IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **MANUEL BRACAMONTES,** **Defendant and Appellant.**	**Supreme Court No. S139702** **San Diego County** **Sup. Ct. No. SCD178329**

APPELLANT'S OPENING BRIEF

On Appeal from the Judgment of the Superior Court of the State of California for the County of San Diego Honorable John M. Thompson, Judge

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STATEMENT OF APPEALABILITY

This automatic appeal is from a final judgment imposing a death sentence. (Pen. Code, § 1239, subd. (b).) [1]

INTRODUCTION

On June 19, 1991, around 9:00 p.m., nine-year-old Laura Arroyo, dressed in pink pajamas, was upstairs in her family's condominium in Chula Vista. The doorbell rang, and Laura ran downstairs. Ten minutes later, her mother came downstairs and Laura was gone. The following morning, her body was found in front of an industrial complex several miles from her home. She had been stabbed, bludgeoned, and likely strangled. Her clothing was intact and both the medical examiner and the police concluded that she had not suffered a sexual assault.

[1] All further statutory references will be to the Penal Code, unless otherwise specified

There was no physical evidence tying appellant to the crime. The medical examiner and the FBI laboratory found that there was no semen or sperm on the victim or her clothes; nor was appellant's DNA otherwise present. Appellant was repeatedly questioned, but was not arrested. Twelve years later, in 2003, San Diego County received funds for "cold-hit DNA" investigations. The case was re-opened and, for the first time, sperm matching appellant's DNA was found all over the victim's pajama top and on swabs taken from her body. Based on the DNA evidence, appellant was arrested and convicted of first degree murder with special circumstances, and was sentenced to death. He has steadfastly maintained his innocence.

This case presented the jury with a seemingly insoluble puzzle. On the one hand was the prosecution's argument that you simply cannot argue with DNA evidence. On the other hand, the balance of the evidence uncovered in the police investigation refused to add up in a way that would convincingly establish that appellant was the perpetrator. As the prosecution's expert explained, the molestation and murder of Laura Arroyo would have been horribly messy, and he concluded that much of it took place in a vehicle. But repeated searches of appellant's car, as well as his residence, clothing and effects, failed to turn up any trace of the victim – no hair, no blood, no residue from her clothing, no DNA. Similarly, the timeline established by the evidence made it highly improbable that appellant could have been the person who abducted the victim, struggled with her, molested her, killed her and disposed of her body. Less than an hour after Laura disappeared, appellant's girlfriend – who was a neighbor of the victim – called him at his parent's house and asked him to come over to the condominium complex. When he arrived minutes later, he had neither showered nor was he particularly dirty.

In addition, one of the police detectives in charge of the investigation testified regarding what police could depend on finding when a pedophile commits such a crime: photos and videos of child pornography; newspaper clippings or other information regarding the crime; mementos of the victim; and – most important – indications that the perpetrator had committed other acts against children or otherwise evinced sexual interest toward children.[2] Neither the searches nor witness interviews turned up anything of that sort regarding appellant; rather, by all accounts he was a good father and stepfather and a valued and trusted adult influence in an extended family with many children.

Thus, despite the DNA evidence, it took the jury two and one-half days of deliberations – and readbacks of testimony regarding the timeline – before returning a guilty verdict. Their path to that verdict, and to their subsequent death verdict, was greatly eased by a series of errors committed by the trial court.

The first and most obvious of the trial court's errors was in ordering appellant shackled in full view of the jury throughout the proceedings. In doing so, the court telegraphed a view that appellant was so dangerous that he had to be restrained, like an aggressive animal. The visible restraints poisoned the well of reasonable doubt available to the jury in determining whether appellant had indeed committed the crime, and it skewed penalty phase deliberations by demonstrating that, even in custody, appellant was, and forever would remain, a danger to others.

This initial error was amplified by the trial court's refusal to permit the jury to consider the fact that appellant had not fled for a dozen years as

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[2] Another tell-tale sign the police were looking for was whether appellant would visit the victim's grave around the time of the anniversary of her death. They put him under surveillance, but he made no such visit.

evidence that he lacked "consciousness of guilt," even though it instructed the jury that appellant's ultimate efforts to avoid arrest supported the inference that he was indeed guilty. The jury's analysis of the case was further distorted by the trial court's erroneous refusal to allow the defense to provide evidence and argue the likelihood that the crime was in fact committed by a third person or persons. The defense efforts to investigate the alternate perpetrator, or perpetrators, were in turn hobbled by the prosecution's utterly unjustified delay in taking 12 years to bring charges – despite having in hand, in 1991, all of the evidence upon which it ultimately founded its case. An equally, if not more, pernicious effect of that unjustified delay was that it effectively precluded the defense from assembling a complete life story of appellant for use in the penalty phase. Finally, paired with the trial court's error in refusing to dismiss the capital allegations on grounds of prosecutorial delay, was its decision to allow a range of "victim impact" testimony that far exceeded the limits tolerated by constitutional due process.

These many errors, separately and together, encouraged the jury to come to verdicts that it likely would not otherwise have reached. Because the judgment in this case followed from repeated violations of appellant's state and federal constitutional rights, it should be reversed.

STATEMENT OF THE CASE

On March 2, 2004, the San Diego County District Attorney filed an information in the San Diego County Superior Court. Appellant was charged, in Count One, with the murder of Laura Arroyo on or about June 19, 1991, in violation of Penal Code section 187, subdivision (a). Three felony-murder special circumstances were alleged under section 190.2, subdivision (a)(17): a killing in the commission and attempted commission of (1) kidnaping in violation of sections 207 and 209, (2) oral copulation in

violation of section 288a, and (3) the performance of a lewd and lascivious act upon a child under the age of 14 in violation of section 288. Count One also alleged that appellant used a deadly and dangerous weapon in violation of section 12022, subdivision (b): "to wit, pick axe like tool." (1 CT 9.)[3]

Counts Two through Five of the information referred to events that occurred in the course of appellant's arrest on October 25, 2003. In Count Two, appellant was charged with "assault on a peace officer, J. Picone, who was engaged in the performance of his duties. (§ 245, subd. (c)." Count Three charged appellant with "attempting to evade a pursuing officer. (Veh. Code, § 2800.2, subd. (a))." Count Four alleged that appellant committed another "assault on a peace officer, M. Evans, who was engaged in the performance of her duties. (§ 245, subd. (c).) Finally, appellant was charged in Count Five with "unlawful possession of a controlled substance. (Health & Saf. Code, § 11377, subd. (a).)" (1 CT 9-10.)

At his arraignment on March 15, 2004, appellant entered a plea of not guilty to all counts, and denied all the special allegations. (3 RT 306.) On May 28, 2004, the prosecution filed a Notice of Evidence in Aggravation. The notice referred to the circumstances of the crimes alleged in the information, victim impact evidence, and an alleged act of domestic violence by appellant in 1996. (1 CT 82-83.)

On February 14, 2005, appellant filed a demurrer to Counts Three and Five. (5 CT 1116-1122; Veh. Code, § 2800.2, subd. (a); Health & Saf. Code, § 11377, subd. (a).) The trial court sustained the demurrer and dismissed Counts Three and Five; Count Four was renumbered as Count Three. (10 CT 2034; 5 RT 629-630.)

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[3] "CT" refers to the clerk's transcript on appeal; and "RT" refers to the reporter's transcript on appeal.

Jury selection began on August 5, 2005, and the guilt phase of the trial began on August 15, 2005. (10 CT 2078-2103.) The jury received guilt phase instructions on August 30, 2005. (8 CT 1737-1801.) During deliberations, the jury sent out two notes. (10 CT 2105, 2108.)[4]

On September 1, 2005, following two and one-half days of deliberations (10 CT 2104-2109), the jury returned verdicts finding appellant guilty of murder in violation of section 187, subdivision (a), and finding the special circumstances and personal use of a deadly weapon allegations to be true. The jury found appellant guilty of Count Two, assaulting Officer Picone, but acquitted him of Count Three, the alleged assault on Officer Evans. (10 CT 2111-2115.)

The penalty phase began on September 14, 2005, and continued through September 21, 2005, when the jury was instructed. (10 CT 2120-2130; 9 CT 1896-1931.) Following fourteen hours of deliberations over the course of three days the jury returned a verdict stating "that the penalty shall be death." (10 CT 2129- 2133.)

On December 7, 2005, the defense filed a motion for a new trial pursuant to section 1181. (9 CT 1936-1942.) On December 14, 2005, a hearing was held on that motion and on appellant's automatic motion to modify the verdict. (§ 190.4, subd. (e).) The trial court denied both motions (10 CT 2138-2141; 47 RT 4141-4169), and sentenced appellant to

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[4] The first note requested a copy of the exhibit list; the trial court provided a redacted list. (10 CT 2104-2105.) The second note asked for the transcript of a portion of the testimony of the victim's mother (also named Laura Arroyo) and of a detective who testified regarding what Mrs. Arroyo told him when he interviewed her after the victim's abduction, and what various other witnesses told him regarding when they saw appellant present at the condominium complex, and when he left, on the night young Laura Arroyo was abducted and murdered. (26 RT 2078-2089.)

death for Count One, but struck the personal use of a deadly weapon allegation. (§12022, subd. (b).) With respect to Count Two, the assault conviction, the court imposed the midterm of four years, to be served concurrently with count one. (10 CT 1984-1988, 2139-2144; 47 RT 4164-4166.)

This automatic appeal followed. (§ 1239, subd. (b).)

STATEMENT OF FACTS

A. THE GUILT PHASE

1. The Disappearance of Laura Arroyo

Laura Arroyo, then nine years old, lived with her parents and two brothers in an 80-unit condominium complex on Monterey Pine, in Chula Vista, California. (28 RT 2381.) The children attended Nicoloff Elementary School in San Ysidro. (25 RT 1999-2001.)

On Wednesday, July 19, 1991, Laura came home from school at about around 2:40 p.m., and took a shower. She dressed in a pink pajama shirt and pants, and went outside to play with her friends Leonar Gomez and Elizabeth Alcarez. (25 RT 1999-2001; 30 RT 2591-2594.) The victim's father, Luis Arroyo, returned home from work at approximately 8:30 p.m. (25 RT 1975-1976; 30 RT 2072.) On his way to his apartment, he saw Laura with her friends, picked her up and gave her a hug. Laura asked if she could stay out a little longer and he agreed. (30 RT 2596-2598.) The girls played until it got dark. Shortly before 9:00, Elizabeth Alcarez walked Laura home, saw her go inside and heard the door click shut. (25 RT 2033-2034, 2036, 2039.) The Arroyos's apartment had a metal security door as well as a wooden door, and the porch light was on. (25 RT 2036, 2039-2040.)

Laura went upstairs and joined her mother[5] watching television in her brothers' room. Five minutes later, the doorbell rang, and Laura ran downstairs. Mrs. Arroyo heard her say, "Who is it? Who is it?," and heard nothing else after that. (25 RT 2003-2004, 2015.) When Mrs. Arroyo went downstairs she saw that the door was barely ajar, as was the screen door. She went to the kitchen, and started cooking. When her husband and sons came downstairs, she asked, "Where's Laura? The girl is not here." Laura's shoes were by the front door. Mrs. Arroyo sent one of her sons to look for her across the street. When he returned, the whole family went outside to look for her at her friends' homes. They searched for about 30 minutes, but could not find her. (25 RT 1979-1981, 1995 2005-2006, 2020.)

At 9:31 p.m., Luis Arroyo telephoned 911. An officer was dispatched at 9:41 p.m. and arrived at the Monterey Pine condominium complex five minutes later. (26 RT 2090-2094.) The police went door-to-door in the complex, and neighbors joined in the search. (25 RT 2043-2045; 31 RT 2731-2733.) Mr. Arroyo went to the place where he worked, a towing company, and printed up flyers to post and distribute. They searched for Laura all night. (25 RT 1981-1982.)

2. The Discovery of the Body

At 6:30 the following morning, a woman arriving for work at a factory on Bay Boulevard, in Chula Vista – some three and a half miles from the Monterey Pine complex – saw the feet of "a woman" on the ground near some trees. (26 RT 2095-2097.) She phoned the owner of the factory (*ibid.*), and the police were summoned. Two police officers, a

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[5] As previously noted, the victim's mother was also named Laura; to avoid confusion she will be referred to as "Mrs. Arroyo."

firefighter and a paramedic came to the scene and found Laura Arroyo, lying on her back, dead. (26 RT 2098-2101.) She was still dressed in her pink pajamas and underpants. (28 RT 2381-2382.)

The responding officers secured the area as a crime scene and called for detectives. (28 RT 2381-2382.) In the course of the ensuing investigation at the site, the detectives interviewed the property manager of the building in front of which the body was found. He had driven through the parking lot twice during the night before, at approximately 7:15 and 10:45 p.m., to check whether the lighting was on. One light was out, near where the body was left. (30 RT 2628-2630; 2632.) The manager regularly checked the area because they had recently had problems with "undesirable people" hanging around there. (30 RT 2631.) When the police interviewed him the following morning, the property manager noticed beer cans nearby that had not been there the night before, as well as fresh tire impressions. (30 RT 2633-2634, 2638-2639, 2668-2670.)[6]

The coroner, Dr. Brian Blackbourne, arrived at the scene around 11:00 a.m. (28 RT 2415.) After performing an autopsy later that day, Dr. Blackbourne concluded that the victim had been stabbed in the torso repeatedly – at least 10 times – and each stab wound had gone completely through both her pajama top and her upper body.[7] (28 RT 2382-2389.) She

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[6] The manager's observations were confirmed by Detective Donald Hunter, who also saw the beer cans and fresh tire impressions in the grass, and testified that the manager had told him that neither had been there the previous night. (30 RT 2638-2639, 2668-2670.) Hunter testified that he told someone to collect the beer cans, but does not know what happened to them. (26 RT 2106.)

[7] Dr. Blackbourne did not testify at appellant's trial; instead, the jury heard from Dr. Mark Super, who had been the deputy medical examiner who assisted with the autopsy and (also) signed the autopsy report. (28 RT

had also been asphyxiated – probably strangled – and had suffered "chop wounds" to her head, which had penetrated her brain, as well as a stab wound that went completely through her head. (28 RT 2402-2409.) Any of those forms of injury to the victim could have been fatal, but Dr. Blackbourne opined that she died relatively soon after receiving the stab wounds to her chest. (*Ibid.*; 28 RT 2385-2387, 2417-2419.) The victim also sustained a number of non-fatal (though still serious) injuries including lacerations, abrasions, a broken nose and several chipped teeth. (28 RT 2396-2402.) However, for reasons that will be detailed below, Dr. Blackbourne concluded that Laura Arroyo had *not* been sexually molested. (28 RT 2411-2412, 2421.)

3. The Investigation Conducted in 1991 and 1992

a. Police Interviews and Searches

When the detectives interviewed the victim's parents, after she went missing, Mrs. Arroyo told them about a suspicious small brown car that was parked in a cul-de-sac across from the Monterey Pine complex around the time that Laura disappeared. The car had four occupants – three men and a woman – and the people who saw it were scared and so left the area around 8:50 or 9:00 p.m.[8] (26 RT 2087-2088.) The "suspicious small brown Datsun" was also reported by neighbors Enrique Loa (known as "Kiki"), his sister Teresa Thomas, and the Loa's friend, Robert Vasquez. (25 RT 2065-2377-2379.)

[8] Mrs. Arroyo also told the police that she believed her daughter had been abducted by more than one person. (26 RT 2087-2088.) The defense offered evidence that Luis Arroyo had told the police that he believed his daughter's disappearance had to do with a bitter dispute he had with a woman regarding the sale of a taco shop, but the trial court barred that evidence. (31 RT 2800-2807.) The trial court's rulings in that regard are the subject of Claim III, *post.*

2066; 26 RT 2076; 30 RT 2625-2626, 2685.) The detectives never located the brown Datsun or the four individuals in the car. (26 RT 2073.)

Vasquez and Loa reported seeing someone else in the area that evening: the appellant, Manuel Bracamonte.[9] (See 25 RT 2048; 26 RT 2074, 2076; 30 RT 2627.) Appellant's girlfriend, Margarita Porter (known as "Maggie") lived in the Monterey Pine complex with her two children from an earlier marriage (Daniel, then age six, and Jessica, age four), and the baby son she and appellant had together, Manuel Junior Bracamontes (31 RT 2717-2719.)[10] Appellant had lived with her at the complex, but was not living there at the time Laura Arroyo was abducted; he had moved out and was living with his mother nearby. (31 RT 2719-2720.) Appellant still came to the complex frequently; he would take the baby to his mother's house while Ms. Porter was working. (31 RT 2721-2722.)

Sometime late in the day on June 19, 1991, appellant came to the complex to drop off his son at Maggie Porter's apartment. (31 RT 2723-2724; 30 RT 2667; 31 RT 2722; 31 RT 2780-2781.) Appellant was acquainted with the victim; Laura and Maggie Porter's daughter, Jessica, frequently played together and the other children referred to appellant as "Jessica's dad." (25 RT 1986-1988, 2007, 2038-2039, 2063; 33 RT 3215-3216.) Laura's slightly older friend, Elizabeth Alcarez, reported that appellant was nice to Laura and that Laura liked him. (30 RT 2602-2603.)

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[9] Although appellant's family name is actually "Bracamonte" – without an "s" at the end – the legal records in this case consistently refer to him as "Bracamontes," and for simplicity we will maintain that misspelling.

[10] Ms. Porter married appellant in 2005, and testified at trial as "Margarita Bracamonte." (31 RT 2717-2719.) To avoid confusion, she will be referred to as Maggie Porter throughout.

Elizabeth testified that on the evening Laura disappeared, "Jessica's dad" came out of "his" (actually, Maggie Porter's) apartment and said "hi" to Laura as he walked by the stairs where the girls were playing. A few minutes later, he was walking back to the apartment and stopped to tell Elizabeth that her parents were looking for her. Elizabeth went to ask if her mother was indeed looking for her; her mother said "no," and that it was okay for her to keep playing outside. She went back to the stairs where she and Laura played until it got dark, and Elizabeth walked Laura home. (25 RT 2029-2030, 2033; 26 RT 2083; 30 RT 2600, 2684.)[11]

At around 8:30 that evening, Kiki Loa and Robert Vasquez encountered appellant walking back from his car, and Kiki invited appellant to come drink beers with them on the balcony of the Loas's apartment. Appellant declined, explaining that he needed to do his laundry. (25 RT 2051-2052, 2055; 30 RT 2626-2627.) Vasquez recalled seeing appellant's black Jetta parked in the building's carport, and remembered seeing the car pull out and leave the complex about 20 minutes later. (30 RT 2626-2627.)

Maggie Porter learned of Laura Arroyo's disappearance when the police knocked on her door, looking for the girl; she heard people outside, yelling Laura's name. Maggie then called appellant at his parent's house and told him she was scared and wanted him to come over and watch the

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[11] Elizabeth Alcarez testified about this encounter some 14 years after it occurred, and some details of that testimony were different than her more contemporaneous reports to the detectives who interviewed her. Thus, on the witness stand, her recollection was that, when appellant stopped to tell her that her parents were looking for her, Laura was the only other girl with her (Leonar Gomez having been called inside), and that both she and Laura had gone to her house to find out if that was true. (25 RT 2029.) When she spoke to the officers in 1991, however, she reported that she alone had gone home to ask her mother if she was being sought, and then returned to play with the other two girls. (30 RT 2684.)

children so she could help search for Laura. The call to appellant was placed at around 10:00 or 10:15 p.m. He arrived at the complex 10 or 15 minutes later, and Maggie joined in the search. (30 RT 2641-2644; 31 RT 2731-2733, 2777-2779.) When appellant came to the condominium, it appeared that he had not showered; there was nothing unusual about him that evening. (31 RT 2742-2743.)

During that period, appellant was working as a bus driver for Chula Vista Transit. (28 RT 2640; 31 RT 2710.) On July 14, 1991, Detectives Wayne Maxey and Donald Hunter came to his workplace to interview him. The interview was informal, conducted on a bench at the Trolley Station. Appellant told the detectives that he learned of Laura's kidnaping when Ms. Porter called him at about 9:45 on the evening it occurred, told him she was scared, and asked him to come stay the night. (30 RT 2639-2642.) He also told them that he had gone home after work that day, and had not gone to the Monterey Pine complex until he received the call from Ms. Porter, after the victim disappeared. (30 RT 2641.) In fact, appellant told them that he had not been at the complex for a week before Ms. Porter summoned him on June 19th. (30 RT 2644, 2657.)

On July 16 1991, the detectives asked appellant to come to the police station for another interview, and he did so voluntarily. (30 RT 2646; 2661, 2675-2676.) At this second interview, the police did not indicate to him that he was a suspect; instead they asked him to fill out a questionnaire regarding what he thought about the crime and asked some follow-up questions.[12] One of the questions on the form asked appellant to detail his

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[12] The completed questionnaire is in the record as Trial Exhibit 61. The first question it asked was: "Someone caused the death of Laura Arroyo. How would you explain this?," to which appellant wrote "Don't what to say" [*sic*]. Asked: "Please write IN DETAIL your ideas that would

whereabouts all day on June 19, 1991; he responded that he had gone to the condominium complex when Maggie Porter called at around 9:45, but that he could not remember what he had done the rest of the day. He was not specifically asked whether he had been to the complex earlier that day, but did tell the detectives that it was his habit to pick up his son from Maggie's apartment in the morning, take the boy to his mother's house, and then return him in the afternoon. (30 RT 2660.)

In the course of both of those first two interviews, appellant made it plain that he lacked confidence in the criminal justice system – and particularly, it seemed, in Detectives Hunter and Maxey, who were questioning him.[13] (30 RT 2654.)

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account for this," he answered "I don't know." The next question was: If you were going to conduct the investigation, how would you do it?" Appellant answered: "I wouldn't know ware [*sic*] to start." Next, appellant was asked: "List the 5 most important causes that would have created this situation: "Don't now [*sic*] what to say." The questionnaire also asked what appellant thought should happen to the person who killed Laura Arroyo. On direct examination, Detective Hunter reported that appellant had responded: "I don't know. Maybe lock them up." On cross-examination, however, it emerged that what he actually said was "Maybe lock them up *forever*." (30 RT 2645, 2659 [emphasis supplied].)

[13] Some months earlier, appellant's brother-in-law, Frank Drinnon, had been shot to death in the front yard of the Bracamontes's home while holding his infant daughter. The shooter was a next-door neighbor with whom Mr. Drinnon had been arguing; Drinnon himself was unarmed. Detectives Maxey and Hunter had been assigned to that case, and although the neighbor was brought to trial, he was acquitted – a result that left the Bracamonte family greeted bitterly, and that left appellant personally very upset. (30 RT 2644-2645, 2654-2655, 2659.) At trial, the defense suggested that appellant's distrust of the two officers was the reason that he was not initially forthcoming about his presence at the Monterey Pines complex prior to the victim's abduction.

On August 1, 1991, the detectives obtained and executed warrants for searches of appellant's person and his car, and both his and his parent's residences. (30 RT 2651.) Appellant was again interviewed. In the course of the interview, Detective Maxey told appellant that there were witnesses who had seen him at the Monterey Pine complex before the victim was abducted; in response, appellant said that he had indeed been there to drop off the baby at Maggie Porter's place. (30 RT 2667.)

The balance of that third interview had a different tone than the first two: Detective Hunter insisted that appellant had been involved in the abduction and murder and demanded that he admit it. Waving a folder, Detective Hunter claimed that he had evidence clearly showing appellant's involvement. At trial, the detective admitted that he had no such evidence – he had lied in an effort to make appellant confess. In response, appellant continued to maintain his innocence: He said that he was not the kind of person capable of doing such a thing. (30 RT 2662-2664.)

Appellant finally told the detectives that he did not want to talk to them anymore. (30 RT 2664-2665.) After the interview, however, when Detective Hunter asked appellant to provide blood, hair and saliva samples, he replied: "no problem" and cooperated in the collection of the samples; when the search warrants were executed appellant willingly turned over the keys to both residences and his car. (30 RT 2671.)

None of the searches turned up any evidence that the police found sufficient to warrant arresting or charging appellant.[14] The Chula Vista

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[14] As will be reviewed presently, the sole bit of forensic evidence that even conceivably could have connected appellant to the crime consisted of a sweater with green-blue fibers that were "consistent with" a similar fiber found on the victim – but the forensic analyst who testified for the prosecution at trial admitted that he could not say the fiber found on the victim came from the sweater, and that there was no way of knowing how

police nonetheless summoned appellant for yet another interview on the one-year anniversary of Laura Arroyo's death. (30 RT 2678.) Detective Maxey had sought advice from the Federal Bureau of Investigation (FBI) on how best to approach appellant, and the FBI suggested that the interviewer be an older, Hispanic officer who could "bond with" appellant. (31 RT 2794.) The interview was conducted by Detective Robert Rutledge, who apparently met that description; neither Detective Hunter nor Maxey were present. (30 RT 2678-2679.) Appellant was indeed more comfortable and forthcoming with Detective Rutledge, who had not been involved in the investigation of his brother-in-law's homicide. (30 RT 2678-2681; Exh. 64 [transcript of interview].) However, appellant still said that he had nothing to do with crime, and nothing inculpatory came out of that interview. (*Ibid.*)

b. Forensic Analyses

When Laura Arroyo's body was discovered, the Chula Vista police dispatched technician Rodrigo Viesca to the scene to collect evidence. (26 RT 2119-2122, 2128-2129.) While examining the victim's body, he observed what appeared to be an orange fluorescent flake on her right cheek, and collected the substance using fingerprint tape. (26 RT 2130.) He also collected a number of hairs at the scene. (26 RT 2130-2132; Exh. 11.) Mr. Viesca observed tire impressions on a piece of cardboard in the parking lot, near the body. He did not collect the cardboard as evidence (26 RT 2189-2191); nor did he collect beer cans that were nearby (32 RT 2891-2892).

Mr. Viesca left the crime scene and proceeded to the Monterey Pine complex, where he lifted 13 or 14 fingerprints from the door of the Arroyo residence. Appellant's fingerprints did not match any of those fingerprints.

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many thousands or millions of other garments had equally "consistent" fibers. (30 RT 2759.)

(26 RT 2173; 33 RT 3180.)

Evidence technician Viesca also attended and documented the autopsy, where he collected additional evidence, including more hairs as well fingernail trimmings. (26 RT 2138-2142, 2181-2183; 32 RT 2890.) He also collected head hair "standards" for known comparison purposes (26 RT 2159-2160), and took a swab from the left side of the victim's neck where he noticed a bruise (26 RT 2153-2155).

In the course of the autopsy, Dr. Blackbourne performed a sexual assault examination, taking two swabs each from the victim's mouth, vagina and anus. Before the swabs dried, he smeared each on a slide, and examined the slides under a microscope. Dr. Blackbourne found no spermatozoa or semen on any of the slides.[15] (26 RT 2149-2150; 28 RT 2412,) A physical examination revealed no evidence of disruption – no bruising or tearing – of the victim's vagina, labia or anus. (28 RT 2411-2412, 2421.)

One set of the swabs prepared by Dr. Blackbourne was kept at the medical examiner's office; the other was taken into custody by Viesca and turned in to evidence control at the Chula Vista Police Department. (26 RT 2150-2151.) The victim's pink pajama top and fingernail trimmings were sent first to the Sheriff's Department lab in June 1991, and then to the FBI lab on September 19, 1991. (26 RT 2194-2195.)

In the meantime, the police executed warrants to search appellant's person and residence, and the residence of his parents. (31 RT 2785-2787.) The police seized items of appellant's clothing and collected fibers from the residences, as well as several tools, a knife, and some orange tape that the

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[15] Dr. Blackbourne did not prepare a slide from, or otherwise examine, the swab that technician Viesca took from the wound on the victim's neck. (14 RT 1273.)

police hoped to match with the orange substance found on the victim's face and one of her body parts. (26 RT 2161-2165; 31 RT 2785-2787.) Similarly, the police collected some orange paint from a cabinet in Maggie Porter's garage at the Monterey Pine complex, as well as two bottles of orange spray paint from appellant's former construction employer. These things were also sent to the Sheriff's lab – and were forwarded to the FBI – but none of the seized implements could have been the murder weapon and none of the orange-colored substances matched what was found on the victim. (30 RT 2570, 2572-2573, 2578; 31 RT 2785-2787.)

