SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	No. S127621
Plaintiff and Respondent,	)	
	)	San Diego County
v.	)	Superior Court
	)	No. SCD161640
SCOTT THOMAS ERSKINE,	)	
	)	
Defendant and Appellant.	)	
	)	

SUPREME COURT
FILED

APR 10 2014

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Automatic Appeal From the Superior Court of San Diego County

Honorable Kenneth K. So, Judge

APPELLANT'S OPENING BRIEF

KIMBERLY J. GROVE
Attorney at Law
CA STATE BAR NO. 095225
P.O. Box 425
Ligonier, Pennsylvania 15658
(724) 238-3497

Attorney for Appellant

DEATH PENALTY

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STATEMENT OF APPEALABILITY

This is an automatic appeal, pursuant to California Constitution, article VI, section 11, and Penal Code section 1239, subdivision (b), from a conviction and judgment of death entered against appellant, Scott Thomas Erskine (hereinafter "appellant"), in San Diego County Superior Court on September 1, 2004. (16 CT 3837.)

STATEMENT OF THE CASE

I. THE CHARGES

The charges in this case stem from a single incident involving two victims, Charles K. and Jonathan S., occurring on March 27, 1993. A complaint filed July 30, 2001, charged appellant with two counts of murder (Pen. Code, § 187, subd. (a)). The complaint alleged that appellant used a

deadly weapon (a rope) in the commission of each of the murders (Pen. Code, § 12022, subd. (b)), and that both victims were tortured (Pen. Code, §190.2, subd. (a)(18)). As to Charles K., the complaint contained the following felony-murder special circumstance allegations: the murder was committed while appellant was engaged in the commission or attempted commission of oral copulation in violation of Penal Code section 288a (Pen. Code, § 190.2, subd. (a)(17)(vi)); the murder was committed while appellant was engaged in the commission or attempted commission of rape by a foreign object in violation of Penal Code section 289 (Pen. Code, §190.2, subd. (a)(17)(xi)); and the murder was committed while appellant was engaged in the commission or attempted commission of a lewd and lascivious act in violation of Penal Code section 289 (Pen. Code, §190.2, subdivision (a)(17)(v)). With regard to Jonathan S., the complaint contained the following felony-murder special circumstance allegations: that the murder was committed while appellant was engaged in the commission or attempted commission of sodomy in violation of Penal Code section 286 (Pen. Code, §190.2, subd. (a)(17)(vi)); and the murder was committed while appellant was engaged in the commission or attempted commission of a lewd and lascivious act in violation of Penal Code section 288 (Pen. Code, §190.2, subd. (a)(17)(v)). The complaint also contained a multiple murder special circumstance allegation (Pen. Code, §190.2, subd. (a)(3)). (1 CT 1-3.)

Following a one-day preliminary hearing on January 28, 2002, appellant was bound over for trial on both counts as well as all of the enhancement and special circumstance allegations. (17 CT 3870-3872.) An information filed on February 26, 2002, repeated the charges and allegations contained in the complaint, and contained an additional special circumstance allegation as to Charles K. that the murder was committed while appellant was

engaged in the commission or attempted commission of sodomy in violation of Penal Code section 286 (Pen. Code, §190.2, subd. (a)(17)(vi)). (1 CT 70-72.)

An amended information filed on August 29, 2003, omitted three of the felony-murder special circumstance allegations contained in the original information (the allegations relating to sodomy with regard to each victim and the allegations regarding rape by a foreign object relating to Charles K.). Under the amended information appellant was charged with two counts of murder (Pen. Code, § 187, subd. (a)). The amended information alleged that appellant used a deadly weapon in the commission of each of the murders (Pen. Code, § 12022, subd. (b)), and that both victims were tortured (Pen. Code, §190.2, subd. (a)(18)). As to Charles K., the amended information contained the following felony-murder special circumstance allegations: the murder was committed while appellant was engaged in the commission or attempted commission of oral copulation in violation of Penal Code section 288a (Pen. Code, § 190.2, subd. (a)(17)(vi)); and the murder was committed while appellant was engaged in the commission or attempted commission of a lewd and lascivious act in violation of Penal Code section 288 (Pen. Code, §190.2, subdivision (a)(17)(v)). With regard to Jonathan S., the amended information alleged that the murder was committed while appellant was engaged in the commission or attempted commission of a lewd and lascivious act in violation of Penal Code section 288 (Pen. Code, §190.2, subd. (a)(17)(v)). The amended information also contained a multiple murder special circumstance allegation (Pen. Code, §190.2, subd. (a)(3)). (11 CT 2588-2590.) On August 29, 2003, appellant was arraigned on the amended information at which time he entered pleas of not guilty to the charges, and

denied the enhancement and special circumstance allegations. (17 CT 3941; 15 RT 1818.)

II. PRE-TRIAL PROCEEDINGS AND VOIR DIRE

Several motions filed by the parties prior to trial were litigated before and during jury selection. Various procedural matters were resolved before the jury panel was assembled. (17 CT 3916-3940.)

Jury selection began on August 29, 2003. (17 CT 3941.) Voir dire concluded on September 18, when both sides accepted the panel of jurors and six alternates. (17 CT 3958.)

III. THE GUILT PHASE

On September 22, 2003, the trial court read preliminary jury instructions, and the parties presented their opening statements. (17 CT 3960; 23 RT 3198-3201 [instructions], 3201-3213 [prosecution opening statement], 3220-3235 [defense opening statement].) The prosecution thereafter began its case-in-chief. (23 RT 3235.) After six days of testimony from a total of 35 witnesses, the prosecution completed its case on September 30. (17 CT 3960 [9/22/03], 3963 [9/23/03], 3967 [9/24/03], 3970 [9/25/03] 3973 [9/29/03], 3975 [9/30/03].) No witnesses were called on behalf of the defense. (17 CT 3975; 29 RT 4094.) The parties presented their closing arguments, and the court instructed the jury. (17 CT 3975; 29 RT 4095-4132 [jury instructions], 4133-4160 [prosecution closing argument], 4161-4163 [defense closing argument]; 4164-4173 [concluding instructions].) The jury retired to commence deliberations at 2:03 p.m. on the 30th (17 CT 3976), and informed the court it had reached verdicts at 4:00 p.m. the following day (17 CT 3978).

The jury returned verdicts finding appellant guilty on all counts. With respect to Counts 1 and 2, the jury convicted appellant of first degree murder.

The jury found that appellant did use a deadly weapon in connection with each murder. All of the alleged special circumstance allegations were found to be true. (12 CT 2691-2698; 17 CT 3979-3986 .) Each juror was polled as to his or her verdict, and ordered to return on October 14, 2003, when the penalty phase of trial was set to begin. (29 RT 4184-4191.)

IV. FIRST PENALTY PHASE

Various *in limine* motions were litigated on October 2, 6, 8, 9, and 10. (17 CT 3990-3993.)

On October 14, the court pre-instructed the jurors and the prosecution presented its opening statement. (31 RT 4484-45604.) The prosecution then called 22 witnesses over the course of 4 days — October 14, 15, 16, and 20. (18 CT 3995-4003.) On November 10, the defense presented its opening statement, and then called 17 witnesses over the course of 11 days — November 10, 12, 13, 14, 17, 18, 19, 20, 21, 24, and 25. (18 CT 4008-4027.) The prosecution called two witnesses in rebuttal. Their testimony was heard on November 26, and on December 1, 2 and 3. (18 CT 4028-4034.) After both sides rested, the trial court instructed the jurors and closing arguments were presented. (53 RT 8251-8457.)

Jury deliberations began on December 9, 2003, at 10:14 a.m. (18 CT 4039), and continued on December 10, 11, 12 and 15. (18 CT 4040-4045.) On the 15th, at 10:23 a.m., the jurors informed the court that they were deadlocked and unable to reach a verdict. (18 CT 4045; 54 RT 8541.) The court inquired further and was informed that two ballots had been taken and that the jurors were deadlocked 11 to 1. (54 RT 8544-8545.) After inquiring of several of the jurors as to whether they felt further deliberations would be productive, the court declared a mistrial. (18 CT 4045; 54 RT 8544-8545.)

V. SECOND PENALTY PHASE

Pre-trial motions were litigated over the course of five days prior to the commencement of the re-trial of the penalty phase. (18 CT 4053 [3/5/04], 4055 [3/9/04], 4057 [3/10/04], 4060 [3/15/04], 4062 [3/18/04].) Voir dire began on March 26, 2004, and continued over a period of 10 days concluding on April 15. (18 CT 4064-4081.)

On April 19, preliminary instructions were read, and the parties presented their opening statements. (18 CT 4082; 67 RT 10597 [instruction], 10598-10629 [prosecution opening statement], 10630-10702 [defense opening statement].) The prosecution presented evidence over the course of 10 days, and called 50 witnesses in its case-in-chief. (18 CT 4082 [4/19/04], 4084 [4/20/04], 4088 [4/21/04], 4090 [4/23/04], 4095 [4/27/04], 4097 [4/28/04], 4099 [4/29/04], 4101 [4/30/04], 4103 [5/3/04].) The defense called 19 witnesses over the course of 12 days. (18 CT 4092 [4/23/04], 4094 [4/26/04], 4105 [5/5/04], 4107 [5/6/04], 4109 [5/7/04], 4111 [5/10/04], 4112 [5/11/04, 4114 [5/17/04], 4115 [5/18/04], 4116 5/19/04], 4118 [5/20/04], 4119 [5/21/04].) The prosecution then presented 4 witness in rebuttal over the course of 3 days. (18 CT 4120 5/24/04], 4122 [5/25/04], 4124 [5/27/04].) The trial judge instructed the jurors on June 1, 2004. (92 RT 14932-14948; 18 CT 4129.) After the jury was instructed on the law, the prosecution presented its closing statement. (92 RT 14952-15026; 18 CT 4129.) The defense began closing statement after the prosecution (92 RT 15029-15113; 18 CT 4129), and concluded it the following day (93 RT 15117-15176; 18 CT 4131.).

The case was submitted to the jury at 11:19 a.m., on June 2, 2004, and at 11:30 the jurors were excused for lunch. They resumed deliberations at 1:30 p.m., and at 3:40 that afternoon the bailiff informed the court the jurors

had reached a verdict. (18 CT 4131.) The jury returned verdicts fixing the penalty for each of the murders at death. (16 CT 3762-3763, 18 CT 4133-4134.)

VI. POST-TRIAL PROCEEDINGS AND SENTENCING

After the jury returned death verdicts various constitutional challenges to the death penalty, which had been raised by written motion filed by the defense prior to trial, were litigated over the course of 10 days. All of the defense challenges were ultimately rejected. (18 CT 4138 [7/26/04], 4139 [7/27/04], 4140 [7/28/04], 4142 [7/29/04], 4144 [7/30/04], 4145 [8/2/04], 4147 [8/3/04], 4148 [8/5/04], 4149 [8/6/04], 4151 [8/31/04].)

On September 1, 2004, the trial judge conducted an automatic review of the verdict under Penal Code section 190.4, subdivision (e), and declined to modify the jury's verdict of death. (16 CT 3843; 18 CT 4153.) The court then formally imposed the death sentence with respect to Counts 1 and 2. (16 CT 3837.) In addition, the court imposed a sentence of one year for each of the deadly weapon enhancements, but stayed the terms. (18 CT 4153.)

STATEMENT OF THE FACTS

THE GUILT PHASE

I. THE CRIMES

On March 27, 1993, Charles K., age 13, and Jonathan S., age 9, left their homes to enjoy a day of bike riding. (23 RT 3238.) Charles and Jonathan had lunch at the Rally's hamburger restaurant on Palm Avenue, San Diego, where they ordered cheeseburgers with fries and soda-pop. (23 RT 3249-3253; 23 RT 3255-3257; 23 RT 3259-3262.) They also spent some time at an amusement center playing video games. (23 RT 3241-3245.)

Around dusk, Jonathan's brother Alton asked his mother if she had heard from Jonathan. When she told him she had not, Alton telephoned Charles's house, and learned that the boys were not there. Alton and his mother then drove to the homes of several of Jonathan's friends looking for him. (23 RT 3288.) Unable to locate Jonathan, they returned home around 7:00 p.m. and contacted police. (23 RT 3289.)

The police, families, and the community searched for the boys (24 RT 3313-3318), until the morning of March 29 when Peter Winslow discovered their bodies off a bike path in the Otay River area (24 RT 3318-3321). Winslow was going through his usual exercise regimen of biking and running through Swiss Park and along the bike path leading to Saturn Boulevard when he noticed a build-up of brush in an area between the path and the west bank of the Otay River. (24 RT 3303-3309.) Looking over the top of the enclosure, he observed the bodies of Jonathan and Charles inside. (24 RT 3310.) Charles was lying on the ground and Jonathan was on his knees, his body held upright by a rope around his neck connected to a branch. Winslow

went for help, and called police from the Home Depot at the end of the trail. (24 RT 3111.)

Two other bicyclists had seen the boys near the bike path the afternoon they disappeared. Arthur Blitz was riding his bicycle from Imperial Beach to downtown San Diego, when he encountered the boys in this area. Jonathan asked Blitz about the rearview mirror on his helmet, and Blitz explained to him how it worked before continuing with his ride. He saw Charles but did not speak to him. (23 RT 3275-3276.) Carol Carr was also riding her bicycle in the area, and saw the boys. (23 RT 3265-3269, 3273-3274.) Shortly before she reached the location, Carr had seen a blue car driving across a field where cars do not normally drive. She stopped her bike and watched as a man got out of the vehicle and waved her on. She described the man as 20-30 years old, with brown hair, a slight build and under 6' tall. (23 RT 3273.) Carr rode quickly past him, and then around the bend in the bike path to where she saw the boys. (23 RT 3273-3274.)

The enclosure where were the boys' bodies were found was a make-shift fort about 10' by 12' and 5' to 6' tall, made out of tumbleweeds with a 2' wide "igloo style" entry. (24 RT 3320, 3360.) A tall broad leafed Castor Bean plant formed the "top" of the fort. (24 RT 3360-3361.) Jonathan's body was held upright by a rope connected to a branch about three and a half feet above the ground. He was on his knees, and his hands were touching the ground. (24 RT 3368-3369.) Charles's body was lying on the ground face down. Both boys were nude from the waist down. (24 RT 3370.)

Jonathan's body was secured to the branch by a length of yellow rope which was attached to another piece of the same type rope tied loosely around his neck. (25 RT 3511.) He was wearing only a multi-colored sweatshirt and socks which were dirty on the bottom. (24 RT 3371; 25 RT 3501.) There was

an additional length of yellow rope around his ankles, and his wrists were bound together with a white cord. (24 RT 3371-3372, 3377-3378.) A gag made from terry cloth was secured to his face with white surgical tape and black electrician's tape. (24 RT 3467.) The gag had slipped down around his chin, and there were marks of adhesive from the tape on his cheeks. (24 RT 3372.)

Charles's body was lying on the ground, and was dressed only in a white sweatshirt and socks. (24 RT 3370.) His head rested on a pile of neatly folded clothing which included shirts, pants, and underwear. (24 RT 3381, 3389, 3395-3400, 3402, 3460.) Two pair of tennis shoes were close by. (24 RT 3389, 3404, 3408.) There were two ropes, yellow and white, tied tightly around Charles's neck. (24 RT 3383, 3501.) Tape residue was visible on his face. (24 RT 3385-3386.)

Investigators found the boys' bikes about 30' from the fort. They were chained together and covered in tumbleweeds. (24 RT 3412-3416.) Also found outside the fort were pieces of rope and cord visually similar to the rope and cord used to bind the boys. (24 RT 3408-3411, 3463-3465.) Two cigarette butts were found on the path near the fort. (24 RT 3418-3419, 3421.) A representative from the medical examiner's office collected sexual assault swabs from the bodies at the scene. (24 RT 3436, 3460-3462; 25 RT 3504-3507.) Additional swabs and biological samples were collected from the bodies during the autopsies. (24 RT 3453, 3456-3457, 3513-3519.)

The autopsies revealed that both boys had been strangled. (25 RT 3540, 3555.) During the external examination of Charles's body, injuries were observed to the genitals, including bruising and an area of torn skin which was consistent with a human bite mark. (25 RT 3530-3532; 24 RT 3481-3484.) An internal examination of the body revealed hemorrhage type

damage extending approximately 3½ inches inside the rectum. This injury occurred pre-mortem, and was consistent with the forceful insertion of a foreign object. (25 RT 3537-3539.)

As a part of the initial investigation in 1993, Annette Peer of the San Diego Police Department crime laboratory examined items of evidence for potential DNA testing, including swabs collected from the victims as well as swatches of fabric cut from their clothing. (25 RT 3588.) Although she was able to extract DNA from anal swabs collected from both boys, the DNA types produced by DQ Alpha testing matched the DNA type of the boy from whom the swab had been collected. (25 RT 3591.) Peer found only a single sperm cell on a scrotum swab from Charles's body, and did not find sperm cells present on any of the other swabs she examined. (25 RT 3592.) She also examined and tested cuttings from the white hooded sweatshirt worn by Charles, but did not obtain positive DNA results. (25 RT 3592-3593.)

Over the next several years DNA tests became more powerful and discriminating. (25 RT 3596.) As a result of advancements in the field, in 2001, Peer re-evaluated evidence in this case and was able to obtain additional results. (25 RT 3598.) She found a second sperm cell on a scrotum swab collected from Charles's body. (25 RT 3599-3600.) She also observed a single sperm cell on an exterior anal swab taken from Charles's body, but none on an interior anal swab. (25 RT 3602-3603.) Of the swabs she examined that were collected from Jonathan's body, Peer observed a low level of sperm cells on the exterior anal swab, far less than the 100 cells required for DNA testing. (25 RT 3604-3605.) No sperm cells were observed on the penile swab, the oral swab, or the interior anal swab from Jonathan's body. (25 RT 3603-3605.) Of all the swabs she examined Peer was only able to

extract a usable quantity of sperm cells from the oral swab collected from Charles's body. (25 RT 3600-3602.)

The DNA extracted from Charles's oral swab was analyzed and determined to be a mixed sample. The non-sperm fraction of the extracted DNA was consistent with Charles's DNA profile. (25 RT 3630.) The sperm fraction was consistent with a mixture of Charles's DNA profile and the profile of an unidentified person. (25 RT 3632.) The unknown profile was submitted to the California Department of Justice for electronic comparison to profiles in their database — commonly referred to as CODIS (the Combined DNA Index System). (25 RT 3619-3621, 3630-3633.) A "cold hit" was returned indicating a preliminary match to appellant's DNA profile at the seven markers submitted for comparison. (25 RT 3621-3624; 3630-3634.) After the database hit, Peer went back over other items of evidence in the case, including the cigarette butts collected at the scene, to determine whether further analysis could be done. (25 RT 3607.) She performed extractions on both cigarette butts, and obtained epithelial cells as to one. (25 RT 3614.)

The lab performed DNA typing tests utilizing the Profiler Plus® and COfiler® kits on the DNA extracted from the cigarette butt and on the DNA extracted from the oral swabs collected from Charles's body. A reference sample was obtained from appellant, and compared to the results of these tests. (25 RT 3630-3636, 3650-3651.) The DNA profiles obtained from the oral swabs and the cigarette butt matched the profile obtained from appellant's reference sample.[1] The statistical probability of a match with regard to the

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[1] The same conclusions with regard to the oral swabs were reached by independent test performed by a private DNA testing lab, Orchid Cellmark, utilizing the same test kits, Profiler Plus® and COfiler®. (25 RT 3560, 3565,

oral swabs was said to be 1 in 1.9 trillion Caucasians, 1 in 600 billion African Americans, and 1 in 3.5 trillion Hispanics. (25 RT 3636.) The statistics with regard to the profile obtained with regard to DNA extracted from the cigarette butt were determined to be 1 in 10 quadrillion Caucasians, 1 in 900 trillion African Americans, 1 in 29 quadrillion Hispanics. (25 RT 3643.)

In preparation for trial, items of clothing recovered from the scene were examined by criminalist Wilfred Del Rosario at the request of the deputy district attorney assigned to the case. Del Rosario found a low number of sperm cells on the white sweatshirt hood that Charles had been wearing, and on the front and the collar area of Jonathan's multi-colored sweatshirt, and found a single sperm cell on the back of a green T-shirt that was among the clothing under Charles's head. (25 RT 3645-3647.) Pediatrician Wendy Wright testified as to her opinion, based on autopsy photographs of the boys, that: "neither one were [sic] of the pubertal stage development that they could form sperm on their own." (26 RT 3667-3670.)

Appellant's roommate at the time of the offenses, Lori Behrens, testified that appellant chained smoked and that he habitually carried a folding knife. (26 RT 3672, 3676-3677.) She also testified that he drove a blue Volvo. (26 RT 3678-3679.) Behrens identified a photograph of a blue Volvo as looking similar to the car appellant drove. (26 RT 3678-3679.) The same photograph was identified by Carol Carr as similar to the vehicle she had seen near the bike path on the day the boys disappeared. (23 RT 3271-3272.)

3568, 3572-3580.) While the conclusions were the same, the statistical calculations differed substantially. Cellmark calculated the probabilities of a match as 1 in 1.6 million Caucasians; 1 in 750,000 African Americans; 1 in 5 million Hispanics. (25 RT 3581.)

II. OTHER CRIMES EVIDENCE

A. Jennifer M.

In the early afternoon of October 22, 1993, Jennifer M.[2] was waiting at a bus stop for public transportation to take her home from school; she was attending classes at Century Business College. (25 RT 3686, 3690.) A bus passed but did not stop for her. (26 RT 3686.) When Jennifer wondered aloud why the bus had passed her by, appellant — who was working on his car across the street — began talking to her. Jennifer couldn't hear him so she walked across the street. (26 RT 3686-3687.) Appellant offered Jennifer a ride, which she declined, and then invited her to his apartment for a drink. (26 RT 3687.)

Jennifer followed appellant to his apartment where he gave her a beer. She drank her beer and watched television while appellant repaired a dead bolt on the front door. After it was repaired, appellant closed and locked the door. (26 RT 3688.) He then offered Jennifer some methamphetamine, and they both inhaled a line. (26 RT 3691.) Appellant suggested they move into another room which was a dining room with a Murphy bed. (26 RT 3694.) As Jennifer walked into the other room, appellant grabbed her around the neck. She was having problems breathing, and asked appellant what he was doing. She let her body go limp, shut her eyes, and lay there without moving. Appellant let go of her, and when she opened her eyes he was holding a knife to her throat. (26 RT 3695-3696.)

Appellant demanded that Jennifer undress and, fearing for her life, she complied. (26 RT 3696-3697.) As she removed her underwear she

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[2] Jennifer M. was unavailable at the time of trial. Her testimony from the 1994 sexual assault prosecution was read to the jurors. (26 RT 3686-3842.)

discovered that she had defecated when appellant strangled her. (26 RT 3698.) Appellant tied Jennifer's hands behind her back, and put tape over her mouth, then cleaned her up. (26 RT 3698.) He then clipped and shaved Jennifer's pubic area with scissors and a small disposable razor, before forcing her to shower with him. (26 RT 3699-3701.)

Appellant told Jennifer that, if she did everything he asked of her, she would be all right. If she did not comply he said she "would go home in a body bag." (26 RT 3702.) Appellant then committed several acts of sexual assault, including acts of forcible oral copulation and rape. During the assault, which took place in both the living room and on the bed in the other room, appellant placed mirrors against the wall and on the floor in various locations. (26 RT 3701-3708.) At one point appellant took a shotgun down off the wall, and warned her he would shoot anyone she sent to his door. (26 RT 3711-3712.)

After completing the sexual assault, appellant gave Jennifer clean pants to wear, fixed her something to eat, and then drove her to a hotel where she was to meet friends. (26 RT 3710-3711.) At the hotel Jennifer told a friend what had happened, but she was afraid to report the incident to police because appellant had told her he would kill anyone who came to his door and she did not want to jeopardize a police officer's life. (26 RT 3720-3723.) She was convinced to report the crimes several days later. (26 RT 3736.) Detectives who spoke to her at that time observed that her eyes had hemorrhages and that her body was bruised. (26 RT 3844.)

A search was conducted of appellant's apartment and car. In his home police located the shotgun, yellow rope, silver duct tape, razors and mirrors. (26 RT 3853-3855, 3870-3872.) More yellow rope was found in appellant's

car, which also contained razors and black tape. (26 RT 3857-3860, 3873-3874.)

B. Renee Baker

On June 23, 1989, Renee Baker's body was discovered lying face down near the shore of a bird sanctuary on the Intercostal Waterway in Palm Beach, Florida. (28 RT 4003-4006, 4016, 4030.) Investigators found her purse and clothing in a pile not far from her body. (28 RT 4023-4024.) A cigarette butt was located a few feet from the purse. (28 RT 4025.)

An autopsy determined that Baker had died as the result of drowning. (29 RT 4089.) She had also sustained blunt trauma injuries to her head and face, and injuries to her neck consistent with having been placed in a choke hold. (29 RT 4085-4087.) Sexual assault swabs were collected during the autopsy. (29 RT 4081-4082.)

Baker's car was later discovered in a supermarket parking lot not far from where her body had been found. (28 RT 4032.) The vehicle was locked, and the windows were rolled up. Investigators were able to unlock the car with keys recovered from Baker's purse. (28 RT 4034.) An adjustable wrench was found on the diver's side floorboard, and the car's air filter, which had been taken off the carburetor, was in hatchback area of the car. (28 RT 4034-4035 .) A glass ashtray containing a single cigarette butt was in the center console, and an empty pack of Doral cigarettes was on the floor. (28 RT 4034.) The cigarette butt in the car differed in appearance from the cigarette butt found at the scene. (29 RT 4034-4035.)

The Baker case remained unsolved for 11 years until, in July of 2000, Cecelia Crouse, supervisor of the Serology and DNA section of the Palm Beach County Sheriff's Department Laboratory was asked to see if she could obtain DNA profiles from two cigarette butts associated with the case. (28 RT 3981.) Crouse performed the PCR-based PowerPlex® 1.1 test on DNA

extracted from both cigarette butts. (28 RT 3981-3982.) With respect to the cigarette butt recovered from Baker's car, Crouse determined that the DNA was contributed by a single individual, and that the individual was female. She obtained testing results for seven out of eight markers. (28 RT 3983.) With respect to the cigarette butt recovered from the scene, Crouse obtained results for four out of eight markers (28 RT 3983), and entered this partial profile into the Palm Beach County DNA database system (28 RT 3985-3986).

In July of 2002 Crouse was provided with a DNA profile supplied by the San Diego Police Department and asked to enter it into their local database. The profile matched the partial profile she had entered from the cigarette butt in the Baker case. (28 RT 3986.) Applying new methods of DNA analysis to the evidence, Crouse retested the DNA originally extracted from the cigarette butt and obtained results at 11 out of 16 genetic markers using the PowerPlex® 16 test. (28 RT 3987-3988.)

Crouse also re-examined the original slides made from the swabs collected at the autopsy. While the vaginal and rectal slides were negative for the presence of sperm, she did find sperm cells on the oral slide. Crouse made another slide from a portion of the oral swab and determined that the quantity of sperm present was sufficient for DNA testing. (28 RT 3990-3991.) She then performed a differential extraction on the sample. DNA analysis on the sperm fraction with the same test utilized on the DNA from the cigarette butt resulted in a complete profile for all 16 markers. (28 RT 3991-3992.)

On September 20, 2002, Crouse received known biological samples obtained from appellant. (28 RT 3992.) She conducted DNA analysis of the standards, and compared the resulting profile to the profile obtained with respect to DNA extracted from the cigarette butt and the oral swab. The

profiles matched, and appellant could not be excluded as a possible donor. (28 RT 3992-3997.) Crouse testified that the probability of a match with regard to the DNA profile relating to the cigarette butt was 1 in 640 billion Caucasians, 1 in 34 billion African Americans, and 1 in 9.6 trillion Hispanics. (28 RT 3999.) The probability of a match with regard to the sperm fraction of the oral swab extraction was said to be 1 in 33.9 quintillion Caucasians, 1 in 9 quintillion African Americans, and 1 in 110 quintillion Hispanics. (28 RT 3999-4000.)

Subsequent investigation determined that, at the time of Baker's death, appellant was working at a fireworks stand about a half a mile from where Baker's car was found. (28 RT 4049-4051.) A young man who worked at the stand with appellant recognized a photograph of Baker as someone who visited with appellant at the stand. (28 RT 4052.) Investigators found fireworks in the glove compartment of Baker's car. (28 RT 4035.)

THE SECOND PENALTY PHASE

I. PROSECUTION EVIDENCE

A. Circumstances of the Crimes

Since the jury at the second penalty phase had not heard evidence produced during the guilt phase, testimony relating to the circumstances of the offenses was presented in its entirety. This evidence did not differ in any significant respect from that described above. Consequently, it would serve no purpose to repeat it here. To the extent the evidence is relevant to issues raised on appeal, it will be discussed in the argument portion of the brief.

B. Other Criminal Conduct

1. Douglas Erskine

The Erskines had four children, two boys and two girls. Appellant is a year and half older than his brother Douglas. (73 RT 11663-11664.) As a

child Douglas was afraid of appellant. As Douglas recalled it, appellant picked on him until he cried and would then laugh at him for crying. (73 RT 11679.) As they grew into adults, Douglas began to stand up to appellant. (73 RT 11680.) They came to blows on at least three occasions. (73 RT 11681-11687.)

One such incident occurred on April 25, 1992, and began with appellant calling Douglas's girlfriend names. When Douglas yelled at him to "shut up," appellant went upstairs and came back with a broken pool cue. Douglas took the pool cue from appellant and hit him with it. (73 RT 11682-11683; 11699.) As Douglas described it, he beat appellant "pretty badly," and the police were called. (73 RT 11699.)

Another physical altercation occurred when Douglas came home from work and was confronted by appellant and his then girlfriend Marie, who were sitting at the kitchen table. (73 RT 11683-11684.) Appellant informed Douglas that he had bet Marie she would not like Douglas. Marie encouraged a fight, telling appellant to "kick [Douglas's] ass." Douglas pushed the kitchen table in an attempt to stop appellant from getting up. Appellant got up and ran upstairs. Fearing that appellant would return with a gun, Douglas followed him. When Douglas reached the top of the stairs, he grabbed appellant and pulled him out of his room. (73 RT 11684.) Douglas hit appellant before appellant put him in a headlock. Douglas pushed appellant into the wall twice, but appellant would not release his hold. He held Douglas's neck so tightly that Douglas lost control of his bodily functions and passed out. (73 RT 11685.) When he regained consciousness he ran first to the bathroom and then downstairs looking for appellant. Appellant was downstairs. (73 RT 11686.)

The third incident occurred in December of 1992. Appellant and Douglas were arguing and Douglas punched appellant. Appellant ran outside, opened the trunk of his car, and pulled out a 30-30 Winchester rifle. (73 RT 11687-11688.) He chambered a round, pointed the rifle at Douglas, and said: "This is for you Doug." Douglas backed inside the house and slammed the front door, then phoned police. (73 RT 11688.)

2. Judy C.

Appellant's younger sister Judy C. testified that when the family lived in Virginia appellant and two other boys forced Judy, who was then 7 years old, and some of her friends to participate in sexual activity in a barn behind their house. (73 RT 11781-11782.) The children climbed up to the loft which was partitioned into several small sections each about the size of a closet. A boy and a girl would go into one of the closet like areas, and the girl would orally copulate the boy. Appellant forced Judy to participate by threatening her. She did not remember whether she was forced to orally copulate appellant or one of the other boys. (73 RT 11783.) Although this activity occurred on more than one occasion, Judy never told anyone what had happened because she was afraid of what appellant might do to her if she did. (73 RT 11784.)

Before these incidents began, appellant had always been protective of Judy, and she was surprised by this change in his behavior. (73 RT 11794.) She described appellant as having a very unpredictable temper, explaining that he could be in a good mood one moment and in a rage the next. (73 RT 11803.)

When Judy was 11 years old, appellant entered her room at night while she slept, and touched her chest and crotch area. Judy pretended to be asleep and rolled over in an attempt to make appellant stop. Although he did quit for

a moment, he soon resumed the touching. (73 RT 11785.) Judy then pretended that she had just woken up, and asked appellant what he was doing. He told her he was "sleep walking." She and appellant went out and sat on the stairs, and appellant asked her not to tell anyone what had happened. Judy was afraid of appellant, and assured him she would not tell anyone, although the next morning she did tell her mother about the incident. (73 RT 11786-11787.) While her mother appeared to be angry at appellant, to Judy's knowledge he was never disciplined. (73 RT 11801.)

