THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA, | Case No. SO99274 |
| Plaintiff and Respondent, | Superior Court No. PA032918 |
| v. | |
| DONALD L. BROOKS, | |
| Defendant and Appellant. | |



Appeal from the Superior Court of Los Angeles County

Honorable Warren G. Greene, Judge

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# APPELLANT'S OPENING BRIEF
**(Volume II of II: Pages 252-493)**

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DEATH PENALTY

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## XVII

**APPELLANT'S CONVICTION OF MURDER, IN COUNT ONE OF THE INFORMATION, MUST BE REVERSED PURSUANT TO THE FEDERAL AND STATE CONSTITUTIONS BECAUSE: (1) THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT OFFENSE; AND (2) THE TRIAL COURT COMMITTED NUMEROUS PREJUDICIAL INSTRUCTIONAL ERRORS RELATED TO THAT COUNT,**

### A. SUMMARY OF ARGUMENT

Appellant was found guilty in count one of the murder of Lisa Kerr. The prosecution presented the following theories to support this conviction: (1) appellant committed premeditated murder; (2) appellant murdered the victim during the commission of a kidnaping; (3) appellant murdered the victim during the commission of arson; and (4) appellant committed murder by torture. (23 RT pp. 2519-2524, 2533-2534.) As explained below, the evidence was insufficient to support appellant's conviction of any of these theories. However, even if this Court were to determine that one or more of the theories were valid, the murder conviction cannot be affirmed because it is not possible to determine that the conviction was based on a valid legal theory supported by the evidence. *(People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129; *People v. Green* (1980) 27 Cal.3d 1, 69.) Furthermore, the finding of guilt of murder was also infected by numerous prejudicial instructional errors. Appellant's right to due process, to a jury determination of the facts to a reliable, non-arbitrary guilt and penalty determination, and right to be free of cruel and

unusual punishment, require reversal of count one because of the insufficiency of the evidence and the instructional errors. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Art I, secs. 1, 7, 15, 16 & 17.) The reversal of the murder conviction also requires reversal of the judgment of death.

**B. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE APPELLANT COMMITTED PREMEDITATED MURDER**

The critical inquiry upon a challenge to the sufficiency of the evidence to support a criminal conviction is whether the record, when read in a light most favorable to the judgment, contains substantial evidence from which a reasonable trier of fact could reasonably have found defendant guilty of the crime beyond a reasonable doubt. (*People v. Ferrara* (1988) 202 Cal.App.3d 201, 207, citing *Jackson v. Virginia* (1970) 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560; *People v. Silva* (1988) 45 Cal.3d 604, 625.) "Substantial evidence" is evidence which, when viewed in light of the entire record, is of solid probative value, maintains its credibility and inspires confidence that the ultimate fact it addresses has been justly determined. (See *People v. Lucero* (1988) 44 Cal.3d 1006, 1020; *People v. Conner* (1983) 34 Cal.3d 141, 149.)

The trial court instructed the jury on the theory of first degree willful, deliberate, and premeditated murder. (23 RT pp. 2520-2521.) Section 187, subdivision (a), provides, "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." Section 188 provides in part that malice is "express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature."

The trial court defined for the jury the terms, "willful,""deliberate," and "premeditated." The term "willful" meant intentional. The term "deliberate" meant, "formed or arrived at or determined as a result of careful thought and weighing of consideration for and against the proposed course of action." (23 RT p. 2521.) The word "premeditated" mean "considered beforehand." (*Ibid.*) The trial court further instructed the jury, "If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon preexisting reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree." (*Ibid.*)

The evidence was insufficient as a matter of law to prove that appellant committed a willful, deliberate, and premeditated murder. A murder, which was the result of "mere unconsidered or rash impulse hastily executed," cannot be first degree murder. (*People v. Bender* (1945) 27 Cal.2d 164, 185, overruled on other in *People v. Lasko* (2002) 23 Cal.App.4th 101, 110.) First degree premeditated murder is one done "as a result of careful thought and weighing of considerations; as a deliberate judgment or plan; carried on cooly and steadily, [especially] according to a preconceived design." (*People v. Caldwell* (1955) 43 Cal.2d 864, 869.) The *Bender/Caldwell* definition of premeditated and deliberated murder, which has been neither legislatively nor judicially rejected, remains the controlling law in California. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) The evidence presented was that appellant strangled Ms. Kerr after he heard her make humiliating remarks

about him to Mark Harvey. (20 RT pp. 2236-2237, 2252-2253.) Mr. Jayne testified appellant said he followed Ms. Kerr to her apartment and then suddenly strangled her. (20 RT pp. 2244-2245.) Spontaneously attacking someone is not a willful, deliberate, and premeditated murder. A killing occurring under such circumstances constitutes voluntary manslaughter.

Provocation and heat of passion that reduce murder to voluntary manslaughter must be affirmatively demonstrated. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252; *People v. Sedeno* (1974) 10 Cal.3d 703, 719.) The sudden quarrel or heat of passion "must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances . . . ." (*People v. Steel, supra*, 27 Cal.4th at p. 1252.) "The passion necessary to constitute heat of passion need not be rage or anger but may be any violent, intense, overwrought or enthusiastic emotion which causes a person to act rashly and without deliberation and reflection." (*People v. Berry* (1976) 18 Cal.3d 509, 515.) The provocation can occur in a single occasion or over a period of time. (*Id.*, at pp. 515-516.) No specific provocation is required, and the provocation may be verbal. (*People v. Berry, supra*, 18 Cal.3d at p. 515; *People v. Valentine* (1946) 28 Cal.2d 121, 141-144.)

In the instant case, appellant responded to verbal provocation. During his opening argument, the prosecutor conceded appellant was under Mark Harvey's residence and heard Ms. Kerr's derogatory remarks about him. (23 RT p. 2566.) Hence, there was no dispute that appellant reacted to verbal provocation when he strangled Ms. Kerr. The provocation was sufficient to arouse the passions of an ordinary person. Appellant had intense emotional

feelings for Ms. Kerr. They had engaged in sexual relations. Ms. Kerr had manipulated appellant for money and to escape her abusive husband. She then discarded appellant and mocked him to others. (20 RT pp. 2224, 2228-2229, 2236-2237, 2252-2253.) Appellant's anger was only heightened because he believed Ms. Kerr was having sexual relations with Mr. Harvey. A reasonable person would have felt extreme anger or rage at such betrayal.

The medical examiner testified that Ms. Kerr was probably alive when the car was set on fire because she had soot in her trachea, but she was most likely unconscious when the fire occurred. (18 RT pp. 1995-1997, 1991.) There was no evidence that appellant knew Ms. Kerr was alive when the car was set on fire. David Jayne, a key prosecution witness, testified that appellant shad he had killed Ms. Kerry by strangulation. (29 RT p. 2244.) The only theory, upon which the jury could have found appellant guilty of willful, deliberate, and premeditated murder, was that appellant set the car on fire with knowledge that she was alive. This theory was not supported by the evidence because there was no evidence appellant knew Ms. Kerr was alive when he started the fire. Hence, the first degree murder conviction cannot be affirmed based on a theory of a willful, deliberate, and premeditated murder.

This Court's decisions support appellant's argument that Ms. Kerr's death was not a premeditated murder. The Court has identified three kinds of evidence that support a verdict of premeditated murder: (1) evidence of "planning activity" prior to the killing; (2) evidence of a prior relationship or conduct from which a "motive" could be inferred; and (3) evidence that the "manner" of the killing was deliberate and precise. (*People v. Anderson* (1968) 70

Cal. 2d 15, 26-27.) A verdict of first degree murder will be sustained "when there is evidence of all three types and otherwise requires *at least* extremely strong evidence of (1) [planning] or evidence of (2) [prior relationship and motive] *in conjunction* with either (1) or (3) [manner of killing]." (*Id.* at p. 27, italics added.)

In subsequent cases interpreting *Anderson* and its progeny, this Court has rejected an "[u]nreflective reliance on *Anderson* for a definition of premeditation." (*People v. Thomas* (1992) 2 Cal.4th 489, 516; see also *People v. Perez* (1992) 2 Cal.4th 1117, 1125.) "Evidence concerning motive, planning, and the manner of killing are pertinent to the determination of premeditation and deliberation, but these factors are not exclusive nor are they invariably determinative." (*People v. Silva*, *supra*, 25 Cal.4th at p. 368.)

The Anderson factors do not support a finding of first degree willful, premeditated, and deliberate murder in this case. Although appellant was despondent over the disintegration of his relationship with Mr. Kerr and made statements prior to Ms. Kerr's death that he wanted to kill her, (18 RT pp. 2081-2082, 2084-2085), there was no evidence he actually planned to do so. The evidence at trial was that appellant suddenly confronted Ms. Kerr after hearing her denigrate him to the man he thought was her new lover. (20 RT pp. 2239-2240, 2244, 2228-2229.) Even the prosecutor conceded that appellant assaulted Ms. Kerr because he heard the derogatory remarks she made to Mr. Harvey about him. (23 RT p. 2566.) The factor of planning was not established, and their prior relationship is not entitled to any weight because the evidence established that appellant, in a fit of momentary rage, assaulted

Ms. Kerr. In addition, Ms. Kerr ultimately died as a result of her thermal injuries. (18 RT p. 1988.) However, there was no evidence appellant knew Ms. Kerr was alive when the car was set on fire. Appellant believed he had killed Ms. Kerr when he assaulted her. Because appellant believed that Ms. Kerr was already deceased, the setting of the car on fire was not an attempt to kill her in a deliberate and precise manner. Appellant set the car on fire to hide a homicide that he believed had already occurred.

For the reasons above, the first degree murder conviction cannot be sustained on the theory that appellant committed a willful, deliberate, and premeditated murder.

**C. THE FIRST DEGREE MURDER CONVICTION CANNOT BE AFFIRMED BASED ON THE FELONY-MURDER THEORY OF KIDNAPING BECAUSE MS. KERR'S KIDNAPING WAS INCIDENTAL TO HER MURDER.**

Section 189 provides in part that, "All murder . . . which is perpetrated in perpetration of, or attempt to perpetrate . . . kidnaping . . . is murder of the first degree." The jury was also instructed that, "the unlawful killing of a human being, whether intentional, unintentional, or accidental, which occurs during the commission or attempted of the crime as a direct causal result of . . . kidnaping is murder of the first degree when the perpetrator had the specific intent to commit that crime." (23 RT pp. 2522-2523.) The jury found true the special circumstance that appellant committed murder while engaged in the commission of a kidnaping. (24 RT p. 2705.)

Under section 189, "a killing is committed in the perpetration of an enumerated felony if the killing and the felony 'are parts of one continuous transaction'." (*People v. Hayes*

(1990) 52 Cal.3d 577, 631, quoting *People v. Ainsworth* (1988) 45 Cal.3d 984, 1016.) "[T]he killing need not occur in the midst of the commission of the felony, so long as that felony is not merely incidental to, or an afterthought to, the killing." (*People v. Prince* (2008) 40 Cal.4th 1179, 1259, quoting *People v. Proctor* (1992) 4 Cal.4th 499, 532.)

It appears the "one continuous transaction" test, and the requirement that the felony not be merely incidental to, or an afterthought to, the killing, restate the same test. *People v. Prince* cited *People v. Proctor* for the "incident to" and "afterthought" test. People v. Proctor cited *People v. Hernandez* (1988) 47 Cal.3d 515, 346, and *People v. Hayes, supra*, 52 Cal.3d at p. 631.) *People v. Hernandez* stated that "the focus is on the relationship between the underlying felony and the killing and whether the felony is merely incidental to the killing, an afterthought" (*People v. Hernandez, supra*, 47 Cal.3d at p. 348.) *People v. Hayes* set forth the "continuous transaction" test. (*People v. Hayes, supra*, 52 Cal.3d at p. 631.)

In the instant case, the kidnaping of Ms. Kerr was an afterthought, or incidental to, her murder. Appellant confronted Ms. Kerr at her apartment and strangled her. (20 RT pp. 2237-2240, 2252-2253.) According to the medical examiner, Ms. Kerr died of thermal injuries from the car being set on fire. (18 RT p. 1991.) The movement of Ms. Kerr's body was incidental to her murder for several reasons. If appellant believed he had killed Ms. Kerr at her apartment, then he could not have kidnaped her because a dead person cannot be kidnaped. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 498 [the crime of kidnaping requires a live victim].) Appellant's mistake of fact, that he believed Ms. Kerr was deceased,

precluded a finding that he kidnaped her. Appellant incorporates from Issue III the discussion concerning appellant's mistake of fact that appellant believed Ms. Kerr was dead when she was moved from her apartment to the location where her body was found. Even if appellant knew Ms. Kerr was alive following the confrontation at the apartment, his purpose was not to kidnap her. The transportation of Ms. Kerr's body was an afterthought to the confrontation at the apartment and an attempt by appellant to hide the crime.

The requirement that the prosecution prove Ms. Kerr's kidnaping was not incidental to her murder constituted an element of the offense of felony-murder, which the prosecution was required to prove beyond a reasonable doubt. (*Ring v. Arizona, supra*, 536 U.S. at p. 609; cf. *Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1476.) Because the prosecution failed to prove this element, appellant's first degree murder conviction cannot be affirmed based on the felony-murder theory of kidnaping.

**D. APPELLANT'S CONVICTION OF FIRST DEGREE MURDER BASED ON THE FELONY-MURDER THEORY OF KIDNAPING CANNOT BE AFFIRMED BECAUSE OF INSTRUCTIONAL ERRORS MADE BY THE TRIAL COURT.**

The trial court gave an erroneous definition of kidnaping. The trial court gave the definition of kidnaping set forth in *People v. Martinez* (1999) 20 Cal.4th 225, which allowed the jury to consider a number of factors other than distance in determining if the victim had been asported. (23 RT pp. 2538-2540.) This instruction was erroneous because prior to *People v. Martinez*, the jury was limited to considering only distance in determining if asportation occurred. (*People v. Martinez, supra*, 20 Cal.4th at pp. 236-237.) The federal due

process clause prevented appellant's jury from relying on the expanded test for asportation. (*People v. Martinez, supra*, 20 Cal.4th at p. 238.) Hence, the felony-murder theory of kidnaping presented to the jury was flawed because the jury relied on an erroneous definition of asportation. This issue was addressed more fully in Issue III and those arguments are incorporated in this portion of the brief.

The trial court also failed to give a mistake of fact instruction for the kidnaping allegation. Appellant's purported statements before and after his arrest showed that he believed he had strangled her and then transported her body to the location where the vehicle was set on fire. (20 RT pp. 2236-2237, 2252-2253.) Appellant requested the trial court give a mistake of fact instruction for the kidnaping allegation. (22 RT p. 2455.) The trial court refused the request. (24 RT pp. 2677-2678.) Because appellant believed Ms. Kerr was dead when he transported her to the location where the vehicle was set on fire and the crime of kidnaping requires a live victim, (*People v. Hillhouse, supra*, 27 Cal.4th at p. 498), the trial court should have given a mistake of fact instruction for the kidnaping allegation. Hence, the felony-murder theory presented to the jury was flawed because of the trial court's failure to give a mistake of fact instruction.

**E. THE MURDER CONVICTION CANNOT BE AFFIRMED BASED ON A THEORY OF MURDER BY TORTURE BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF TORTURE, AND EVEN IF THE FACTS SHOWED THAT TORTURE OCCURRED, IT WAS INCIDENTAL TO MS. KERR'S MURDER.**

Section 189 provides that "All murder which is perpetrated by . . . torture . . . is murder of the first degree." The trial court instructed the jury on the theory of murder by

torture. The trial court instructed the jury that the elements were: (1) One person murdered another person; (2) the perpetrator committed the murder with willful, deliberate, and premeditated intent to inflict extreme and prolonged pain upon a living human being for the purpose of revenge, extortion, persuasion, or for any sadistic purpose; and (2) the act or actions take by the perpetrator to inflict extreme and prolonged pain were a cause of the victim's death. (23 RT pp. 2533-2534.) The jury was also instructed that, "The crime of murder by torture does not require any proof that the perpetrator intended to kill his victim or any proof that the victim was aware of pain or suffering." (23 RT p. 2534.) The jury found true the special circumstance allegation that "the murder was intentional and involved the infliction of torture . . ." (24 RT p. 2705.)

Appellant's torture of Ms. Kerr must not have been "merely incidental to, or an afterthought to, the killing," (*People v. Prince, supra*, 40 Cal.4th at p. 1259), in order for appellant to be guilty of first degree murder under section 189. The torture of Ms. Kerr was an afterthought to her murder for several reasons. The prosecution evidence showed appellant strangled Ms. Kerr at her apartment. Appellant believed she was dead. (20 RT pp. 2236-2237.) Appellant could not have tortured Ms. Kerr if he thought she was dead when he set the car on fire. The burning of Ms. Kerr's vehicle was done to destroy evidence. The fact that appellant's motive was to destroy evidence made the purported torture of Ms. Kerr incidental to her murder.

The crime of torture requires the defendant to have acted with the intent to cause cruel

and extreme pain and suffering. (*People v. Mungia, supra*, 44 Cal.4th at p. 1136.) Appellant thought Ms. Kerr was dead, or at the very least unconscious, when he started the fire. He therefore could not have acted with the intent to cause her extreme and prolonged pain. There was similarly no evidence that appellant was acting for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose.

The due process clause required the prosecution to prove beyond a reasonable doubt that the purported torture of Ms. Kerr was not incidental to her murder. (*Ring v. Arizona, supra,* 536 U.S. at p. 609.) Because the prosecution failed to prove this element of murder by torture, appellant's conviction of first degree murder cannot be affirmed on that theory.

**F. APPELLANT'S CONVICTION OF FIRST DEGREE MURDER CANNOT BE AFFIRMED BASED ON THE THEORY OF MURDER BY TORTURE BECAUSE OF INSTRUCTIONAL ERROR AND THE DEFINITION OF TORTURE WAS UNCONSTITUTIONALLY VAGUE**

A criminal statute is void for vagueness under the due process clause and the Eighth Amendment if it fails to provide adequate notice to ordinary people of the kind of conduct prohibited or if it authorizes arbitrary and discriminatory enforcement. (*Kolender v. Lawson*, supra, 461 U.S. at p. 357.) The murder by torture instruction told the jury that appellant tortured Ms. Kerr if he inflicted "extreme and prolonged pain" on her. (23 RT pp. 2533-2534.) This instruction suffered from the same vagueness problems as the statutes in *Godfrey v. Georgia* (1980) 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398, and *Maynard v. Cartwright* (1988) 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372.

In *Godfrey v. Georgia*, the Supreme Court found a special circumstance allegation that

a murder was committed "outrageously or wantonly vile, horrible, or inhuman" to be unconstitutionally vague. (*Godfrey v. Georgia, supra*, 446 U.S. at pp. 428-429.) In *Maynard v. Cartwright*, the Supreme Court found a special circumstance allegation that the murder was committed in an "especially heinous, atrocious, or cruel" manner to be unconstitutionally vague. (*Maynard v. Cartwright, supra*, 486 U.S. at pp. 363-364.) The term "extreme and prolonged pain" fails to provide adequate notice of the forbidden conduct. Reasonable individuals could have substantially different understandings of what is encompassed by "extreme and prolonged pain." Appellant incorporates in this portion of the brief the arguments from Issue V.

Appellant, furthermore, most likely believed Ms. Kerr was deceased when he started the fire. The medical examiner testified she was most likely unconscious when the fire started. (18 RT pp. 1995-1997.) A reasonable person would not believe it would be possible to torture an unconscious or deceased person. Hence, the definition of torture given to the jury was unconstitutionally vague.

The trial court also erred by failing to instruct the jury on felony assault as a lesser included offense of torture. Appellant incorporates the arguments made in Issue VII in this portion of the Opening Brief. Assault by means of force likely to cause great bodily injury is a lesser included offense of the crime of torture. (*People v. Martinez* (2005) 125 Cal.App.4th 1035, 1044.) Substantial evidence raised a question of fact whether appellant committed felony assault rather than torture. Because Ms. Kerr was unconscious when the

fire was started, there was no evidence appellant started the fire for the purpose of revenge, extortion, persuasion, or any sadistic purpose. There was also no evidence appellant intended to inflict extreme and prolonged pain on Ms. Kerr because she was unconscious and appellant must have been aware of that fact. The trial court should have instructed the jury that assault with means of force likely to cause great bodily injury was a lesser included offense of torture. The due process clause, furthermore, required the trial court to instruct the jury on felony assault as a lesser included offense of torture. (*Beck v. Alabama, supra,* 447 U.S. at p. 630.)

Because the torture instruction was unconstitutionally vague, and the trial court failed to instruct on the lesser included offense of felony assault, appellant's first degree murder conviction cannot be affirmed based on the theory that he committed murder by torture.

## G. THE FIRST DEGREE MURDER CONVICTION CANNOT BE AFFIRMED BASED ON THE THEORY OF THE COMMISSION OF A MURDER COMMITTED DURING AN ARSON BECAUSE THE ARSON WAS INCIDENTAL TO THE MURDER

Section 189 provides in part that, "All murder . . . which is committed in the perpetration of, or attempt to perpetrate, arson . . . is murder of the first degree." The jury was instructed that, "the unlawful killing of a human being, whether intentional, unintentional, or accidental, which occurs during the commission or attempted commission of the crime as a direct causal result of arson . . . is murder of the first degree when the perpetrator had the specific intent to commit that crime." (23 RT pp. 2522-2523.) Appellant was found guilty of arson. (24 RT pp. 2704-2705.) In order for the jury to find that appellant committed

felony-murder based on arson, the arson must not have been incidental to Ms. Kerr's murder. (*People v. Clark* (1990) 50 Cal.3d 583, 608.) The arson of the vehicle was incidental to Ms. Kerr's death if the fire was started for some purpose other than causing Ms. Kerr's death. (*Ibid.*)

Here, appellant started the car on fire to conceal evidence. In *People v. Lewis* (2009) 46 Cal.4th 1255, 1300, the Court gave as an example of an incidental felony "when, for example, the defendant intends to murder the victim and after doing so takes his or her wallet for the purpose of making identification of the body more difficult." Under any factual scenario, the death of Ms. Kerr was incidental to the arson of the vehicle. Appellant's alleged out-of-court statements showed he believed he had strangled Ms. Kerr. If appellant believed he had killed Ms. Kerr in that manner, then the burning of the car was incidental to Ms. Kerr's death for two independent reasons. Appellant's burning of the car was not for the purpose of causing her death. Second, the burning of the car was for the purpose of concealing her identity and destroying evidence connecting him to the crime.

If appellant knew Ms. Kerr was alive when he started the fire, the burning of the vehicle was still incidental to Ms. Kerr's murder. The burning of the vehicle was an afterthought to her murder. "[T]he killing need not occur in the midst of the commission of the felony, so long as that felony is not merely incidental to, or an afterthought to, the killing." (*People v. Prince, supra*, 40 Cal.4th at p. 1259.) Hence, appellant's first-degree murder conviction cannot be affirmed based on the felony-murder theory of arson.

## H. THE JUDGMENT TO COUNT ONE MUST BE REVERSED BECAUSE IT IS NOT POSSIBLE TO DETERMINE IF THE JURY FOUND APPELLANT GUILTY OF THAT CHARGE BASED ON A VALID LEGAL THEORY WHICH WAS SUPPORTED BY THE EVIDENCE.

The judgment of guilt to count one must be reversed because this Court cannot determine that the conviction rested upon a valid legal theory which was supported by the evidence.

In *People v. Green* (1980) 27 Cal.3d 1, 69, overruled on another ground in *People v. Martinez* (1999) 20 Cal.4th 225, this Court stated that, "When the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." In *Griffin v. United States* (1991) 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371, the defendant was charged with conspiracy which alleged two separate objects. The evidence was sufficient to prove one object, but insufficient to prove the other object. The defendant argued the conviction had to be reversed because the general verdict created doubt whether the jury had convicted her based on the object of the conspiracy which was supported by the evidence. The Court noted the common law rule: "It was settled in England before the Declaration of Independence, and in this country long afterwards, that a general jury verdict was valid so long as it was legally supportable on one of the submitted grounds–even though that gave no assurance that a valid, rather than an invalid one, was actually the basis for the jury's action." (*Griffin v. United States, supra*, 502 U.S. at p. 49.)

The Court distinguished between legal error and factual error in determining whether the conviction should be reversed:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law -- whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence . . ..

(*Griffin v. United States, supra*, 502 U.S. at p. 59.)

*People v. Guiton* (1993) 4 Cal.4th 1116, synthesized the holdings of *People v. Green* and *Griffin v. United States*. The Court stated:

> Although the *Griffin* court recognized that "[i]n one sense" the sufficiency of the evidence is always a legal question, for purposes of this issue it carefully distinguished between two types of cases involving insufficient evidence: (a) those in which "a particular theory of conviction . . . is contrary to law," or, phrased slightly differently, cases involving a "*legally* inadequate theory"; and (b) those in which the jury has merely been "left the option of relying upon a *factually* inadequate theory," or, also phrased slightly differently, cases in which there was an "insufficiency of proof." (*Griffin, supra*, 502 U.S. at p. [116 L.Ed.2d at pp. 382-383, 112 S.Ct. at p. 474], italics added.) The former type of case is subject to the rule generally requiring reversal; the latter generally does not require reversal if at least one valid theory remains. (*Ibid.*)

(*People v. Guiton, supra*, 4 Cal.4th at p. 1128.) The Court thus concluded that:

> the rule in *Green, supra*, 27 Cal.3d 1, which we construe as

> applying only to cases of *legal* insufficiency in the *Griffin* sense, survives our adoption of *Griffin, supra,* 502 U.S. [112 S.Ct. 466]. If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground. But if the inadequacy is legal, not merely factual, that is, when the facts do not state a crime under the applicable statute, as in *Green,* the *Green* rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground.

(*People v. Guiton, supra*, 4 Cal.4th at pp. 1128-1129; see also *People v. Gutierrez* (2009) 174 Cal.App.4th 515, 523-524 [discussing the rules from *Green, Griffin, and Guiton*].) The Court characterized its holding as "general rules to apply to apply in the absence of a basis in the record supporting the opposite result. But the record may sometime affirmatively indicate that the general rule should not be followed." (Id., at p. 1129.)

The theories presented by the prosecution to prove appellant committed first degree murder were; (1) premeditated murder; (2) murder during the commission of a kidnaping; (3) murder during the commission of arson; and (4) murder by torture. This Court cannot be confident the jury rested its verdict on a valid legal theory supported by evidence because of the large number of theories presented to the jury that were both factually insufficient and legally flawed.