Evidence technician Viesca participated in the search of appellant's residence, but found no bloody clothing or strands of the victim's hair. (26 RT 2202.) He used an alternate light source (or "ALS") to look for blood, but found none. (32 RT 2902-2903.)

Appellant's car was seized and held for four days. Over the course of those four days, Mr. Viesca searched the car and collected a variety of fibers and hairs, as well as a towel with blood on it that he found on the seat. (26 RT 2165-2167; Exh. 26.) He found no blood or hair from the victim in the car; the blood on the towel was tested, but the DNA matched appellant's, not the victim's. (26 RT 2199-2200; 31 RT 2787-2788.)

Neither the Sheriff's lab nor the FBI examined the swabs collected from the victim's orifices because the medical examiner had done so and found no sign of sperm or semen. (31 RT 2782-2784.) The hair was examined first by the Sheriff's lab, which then sent it to a private lab for further testing, but nothing was found that connected appellant to the crime. (31 RT 2781-2782.) The victim's clothing and fingernail trimmings were examined by the FBI laboratory, as was the hair found in her hand and on her clothing. The FBI found none of appellant's DNA present, and reported that there was no semen or sperm on the victim's bloody pajama top. (34

RT 3233-3238.) The police concluded that she had not been sexually assaulted. (33 RT 3182.)

The closest the police came to finding forensic evidence implicating appellant was when a blue-green fiber, found on the victim's pants, was deemed by the FBI to be "consistent with" a fiber taken from a sweater in appellant's residence and fibers found in "tape-lifts" taken from appellant's car. (31 RT 2749-2755.) However, when asked on cross-examination how many items of clothing in the world contain the fiber found on the victim's pants, the FBI examiner who conducted the tests responded:

> I have no idea that that fiber came from that sweater. I don't know how many other sweaters or garments like that would have a fiber that had the same microscopic characteristics and optical properties as that fiber. So the bottom-line answer is I don't know.

(31 RT 2759.)

In short, the authorities did not have a basis for charging appellant with the crime. The detectives in charge of the investigation never asked for the evidence to be re-examined.[16] (31 RT 2814-2815.)

4. Periodic Attempts to Reinvestigate the Case

The police reopened the Arroyo case in 1996, and once again focused on appellant. Detective Susan Rodriguez was assigned to the case and the new investigation went on for over three years. (33 RT 3173, 3176-3182.) In 1999, Detective Rodriguez tracked down appellant's Jetta (which had been sold to a third party) arranged to borrow it, and had it processed again. (33 RT 3177-3178.) The results were the same; no blood or anything else inculpating appellant in the victim's murder was found. (33 RT 3180.) Detective Rodriguez also rechecked the fingerprints found on

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[16] The detectives did pursue another avenue: they retained a psychic. Although they consulted the psychic several times during the initial investigation and did so again some years later, those efforts apparently did not bear fruit. (31 RT 2793; 33 RT 3180.)

the Arroyo's door – again with the same result: they were not appellant's. (*Ibid.*) She did not, however, ask for any of the biological evidence to be re-examined – or, in the case of the swabs that had never been tested, examined for the first time.[17] (33 RT 3181-3183.)

In 2001, Sergeant John Stewart, who was in charge of the Chula Vista police homicide unit, reviewed the Arroyo case again. (32 RT 2952-2953.) He noticed that the FBI lab had reported finding a hair fragment in the scraping under the victim's fingernails. (32 RT 2953.) Thinking this might lead to some new DNA evidence, he had the material retested. (*Ibid.*) The Sheriff's crime lab examined the material and found no hair, but only a small piece of cotton fiber. (32 RT 2954-2956.)

5. The New Investigation – 2003-2004

a. Forensic Analysis

In 2003, the San Diego District Attorney's Office established a "Cold Case Unit." In August of that year Chula Vista Police Detective Robert Conrad met with the unit, and they decided to review the evidence in the Arroyo case again. (32 RT 2957-2960, 2965-2966.) In the initial meetings, DNA was not discussed because the investigators, including Detective Maxey, were of the opinion that no sexual assault had occurred. (32 RT 2967-2968, 2970-2971.) For his part, Detective Conrad considered ordering mitochondrial DNA testing of the hair evidence, but private labs who conducted such testing were costly. The hair evidence was never submitted for testing. (32 RT 2969-2970, 2971-2979.)

In September 2003, Detective Conrad learned that the San Diego Police Department (SDPD) – which had not previously been involved in the case – had gotten a grant to do DNA testing in "cold hit" cases, and he

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[17] Detective Rodriguez did, however, re-engage the psychic for two more sessions. (33 RT 3180.)

sought their help.[18] (32 RT 2960-2962.) Dr. Patrick O'Donnell, who supervised the SDPD laboratory, agreed, and after reviewing the evidence list, decided that he wanted to look at the oral swabs and fingernail trimmings taken from the victim at the autopsy. On September 23, 2003, Chula Vista evidence technician Viesca delivered a cardboard box to Ian Fitch, a criminalist at the SDPD lab; in the box were brown paper bags containing the swabs and the victim's fingernail trimmings. (28 RT 2286-2289; 32 RT 2960-2962, 2971-2972.)

After testing the items, Mr. Fitch determined that there was sperm present on the swabs taken from the victim's mouth and the wound on her neck as well in the material found under her fingernails.[19] (28 RT 2296-2297, 2310, 2312.) Performing a DNA analysis of the results and of a sample taken from appellant's plucked hair, Mr. Fitch concluded that "Mr. Bracamontes [was] very likely the source of the sperm . . . ." (28 RT 2303, 2307, 2314.) In regard to the oral swab, Mr. Fitch opined that the approximate probabilities that a person chosen at random would possess the predominant DNA profile in the sperm fraction were one in 3.2 trillion for the Caucasian population, one in 9 trillion for the African-American population, and one in 2.7 trillion for the Hispanic population. (28 RT 2307-2309.)

Other items of evidence, including the victim's clothing, were delivered to the San Diego Sheriff's Department laboratory for reexamination. (32 RT 2962-2963.) There, criminalist Shelley Webster

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[18] A "cold hit" case is one in which DNA previously taken from a crime scene is matched to DNA samples stored in a computer database. (See *People v. Robinson* (2010) 47 Cal.4th 1104, 1114-115.) The Arroyo case was not a cold hit case.

[19] No sperm was detected on the swabs taken from the victim's vagina and anus. (28 RT 2304, 2321.)

examined the pink pajama top for semen, even though she was aware that the FBI had examined the garment and found no biological material. Using an alternate light source, she determined that several areas of the shirt were "ALS positive" – the right shoulder and right neck areas, and the middle of the shirt – indicating that sperm may be present. She cut samples from those areas, put them in tubes, added water, agitated them for 30 minutes, used a toothpick to further mix them, and looked for cells in the substrate. (28 RT 2434-2436; 29 RT 2470-2471; Exh. 56.)

Ms. Webster identified sperm in all three cuttings, separated the sperm from the non-sperm fractions on each cutting, and performed a DNA analysis on the six fractions. (28 RT 2437-2438; Exh. 52.) Comparing the profiles to reference samples for the victim and appellant, she concluded that "[t]he only scientific reasonable explanation is that the donor of the sperm and the non-sperm of the chest area [was appellant]." (28 RT 2439, 29 RT 2465-2466.) Ms. Webster estimated that the likelihood of someone matching that DNA profile was, at its highest, one in 30 quadrillion. (29 RT 2465-2466.)

On cross-examination, Ms. Webster testified that, if the pajama top had been examined with an ALS in 1991, she would expect a lab analyst to observe the same thing that she did – and that such lights were in use at the time.[20] Ms. Webster had never worked on a case where semen was not observed originally, and then found several years later. (29 RT 2471-2474.)

The possibilities of contamination and degradation arose repeatedly in the testimony regarding the handling of DNA evidence. (See, e.g., 28 RT 2284, 2334, 2336, 2341; 29 RT 2488; 32 RT 2901, 2919-2920, 2924-2925.)

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[20] Evidence technician Viesca in fact used an ALS when searching appellant's residence in 1991. (32 RT 2902-2903.)

It emerged that evidence gathered from the victim, the crime scene and the searches of appellant was all handed over to Chula Vista "evidence control assistant" Lisa Bourgeois after it was processed, and that Ms. Bourgeois had subsequently been forced to resign her post.[21] (26 RT 2180-2181, 2186, 2187.) In addition to the potential for contamination this suggested,[22] problems relating to "degradation" arose as well. The criminalist Ian Fitch testified that all DNA evidence degrades over time – faster if it not frozen and otherwise properly stored; that there was some degradation of all of the evidence in this case; and that the passage of 12 years had made some of the

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[21] The defense sought to prove that Ms. Bourgeois's departure from the Chula Vista Police Department came about "after being accused of and actually admitting to some thefts and destruction of property." (34 RT 3221.) When the prosecution objected, the trial court held a hearing pursuant to Evidence Code section 402, at which the police officer who had investigated the matter testified that Ms. Bourgeois had indeed stolen money and property, and admitted to destroying some property that had been committed to her for safekeeping. (34 RT 3261-3262.) However, because there had not been any allegations of Ms. Bourgeois tampering with the evidence in this particular case (see 34 RT 3263-3264), the trial court held that the evidence concerning her was "marginally relevant, at best," and refused to let the jury hear it (34 RT 3269-3270).

[22] Other issues concerning contamination have since surfaced concerning the San Diego Police Department laboratory that ultimately reported the discovery of appellant's DNA on the swabs taken from the victim's body. In the course of a 2012 re-investigation of a rape/murder that had occurred in 1984, swabs taken from the victim were examined and yielded DNA pointing to an employee of the lab itself. It was ultimately concluded that the findings were the result of contamination stemming from the (now-outdated) methods used for obtaining, drying and storing such swabs. In the meantime, however, the employee – who had become the focus of an intrusive and humiliating police investigation – hanged himself. (See Balko, *A Crime Lab Analyst Killed Himself After Contamination Wrongly Made Him A Suspect in a 30-Year-Old Murder*, Washington Post (June 5, 2017) [noting that "the lab had a long history of cross-contamination problems."].)

evidence unreliable for sampling. (26 RT 2196; 28 RT 2284-2285, 2324, 2336; 32 RT 2919-2920, 2924.) In this regard, the defense brought out the fact that, before the evidence was analyzed in 2003, it had been removed from the freezer by Mr. Viesca and left out on a workbench for some months. (26 RT 2213; 32 RT 2969.) Mr. Fitch testified, however, that he would not expect that fact to have changed the results of the tests. He explained that degradation can make it harder (or impossible) to test a sample but, if a given DNA profile has been detected, degradation does not affect the reliability of that determination.[23] (26 RT 2324; 32 RT 2925-2926.)

b. Other Results of the Renewed Investigation

The balance of what was found in the new investigation was, if anything, exculpatory of appellant. Besides having the biological evidence analyzed, the authorities made some efforts to reconstruct the circumstances of the killing. In 2004, the prosecution retained a former police officer named Rod Englert, who worked as a consultant in crime scene reconstruction.[24] (29 RT 2447-2455, 2459-2461.) The investigating authorities in this case asked Mr. Englert to answer "three questions:" where was the victim killed?; was she killed on the sidewalk where her

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[23] Scholarship regarding the science of DNA testing indicates that Mr. Fitch's testimony was at least misleading in that regard: degradation of samples can indeed lead to false inculpatory results. (See, e.g., Butler, Forensic DNA Typing: Interpretation (2011) pp. 327, 337.)

[24] Mr. Englert testified that he had served as a consultant in over 380 cases and had qualified as an expert five or six times in California courts. Though he had no college degree in anything related to biological sciences (he was a political science major), he testified that he had been a police officer for 31 years and had attended hundreds of hours of in-service training. (29 RT 2447-2455, 2459-2461.)

body was found?; and were the bruises and lacerations about the face consistent with the crime having occurred on the sidewalk or elsewhere? (29 RT 2504-2505.)

Mr. Englert reviewed all of the reports, photographs and other evidence, met with Sheriff's criminalist Shelley Webster, examined the victim's clothing as well as portions of the victim's mandible and scapula, and went to the site of abduction and the location where the body was found with Chula Vista police criminalist Viesca. (29 RT 2504-2507.) Relying on detailed measurements that Mr. Viesca had made of blood spatter and other evidence at the time the body was discovered, and after examining (still extant) chips in the concrete sidewalk where the murder weapon had apparently made contact after penetrating the victim's torso and blood stains on a nearby column, Mr. Englert reconstructed "what happened at that scene" 13 years earlier, including the positions of the attacker and the victim when the blows occurred. (29 RT 2507.)

Testifying for the prosecution, Mr. Englert opined that the victim was killed on the sidewalk where her body was discovered. In his opinion, however, the victim was placed at that location, and the fatal blows followed; she did not move and was incapacitated during the entire attack. (29 RT 2524-2525.) There was no evidence that the victim walked to the fatal spot. Moreover, although the victim had been sexually assaulted, there was nothing to indicate that occurred where her body was found. (29 RT 2547.) Rather, Mr. Englert testified, the victim was sexually assaulted in a car and carried to where she was killed. (29 RT 2530-2531, 2533-2534.)

Mr. Englert observed that the victim had suffered potentially fatal chopping and stabbing blows, and he opined the stab wounds occurred after the chop wounds. But the victim had also sustained many injuries to her face, neck and shoulders that were unrelated to the stab and chop wounds,

and those bore "classical marks consistent with struggle within a vehicle, [the] confines of a vehicle." The photographs of the victim's face showed an attempt to commit sexual assault by oral copulation.[25] (29 RT 2530-2531, 2538.)

According to Mr. Englert, if there had been a violent struggle in a car, one would expect to find bodily fluids, hairs and fibers, and broken fingernails from the victim there. He was aware that the victim had fractured and broken teeth, and that numerous hairs were found at the scene. If the hairs had been deposited at the scene, he would expect to see blood on them. If (as he concluded) there had been a violent struggle in a car, and the victim had long hair – as did the victim in this case – there is a strong possibility that hairs would be found in the vehicle.[26] (29 RT 2535-2536.)

When the police searched appellant's residence and his parent's residence, they were not just looking for physical evidence tying him to the victim and the crime. When Detective Hunter procured the 2003 search warrant he informed the judge that law enforcement was looking for evidence that appellant was a pedophile. Based on Detective Hunter's experience, someone who would molest a child would be prone to pedophilia, and commonly such persons would have child porn and store such materials at their residence. No such evidence was found at appellant's residence: no newspaper articles or mementos or anything

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[25] There had been no disturbance to her genital area; the victim's underpants had not been pulled down. (27 RT 2510, 2532.)

[26] Despite appellant's car being searched repeatedly, no evidence was found of Laura Arroyo's blood or hair, or anything else indicating that she had been in the vehicle. Nor was there any evidence of a violent struggle "in the confines of the vehicle" – evidence that Mr. Englert said would be found if that was where the assault occurred.

regarding the victim were found; no photos or videos depicting child pornography was found. In fact, no photos or other items were found that would provide a motive for the crime. (33 RT 3148-3151.)[27]

Similarly, the prosecution theorized that the instrument used to bludgeon and stab the victim was a pick mattock – a short, heavy agricultural tool with a head that consists of a hoe-like chopping surface, or adze, at one end and a pointed pick at the other. (See 30 RT 2554.) Detective Maxey suspected early on that such a tool had been used because of the two different types of injuries: chop wounds and punctures. (31 RT 2784-2785.) The prosecution's theory was supported by the testimony of another witness – Dr. Norman Sperber. Dr. Sperber was a dentist by training, having received his dental degree in 1954, and had testified as a forensic odontologist in a number of criminal cases regarding bite marks and wound patterns.[27] (27 RT 2245-2254, 2253, 2256-2257, 2265.) He was not a tool mark expert, and had no formal training in wound pattern analysis. (27 RT 2257, 2265.) Nonetheless, in the Arroyo case, Dr. Sperber was permitted – over vigorous defense objection – to testify as an expert in that regard. (7 RT 676-678; 8 RT 749-783.)

Dr. Sperber was shown a pick mattock, and asked to compare the blades on that tool to the injuries on the victim's scapula and mandible, defects in the sidewalk, and also to compare to it to injuries to the victim's

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[27] When the 2003 search warrant was executed, appellant's family invited law enforcement into the house. (*Ibid.*)

[27] This Court became acquainted with Dr. Sperber when his false testimony regarding bite marks led to the grant of habeas corpus relief in a non-capital murder case – and, along the way, prompted the legislature to amend the statute regarding false evidence provided by experts. (See *In re Richards* (2016) 63 Cal.4th 291.)

mouth. He opined that damage to the scapula and mandible bones, and the sidewalk divots, could have been caused by a pick mattock.[28] (27 RT 2259-2263.) For his part, Mr. Englert, the crime scene reconstructionist, agreed that the injuries inflicted on the victim were "consistent with" a tool with two ends, such as a pick mattock – or with the use of more than one tool. (29 RT 2539-2540.) Similarly, Dr. Super, the pathologist who assisted in the autopsy, testified that a pick mattock "could have" caused the fatal wounds. (28 RT 2424.)

No pick mattock was found in appellant's residence or that of his parents, Maggie Porter's garage, or appellant's car. Although the prosecution suggested that he had used one on a previous job it was unable to prove that, nor was it able to prove that a pick mattock might have been among tools stolen from a truck near the crime scene. The prosecution was nonetheless permitted to introduce a pick mattock into evidence. (25 RT 1907, 1910; 26 RT 2197; 27 RT 2259; 30 RT 2550, 2568-2569; 31 RT 2785-2786; 35 RT 3379; Exh. 33.) The specific tool admitted into evidence (and subsequently sent to the jury room) was acquired in 2004 by Detective Conrad, who purchased a new one at the store, which he then traded to a workman for a well-used pick mattock that he thought would look more like the murder weapon. (32 RT 2973-2975.)

6. Appellant's Arrest

A warrant was issued for appellant's arrest on October 24, 2003. (32 RT 2981.) Two District Attorney's investigators, Michael Howard and Robert Marquez, went to where Maggie Porter was living, on Dave's Way in San Diego, to get information about where they could find him. (32 RT

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[28] Dr. Sperber said he was familiar with pick mattocks, having worked with one on an agricultural crew in the 1940s. (8 RT 770.)

3013-3014.) They parked their unmarked Chevrolet Impala and, as they approached the residence, they encountered a boy in the front yard whom Investigator Marquez recognized as appellant's son, Manuel Junior Bracamonte.[29] (32 RT 2983-2984, 2991.) The investigator asked to speak to the boy's mother; Manuel Junior said: "wait a minute," went into the house and locked the door. (31 RT 2984-2985.) The boy came back out, told the investigator's that his mother was not at home but that his dad was coming to pick him up. The men thanked him, went back to their car and called for backup. (32 RT 2985.)

Moments later, as the two investigators were sitting in their car, appellant pulled up in his Ford Explorer. Investigator Howard started the car and drove toward appellant's vehicle. Just then they saw Manuel Junior walking to the Explorer. They stopped the Impala a few feet in front of appellant's vehicle and both men got out. (32 RT 2985-2986.)

According to Investigator Marquez, as he approached the Explorer, appellant asked him who he was; he identified himself by name and as a District Attorney's investigator. Then, as Manuel Junior went to get in on the passenger's side, Investigator Howard pushed him away, threw open the passenger door and pointed his gun at appellant's head. As Manuel Junior screamed at them, Investigator Howard told appellant that he was under arrest; appellant asked: "What for?," and the investigator replied: "For murder." (32 RT 2986-2988.) For his part, Manuel Junior testified that the investigators did not identify themselves to appellant and when appellant

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[29] Manuel Junior, an infant at the time of Laura Arroyo's abduction, had just turned 13 when the investigators came to his mother's door. (34 RT 3271.)

asked, "What did I do?," they refused to tell him.[30] (34 RT 3279.)

Whatever was said, appellant responded by driving away "at a high rate of speed." (32 RT 2988.) The rapidity of acceleration forced the passenger door to close. (32 RT 3020-3021.) Investigator Howard crouched and fired two rounds from his gun in the direction of the Explorer.[31] The investigators jumped into their Impala, made a U-turn and gave chase, but lost sight of appellant's vehicle. (32 RT 2989.)

At around 2:00 a.m. the following morning, a police officer – having been alerted to be on the lookout for appellant's Ford Explorer – spotted it parked at the Bay Cities Motel in Chula Vista. He called into dispatch, verified the license number, and waited there until 6:30 a.m. (32 RT 3026-3030.) A team of officers went to the motel; after speaking to the clerk and determining that appellant was not registered there, they went to each room in the motel looking for him, with no success.[32] Finally, at around 10:30 that morning, the police installed a GPS tracking device on the Explorer. (32 RT 3037-3038; 33 RT 3049-3051, 3054.)

At about 10:40 a.m., Chula Vista Police Officers Joseph Picone and Michele Evans received a radio call that "a vehicle driven by a suspect was

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[30] On cross-examination, Mr. Marquez admitted that, in his written report of the incident, he never mentioned identifying himself to appellant as an investigator. (32 RT 3023.)

[31] The defense elicited testimony that there was a school at the end of Dave's Way near Maggie Porter's home, and that it was common for children to be playing in the area at the time the shots were fired. (33 RT 3701; 34 RT 3276.)

[32] The officer who testified regarding the events at the motel acknowledged that they knew that Investigator Howard had fired his gun at appellant, but denied that he and the other officers at the motel intended to kill him. (33 RT 3059-3060.)

in the area" of Interstate 5 and Palm Avenue. They were instructed to go to that location and shut down the southbound traffic on the freeway. (33 RT 3100-3101.) The two officers drove over in separate cars, but after they arrived they were told that the suspect had just been seen in the area of Palm and Hollister, and so proceeded (again, separately) to that location. (33 RT 3064-3066, 3101.) Once there, Officer Evans spotted appellant's Ford Explorer in an alley called Donax Avenue. After verifying the license plate number, she put her squad car in reverse and positioned it in the entry to the alleyway; Officer Picone similarly blocked the other end of the alleyway. (33 RT 3068-3069.)

The two officers got out of their cars and were walking towards the Explorer when they saw the brake lights come on and they heard the vehicle start up. (33 RT 3069-3070, 3103-3104.) The Explorer made a complete u-turn and was facing the police officers, who pulled out their guns. (33 RT 3070-3071, 3104.) Officer Picone, who could see appellant in the driver's seat, commanded him "to turn off the car and get out of the vehicle. Said that several times." (33 RT 3105.) Appellant initially stopped and put his hands up, but then put his hands back down and started moving toward where Officer Picone was standing. The officer held his ground for a time, but appellant, after raising his hands and putting them down once again, accelerated; the officer jumped out of the way "at the last minute." (33 RT 3105.) Although the alleyway was blocked by the police car, appellant jumped the curb and escaped onto Hollister Street. (33 RT 3106.)

The two officers got into their cars, turned on their lights and sirens and "initiated a pursuit." (33 RT 3072.) Appellant drove to the freeway, going north in the southbound lane, got onto Interstate 5, and then exited on Main Street. (33 RT 3106-3107.) Officer Picone followed him down the off ramp, which had a sharp turn. Appellant's vehicle spun out, turned

around and started heading towards Officer Picone's car. At the last minute, the officer turned left off of the roadway into the dirt in order to avoid a head-on collision. (33 RT 3108-3011.)

At that point, Officer Evans's patrol car came down the off-ramp going fast – "too fast" according to Officer Picone – slid, and came to a stop. The Explorer hit Officer Evans's vehicle, striking the right, rear panel. Another police car was parked there; appellant turned his vehicle to avoid striking it. The Explorer spun around, and then rolled several times. (33 RT 3108-3111, 3120-3125.) Appellant was pulled out of the Explorer by two other officers and taken into custody. (33 RT 3112.)

B. The Penalty Phase

1. The Prosecution's Case

The bulk of the prosecution's case at penalty consisted of victim impact evidence. Thus the jury heard from the four surviving members of Laura Arroyo's immediate family: her father, Luis, her mother, Laura, and her brothers Agustin and Jose Arroyo (both of whom had grown to adulthood). (42 RT 3701-3711, 3745-3767).

All talked about what a good daughter and sister Laura had been; how friendly, kind, funny, helpful, smart and full of life – how "adorable" she was. (42 RT 3753.) They described the things she liked to do – swimming, riding her bike, roller-skating and playing with her brother and friends. They related her dreams: to be a cheerleader in high school, to be a teacher when she grew up. Each family member talked about how he or she learned that Laura was dead, and the grief that the family felt – how (in Agustin's words) it "just tore up the whole family." (42 RT 3752.) Agustin described watching the coroner put her in a body bag, and he and both parents described her white casket, closed because she was so bruised. They all talked about the well-attended funeral, which Jose described as the

saddest day of his life. (42 RT 3755.)

Each family member talked about how they still continued to miss Laura. Luis Arroyo described how they had kept her room exactly as it was for years; Agustin said that the house was empty without her. (42 RT 3710, 3751.) Each related how they and the others had changed as a result of Laura's killing; Agustin described how his parents had become quiet and sad -- how his father cried for years afterwards and his mother was devastated. (42 RT 3751.) Luis Arroyo said that the hardest part was just to go on living "because she was everything to us." (42 RT 3710.) Asked if there were "any particular days or holidays that bring back her memory," he replied: "Every day, you know. The holidays, birthday, every time we go for dinner, at the table, her chair is there. It's empty, the chair." (42 RT 3711.)

The prosecution also called Laura's third-grade teacher, Mari Peterson, as an additional victim impact witness. (42 RT 3768-3796.) Her testimony, and the video that accompanied it, are the subject of Claim V, *post*, and will be discussed in more detail there.

Finally, the prosecution put on evidence of an incident of domestic violence involving Maggie Porter, which occurred in 1996 – five years after the capital crime, and nine years before the trial.

The first witness was Daniel Porter, Sr., Maggie Porter's former husband. Their marriage had lasted two years, and ended in divorce in 1989. Their two children – Daniel, Jr. and Jessica – lived with Maggie and Manuel Junior. Mr. Porter testified that, on June 8, 1996, some time after 10 p.m., he received a phone call from one of the kids that Maggie and appellant were arguing. He went to Maggie's to make sure everything was alright, and appellant let him in. He could not remember the words that were exchanged, but appellant was upset, as was Maggie. Appellant said he

should leave, that the dispute was between appellant and Maggie; there was some pushing and shoving, and Maggie asked him to leave. Appellant hit him and he hit appellant in return. Maggie was so upset that she fell to the floor. Appellant went to help Maggie, and Mr. Porter backed off. They all went outside; appellant tried to help Maggie get into a truck, but she was hysterical. Daniel Jr. grabbed an iron pole to hit appellant, but his father said "no" and grabbed him. Appellant and Maggie left in the truck. The police arrived at some point. (42 RT 3712-3717, 3722.)

On cross-examination, Mr. Porter testified that he never saw appellant do anything to Maggie. Before that day, he had no problems with appellant and the children had no problems with appellant. There were no other problems between appellant and Maggie other than the one incident. After the capital crime occurred, the police asked Mr. Porter whether appellant had ever touched the children inappropriately. After he questioned the children, Mr. Porter had no concerns about the time they spent with appellant. He had never seen appellant demonstrate any sexual interest in children. When questioned by the police, he stated that he did not think that appellant was capable of such a crime. (42 RT 3717-3719.)

Maggie Porter testified that the incident occurred on a Saturday evening. She was home with her three children when appellant arrived. Maggie was mad and jealous; she wanted appellant to be with her. She started hitting him, and kept hitting him. He kept asking why she was mad. Finally, appellant held her to keep her from hitting him. Appellant did not strike Maggie, but simply held her back while she was swinging. (42 RT 3723-3731.)

Maggie was later interviewed by an officer named Bailiff and gave a statement. Photos showing her bruises were introduced into evidence. Maggie denied telling the officer that she was trying to break up with

appellant; nor did she tell the officer that appellant got upset when she asked him to leave the house, or that appellant pushed her onto the couch. Rather, Maggie testified, appellant was holding her down to prevent her from hitting him; they were sitting and he was saying, "No, Shorty, don't hit me no more. What's wrong with you? . . . Let's talk." (42 RT 3725-3726, 3729.) Maggie denied telling the officer that she was crying and yelling loud because appellant covered her mouth. After the incident, she went into the truck to talk to appellant while Daniel Porter stayed with the children. After she returned to the house, she was interviewed by the police. (42 RT 3723-3731; Exh. 95.)