3. Barbara G. (Spring 1976)

In the spring of 1976, Barbara G. was in the fifth grade. She and appellant's sister Judy were close friends, and Barbara spent quite a bit of time at the Erskine home. She visited almost daily, ate dinner with the Erskines an average of two times a week, and frequently stayed overnight on the weekends. Mrs. Erskine was like a second mother to Barbara and, in fact, she called her "Mom." (74 RT 11983-11987.)

One afternoon in March or April of that year, Barbara was playing on the playground at Harbor View school, waiting for Judy to finish baseball practice, when appellant came up to her and asked if she wanted to see the fort he made. (74 RT 11989-11990.) Appellant was 13 years old at the time,[3] and had always been nice to Barbara. She agreed to go see the fort. (74 RT 11990-11991.)

They walked 4 or 5 blocks to appellant's "fort" which was made of foliage and shaped like an igloo. Barbara had her bike with her, and appellant took it from her, telling her he had a parking space for it. (74 RT 11991.) After pushing the bike into the brush where it could not be seen, appellant

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[3] 71 RT 11315.

took Barbara to the fort entrance and prompted her to crawl through the low opening, saying "ladies first." As Barbara began to crawl into the fort, appellant grabbed her from behind, covered her mouth and nose with one hand, and held a knife to her throat with the other. (74 RT 11992.) Barbara froze, and appellant warned her not to scream, threatening to kill her if she did. He then instructed her to continue in to the fort. She crawled in, and he followed her. (74 RT 11993.)

Once they were inside, appellant pulled Barbara's shorts down. She pulled them up, and he pulled them down again. (74 RT 11993.) Barbara tried to escape. She ran through the brush, and screamed loudly enough for some people in the distance to turn in their direction, but appellant grabbed her by the ankle, causing her shoe to come off, and pulled her back in to the fort. He had the knife in his hand and threatened to kill her if she screamed again. (74 RT 11993-11994.)

He then forced Barbara to the ground on her back, took off her shorts and underwear, and told her to cover her eyes. (74 RT 11995.) After Barbara complied, appellant put his finger in her vagina 4-5 times, then inserted a stick 4-5 times before turning her over and putting his finger in her anus several times. (74 RT 11995-11996.) He again inserted a stick before turning her over and forcing her to orally copulate him. When she told him she couldn't breathe, he removed his penis from her mouth briefly but resumed after allowing her to catch her breath. (74 RT 11997-11998.)

After a period of time Barbara told appellant she needed to go home. He picked up the knife, and made her promise she would not tell anyone what had happened. Barbara rode her bike home. When she got there she told her parents she didn't feel well, took a bath, and went to bed without telling them what had happened. (74 RT 11999.)

The next day she told Judy about the incident, and Judy decided they should talk to Judy's mother. (74 RT 11999.) Barbara waited in the alley and Judy went in the house to make sure appellant was not home. While Judy was inside, appellant confronted Barbara. He put the knife to her throat, and reminded her she had promised not to tell anyone what had happened. Barbara assured him she would not say anything. (74 RT 12000.) The next day Barbara and Judy told Judy's mother what had happened. (73 RT 11815; 74 RT 12000; 79 RT 12884-12885.)

Appellant was arrested soon after. (73 RT 11826; 74 RT 12000.) When police officers came to talk to Barbara, she thought they knew about the incident, but they were apparently concerned with a different event and asked her if she had been to the beach with appellant a few weeks earlier. (74 RT 12000.) They wanted to know where she had been on June 25, 1976. That day was her birthday so she recalled her activities and told the officers. They thanked her and left. Barbara concluded that appellant had tried to use her as an alibi. Soon after this Barbara noticed that appellant was no longer living in the Erskine household. (74 RT 12001.)

Over the years Barbara ran into appellant from time to time. She left her senior prom because he was there. Shortly before Barbara's wedding, appellant cornered her in front of a store near her house, and told her he wouldn't let her leave until she forgave him. She told him she forgave him in order to get away from him. (75 RT 12002-12003.)

4. Randie C.

When Randie C. was 11 or 12 years old she and appellant, who was 2 years older, had a "boyfriend/girlfriend" relationship. (74 RT 11975-11976.) The relationship lasted a year to a year and a half during which time their physical interaction was limited to hand holding and kissing. (74 RT 11976.)

One day, as they walked together to the 7-Eleven holding hands, appellant asked Randie to "prove she loved him" by having sex with him. When she refused, he hit her in the head causing her to stagger backward. (74 RT 11977-11979.) She then turned around and walked home. Afterward appellant apologized to her, and said it would never happen again. (74 RT 11980.) He visited her house over the next couple of days and again apologized for his actions. She eventually forgave him, and there were no further acts of violence between them. (74 RT 11981.) Their relationship ended when Randie's mother and step-father sent her to live with her father for a few months. After her return, her relationship with appellant was not the same. (74 RT 11982.)

5. Colleen L. (April 17, 1978)

On April 17, 1978, Colleen L. was 12 years old. (73 RT 11837.) That evening she met her friends Laura and Phillip at a 7-Eleven near her house. Appellant, who was 15 at the time,[4] was with Laura and Phillip, and they all stood outside the store talking after making their purchases. As they were about to leave, Phillip asked Colleen if she had come to the store alone. When she said she had, Phillip asked her if appellant could walk her home since it was by then dark. (73 RT 11838.)

Colleen agreed, and she and appellant took a shortcut through a condominium complex where a plank had been removed from the fence. As Colleen stepped through the fence appellant came up behind her, and put a knife to her throat. (73 RT 11839-11842.) He warned her not to scream, and threatened to kill her if she did. Colleen was crying and asked appellant to let her go as he pulled her into a drainage ditch. (73 RT 11842.) There he made

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[4] Appellant's date of birth is December 22, 1962. (79 RT 12827.)

her remove her clothing and his, then forced her to her knees and had her orally copulate him. (73 RT 11843.) Afterward he positioned her face down on the ground and sodomized her. Throughout the ordeal he yelled at her to stop crying and told her it wasn't that bad. (73 RT 11844.) Appellant ejaculated, forced Colleen to orally copulate him again, and then raped her. (73 RT 11845.)

According to Colleen, appellant was very calm and controlled throughout the assault. (73 RT 11847.) Afterward, he said to her: "Well I suppose I should walk you home because I told Phil I would." (73 RT 11846.) Appellant put his arm around Colleen, held the knife to her throat, and threatened to kill her sister if she told anyone what had happened. He then walked her to her house. When Colleen got home, she told her parents what had happened. They took her to the hospital and contacted police to report the crimes. (73 RT 11847.)

6. Virgen M. (April 18, 1978)

The day after the incident involving Colleen L., appellant accosted 27 year old Virgen M. in the same location. (73 RT 11852-11853.) As Virgen was jogging, a young man tapped her on the back, and she stopped, thinking he wanted to ask her the time. The teen, later identified as appellant, pulled out a knife, and told Virgen that nothing would happen to her if she was quiet. When she said something to him in an attempt to extricate herself from the situation, he again ordered her to be quiet. He instructed her to give him her hand, and advised her to walk normally. (73 RT 11854.) Pointing the knife at her abdomen, appellant grabbed Virgen's hand and began walking. She asked him why he was doing this, and he replied: "To keep up my reputation." (73 RT 11855-11856.) Virgen told appellant that she lived nearby, and asked to go to her home. When appellant demanded she jump over a fence, Virgen

broke away from him and started to run, but he grabbed her by the hair and pulled her back. (73 RT 11856-11857.) Virgen struggled to free herself, but appellant managed to put her in a headlock. As she continued to resist, Virgen was cut on the hand, body and head. She eventually managed to break free and run when appellant was momentarily distracted by something. (73 RT 11857-11859.)

Virgen saw her neighbor, Manuel Jiminez, and ran to him. Seeing her with grass in her hair and crying, he asked her if she was all right. (73 RT 11859.) Virgen explained that she had been attacked while jogging through a nearby vacant lot, and said she thought her attacker was still there in the bushes. (73 RT 11867.) Jiminez and another man went to the lot in Jiminez's car, and began looking through the shrubbery. They quickly spotted appellant in a crouching position, and told him to come out. When appellant failed to comply, the man with Jiminez went in and pulled him out. He took the knife appellant was holding, and the two men put appellant in the backseat of Jiminez's car. (73 RT 11868-11869.)

They drove appellant back to Jiminez's house, and asked Virgen if he was the person who had assaulted her. When she said he was, Jiminez asked his wife to call police. (73 RT 11869.) As they were getting out of the car, appellant made a move to try to get away, but Jiminez held him until police arrived. (73 RT 11870.) Patrol officer Norman Newton responded, and took statements from Virgen and Jiminez. (74 RT 11876-11878.) He then read appellant his *Miranda* rights, and asked him what had happened. Appellant made the following statement: "I saw the girl jogging near the apartments. I didn't talk to her, and she didn't talk to me. I kept on walking. Next thing I knew was that a guy was stopping me and hitting me in the head." Newton observed a cut on appellant's right thumb, and asked him how he had injured

himself. He claimed he had cut himself whittling. Newton arrested appellant, and took possession of the knife which had fresh blood on it. (74 RT 11878-11881.)

7. Robert M. (June 24, 1980)

On June 24, 1980, 14 year old Robert M. encountered appellant at Ramona High School. (74 RT 11924-11927.) Robert had been dropped off early that morning to work out in the school weight room. Unfortunately, when he arrived the room was locked. (74 RT 11926.) As he sat waiting for someone to open the door, appellant approached him and asked where the men's room was. Robert gave appellant directions to the restroom. (74 RT 11927-11928.) Appellant was wearing white sneakers, blue jeans, a T-shirt, a green jacket, and a black cowboy hat with a red bandana around it. (74 RT 11928.) Robert had seen him earlier sitting on a corner bus stop with a suitcase and a bedroll. (74 RT 11928.) Appellant walked off in the direction Robert had indicated, but returned a short time later and said he could not find the restroom. (74 RT 11929.) He asked Robert to show him the way, and the two walked together. Robert was new to the school, and was not sure exactly where the restrooms were located. (74 RT 11928.)

As they walked behind the main building, appellant attacked without warning, grabbing Robert by the hair and pushing him. (74 RT 11930.) Appellant held Robert up against the wall with one hand and pulled back his other hand as if to punch him. (74 RT 11931.) He said he was going to "motherfuck" Robert, threatened to kill him if he resisted, and ordered him to lie on the ground and take his pants off. Robert attempted to talk his way out of the situation, but appellant was not deterred. (74 RT 11932-11933.) Robert pulled his shorts down but left his underwear up. Appellant attempted to pull Robert's underwear down, and slapped him in the groin. (74 RT

11934.) He repeatedly threatened to kill Robert if he did not cooperate, and demanded that he "get hard." (74 RT 11935.)

Robert attempted to escape and ran a few steps before appellant caught him, slammed him up against the wall and hit him several times, then threw him to the ground. (74 RT 11936.) Appellant was wearing a school ring as he punched Robert in the face about 20 times. (74 RT 11936.) He told Robert he was going to kill him, kicked him in the head, then sat on him and choked him into unconsciousness. (74 RT 11937.)

When Robert came to, appellant was shaking him and asking him if he was all right. (74 RT 11938.) Strangely, appellant was acting as if he had just found Robert rather than as if he was the one who had beaten him and choked him out. Robert got up and ran around the building and up the street to a nearby house where he asked to use the phone. (74 RT 11939.) He called his mother and she came, picked him up, and took him directly to the hospital where he was treated for facial lacerations, two black eyes and bruising to his throat. (74 RT 11939-1140.)

After Robert left the scene, San Diego County deputy sheriff Michael Vaszorich responded to Ramona High School. (74 RT 11951.) He parked his vehicle, and was walking toward a group of people, when appellant contacted him and told him he had seen a male running across the school grounds. Appellant, who was shirtless and wearing a pair of Levi's and tennis shoes, told Deputy Vaszorich that he had found Robert crying and had tried to help him, but Robert started screaming. Appellant said he left Robert and went to call for help. Vaszorich noticed that appellant had a yellow T-shirt hanging from his back pocket. Appellant described the man he had seen running across the ground as a white male wearing a black cowboy hat with a red

bandana tied as a hat band, a green jacket, a pair of blue Levi's with no design on the back pocket, and brown square toed boots. (74 RT 11952.)

Appellant told Deputy Vaszorich he would wait by the bus stop in case Vaszorich wanted to talk with him further. Vaszorich went to where appellant said the boy was, then went back to the group of people he had seen when he arrived. One of the people in the group was a coach with the school, who told Vaszorich that he had seen Robert with bruises on his head and that Robert's mother had picked him up and taken him to the hospital. (74 RT 11954-11955.) Robert had given the coach a description of his attacker as a white male wearing a black cowboy hat with a red bandana band, a green jacket, blue Levi's, and tennis shoes and carrying a yellow sleeping bag and small brown suitcase. (74 RT 11955.)

While he was talking with the coach, Deputy Vaszorich looked over at the bus stop, and saw appellant sitting with a yellow sleeping bag and a brown suitcase. (74 RT 11956.) He went over and asked appellant when he had arrived at the bus stop. Appellant said he had been dropped off at 6:30 that morning. When Vaszorich asked appellant what he had in the suitcase, appellant bent down and unzipped it, saying "Oh, I want to let you know that I have a black hat in here and a green jacket." As appellant opened the suitcase, Vaszorich saw a black felt cowboy hat with a red bandana band crushed down on top of a green jacket. He arrested appellant. (74 RT 11957.)

Appellant was convicted of felony assault (Pen. Code, §245, subd. (a)), and misdemeanor battery (Pen. Code, §§ 242/243) as a result of the incident.[5] (74 RT 11969-11970; 16 CT 3799.)

8. Michael A. (January 6, 1981)

On January 6, 1981, Michael A. was arrested for sleeping under the then abandoned Belmont Park roller coaster. (74 RT 11889.) Michael was taken to jail and placed into a holding cell with 14 other men. (74 RT 11889-11890.) Appellant was in the cell and appeared to Michael to be the "shot caller" — the person running the cell. (74 RT 11890.) Michael wanted to write to his grandmother, but did not have an envelope. He asked if anyone could help him out with an envelope, and appellant responded: "What are you going to do for me?" Michael told him that he would pay him back for the envelope. Michael got an envelope and wrote the letter to his grandmother, asking her to send him some money. He also filled out a commissary slip expecting that the money would arrive from his grandmother before the slip was filled. The deputy who came by the cell to pick up the slips told Michael he would not be there long enough to use the commissary slip. (74 RT 11892.)

About 20-30 minutes after the deputy left, appellant and another man came to Michael and asked him how he was going to pay for the envelope. Michael offered to give them the dessert from his dinner tray, but appellant replied: "No, no, doesn't work that way around here." When Michael asked

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[5] Department of Corrections records relating to this conviction were introduced into evidence at trial. (74 RT 11969-11973.) Appellant was declared unfit for treatment as a juvenile and tried as an adult. He was convicted by a jury, sentenced to 4 years in prison, and paroled on February 10, 1983. (16 CT 3799.)

him what he was talking about, appellant hit him in the side of the head. (74 RT 11893.) Michael was hit a second time and fell to the floor. He saw one man acting as a look-out and another watching people in the cell to make sure none of them attempted to intervene. (74 RT 11894.) Appellant, who was 18 years old at the time,[6] was larger than 19 year old Michael who stood 5'5" tall and weighed around 130 pounds. (74 RT 11894-11895.)

Appellant pulled Michael off to the side of the cell and told him: "You're going to suck our dicks, bitch, or I'm going to have this whole tank pull a train on you." When Michael replied that he would rather die, appellant grabbed him by the back of the head and began slamming it into the concrete floor. (74 RT 11895.) Michael slipped partially under one of the bunks and wrapped himself in a blanket in an effort to cushion the blows. When someone on the top bunk told appellant to leave Michael alone, appellant looked up and replied: "You want some of this? Why don't you mind your own business? Or you'll get some of this too." (74 RT 11896.) Appellant dragged Michael out from under the bunk, but when the person acting as lookout came over to him and said: "Hey, partner, you're going to have to change tactics, because this guy ain't going to play," appellant's demeanor changed. He composed himself and began to speak calmly to Michael. (74 RT 11897-11898.)

Appellant told Michael he was not the type of person who belonged in jail, and warned him that he could be seriously hurt. He advised Michael he needed to learn to defend himself, then showed him a few self-defense moves. Appellant then told Michael: "If you do this five-minute favor for me, I'll

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[6] According to court records appellant is 5'9" tall, and near the time of trial he weighed 160 pounds. (16 CT 3792.)

make sure that none of these guys fuck with you." Michael told appellant he had never done anything like that before. Appellant said: "Just follow my lead," and pulled down his jumpsuit. (74 RT 11898.) Michael complied with appellant's request and orally copulated him. (74 RT 11899.)

A guard came by, shined his flashlight in the cell and called Michael over. Appellant looked at Michael and mouthed the words: "If you say anything, you're fucking dead." (74 RT 11900.) The deputy removed Michael from the cell, and took him into another room where he gave him a glass of water and offered him a cigarette. (74 RT 11915.) He brought Michael a cold washcloth for his face, which was beginning to swell, and asked him what had happened. After speaking to his supervisor, the guard showed Michael some photographs, asked him who had beaten him up, and threatened to put Michael back in the cell if he did not cooperate. (74 RT 11915-11916.) The only person Michael could identify was appellant. He was not able to identify the other two men. (74 RT 11901-11902.)

9. Deborah Erskine (May 14, 1989)

Appellant met his former wife Deborah in June of 1988. At that time he was working for Deborah's brother, and they met at the brother's house in West Palm Beach, Florida. Their romantic relationship began soon after they met. (75 RT 12032-12033.) Over the 4th of July holiday Deborah and appellant worked at a fireworks stand owned by Deborah's brother. Soon after that Deborah returned to her home in Orlando. Appellant went with her, and moved into the home she shared with her daughter. (75 RT 12033.)

Deborah and appellant got along well until she became pregnant with his child. At that point things changed, and appellant became controlling and short tempered. He treated Deborah as if he owned her, and they argued frequently. Their altercations even became physical at times. (75 RT 12034.)

One incident of violence occurred on May 14, 1989. Deborah and appellant had been arguing on and off over a couple of days. When she returned home that day the argument escalated. As she entered the house, Deborah noticed that the window in the living room was closed and the drapes were drawn. The window was customarily left open because appellant smoked and Deborah's daughter had asthma. Deborah brought in the groceries and asked appellant, who was sitting in a chair by the window, why the curtains were closed. They began arguing as Deborah carried the groceries into the kitchen and put them away. Deborah accused appellant of stealing money from her flower stand. Appellant became angry, and the argument moved into the bedroom which was next to the kitchen. (75 RT 12035-12037.)

Appellant pushed Deborah, who was six months pregnant, onto the bed and held her down with his hands around her neck. He began choking her and screaming at her. A struggle ensued as Deborah attempted to get away. Appellant was wearing boots, and he put his foot on Deborah's stomach and pushed her back down on the bed. (75 RT 12038-12039.) Deborah felt as if she and the baby had been injured. She ran to the living room and attempted to get out the window, but found that it was locked. Appellant blocked Deborah's way to the front door, and she saw that the deadbolt was now locked — she had not locked it when she entered the house. (75 RT 12039-120490.) Deborah ran toward the back of the house to get out through the sliding glass door, but found that it was also locked. She put her shoulder into the door, lifted it off the tracks, and opened it, only to find the screen door was also locked. Appellant was yelling at Deborah, telling her he had a gun and was going to shoot her. (75 RT 12041-12042.) She kicked out the screen door, and ran down the street to her mother's house. Appellant chased after

her. When Deborah reached her mother's house, her brother Vance was outside. Deborah yelled to him that appellant had a gun, and ran in the house. Appellant and Vance exchanged blows. (75 RT 12044.)

Deborah went to the hospital. She sustained injuries as the result of appellant's kick, which complicated her pregnancy and required her to remain bedridden throughout the remainder of her term. (75 RT 12044.) Appellant did not live with Deborah while she was bedridden. Although they did later reconcile for a short period of time, appellant and Deborah eventually split up and divorced. (75 RT 12045.)

10. Renee Baker (June 1989)

The evidence presented at the second penalty phase regarding the Baker case did not differ in any significant respect from the evidence introduced at the guilt phase.

11. Phyllis Serrano (March 11, 1993)

Phyllis Serrano worked with appellant driving rental cars to a rental company turn-back lot or to auction. (76 RT 12259.) She saw him on a daily basis and they also had a dating relationship. In January or February of 1993 appellant moved in with Serrano and her son. (76 RT 12259-12261.) During this time appellant was nice, charming, and even-tempered with Serrano as well as with their co-workers. (76 RT 12261.) However, by March of 1993, appellant and Serrano had begun to argue about finances because Serrano felt that appellant was not paying his share of the household expenses. (76 RT 12263.) On March 11th, they argued and when appellant went to make a call, Serrano told him he could not use the phone since he was not paying his share of the expenses. Appellant became enraged, and pulled the phone cord out of the wall, telling Serrano that if he couldn't use the phone, she couldn't either. (76 RT 12263-12264.)

After pulling the cord out of the wall, appellant threw other items around and generally made a mess out of the apartment. (76 RT 12264.) He then went after Serrano, grabbing her around the neck and applying pressure with an amount of force that made it difficult for her to breathe. He raised his fist and threatened to beat her. (76 RT 12265.) Serrano had already told appellant she was going to call police, and when he grabbed her throat, she gave him a look which caused him to let go of her. As he did, she went to another phone in the apartment and called police. Appellant changed his clothes, and prepared to go to jail. Officers responded to Serrano's call and took appellant into custody. (76 RT 12266-12267.)

After appellant was released from jail he did not move back in with Serrano, although he did ultimately convince her that he was sorry for what had happened, and they resumed their relationship. (76 RT 12267.) Serrano and appellant also continued to work together. (76 RT 12268-12270.) Their relationship endured through October of 1993, and they were married on March 29, 1994, while appellant was in custody in connection with the Jennifer M. offenses. (76 RT 12286-12287.)

12. Jennifer M. (October 22, 1993)

Evidence introduced at the second penalty phase regarding the circumstances of the Jennifer M. offenses did not differ in any material respect from evidence presented at the guilt phase.[7] However, the prosecution introduced additional evidence at the penalty phase regarding statements made by appellant to police.

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[7] Jennifer M. remained unavailable at the second penalty phase trial, and her testimony from the 1994 sexual assault prosecution was read to the jurors. (75 RT 12046-12203.)

Detective Gregg interviewed appellant. After she read him his *Miranda* rights, he agreed to speak to her. Gregg found appellant's demeanor to be calm, cocky and boastful. Appellant said he had met Jennifer when she was sitting after missing her bus. He said he called her over, and she came to where he was working on his car. He invited her in to his apartment for a soda or beer and she went in with him. He gave her a beer, they sat and talked for a while and eventually had sex. (75 RT 12227.)

Detective Gregg told appellant that Jennifer said the sex had been forced, that he had held a knife to her throat, and had tied her up. Appellant laughed and said it wasn't against her will. He said that they had been drinking beer and had done a line of methamphetamine. She drank ten beers while he had two. Appellant said Jennifer soiled herself when she got up and thought she was going to pass gas. He was embarrassed for her, helped her clean up, and gave her a pair of his pants to wear. He said she asked him to shave her pubic area. (75 RT 12228.) According to appellant, Jennifer initiated everything. (75 RT 12229-12230.) Appellant boasted to Gregg of his sexual prowess, and described himself as being the "nicest asshole you'll ever meet." He told Gregg that he had been arrested for choking his brother during a fight they got into because his brother was jealous of him. He also said he always carried a knife which he used as a tool. He said he had handed the knife to Jennifer to look at and she handed it back to him. (75 RT 12229.) He also told Gregg that Jennifer had asked to see the shotgun so he took it off the wall and showed it to her. (75 RT 12230.)

II. DEFENSE EVIDENCE

A. Appellant's Background

Appellant's mother and father married young, and remained together for 31 years. (79 RT 12816-12817.) They had four children: Nadine born in November of 1959 (79 RT 12823), appellant born December 22, 1962 (79 RT 12827), Doug born 16 months after appellant (79 RT 12831), and Judy born 16 months after Doug (79 RT 12831). Both parents drank to excess, and the marriage was turbulent throughout. (78 RT 12603-12604.) Appellant's father was physically and verbally abusive to his wife and children when he was under the influence of alcohol. (79 RT 12862-12863, 12871-12872.)

In 1968, at five years of age, appellant was hit by a car and seriously injured. His father had driven him and Nadine to a school carnival and told eight year old Nadine to walk home with appellant. (78 RT 12591-12592.) On the way home Nadine made several attempts to cross a busy highway at the marked cross-walks, but motorists did not yield for them. Eventually one car stopped, and the driver waved them across. As Nadine stepped off the curb she was hit by another vehicle. (78 RT 12593-12594.) Appellant was also hit (78 RT 12581-12583; 15 CT 3633, 3643), and he and Nadine were taken to the hospital by ambulance. Nadine's elbow was x-rayed and she was released. Appellant, however, required extensive treatment. (78 RT 12599; 79 RT 12838.)

Appellant sustained multiple injuries including a fracture of his left femur, a fractured pelvis, fractured ribs, lacerations to his face, lacerations to his elbow, bruising of lung tissue, and bruising of brain tissue. (78 RT 12690-12691.) Upon admission to the hospital he was non-responsive to external stimuli, and although his eyes were open he was in a non-communicative state. His eyes drifted sideways from each other which indicated that he had

sustained brain stem injury. Appellant's blood pressure was low and he was cyanotic (appeared blue in color) due to a lack of oxygen in the blood. Hospital notes reflected widespread injury resulting in bruising in several different areas of the brain. He was admitted under guarded prognosis with a request for a neurological examination. (78 RT 12691-12693.)

The assigned neurosurgeon found no evidence of hemorrhage forming inside the brain that would require surgery. He prescribed the anti-swelling medication Decadron, which is a type of steroid hormone, and advised that fluids be restricted. (78 RT 12694-12695.) He further recommended placing Mannitol at the bedside in case of emergency. If appellant's brain showed signs of swelling, this medication would buy time to get him into surgery. Hospital personnel were instructed to watch his pupil size. (78 RT 12695-12696.) Appellant received large doses of steroids for several days. (78 RT 12700.) During his first week in the hospital he was semi-conscious. (78 RT 12708.) After 17 days he was taken off critical condition. (78 RT 12703.)

After being hospitalized for 42 days appellant was released on June 29th with no recommendation for aftercare regarding his brain injury. (78 RT 12710-12711.) Today assessments would have been performed to determine the nature and degree of his brain injury. Such assessments, however, were not common practice in 1968. (78 RT 12711.)

Appellant's mother noticed a marked change in his behavior and well-being following the accident. Appellant experienced headaches so severe he would bang his head against the wall, and his mother would have to hold him to stop him. Despite the severity of the pain, the parents were only advised to give him baby aspirin. (79 RT 12844.) He also began having temper tantrums. For example, occasionally the children would be sitting and watching television when appellant would suddenly get up and hit his brother,

or throw him up against the wall, for no reason. He would then quietly go to his room and shut the door, and the family would not see him again for the rest of the evening. (79 RT 12845.)

Appellant started kindergarten in Long Beach, but had trouble keeping up with the other children as the result of physical and intellectual deficiencies. He was unable to hop on one leg, had no control, and could not write. According to his mother, his teacher did not believe appellant had been hit by a car, and she treated him unfairly. She would not let him use scissors, and would frequently put him in a corner in the back of the room. Appellant was ultimately moved to another school where the faculty understood and worked with him. (79 RT 12846.) Overall, appellant did not do well in school, and was at times bullied by other children. (79 RT 12848-12849.)

By the time he was 10 years old, appellant's behavior was out of control. He was stealing, lying, refusing to do his homework, and running away from home. (79 RT 12850, 12854.) His bad behavior towards his brother Doug also intensified. Doug reported to his mother that, in the middle of the night appellant would pick him up, throw him, and hit him. (79 RT 12850-12851.) Appellant had been seen by a psychiatrist, and was prescribed Haldol and Ritalin. (79 RT 12855-12856.) Because one of these medications caused him to fall asleep during school, his mother took him off them after two months. (79 RT 12856.)

When appellant was 12 years old he was placed in a youth facility known as Green Valley Ranch after running away from home. (79 RT 12874-12875.) During his stay there, from February 20th until the end of November 1975, appellant was treated by psychiatrist Dr. Roy Resnikoff. (83 RT 13708, 13713.) The intake report compiled by Ranch staff reads as follows:

> Scott is a 12-year-old boy referred for further consultation after it was noted he had apparent psychotic episodes where he would become extremely angry, talk about suicide, appear very disassociated and impulsive. These episodes would last approximately a half hour or an hour, and afterwards Scott would deny any recollection of these episodes. There was no documentation of tonic clonic movements [grand mal seizures], and there was no reported loss of bowel or bladder control. Scott had an auto accident where he was hit by a car when he was aged four. Apparently, there was damage to the right side of the brain . . . and there have been various EEGs and neurological tests subsequently. EEGs had been reported to be abnormal. Scott has demonstrated periods of impulsive behavior, and his parents have been unable to control him. At one point IQ was tested to be within the normal range, IQ approximately 95.

(83 RT 13715.)

Dr. Resnikoff performed a battery of diagnostic tests, and noted in appellant's file that: "It is likely that the sudden onset of psychotic behavior may be a temporal lobe seizure with the patient unable to recall the events during the seizure." (83 RT 13726.) The initial neurological and mental status examinations indicated a right-sided lesion perhaps involving the cerebellum and temporal lobe area of the brain. (83 RT 13720-13726.) Damage to the temporal lobe would help explain seizures, and damage to the frontal lobe would relate to his out of control behavior. (83 RT 13725-13726.) Dr. Resnikoff suggested Dilantin which would be useful to help control seizures, and Valium which has anti-seizure properties. (83 RT 13726-13727.) He was also concerned about the possibility that appellant suffered from post traumatic stress disorder, and recommended further neurological testing and an electroencephalogram or "EEG." (83 RT 13727.)

Dr. Resnikoff concluded that appellant's problems were organically based inasmuch as he had suffered damage to significant portions of the brain.

Resnikoff was concerned with helping the brain directly with medications such as Dilantin, and wanted to assist appellant in functioning better with other children and family members, and controlling his impulses and emotions because they were out of control. (83 RT 13728-13729.)

As he began working with appellant, Dr. Resnikoff determined that a structured environment would be beneficial. He hoped that, if teachers and supervisors were available to provide appellant with immediate feedback, he would be forced to deal with reality and with the results of his behavior. In this way other people could help compensate for any part of his brain that was not functioning properly. (83 RT 13739.) Recognizing that appellant would need support in order to make progress in terms of his behavior, Dr. Resnikoff sought the cooperation of appellant's parents in family counseling. (83 RT 13740.) While the mother was willing to participate, the father did not feel family counseling was necessary and attended only a few sessions. (83 RT 13778-13779.)

In August of 1975, Dr. Resnikoff noted that: "There were hints of improvement, but . . . based on Scott's intrinsic difficulties with emotions and impulse control and then the family lack of proper discipline and guidance, that he would need at least another year [at the facility]." (83 RT 13781-13782.) Appellant's therapy, however, ended abruptly in November after his father removed him from the ranch. (83 RT 13780, 13784.) At this point, in Dr. Resnikoff's opinion, appellant's prognosis was poor. (83 RT 13788.) This assessment was based on Resnikoff's diagnosis which was multi-layered and encompassed organic brain damage, a stress response — which included being over-reactive and under-reactive at times — an evolving personality disorder, and a severely dysfunctional family environment. (83 RT 13789.)

Approximately six months later, appellant was placed in a residential treatment facility, Southwood Psychiatric Hospital. (71 RT 11313-11315.) He had been referred to Southwood by the head psychiatrist of the children's division of County Mental Health. (71 RT 11333.) Appellant was 13 years old. (71 RT 11334.) At Southwood appellant's treating psychiatrist from May through September of 1977 was Dr. Allan Rabin. (71 RT 11338.)

Dr. Rabin's initial diagnosis was dissociative neurosis, organic brain syndrome with history of trauma, and borderline psychosis. (71 RT 11354.) At that time Dr. Rabin observed that appellant was agitated and having self-destructive thoughts, and that he had threatened suicide. (71 RT 11368.) Dr. Rabin noted that consideration might have to be given to long term closed ward treatment. (71 RT 11357.) Subsequent in-depth testing revealed that appellant exhibited significant memory impairment indicating organic brain damage. (71 RT 11373-11376.) The diagnosis of the doctor who performed the tests was: "Impulsive personality and hyperkinesis secondary to organic brain syndrome." (71 RT 11379.)