The first issue is whether the murder conviction can be upheld if the evidence was insufficient as a matter of law to prove that appellant committed premeditated murder. This presents a case of factual insufficiency. Hence, "[i]f the inadequacy of proof is purely factual,

of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground." (*People v. Guiton, supra*, 4 Cal.4th at pp. 1128-1129.) As explained below, reversal of the murder conviction is required because it is not possible to conclude the jury based the guilty verdict on a valid legal theory that was supported by the evidence.

The jury found appellant guilty of first degree murder without specifying the legal basis for the finding of guilt. (16 CT p. 3886.) Hence, it is not possible to determine from the verdict for count one the basis upon which the jury found appellant guilty of first degree murder. The jury did not ask any questions during the penalty phase deliberations. The jury found true the special circumstance allegations of kidnaping and torture. (16 CT p. 3886.) Appellant was also found guilty of arson. (16 RT p. 3888.)

As argued above, the jury's true finding to these special circumstance allegations did not establish a valid basis to find appellant guilty of count one based on the felony-murder theory of kidnaping or murder by torture. Felony-murder kidnaping and arson, and murder by torture, requires those crimes not to be incidental to the killing of the victim. (*People v. Prince, supra*, 40 Cal.4th at p. 1259.) As explained above, the kidnaping and torture of Ms. Kerr was incidental to her death. The arson of her vehicle was also incidental to her death. The jury found the murder by torture allegation to be true despite the insufficiency of the evidence to prove appellant tortured Ms. Kerr. This finding made it clear the jury based its

verdict on a factually insufficient theory. This Court cannot, therefore, assume the jury rested its verdict on a factually sufficient ground despite being presented with legally insufficient and flawed theories. Hence, reversal of count one is required if the evidence was insufficient to prove appellant committed premeditated murder despite the jury also being instructed on felony-murder kidnaping, felony-murder arson, and murder by torture.

Nor can the murder conviction cannot be affirmed if there was sufficient evidence of a premeditated murder because there was error associated with the felony-murder kidnaping, felony-murder arson, and murder by torture theories presented to the jury. The jury was erroneously instructed regarding the asportation element of kidnaping. Appellant's jury should have been instructed to consider only the distance Ms. Kerr was moved in determining if appellant had kidnaped her. (*People v. Martinez, supra*, 20 Cal.4th at pp. 236-237; 23 RT pp. 2538-2540.) Instead, the jury was erroneously instructed to consider whether the movement elevated the risk of harm to Ms. Kerr in determining if asportation had occurred. The murder by torture theory presented to the jury was flawed because the definition of torture was unconstitutionally vague, (Cf. *Maynard v. Cartwright, supra*, 486 U.S. at pp. 363-364), and the trial court failed to instruct the jury on the lesser included offense of felony assault. (*People v. Martinez, supra*, 125 Cal.App.4th at p. 1044.) The trial court also erred by: (1) failing to instruct the jury that the definitions of kidnaping given in connection with the special circumstance allegations also applied to felony-murder kidnaping allegation, (See Argument VI); and (2) failing to give a mistake of fact instruction for the

felony-murder kidnaping charge, (see Argument III); and (3) failing to instruct the jury that the definition of arson applied to the felony-murder charge. (See Argument VI).

The jury was not capable of determining: (1) that it had been given an erroneous definition of asportation; (2) that the definition of torture was unconstitutionally vague and a lesser included offense instruction should have been given; (3) whether a mistake of fact instruction should have been given for the kidnaping allegation; and (4) that the definitions of kidnaping and torture given in connection with the special circumstance allegations applied to felony-murder kidnaping and the murder by torture allegation; and (5) that the definition of arson in the arson charge also applied to the felony-murder arson allegation. These were all legal errors. "If the inadequacy is legal, not merely factual . . . the Green rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground." (*People v. Guiton, supra*, 4 Cal.4th at p. 1129.)

Count one must be reversed unless there is a basis in the record to find that the jury found appellant guilty of count one based on the commission of a premeditated murder. This Court cannot make that finding. Assuming without conceding that the evidence was sufficient for the jury to find that appellant committed a premeditated murder, the guilty verdict for count one cannot be upheld because the other theories were flawed, and the jury's true finding to the special circumstance allegations and substantive crimes suggests that it was relying on the invalid theories when it reached its verdict.

The jury instructions, the arguments of counsel, and the verdicts, also fail to establish

that the guilty verdict for count one was based on the commission of a premeditated murder. The jury was given the standard jury instructions for premeditated murder, felony-murder by kidnaping, and murder by torture. (23 RT pp. 2519-2523, 2533-2534.) The instruction for premeditated murder was not given any more emphasis than any of the other instructions. The prosecutor argued during his opening argument that appellant committed premeditated murder. (23 RT pp. 2549-2558.) The prosecutor, however, also argued at length the felony-murder kidnaping and arson theories and the murder by torture allegation. (23 RT pp. 2561-2562.) The prosecutor later argued the felony-murder kidnaping theory and murder by torture. (23 RT pp. 2565-2566.) The prosecutor, during his rebuttal argument, continued to argue the felony-murder theory. He argued that, "if you commit a felony of arson and someone dies in it, you are guilty of first degree murder . . .." (24 RT p. 2638.) He then argued, "Kidnaping a person and them dying in the course of it is part of felony murder." (*Ibid.*) The prosecutor later referred again to the felony-murder theories of kidnaping and arson. (24 RT p. 2659.)

Given the amount of time the prosecutor spent arguing felony-murder and murder by torture, this Court cannot conclude that the jury found appellant guilty of count one based on the commission of a premeditated murder. The jury did not ask any questions during deliberations. Hence, it is not possible to glean the basis for the guilty verdict for count one from the jury's deliberations. The basis for the guilty verdict for count one cannot be gleaned from the verdict form because appellant was found guilty of that count without the jury

specifying the basis for its verdict. (16 CT p. 3886.)

Assuming there was evidence appellant committed a premeditated murder, there is no basis in the record to conclude the guilty verdict for count one was based on that theory. The felony murder instructions, and the murder by torture instructions, were riddled with legal errors. Even if this Court could find a valid legal theory to support the verdict to count one, there were so many flawed theories presented to the jury that this Court cannot conclude the verdict rested upon a valid theory supported by evidence. The prosecutor discussed those theories at length during his opening and rebuttal arguments. This Court cannot conclude that the jury found appellant guilty of count one based on the commission of a premeditated murder. The judgment of guilt to count one must be reversed. The judgment of death must also be reversed.

**I. THE JUDGMENT OF DEATH MUST BE REVERSED PURSUANT TO *BROWN V. SANDERS* (2006) 546 U.S. 212, 126 S.CT. 884, 163 L.ED.2D 723.**

Assuming this Court does not reverse the judgment of death for the reasons set forth in subpart H of this argument, the Supreme Court's decision in *Brown v. Sanders, supra*, 546 U.S. 212, still requires reversal of the judgment of death.

Appellant was eligible for the death penalty only if he was guilty of first degree murder and the jury found at least one special circumstance allegation to be true (Pen. Code, §190.2, subd. (a).) The theories presented to the jury to find appellant guilty of first degree murder were: (1) a premeditated murder; (2) murder during the commission of a kidnaping; (3) murder during the commission of arson; and (4) murder by torture. If appellant's

conviction cannot be affirmed on any of these three theories for the reasons above, then the judgment of guilt to first-degree murder, and the judgment of death, must be reversed.

If this Court were to find the evidence sufficient to sustain the first-degree murder conviction based on one, two, or three of the above theories, but not all four, then appellant's first degree murder conviction will be affirmed. The judgment of death, however, must still be reversed. *Brown v. Sanders, supra*, 546 U.S. 212, addressed the standard for reversal of a judgment of death when the court of appeal reversed the true finding to an aggravating factor. The Court concluded that, "An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to aggravating weight to the same facts and circumstances." (*Brown v. Sanders, supra*, 546 U.S. at p. 220.)

The verdict form did not specify on what legal theory the jury found appellant guilty of first degree murder. The verdict simply stated, "We, the jury in the above-entitled action, find the Defendant, DONALD LEWIS BROOKS, JR, GUILTY of the crime of MURDER, in violation of Penal Code section 187 (a), a Felony as charged in Count 1 of the Information, and we find it to be MURDER in the first degree." (16 CT p. 3886.) The jury found true the special circumstance allegations that appellant kidnaped and tortured Ms. Kerr in the commission of the murder. (*Ibid.*) Because the jury found these special circumstance allegations to be true, it was likely the jury also used the kidnaping, arson and torture theories

as a basis to find appellant guilty of first degree murder. The jury's erroneous use of any theory of first degree murder that was not supported by the evidence, or infected by instructional error, improperly added to the aggravation scale when the jury determined whether to impose the death penalty. Appellant's jury was instructed to consider "the circumstances of crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true." (27 RT pp. 3034-3035.) The jury must have viewed a premeditated murder as worse than a murder that was not premeditated. Similarly, it must have viewed a murder accompanied by kidnaping, arson, or torture as worse than a murder which did not involve any of those factors.

Because the special circumstance allegations must be reversed, there are no other sentencing factors, which enabled the jury to give weight to the felony-murder findings of murder by kidnaping and murder by torture. Hence, the judgment of death must be reversed even if the first degree murder conviction can be upheld based on the theory of a premeditated murder. Similarly, even if the evidence was sufficient to prove appellant committed a premeditated murder, the findings of murder by kidnaping, arson and torture were infected by instructional error and insufficiency of the evidence. The kidnaping, arson and torture findings for the first degree murder charge added to the jury's aggravation scale in determining whether to impose the death penalty.

Appellant presented substantial evidence in mitigation. Lindsey Peet knew appellant from the plumbing business. He believed appellant was a good man, but confused. Appellant

often helped out other individuals who were struggling. (26 RT pp. 2828-2829.) Appellant did not take work when it would interfere in spending time with his daughter. (26 RT p. 2829.) Sheila Peet also believed appellant was a kind and loving person. Ms. Kerr manipulated appellant. (26 RT p. 2869.) Appellant alternated between joy and despair depending on how Ms. Kerr treated him. (26 RT pp. 2869-2870.) Susan Baker knew appellant because her ex-husband had been in Alcoholics Anonymous meeting with him. She believed appellant was a caring person who would give the shirt off his back to help another. (26 RT p. 2838.)

Appellant witnessed unconscionable violence as a youth. Appellant's mother was often assaulted by appellant's step-father. (26 RT pp. 2882-2883.) Appellant witnessed his step-father shoot his mother. (26 RT pp. 2856, 2884.) Appellant should not have received the death penalty. He did not have a long history of violent criminal acts. He had many redeeming qualities. The jury's conclusion that appellant committed a premeditated murder, or kidnaped or tortured Ms. Kerr, likely tipped the scales towards the death penalty. The jury struggled with the decision to impose the death penalty. As explained below, the trial court coerced a penalty phase verdict from the jury by compelling it to continue deliberating despite the jury being deadlocked. The judgment of death must be reversed.

## XVIII

**THE JUDGMENT OF GUILT MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO SUA SPONTE APPOINT A SECOND ATTORNEY TO REPRESENT APPELLANT AND THEREBY VIOLATED APPELLANT'S: (1) RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION; (2) RIGHT TO PRESENT A DEFENSE AND TO A FAIR TRIAL UNDER THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 7 OF THE CALIFORNIA CONSTITUTION; (3) RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES IN VIOLATION OF THE RIGHT OF CONFRONTATION IN THE SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION; (4) RIGHT TO AN INDIVIDUALIZED DETERMINATION OF DEATH ELIGIBILITY AND SENTENCE AS REQUIRED BY FEDERAL AND STATE DUE PROCESS OF LAW AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND CALIFORNIA CONSTITUTIONS; (5) RIGHT TO EQUAL PROTECTION UNDER FIFTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 7 OF THE CALIFORNIA CONSTITUTION; AND; (6) RIGHT TO BE FREE OF CRUEL AND UNUSUAL PUNISHMENT AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION.**

### A. SUMMARY OF ARGUMENT

Appellant was represented by attorney Edward Murphy. Appellant did not have the benefit of a second attorney representing him and assisting Mr. Murphy. The failure of the

trial court to sua sponte appoint a second attorney to represent appellant violated his state and federal constitutional rights to the effective assistance of counsel, to present a defense, to confront and cross-examine witnesses, to due process and right to a fair trial, to a reliable , individualized determination of death eligibility and sentence, to equal protection of the law, and his right to be free of cruel and unusual punishment. (U.S. Const., 5th, 6th, 8th, 14th Amends; Cal. Const. art., I, §§1, 7, 13, 15, 16 & 17.) The requirement of effective representation, heightened reliability, and an individualized determination of guilt and the appropriate punishment, require a defendant in a capital case to be represented by two attorneys. (*Ford v. Wainwright* (1986) 477 U.S. 399,411 (plurality opinion) ("This especial concern [for reliability in capital proceedings] is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different"); *Gardner v. Florida* (1977) 430 U.S. 349,357 (plurality opinion); *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (plurality opinion); *Furman* v. *Georgia* (1972) 408 U.S. 238, 289 (Brennan, J., concurring) ("The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself.").

The American Bar Association task force assigned to study the death penalty recommends that "two qualified trial attorneys should be assigned to represent the defendant." *(ABA Guidelines for the Appointment and Performance of Counsel in Death*

*Penalty Cases,* Guideline 2.1 (1989).)[2] The commentary section to the 1989 ABA Guidelines establishes why two attorneys are essential in capital representation:

> Because many of the duties of defense counsel in capital cases are definably different from those performed by counsel in criminal cases generally, because there are many rapid developments in the complex body of law affecting death penalty cases, and especially because of the harsh and irrevocable nature of the potential penalty, the responsibilities of trial counsel are sufficiently onerous to require the appointment of two attorneys as trial counsel in order to ensure that the capital defendant receives the best possible representation.

(ABA Guidelines, Commentary to Section 2.1)

The United States Supreme Court has frequently referred to the ABA Guidelines as standards for the prevailing norms in death penalty litigation. (E.g., *Wiggins v. Smith* (2003) 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471.) This Court should hold that protection of a capital defendant's federal and state constitutional rights required the trial court to sua sponte appoint a second attorney to represent appellant in the trial court.

## B. STANDARDS FOR REPRESENTATION BY COUNSEL IN DEATH PENALTY CASES

The Sixth and Fourteenth Amendments guarantee a criminal defendant the right to the

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[2] See *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 2.1 (1989). The ABA Guidelines for capital representation were revised in 2003. The requirement for two attorneys to represent a capital defendant has been retained in the revised guidelines. (*ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 4.1, subdivision (A)(1).

effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 80 L.Ed.2d 674, 104 S.Ct. 2052.) "The proper standard for attorney performance is that of reasonably effective assistance." (*Strickland v. Washington, supra*, 466 U.S. at p. 687.) *Strickland v. Washington* requires a defendant to show deficient performance by his defense attorney and that there is a reasonably probability the result of the trial would have been different but for counsel's deficient performance. (*Strickland v. Washington, supra*, 466 U.S. at pp. 687, 694.) *Strickland v. Washington* noted that, "Prevailing norms of practice as reflected in American Bar Association standards and the like, *e. g.*, ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides." (*Strickland v. Washington*, 466 U.S. at p. 688.)

In *Wiggins v. Smith, supra*, 539 U.S. 510, the Court relied on the ABA Guidelines for investigation of mitigation evidence when it concluded the defendant had been deprived of effective assistance of counsel because his trial defense counsel failed to conduct an adequate mitigation investigation:

> Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)--standards to which we long have referred as "guides to determining what is reasonable." *Strickland, supra*, at 688, 80 L Ed 2d 674, 104 S Ct 2052 *Williams v. Taylor, supra*, at 396, 146 L Ed 2d 389, 120 S Ct 1495. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the

> Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. Cf. id., 11.8.6, p 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history,* prior adult and juvenile correctional experience, and religious and cultural influences) (emphasis added); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p 4-55 ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. . . . Investigation is essential to fulfillment of these functions").

(*Wiggins v. Smith, supra*, 539 U.S. at pp. 524-525.)

In *Rompilla v. Beard* (2005) 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360, and *Padilla v. Kentucky* (U.S. S.Ct., Mar. 31, 2010) 2010 U.S. Lexis 2928, the Court continued to cite the ABA Guidelines as standards for competent criminal representation. In *Rompilla v. Beard*, the defense counsel failed to conduct an adequate investigation regarding the defendant's mental health history. The Court noted that the ABA Guidelines required the defense attorney to conduct a prompt investigation of the case and explore all avenues relevant to guilt and penalty. (*Rompilla v. Beard, supra*, 545 U.S. at p. 387, quoting 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.). In *Padilla v. Kentucky*, the Court cited the ABA Guidelines in support of its conclusion that the requirement of effective assistance of counsel required a criminal defense attorney to properly advise his client of the immigration consequences of a guilty plea. (*Padilla v. Kentucky, supra*, 2010 U.S. Lexis

2928 at pp. 20-21.)[3] The Court has rejected relying on the ABA Guidelines as "inexorable commands," or on ABA Guidelines promulgated before the inception of the defense attorney's representation of the defendant. (*Bobby v. Van Hook* (2009) ___U.S.____, 130 S.Ct. 13, 175 L.Ed.2d 255, 258-259.) This Court has also referred to the ABA Guidelines in assessing what constitutes reasonable performance by counsel. (In re Thomas (2006) 37 Cal.4th 1249, 1262.)

The 1989 version of the ABA Guidelines, Guideline 2.1, provides that, "In cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant."[4] The Guidelines are part of a comprehensive guideline adopted

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[3] The specific page citation is to the internal pagination with the Lexis document.

[4] The 2003 revised Guidelines continue this requirement:

> Guideline 4.1 The Defense Team and Supporting Services
>
> A. The Legal Representation Plant should provide for assembly of a defense team that will provide high quality legal representation.
>
> 1. The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist.
>
> 2. The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

(ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 4.1 (A)(1) and (2), p. 28 (rev. ed., 2003)).

by the ABA, which are designed to insure that a defendant receives competent representation. Guideline 3.1 requires each jurisdiction to formalize a plan for legal representation of defendants in capital cases. Guideline 4.1 requires a process for the identifying and screening of competent counsel for capital cases. Guideline 5.1 sets forth the qualifications of attorneys for capital cases. It requires extensive skill in the use of experts, recent training in capital representation and jury trial experience in complex and serious cases. (Guideline 5.1, subdivision (1). Guideline 7.1 requires the designation of an agency to ensure that each defendant receives high quality representation and to screen and monitor the performance of counsel in capital cases. Guideline 8.1 requires the funding of supporting services, including investigators and experts. Guideline 9.1 requires ongoing training for attorneys representing capital defendants. Guideline 10.1 requires appropriate compensation for attorneys representing capital defendants.[5]

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[5] Adoption of the ABA Guidelines, furthermore, would be consistent with a growing trend towards adopting those guidelines as the benchmark for capital representation. In 2008, the Nevada Supreme Court issued new standards for capital representation that substantially conformed to the 2003 ABA Guidelines. In 2007, the Oregon Office of the Public Defender adopted the 2003 ABA Guidelines. In 2006, the Arizona Supreme Court amended the Arizona Rules of Criminal Procedure to require counsel in death penalty cases to be guided by and familiar with the performance standards of the ABA Guidelines. In 2006, the Texas State Bar adopted a Texas version of the Guidelines which was almost identical to the ABA version of the Guidelines. In 2005, the Georgia Public Defenders Standards Council adopted the ABA Guidelines except where the Guidelines conflicted with Georgia law. In 2005, the Alabama Circuit Court Judge Conference adopted the ABA Guidelines by resolution. In 2003, the National Association of Criminal Defense Lawyers adopted the ABA Guidelines, noting that the Guidelines were necessary standards to ensure minimally adequate representation in capital cases. In 2003, the Department of Public Advocacy for the Commonwealth of

## C. THE TRIAL COURT FAILED TO SUA SPONTE APPOINT A SECOND ATTORNEY TO REPRESENT APPELLANT IN VIOLATION OF HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS AND MUST RESULT IN REVERSAL OF THE JUDGMENT

*Strickland v. Washington* noted that, "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." (*Strickland v. Washington, supra*, 466 U.S. at pp. 688-689.) Hence, "Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." (*Strickland v. Washington, supra*, 466 U.S. at p. 689.) This rule applies to tactical decisions made by attorneys during the course of representing a defendant and not to systematic issues such as the number of attorneys required to competently represent a capital defendant.

This Court has held that the trial court has the discretion to appoint a second attorney to represent a capital defendants. (*Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430 [the appointment of a second attorney to represent a capital defendant is not an absolute right of the defendant and the decision remains within the sound discretion of the trial court.]; *People*

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Kentucky adopted the performance standards of the ABA Guidelines. Numerous federal and state court cases have referred to the ABA Guidelines as the standard of representation in capital cases. (E.g., *Dickerson v. Bagly* (6th Cir. 2006) 453 F.3d 690, 693; *Hedrick v. True* (4th cir. 2006) 443 F.3d 342, 350; Summerlin v. Schriro (9th Cir. 2005) 427 F.3d 623, 629; *Smith v. Dretke* (5th Cir. 2005) 422 F.3d 269, 279; *Commonwealth v. Spotz* (Pa. 2006) 896 A.2d 1191, 1225; *Henry v. State* (Fla. 2006) 937 So.2d 563, 573; *Franks v. State* (Ga. 2004) 278 Ga. 246, 261; *Zebroski v. State* (Del. 2003) 822 A.2d 1038, 1046.)

*v. Jackson* (1980) 28 Cal.3d 264, 287 [a plurality opinion which stated that equal protection demands were satisfied by permitting the trial court, in its discretion, to appoint additional counsel at public expense if the circumstances in a particular case appear to require such an appointment].) *Keenan v. Superior Court* and *People v. Jackson* should be overruled. Appellant was represented by a single attorney in violation of the ABA Guidelines. This Court should hold that appellant's representation by a single attorney constituted deficient performance as a matter of law in violation of appellant's federal and state constitutional rights.

Under *Strickland v. Washington*, the defendant must show a reasonable probability that outcome of the trial would have been different had his attorney not provided deficient performance. (*Strickland v. Washington, supra*, 466 U.S. at p. 694.) "Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." (*United States v. Cronic* (1984) 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657.) The Court noted, however, that prejudice would be presumed in certain situations. "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." (*Strickland v. Washington, supra*, 466 U.S. at p. 692.)

In the instant case, prejudice should be presumed because appellant was not represented at trial by two attorneys. The lack of a second trial attorney was a systematic failure which should trigger a presumption of prejudice. *Strickland v. Washington* and *United*

*States v. Cronic* both noted that prejudice will be presumed in the context of a claim of ineffective assistance of counsel in specific situations. Prejudice will be presumed when error has occurred and measuring prejudice is difficult or impossible. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." (*People v. Chacon* (1968) 69 Cal.2d 765, 776.) "The presumption of prejudice is a prophylactic measure established to address situations where Strickland itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." (*People v. Dooline* (2009) 45 Cal.4th 390, 418.)

The prejudice requirement in *Strickland v. Washington* is inadequate to assure protection of appellant's Sixth Amendment right to the effective assistance of counsel because of the difficulty of measuring and demonstrating prejudice from appellant's representation by a single attorney. Hence, this Court should presume that appellant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments, and Article I, section 15 of the California Constitution, and reverse the judgment.

Appellant's representation by a single attorney also violated the prohibition against the imposition of cruel and unusual punishment in the Eighth and Fourteenth Amendments and Article I, section 17, of the California Constitution. The prohibition against cruel and unusual punishment in the Eighth and Fourteenth Amendments requires heightened reliability

in the fact finding process of a capital prosecution. (*Beck v. Alabama* (1980) 447 U.S. 625, 632, 100 S.Ct. 2382, 65 L.Ed.2d 403.) The California Constitution, Article I, section 17, also prohibits cruel and unusual punishment, and similarly requires heightened reliability in a capital prosecution. (*People v. Ayala* (2000) 23 Cal.4th 225, 262-263.) The heightened reliability required in capital cases is undermined when the judgment of only one attorney prevails in a case.

A defendant has the right to equal protection of the law under the Fifth and Fourteenth Amendments, and Article I, section seven of the California Constitution. The requirement of equal protection requires similarly situated individuals to be treated similarly. *(People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199.) Capital defendants in California courts have been accorded the privilege of representation by two attorneys. (E.g., *Keenan v. Superior Court, supra*, 31 Cal.3d at p. 430 [holding that the trial court abused its discretion by refusing to appoint a second attorney for a capital defendant].) Appellant was denied equal protection of the law because he was not represented by two attorneys in the trial court.

A defendant also has a due process right to present evidence and confront and cross-examine witnesses under the state and federal due process clauses and the right to confront and cross-examine witnesses under the Sixth and Fourteenth Amendments and Article I, section 15, of the California Constitution. (*Davis v. Alaska* (1974) 415 U.S. 308, 317, 94 S.Ct. 1105, 39 L.Ed.2d 347; *Chambers v. Mississippi* (1973) 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297.) Appellant's ability to confront and cross-examine witnesses was impaired

because his trial attorney did not have the assistance of another attorney. Given the myriad functions required for competent representation of a capital defendant, (ABA Guidelines, Commentary to Section 2.1), one attorney could not have fulfilled all these duties.

This Court has imposed sua sponte obligations on the trial court when necessary to protect the defendant's constitutional rights. (E.g. *People v. Barton* (1995) 12 Cal.4th 186, 196-197 [sua sponte duty of the trial court to instruct on lesser included offenses even over the defendant's objection].) For the reasons above, this Court should presume appellant was prejudiced by representation by a single trial attorney. The judgment of guilt must be reversed.

## PENALTY PHASE ISSUES[1]

### XIX

### THE SENTENCE SHOULD BE VACATED BECAUSE THE TRIAL COURT COERCED A VERDICT BY FORCING THE JURY TO CONTINUE DELIBERATIONS WHEN IT WAS HOPELESSLY DEADLOCKED, IN VIOLATION OF: (1) PENAL CODE SECTION 1140; (2) APPELLANT'S RIGHT TO FEDERAL DUE PROCESS OF LAW; (3) APPELLANT'S SIXTH AND FOURTEENTH AMENDMENTS RIGHT TO A JURY TRIAL; (4) THE EIGHTH AND FOURTEENTH AMENDMENTS RIGHT AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT; AND (5) THE CORRESPONDING RIGHTS UNDER THE CALIFORNIA STATE CONSTITUTION.