San Diego Police Officer Ronald Bailiff testified that he responded to Maggie Porter's residence on June 8, 1996, after 10 p.m. Officer Bailiff testified that he interviewed Maggie Porter that evening and she told him that she and appellant got into an argument because she could not handle their relationship any longer. She said that she wanted to break up with appellant, and that he got more and more angry. She asked him to leave and he said he would not leave and pushed her onto the couch. She tried to get away, but appellant held her down by the arm and neck. She started to scream and cry so loudly that he placed his hand over her mouth. They continued to argue until Daniel Porter arrived. Daniel and appellant started to argue and were trying to fight. At that point, Maggie had an anxiety attack and felt that she needed to go to the hospital. Appellant wanted to take her to the hospital but she wanted her brother instead. Appellant forced her into the car and he calmed down about 10 minutes into the ride. Appellant dropped her off close to downtown. (42 RT 3733-3742.)

Maggie Porter later filled out a domestic violence supplemental form that documented her injuries. She had two abrasions to her upper chest, and a bruise on her neck. The domestic violence report noted that she was

frightened and crying. (42 RT 3733-3742; Exh. 95.) On cross-examination, Officer Bailiff stated that he did not call the paramedics to the scene and did not need to take Ms. Porter to the hospital. The officer spoke to appellant the next day, and he was calm and cooperative. Appellant had minor cuts and lacerations to his chest. (42 RT 3743-3745.)

At the prosecution's request, the court took judicial notice of a change of plea form from July 17, 1996, on which appellant plead guilty/no contest to a misdemeanor violation of Penal Code section 273.5, and in doing so admitted that he had "injured Margarita Porter, causing a traumatic condition." (44 RT 3976-3977.)

2. The Defense Case

The defense did not present mental health, childhood abuse, or similar mitigation evidence at the penalty phase.[33] Instead, the defense called more than 20 witnesses who knew appellant well and testified that, in their opinions, he was incapable of committing such a horrific crime.

First up were Maggie Porter – now Maggie Bracamonte – and her family. Maggie herself testified that she loved appellant and did not believe he was capable of the crime committed against Laura Arroyo. Indeed, she had married appellant shortly before the trial. (42 RT 3806-3809.) Maggie's ex-husband, Daniel Porter, Sr., was also recalled to the stand and testified that he did not believe that appellant was capable of hurting a child and did not believe that appellant committed the crime. Mr. Porter had told the police as much, and he had asked the prosecutor to show appellant leniency, if only for the sake of Manuel Junior. (42 RT 3802-3805.)

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[33] Defense counsel began her opening penalty phase statement to the jury as follows: "[T]hose who know Mr. Bracamontes do not agree with your decision." (42 RT 3693.)

Ms. Porter's children also testified on appellant's behalf. Jessica Marie Porter (19 years old at the time of trial) confirmed that appellant was good to her when she was growing up – he was like a father to her. He never touched her or acted inappropriately, or made her feel uncomfortable. They took several trips together including to Disneyland. Appellant liked to cook and made her soup when she was sick, and they watched movies together at home. (44 RT 3935-3952; Exh. 107.) Maggie's oldest won, Daniel Porter, Jr. – now also an adult – described appellant as a loving father to Daniel's brother, Manuel Junior, and affirmed that appellant never said or did anything inappropriate to him or his sister. (42 RT 3797-3799.) Asked whether he thought appellant was capable of committing "the crime," Daniel, Jr. replied: "No, definitely not." (42 RT 3799.) Like his parents and sister, he thought that appellant should not be executed. (42 RT 3799.)

Most of the other mitigation witnesses were members of appellant's family of origin – his mother, father, three of his five sisters (appellant was the only son), an uncle, three nieces, a nephew and two cousins, as well as a woman named Leslie Norfolk, who was a close friend of his younger sister, Ruby.[34] (43 RT 3859-3860.) What emerged from their testimony was a picture of appellant as having been a reserved but well-adjusted child who played baseball and games with his younger sisters, and had pets that he cared for. (42 RT 3812-3816, 43 RT 3852-3855, 3856-3858; 44 RT 3933-3934, 3955.) He never suffered physical, sexual or emotional abuse. (42

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[34] Other non-family members who testified on appellant's behalf included his Little League coach (43 RT 3889-3890) and Dale Daulton, a supervisor at a firm where appellant worked as a pipe fitter for many years. Mr. Daulton testified that appellant was a hard worker, had a good work ethic, and got along well with his co-workers (43 RT 3864-3867).

RT 3813-3814.)

Growing up, and as an adult, appellant was a loving, respectful, helpful and extremely supportive son and brother. (43 RT 3859-3861; 44 RT 3916-3921.) His sister, Theresa, testified that "he . . . always, as I was little, watched for me all the time." (44 RT 3954.) After their father suffered devastating injuries in a car accident and was confined to bed for two years, appellant helped care for him and provided support and comfort to the rest of the family. (42 RT 3812-3816; 44 RT 3965.) Similarly, when Frank Drinnon, appellant's brother-in-law, was shot to death on their front lawn while holding his two-year-old daughter Angelica, the family suffered immensely. (42 RT 3832-3836; 44 RT 3966-3968). Appellant provided comfort to his widowed sister Theresa and their children – "he was there for them always." (43 RT 3861.) Theresa testified: "He means everything to me" (44 RT 3969); appellant's sister Ruby echoed that, saying that she loved him "with all my heart (43 RT 3857).

Appellant had never touched his younger sisters inappropriately or said anything of a sexual nature to them. (44 RT 3968.) Similarly, his three nieces all testified that he had never made them uncomfortable and had never acted in an inappropriate or sexual manner. (43 RT 3871 [Angelica Drinnon], 3891-3894 [Patricia Mena]; 44 RT 3917-3918 [Cynthia Remington].) A cousin, Richard Gonzalez, testified that appellant had taught his little daughter Tiffany how to swim; asked if he had ever seen appellant act inappropriately with Tiffany, Mr. Gonzalez replied: "No. He'd never do that." (44 RT 3925.)

Angelica Drinnon – who had been the child in her father's arms when he was shot – described how appellant had stepped in to take her father's place in her life. He bought her clothes, fed her, treated her like his own daughter. If he were executed, she said, her life would never be the

same; it would be as if she lost her father again. (43 RT 3869-3875.)

Several of the witnesses described the love and caring with which appellant treated Manuel Junior – he was "proud and very good to him." (43 RT 3861, 3898.) Manuel Junior, then 14 years old, testified himself. He said that appellant treated his own parents respectfully and was loving and attentive to him. They spent time together at the batting cages, bowling, riding, and playing miniature golf. Appellant never hit or slapped him or either of Maggie Porter's other children. He loves his father, he said, and his father loves him. (44 RT 3970-3976.)

APPELLANT'S CLAIMS

I.

APPELLANT WAS IMPROPERLY SHACKLED IN FULL VIEW OF THE JURY, AND THE TRIAL COURT'S FAILURE TO TAKE OBVIOUS MEASURES TO SHIELD THE RESTRAINTS FROM THE JURORS' VIEW VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

A. Introduction

Although appellant never caused any disruption in the courtroom, made no threats, and posed no security problem for his jailors or the court, the trial court nonetheless ordered him shackled throughout the course of trial. The restraints were supposed to be hidden from the jurors' view, but defense counsel informed the court during voir dire that the restraints – "ankle cuffs" – were readily visible from the jury box. When the judge suggested moving a table to block the jurors' line of sight, the bailiff responded that it was not possible to do so, and that was the end of the matter. So, as far as the record discloses, appellant went through the remainder of jury voir dire and the entire trial visibly shackled in full view of the jury.

As this Court has reiterated, "the unjustified imposition of *visible physical restraints* violates a criminal defendant's right to due process

under the Fifth and Fourteenth Amendments to the federal Constitution." (*People v. Hernandez* (2011) 51 Cal.4th 733, 745, [emphasis in original] citing *Deck v. Missouri* (2005) 544 U.S. 622, 629 (*Deck*).) This Court and the United States Supreme Court have thus made clear that "a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." (*People v. Duran* (1976) 16 Cal.3d 282, 290-291 (*Duran*); see also *Deck*, *supra*, 544 U.S. at p. 629.) There was no such "manifest need" in the instant case, and appellant should not have been shackled at all.

The more egregious error, however, was the trial court's failure to take readily available measures to ensure that the restraints did not remain visible to the jurors. As this Court has taught, even "where physical restraints are used those restraints should be as unobtrusive as possible . . . ." (*Duran*, *supra*, 16 Cal.3d at p. 291.) Making the restraints "as unobtrusive as possible" could have been accomplished quite easily in the instant case by, for instance, using curtains on the counsel tables, which would have obscured the jury's view. (See *People v. Wallace* (2008) 44 Cal.4th 1032, 1049; *Maus v. Baker* (7th Cir. 2014) 747 F.3d 926, 927, and cases cited therein.) The trial court's failure to even make an effort "to minimize the appearance of restraints, and therefore minimize the likelihood of prejudice to the jury" (*Maus v. Baker*, *supra*, 747 F.3d at p. 928) violated appellant's constitutionally-protected rights. Finally, the trial court compounded its errors by breaching its sua sponte duty to instruct the jury that the restraints should have no bearing on its determinations. (*Duran*, *supra*, 16 Cal.3d at pp. 291-292.) These errors, individually and combined, were prejudicial to appellant in both the guilt and penalty phases of his trial.

B. Background

On February 7, 2005, before trial proceedings commenced, defense counsel filed a "Motion for Defendant to Appear Without Physical Restraints." (2 CT 381.) In an accompanying memorandum defense counsel set out the prohibition, articulated in *Duran*, on placing a defendant in restraints of any kind absent a showing of "'manifest need for such restraints.'" (2 CT 383, quoting *People v. Cox* (1991) 53 Cal.3d 618, 651.) The motion reiterated this Court's case law, which narrowly defines "manifest need" as arising "only upon a showing of "unruliness, an announced attention to escape," or disruptive conduct (2 CT 384, quoting *People v. Cox*, *supra*, 53 Cal.3d at p. 651), and pointed out that:

> In this case, the Defendant MANUEL BRACAMONTES has been making court appearances in connection with this case for over a year. He has never been unruly or disruptive, nor has he posed a threat to courtroom security. Therefore, there is no manifest need for Mr. BRACAMONTES to appear shackled in front of the jury.

(2 CT 385.) The prosecution did not oppose the motion but rather filed a "Response" stating, in its entirety, as follows: "Defendant correctly lists the legal standard required for the use of restraint and the People submit this issue to the Court." (4 CT 852.)

At the hearing on the motion on March 14, 2005, the trial court first announced that:

> The tentative would be to deny [the motion for the defendant to appear without physical restraints], but with the explanation what we are going to do [*sic*] is what we are doing today, and that is that Mr. Bracamontes will have – the procedure that I'm suggesting is that Mr. Bracamontes have ankle cuffs on, that they be tethered to a bolt in the floor. His hands will not be shackled. He will not be waist chained. He will be free to stand, turn, talk to both counsel, certainly assist in his defense. [¶] What he will be prevented from doing is leaving counsel table, which he isn't allowed to do anyway.

[¶] We'll make every effort to ensure that the panel is not aware that he is chained to the floor. . . . . This is the way we have handled numerous death defendants or LWOP defendants, murder cases. It has proved very successful in the past.

(7 RT 667-68.)

Defense counsel responded that while there may not have been a problem with shackling appellant then, during pretrial motion proceedings, it would be different to do so "during trial in front of the jury. [¶] I don't think there's been any showing of manifest need to do this. There's been no showing of his unruliness or intention to escape or disruptive conduct over the past year and a half in court. I don't think it's appropriate at this time to shackle him to the floor." (7 RT 668.)

The court asked whether it was not appropriate to take into consideration, in assessing whether appellant was a "flight risk," the allegation that he had twice tried to escape from the police when they attempted to apprehend him. (7 RT 668-69.) Defense counsel replied:

> It's not indicative of how his behavior is in court during his trial. . . . Here in court, he's sitting here. The deputies are present. He's on trial. Obviously does not want to be disruptive in front of the jury who [*sic*] is deciding his fate. [¶] There's no indication in a courtroom setting that – or even in a jail setting, there's no indications that he's been uncooperative or caused any problems with the deputies in the jail setting.

(7 RT 669-70.) To that the trial court responded:

> I have to agree with you with regard to your assessment that Mr. Bracamontes has always been very respectful in court. I have nothing to indicate that he has not been to and from court. I specifically asked Frank, "Are there any incidents that we know of?" Frank said he's got nothing.
>
> The mere fact of the charges and the potential penalty in this case, do you think I disregard that?

(7 RT 670.)

Defense counsel replied: "Yes. I don't think that's one of the criteria . . . that you are allowed to use when assessing his potential for disruptiveness or escape." (7 RT 670.) The trial court nonetheless announced, without further explanation, that it would "continue with the restraint policy that it has in effect." (7 RT 671.)

On August 11, 2005, while jury *voir dire* was under way, defense counsel and the trial court had the following exchange:

> [Defense counsel]: It appeared to us yesterday that with the table turned facing the audience, that the jurors that were seated in the jury box, at least some of them could see that Mr. Bracamontes was shackled to the floor, which I think is a violation of his constitutional rights for the jurors to be aware that he was appearing shackled in front of the jurors in a death penalty [case]. I think that's a problem. The wire was visible underneath the chairs at least to probably the six people that are closest to the bench.
>
> [The Court]: We'll make every effort to make sure they can't see it.
>
> [Defense counsel]: Well, I'm afraid that they already have seen it.
>
> [The Court]: *I'm afraid I'm going to do nothing about it other than possibly turn the table.* We are not going to get rid of the panel. Do you want to turn the table, Frank?
>
> [Bailiff]: *I don't know how I can.* There's more people at the counsel table than expected and there's more people in the way when he stands.
>
> [The Court]: *We'll leave it the way it is.*

(23 RT 1700-01 [emphasis supplied].)

Although appellant remained restrained in this fashion throughout trial (see 46 RT 4137-4138), the trial court did not discuss the matter again, and the jury received no instructions regarding the impact that seeing appellant in restraints would have on their verdicts.

C. The Unnecessary and Visible Shackling of Appellant In The Presence of the Jury Violated His Constitutional Rights

This Court has carefully traced the history and significance of the "limitations on the use of physical restraints on defendants during trial [which] date from the early common law . . . ." (*People v. Mar* (2002) 28 Cal.4th 1201, 1216 & fn. 3, quoting 4 Blackstone's Commentaries 322; 2 Hale, Pleas of the Crown 219; and 2 Bishop, New Commentaries on the Law of Pleading and Evidence and the Practice in Criminal Cases (2d ed.1913) 955; and discussing *People v. Duran*, *supra,* 16 Cal.3d at p. 288-291; and *People v. Harrington* (1871) 42 Cal. 165, 168.) This history, and its importance, were reviewed in even greater detail by the United States Supreme Court in *Deck v. Missouri*, *supra*, which concluded that the right of "a criminal defendant . . . to remain free of physical restraints that are visible to the jury has a constitutional dimension," grounded in the Due Process guarantees of the Fifth and Fourteenth Amendments to the United States Constitution. (*Deck*, *supra*, 544 U.S. at pp. 626-630.) And both Courts have been clear about the principal concern animating that constitutional protection:

> We believe that it is manifest that the shackling of a criminal defendant will prejudice him in the minds of the jurors. When a defendant is charged with any crime, and particularly if he is accused of a violent crime, his appearance before the jury in shackles is likely to lead the jurors to infer that he is a violent person disposed to commit crimes of the type alleged.

(*Duran*, *supra*,16 Cal.3d at p. 290, citing, inter alia, *Illinois v. Allen* (1970) 397 U.S. 337, 344; accord *Deck*, *supra*, 544 U.S. at p. 631.)

Recognizing that, nonetheless, it is sometimes necessary to restrain a criminal defendant, this Court and the United States Supreme Court have set forth clear restrictions on when and how such restraints may be

employed, and have mandated specific steps that the trial court must take to ameliorate the resulting prejudice. The trial court in this case failed to honor any of those requirements.

1. There Was No "Manifest Need" For The Restraints

The first rule, already noted, is that "a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." (*Duran, supra,* 16 Cal.3d at p. 290-291; see also, *Deck, supra,* 544 U.S. at p. 627-628 ["Trial courts may not shackle defendants routinely, but only if there is a particular reason to do so. . . . '[S]hackling should be permitted only where justified by an essential state interest specific to each trial.'"], quoting *Holbrook v. Flynn* (1986) 475 U.S. 560, 569.)

There was no "manifest need" to shackle appellant. As both parties agreed – and this Court has taught – the "manifest need . . . requirement is satisfied by evidence that the defendant has threatened jail deputies, possessed weapons in custody, threatened or assaulted other inmates, and/or engaged in violent outbursts in court." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1031-1032.) It is indisputable that appellant did none of these things – on the contrary, in the words of the trial judge, appellant had "always been very respectful in court. I have nothing to indicate that he has not been to and from court. I specifically asked [the bailiff],'Are there any incidents that we know of?' [The bailiff] said he's got nothing." (7 RT 670.)

In announcing its tentative ruling, the trial court did not explain why – given his "respectful" and orderly conduct – appellant had to be shackled. Rather, the court merely announced that this was how it always proceeded in such cases. (See 7 RT 668 ["This is the way we have handled numerous death defendants or LWOP defendants, murder cases. It has proved very

successful in the past"].) When defense counsel responded that "there's been no showing of his unruliness or intention to escape or disruptive conduct over the past year and a half in court," the trial court asked whether it could take into consideration the (then unproved) allegation in the prosecution's pleadings that appellant had twice tried to escape when he was being arrested. (7 RT 668-669.) Defense counsel pointed out that there had been no actual evidence submitted in that regard, and that – more importantly – there had been "no indication in a courtroom setting – or even in a jail setting . . . that he's been uncooperative or caused any problems." (7 RT 669-670.) Thus, counsel argued, it was unfair to shackle appellant based on what had happened in an entirely different context. (*Ibid.*)

The trial court then pivoted back to its original premise: "Do you think the mere fact that Mr. Bracamontes is facing the death penalty in this particular case – are you saying I'm to disregard that as to potential for flight, for trying to get away? . . . The mere fact of the charges and the potential penalty in the case, do you think I disregard that?" (7 RT 670.) After defense counsel responded that the charges and potential penalty were not an appropriate basis for a shackling order, the trial court denied the motion and announced that it would "continue with the restraint policy that it has in effect." (7 RT 670-671.)

What clearly emerges from this exchange is that the trial court's decision was based principally, and perhaps entirely, on the nature of the charges and the penalty facing appellant – it did not clearly articulate another rationale. As this Court has consistently held in capital cases, "[t]he circumstance that defendant was charged with a violent crime . . . does not establish a sufficient threat of violence or disruption to justify physical restraints during trial." (*People v. Seaton* (2001) 26 Cal.4th 598, 652, citing *People v. Hawkins* (1995) 10 Cal.4th 920, 944; *People v. Duran, supra,* 16

Cal.3d at p. 293; see also *Stephenson v. Wilson* (7th Cir. 2010) 619 F.3d 664, 668-669 ["The cases thus hold that the nature of the crime with which a defendant is charged, however heinous, is insufficient by itself to justify visible restraints"] citing, inter alia, *Deck v. Missouri*, *supra*, 544 U.S. at p. 634-635.) Nor would the shackling decision have been justified by the addition of proof that, long before and in a completely different circumstance, appellant had aggressively evaded arrest. (Cf. *People v. Hawkins*, *supra*, 10 Cal.4th at p. 944 ["We agree with defendant that his record of violence, or the fact that he is a capital defendant, cannot alone justify his shackling"])

In short, the trial court substituted a general policy of shackling defendants in murder cases (and the mention of a remote history of resistance on appellant's part) for the specific and individualized determination of "manifest need" that is required before a defendant is placed in restraints during trial. In doing so, the court below violated its constitutional duty to "make an individualized decision that a compelling government purpose would be served and that shackles are the least restrictive means for maintaining security and order in the courtroom." (*United States v. Sanchez-Gomez* (9th Cir. 2017) 859 F.3d 649, 661 [*en banc*] (citations and footnote omitted), cert. granted Dec. 8, 2017, No. 17-312, ___ U.S. ___.) The decision to shackle appellant thus violated his rights guaranteed by the Fifth, Sixth and Eighth Amendments to the United States Constitution, and analogous provisions of state law. (*Deck, supra,* 544 U.S. at p. 629, 632-633; see also, *Duran*, *supra*, 16 Cal.3d at p. 293.)

2. Even If the Record Had Been Adequate to Demonstrate That Shackling Was Necessary, There Was No Excuse for Failing to Conceal the Restraints From the Jury's View

Regardless of whether the trial court found the required "manifest need" to shackle appellant, there was still absolutely no justification for the

court's failure to ensure that the restraints were concealed from the jury – particularly after it was brought to the court's attention that the restraints were indeed visible from the jury box.

This Court and the United States Supreme Court have consistently made plain that, even when the need for restraints has been established, the trial court must ensure that the restraints actually employed are the least obstructive and visible ones that can effectively do the job. (*People v. Mar*, *supra*, 28 Cal.4th at p. 1226, citing *Duran*, *supra*, 16 Cal.3d 291, and *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712; see also, *Deck*, *supra*, 544 U.S. at pp. 634-635 [shackling violated due process where, inter alia, judge failed to "explain why, if shackles were necessary, he chose not to provide for shackles that the jury could not see"].)

A common, well-accepted method for accomplishing this goal when (as in this case) ankle restraints are employed is to drape a skirt or curtain over counsel tables, so that neither the defendant's legs nor those of others seated at counsel tables can be seen by the jurors. As a federal court of appeals summarized, reviewing a number of similar cases from around the country, dating back several decades:

> Even when a visible restraint is warranted by the defendant's history of escape attempts or disruption of previous court proceedings . . . it must be the least visible secure restraint, such as, it is often suggested, leg shackles made invisible to the jury by a curtain at the defense table. (There should of course be a curtain at the prosecution table as well, lest the jury quickly tumble to the purpose of the curtain at the defense table.)

(*Stephenson v. Wilson*, *supra*, 619 F.3d at p. 668-669, and cases cited therein; *People v. Wallace*, *supra*, 44 Cal.4th at p. 1049; *Maus v. Baker*, *supra*, 747 F.3d at p. 927 and cases cited therein; *Rich v. Calderon* (9th Cir. 1999) 187 F.3d 1064, 1069.) The constitutional necessity for taking such

ameliorative steps was cogently explained by Judge Posner of the Seventh Circuit:

> The sight of a shackled litigant is apt to make jurors think they're dealing with a mad dog; [such practices are] likely to influence the jury against the prisoner, and ha[ve] long been recognized as being highly prejudicial. There may have been adequate reasons to shackle the plaintiff in this case – a violent person, who had attacked guards – but the shackles should have been concealed from the jury. Ordinarily courtroom security can be assured by shackling the prisoner just at the ankles (skipping the handcuffs); and when that is done a curtain attached to the table at which he sits will hide the shackles from the jury's sight.

(*Maus v. Baker*, *supra*, 747 F.3d at p. 927 [citations omitted].)

Despite knowing that the jury could see that appellant's ankles were tethered, the trial court did not even look into whether the tables could have been draped or other means could have been used to conceal the restraints. Rather, when defense counsel said that she was "afraid" that the jury had already seen the shackles, the trial judge replied, "I'm afraid I'm going to do nothing about it . . . ." Thus the shackles apparently remained in the jury's view for the duration of the trial. The trial court's inexplicable failure to take any ameliorative step – even after being informed that appellant's restraints were visible to the jury – violated appellant's rights under the United States Constitution and state law, irrespective of whether there was any "manifest need" to shackle him in the first place.

3. The Trial Court Failed To Honor Its Sua Sponte Duty To Instruct The Jurors To Disregard The Restraints

The trial court committed additional error by neglecting to provide the required curative instruction regarding how the jury should deal with having seen appellant in shackles. As this Court has reiterated several times: "'In those instances when visible restraints must be imposed the court shall instruct the jury sua sponte that such restraints should have no

bearing on the determination of the defendant's guilt.'" (*People v. Mar*, *supra*, 28 Cal.4th at p.1217, quoting *Duran*, *supra*, 16 Cal.3d at p. 291; accord *People v. Lopez* (2013) 56 Cal.4th 1028, 1079-1081; see also *Lemons v. Skidmore* (7th Cir. 1993) 985 F.2d 354, 359.) The record in this case shows that the restraints were visible to the jurors. The sua sponte duty to instruct was thus triggered, but the trial court did not give the required instruction. The trial court in this case thus compounded the constitutional error it committed in neglecting to shield the jurors from the sight of appellant in shackles, and committed error anew, when it failed to give the jury an instruction designed to cure – or at least ameliorate – the resulting damage.

D. The Trial Court's Errors in Ordering Appellant Shackled, In Failing to Shield The Shackles From the Jury's View, And in Failing to Give a Required Curative Instruction Were Prejudicial To Both the Guilt and Penalty Determinations

In the instant case, as "'in *Deck,* there was no dispute that the restraints were visible to the jury – a circumstance that courts consistently have viewed as inherently prejudicial.'" (*People v. Williams* (2015) 61 Cal.4th 1244, 1259-1260; quoting *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 155, discussing *Deck*, *supra*, 544 U.S. at p. 635; see also *Holbrook v. Flynn*, *supra*, 475 U.S. at p. 568.) The most fundamental harm caused by such shackling is its corrosive effect on the jurors' ability to hold to the requirement that they presume the defendant innocent unless guilt is proved beyond a reasonable doubt. As the high court explained: "Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process. It suggests to the jury that the justice system itself sees a 'need to separate a defendant from the community at large.'" (*Deck*, *supra*, 544 U.S. at p. 630, quoting *Holbrook v. Flynn*, *supra*, 475 U.S. at p. 569.) Or, as Judge Posner more evocatively put it: "The sight of

a shackled litigant is apt to make jurors think they're dealing with a mad dog," and the effect has "long been recognized as being highly prejudicial." (*Maus v. Baker, supra*, 747 F.3d at p. 927.)

"Thus where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove 'beyond a reasonable doubt that the' shackling 'error complained of did not contribute to the verdict obtained.'" (*Deck, supra,* 544 U.S. at p. 635, quoting *Chapman v. California* (1967) 386 U.S. 18, 24; accord, *People v. Hernandez, supra*, 51 Cal.4th at p. 745.) And, as *Deck* clarified, both the constitutional mandate and the stated standard for assessing prejudice apply equally to the guilt and penalty phases of a capital proceeding. (*Deck, supra,* 544 U.S. at pp. 633, 635.)

In this case, the unnecessary, obtrusive shackling of appellant infected the jury's determination of both the guilt and penalty verdicts, and both should be reversed.

1. The Guilt Phase

Appellant does not dispute in this brief that the evidence against him was sufficient to support a conviction – but he does argue that a rational juror could well have entertained a reasonable doubt had the process not been contaminated by his visible shackling.

However strong the evidence of appellant's guilt may have appeared, the reasons for doubting it were also impossible to ignore. The prosecution's case was played almost entirely on one note: the testing done in 2003 that indicated appellant's semen, identified through DNA analysis, was on the victim's person and clothing. Beyond that, the evidence against him was circumstantial and quite susceptible of noninculpatory explanations. The fact that appellant was at the apartment complex that

evening, and related briefly to the group of girls that included the victim, was unremarkable given that he had lived there and his son and stepdaughter (a friend of the victim's) lived there still. The fact that a tool like the one that *could* have been used in the killing (a "pick mattock") was found in his parents' garage means little, given that it definitely was not *the* weapon used, and tens of thousands of them are sold each year. That a blue fiber found on the victim was "consistent with" fibers from a piece of appellant's clothing proves next to nothing without information about how many millions of other garments it was "consistent with." The fact that he was initially less than forthcoming with police regarding when he was at the complex is credibly explained by the fact that his entire family had recently had an extremely negative interaction with these same police in regard to the shooting of his sister's husband: appellant simply did not trust them. Finally, that same history of mistrust provides some explanation for his decision to flee when the police announced, at gunpoint, that he was being arrested for murder. Not that these various points were devoid of probative value, but – individually and collectively – they fall far short of providing overwhelming corroboration of appellant's culpability.