Appellant was treated at Southwood as an inpatient between May 28th and June 11th, 1976 and then again from July 2nd to October 23rd. He was medicated with Ritalin and Cylert for attention deficit hyperactivity disorder, and Mellaril, an anti-psychotic, to control agitation and rage. (71 RT 11384-11385.) He had been stabilized in the hospital during his first stay, but when he returned after being released, his behavior was again out of control. He was threatening and intimidating, and required strict guidelines about what his behavior would be in hospital. (72 RT 11390.)

At Southwood appellant participated in one-on-one therapy as well as small group therapy, and occupational therapy. He required high structure from the time he got up until the time he went to bed, but made good progress

in a totally structured environment. (72 RT 11393-11394.) Appellant got along well with staff, but displayed very poor interpersonal skills when relating to peers. He did well with authority figures, and had reasonably good emotional contact with the treatment staff. (72 RT 11395.)

After a period of time Dr. Rabin became concerned that appellant was adapting to the setting, and concluded that he should be placed in a less restrictive environment to prevent him from becoming institutionalized. This type of placement would also give his parents an incentive to "get their act together" as a family unit. (72 RT 11400.) Dr. Rabin wanted to see appellant moved to a residential facility where he could have visits with his family, perhaps even overnight visits. (72 RT 11401.) For these reasons Dr. Rabin made arrangements for appellant to be moved to Southwood's residential treatment facility in Chula Vista. Appellant was released from the closed facility on October 23rd and admitted to the residential facility on October 26th. However, he quickly ran away and was discharged as a result on November 9th. (72 RT 11401-11403.)

In Dr. Rabin's opinion appellant was seriously disturbed both psychiatrically and organically. He had impaired judgment and impaired reasoning abilities. (72 RT 11420.) Rabin diagnosed appellant as suffering from organic brain syndrome and neurotic tension discharge disorder. (72 RT 11413011414.) Dr. Rabin explained the effects of the latter disorder as like a tidal wave. It comes from nowhere, and persons suffering from it have no control over it. They are unable to talk themselves down, and do not have terms to describe what they are feeling. They are unable to say, "How should I get help? Who should I get help from?" They are overwhelmed by it. According to Dr. Rabin this sort of problem requires a long-term commitment on the part of family, educators, physicians and mental health professionals.

Appellant did not have this type of support, and, as a 13 year old, did not have insight into his problems. (72 RT 11417.)

After appellant was discharged from Southwood, he was arrested for assaulting a 12 year old girl. (79 RT 12888.) As a result of that incident, appellant's parents sent him to stay with Mr. Erskine's sister Janet in New Hampshire. (79 RT 12889.) Janet was not told of appellant's psychiatric and criminal history. (79 RT 13009-13012.) She and appellant initially got along well. However, one day appellant skipped school and brought a girl home while Janet was at work. When Janet learned about it, she told appellant she would have to send him home. (79 RT 13015.) Afterwards appellant went in the bathroom medicine cabinet and took a number of pills. He overdosed on Valium, and Janet took him to the hospital where his stomach was pumped. The treating physician told Janet that if appellant survived, he would need mental health treatment. Janet called Mrs. Erskine who then flew to New Hampshire and took appellant home with her. (79 RT 12890, 13015-13018.)

In April of 1978 appellant was arrested for the offenses committed against Colleen L. and Virgen M. (79 RT 12891.) Appellant was 15 years old, and was sent to the California Youth Authority for 2 years. (79 RT 12892.) He was received at Norwalk Southern Reception Center on May 30, 1978. (80 RT 13180.) On July 26th he was transferred to the Wintu program, which was an experimental counseling program designed for mentally ill, emotionally disturbed, and/or suicidal wards. (80 RT 13180.) Juveniles who measured low on the global assessment scale based upon a battery of psychological, psychiatric and educational tests were referred to this program because they were presumably not appropriate for placement in the general population. There were only 40 beds and, because the average stay was 18 months, beds were not readily available. (80 RT 13180-13182.) Appellant

unfortunately was unable to get into the program. (80 RT 13182.) Over the next six months appellant was transferred six or seven more times. (80 RT 13185.) He spent the majority of his commitment in the Nelles facility. (80 RT 13182-13186.) Generally, older wards were placed at Nelles, which was considered one of the toughest placements. It housed primarily tough city kids from Los Angeles. (80 RT 13186-13187.) Appellant was released on May 15, 1980. (80 RT 13186.)

On June 24, 1980, appellant was arrested for assaulting Robert M. (74 RT 11957.) His mother believed he had committed the crimes, and felt that he needed to be confined and provided with psychiatric care. She told the judge: "You've got to help him. He's going to kill somebody some day." (79 RT 12894.) At 17 years old appellant was evaluated for possible classification as a mentally disordered sex offender in connection with the Robert M. case. (81 RT 13403.) Dr. Haig Koshkarian was retained by the defense to determine whether appellant fit the MDSO definition — someone who, by virtue of mental disease, defect or disorder, is predisposed to sexual offenses to a degree and to an extent that they represent a danger to the health and safety of others and would benefit from treatment. (81 RT 13403-13405.) Two county psychiatrists also examined appellant. (81 RT 13405.) Dr. Koshkarian diagnosed appellant per DSM Axis I as conduct disorder aggressive (81 RT 13429), and concluded that he fit the MDSO definition (81 RT 13436). The two county psychiatrists diagnosed appellant with antisocial personality disorder, and concluded that the sexual acting out was just part of a larger pattern so there was no specific disorder warranting treatment or attention under the MDSO system. (81 RT 13474-13475.)

The judge found that appellant was not an MDSO and referred him back to court for sentencing. (82 RT 13482.) Had the judge found that he fit

the definition of mentally disordered sex offender, appellant would have been committed to a state hospital in the Department of Corrections where he would have been placed in a special program for period of years. (81 RT 13408.) More serious sex offenders were usually confined until their maximum prison term was served, and time could then be extended beyond the maximum sentence. Most people in the MDSO program spent more time in confinement than they would have had they done their time in prison. (81 RT 13409.) Appellant was ultimately sentenced to the maximum term of four years in prison. He completed his sentence and was released on parole on February 10, 1983. (82 RT 13482.)

B. Neurological and Psychological Assessments

1. Learning Disabilities

Dr. Nancy Cowardin, a consultant to the justice system on disability issues, was asked to assess appellant's intellectual functioning, learning ability, and deficits. (81 RT 13260-13261.) She administered a battery of tests, and reviewed appellant's school records and assessments, prison educational records, and mental health records. (81 RT 13263-13265.) Based upon testing, Dr. Cowardin determined that appellant's IQ is 88. The normal range is one standard deviation on either side of the mean of 100 which would be 85-115, and 68% of the population would fall within that range. Appellant's score of 88 would fall within the low average 34% of the 68%. (81 RT 13271-13275.)

The tests Dr. Cowardin administered are scaled so that they can be compared to each other even though they measure different things. (81 RT 13272.) Generally one would expect to see similar scores across the range of tests, and a significant difference in any one area would indicate a specific learning disability. (81 RT 13276.) Some of appellant's scores were similar

to his IQ score. For example his reading score was 82, and his math score was 78. His score in the application of math and reading test was 90, and his receptive vocabulary score was also within what one would expect for his IQ score. (81 RT 13276-13277.) However, significant differences were observed with regard to appellant's expressive vocabulary score of 65, which was more than 2 standard deviations below the mean, and his language fundamental score of 57. (81 RT13279.) These two sections of the test have a memory component (81 RT 13278), and results in several areas of the testing showed appellant's impaired memory function (81 RT 13291-13292). The test results also represented "a complicated picture of someone with pretty significant attention problems across all of the dimensions." (81 RT 13316.) For example, his "TOVA" score was negative14 on a scale where negative 2 would be the beginning score for prescribing medication to children for ADHD. (81 RT 13317.) Appellant's score placed him in the bottom .13% of the population for his age group. (81 RT 13314-13315.)

*2. **Neurological Impairment***

Appellant was also evaluated by Dr. Thomas Wegman a psychologist board certified in neuropsychology. Wegman performed a neuropsychological assessment consisting of three basic parts: conducting a client interview, administering neuropsychological diagnostic test procedures, and reviewing records for historical information. (84 RT 13914.) The testing revealed that appellant suffered from impaired executive functions involving judgment, inhibition of impulses, and planning. However, other executive functions were intact, including those involved with physical tasks such as putting blocks in order. (84 RT 13923.) Appellant's test scores showed overall mildly impaired cerebral functioning. (84 RT 13932.) However, in certain areas appellant's scores placed him in the severely impaired range. For

example, on the inhibition switching portion of one test — designed to measure a person's ability to flexibly reconsider problem solving strategies and inhibit mental impulses — he scored a 2. This score was lower than 99% of the population. (84 RT 13945-13946.) Appellant did well on portions of the tests involving concrete tangible tasks. (84 RT 13952.) On the other hand, most of appellant's scores on the California Verbal Learning test were in the moderate to severe impairment range. (84 RT 13960.)

Overall Dr. Wegman described appellant as someone who appears superficially normal upon casual observation, but does not possess the same controls as other people. (84 RT 13972.) According to Dr. Wegman, appellant is "likely to be able to perform and stay functioning normally when he's in a structured situation, when he's got a very clearly defined situation he has to deal with. It's when he's left to his own devices that you see the executive dysfunction take place." (84 RT 13977.) Appellant simply does not "have a normal ability to stop — to put on the brakes and consider an alternative when he feels an impulse." (84 RT 13980.)

3. Mental Disorders

Dr. Judith Becker, a professor of psychiatry and psychology at the University of Arizona and consultant to the Arizona Community Protection and Treatment Center, also evaluated appellant after interviewing him, administering standardized psychological tests, and reviewing relevant records. (85 RT 14102-14103, 14133-14134.) Dr. Becker observed that over the years appellant had presented a challenge diagnostically. (85 RT 13141.) Her own diagnosis was multifaceted and included: intermittent explosive disorder, sexual sadism, paraphilia not otherwise specified, methamphetamine dependence, a provisional diagnosis of pedophilia, and antisocial personality disorder. (85 RT 14138.)

Medical records from San Diego County Jail indicated that appellant was bipolar, and that his bipolar disorder had psychotic features including paranoia, auditory hallucinations, and ideas of reference (which are ideas or beliefs that do not correspond to reality). (86 RT 14325-14327.) The records documented that these symptoms had been experienced by appellant over a period of years. (86 RT 14331.) Appellant received medication to reduce his psychotic symptoms and to help alleviate depression. He was also treated with medication for anxiety, panic and insomnia. (87 RT 14334.) Appellant, thus, was on a wide variety of prescription drugs at the same time in order to address a broad spectrum of symptoms. (87 RT 14335.) Specifically, while incarcerated, appellant was prescribed the following drugs at various times: Zyprexa, a new anti-psychotic medication; Paxil, an anti-depressant selective serotonin reuptake inhibitor; Vastaril, a mild sedative anti-anxiety medication used for sleep; Trazodone, an anti-depressant also used some for anxiety and sleep; Thorazine, a phenothiazine anti-psychotic that has somewhat of a sedating, calming, anti-agitation effect; Cogentin, a side effect medication for tremors or muscle stiffness; Klonopin, an anti-anxiety medication similar to Valium or Xanax; Elavil, an anti-depressant; Prozac and Wellbutrin, which are also anti-depressants; and Depakote, a type of mood stabilizer or mood regulator used for patients with bipolar disorder or mood swings. (87 RT 14335-14341.) For the first 15 months of his incarceration appellant was on a combination of Zyprexa, Vistaril, Cogentin and Paxil. (87 RT 14357.) From January of 2003 on appellant was taking Wellbutrin, Zyprexa, Vistaril, Cogentin and Loxitane (which is an anti-psychotic medication similar to Thorazine). (87 RT 14357-14358.)

III. PROSECUTION REBUTTAL EVIDENCE

Dr. David Griesemer, a professor of neurology, conducted a mental status examination of appellant. (88 RT 14474-14476.) He concluded that appellant may have a problem with impulsivity to a "mild degree," a spur of the moment inability to think through the consequences of his actions. However, Dr. Griesemer's opined: "I don't think Mr. Erskine has any neurologic impairment that obligates or forces certain behavior. He doesn't have sufficiently broad impairment that he wouldn't be responsible for directing his behavior." (88 RT 14492.)

Although appellant refused, on the advice of counsel, to be examined by forensic psychiatrist Dr. Park Dietz, Dietz diagnosed appellant based upon his review of records. (90 RT 14757, 14776.) In Dr. Dietz's opinion four diagnoses were supported by the records: attention deficit hyperactivity disorder, poly-substance abuse, sexual sadist, and antisocial personality disorder. (90 RT 14780-14782.) Dr. Dietz also concluded "[t]hat at the time of these homicides and the events leading up to them, [appellant] was capable of knowing right from wrong and could appreciate the wrongfulness of his conduct." (90 RT 14832.) He further concluded that appellant was able to conform his conduct to the requirements of the law. (90 RT 14845.)

AUTHORITIES AND ARGUMENT

I.

THE TRIAL COURT ERRED IN ADMITTING IMPROPER CHARACTER EVIDENCE WHICH WAS MORE PREJUDICIAL THAN PROBATIVE.

The trial court admitted, over defense objection, evidence of two prior incidents — the Jennifer M. case in which appellant was convicted of multiple sex offenses and sentenced to a lengthy prison term, and the yet uncharged Florida murder of Renee Baker — under Evidence Code section 1101, subdivision (b), to show identity, preparation, plan, modus operandi, and intent, and under section 1108, to show propensity to commit sexual assaults. However, the evidence did not satisfy the criteria for admissibility under either section. Additionally, the evidence should have been excluded under Evidence Code section 352 as unduly prejudicial, because it lacked probative value, was cumulative and unnecessary, and because it was time consuming, confusing and inflammatory. The trial court, thus, erred in admitting the evidence. Moreover, under the circumstances of the present case, the erroneous admission of improper character evidence violated appellant's right to due process, and cannot be regarded as harmless. Reversal is, therefore, required.

A. Proceedings Below

Prior to trial the defense moved to exclude, and the prosecution moved to introduce, evidence of unrelated prior misconduct by appellant. On April 28, 2003, the prosecution filed an "In Limine Motion to Admit Evidence Pursuant to Evidence Code sections 1101 & 1108." (9 CT 2015-2045.) On this same date the defense filed a "Memorandum of Points and Authorities in Opposition to Evidence to be Proffered by the Prosecution at Trial Pursuant

to Evidence Code section 1101(b) and 1108." (9 CT 1916-1962.) The defense filed opposition to the prosecution's motion (9 CT 2072- 2091), and the prosecution filed supplemental points and authorities responding to the defense (9 CT 2092-2144).

The prosecution argued that the other crimes evidence was admissible under Evidence Code section 1101, subdivision (b), to show "identity, motive, intent and a common plan or design." (9 CT 2032.) Additionally the prosecution argued that, under Evidence Code section 1108, evidence appellant had committed other sex crimes was admissible "not to prove he is a bad person deserving of punishment, but to prove he has a propensity for this genre of offense, and, therefore, he is more likely to have committed the current sex offenses." (9 CT 2035.)

Among other things, the defense argued that the prior crimes evidence was not admissible on the question of intent since "intent will not be an issue in this case," and "the other crimes evidence would be merely cumulative on this point . . . ." (9 CT 1933.) The defense also argued that the alleged prior offenses were not sufficiently similar to the currently charged crimes to be admissible on the question of identity or as evidence of a common scheme or plan. (9 CT 1934-1941.) Finally, the defense argued that even if the evidence was admissible under Evidence Code sections 1101 and 1108, it should be excluded under Evidence Code section 352 as more prejudicial than probative. (9 CT 1941-1953, 2077-2083.)

The trial court ultimately ruled that evidence regarding the incidents involving Jennifer M. and Renee Baker was admissible under Evidence Code section 1108, and under Evidence Code section 1101, subdivision (b), to show "identity, preparation, plan, modus operandi, whether or not the events in the instant case — whether or not, in the instant case, there was deliberation or

premeditation and whether or not certain kinds of intent was present." (8 RT 1118.) In determining that evidence relating to these two incidents was admissible, the trial court considered "under 352, whether the probative value of these incidents substantially — is substantially outweighed by the probability that their admission will necessitate an undue consumption of time or create a substantial danger of undue prejudice of confusing the issues or misleading the jury." (8 RT 1117.)

At trial the prosecution presented testimony from four witnesses relating to the Jennifer M. case (26 RT 3685-3875), and five witness regarding the Baker incident (28 RT 3979-4052, 29 RT 4078-4093). Overall, approximately 39% of the total guilt phase trial transcript was devoted to evidence regarding these two other crimes.[8] During the presentation of this evidence, the trial court admonished the jury as follows: "Evidence concerning the crimes involving Jennifer M[] and Renee Baker has been admitted. This evidence, if believed, may not be considered by you to prove that defendant is a person of bad character." (29 RT 4077.) At the conclusion of the case, the jurors were instructed on other crimes evidence in general pursuant to a modified version of CALJIC No. 2.50 as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial.
>
> Except as you will otherwise be instructed, this evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to

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[8] Of the 724 pages of testimony 441 pages related to the current crimes (23 RT 3235 - 24 RT 3468, 24 RT 3475 - 26 RT 3683), and 283 pages related to the Jennifer M. and Baker crimes (26 RT 3685 - 28 RT 4053, 29 RT 4077 - 4094).

commit crimes. It may be considered by you for the limited purpose of determining if it tends to show:

A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged or the identity of the person who committed the crime, if any, of which the defendant is accused or a clear connection between the other offense and the one of which the defendant is accused so that it may be inferred that if the defendant committed the other offenses defendant also committed the crimes charged in this case;

The existence of the intent which is a necessary element of the crime charged;

The identity of the person who committed the crime, if any, of which the defendant is accused;

For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.

(12 CT 2726-2727.) The trial court also informed the jurors, pursuant to CALJIC No. 2.50.01, of the following with respect to other sexual crimes:

Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in the case.

"Sexual offense" means a crime under the laws of a state or of the United States that involves any of the following:

A. Any conduct made criminal by California Penal Code sections 261(a)(2), 288a(c) or 289(a). The elements of these crimes are set forth elsewhere in these instructions.

B. Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person.

C. Contact, without consent, between the genitals or anus of the defendant and any part of another person's body.

D. Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person.

If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused.

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

(12 CT 2728-2729.) The court also instructed the jurors that the prosecution had the burden to prove prior crimes by a preponderance of the evidence (12 CT 2730), and defined preponderance of the evidence. (12 CT 2731.)

During closing argument the prosecution referred to the extensive other crimes evidence without intelligibly and logically connecting it directly to a material issue of fact. Instead the prosecutor argued in a general way stating: "you can use it for determining who it was that committed the murder against the boys for the identity of the perpetrator. [¶] You can use it for intent. What was the defendant's intent? You can use it for, what's called, M.O.,

which I'm sure you guys have heard of before. And you can use it for propensity. Okay? Did he have the disposition to commit the crimes?" (29 RT 4144.)

The prosecutor essentially conceded that the other crimes evidence was cumulative and unnecessary with regard to intent to kill and premeditation and deliberation, stating that these matters were proved beyond dispute based upon the circumstances of the victims' deaths: "you have that [intent to kill, premeditation and deliberation] in this case based on the time it took to kill the boys, the manner of killing the boys, the number of people he killed. Clearly establishes express malice, premeditation and deliberation. I don't believe there will be any argument that this was anything but a first degree murder based on the theory of premeditation and deliberation." (29 RT 4146.)

The prosecutor also basically acknowledged that the other crimes evidence was cumulative and unnecessary with respect to any issue regarding felony murder based upon the commission of sex offenses. (29 RT 4149-4158.) In this regard the prosecutor argued that the fact that the sexual offenses had been committed was established by the crime scene evidence – referring to it as a "sexual crime scene."[9] (29 RT 4150-4151, 4157.) The prosecutor also stated: "I don't think there will be any argument but that the defendant committed the crime of oral copulation with Charlie and that the murder was committed during the commission of that offense." (29 RT

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[9] Specifically the prosecutor argued: "Clearly, as to both boys, this is a sexual scene. They're undressed. There's sperm on their bodies that they are not old enough to produce. Sperm on Charlie's scrotum, sperm on Charlie's anus, sperm on Charlie's sweatshirt, sperm on Jonathan's anus, sperm on Jonathan's penis, and sperm on the collar of Jonathan's shirt, the one he's wearing right there in the picture." (29 RT 4157.)

4153.) Similarly, the prosecutor stated: "As to both boys, there's no contest — it is uncontradicted — what lewd acts occurred." (29 RT 4156.)

Thus, although the other crimes evidence was admitted by the trial court under Evidence Code section 1101, subdivision (b), to show preparation, plan, modus operandi, and intent, and under section 1108, to show propensity to commit sexual assaults, the evidence was cumulative and unnecessary with respect to these matters. Additionally, by informing jurors they could use evidence of other crimes to "infer that the defendant had a disposition to commit sexual offenses" and to then infer "that he was likely to commit and did commit the crime or crimes of which he is accused" — i.e. **murder** — the jury instructions provided by the trial court did not limit the jurors use of the evidence to a proper purpose.

B. Evidence Regarding the Prior Incidents Should Have Been Excluded as Improper Character Evidence.

1. General Principles Regarding Other Crimes Evidence

Under Evidence Code section 1101, subdivision (a), "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." This section expressly prohibits the use of evidence of prior bad acts committed by the defendant "if the only theory of relevance is that the accused has a propensity (or disposition) to commit the crime charged and that this propensity is circumstantial proof that the accused behaved accordingly on the occasion of the charged offense." (*People v. Thompson* (1980) 27 Cal.3d 303, 316.)

Section 1101 codifies a longstanding principle of Anglo-American jurisprudence. As explained in *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378:

> The use of "other acts" evidence as character evidence is not only impermissible under the theory of evidence codified in the California rules of evidence [citation] and the Federal Rules of Evidence [citation], but is contrary to firmly established principles of Anglo-American jurisprudence. In 1684, Justice Withins recalled a prior case in which the court excluded evidence of any forgeries, except the one for which the defendant was standing trial. [Citation.] Similarly, in *Harrison's Trial*, the Lord Chief Justice excluded evidence of a prior wrongful act of a defendant who was on trial for murder, saying to the prosecution: "Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter." [Citation.] Early American courts retained the rule against using "other acts" evidence as character evidence to show action in conformity therewith. [Citations.] As acknowledged by the Supreme Court in *Brinegar v. United States*, 338 U.S. 160, 174, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879 (1949):
>
> > "Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property."
>
> The rule against using character evidence to show behavior in conformance therewith, or propensity, is one such historically grounded rule of evidence. It has persisted since at least 1684 to the present, and is now established not only in the California and federal evidence rules, but in the evidence rules of

> thirty-seven other states and in the common-law precedents of the remaining twelve states and the District of Columbia. [footnote omitted.]

(*Id.* at pp. 1380-1381; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 913, and cases cited therein.)

Traditionally, propensity evidence is disfavored on the ground that people should be tried for their charged acts and not for their past deeds or personalities. (*United States v. Myers* (5th Cir. 1977) 550 F.2d 1036, 1044 ["A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is."]; *People v. Garceau* (1993) 6 Cal.4th 140, 186 [noting that the use of such evidence may dilute the presumption of innocence].) The rule guards against the "natural and inevitable tendency" of jurors to give excessive weight to the prior conduct and either allow it to bear too strongly on the present charge, or to take the proof of it as justifying a conviction irrespective of guilt of the present charge. (*People v. Guerrero* (1976) 16 Cal.3d 719, 724; *People v. Schader* (1969) 71 Cal.2d 761, 773, fn. 6; see also *People v. Ortiz* (2003) 109 Cal.App.4th 104, 111.) As the United States Supreme Court stated in *Michelson v. United States* (1948) 335 U.S. 469:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, [citation], but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too

> much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

(*Id.* at pp. 475-476 [footnotes omitted].)

The prohibition against admission of character evidence to prove conduct on a specified occasion is, thus, based on fundamental principles of fairness. "'While to the layman's mind a defendant's criminal disposition is logically relevant to his guilt or innocence of a specific crime, the law regards the inference from general to specific criminality so weak, and the danger of prejudice so great, that it attempts to prevent conviction on account of a defendant's bad character. . . .'" (*People v. Smallwood* (1986) 42 Cal.3d 415, 429.) This Court has recognized three separate reasons supporting the general rule against admission of propensity evidence: "The rule of exclusion (1) relieves the defendant of the often unfair burden of defending against both the charged offense and the other uncharged offenses, (2) promotes judicial efficiency by avoiding protracted 'mini-trials' to determine the truth or falsity of the prior charge, and (3) guards against undue prejudice arising from the admission of the defendant's other offenses." (*People v. Falsetta*, *supra*, 21 Cal.4th at pp. 915-916.)

(a) Subdivision (b) of Section 1101

Although evidence of prior bad acts is generally inadmissible to prove that the accused had the propensity or disposition to commit the crime charged, "evidence may be admitted, even though it embraces evidence of the commission of another crime, if it logically tends to prove a material element

in the People's case." (*People v. Guerrero, supra,* 16 Cal.3d at p. 724.) In this regard subdivision (b) of section 1101, provides as follows:

> (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

This Court has articulated a three-part test for determining the admissibility of other-crimes evidence for a non-propensity purpose which takes into consideration: "(1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence." (*People v. Kelly* (2007) 42 Cal.4th 763, 783.)

"In order to satisfy the requirement of materiality, the fact sought to be proved may be either an ultimate fact in the proceeding [fn. omitted] or an intermediate fact 'from which such ultimate fact[] may be presumed or inferred.' [Fn. omitted.] [Citation.] Further, the ultimate fact to be proved must be 'actually in dispute.' [Citation.] If an accused has not 'actually placed that [ultimate fact] in issue,' evidence of uncharged offenses may not be admitted to prove it. [Citations.]" (*People v. Thompson, supra,* 27 Cal.3d at p. 315.) Furthermore, otherwise relevant misconduct evidence is not admissible if it is merely cumulative with respect to other evidence the prosecution may use to prove the same issue. (*People v. Alcala* (1984) 36 Cal.3d 604, 631-632; *People v. Guerrero, supra,* 16 Cal.3d at p. 724.)

The second relevant inquiry requires that the court scrutinize the proffered evidence to determine its probative value on the issue(s) for which

it is offered. The other-act evidence has a tendency to prove or disprove the material fact when it "serves '"logically, naturally, and by reasonable inference"' to establish [or disprove] that fact. [Citations.]" (*People v. Thompson, supra*, 27 Cal.3d at p. 316 [fn. omitted].)

Lastly, the court must ascertain and evaluate "the existence of any rule or policy requiring the exclusion of relevant evidence." (*People v. Thompson, supra*, 27 Cal.3d at p. 315.) This evaluation is required because "[e]vidence of uncharged offenses 'is so prejudicial that its admission requires extremely careful analysis. [Citations.]' [Citations.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) "The main policy that may require exclusion of the evidence is the familiar one stated in Evidence Code section 352: Evidence may be excluded if its prejudicial effect substantially outweighs its probative value. Because substantial prejudice is inherent in the case of uncharged offenses, such evidence is admissible only if it has substantial probative value." (*People v. Kelly, supra*, 42 Cal.4th at p. 783.)

(b) Evidence Code section 1108

In 1995, in a stark departure from centuries of legal tradition, Evidence Code section 1108 was enacted as a stand-alone statutory exception to the exclusion of propensity evidence mandated by Evidence Code section 1101, subdivision (a). This section provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] Section 352." (Evid. Code, § 1108, subd. (a).) "Section 1108 was modeled on rule 413 of the Federal Rules of Evidence, fn. 2 (28 U.S.C.) adopted in 1994, which provides in pertinent part that '(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the

defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.'" (*People v. Falsetta, supra*, 21 Cal.4th at p. 912.) Congress passed Federal Rules of Evidence 413 – 415 as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) — bypassing the regular rulemaking process. (See 23 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5411 (2005 Supp.); David P. Leonard *The Federal Rules of Evidence and the Political Process* (1995) 22 FORDHAM URB. L.J. 305.)

In sex crimes prosecutions section 1108 "radically changed" the traditional rule prohibiting propensity evidence. (*People v. Isom* (2006) 145 Cal.App.4th 1371, 1379; *People v. Britt* (2002) 104 Cal.App.4th 500, 505.) The policy underlying section 1108 has been explained by this Court as follows: "'Our elected Legislature has determined that the policy considerations favoring the exclusion of evidence of uncharged sexual offenses are outweighed in criminal sexual offense cases by the policy considerations favoring the admission of such evidence. The Legislature has determined the need for this evidence is "critical" given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial. [Citation.]' [Citation.]" (*People v. Falsetta, supra*, 21 Cal.4th at p. 912 [quoting *People v. Fitch* (1997) 55 Cal.App.4th 172, 181-182].) By removing the restriction on character evidence codified in Evidence Code section 1101, section 1108 now permits jurors in sex offense cases to consider evidence of prior offenses for any relevant purpose. (*People v. James* (2000) 81 Cal.App.4th 1343, 1353, fn. 7; *People v. Britt, supra*, 104 Cal.App.4th at p. 505.)

In *People v. Falsetta, supra,* 21 Cal.4th 903, the constitutionality of section 1108 was challenged. It was argued that the section, which represents a deviation from the long established practice of excluding propensity evidence, denied defendants due process. After observing that "[h]ad section 1108 allowed unrestricted admission of defendant's other 'bad acts,' character, or reputation," the due process challenge would have been stronger, the *Falsetta* court upheld the constitutionality of section 1108 because, among other reasons, trial courts retained discretion to exclude the evidence of propensity if its prejudicial nature outweighed its probative value, its production would consume an undue amount of time, or it would confuse the issues or mislead the jury. (*Id.* at p. 916-917)

> In summary, we think the trial court's discretion to exclude propensity evidence under section 352 saves section 1108 from defendant's due process challenge. As stated in *Fitch*, "[S]ection 1108 has a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial. Such evidence is still subject to exclusion under . . . section 352. (. . . § 1108, subd. (a).) By subjecting evidence of uncharged sexual misconduct to the weighing process of section 352, the Legislature has ensured that such evidence cannot be used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. (. . . § 352.) This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence. [Citation.] With this check upon the admission of evidence of uncharged sex offenses in prosecutions for sex crimes, we find that . . . section 1108 does not violate the due process clause." [Citation.]

(*Id.* at pp. 917-918.)

As written, "section 1108 passes constitutional muster if and only if section 352 preserves the accused's right to be tried for the current offense."

(*People v. Harris* (1998) 60 Cal.App.4th 727, 737.) "A careful weighing of prejudice against probative value under [Evidence Code section 352] is essential to protect a defendant's due process right to a fundamentally fair trial. [Citations.]" (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.) Thus, any due process assertion necessarily depends on whether the trial court sufficiently and properly evaluated the proffered evidence under section 352. (*People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1104; *People v. Miramontes* (2010) 189 Cal.App.4th 1085, 1097.)

In addressing the possible undue prejudice arising from the admission of prior crimes evidence, *Falsetta* recognized that trial courts "must engage in a careful weighing process under section 352." (*People v. Falsetta, supra,* 21 Cal.4th at p. 917.) "Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]" (*Ibid.*)

(c) Standard of Review

Courts subject other crimes evidence to "'extremely careful analysis'" (*People v. Ewoldt, supra,* 7 Cal.4th at p. 404), and review the admission of such evidence for abuse of discretion (*People v. Loy* (2011) 52 Cal.4th 46, 61; *People v. Lindberg* (2008) 45 Cal.4th 1, 23; *People v. Kelly, supra,* 42 Cal.4th at p. 783; *People v. Cudjo* (1993) 6 Cal.4th 585, 609). A trial court's decision

to admit other crimes evidence is, thus, entitled to some deference; however, such a decision can withstand appellate review only if the evidence falls within the bounds marked by the legal standards set forth in the rules of evidence. "Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion. [Citation.]" (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297; accord, *Miyamoto v. Department of Motor Vehicles* (2009) 176 Cal.App.4th 1210, 1218-1219 [court abused its discretion when it applied the wrong legal standard for evaluating the foundational requirements for the admissibility of evidence under section 1280]; *People v. Harris*, *supra*, 60 Cal.App.4th at p. 736 [court abused its discretion in admitting evidence under section 1108].) Thus, "[t]o determine if a court abused its discretion, we must . . . consider 'the legal principles and policies that should have guided the court's actions.' [Citation.]" (*Sargon Enterprises, Inc. v University of Southern California* (2012) 55 Cal.4th 747, 773.) Discretion is delimited by the applicable legal standards, a departure from which constitutes an "abuse" of discretion. (*City of Sacramento v. Drew*, *supra*, 207 Cal.App.3d at pp. 1297-1298.) "'The discretion intended ... is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.' [Citations.]" (*People v. Harris*, *supra*, 60 Cal.App.4th at p. 737.) "To the extent the trial court's ruling depends on the proper interpretations of the Evidence Code, however, it presents a question of law; and [] review is de novo." (*People v. Walker* (2006) 139 Cal.App.4th 782,

792; see also *Amdahl Corp. v. County of Santa Clara* (2004) 116 Cal.App.4th 604, 611.)