### A. SUMMARY OF ARGUMENT

All 12 jurors were required to agree on a verdict in order for appellant to be sentenced to death. During jury deliberations, the jurors informed the trial court several times it was hopelessly deadlocked. The trial court refused to take no for an answer. Over numerous defense objections, the trial court forced the jury to deliberate until it agreed on a verdict of death. Penal Code section 1140, the federal and state due process clauses, the right to a jury trial under the Sixth and Fourteenth Amendments and Article I, Section 17 of the California Constitution, the prohibition against imposition of cruel and unusual punishment in the Eighth Amendment and Fourteenth Amendments and Article I, Section 17 of the California

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[1] Issues XXIII seeks reversal of the judgment of guilt as well as the penalty of death. The issues have been placed in the Penalty Phase portion of the Opening Brief because events which gave rise to the claim of legal error occurred during the penalty portion of the trial.

Constitution, prohibit the trial court from forcing a jury to reach a verdict by requiring continued deliberations after it is hopelessly deadlocked. The trial court coerced a verdict of death by requiring the jury to continue deliberations after it was hopelessly deadlocked. The jury's verdict of death was not reliable. Hence, the sentence should be reversed.

**B. SUMMARY OF PROCEEDINGS BELOW**

The jury commenced deliberations on June 19, 2001, at 3:20 p.m. (27 RT pp. 3042-3043; 16 CT p. 3910.) It deliberated until 4:00 p.m. (16 CT p. 3910.) The jury resumed deliberations on June 20, 2001, at 9:10 a.m., and deliberated until 12:00 p.m. Deliberations resumed at 1:30 p.m. (27 RT p. 3045; 16 CT p. 3912.) At 3:15 p.m., the trial court and the attorneys discussed the following note from the jury:

> There are people who "lied" in order to get on this jury. They never intended to vote for death. This has come out during deliberations.
>
> Juror #9 states she did not believe in the death penalty
>
> Juror #8 (person sitting in seat 8) never intended to put someone to death.
>
> Religious conviction.[2]
>
> ---
>
> 7 people have travel plans for Monday, June 25.

(16 CT p. 3911.)

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[2] In the letter, a line is drawn from the comment about juror number nine to the words, "Religious conviction." (16 CT p. 3911.)

The trial court and the attorneys discussed the note. (27 RT pp. 3046-3047.) The jury foreperson had told the bailiff the jury was hung nine, four, and one. The bailiff informed the trial court of this split. (27 RT p. 3048.)[3] After the trial court wondered how 14 votes could have been counted, the bailiff commented, "That's what specifically was told to me, and I told - - advised you of that. You asked me to go back inside and advise them to continue the deliberations. However, the jury, upon telling them that, stated specifically that they were hung and they requested to take a break." (27 RT p. 3048.) The trial court stated the source of information about the numerical breakdown was an oral statement from the jury foreperson to the bailiff. The trial court had not solicited information about the numerical breakdown. (27 RT p. 3049.)

The trial court pulled the jury questionnaires for jurors eight and nine. (27 RT pp. 3038-3049.) Juror number nine had expressed serious misgivings about the death penalty, but stated upon questioning she stated she would not automatically vote against it. (27 RT p. 3049.) The questionnaire completed by juror number eight did not give any indication he was automatically against the death penalty. The trial court commented, "If indeed he is now taking a position that he would never vote for it no matter what, then there has been a misrepresentation made in the voir dire process." (27 RT p. 350.)

The prosecutor commented that the trial court had two options. It could ask the jury

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[3] The trial court commented the count was wrong because there were only twelve jurors. (16 RT p. 3048.)

if it was hung and the numerical breakdown. If certain jurors had reached a decision to not impose the death penalty based on the evidence, a mistrial had to be declared. If jurors were engaged in misconduct, they should be replaced. ((27 RT pp. 3050-3051.) The defense counsel agreed the trial court could ask the jury whether it was hung. (27 RT p. 3051.) The defense counsel also commented that any inquiry of jurors eight and nine should be limited to whether they lied during voir dire and not what was said during jury deliberations. (27 RT p. 3052.)

The jurors were brought into the courtroom. (27 RT p. 3053.) Juror number one stated the jury was hopelessly deadlocked, there was no reasonably probability of a verdict being reached, and the trial court could do nothing to assist the jury in reaching a verdict. (27 RT pp. 3053-3054.) Juror number one said three votes had been taken. In response to a question from the trial court, juror number one stated the numerical breakdown on the last ballot was seven to four. (27 RT p. 3054.) The remaining twelve jurors agreed the jury was hopelessly deadlocked and further deliberations would not assist the jury in reaching a verdict. (27 RT pp. 3054-3055.)

The trial court and the attorneys discussed the situation at sidebar. (27 RT p. 3055.) Because of the numerical breakdown, the trial court commented, "It seems to me that any inability to reach a decision here stretches beyond any problem, quote/unquote, associated with jurors 8 and 9." (27 RT p. 3056.) The trial court and the prosecutor agreed a juror was abstaining from voting. (27 RT p. 3056.) The prosecutor stated he was troubled if a juror

was not participating in deliberations. (27 RT p. 3057.) The defense counsel commented the jury was hopelessly deadlocked regardless of who was abstaining from voting or whether jurors had committed misconduct. (27 RT p. 3058.) The trial court stated it was going to inquire into the numerical breakdown of the vote on the two prior ballots. (27 RT pp. 3058-3059.)

Proceedings resumed in front of the jury. (27 RT p. 3059.) Juror number one clarified that one juror was undecided rather than not deliberating. (27 RT p. 3060.) In response to a question from the trial court, juror number one stated the numerical breakdown on the second ballot was nine to two to one. The numerical breakdown on the first ballot was eight to three to one. (27 RT p. 3061.) At a sidebar conference, the trial court stated the trend was moving away from unanimity, and "there's no positive direction in the deliberations." (27 RT pp. 3061-3062.)

The trial court stated it was going to order the jury to continue deliberations. (27 RT p. 3062.) The defense counsel noted the penalty phase had involved only a few witnesses and the jury had adequate time to deliberate. (*Ibid.*) He argued the jurors, "might interpret your comments to mean they should change their votes and reach a verdict. I'm very much afraid of that and, therefore, I would ask the court to dismiss the jury and declare a mistrial for that reason." (27 RT p. 3063.) The defense counsel also requested the trial court inform the jurors he was not trying to make them reach a verdict if a mistrial was not declared. (27 RT p. 3063.)

The trial court asked whether the presence of an undecided juror warranted the continuation of jury deliberations. (27 RT p. 3064.) The prosecutor observed the jury foreperson appeared to want to volunteer more information. (27 RT p. 3065.) The defense counsel stated if the jury was ordered to deliberate, it should be told it was not being ordered to agree and that the trial court understood one juror had not made up his mind. The prosecutor objected to any comment about an individual juror. The defense counsel responded that all 12 jurors had said more time to deliberate would not help. (27 RT p. 3066.)

The trial court stated in the presence of all the jurors that it was not looking for a certain result. (27 RT p. 3068.) A sidebar conference occurred in the presence of juror number one. (27 RT pp. 3068-3069.) The trial court admonished juror number one not to disclose anything said during jury deliberations, but the court wanted to know about any misconduct. (27 RT pp. 3069-3070.) Juror number one stated, "First of all, I do not believe this jury will ever come to a verdict ever." (27 RT p. 3070.) He also made the following comment regarding juror number nine:

> Secondly, there was one juror who reiterated her testimony during the voir dire process, in which she mentioned that she did not believe in the death penalty but would keep an open mind towards the charges.
>
> What she meant was that she would never vote for the death penalty. She- - religious convictions could not lead her to the death penalty. But she - - she just can't in any circumstance see herself voting for the death penalty.

(27 RT p. 3070.)

The trial court asked if the jury was unable to reach a verdict because there was at least one juror who could not vote for the death penalty as a matter of religious conviction. Juror number one said yes. (27 RT p. 3070.)

The trial court asked, "Mr. Gordon [the prosecutor] if the court were to indicate that it's prepared to declare a mistrial, is there any objection from the People?" (27 RT p. 3072.) The prosecutor responded, "Based upon what we have on the record, no. It would seem appropriate." (*Ibid.*) The defense counsel had no objection to declaring a mistrial. (*Ibid.*) The prosecutor asked the court to make one more inquiry of the jurors to determine if anything could break the deadlock. The defense counsel objected. (27 RT p. 3072.)

The trial court asked jurors two through 12 if a readback of jury instructions, or additional argument by the attorneys, could help break the deadlock. The trial court would not, however, permit the admission of additional evidence. (27 RT pp. 3073-3074.) Juror numbers two, three, seven, and 10, said nothing could help break the deadlock. Jurors four, five, six, 11, and 12 said yes. Juror number eight said possibly. (27 RT pp. 3074-3075.) The trial court said it needed to know whether the jurors wanted a rereading of the jury instructions, a readback of testimony, or additional argument. (27 RT p. 3075.) The trial court commented, "Obviously, each and every one of us in this courtroom has a lot invested in the case in terms of time, our energy, and if we can reach a decision, I'd like to. And by my saying that, I'm not suggesting that you should reach a decision one way or the other." (27 RT p. 3075.) Juror number 12 stated the jury wanted to hear additional closing argument by

the attorneys. (27 RT p. 3075.) The jurors were then excused. (27 RT pp. 3076-3077.)

The trial resumed the morning of June 21, 2001. (28 RT p. 3079.) The jury sent two notes to the trial court. (28 RT p. 3080.) The first note read as follows:

> REQUEST: New Arguments —different spin on final arguments. (15 minutes maximum w/no babbling)(no visual aid).

(16 CT p. 3928.) The next question from the jury was as follows:

> To hear from Donald Brooks.

(16 CT p. 3929.)

The trial court stated it was not going to allow additional argument. (28 RT p. 3082.) Both attorneys stated they did not wish to present additional argument to the jury. (28 RT pp. 3083-3084.) The defense counsel asked the trial court to declare a mistrial. (28 RT p. 3084.) Alternatively, he requested the trial court to poll the jury again to determine if it was hung. (28 RT p. 3085.) The defense counsel argued the jury's question about hearing from appellant proved that topic had been discussed and the jury was not following the trial court's instructions. He requested a mistrial on those grounds. (28 RT p. 3085.)[4] The trial court denied the motion for a mistrial. (28 RT p. 3086.) At the request of the defense counsel, the trial court agreed to simply tell the jury the request to hear from appellant was denied rather than explaining appellant had a right not to testify. (28 RT pp. 3087-3088.)

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[4] Issue _____ raises the issue of whether the trial court erred by denying appellant's motion for a mistrial because the jury asked to hear from appellant during penalty phase deliberations.

The jury returned to the courtroom. (28 RT p. 3090.) The trial court told the jury its request to hear from appellant was denied. (*Ibid.*) The trial court then explained it was denying the request for additional argument. (28 RT p. 3091.) Juror number one asked for additional explanation of factor K. (*Ibid.*) He asked, "There's a lot of—do you need just one item - - if you find one item in mitigation, is that enough for life in prison, if you find just one, or do you need several for each, or is it a scale? How does that operate?" (28 RT pp. 3091-3092.) Juror Number One stated another vote had been taken in response to an inquiry from the trial court. The split was eight to three to one. (28 RT p. 3092.)

The jury was excused. The trial court stated CALJIC Number 8.88 answered the question. (28 RT p. 3093.)[5] The defense counsel argued the jury had to be told one factor in mitigation was sufficient for the jury to sentence appellant to life without the possibility of parole. (28 RT p. 3094.) The prosecutor argued against giving any such instruction to the jury because he believed it would lead the jury to a mechanical weighing of aggravating and mitigating factors. (28 RT p. 3095.) The trial court called the jury into the courtroom and read CALJIC Number 8.88. It then recessed for lunch. (28 RT pp. 3097-3100.)[6]

Following the noon recess, the defense counsel submitted citations to the trial court

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[5] CALJIC 8.88 instructed the jury how to weigh the aggravating factors against the mitigating factors and determine whether to impose the death penalty. (27 RT pp. 3040-3041.)

[6] The trial court's erroneous refusal to instruct the jury that a single factor in mitigation was sufficient to impose a sentence of life without the possibility of parole is raised in Issue XXII.

in support of his argument a single factor in mitigation was sufficient for the jury to sentence appellant to life in prison without the possibility of parole. (28 RT pp. 3102-3103.)[7] The trial court agreed the cases supported the cited proposition of law. (28 RT pp. 3102-3103.) The prosecutor objected to giving the instruction requested by the defense counsel. (28 RT p. 3103.) After additional argument, the trial court stated it was limiting the jury to CALJIC Number 8.88, and would not give the instruction requested by the defense counsel. (28 RT pp. 3110-3111.) The defense counsel moved for a mistrial because the trial court denied the request for the jury instruction regarding a single factor in mitigation. The motion was denied. (28 RT p. 3112.)

The jury resumed deliberations. (28 RT p. 3112; 16 CT p. 3936.) At 3:05 p.m., the trial court was informed the jury had reached a verdict. (28 RT p. 3113; 16 CT 3936.) Appellant was sentenced to death. (28 RT p. 3113.)

## C. THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT COERCED A VERDICT FROM THE JURY BY COMPELLING IT TO CONTINUE DELIBERATIONS AFTER IT WAS HOPELESSLY DEADLOCKED, IN VIOLATION OF APPELLANT'S STATUTORY, FEDERAL, AND CONSTITUTIONAL RIGHTS

### 1. The Trial Court Violated Appellant's Federal and State Constitutional Rights by Compelling the Jury to Continue Deliberations After it was Hopelessly Deadlocked.

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[7] The written instruction requested by the defense counsel stated, "In addition to the instructions I read before lunch, specifically in response to your question, one mitigating circumstance may be sufficient to support a decision that death is not appropriate punishment in this case." (16 CT p. 3930.) The defense counsel cited *People v. Berryman* (1993) 6 Cal.4th 1048, 1099, *People v. Grant* (1988) 45 Cal.3d 829, and *People v. Johnson* (1989) 47 Cal.3d 1194, 1245, in support of the requested instruction.

The trial court's coercion of a jury verdict violates a defendant's Fifth, Sixth and Fourteenth Amendments right to due process of law, a fair trial, a jury trial, and the Eighth and Fourteenth Amendments prohibition against cruel and unusual punishment. The corresponding provisions of the California Constitution, Article I, Section 1, 7, 15, 16, and 17, are also violated by a coerced verdict. Penal Code section 1042 provides, "Issues of fact shall be tried in the manner provided by Article I, Section 16 of the Constitution of this State." Article I, Section 16 of the California Constitution provides in part that, "[t]rial by jury is an inviolate right."

Jury deliberations are a critical stage of the criminal trial. (*Bollenbach v. United States* (1946) 326 U.S. 607, 612-613, 66 S.Ct. 402, 90 L.Ed. 350.) The defendant's right to due process of law is violated by a jury verdict that has been coerced. (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 237-239, 108 S.Ct. 546, 98 L.Ed.2d 568; *Jiminez v. Myers* (9th Cir. 1994) 40 F.3d 976, 979.) If the trial court "fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors." (*Arizona v. Washington* (1978) 434 U.S. 497, 509, 98 S.Ct. 824, 54 L.Ed.2d 717.) The question of whether holdout jurors have been coerced to join other jurors to reach a unanimous verdict is a mixed question of law and fact requiring the application of legal principles to the historical facts. (*Jimenez v. Myers, supra*, 40 F.3d 979.) The appellate court determines de novo the constitutional weight to be given the facts. (*Ibid.*)

Whether the trial court coerced a jury verdict requires consideration of the trial court's actions "in its context and under all the circumstances." (*Lowenfield v. Phelps, supra*, 484 U.S. at p. 237.)

The trial court erred by forcing the jury to continue deliberations after it was hopelessly deadlocked. The penalty phase was very short. The prosecution penalty phase consisted of four witnesses. (25 RT pp. 2745-2787.) The defense penalty phase consisted of five witnesses. (26 RT pp. 2826-2899.) The penalty phase testimony commenced sometime after 10:30 a.m on June 14, 2001. (25 RT p. 2745; 16 CT p. 3904.) It does not appear any proceedings occurred during the afternoon session of June 14, 2001. (16 CT pp. 2904-3905.) Penalty phase testimony resumed at 11:04 a.m. on June 15, 2001. (26 RT p. 2820.) Testimony concluded during the afternoon session of June 15, 2001. (26 RT p. 2900.) The penalty phase testimony did not include complex testimony, such as the opinions of psychiatrists or psychologists.

The jury commenced deliberation late during the afternoon session of June 19, 2001, and deliberated on June 20, 2001. (27 RT pp. 3042-3043, 3053; 16 CT p. 3910.) During the afternoon session of June 20, 2001, the trial court learned through the bailiff the jury was split nine to four to one. (27 RT p. 3048.)[8] The jury was polled and all 12 jurors stated the jury was hopelessly deadlocked. (27 RT pp. 3054-3055.) The trial court conceded the problem of the deadlocked jury extended beyond jurors eight and nine, who were unwilling

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[8] The numbers for this numerical split were obviously erroneous.

to impose the death penalty under any circumstances, because of the numerical division of the jury. (27 RT p. 3-56.) The trial court also noted the trend of the jury's voting was away from unanimity. (27 RT p. 3062.) The defense counsel then made his first motion for a penalty phase mistrial which was denied. (27 RT p. 3063.) After further discussion, the prosecutor conceded it was appropriate to declare a mistrial. (27 RT p. 3072.)

The trial court erred by failing to declare a mistrial following the defense counsel's first motion for a mistrial. The jury had clearly stated it was hopelessly deadlocked. When the trial court asked the prosecutor if he was opposed to declaring a mistrial, he stated, "Based upon what we have on the record, no. It would seem appropriate." (27 RT p. 3072.) Hence, even the prosecutor conceded it was appropriate to declare a mistrial. Given the numerical split of the jury, the trend away from unanimity, and all 12 jurors agreeing they were hopelessly deadlocked, there was no reasonable probability the jury was going to reach a unanimous verdict. The trial court's additional efforts to reach a verdict simply resulted in the jury being coerced into a verdict. Even worse, as a result of its continued deliberations, the jury considered appellant's failure to testify. The jury, unable to reach a decision, asked to hear from appellant. (16 CT p. 3929.)

The defense counsel made two more motions for a mistrial that the trial court denied. (28 RT pp. 3084, 3112.) When the trial court polled the jurors following the denial of the defense counsel's first motion for a mistrial, jurors four, five, six, 11, and 12 said something could possibly break the deadlock. Juror number 12 mentioned receiving additional argument

by the attorneys. (27 RT p. 3075.) The next morning, the jury sent a note requesting additional argument. (16 CT p. 3928.) The jury did not hear additional argument by the attorneys. The jury also did not receive an answer to its question about one mitigating factor being sufficient to sentence appellant to life without the possibility of parole. After the jurors first stated they were hopelessly deadlocked, nothing happened to break the deadlock other than the jury being coerced into a verdict by continued deliberations. The trial court, furthermore, pressured the jury by commenting that "Each and everyone one of us in this courtroom has a lot invested in the case in terms of our time, our energy, and if we can reach a decision, I'd like to." (27 RT p. 3075.) This clearly communicated to the jury that they needed to reach a verdict.

The trial court's inquiry into the numerical division of the jury also coerced the jury in violation of appellant's enumerated above.[9] Courts have recognized the danger of inquiries into the numerical division of the jury. The United States Supreme Court concluded in *Brasfield v. United States* (1926) 272 U.S. 448, 450, 47 S.Ct. 135, 71 L.Ed. 345, that the trial court's inquiry into the numerical split of the jury was prejudicial per se because it had a tendency to coerce the jurors. *Lowenfield v. Phelps* concluded this rule from *Brasfield v. United States* was based on the Court's supervisory power rather than the federal constitution, but stated "Although the decision in Brasfield was an exercise of this Court's

[9] Although this Court has authorized the trial court to conduct a numerical inquiry into the vote of the jury, (*People v. Carter, supra*, 68 Cal.2d at p. 815), in this case the trial court's inquires were additional factors among many leading to a coerced verdict.

supervisory powers, it is nonetheless instructive as to the potential danger of jury polling." (*Lowenfield v. Phelps, supra*, 484 U.S. at p. 240.) Justice Stone stated in *Brasfield v. United States*:

> We deem it essential to the fair and impartial conduct of the trial that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious, although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned

(*Brasfield v. United States, supra*, 272 U.S. at p. 450.) *Locks v. Sumner* also concluded, "we do not wish to imply that an inquiry into the jury's balloting will never infringe on a defendant's right to an impartial jury and fair trial. This would occur if the trial judge's inquiry would be likely to coerce certain jurors into relinquishing their views in favor of reaching a unanimous decision." (*Locks v. Sumner, supra*, 703 F.2d at p. 406.)

The trial court's repeated numerical inquiry into the split of the jury pushed it towards unanimity in violation of appellant's rights set forth above. The jury foreperson initially told the bailiff the jury was split nine to four to one. This fact was communicated to the trial judge. (27 RT p. 3048.) The jurors then stated they were deadlocked. (27 RT pp 3054-3055.) The trial court ordered the jury to resume deliberations after asking the jury foreman about

the numerical breakdown of the votes. (27 RT p. 3062.) The trial court made another inquiry into the numerical breakdown of the jury after the denial of several motions for a mistrial and denial of requests from the jury for additional argument and to hear from appellant. (27 RT pp. 3082, 3084-3085, 3090, 3092.) The split was eight to three to one. (28 RT p. 3092.) The trial court then refused to provide additional guidance to the jury regarding its question about mitigation. (28 RT pp. 3110-3111.)

The pressure exerted by the trial court was the only possible explanation for the jury reaching a verdict following its firm statements in court that it was deadlocked. A significant amount of pressure was exerted by the trial court's inquiry into the jury's numerical split. None of the jury's questions to break the deadlock were answered and its proposed solutions to help it reach a verdict were not followed.

Justice Stone's observation above about the tendency of the trial court's inquiry into the jury's numerical split having the tendency to coerce applies to this case. (*Brasfield v. United States, supra*, 272 U.S. at p. 450.) The trial court's inquiries regarding the numerical split of the jury communicated to the minority jurors that it wanted them to change their mind.[10] The trial court's repeated directions to the jury to continue deliberations even after it announced it was deadlocked, and further deliberations were futile, could only have been for the purpose of having the majority pressure the minority into changing its vote. The

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[10] The trial court in the instant case did not determine how many jurors favored imposition of the death penalty. It simply determined the numerical split of the jury without ascertaining whether the jurors who were voting for death were in the majority.

minority jurors must have been aware of this fact. The minority jurors could not realistically have believed the trial court thought the majority jurors would change their minds. The minority jurors knew deliberations were continuing for the sole purpose of convincing them to agree with the majority. The trial court's erroneous repeated inquiries into the split of the jury violated due process because it was "likely to coerce certain jurors into relinquishing their views in favor of reaching a unanimous decision." (*Locks v. Sumner, supra*, 703 F.2d at p. 406.)

The defense counsel objected when the trial court followed the prosecutor's suggestion and asked the jury whether anything could help break the deadlock. (27 RT pp. 3072.) The defense counsel also repeatedly moved for a mistrial following the trial court's first inquiry into the numerical split of the jury. (28 RT pp. 3084-3085, 3112.) The trial court's repeated inquiries into the numerical split of the jury can be considered by this Court in determining whether verdict was coerced because it is relevant to whether the trial court erred by denying the defense counsel's repeated motions for a mistrial.

*Jiminez v. Myers* demonstrates the verdict was coerced in the instant case. The trial court twice inquired of the jury's numerical division after it had twice stated it was deadlocked. During the second inquiry, the trial court said to the jury, "so there has been, then, substantial movement since the last time." (*Jimenez v. Myers, supra*, 40 F.3d at p. 979.) The jury division was 11-1 when the trial court made this comment.

The magistrate judge concluded the verdict had been coerced because "the state trial

judge twice polled the jury about the jury's numerical division on the merits after the jury had announced an impasse; that the prosecution and defense agreed to accept a deadlock after the jury's second note, but the court refused; and that the judge's comments to the jury strongly implied the jury's movement from an initial division of seven to five to a division of eleven to one should continue toward unanimity." (*Ibid.*) The district court judge disagreed and denied the defendant's writ. The Ninth Circuit concluded the verdict had been coerced because, "In view of the disclosure after the second impasse that only one juror remained in the minority and the trial court's implicit approval of the "movement" toward unanimity, the court's instruction to continue deliberating until the end of the day sent a clear message that the jurors in the majority were to hold their position and persuade the single hold-out juror to join in a unanimous verdict, and the hold-out juror was to cooperate in the movement toward unanimity." (*Jimenez v. Myers*, 40 F.3d at p. 981.)

The instant case closely parallels *Jimenez v. Myers* on several key points. In both cases, the trial court inquired into the numerical division of the jury. The prosecutor in *Jimenez v. Myers*, and the prosecutor in the instant case, agreed it was appropriate to declare a mistrial. (27 RT p. 3072.) The trial judge in *Jimenez v. Myers* implicitly approved the jury's movement towards unanimity. The trial judge in the instant case commented, "Obviously, each and every one of us in this courtroom has a lot invested in the case in terms of our time, our energy, and if we can reach a decision, I'd like to. And by my saying that, I'm not suggesting that you should reach any decision one way or the other. I'm just generally

inquiring." (27 RT p. 3075.) This comment communicated to the jury the trial judge's desire for the minority jurors to yield their position. In this case, the defense counsel made numerous objections and motions for a mistrial to the jury being allowed to continue deliberations. The jury reached a verdict shortly after being told its final request–for additional instruction regarding mitigating factors—was denied. (28 RT pp. 3112, 3113; 16 CT p. 3936.) The trial judge in the instant case, similar to the trial judge in *People v. Jimenez*, coerced the verdict.