What persists, then, is the DNA evidence uncovered in 2003. Equally persistent, however, is the fact that the same material – the swabs, the victim's fingernails, her clothing – were carefully and repeatedly examined, tested and analyzed more than a decade before. The county Medical Examiner, police criminalists, an outside laboratory and the Federal Bureau of Investigation had all looked for that same inculpatory evidence, but no semen or DNA evidence pointing to appellant had been found. And the prosecution's witnesses testified that the means used in 2003 to uncover the decisive evidence were commonly available when the original investigation took place.

That anomaly raises questions about *the* decisive evidence – and the prosecution's only response was that all of those experts just missed it the first time.

The questions multiply when one is reminded of all the inculpatory proof that the police would have been expected to find, but never did. The prosecution's "crime scene reconstruction expert" opined that the victim had been sexually assaulted in a car or truck, but testified that, if such was the case, one would expect to find bodily fluids, hairs and fibers, and broken fingernails from the victim in the vehicle. (27 RT 2530-2536.) Despite extensive and repeated searches, no traces of the victim – no blood, no hair, no clothing fibers, nothing – were ever found on appellant's clothing or effects or, most tellingly, in his car.

Another body of evidence inexplicably absent from the prosecution's case was anything at all that would point to appellant as the sort of person who would commit such a crime. He was never accused of any other crime against a child, and there was absolutely no indication of pedophilia; he was by all accounts a good father and stepfather . The searches of appellant's home and effects turned up none of the evidence that (according to the investigating officer) would commonly be found in the residence of a child molester: there were no photos or videos containing child pornography, and no newspaper articles, mementos or anything else regarding the victim were found. (33 RT 3148-3151; see *People v. McAlpin* (1991) 53 Cal.3d 1289, 1305-1306 [evidence that defendant lacks disposition of child molester tends to prove he did not commit charged sexual crime against a child], discussing *People v. Stoll* (1989) 49 Cal.3d 1136, 1152-1153 [same] and *People v. Jones* (1954) 42 Cal.2d 219 [same]; compare, e.g., *People v. Memro* (1995) 11 Cal.4th 786, 843 [evidence of defendant's "morbid sexual interest in young boys," and prior molestation of nine year old, supported

conclusion that he had murdered (after attempting to sodomize) seven-year-old boy].)

It was also difficult to square the timing of the assault and killing with the evidence regarding appellant's whereabouts that evening. According to the victim's parents, she was still in their home at around 9:00 p.m.[35] After they discovered the victim missing, her parents called the police, who arrived at about 9:45 p.m.[36] A few minutes later, Maggie Bracamontes called appellant at his parents' home; he answered and she asked him to come back to the complex because she was afraid. He arrived 10 to 15 minutes after that.[37] The victim's mother told police that she saw appellant park his car and walk to Maggie's apartment at approximately 10:00 p.m.[38]

Even taking into account predictable imprecisions in these accounts, the upshot is that if appellant had indeed been the perpetrator, he would have had to have kidnapped the victim, assaulted her, taken her to the site where her body was discovered, killed her, and driven to his parents' home in time to pick up the phone when Maggie called – all within roughly an hour or less – and then return immediately to the complex, where he

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[35] Luis Arroyo testified that he went upstairs to shower with his sons sometime between 8:45 and 9:00 p.m., and his daughter came upstairs twenty minutes later. (25 RT 1977-1978; 30 RT 2075.) The victim's mother testified that Laura went upstairs when Luis and the boys were showering, then joined her watching television in the boys' room. Five minutes later, the doorbell rang and Laura went to answer it. (25 RT 2003-2004, 2015.)

[36] An officer was dispatched at 9:41 and arrived at the scene roughly five minutes later. (26 RT 2090-2094.)

[37] See 30 RT 2641-2644; 31 RT 2731-2733, 2777-2779.

[38] 26 RT 2085-2087.

appeared neither to have showered nor to be covered in the grisly aftermath of a violent murder. At a minimum, this would raise even more questions about whether appellant committed the crime.

It is apparent from the record of guilt phase deliberations that the jurors did indeed wrestle with those questions. In the midst of their deliberations, the jurors sent a note requesting readbacks of the testimony of Laura Arroyo (the victim's mother), and of police Captain Leonard Miranda, who testified to his interviews with Ms. Arroyo and other witnesses specifically in regard the chronology of events that evening. (10 CT 2106, 2108.)

As the Ninth Circuit summarized, the prevailing appellate view of such requests for readbacks is that they are "an indication that '[t]he jury was clearly struggling to reach a verdict' [and] '"evidently did not regard the case as an easy one"'" (*Thomas v. Chappell* (9th Cir. 2012) 678 F.3d 1086, 1103 (citations omitted), cert. denied, (2013) ___ U.S. ___, 133 S.Ct. 1239; see also, *People v. Diaz* (2014) 227 Cal.App.4th 362, 384-385 [noting requests for readbacks, length of deliberations and declarations of deadlock, court concludes "the record unequivocally indicates that the jury viewed this as a close case"]; *In re Hernandez* (2006) 143 Cal. App.4th 459, 476, 477 [readbacks demonstrated jury believed it was close case]; compare *People v. Livingston* (2012) 53 Cal.4th 1145, 1160 [despite prosecutor's invitation to the jurors to "watch it, if it's important to you," deliberating jurors did not ask to view videotape of witness interrogation].)

That the guilt phase was indeed difficult for the jurors to decide – i.e., that it was a close case – is underscored by the fact that, although the charges were few and the facts uncomplicated, it took them two-and-one-half days to reach their verdicts. (See, e.g., *Parker v. Gladden* (1966) 385 U.S. 363, 365 [finding prejudice from error where "the jurors deliberated

for 26 hours, indicating a difference among them as to the guilt of petitioner"]; *In re Martin* (1987) 44 Cal.3d 1, 51 [deliberations over the course of five days "practically compels the conclusion" that the case was "very close"]; *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [12 hours of deliberations "graphic demonstration of the closeness of the case"]; *People v. Rucker* (1980) 26 Cal.3d 368, 391 ["the degree of appellant's criminal liability was not clear-cut . . . . The fact that the jury deliberated nine hours before reaching a verdict underscores this fact"]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 ["The issue of guilt in this case was far from open and shut, as evidenced by the sharply conflicting evidence and the nearly six hours of deliberations by the jury before they reached a verdict"]; *People v. Paniagua* (2012) 201 Cal.App.4th 499, 520 [characterizing three days of deliberations as "lengthy" and bearing on the issue of prejudice "favorably to the defendant"] accord *Thomas v. Chappell, supra*, 678 F.3d at p. 1103 "'[Lengthy deliberations suggest a difficult case'"] , quoting *United States v. Velarde-Gomez* (9th Cir.2001) 269 F.3d 1023, 1036 [en banc]; additional citations omitted.)

Appellant is mindful of decisions suggesting that the length of deliberations in a given case may only indicate that the jurors were taking seriously their duty carefully to weigh the evidence before reaching a verdict. Appellant submits that in this case, however, the Court cannot reasonably exclude the likelihood that there could have been a different result from that weighing process had the visible shackling not placed a fat thumb on the scale. Particularly in light of the fact that the jury was not instructed to exclude the sight of appellant in shackles from their determination, it cannot be concluded "'beyond a reasonable doubt that the' shackling 'error complained of did not contribute to the verdict obtained.'" (*Deck, supra*, 544 U.S. at p. 635, quoting *Chapman v. California, supra*,

386 U.S. at p. 24.)

2. The Penalty Phase

"The considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases."[39] (*Deck, supra*, 544 U.S. at p. 632.) In this case, the effect of the unconstitutional, visible shackling of appellant was, if anything, more potently prejudicial to him in the penalty phase of his trial, for two reasons.

First, before penalty deliberations the jurors were instructed regarding "lingering doubt," as follows:

> It is appropriate for the jury to consider any lingering doubt it may have concerning the defendant's guilt. Lingering or residual doubt is defined as that state of mind between "beyond a reasonable doubt" and "beyond all possible doubt."

(CT 1921; *see also*, *People v. Harrison* (2005) 35 Cal.4th 208, 256.)

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[39] This Court has not had occasion to apply the quoted principle in a case involving unjustifiably obtrusive shackling during the penalty phase of a capital trial. However, in treating the related issue of a trial court's erroneous failure to instruct a penalty phase jury that the sight of shackles should have no bearing on its deliberations, the Court held that "where . . . a defendant has been convicted of a special circumstance murder, the rationale requiring a sua sponte instruction is no longer applicable [because] 'the risk of substantial prejudice to a shackled defendant is diminished once his guilt has been determined.'" (*People v. Lopez* (2013) 56 Cal.4th 1028, 1079-1081; quoting *People v. Medina* (1990) 51 Cal.3d 870, 898.) Appellant respectfully submits that this view is incompatible with the Supreme Court's analysis in *Deck*, which – while noting that the "presumption of innocence" is no longer in play in the penalty phase – emphasizes that other, related concerns make visible shackling during that phase equally, if not more, potentially prejudicial than during the guilt phase. (*Deck v. Missouri, supra*, 544 U.S. at pp. 632-633.) *Deck*'s teaching will be discussed more fully in the text, *post*; it is sufficient for now that the contrary view expressed in *Medina* and its progeny (including *Lopez*) is unsupportable in light of *Deck*, and should be disapproved by this Court.

During their (relatively brief) penalty phase arguments, defense counsel repeatedly exhorted the jurors to employ that instruction and reject the death penalty if they had *any* doubt at all regarding appellant's culpability for the murder.[40] (45 RT 4076-4077; 4098-4104.) This Court and others have long recognized that the sight of a defendant visibly restrained can vitiate the jury's "reasonable doubt" regarding his guilt. It follows, a fortiori, that the same constitutional violation would be likely to have an utterly corrosive effect on any "lingering doubt" that the jurors could summon in the penalty phase.

In *Deck*, the Supreme Court outlined a second, and even more compelling, basis for concluding that the unconstitutional, obtrusive shackling of appellant was prejudicial to the outcome of the penalty phase:

> The Court has stressed the "acute need" for reliable decision making when the death penalty is at issue. The appearance of the offender during the penalty phase in shackles, however, almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community – often a statutory aggravator and nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point. It also almost inevitably affects adversely the jury's perception of the character of the defendant. And it thereby inevitably undermines the jury's ability to weigh accurately all relevant considerations – considerations that are often unquantifiable and elusive – when it determines whether a defendant deserves death. In these ways, the use of shackles can be a "thumb on death's side of the scale."

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[40] Thus counsel retraced the anomalies in the prosecution's guilt phase evidence and argued, for example, as follows: "The law only requires you to find someone guilty beyond a reasonable doubt, not beyond all possible doubt. That was the instructions [*sic*] that you received at the first phase of the trial. But the law recognizes a difference. And at this stage, you can set . . . a higher standard than beyond a reasonable doubt for when you want to impose death. You can make that standard beyond all possible doubt." (45 RT 4098-4099.)

(*Deck v. Missouri, supra*, 544 U.S. at pp. 632-633 [citations omitted].)

While it is true that the jury had decided, beyond a reasonable doubt, that appellant had sexually assaulted and murdered a young girl, that in itself does not demonstrate – beyond a reasonable doubt – that a death verdict was inevitable.[41] As this Court has held in several cases involving a guilt phase determination of murder with special circumstances, accompanied by shocking evidence in aggravation: a death sentence "was by no means a foregone conclusion." (*People v. Sturm* (2006) 37 Cal.4th 1218, 1244 [defendant's crime of murdering three friends while they were bound and begging for mercy was "undeniably heinous," nevertheless, a death verdict was not "a forgone conclusion"]; see also *People v. Gay* (2008) 42 Cal.4th 1195, 1227 [death verdict not a foregone conclusion despite evidence that defendant murdered peace officer in the performance of his duties and had committed a series of crimes which were "unusually – and unnecessarily – brutal and cruel," and "scant evidence in defendant's social history to excuse or mitigate these heinous crimes"]; *People v. Gonzalez* (2006) 38 Cal.4th 932, 962 [despite egregious nature of capital double murder, along with prior assaults on inmates, possession of assault weapon, and possession of shank in jail, "a death verdict was not a foregone conclusion."].)

There was no evidence in this case that appellant committed any other acts of egregious violence, and there was a great deal of evidence in mitigation demonstrating his loyalty and constancy to his family and his other good qualities. The state cannot establish, beyond a reasonable doubt,

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[41] Along with this Court's precedent (discussed presently) the high court's decision in *Deck* illustrates this point: the high court held that the shackling was prejudicial to the jury's death determination, despite the fact that the defendant had "robbed, shot, and killed an elderly couple." (*Deck, supra*, 544 U.S. at pp. 624, 634.)

that a death sentence was "a foregone conclusion" in this case. But what could well have made it so was the prejudicial effect on the jurors of having seen appellant in shackles.

It is in this context that Judge Posner's observation that "[t]he sight of a shackled litigant is apt to make jurors think they're dealing with a mad dog" takes on its maximum significance. As everyone knows, the only thing to do with a mad dog is to put it down. That is just what the jury decided here, and the state cannot "prove 'beyond a reasonable doubt that the' shackling 'error complained of did not contribute to the verdict obtained.'" (*Deck*, *supra*, 544 U.S. at p. 645, quoting *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Because, as discussed, the clear constitutional error infected both the guilt and penalty phases of appellant's trial, the judgment should be reversed in its entirety.

II.

THE TRIAL COURT'S REFUSAL TO GIVE BALANCED INSTRUCTIONS REGARDING FLIGHT AND CONSCIOUSNESS OF GUILT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR JURY TRIAL

This case is unusual in that the appellant both did *and* did not flee in the face of accusations that he murdered the victim. In August, 1991 – some six weeks after the homicide – an interrogating detective accused appellant of being the perpetrator, and made it clear that he intended to see appellant prosecuted for the crime. (1 CT 150-154.) Although appellant was not charged then, the focus on him remained: a year later, appellant was again called to the police station and interrogated regarding the murder. (30 RT 2678-2679; Exh. 64.) In response, appellant did not hide, flee or evade the police; on the contrary, he remained fully cooperative and continued to maintain residence in the same area for over a dozen years.

Then, in October, 2013, when uniformed officers did attempt to arrest appellant, he tried to escape.

Based on that ultimate effort to flee, the trial court gave the jurors the standard pattern instruction (CALJIC No. 2.52), permitting them to infer that his flight betokened a consciousness of guilt. (35 RT 3347-3358.) The prosecutor devoted a considerable portion of his closing argument to exploiting that instruction. (35 RT 3451-3454.) The court refused, however, to give a corresponding instruction, requested by the defense, to the effect that a defendant's choice *not* to flee when he is accused of a crime – the course followed by appellant for more than a decade – may give rise to the parallel but opposite inference that he does not have a guilty mind. (35 RT 3358-3359.) Although the defense attempted to argue that point (see 35 RT 3483), it was forced to do so without any instructional support, and in the face of the antagonistic instruction that favored the prosecution.

Under the unique circumstances of this case, the trial court's refusal to give even-handed instructions, and its decision instead to provide only the instruction that favored the prosecution, offended federal constitutional principles of due process and deprived appellant of a fair trial. (*Cool v. United States* (1972) 409 U.S. 100, 103, fn.4. (*Cool*); see also *Washington v. Texas* (1967) 388 U.S. 14, 22; *Chambers v. Mississippi* (1973) 410 U.S. 284, 295-298.)

Appellant acknowledges that this Court's precedent suggests a contrary conclusion, but respectfully submits that the clarity with which the issue is framed in the instant case makes it an ideal vehicle for the Court to reconsider whether favoring the prosecution in this fashion is compatible with fundamental fairness and basic constitutional guarantees.

It is a venerable (though oft-criticized) practice for courts to instruct jurors to the effect that, if a defendant flees from the scene of a crime or

after learning he was accused of a crime, it may be inferred that he fled because he knew he was guilty. Indeed, where such evidence of flight has been introduced, the courts of this state are statutorily obliged to give such an instruction. (Pen. Code, § 1127c.)[42] On the other hand, this Court has held that – even if the evidence shows that the defendant has made no attempt to flee despite being aware of the most serious accusations against him or her – the defendant does not have a right, even upon request, to a corresponding jury instruction regarding the inference that the defendant had an innocent state of mind. (*People v. Staten* (2000) 24 Cal.4th 434, 459; *People v. Green* (1980) 27 Cal.3d 1, 39-40 & fn. 26 (*Green*).)

This disparate treatment of the parallel inferences to be drawn from a defendant's response to an accusation necessarily favors the prosecution. As such it would seem, on its face, to implicate principles of fairness and due process guaranteed by the federal and state Constitutions. As this Court has long held, "there should be absolute impartiality between the People and the defendant in the matter of instructions." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527.) The United States Supreme Court has made it very clear that procedural rules that inure solely to the benefit of the prosecution in a criminal proceeding offend the due process guarantees of the federal Constitution. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 474 [holding that requiring solely the defense to make discovery on a given

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[42] That statute provides, in pertinent part that "where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine." (Pen. Code, § 1127c.) The jury in the instant case was instructed with nearly identical language, pursuant to CALJIC No. 2.52. (8 CT 1756.)

topic is fundamentally unfair; "the Due Process Clause speak[s] to the balance of forces between the accused and his accuser"]; *Washington v. Texas*, *supra*, 388 U.S. at p. 22 [Texas rule permitting accomplices to testify for the state, but not for the defendant, unconstitutional]; *Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 295-298 [unconstitutional to bar defendant from impeaching his own witness when the government was free to do so with theirs].)

The high court has specifically applied this rule of even-handedness to the instruction of juries in criminal cases. In *Cool*, for example, the defendant's alleged accomplice gave testimony completely absolving her of any knowing participation in his counterfeiting activities. (*Cool*, *supra*, 409 U.S. at p. 101.) In reversing the defendant's conviction, the court's primary holding was that an instruction by the trial court – suggesting that accomplice testimony could only be credited if the jury credited the testimony "beyond a reasonable doubt" – placed "an improper burden on the defense" and "reduced the level of proof necessary for the Government to carry its burden." (*Id.* at pp. 103-104.) In an often-overlooked alternative holding, however, the court set out the constitutional imperative that forbids one-way instructions favoring the prosecution:

> In the next paragraph of his instruction, the judge stated: "I further instruct you that testimony of an accomplice may alone and uncorroborated support your verdict of guilty of the charges in the Indictment if believed by you to prove beyond a reasonable doubt the essential elements of the charges in the Indictment against the defendants." In light of the fact that the only accomplice testimony in the case was exculpatory, this instruction was confusing to say the least. But even if it is assumed that [the accomplice] testimony was to some extent inculpatory, *the instruction was still fundamentally unfair in that it told the jury that it could convict solely on the basis of accomplice testimony without telling it that it could acquit on this basis*. Even had there

> been no other error, the conviction would have to be reversed on the basis of this instruction alone.

(*Id.* at p. 103, fn. 4 [emphasis supplied].)

The logic of *Cool* compels the same conclusion in regard to the one-way flight instruction given in the instant case. Appellant's jury was told that, although it could not convict him based *solely* on the fact that he attempted to flee, it could infer from that fact that he was indeed guilty. But the trial court refused to tell the jurors that they could also infer that he was not guilty from the fact that he was cooperative, available and did not leave the area for more than a dozen years after he was accused of murder by the police. This imbalance was fundamentally unfair, for precisely the reasons articulated by the Court in *Cool.*

Appellant recognizes that, although this Court has never addressed *Cool*, it has rejected the view that due process requires even-handed instruction regarding inferences to be drawn when a defendant does – or does not – flee. (*People v. Staten*, *supra*, 24 Cal.4th at p. 459.) The *Staten* court did not explain its reasoning beyond reiterating what it had said two decades earlier in holding that an "absence of flight" instruction need not be given:

> [S]uch an instruction would invite speculation; there are plausible reasons why a guilty person might refrain from flight. (*Green, supra,* 27 Cal.3d at pp. 37, 39.) Our conclusion therein also forecloses any federal or state constitutional challenge based on due process. (See also *People v. Williams* (1997) 55 Cal.App.4th 648, 652–653 [rejecting constitutional argument with regard to instruction on absence of flight].)

(*People v. Staten*, *supra*, 24 Cal.4th at p. 459.)

In *People v. Williams*, *supra*, the court was more direct. After reiterating what *Green* said about the weakness of exculpatory inferences to

be drawn from absence of flight, the *Williams* court held:

> [T]here is no fundamental unfairness in not requiring an instruction on the absence of flight. As previously discussed, unlike the flight of an accused from the scene of a crime or after accusation of a crime, the absence of flight presents such marginal relevance it is usually not even admissible. Since flight and the absence of flight are not on similar logical or legal footings, the due process notions of fairness and parity in *Wardius* are inapplicable.

(*People v. Williams, supra,* 55 Cal.App.4th at p. 653, citing *Green*, *supra*, 27 Cal.3d at p. 37.)

The notion, in short, is that it is fundamentally fair for courts to give the standard, inculpatory flight instruction (when supported) but to refuse to give an exculpatory "absence of flight" instruction (even when supported) because the inferences to be drawn from the former are so powerful while those to be drawn from the latter are "marginal." This reasoning is empirically unsupported and – as explained below – doctrinally indefensible.

On the one hand, even the *Green* opinion acknowledged that a defendant's "absence of flight" is relevant evidence, in that it tends in some measure to show the "defendant's innocent state of mind." (*Green*, *supra*, 27 Cal.3d at p. 38.) On the other hand, courts and commentators – including, most notably, the United Supreme Court – have long observed that the inference of guilt that arises from a defendant's flight is not, in fact, a particularly strong or convincing one. Thus in *Wong Sun v. United States* (1963) 371 U.S. 471 (*Wong Sun*), the high court – holding that proof of a defendant's flight is not sufficient to provide probable cause for his arrest – famously reiterated that:

> [W]e have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime. In *Alberty v. United States*, 162 U.S. 499, 511, this Court said: ". . . it is not universally true that a man who is conscious that he has done a wrong, 'will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right, and proper,' since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.'"

(*Wong Sun*, *supra*, 371 U.S. at p. 484 [remaining citations omitted].) In support of this proposition, the court cited and quoted two federal cases: "see *Vick v. United States* (5th Cir. 1954) 216 F.2d 228, 233 ('One motive is about as likely as another. Appellant may be guilty, but his conviction cannot rest upon mere conjecture and suspicion'); *Cooper v. United States* (D.C. Cir. 1954) 218 F.2d 39, 41 'After all, innocent people caught in a web of circumstances frequently become terror-stricken')." (*Wong Sun*, *supra*, 371 U.S. at p. 484.) Other courts have looked to scientific scholarship on the subject, and concluded that "numerous psychological authorities . . . demonstrate that when we deal with a person's flight from the scene of, or an accusation of, crime, we deal with an extraordinarily complex action, potentially prompted by a variety of motives other than guilt of the actual crime." (*Austin v. United States* (D.C. Cir. 1969) 414 F.2d 1155, 1157 [citations omitted].)

It is thus unsurprising that, in recent decades, a number of jurisdictions have barred the use of flight instructions entirely. (See, e.g., *Hadden v. State* (Wyo. 2002) 42 P.3d 495, 508; *Dill v. State* (Ind. 2001) 741 N.E.2d 1230, 1233; *State v. Hall* (Mont. 1999) 991 P.2d 929, 937; *Fenelon*

v. State (Fla.1992) 594 So.2d 292, 295; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748–749; *State v. Grant* (SC. 1980) 272 S.E.2d 169, 171; *State v. Stilling* (Ore. 1979) 590 P.2d 1223, 1230; *State v. Reed* (Wash. 1979) 604 P.2d 1330, 1333; *State v. Fleming* (Mo.Ct.App.1975) 523 S.W.2d 849, 854 [reporting that the Missouri Supreme Court had directed that flight instructions should no longer be given].) Others – including several federal circuits – actively discourage trial courts from giving such instructions. (See, e.g., *United States v. Robinson* (7th Cir. 1998) 161 F.3d 463, 469; *United States v. Williams* (7th Cir. 1994) 33 F.3d 876, 879 ["Because the probative value of flight evidence is often slight, there is a danger that a flight instruction will isolate and give undue weight to such evidence. Consequently, we have discouraged its use in this circuit"]; *United States v. Amuso* (2d Cir. 1994) 21 F.3d 1251, 1260; *United States v. Robinson* (D.C.Cir.1973) 475 F.2d 376, 384; 9th Cir. Manual of Model Crim. Jury Instructions § 4.20 [approved Jan. 2007].)

In *United States v. Mundy* (2nd Cir. 2008) 539 F.3d 154, in an analysis with particular resonance to the case at bench, the United States Court of Appeals for the Second Circuit explained the provenance of the standard flight instruction, its proper use, and its limitations:

> It appears that the giving of a flight instruction is a vestige of the late nineteenth and early twentieth centuries, when it was common practice for judges to summarize and comment upon the evidence generally. For good reason, that practice has fallen into widespread disfavor, absent special circumstances. Judges cannot marshal the evidence without exercising their own judgment on how evidence should be described, which aspects should be stressed, which aspects ignored. In doing so, courts inescapably influence the jury on decisions which should be in the jury's sole province. Especially in a criminal trial, in which the defendant often

> declines to present evidence, the court's marshaling of the evidence often amounts substantially to a repetition of the prosecutor's summation. Today, marshaling of evidence is rarely practiced in federal court. A majority of states bar judges from commenting upon the evidence, and a plurality of states bar them from summing up the evidence as well. In light of these changed practices, court instructions to the jury on inferences to be drawn from flight may be an anomaly. The mere fact that a practice has existed in the past is not necessarily sufficient reason for its continuation.
>
> We nonetheless recognize that in some circumstances the party that opposes drawing the inference of consciousness of guilt from flight may welcome a balanced version of the charge because it gives court approval to the proposition that flight does not necessarily result from consciousness of guilt. . . . It is where that party does object that we urge courts to think carefully whether the charge serves a useful and proper purpose or whether it simply gives court imprimatur to one side's factual contention.

(*United States v. Mundy* (2nd Cir. 2008) 539 F.3d 154, 158-159 [citations and footnote omitted]; cf. *People v. Roder* (1983) 33 Cal.3d 491, 506 ["[A] trial court's instruction on . . . a permissive inference with reference to the specific facts of the case is comparable to a restrained form of judicial comment on the evidence"].)

Appellant is not now contending that it was improper to give the standard flight instruction. Rather, the question presented by the instant case is whether the trial court, by simultaneously giving the standard CALJIC flight instruction while refusing to instruct on the inferences to be drawn from appellant's prior (and prolonged) determination *not* to flee, unfairly gave "court imprimatur to one side's factual contention." It is in that regard that the criticisms of the standard instruction leveled by the high court and a multitude of other state and federal jurisdictions are extremely important, for they vitiate the assumption that the inference to be drawn

from flight is so powerful that it is fair to give the standard instruction while ignoring the inferences to be drawn from the decision not to flee.

The relative strength of the competing inferences is not something that can be determined in the abstract, dependent as that measurement is on the facts of the given case. But even if one inference is arguably stronger than the other, the fundamental fact remains that they are both just that – inferences that reasonably *may* be drawn from specific evidence. For the trial court to, in effect, provide a commentary on the evidence that emphasizes one of those inferences, while ignoring the other, "inescapably influence[s] the jury on decisions which should be in the jury's sole province." (*United States v. Mundy, supra*, 539 F.3d at p. 158.) And doing so in a criminal case – particularly one in which the defendant's life hangs in the balance – is "fundamentally unfair" for precisely the reason outlined by the high court in *Cool*: the trial court is telling the jury that it can take the defendant's conduct regarding flight as evidence in favor of conviction, without telling the jury that it can consider that conduct as evidence in favor of acquittal. (See *Cool, supra*, 409 U.S. at p. 103, fn. 4.)