2. ***The Evidence Did Not Tend Logically, Naturally and by Reasonable Inference to Prove a Material Issue of Fact as Required for Admission Under Subdivision (b) of Section 1101.***

"Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent." (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) Where the other conduct is offered to show a common design or plan, courts require a greater degree of similarity between the prior conduct and the charged crime (*id.* at pp. 402-403); there must be "'a high degree of similarity.'" (*Id.* at p. 403.) The highest quantum of similarity between the other conduct and the charged crime is necessary where the other-act evidence is offered to prove identity. (*Ibid.*; see also *People v. Hovarter* (2008) 44 Cal.4th 983, 1003.)

If the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.' [Citation.]" (*People v. Daniels* (1991) 52 Cal.3d 815, 856; accord, *People v. Spector* (2011) 194 Cal.App.4th 1335, 1373.) Additionally, as noted by this Court in *People v. Smallwood, supra*, "[w]henever an inference of the accused's criminal disposition forms a 'link in the chain of logic connecting the uncharged offense with a material fact' [citation] the uncharged offense is simply inadmissible, no matter what words or phrases are used to 'bestow[] a

respectable label on a disreputable basis for admissibility — the defendant's disposition.' [Citation.]" (42 Cal.3d at p. 428.)

Here, as discussed more fully below, the evidence was not sufficiently similar to support a rational inference of identity, common scheme or plan, or intent.

(a) Identity

The probative value of other crimes evidence on the issue of identity "is dependent upon the extent to which it raises an inference that the perpetrator of the uncharged offense was the perpetrator of the charged offense and . . . the determination as to the presence and strength of such an inference proceeds through an evaluation of marks shared by the uncharged and charged crimes." (*People v. Thornton* (1974) 11 Cal.3d 738, 756.) "It is apparent that the indicated inference does not arise . . . from the mere fact that the charged and uncharged offenses share certain marks of similarity, for it may be that the marks in question are of such common occurrence that they are shared not only by the charged crime and defendant's prior offenses, but also by numerous other crimes committed by persons other than defendant." (*People v. Haston* (1968) 69 Cal.2d 223, 245.) In this regard it has been observed:

> [I]t would be possible to list any number of marks common to the charged and uncharged crimes each of which is so lacking in distinctiveness that its presence, whether or not in combination with other equally nondistinctive factors, is wholly lacking in significance. To give an example whose very absurdity illustrates the point, it might be observed that in both the charged and uncharged crimes the robber wore trousers, had two ears, etc. The sum of zero is always zero. Thus, it would seem that the distinctiveness of the common marks offered must always be a factor for consideration whether such marks are taken singly or in combination.

(*Id.* at p. 246, fn. 15.) """If admission of proof of other crimes were to be hinged upon a showing of methods common to most or many . . . [criminal] practitioners, then application of the inclusionary rule would be so broad as to nullify the principle that a defendant is not to be convicted because the prosecution can prove, on his prior (or subsequent) record, that he is a bad man. Assertion of the principle of exclusion as a preliminary to its avoidance becomes mere pretense."'" (*People v. Antick* (1975) 15 Cal.3d 79, 94.)

For other crimes evidence to be admissible on the question of identity then, "the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' [Citation.]" (*People v. Ewoldt, supra,* 7 Cal.4th at pp. 403-404; accord *People v. Balcom* (1994) 7 Cal.4th 414, 424-425.) """The highly unusual and distinctive nature of both the charged and [uncharged] offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense." [Citation.]'" (*People v. Hovarter, supra,* 44 Cal.4th at p. 1003.)

The offenses at issue in the present case have virtually no common marks with any degree of distinctiveness and they could not, by any stretch of the imagination, be regarded as "signature" crimes. The Jennifer M. case involved multiple sex offenses committed against an adult female in appellant's apartment over the course of several hours. The trial court found the following similarities between the current charges involving the murder of two juvenile males and the Jennifer M. case: "There was a strangulation. There was forced oral copulation. There was the yellow rope and the tape." (8 RT 1118.) With regard to the Renee Baker case, the trial court made

reference to the following similarities: "there was the oral copulation, the strangulation, the cigarette butt and the piling of clothes." (*Ibid.*) Baker was an adult female whose body was found in an easily noticeable, albeit non-public location. While she may have been choked at some point, her cause of death was drowning. She sustained blunt trauma injuries to her head and face, and there was no indication she had been tied up or gagged. Nothing about the facts of either of the prior incidents "virtually eliminate[s] any other suspect for the instant crimes. Consequently neither was admissible on the issue of identity. (See *People v. Balcom*, *supra*, 7 Cal.4th at pp. 424-425.) In this regard the present case is unlike other cases where this Court has found sufficient similarities between past offenses and current crimes to support an inference of identity.

In *People v. Hovarter, supra,* 44 Cal.4th 983, this Court found that the trial court did not abuse its discretion in allowing evidence of an uncharged crime to be introduced to prove identity. The "distinctive facts common to both sets of crimes" included the following: "both involved abduction, rape, and murder (or attempted murder); both involved teenage girls...; both occurred along Highway 101 under circumstances suggesting the young women were taken from along the highway; both occurred in roughly the same time frame . . . both victims were moved a substantial distance [and the] ... perpetrator of both crimes sought to dispose of the victim's body in a river." (*Id.* at p. 1004.)

In *People v. Kelly, supra,* 42 Cal.4th 763, this Court also found there was no error in allowing the prosecution to present evidence of uncharged crimes committed by the defendant against six women over a period of nine years, because the women's "testimony was critical to the jury's full understanding of the circumstances of" the victim's death. (*Id.* at p. 786.)

The evidence showed: (1) that defendant had used the same false cover story to con, or attempt to con, money from four women he had befriended at the same fitness center at which he had befriended the victim; (2) that he had assaulted one of those women, and raped a second one, just a week before the victim disappeared and in the same apartment in which her body was found; and (3) that in 1987 and 1991, using the same story he was using in 1993, he had lured two other women to his lodgings and raped both of them. Under these circumstances, this Court determined that the similarities between the uncharged crimes and the homicide were relevant to prove both intent and identity. (*Id.* at pp. 785-787.)

Unlike *Hovarter* or *Kelly*, in the present case there were virtually no distinctive similarities between the prior cases and the current charges. Since there were insufficient distinctive common marks between the prior incidents and the offenses charged in the present case to render them "signature" crimes, the evidence was not admissible on the question of identity.

(b) Common Scheme or Plan

"[I]n establishing a common design or plan, evidence of uncharged misconduct must demonstrate, 'not merely a similarity in results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) "To establish the existence of a common design or plan, the common features must indicate the existence of a plan . . . ." (*Id.* at p. 403.)

Additionally, evidence establishing a common scheme or plan is relevant only to issues relating to whether or not a particular act took place in keeping with the scheme or plan. "[I]f it is beyond dispute that the alleged crime occurred," evidence of uncharged conduct to demonstrate a common

design or plan "would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 406.) "Evidence of a common design or plan, therefore, is not used to prove the defendant's intent or identity but rather to prove that the defendant engaged in the conduct alleged to constitute the charged offense." (*Id.* at pp. 393-394.)

Thus, where other crimes evidence is offered to establish a common scheme or plan, the identity of the actor is conceded or assumed, and the issue is whether a particular act took place — in other words, the question is what was done, not who did it. On the other hand, where other crimes evidence is offered to establish identity, the act is conceded or assumed and the question is who did it. In the present case there was no dispute the acts constituting the charged offenses were committed by someone with the intent alleged by the prosecution. The sole question was the identity of the perpetrator — a matter upon which proof of a common scheme or plan has no bearing. Consequently, the evidence was not admissible on this basis.

(c) Intent

To be admissible on the question of intent, the prior conduct and the charged offense must be sufficiently similar to support the inference that the defendant probably harbored the same intent in each instance. (*People v. Cole* (2004) 33 Cal.4th 1158, 1194; *People v. Yeoman* (2003) 31 Cal.4th 93, 121; *People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) "'[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence . . . or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .'" [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be

sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]'" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402.)

In the present case there were no issues regarding accident, inadvertence or other innocent mental state. Consequently, the other crimes evidence would not have been relevant as showing the recurrence of a similar result which tended to negative accident, inadvertence, good faith, or other innocent mental state, and tended to provisionally establish the presence of the normal criminal intent accompanying such an act.

The trial court held that the other crimes evidence was admissible not to show by repetition of action the absence of innocent intent, but rather to show "whether or not, in the instant case, there was deliberation or premeditation and whether or not certain kinds of intent was [sic] present." (8 RT 1117.) However, as to either point, the evidence would have been relevant only in terms of propensity, an inadmissible purpose with regard to evidence offered under subdivision (b) of section 1101. As this Court held in *People v. Balcom*, *supra*, 7 Cal.4th at p. 423:

> [T]he statement in the concurring and dissenting opinion that such evidence is admissible "if the circumstances of the accused's criminal sexual misconduct on other occasions tend to establish that he harbored criminal sexual intent toward the current complainant" (conc. and dis. opn. of Baxter, J.) would establish an ill-defined standard that does not clearly exclude evidence of a defendant's criminal disposition, as required by Evidence Code section 1101, subdivision (a). For example, evidence that a defendant charged with rape had committed rape on another occasion in a manner different from the charged offense may tend to establish that the defendant had a propensity to commit rape and, therefore, "harbored criminal sexual intent toward the current complainant," but such

evidence is inadmissible under Evidence Code section 1101 as mere evidence of criminal disposition.

(*Id.* at p. 423, citing *People v. Ewoldt, supra*, 7 Cal.4th at p. 393.) The propensity purpose described in *Balcom* was the only potential use of the other crimes evidence with respect to the issue of intent. Under these circumstances, the prior crimes evidence was not admissible under subdivision (b) of section 1101 on the question of intent.

(d) The Trial Court Erred in Admitting the Evidence Under Section 1101

Overall, the prior crimes evidence was not admissible under subdivision (b) of section 1101 to prove identity, common design or plan, or intent. In light of the high potential for prejudice associated with other crimes evidence, when prior misconduct evidence is presented under subdivision (b) of section 1101, courts must carefully consider whether it is genuinely being offered for a proper, non-character purpose, or whether it might actually be aimed at sustaining an improper inference of action in conformity with a person's bad character. Otherwise evidence of past misconduct could routinely be allowed to sustain an inference of action in conformity with bad character — so long as the proponent of the evidence could proffer a plausible companion inference that does not contravene the rule. Here the evidence was not plausibly aimed at a proper purpose, and should have been excluded.

Even if it is determined that the other crimes evidence was marginally relevant to a legitimate purpose it should have been excluded under Evidence Code section 352 because its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. (See Subsection 4, *ante*.)

3. ***The Trial Court Erred in Admitting the Prior Crimes Evidence Under Evidence Code Section 1108.***

"[O]n its face, section 1108 is limited to the *defendant's sex offenses*, and it applies only when he is charged with committing *another sex offense*." (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 915 [emphasis in original].) "As the legislative history indicates, the Legislature's principal justification for adopting section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant's possible disposition to commit sex crimes. [Citation.]" (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 915.) In such cases Evidence Code section 1108 allows admission of evidence of prior sex offenses "for any relevant purpose" including propensity to engage in sexual misconduct. (*People v. James, supra,* 81 Cal.App.4th at p. 1353, fn. 7; *People v. Britt*, *supra*, 104 Cal.App.4th at p. 505.)

The defendant's possible disposition to commit sex crimes, however, must be relevant to some issue of consequence in the action. Under Evidence Code section 350: "No evidence is admissible except relevant evidence." Relevant evidence is defined as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove ***any disputed fact that is of consequence*** to the determination of the action." (Evid. Code, § 210 [emphasis added].)

Although appellant was not independently charged with a sex offense in the present case, this Court has held that "section 1108 applies . . . when the prosecution accuses the defendant of first degree felony murder with rape (or

another crime specified in section 1108, subdivision (d)(1)), ..." (*People v. Story* (2009) 45 Cal.4th 1282, 1294.) Evidence of other sex crimes could potentially be relevant to whether or not the sex offenses supporting the prosecution's felony murder theory of first degree murder and special circumstance allegations were committed. (*Id.* at pp. 1296-1297.) Such was the case in *Story* where it was argued "that there was no evidence from which a reasonable jury could conclude that defendant entered [the victim's] apartment intending to rape her, or that [the victim] failed to consent to the intercourse, or that she resisted defendant . . . ." (*Id.* at p. 1296.) Under those circumstances this Court concluded that "the evidence of defendant's other offenses provide[d] compelling evidence that defendant entered [the victim's] apartment intending to rape her and that he killed her during the course of rape." (*Id.* at p. 1297.)

Unlike *Story*, in the present case there was no issue as to whether the person who committed the charged murders harbored the requisite intent to commit a relevant sex offense, no issue concerning consent, and no issue as to whether the sex crimes supporting the prosecution's felony murder theory were committed. The evidence of other sex crimes was, thus, not relevant to a material issue of fact. Under these circumstances the other crimes evidence should not have been admitted under section 1108.

With regard to other crimes evidence offered under subdivision (b) of section 1101, in *People v. Thompson*, *supra*, 27 Cal.3d at p. 315, this Court held: "If an accused has not 'actually placed that [ultimate fact] in issue,' evidence of uncharged offenses may not be admitted to prove it." The Court further held: "The fact that an accused has pleaded not guilty is not sufficient to place the elements of crimes charged against him 'in issue.'" (*Ibid.*) In more recent cases under section 1101, this Court has apparently retreated

somewhat from the rule stated in *Thompson.*[10] (See e.g. *People v. Steele* (2002) 27 Cal.4th 1230, 1243; *People v. Daniels, supra,* 52 Cal.3d at pp. 857-858.) However, with regard to 1108 evidence, technical relevance should not be enough to justify the admissibility of evidence of prior bad acts purportedly aimed at establishing whether or not a murder was committed during the commission of a sex offense. Fidelity to the integrity of the rationale underlying section 1108's exception to the long-standing rule excluding propensity evidence requires a careful evaluation of the true — and predominant — purpose of any evidence proffered under section 1108. If proof of the commission of a sex offense is merely a ruse, and the real effect of prior misconduct evidence is to suggest a defendant's propensity to commit murder, the evidence should not be admitted.

This Court has recognized "the potentially devastating impact of other-crimes evidence that permits the jury to conclude that a capital defendant has a propensity to commit murder. Such evidence invites the jury to be swayed by speculation that, because the defendant previously has murdered, he or she also committed the charged murder. (See *Michelson v. United States* (1948) 335 U.S. 469, 475-476; *People v. Smallwood* (1986) 42 Cal.3d 415, 428.)" (*People v. Garceau, supra,* 6 Cal.4th at p. 187; see also

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[10] In *Steele* the Court stated: "Defendant's not guilty plea put in issue all of the elements of the offenses. [Citation.] Defendant argues that he conceded at trial the issue of intent to kill. Even if this is so, the prosecution is still entitled to prove its case and especially to prove a fact so central to the basic question of guilt as intent."]. (27 Cal.4th at p. 1243.) Similarly, in *Daniels* the Court observed that "contrary to *Thompson*, it appears that defendant's plea does put the elements of the crime in issue [] for the purpose of deciding the admissibility of evidence under Evidence Code section 1101, [] unless the defendant has taken some action to narrow the prosecution's burden of proof." (52 Cal.3d at pp. 857-858 [footnotes omitted].)

Old Chief v. United States (1997) 519 U.S. 172, 180-181 [holding that the prosecution may not introduce propensity evidence that "generaliz[es] a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily)."].) Yet, this is precisely the purpose of the other crimes evidence in this case.

The only potential use the jury could have made of the other crimes evidence was to show appellant committed the charged murders. The prosecution offered the evidence of other sex crimes not to show that sex crimes were committed with regard to the charged murders but to show that appellant committed them. In light of the factual questions actually at issue in the present case, the evidence should have been excluded. Either the evidence was inadmissible under section 1108 because the true purpose of the evidence was an impermissible one; or the evidence should have be excluded under section 352 because the probative value of the evidence with respect to any permissible purpose was outweighed by its propensity for an improper inference or for jury confusion about its real purpose. (See further discussion below.) Either way the trial court erred in admitting the evidence under Evidence Code section 1108.

4. ***The Evidence Should Have Been Excluded Under Evidence Code Section 352.***

Once it has been determined that evidence of prior acts of misconduct is admissible under subdivision (b) of Evidence Code section 1101, and/or under Evidence Code section 1108, courts must carefully weigh the evidence under Evidence Code section 352 which provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the

probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, or confusing the issues, or of misleading the jury."

As discussed above, with regard to evidence admitted under section 1108 the trial court "must engage in a careful weighing process under section 352. Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 917.)

The weighing process under section 352 "depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules." (*People v. Jennings*, *supra*, 81 Cal.App.4th at p. 1314; accord *People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274.) In light of the due process function of section 352 in this setting, this Court should require a display of the process and the reasoning behind the trial court's 352 balance.

Clearly "[a] careful weighing of prejudice against probative value under [Evidence Code section 352] is essential to protect a defendant's due process right to a fundamentally fair trial." (*People v. Jennings*, *supra*, 81 Cal.App.4th at p. 1314.) However, the section 352 balance can break down into canned formulas, circular reasoning, and empty gestures. What should

be a highly fact-based and contextual weighing of the relative merits of the evidence can be instead transformed into pat incantation. In order to assure that section 352 actually serves as a safeguard against due process violations, it is particularly important for the trial court to fully evaluate the proffered section 1108 evidence and make a clear record of the reasoning behind its ruling. (*cf. United States v. Guardia* (10th Cir. 1998) 135 F.3d 1326, 1331 ["Because of the sensitive nature of the balancing test in these cases, it will be particularly important for a district court to fully evaluate the proffered Rule 413 evidence and make a clear record of the reasoning behind its findings."].)

Here the trial court indicated that it had considered "under 352, whether the probative value of these incidents . . . is substantially outweighed by the probability that their admission will necessitate an undue consumption of time or create a substantial danger of undue prejudice of confusing the issues or misleading the jury." (8 RT 1117.) However, the court did not make a record of the specific facts considered or the reasoning behind its ruling. Under these circumstances this Court should conduct an independent review of the matter. When considered together, the relevant factors establish an abuse of discretion in admitting the evidence, and demonstrate that appellant was deprived of a fair trial as a result.

The first relevant factor under Evidence Code section 352 is the probative value of the evidence. "[E]vidence is probative if it is material, relevant, and necessary. '[H]ow much "probative value" proffered evidence has depends upon the extent to which it tends to prove an issue by logic and reasonable inference (degree of relevancy), the importance of the issue to the case (degree of materiality), and the necessity of proving the issue by means of this particular piece of evidence (degree of necessity).'" (*People v. Thompson, supra*, 27 Cal.3d at p. 318, fn. 20 [disapproved on another point

in *People v. Rowland* (1992) 4 Cal.4th 238, 260].) As this Court has explained:

> On the issue of probative value, materiality and necessity are important. The court should not permit the admission of other crimes until it has ascertained that the evidence tends logically and by reasonable inference to prove the issue upon which it is offered, that it is offered on an issue material to the prosecution's case, and is not merely cumulative.

(*People v. Stanley* (1967) 67 Cal.2d 812, 818-819 [fns. omitted]; accord *People v. Ewoldt, supra*, 7 Cal.4th at p. 406 ["if it is beyond dispute that the alleged crime occurred," evidence of uncharged conduct to demonstrate a common design or plan "would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value"]; *People v. Foster* (2010) 50 Cal.4th 1301, 1331.)

As discussed above, the other crimes evidence admitted in the present case did not tend logically and by reasonable inference to prove any contested issue of material fact. If relevant at all, the probative value of the evidence was exceedingly low.

Under section 352 this weak probative value must be balanced against factors affecting its potential for negatively impacting the trial including the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as excluding irrelevant though inflammatory details surrounding the offense. (*People v. Falsetta, supra*, 21 Cal.4th at p. 917.) All of these factors weigh against admission of the evidence.

If the prior offense did not result in a conviction, as was the case with the Baker homicide, that fact increases the likelihood of confusing the issues "because the jury [has] to determine whether the uncharged offenses [in fact] occurred." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405.) In *People v. Falsetta*, *supra*, 21 Cal.4th at p. 917, this Court recognized "that the prejudicial impact of the evidence is reduced if the uncharged offenses resulted in actual convictions and a prison term, ensuring that the jury would not be tempted to convict the defendant simply to punish him for the other offenses, and that the jury's attention would not be diverted by having to make a separate determination whether defendant committed the other offenses." Similarly in *People v. Loy*, *supra*, 52 Cal.4th 46, this Court upheld the admission of prior crimes evidence where: "Defendant had been convicted of both previous assaults, which strongly supports their admission. His commission of those crimes had already been established and was thus certain, and defendant bore no new burden of defending against the charge. The jury would not be tempted to convict him of the charged crime to punish him for the earlier crimes. [Citation.] Additionally, the convictions meant there was little danger of confusing the issues or requiring an inefficient mini-trial to determine defendant's guilt of the previous crimes. [Citation.] The evidence was presented quickly, with only the victim of each assault testifying." (See also *People v. Wesson* (2006) 138 Cal.App.4th 959, 970 [holding "Defendant's guilty plea resolved the issue of certainty. The jury would not be distracted or confused by the prior convictions, because defendant had been convicted of these offenses. . . There was no burden on defendant to defend against these prior offenses, because he had pleaded guilty in 1990. The admission of documentary evidence removed much of the potential inflammatory details of the prior offenses."].)

Here, while appellant had been convicted in the Jennifer M. case, he had not even been charged in connection with the Renee Baker case as of the time of trial. Additionally, as to both cases, the prosecution called numerous witnesses and presented extensive details of the crimes. The testimony concerning the prior crimes represented almost 40% of the evidence presented to the jurors in the guilt phase. Both, thus, resulted in inefficient mini-trials which presented a danger of confusing the issues and diverting the jurors' attention from the primary issue in the case — whether appellant committed the charged murders. Additionally with regard to the Baker case, admission of the evidence placed an unfair burden on appellant of defending against a crime alleged to have been committed many years earlier in another state which had not yet been charged. The evidence was also unduly prejudicial.

The prejudice or damage to be avoided under section 352 is not that which naturally flows from relevant, highly probative evidence, but from evidence that """tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues."""" (*People v. Smith* (2005) 35 Cal.4th 334, 357 [quoting *People v. Karis* (1988) 46 Cal.3d 612, 638] [italics omitted].) "Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors. [Citation.]" [Citation.]' ... In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008-

1009; accord *People v. Branch* (2001) 91 Cal.App.4th 274, 286; *People v. Zapien* (1993) 4 Cal.4th 929, 958.)

The other offense evidence introduced in this case had no probative value other than the weak inference which may be drawn from propensity to specific criminality. (*People v. Smallwood, supra*, 42 Cal.3d at p. 429.) That is, it had no reasonable tendency to prove any fact at issue in this action. (*People v. Daniels, supra*, 52 Cal.3d at p. 856.) It had an inherent and very great prejudicial effect in the sense of promoting prejudgment based on the defendant's past record. (*Michelson v. United States, supra*, 335 U.S. at p. 476; *People v. Thompson, supra*, 27 Cal.3d at p. 318.) Moreover, while not as inflammatory as the offense with which defendant currently was charged, it was inflammatory. This increased the promotion of prejudgment on the basis of appellant's status rather than his present acts, an impermissible foundation for conviction. (Cf. *Robinson v. California* (1962) 370 U.S. 660.) As a consequence, its admission not only represented an abuse of discretion under Evidence Code section 352, but violated due process of law.

C. Prejudice

The error deprived appellant of additional constitutional rights. State evidentiary rules create "a substantial and legitimate expectation" that a defendant will not be deprived of his life or liberty in violation of those rules. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) This expectation is protected against arbitrary deprivation under the Fourteenth Amendment. (*Ibid.*) By misapplying well-established state law that prevents the prosecution from using evidence admitted for a limited purpose as general propensity evidence (Evid. Code, § 1101, subd. (a)), and excludes the use of unduly prejudicial evidence (Evid. Code, § 352), the trial court arbitrarily deprived appellant of a state-created liberty interest. Additionally, admission of the evidence

violated the due process clause of the Fourteenth Amendment because it was unduly prejudicial. (See *Payne v. Tennessee* (1991) 501 U.S. 808, 825.) Erroneous admission of evidence of uncharged criminal acts may render a trial fundamentally unfair and thereby violate a defendant's right to due process. (*McKinney v. Rees*, *supra*, 993 F.2d at pp. 1380-1381; see also *People v. Garceau*, *supra*, 6 Cal.4th at p. 186 [applying the standard of review applicable to federal constitutional violations to find error harmless]; *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 775 [holding that an erroneous instructing permitting the jury to consider the defendant's propensity to commit murder "so offended fundamental conceptions of justice and fair play as to rise to the level of constitutional violation."].)

Because the error here is of federal as well as state constitutional dimension, prejudice must be evaluated under the reversible error standard set forth in *Chapman v. California* (1967) 386 U.S. 18. This test provides that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (*Yates v. Evatt* (1991) 500 U.S. 391, 402-403, disapproved on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72-73, fn. 4; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) The burden is on the beneficiary of the error "either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." (*Chapman v. California*, *supra*, 386 U.S. at p. 24; see also *People v. Louis* (1986) 42 Cal.3d 969, 993-994.)

Error in admitting the evidence is, therefore, deemed prejudicial unless the prosecution shows beyond a reasonable doubt the error did not affect the verdict. (*Arizona v. Fulminante* (1991) 499 U.S. 279; *People v. Bradford* (1997) 15 Cal.4th 1229, 1313; *People v. Cahill* (1993) 5 Cal.4th 478, 510; *People v. Sims* (1993) 5 Cal.4th 405, 447.) "To say that an error did not

contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt*, *supra*, 500 U.S. at p. 403; see *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [the proper *Chapman* inquiry is whether the guilty verdict actually rendered in the trial at hand was surely unattributable to the error].)

As discussed above, the courts consider the great inherent prejudicial potential of other offense evidence as creating an unacceptably high risk of undue prejudice when the evidence is probative of nothing other than propensity; that is the basis upon which it is excluded. (See *Michelson v. United States*, *supra*, 335 U.S. at p. 476; *People v. Smallwood*, *supra*, 42 Cal.3d at pp. 428-429; *People v. Kelly*, *supra*, 66 Cal.2d at p. 243.) The other sexual offense evidence admitted in this case was probative only of propensity and, even under Evidence Code section 1108 there was no permissible inference the jury could have drawn from it. Accordingly, because of the highly prejudicial nature of the improperly admitted evidence as discussed above, it cannot be said the error was harmless beyond a reasonable doubt. The judgment of the trial court must, therefore be reversed.

II.

THE TRIAL COURT'S IMPROPER REMOVAL OF PROSPECTIVE JUROR #154 FOR CAUSE NECESSITATES REVERSAL OF THE DEATH PENALTY JUDGMENT.

A. Introduction

An accused's right to a fair and impartial jury drawn from a representative cross-section of the community is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as by article I, section 16, of the California Constitution. (*Morgan v. Illinois* (1992) 504 U.S. 719, 727; *Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Wilson* (2008) 44 Cal.4th 758, 778.) In capital cases if the state has excluded members of the community with reservations about capital punishment from the jury, the sentencing body is not impartial. Consequently, when those opposed to capital punishment are excluded from the venire, the State "cross[es] the line of neutrality," "produce[s] a jury uncommonly willing to condemn a man to die," and violates the Sixth and Fourteenth Amendments. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 520-521.)

"[A] sentence of death cannot be carried out if the jury imposing or recommending 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 [fn. omitted].) "[U]nder existing United States Supreme Court precedent, the erroneous excusal of a prospective juror for cause based on that person's views concerning the death penalty automatically compels the reversal of the penalty phase without any inquiry as to whether the error actually prejudiced defendant's penalty determination." (*People v. Riccardi* (2012) 54 Cal.4th 758, 783 [citing *Gray v. Mississippi* (1987) 481 U.S. 648].)

In the present case during the voir dire accompanying the retrial of the penalty phase, the trial court excused prospective juror #154 for cause over defense objection after she voiced reservations about capital punishment but also stated that she was prepared to set aside her personal beliefs and follow the court's instructions. Nothing in the questionnaire completed by this prospective juror, or in her responses during voir dire, demonstrated that her personal opinion regarding capital punishment would prevent or substantially impair the performance of her duties as a juror in accordance with the court's instructions and the juror's oath. As discussed more fully below, the improper exclusion for cause of this prospective juror requires reversal of appellant's death sentence.

B. General Legal Principles

"[A] prospective juror who is firmly opposed to the death penalty is not disqualified from serving on a capital jury." (*People v. Martinez* (2009) 47 Cal.4th 399, 427.) This is so because "'[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.'" (*Uttecht v. Brown* (2007) 551 U.S. 1, 6.)

> " . . . The real question is whether the juror's attitude will '"prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."' [Citation.] A prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law. 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."

(*People v. Stewart* (2004) 33 Cal.4th 425, 446 [quoting *People v. Kaurish* (1990) 52 Cal.3d 648, 699] [emphasis omitted].) As the United States

Supreme Court has stated, "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.)

The moving party bears the burden of demonstrating to the trial court that the governing legal standard is satisfied as to each of the challenged jurors. (*People v. Stewart, supra*, 33 Cal.4th at p. 445.) "As with any other trial situation where an adversary wishes to exclude a juror because of bias, . . . it is the adversary seeking exclusion who must demonstrate through questioning that the potential juror lacks impartiality . . . . It is then the trial judge's duty to determine whether the challenge is proper." (*Wainwright v. Witt, supra*, 469 U.S. at p. 423.) On appeal the trial court's ruling regarding the prospective juror's views must be supported by substantial evidence. (*People v. Griffin* (2004) 33 Cal.4th 536, 558.) Reviewing courts examine the context in which the trial court ruled on the challenge in order to determine whether the trial court's decision that the juror's beliefs would or would not "'substantially impair the performance of [the juror's] duties' fairly is supported by the record." (*People v. Crittenden* (1994) 9 Cal.4th 83, 122.)

C. Factual Background

Potential jurors in the penalty phase retrial were provided with a questionnaire containing 113 questions divided into the following categories: personal data, education, training and job experience, military service, experience with the justice system, crimes of violence, prior jury experience, nature of crimes charged and prior media coverage, evaluating testimony, knowledge of individuals or witnesses, role of the jury, expert witnesses, attitudes toward the death penalty, deliberations and concluding questions.

Page 12 of the questionnaire informed jurors that appellant had been convicted of two counts of murder and that: "This jury will determine whether the defendant's punishment will be death or life without the possibility of parole." (72 CT 17743.) The questionnaire also generally explained the duties of jurors with respect to the penalty determination and outlined potential aggravating and mitigating evidence. (72 CT 17750-17752.) The beginning of this section read as follows:

> The court is asking these questions regarding your feelings about the death penalty because there are two possible sentences in this case; death or life without the possibility of parole. Jurors sitting on this case will have to decide which of these two penalties to impose. The court therefore must know whether you could be fair to both the prosecution and defense on the issue of punishment. Although the law has no preference for or against the death penalty, we know that many people have very strong feelings on this issue. However, whatever a juror's personal feelings, the law requires the jury to accept and apply the law as instructed by the judge. If a juror is unable to perform that function, the court and both parties need to know it. Therefore, we ask that you take extra care in answering the following questions openly and honestly.