The trial court's coercion of the verdict also violated appellant's right to jury trial under the Sixth and Fourteenth Amendments and Article I, Section 16 of the California Constitution. *Turner v. Louisiana* (1965) 379 U.S. 466, 472, 85 S.Ct. 546, 13 L.Ed.2d 424, explained that, "[i]n essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Hence, "[t]he requirement that a jury's verdict must be based upon the evidence developed at trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." (*Id.*) *United States v. Gaudin* (1995) 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444, explained the requirement under the constitution for a valid jury verdict:

> The right to have a jury make the ultimate determination of guilt has an impressive pedigree. Blackstone described "trial by jury" as requiring that "*the truth of every accusation,* whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors...." 4 *W. Blackstone, Commentaries on the Laws of England* 343 (1769) (emphasis added). Justice Story wrote that the "trial by jury"

> guaranteed by the Constitution was "generally understood to mean ... a trial by a jury of twelve men, impartially selected, who must unanimously *concur in the guilt of the accused before a legal conviction can be had.*" 2 *J. Story, Commentaries on the Constitution of the United States* 541, n. 2 (4th ed. 1873) (emphasis added and deleted). This right was designed "to guard against a spirit of oppression and tyranny on the part of rulers," and "was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties." *Id.,* at 540-541

*Ring v. Arizona* (2002) 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556, held that the Sixth Amendment required the jury to find the aggravating facts necessary to impose the death penalty. A coerced juror has not decided the factual issues presented to him or her for resolution as required by *Ring v. Arizona.*

Furthermore, jurors who are coerced into reaching a verdict are not impartial and indifferent jurors under the Sixth Amendment or Article I, Section 16 of the California Constitution. A juror who consents to a verdict through coercion has not based his or her verdict on the evidence developed at trial but on the improper influence of the trial judge. In *United States v. Gaudin*, the Supreme Court found a violation of the defendant's Sixth Amendment right to a jury trial because the issue of materiality had been decided by the trial court and not the jury. (*United States v. Gaudin, supra*, 515 U.S. at p. 510.) By parity of reasoning, appellant was denied his Sixth Amendment right to a jury trial when the jury was coerced into reaching a verdict.

The trial court's coercion of a verdict also violates the prohibition against cruel and unusual punishment in the Eighth Amendment and Article I, Section 17 of the California

Constitution. The Eighth Amendment requires a greater degree of reliability when the death sentence is imposed. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973.) The Eighth Amendment requires the jury to decide the facts necessary to impose the death penalty. (*Ring v. Arizona, supra*, 536 U.S. at pp. 606-607.) A coerced verdict is neither a reliable verdict nor a verdict in which the jury has determined the aggravating facts necessary to impose the death penalty. Hence, the jury returned a verdict in violation of the prohibition against the imposition of cruel and unusual punishment in the Eighth Amendment and Article I, Section 17 of the California Constitution.

The trial court erred by forcing the jury to resume deliberations after it was hopelessly. Hence, the sentence must be vacated.

**2. The Trial Court Coerced a Verdict in Violation of Penal Code Section 1140 by Compelling the Jurors to Continue Deliberating after They were Hopelessly Deadlocked**

Penal Code section 1140 states as follows:

> Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.

The determination of whether there is a reasonable probability of jury agreement rests in the discretion of the trial court. (*People v. Breaux* (1991) 1 Cal.4th 281, 319; *People v. Rodriguez* (1986) 42 Cal.3d 730, 775.) "The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment `in

favor of considerations of compromise and expediency.'" (*People v. Breaux, supra*, 1 Cal.4th at p. 319.)

The question of coercion depends on the facts and circumstances of each case. (*Ibid.*) In determining whether there is a reasonable probability of agreement, California law permits the trial court to ascertain the numerical division of the jury. (*People v. Carter* (1968) 68 Cal.2d 810, 815; but see *Brasfield v. United States* (1926) 272 U.S. 448, 450, [71 L.Ed.2d 345, 47 S.Ct. 135][holding it to be reversible error for the trial court to inquire into the numerical division of the jury].) In determining whether the trial court abused its discretion by requiring the jury to continue deliberations, the court should consider the length of the trial, the amount of evidence, and the complexity of the issues. (*People v. Rodriguez, supra*, 42 Cal.3d at p. 776.)

In *People v. Carter* (1968) 68 Cal.2d 810, this Court observed:

> the surrender of the independent judgment of a jury may not be had by command or coercion. It is not enough to cure the error to conventionally say that it is the function of the jury to decide questions of fact. Pressure of whatever character, whether acting on the fears or hopes of the jury, if so exerted as to overbear their volition without convincing their judgment, is a species of restraint under which no valid judgment can be made to support a conviction. No force should be used or threatened, and carried to such a degree that the juror's discretion and judgment is overborne, resulting in either undue influence or coercion. A judge may advise, and he may persuade, but he may not command, unduly influence, or coerce.

(*People v. Carter, supra*, 68 Cal.2d at p. 814.)

The verdict in this case was coerced in violation of section 1140 for the same reasons

the verdict was coerced in violation of appellant federal and state constitutional rights. All twelve jurors agreed the jury was hopelessly deadlocked when it was first polled. (27 RT pp. 3054-3055.) The trial court noted the jury's voting pattern was moving away from unanimity. (27 RT p. 3061.) The jury foreman expressed the view again that the jury was deadlocked. (27 RT p. 3070.) Instead of granting the defense counsel's numerous motions for a mistrial, at least one of which was the prosecutor conceded was appropriate, the trial court compelled the jury to continue deliberations. The jurors suggested three options to help it break the deadlock: (1) additional argument; (2) testimony from appellant; and (3) an explanation of mitigating factors. (28 RT pp. 3082, 3110-3111; 16 CT p. 3928.) The trial court denied each of the jury's requests. None of the options requested by the jurors to help break the deadlock were provided to them. The only explanation for the jury reaching a verdict was the coercion exerted by the trial court. Hence, the jury's verdict was rendered in violation of section 1140

**D. CONCLUSION**

In the instant case, the trial court coerced the jury's verdict for the reasons stated above. The coercion of the jury's verdict violated section 1140, appellant's right to federal due process of law and a fair trial under the Fifth and Fourteenth Amendments, appellant's right under the Sixth and Fourteenth Amendments to have the jury determine the facts necessary to convict him and impose the death penalty, as well as his Eighth Amendment right to be free from cruel and unusual punishment, and the corresponding rights under the California Constitution. The coercion of a verdict in violation of the aforementioned is

prejudicial per-se. (*People v. Carter, supra*, 68 Cal.2d at p. 820; *Jimenez v. Myers, supra*, 40 F.3d at p. 981; *Jenkins v. United States* (1965) 380 U.S. 445, 446, 85 S.Ct. 1059, 13 L.Ed.2d 957; Cf. *Brasfield v. United States, supra*, 272 U.S. at p. 450.) Hence, the sentence of death must be reversed.

## XX

**THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT INQUIRED INTO THE NUMERICAL DIVISION OF THE JURY IN VIOLATION OF: (1) PENAL CODE SECTION 1140; (2) APPELLANT'S RIGHT TO STATE AND FEDERAL DUE PROCESS OF LAW; (3) APPELLANT'S RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS; AND (4) THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS**

As discussed in Issue XIX, the trial court asked the jury several times its numerical breakdown. The jury foreman provided the breakdown. This Court has approved of the trial asking the jury its numerical breakdown. (*People v. Carter, supra*, 68 Cal.2d at p. 815.) The United States Supreme Court has forbidden the practice pursuant to its supervisory powers over the federal courts. (*Lowenfield v. Phelps, supra*, 484 U.S. at pp. 239-240; *Brasfield v. United States, supra*, 272 U.S. at p. 450.) This Court should alter its holding in *People v. Carter* and rule that the trial court's inquiry into the numerical breakdown of the jury's deliberations is inherently prejudicial.

The trial court first learned of the jury's numerical breakdown when it was communicated to the bailiff by the jury foreman. The trial court did not solicit this information. (27 RT pp. 3048-3049.) The defense counsel agreed to the trial court's first inquiry of the jury's numerical breakdown. (27 RT pp. 3051, 3054.) The defense counsel made a motion for a mistrial which was denied. (27 RT p. 3063.) After the jury requested additional argument, to hear from appellant, and for clarification of the mitigation

instruction, the trial court asked the jury foreman again the jury's numerical breakdown. (28 RT p. 3092.) The jury foreman stated the vote was eight to three to one. (28 RT p. 3092.)

This Court can review whether the trial court erred by inquiring into the numerical breakdown of the jury despite the lack of an objection by the defense counsel. The requirement for an objection is excused when it would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) It would have been futile for the defense counsel to have objected to the trial court's inquiry into the numerical division of the jury *People v. Carter* approved of the practice. Case law, furthermore, has not required an objection when the trial court has unlawfully invaded the province of the jury by inquiring about its numerical breakdown. (*Brasfield v. United States, supra*, 272 U.S. at p. 450.)

*People v. Carter* should be overruled because it relied on a series of cases that were flawed and failed to adequately discuss the issue. In *People v. Talkington* (1935) 8 Cal.App.2d 75, the trial court asked the jury foreman the jury's numerical breakdown and how many jurors had voted for guilty or not guilty. The Court of Appeal stated, "[w]hile a number of cases might be cited to the effect that reversible error was not committed when the trial court simply asked as to the numerical division of the jury, the great weight of authority is to the effect, however, that reversible error is committed if the trial court, in addition to asking the numerical division of the jury, also asks as to how they voted with reference to the guilt or innocence of the defendant, the province of the jury has been invaded, and reversible error has been committed." (*People v. Talkington, supra*, 8

Cal.App.2d at p. 84.) The Court cited *Brasfield v. United States* in support of that proposition.

*People v. Talkington* thus concluded *Brasfield v. United States* found error when the trial court inquired into the numerical division of the jury and how many jurors had voted for guilt or not guilty. In *Brasfield v. United States*, however, the court dealt with a situation in which, "[t]he jury having failed to agree after some hours of deliberation, the trial judge inquired how it was divided numerically, and was informed by the foreman that it stood nine to three, without indicating which number favored conviction." (*Brasfield v. United States*, *supra*, 272 U.S. at p. 449.) The Supreme Court found error based on the trial court's numerical inquiry into the vote of the jury regardless of whether that inquiry also ascertained how the vote was split.

The erroneous description in *People v. Talkington* of the holding of *Brasfield v. United States* worked its way into established California law. In *People v. Von Badenthal* (1935) 8 Cal.App.2d 404, 410, the court cited *People v. Talkington* for the proposition, "[t]here was no error in the fact that the court by inquiry ascertained how the jury was numerically divided." *People v. Curtis* (1939) 36 Cal.App.2d 306, 325, cited *People v. Talkington* when it concluded, "the weight of authority seems to be that only when the inquiry of the court as to how stands numerically is coupled with the purpose on the part of the court to ascertain how the jury is divided as to the guilt or innocence of the defendant, is the province of the jury invaded and reversible error committed." In *People v. Lammers*

(1951) 108 Cal.App.2d 279, 282, the court cited *People v. Curtis* and concluded, "it was not error for a court to inquire how the jurors are numerically divided so long as inquiry is not made for ascertaining how the jury is divided as to the innocence or guilt of the defendant."

*People v. Carter* cited *People v. Lammers* and *People v. Curtis* for the proposition, "the court in such cases may inquire of the jury as to its numerical division without seeking to discover how many jurors are for conviction and how many are for acquittal." *(People v. Carter, supra*, 68 Cal.2d at p. 815.) The holdings of *People v. Lammers* and *People v. Curtis* were flawed because those cases relied on the flawed description in *People v. Talkington* of the holding of *Brasfield v. United States*.

*People v. Carter* also cited *People v. Tarantino* (1955) 45 Cal.2d 590, in support of its conclusion the trial court may properly ask the jury its numerical division. *(People v. Carter, supra*, 68 Cal.2d at p. 815.) *People v. Tarantino*, however, contained no substantive discussion of whether it was error for the trial court to inquire regarding the numerical division of the jury. (*People v. Tarantino, supra*, 45 Cal.2d at p. 600.) *People v. Tarantino* cited *People v. Walker* (1949) 93 Cal.App.2d 818 and *People v. Crowley* (195) 101 Cal.App.2d 71, in support of its conclusion the jury's verdict had not been coerced. *(People v. Tarantino, supra*, 45 Cal.2d at p. 600.) *People v. Crowley* did not deal with the issue of the trial court's inquiry into the numerical division of the jury but, whether the trial court's comments urging the jurors to reach agreement coerced a verdict. (*People v. Crowley, supra,* 101 Cal.App.2d at p. 75-79.) *People v. Walker* reversed the defendant's conviction when the

trial court ascertained how many jurors had voted guilty and made comments which pressured the jury to reach a verdict. The court stated without any citation to authority or substantive discussion that "[t]here was no impropriety in his [i.e., the trial judge] asking how the jury stood numerically . . . ." (*People v. Walker, supra,* 93 Cal.App.2d at p. 825.) *People v. Tarantino* did not therefore support this Court's conclusion in *People v. Carter* that the trial court was authorized to inquire into the numerical division of the jury. Since *People v. Carter* was decided, this Court has approved in a number of other decisions the trial court's inquiry into the numerical division of the jury. (*People v. Johnson* (1993) 3 Cal.4th 1183, 1254; *People v. Proctor* (1993) 4 Cal.App.4th 499, 538-539; *People v. Breaux* (1991) 1 Cal.4th 281, 319.)

The foregoing discussion demonstrates the rule that the trial court may properly inquire into the numerical division of the jury became the law in California through misinterpretation of case authority. This Court should hold the trial court's inquiry into the numerical division of the jury violates section 1140, a defendant's state and federal right to due process of law, and state and federal right to a jury trial. This Court should also hold that such an inquiry violates the Eighth Amendment ban against cruel and unusual punishment in the context of capital prosecutions.

*Brasfield v. United States* condemned the practice of inquiring into the jury's numerical division because, "[i]ts effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts

and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious, although not measurable, an improper influence upon the jury . . . ." (*Brasfield v. United States, supra*, 272 U.S. at p. 450.) Federal courts have preserved the rule the trial court's inquiry into the numerical division of the jury constitutes reversible error per se. (*Jiminez v. Myers, supra*, 40 F.3d at p. 980, fn. 3; *United States v. Noah* (9th Cir. 1979) 594 F.2d 1303, 1304.) It is completely contradictory for California to hold judicial inquiry into the numerical division of the jury does not even constitute error while federal practice condemns it as error that is prejudicial per se. If the trial court's inquiry into the numerical division of the jury is coercive for the reasons explained in *Brasfield v. United States*, the coercive nature of that inquiry does not vanish because the case is being tried in state court.

This Court should hold that section 1140, and various constitutional provisions, forbid the trial court from inquiring into the numerical division of the jury. The Eighth Amendment requires a heightened degree of reliability when the jury decides a defendant's fate in a capital proceeding. (*Lockett v. Ohio, supra*, 438 U.S. at p. 604.) The reliability of the jury's verdict is undermined when the jury has been pressured to reach a verdict because the trial court inquired into the numerical division of the jury.

The pressuring of a jury to reach a verdict by inquiring into its numerical division also violated the defendant's Sixth and Fourteenth Amendments right to a jury trial. Under *Ring v. Arizona*, the Sixth Amendment requires the jury to find the facts necessary to impose the

death penalty and to decide that death is the appropriate punishment. (*Ring v. Arizona, supra*, 536 U.S. at pp. 607-609.) Intrusion in the jury's fact finding and deliberative process by judicial inquiry into their numerical split undermines the ability of the jury to perform those functions.

Similar reasoning applies to a defendant's due process right. A defendant's right to a fair trial is undermined "if the trial judge's inquiry would be likely to coerce certain jurors into relinquishing their views in favor of reaching a unanimous decision." *(Locks v. United States, supra*, 703 F.2d 406.) *Brasfield v. United States* held any judicial inquiry into the numerical division of the jury had some tendency to coerce a jury into reaching a verdict. (*Brasfield v. United States, supra*, 272 U.S. at p. 450.) Judicial inquiry into the numerical division of the jury therefore violates a defendant's right to due process of law and Sixth and Fourteenth Amendments right to a jury trial.

The federal courts have ruled judicial inquiry into the numerical division of the jury to be prejudicial per se. (*United States v. Noah, supra*, 594 F.2d at p. 1304.) This rule has been adopted pursuant to the Supreme Court's supervisory powers over the federal courts. (*Lowenfield v. Phelps, supra*, 484 U.S. at p. 239.) A similar rule of prejudice should be adopted by this Court to judicial inquiry into the numerical division of the jury in violation of section 1140, a defendant's right to federal and state due process of law, a defendant's right to a jury trial under the federal and state constitutions , and the prohibition against cruel and unusual punishment in the federal and state constitutions. A rule of prejudice per se is

appropriate because: (1) of the difficulty of precisely measuring the degree of coercion associated with judicial inquiry into the numerical split of the jury; and (2) some degree of judicial coercion is always associated with such an inquiry. (*Brasfield v. United States*, *supra*, 272 U.S. at p. 450.) Hence, the judgment of death should be reversed.

Reversal of the judgment of death is required, furthermore, even if the trial court's erroneous inquiry into the numerical division of the jury is tested for prejudice under the harmless beyond a reasonable doubt standard in *Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705, or the more likely than not test in *People v. Watson* (1956) 46 Cal.2d 818, 836. During the afternoon of June 20, 2001, the jurors stated they were hopelessly deadlocked when polled by the trial court. Even the prosecutor conceded declaring a mistrial was appropriate. (27 RT p. 3072.) The defense counsel made several motions for a mistrial which were denied. (27 RT p. 3063; 28 RT p. 3085-3086.) After the trial court had refused to take respond to the jury's requests for assistance in breaking the deadlock, it made another inquiry into the numerical division of the jury. (28 RT p. 3092.) The trial court then refused to instruct the jury with the defense counsel's requested instruction regarding a single mitigating factor and had the jury resume deliberations. (28 RT pp. 3110-3112.) The jury shortly thereafter reached a verdict. (28 RT p. 3113.)

This Court cannot conclude beyond a reasonable doubt, or under the more likely than not standard, that the trial court's final inquiry into the numerical division of the jury did not push the jury towards reaching a verdict. The trial court's final inquiry into the numerical

inquiry of the jury occurred during the morning session on June 21, 2001. (28 RT p. 3092.) The jury reached a verdict during the afternoon session of June 21, 2001. (28 RT p. 3113.) *Brasfield v. United States* recognized any judicial inquiry into the numerical division of the jury has some tendency to coerce a jury into reaching a verdict. (*Brasfield v. United States*, supra, 272 U.S. at p. 450.)

This jury was clearly hung. The only significant event following the trial court's final inquiry into the numerical division of the jury was the trial court's reading of CALJIC Number 8.88 to the jury. (28 RT pp. 3097-3100.) This instruction was read to jury and they had a copy of it during deliberations. The jury's split was eight to three to one when the trial court made its final inquiry. (28 RT p. 3092.) This was a significant split and signified a jury that could not reach agreement. The jury's return of a verdict can only be explained by the trial court's inquiry into the numerical division of the jury and the pressure exerted on the jury to reach a verdict through continued deliberations. This jury did not return a reliable verdict. The judgment of death must be reversed.

## XXI

## THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE JURY CONSIDERED APPELLANT'S FAILURE TO TESTIFY IN VIOLATION OF HIS RIGHT TO SILENCE UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND THE CORRESPONDING RIGHTS UNDER THE CALIFORNIA CONSTITUTION.

### A. SUMMARY OF ARGUMENT

During penalty phase deliberations, the jury asked to hear from appellant. The request was denied with the agreement of the defense counsel. The defense counsel moved for a mistrial because the jury had considered appellant's failure to testify in deciding the penalty. The motion was denied. A criminal defendant has the right to silence under the Fifth and Fourteenth Amendments and article I, section 15, of the California Constitution. The jury's consideration of a defendant's right to silence undermined the reliability of its penalty phase verdict in violation of the prohibition against cruel and unusual punishment in the Eighth and Fourteenth Amendments and Article I, section 17, of the California Constitution as well as appellant federal and state constitutional right to silence. The jury's consideration of appellant's failure to testify was not harmless beyond a reasonable doubt. The trial court therefore erred by denying appellant's motion for a mistrial. Hence, the judgment of death must be reversed.

## B. SUMMARY OF PROCEEDINGS BELOW

During the guilt phase instructions, the trial court instructed the jury that, "A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that the defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way." (23 RT p. 2514.) During discussion of the penalty phase instructions, the defense counsel stated he was not requesting any additional instructions about appellant not testifying. (27 RT p. 2948.) The trial court stated it would not reread the guilt phase instructions, but was "going to advise the jury that they may consider such of those instructions as they deem appropriate, they should not consider those instructions that they deem inapplicable to this phase of the trial." (27 RT p. 2950.) The trial court intended, however, to send a copy of the guilt phase instructions to the jury room during penalty phase deliberations. (27 RT p. 2951.) The defense counsel objected to the jury having the guilt phase instructions during penalty phase deliberations. The trial court overruled the objection. (27 RT p. 2951.)

During penalty phase instructions, the trial court instructed the jury, "Ladies and Gentlemen, in the early guilt or innocence phase of the trial, I instructed you on the law applicable to that phase of the trial. You should consider those prior instructions on the law to the extent that you view them as properly applying to any of the issues present in this penalty phase of the trial. /P/ However, you should not consider any of the prior instructions on the law which you find to be inapplicable to the questions and issues now before you in

this penalty phase." (27 RT p. 3033.) The jury was not given any penalty phase instruction about the defendant's right to silence. (27 RT pp. 3033-3041.)

During the morning session of June 21, 2001, the jury asked, "To hear from Donald Brooks." (16 CT p. 3929.) The defense counsel argued the jury was not following the trial court's instructions and had discussed appellant's failure to testify. He requested a mistrial. (28 RT p. 3085.) The motion was denied. (28 RT p. 3086.) The defense counsel requested the jury be told its request to hear from appellant was denied. The trial court agreed and the jury was informed its request to hear from appellant was denied. (28 RT pp. 3088-3090.) The jury reached a verdict on June 21, 2001, at 3:05 p.m. (28 RT p. 3113.)

During the discussion of the automatic motion to reduce the penalty to life in prison without parole, the trial court commented:

> One of the things they said was "We'd like to hear from the defendant." And I told the jury at that time that that was a request that we would not be considered and that it was inappropriate and that we would move forward.
>
> Obviously, I did not go into any great length to explain to them that the defendant has a right not to testify and he chose to exercise that right, which is perfectly proper, and in exercising that right it cannot be held against him. But I can guarantee you that what the jury wanted to know was what was the defendant's motivation when he set the car on fire. Was he finishing the job? Was she in the back seat moaning and groaning even though in a semiconscious state, or did he think she was dead and he was just destroying the evidence?
>
> I think the answer to that question could very clearly have changed the jury's thinking about this case. And, indeed, I've thought long and hard about it. I can't make up an answer to

> that question. I cannot speculate or conjecture. That evidence is not before this court to be reweighed. It was not before the jury to be considered.
>
> What the jury did decide, based upon the evidence, was that she was killed by thermal injury. So I've often thought that if we knew the answer to my question, it might be a very difficult situation with which we are all now confronted, but as I've indicated, I cannot fill in the blanks. I can only reweigh the evidence that was presented, and I have carefully considered and weighed the aggravating and mitigating circumstances, all as previously stated.

(29 RT pp. 3149-3150.)

**C. THE JUDGMENT MUST BE REVERSED BECAUSE THE JURY IMPROPERLY CONSIDERED APPELLANT'S FAILURE TO TESTIFY WHEN IT DECIDED TO SENTENCE APPELLANT TO DEATH**

The Fifth Amendment Self-Incrimination Clause, which applies to the States via the Fourteenth Amendment, (*Malloy v. Hogan* (1964) 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653), provides that no person "shall be compelled in any criminal case to be a witness against himself." The essence of this basic constitutional principle is "the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." (*Culombe v. Connecticut*, 367 U.S., 581-582, 81 S.Ct. 1860, 1867, 6 L.Ed.2d 1037 (1961) (opinion announcing the judgment).)

A criminal defendant's Fifth Amendment privilege against self-incrimination was extended to the penalty phase of capital proceedings in *Estelle v. Smith* (1981) 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359. The Supreme Court concluded, "We can discern no basis

to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees. (Citations omitted)." (*Estelle v. Smith, supra*, 451 U.S. at p. 463.) The Fifth Amendment prohibits the jury from inferring guilt from the defendant's exercise of the right to silence. (*Griffin v. United States* (1965) 380 U.S. 609, 614-615, 85 S.Ct. 1229, 14 L.Ed.2d 106; *Baxter v. Palmigiano* (1976) 425 U.S. 308, 319, 96 S.Ct. 1551, 47 L.Ed.2d 810; *People v. Sanders* (1995) 11 Cal.4th 475, 528.) Article I, section 15, of the California Constitution also guarantees a defendant the right against self-incrimination.

The jury's consideration of a defendant's failure to testify also violates the prohibition against cruel and unusual punishment in the Eighth Amendment and Article I, section 17, of the California Constitution. Both constitutional provisions require a greater degree of reliability when the death sentence is imposed. (*Lockett v. Ohio, supra*, 438 U.S. at p. 604; *People v. Ayala* (2000) 23 Cal.4th 225, 263.) The Eighth Amendment requires the jury to decide the facts necessary to impose the death penalty. (*Ring v. Arizona, supra*, 536 U.S. at pp. 606-607.) A death sentence imposed as a result of the jury's consideration of the defendant's failure to testify was not a reliable verdict. The jury's fact finding process, furthermore, is distorted by considering the defendant's failure to testify.

The jury provided direct proof that it considered appellant's failure to testify during

penalty phase deliberations by sending the note to the trial court asking "To hear from Donald Brooks." (16 CT p. 3929.) The trial court told the jury its request was denied without further explanation. (28 RT p. 3090.) This was not a situation in which the jurors made a brief, harmless reference to the defendant's failure to testify during deliberations. This jury directly violated the trial court's instruction not to discuss appellant's failure to testify, or infer guilt from that fact, by: (1) discussing appellant's failure to testify; and (2) sending a note requesting appellant to waive his Fifth Amendment privilege against self-incrimination.

In *People v. Leonard* (2007) 40 Cal.4th 1370, 1424, two jurors signed affidavits stating that during penalty phase deliberations, they made the comment they wished they had heard from the defendant. This Court stated that, "By violating the trial court's instructions not to discuss defendant's failure to testify, the jury committed misconduct." *(People v. Leonard, supra*, 40 Cal.4th at p. 1425; see also *People v. Perez* (1992) 4 Cal.App.4th 893, 908, [jury misconduct to disregard trial court's express instruction not to consider defendant's failure to testify].) The jury's misconduct gave rise to a presumption of prejudice which "may be rebutted . . . by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm." (*People v. Leonard, supra*, 40 Cal.4th at p. 1425, quoting *People v. Hardy* (1992) 2 Cal.4th 86, 174.) Whether prejudice arose from juror misconduct is a mixed question of law and fact subject to an appellate court's independent determination. (*People v. Nesler* (1997) 16 Cal.4th 561, 582.)