As in *Cool*, that abrogation of the right to due process requires that appellant's conviction be reversed. (See *Cool, supra*, 409 U.S. at p. 103, fn. 4.) Once again, the burden falls on the state to demonstrate that the federal constitutional error "was harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24.) Appellant has already discussed, in regard to the trial court's shackling errors, the reasons why the state cannot meet that demanding standard: that the prosecution's case rested almost entirely on the DNA testing performed in 2003 – the persuasive force of which was challenged by the fact that extensive forensic testing a dozen years earlier had failed to implicate appellant; that a slew of other facts pointed to appellant's innocence, including that the established timeline

made it unlikely (if not near impossible) for him to have been the culprit, as did the fact that extensive searches of appellant's car did not disclose *any* of the forensic evidence (such as bodily fluids, hair, fibers, etc.) the prosecution's "crime scene reconstruction expert" said he would have expected to find there; that the complete absence of any evidence of pedophiliac activities or inclinations in appellant's history was persuasive evidence that he would not have committed such a crime. Appellant also pointed out how the objective facts concerning the jury deliberations – including the length of those deliberations and the readbacks requested by the jury – demonstrated that this was a close case.[43]

The harm caused by the trial court's instructional endorsement of the inculpatory inference, coupled with its silence regarding the parallel, exculpatory inference is manifest in the parties' respective jury arguments. The prosecutor centered his argument around "11 reasons that Laura Arroyo was killed by the defendant based on the evidence . . . ." (35 RT 3436 *et seq.*) He set out the final, capping "reason" for the jury to conclude that appellant was guilty as follows:

> You are going to get a flight instruction – or you already got a flight instruction. Everybody knows from common experience that when people run away from an event, they run away because they are trying to hide something. It shows a guilty mind.

(25 RT 3451.) The prosecutor then proceeded to argue at some length that appellant's effort to escape from the police in 2003 "[s]hows that he had a guilty mind" and amounted to: "Classic flight, ladies and gentlemen.

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[43] As also pointed out, the reasonable doubt engendered by these factors applied not just to the guilt phase but, arguably, with greater force to the penalty phase where "lingering doubt" was at the forefront of the defense presentation.

Classic flight to add to all 10 of your reasons, making 11 reasons why this defendant is guilty of the killing of Laura Arroyo." (35 RT 3452-3454.)

In contrast, the defense could only point out that appellant did not flee initially and in fact was still living and working in the area 12 years later, and assert that the "reasonable interpretation of this evidence . . . is that he's innocent." (35 RT 3483.)[44] Unlike the prosecution, the defense had nothing to point to in any of the court's instructions to support that assertion or to legitimize the inference upon which it relied. (See *People v. Rivera* (1984) 157 Cal.App.3d 736, 744 [failure to give needed instruction rendered defendant's "argument on this point . . . essentially meaningless since the jury did not have a legal framework against which it could apply his factual contentions"].)

In short, the inequality in the pertinent instructions functioned to put "the court's imprimatur to one side's factual contention" (*United States v. Mundy*, *supra*, 539 F.3d. at p. 159) in an area that was acknowledged by both sides to be significant to the jury's determination of the case.[45] As this

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[44] Defense counsel next was forced to argue, at much greater length, that the prosecutor's "consciousness of guilt" inference – asserted by the prosecutor, based on the standard flight instruction – did not really apply on the facts of the instant case. (35 RT 3484-3488.)

[45] Defense counsel made this point forcefully while the trial court was conferring with the parties about the proposed guilt phase instructions:

> "Your Honor, I think one of the problems is you are giving the People instructions coming from the bench as to all of their theories. You are saying that we can argue all of our theories but the jury isn't hearing anything from the court saying that these are correct statements of law or that it's something they can consider. [¶] I think there's an imbalance there, an unfairness that the defense doesn't get any instructions or even a paragraph in the appropriate instructions that will support our argument, whereas the people get all the instructions and can refer to it [*sic*]. 'You

Court has taught, when a prosecutor has been permitted to argue "consciousness of guilt" based on instructions biased in favor of the prosecution, it is likely that "an impermissible impact . . . resulted in the minds of the jurors." (*People v. Hannon* (1977) 19 Cal.3d 588, 603; cf. *People v. Roder* (1983) 33 Cal.3d 491, 505 [prosecutor's reliance on improper presumption in his closing argument indicia of prejudicial error]; *Kyles v. Whitley* (1995) 514 U.S. 419, 444.)

For the trial court in this case to have, in effect, put a thumb on the prosecution's side of the scale by giving what amounted to a "pinpoint" instruction inviting the jury to infer guilt from certain of appellant's conduct – while refusing to give an instruction regarding the inferences to be drawn from his corresponding, exculpatory conduct – cannot be deemed "harmless beyond a reasonable doubt."

Accordingly, the entire judgment should be reversed.

III.

THE TRIAL COURT'S REFUSAL, BASED ON A NON-EXISTENT PROCEDURAL RULE, TO PERMIT THE DEFENSE TO DEVELOP AND ARGUE ITS THEORY OF THIRD PARTY CULPABILITY DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE

The only question for the jury regarding the central charges in this case was whether it was appellant, or someone else, who kidnaped, molested and murdered Laura Arroyo. In addition to emphasizing the many reasons for the jury to doubt that appellant was the perpetrator – the nearly impossible timeline, the fact that appellant in no way corresponded to the established profile of such criminals, and the fact that the prosecution's critical forensic evidence was not developed until more than a decade later, after contemporaneous testing had failed to implicate him – the defense

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> heard the court say this and that, and that fits in beautiful [*sic*] with what I'm telling you.' And we are left to argue things without the support of instructions to back it up. I don't think that's fair." (35 RT 3367-3368.)

attempted to bolster reasonable doubt with evidence that some other person (or persons) committed the crime.

The trial court cut off the defense from fully developing that evidence, and forbade any argument regarding third party culpability, based on a nonexistent procedural rule that the trial court mistakenly believed to be compelled by this Court's precedent. Specifically, the trial court thought that this Court's opinion in *People v. Hall* (1986) 41 Cal.3d 826 (*Hall*) created a requirement that criminal defendants must give pretrial notice to the prosecution and bring a motion for permission to present a third party culpability theory before actually doing so. (31 RT 2805-2807; 35 RT 3311.) No such notice requirement is mentioned in *Hall*, nor is one established by any case, statute or rule that appellant has been able to discover. Nonetheless, predicated upon this phantom notice provision, the trial court "completely prohibited any third party liability suggestion . . . ." (35 RT 3305.)

In *Holmes v. South Carolina* (2006) 547 U.S. 319 (*Holmes*), the United States Supreme Court vacated a death sentence because the state court had improperly precluded the defendant from presenting third party culpability evidence. In doing so, the high court reiterated the fundamental principle:

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" This right is abridged by evidence rules that "infringe upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'"

(*Id.* at pp. 324-325 [citations omitted].)

There can be no question that the trial court's refusal to allow the defense even to suggest that someone other than appellant murdered Laura

Arroyo "infringed upon a weighty interest of the accused." Indeed, it was the exact same interest that was at play in *Holmes*. And because the trial court's decision was based entirely on a rule that the trial court itself invented, without support in law or precedent, that decision was by its very definition "arbitrary."

By foreclosing the development of the defense theory based on third party culpability, the trial court deprived appellant of the constitutional rights outlined in *Holmes*. Moreover, because the limitations imposed by the trial court extended to the jury arguments presented on appellant's behalf, they also infringed upon his right to counsel, as guaranteed by the federal and state Constitutions. (See *People v. Farley* (2009) 46 Cal.4th 1053, 1130, fn. 31; *People v. Snow* (2003) 30 Cal.4th 43, 129; *Conde v. Henry* (9th Cir. 2000) 198 F.3d 734, 739.) Because the trial court cut short the presentation of evidence and forbade the theory without ever holding a hearing into its adequacy – and given that (as reviewed above) this was a close case for the jury – these constitutional errors cannot be written off as harmless. Accordingly, the conviction should be reversed in its entirety.

A. Procedural History

In the course of a pretrial discussion regarding outstanding discovery matters, the trial court announced its view that any defense based on third party culpability must be raised by way of "a noticed motion, that you are going to claim third-party liability. And you have to give me under – I forget the name of the case, that criteria that will allow me to allow you to make a third-party claim that someone else did it." (7 RT 665.) The specific discovery request under discussion – which involved evidence that (defense counsel thought) might show that Laura's death stemmed from a drug trafficking feud – was otherwise resolved, and the defense did not pursue the drug-trafficking theory. (See 7 RT 656-657; 8 RT 741.)

The trial court's view of the law regarding third party culpability nonetheless became significant during the course of the trial itself, when evidence emerged pointing to a potentially more viable third party defense. A number of eyewitnesses, including the victim's mother, had reported to the police that there was a "suspicious small brown Datsun," with four occupants parked in a cul-de-sac just outside of the apartment complex during the time when Laura Arroyo was kidnaped. (See 25 RT 2051-2052 [Enrique Loa]; 25 RT 2065-2066 [Teresa Thomas]; 26 2087-2088 [Det. Miranda, testifying regarding report from Mrs. Arroyo]; 30 RT 2625-2626 [Det. Maxey, regarding report taken from Robert Vasquez].)

When Enrique Loa and Robert Marquez, returning from a store, were dropped off at the complex, the occupants of the Datsun – three men and a woman – apparently "squatted down to hide." (25 RT 2066, 2087.) Other residents of the apartment complex who were in the adjacent park grew alarmed by the presence of "these people in the four-door vehicle [and] got scared and left the park at that time . . . ." (26 RT 2087.) At around 8:50 or 9:00 p.m. – in other words, at approximately the same time that Laura Arroyo disappeared – the residents noticed that the brown car had left the area. (*Ibid.*; see 25 RT 1979-1981, 1995; 26 RT 2090-2094.)

The defense attempted to relate this information to another evidentiary thread that also originated with the victim's parents. When the police interviewed Luis Arroyo regarding his daughter's murder, they asked him to list the "'most important causes that would have created this situation.'" (9 RT 964.) His response was "the selling of the taco shop." (*Ibid.*; see also 13 RT 1217.) Apparently, Mr. Arroyo had been involved in an extremely acrimonious business transaction concerning the sale of that taco shop, and indicated to the police that he believed the shop's owner – a woman named Guadalupe Echeverria – was likely involved in the crime.

(11 RT 963-965; 13 RT 1217-1218; 16 RT 1396.)

The defense apparently intended to align these facts with the evidence that one of the occupants of the suspect brown Datsun was a woman. However, when defense counsel attempted to develop the evidence in the course of cross-examining Detective Maxey, the prosecutor asked for "a sidebar," – to which the trial court responded: "It's about time." (31 RT 2804-05.) The prosecutor asserted his objection to "all of these lines of questioning having to do with third-party liability," to which the trial court responded:

> Exactly. I don't know why the objections didn't come earlier. [¶] It was never noticed. We even talked about it in pretrial motions. It was never noticed. All this stuff is irrelevant. [¶] You can say someone else did the murder, but you can't point to who it is. . . . All of this third-party liability stuff has to be noticed, has to be litigated pretrial. . . . [¶] It was not resolved because it was never noticed that you were going to be making a third-party liability claim. As I understand it, you are required to do so.

(31 RT 2805-2806.)[46]

Based on that same misunderstanding, the trial court made clear that it would not allow jury argument regarding third party culpability. In the course of discussing jury instructions, the court reiterated: "I have completely prohibited any third party liability suggestion based upon the rulings I have made." (35 RT 3305.) The trial court expanded on this point a few minutes later:

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[46]Although the prosecutor couched his objection as (at least in part) based on the hearsay rule, the trial court made clear that it was shutting down the inquiry strictly because of what it believed to be the prohibition against third party culpability evidence that had not been presented by way of a noticed motion. (31 RT 2805.)

> Third-party culpability. The reason the people are required to receive notice of third-party culpability is . . . because a third-party culpability defense points at a specific person. The defense doesn't say, "My client didn't do the crime." The defense says, "Joe Johnson committed the murder." . . . .
>
> The notice requirement, I think – isn't *Hall* the third-party liability case? The reason they have it, the logic I see is when the defense wants to say, "Joe Johnson did this, and we are pointing the finger at him. Not our guy," that let's you know you can investigate Joe Johnson and you have to make a threshold determination whether – I don't know what the standard is. A certain amount of evidence to suggest that the jury could infer that Joe Johnson committed the crime.

(35 RT 3311.)

B. The Nonexistent Pretrial Notice Requirement That The Trial Court Erroneously Ascribed to *Hall* Arbitrarily Infringed Upon Appellant's Right To Present A Third Party Culpability Defense

The trial court was wrong about what *Hall* requires; in fact, the lower court's invocation of a new and unprecedented restriction on the presentation of third party culpability evidence was contrary to the fundamental point of the Court's opinion in *Hall.*

As the Court explained, it granted review in *Hall* to "examine and clarify" – and ultimately to overrule – what was known as the *Mendez-Arline* rule, which forbade the admission of proof of third party culpability unless the defense demonstrated that "it constitute[d] 'substantial evidence tending to directly connect that person with the actual commission of the offense.'" (*Hall, supra*, 41 Cal.3d at pp. 828-829, 831, quoting *People v. Green* (1980) 27 Cal.3d 1, 22, discussing *People v. Mendez* (1924) 193 Cal. 39 and *People v. Arline* (1970) 13 Cal.App.3d 200.) Noting that it "creates a distinct and elevated standard for admitting this kind of exculpatory evidence," the Court rejected the *Mendez-Arline* rule as imposing an intolerable burden on the accused in criminal cases and held instead that

"courts should simply treat third party culpability evidence like any other evidence . . . ." (*Hall, supra*, 41 Cal.3d at pp. 834.) The Court then explained how such evidence should be evaluated under the regular provisions of Evidence Code section 352. (*Id.* at pp. 834-835.)

The trial court never evaluated appellant's third party culpability evidence under the criteria and in the manner prescribed by *Hall*. Indeed, the third party culpability theory was never even fully developed or properly articulated because the trial court created new and unique restrictions on the presentation of that particular type of evidence. Neither *Hall,* nor any case, statute or rule following *Hall* authorized such restrictions. On the contrary, by imposing a unique and unsanctioned procedural requirement, applicable only to third party culpability evidence, the trial court contravened *Hall*'s instruction that "courts should simply treat third party culpability evidence like any other evidence . . . ." (*Hall, supra,* 41 Cal.3d at p. 834.)

This unauthorized curtailment of appellant's opportunity to present and argue his defense was constitutionally intolerable. The United States Supreme Court has consistently emphasized that the Sixth and Fourteenth Amendments guarantee a defendant the right to present his or her version of the facts to the jury so that it can resolve where the truth lies. (*Washington v. Texas* (1967) 388 U.S. 14, 19.) Whether this right is categorized under the due process, compulsory process, or confrontation clauses, the purpose of protecting the right remains the same: a defendant has the right to subject the prosecution's case to meaningful testing. (*Holmes, supra*, 547 U.S. at pp. 324-325; *Crane v. Kentucky* (1986) 476 U.S. 683, 690-691.) Specifically, as the high court's opinion in *Holmes* makes clear, this constitutionally-guaranteed right to "'a meaningful opportunity to present a complete defense'" is abridged when the state court invokes an "arbitrary"

rule that prevents the accused from presenting a defense premised – in whole or part – on third party culpability. (*Holmes*, *supra*, 547 U.S. at pp. 324-325.)

In *Holmes* and the other cited cases, the courts were called upon to weigh the defendants' rights to present their defenses against the states' interests in applying established rules and procedures. What makes this case different – and worse – is that here there was no established legal rule or procedure to balance against appellant's constitutionally-protected interests. Instead, the trial court foreclosed the defense based entirely on a procedural requirement of the trial court's own making, which the court mistakenly ascribed to higher authority. As such, the rule applied by the trial court fit the precise definition of "arbitrary." (See Black's Law Dictionary (8th ed. 2004) at p. 112 [defining "arbitrary" as "determined by a judge rather than by fixed rules, procedures, or law"]; American Heritage Dictionary of the English Language (4th ed. 2006) at p. 91 ["Based on or subject to individual judgment or preference . . . . Established by a court or judge rather than by a specific law or statute."].)

Although the jurors were permitted to hear some fractional portion of the evidence pointing to an alternative perpetrator (or perpetrators), the trial court sealed the constitutional violation by forbidding trial counsel from arguing the third party culpability theory to the jury. "'It is firmly established that a criminal defendant has a constitutional right to have counsel present closing argument to the trier of fact.'" (*People v. Snow*, *supra,* 30 Cal.4th at p. 129, quoting *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1184, and discussing *Herring v. New York* (1975) 422 U.S. 853, 858; see *People v. Green* (1893) 99 Cal.563, 567.) This constitutional right is grounded in the assistance of counsel guarantee of the Sixth Amendment. (See *Herring*, *supra*, 422 U.S. at pp. 857-858; *People v. Snow*, *supra*, 30

Cal.4th at p. 129.) Moreover – to the extent that its violation lessens the state's burden of proving the prosecution case beyond a reasonable doubt – "[i]mproper limitation of closing argument may also infringe upon a defendant's Fourteenth Amendment due process rights . . . ." (*State v. Frost* (Wash. S.Ct. 2007) 161 P.3d 361, 366 [citations omitted]; accord, *Conde v. Henry*, *supra*, 198 F.3d at p. 739.)

While the trial court enjoys the discretion to limit the length and scope of closing arguments in a criminal case (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1184), "[w]here the trial court's decision rests on an error of law, as it does here, the trial court abuses its discretion." (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 742.) The trial court abused its discretion and thus violated appellant's constitutional rights when it forbade counsel from presenting a legally appropriate argument that was significant to the defense of the case. (*State v. Frost*, *supra*, 161 P.3d at p. 366 (*en banc*) [citations omitted]; accord, *Conde v. Henry*, *supra*, 198 F.3d at p. 739; see *People v. Green*, *supra*, 99 Cal. at p. 567 [limitations on closing argument "'must be done at the risk of a new trial, if . . . the prisoner was deprived, by the limitation, of the opportunity of a full defense, for this is his constitutional right, without which he cannot be convicted'"].)

C. The Constitutional Violation Cannot Be Deemed "Harmless"

It is difficult to take a full and accurate measure of the damage done by the trial court's erroneous stance. Because the trial court precluded the defense from properly developing the evidence of third party liability – and forbade any argument whatever based on that theory – it is impossible to assess exactly how strong that theory would have been. For precisely that reason, it cannot fairly be contended that the evidence would have failed to satisfy the standards set forth in *Hall* – indeed, the trial court's refusal to

conduct the inquiry mandated by *Hall* ensured that this Court lacks the information necessary to make that determination.

For much the same reason, the error is not susceptible to standard harmless error analysis. Ninth Circuit precedent holds that when a trial court erroneously precludes the defense in a criminal case from arguing a viable theory, "[s]uch an error is structural and requires reversal . . . ." (*United. States v. Miguel* (9th Cir. 2003) 338 F.3d 995, 1001; accord, *Conde v. Henry, supra*, 198 F.3d at pp. 740-741.)[47] Under this analysis – which appellant submits is the more sound one – he is entitled to a new trial without further showing of prejudice.

Assuming, arguendo, that the constitutional violation can be analyzed for harmless error at all, its prejudicial effect is manifest. As discussed above, the prosecution had very little proof aside from the forensic evidence found on the victim's clothing and person – evidence that did not seem to exist when the crime was committed and testing was initially done, but then abruptly appeared a dozen years later. In response,

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[47] The issue of whether such errors could be considered "harmless" split the Washington Supreme Court in *Frost*, with a bare majority holding that harmless error analysis applied (*State v. Frost, supra*, 161 P.3d at pp. 369-371) and four justices, including the Chief Justice, opining that the error was structural (*id.* at pp. 783-786 [Sanders, J., dissenting]). On federal habeas corpus review, the Ninth Circuit, sitting *en banc*, held that the state court's decision regarding prejudice was an "unreasonable application of clearly established federal law as determined by the Supreme Court of the United States." Agreeing with the dissenters that such errors are indeed structural and not susceptible to harmless error review, the Ninth Circuit ordered that relief be granted. (*Frost v. Van Boening* (9th Cir. 2013) 757 F.3d 910, 918-919 [*en banc*].) The United States Supreme Court granted *certiorari* and reversed on the narrow ground that its precedent had not in fact "clearly established" whether or not partial limitations on closing arguments constituted structural error. (*Glebe v. Frost* (2014) ___ U.S. ___, 135 S.Ct. 429, 430.) Thus the question of whether the error is "structural" or instead may be analyzed for its prejudicial effect remains unsettled.

the defense had an array of facts that made it at least a little hard to believe that appellant had committed the crime – including the unlikeliness that he could have done so within the acknowledged time frame; the lack of any trace of evidence that the victim had been in his car (where, according to the prosecution, enormous violence occurred); the fact that appellant did not flee or attempt to avoid the police for years afterwards, despite their insistent accusations; the lack of forensic evidence tying appellant to the crime in the first instance; and the fact that appellant's lack of the established qualities and behavior of a pedophile evidenced "[g]ood character for the traits involved in the commission of the crime charged" – evidence that "may be sufficient in itself to raise a reasonable doubt as to [his] guilt . . . ." (CALJIC No. 2.40.)

This Court simply cannot rest assured, beyond a reasonable doubt, that cogent evidence and argument pointing to someone else as the perpetrator would not have made a difference. Again, this had the hallmarks of a close case, including jury requests for readbacks bearing on the crucial timing issue, and the fact that the jurors took two-and-one-half days to decide an exceedingly straightforward guilt phase case. By refusing to allow the defense even to raise the possibility that an alternative perpetrator (or perpetrators) bore responsibility for the kidnaping and murder of Laura Arroyo, the trial court lessened the prosecution's burden of proving appellant guilty beyond a reasonable doubt and created a fateful imbalance in the jury's deliberations. It thus cannot be concluded with just assurance that "the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, discussing *Chapman v. California, supra*, 386 U.S. at pp. 22-24.) Appellant's convictions and the judgment of death must be reversed.

IV.
THE INEXCUSABLE TWELVE-YEAR DELAY IN BRINGING CHARGES AGAINST APPELLANT HOBBLED HIS ABILITY TO DEFEND AGAINST THE CAPITAL CHARGE AND VIOLATED HIS FEDERAL AND STATE RIGHTS TO DUE PROCESS

A. Introduction

Soon after Laura Arroyo was murdered in July 1991, the prosecuting authorities zeroed in on appellant as a suspect. The police repeatedly interrogated him, searched his home and his car, seized some of his property, took his fingerprints and obtained biological samples including hair from the top of his head and his mustache, blood and saliva. In the meantime, evidence of the crime – including fingerprints collected from the door of the Arroyo home, biological samples taken from the victim's body and crime scene, and the victim's bloodied clothing – was collected and testing was performed by local law enforcement, private laboratories and the Federal Bureau of Investigation (FBI) laboratory. None of this analysis turned up any substantial evidence connecting appellant to the murder, and no charges were brought.

Almost exactly 12 years later, the authorities decided to reopen the investigation and re-analyze the forensic evidence. Using simple techniques that were readily available when the case was first investigated, they discovered semen on swabs taken from the victim's mouth and on her pajama top – which had specifically been declared free of semen by the FBI lab more than a decade before. Following DNA testing, they declared that the semen was appellant's; they filed a criminal complaint and obtained a warrant for his arrest.

There were only two possible explanations for discovery, in 2003, of strong evidence where no evidence at all had been detected in 1991 and 1992: either the tested material had been contaminated or the investigative authorities were simply negligent. What is undebatable is that, in the

interim, appellant lost the opportunity to bring witnesses and adduce other evidence that could have helped him defend against the capital murder prosecution to which he was belatedly forced to respond.

"The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution protect a defendant from the prejudicial effects of lengthy, unjustified delay between the commission of a crime and the defendant's arrest and charging." (*People v. Cowan* (2010) 50 Cal.4th 401, 430 [citations omitted].) The lengthy, unjustified delay suffered by appellant in this case offended due process.

In regard to the guilt phase, the prejudicial effect of the insupportable prosecutorial delay was straightforward. As discussed above, there was eyewitness and other evidence pointing to potential alternative perpetrators of the crime, but the trial court refused to let the defense present an argument on that basis. Putting aside the merit, *vel non*, of the trial court's ruling in that regard, the inescapable reality is that the passage of time made it functionally impossible for appellant's counsel to investigate that defense in a timely and effective manner that could have overcome the trial court's reasons for keeping it from the jury.

But what sets this case apart – and indeed makes it one of first impression – is the prejudice suffered by appellant in regard to his penalty phase defense. As the Supreme Court has frequently and famously observed, "'death is different,' [and requires] protections that the Constitution nowhere else provides.'" (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [citations omitted].) One fundamental, and unique, aspect of defending against the death penalty is that the defense must "secure an independent, thorough social history of the accused well in advance of trial . . . ." (*In re Lucas* (2004) 33 Cal.4th 68 2, 708, citing *Wiggins v. Smith*

(2003) 539 U.S. 510, 522-523; see also *Williams v. Taylor* (2000) 529 U.S. 362, 396.) This is because, without being able to compile *all* of the information needed to provide a complete portrait of the individual defendant, the defense cannot present the jury with the evidence needed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 303-304.)

As a result of the 12 years of unjustifiable delay before charges were brought against appellant, whole categories of evidence essential to presenting the jury with a full picture of appellant were lost: virtually all of his school records, medical records and employment records were destroyed in the interim and it became impossible to identify (much less call as witnesses) teachers, classmates, doctors, co-workers who could have testified in mitigation. Other identified witnesses had died in the meantime; notably Maggie Porter's parents, whose whole-hearted embrace of the father of their grandchild could have vitiated an important aspect of the state's case in aggravation.

If, as the high court has consistently held, the state violates the federal Constitution by precluding the defense from presenting such mitigation evidence, it follows, a fortiori, that the Constitution is similarly offended when the state – through an unjustifiable delay in bringing charges – ensures that the defense is never able to obtain the evidence in the first place. Thus what could be dismissed as speculative in other contexts must be acknowledged as real constitutional prejudice when it pertains to the defense against a judgment of death.

B. Background

Prior to trial, the defense brought on a "motion to dismiss for denial of due process due to prosecutorial delay," and requested the opportunity to put on evidence in support thereof. (4 CT 344, et seq.) The prosecution responded, contending principally that any determination of the issue should be postponed until after trial. (4 CT 834-836.)

1. The Initial Defense Presentation

After reviewing the parties' briefs, the trial court indicated on the record that its "tentative [decision] was to deny," but agreed to allow the defense to "present witnesses in support of that motion." (4 RT 993.) The defense proceeded to call some 22 witnesses. The bulk of the testimony pertained to penalty phase issues.

Custodians of records representing the various schools that appellant had attended testified that, in the intervening years, virtually all records pertaining to him had been destroyed, including all but one of his report cards and anything that would have set out either his activities and accomplishments or any learning disabilities or behavioral issues. (8 RT 839-856, 982-984.) Not even yearbooks were available, and it was impossible to ascertain who his high school teachers had been – much less to interview them. (8 RT 848-849, 852-854.) A defense investigator testified that she had tried and almost entirely failed to find records from appellant's earliest school years. (8 RT 982-984.) The investigator identified someone who was possibly appellant's preschool teacher, but that person had died in 2003; she was unable to locate appellant's kindergarten teacher, but spoke to his first grade teacher who was 87 years old and had no memory of him. (8 RT 984-985.) Most of the teachers the investigator was able to identify were dead, and the remainder had no memory of him. (8 RT 986-992, 994.) In addition, the custodian of records from Scripps

Mercy Hospital testified that all records regarding appellant's birth had been purged. (8 RT 836.)

There was a similar dearth of information available regarding appellant's work life during the years prior to the crime, other than the fact that he did hold several regular jobs. George Ham, the manager of Ham Brothers construction company at which both appellant and his father had been employed, remembered appellant's father, but not appellant; he testified that all of the employee records from that time period had been destroyed in 2003, including any information regarding appellant's co-workers. (8 RT 743-746.) Representatives of TC Construction, Ortiz Construction, NCI Naval Coating, and Atomic Investments similarly confirmed that appellant had worked for their companies, but testified to having sparse records – or more often no records at all – regarding his employment or the identities of his co-workers. (8 RT 859-860, 863-877.) Another defense investigator testified that she had tried to obtain records from several other of appellant's former employers – Addax Construction, Chula Vista Farms, Concrete Dynamics, Inc., M.D.S. Unlimited, Inc. – but their records had been destroyed and the employers' memories had faded such that they had nothing substantive to say about appellant. (12 RT 969-981.) Perhaps most significant, the representative of A.T.C. Land Com, which operated the Chula Vista Transit system for which appellant was employed at the time of the killing, testified that, in 1995 or soon thereafter, the company had destroyed all pertinent records – including records that would have shown the hours he worked and the routes he covered on the day of the crime. (8 RT 856-858.)