(72 CT 17750.) Potential jurors were also informed: "The death penalty is never mandatory. At the penalty phase, California law requires that the jurors consider all the evidence in aggravation and mitigation. Then, guided by specific factors described by the law, the jurors must use their discretion in choosing the appropriate penalty." (*Ibid.*)

In responding to the questionnaire, prospective juror #154 disclosed her personal opposition to the death penalty. For example, in response to question 87: "What are your feelings about the death penalty?" she answered: "I believe the U.S. should outlaw the death penalty as I do not believe 'an eye for an eye.'" (72 CT 17752.) She also indicated that she was strongly

opposed to the death penalty, and that she did not believe it served any purpose. (*Ibid.*) In response to question 97: "Are you a member of a religion, or religious organization that takes an official position on the death penalty?" she answered "No." However, in response to question 98: "Do you have any moral, religious, or philosophical opposition to the death penalty so strong that it would substantially affect your ability to impose the death penalty regardless of the facts?" she answered "Yes." Adding further explanation in the space provided she wrote: "I am not positive that I will not feel responsible should the decision be the death penalty. I would need to discuss further (after the case with my Rabbi)."[11] (72 CT 17754.) Similarly, in response to question number 100: "Do you feel so strongly against the death penalty that it would substantially affect your ability to vote for the death penalty, no matter what evidence was presented?" she answered "Yes" and referred back to her written explanation to question 98. (*Ibid.* [emphasis in questionnaire].)

Throughout the questionnaire prospective juror #154 confirmed her ability to follow the court's instructions and to be fair to both sides with respect to the matter of penalty. For example in response to question 77: "The jurors who decide this case will be told that they must follow the law as the judge explains it to them, whether or not they like the law. Can you promise to do that?" she answered "Yes." (72 CT 17748.) In response to question 80: "Everyone has some biases, prejudices or preconceived ideas. Do you believe

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[11] In response to questioning by the prosecutor during voir dire, prospective juror #154 confirmed that her response to this question related to how she would feel about returning a verdict of death after the fact, rather than her ability to return such a verdict in an appropriate case. (66 RT 10481 ["Again, it was more in terms of how I would feel personally after. . . . I could follow the rules definitely."].)

you have any that would interfere with your ability to fairly decide this case?" she wrote: "I'm not in favor of the death penalty law in general but I am fair and honest about following the judge's direction." (72 CT 17749.) In response to question 86: "Are you willing to weigh and consider any evidence of aggravating and mitigating factors that may be presented to you before deciding what the appropriate punishment should be?" she answered "Yes." (72 CT 17752.) She answered "No" to question 111: "Are you aware of any reason why you would not be a fair and impartial juror for both the prosecution and the defense in this case?" (72 CT 17757.) In response to the last question on the questionnaire: "Is there anything else the court should know about you?" she wrote: "I feel as though I have maybe contradicted myself about my attitude against the death penalty and my ability to be open minded and non-judgment about deciding the case. But it's kind of like my being highly pro-choice but I couldn't imagine having an abortion when I found I was pregnant. Attitudes change upon circumstance and life experience. I do feel I can follow the law laid out by the judge. Thank you." (72 CT 17757.)

During voir dire defense counsel asked prospective juror #154: "Given your views, are you someone who could nevertheless take the law from the judge, as he instructs it to you, listen to this evidence and be as open to the idea of returning a death verdict as you might be to returning a life verdict?" She replied: "Yes. I'm able to follow the laws that the judge provides to me. However, I don't know how I would feel should the case be that this gentleman was, you know, sentenced to death. I'm not positive that I could handle that afterwards." (66 RT 10447.) Defense counsel then followed up asking: ". . . That's part of what we're here for this morning. It's not necessarily to find out how you feel. You're entitled to feel miserable. [¶] But

the question is, if you felt that that was the appropriate sentence, if you'd heard the evidence, seen at least a little snippet of what it's about — the violent criminal history, the nature of the crimes against these boys — if you felt that death was appropriate, you went into the jury room, you discussed it with your fellow jurors, if you were convinced that that was the appropriate sentence, could you come into this courtroom and announce it, stand by it?" Prospective juror #154 replied: "If I was convinced that that was the appropriate sentence in accordance with the laws of the State of California, then yes." (66 RT 10447-10448.) When questioned by the prosecution, she confirmed her ability to put aside her personal feelings regarding the death penalty and follow the law as set forth by the judge. (66 RT 10476-10477 [". . . I believe that I can follow the laws that are in place."]; 66 RT 10477 [". . . I am against the death penalty, but that doesn't mean that I can't follow the law as provided to me."]; 66 RT 10480 ["I could follow the rules, definitely."].)

The prosecution ultimately challenged prospective juror #154 for cause. (66 RT 10406.) The defense objected arguing in part:

> The last thing I'd like to say with respect to this particular juror is that she indicated that a concern that she had was how this verdict might affect her personally.
>
> If she were to sit on this case, she would follow this Court's instructions. She has the ability to return a death sentence if a death sentence is warranted. And she could live with that verdict, but it would affect her.
>
> When Miss Summers was asking her the question, which is a term of art that has a meaning to us that is different than what a jury might ask, which is, "Would it substantially affect you?" Her answer was, "Yes."

I think it was clear from the way she answered it that she meant affect her personally.

And as I'm being reminded by co-counsel, that is precisely what she said, is she was referring to how it would affect her personally.

Juror 154 is able to set her personal views regarding the death penalty aside and has repeatedly told this Court that she can follow the law, return such a verdict, if it was appropriate, and is no more a sustained challenge for cause than — I can't even begin to count the number of folks who said child murderers should be executed; persons who commit multiple murders should be executed; persons with a lengthy history of violent crimes should be executed; but they'd be willing to put that aside and sit on this case and judge this case fairly and who have passed cause.

(66 RT 10527-10528.)

In reply the prosecutor, employing an incorrect standard, argued that prospective juror #154 should be excused for cause as follows:

Ms. Summers: The standard is whether or not her feelings on the death penalty would substantially affect her ability to return a death verdict.

And looking to her questionnaire as well as her answers in court — I advise the Court to look at question 80, question 80, where this juror indicates she's not in favor of the death penalty; question 87, wherein she indicates, "I believe the U.S. should outlaw the death penalty, as I don't believe in an 'eye for an eye'"; question 88, where she thinks LWOP is "the appropriate direction society should take"; question 89, where she indicates she "strongly opposes" the death penalty; question 91, where she indicates that no crime — and she confirmed these answers for us — that no crime warrants the death penalty; 94, where she indicates that the death penalty — "I do not believe it should be done"; question 95, when asked which is worse, she indicates, in closing, that she believes someone should be punished, "but not" — and underlines not — "take their life."

> Question 98, does she have moral and philosophical and religious beliefs that are so strong it would substantially affect — and it doesn't say in this questionnaire "substantially affect how she lives her life tomorrow, after she returns a verdict" — but it says, "substantially affect your ability to impose a death penalty regardless of the facts?"
>
> And she says, "yes," it would substantially impair her ability.
>
> And then she repeats that same sentiment on number 100, "Do you feel so strongly against the death penalty that it would substantially affect your ability to vote for the death penalty, no matter what the evidence was that was presented?"
>
> And it doesn't ask, "Would it substantially affect your life?"
>
> It says, "Would it substantially affect your decision-making on this case?"
>
> And she says, "yes," it would substantially affect her decision-making.
>
> Again, she indicates throughout, at 102 and 103, that she doesn't believe in the death penalty. It is substantially affecting her.
>
> The fact that she wants to intellectualize that she would realistically consider both penalties is not the standard.
>
> The standard is, would her opposition to the death penalty substantially affect her decision-making process?
>
> She has repeatedly said, yes, it would. Let's take this juror at her word.

(66 RT 10529-10530.)

The trial court granted the prosecution's challenge for cause reasoning as follows:

> All right. As far as juror 154 is concerned, the Court finds that she is not qualified to be a juror.
>
> I don't find that she's death-qualified, in particular, questions 100 and 98. And she affirmed the answer to question 100 in the oral questioning, that she feels so strongly against the death penalty that it would substantially affect her ability to vote for the death penalty, no matter what evidence was presented, and 98, does she have any moral or religious opposition to the death penalty so strong that it would substantially affect her ability to impose the death penalty regardless of the facts?
>
> As a matter of fact, this was one of my ones that I had checked off after reading the questionnaires.
>
> So I believe that she is unable to vote for death.

(66 RT 10530-10531.) However, the record does not support the trial court's finding that prospective juror #154 was unqualified to serve as a juror on this case.

Based upon her written and oral responses, the most that can be said is that prospective juror #154 was personally opposed to the death penalty and would find it very difficult to return a verdict of death. However, as this Court has recognized, "a prospective juror who simply would find it 'very difficult' ever to impose the death penalty, is entitled — indeed, duty bound — to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 446 [internal quotation marks and brackets omitted].) Prospective juror #154's answers on the questionnaire and during voir dire demonstrated that she was willing and able to listen to the evidence, follow the court's instructions, and decide upon an appropriate penalty. As discussed more fully below, the exclusion of this prospective juror for cause was not supported by substantial evidence that her views

regarding the death penalty would substantially impair her ability to perform her duties as a juror in accordance with her instructions and her oath.

D. The Exclusion of Prospective Juror #154 for Cause Was Not Supported by Substantial Evidence That Her Feelings about the Death Penalty Would Prevent or Substantially Impair Her Ability to Perform Her Duties as a Juror.

The prosecution's argument that prospective juror #154 was subject to removal for cause was based in large part upon her disapproval of the death penalty in general. In this regard the prosecutor referred to prospective juror #154's answers to several questions on the written questionnaire disclosing her personal opposition to the death penalty. (66 RT 10529.) However, "it is entirely possible that a person who has a 'fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law — to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." (*Boulden v. Holman* (1969) 394 U.S. 478, 483-484.) Consequently, prospective jurors cannot be disqualified merely for expressing strong views against the death penalty. (*People v. McKinnon* (2011) 52 Cal.4th 610, 643.) Rather, they can only be removed for cause based upon evidence that engenders a "definite impression that [they] would be unable to faithfully and impartially apply the law." (*Wainwright v. Witt, supra*, 469 U.S. at pp. 425-426.)

Prospective juror #154's responses on the questionnaire and during voir dire demonstrated her willingness to put her personal opinions aside and follow the court's instructions. Specifically, when asked by defense counsel: "Given your views, are you someone who could nevertheless take the law from the judge, as he instructs it to you, listen to this evidence and be as open to the idea of returning a death verdict as you might be to returning a life

verdict?" she replied: "Yes. I'm able to follow the laws that the judge provides to me." (66 RT 10447.) She subsequently confirmed her willingness and ability to follow the law on several occasions when questioned by the prosecution. (66 RT 10476-10477 [". . . I believe that I can follow the laws that are in place."]; 66 RT 10477 [". . . I am against the death penalty, but that doesn't mean that I can't follow the law as provided to me."]; 66 RT 10480 ["I could follow the rules, definitely."].)

These answers during voir dire were consistent with prospective juror #154's written responses on the questionnaire. (72 CT 17748 [in response to question 77: "The jurors who decide this case will be told that they must follow the law as the judge explains it to them, whether or not they like the law. Can you promise to do that?" she answered "Yes."]; 72 CT 17749 [in response to question 80: "Everyone has some biases, prejudices or preconceived ideas. Do you believe you have any that would interfere with your ability to fairly decide this case? she wrote: "I'm not in favor of the death penalty law in general but I am fair and honest about following the judge's direction."]; 72 CT 17752 [in response to question 86: "Are you willing to weigh and consider any evidence of aggravating and mitigating factors that may be presented to you before deciding what the appropriate punishment should be?" she answered "Yes."]; 72 CT 17757 [she answered "No" to question 111: "Are you aware of any reason why you would not be a fair and impartial juror for both the prosecution and the defense in this case?"]; 72 CT 17757 [in response to the last question on the questionnaire: "Is there anything else the court should know about you?" she wrote: "I feel as though I have maybe contradicted myself about my attitude against the death penalty and my ability to be open minded and non-judgment about deciding the case. But it's kind of like my being highly pro-choice but I couldn't imagine having an

abortion when I found I was pregnant. Attitudes change upon circumstance and life experience. I do feel I can follow the law laid out by the judge. Thank you."].)

Notwithstanding her personal opposition to the death penalty, nothing in prospective juror #154's written or oral responses indicated that she was unwilling or unable to follow the trial court's instructions, and in fact she repeatedly and consistently said she could and would do so.

In arguing that this prospective juror was subject to challenge for cause the prosecutor stated: "The standard is would her opposition to the death penalty substantially affect her decision-making process." (66 RT 10530.) The question, however, is not whether a prospective juror's opinion regarding the death penalty would "affect" his or her decision-making process. As discussed above, the question is "whether the juror's attitude will '"prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."'" (*People v. Stewart*, *supra*, 33 Cal.4th at p. 446.)

There is a constitutionally significant difference between being "affected" and being "impaired." As the United States Supreme Court has stated: "[T]o exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law." (*Adams v. Texas* (1980) 448 U.S. 38, 50.) Even prospective jurors whose opposition to the death penalty would "predispose" them "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 [them] from engaging in the weighing process and returning a capital

verdict." (*People v. Kaurish* (1990) 52 Cal.3d 648, 699.) As explained by this Court:

> Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under *Witt*, *supra*, 469 U.S. 412. . . . A juror might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law.

(*People v. Stewart*, *supra*, 33 Cal.4th at p. 447.) Clearly the standard argued by the prosecution is not the governing standard.

Nevertheless, utilizing the same incorrect "substantially affect" legal standard articulated by the prosecution, the trial court found prospective juror #154 to be unqualified based upon her answers to two questions on the written questionnaire. In granting the prosecution's challenge for cause the court stated: "I don't find that she's death-qualified, in particular, questions 100 and 98. And she affirmed the answer to question 100 in the oral questioning, that she feels so strongly against the death penalty that it would substantially affect her ability to vote for the death penalty, no matter what evidence was presented, and 98, does she have any moral or religious opposition to the death penalty so strong that it would substantially affect her ability to impose the death penalty regardless of the facts?" (66 RT 10531.) It is established that when a trial court applies the wrong standard, its subsequent ruling is an

abuse of discretion. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 150; *Miyamoto v. Department of Motor Vehicles*, *supra*, 176 Cal.App.4th at p. 1219.) Moreover, prospective juror #154's responses to the questions referred to by the trial court did not render her unqualified to serve as a juror, and in any event, the trial court completely disregarded the fact that juror #154 consistently and firmly indicated she was willing to set aside her views and follow the law given her by the judge.

As noted above, in response to question 98: "Do you have any moral, religious, or philosophical opposition to the death penalty so strong that it would substantially affect your ability to impose the death penalty regardless of the facts?" prospective juror #154 answered "Yes" and then offered the following additional explanation: "I am not positive that I will not feel responsible should the decision be the death penalty. I would need to discuss further (after the case with my Rabbi)." (72 CT 17754.) Similarly, in response to question number 100: "Do you feel so strongly against the death penalty that it would substantially affect your ability to vote for the death penalty, no matter what evidence was presented?" she answered "Yes" and referred back to her written explanation to question 98. (*Ibid.* [emphasis in questionnaire].) During questioning by the prosecution regarding these answers prospective juror #154 confirmed that the effect she was referring to was how she would feel ***after*** returning a death verdict. In this regard the following exchange took place:

> Q: Then on question 98 it said, "Do you have moral, religious or philosophical opposition to the death penalty so strong that it would substantially affect your ability to impose the death penalty regardless of the facts?"
>
> And you answered that, "yes," it would substantially affect your ability.

Is that your answer today?

A: Again, it was more in terms of how I would feel personally after.

Q: Okay. So are you modifying your answer to this question now?

A: (No audible response.)

Q: Or do you still think it would substantially affect how you judge this case?

A: Oh, no. I could follow the rules, definitely.

Q: Would your feelings on the death penalty substantially affect how you view this case?

A: No.

Q: So you want to change that answer?

A: Yes.

Q: On 98 [actually is question #100], do you feel so strongly against the death penalty it would substantially affect your ability to vote for the death penalty no matter what the evidence was that was presented to you?

Again, you answered that "yes," that you would be substantially affected by your views against the death penalty.

Is that your view today?

A: Can you please repeat the question?

Q: Yes.

> The question was, do you feel so strongly against the death penalty that it would substantially affect your ability to vote for the death penalty no matter what evidence was presented?
>
> And you answered that in the affirmative. You answered that "yes."
>
> A: No. I guess I will keep that answer as correct, because I did answer in the emotional state, in consideration, that I was in at that time.

(66 RT 10480-10482.) During this exchange, however, prospective juror #154 simply voiced her concerns about the impact rendering a death verdict might have on her afterward, and her responses did not support a finding that she was unqualified to sit on the jury.

Certainly, it is beyond dispute that "'[e]very right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow man.' [Citation.]" (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 515, n.8; see also *Eddings v. Oklahoma* (1982) 455 U.S. 104, 127 (Burger, J., dis. opn.) ["It can never be less than the most painful of our duties to pass on capital cases"]; *McGautha v. California* (1971) 402 U.S. 183, 208 [recognizing the "truly awesome responsibility of decreeing death for a fellow human being"].) Hence, the pain or extreme difficulty that otherwise inheres in the decision to execute another human being simply does not establish that a prospective juror would be prevented from, or substantially impaired in, performing her duties. (*People v. Stewart*, *supra*, 33 Cal.4th at pp. 446-449.)

Overall, the prosecutor did not bear her burden of demonstrating that the *Witt* standard was satisfied as to prospective juror #154, and the trial court's stated basis for excusing her fell far short of amounting to substantial evidence that her personal opposition to the death penalty in general would

prevent or substantially impair the performance of her duties as a juror. Consequently, the record does not support the trial court's excusal of prospective juror #154 for cause under the governing legal standard.

E. Remedy

By erroneously excusing prospective juror #154 for cause, the trial court denied defendant the impartial jury to which he was entitled under the Sixth and Fourteenth Amendments to the United States Constitution. (*Uttecht v. Brown*, *supra*, 551 U.S. at pp. 6, 9; *People v. Pearson* (2012) 53 Cal.4th 306, 333.) When a trial court erroneously sustains a prosecutor's challenge for cause in violation of *Witherspoon* and *Witt*, the error "compel[s] the *automatic reversal* of [the] defendant's death sentence, and in that respect the error is not subject to a harmless-error rule, regardless [of] whether the prosecutor may have had remaining peremptory challenges and could have excused [the prospective juror(s) in question]." (*People v. Heard* (2003) 31 Cal.4th 946, 966 [emphasis in original].) The exclusion of a single prospective juror in violation of *Witherspoon* and *Witt* mandates reversal. (*Gray v. Mississippi*, *supra*, 481 U.S. at pp. 666-668.) Because the trial court committed *Witherspoon/Witt* error by excusing prospective juror #154 for cause, the judgment of death must be set aside.

III.

THE FEDERAL AND STATE CONSTITUTIONS BAR THE RE-TRIAL OF THE PENALTY PHASE OF A CAPITAL CASE AFTER THE JURY IN THE FIRST PENALTY TRIAL WAS UNABLE TO REACH A UNANIMOUS VERDICT.

A. Introduction

At appellant's first trial, the jurors deliberated over the course of four days on the issue of penalty. (18 CT 4039-4045.) On the fourth day, the trial court declared a mistrial, finding that the jury was hopelessly deadlocked on the question of sentence. (18 CT 4045.) In the penalty retrial, a second jury returned a death verdict against appellant after approximately three hours of deliberation. (18 CT 4131.)

The penalty retrial following the hung jury violated appellant's federal constitutional rights to a fair jury trial, reliable penalty determinations, freedom from cruel and unusual punishment, due process and equal protection as guaranteed by the Sixth, Eighth and Fourteenth Amendments of the United States Constitution as well as state constitutional protections in article I, sections 5, 7, 15, 16 and 17 of the California Constitution. As discussed more fully below, if a prosecutor is unable to convince a jury to unanimously vote to impose the death penalty the State cannot, consistent with constitutional safeguards, make repeated attempts to exact the ultimate penalty against the defendant from new and different juries. This Court concluded otherwise in *People v. Taylor* (2010) 48 Cal.4th 574, 633-634. However, the Supreme Court of the United States has not addressed the issue, and appellant respectfully raises the issue here in order to preserve his right to raise the issue in future proceedings.

B. Proceedings Below

The jury returned verdicts finding appellant guilty on all counts. With respect to Counts 1 and 2, the jury convicted appellant of first degree murder, found that appellant did use a deadly weapon in connection with each murder, and found all of the special circumstance allegations to be true. (12 CT 2691-2698; 17 CT 3979-3986.) At the first penalty trial, the jury was unable to reach a unanimous verdict. The court inquired and was informed that two ballots had been taken and that the jurors were deadlocked 11 to 1. (54 RT 8544-8545.) After inquiring of several jurors as to whether they felt further deliberations would be productive, the court declared a mistrial. (18 CT 4045; 54 RT 8544-8545.)

After the mistrial was declared, the defense filed a Motion to Declare Retrial of the Penalty Phase in Violation of the United States Constitution and Article I, section 17, of the California Constitution. (14 CT 3219.) The prosecution filed points and authorities in opposition (14 CT 3291), and the defense filed a reply to that opposition (14 CT 3440). Following a hearing, the trial court denied the motion and ordered a retrial of the penalty phase. (58 RT 8924, 8980.)

C. Penalty Phase Retrials After A Hung Jury Are In Conflict With Evolving Standards Of Decency, Which Are Reflected In The Death Penalty Statutes Of 23 State And Federal Jurisdictions, And Such Retrials Are Barred By The Federal And State Constitutions.

The Eighth Amendment provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In the case of *Trop v. Dulles* (1958) 356 U.S. 86, 100-101, the United States Supreme Court has stated that: "The basic concept underlying

the Eighth Amendment is nothing less than the dignity of man ... the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Following *Trop*, the Court has prohibited the use of the death penalty in several cases under the evolving standards of decency theory of the Eighth Amendment. (*Roper v. Simmons* (2005) 543 U.S. 551, 570-578 [individuals under the age of 18]; *Atkins v. Virginia* (2002) 536 U.S. 304, 321 [mentally retarded]; *Thompson v. Oklahoma* (1988) 487 U.S. 815 [15 year old minor]; *Ford v. Wainwright* (1986) 477 U.S. 399 [insane person]; *Enmund v. Florida* (1982) 458 U.S. 782 [accomplice in a robbery]; *Coker v. Georgia* (1977) 433 U.S. 584 [person convicted of rape].)

In the *Atkins* case, the Court stated that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (*Atkins v. Virginia, supra*, 536 U.S. at p. 312 [citing *Penry v. Lynaugh* (1989) 492 U.S. 302, 331].) In addition to reviewing the laws of the various states, the Court must also apply its "own judgment ... on the question of the acceptability of the death penalty under the Eighth Amendment." (*Atkins v. Virginia, supra*, 536 U.S. at pp. 312-313.) There the issue was whether sentencing the mentally retarded to death violated the Eighth Amendment. At the time 18 states and the federal government prohibited imposition of the death penalty on the mentally retarded. (*Id.* at pp. 314-315.) The Court also observed that the number of states barring the death penalty for mentally retarded offenders had grown impressively, and had consistently changed in the direction of prohibiting its use. This was seen as "powerful evidence that today our society views mentally retarded offenders as categorically less culpable." (*Id.* at pp. 315-316.) Applying its own

independent evaluation, the Court concluded that "death is not suitable punishment for a mentally retarded criminal." (*Id.* at p. 321.)

In *Roper v. Simmons*, *supra*, 543 U.S. at pages 564-568, 570-578, the Court applied the *Atkins* analysis to the issue of executing juvenile offenders under the age of 18. After finding a national consensus against the death penalty for juveniles, the Court applied its own independent judgment to determine whether the death penalty is a disproportionate punishment for juveniles. (*Id.* at pp. 564-569.) The Court ultimately concluded: "A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment." (*Id.* at pp. 567-568.)

In *Coker v. Georgia*, *supra*, 433 U.S. at page 592, the Court held that the imposition of the death penalty for the rape of an adult woman is "grossly disproportionate and excessive punishment" forbidden by the Eighth Amendment. After determining that only three states provided the death penalty for rape (*id.* at p. 594), the Court observed that "the current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman." (*Id.* at p. 596.)

In *Enmund v. Florida*, *supra*, 458 U.S. 782, the Court held that imposition of the death penalty upon a defendant who participated in a robbery during which a murder was committed, where the defendant did not himself kill or intend the victim to be killed, violated the Eighth and Fourteenth Amendments. In reaching this conclusion the Court noted that out of 36 states, only 8 authorized the death penalty based on participation in a robbery in which another robber takes a life. Twenty-eight states rejected the

death penalty in robbery murder cases where the defendant neither killed nor intended to kill the victim. (*Id.* at pp. 789-793.) The Court ultimately concluded that, although not unanimous, the majority of the state legislative judgments against imposing the death penalty "weighs on the side of rejecting capital punishment for the crime at issue." (*Id.* at p. 793.)

As the above cases make clear, in assessing whether imposition of the death penalty violates the Eighth Amendment in a particular type of case, courts must look to "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 563.) The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (*Penry v. Lynaugh*, *supra*, 492 U.S. at p. 331.) The existence of a "national consensus" against imposing the death penalty in certain contexts can provide the basis for finding that the Eighth Amendment operates as a substantive ban on the death penalty in those contexts. (*Roper v. Simmons*, *supra*, 543 U.S. at pp. 563-564; *Graham v. Florida* (2010) 560 U.S. 48.) When the country's legislatures have developed a consensus, a Court must ask "whether there is reason to disagree with the judgment reached by the citizenry and its legislators." (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 313.)

The analysis of an Eighth Amendment challenge may "involve the *procedure* employed by the State to select persons for the unique and irreversible penalty of death," not simply the final punishment. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 287 [emphasis added].) A myriad of procedural issues greatly affect the exposure of a defendant to a potential sentence of death. One such issue is what happens in the event that a jury is unable to reach a unanimous decision in the penalty phase.

In California the 1977 death penalty statute, enacted in order to comply with *Furman v. Georgia* (1972) 408 U.S. 238, barred any retrial of the penalty phase after the first jury could not reach a unanimous verdict. (*People v. Kimble* (1988) 44 Cal.3d 480, 511.) Former Penal Code section 190.4, subdivision (b) provided: "If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and impose a punishment of confinement in state prison for life without possibility of parole." (Stat. 1977, ch. 316 §12.)

Section 190.4, subdivision (b) was amended by ballot initiative in 1978 to require retrials of the penalty phase after a hung jury, and now provides: "If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury empaneled to try the issue as to what the penalty shall be." After two hung juries, the court has the discretion to either order a new jury or sentence the defendant to life without possibility of parole. (*Ibid.*)

As discussed more fully below, "retrial is not the prevailing rule for capital penalty-phase proceedings." (*Jones v. United States* (1999) 527 U.S. 373, 419 (Ginsburg, J., dis. opn.).) In fact, "[t]he majority of states have statutorily provided for an automatic sentence of less than death in the event of a deadlocked jury." (*State v. Peeler* (Conn. 2004) 857 A.2d 808, 867 [cert. den. sub nom. *Peeler v. Connecticut* (2005) 546 U.S. 845]; see also *State v. Hochstein* (Neb. 2001) 632 N.W.2d 273, 282.)

The death penalty is available in 32 states, and the federal judiciary is a 33rd jurisdiction in which the death penalty is available.[12] (18 U.S.C. §

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[12] See also: http://www.deathpenaltyinfo.org/states-and-without-death-penalty

3591, et seq.; see generally *United States v. Moussaoui* (4th Cir. 2010) 591 F.3d 263, 300-303.) In 23 of these 33 jurisdictions penalty phase retrials are statutorily prohibited. If the jury in the original penalty phase does not unanimously vote in favor of the death penalty, the prosecution may not make a repeat attempt to secure the death penalty. Rather, the defendant must be sentenced to life without parole or some lesser sentence.[13] The Model Penal Code also prohibits retrial of the penalty phase if the jury is unable to reach a unanimous verdict on the penalty. It states: "If the jury is unable to reach a unanimous verdict, the court shall dismiss the jury and impose a sentence for a felony of the first degree [life]." (A.L.I., Model Penal Code §210.6(2).)

California is one of only six states authorizing retrial of a penalty phase following juror deadlock in the original penalty phase by statute. (Pen. Code, §190.4, subd. (b).) The other five states are Alabama, Arizona, Indiana,

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[13] Title 18 United States Code §3594; Arkansas Code Annotated §5-4-603, subdivision (c); Colorado Revised Statutes §18-1.3-1201, subd. (2)(d); 11 Delaware Code §4209; Georgia Code Annotated §17-10-31, subd. (c); Idaho Code §19-2515, subd. (7)(b); Kansas Statutes Annotated §21-4624, subd. (e); Louisiana Code of Criminal Procedure art. 905.8; Mississippi Code Annotated §99-19-101, subd. (3)(c); Missouri Revised Statutes §565.030, subd. (4); Nebraska R.R.S. §29-2520; New Hampshire Revised Statutes Annotated §630:5, subd. (IX); North Carolina General Statutes §15A-2000, subd. (b); Oklahoma Statutes Annotated title 21, §701.11; Ohio Revised Code Annotated §2929.03, subd. (D)(2); 42 Pennsylvania Consolidated Statutes Annotated §9711, subdivision (c)(1)(v); South Carolina Code Annotated §16-3-20, subd. (C); South Dakota Codified Laws §23A-27A4; Tennessee Code Annotated §39-13-204, subd. (h); Texas Code of Criminal Procedure Annotated art. 37.071.2, subd. (g); Utah Code Annotated §76-3-207, subd. (5)(c); Virginia Code Annotated §19.2-264.4, subd. (E); Washington Revised Code Annotated §10.95.080, subd. (2); Wyoming Statutes Annotated §6-2-102, subd. (d)(ii).

Nevada, and Oregon.[14] In Kentucky, courts have determined, in the absence of specifically controlling legislation, that penalty phase retrials may go forward after original capital sentencing juries deadlock. (*Skaggs v. Commonwealth* (Ky. 1985) 694 S.W.2d 672, 681.) In the remaining three states, Delaware, Florida, and Montana, juries do not make the ultimate sentencing determination in capital cases.[15]

Clearly, a strong national consensus exists against allowing prosecutors to make multiple attempts to convince juries to impose the death penalty on a single defendant. The "contemporary values" reflected by this "national consensus" requires this Court to ask whether there is reason to disagree with this consensus. (*Atkns v. Virginia, supra*, 536 U.S. at p. 313.) The answer to this question is no for several reasons.

First, the Supreme Court has interpreted the Eighth Amendment to "require[] that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 442-443; accord, *Tennard v. Dretke* (2004) 542 U.S. 274, 285.) In appellant's original trial, one juror felt that the death penalty was not warranted. However, the voice of that juror has not been "give[n] effect."

The fact that a penalty phase jury is unable to reach a unanimous verdict establishes that at least one of the jurors believed the defendant's life

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[14] Alabama Code §13A-5-46, subd. (g); Arizona Revised Statutes §13.752, subd. (K); Indiana Code Annotated §35-50-29, subd. (f); Nevada Revised Statutes Annotated §175.556, subd. (1); Oregon Revised Statutes §163.150, subd. (2)(a) & (l)(c)(B); .

[15] 11 Delaware Code Annotated §4209, subd. (c)(3)(b)(1) & (2); Florida Statutes §921.141, subd. (2) & (3); Montana Code Annotated §46-18-305.

was worth sparing, and that the evidence presented during the penalty trial was not sufficiently aggravating to warrant a death sentence. To allow a retrial of the penalty phase after the first jury is hung creates a risk that the death penalty will later be imposed in a wanton and freakish manner. The Supreme Court has stated that "the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and ... freakishly imposed" violates the Eighth and Fourteenth Amendments. (*Lewis v. Jeffers* (1990) 497 U.S. 764, 771; *People v. Bacigalupo* (1993) 6 Cal.4th 457, 465.)

A retrial of a penalty phase in a capital case also places a heavy burden on the defendant who must be subjected to a second trial for his life. In the context of the double jeopardy clause, the Supreme Court has stated that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual of an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty." (*Green v. United States* (1957) 355 U.S. 184, 187-188.) As one court noted, "repeated trials subject a defendant to serious hardship." (*Carsey v. United States* (D.C. Cir. 1967) 392 F.2d 810, 812.)

Recently the Supreme Court rejected the argument that the double jeopardy clause or the due process clause barred the State from retrying a penalty phase after the first jury was unable to reach a unanimous verdict. (*Sattazahn v. Pennsylvania* (2003) 537 U.S. 101; see also *Richardson v. United States* (1984) 486 U.S. 317, 324-326 [neither the failure of the jury to reach a verdict nor a mistrial following a hung jury is an event that terminates the original jeopardy].) The *Sattazahn* case, however, did not address the

Eighth Amendment issue appellant now raises. The Eighth Amendment's evolving standards of decency require that the State be limited to one opportunity to present its case for death to a jury. If the original jury cannot reach a unanimous verdict of death, 23 states and the federal government have concluded that the death penalty shall not be imposed upon the defendant. The jury should be discharged and the defendant should be given a sentence of life imprisonment without parole.