The presumption of prejudice from the jury's consideration of appellant's failure to testify was not rebutted. The jury had a difficult time deciding the penalty. There were substantial factors in mitigation. Appellant was a loving father. (26 RT pp. 2829, 2839.) Appellant occasionally brought his daughter, Nicole, to a job site. He took time off from work to take her to Disneyland. (26RT p. 2839.) Appellant had visitation rights every other weekend with Nicole. (26 RT p. 2829.) Appellant helped individuals who were struggling by letting them live with him and providing employment. (26 RT p. 2828.) He employed individuals who had been released from prison in order to give them a chance to succeed. (26 RT p. 2828.) Appellant had overcome his drug and alcohol problems. (26 RT p. 2889.) Appellant had a prosperous business as a plumber and was held in high esteem by his customers. (26 RT p. 2830.) This was not a case where the defendant had led a life of violent crime and had no redeeming qualities.

Appellant was an emotionally vulnerable person who was manipulated by Ms. Kerr. Ms. Kerr allowed appellant to pay for her apartment and provide her money so she could escape from her husband. (19 RT pp. 2113-2114.) Ms. Kerr allowed appellant to pay for her apartment even after she had gone to the police department to obtain a restraining order against appellant. (15 RT p. 1635; 17 RT pp. 1915-1916, 1925-1925, 1945.) Appellant wanted to start a family with Ms. Kerr. (19 RT p. 2146.)

Sheila Peet knew appellant through his work as a plumber. Ms. Peet and her husband ran a plumbing business and called appellant when they had excess work or a difficult job.

(26 RT p. 2867.) Ms. Peet was familiar with appellant's relationship with Ms. Kerr. (26 RT p. 2868.) She believed they were a bad match for the following reasons:

> A. Because of his nature. He was naive. He really was naive about people and trusting, and she was far more savvy. She knew how to manipulate people and work with them. He wasn't very good at that.
>
> Q. Why do you say — let's focus on Don for a while. Why do you say he was naive and not good at that?
>
> A. He always thought everybody was good, that no one would hurt him. That's not the way the world is. Things happen.
>
> Q. Did you have a chance to observe him, how —whether he was hurt or how he reacted as a result of his relationship with Lisa?
>
> A. He was on a roller coaster constantly. Euphoric one moment and then tortured the next. He'd come in, he was crying, he'd look like he hadn't slept in days, and then you would know when they were back together, because he'd walk in all nice and clean again and happy, and then two, three days later, depressed again.

(26 RT pp. 2869-2870.) Ms. Peet believed Ms. Kerr "tortured" appellant's emotions. (26 RT p. 2872.) Ms. Peet said appellant "loved her. He worshiped her. That's all he talked about. He was trying to keep her husband from killing her half the time, he was telling us. He didn't want to see her hurt. He got her an apartment." (26 RT p. 2875.)

Other witnesses confirmed Ms. Peet's assessment of appellant's relationship with Ms. Kerr. David Heiserman was appellant's employee and witnessed the relationship between appellant and Ms. Kerr. (18 RT pp. 2067-2071.) One to two months prior to Ms. Kerr's

death, appellant stated he believed Ms. Kerr was having sexual relations with someone named Mark. (18 RT pp. 2079-2080.) Ms. Kerr told appellant in a sarcastic manner she loved him. (19 RT p. 2107.) Mr. Heiserman believed Ms. Kerr was being sarcastic for the following reason:

> A. Because I always viewed her attitude towards Louie was—was not —it wasn't appropriate.
>
> Q. Why wasn't it ----why did you view it as inappropriate?
>
> A. Because she would clown him most of the time. And what I mean by clowning is making fun of him.
>
> Q. Would she make fun of him in front of you?
>
> A. Yes.
>
> Q. How would she make fun of him?
>
> A. She'd say little things like, you know, "check yourself" and —you know, little phrases that are known to be thrown around in prison or around —little things like that.
>
> Q. Did Mr. Brooks—how did Mr. Brooks respond to those phrases that were—that were thrown around?
>
> A. You could tell that they affected him.

(19 RT p. 2108.) When Ms. Kerr made fun of appellant, "he smiled. He smiled because his ignorance didn't really know what it was." (19 RT p. 2109.) Ms. Kerr regularly insulted appellant, told him he was "lame," and was rude to him. (19 RT p. 2113.)

Appellant was in the crawl space under Mr. Harvey's residence when Ms. Kerr spoke with Mr. Harvey about appellant. (15 RT pp. 1705-1706; 17 RT pp. 1891-1893, 18 RT p.

2098.) Ms. Kerr and Mr. Harvey talked about having a physical relationship. (17 RT pp. 1891.) When Ms. Kerr left Mr. Harvey's residence, she referred to appellant as "squirrel boy." (17 RT pp. 1860-1861.) Appellant could not take the emotional abuse. He confronted Ms. Kerr. (18 RT p. 2098; 20 RT pp. 2236-2237, 2252-2253.)

There were substantial factors in mitigation. The jury's consideration of appellant's failure to testify pushed the jury over the edge to a sentence of death. The jury was hopelessly deadlocked. (27 RT pp. 3054-3055.) The jury made three requests of the trial court to help it break the deadlock: (1) additional argument from counsel for both parties; (2) to hear from appellant; and (3) an explanation of mitigating factors. (16 CT pp. 3928-3929; 28 RT pp. 3091-3092.) The three requests were refused. Hence, the breaking of the deadlock cannot be explained by the jury receiving additional argument from counsel or an explanation of mitigating factors. Because the jury asked to hear from appellant, it most likely held appellant's failure to testify against him when it decided the penalty.

Trial court's comments when it denied the automatic motion to reduce the penalty to life in prison demonstrates that the jury's discussion of appellant's failure to testify was prejudicial. The trial court, when discussing the note from the jury asking to hear from appellant, commented, "But I can guarantee you that what the jury wanted to know was what was the defendant's motivation when he set that car on fire. Was he finishing the job? Was she in the back seat moaning and groaning even though in a semiconscious state, or did he think she was dead and he was just destroying the evidence." (29 RT p. 3149.) The trial

court believed the answer to that question could have changed the jury's mind about the penalty. (29 RT pp. 3149-3150.) These comments reflect the trial court's belief the jury decided to impose the death penalty because appellant failed to honor the jury's request to testify and explain what happened when the victim died.

In *People v. Leonard, supra*, 40 Cal.4th at pp. 1425-1426, this Court concluded the jury's discussion of the defendant's failure to testify was harmless because the jurors merely expressed the sentiment during deliberations that they wished they had heard from the defendant. This Court agreed with the comment of the trial court that merely referring to the defendant's failure to testify is not the same as drawing a negative inference from the absence of that testimony. (*People v. Leonard, supra*, 40 Cal.4th at p. 1425.)

The same reasoning cannot be applied to this case. The content of the jurors' discussion are not in the record. The note established appellant's failure to testify was discussed in detail. There was no way the jury could not have discussed appellant's failure to testify and have sent the note. The jury must have drawn an adverse inference when it was told its request to hear from appellant was denied.

The presumption of prejudice from the jury considering appellant's failure to testify was not rebutted. The error was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.) Appellant was manipulated by a woman who exploited his emotional vulnerability and used him for her financial convenience. She ridiculed him to his face and insulted him when he was not

present. Appellant had many good qualities. He tried to help other people and be a good father to his daughter. He maintained employment and ran his own business. Appellant does not deserve the death penalty. The jury's consideration of appellant's failure to testify was prejudicial.

The trial court's comments also reflect why the jury's fact finding process during the penalty phase was distorted by considering appellant's failure to testify in violation of the Eighth Amendment and Article I, Section 17, of the California Constitution. *Ring v. Arizona, supra*, 536 U.S. at pp. 606-607 requires the jury to find the facts in aggravation and mitigation. The trial court concluded the jury inferred appellant knew the victim was alive when he started the fire because appellant failed to testify. The jury was not allowed to draw this inference from appellant's failure to testify. The jury improperly weighed aggravating and mitigating factors as a result of its consideration of appellant's failure to testify. The Eighth Amendment requires that a sentence of death not be imposed arbitrarily. (*Jones v. United States, supra*, 527 U.S. at p. 381; *Buchanan v. Angelone* (1998) 522 U.S. 269, 275, 139 L.Ed.2d 702, 118 S.Ct. 757.) "Accurate sentencing information is an indispensable prerequisite to a [jury's] determination of whether a defendant shall live or die." (*Gregg v. Georgia* (1976) 428 U.S. 153, 190, 49 L.Ed.2d 859, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and Stevens, JJ.).)

Appellant's jury erroneously considered appellant's failure to testify when in violation of the Eighth Amendment and Article I, section 17, of the California Constitution. The error

was not harmless beyond a reasonable doubt. The death sentence should be reversed.

## XXII

**THE JUDGMENT OF DEATH SHOULD BE REVERSED BECAUSE THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW AND A FAIR TRIAL, AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS, BY REFUSING TO GIVE A DEFENSE REQUESTED INSTRUCTION THAT A SINGLE FACTOR IN MITIGATION WAS SUFFICIENT TO IMPOSE A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE.**

### A. SUMMARY OF ARGUMENT

This Court has held a single factor in mitigation is sufficient for the jury to impose a sentence of life without the possibility of parole. Appellant's jury did not understand that concept because it asked whether a single factor in mitigation was sufficient to sentence to appellant to life in prison. The trial court refused the defense request to give a supplemental instruction to clarify that concept. Because the trial court erred by refusing to give the defense requested special instruction, the judgment of death must be reversed.

### B. SUMMARY OF PROCEEDINGS BELOW

The trial court gave the standard penalty phase jury instructions, including CALJIC Numbers 8.85 and 8.88. (27 RT pp. 3034-3036, 3040-3041; 16 CT pp. 3918-3919, 3926-3927.) CALJIC Number 8.85 instructed the jury on the factors in aggravation and mitigation. (27 RT pp. 3034-3037.) CALJIC Number 8.88 told the jury how to weigh the aggravating

and mitigating factors. (27 RT pp. 3039-3041.)[11]

During penalty phase deliberations, the jury foreperson asked, "There's a lot of----do you need just one item–if you find one item in mitigation, is that enough for life in prison, if you find just one, or do you need several for each, or is it a scale? How does that operate." (28 RT pp. 3091-3092.) At a sidebar hearing, the trial court stated CALJIC Number 8.88 answered the jury's question. (28 RT p. 3093.) The defense counsel argued the jury had to be told one factor in mitigation was sufficient to sentence appellant to life in prison without the possibility of parole. (28 RT p. 3094.)

Following the noon recess, the defense counsel submitted the following written instruction to the trial court to be read to the jury: "In addition to the instructions I read before lunch, specifically in response to your question, one mitigating circumstance may be sufficient to support that death is not appropriate punishment in this case." (16 CT p. 3930.) The defense counsel cited *People v. Berryman* (1993) 6 Cal.4th 1048, *People v. Johnson* (1989) 47 Cal.3d 1194, and *People v. Grant* (1988) 45 Cal.3d 829, in support of the requested instruction. (*Ibid.*)

The trial court refused to give the requested instruction. (28 RT p. 3111.) The trial court did not read CALJIC Number 8.88 to the jury again. The defense counsel moved for a mistrial based on the trial court's refusal to give the requested instruction. The motion was denied. (28 RT p. 3112.) The trial court ordered the jury to resume deliberations. (28 RT p.

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[11] The text of CALJIC 8.85 and CALJIC 8.88 are set forth later in the argument.

3112.) The jury shortly thereafter reached a verdict. (28 RT pp. 3112-3113; 16 CT. p. 3936.)

## C. THE TRIAL COURT ERRED BY REFUSING TO GIVE THE DEFENSE REQUESTED SPECIAL INSTRUCTION REGARDING A SINGLE MITIGATING FACTOR

The requested instruction was a correct statement of the law. This Court has held that "[o]ne mitigating circumstance may be sufficient to support a decision that death is not appropriate punishment . . . ." (*People v. Grant, supra*, 45 Cal.3d at p. 857, fn. 5.) This Court has repeated that rule in numerous cases. (*People v. Hinton* (2006) 37 Cal.4th 839, 912; *People v. Earp* (1999) 20 Cal.4th 826, 902; *People v. Berryman, supra*, 6 Cal.4th at p. 1109; *People v. Johnson, supra*, 47 Cal.3d at p. 1245.)

CALJIC Number 8.88 was not an adequate substitute for the special instruction requested by the defense counsel in view of the jury's question. CALJIC Numbers 8.85 and 8.88 collectively instruct the jury how to determine whether the death penalty should be imposed. CALJIC Number 8.85 stated as follows:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account, and be guided by the following factors, if applicable:
>
> A. The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true;
>
> B. The presence or absence of any criminal activity by the defendant other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied

threat to use force or violence or the express or implied threat to use force or violence.

C. The presence or absence of any prior felony conviction other than the crimes for which the defendant has been tried in the present proceedings;

D. Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;

E. Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act;

F. Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct;

G. Whether or not the defendant acted under extreme duress or under the substantial domination of another person;

H. Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication;

I. The age of the defendant at the time of the crime;

J. Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor;

K. Any other circumstances which extenuates the gravity of the crime even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(27 RT pp. 3034-3036.)

CALJIC Number 8.88 provided in relevant part as follows:

> You shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity or adds to its injurious consequences which is above and beyond the elements of the crime itself.
>
> A mitigating circumstance is any fact, condition, or event which does not constitute a justification or excuse for the crime in question but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.
>
> In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.
>
> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(27 RT pp. 3040-3041.)

The weighing process refers to the jurors' personal determination that death is the appropriate penalty under all the circumstances. (*People v. Jackson* (1996) 13 Cal.4th 1164,

1243-1244.) The 1978 death penalty statute permits the jury in a capital case to return a verdict of life without the possibility of parole even in the complete absence of mitigation. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979 [the jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death].)

The jury manifested its confusion about the weighing process prescribed by CALJIC Number 8.88 by asking if a single mitigating factor was sufficient to impose a life sentence. The jury would not have asked this question if it understood that concept.

CALJIC Number 8.88 failed for several reasons to communicate to the jury that it could impose a life sentence based on one mitigating factor. The instruction told the jurors that "[t]he 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." (Vol. 16, R.T. p. 3855.) This language did not tell jury that a single factor in mitigation was sufficient to impose a life sentence. The sentence, "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," suggested that mitigating factors could be ignored. This sentence allowed the jury to assign no weight to a mitigating factor. The sentence, "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," (27 RT p. 3041), did not include any language stating that: (1) life was mandatory if mitigating circumstances outweighed aggravating circumstances, and; (2) death did not have to be imposed even if aggravating circumstances outweighed mitigating circumstances. (See *People v. Smith* (2005) 35 Cal.4th 334, 371 [approving an instruction which stated, "You may, but are not required to return a judgment of death if each of you are persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole."].)

Given the deficiencies above, CALJIC Number 8.88 did not adequately inform the jury that a single factor in mitigation was sufficient to impose a life sentence. The jury recognized this deficiency in CALJIC Number 8.88 when it asked if a single aggravating factor was sufficient to sentence appellant to life in prison. This Court cannot conclude the jury understood a single mitigating factor was sufficient to sentence appellant to life in prison when it asked the above question. The most telling evidence of the deficiency in the pattern instruction was the jury's evident failure to understand it.

In *People v. Earp, supra*, 20 Cal.4th 826, the defendant requested a number of special jury instructions. Special instruction "I" would have instructed the jury, "the law of this state does not place any specific weight or numerical value on any particular aggravating or mitigating circumstance," and, "one mitigating circumstance may be sufficient to support a decision that death is not the appropriate punishment in this case," and, "the weight you each

give to any factor is for you individually to decide." This Court concluded the portion of the special instruction regarding one mitigating factor was properly rejected by the trial court; "Special instruction "I" was argumentative because it would have advised the jury that a single mitigating circumstance can be dispositive of penalty without stating the same as to a single aggravating circumstance." (*People v. Earp, supra*, 20 Cal.4th at p. 903, citing *People v. Mickey* (1991) 54 Cal.3d 612, 697.)

Neither *People v. Earp* nor *People v. Mickey* warrants upholding the trial court's decision in this case to refuse the defense requested special instruction regarding a single mitigating factor. In both cases, the defense requested the instruction as part of the standard set of penalty phase instructions to be initially read to the jury. (*People v. Earp, supra*, 20 Cal.4th at p. 902; *People v. Mickey, supra*, 54 Cal.3d at p. 696.) In that context, the instruction was argumentative because it failed to state the death penalty could be imposed based on a single aggravating factor.

In the instant case, appellant requested the jury instruction about a single mitigating factor after the jury exhibited confusion about that concept. The instruction requested by the defense counsel was not argumentative but a clarification of a point of law which the jury did not understand. Furthermore, because the defense requested instruction regarding a single mitigating factor was a correct statement of the law, its failure to mention imposition of a death sentence based on a single aggravating factor was not an adequate basis to refuse the instruction. It was incumbent on the prosecutor to propose a proper supplemental instruction

in response to the defense request for an instruction on a single mitigating factor.

The jury's question about a single mitigating factor was affirmative evidence CALJIC Number 8.88 did not convey to this jury that a single mitigating factor was sufficient to impose a life sentence. This Court simply cannot conclude otherwise.

CALJIC Number 8.88 also erroneously failed to communicate to the jury that a life sentence could be imposed even in the absence of mitigation. (*People v. Grant, supra*, 45 Cal.3d at p. 857, fn. 5.) The instruction told the jury that "[y]ou shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating factors upon which you have been instructed." (Vol. 16, R.T. p. 3855.) The phrases, "you shall . . . " and "be guided . . ." contain mandatory language which gave the jury no discretion to impose a life sentence other than by finding factors in mitigation, and that the factors in mitigation outweighed the factors in aggravation. The jurors were never informed that they did not have to impose the death penalty regardless of how they weighed the aggravating and mitigating factors. Because the jurors were never informed on this point of law, it was unlikely they understood their discretion to impose a life sentence, even if they concluded that the circumstances in aggravation outweighed the circumstances in mitigation.

**D. THE TRIAL COURT'S REFUSAL TO GIVE THE DEFENSE REQUESTED SPECIAL INSTRUCTION REGARDING A SINGLE MITIGATING FACTOR VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS**

The above deficiencies in CALJIC No. 8.88 violated appellant's right to due process of law under the federal and state constitutions, his right to a jury determination of the facts

as required by the federal and state constitutions, and the prohibition in the California Constitution against imposition of cruel and unusual punishment.

**1. The Trial Court's Failure to Give the Requested Defense Instruction Violated Appellant's Right to State and Federal Due Process of Law and the Prohibition Against Imposition of Cruel and Unusual Punishment in the Federal and State Constitutions.**

Under the federal due process clause and the Eighth Amendment, the jury's "discretion [in a capital case] must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Zant v. Stephens, supra*, 462 U.S. at p. 874; See also U..S. Const, 5th , 6th and 14th Amends.) Article I, section 7 of the California Constitution grants a defendant the right to due process of law. Article I, section 17 of the California Constitution prohibits the imposition of cruel and unusual punishment. Both provisions have been interpreted to require reliability in the procedure utilized to impose the death penalty. (*People v. Ayala* (2000) 23 Cal.4th 225, 263; See also Cal. Const, Art. I, §§1 [granting the people the right to life and liberty], 15 [granting defendants in criminal proceedings the right to due process of law], and 16 [guaranteeing criminal defendants the right to a jury trial].)

The failure of CALJIC Number 8.88 to inform the jury that a sentence of life without the possibility of parole could be imposed if it found a single factor in mitigation, or in the absence of any mitigating factors, undermined the reliability of the penalty phase proceedings. There was no way to be sure that the jury understood its discretion to impose a sentence of life without the possibility of parole because the trial court refused to give the defense requested special instruction regarding a single mitigating factor.

The jury's failure to properly understand the concept of mitigation violated the Eighth and Fourteenth Amendments. In *Lockett v. Ohio, supra*, 438 U.S. 586, the defendant was convicted of aggravated murder and aggravated robbery. She was the getaway driver. The defendant argued the Ohio death penalty statute failed to allow the jury to consider all the relevant mitigating evidence. The Court first noted, "We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio, supra*, 438 .U.S. at p. 604.) Hence, "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Id.*, at pp. 604-605.) "[A]n individualized decision is essential in capital cases." (*Id.*, at p. 605.)

*Lockett v. Ohio* concluded that, "a statute which prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Ibid.*)

In *Lockett*, the Ohio death penalty statute required imposition of the death penalty if the defendant was found guilty of aggravated murder with the commission of at least one of

seven aggravating factors. However, the death penalty did not have to be imposed if the trial judge, considering the nature and circumstances of the offense and the history of the offender, found one of the following three mitigating factors by a preponderance of the evidence: (1) the victim of the offense induced it; (2) it was unlikely the offense would have been committed for defendant being under duress, coercion, or strong provocation; or (3) the offense was primarily the result of the defendant's psychosis or mental deficiency. The Court concluded the statute did not adequately allow consideration of relevant mitigating evidence:

> once it is determined that the victim did not induce or facilitate the offense, that the defendant did not act under duress or coercion, and that the offense was not primarily the product of the defendant's mental deficiency, the Ohio statute mandates the sentence of death. The absence of direct proof that the defendant intended to cause the death of the victim is relevant for mitigating purposes only if it is determined that it sheds some light on one of the three statutory mitigating factors. Similarly, consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision.
>
> The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.

(*Lockett v. Ohio*, 438 U.S. at pp. 608.) *Lockett v. Ohio* was a plurality opinion. Its holding, however, was endorsed and broadened in *Eddings v. Oklahoma* (1982) 455 U.S. 104, 113-116, 102 S.Ct. 869, 71 L.Ed.2d 1, [reversing death sentence when the sentencing judge as

a matter of law refused to consider the mitigating evidence of the defendant's unhappy childhood and emotional disturbance, including evidence of turbulent family history and beatings by a harsh father], and *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5, 106 S.Ct. 1669, 90 L.Ed.2d 1 [holding the defendant had the right under *Lockett v. Ohio* to present evidence of his good behavior during the past seven months while in jail waiting for trial].)

An instruction precluding the jury from giving meaningful effect to mitigating evidence violates the Eighth and Fourteenth Amendments. In *Abdul-Kabir v. Quarterman*, the defendant killed his grandfather for $20. The sentencing jury was required to answer two questions: (1) did the defendant kill the victim deliberately and with the reasonable expectation that the death of the victim would result?; and (2) was there a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to sociey? The jury's affirmative answers to these questions required the trial judge to impose the death penalty. The defendant presented mitigating evidence of his difficult childhood and testimony from a psychologist and a former mental health officer for the Texas Department of Corrections. The trial court refused to give requested defense instructions, which would have allowed negative answers to these questions based on mitigating evidence including the defendant's character and background.

The Court first noted, "[a] careful review of our jurisprudence in this area makes clear that well before our decision in *Penry I*, our cases had firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that

might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." (*Abdul-Kabir v. Quarterman, supra*, 127 S.Ct. at p. 1664.) The Eighth Amendment is violated when the jury is prevented from giving "meaningful effect" or a "reasoned moral response" to mitigating evidence offered by the defendant. (*Id.,* at p. 1675.) The jury in *Abdul-Kabir v. Quarterman* recommended imposition of the death penalty based on answering two questions which failed to require the jury to consider all the mitigating evidence offered by the defendant. The procedure therefore violated the prohibition against imposition of cruel and unusual punishment.

The error in this case was similar to the errors in *Lockett v. Ohio* and *Abdul-Kabir v. Quarterman.* The jury in the instant case was confused about how it should weigh the mitigating evidence and whether a single factor in mitigation was sufficient to sentence appellant to life in prison. The sentencer in *Lockett v. Ohio* was not allowed by statute to give adequate weight to relevant mitigating facts. There is no meaningful difference between appellant's jury failing to understand that a single mitigating factor was sufficient to impose a life sentence and the sentencer in *Lockett v. Ohio* failing to consider relevant mitigating facts. (See *Abdul-Kabir v. Quarterman* (2007) 50 U.S. 233, 127 S.Ct. 1654, 1675, 167 L.Ed.2d 585 [the rule from *Lockett v. Ohio* is violated whether the sentencer is precluded from giving meaningful effect to mitigating evidence by a statute or judicial interpretation of a statute].) In each case, the jury's proper weighing of the aggravating and mitigation

factors was distorted.

In the instant case, the law provides the jury may impose a life sentence based on a single mitigating factor. Appellant's jury failed to understand this concept was demonstrated by its question. The jury's failure to understand a single mitigating factor was sufficient to impose a life sentence prevented it from rendering a "reasoned moral response" to the question of whether appellant should be sentenced to death. *Abdul-Kabir v. Quarterman* concluded the jury was prevented from giving adequate consideration to the defendant's mitigating evidence because the jury answered two narrow questions which failed to require it to consider all the mitigating evidence offered by the defendant. The jury in appellant's case could not have given adequate consideration to appellant's mitigating evidence if it failed to understanding a single mitigating factor was sufficient to impose a life sentence.

**2. The Trial Court Violated Appellant's Right to a Jury Determination of the Relevant Facts under the Federal and State Constitutions.**

The trial court also violated appellant's right to a jury trial under the Sixth and Fourteenth Amendments, and Article I, Section 16, of the California Constitution.[12] *Ring v.*

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[12] Penal Code section 1042 provides that "[i]ssues of fact shall be tried in the manner provided in Article I, Section 16 of the Constitution of this State." Article I, Section 16 of the California Constitution provides in part, "trial by jury is an inviolate right and shall be secured to all . . . ."

. . .

In criminal actions in which a felony is charged, the jury shall consist of 12 persons. In criminal actions in which a misdemeanor is charged, the jury shall consist of 12 persons or a lesser number agreed on by the parties.

*Arizona* requires the jury to determine the aggravating and mitigating factors necessary to determine if appellant should be sentenced to death. The Court rejected Arizona's argument the judge could determine the aggravating and mitigating factors because, "[t]he notion `that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence'." (*Ring v. Arizona, supra*, 536 U.S. at p. 606, quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 539, 120 S.Ct. 2348, 147 L.Ed.2d 435 [J. O'Conner dissenting].) Hence, "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold the Sixth Amendment applies to both." (*Ring v. Arizona, supra*, 536 U.S. at p. 609.)

Appellant's Sixth Amendment right to a jury determination of the aggravating and mitigating factors was impaired because the trial court refused to clarify that a single mitigating factor was sufficient to impose a life sentence. The jury had to understand a single mitigating factor was sufficient to impose a life sentence in order to properly find the aggravating and mitigating facts as required by the Sixth Amendment, and balance those factors to make the subjective determination of whether death was appropriate. The trial court's failure to give the defense requested instruction regarding a single mitigating factor

therefore violated appellant's right's under the Sixth Amendment, and Article I, section 16 of the California Constitution, to a jury determination of the facts.