Evidence was also presented regarding the deaths of several potentially significant mitigation witnesses. Maggie Porter testified that her parents – the grandparents of appellant's son and namesake – had known

appellant for 25 years, were very fond of him, and encouraged her relationship with appellant.[48] (8 RT 791-792.) They were not able to testify on his behalf, however, for Ms. Porter's father had died in 1992, and her mother in 2004. (8 RT 792-793.) Similarly, appellant's cousin, Alicia Bracamonte, testified that her father was appellant's godfather, loved him very much, and wanted to help – but had died the year before the trial commenced. (8 RT 785-789.)

Some of the evidence concerned the prejudice appellant suffered in defending the guilt phase. It was shown that there was an alarm system in place at appellant's parents' home, where he was living at the time of the crime, that could have helped establish the time when he returned home the evening of the crime. (8 RT 800, see 8 RT 832-833.) Those records had long since been destroyed. (8 RT 832.) Similarly, appellant's sister, Teresa Bracamonte, testified that, on the day of the crime, appellant had been helping her family move in a rented U-Haul truck. (8 RT 799-800.) But records regarding when the truck was returned – which also could have called into question whether appellant's whereabouts corresponded to the timeline established by the police – had been destroyed in 1998 or thereabouts. (8 RT 825-826.)

Most significant in this regard was evidence pertaining to a possible alternative perpetrator (or perpetrators). As discussed above, the victim's father had indicated to the police that he believed her abduction was related to an acrimonious dispute regarding the sale of a taco shop. (12 RT 964-965.) However, his adversary in that dispute – a woman named Guadalupe

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[48] As will be discussed, the testimony of Ms. Porter's parents could have been particularly important as the prosecution's only evidence in aggravation – other than that related to the crime of conviction – consisted of allegations of domestic violence against Ms. Porter. (42 RT 3712, et seq.)

Escheverria – died in December, 1991. (12 RT 970-971.) The defense called the lawyer who had represented Ms. Escheverria, but he no longer had either any pertinent memories or records regarding the matter. (12 RT 966-969.)

2. Evidence Regarding the Delay

After hearing the defense evidence, the trial court indicated that, although it was not convinced that the defense had shown "substantial prejudice," it had established sufficient prejudice from the delay to shift the burden to the prosecution to offer some justification for it. (12 RT 1054-1062.) Accordingly, another hearing was set at which the prosecution presented a number of witnesses who addressed the forensic testing done in the case.[49] (12 RT 1062, RT 13 1066 *et seq.*)

The fundamental fact that emerged from that hearing is that, despite a good deal of testing in 1991 and 1992, the prosecuting authorities did not find any useful forensic evidence tying appellant to the murder of Laura Arroyo because they failed to use basic analytical techniques that were

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[49] Although the bulk of the prosecutor's evidence was devoted to the reasons for the delay in charging appellant, he also called Teresa Bracamonte, appellant's sister, to the stand in an effort to rebut the prejudice showing. (13 RT 1156.) Ms. Bracamonte testified that, so far as she knew, appellant had not been abused as a child, had never been removed from their home, had never been arrested as a juvenile, had no problems with drugs or alcohol, did not get into fights and was never in a gang. (13 RT 1160-1162.) Rather, he had a fairly normal childhood, playing baseball and joining the Boy Scouts. (13 RT 1162.) The prosecutor also elicited the names of various other family members, as well as a friend who teaches Sunday School, who could be called to testify on appellant's behalf. (13 RT 1158, 1163-1166.) On cross-examination, Ms. Bracamonte testified that she had no training to detect psychological problems or learning disabilities, and that most of the relatives she named (including two of their sisters, who were not at home when appellant was growing up) were not particularly close to appellant or well-acquainted with him. (13 RT 1167-1172.)

readily available at the time – the same techniques which, employed in 2003, revealed the biological evidence on which appellant's conviction was ultimately founded.

In the course of the autopsy of the victim's body, swabs were taken from her mouth and other bodily cavities to be tested for indicia of sexual assault.[50] (13 RT 1072-1073, 15 RT 1299-1301.) The medical examiner prepared "slide smears" from those swabs but, upon examining them under a microscope, declared that (to quote the prosecutor) "[t]he slide smears indicated 'no spermatozoa.'" (5 CT 832; 13 RT 1189.) Based on that conclusion, the investigators did *not* include the swabs with the quantity of other biological material sent out for serological and DNA testing. (13 RT 1092, 1099, 1189.) The swabs were instead stored, and not examined until 2003. (13 RT 1208-1209.)

Meanwhile, the victim's clothing (including, notably, her pajama top) and hairs found on her body were sent out to be tested, initially by the San Diego Sheriff's Crime Lab. To again quote the prosecutor, "[n]o evidence was discovered that connected any suspect to the murder." (5 CT 832.) The clothing and clippings of the victim's fingernails were then sent to the FBI lab for analysis. Neither lab found DNA evidence or semen on the fingernails or on the clothes; in fact, the report from the FBI specifically stated that there was *no* semen detected on the victim's clothing. (13 RT 1208-1209.)

In the meantime, the authorities had fixed on appellant as their suspect and, pursuant to a warrant, took samples of his blood, saliva and hair, as well as personal items, including a blood-stained towel from his car.

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[50] A swab was also taken from a wound on the victim's neck, but no slide was prepared and the swab was not sent out to a laboratory. (14 RT 1273.) When it was finally examined, 12 years later, appellant's semen was found on that swab. (13 CT 1116.)

(13 RT 1094-1095,1190-1191.) Those things were also sent out for testing, including to a pair of commercial laboratories – Cellmark and SERI – where they were examined along with samples from the victim. (13 RT 1187, 1214-1215.) The blood on the towel was found to be appellant's. (*Ibid.*) Other than the presence of a blue fiber on the victim's top that matched fibers found on some of appellant's clothing (13 RT 1193) – an inconclusive point, given the lack of evidence as to how many thousands or millions of other garments contained the same fiber (see 30 RT 2759) – no match was made with the evidence taken from the victim. (5 CT 832-833; 13 RT 1210-1214.)

Although appellant was not charged, in the years that followed, the authorities continued to pursue the case with the belief that he was the perpetrator. The investigation was reopened in 1996, and remained so until 1999; during that time, the authorities retested the fingerprints and located and searched appellant's car (which he had sold in the meantime). (13 RT 1228-1232.) They even consulted a clairvoyant. (14 RT 1254-1255.) However, they still did not attempt to test the swabs taken from the victim's body, which remained in police storage. (14 RT 1247-1248.)

In 2003, the case was reopened, and – for the first time – the body cavity swabs were analyzed. The criminalist examining the oral cavity swab noticed a blood stain, and performed a "differential extraction" process that isolated the DNA from sperm and nonsperm cells. He found a quantity of sperm cells which, when tested, matched appellant's DNA. (13 RT 1107-1108.) He also found appellant's sperm cells under the fingernail clippings and on the swab taken from the victim's neck wound. (13 RT 1114-1116.) Another criminalist examined the victim's pajama top; seeing blood stains, she shined an "alternate light source" on the garment, which revealed the presence of bacteria (suggesting semen or saliva) in three

different areas. (15 RT 1316.) The criminalist cut out sections of the stained cloth, put them in tubes, added water, and agitated the tubes. (*Ibid.*) She then put the product on slides which she examined under a microscope. There was sperm in all three areas, and it matched appellant's DNA. (15 RT 1317-1318.)

Both the use of an "alternate light source" and the "water extraction" method used for isolating the DNA on the pajama top in 2004 were standard procedures in 1991 and 1992 (15 RT 1336), and the amount of DNA contained in the sperm found on the pajama top was ample to permit testing under the methods employed in 1991. (15 RT 1318-1322, 1324, 1339; 31 RT 2819; 32 RT 2902.) Asked why the FBI had reported that there was no sperm on the garment, Patrick O'Donnell, supervisor of the San Diego Sheriff's Crime Lab testified that there were only two possible explanations: either the FBI made "an error," or "the semen wasn't on the item of clothing at the time the FBI examined it. . . ." (13 RT 1150-1151.)

Dr. Elizabeth Johnson, a forensic science consultant called by the defense, testified that, in the early 1990s it was standard practice to send out body cavity swabs and victims' clothing to be tested for semen – regardless of whether the medical examiner said he had found any.[51] (15 RT 1331, 1333-1334.) Dr. Johnson went on to testify that there were standard tests

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[51] John Souza, a former police investigating detective, who had retired from the Fresno Sheriff's Department after 30 years, was also called as a defense witness. He testified that it was standard procedure in a case of this sort to send out all biological evidence for testing, and not to simply rely on the medical examiner's conclusions regarding whether sperm was present. (16 RT 1370, 1373-1374.) Mr. Souza also testified that serology testing available in the early 1990s would have detected the presence of sperm, and that it was extraordinary that, when the case was re-examined in 1996 through 1999, no biological evidence was sent out for testing; doing so, he opined, would have been far more reasonable than consulting a psychic. (16 RT 1380-1381.)

readily available at the time that easily would have revealed semen on the swabs and the pajama top, and available DNA testing that would have revealed whether there was a match with appellant. (15 RT 1335-1338, 1340.) Asked about the failure to detect semen on the pajama top, she replied: "I don't see how any competent analyst could have missed this. That stain is quite large, and there are other stains." (15 RT 1341-1342.)

3. The Trial Court's Initial Ruling

After hearing several days of testimony and further arguments of counsel, the trial court took defendant's motion to dismiss under submission. (16 RT 1409.) On June 15, 2005, the court issued a written memorandum order denying the motion. (7 CT 1560.)

After first rejecting the prosecution's request to defer ruling on the motion, the trial court opined that the evidence of prejudice submitted by the defense was insufficient to support a claim that appellant was denied due process, either as to the guilt or penalty phase. (7 CT 1560-1561.) Nonetheless, the trial court found, there was "sufficient 'prejudice' to trigger a balance of pre-indictment delay against the justification for the delay . . . ." (7 CT 1561.) Reviewing the prejudice as to the guilt phase, the trial court concluded that the lost records regarding the alarm system at the Bracamontes' residence, the rental of the U-Haul truck and appellant's work schedule on the day of the crime might have been helpful to the defense, but were duplicative of other evidence and would not have rebutted the several prosecution witnesses who placed appellant at the apartment complex around the time of the victim's abduction. (7 CT 1561-1562.)

More significantly, the trial court found "intriguing, yet unsupported" what it termed appellant's "'third party culpability theory.'" (7 CT 1562.) Noting that (at that point in the proceedings) the evidence was limited to the fact of a dispute concerning a taco shop, the court

observed that "no competent evidence was presented to suggest that someone, other than the Defendant, was the perpetrator of this crime *or that others were present during the commission of the crime.*" (*Ibid.*, emphasis supplied.)

"As to the 'Penalty Phase,'" the trial court wrote, appellant's "claim of prejudice presents a more perplexing issue." Noting that "many of Defendant's employment records and school records have been destroyed and many of the individuals with whom Defendant had contact during his life have died or are otherwise unavailable," the trial court noted that, in terms of "provid[ing] the trier of fact with the 'fabric' of Defendant's life, it is . . . clear that several avenues have been closed due to the passage of time." (7 CT 1563.) Nonetheless, the trial court concluded, the defense showing in this regard "falls short of establishing the presence of ***actual*** prejudice." (*Ibid.*, emphasis in original.)

Still, the trial court did not conclude that the prejudice showing was categorically insufficient to support a motion to dismiss; rather the court proceeded to balance it against "the justification for the pre-indictment delay." (7 CT 1564.)

At the core of the trial court's discussion is its finding that the prosecuting authorities acted in "good faith" because their failure to test the cavity swabs and the victim's clothing stemmed from the medical examiner's initial opinion that the victim was not sexually assaulted. (7 CT 1564-1566, 1568, 1569-1570.) Despite repeatedly acknowledging that this failure was founded and perpetuated by a number of "errors" on the part of the authorities – beginning with the medical examiner's erroneous conclusion and his decision not to subject evidence to routine testing; the investigators' and prosecutors' blind reliance on those erroneous decisions; the faulty testing that was performed on some material and the (seemingly

random) failure to test other material; and the subsequent failure to do the necessary testing even when the case was reopened a few years later (see 7 CT 1565, 1566, 1570) – the trial court "concluded that there was a 'valid reason' for the delay in indicting the Defendant . . . ." (7 CT 1569.) \

Based on this premise, the trial court variously suggested that (a) the fact that the prosecutors were acting in "good faith," and with every intention of bringing charges as soon as the evidence permitted, meant that the delay in doing so was not the result of negligence (7 CT 1564); or (b) even if there was negligence involved, the authorities "good faith" served as a "justification" for the delay (7 CT 1566, 1568); or © that – based on this Court's opinion in *People v. Catlin* (2001) 26 Cal.4th 81, 110 – nothing short of proof that the prosecution delayed indictment in order to gain a "tactical advantage" over the appellant (what the trial court referred to as the "federal element") would suffice to support a due process claim. (7 CT 1566.)

In the end, the trial court set out a "balancing test" in which it arrayed the factors against granting relief – the "good faith justification," the public interest in prosecuting child murderers, and what it viewed (pre-trial) as "strong evidence" of guilt – against what it considered an "unpersuasive" showing of prejudice, and accordingly denied appellant's motion to dismiss. (7 CT 1569-1570.)

4. Renewal of the Motion to Dismiss

As reviewed in Claim III, *ante*, in the course of the trial the defense attempted to develop evidence showing that were indeed "others were present during the commission of the crime," but those efforts were cut off by the trial court, which forbade the defense from arguing an alternative perpetrator theory.

Following the submission of evidence at the penalty phase, before the jury was instructed, the defense renewed its "due process motion" and asked the trial court to "dismiss the death penalty as an option in this case and sentence Mr. Bracamontes to life in prison without the possibility of parole . . . ." (45 RT 4026.) Defense counsel argued that "an incomplete picture of the man has been presented to the jury due to the unjustified delay in the prosecution[,] and as expected, the defense has not been able to present a full case in mitigation to let the jury know all of the aspects of Mr. Bracamontes background and character." (*Ibid.*) The prosecutor offered no counterargument, and the trial court responded, simply: "That motion is denied." (45 RT 4028.)

C. Applicable Legal Principles

This Court has reiterated the constitutional protections pertinent to this case, as follows:

> "'The right of due process protects a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence.' Accordingly, '[d]elay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay.'"

(*People v. Cowan, supra*, 50 Cal.4th at p. 430, quoting, *People v. Nelson* (2008) 43 Cal.4th 1242, 1250, quoting, *People v. Martinez* (2000) 22 Cal.4th 750, 767 and *People v. Catlin* (2001) 26 Cal.4th 81, 107; see also, *United States v. Marion* (1971) 404 U.S. 307, 324.)

Contrary to the trial court's mistaken understanding of this Court's decision in *People v. Catlin*, in order to prevail it is *not* necessary for appellant to demonstrate that the prosecuting authorities purposely delayed charging him in order to gain some unfair advantage. On the contrary, this Court has since explicitly rejected that view, holding that,

> "'. . . negligent, as well as purposeful, delay in bringing charges may, when accompanied by a showing of prejudice, violate due process. This does not mean, however, that whether the delay was purposeful or negligent is irrelevant.' Rather, 'whether the delay was purposeful or negligent is relevant to the balancing process. Purposeful delay to gain advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation.'"

(*People v. Cowan*, *supra*, 50 Cal.4th at p. 431, quoting, *People v. Nelson*, *supra*, 43 Cal.4th at p. 1256.)

The trial court's misreading of this Court's precedent was rooted in the Court's discussion of a possible difference between what must be shown to make out a due process violation under the United States Constitution, as opposed to a violation of the due process guaranteed by the California Constitution. In *Catlin*, the Court suggested that – unlike under our state Constitution – "a claim [asserting prejudicial preindictment delay] based upon the federal Constitution also requires a showing that the delay was undertaken to gain a tactical advantage over the defendant." (*People v. Catlin*, *supra*, 26 Cal.4th at p. 107.) More recently, however, the Court has stated that "the federal constitutional standard for what constitutes sufficient justification for delay is unclear . . . ." (*People v. Cowan*, *supra*, 50 Cal.4th at pp. 430-431, discussing *People v. Nelson*, *supra*, 43 Cal.4th at pp. 1251-1254.)

Appellant submits that the Court should adopt the analysis of a number of federal and state courts which have held that a federal due process claim may indeed be founded on a showing of negligence on the part of the prosecuting authorities. (E.g., *Howell v. Barker* (4th Cir. 1990) 904 F.3d 889, 895; *United States v. Moran* (9th Cir.1985) 759 F.2d 777, 782; *United States v. Valentine* (9th Cir. 1986) 783 F.2d 1413, 1416; *Rivera v. People* (V.I. 2016) 64 V.I. 540, 576; *State v. Oppelt* (Wash. 2011) 172 Wash.2d 285, 292, 257 P.3d 653, 658; *State v. Passmore* (Mont. 2010) 355 Mont. 187, 199, 225 P.3d 1229, 1240; but see, *State v. McGuire* (2010) 328 Wis.2d 289, 312 & fn.10, 786 N.W.2d 227, 238 & fn.10 [collecting cases and noting that majority of federal circuits require showing of intentional governmental misconduct].) Thus appellant asserts that, regardless of whether it was intentional or negligent, the prosecutorial authorities' delay in charging him violated his rights to due process under both the federal and state Constitutions.

For purposes of the Court's resolution of the instant claim, however, any difference between the applicable federal and state due process tests is academic, for "'the law under the California Constitution is at least as favorable for the defendant in this regard' as federal law." (*People v. Cowan*, *supra*, 50 Cal.4th at p. 431, quoting, *People v. Nelson*, *supra*, 43 Cal.4th at p. 1251.) Accordingly, as in its prior cases, the Court need only apply California law in order to determine this claim. (*Ibid.*)

D. The Trial Court Misconstrued the Law And Thus Abused Its Discretion

This Court "review[s] for abuse of discretion a trial court's ruling on a motion to dismiss for prejudicial prearrest delay . . . ." (*People v. Cowan*, *supra*, 50 Cal.4th at p. 431, citing *People v. Morris* (1988) 46 Cal.3d 1, 38.) It is fundamental, however, that a trial court's "'discretion can only be truly exercised if there is no misconception by the trial court as to the legal basis

for its action.'" (*In re Marriage of LaMusga* (2004) 32 Cal. 4th 1072, 1105, quoting *In re Carmaleta B.* (1978) 21 Cal.3d 482, 496; accord, *People v. Patterson* (2017) 2 Cal.5th 885, 894 ["When a trial court's decision rests on an error of law, that decision is an abuse of discretion"].) Because the trial court in this case founded its denial of appellant's motion on a series of misconceptions about the applicable law, that decision is not entitled to deference under the abuse of discretion standard.

The trial court's most obvious error was in its holding that both California and federal due process standards required appellant to show purposeful misconduct on the part of law enforcement. (See 7 CT 1566-1568, discussing *People v. Catlin*, *supra*, 26 Cal.4th at p. 110.) As just discussed, this Court has since made it quite clear that – at least under California law – "'negligent, as well as purposeful, delay in bringing charges may, when accompanied by a showing of prejudice, violate due process.'" (*People v. Cowan*, *supra*, 50 Cal.4th at p. 431, quoting *People v. Nelson*, *supra*, 43 Cal.4th at p. 1256.) The trial court was simply wrong about the law, and that prong of its decision constituted a clear abuse of discretion.

The trial court did go on to offer an alternative basis for its decision: it purported to balance the prejudice to appellant against the justification asserted for the delay. (7 CT 1569-1570.) In doing so, however, it fell into essentially the same legal error – albeit in a less obvious form. The trial did so by holding, in essence, that the "good faith" of the prosecuting authorities vitiated any blame that could be assigned to their incompetent and demonstrably negligent failure to perform the tests and obtain the evidence upon which they predicated their decision to charge appellant. (*Id.* at pp. 1564-1566, 1569 [finding "that there was a 'valid reason' for the delay in indicting the Defendant and that the District Attorney acted in

'good faith' in its [*sic*] initial decision not to indict the Defendant."].)

This was specious reasoning. If (as the trial court found) "good faith" is enough to justify prosecutorial delay – enough, in this case to provide a "valid reason" for the fact that appellant was not charged until 12 years after the crime was committed – it follows that the only form of *unjustified* delay is that which results from "bad faith." In other words, the only way appellant could prevail would be by showing "purposeful delay in bringing charges" – exactly what this Court has held is *not* required. As such, the trial court's supposed alternative holding was merely a less straightforward restatement of its principal, legally erroneous holding, for both required a showing of intentional prosecutorial misconduct.

Nor was that the only defect in the trial court's analysis. In evaluating the prejudice to appellant, the trial court failed to reckon with the fundamental point that, because "death is different," a distinct mode of inquiry is necessary when examining the effect of delay on a defendant's ability to defend himself in the penalty phase of a capital proceeding. As will be addressed presently, that difference required that, at a minimum, the death penalty should not have been an option for the jury's consideration in this case.

E. Unjustified, Prejudicial Delay In Bringing Capital Charges Violated Due Process

The pertinent constitutional inquiry is, simply, whether the unjustified delay in bringing charges against appellant deprived him of a fair adjudication of his guilt, of the appropriate penalty, or both. (See *People v. Cowan*, *supra*, 50 Cal.4th at p. 430; *People v. Nelson*, *supra*, 43 Cal.4th at p. 1250.)

1. There Was No Justification For The Extraordinary Delay In Bringing Charges

The inescapable fact is that the prosecution's delay was utterly unjustified. The testimony of the police and prosecutors was that they were unable to bring charges until they obtained physical evidence that it was appellant who committed the crime. But if – as the prosecution's evidence indicated – the fluids taken from the victim's body were saturated with appellant's sperm, and the pajama top that she was wearing was soaked in it, there was no good reason why the prosecuting authorities could not have determined those facts in 1991, or 1992 at the latest.

Perhaps the simplest example is how the sperm was ultimately detected on the pajama top: all the criminalist did was first shine an "alternative light source" on the garment, which showed the likely presence of semen, and then cut out pieces, put them in tubes of water and agitate them. The sperm was readily apparent under a microscope, and was present in more than sufficient quantity for the DNA testing available at the time of the crime. Every part of this process was accomplished with technology available at the time of initial investigation, in the early 1990s. Similarly, available technology could have detected sperm on the swabs taken from the victim's mouth and neck. But those swabs were never tested during that decade,[52] and the plainly incompetent examination of the pajama top resulted in a finding that there was no sperm present.

The state's argument below, which the trial court essentially accepted, was that the individual prosecutors were not at fault but fairly relied on the conclusions of the forensic investigators, beginning with the medical examiner who declared that there was no sperm to be found. As

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[52] As noted, there was not even a slide prepared from a smear from the neck wound – meaning that evidence was not examined at all until 12 years after it was obtained.

defense counsel correctly observed below, the argument is an inadequate – and indeed, inappropriate – response to the constitutional claim. At issue is not whether the line prosecutors conducted themselves in some malignant fashion that must be checked; it is rather whether the delay unfairly diminished appellant's ability to defend himself in a capital proceeding. Thus, if the delay was the result of negligence on the part of *any* of the investigative or prosecutorial agencies or individuals involved in bringing the case, it must be viewed as unjustified. (See *People v. Nelson*, *supra*, 43 Cal.4th at 1254-1255 ["'Negligence on the part of police officers in gathering evidence or in putting the case together for presentation to the district attorney, or incompetency on the part of the district attorney in evaluating a case for possible prosecution can hardly be considered a valid police purpose justifying a lengthy delay'"], quoting *Penney v. Superior Court* (1972) 28 Cal.App.3d 941, 953.)

Assuming, as the trial court found, that the prosecuting authorities were seriously – and in "good faith" – intent on finding sufficient evidence with which to charge appellant, their efforts can only be described as incompetent. This was negligence, pure and simple. The 12-year delay in bringing charges against appellant was unjustified.

2. The Unjustified Delay Was Prejudicial To Appellant

a. The Guilt Phase

The prejudice to appellant's guilt phase defense, resulting from the authorities' incompetent failure to commence criminal proceedings in a timely manner, was relatively straightforward. As discussed in Claim III, *ante*, there was evidence pointing to the existence of alternative perpetrators of the crime. Part of that evidence concerned the acrimonious dispute over the sale of a taco shop, which the victim's father immediately reported to the police as a likely reason why his daughter had been taken. More

significant evidence to support the defense theory of third party culpability emerged during the course of the trial, in the accounts of prosecution eyewitnesses who reported seeing four people in a "suspicious small brown Datsun," parked just outside of the apartment complex when the victim disappeared.[53] (See 25 RT 2051-2052; 25 RT 2065; 26 2087-2088; 30 RT 2625-2626.)

As discussed, the trial court barred the defense from even arguing that theory because not enough had been presented, pretrial, to support it. But how could the defense possibly have developed that evidence? The delay in charging appellant ensured that the defense investigation could not commence until 12 years after the Datsun and its occupants had disappeared and 11 years after Luis Arroyo's antagonist in the business dispute had herself died – in short, after the trail had grown stone cold Appellant submits that the lost opportunity to investigate the very real possibility that others committed the crime was, within any meaningful definition, "actual prejudice" suffered by the defense.

b. The Penalty Phase

It is clear that a vast amount of information about appellant and his life prior to the date of the crime was lost as a result of the prosecution's delay. As a result it is impossible to know the shape and content of an adequately-prepared defense mitigation presentation. In the unique context of the penalty phase in a capital trial – when the defendant's life or death is the single issue for the jury to decide – the fact that there was such a

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[53] Although the evidence regarding the occupants of the Datsun was not raised by defense counsel in connection with the initial motion to dismiss for unjustified delay, it was before the trial court when the motion to dismiss was renewed, at the close of trial. It is thus properly considered by this Court in determining whether the preindictment delay was unfairly prejudicial to appellant. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 431.)

substantial but unquantifiable loss of evidence, due to unjustifiable prosecutorial delay, must be deemed sufficiently prejudicial to constitute a denial of due process.

So far as appellant has been able to ascertain, the question of how to measure the prejudice that flows from the loss of such evidence in a capital penalty phase proceeding has never been addressed by this Court or any other. While the trial court appeared to fault trial counsel for failing to provide any authority on this specific issue (see 5 CT 1002-1003), this Court can recognize it for what it is: a matter of first impression.

There is, however, guidance to be found in other cases dealing with the special concerns at play in penalty proceedings, and the special accommodations they require. The United States Supreme Court has repeatedly "acknowledge[d] what cannot fairly be denied [–] that death is a punishment different from all other sanctions in kind rather than degree." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 303-04 [citations omitted].) And, because "[t]here is no more important hearing in law or equity" than the penalty phase of a capital trial (*Correll v. Ryan* (9th Cir. 2006) 465 F.3d 1006, 1012), "[i]t is imperative that all relevant mitigating evidence be unearthed . . . ." (*Caro v. Woodford* (9th Cir 1999) 165 F.3d 1223, 1227.) As the Ninth Circuit described it:

> The issue for the jury was whether [appellant] would live or die. We have emphasized the importance of presenting the available mitigating evidence in order for the jury to fairly make the vital determination of whether the defendant will live or die. . . . [T]he failure to present important mitigating evidence in the penalty phase can be as devastating as a failure to present proof of innocence in the guilt phase. The Supreme Court has also recognized the importance of the use of a defendant's background as mitigation evidence: "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit

> criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."

(*Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, 1135, quoting *Boyde v. California* (1990) 494 U.S. 370, 380 [remaining citation omitted]; see also, *McCleskey v. Kemp* (1987) 481 U.S. 279, 304 ["Any exclusion of the 'compassionate or mitigating factors stemming from the diverse frailties of humankind' that are relevant to the sentencer's decision would fail to treat all persons as 'uniquely individual human beings'"])

This Court has accordingly held that "the prevailing professional norm in capital defense [is] that defense counsel should secure an independent, thorough social history of the accused well in advance of trial . . . ." (*In re Lucas* (2004) 33 Cal.4th 682, 708.) The most pernicious effect of the unjustified preindictment delay in this case was that it precluded defense counsel from securing – and the jurors from hearing – a "thorough social history of the accused." Such a history would have included (among many, many other things) favorable testimony from the parents of Maggie Porter. Given that the only real evidence in aggravation presented by the prosecution (aside from the facts of the crime itself) had to do with an altercation between appellant and Ms. Porter, her parents' testimonials would have been particularly helpful. As such, the loss of evidence due to unjustified delay rendered the penalty proceeding that was held – and any future penalty phase trial that could be held – unreliable and fundamentally unfair.

