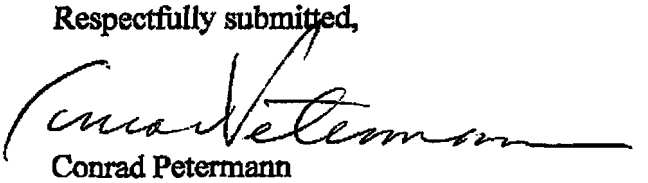
*Sandoval's* application of SB40 also violates the guarantee of equal protection because persons who are resentenced on appeal after *Sandoval* have their resentencing controlled by SB 40,while persons who were resentenced prior to *Sandoval* are subject to the more favorable treatment of pre-SB 40 DSL and court rules. Because there is no rational basis for the disparate treatment of the two groups of similarly situated persons, it violates the guarantees of equal protection. (See *People v. Olivas, supra,* 17 Cal.3d 236, 248-250; *People v. Alvarez* (2001) 88 Cal.App.4th 1110, 1116 [106 Cal.Rptr.2d 447]; see also *People v. Wilkinson* (2004) 33 Cal.4th 821, 838 [16 Cal.Rptr.3d 420].) Accordingly, this case should be remanded for resentencing under section 1170 and the Rules of Court as they existed at the time the current offense was committed.

## CONCLUSION

For the foregoing reasons, Kevin's convictions and death sentence must be reversed.

Dated: November 5, 2008

Respectfully submitted,



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**DECLARATION OF SERVICE**

I, undersigned, say: I am a citizen of the United States, a resident of Ventura County, over 18 years of age, not a party to this action and with the above business address. On the date executed below, I served *APPELLANT'S OPENING BRIEF* by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Ojai, California. Said copies were addressed to the parties as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on November 12, 2008, at Ojai, California.

Conrad Petermann