**E. PREJUDICE**

The trial court's failure to give the defense requested instruction regarding a single mitigating factor must result in reversal of the judgment unless the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.)

The trial court's failure to give the instruction was not harmless beyond a reasonable doubt. Appellant explained above why CALJIC Number 8.88 was not an adequate substitute for the defense requested instruction. Appellant incorporates that argument in this prejudice discussion as if fully set forth therein. Appellant presented substantial mitigating evidence. In the interest of brevity, appellant incorporates the discussion of prejudice from Issue XXI in this portion of the Opening Brief. The mitigating evidence presented by appellant included: (1) a difficult childhood punctuated by witnessing violence against his mother and an unstable home life; (2) the lack of a prior criminal record; (3) his success in ending his abuse of alcohol and drugs; (4) his maintenance of stable employment; and (5) his loving relationship with his child, Nicole. The jury struggled with the decision to sentence appellant to death. It was hopelessly deadlocked. The deadlock was broken only through coercive measures adopted by the trial court. The jury's question about a single mitigating factor implied the jury believed there were mitigating factors. The jury did not understand: (1) a

single factor in mitigation was sufficient to impose a life sentence; and (2) how to balance the aggravating and mitigating factors and make the normative determination that death was the appropriate sentence. This Court cannot conclude beyond a reasonable doubt the jury would have imposed a death sentence had it understood a single mitigating factor was sufficient to impose a life sentence. The judgment of death must therefore be reversed.

## XXIII

**THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT, IN VIOLATION OF APPELLANT'S RIGHT TO STATE AND FEDERAL DUE PROCESS OF LAW AND A FAIR TRIAL AND STATE AND FEDERAL RIGHT TO A JURY TRIAL: (1) ERRONEOUSLY DENIED A DEFENSE MOTION FOR A MISTRIAL BASED UPON JUROR MISCONDUCT AT BOTH THE GUILT AND PENALTY PHASES OF THE TRIAL; AND (2) ERRONEOUSLY FAILED TO REMOVE A JUROR WHO ENGAGED IN SERIOUS MISCONDUCT; ALTERNATIVELY, THE JUDGMENT OF DEATH MUST BE REVERSED FOR THE SAME REASONS.**

### A. SUMMARY OF ARGUMENT

During the penalty phase, the trial court learned a juror was reading a book about stalking. The book contained several personal quotes from the prosecutor. The defense counsel made a motion to remove the juror from the jury panel. The trial court denied the motion. The defense counsel then moved for a mistrial which was denied.

The trial court erred by refusing to remove the juror in question from the jury. It also erred by denying the defense motion for a mistrial. A criminal defendant has the right to trial by impartial jurors under the due process clause and the Sixth and Fourteenth Amendments right to a jury trial. The corresponding provisions of the California Constitution also guarantee a criminal defendant the right to trial by impartial jurors. Because the trial court erred by failing to remove the juror in question and denying the defense motion for a mistrial, the judgment of guilt must be reversed. Alternatively, the judgment of death must be reversed.

## B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

Following the close of the penalty phase evidence, the prosecutor stated, "as the jurors were walking out, I noted that one of them, juror No. 5, I think it is, was carrying a book with her that is a book -----a nonfiction book with regard—it deals with the subject of stalking that I am quoted in several places." (26 RT p. 2918.) The prosecutor stated the title of the book was "The Gift of Fear." (26 RT p. 2918.) The trial court stated it would deal with the issue when the jury returned on Tuesday. (*Ibid.*)

The trial court addressed the issue during the morning session of June 19, 2001. (27 RT pp. 2944, 2953.) Juror Number Five stated she had been reading "The Gift of Fear." She said it was about protection and listening to intuition. (27 RT pp. 2953, 2955.) The book discussed stalking. (27 RT p. 2955.) Juror Number Five started reading the book the prior week. (27 RT p. 2955.) She stopped reading the book when the prosecutor's name appeared. She read to page 17. (27 RT pp. 2954, 2956.) Her chiropractor gave her the book on June 8. (27 RT pp. 2954, 2957.) She started reading the book during the evening and then brought it to court. (27 RT p. 2956.) Juror Number Five could not recall if she had read the book prior to the end of the guilt phase. (27 RT p. 2960.) She believed the last day she had read the book in court was the previous Thursday. (27 RT p. 2961.) Juror Number Five did not get very far in the book and it had not affected her impartiality. (27 RT p. 2954.) She stated, "I didn't learn anything new from reading that. It was things that I already knew. So that's why it hasn't affected how I feel about anything yet." (27 RT pp. 2957-2958.) When Juror

Number Five's chiropractor gave her the book to read, "she had said that all women should read that book. She knows that I live by myself, so she thought I should read it. That's basically it." (27 RT p. 2958.)

Following the questioning of Juror Number Five, the defense attorney made a motion for a mistrial for the guilt and penalty phases of the trial. Alternatively, he requested the juror to be removed from the jury. (27 RT p. 2962.) The trial court denied the motions:

> The Court: Well, based upon her responses, it wasn't as though she went out looking for this book. It was given to her by a professional friend, an associate. She read the book briefly. Once she came to the point where Mr. Gordon was quoted, she stopped reading it.
>
> She indicates it would have no effect and has had no effect on her ability to be fair, objective, and impartial as a juror. So I find that there is nothing in all of these disclosures that should disqualify her from being a juror or which should be the basis upon which any motion for a mistrial should be granted.

(27 RT pp. 2962-2963.)

**C. STANDARD OF REVIEW**

Whether prejudice arose from juror misconduct is a mixed question of law and fact subject to an appellate court's independent determination. (*People v. Nesler* (1997) 16 Cal.4th 561, 582.)

**D. THE TRIAL COURT ERRED BY DENYING THE DEFENSE MOTIONS FOR A MISTRIAL AND REFUSING TO REMOVE JUROR NUMBER FIVE FROM THE JURY**

A defendant in a criminal case has a right under both the federal and state constitution

to have the charges against him determined by a fair and impartial jury. (U.S. Const., 5th, 6th and 14th Amends.; Cal. Const., art. I, § 16; *People v. Nesler* (1997) 16 Cal.4th 561, 578.) "Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation] it is settled that a conviction cannot stand if even a single juror has been improperly influenced." (*People v. Nesler, supra,* 16 Cal.4th at p. 578.) Both the Sixth Amendment and the due process clause guarantee a criminal defendant the right to trial by a fair jury. (*Irvin v. Dowd* (1961) 366 U.S. 717, 721, 81 S.Ct. 1639, 6 L.Ed.2d 751; *Ristaino v. Ross* (1976) 424 U.S. 589, 595, fn. 6, 96 S.Ct. 1017, 47 L.Ed.2d 258.)

A defendant's constitutional right to a fair and impartial jury also is protected by statute. Penal Code section 1089 requires removal of a juror who for "good cause shown to the court is found to be unable to perform his or her duty . . .." Penal Code section 1089 requires a hearing is required whenever a court is put on notice that juror misconduct may have occurred. (*People v. Burgener* (1986) 41 Cal.3d 505, 520, *People v. Chavez, supra,* 231 Cal.App.3d 1471, 1485.) Penal Code section 1120 requires a juror who had any personal knowledge "respecting a fact in controversy in a cause" to inform the trial court.

The behavior of Juror Number Five demonstrated she was not impartial. She had already listened to most of the guilt phase evidence when she started reading, "The Gift of Fear." (27 RT pp. 2955-2956.) She knew by the time she started reading the book that stalking was a key issue in this case. An impartial juror would not have started reading the book. The trial court gave the jury the standard admonition when the trial commenced not

to read anything about it or to conduct independent investigation. The jury was told, "You must not independently investigate the facts or the law or consider or discuss facts as to which there is no evidence. This means, for example, that you must not on your own visit the scene, conduct experiments, or consult reference works or other individuals for additional information." (13 RT p. 1435.) Reading a book about stalking constituted a clear violation of the foregoing admonition. The bias of Juror Number Five was demonstrated by her conduct after she realized the prosecutor had been quoted in the book. She claimed she stopped reading the book, but she failed to notify the trial court she had read a book about stalking which quoted the prosecutor.

"Impartiality is not a technical concept. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." (*United States v. Wood* (1936) 299 U.S. 123, 145-146, 57 S.Ct. 177, 81 L.Ed. 78.) The jury is not required to be totally ignorant of the facts and issues, but "it is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." (*Irvin v. Dowd, supra*, 366 U.S. at pp. 722-723.)

A verdict should be reversed if a juror's partiality constituted grounds for a challenge for cause during jury selection. (*People v. Nesler, supra*, 16 Cal.4th at p. 581.) A juror's concealment of actual bias is also grounds to reverse a conviction. (*Ibid.*) "Actual bias" is "the existence of a state of mind on the part of the juror in reference to the case, or to any of

the parties, which will prevent the juror from acting with entire impartiality and without prejudice to the substantial rights of any party." (*Ibid*, quoting Code Civ. Proc., §225, subd. (b)(1)(C).) A sitting juror's actual bias that would have supported a challenge for cause renders the juror incapable of performing his or her duties and thus subject to discharge. (*Ibid.*)

Juror Number Five would have been subject to a successful challenge for cause during jury selection if it had been known she was reading a book about stalking that quoted the prosecutor. A prospective juror who was reading a book about stalking would not have been suitable to decide a case which involved stalking. Such a prospective juror would be predisposed to have a negative view of the defendant and also to rely on information gleaned from the book rather than the courtroom.

*People v. Nesler* outlined the analytical framework to determine whether a conviction should be reversed based on juror misconduct. A presumption of prejudice may be established by the receipt of information about a party or the case that was not part of the evidence received at trial. (*People v. Nesler, supra,* 16 Cal.4th at p. 578.) This presumption can be rebutted by a reviewing court's determination upon examining the entire record that there was no substantial likelihood the complaining party suffered actual harm. (*In re Carpenter* (1995) 9 Cal.4th 634, 653.)

When juror misconduct involves the receipt of information from extraneous sources, the verdict will be set aside only if there appears a substantial likelihood of juror bias. (*In*

*re Carpenter* (1995) 9 Cal.4th 634, 653.) Such bias may appear in either of two ways: (1) if the extraneous material, judged objectively, is inherently and substantially likely to have influenced a juror; or (2) even if the information is not inherently prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was "actually biased" against the defendant. (*Id.* at pp. 653-654.) The receipt of information about a party or the case that was not part of the evidence received at trial leads to a presumption the defendant was prejudiced because it poses the risk one or more of the jurors may be influenced by information the defendant did not have the opportunity to confront, cross-examine, or rebut. (*People v. Nesler, supra,* 16 Cal.4th at p. 578.)

Under the first test, "a finding of 'inherently' likely bias is required only when the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment." (*In re Carpenter, supra,* 9 Cal.4th at p. 653.) Application of this "inherent prejudice" test requires review of the trial record to determine the prejudicial effect of the extraneous information. (*Ibid.*)

The admission into evidence of a book about stalking that included quotes from the prosecutor in the specific case being tried constitutes grounds for reversal of the judgment. The fact the prosecutor had been quoted in a book about stalking suggested a special expertise and knowledge concerning it. Juror Number Five was far more likely to view the prosecutor's arguments as authoritative because he had been quoted in a book about stalking.

The prosecutor strenuously argued appellant was guilty of stalking and terrorizing the victim and hence deserved death. He argued, "you heard that she lived in fear. You heard that she dealt with fear, that fear was part of her life as a circumstance and a result of this crime. And, in fact, you heard that before she died, she told Kim Hyer to take care of her little boy in case something would happen to her, to take care of Tyler, that she's afraid something is going to happen to her, and it did." (27 RT p. 2970.)

Juror Number Five no doubt gave extra weight to the prosecutor's arguments because he had been quoted in a book about stalking. Juror Number Five did not know exactly when she started reading the book. She believed she received it on June 8. (27 RT p. 2957.) She started reading the book the week prior to June 19. (27 RT pp. 2955, 2957.) The jury rendered its guilt phase verdict on June 11, 2001. (24 RT pp. 2704-2707.)[1] Because Juror Number Five had possession of the book prior to guilt phase verdicts being returned, it is a reasonable inference she read it prior to the return of the those verdicts. Hence, the guilty verdicts must be reversed.

Reversal of the guilty verdicts is required, furthermore, even if Juror Number Five did not read any of the book prior to the guilt phase verdict being reached. Her conduct in reading the book when she knew it directly related to a key issue in the case, and failure to inform the trial court she had read it, demonstrated she was a biased and dishonest juror who

[1] June 8, 2001 was a Friday. June 11 was a Monday. June 19 was a Tuesday.

refused to follow the trial court's instructions.[2]

Even if this Court concludes reversal of the guilty verdicts is not required, the judgment of death must be reversed. Juror Number Five should have been removed as a juror. She should not have been allowed to sit as a juror for the penalty phase. Her conduct demonstrated clear bias against appellant. She violated the trial court's order about not consulting reference material outside the courtroom and then failed to inform the trial court of her misconduct.

The second test for bias under *People v. Nesler* is whether the nature of the misconduct, and the surrounding circumstances, demonstrates a substantial likelihood that a juror was "actually biased" against the defendant. (*People v. Nesler, supra*, 16 Cal.4th at p. 578.) If the reviewing court concludes there was a substantial likelihood a juror was actually biased, the verdict must be set aside, regardless of whether the court believes an unbiased jury would have reached the same verdict. A biased adjudicator is one of the few structural trial defects compelling reversal without application of a harmless error standard. (*Id.* at p. 579)

Juror Number Five was actually biased against appellant. Despite her oath to decide the case based solely on the evidence presented at trial, she started reading a book about

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[2] Prior to the commencement of trial in California, jurors take an oath to render a true verdict, "according only to the evidence presented . . . and to the instructions of the court." (Code of Civ. Proc. § 232, subd. (b).) Jurors who violate this oath commit misconduct. (*People v. Chavez* (1991) 231 Cal.App.3d 1471, 1484.)

stalking. She hid her dereliction by failing to inform the trial court of it. Juror Number Five knew she had engaged in misconduct because she stopped reading the book when she read the quotes from the prosecutor. Juror Number Five commented, " I didn't learn anything new from reading that. It was things that I already knew. So that's why it hasn't affected how I feel about anything yet." (27 RT pp. 2957-2958.) These comments demonstrate Juror Number Five was harboring a hidden bias against individuals who as appellant, had been accused of crime such as those in this case. Juror Number Five received the book from a trusted friend who advised her that all woman should read the book. This was obviously a pro-prosecution point of view. Juror Number Five, furthermore, did not stop reading the book when she discovered it was about stalking—a central topic in the instant case. She only stopped reading the book when the prosecutor's name was mentioned. Reversal of the guilty verdicts and the death sentence is required under the second prong of the test for juror misconduct in *People v. Nesler*.

Federal cases also establish that reversal is required of the guilt and penalty phase verdicts. A criminal defendant in state court has a right to an impartial jury under the due process clause and the Sixth Amendment. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 148, 88 S.Ct. 1444, 20 L.Ed.2d 491; *Irvin v. Dowd*, *supra*, 366 U.S. at p. 722.) "[T]he right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." (*Turner v. Louisana* (1965) 379 U.S. 466, 472, 85 S.Ct. 546, 549, 13

L.Ed.2d 424.)

Jurors have a duty to consider only evidence presented to them in open court. (*Turner v. Louisana* (1965) 379 U.S. 466, 472, 85 S.Ct. 546, 549, 13 L.Ed.2d 424.) Once a juror has breached this duty by injecting extrinsic material into the deliberations, a new trial is warranted if there is a reasonable probability that it could have affected the verdict. (*Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171.) Not every instance of juror misconduct or bias requires a new trial. "The ultimate question is whether it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict." (*Bayramoglu v. Estelle* (9th Cir. 1986) 806 F.2d 880, 887, internal quotations omitted.)

In *Turner v. Louisiana*, the defendant was convicted of murder and sentenced to death. During the course of trial, and throughout the deliberations, two sheriffs deputies who were principal witnesses for the prosecution, shared the responsibility of sequestering the jury with other sheriff's deputies in the jurisdiction. The deputies ate with the jurors, conversed with them and ran errands for them. The Supreme Court overturned the defendant's conviction because the interaction between the jury and the two sheriff's deputies had the potential to affect the jury in such a way as to make the courtroom proceedings "little more than a hollow formality." (*Turner v. Louisiana, supra*, 379 U.S. at p. 473.) The court stated, "In a constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public

courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." (Id., at p. 472-473.)

Similar to *Turner v. Louisiana*, Juror Number Five allowed extraneous information to become part of the deliberation process. This Court cannot conclude beyond a reasonable doubt Juror Number Five's reading of the book did not influence her guilt or penalty phase verdicts. Appellant's right to an unbiased and impartial jury under both state and federal law was violated.

The judgment must be reversed.

## XXIV

**THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND CALIFORNIA CONSTITUTIONS, ADMITTED AGGRAVATING EVIDENCE PURSUANT TO PENAL CODE SECTION 190.3, SUBDIVISION (B) WITHOUT: (1) SUA SPONTE DEFINING THE ELEMENTS OF THE CRIMES APPELLANT ALLEGEDLY COMMITTED; AND (2) REQUIRING THE PROSECUTOR TO INFORM THE JURY WHAT CRIMES APPELLANT HAD COMMITTED**

### A. SUMMARY OF ARGUMENT

During the penalty phase, the trial court admitted several acts of violence appellant allegedly committed against his former spouse. This evidence was offered by the prosecution. The evidence was offered pursuant to Penal Code section 190.3, subdivision (b), which allows the prosecution to admit as aggravating evidence criminal activity by the defendant that involves violence, the threat of violence, or the implied threat to use violence. The trial court had a sua sponte duty to inform the jury what crimes appellant committed when it admitted aggravating evidence under section 190.3, subdivision (b), and a sua sponte duty to define the elements of those crimes. [3] The trial court failed to state what crimes appellant

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[3] This Court has held that the trial court does not have a duty to define the elements of the crimes offered as aggravating evidence under section 190.3, subdivision (b). (*People v. Cook*, *supra*, 39 Cal.4th at p. 611.) This Court has also held in *People v. Robertson* (1982) 33 Cal.3d 21, 55, fn. 19, that the prosecutor should request an instruction enumerating the crimes committed by the defendant when it offers aggravating evidence pursuant to section 190.3, subdivision (b). Appellant argues herein that this

had committed and failed to inform the jurors of the elements of those crime. The sentence must be reversed because these errors were prejudicial.

Section 190.3, subdivision (b), refers to acts of violence that constitute a violation of the Penal Code. (*People v. Pollock* (2005) 32 Cal.4th 1153, 1178.) This Court has held, however, that the trial court does not have a duty to define the elements of the crimes offered as aggravating evidence under section 190.3, subdivision (b), because the defense counsel may have a tactical reason to forego requesting such instructions. (*People v. Cook* (2006) 39 Cal.4th 566, 611.) The trial court in this case did not define the elements of the criminal acts allegedly committed by appellant that constituted aggravating evidence under section 190.3. A valid death penalty scheme requires the eligibility of defendants for the death penalty be narrowed and channeled to avoid arbitrary and capricious results. The trial court's failure to define the elements of the crimes appellant allegedly committed that constituted aggravating evidence under section 190.3, subdivision (b), resulted in appellant's suitability for the death penalty being determined in an arbitrary and capricious manner in violation of appellant's right to due process of law and the prohibition against cruel and unusual punishment in the federal and state constitutions. The judgment of death must therefore be reversed.

**B. SUMMARY OF PROCEEDING IN THE TRIAL COURT**

Prior to the commencement of the penalty phase evidence, the prosecutor made an

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Court should reconsider the rule that the trial court does not have a sua sponte duty instruct the jury on the elements of crime offered as aggravating evidence under section 190.3, subdivision (b), and impose such a duty. .

offer of proof regarding the evidence he intended to admit. The prosecutor was offering acts of violence committed by appellant against his former spouse pursuant to Penal Code section 190.3, subdivision (b). (25 RT pp. 2716, 2722-2724.) .) The defense counsel objected to the admission of the evidence because the acts did not involve violence or force or the threat of the use of force or violence. (25 RT pp. 2717-2718, 2720, 2725.) The trial court overruled the defense objections with the exception of sustaining an objection to one incident.

Mary Christian gave the following testimony before the jury. She married appellant in November 1986. They had two children, Spencer and Lindsey. Spencer was 14 years old at the time of trial. Lindsey was 12 years of age. (25 RT p. 2782.) When Ms. Christian was pregnant with Spencer, appellant entered a bathroom and grabbed her hair on the back of her head. Appellant attempted to push Ms. Christian's face into a tub of hot water. Ms. Christian got up and walked out of the bathroom. (25 RT p. 2783.)

Sometime in 1989, Ms. Christian came home and found a number of people using drugs in the house. Lindsey was about three to four months old at the time. Ms. Christian asked them where appellant was. They said he had left for a couple of hours. The next day, Ms. Christian argued with appellant about the incident. (25 RT p. 2784.) The fireplace was lit. Appellant attempted to push Ms. Christian into the fireplace. Ms. Christian kicked appellant and he ran away. (25 RT p. 2785.)

Ms. Christian and appellant commenced divorce proceedings. She obtained a restraining order against him. Appellant told Ms. Christian she should frame the restraining

order so she could remember what she put him through. (25 RT pp. 2785-2786.) Ms. Christian told appellant to "stick it up his ass," because it was not her fault she had to obtain a restraining order. They got into a fight. Appellant grabbed Lindsey and the keys and said he was taking the children. (25 RT p. 2786.) She said he was not leaving and tried to call 911. Appellant ripped the telephone out of the wall. Ms. Christian fled from the house. Appellant put the children down and pursued her. (25 RT p. 2787.)

Ms. Christian ran to a neighbor's residence and called 911. Appellant followed Ms. Christian, put her in a headlock, and dragged her back to their house. The police arrived and appellant fled to the back of the house. (25 RT p. 2787.)

Ms. Christian also testified that when she was eight months pregnant, appellant pointed a 12-gauge shotgun at her stomach and laughed. He asked her, "Do you want to die?" Ms. Christian said, "Pull the fucking trigger. I'm tired of talking about it." (25 RT p. 2788.) Other incidents occurred where appellant punched Ms. Christian in the head or grabbed the hair on the back of her head and pulled. On another occasion, appellant struck appellant in the arm very hard. Ms. Christian left appellant because of the violence. They separated at the end of 1989 or the beginning of 1990. (25 RT p. 2789.)

The trial court and the attorneys discussed penalty phase jury instructions during the morning sessions on June 18, and 19, 2001. (26 RT pp. 2920-2942; 27 RT pp. 2944-2951.) The trial court, at the suggestion of the prosecutor, did not insert the specific crimes appellant allegedly committed in the blank line which appears in CALJIC Number 8.87 and which was

intended for that purpose. (26 RT pp. 2927-2928; See Use Note to CALJIC No. 8.87.) The trial court and the attorneys did not discuss whether jury instructions defining the elements of the crimes committed by appellant, and offered as aggravating evidence under section 190.3, subdivision (b), should be given. The trial court instructed the jury that in determining the penalty, it could consider, if applicable, "the presence or absence of criminal activity by the defendant other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (27 RT p. 3035.) Neither the specific crimes committed by appellant nor their elements, offered as aggravating evidence under section 190.3, subdivision (b), were included in the jury instructions.

**C. THE TRIAL COURT ERRED BY NOT SUA SPONTE INFORMING THE JURY WHAT CRIMES APPELLANT HAD COMMITTED WHEN IT OFFERED AGGRAVATING EVIDENCE PURSUANT TO SECTION 190.3, SUBDIVISION (B).**

Section 190.3, subdivision (b), which sets forth the factors the jury is required to consider in determining whether to sentence a defendant to death, allows the jury to consider, "The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." Section 190.3 refers to conduct which violates a penal statute. (*People v. Pollock* (2005) 32 Cal.4th 1153, 1178; *People v. Kipp* (2001) 26 Cal.4th 1100, 1133; *People v. Boyd* (1985) 38 Cal.3d 762, 772.)

In *People v. Robertson* (1982) 33 Cal.3d 21, the prosecution admitted during the guilt

phase statements from the defendant in which he admitted killing two people. These alleged victims were not part of the charges in the case. The jury was instructed during the penalty phase that it could consider in aggravation the guilt phase evidence and the defendant's criminal activity which involved the use or attempted use of force or violence or the express or implied threat to use force or violence. The defendant argued on appeal the trial court erred by failing to sua sponte instruct the jury that it could consider the aforementioned evidence only if it was proven beyond a reasonable doubt. The Court agreed and made the following observation:

> In order to avoid potential confusion over which "other crimes" - if any - the prosecution is relying on as aggravating circumstances in a given case, the prosecution should request an instruction enumerating the particular other crimes which the jury may consider as aggravating circumstances in determining penalty. The reasonable doubt instruction required by the *Polk-Stanworth* line of cases can then be directly addressed to these designated other crimes, and the jury should be instructed not to consider any additional other crimes in fixing the penalty. Without such a limiting instruction, there is no assurance that the jury will confine its consideration of other crimes to the crimes that the prosecution had in mind, because - as already noted - the jury is instructed at the penalty phase that in arriving at its penalty determination it may generally consider evidence admitted at all phases of the trial proceedings. (See former §§ 190.4, subd. (d).)

(*People v. Roberson,* supra, 33 Cal.3d at p. 55, fn. 19.)

The prosecution presented evidence that appellant: (1) pushed Ms. Christian's head towards a tub of hot water; (2) pushed Ms. Christian towards a lit fireplace; (3) ripped the telephone out of the wall during a domestic dispute with Ms. Christian and then followed her

to neighbor's house and put her in a headlock; and (4) pointed a shotgun at Ms. Christian's stomach when she was pregnant and asked her if she wanted to die. The prosecutor did not request, and the trial court did not give, an instruction to the jury identifying the crimes appellant committed for the aggravating evidence offered pursuant to section 190.3, subdivision (b). The jury was given CALJIC Number 8.85, the standard instruction for factors in aggravation and mitigation. (27 RT pp. 3034-3035; 16 CT p. 3918.) This instruction did not specify the crimes or their elements.