The trial court seemed to recognize that assessing prejudice in regard to the penalty trial presented a special – to use that court's term, "perplexing" – analytical problem. (7 CT 1563.) The trial court allowed that in terms of "provid[ing] the trier of fact with the 'fabric' of Defendant's life, it is . . . clear that several avenues have been closed due to the passage

of time." (*Ibid.*) But, ultimately, the trial court concluded that, because appellant could not show what exactly was lost – now that the opportunity to find that evidence has vanished – his claim "falls short of establishing the presence of [the] ***actual*** prejudice" required by this Court's precedent. (*Ibid.*, emphasis in original.)

What the trial court failed to recognize is that the penalty proceeding is, in the high court's phrase, "different in kind" from this or any other guilt phase trial. Because "'death is different,'" the high court and this Court alike "have imposed protections that the Constitution nowhere else provides." (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) A particularly pertinent example of the difference in the way that this Court approaches claims involving capital penalty proceedings is in how it examines prejudice. As the Court has explained,

> [W]hen reviewing state-law errors occurring at the guilt phase of a trial, the standard of review is that announced in People v. Watson (1956) 46 Cal.2d 818, 836, i.e., whether it is "reasonably probable" a result more favorable to the defendant would have been reached had the error not occurred. For over two decades, however, we have recognized a fundamental difference between review of a jury's objective guilt phase verdict, and its normative, discretionary penalty phase determination. Accordingly, we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial.

(*People v. Brown* (1988) 46 Cal.3d 432, 446-447 [holding that even state-law errors at the penalty phase require reversal if "there is a 'reasonable possibility' such an error affected [the] verdict"]; accord, *People v. Hamilton* (2009) 45 Cal. 4th 863, 917.)

For precisely the same reasons, the prejudicial effect of unjustified prosecutorial delay on capital penalty proceedings should be evaluated in a different and more demanding manner than it has been when applied to

guilt phase proceedings. It is more appropriate in the guilt phase to require the defendant to provide concrete examples of exactly what evidence was lost due to the delay, for there, prejudice is measured against an objective determination. In the penalty context, however, the jury's task is a "normative, discretionary" one, rendering it impossible fairly to measure the full effect of losing some large quantity of evidence that could have helped the jury see defendant as a "uniquely individual human being" – and thus to make a properly informed decision as to whether he should live or die. Thus, in this case, the prejudice suffered by appellant in regard to the loss of mitigation evidence cannot simply be shrugged off as "speculative." Rather, under these circumstances, it must be acknowledged that the prosecution's negligence, and the delay that resulted from it, render it impossible for the Court to be satisfied that appellant received a fair and reliable penalty phase hearing.

The unjustified delay in bringing capital charges against appellant deprived him of due process. The judgment should be reversed as to both guilt and penalty – but even if the Court is not convinced that the prejudice in regard to the guilt phase was sufficient to compel a complete retrial, the prejudicial effect of the delay on appellant's ability to mount a penalty phase defense is manifest. The trial court accordingly erred in failing to dismiss the death penalty allegations and the State should be barred from asserting them on retrial.

V.

THE TESTIMONY OF THE VICTIM'S TEACHER EXCEEDED THE BOUNDS OF PERMISSIBLE "VICTIM IMPACT" EVIDENCE UNDER THE FEDERAL AND STATE CONSTITUTIONS AND THE CALIFORNIA EVIDENCE CODE

Each of the members of Laura Arroyo's immediate family testified, movingly, about the victim and the effect on them of losing her. But the prosecution was not content with using such well-accepted "victim impact"

evidence. Over repeated defense objection, Mari Peterson, the victim's third grade teacher was also permitted to testify as a witness in aggravation, and the prosecution showed an in-class video she made featuring the victim. Ms. Peterson testified that the victim was her favorite student and that her own grief and survivor's guilt was so intense that she never taught third grade again and nearly abandoned her teaching career entirely. She also spoke evocatively of the suffering, grief and fear of all of the other (mostly unnamed) students in the class, asserting that the victim was somehow the best friend of each and every one and talked about the impact on all of their (otherwise unidentified) parents. The teacher went on to describe the victim's funeral – the tiny white casket, the teddy bear, the little hole in the ground into which she was lowered.

Appellant recognizes that the United States Supreme Court and this Court approved the use of victim impact evidence in the penalty phase of capital cases in *Payne v. Tennessee* (1991) 501 U.S. 808 (*Payne*), and *People v. Edwards* (1991) 54 Cal.3d 787 (*Edwards*). But as the high court recently reminded the states, that does not mean there are no constitutional limits on the nature and extent of such evidence. (See *Bosse v. Oklahoma* (2016) 580 U.S. ___, 137 S.Ct. 1.) The high court has outlined the constitutionally acceptable purposes of victim impact presentations – to give a full and accurate picture of the defendant's individual culpability and to counter-balance mitigation evidence regarding the defendant and his positive qualities with an equivalent insight into the victim and the harm caused by her loss. (See *Payne, supra,* 501 U.S. at pp. 826-827.) But the additional evidence in this case was an inflammatory appeal to the raw sentiments of the jurors that went well beyond those permissible objectives. Put strictly in terms of the law of evidence, the unfairly prejudicial effect of the teacher's testimony far outweighed any proper probative value it may

have had (see Evid. Code, § 352); put in constitutional terms, it was "so unduly prejudicial that it renders the trial fundamentally unfair . . . ." (*Payne*, *supra*, 501 U.S. at p. 825.) Because the erroneous admission of the evidence tainted the jury's penalty determination, the death judgment should be reversed.

A. Background

1. Motion Practice

Prior to trial, the prosecution filed a "Notice of Evidence in Aggravation Pursuant to Penal Code section 190.3," announcing that it "may seek" to introduce at the penalty phase: "Statements of family members or members of the community, photographs, video cassettes and other papers, documents or effects of Laura Arroyo or her family that fall within 'victim impact' evidence that is consistent with [*Payne* and *Edwards*]." (1 CT 82-83.)

In response to this generalized announcement, the defense filed a pair of motions *in limine*. The first asked the trial court to exclude *all* victim impact evidence on the ground that, under *Payne*, such evidence could only be presented if a state statute explicitly authorized it, since California has no such enabling legislation, any use of victim impact evidence would be contrary to the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (4 CT 725-734.)[54]

The second motion asked the trial court to "exclude or limit victim impact evidence [on] other grounds," asserting, inter alia, that, pursuant to constitutional limitations, the scope of the evidence should be strictly

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[54] The defense memorandum recognized that, in *Edwards*, the Court read section Penal Code section 190.3, factor (a), as providing such authority, but the memorandum argued in essence that in that regard *Edwards* was decided wrongly and "in excess of [the Court's] jurisdiction." (4 CT 732.)

"limited to 'the victim's personal characteristics that were known to the defendant at the time of the capital crimes or were disclosed by evidence properly received during the guilt phase . . . .'" (4 CT 742-744, quoting *People v. Fierro* (1991) 1 Cal.4th 173, 265 [conc. opn. of Kennard, J.]), and that the evidence should be excluded if its prejudicial impact outweighed its probative value under Evidence Code section 352. (4 CT 746-748.)[55] In addition, the defense requested a hearing pursuant to Evidence Code section 402 to ascertain whether it had received "proper notice of aggravation," and whether the "proffered victim-impact evidence is unduly prejudicial." (4 CT 744-745.)

The prosecution filed written oppositions to the motions, and, after hearing argument, the trial court denied them, but said that it would recognize a "continuing objection" to the evidence and would monitor it under Evidence Code section 352. (9 RT 914-920.)

The issue came to the fore once again during preparations for the penalty phase. After ascertaining the prosecutor's specific intentions regarding the teacher's testimony, the defense argued that it was improper to allow her – or other non-relatives – to testify, asserting that doing so would violate the California Constitution "as well as the 8th and 14th Amendments to the United States Constitution and the right of our client to a fair trial and due process and a reliable penalty determination." (40 RT

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[55] The motion also asserted (1) that because the crime in this case occurred during the period between the Supreme Court's decision in *Booth v. Maryland* (1987) 482 U.S. 496, forbidding any use of victim impact evidence and the high court's decision in *Payne,* conditionally (re)authorizing the introduction of some such evidence, the admission of victim impact evidence in the instant case would violate the Ex Post Facto Clause (4 CT 737-739) and (2) that "the admission of victim impact evidence renders the California Sentencing statute unconstitutionally vague." (4 CT 742-744.)

3596-3598.) Relying on this Court's cases, the trial court overruled the objection (40 RT 3600, discussing *People v. Marks* (2003) 31 Cal.4th 197), but ordered that the testimony be limited to the effects on the teacher and her class during the few days after the killing occurred (40 RT 3602.) The defense also sought to limit the number of photographs of the victim that could be shown the jury, and asked the court to exclude the videotape of the victim in her classroom. The trial court agreed to limit the total number of photographs to 12, and prohibited the prosecution from using certain ones the court deemed inappropriate, but allowed the use of the videotape. (40 RT 3614.)

2. Mari Peterson's Testimony

After adducing "victim impact" testimony from Laura Arroyo's mother, father and two brothers, the prosecution called Mari Peterson to the stand. (42 RT 3768.) Ms. Peterson testified that she had taught school at Nicoloff Elementary in the South Bay since 1989. In 1991-1992 she was teaching third grade, and Laura was one of her students, who was always the first in line to greet her. (42 RT 3771.) Laura was "cute, very pretty. She had bright eyes. She was very bouncy, friendly. She was the type of student that from the time you met her, you just wanted to love her. . . . Teachers . . . aren't supposed to have favorite students [but] Laura was my favorite student that year." (42 RT 3772.) The teacher added: "It was like she had – I don't know. She sparkled." (*Ibid.*)

Asked how Laura got along with the other students, Ms. Peterson responded that "[a]ctually she was best friends with everybody. She was the type of child that was best friends with everybody." (*Ibid.*) Ms. Peterson added that, every time a new student came into the class, she would have Laura "be their best friend" and show them around. (42 RT 3772-3773.)

According to Ms. Peterson, the victim "loved school," was never late, and "was a pretty good little artist." (42 RT 3773.) The jury was shown part of a video Ms. Peterson had made in the classroom, in which she conducts mock-interviews of the students, including the victim, who describes visiting her grandmother in Tijuana. The teacher refers to Laura as "sweety-heart," and "Jumping Bean," commenting that "[s]he's always happy." (Trial Exh. 98.)

Ms. Peterson described how the victim's death was devastating to her personally. The teacher had called in sick that day – really just because she wanted a day off work (42 RT 3773-3774) – and still, a dozen years later, had "a sense of guilt because the last day of [the victim's] life I played hooky and I stayed home. I always think maybe there was something I could have done or said. I know that's not so. But still, the guilt and knowing that I – I didn't do anything that day for her. I didn't even say goodbye. . . . I think I'll have to live with that for the rest of my life." (42 RT 3779-3780.) Afterwards, she thought she would have to give up teaching entirely, but ultimately decided to go back when the new term started a few weeks later. (42 RT 3780.) However, she never again set foot inside that classroom and has never again taught third grade. (42 RT 3779.)

Ms. Peterson described the events that unfolded on the morning after the murder, as she and the other children learned of Laura's death; how there were "missing" posters up when she arrived at school at 7:45 a.m.; how another child's mother told her that a little girl's body had been found; and how she brought all of her pupils into the classroom. (42 RT 3774-3775.) "Half of them were crying already. *They were afraid they were next.* At that point, they were just crying. They wanted to know where their friend was." (42 RT 3775 [emphasis supplied].)

After recess, the school principal told Ms. Peterson that it was Laura's body that had been found. Ms. Peterson was crying, unable to speak. The principal instructed her: "You have to go and tell your students," but Ms. Peterson said that she could not. The school psychologist came into the classroom with her. When the students saw that Ms. Peterson was crying, they "just started to cry." The psychologist "just said that Laura was in heaven." (42 RT 3776.) After that the children were crying; "they couldn't do anything. So they were hugging each other. They were asking me questions. They wanted to know if she suffered. [¶] Of course I told them 'No.' [¶] They asked me if she was in heaven. [¶] I told them, 'Yes, angels go directly to heaven.' It was terrible. The kids, half of them didn't even have lunch that day. All they did was cry." (42 RT 3777.)

During the remaining 10 days of the term, the children were unable to do any work. "They want to know where she is. They want her back. Everybody wants to sit at her desk. It was terrible." (42 RT 3777.)

Ms. Peterson testified that, "one of [the victim's] best friends, Jacqueline Carganos, she was the worst. She just cried and cried." (42 RT 3777.) Ms. Peterson had described how Laura had brought the teacher back a "very colorful pen" from vacation. She said, "I liked it every much." (42 RT 3773.) After the victim's death, Jacqueline "kept on touching my pen, the one that Laura gave me. Finally, I gave it to her. I said, 'I think she would like you to have it.' So she wore that pen even when she went to bed, would not remove it . . . nobody would touch it." (42 RT 3773-3774.)

According to Ms. Peterson, the suffering was not limited to the victim's classmates:

> Most of the students live in the neighborhood, so they walk to school with older siblings. After that, the parents came to bring them to school, even the older ones. They came to pick them [up] from school. It was a nightmare for

> the parents, for the children. Not just my students, but everybody that knew her. That is the thing. She played with everybody. Everybody knew who Laura was.

(42 RT 3778.)

Perhaps the most affecting part of the Ms. Peterson's testimony was her description of the funeral:

> There was [*sic*] so many children at that funeral. Everybody was crying. The church was packed. Packed. . . . . The picture of Laura was in front of the church. And then they brought in this tiny little casket. I mean, it looked like a toy casket. It was white. It had a teddy bear. . . . The children still [*sic*] went to the burial. It was just so many kids crying. And then you could see on this kind of a hill this tiny little hole. Even the hole was small, it looked to me, and the tiny casket with the flowers and the teddy bear.

(42 RT 3778-3779.)

The prosecutor made extensive use of the entirety of Ms. Peterson's testimony in his argument urging the jury to condemn appellant to death. He began by appealing to the jury to take account of "what [appellant] did to that teacher and that little third grade community that was Laura's by what he did to Laura," he read from the teacher's testimony about how Laura was her favorite, he recounted the testimony about how the events unfolded for the teacher and the students, asserting that "when you are in the third grade, you don't know anything about death. You don't know anything about evil. You don't know that there's people out there that will kill and do bad things to little kids." He referred to "the tiny casket. It looked like a toy. At the burial, even the hole was small. A small little hole for that tiny casket. The flowers, and then Laura's teddy bear that she had shown in the class at one of the show-and-tells." (45 RT 4060-4062.)

B. Ms. Peterson's Testimony Unfairly Prejudiced The Penalty Phase Determination

In death penalty cases, the Eighth Amendment requires an individualized assessment of the character of the defendant and the circumstances of the crime in order to ensure that the punishment is "directly related to the personal culpability of the criminal defendant." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319.) The assessment and the decision to impose death must be "based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.)

In *Booth v. Maryland*, *supra*, 482 U.S. 496 (*Booth*), and *South Carolina v. Gathers* (1989) 490 U.S. 805 (*Gathers*), the Supreme Court held that victim impact evidence and argument were wholly incompatible with the Eighth Amendment. The Court soon reconsidered that blanket prohibition, however, in *Payne*, concluding that *Booth* and *Gathers* had created an imbalance favoring mitigation over aggravation, the Court held that,

> . . . if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence *about the victim* and about *the impact of the murder on the victim's family* is relevant to the jury's decision as to whether or not the death penalty should be imposed.

(*Payne*, *supra*, 501 U.S. at p. 827 [emphasis supplied].)

As the quoted language imports, however, victim impact testimony is only permissible if, and to the extent which, its use is authorized by state law. Although there is no explicit mention of it in California's death penalty statutes, this Court, in *Edwards*, held that use of victim impact evidence is implicitly sanctioned by Penal Code section 190.3, factor (a), which permits the prosecution to present, as evidence in aggravation, the "'circumstances of the crime of which the defendant was convicted in the

present proceeding . . . .'" (*Edwards*, *supra*, 54 Cal.3d at pp. 833-834 [quoting the statute].)

In *Payne*, the prosecution introduced brief testimony by the victim's mother, which related to the actual victims of the crime and the surviving family. (*Payne*, *supra*, 501 U.S. p. 827; see also *id.* at p. 831 (conc. opn. of O'Connor, J.).) Accordingly, *Payne* provided authority for admitting the pertinent testimony of the victim's parents and brothers. Similarly, at issue in *Edwards* was testimony regarding the impact of the victim's death on her family – testimony that the Court held was admissible as "factor (a) evidence" under *Payne*. (*Edwards*, *supra*, 54 Cal.3d at pp. 833-834.)

The victim impact testimony introduced in this case went very far past the brief and limited evidence held permissible in *Payne* and *Edwards*. Ms. Peterson was not part of the victim's family, but rather someone who – however fond she may have been of the victim – bore a professional and transient relationship to her. But what Ms. Peterson said about her own relationship to the victim was the least attenuated content of her testimony. She also spoke in sweeping terms (and clearly well past her personal knowledge) about the reactions and feelings experienced by an unspecified number of mostly unnamed others – students, their siblings and their parents. And her testimony climaxed in a cascade of distressing emotional details about the victim's funeral and burial; details that cannot fairly be described as demonstrating "[t]he circumstances of the crime of which the defendant was convicted" (§190.3, factor (a)) or "the specific harm caused by the crime in question" (*Payne*, *supra*, 501 U.S. at p. 825), but that were virtually guaranteed to mobilize the sentiments of the jurors against the appellant and in favor of putting him to death.

Even as it authorized the use of victim impact evidence, the high court cautioned that there were boundaries around what is permissible.

(*Payne*, *supra*, 501 U.S. at p. 825.) This Court made the point even more explicitly:

> Our holding also does not mean there are no limits on emotional evidence and argument. "[T]he jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed."

(*Edwards*, *supra*, 54 Cal.3d at p. 836 [citations omitted].) And in cases following *Edwards*, the Court reemphasized that victim impact evidence must relate to "the immediate injurious impact" of the killing. (See *People v. Panah* (2005) 35 Cal.4th at p. 494; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1063 [holding that "[e]vidence of the impact of the defendant's conduct on victims other than the murder victim is relevant if related directly to the circumstances of the capital offense"].)

Ms. Peterson's testimony clearly exceeds the limitations described, and violates the intentions expressed, in those cases. However, appellant recognizes that other of this Court's more recent opinions can be read to suggest that, as a practical matter, there are no real limitations on the form and nature of permissible victim impact evidence. (See, e.g., *People v. Ervine* (2009) 47 Cal.4th 745, 792.) To the extent that the Court's precedent can be interpreted to permit the introduction of the disputed impact evidence in this case, appellant respectfully submits that it is incompatible with United States Supreme Court precedent. Last year, the high court reiterated the narrow scope of the holding in *Payne*, noting that, in that case, it had:

> . . . granted certiorari to reconsider [the] ban on "'victim impact' evidence *relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family.*" The Court held that *Booth* was wrong to conclude that the Eighth Amendment required such a ban. *That holding was expressly 'limited to' this particular type of victim impact testimony.*

(*Bosse v. Oklahoma*, *supra*, 137 S.Ct. at p. 2 [citations omitted; emphasis supplied].) While *Bosse*'s own holding was addressed to something else – the continuing vitality of *Booth*'s prohibition against victim's family members testifying regarding their view of the appropriate punishment (*id.* at pp. 2-3) – the Court's emphatically narrow description of the scope of the holding in *Payne* should be understood as a signal and a caution to lower courts that have strayed from its "express" limitations. Neither *Payne* nor any other United States Supreme Court precedent authorizes the introduction of the sort of evidence used in this case – i.e., testimony by someone unrelated to the victim asserting harm suffered by an unspecified number of other, unnamed individuals and providing emotionally charged details that bore no direct relationship to the actions of the defendant.

But even under the most expansive interpretation of *Payne* and *Edwards*, what happened in this case was impermissible. There is a basic point on which all agree: when victim impact "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Payne*, *supra*, 501 U.S. at p. 825; see *People v. Ervine*, *supra*, 47 Cal.4th at p. 792.) The climactic moments of Ms. Peterson's testimony in the instant case were her evocative descriptions of the victim's tiny "toy" casket, the teddy bear, the little hole in the ground to which the body was committed for eternity. These descriptions did nothing to illuminate appellant's conduct or even the suffering of the deceased; they served only

to inflame the passions and prejudices of the jurors. This was, in short, evidence that was"so inflammatory as '"to divert the jury's attention from its proper role or invite an irrational, purely subjective response. . . ."'" (*People v. Jones* (2012) 54 Cal.4th 1, 70, quoting *Edwards*, *supra*, 54 Cal.4th at p. 836 [remaining citations and internal signals omitted].)

While Ms. Peterson was just answering the questions asked, the prosecution's purpose in adducing her testimony could not have been clearer: it sought to evoke an overwhelmingly emotional response from the jurors that would override any rational consideration of the appropriate penalty in the case. That it succeeded in doing just that rendered the penalty phase of appellant's trial fundamentally unfair. And, without even reaching the constitutional error, the introduction of the evidence was clearly more prejudicial than probative, and thus an abuse of discretion under section 352 of the Evidence Code.

Whether viewed as a constitutional violation or simply as contrary to the Evidence Code, the erroneous admission of Ms. Peterson's testimony at the penalty phase of appellant's trial cannot be dismissed as harmless. The same prejudice test applies: "State law error occurring during the penalty phase will be considered prejudicial when there is a *reasonable possibility* such an error affected a verdict. Our state *reasonable possibility* standard is the same, in substance and effect, as the *harmless beyond a reasonable doubt* standard of *Chapman v. California* (1967) 386 U.S. 18, 24." (*People v. Jones* (2003) 29 Cal.4th 1229, 1265 fn.11[remaining citations omitted].)

The consequences of penalty phase error are difficult to evaluate due to the discretion that capital jurors possess (*Satterwhite v. Texas* (1988) 486 U.S. 249, 258; *People v. Brown* (John) (1988) 46 Cal.3d 432, 447), and victim impact evidence "is perhaps the most compelling evidence available to the State." (Logan, *Through the Past Darkly: A Survey of the Uses and*

Abuses of Victim Impact Evidence in Capital Trials (1999) 41 Ariz. L.Rev. 143, 178–179.) But even granting that the jury had already decided that appellant committed the crime and recognizing that – as mentioned – there was other, strong victim impact testimony from the family, the jury's verdict was by no means a foregone conclusion. On the contrary: the jury nonetheless deliberated for nearly two full days before returning a death penalty determination. (See 10 CT 2130-2132.)[56] The length of those deliberations surely reflected the fact that appellant – unlike the vast majority of those appearing in capital cases – did not have a substantial record of crime or even anti-social conduct; rather he was a well-liked and hard-working, devoted family man. The evidence presented in mitigation showed that appellant was a good and loving father, not only to his own son but also to Maggie Porter's daughter, whom he helped raise. (44 CT 3937-3942, 3974-3976.) He was a rock upon whom his sister relied during hard times – including when her husband was murdered – and took loving care of his ailing father. (44 CT 3965-3969.)

But whatever inclination the jury may have had toward lenity was finally extinguished by Ms. Peterson's testimony. This was not just a result of truly poignant (and frankly gratuitous) images that she evoked – including the "toy" coffin and the teddy bear, lowered into the tiny hole in the ground. She also purported to speak for an untold number of others who reportedly suffered from the victim's death and thus became "victims" themselves. It has been shown that the number of victims and the degree of harm influence the amount of blame a capital juror will attribute to a

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[56] Penalty phase deliberations commenced on September 21, 2005 at 2:07 p.m. (10 CT 2130), and continued throughout the following day (10 CT 2031) and most of the day after that (10 CT 2032). The jury notified the trial court of its verdict at 1:07 p.m. on September 23, 2005. (10 CT 2032.)

defendant. (See Myers, *The Prejudicial Nature of Victim Impact Statements* (2004) 10 Psychol. Pub. Pol'y & L. 492, 497, 499–500.)

This is not a case involving a single reference, or "brief and relatively bland references," to improper penalty phase evidence or argument. (E.g., *People v. Williams* (1997) 16 Cal.4th 153, 256; *People v. Sanders* (1995) 11 Cal.4th 475, 527.) Ms. Peterson's testimony was strong and occupied a prominent place, both in the prosecutor's presentation of aggravation evidence and in his closing argument to the jury. Pursuant to CALJIC No. 8.85, the jurors were *required* to consider the evidence in making their sentencing decision, and are presumed to have done so. (See *Richardson v. Marsh* (1987) 481 U.S. 200, 206.) The improperly admitted evidence, and the resulting inflammatory argument, weighed heavily on death's side of the scale. The result was an unconstitutional sentence of death which must now be reversed.

VI.

THE CUMULATIVE EFFECT OF THESE ERRORS DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND REQUIRES THAT THE JUDGMENT BE REVERSED

As demonstrated in the preceding arguments, there were a number of errors committed in this case, each of which is sufficient to compel reversal of both the penalty determination and the underlying judgment of conviction. Even were that not the case, however, reversal would nonetheless be compelled by the cumulative effect of those errors. The corrosive impact that the visible shackling of appellant had in undermining the reasonable doubt that the jurors quite apparently entertained was multiplied by the trial court's one-sided instruction regarding the significance of appellant's respective decisions regarding flight and by the legally unfounded limitation the court placed on the defense regarding third party liability evidence. That last error was, in turn, inseparable from the

trial court's refusal to grant appellant any relief from the prejudicial effect of the prosecution's utterly unjustified delay in bringing charges, a delay which made proper investigation of alternative perpetrators impossible, and which affected the ability of the defense properly to present its case in mitigation to an extent that is now simply unknowable. Finally, the effect of improper "victim impact" evidence on the jury's penalty determination could only have been exacerbated by the many ways in which the defense case had already unfairly been weakened.

As this Court has taught, "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844-845; *People v. Rivas* (2013) 214 CalApp.4th 1410, 1436; see also *United States v. Preston* (9th Cir. 2017) 873 F.3d 829, 835 ["the cumulative effect of multiple trial errors '"can violate due process even where no single error . . . would independently warrant reversal."'"] (citations omitted).) The series of errors committed by the trial court in the instant case ensured that appellant would not receive the full and fair consideration of both his guilt and the appropriate penalty by the jury, vouchsafed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Accordingly, the entire judgment must be reversed.

VII.

CALIFORNIA'S DEATH PENALTY STATUTE AND INSTRUCTIONS VIOLATE THE UNITED STATES CONSTITUTION BY NOT REQUIRING THAT THE JURY'S WEIGHING DETERMINATION BE MADE BEYOND A REASONABLE DOUBT

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 886, 887; *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v.*

Hawthorne (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence.

Apprendi v. New Jersey (2000) 530 U.S. 466, 490, *Ring v. Arizona* (2002) 536 U.S. 584, 602, 609, and *Blakely v. Washington* (2004) 542 U.S. 296, 303-305 require that any fact used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 9 CT 1898-1899.) Because these additional findings were required before the jury could impose the death sentence, *Ring, Apprendi,* and *Blakely* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson, supra,* 25 Cal.4th at p. 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). Appellant urges the Court to reconsider these decisions in light of subsequent developments in the law.

The United States Supreme Court recently held Florida's death penalty statute unconstitutional under *Apprendi* and *Ring* because the sentencing judge, not the jury, made a factual finding – the existence of an aggravating circumstance – that is required before the death penalty can be imposed. (*Hurst v. Florida* (2016) __ U.S. __ ,136 S.Ct. 616, 624 [hereafter "*Hurst*"].) *Hurst* supports appellant's request for reconsideration of this Court's holdings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson*, *supra*, 25 Cal.4th at p. 589, fn. 14), does not require factual findings within the meaning of *Ring* (*People v. Merriman* (2014) 60 Cal.4th 1, 106), and therefore does not require the jury to find unanimously and beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances before the jury can impose a sentence of death (*People v. Prieto* (2003) 30 Cal.4th 226, 275).