To paraphrase the language in the Supreme Court's *Green* decision, repeated attempts to convince a jury to return a death verdict enhance the possibility that even though the defendant's crime warrants a life sentence, he may be sentenced to death. (See *Green v. United States*, *supra*, 355 U.S. at p. 188.) Therefore, appellant urges this Court to reverse his death sentence by finding that retrial of the penalty phase after a hung jury violates the Eighth and Fourteenth Amendments.

Appellant also argues that penalty phase retrials after a hung jury at the first penalty trial violate the California Constitution under its provisions ensuring the right to a fair jury trial, to a reliable penalty determination, to be free from cruel or unusual punishment, and to due process of law. (Cal. Const. Art. I, §§ 5, 7, 16 and 17.) The California Constitution may provide greater protections to a defendant in a capital case than those afforded by the federal Constitution. (*People v. Ramos* (1984) 37 Cal.3d 136, 152; see also, *California v. Ramos* (1983) 463 U.S. 992, 997; *People v. Ramos* (1982) 30 Cal.3d 553.)

In *People v. Ramos*, *supra*, 37 Cal.3d 136, 153-155, this Court held that the Briggs instruction, informing the jury that a sentence of life without the possibility of parole may be commuted, violated Article I, section 15 of the California Constitution, which guarantees the right to due process of law.

This occurred after the Supreme Court had found no federal constitutional violation in giving the instruction. (*California v. Ramos*, *supra*, 463 U.S. at p. 992.) This Court stated that the term "due process" in the California Constitution "encompasses a broad range of safeguards," and includes the right to "a fundamentally fair decision-making process."[16] (*People v. Ramos*, *supra*, 37 Cal.3d at 153.)

Therefore, appellant asks this Court to find that penalty phase retrials after the original jury has failed to reach a unanimous verdict are unconstitutional under both the federal and state constitutions. When the original penalty phase jury becomes deadlocked, a mistrial must be declared, the jury must be discharged, and the defendant must be sentenced to life imprisonment without possibility of parole. Penal Code section 190.4, subdivision (b) should be declared unconstitutional to the extent that it permits the retrial of a penalty phase after a hung jury. Since appellant received a death sentence as a result of a penalty phase retrial after a hung jury, appellant's death sentence should be reversed, and the case should be remanded for re-sentencing to impose a sentence of life imprisonment without possibility of parole on Counts 1 and 2.

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[16] Article I, section 27 of the California Constitution provides in part that "the death penalty ... statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments ... nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution." In the *Ramos* case, this provision was considered and was found to be no bar to the court's authority to insure the fundamental fairness of the trial court proceedings at which the death penalty is being considered. (See *People v. Ramos*, *supra*, 37 Cal.3d 136, 161-162 [Lucas, J. dissenting, indicating that Article I, section 27 was considered, but rejected by the majority opinion].) Article I, section 27 only "validates the death penalty as a permissible type of punishment under the California Constitution." (*People v. Frierson* (1979) 25 Cal.3d 142, 186.)

IV.

THE DEATH SENTENCE MUST BE STRICKEN BECAUSE EMPIRICAL EVIDENCE SHOWS THAT THE CALIFORNIA DEATH PENALTY SCHEME FAILS IN PRACTICE TO MEET MINIMUM CONSTITUTIONAL REQUIREMENTS; BUT IF IT IS NOT UNCONSTITUTIONAL, THEN THE TRIAL COURT ERRED BY REJECTING ALTERNATIVE PROCEDURES TO OVERCOME FAILINGS SHOWN BY THAT EVIDENCE.

A. Introduction

Prior to the first trial, the defense filed a motion entitled "Motion to Declare the Death Penalty Unconstitutional for its Failure, in Practice, to Meet the Minimum Constitutional Requirements of *Furman*, *Gregg*, and Their Progeny [and for Other Relief in the Alternative as is Justified by the Evidence]." (See 3 CT 591, referencing *Furman v. Georgia* (1972) 408 U.S. 238 and *Gregg v. Georgia* (1976) 428 U.S. 153.) The motion was accompanied by points and authorities (3 CT 595-668) and was supported by numerous exhibits, all of which were published studies by social scientists (3 CT 681 - 7 CT 1838). The prosecution filed opposition to the motion (10 CT 2188-2203), and the defense filed a reply detailing the alternative procedures it would seek if the death penalty were not declared unconstitutional (10 CT 2271-2274). Insofar as is relevant for present purposes, the alternative procedures were (1) individual, sequestered "*Hovey*-style" voir dire;[17] and (2) questioning prospective jurors about whether they believed that death was the only appropriate punishment for certain specific types of crimes.

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[17] See *Hovey v. Superior Court* (1980) 28 Cal. 3d 1.

The trial court refused to rule on the constitutional challenge itself prior to the trial (see, e.g., 10 RT 1287), but it rejected the alternative procedures suggested by the defense (10 RT 1348-1349, 1362). In rejecting the suggested procedures, the court considered both the 26 studies that accompanied the motion and defense counsel's additional offer of proof as to what expert witnesses would testify to in support of the motion. (10 RT 1348.) The court postponed the question of expert testimony on the constitutionality of the death penalty scheme until after a penalty verdict had been reached. (10 RT 1366-1367.) Subsequently, after the penalty retrial, the court heard three days of testimony from Dr. William J. Bowers, principal research scientist at the Capital Jury Project. (95 RT 15217-15318, 96 RT 15320-15479, 104 RT 16624-16783.) Thereafter, although at no point had the prosecution offered any evidence contrary to that which appellant introduced, the court refused to hold the death penalty unconstitutional. (105 RT 16851-16854.)

B. The Record

The evidence underlying the present claim came primarily from studies by the Capital Jury Project (CJP), a program of national research into the decision-making of capital jurors, conducted by a consortium of university-based researchers and funded over the years by the National Science Foundation. The findings of the CJP were based on in-depth interviews with more than 1,200 jurors from 20 to 30 capital trials in each of 14 death-penalty states, including California, for a total of roughly 350 trials. (95 RT 15257, 15261.) Approximately half of the jurors had served at trials where death verdicts were returned, and half at trials resulting in non-death verdicts. (95 RT 15251, 15261-15262, 15313-15314.) The states chosen represented all of the various forms of death penalty statutes and accounted for 74 percent of the

death sentences and 78 percent of the executions in the United States. (95 RT 15265-15267.) The interviews chronicled the jurors' experiences and decision making over the course of the trial, identified points at which various influences come into play, and revealed the ways in which jurors reach their final sentencing decisions.

The CJP research disclosed seven ways that juries' actual decision-making process is at odds with basic assumptions of Supreme Court decisions from *Gregg* onward, i.e., assumptions that guided discretion statutes could eliminate arbitrariness in the imposition of the death penalty. In the next several pages, we outline those shortcomings.

1. & 2. Deciding on Penalty Prior to the Penalty Phase, and Failure of Jury Selection to Remove Large Numbers of Death-Biased Jurors: The research showed that half of the jurors knew what the penalty should be before the penalty phase started — 30 percent favoring death, 20 percent favoring the non-death alternative, the results being consistent across all states studied — and that a large majority of these jurors maintained that position through to penalty verdict. (95 RT 15279-15280, 15284-15285, 15305.) Dr. Bowers concluded that "if you believed, as I think the Supreme Court believed, that people should not take a stand on punishment prior to the sentencing stage of the trial, to discover that 50 percent had — out of a sample of 1,200, that 600 had — is a monumental statistical departure." (95 RT 15310.)

Moreover, the data showed that the jurors who drew guilt-phase conclusions in favor of death tended to be people who believed that death was the only appropriate punishment for many common death-eligible crimes, meaning that jury selection had "utterly failed to eliminate people who believe death is the only acceptable punishment." (95 RT 15311.)

3. *Widespread Belief That Death Is Required*: The research also found that in every jurisdiction, approximately 40 percent of jurors believed that they were required by law to return a death verdict if the defendant's conduct was heinous, vile, or depraved or if the defendant would be dangerous in the future. (96 RT 15323-15324, 15325; see also 96 RT 15332-15333, referencing Bentele and Bowers, *How Jurors Decide On Death: Guilt Is Overwhelming; Aggravation Requires Death; And Mitigation Is No Excuse* (2001) 66 Brooklyn L. Rev. 1011, at 4 CT 800 et seq.) Even in California, where there is no instruction or aggravating factor relating to either heinousness or future dangerousness, 30 percent of the 140 jurors who had served in capital cases and were interviewed for the study believed the law required a death sentence if the killing was heinous, vile, or depraved, and 20 percent believed the law required death if the defendant would be dangerous in the future. (Post-Trial Exh. 2, Table 14.) This misunderstanding skews the penalty decision toward death. (96 RT 15330-15331.)

4. *Pervasive Failure of Jurors to Comprehend and/or Follow the Law*: Not only did many jurors have incorrect beliefs that the matters just discussed compelled a death verdict as a matter of law, but the research found that jurors failed to understand the instructions in other ways, chiefly involving mitigation. Large numbers of jurors in all jurisdictions did not understand that they could consider any mitigating evidence, that they did not need to be unanimous as to mitigation, and that mitigation did not need to be established beyond a reasonable doubt. (96 RT 15327-15330; see also 96 RT 15332-15333, referencing Bentele and Bowers, *supra*, 66 Brooklyn L. Rev. 1011 at 4 CT 800 et seq.) Even in California, where standardized instructions have been developed, 24 percent of jurors who served in capital cases did not understand that they could consider any mitigating evidence, 56 percent

thought that unanimity was required, and 38 percent believed mitigation had to be found beyond a reasonable doubt. (Post-Trial Exh. 2, Table 13.) Like jurors' beliefs that death is mandatory in many situations, these misunderstandings, too, skew the penalty-phase decision toward death. (96 RT 15330-15331.)

5. Jurors' Evasion of Responsibility for the Punishment Decision: The CJP research further found that 80 percent of jurors believed that of five possible factors, the ones that were most responsible for the defendant's punishment were the defendant and the law, and only a small number of jurors (approximately 15%) found that they individually or the jury as a whole was responsible.[18] (96 RT 15335-15339.) Indeed, the law itself was ranked as the first or second most responsible factor the most often of all. (96 RT 15339.) These results were not surprising in light of the earlier matters discussed. As Professor Bowers pointed out, "if you misunderstand what the law requires, believing that it requires you to impose a death sentence when it doesn't, [then] you are more apt . . . to designate the law as the one responsible for the punishment." (96 RT 15339.)

6. Jurors' Underestimating the Non-Death Alternative: The CJP research also showed that in every state studied, at least half of the jurors believed that if not sentenced to death, the defendant would get out of prison, indeed would get out at a time that was less than what the law actually

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[18] The jurors were asked to rank the following sources or agents of responsibility for the defendant's punishment, from "most" to "least" responsible: (1) "the defendant because his/her conduct is what actually determined the punishment," (2) "the law that states what punishment applies," (3) "the jury that votes for the sentence," (4) "the individual juror's vote since the jury's decision depends on the vote of each juror," and (5) "the judge who imposes sentence." (See Post-Trial Exh. 2, Table 15.)

prescribed as the mandatory minimum. (96 RT 15342-153343, 15350.) Even in states with LWOP as the alternative, "most people don't know what the facts are and/or don't believe what they're told the facts are or believe what the facts are from reading about somebody who was convicted of murder, got out in 10 years and committed some other crime, without having any notion or without being sure or knowing that that was a person convicted of capital murder instead of some other homicide." (96 RT 15349.) Thus, in California, where jurors are instructed that the alternative to a death sentence is life without possibility of parole, the median estimate of the time the defendant would serve in prison if not given death was 17 years. (See Post-Trial Exh. 2, Table 17; see also 96 RT 15348-15350, 15353-15354.)

The significance of this misperception became greater as the trials proceeded, so that by the time the jurors cast their final punishment vote, two-thirds of those who believed the defendant would be out of prison in fewer than 20 years voted for death, whereas only 43 percent of those who believed he would be out in 20 years or more did so. (See Post-Trial Exh. 3.) Moreover, underestimation of the LWOP alternative was a consideration that made a juror view the defendant as more likely to be dangerous in the future. (96 RT 15354.)

7. The Effect of Juror Race on Capital Decision-Making: Finally, the CJP research found "vast and stark differences between the races in their reactions to the same evidence" in cases where there was a black defendant and a white victim. (96 RT 15358, 15359; see Post-Trial Exh. 2, Table 16.) These differences showed up in jurors' reactions to lingering doubt, remorse, dangerousness, and beliefs about early release. (96 RT 15359-15363.) Moreover, the research found that the probability of a death sentence doubled when there were five or more white males on the jury, and that the probability

of a death sentence dropped by 30 percent when there were one or two black jurors. (96 RT 15365-15366.) And these differences were in addition to the substantial role that the race of the defendant and the victim played in the death penalty decision. (96 RT 15363, 15364-15365.)

Conclusion: Based on all this research, Dr. Bowers concluded that death penalty statutes of the modern era "have failed to remedy arbitrariness, that arbitrariness is manifest to an unacceptable extent in the post-*Furman* administration of the death penalty." (96 RT 15368.)

C. The Constitutional Violation[19]

The federal constitutional underpinning of valid death penalty schemes in this nation are well known to this Court and will not be discussed at length. In brief, a capital jury's sentencing decision cannot be arbitrary and capricious. It cannot reflect the standardless exercise of the jury's power to choose whatever penalty it sees fit. The decision must, instead, be channeled by objective criteria that provide specific guidance as to how the sentencer is to go about making its decision. Jurors may not bring their own rules to the table but must accept and follow those given to them by the trial court. The criteria guiding the jury's decision-making cannot be vague and open to each individual's personal interpretation, but must be clear in the sense that persons "'of ordinary sensibility'" will be able to understand and apply them in an even-handed like-fashion. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363.) The jurors' decision-making cannot be the result of false or misleading assumptions which force them to select death in order to allay fears not based in reality. Race and other improper factors can play no role in the

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[19] All the points in this subsection were presented to the trial court in detail, including at 3 CT 595-632.

decision-making dynamic. (See, e.g., *Shafer v. South Carolina* (2001) 532 U.S. 36; *Simmons v. South Carolina* (1994) 512 U.S. 154; *Stringer v. Black* (1992) 503 U.S. 222; *Maynard v. Cartwright, supra*, 486 U.S. 356; *Turner v. Murray* (1986) 476 U.S. 28; *Godfrey v. Georgia* (1980) 446 U.S. 420; *Roberts v. Louisiana* (1976) 428 U.S. 325; *Woodson v. North Carolina* (1976) 428 U.S. 280; *Gregg v. Georgia, supra*, 428 U.S. 153.)

In addition, death can never be the only appropriate penalty for a convicted capital murderer, irrespective of how terrible his crimes may be, who the victims may have been, or how horrific the defendant's criminal background. Instead, the Eighth Amendment confers on every capital defendant the right to an individualized determination that death is, or is not, the appropriate sentence given the unique circumstances of his or her case and his or her life and situation. This right to an individualized determination of sentence means that neither the State nor the trial court can restrict the defendant's ability to present evidence in mitigation. The right to an individualized determination of sentence also means that the jury deciding the defendant's fate must be both willing and able to listen to the defendant's evidence: able to consider it and to give it effect. A juror who refuses or cannot do these things is functioning in a manner at odds with the Eighth Amendment regardless of the cause of the impediment — be it statute, instruction, an individual juror's belief system, or a particularly egregious and shocking crime. The right to an individualized determination of sentence further means that the defendant is entitled to the individual opinion of each juror. There can be no requirement of unanimity with respect to mitigation. Nor can the jury make its decision on the basis of false or misleading assumptions. Erroneous beliefs that compel the jury to choose death so as to avoid a falsely held fear are incompatible with these principles. In a similar

vein, the jury cannot make a decision that is influenced by improper factors such as race. Moreover, the jurors must understand that they, and they alone, are responsible for their sentencing decision. Neither the law, nor the judge, nor the availability of appellate review can be used by the jurors to avoid responsibility for a decision that only they can make. (See, e.g., *Williams v. Taylor* (2000) 529 U.S. 362; *McKoy v. North Carolina* (1990) 494 U.S. 433; *Penry v. Lynaugh* (1989) 492 U.S. 302; *Mills v. Maryland* (1988) 486 U.S. 367; *Sumner v. Shuman* (1987) 483 U.S. 66; *Turner v. Murray*, *supra*, 476 U.S. 28; *Skipper v. South Carolina* (1986) 476 U.S. 1; *Caldwell v. Mississippi* (1985) 472 U.S. 320; *Eddings v. Oklahoma* (1982) 455 U.S. 104; *Lockett v. Ohio* (1978)438 U.S. 586; *Roberts v. Louisiana* (1977) 431 U.S. 633; *Roberts v. Louisiana* (1976) 428 U.S. 325; *Woodson v. North Carolina*, *supra*, 428 U.S. 280.)

Finally, a potential capital juror who is not "'as indifferent as he stands unsworne'" on the question of what penalty a person guilty of the crimes charged should receive, is not qualified to be seated as a juror. (*Morgan v. Illinois* (1992) 504 U.S. 719, 727.) A potential capital juror who has "'formed an opinion'" on what penalty a person should receive for the kinds of crimes that the juror will have before him or her is not qualified to be seated as a juror. (*Ibid.*) A potential capital juror for whom "mitigating factors are irrelevant" (*id.* at p. 739), or who "will fail in good faith to consider the mitigating evidence" (*id.* at p. 729) is not qualified to be seated as a juror. "If even one such juror is empanelled and the death sentence is imposed, the State is disentitled to execute the sentence." (*Ibid.*) In addition, trial courts must ensure that the capital defendant is given the opportunity to conduct the kind of voir dire that genuinely permits trial counsel to identify jurors who will not be able to listen to, consider, and give effect to the defendant's case in

mitigation, and to do so in the context of the evidence which that juror is likely to be exposed to. It is the trial judge's responsibility to make sure that more than mere lip service is paid to this right, for only through an adequate voir dire can the trial court assure the defendant his or her constitutional right to be judged by an impartial jury. (See, e.g., *Morgan v. Illinois*, *supra*, 504 U.S. 719; *Turner v. Murray*, *supra*, 476 U.S. 28; *Wainwright v. Witt* (1985) 469 U.S. 412; *Rosales-Lopes v. United States* (1981) 451 U.S. 182; *Witherspoon v. Illinois* (1968) 391 U.S. 510; *People v. Cash* (2002) 28 Cal.4th 703.)

In the preceding paragraphs, appellant has set forth the constitutional underpinnings of a constitutional death penalty scheme. And what the research produced below shows without contradiction is that, in fact, these principles are not effectuated for an unacceptably large proportion of capital case jurors in the real world, most importantly including capital jurors in California. Consequently, the death penalty in this State — or at least as applied to appellant — should be struck down as unconstitutional.

D. The Trial Court Erred in Refusing to Implement Alternative Remedies

If, however, this Court were to conclude that appellant's death sentence should not be stricken for the reasons just discussed, the judgment would still have to be reversed because of the trial court's refusal to adopt alternative remedies to ameliorate at least some of the problems the CJP research has uncovered. Most significantly for present purposes, the trial court erred by refusing to allow individual, sequestered *Hovey*-style voir dire and by refusing to allow potential jurors to be asked questions about specific types of crimes for which they would consider death to be the only appropriate punishment. Both of these procedures would have decreased the chance that persons

excludable for cause based on extreme pro-death attitudes would have gone unidentified. As discussed in connection with the second flaw in subsection B above, asking questions about specific crimes was effective in identifying pro-death persons who were excludable but were not otherwise identified by normal voir dire. Moreover, individual sequestered voir dire would have enabled the court to more successfully ensure that seated jurors would accept the reality of LWOP and would not be affected by extraneous aggravating factors such as future dangerousness.[20]

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[20] Appellant acknowledges that this Court has often refused to reconsider its decision that *Hovey*-type voir dire is constitutionally required, most recently in *People v. Thomas* (2012) 53 Cal.4th 771, 789. However, in none of the prior decisions was this Court presented with the research that has been presented in this case.

V.

THE TRIAL JUDGE VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS WHEN HE INSTRUCTED JURORS THAT THEY SHOULD REACH A VERDICT ON PENALTY "REGARDLESS OF THE CONSEQUENCES."

A. Introduction

In the present case the trial court provided the second penalty phase jurors with preliminary instructions including CALJIC No. 1.00, which concluded with the following admonishment: "Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law and reach a just verdict ***regardless of the consequences***." (66 RT 10571 [emphasis added].) This portion of CALJIC No. 1.00 is routinely given in noncapital cases and at the guilt phase of capital trials. (*People v. Easley* (1983) 34 Cal.3d 858, 875.) It is intended to direct jurors to reach a verdict based solely on the "evidence" and without regard to such irrelevant and speculative "consequences" as the punishment the defendant might receive. (*People v. Brown* (1985) 40 Cal.3d 512, 537, fn. 7.) At the penalty phase, however, "the 'consequences' — the choice between the two most extreme punishments the law exacts — are precisely the issue the jury must decide," and therefore, "this portion of CALJIC No. 1.00 should never be given in a capital penalty trial." (*Ibid.*) Consequently, the trial court erred in reading this portion of CALJIC No. 1.00 to the penalty phase jurors.[21]

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[21] Although trial counsel did not voice an objection to this portion of the instruction, the issue is cognizable on appeal. "'The trial court has the duty to instruct on general principles of law relevant to the issues raised by the evidence [citations] and has the correlative duty "to refrain from instructing on principles of law which not only are irrelevant to the issues . . . but also have the effect of confusing the jury . . .."'" (*People v. Alexander* (2010) 49 Cal.4th

The effect of the instruction was to diminish the jurors' sense of responsibility, and under the circumstances of the present case it cannot be said the error was harmless beyond a reasonable doubt.

B. Instructing the Jurors That They Should Reach a Verdict on Penalty Regardless of the Consequences Diminished Their Sense of Responsibility.

The Eighth Amendment requires that "jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision." (*McGautha v. California* (1971) 402 U.S. 183, 208; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 329-330.) Instructing jurors in a capital case that they should reach a penalty verdict "regardless of the consequences" violates this principle. As this Court has recognized, in this respect CALJIC No. 1.00 has the "potential to diminish the jury's sense of responsibility for the penalty decision ... since the precise issue before the jury -- whether the penalty shall be death or life imprisonment without possibility of parole — is the 'consequence' of the verdict.'" (*People v. Jennings* (1988) 46 Cal.3d 963, 991.) As a result, this Court has repeatedly held that language instructing the jury to disregard the consequences of its verdict is inappropriate and should not be given at the penalty phase of a capital trial. (*People v. Streeter* (2012) 54 Cal.4th 205, 263 fn 12; *People v. Mayfield* (1993) 5 Cal.4th 142, 183; *People v. Jennings*, *supra*, 46 Cal.3d at p. 991; *People v. Keenan* (1988) 46 Cal.3d 478, 517.) The trial court clearly erred in this regard.

846, 920.) Further, an appellate court may review an instruction given, even though no objection was made in the lower court, if the "substantial rights" of the defendant are affected. (Pen. Code, § 1259; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7.)

In other cases, this Court has held the error to be harmless considering the instructions as a whole in conjunction with the arguments of counsel. (See, e.g., *People v. Ray* (1996) 13 Cal.4th 313, 354.) In such cases the Court concluded that the jury "almost certainly understood" that it bore the ultimate responsibility for choosing between death and life imprisonment without parole based on the particular circumstances of the case. (*Id.* at p. 355) In the present case, however, the prosecutor encouraged a common misperception among jurors that the ***law*** was responsible for the defendant's punishment. In this regard, from voir dire through closing arguments, the prosecutor indoctrinated jurors with the incorrect notion that they were required by law to impose the death penalty if they found that aggravating factors outweighed mitigating factors.[22] For example, during closing argument the prosecutor stated: "If the aggravation outweighs the mitigation, then your verdict is death." (92 RT 14958.) More specifically the prosecutor informed the jurors:

> And if the aggravation outweighs the mitigation — and as counsel told you in the jury selection, it does, substantially — then your verdict shall be death. Absent disregarding the law in that area or disregarding some of the facts, we all know what the verdict is.

(*Ibid.*) The prosecutor's statements were clearly incorrect as it is well settled that: "The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant

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[22] See e.g. 60 RT 9151, 9161-1963, 9304, 9308; 61 RT 9411, 9428, 9436, 9520-9521, 9531-9532, 9536; 62 RT 9645, 9645, 9648-9649; 63 RT 9739, 9750-9751, 9755, 9765, 9852-9853, 9864, 9868, 9868-9869, 9877; 64 RT 9988, 9988-9989, 9992, 9993, 10003, 10101, 10101-10102, 10113, 10120; 65 RT 10228, 10235, 10237, 10237-10238, 10249, 10256, 10259, 10259-10260, 10362, 10362, 10364, 10369, 10376; 66 RT 10493, 10494, 10510; 92 RT 14954-14958, 14961, 14965-14966, 15003-15004.

death." (*People v. Duncan* (1991) 53 Cal.3d 955, 979.) Not only was the prosecutor's statement incorrect, but it reinforced one of jurors' most commonly held misperceptions. As discussed at length in Argument IV above, CJP research found that the vast majority of jurors ranked the law as the first or second factor most responsible for the defendant's punishment, and only 15% of jurors believed that they individually or the jury as a whole was responsible. (96 RT 15335-15339.) As Professor Bowers pointed out, "if you misunderstand what the law requires, believing that it requires you to impose a death sentence when it doesn't, [then] you are more apt . . . to designate the law as the one responsible for the punishment." (96 RT 15339.) The prosecutor's repeated statements that death was mandatory if aggravation outweighed mitigation, thus, reinforced the jurors' natural inclination to diminish their own sense of responsibility for the penalty determination.

Under these circumstances it cannot be said that the jury almost certainly understood that it bore the ultimate responsibility for choosing between death and life imprisonment. The instructional error, therefore, cannot be regarded as harmless beyond a reasonable doubt.

V.

BOTH TODAY AND AT THE TIME OF THE CHARGED MURDERS IN THIS CASE, THE CALIFORNIA DEATH PENALTY STATUTE HAS FAILED TO NARROW THE CLASS OF OFFENDERS ELIGIBLE FOR THE DEATH PENALTY AND THUS VIOLATES THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION.[23]

A. Introduction

Prior to trial appellant filed a motion to "Bar Death Penalty for Failure to Comply with the Eighth Amendment's Narrowing Requirement" arguing that California's death penalty statute was unconstitutional in that it did not meaningfully narrow the pool of murderers eligible for the death penalty.[24] (8 CT 1839.)

When only a handful of offenders is sentenced to death under expansive statutes that render most murderers eligible for the death penalty, it becomes more likely that those selected for death are being chosen arbitrarily. This arbitrariness motivated the Supreme Court's temporary invalidation of all of this nation's death penalty laws in 1972 in *Furman v. Georgia* (1972) 408 U.S. 238. In the words of Justice Stewart, the petitioners

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[23] The term "Eighth Amendment" is used hereafter to also encompass a claim under article I, section 17 of the California Constitution. (Cf. *People v. Mincey* (1992) 2 Cal.4th 408, 476.)

[24] Additional pleadings were filed by both parties including: prosecution points and authorities in opposition to the motion (10 CT 2175), defense reply to the opposition (10 CT 2204), defense request for hearing (14 CT 3199), prosecution opposition (14 CT 3250), and defense declaration of Professor Steven Shatz re Study of California Cases Involving Murder Convictions (14 CT 3300).

in *Furman* were a "capriciously selected random handful" of the many defendants who could have faced execution. (*Id.* at pp. 309-310 (Stewart, J., concurring).) Four years later, in *Gregg v. Georgia* (1976) 428 U.S. 153 (plurality opinion), the Court approved the death penalty statutes that Georgia enacted after *Furman*, concluding that the revised Georgia law adequately guided jurors' discretion by requiring them to find at least one statutory aggravating factor before the defendant could be eligible for the death sentence. (*Id.* at pp. 206-207.) *Gregg* envisioned a death penalty scheme in which aggravating factors genuinely narrowed the scope of jurors' discretion to a smaller, more culpable subset of offenders for whom death sentences would be imposed more consistently.

In *Zant v. Stephens* (1983) 462 U.S. 862, the Court expounded upon the narrowing requirement for these aggravating factors, explaining that such factors must "genuinely narrow" the class of offenders eligible for the death penalty to a smaller group of offenders deemed particularly deserving of death:

> To avoid this constitutional flaw [of arbitrary and capricious sentencing], an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. . . . 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.

(*Id.* at pp. 877-878.)

According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.) The 1978 death penalty law came

into being, however, not to narrow those eligible for the death penalty but to make ***all*** murderers eligible. (See 1978 Voter's Pamphlet, p. 34,[25] "Arguments in Favor of Proposition 7.") Since the enactment of the Briggs Initiative, both the California Legislature and the voters (through various initiative measures) have continued to expand the circumstances under which a defendant is eligible for death. As discussed more fully below, by no later than 1993 the statute's expansive list of broadly defined special circumstances failed to confine death eligibility to the most heinous offenders because it included the vast majority of murderers within its scope. For example, almost all felony murders — which in 1993 included (and still include) accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others — were special circumstance cases. (*People v. Dillon* (1983) 34 Cal.3d 441, 477.) Additionally, section 190.2's reach was extended to practically all intentional murders by virtue of the lying-in-wait special circumstance, which has been in existence since the 1978 Death Penalty Law was enacted. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These broad categories were joined by so many other categories of capital murder that the statute practically achieved its goal of making every murderer eligible for death.

During the hearing on the matter in the trial court appellant presented the testimony of Professor Steven Shatz of the University of San Francisco School of Law regarding his study of California murder cases, which gave empirical support for the conclusion that the California death penalty scheme did not contain the legislatively defined narrowing factors necessary to meet the *Furman/Gregg* standard. (57 RT 8675-8815.) The trial court ultimately

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denied the motion stating in part: "I believe that the courts have — California Supreme Court has repeatedly held that 190.2 and 190.3 have satisfied the narrowing requirement. I think I'm bound by the highest court in our State." (58 RT 8904.) Appellant recognizes that this Court, in the past, has summarily rejected arguments similar to those advanced in the following sections.[26] (See e.g. *People v. Frye* (1998) 18 Cal.4th 894, 1028-1029; *People v. Bemore* (2000) 22 Cal.4th 809; 858-859; *People v. Morrison* (2004) 34 Cal.4th 698, 730; *People v. Beames* (2007) 40 Cal.4th 907, 933-934.) However, appellant requests that the question of whether California's death penalty statute is unconstitutionally broad be reconsidered in light of the empirical evidence introduced below.

B. Rather Than Narrow the Class of Defendants Eligible for the Death Penalty California's Death Penalty Statute Was Intended to, and Does on Its Face, Make the Vast Majority of Murderers Eligible for the Death Penalty.

In response to *Furman*, in 1973 the California Legislature adopted a mandatory death penalty to be applied upon proof of one of five special circumstances. (Stats. 1973, ch. 719, §§ 1-5, pp. 1297-1300.) This statute was held unconstitutional in *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, after the United States Supreme Court's invalidation of mandatory death penalty schemes in *Woodson v. North Carolina* (1976) 428 U.S. 280 and *Roberts v. Louisiana* (1976) 428 U.S. 325.

In 1977, when the California Legislature reenacted the death penalty, it returned discretion to the jury in applying the death penalty but attempted to limit that discretion by requiring that, to make a murderer death-eligible,

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[26] In none of the cases has the Court considered empirical evidence on the issue, nor attempted to examine, or even estimate, either the narrowing effect of Penal Code section 190.2 or California's death sentence ratio.

one of 12 "special circumstances" be found beyond a reasonable doubt. (Stats. 1977, ch. 316, pp. 1255-1266.) Under the new death penalty statute, first degree murder was "punishable by life imprisonment except for extraordinary cases in which special circumstances are present." (*Owen v. Superior Court* (1979) 88 Cal.App.3d 757, 760 [quoted with approval in *People v. Green* (1980) 27 Cal.3d 1, 48].)

Special circumstances were intended to define death eligibility in this state:

> At the very least, therefore, the Legislature must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not.