The trial court also gave CALJIC Number 8.87. (27 RT p. 3037; 16 CT p. 3920.) CALJIC Number 8.87, as it appears in CALJIC, requires the insertion of the crime committed by the defendant in the first sentence of the instruction. A blank is left in the standard form instruction in the CALJIC book for this purpose. The trial court, at the suggestion of the prosecutor, decided to not insert the specific crimes in that blank. (26 RT pp. 2927-2928.)[4] The first sentence of CALJIC 8.87 given to the jury by the trial court thus stated, "Evidence has been introduced for the purpose of showing that the defendant has committed criminal acts of activity which involved the express or implied use of force or violence or the threat of force or violence. (26 RT p. 3037; 16 CT p. 3920.) The prosecutor

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[4] The defense counsel objected to the giving of CALJIC Number 8.87 in its entirety. Alternatively, he requested the trial court to omit the first sentence of CALJIC Number 8.87 and start the instruction with the second sentence. (26 RT pp. 2927-2928.) The second sentence of CALJIC Number 8.87 states, "Before a juror may consider any criminal [act[s]] [activity] as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant [ ] did in fact commit the criminal [act[s] [activity]. The trial court rejected that suggestion. (26 RT p. 2928.)

during his closing and rebuttal arguments failed to identify for the jury the crimes appellant committed. (27 RT pp. 2965-2979.) As explained below, the trial court's failure to identify for the jury the crimes appellant committed violated his rights under the federal and state constitution and was prejudicial. The judgment of death must therefore be reversed.

**D. THE TRIAL COURT ERRED BY NOT SUA SPONTE SETTING FORTH THE CRIMES, AND THEIR ELEMENTS, COMMITTED BY APPELLANT AND OFFERED AS AGGRAVATING EVIDENCE UNDER SECTION 190.3, SUBDIVISION (B).**

The trial court has a duty to request the prosecutor to specify the jury instructions which should be given for acts offered as aggravating evidence pursuant to section 190.3, subdivision (b). (*People v. Robertson, supra*, 33 Cal.3d at p. 55, fn. 19.) However, this Court has held that the trial court has no duty under to define the elements of unadjudicated crimes admitted as aggravation evidence under section 190.3, subdivision (b). (*People v. Cook* (2006) 39 Cal.4th 566, 611; *People v. Carter* (2003) 30 Cal.4th 1166, 1227; *People v. Lewis* (2001) 25 Cal.4th 610, 668.) The basis for this rule is that "[A] criminal defendant may have tactical reasons to forgo lengthy instructions on the elements of other crimes. We fail to see how forcing a capital defendant to forgo this tactical option vindicates his federal constitutional rights." (*People v. Hardy* (1992) 2 Cal.4th 86, 207.) A defendant is entitled, upon request, to instructions on the elements of crimes offered as aggravating evidence under section 190.3, subdivision (b). (Ibid)

This Court should reverse its holding that the trial court does not have to define the elements of crimes admitted as aggravating evidence under section 190.3, subdivision (b).

Absent such instructions, the jury is left to engage in impermissible speculation about what crimes the defendant committed and whether those crimes support imposing the death penalty. The trial court, furthermore, erred by failing to require the prosecutor to state the specific crimes committed by appellant which constituted aggravating evidence under section 190.3, subdivision (b), and instructing the jury accordingly.

*Lockett v. Ohio* concluded the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio, supra*, 438 .U.S. at p. 604.) "[A]n individualized decision is essential in capital cases." (*Id.*, at p. 605.) "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary capricious action." (*Gregg v. Georgia* (1976) 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 [joint opinion of Steward, Powell, and Stevens, JJ.].) The Eighth Amendment requirement for greater reliability in capital proceedings, and individualized consideration of the defendant, required the trial court in this case to: (1) instruct the jury on what crimes appellant may have violated in connection with the section 190.3, subdivision (b), evidence; and (2) define the elements of those crimes.

Section 190.3, subdivision (b), limits aggravating evidence to acts constituting a violation of the Penal Code. (*People v. Pollock, supra*, 32 Cal.4th at p. 1178.) Hence, the jury should only have considered the above incidents as aggravating evidence if appellant's

conduct violated a Penal Code statute. The jury, however, had no way of determining whether any of the above acts violated a Penal Code statute without instructions on what crimes may have occurred and the elements of those crimes.

The absence of such instructions left the jury to speculate whether appellant committed a misdemeanor, a felony, or no crime at all. The jury may have concluded the incidents from the bathtub and fireplace were felony assaults and given the incidents a great deal of weight in deciding to impose the death penalty. Alternatively, the jury could have concluded incidents were minor assaults and entitled to little weight. The jury may have concluded the shotgun incident was a felony assault, misdemeanor brandishing a firearm, or some other less serious criminal offense. It was simply impossible for the jury to give adequate weight to the section 190.3, subdivision (b), evidence without knowing the Penal Code sections that were violated. The classification of conduct as a felony or misdemeanor reflects society's assessment of the seriousness of the conduct and degree of moral condemnation associated with it. (See *People v. Johnson* (2006) 145 Cal.App.4th 895, 904.)

The Eighth Amendment requires the state to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death." (*Lewis v. Jeffers* (1990) 497 U.S. 764, 774, 110 S.Ct. 3092, 111 L.Ed.2d 606.) The trial court's failure to set forth the crimes allegedly committed by appellant which was aggravating evidence under section 190.3, subdivision (b), resulted in appellant's jury not having "clear and objective standards" or

"specific and detailed guidance" about the gravity of that conduct and whether it weighed in favor of imposing the death penalty.

*Buchanan v. Angelone* (1998) 522 U.S. 269, 118 S.Ct. 757, 139 L.Ed.2d 702, does not warrant finding the instructions in this case adequate. In *Buchanan v. Angelone*, the jury heard aggravating and mitigating evidence. The Virginia Code listed a number of factors in mitigation. The defense counsel requested jury instructions on the factors in mitigation. The trial court refused the request because Virginia law did not allow jury instructions singling out specific mitigating factors to the sentencing jury. The jury was told it had to find the aggravating facts beyond a reasonable doubt. It was also told it could fix the punishment at life if it believed from all the evidence the death penalty was not justified.

The defendant argued on appeal the Eighth Amendment had been violated when the trial court refused to give jury instructions on the concept of mitigation and to instruct the jury on particular statutorily-defined mitigating factors. The Court stated the defendant had confused the eligibility and selection phases of a death penalty trial. The eligibility phase required the jury's discretion be channeled and limited to avoid arbitrary and capricious imposition of the death penalty. During the selection phase, a broad inquiry was necessary to insure all relevant mitigating evidence was offered to allow individualized determination. (*Buchanan v. Angelone, supra*, 522 U.S. at pp. 275-276.) The Court's "consistent concern has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence." (*Id.*, at p. 276.) However, the Supreme

Court has "never gone further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence." (*Ibid.*) The Court approved the instructions because they "did not foreclose the jury's consideration of any mitigating evidence. By directing the jury to base its decision on `all the evidence,' the instruction afforded jurors an opportunity to consider mitigating evidence." (*Buchanan v. Angelone, supra*, 522 U.S. at p. 277.)

*Buchanan v. Angelone* is distinguishable from the issue raised by appellant. The issue was whether the jury instructions precluded the jury from giving adequate consideration to mitigating evidence. The instructions were adequate because the jury was told it had to find the aggravating facts beyond a reasonable doubt and could impose a life sentence if they believed the evidence justified the lesser penalty.

The infirmity in the instructions discussed in this assignment of error does not deal with the jury's consideration of mitigating evidence. It deals with aggravating evidence. Appellant is not arguing the jury instructions precluded the jury from giving effect to mitigating evidence. Appellant is arguing: (1) the jury instructions told the jury specific forms of conduct, i.e., acts involving violence or the threat of violence, constituted aggravating evidence; (2) this Court has interpreted section 190.3, subdivision (b), to refer to violations of the Penal Code; and (3) the lack of jury instructions about what Penal Code sections appellant may have violated forced the jury to speculate about the weight to be given the aggravating evidence. The fact that aggravating evidence under section 190.3, subdivision

(b), refers only to violations of the Penal Code distinguishes this case from *Buchanan v. Angelone*. In *Buchanan v. Angelone*, the jury was able to use its common sense and the plain wording of the jury instructions to give effect to the mitigation evidence offered by the defendant. Any juror could understand a troubled childhood was mitigating evidence. None of the jurors could have known what specific Penal Code statutes appellant violated based on the aggravating evidence offered by the prosecution pursuant to section 190.3, subdivision (b).

The Eighth Amendment requires aggravating circumstances to not be unconstitutionally vague. (*Lewis v. Jeffers, supra*, 497 U.S. at p. 775.) In *Godfrey v. Georgia* (1980) 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398, the Georgia Code allowed imposition of the death penalty if the jury found beyond a reasonable doubt the offense, "was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." The Court had previously concluded in *Gregg v. Georgia* (1976) 428 U.S. 153, 201, 96 S.Ct. 2909, 49 L.Ed.2d 859, that this standard was not unconstitutionally vague based on the assumption the Georgia Supreme Court would give it a narrow construction. The jury instructions in *Godfrey v. Georgia* repeated the statutory language above as the standard for imposition of the death penalty. The Supreme Court concluded, "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as `outrageously and wantonly vile, horrible, and inhuman.'" (*Godfrey v. Georgia, supra*, 446 U.S. at pp. 428-429.) The judgment

of death was reversed because, "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." (*Id.*, at p. 433.)

The trial court's failure to instruct the jury, in connection with the aggravating evidence offered under section 190.3, subdivision (b), what crimes appellant committed and the elements of the offenses, resulted in vagueness similar to that condemned in *Godfrey v. Georgia*. The lack of such instructions resulted in the jury not having any restraint or guidance on the weight to be given the aggravating evidence and whether it should tip the balance towards a death sentence. This Court has recognized the duty of the trial court to give to give correct instructions on the basic principles of the law applicable to the case that are necessary to the jury's understanding of the case. (*People v. Avila* (2006) 38 Cal.4th 491, 568.) That duty requires the trial court to instruct on all the elements of the charged offenses and enhancements. (*People v. Birks* (1998) 19 Cal.4th 108, 112.) This sua sponte duty should extend to instructing the jury on the nature of the crimes a defendant committed when specific instances of conduct is offered as aggravating evidence under section 190.3, subdivision (b), and the elements of those offenses. Instructions on the elements of an offense is analogous to instructions on the elements of offenses offered as aggravating evidence. The trial court should have a duty in each case to give proper jury instructions.

**E. PREJUDICE**

The judgment must be reversed unless the trial court's failure to instruct the jury regarding the crimes appellant committed, and the elements of those crimes, offered as

aggravating evidence under section 190.3, subdivision (b), was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.)

The trial court's failure to give the above instructions was not harmless beyond a reasonable doubt. During jury deliberations, the jury foreperson asked for "a deeper explanation of A through K of the – of our jury instructions." (28 RT p. 3091.) The jury foreperson then asked, "Yes, in other words, there's a lot of—do you need just one item — if you find one item in mitigation, is that enough for life in prison, if you find just one, or do you need several for each, or is it a scale? How does that operate." (28 RT pp. 3091-3092.)

The jury was confused about how to balance the aggravating and mitigating factors. Appellant's acts of violence towards his former spouse must have weighed heavily in the jury's deliberation process. It was the only aggravating evidence offered by the prosecution other than the facts and circumstances of the charged offenses. The incidents with the bathtub and the fireplace constituted misdemeanors and at worst attempted felony assaults. The headlock incident was nothing more than misdemeanor assault. The incident with the shotgun was misdemeanor brandishing a firearm because it appears appellant never had any intention of firing the weapon, there was no evidence the weapon was loaded, and Ms. Christian responded in a manner which suggested she did not take the threat seriously.[5]

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[5] The elements of misdemeanor brandishing a firearm are: (1) a person, in the presence of another person drew or exhibited a firearm, whether loaded or unloaded; (2) the person did so in a rude, angry, or threatening manner [or] that person, in any manner, unlawfully used the firearm in a fight or quarrel; and (3) the person was not acting in lawful self-defense. (CALJIC No. 16.290.)

Because jury instructions were not given informing the jury what crimes appellant may have committed and their elements, the jury had no rational method for properly weighing the gravity of those incidents. "[T]he seriousness of an offense could easily be determined in the first instance by the classification of the crime as a felony rather than a misdemeanor." (*People v. Johnson* (2006) 145 Cal.App.4th 895, 904.) Appellant's jury never knew whether appellant's acts of violence towards his former spouse were misdemeanors—which should have been given little or no weight in favor of imposition of the death penalty–or felonies which were entitled to at least some weight.

The jury struggled with the decision to impose the death penalty. Appellant presented substantial mitigating evidence. Appellant witnessed acts of violence against his mother by his stepfather, including a shooting. (26 RT pp. 2856, 2884.) Appellant was a devoted father and helped other individuals who were struggling. (26 RT pp. 2828-2829, 2839.) Appellant was an emotionally vulnerable person who was manipulated by Ms. Kerr. (26 RT p. 2869.) The trial court had to coerce a verdict from the jury. The jury foreperson stated several times the jury was hopelessly deadlocked. The trial court's failure set forth the crimes committed by appellant and their elements, admitted as aggravating evidence under section 190.3, subdivision (b), was not harmless beyond a reasonable doubt. The judgment of death must be reversed.

## XXV

## THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT REFUSED TO GIVE A SERIES OF DEFENSE-REQUESTED INSTRUCTIONS REGARDING HOW THE JURY SHOULD DETERMINE WHETHER TO IMPOSE THE DEATH PENALTY IN VIOLATION OF APPELLANT'S RIGHT TO STATE AND FEDERAL DUE PROCESS OF LAW AND IN VIOLATION OF THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS

### A. SUMMARY OF ARGUMENT

The defense counsel requested the trial court to give a series of penalty phase instructions designed to assist the jury in determining whether to impose the death penalty. The trial court gave several of the instructions with modifications and refused to give other instructions. The instructions requested by the defense counsel were critical for the jury to understand the legal principles controlling its penalty decision. Due process of law and the prohibition against imposition of cruel and unusual punishment in the federal and state constitutions required the trial court to give the instructions requested by the defense counsel. Because the failure to give the requested instructions was not harmless beyond a reasonable doubt, the judgment of guilt must be reversed.

### B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

The trial court and the attorneys discussed penalty phase jury instructions on June 18, 2001. (26 RT p. 2920.) The first special instruction requested by the defense counsel stated as follows:

> Evidence has been introduced in this case that may arouse in you a natural sympathy for the victim or the victim's family.
>
> You must not allow such evidence to divert your attention from your proper role in deciding the appropriate punishment in this case. You may not impose the penalty of death as a result of an irrational, purely emotional response to this evidence.

(26 RT p. 2929.) The above instruction was based on *Payne v. Tennessee* (1991) 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720, and *People v. Edwards* (1991) 54 Cal.3d 787, 836. The prosecutor objected to the second paragraph because he believed it suggested to the jury it could not consider victim impact testimony. (26 RT pp. 2930-2931.) The trial court stated it would not give the instruction as drafted. (26 RT p. 2930.) The trial court suggested deleting the first sentence of the second paragraph. The defense counsel agreed to that modification without waiving his request for the entire instruction. (26 RT p. 2931.)

The next special instruction requested by the defense counsel stated as follows:

> After considering all the aggravating and mitigating factors that are applicable in this case, you may decide to impose the penalty of life in prison without the possibility of parole in exercising mercy on behalf of the defendant. You may decide not to impose the penalty of death by granting the defendant mercy regardless of whether or not you determine he deserves your sympathy.

(26 RT p. 2932.) The prosecutor objected to the latter portion of the instruction because he believed it sounded dictatorial. (26 RT p. 2933.) The trial court stated it was inclined to give the jury only the first sentence of the instruction. (*Ibid.*) The defense counsel agreed to this modification without waiving his request for the entire instruction. (26 RT p. 2934.) The trial

court agreed to do so. (26 RT p. 2934.)

The trial court and the attorneys then discussed the defense requested lingering doubt instruction. (26 RT pp. 2934-2936.) It stated:

> A juror who voted for conviction at the guilt phase may still have a lingering or residual doubt as to whether the defendant truly did not kill Lisa Kerr in the heat of passion. Such a lingering doubt at the guilt phase, may still be considered as a mitigating factor at the penalty phase. Each individual juror may determine whether any lingering or residual doubt is a mitigating factor and may assign it whatever weight the juror feels is appropriate.

(See Appellant's Motion to Augment the Record.) The prosecutor objected to the instruction. The trial court agreed to give the instruction in modified form. (26 RT pp. 2935-2936.)

The next instruction requested by the defense counsel was as follows:

> Although you were instructed during the guilt phase of this trial that you must set aside any sympathy or pity for the–for a defendant in determining his guilt or innocence, this rule does not apply to the penalty phase of the trial.
>
> You many consider sympathy or pity for a defendant if you feel it appropriate to do so in determining to impose a penalty of life in prison without the possibility of parole.
>
> If any of the evidence arouses sympathy or compassion in you to such an extent as to persuade you that death is not the appropriate punishment, you may react in response to those feelings of sympathy and compassion and impose life in prison without the possibility of parole.

(26 RT p. 2937.) The defense counsel objected to the second sentence. (26 RT p. 2938.) The trial court agreed to give the instruction without the last paragraph. (26 RT p. 2939.)

Based on the foregoing discussions, the trial court gave the following penalty phase special instructions:

> Evidence has been introduced in this case that may arouse in you a natural sympathy for the victim or the victim's family.
>
> You may not impose the penalty of death as a result of an irrational purely emotional response to this evidence.

(27 RT p. 3038; 16 CT p. 3921.) The next instruction stated:

> After considering all the aggravating and mitigating factors that are applicable in this case, you may decide to impose the penalty of life in prison without possibility of parole in exercising mercy on behalf of the defendant.

(27 RT p. 3038; 16 CT p. 3922.) The next instruction stated:

> It is appropriate for you to consider in mitigation any lingering doubt you 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.

(27 RT pp. 3038-3039 ; 16 CT p. 3923.) The next instruction stated as follows:

> Although you were instructed during the guilt phase of this trial that you must set aside any sympathy or pity for the defendant in determining his guilt or innocence, this rule does not apply to the penalty phase of the trial. You may consider sympathy or pity for the defendant if you feel it is appropriate to do so in determining to impose the penalty of life in prison without the possibility of parole, rather than the penalty of death.

(27 RT p. 3039; 16 CT p. 3924.)

**C. THE TRIAL COURT ERRED BY REFUSING TO GIVE THE DEFENSE REQUESTED INSTRUCTIONS**

**1. The Trial Court Erred by Not Giving the Defense Requested Victim Impact Instruction.**

The trial court gave the defense requested victim impact instruction, but deleted the sentence, "You must not allow such evidence to divert your attention from your proper role in deciding the appropriate punishment in this case." (26 RT p. 2929.) In *Payne v. Tennessee* (1991) 501 U.S. 808, 825, 111 S.Ct. 2597, 115 L.Ed.2d 720, the Court concluded, "[w]e are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." The Eighth Amendment erects no barrier to the admission of victim impact evidence. (*Payne v. Tennessee, supra*, 502 U.S. at p. 827.) "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." (*Ibid.*) *Payne v. Tennessee* overruled *Booth v. Maryland* (1987) 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440, and *South Carolina v. Gathers* (1989) 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876), which had ruled victim impact testimony inadmissible.

The inclusion of the phrase, "You must not allow such evidence to divert your attention from your proper role in deciding the appropriate punishment in this case," was necessary for the jury to understand the relationship between victim impact testimony and the decision to impose the penalty of death or life in prison. Due process and the Eighth Amendment require the capital defendant be treated as "a uniquely individual human being."

(*Woodson v. North Carolina* (1976) 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944.) The Constitution requires the jury to make an individualized determination whether the defendant should be executed based on the character of the individual and the circumstances of the crime. (*Tennessee v. Payne, supra*, 501 U.S. at p. 818, quoting *Zant v. Stephens* (1983) 462 U.S. 862, 879, 103 S.Ct. 2733, 77 L.Ed. 235.) The above phrase was necessary for the jury to understand that victim impact testimony should not take the jury's attention away from making an individualized assessment of appellant's culpability and general character in determining the appropriate penalty.

The prosecutor's objected to the second paragraph of the instruction on the basis it suggested to the jury it could not consider victim impact testimony. The trial court apparently agreed with the prosecutor because it deleted the first sentence of the second paragraph. The prosecutor and the trial court's concern was not well founded. The jury had heard victim impact testimony. Friends and relatives of Ms. Kerr testified during the penalty phase about the significance of her loss. The jury was obviously not going to simply ignore this evidence. The language which the trial court excised from the instruction did not tell the jury to ignore victim impact testimony, but to not let such evidence overwhelm the jury's decision making process regarding the penalty.

*Tennessee v. Payne* overruled the holding of *Booth v. Maryland* and *South Carolina v. Gathers* that the Eighth Amendment barred victim impact testimony. *Booth v. Maryland* concluded victim impact testimony was barred from admission at the penalty phase by the

Eighth Amendment because, "the prospect of a `mini-trial' on the victim's character is more than simply unappealing; it could well distract the sentencing jury from its constitutionally required task--determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime." *(Booth v. Maryland, supra*, 482 U.S. at pp. 507.) *Tennessee v. Payne* did not reject the notion articulated in *Booth v. Maryland* that victim impact testimony could distract the jury from focusing on the background and character of the victim, but simply held those concerns were not sufficient to outweigh the state's right to admit relevant evidence.

Despite *Booth v. Maryland* being overruled by *Tennessee v. Payne*, the concern in the Booth v. Maryland about the risk of victim impact testimony improperly diverting the jury's attention from assessing the capital defendant's individual culpability and character remains. Victim impact testimony is emotionally powerful evidence. (*Booth v. Maryland, supra*, 482 U.S. at p. 508.) *Tennessee v. Payne* ruled victim impact testimony was not barred by the Eighth Amendment because it was relevant evidence. It did not hold that victim impact testimony should be given special weight. Appellant's jury should have been instructed not to allow the victim impact testimony to overwhelm the decision making process by causing the jury to give inadequate weight to other relevant factors. The sentence excised by the trial court would have accomplished that goal.

Appellant presented substantial mitigating evidence. He was a good father to his daughter. (26 RT p. 2829.) Respected members of the community held a high opinion of

appellant. (26 RT pp. 2826-2834, 2836-2839, 2866-2872 [the testimony of Lindsey Peet, Susan Baker, and Sheila Peet].) Appellant's plumbing business was prospering through his hard work. (*Ibid.*) The prosecution presented the emotionally charged testimony of the victim's family members and friends who testified about the impact of Ms. Kerr's death. Helen Sorena, Ms. Kerr's grandmother, testified that Tyler had a difficult time after his mother's death. (25 RT p. 2748.) Ms. Sorena had a heart attack as a result of Ms. Kerr's death. (25 RT p. 2749.) Ms. Kerr's mother could not attend the trial because of the stress. She had been under a physician's care since Ms. Kerr's death. (25 RT pp. 2749, 2762.) Travis Johnson, Ms. Kerr's brother, testified about walking her down the aisle when she got married. (25 RT p. 2761.)

Ms. Hyer testified about the impact of Ms. Kerr's death on her son:

> Q. How has your role with regard to Tyler changed since Lisa died?
>
> A. Tyler is just different. I want to tell you he was the gentle, kind, caring, sweet, generous, loving little boy, and there's a part of him now that is angry and afraid, and he's scared that everybody is going to leave and he's not going to have anybody, you know.
>
> I've always tried to be there to remind him that nobody is going to go anywhere and that he's god's first child and his mom still loves him and his dad still loves him and I still love him, and those of us that are left, no matter what, are not going to leave him.

(25 RT pp. 2767-2768.)

Ms. Hyer also described how Tyler released a Mother's Day balloon into the air with

the words, "To mommy, love Tyler," written on it. Ms. Hyer told Tyler his mother would get the message in heaven. (25 RT pp. 2765-2766.) During closing argument, the prosecutor argued, "You heard the testimony of the victim's grandmother, Helen, of her brother Travis, of Kim. You heard about the effects on her son Tyler. You heard about the fact that Tyler now tries to communicate with his mom by sending balloons up to heaven." (27 RT p. 2968.) It was essential the jury be instructed with the sentence excised by the trial court instructing the jury not to be diverted from its proper role by the victim impact testimony because: (1) of the emotionally powerful nature of the victim impact testimony offered in this case; and (2) the risk such evidence would divert the jury from assessing appellant's culpability and character. The trial court's excision of the sentence in question was error.

**2. The Trial Court Erred by not Giving the Defense Requested Mercy Instruction.**

The trial court deleted the sentence, "You may decide not to impose the penalty of death by granting the defendant mercy regardless of whether or not you determine he deserves your sympathy," from the defense requested instruction on mercy. (26 RT pp. 2932.) The exclusion of this sentence violated appellant's right to due process of law and the Eighth Amendment prohibition against cruel and unusual punishment. Under the California death penalty scheme, the jury may return a verdict of life without the possibility of parole even in the complete absence of mitigation. (*People v. Duncan* (1991) 53 Cal.3d 955, 979 [the jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death].) The weighing process refers to each

juror's personal determination that death is the appropriate penalty under all the circumstances. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1243-1244.) The above sentence excluded by the trial court told the jury that it could impose a life sentence by granting appellant mercy. Mercy is a concept independent from the weighing process described in CALJIC Number 8.88. The exclusion of the above sentence resulted in the jury not understanding it had the absolute power to return a sentence of life without the possibility of parole.

The jury was instructed, "After considering all the aggravating and mitigating factors that are applicable in this case, you may decide to impose the penalty of life in prison without possibility of parole in exercising mercy on behalf of the defendant." (27 RT p. 3038; 16 CT p. 3922.) It was also instructed, "You may consider sympathy or pity for the defendant if you feel it is appropriate to do so in determining to impose the penalty of life in prison without the possibility of parole, rather than the penalty of death." (27 RT p. 3039; 16 CT p. 3924.)

The above instructions were not an adequate substitute for the sentence excluded by the trial court. The sentence excluded by the trial court specifically referred to not imposing the death penalty because of mercy even if the jury concluded appellant did not deserve their sympathy. This sentence in substance told the jury it had the absolute power to impose a life sentence. The first instruction given by the trial court told the jury it could impose a life sentence based on "mercy, " but failed to provide the jury with any guidance regarding how "mercy" should be a basis for a life sentence in relation to its assessment of appellant's

character. The next instruction referred only to "sympathy" and "pity," and told the jury those factors could be considered if it believed it was appropriate to do so. The jury was not instructed whether it should consider those factors. This instruction failed to convey clearly to the jury its ability to impose a life sentence based on mercy regardless of other factors.