A. Under *Hurst*, Each Fact Necessary To Impose A Death Sentence, Including The Determination That The Aggravating Circumstances Outweigh The Mitigating Circumstance, Must Be Found By A Jury Beyond A Reasonable Doubt

In *Apprendi*, a noncapital sentencing case, and *Ring*, a capital sentencing case, the United States Supreme Court established a bright-line rule: if a factual finding is required to subject the defendant to a greater punishment than that authorized solely by the jury's determination that the defendant is liable for the charged offense, the additional fact (or facts) must be found by the jury beyond a reasonable doubt. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 589 [hereafter "*Ring*"]; *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 483 [hereafter "*Apprendi*"].) As the Court explained in *Ring*:

> The dispositive question, we said, "is one not of form, but of effect." If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that

> fact – no matter how the State labels it – must be found, by a jury beyond a reasonable doubt.

(*Ring*, *supra*, 536 U.S. at p. 602, quoting *Apprendi*, *supra*, 530 U.S. at p. 494 and pp. 482-483.)

Applying this mandate, the high court invalidated Florida's death penalty statute in *Hurst*. (*Hurst*, *supra*, 136 S.Ct. at pp. 621-624.) The Court restated the core Sixth Amendment principle as it applies to capital sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary to impose a sentence of death*." (*Hurst*, *supra*, 136 S.Ct. at p. 619, italics added.) Further, as explained below, in applying this Sixth Amendment principle, *Hurst* made clear that the weighing determination required under the Florida statute was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst*, *supra*, 136 S.Ct. at p. 622.)

In Florida, a defendant convicted of capital murder is punished by either life imprisonment or death. (*Hurst*, *supra*, 136 S.Ct. at p. 620, citing Fla. Stat. §§ 782.04(1)(a), 775.082(1).) Under the statute at issue in *Hurst*, after returning its verdict of conviction, the jury rendered an advisory verdict at the sentencing proceeding, but the judge made the ultimate sentencing determinations. (*Hurst*, *supra*, at p. 620.) The judge was responsible for finding that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh aggravating circumstances," which were prerequisites for imposing a death sentence. (*Hurst*, *supra*, at p. 622, citing Fla. Stat. § 921.141(3).) The Court found that these determinations were part of the "necessary factual finding that *Ring* requires." (*Ibid.*)[57]

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[57] The Court in *Hurst* explained:

> [T]he Florida sentencing statute does not make a defendant

The questions decided in *Ring* and *Hurst* were narrow. As the Supreme Court explained, "Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." (*Ring*, *supra*, 536 U.S. at p. 597, fn.4.) *Hurst* raised the same claim. (See Petitioner's Brief on the Merits, *Hurst v. Florida*, 2015 WL 3523406 at *18 ["Florida's capital sentencing scheme violates this [Sixth Amendment] principle because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty'"].) In each case, the Court decided only the constitutionality of a judge, rather than a jury, finding the existence of an aggravating circumstance. (See *Ring*, *supra*, 536 U.S. at p. 588; *Hurst*, *supra*, 136 S.Ct. at p. 624.)

Nevertheless, the seven-justice majority opinion in *Hurst* shows that its holding, like that in *Ring*, is a specific application of broader Sixth Amendment principles. The first is that any fact that is required for a death sentence, but not for the lesser punishment of life imprisonment, must be found by the jury. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) This is simply a restatement of the fundamental rule expressed in *Apprendi*, that "*all* facts affecting punishment need go to the jury . . . ." (*Apprendi,* 530 U.S. at p. 483, fn. 10, italics added.) The second pertinent principle "is the companion right to have the jury verdict *based on proof beyond a*

> eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The trial court alone must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); see [*State v.*] *Steele*, 921 So.2d [538,] 546 [(Fla. 2005)].

(*Hurst*, *supra*, 136 S.Ct. at p. 622.)

reasonable doubt." (*Id.* at p. 478, citing, inter alia, *In re Winship* (1970) 397 U.S. 358, 361.)

These correlative points are repeatedly emphasized in *Hurst*. At the outset of its opinion, the Court refers not simply to the finding of an aggravating circumstance, but, as noted above, to findings of "each fact *necessary to impose a sentence of death*." (*Hurst, supra*, 136 S.Ct. at p. 619, italics added.)[58] And after setting out the history of the case, the Court began its substantive legal analysis by reiterating that – just as when the jury is considering whether the elements of the underlying crime have been satisfied – due process requires that the jury's finding of facts required to support a death sentence must be "beyond a reasonable doubt." (*Id.* at p. 621.)

The Court's language is clear and unqualified. It also is consistent with the established understanding that *Apprendi* and *Ring* apply to each fact essential to imposition of the level of punishment the defendant receives. (See *Ring, supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.); *Apprendi, supra*, 530 U.S. at p. 494.) The high court is assumed to understand the implications of the words it chooses and to mean what it says. (See *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863, 881-882, fn. 10.)

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[58] The Court reiterated this fundamental principle throughout the opinion. (See *id.* at p. 621 ["In *Ring*, we concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts *necessary to sentence a defendant to death*," italics added]; *id.* at p. 622 ["Like Arizona at the time of *Ring*, Florida does not require the jury to make *the critical findings necessary to impose the death penalty*," italics added]; *id.* at p. 624 ["Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty"].)

B. California's Death Penalty Statute Violates *Hurst* By Not Requiring That The Jury's Weighing Determination Be Found Beyond A Reasonable Doubt

California's death penalty statute violates *Apprendi*, *Ring* and *Hurst*, although the specific defect is different than those in Arizona's and Florida's laws. Unlike in those states, California requires that the jury, not the judge, make the findings necessary to sentence the defendant to death and that it do so unanimously. (Pen. Code, § 190.4, subd. (b); see *People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16 [distinguishing California's law from that invalidated in *Hurst* on the grounds that, unlike Florida, the jury's "verdict is not merely advisory"].) The vice that infects California law is that it applies no standard of proof to the weighing determination, let alone the constitutional requirement that the finding be made beyond a reasonable doubt. (See *People v. Merriman, supra,* 60 Cal.4th 1, 106.)

California's law is thus similar to the statutes invalidated in Arizona and Florida in ways that are crucial for applying the *Apprendi/Ring/Hurst* principle. In all three states, a death sentence may be imposed only if, after the defendant is convicted of first degree murder, the sentencer makes two additional findings. In each jurisdiction, the sentencer must find the existence of at least one statutorily-delineated circumstance – in California, a "special circumstance" (Pen. Code, § 190.2) and in Arizona and Florida, an "aggravating circumstance" (Ariz. Rev. Stat. §13-703(G); Fla. Stat. § 921.141(3)). This finding alone, however, does not permit the sentencer to impose a death sentence. The sentencer must make another factual finding: in California that "'the aggravating circumstances outweigh the mitigating circumstances'" (Pen. Code, § 190.3); in Arizona that "'there are no mitigating circumstances sufficiently substantial to call for leniency'" (*Ring, supra*, 536 U.S. at p. 593, quoting Ariz. Rev. Stat. § 13–703(F)); and in Florida,"that there are insufficient mitigating circumstances to outweigh

aggravating circumstances" (*Hurst*, *supra*, 136 S.Ct. at p. 622, quoting Fl. Stat. §921.141(3)).[59]

The pertinent question is not what the weighing determination is called, but what is its consequence. *Apprendi* made this clear: "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (*Apprendi*, *supra*, 530 U.S. p. 494.) Justice Scalia echoed this point in *Ring*:

> [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.

(*Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.) The constitutional question cannot be answered, as this Court has done, by collapsing the weighing finding and the sentence-selection decision into one determination and labeling it "normative" rather than factfinding. (See, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 639-640; *People v. McKinzie* (2012) 54 Cal.4th 1302,1366.) At bottom, the *Ring* inquiry is one of function.

In California, when a jury convicts a defendant of first degree murder, the maximum punishment is imprisonment for a term of 25 years to

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[59] *Hurst* made clear, "the Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" (*Hurst*, *supra* 136 S.Ct. at p. 622, citation and italics omitted.) In *Hurst*, the Court uses the concept of death penalty eligibility in the sense that there are findings which actually authorize the imposition of the death penalty in the sentencing hearing, and not in the sense that an accused is only potentially facing a death sentence, which is what the special circumstance finding establishes under the California statute. For *Hurst* purposes, under California law it is the jury determination that the aggravating factors outweigh the mitigating factors that finally authorizes imposition of the death penalty.

life. (Pen. Code, §190, subd. (a) [cross-referencing §§ 190.1, 190.2, 190.3, 190.4 and 190.5).) When the jury returns a verdict of first degree murder with a true finding of a special circumstance listed in Penal Code section 190.2, the penalty range increases to either life imprisonment without the possibility of parole or death. (Pen. Code, §190.2, subd. (a).) Without any further jury findings, the maximum punishment the defendant can receive is life imprisonment without the possibility of parole. (See, e.g., *People v. Banks* (2015) 61 Cal.4th 788, 794 [where jury found defendant guilty of first degree murder and found special circumstance true and prosecutor did not seek the death penalty, defendant received "the mandatory lesser sentence for special circumstance murder, life imprisonment without parole"]; *Sand v. Superior Court* (1983) 34 Cal.3d 567, 572 [where defendant is charged with special-circumstance murder, and the prosecutor announced he would not seek death penalty, defendant, if convicted, will be sentenced to life imprisonment without parole, and therefore prosecution is not a capital case within the meaning of Penal Code section 987.9]; *People v. Ames* (1989) 213 Cal.App.3d 1214, 1217 [life in prison without possibility of parole is the sentence for pleading guilty and admitting the special circumstance where death penalty is eliminated by plea bargain].) Under the statute, a death sentence can be imposed only if the jury, in a separate proceeding, "concludes that the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code, § 190.3.) Thus, under Penal Code section 190.3, the weighing finding exposes a defendant to a greater punishment (death) than that authorized by the jury's verdict of first degree murder with a true finding of a special circumstance (life in prison without parole). The weighing determination is therefore a factfinding.[60]

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[60]Justice Sotomayor, the author of the majority opinion in *Hurst*, previously found that *Apprendi* and *Ring* are applicable to a sentencing scheme that requires a finding that the aggravating factors outweigh the

C. This Court's Interpretation of the California Death Penalty Statute in *People v. Brown* Supports the Conclusion That The Jury's Weighing Determination Is a Factfinding Necessary to Impose a Sentence of Death

This Court's interpretation of Penal Code section 190.3's weighing directive in *People v. Brown* (1985) 40 Cal.3d 512, rev'd on other grounds sub nom. *California v. Brown* (1987) 479 U.S. 538, does not require a different conclusion. In *Brown*, the Court was confronted with a claim that the language "shall impose a sentence of death" violated the Eighth Amendment requirement of individualized sentencing. (*Id.* at pp. 538-539.) As the Court explained:

> Defendant argues, by its use of the term "outweigh" and the mandatory "shall," the statute impermissibly confines the jury to a mechanical balancing of aggravating and mitigating factors . . . Defendant urges that because the statute requires a death judgment if the former "outweigh" the latter under this mechanical formula, the statute strips the jury of its constitutional power to conclude that the totality of constitutionally relevant circumstances does not warrant the death penalty.

(*Id.* at p. 538.) The Court recognized that the "the language of the statute, and in particular the words 'shall impose a sentence of death,' leave room for some confusion as to the jury's role" (*id.* at p. 545, fn. 17) and construed this language to avoid violating the federal Constitution (*id.* at p. 540). To that end, the Court explained the weighing provision in Penal Code section 190.3 as follows:

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mitigating factors before a death sentence may be imposed. More importantly here, she has gone on to find that it "is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole." (*Woodward v. Alabama* (2013) ___ U.S. ___, 134 S.Ct. 405, 410-411(dis. opn. from denial of certiorari, Sotomayor, J.).)

> [T]he reference to "weighing" and the use of the word "shall" in the 1978 law need not be interpreted to limit impermissibly the scope of the jury's ultimate discretion. In this context, the word "weighing" is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary "scale," or the arbitrary assignment of "weights" to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor "k" as we have interpreted it. By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.

(*People v. Brown*, *supra*, at p. 541, [hereafter "*Brown*"], footnotes omitted.)[61]

Under *Brown*, the weighing requirement provides for jury discretion in both the assignment of the weight to be given to the sentencing factors and the ultimate choice of punishment. Despite the "shall impose death" language, Penal Code section 190.3, as construed in *Brown*, provides for jury discretion in deciding whether to impose death or life without possibility of parole, i.e. in deciding which punishment is appropriate. The weighing decision may assist the jury in reaching its ultimate determination of whether death is appropriate, but it is a separate, statutorily-mandated

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[61] In *Boyde v. California* (1990) 494 U.S. 370, 377, the Supreme Court held that the mandatory "shall impose" language of the pre-*Brown* jury instruction implementing Penal Code section 190.3 did not violate the Eighth Amendment requirement of individualized sentencing in capital cases. Post-*Boyde*, California has continued to use *Brown*'s gloss on the sentencing instruction.

finding that precedes the final sentence selection. Thus, once the jury finds that the aggravation outweighs the mitigation, it still retains the discretion to reject a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979 ["[t]he jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death."]

In this way, Penal Code section 190.3 requires the jury to make two determinations. The jury must weigh the aggravating circumstances and the mitigating circumstances. To impose death, the jury must find that the aggravating circumstances outweigh the mitigating circumstances. This is a factfinding under *Ring* and *Hurst*. (See *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 257-258 [finding weighing is *Ring* factfinding]; *Woldt v. People* (Colo. 2003) 64 P.3d 256, 265-266 [same].) The sentencing process, however, does not end there. There is the final step in the sentencing process: the jury selects the sentence it deems appropriate. (See *Brown*, *supra*, 40 Cal.3d at p. 544 ["Nothing in the amended language limits the jury's power to apply those factors as it chooses in deciding whether, under all the relevant circumstances, defendant deserves the punishment of death or life without parole"].) Thus, the jury may reject a death sentence even after it has found that the aggravation circumstances outweighs the mitigation. (*Brown*, *supra*, 40 Cal.3d at p. 540.) This is the "normative" part of the jury's decision. (*Brown*, *supra*, 40 Cal.3d at p. 540.)

This understanding of Penal Code section 190.3 is supported by *Brown* itself. In construing the "shall impose death" language in the weighing requirement of section 190.3, this Court cited to Florida's death penalty law as a similar "weighing" statute:

> [O]nce a defendant is convicted of capital murder, a sentencing hearing proceeds before judge and jury at which evidence bearing on statutory aggravating, and all mitigating, circumstances is adduced. The jury then renders an advisory verdict "[w]hether sufficient mitigating circumstances exist ... which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." (Fla.Stat. (1976-1977 Supp.) § 921.141, subd. (2)(b), (c).) The trial judge decides the actual sentence. He *may* impose death if satisfied in writing "(a) [t]hat sufficient [statutory] aggravating circumstances exist . . . and (b) [t]hat there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances." (*Id.* subd. (3).)

(*Brown*, *supra*, 40 Cal.3d at p. 542, italics added.) In *Brown*, the Court construed Penal Code section 190.3's sentencing directive as comparable to that of Florida – if the sentencer finds the aggravating circumstances outweighed the mitigating circumstances, it is authorized, but not mandated, to impose death.

The standard jury instructions were modified, first in CALJIC No. 8.84.2 and later in CALJIC No. 8.88, to reflect *Brown*'s interpretation of Penal Code section 190.3.[62] The requirement that the jury must find that the

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[62] CALJIC No. 8.84.2 (4th ed. 1986 revision) provided:

> In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence (circumstances) is (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

From 1988 to the present, CALJIC No. 8.88, closely tracking the language of *Brown*, has provided in relevant part:

aggravating circumstances outweigh the mitigating circumstances remained a precondition for imposing a death sentence. Nevertheless, once this prerequisite finding was made, the jury had discretion to impose either life or death as the punishment it deemed appropriate under all the relevant circumstances. The revised standard jury instructions, CALCRIM, "written in plain English" to "be both legally accurate and understandable to the average juror" (CALCRIM (2006), volume 1, Preface, at p. v.), make clear this two-step process for imposing a death sentence:

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances *both* outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.

(CALCRIM No. 766, italics added.) As discussed above, *Hurst*, *supra*, 136 S.Ct. at p. 622,which addressed Florida's statute with its comparable weighing requirement, indicates that the finding that aggravating circumstances outweigh mitigating circumstances is a factfinding for purposes of *Apprendi* and *Ring*.

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

D. This Court Should Reconsider Its Prior Rulings That The Weighing Determination Is Not A Factfinding Under *Ring* And Therefore Does Not Require Proof Beyond A Reasonable Doubt

This Court has held that the weighing determination – whether aggravating circumstances outweigh the mitigating circumstances – is not a finding of fact, but rather is a "'fundamentally normative assessment . . . that is outside the scope of *Ring* and *Apprendi*.'" (*People v. Merriman, supra,* 60 Cal.4th 1, 106, quoting *People v. Griffin* ((2004) 33 Cal.4th 536, 595, citations omitted); accord, *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263.) Appellant asks the Court to reconsider this ruling because, as shown above, its premise is mistaken. The weighing determination and the ultimate sentence-selection decision are not one unitary decision. They are two distinct determinations. The weighing question asks the jury a "yes" or "no" factual question: do the aggravating circumstances outweigh the mitigating circumstances? An affirmative answer is a necessary precondition – beyond the jury's guilt-phase verdict finding a special circumstance – for imposing a death sentence. The jury's finding that the aggravating circumstances outweigh the mitigating circumstances opens the gate to the jury's final normative decision: is death the appropriate punishment considering all the circumstances?

However the weighing determination may be described, it is an "element" or "fact" under *Apprendi*, *Ring* and *Hurst* and must be found by a jury beyond a reasonable doubt. (*Hurst*, *supra*, 136 S.Ct. at pp. 619, 622.) As discussed above, *Ring* requires that any finding of fact required to increase a defendant's authorized punishment "must be found by a jury beyond a reasonable doubt." (*Ring*, supra, 536 U.S. at p. 602; see *Hurst*, *supra*, 136 S.Ct. at p. 621 [the facts required by *Ring* must be found beyond

a reasonable doubt under the due process clause].)[63] Because California applies no standard of proof to the weighing determination, a factfinding by the jury, the California death penalty statute violates this beyond-a-reasonable-doubt mandate at the weighing step of the sentencing process.

The recent decision of the Delaware Supreme Court in *Rauf v. State* (Del. 2016) 145 A.3d 430 (per curiam) [hereafter "*Rauf*"] supports appellant's request that this Court revisit its holdings that the *Apprendi* and *Ring* rule do not apply to California's death penalty statute. *Rauf* held that Delaware's death penalty statute violates the Sixth Amendment under *Hurst*. (*Id.* at pp. 433-434.) In Delaware – unlike in Florida and more akin to California – the jury's finding of a statutory aggravating circumstance is determinative, not simply advisory. (*Id.* at p. 456.) Nonetheless, in a 3-to-2 decision, the Delaware Supreme Court – answering several certified questions from the superior court – found the state's death penalty statute violates *Hurst*.

Among the reasons the *Rauf* court invalidated Delaware's law is that the jury in Delaware – like the jury in California – is not required to find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. (*Rauf*, 145 A.3d at p. 434; see also *id.* at p. 484 (conc. opn. of Holland, J).) With regard to that defect:

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[63]The *Apprendi/Ring* rule addresses only facts necessary to increase the level of punishment. Once those threshold facts are found by a jury, the sentencing statute may give the sentencer, whether judge or jury, the discretion to impose either the greater or lesser sentence. Thus, once the jury finds a fact required for a death sentence, it still may be authorized to return the lesser sentence of life imprisonment without the possibility of parole.

> This Court has recognized that the weighing determination in Delaware's statutory sentencing scheme is a factual finding necessary to impose a death sentence. "[A] judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors . . . ." The relevant "maximum" sentence, for Sixth Amendment purposes, that can be imposed under Delaware law, in the absence of any judge-made findings on the relative weights of the aggravating and mitigating factors, is life imprisonment.

(*Id.* at p. 485 (conc. opn. of Holland, J.)

The Delaware court is not alone in reaching this conclusion. Other state supreme courts have recognized that the determination that the aggravating circumstances outweigh the mitigating circumstance, like the finding that an aggravating circumstance exists, comes within the *Apprendi/Ring* rule. (See e.g., *State v. Whitfield, supra,* 107 S.W.3d at pp. 257-258; *Woldt v. People, supra,* 64 P.3d at pp. 265-266; see also *Woodward v. Alabama, supra,* 134 S.Ct. at pp. 410-411 (Sotomayor, J., dissenting from denial of cert.) ["The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is . . . [a] factual finding" under Alabama's capital sentencing scheme]; contra, *United States v. Gabrion* (6th Cir. 2013) 719 F.3d 511, 533 (en banc) [finding that-under *Apprendi* and *Ring*-the finding that the aggravators outweigh the mitigators "is not a finding of fact in support of a particular sentence"]; *Ritchie v. State* (Ind. 2004) 809 N.E.2d 258, 265 [reasoning that the finding that the aggravators outweigh the mitigators is not a finding of fact under *Apprendi* and *Ring*]; *Nunnery v. State* (Nev. 2011) 263 P.3d 235, 251-253 [finding that "the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor" under *Apprendi* and *Ring*].)

Because in California the finding that aggravating factors outweigh mitigating factors is a necessary predicate for the imposition of the death

penalty, *Apprendi*, *Ring and Hurst* require that this finding be made, by a jury and beyond a reasonable doubt. Because appellant's jury was not required to make this finding, his death sentence must be reversed.

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

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (I) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Penal Code Section 190.2 is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers

eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, Penal Code section 190.2 contained 19 special circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application of Penal Code Section 190.3, Factor (a), Violated Appellant's Constitutional Rights

Penal Code section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 43 RT 3686-3687.) 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. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749, disapproved on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919-920 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of Penal Code section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Romero* (2008) 44 Cal.4th 386, 428; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges the Court to reconsider this holding.

C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof

1. Appellant's Death Sentence Is Unconstitutional Because It Is Not Premised on Findings Made Beyond a Reasonable Doubt

In Claim VII., *ante*, appellant urges this Court to reconsider its holdings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (see *People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14) and does not require factual findings within the meaning of *Ring v. Arizona* (2002) 536 U.S. 584, 602, 609 (see *People v. Merriman* (2014) 60 Cal.4th 1, 106). Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced

beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This court has previously rejected appellant's claim that either the due process clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36 Cal.4th at p. 753.) Appellant requests that the Court reconsider this holding.

2. Either Some Burden of Proof is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence. The jury was not so instructed in the instant case. (See 9 RT 904-910 [argument on defense request for instructions that State bears the burden of proving all aggravating factors and appropriateness of death penalty beyond a reasonable doubt]; 9 CT 1897-1931 [penalty phase instructions given to the jury, specifying only that appellant's alleged prior criminal act be proved beyond a reasonable doubt per CALJIC 8.87].)

CALJIC Nos. 8.85 and 8.88, the instructions given here (9 CT 1898-1899, 1930-1931) fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict Was Not Premised On Unanimous Jury Findings

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Woodson v. North Carolina* (1976) 428 U.S. 290, 305.) Nonetheless, this Court "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.) The

Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*, 536 U.S. 584. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.); see *Hurst v. Florida*, *supra*, 136 S.Ct. at p. 622 [indicating that determinations that aggravating circumstances exist and that they outweigh the mitigating circumstances are factual findings under *Ring*].)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Y1st* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should

live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

4. The Instructions Caused the Penalty Determination to Turn On An Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (9 CT 1930.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright, supra*, 486 U.S. at p. 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The Instructions Failed to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make clear to jurors that this is the overriding concern; rather it instructs them they can

return a death verdict if the aggravating evidence "warrants" death rather than life without parole.[64] These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

6. The Instructions Failed To Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return a Sentence Of Life Without the Possibility of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal

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[64] CALCRIM No. 766 reflects the argument made by appellant and tells the jurors that they can return a death verdict if they find it "appropriate and justified."

Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments By Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S.286, 293-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina, supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left

with the impression that the defendant bore some particular burden in proving facts in mitigation. The decision in *Kansas v. Carr* (2016) __ U.S. __, 136 S.Ct. 633, does not control this claim because the Kansas statute, unlike California's law, provides a burden of proof. (*Id.* at p. 643 [that one or more aggravating circumstance exist and that they are not outweighed by any mitigating circumstances must be found beyond a reasonable doubt, but mitigating circumstances must simply be found to exist].)

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here.

Kansas v. Carr, *supra*, 136 S.Ct. 633 is not applicable because it did not address the unanimity question. In any event, the jury in *Carr* unanimously found that aggravating circumstances existed and outweighed the mitigating circumstances (*id.* at pp. 640, 643), and under Kansas law, the jury is instructed that unanimity is not required for consideration of mitigating circumstances (*State v. Carr* (2014) 331 P.3d 544, 732, rev'd on

other grounds, *Kansas v. Carr* (2016) 136 S.Ct. 633). In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The Penalty Jury Should Be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. 8th & 14th Amends.), and his right to the equal protection of the laws (U.S. Const. 14th Amend.).

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.)

However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing to Require That the Jury Make Written Findings Violated Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the court to reconsider its decisions on the necessity of written findings.

E. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in the List Of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; Pen. Code, § 190.3, factors (d) and (g); 9 CT 1898-1899) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. at p. 384; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Several of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case – some patently so – including the issue of prior felony convictions (factor (c)); whether the offense was committed "under the influence of extreme mental or emotional disturbance" (factor (d)); whether the victim consented to or participated in the homicidal act (factor (e)); whether appellant was under duress (factor (f)); appellant's capacity to appreciate the wrongness of the crime (factor (g)); and whether appellant was a minor accomplice to the crime (factor (j)). The trial court failed to omit those factors from the jury instructions (9 CT 1898), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 36 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – 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. Davenport* (1985) 41 Cal.3d 247, 288-289).

Appellant's 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.[65] Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors, precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, appellant asks the Court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

F. The Prohibition Against Intercase Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., intercase proportionality review. (See *People v. Bonilla* (2007) 41 Cal.4th 313, 359.) The failure to conduct intercase proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the court to reconsider its failure to require intercase proportionality review in capital cases.

G. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme violates the equal protection clause by providing significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with noncapital

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[65] CALCRIM No. 763 addresses this issue by removing the "or not" language from the instruction.

crimes. To the extent that there may be differences between capital defendants and noncapital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a noncapital case, any true finding on an enhancement allegation must be unanimous and have been found to be true beyond a reasonable doubt. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325.) Additionally, a trial court must state on the record its specific reasons for choosing the term of imprisonment it may be imposing. (Cal. Rules of Court, rule 4.420(e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any statement of reasons to justify the defendant's sentence. Appellant acknowledges that the Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider.

H. California's Use of the Death Penalty as a Regular Form Of Punishment Falls Short of International Norms

This Court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook* (2006) 39 Cal.4th 566, 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the U.S. Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions.

CONCLUSION

For the reasons set forth above, the judgement of conviction and sentence of death must be reversed.

DATED: January 17, 2018

Respectfully submitted,

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State Public Defender

/S/ AJ Kutchins
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CERTIFICATE AS TO LENGTH OF BRIEF

Pursuant to California Rules of Court, rule 8.630(b)(2), I hereby certify that I have verified, through the use of our word processing software, that this brief, excluding the tables, contains approximately 48,133 words.

DATED: January 17, 2018

/S/ AJ Kutchins
AJ Kutchins
Senior Deputy State Public Defender

DECLARATION OF SERVICE

Case Name: ***People v. Bracamontes***
Case Number: **Supreme Court Case. No. S139702**
San Diego County Superior Court No. SCD178329

I, **Glenice Fuller**, declare as follows: I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, 10th Floor, Oakland, California 94607. I served a copy of the following document(s):

APPELLANT'S OPENING BRIEF

by enclosing it in envelopes and

/X/ placing the envelopes for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed on **January 17, 2018**, as follows:

San Diego Superior Court
Clerk of the Superior Court
220 W. Broadway
San Diego, CA 92101

San Diego County Public Defender
450 B Street, # 900
San Diego, CA 92101

Mr. Manuel Bracamontes
F-06185; CSP-SQ
San Quentin, California 94974
To be personally served within 30 days in accordance with CSC Policy 4

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Signed January 17, 2018, at Oakland, California.

/S/glenice fuller
Glenice Fuller