(*People v. Green*, *supra*, 27 Cal.3d at p. 61.) Whether the special circumstances in the 1977 statute actually performed the constitutionally required narrowing function was never decided by the courts. In finding the 1977 law constitutional, the United States Supreme Court assumed that the special circumstances narrowed the class of those eligible for the death penalty, but the Court left open the possibility that evidence might be presented to show that the law did not comply with the *Furman/Gregg* mandate. (*Pulley v. Harris* (1984) 465 U.S. 37, 53-54.)

In 1978 the 1977 law was superseded by the enactment of Proposition 7 — the "Briggs Initiative." The explicit intent of Proposition 7, as expressed clearly in the ballot proposition arguments, was to give Californians the toughest death penalty law in the country. (1978 Voter's Pamphlet, p. 34, Argument in Favor of Proposition 7; *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 145, n. 13.) In fact, it was the intent of the voters, as expressed in the ballot proposition arguments, to make the death penalty applicable to *all* murderers.

> 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.

(1978 Voter's Pamphlet, p. 34.)[27] The Briggs Initiative sought to achieve this result in two ways. First, it expanded the scope of Penal Code section 190.2 to more than double the number of special circumstances compared to the prior law. Second, it substantially broadened the definitions of the prior law's special circumstances, most significantly by eliminating the across the board intent to kill requirement of the 1977 law.

The number and scope of the special circumstances have steadily increased since 1977, and by 1993 there were 28 special circumstances. In addition, the passage of Proposition 115 in 1990 eliminated the intent-to-kill requirement for death-eligibility of felony murder accomplices — instead requiring only that the accomplice have acted with "reckless indifference to human life and as a major participant" in the felony. (State of California, Crime Victims Justice Reform Act, Initiative Measure Proposition 115, § 10 (approved June 5, 1990, and codified as Pen. Code § 190.2(d)); see *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 985.)

In enacting Penal Code section 190.2, and certainly by amending it prior to 1993, voters came close to achieving their stated purpose: they gave California one of the broadest — probably the broadest — death penalty

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[27] This goal of the voters was plainly unconstitutional. This Court has repeatedly held that election ballot arguments are entitled to great weight in interpreting statutes. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 740 fn. 14; *Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, 943 fn. 5.)

statutes in the country[28] and assured that a substantial majority of first degree murderers would be death eligible. Many observers, including United States Supreme Court Justice Blackmun, have noted that California's statutory scheme is one of the broadest death penalty schemes in the nation. (See *Tuilaepa v. California* (1994) 512 U.S. 967, 994 (Blackmun, J., dis. opn.) ["By creating nearly 20 such special circumstances, California creates an extraordinary large death pool. Because petitioners mount no challenge to these circumstances, the Court is not called on to determine that they collectively perform sufficient, meaningful narrowing."].) In particular, observers point out that the list of special circumstances is so broad as to allow a "prosecutor [to] argue practically any case warrants the death penalty" and to "encompass nearly every first degree murder." (Sanger, *Comparison of Illinois Commission Report on Capital Punishment with the Capital punishment System in California* (2003) 44 Santa Clara L.Rev. 101, 108-110; see also Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study* (2007) 59 Fla. L. Rev.

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[28] Overall comparisons of death penalty statutes between states are necessarily imprecise, because of the different combinations of narrowing circumstances in the various statutes, because of differences in statutory language used to identify the particular circumstances and because of differences in courts' interpretation of the circumstances. Nevertheless, the sheer number of special circumstances, the breadth of definition or interpretation of the various circumstances, the frequency of occurrence of the circumstances in actual murder cases and the existence of certain collateral doctrines, (e.g., that the various felony-murder special circumstances apply even to unintentional and unforeseeable killings) set California apart from all other states. For example, California is one of only five states that declares someone death eligible based upon felony murder without regard to intent, and only three other states make someone death eligible based upon lying in wait. (57 RT 8696; 8 CT 1877.)

719, 727-728; *Symposium, Report of the Massachusetts Governor's Council on Capital Punishment* (2005) 80 Ind. L.J. 1, 9.)

As of March 27, 1993 (the date of the capital crimes of which appellant was convicted), the California death penalty scheme had 18 separately numbered special circumstances encompassing at least 28 distinct categories of first degree murderers.[29] An adult murderer fitting any one of the 28 categories was death eligible. (Pen. Code, § 190.2, subd. (a)(1)-(22).) Any of the 28 individual special circumstances may have been sufficiently objective and, viewed in isolation, sufficiently narrow to satisfy *Furman.*

Although this Court has, on several occasions, addressed the constitutionality of particular individual special circumstances on their face,[30] the question here is whether, given the number and breadth of all the special circumstances, the relevant scheme as a whole genuinely narrows the death eligible class. Throughout this discussion, appellant refers to sections 189 and 190.2 as they appeared in 1993, the time the crimes charged in this case were committed. In general terms the discussion also applies to California's death penalty scheme as it stands today.

Under Penal Code section 190.2, a substantial majority of first degree murderers are death eligible. Because of the substantial overlap between the special circumstances listed in section 190.2 and the factors listed in Penal

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[29] There were actually 19 sets of special circumstances in section 190.2 in 1993, but one special circumstance— applicable to murders that were "heinous, atrocious, and cruel" — has been ruled to be unconstitutionally vague, and thus appellant does not count it here.

[30] See, e.g., *People v. Coleman* (1988) 46 Cal.3d 749 [upholding subdivision (a)(17) felony-murder]; *People v. Edelbacher* (1989) 47 Cal.3d 983 [upholding subdivision (a)(15) "lying in wait"]; *People v. Raley* (1992) 2 Cal.4th 870 [upholding (a)(18) "torture"].

Code section 189, defining which murders are first degree murders, most first degree murderers are death eligible. In general, in 1993 section 189 specified three categories of murders which were (and still are) first degree murders: murders committed by one of five listed means, killings committed during the perpetration of one of eleven felonies, and murders committed with premeditation and deliberation. The overlap between the special circumstances listed in section 190.2 and the three groups of factors listed in section 189 varied according to whether the murder was intentional or unintentional.

In the case of intentional killings, four of the five "means" listed in section 189 (murders by destructive device or explosive, poison, torture and lying in wait) were also special circumstances. (See Pen. Code, former § 190.2, subds. (a)(4), (a)(6), (a)(15), (a)(18), (a)(19).)[31] Only a first degree murder committed by means of "knowing use of ammunition designed primarily to penetrate metal or armor" did not automatically lead to death eligibility. All eleven of the felonies listed in section 189 were also special circumstances. (See Pen. Code, former § 190.2, subds. (a)(17)(i) - (a)(17)(xi).)

The only intentional first degree murders not expressly qualifying for the death penalty were those where the first degree murder was established by proof of premeditation and deliberation. However, some such murders were

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[31] There are some slight differences in wording having no substantive effect. Appellant notes that two somewhat different versions of section 190.2 were approved by the voters in the 1990 election, one broader in its reach than the other. This Court subsequently held that the broader version, which received fewer votes, was not in conflict with the narrower version, and thus essentially both versions went into effect. (*Yoshisato v. Superior Court*, *supra*, 2 Cal.4th 978.)

capital murders because the defendant committed another murder (Pen. Code, § 190.2, subds. (a)(2), (a)(3)), the defendant acted with a particular motive (Pen. Code § 190.2, subds. (a)(1), (a)(5), (a)(16)), or the defendant killed a particular type of victim (Pen. Code, § 190.2, subds. (a)(7) - (a)(13)).

Virtually all of the remaining premeditated murders would also be capital-eligible murders because, by dint of the expansive definition announced by this Court, most premeditated murders are done while the defendant is lying in wait. (Pen. Code § 190.2, subd. (a)(15).)[32] Lying in wait is established if the defendant: (1) concealed his purpose to kill the victim, (2) watched and waited for an opportune time to act, and (3) immediately thereafter launched a surprise attack on the victim from a position of advantage. (*People v. Morales* (1989) 48 Cal.3d 527, 557.) The second element — watching and waiting — adds nothing to premeditation and deliberation since the duration of the watching and waiting need only be "such as to show a state of mind equivalent to premeditation or deliberation." (*People v. Edelbacher, supra*, 47 Cal.3d at p. 1021 [emphasis omitted].) As for the other two elements, it will be a rare premeditated murder — i.e., a murder committed "as a result of careful thought and weighing of considerations . . . carried on coolly and steadily, [especially] according to a preconceived design" (*People v. Bender* (1945) 27 Cal.2d 164, 183) — where

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[32] The existence of the lying in wait special circumstance contributes to making the California statute far more sweeping than those in the other death penalty states. Only 3 of the other 35 death penalty states list lying in wait as one of the narrowing circumstances. (See Colorado Revised Stats. § 16-11-103(5)(f); Indiana Code 35-50-2-9(b)(3); and Montana Code 46-18-303(4).) Further, Indiana applies a much narrower version of lying in wait, requiring concealment of the person (*Matheney v. State* (Ind. 1992) 583 N.E.2d 1202, 1208), and it appears that Colorado has never applied its lying in wait circumstance at all.

the defendant reveals his purpose in advance or fails to try to take the victim from a position of advantage. As Justice Mosk has said:

> [The lying-in-wait special circumstance] is so broad in scope as to embrace virtually all intentional killings. Almost always the perpetrator waits, watches, and conceals his true purpose and intent before attacking his victim; almost never does he happen on his victim and immediately mount his attack with a declaration of his bloody aim.

(*People v. Morales*, *supra,* 48 Cal.3d at p. 575 (Mosk, J., dis. opn.).) In sum, while there may be occasional premeditated murders not done with any of the other listed means or during the listed felonies,[33] the overwhelming majority of intentional first degree murderers are death eligible.

The situation is similar with regard to unintentional first degree murders. Since an unintentional killing cannot be done with premeditation and deliberation, virtually all unintentional first degree murders are such because of the first degree felony-murder rule, and even an unintentional killing during one of the listed felonies makes the actual killer death eligible. While there are occasional unintentional first degree murders based on the listed means[34] or based on vicarious liability for a felony-murder[35] — neither

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[33] See, e.g., *People v. Beltran* (1989) 210 Cal.App.3d 1295 [defendant's decision to kill apparently made after victim already being held at gunpoint].

[34] See, e.g., *People v. Laws* (1993) 12 Cal.App.4th 786, 795-796 [defendant lay in wait to assault the victim and killed her by accident]. However, some such unintentional killings can make the defendant death eligible. In *People v. Morse* (1992) 2 Cal.App.4th 620, 652, 654-655, after the defendant was arrested for possession of an anti-personnel bomb, two police officers were killed attempting to dismantle the bomb. Although the Court overturned a first degree murder conviction based on the felony-murder rule (since reckless possession of bomb is not one of the listed felonies), it acknowledged that defendant could have been convicted of murder on an

of which situations would invoke the death penalty — such prosecutions are rare in comparison with ordinary felony-murders.

It is apparent not only that definitionally most first degree murders are (and were in 1993) capital murders, but also that most murders in California are first degree murders. Most murders are first degree murders primarily because of the broad interpretation of lying in wait and because of the felony-murder rule. The expansive sweep of the felony-murder rule is a product of three factors. First, the felony-murder rule applies to the most common felonies resulting in death, particularly robbery and burglary,[36] crimes which have been defined exceedingly broadly by statute and court decision. With regard to robbery, the courts have long given the broadest interpretation to the "force or fear" element[37] and the "immediate presence" element.[38] With regard to burglary, California has made any (even minimal)

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implied malice theory for killing with a bomb. Defendant would then have been death eligible because of the multiple murder. (See Pen. Code, former § 190.2(a)(3).)

[35] See, e.g., *People v. Thompson* (1992) 7 Cal.App.4th 1966, 1969-1970.

[36] Among the other 35 death penalty states, eleven do not make felony-murder robbery a narrowing circumstance, and eleven do not make felony-murder burglary a narrowing circumstance, and several others only apply the narrowing circumstance when the killing is intentional. (See Colorado Revised Stats. § 16-11-103(5)(g); Texas Pen. Code § 19.03(a)(2); and Wyoming Stats. 6-2-102(h)(xii).)

[37] See *People v. Mungia* (1991) 234 Cal.App.3d 1703 [forceful purse snatch].

[38] See *People v. Webster* (1991) 54 Cal.3d 411, 440-441 [property taken was one-quarter of a mile away from victim].

entry[39] into virtually any enclosed space[40] with the intent to commit any felony or theft[41] a burglary. (Pen. Code, § 459.) Second, the felony murder rule has applied to killings occurring even after completion of the felony, if the killing occurred during an escape[42] or as a "natural and probable consequence" of the felony.[43] Third, the felony murder rule has not been limited in its application by normal rules of causation,[44] but has been applied to altogether accidental and unforeseeable deaths:

> [F]irst degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable."

(*People v. Dillon, supra*, 34 Cal.3d at p. 477.)

The combination of the felony murder special circumstances, which themselves perform no narrowing function at least as to the actual killer, and the lying in wait special circumstance, which by definition encompasses most

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[39] See *People v. Ravenscroft* (1988) 198 Cal.App.3d 639 [use of ATM card is entry into bank].

[40] See *People v. McCormack* (1991) 234 Cal.App.3d 253 [going from one room to another within a house is an entry].

[41] See *People v. Salemme* (1992) 2 Cal.App.4th 775 [entry to sell fraudulent securities is a burglary].

[42] See *People v. Cooper* (1991) 53 Cal.3d 1158, 1164-1165.

[43] See *People v. Birden* (1986) 179 Cal.App.3d 1020, 1024-1025.

[44] See *People v. Johnson* (1992) 5 Cal.App.4th 552, 561.

premeditated murders, results in section 190.2 rendering death eligible the vast majority of murderers. In fact, given the definition of first degree murder in Penal Code section 189 and the 29 special circumstances in Penal Code section 190.2, at the time of the homicides in this case (1993), there were only seven factual scenarios in which a defendant could have been guilty of first degree murder and not have been death eligible:

1. The murder was by means of a destructive device or explosive that was neither planted, hidden or concealed in any place, area, dwelling, building or structure, nor mailed or delivered or attempted or caused to be mailed or delivered;

2. The murder was by means of ammunition designed primarily to penetrate metal or armor;

3. The murder was unintentional and by poison;

4. The murder was unintentional and by lying in wait;

5. The murder was unintentional and by torture;

6. The murder was premeditated and *not* committed (a) against a listed victim (e.g., peace officer, fire fighter, witness), (b) with a listed motive (financial gain, escape from custody or avoidance or arrest, racial or ethnic bias), (c) while the defendant was lying in wait or by any other listed means (poison, torture, destructive or explosive device), (d) while the defendant was engaged in the commission or attempted commission of a listed felony, or (e) by a defendant previously or contemporaneously convicted of murder; or

7. The defendant was not the actual killer and did not act with at least reckless indifference as a major participant in a special circumstances felony.

(8 CT 1866-1867 [Declaration of Steven Shatz].)

In contrast to the number and breadth of the special circumstances categories, the seven excluded categories were so narrow that, taken together, they encompassed too few first degree murderers to demonstrate genuine narrowing of death-eligibility in California. Twenty-five years ago, Justice Broussard reached exactly this conclusion: "California's 1978 statute ... sweeps so broadly that most murders are subject to the death penalty, and only a few excluded." (*People v. Adcox* (1988) 47 Cal.3d 207, 275 (Broussard, J., concurring).)

The death eligible class created by the California death penalty scheme at the time of the homicides in this case was too broad to comply with the constitutional requirements set forth in *Furman v. Georgia, supra*, as a result of the broad legislative definition of first degree murder, the number of special circumstances, and judicial rulings on the scope of both first degree murder and special circumstances. Moreover, the overbreadth of section 190.2 was more than just theoretical. As discussed more fully below, an exhaustive analysis by Professor Shatz confirms what is apparent from the face of the statute — section 190.2 performed no real narrowing function.

C. Empirical Evidence Demonstrates that, in Practice, Penal Code Section 190.2, as It Existed in 1993, Did Not Narrow The Class of Death Eligible Murders.

As discussed above, in order to meet the concerns of *Furman*, the states were required to genuinely narrow, by rational and objective criteria, the class of murders eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the state of legislative definition: they circumscribe the class of persons eligible for the death penalty.

(*Zant v. Stephens*, *supra*, 462 U.S. at p. 878.) It was the Court's understanding that, as the class of death eligible murderers was narrowed, the percentage of those in the class receiving the death penalty would go up and the risk of arbitrary imposition of the death penalty would correspondingly decline:

> As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate. . . it becomes reasonable to expect that juries — even given discretion not to impose the death penalty — will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device.

(*Gregg v. Georgia* (1976) 428 U.S. 153, 222 (White, J., concurring).)

At the time of the decision in *Furman*, the evidence before the Court established, and the justices understood, that approximately 15% to 20% of those convicted of capital murder were actually sentenced to death.[45] Thus, although the Court did not address precisely what percentage of statutorily death eligible defendants would have to receive death sentences in order to eliminate the constitutionally unacceptable risk of arbitrary capital sentencing, *Furman*, at a minimum, must be understood to have held that any death penalty scheme under which less than 15% to 20% of statutorily death eligible defendants are sentenced to death permits too great a risk of arbitrariness to satisfy the Eighth Amendment.

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[45] Chief Justice Burger so stated for the four dissenters (408 U.S. at p. 386, fn.11), and Justice Stewart relied on Justice Burger's statistics when he said: "[I]t is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder. . . ." (408 U.S. at p. 309, fn.10).

Professor Shatz' studies of California's death penalty scheme demonstrate that, overall, Penal Code section 190.2 has failed to perform the narrowing function required under the Eighth and Fourteenth Amendments. Shatz' data was drawn from appellate opinions in first degree murder cases decided between 1988 and 1992. His study examined all published opinions during the five year period and all unpublished opinions in the First Appellate District during the same period. (14 CT 3305.) This amounted to opinions from 404 murder appeals, including 159 death penalty cases. (14 CT 3304.) With respect to each case of first degree murder, it was determined whether special circumstances had been found and, if not, whether a special circumstance could have been found beyond a reasonable doubt under the facts as stated in the opinion. Excluding the cases of juvenile murderers, to which the death penalty would not apply (approximately 3.5%), the percentage of first degree murderers who were death eligible was found to be approximately 84%. The percentage of first degree murderers actually sentenced to death (9.6%)[46] was then divided by the percentage found to be death eligible. This produced a death sentence rate of 11.4% for death eligible first degree murderers. (57 RT 8712; 14 CT 3318; Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U.

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[46] This total was independently calculated based upon figures supplied by the Attorney General in the course of discovery in another case, figures that showed that during the period from 1988 to 1992, 1,729 persons were committed to the Department of Corrections on new first degree murder convictions, of which 166 were sentences of death. (14 CT 3303.) Thus, death sentences were handed down in 9.6% of all first degree murder cases. But some of the individuals convicted of first degree murder were not eligible for the death penalty. Shatz' study was designed to determine the percentage of death verdicts within the population of death-eligible defendants. (14 CT 3304.)

L. Rev. 1283, 1327-1335 [reporting the study's methodology and results].) This 11.4% death sentence rate was even lower than the 15% to 20% rate in *Furman,* which was the basis for holding that Georgia's death penalty created an unconstitutional risk of arbitrary and capricious death sentencing under the Eighth Amendment.

The California death penalty scheme applied to appellant was thus a "wanton and freakish" system, within the meaning of *Furman*, one which randomly chose a few offenders for the ultimate sanction from among the thousands of murderers in California. Imposition of a death sentence under this arbitrary and capricious scheme violated the ban against cruel and usual punishment of the Eighth Amendment, and the due process clause of the Fourteenth Amendment.

D. Conclusion

In *Bacigalupo*, this Court upheld the California death penalty scheme on the assumption that section 190.2 served the constitutionally required function of defining "some narrowing principle" providing an objective basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not, and thus "strictly confining" the class of death eligible murderers. (*People v. Bacigalupo*, *supra*, 6 Cal.4th at pp. 465-468.) The evidence produced below makes it abundantly clear that the section serves no such function. The vice of the California scheme is not that any one of the special circumstances taken alone is or was unconstitutional — each has arguably identified a subclass of all first degree murderers more deserving of the death penalty than other members of the class. The vice is that, taken together, the special circumstances in 1993 covered virtually all first degree murders (and a substantial majority of all murderers), and, thus, performed no narrowing function at all.

The basic concern in *Furman* was that when a state fails to place any objective limits on the imposition of the death penalty, it will necessarily be imposed in a random and unpredictable fashion, in violation of the Eighth Amendment:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

(*Furman v. Georgia*, *supra*, 410 U.S. at pp. 309-310 [footnote omitted].) With the Briggs Initiative, the voters intended to, and did, make virtually all first degree murderers death eligible and thereby made the actual imposition of the death penalty on the few who receive that sentence cruel and unusual in violation of both the Eighth Amendment and article I, section 17 of the California Constitution. Because appellant was prosecuted under an unconstitutional statute, his death sentence is invalid and must be set aside.

VII.

EXECUTING A PERSON SUCH AS APPELLANT, WHO IS PSYCHIATRICALLY, ORGANICALLY, AND EMOTIONALLY DISORDERED, IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION AND THE PARALLEL PROVISIONS OF THE STATE CONSTITUTION, AND VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

Prior to the penalty phase, the defense filed a motion to declare the death penalty unconstitutional as applied to appellant, arguing that executing a person who is psychiatrically, organically, and emotionally disordered violates the Eighth Amendment's prohibition against cruel and unusual punishment. (16 CT 3779, 3788-3791.) The prosecution filed points and authorities in opposition. (16 CT 3815, 3818-3821.) The matter was heard after the penalty phase, at which time the court denied the motion. (103 RT 16560.) However, as discussed more fully below, in light of appellant's severe brain impairments, the death sentence imposed in this case violates the state and federal constitutions.

A. Executing a Person Who is Psychiatrically, Organically, and Emotionally Disordered, Is Cruel And Unusual Punishment in Violation of the Eighth Amendment.[47]

The Eighth Amendment forbids a punishment that is disproportionate to a defendant's "personal responsibility and moral guilt." (*Enmund v.*

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[47] The following argument also applies to appellant's claim that his execution would violate the prohibition against cruel or unusual punishment found in article I, section 17 of the California Constitution. (Cf. *People v. Bean* (1988) 46 Cal.3d 919, 957-958.)

Florida (1982) 458 U.S. 782, 801; see also *Roper v. Simmons* (2005) 543 U.S. 551, 560; *Atkins v. Virginia* (2002) 536 U.S. 304, 311; *Solem v. Helm* (1983) 463 U.S. 277, 286-292, 303). Capital punishment must "be limited to those offenders . . . whose extreme culpability makes them 'the most deserving of execution.'" (*Atkins v. Virginia, supra*, 536 U.S. at p. 319.) The Eighth Amendment applies with "special force" to capital cases. (*Roper v. Simmons, supra*, 543 U.S. at p. 568.)

In 1986, in the case of *Ford v. Wainwright* (1986) 477 U.S. 399, the Supreme Court held that the Constitution forbids executing a person who is insane:

> For centuries no jurisdiction has countenanced the execution of the insane, yet this Court has never decided whether the Constitution forbids the practice. Today we keep faith with our common-law heritage in holding that it does.
>
> . . . Since this Court last had occasion to consider the infliction of the death penalty upon the insane, our interpretations of the Due Process Clause and the Eighth Amendment have evolved substantially . . . . This Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.

(*Id.* at pp. 401, 405-406, 409-410.)

Sixteen years later the high court formally recognized that executing the mentally retarded also offended the Constitutional prohibition on cruel and unusual punishment. In *Atkins v. Virginia, supra*, 536 U.S. 304, the Court articulated the reasons for its decision, adopting an approach which focused on how the mentally retarded offender — by reason of his or her psychiatric,

organic, and intellectual deficits — perceived, reacted to, and processed the world around him/her:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others .... There is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan .... Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.
>
> ... The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable — for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses — that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.
>
> ... Constructing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded offender.

(*Atkins v. Virginia*, *supra*, 536 U.S. at pp. 318, 320, 321.)

The United States Supreme Court has not addressed whether the Eighth and Fourteenth Amendments bar the execution of a person, such as appellant, who is impaired intellectually, significantly brain-damaged and severely

mentally ill.[48] However, *Atkins v. Virginia*, *supra*, 536 U.S. 304, and *Roper v. Simmons*, *supra*, 543 U.S. 551, support appellant's position that the death sentence in his case violates the federal Constitution.

In *Atkins*, the Court found that a national consensus existed against the execution of the mentally retarded. (*Atkins v. Virginia*, *supra*, 536 U.S. at pp. 311-317.) It also examined the moral culpability of mentally retarded persons and determined that, because of their impairments in reasoning, judgment, and control of their impulses, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. (*Id.* at pp. 317-320.) The Court also examined the acceptable goals served by the death penalty — retribution and deterrence — and concluded that, in light of the impairments and resultant diminished culpability of mentally retarded persons, a serious question exists as to whether the execution of such persons would measurably further those goals. (*Id.* at pp. 318-320.) The Court ultimately concluded that the lesser culpability of the mentally retarded "does not merit" a death sentence. (*Id.* at p. 319.)

In *Roper*, the Court applied a similar analysis and concluded that the Eighth and Fourteenth Amendments bar the execution of persons who were juveniles at the time of their crimes. (*Roper v. Simmons*, *supra*, 543 U.S. 551 at p. 578.) In addition to finding a national consensus against the execution

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[48] A number of courts have thus far refused to extend *Atkins* to the mentally ill. (See *In re Neville* (5th Cir. 2006) 440 F.3d 220, 223; *Diaz v. State* (Fla. 2006) 945 So.2d 1136, 1150-1151; *Lewis v. State* (Ga. 2005) 620 S.E.2d 778, 786; *State v. Johnson* (Mo. 2006) 207 S.W.3d 24, 51; *State v. Hancock* (Ohio 2006) 840 N.E.2d 1032, 1059-1060.) None of those cases involved a defendant, such as appellant, who presented clear and convincing evidence of brain damage, significant impairments in intellectual functioning, and severe mental disorders.

of juveniles (*id.* at pp. 564-567), the Court noted that juveniles are generally less mature and have an underdeveloped sense of responsibility and, as a result, tend to act impulsively and may make decisions without considering the consequences. They also tend to be more vulnerable to outside influences and negative pressures, including peer pressure, because they have less control, or less experience with control, over their surrounding environment. (*Id.* at pp. 569-570.) Based on those differences, and others, the Court concluded that the irresponsible behavior of juveniles could not be considered as "'morally reprehensible as that of an adult.'" (*Id.* at p. 569.) The Court further concluded, as it had in *Atkins*, that in light of the diminished culpability of juveniles, "the penological justifications for the death penalty apply to them with lesser force than to adults." (*Id.* at p. 571.)

Applying the principles set forth in *Atkins* and *Roper* to this case, the following conclusions must be reached: the death sentence meted out to appellant is incompatible with this nation's evolved standards of decency, is excessive and disproportionate to appellant's diminished culpability, and makes no measurable contribution to any acceptable goals of capital punishment.

First, the death sentence imposed on appellant is incompatible with this nation's evolved standards of decency. Both *Atkins* and *Roper* stressed that the meaning of the Eighth Amendment's prohibition on excessive or disproportionate punishment is not static: rather, it "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Atkins v. Virginia*, *supra*, 536 U.S. at pp. 311-312 [internal quotation marks omitted]; see also *Roper v. Simmons*, *supra*, 543 U.S. at p. 561.) The Court ascertains those standards, in part, by assessing whether a national consensus exists against the execution of certain individuals. (*Atkins*

v. Virginia, supra, 536 U.S. at pp. 311-317; *Roper v. Simmons, supra*, 543 U.S. at pp. 563-567.)

There is no legislative consensus against the execution of the severely mentally ill. However, legislative action is not the sole evidence of the nation's evolving standards of decency; evidence of a professional consensus against the execution of certain persons is also relevant. (See *Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21; *Roper v. Simmons, supra*, 543 U.S. at pp. 575-578.) Numerous national legal, medical, and psychological associations have spoken out against the execution of individuals with severe mental illness. The American Psychological Association, the American Psychiatric Association, the National Alliance for the Mentally Ill, and the American Bar Association have all passed resolutions urging the exemption of those with serious mental illness from the death penalty. (See American Bar Association, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities* (2006) 30 MENTAL & PHYSICAL DISABILITY L. REP. 668[49] [noting that the recommendation was previously adopted by the American Psychiatric Association, the American Psychological Association, and the National Alliance of the Mentally Ill (NAMI)]; see also Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier* (2009) 50 B.C. L.Rev. 785, 789-790, fn. 37.; *State v. Ketterer* (Ohio 2006) 855 N.E.2d 48, 86-87, 106 (Lundberg Stratton, J., conc. opn.).)

Other indicia of a national consensus against the execution of the severely mentally ill include a 2002 Gallup poll, where 75% of those surveyed

[49] Available at: http://www.iapsych.com/iqmr/abaposition2006.pdf

opposed executing such persons. (See *State v. Ketterer, supra*, 855 N.E.2d at p. 85 (Lundberg Stratton, J., conc. opn.) [providing Gallup poll data].) That poll is consistent with the actions of sentencing juries, another indicium of this nation's evolved standards of decency. In *State v. Nelson* (N.J. 2002) 803 A.2d 1, Justice Zazzali, in a concurring opinion, observed that an examination of jury verdicts in New Jersey capital sentencing trials showed a "growing reluctance to execute those whose mental disease . . . contributes to their difficulty in reasoning about what they are doing." (*Id.* at pp. 42-43 (Zazzali, J., conc. opn.).)

A broader social consensus against the execution of defendants with severe mental illness is evidenced by the fact that international human rights norms condemn, and customary international law prohibits, the death penalty for such persons. (See Winick, *supra*, 50 B.C.L.Rev. at pp. 818-819; Note, *Is The Death of the Death Penalty Near? The Impact of Atkins and Roper on the Future of Capital Punishment for Mentally Ill Defendants* (2007) 76 Ford. L.Rev. 465, 505-507.) International law provides "significant confirmation" of a social consensus against the execution of a person who is brain-damaged and severely mentally ill. (*Roper v. Simmons, supra*, 543 U.S. at p. 578; *Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21.)

Atkins and *Roper* clearly establish that the presence or absence of consensus is not dispositive; ultimately, the Court must bring its own judgment to bear on the issue. (*Atkins v. Virginia, supra*, 536 U.S. at p. 313; *Roper v. Simmons, supra*, 543 U.S. at p. 563; see also *Kennedy v. Louisiana* (2008) 554 U.S. 407, 421, 434-441.) When that judgment is applied to appellant's case, only one reasonable conclusion can be reached: appellant's psychiatric, organic and emotional impairments are, for Eighth Amendment

purposes, either identical to or more severe than the impairments associated with the mentally retarded and juveniles.

The label attached to an offender's mental disabilities should not determine whether his or her execution offends the Constitution. Rather, the real question should be whether the offender's crimes were committed with a healthy, functioning mind that was capable of well reasoned, considered and well thought out criminality, or whether the crimes were instead the product of a person whose brain chemistry, brain structure, and brain functioning were disordered in ways that left him/her with "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." (*Atkins v. Virginia*, *supra*, 536 U.S. at p. at p. 318.)

Appellant is not someone who is free of the kind of debilitating psychiatric, organic, emotional, and intellectual disorders that leave one fully in charge of his own destiny. The evidence is this case establishes that he is, instead, someone who has suffered from serious psychiatric, organic, emotional, and intellectual deficits since early childhood. The evidence of his disorders, impairments, and functional shortcomings is clear. From the damage that he suffered at the age of five when he was struck by a car on Pacific Coast Highway, to his very early treatment as a seven and eight year old by psychiatrists, to his confinement in psychiatric hospitals and facilities as an early adolescent — appellant has not functioned in this world as a whole healthy, human being. Something is seriously wrong with his brain and all that it produces. Testimony from his early treating psychiatrists — Doctors Resnikoff and Rabin — made it abundantly clear that the boy they were treating in the mid to late 1970s was one who met the substance of the *Atkins*

Court's ruling; i.e. that he was someone who, by reason of psychiatric, organic, and emotional deficits, had "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." (*Atkins v. Virginia*, *supra*, 536 U.S. at p. at p. 318.)

Both *Atkins* and *Roper* also stressed that a death sentence is excessive under the Eighth and Fourteenth Amendments if it makes no "measurable contribution" to either of the acceptable goals of capital punishment: retribution and deterrence of capital crimes. (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 319; see also *Kennedy v. Louisiana*, *supra*, 554 U.S. at p. 441.) Neither goal is measurably furthered in appellant's case. Retribution is inappropriate and deterrence would be ineffective for a person such as appellant. (See *Atkins v. Virginia*, *supra*, 536 U.S. at pp. 318-320; *Simmons v. Roper*, *supra*, 543 U.S. at pp. 571-572; see also *State v. Ketterer*, *supra*, 855 N.E.2d at pp. 84-85 (Lundberg Stratton, J., conc. opn.).)

On this record, appellant is not mentally retarded. He does not meet the criteria of that label as currently established in the Diagnostic and Statistical Manual for Mental Disorders. He is, however, a severely impaired person — one whose brain chemistry, brain functioning, and brain structure cause him to perceive, process, react to, and function in the world in an extraordinarily disordered manner. He did not choose to be this way. Between what nature gave him genetically, and his experiences in the world of family and environment, appellant became a severely disordered human being at a very early age.

We are diminished as a people when we fail to take those kinds of shortcomings into account. Executing a person who is as damaged as

appellant is at odds with the overwhelming perspectives, practices, and values of the global community, makes no "measurable contribution" to either of the acceptable goals of capital punishment — retribution and deterrence of capital crimes. Imposition of the death penalty on appellant is, therefore, contrary to the tenets expressed by the Supreme Court in *Atkins v. Virginia*, *supra*, 536 U.S. 304 and *Roper v. Simmons*, *supra*, 543 U.S. 551, and violates the cruel and unusual punishment clause of the Eighth Amendment to the Unites States Constitution. As discussed next, the death sentence also violates appellant's rights to due process and equal protection under the state and federal constitutions.

B. The Death Sentence Violates Appellant's Rights Under the Due Process and Equal Protection Clauses of the State and Federal Constitutions.

The equal protection clause of the Fourteenth Amendment requires that like cases be considered alike. (See *Vacco v. Quill* (1997) 521 U.S. 793, 799; *City of Cleburne, Tex. v. Cleburne Living Center* (1985) 473 U.S. 432, 439; *Plyler v. Doe* (1982) 457 U.S. 202, 216.) Classifications by state actors are not prohibited by that clause, but the state is forbidden from "treating differently persons who are in all relevant respects alike." (*Nordlinger v. Hahn* (1992) 505 U.S. 1, 10.)

The due process clause of the Fourteenth Amendment contains, in addition to a procedural component, a substantive component that protects fundamental rights from infringement by the states no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. (See *Reno v. Flores* (1993) 507 U.S. 292, 301-302; *Planned Parenthood of Southeastern Pa. v. Casey* (1992) 505 U.S. 833, 846-850.) The

California Constitution provides similar protections. (Cal. Const., art. I, §§ 7, 15 & 24.)

This Court has held that the federal and state guarantees of equal protection are substantially equivalent and are analyzed in a similar fashion. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 571-572.) In addition, the analysis of substantive due process claims is substantially similar to the analysis applied to equal protection claims. (See *Zablocki v. Redhail* (1978) 434 U.S. 374, 395 (Stewart, J., conc. opn.); *People v. Jenkins* (2000) 22 Cal.4th 900, 1053.) Therefore, the following analysis applies to both claims.

When state action burdens a fundamental right or targets a suspect class, that action receives heightened scrutiny under the Fourteenth Amendment's equal protection clause. (*Romer v. Evans* (1996) 517 U.S. 620, 631; see also *Washington v. Glucksberg* (1997) 521 U.S. 702, 720-721 [due process clause "provides heightened protection against government interference with certain fundamental rights and liberty interests"]; *In re Smith* (2008) 42 Cal.4th 1251, 1262-1263.) In this case, the interest or right involved is fundamental — appellant's life. (U.S. Const., 8th & 14th Amends.; see *Ohio Adult Parole Auth. v. Woodard* (1998) 523 U.S. 272, 288 (O'Connor, J., conc. opn.); *Tennessee v. Garner* (1985) 471 U.S. 1, 9.)[50]

To succeed on an equal protection claim, a person must show that "the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*In re Eric J.* (1979) 25 Cal.3d 522, 530,

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[50] In *Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, at pages 442 through 447, the high court concluded that mentally retarded persons were not a quasi-suspect class for equal protection purposes. In *Heller v. Doe* (1993) 509 U.S. 312, 319-321, the Court rejected an equal protection attack on a statute that allows commitment of persons with mental retardation on a lesser standard of proof than persons with mental illness.

emphasis in original; see also *City of Cleburne v. Cleburne Living Center, Inc.*, *supra*, 473 U.S. at p. 439.) In this case, the classification involves eligibility for the death penalty. A person such as appellant who is psychiatrically, organically, and emotionally disordered is eligible to be sentenced to death; a mentally retarded person or a juvenile is not, both by statute and by judicial decision. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 321; *Roper v. Simmons*, *supra*, 543 U.S. at pp. 578-579; Pen. Code,§190.5, subd. (a) Pen. Code, §1376.)

For purposes of equal protection and due process, this unequal treatment cannot survive any standard of review because it is not rationally based. As argued above, a person with brain damage and severe mental illness, has the same or worse impairments than a mentally retarded person or a juvenile. (See Slobogin, *What Atkins Could Mean for People With Mental Illness* (2003) 33 N.M. L.Rev. 293, 303-306.) "Although . . . there are psychological differences between people with mental retardation and people with mental illness, there are no significant, legally relevant differences between these two groups, or between them and children." (Slobogin, *Mental Illness and the Death Penalty* (2000) 1 Cal.Crim.L.Rev. 3, 7.) The culpability and deterrability of all three groups is equally diminished. Thus, there is no rational, legitimate, or compelling interest advanced by the state's disparate death-eligibility treatment of defendants who are brain-damaged and severely mentally ill. Permitting the state to execute a brain-damaged and severely mentally ill person, such as appellant, while barring the state from executing the mentally retarded and juveniles, violates appellant's right to equal protection and due process under the state and federal constitutions. (See *Cleburne v. Cleburne Living Center, Inc.*, *supra*, 473 U.S. at p. 439; *Washington v. Glucksberg*, *supra*, 521 U.S. at pp. 720-721; *Wolff v.*

McDonnell (1974) 418 U.S. 539, 558 ["The touchstone of due process is protection of the individual against arbitrary action of government"].)

C. Appellant's Death Sentence Must Be Reversed.

The death sentence meted out to appellant is excessive, disproportionate to his culpability, and makes no measurable contribution to retribution and deterrence. It also violates appellant's rights to due process and equal protection. Therefore, that sentence must be reversed, and the judgment modified to life imprisonment without possibility of parole. (See Pen. Code, §1181, subd. 7; Pen. Code, §1260.)

VIII.

CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

Prior to the penalty phase, the defense filed a motion to declare the death penalty unconstitutional arguing that the death penalty is at odds with evolving standards of decency that mark the progress of this country as a member of a much larger global community, and violates the Eighth Amendment's prohibition against cruel and unusual punishment. (16 CT 3779-3788.) The prosecution filed points and authorities in opposition. (16 CT 3815-3817.) At a hearing below the defense presented expert testimony from Professor Thomas Hilary Rice regarding the status of the death penalty within the international community. (100 RT 16148-16221.) The trial court ultimately rejected the defense's argument and denied the motion. (103 RT 16560.) However, as discussed more fully below, California's use of the death penalty as a regular form of punishment falls short of international norms of humanity and decency and violates the Eighth and Fourteenth Amendments.

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 (Brennan, J., dis. opn.);

Thompson v. Oklahoma, *supra*, 487 U.S. at p. 830 (Stevens, J., plur. opn.).) 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 of due process. "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. 268, 315 (Field, J., dis. opn.); *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. 367, 409.)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia*, *supra*, 408 U.S. at p. 420 (Powell, J., dis. opn.).) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100; *Atkins v. Virginia* (2002) 536 U.S. 304, 325.) It prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used

by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own.

In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the United States 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].) More recently, in finding that the Eighth Amendment now prohibits the execution of offenders under the age of 18, the Court observed: "Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.' [Citation.]" (*Roper v. Simmons* (2005) 543 U.S. 551.)

In 1958 when *Trop* was decided, most countries in the world authorized the death penalty as a form of punishment for crime. In fact, in the Court's opinion the issue of whether the death penalty represented excessive punishment for the crime of war-time desertion was rejected as a given. (*Trop v. Dulles, supra*, 356 U.S. at p. 99 ["Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime."].) However, in the years

since *Trop* was decided, the world has evolved into a vastly different place. The global community — and in particular that part of the global community with whom we share the most in common in terms of our culture, or Western heritage, our traditions, and our democratic principles — has overwhelmingly rejected the death penalty.

Today, the United States practices a form of punishment that 100 other countries, including nearly every democratic nation in the world, have abolished. At August of 2004 hearing in this case, Professor Rice testified that 81 countries had abolished the death penalty for all crimes, and that 14 additional countries had abolished the death penalty for ordinary crimes, reserving it for military crimes such as treason, war crimes or genocide. (100 RT 16165.) Professor Rice confirmed the accuracy of the information contained on the website www.handsoffcain (100 RT 16163), which is continually updated and now states:

> The worldwide trend towards abolition, underway for more than fifteen years, was again confirmed in 2012 and the first six months of 2013. There are currently 158 countries and territories that, to different extents, have decided to renounce the death penalty. Of these: 100 are totally abolitionist; 7 are abolitionist for ordinary crimes; 5 have a moratorium on executions in place and 46 are de facto abolitionist (i.e. Countries that have not carried out any executions for at least 10 years or countries which have binding obligations not to use the death penalty). Countries retaining the death penalty worldwide declined to 40 (as of 30 June 2013), compared to 43 in 2011. Retentionist countries have gradually declined over the last few years: there were 42 in 2010, 45 in 2009, 48 in 2008, 49 in 2007, 51 in 2006 and 54 in 2005.

(http://www.handsoffcain.info/bancadati/index.php?tipotema=arg&idtema =17308119 [as of June 30, 2013].) Outside of Cuba and a handful of small countries in the Caribbean, not one country in the Western Hemisphere

continues to execute its citizens. (*Ibid.*) Moreover, 44 of 45 countries in the Council of Europe have ratified Protocol 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty. (100 RT 16179-16181.) The only country in the Council of Europe which has not ratified Protocol 6 is Russia, which has imposed a moratorium on executions while the Duma studies the question of abolition. (100 RT 16182.) Of the countries that have abolished or abandoned the death penalty, more than 70 of them have done so since 1976. (100 RT 16174.)

The United States is one of 44 countries classified as "retentionist" countries.[51] Even if it could be said that capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of cases — as opposed to extraordinary punishment for extraordinary crimes such as war crimes, treason, and genocide — is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Thus, California's use of death as regular punishment violates the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

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[51] At the time of the hearing below Professor Rice testified that there were 63 retentionist countries. (100 RT 16167.) This figure has been updated according to the Hands Off Cain website information.

IX.

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

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

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. However, this analytic approach is constitutionally defective. As the United States Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6; see also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].)

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, each of

the missing procedural safeguards discussed in this section, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

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

Penal Code, section 190.3, subdivision (a), violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a 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) directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to this provision 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.[52] The Court has allowed factor (a) to have an extraordinary sweep, approving reliance upon it to support aggravating factors based upon

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[52] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3 and CALCRIM No. 763(a).

the defendant's having sought to conceal evidence three weeks after the crime,[53] or having had a "hatred of religion,"[54] or threatened witnesses after his arrest,[55] or disposed of the victim's body in a manner that precluded its recovery.[56] Factor (a) also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

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

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa v. California*, *supra*, 512 U.S. at pp. 986-990 (Blackmun, J., dis. opn.).) 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

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

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

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

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

homicide — into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in the 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 factor of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal Constitution.

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

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (Pen. Code, § 190.2) or in its sentencing guidelines (Pen. Code, § 190.3). (See Argument VI, *ante*.) Penal Code section 190.3, subdivision (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. (See Subsection A, *ante*.)

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death.

Juries do not have to 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. They do not have to make written findings or achieve unanimity as to aggravating circumstances. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make — whether or not to condemn a fellow human to death.

1. California's Death Penalty Scheme Violates the Sixth Amendment Right to Jury Trial Because California Does Not Require the Jury to Find Beyond a Reasonable Doubt, and Unanimously (or by a Majority), That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence. All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that

they outweigh mitigating factors . . ." This pronouncement, however, is squarely inconsistent with the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Ring v. Arizona* (2002) 536 U.S. 584; *Blakely v. Washington* (2004) 542 U.S. 296; and *Cunningham v. California* (2007) 549 U.S. 270.

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. (530 U.S. 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 the judge found at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 593.) The Court acknowledged that a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639), upheld the law on the basis that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 598.) The Court found that in light of *Apprendi*, *Walton* was no longer good law. ***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* on 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 p. 299.) By statute the State of Washington set forth illustrative factors including aggravating circumstances one of which was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Id.* at pp. 299-300.) The Supreme Court ruled that allowing the judge to find the "substantial and compelling reasons" necessary to impose a greater sentence than was authorized by the jury's verdict alone was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 313.) In reaching this decision, the Court emphasized that the governing rule since *Apprendi* is that, other than a prior conviction, ***any*** fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt, and that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose ***without*** any additional findings." (*Id.* at p. 304 [emphasis in original].)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, Justice Stevens, writing for a 5-4 majority, ruled 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* reiterated 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 v. California, supra,* the high court rejected this Court's interpretation of *Apprendi*, and held 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. 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.

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

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality relied upon as an aggravating circumstance. (See *People v. Fairbank* (1997) 16 Cal.4th 1223; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].) California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, Penal Code 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.

As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was provided to the jurors in the present case, "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*. . . . " (16 CT 3737-3738; CALJIC No. 8.88 [emphasis added].) The jurors were further informed: "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 in prison without parole. (16 RT 3738.) Thus, before the process of weighing aggravating factors against mitigating factors can begin, one or more aggravating factors must be found by the jury, and before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[57] 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.[58]

This Court has repeatedly rejected 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; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) However, it had applied precisely the same analysis to fend off *Apprendi* and

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[57] 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)

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

Blakely in non-capital cases until the United States Supreme Court explicitly rejected that reasoning in *Cunningham*.

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

In *Cunningham* the principle that any fact which exposes 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 used to justify increased punishment were factual in nature, and concluded they were, after a review of the relevant rules of court. (549 U.S. at pp. 276-279.) That was the end of the matter, and the *Black* court should not have proceeded to ask whether finding those facts was traditionally used by sentencing judges. The Court held that *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]." (*Id.* at pp. 290-291) *Cunningham* then examined this Court's extensive explanation of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that this was "comforting, but beside the point." (*Id.* at p. 293.)

> 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, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line").

(*Cunningham v. California, supra,* 549 U.S. at p. 291.) *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."'" (*Cunningham v. California, supra,* 549 U.S. at p. 289 [quoting *Black, supra,* 35 Cal.4th at p. 1253 (Kennard, J., conc. & dis. opn.)].) In the wake of *Cunningham*, it is clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, the sole relevant question is whether or not there is a requirement that factual findings be made before a death penalty can be imposed.

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

[citation], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) However, Arizona had advanced precisely the same argument in *Ring*, and it was rejected by the Court.

In *Ring*, Arizona pointed out that a finding of first degree murder in that state, like a finding of guilt plus one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and it argued that Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected the argument: "This argument overlooks *Apprendi*'s instruction that 'the relevant inquiry is one not of form, but of effect.' [Citation]. 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.' [Citation.]" (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring v. Arizona*, *supra*, 530 U.S. at p. 604.) Penal Code section 190, subdivision (a), provides that the punishment for such a crime is life without possibility of parole, or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5." Neither LWOP nor death can be imposed unless the jury finds a special circumstance. (Pen. Code, §190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Pen. Code, §190.3; CALJIC No. 8.88 (7th Ed., 2003).) It cannot be assumed that a special circumstance suffices as the

aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC No. 8.88), and this Court has recognized that a particular special circumstance can even be argued to the jury as a *mitigating* circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835 [financial gain special circumstance (Pen. Code, § 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].)

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency,[59] while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances.[60] There is no meaningful difference between the processes followed under each scheme.

"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

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[59] Ariz.Rev.Stat.Ann. section 13-703(E) provides: "In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

[60] Section 190.3 provides in pertinent part: "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 circumstances outweigh the mitigating circumstances."

it — must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604.) In *Blakely*, the high court made it clear that, as Justice Breyer pointed out, " 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." (542 U.S. at p. 328 [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."

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32; citing *People v. Anderson*, *supra*, 25 Cal.4th at pp. 589-590, fn.14.) The Court has repeatedly sought to reject *Ring's* applicability 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. Prieto*, 30 Cal.4th at p.275; *People v. Snow*, 30 Cal.4th at p. 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are *no* facts, in Arizona or California, that are "necessarily determinative" of a sentence — in both states, the sentencer is free to impose

a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death — no single specific factor must be found in Arizona or California. Additionally, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. And *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal constitution.

In *Prieto*, the Court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' [Citation.] No single factor therefore determines which penalty — death or life without the possibility of parole — is appropriate." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263 [emphasis added].) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present — otherwise, there is nothing to put on the scale in support of a death sentence. (See, *People v. Duncan* (1991) 53 Cal.3d 955, 977-978.)

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. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, as noted above, the Arizona Supreme Court has found that this weighing process 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 ["Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency."]; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo. 2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.[61])

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make the finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own — a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the state's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely v. Washington*, *supra*, 542 U.S. at p. 305.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a

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[61] 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 mitigating circumstances are sufficiently substantial to call for leniency since both findings are essential predicates for a sentence of death).

Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi*, *Ring* and *Blakely* are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC No. 8.88? The maximum sentence would be life without possibility of parole. (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence would still be life without possibility of parole unless the jury made an additional finding — that the aggravating circumstances substantially outweigh the mitigating circumstances.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*People v. Prieto*, 30 Cal. 4th at 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed.

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." [Citation.] The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting states more leeway under the Fifth and Sixth Amendments in proving an

> aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence."

(*Ring v. Arizona*, *supra*, 536 U.S. at p. 606, quoting with approval Justice O'Connor's *Apprendi* dissent, 530 U.S. at 539.)

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 ["the death penalty is unique in both its severity and its finality"].)[62] As the high court stated in *Ring*, *supra*, 536 U.S. at pp. 608-609:

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

The final 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 eliminate procedural protections that would render the decision a rational and reliable one. By failing to impose a

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[62]The *Monge* court, in explaining its decision not to extend the double jeopardy protection it had applied to capital sentencing proceedings to a noncapital proceeding involving a prior-conviction sentencing enhancement, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* (1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 [emphasis added].)

requirement that at least one aggravating factor exists, and that aggravating factors outweigh mitigating factors, this Court allows the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

b. The Requirements of Jury Agreement and Unanimity

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; *accord, People v. Bolin* (1998) 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to appellant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor — including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[63] And it violates

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[63] See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in

the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the final deliberative process in which the ultimate normative determination is made. In *Ring* and *Blakely* the United States Supreme Court has made clear that such factual findings must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. These protections include jury unanimity.

The Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.[64]) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at p. 732;[65] *accord, Johnson v. Mississippi* (1988) 486 U.S. 578, 584), the Sixth,

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constitutionality determination]; *Den ex dem. Murray v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

[64] In a non-capital context, the high court has upheld the verdict of a twelve member jury rendered by a vote of 9-3. (*Johnson v. Louisiana* (1972) 406 U.S. 356; *Apodaca v. Oregon* (1972) 406 U.S. 404.) Even if that level of jury consensus were deemed sufficient to satisfy the Sixth, Eighth, and Fourteenth Amendments in a capital case, California's sentencing scheme would still be deficient since, as noted above, California requires no jury consensus at all as to the existence of aggravating circumstances.

[65] The *Monge* court developed this point at some length, explaining as follows: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate

Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., Pen. Code, §§ 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and certainly no less (*Ring v. Arizona*, 536 U.S. at p. 609).[66] (See Subsection C, *post.*)

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[67] To apply the requirement

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punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida* 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington,* 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (*Monge v. California*, *supra*, 524 U.S. at pp. 731-732.)

[66] Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).)

[67] The first sentence of article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See

to findings carrying a maximum punishment of one year in the county jail — but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) — would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. *The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.*

(526 U.S. at p. 819 [emphasis added].)

People v. Wheeler (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and did not do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne, supra,* 4 Cal.4th 43; *People v. Hayes* (1990) 52 Cal.3d 577, 643.) However, *Ring* and *Blakely* make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

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

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

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

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general, and the jury in particular, the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" the decision is appropriate. (*In re Winship*, *supra*, 397 U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 743, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value" (*Speiser v. Randall*, *supra*, 375 U.S. at p. 525), how much more transcendent is human life itself! Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *In re Winship*, *supra*, 397 U.S. 358 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Cal.3d 306 [same]; *People v. Thomas* (1977) 19 Cal.3d 630 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that

our social commitment to the sanctity of life, and the dignity of the individual, be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure" (*Santosky v. Kramer*, *supra*, 455 U.S. at p. 755), the United States Supreme Court reasoned:

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

(455 U.S. at p. 755.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky v. Kramer*, *supra*, 455 U.S. at p. 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of

convictions resting on factual error." (*In re Winship, supra*, 397 U.S. at p. 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) 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.

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) No greater interest is ever at stake; see *Monge v. California, supra*, 524 U.S. at p. 732 ["the death penalty is unique in its severity and its finality"].) In *Monge*, the 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.' [Citations.]" (*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 that not only are the factual bases for its decision true, but that death is the appropriate sentence.

Appellant is aware that this Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See *People v. Griffin* (2004) 33 Cal.4th 536, 595; *People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (Conn. 2003) 833 A.2d 363, 408-409, fn. 37.)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama, supra*, 447 U.S. at pp. 637-638.) No greater interest is ever at stake. (See *Monge v. California, supra*, 524 U.S. at p. 732 ["the death penalty is unique in its severity and its finality"].) Under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

3. ***California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Make Written Findings Regarding Aggravating Factors Upon Which Its Death Verdict Is Based.***

The failure to require written or other specific findings by the jury regarding the aggravating factors it relied on deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra,* 16 Cal.4th at p. 1255-1256), there can be no meaningful appellate review without written findings because it is otherwise impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

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

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

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Pen. Code, § 1170, subd. (c).) Capital defendants are entitled to ***more*** rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra,* 536 US at p. 609), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found as the reasons for choosing the death penalty.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland,* for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., 486 U.S. at 383, fn. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes, supra,* 52 Cal.3d at p. 643) and "moral" (*People v.*

Hawthorne, *supra*, 4 Cal.4th at p. 79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[68]

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. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3,

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[68]See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. §5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. §53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. §921.141(3) (West 1985); Ga. Code Ann. §17-10-30(c) (Harrison 1990); Idaho Code §19-2515(e) (1987); Ky. Rev. Stat. Ann. §532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, §413(I) (1992); Miss. Code Ann. §99-19-103 (1993); Mont. Code Ann. §46-18-306 (1993); Neb. Rev. Stat. §29-2522 (1989); Nev. Rev. Stat. Ann. §175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. §630:5(IV) (1992); N.M. Stat. Ann. §31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, §701.11 (West 1993); 42 Pa. Cons. Stat. Ann. §9711 (1982); S.C. Code Ann. §16-3-20(c) (Law. Co-op. 1992); S.D. Codified Laws Ann. §23A-27A-5 (1988); Tenn. Code Ann. §39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. §37.071(c) (West 1993); Va. Code Ann. §19.2-264.4(D) (Michie 1990); Wyo. Stat. §6-2-102(e) (1988).

the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. (See Subsection B1, *ante*.) Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

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

The Eighth Amendment 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, 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*." (*Id.* at p. 51 [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. (*Pulley v. Harris*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of Penal Code section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See Arguments IV and VI, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Subsections B1-B3, *ante,* and Subsection C, *post*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Subsection A, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*, 548 U.S. 163), this absence renders the scheme unconstitutional.

Penal Code section 190.3 does not require that either the trial court or this Court undertake a comparison between the case at bar and other similar cases regarding the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court (see, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947), and violates the Eighth Amendment.

C. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants That Are Afforded to Non-capital Defendants.

As noted in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at 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 [emphasis added].) "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." (*Commonwealth v. O'Neal* (Mass. 1975) 327 N.E.2d 662, 668.)

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. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v.*

Olivas, *supra,* 17 Cal.3d 236; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification must be more strict, and any purported justification by the State of the discrepant treatment must 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 for capital defendants.

In *Prieto*,[69] as in *Snow*,[70] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. 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.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., Pen. Code, §§ 1158, 1158a.) When a California judge is considering which sentence is appropriate, the

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[69] "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.*" (*People v. Prieto*, *supra*, 30 Cal.4th at 275 [emphasis added].)

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

decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

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 sections B1-B3, *ante*.) Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. Further, unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See section B3, *ante*.) These discrepancies on basic procedural protections are skewed against persons subject to loss of life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) In stark contrast to *Prieto* and *Snow*, there is no hint in *Allen* that capital and non-capital sentencing procedures are in any way analogous. In fact, the decision rested on a depiction of fundamental differences between the two sentencing procedures.

The Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived,

is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen, supra*, 42 Cal. 3d at p. 1286.) But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses. (*Coker v. Georgia, supra*, 433 U.S. 584) or offenders (*Enmund v. Florida* (1982) 458 U.S. 782; *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra,* 536 U.S. 304.) Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See Pen. Code, § 190.4; *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.)

The second reason offered by *Allen* for rejecting the equal protection claim was that the range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen, supra*, 42 Cal.3d at p. 1287 [emphasis added].) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures

aspire to a heightened standard of reliability [citation]. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright, supra*, 477 U.S. at p. 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina*, supra, 428 U.S. at p. 305 [opn. of Stewart, Powell, and Stephens, J.J.]; see also *Reid v. Covert* (1957) 354 U.S. 1, 77 [conc. opn. of Harlan, J.]; *Kinsella v. United States* (1960) 361 U.S. 234, 255-256 [conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.]; *Gregg v. Georgia, supra*, 428 U.S. at p. 187 [opn. of Stewart, Powell, and Stevens, J.J.]; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Lockett v. Ohio, supra*, 438 U.S. at p. 605 [plur. opn.]; *Beck v. Alabama, supra*, 447 U.S. at p. 637; *Zant v. Stephens, supra*, 462 U.S. at pp. 884-885; *Turner v. Murray* (1986) 476 U.S. 28, 90 L.Ed.2d 27, 36 [plur. opn.], quoting *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Harmelin v. Michigan, supra*, 501 U.S. at p. 994; *Monge v. California, supra*, 524 U.S. at p. 732.)[71] The qualitative

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[71] The *Monge* court developed this point at some length: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington*, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have

difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply procedural safeguards used in noncapital settings to capital sentencing.

Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. (*People v. Allen, supra*, 42 Cal.3d at p. 1287.) The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference – and one that was recently rejected by this Court in *Prieto* and *Snow*. A trial judge may base a sentence choice under the DSL on factors that include precisely those considered as aggravating and mitigating circumstances in a capital case. (Compare Pen. Code, § 190.3, subds. (a) through (j), with California Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate *all* sentencing choices.

The equal protection clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights, and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000) 531 U.S. 98.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

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consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (*Monge v. California, supra*, 524 U.S. at pp. 731-732.)

The fact that a death sentence reflects community standards has also been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, e.g., *Atkins v. Virginia*, *supra,* 536 U.S. 304.)

Nor can this fact justify the refusal to require written findings by the jury — considered by this Court to be the sentencer in death penalty cases (*People v. Allen*, *supra*, 42 Cal.3d at p. 1286) — or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (*Blakely v. Washington*, *supra*, 542 U.S. 296; *Ring v. Arizona*, *supra*, 536 U.S. 584.)[72]

California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due

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[72]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 v. Arizona*, *supra*, 536 U.S. at p. 609.)

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 at p. 421; *Ring v. Arizona, supra*, 536 U.S. 584.)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California, supra,* 524 U.S. 721.) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

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

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented evidence regarding 12 other individuals alleged to have been victims of prior crimes committed by appellant, 9 of which involved unadjudicated criminal activity. Appellant sustained convictions in connection with the events involving Robert M., Michael A. and Jennifer M. A substantial portion of the prosecution's closing argument was devoted to prior misconduct by appellant. (92 RT 15005-15018.)

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

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

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

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

As a matter of state law, most of the factors introduced by a prefatory "whether or not" — factors (d), (e), (f), (g), (h), and (j) — were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034.) The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus

invited to aggravate the sentence upon the basis of irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra*, 428 U.S. at p. 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.) Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

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

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. [Citations.] Indeed, "*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.*" [Citation.]

(*People v. Morrison* (2004) 34 Cal.4th 698, 730 [emphasis added].) This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.* at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same

way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest — the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) — and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 [holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment]; and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].) This also violated the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the pattern jury instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

G. The Trial Court's Failure to Delete Inapplicable Sentencing Factors From the Jury Instructions Violated Appellant's Constitutional Rights.

Most of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case.[73] Nevertheless, the trial court overruled a defense objection and refused to delete those inapplicable factors from the instruction. (15 CT 3685, 3688 [defense proposed modification]; 91 RT 14893-14900, 14901-14907, 14911-14912.) However, including these irrelevant factors in the statutory list introduced confusion, capriciousness, and unreliability into the capital decision-making process, in violation of appellant's rights under the Sixth, Eighth, and Fourteenth Amendments. Appellant recognizes that this Court has rejected similar contentions (see, e.g., *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064), but requests reconsideration for the reasons given below. In addition, appellant raises the issue to preserve it for federal review.

Including inapplicable statutory sentencing factors was harmful in a number of ways. First, only factors (a), (b), and (c) may lawfully be considered in aggravation. (See *People v. Gurule* (2002) 28 Cal.4th 557, 660.) However, the "whether or not" formulation used in CALJIC No. 8.85 given in this case suggested that the jury could consider the inapplicable factors for or against appellant. Moreover, instructing the jury on irrelevant

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[73] Those inapplicable factors included: factor (e) ["Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act"]; factor (f) ["Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct"]; factor (g) ["Whether or not the defendant acted under extreme duress or under the substantial domination of another person"]; factor (i) ["The age of the defendant at the time of the crime"]; and, factor (j) ["Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor"]. (See 13 CT 3114-3115.)

matters dilutes the jury's focus, distracts its attention from the task at hand, and introduces confusion into the process. Such irrelevant instructions also create a grave risk that the death penalty will be imposed on the basis of inapplicable factors. Finally, failing to delete factors for which there was no evidence at all inevitably denigrated the mitigation evidence which was presented. The jury was effectively invited to sentence appellant to death because there was evidence in mitigation for one factor, whereas there was either evidence in aggravation or no evidence at all with respect to all the rest.

In no other area of criminal law is the jury instructed on matters unsupported by the evidence. Indeed, this Court has said that trial courts have a "duty to screen out invalid theories of conviction, either by appropriate instruction or by not presenting them to the jury in the first place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.) The failure to screen out inapplicable factors here required the jurors to make an ad hoc determination on the legal question of relevancy and undermined the reliability of the sentencing process.

The inclusion of inapplicable factors also deprived appellant of his right to an individualized sentencing determination based on permissible factors relating to him and to the crime. In addition, that error artificially inflated the weight of the aggravating factors and violated the Sixth, Eighth, and Fourteenth Amendment requirements of heightened reliability in the penalty determination. (*Ford v. Wainwright* (1986) 477 U.S. 399, 411, 414; *Beck v. Alabama, supra*, 447 U.S. at p. 637.) Reversal of appellant's death judgment is required.

CONCLUSION

For the reasons set forth herein, the judgment of conviction and sentence of death must be reversed.

Respectfully submitted,

Kimberly J. Grove
Attorney for Appellant

CERTIFICATION OF WORD COUNT

I, Kimberly J. Grove, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 63,539 words, excluding the tables and this certificate. This document was prepared in WordPerfect, and this is the word count generated by the program for this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 2, 2014, at Ligonier, Pennsylvania.

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Kimberly J. Grove

DECLARATION OF SERVICE

I, the undersigned, declare:

I am a citizen of the United States, over 18 years of age, employed in the county of Westmoreland, Pennsylvania, in which county the within-mentioned delivery occurred, and not a party to the subject cause. My business address is P.O. Box 425, Ligonier, Pennsylvania. I served the Appellant's Opening Brief by placing a copy in an envelope for the addressee named hereafter, addressed as follows:

The Honorable Kenneth K. So
Superior Court
220 West Broadway
San Diego, CA 92101

Robin Urbanski
Deputy Attorney General
P.O. Box 85266
San Diego, CA 92186

Valerie Summers
Deputy District Attorney
330 West Broadway
San Diego, CA 92101

Scott Thomas Erskine
P.O. Box J-16985
San Quentin, CA 94974

California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

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Executed on April ___, 2014, at Ligonier, Pennsylvania.

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Kimberly J. Grove