The jury's failure to have a complete understanding of its sentencing role and authority violates due process and the Eighth Amendment ban on cruel and unusual punishment. "[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio, supra*, 438 U.S. at pp. 604-605.) Parity of reasoning suggests due process and the Eighth Amendment requires the jury to understand its power to impose a life sentence based on mercy.

**3. The Trial Court Erred by not Giving the Defense Requested Lingering Doubt Instruction.**

The trial court refused to give the portion of the defense requested lingering doubt instruction which stated, "A juror who voted for conviction at the guilt phase may still have a lingering or residual doubt as to whether the defendant truly did not kill Lisa Kerr in the heat of passion." (See Appellant's Motion to Augment the Record.) The trial court instead instructed the jury that, "It is appropriate for you to consider in mitigation any lingering doubt you may have concerning the defendant's guilt." (27 RT pp. 3038-3039; 16 CT p. 3923.) This Court has approved the jury considering lingering doubt as a factor in mitigation,

but rejected any argument the jury must be instructed on lingering doubt. (*People v. Brown* (2003) 31 Cal.4th 518, 567; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219; *People v. Milwee* (1998) 18 Cal.4th 96, 165.)

Despite the above authorities, the trial court erred by refusing to give the defense requested instruction on lingering doubt. The trial court may not have had an obligation to give a lingering doubt instruction. However, once it decided to give a lingering doubt instruction, it should have given an instruction properly pinpointing the defense theory of lingering doubt. (*People v. Gay* (2008) 42 Cal.4th 1195, 1218-1219 [a defendant has the right to present his guilt phase theory of the case during the penalty phase because of his right to have the jury consider any lingering doubt about his guilt].) A defendant is entitled, upon request, to a nonargumentative instruction that pinpoints his or her theory of the case. (*People v. Wright, supra,* 45 Cal.3d 1126, 1135-1136.) An instruction that directs the jury to consider certain evidence is properly refused as argumentative. ( *Id.* at p. 1135) A proper pinpoint instruction does not pinpoint specific evidence, but the theory of the defendant's case. (*Id.* at p. 1137.)

The defense theory of the case was that appellant killed Ms. Kerr in the heat of passion and was guilty only of voluntary manslaughter. The defense counsel conceded in his opening statement that appellant killed Ms. Kerr. (14 RT p. 1471.) The defense counsel requested, and the trial court gave, voluntary manslaughter instructions. (21 RT p. 2413; 23 RT p. 2524.) The lingering doubt instruction requested by the defense counsel properly

pinpointed the defense theory of lingering doubt.

*People v. Gay* established appellant's right to have the jury instructed on his heat of passion theory as part of a lingering doubt instruction. The defendant in that case was convicted of shooting a peace officer and sentenced to death. During the penalty phase, the defendant attempted to admit the testimony of several witnesses who would have testified that the defendant did not fire the fatal shots. The trial court excluded this evidence because it believed the jury's true finding to a firearm established that the defendant was the shooter. The trial court therefore excluded any evidence to the contrary during the penalty phase. This Court concluded the exclusion of the evidence was error because it deprived the defendant of the right to have the jury consider any lingering doubt about his guilt:

> In reversing the judgment and ordering a third penalty trial, we declared that the text of Penal Code former section 190.1, which sanctioned "the presentation of evidence as to 'the circumstances surrounding the crime ... and of any facts in ... mitigation of the penalty,'" encompassed evidence relating to a "defendant's version of such circumstances surrounding the crime or of his contentions as to the principal events of the instant case in mitigation of the penalty." (*People v. Terry, supra,* 61 Cal.2d at p. 146 ) Our decision, which was the first in which we recognized the theory of lingering doubt as a mitigating factor (see *People v. Johnson* (1992) 3 Cal.4th 1183, 1259, 14 Cal.Rptr.2d 702, 842 P.2d 1 (conc. opn. of Mosk, J.)), further explained: "Indeed, the nature of the jury's function in fixing punishment underscores the importance of permitting to the defendant the opportunity of presenting his claim of innocence. The jury's task, like the historian's, must be to discover and evaluate events that have faded into the past, and no human mind can perform that function with certainty. Judges and juries must time and again reach decisions that are not free from doubt; only the most fatuous would claim the adjudication

> of guilt to be infallible. The lingering doubts of jurors in the guilt phase may well cast their shadows into the penalty phase and in some measure affect the nature of the punishment." (*Terry, supra,* 61 Cal.2d at p. 146.)

(*People v. Gay, supra*, 42 Cal.4th at p. 1218.) Hence, this Court concluded that the trial court erred by refusing to admit the evidence offered by the defendant pertaining to lingering doubt about whether he was the shooter. (*Id.*, at pp. 1219-1220.)

*People v. Gay* dealt with the exclusion of evidence. The instant case dealt with the trial court's refusal to give a defense requested lingering doubt instruction pinpointing its theory of the case. If a defendant has the right to admit evidence during the penalty phase pertaining to his guilt phase theory of the case, then he also has the right to a lingering doubt instruction which incorporates his guilt phase theory of the case. Without such an instruction, the defendant's right to present mitigation via a theory of lingering doubt would be substantially eviscerated.

The instruction given by the trial court was not an adequate substitute for the instruction refused by the trial court. The trial court instructed the jury, "[i]t is appropriate for you to consider in mitigation any lingering doubt you may have concerning the defendant's guilt." (27 RT pp. 3038-3039; 16 CT p. 3923.) This instruction was too broad to direct the jury to the defense theory of lingering doubt. Most jurors would simply consider the phrase, "the defendant's guilt," to refer to whether appellant killed Ms. Kerr. However, appellant had conceded he killed Ms. Kerr. The jurors would not understand the phrase, "the defendant's guilt," to refer to the question of whether appellant killed Ms. Kerr through

premeditation, felony murder, or heat of passion. The instruction given by the trial court therefore precluded the jury from giving any meaningful consideration to whether appellant was guilty merely of manslaughter when it assessed the mitigating evidence.

The trial court's failure to give the defense requested lingering doubt instruction violated appellant's right to federal due process of law, Sixth Amendment right to a jury trial, the Eighth Amendment, and the corresponding constitutional provisions under the California Constitution. California law permits the jury to consider lingering doubt as mitigating evidence. (*People v. Brown, supra*, 31 Cal.4th at p. 567.) Because California state law considers lingering doubt to be proper mitigating evidence, the jury needed to be properly instructed on how lingering doubt applied to the facts of this case in order to give it proper weight in its balancing of aggravating and mitigating factors.

The Sixth Amendment right to a jury trial means a verdict returned by the jurors after consideration of all the evidence. (*Turner v. Louisiana* (1965) 379 U.S. 466, 472, 85 S.Ct. 546, 13 L.Ed.2d 424 [the requirement that a jury's verdict must be based upon the evidence developed at trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury]; *United States v. Gaudin* (1995) 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 [the right to trial by jury means requiring that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of the defendant's equals and neighbors].) *Ring v. Arizona* (2002) 536 U.S. 584, 609, 122 S.Ct. 2428, 153

L.Ed.2d 556, held the Sixth Amendment required the jury to find the aggravating facts necessary to impose the death penalty. The trial court's failure to give the defense requested lingering doubt instruction precluded the jury from considering as mitigation whether appellant acted in the heat of passion when he killed Ms. Kerr.

California law also protected appellant's right to have the jury properly consider lingering doubt as mitigating evidence. Article I, sections 7 and 15 of the California Constitution guarantees due process of law to defendants. Penal Code section 1042 provides that, "[i]ssues of fact shall be tried in the manner provided by Article I, Section 16 of the Constitution of this State. Article I, Section 16 of the California Constitution provides in part that, "[t]rial by jury is an inviolate right . . .." The trial court's failure to give the defense requested lingering doubt instruction therefore violated appellant's rights under the California Constitution.

Because California law required the jury to consider lingering doubt as a factor in mitigation, the trial court's failure to give the defense requested lingering doubt instruction violated appellant's right to federal due process of law. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 345, 100 S.Ct. 2227, 65 L.Ed.2d 175.) *Hicks v. Oklahoma* concluded that right of a criminal defendant under state law to have his punishment fixed in the discretion of the jury gave him "a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion (citation omitted), and that liberty interest is one that the Fourteenth Amendment preserves against

arbitrary deprivation by the State. (Citations omitted)." (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.)

Similar reasoning applies to the instant case. Appellant had a right protected under the federal due process clause to have the jury consider the evidence he killed Ms. Kerr in the heat of passion as mitigation. The trial court's refusal to give the defense requested lingering doubt instruction deprived appellant of that right.

**4. The Trial Court Erred by Refusing to Give the Defense Requested Sympathy and Compassion Instruction.**

The trial court deleted from the defense sympathy instruction the following paragraph: "If any of the evidence arouses sympathy or compassion in you to such an extent as to persuade you that death is not the appropriate punishment, you may react in response to those feelings of sympathy and compassion and impose life in prison without the possibility of parole." (26 RT p. 2937; 27 RT p. 3039.) The exclusion of this paragraph was error and violated appellant's right to be free of cruel and unusual punishment in violation of the federal and state constitutions.

The prohibition against cruel and unusual punishment requires the trier of fact to consider all mitigating factors in deciding whether to impose the death penalty. *(Lockett v. Ohio, supra*, 438 U.S. at pp. 604-605.) The trial court determined it was appropriate for the jury to consider sympathy and pity for the defendant because it gave the first part of the special instruction requested by the defense counsel. (27 RT p. 3039.) The instruction, however, only told the jury, "You may consider sympathy or pity for the defendant if you feel

it is appropriate to do so . . .." (*Ibid.*) This Court has approved of mercy by the jury as an appropriate basis for it to not impose the death penalty. (*People v. Abilez* (2007) 41 Cal.4th 472, 532.) The paragraph omitted by the trial court would have made it clear to the jury that sympathy and pity alone were sufficient grounds to sentence appellant to life in prison without the possibility of parole. The jury has the discretion to sentence a defendant to life in prison without the possibility of parole even in the complete absence of mitigation. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979 [the jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death].) If appellant's jury had the absolute discretion to not impose the death penalty, then it also needed to understand that it had the discretion to not impose the death penalty based on sympathy and pity. The prohibition against cruel and unusual punishment required the jury to understand that sympathy and pity were sufficient grounds to impose a life sentence.

In *People v. Abilez, supra*, 41 Cal.4th at pp. 532-533, this Court concluded that the trial court's failure to instruct on pity as a mitigating factor was not error because the trial court gave an expanded version of a factor (k) instruction. That instruction allowed the jury to consider, "Any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death." (*People v. Abilez, supra*, 41 Cal.4th at p. 533.) A similar factor (k) instruction was given in the instant case. (27 RT p. 3036.) The factor (k) instruction did not make it clear that sympathy and compassion alone

were sufficient grounds to impose a life sentence. The instruction proposed by appellant did make that concept clear. Hence, the trial court erred by excluding the above paragraph from the defense pity and sympathy instruction.

**D. PREJUDICE**

Because the trial court's failure to give the defense requested penalty phase instructions violated appellant's federal constitutional rights, the judgment must be reversed unless the errors were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.) The trial court's refusal to give the requested instructions requires reversal under the lesser standard for state law error. *(People v. Watson* (1956) 46 Cal.2d 818, 836.) The trial court's refusal to give the requested instructions was prejudicial individually and cumulatively.

This jury struggled with the decision to impose the death penalty. The emotional impact of the victim impact testimony was compelling. The jury must have felt a great deal of anger towards appellant when Ms. Hyer described Tyler floating the balloons up to heaven to his mother.

The jury's questions demonstrates its confusion about how to weigh the aggravating and mitigating evidence. (28 RT pp. 3091-3092 [the jury asked, "if you find one item in mitigation, is that enough for life in prison, if you find just one, or do you need several for each, or is it a scale? How does that operate"].) The admonition in the defense requested instruction that, "You must not allow such evidence to divert your attention from your proper

role in deciding the appropriate punishment," (26 RT p. 2929), was essential for the jury to not give improper weight to the victim impact testimony because of: (1) the jury's confusion regarding the role of mitigating factors; and (2) the emotionally charged nature of the victim impact testimony in this case.

The trial court failure to instruct the jury, "You may decide not to impose the penalty of death by granting the defendant mercy regardless of whether or not you determine he deserves your sympathy," (26 RT p. 2932), was also not harmless beyond a reasonable doubt. Because the jury was confused about the weighing process, the jury needed to understand it could impose a life sentence based on mercy even if the aggravating factors outweighed the mitigating factors. The jury understandably was likely repulsed at the manner in which appellant killed Ms. Kerr and the tragedy of her son growing up without her. Hence, it was necessary for the jury to understand appellant could be given life in prison as an act of mercy even if it felt little sympathy for him.

The trial court's refusal to give the lingering doubt was prejudicial under either the Chapman or Watson standard. The defense counsel conceded during his guilt phase opening statement, and his closing argument, that appellant had killed Ms. Kerr. Appellant's defense was that he was guilty of voluntary manslaughter rather than first degree murder. Because the lingering doubt instruction given by the trial court referred only to "any lingering doubt you may have concerning the defendant's guilt," (27 RT p. 3038), and appellant conceded during the guilt phase that he was responsible for Ms. Kerr's death, the lingering doubt

instruction given by the trial court was essentially useless. The jury needed to be directed to whether it had any lingering doubt about whether appellant killed Ms. Kerr in the heat of passion. Similarly, the exclusion of the second paragraph of the pity and sympathy instruction was prejudicial because it prevented the jury from understanding that those factors alone were sufficient to impose a life sentence.

Appellant presented a classic voluntary manslaughter defense. He was involved in a relationship with a woman who manipulated and used him and then finally pushed him over the edge through demeaning him. The jury struggled greatly with the decision to impose the death penalty. The trial court almost declared a penalty phase mistrial several times. It was unlikely the jury would have imposed the ultimate penalty had the jurors known to consider any lingering doubt about appellant's guilt of voluntary manslaughter.

Even if the refusal to give any one of the defense requested instructions was harmless, the cumulative effect of refusing to give the defense requested instructions was prejudicial. The jury did not understand how to weigh aggravating and mitigating evidence. (28 RT pp. 3091-3092.) The jury was not specifically informed that a life sentence could be imposed based on sympathy and compassion. (26 RT p. 2937; 27 RT p. 3039.) The jury did not understand that it could consider appellant's theory of heat of passion as lingering doubt evidence in mitigation of the sentence. (27 RT pp. 3038-3039; See Appellant's Motion to Augment the Record on Appeal.) Appellant presented compelling facts in mitigation. Appellant's heat of passion theory was substantial mitigating evidence even if did not rise

to the level of a defense. The combination of the jury's lack of understanding how to weigh mitigating and aggravating evidence, its failure to understand that any lingering doubt it had whether appellant killed the victim in the heat of passion was mitigating evidence, and its failure to understand the role of sympathy and compassion in assessing the proper penalty, impaired the jury's constitutional duty to balance aggravation against mitigation and impose the proper penalty. The penalty must be reversed.

## XXVI

## THE PENALTY OF DEATH SHOULD BE REVERSED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY DURING THE PENALTY PHASE THAT IT COULD APPLY THE GUILT PHASE INSTRUCTIONS THAT IT DEEMED APPLICABLE, THEREBY DEPRIVING APPELLANT OF DUE PROCESS OF LAW, A FAIR TRIAL, AND HIS RIGHT AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT AS PROVIDED IN THE FEDERAL AND STATE CONSTITUTIONS.

### A. SUMMARY OF ARGUMENT

During the guilt phase, the trial court gave the full panoply of jury instructions, which included instructions on evaluation of evidence, the elements of the crimes, and defenses. During the penalty phase, the trial court gave the standard penalty phase instructions in addition to some modified defense requested special instructions. The trial court instructed the jury to apply the guilt phase instructions it deemed applicable. This instruction was erroneous because the trial court was required to determine the jury instructions to be given the jury. The jury was required to determine the facts based upon the jury instructions. The trial court's failure to instruct the jury which specific guilt phase instructions applied to the penalty phase deprived the jury of any guidance regarding how to evaluate the evidence. Appellant was therefore deprived of due process of law, a fair trial, and his right against the imposition of cruel and unusual punishment in the federal and state constitutions. The judgment of death must therefore be reversed.

## B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

The trial court's guilt phase instructions included the standard CALJIC instructions. (23 RT pp. 2500-2531; 16 CT pp. 2804-3883.) During the morning of June 19, 2001, the trial court and the attorneys discussed the penalty phase instructions. The trial court commented it was required to reinstruct the jury on the guilt phase instructions that applied to the penalty phase. (27 RT p. 2945.) The defense counsel objected because he did not want the jury being read, for a second time, the elements of the substantive offenses and the special circumstances. (27 RT pp. 2945-2946.) The trial court stated it did not intend to read those instructions, but "[t]here are basic instructions, which if I read the Use Note correctly, that I'm required to identify and incorporate by reference, if not reread to this jury, for this separate phase of the trial. My failure to do so may constitute error." (27 RT p. 2946.) The prosecutor stated he was satisfied as long as the issue discussed in footnote 26 of *People v. Babbitt* (1988) 45 Cal.3d 660, 718, was addressed. (27 RT pp. 2946-2947.)[6]

The defense counsel did not want the guilt phase instructions read to the jury because he feared the defense requested special penalty phase instructions would not be given adequate attention by the jury. (27 RT pp. 2948-2949.) The trial court took a recess in order to consult with another judge. (27 RT pp. 2949-2950.) The trial court then stated it was not going to reread the applicable guilt phase instructions, but "simply going to advise the jury

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[6] Footnote 26 of the *Babbit* decision required the trial court to expressly inform the jury during the penalty phase which of the guilt phase instructions continue to apply. (*People v. Babbitt, supra*, 45 Cal.3d at p. 719, fn. 26.)

that they may consider such of those instructions as they deem appropriate, they should not consider those instructions that they deem inapplicable to this phase of the trial." (27 RT p. 2950.) It also stated the guilt phase instructions would go into the jury room for the jury's review, but it would not reread any instructions. (27 RT p. 2951.) The defense counsel objected to the guilt phase instructions being in the jury deliberation room. (27 RT p. 2951.) The trial court overruled the objection. (*Ibid.*)

The trial court gave the following instruction at the commencement of the penalty phase instructions:

> Ladies and gentlemen, in the early guilt or innocence phase of the trial, I instructed you on the law applicable to that phase of the trial. You should consider those prior instructions on the law to the extent that you view them as properly applying to any of the issues present in this penalty phase of the trial.
>
> However, you should not consider any of the prior instructions on the law which you find to be inapplicable to the questions and issues now before you in this penalty phase.

(27 RT pp. 3032-3033.) The trial court then gave the standard penalty phase instructions and the modified defense special instructions. (27 RT pp. 3033-3041; 16 CT pp. 3915-3927; CALJIC Numbers 8.84, 8.84.1, 8.85, 8.87, 8.88.) These instructions told the jury, "You must determine what the facts are from the evidence unless you are otherwise instructed." (27 RT p. 3034.) The jury was also instructed, "You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial except as

instructed by this Court." (*Ibid.*)[7] The penalty phase instructions did not include any instructions to the jury regarding the evaluation of evidence or CALJIC Numbers 17.31, 17.40, 17.41, and 17.41.1.[8]

**C. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY REGARDING THE GUILT PHASE INSTRUCTION THAT APPLIED TO THE PENALTY PHASE AND GIVING CONTRADICTORY INSTRUCTIONS**

What jury instructions should be given to the jury is a question of law for the trial court. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217.) In *People v. Babbitt* (1988) 45 Cal.3d 660, the trial court failed to instruct the jury which guilt and sanity phase instructions applied to the penalty phase. The defendant argued this was error. This Court rejected the defendant's argument but stated in a footnote, "[t]o avoid any possible confusion in future cases, trial courts should expressly inform the jury at the penalty phase which of the instructions previously given continue to apply." (*People v. Babbitt, supra*, 45 Cal.3d at p. 719, fn. 26.)

The trial court in this case erred when it instructed the jury that it should apply the guilt phase instructions it deemed applicable, but ignore the instructions it deemed

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[7] This instruction was CALJIC 8.81.1. The Use Note to the instruction states it was the CALJIC committee's response to footnote 26 in *People v. Babbitt* (1988) 45 Cal.3d 660.

[8] CALJIC Number 17.31 told the jury that all the instructions were not necessarily applicable. CALJIC Number 17.40 told the jury that the individual opinion of each juror was required. CALJIC Number 17.41 instructed the jury how they should approach the task of deliberating. CALJIC Number 17.41.1 told the jury about what constituted misconduct.

inapplicable. (27 RT pp. 3032-3033.) This instruction erroneously delegated to the jury the legal task of determining which guilt phase instructions applied to the penalty phase. The jury has the task of applying the instructions to determine the facts. That is not what occurred in the instant case. The jury was instead required to decide for itself if an instruction applied.

The trial court's instructions were also contradictory. The jury was initially told to apply the prior instructions it deemed applicable. (27 RT p. 3033.) The jury was then told to "disregard all other instructions given to you in other phases of this trial except as instructed by this court." (27 RT p. 3034.) Given these conflicting instructions, the jury could not possibly have known the guilt phase instructions that applied to the penalty phase.

**D. THE TRIAL COURT'S ERRONEOUS INSTRUCTIONS VIOLATED APPELLANT'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS.**

Under the federal due process clause of the Fifth and Fourteeth Amendments, and the prohibition against cruel and unusual punishment in the Eighth Amendment, the jury's "discretion [in a capital case] must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Zant v. Stephens, supra*, 462 U.S. at p. 874.) Article I, section 7 of the California Constitution grants a defendant the right to due process of law. Article I, section 17 of the California Constitution prohibits the imposition of cruel and unusual punishment. Both provisions have been interpreted to require reliability in the procedure utilized to impose the death penalty. (*People v. Ayala* (2000) 23 Cal.4th 225, 263.)

The trial court's failure to instruct the jury regarding the guilt phase instructions that applied to the penalty phase undermined the heightened reliability required in capital proceedings. The jury could not have properly determined the facts in aggravation and mitigation without guidance on how to determine the credibility of the penalty phase witnesses. The Sixth Amendment, as interpreted in *Ring v. Arizona, supra*, 536 U.S. at page 609, requires the jury to determine the facts in aggravation and mitigation. The jury could not have performed its Sixth Amendment function of determining the facts in aggravation and mitigation without adequate guidance on how to assess the evidence, including witness credibility.

**E. THE INVITED ERROR DOCTRINE DOES NOT PRECLUDE APPELLANT REVIEW OF THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY REGARDING THE GUILT PHASE INSTRUCTIONS THAT APPLIED TO THE PENALTY PHASE**

Appellant's trial defense counsel did not want the guilt phase instructions reread to the jury. (27 RT pp. 2948-2949.) The defense counsel, however, did not request the trial court to instruct the jury to determine for itself the guilt phase instructions that applied to the penalty phase. The trial court decided on that course of action on its own after consultation with another judge. (27 RT p. 2950.) The defense counsel did not consent to the trial court proceeding in that manner as evidenced by his objection to the jury having a copy of the guilt phase instructions during penalty phase deliberations. (27 RT p. 2951.)

The test for invited error is not whether the record provides an inference of acquiescence to the error, but whether the record affirmatively shows the error was at the

deliberate behest of counsel based on a tactical decision. (*People v. Wickersham* (1982) 32 Cal.3d 307, 333-335.) The trial court did not instruct the jury to consider the guilt phase instructions it deemed applicable to its penalty phase instructions at the behest of the defense counsel. Hence, the invited error doctrine does not preclude reversal of the judgment of death because of the trial court's flawed penalty phase instruction.

Penal Code section 1259 provides that errors pertaining to jury instructions can be reviewed on appeal even in the absence of an objection in the trial court. Hence, this Court can review the trial court's erroneous instruction to the jury to apply the guilt phase instructions it deems applicable to its penalty phase deliberations, even if the defense counsel did not specifically object to that instruction, because the record does not demonstrate a tactical decision by the defense counsel to not object to the instruction. (*People v. Wickersham, supra*, 32 Cal.3d at pp. 333-335.)

**F. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY REGARDING THE GUILT PHASE INSTRUCTIONS THAT APPLIED TO THE PENALTY PHASE WAS PREJUDICIAL ERROR**

Because the trial court's failure to instruct the jury which guilt phase instructions applied to the penalty phase violated appellant's federal constitutional rights, the judgment of death must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California,* supra, 386 U.S. at p. 24.) The error was not harmless, furthermore, under the more likely than not standard applicable to state law error. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

The jury was left with a myriad of conflicting instructions because of the trial court's error. The jury was also not given any guidance during the penalty phase regarding how to evaluate evidence. CALJIC Number 1.00 told the jury, "You must not be influenced by pity for or prejudice against a defendant." (23 RT p. 2501; 16 CT p. 3804.) CALJIC Number 1.00 further told the jury, "You must not be influenced by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feelings." (23 RT p. 2502; 16 CT pp. 3804-3805.) The above language in CALJIC Number 1.00 directly contradicted the special instructions given during the penalty phase regarding mercy for the defendant. The jury could not have known what role mercy, sympathy, or pity should have played in its penalty phase decision.

These contradictory instructions were prejudicial. The jury heard during the penalty phase evidence regarding appellant's difficult childhood, which was punctuated by violence and abuse by appellant's stepfather towards his mother. The jury also heard evidence regarding Ms. Kerr's manipulation of appellant and how he suffered extreme emotional highs and lows as a result. The jury could not have known whether to give this testimony a great deal of weight, little weight, or no weight, when it decided the penalty because of the trial court's confusing instructions.

CALJIC Number 1.02 told the jury that "Statements made by the attorneys during the trial are not evidence," and "Do not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken by the court; treat it as though you had never

heard of it." (23 RT pp. 2502-2503; 16 CT p. 3807.) CALJIC Number 1.03 told the jurors not to make any independent investigation. (23 RT p. 2503; 16 CT p. 3808.) CALJIC Numbers 2.00 and 2.01 told the jury how to evaluate direct and circumstantial evidence. (23 RT pp. 2505-2506; 16 CT pp. 3813-3814.) CALJIC Numbers 2.11 told the jury neither side was required to produce all evidence. (23 RT p. 2509; 16 CT p. 3818.) CALJIC Numbers 2.13 told the jury that prior consistent and inconsistent statements may be used to test credibility and to prove the truth of the matters asserted. (23 RT p. 2509; 16 CT p. 3819.) CALJIC Number 2.20 told the jury how to evaluate the credibility of witnesses. (23 RT pp. 2510-2511; 16 CT p. 3820.) CALJIC Number 2.21.1 told the jury how to assess the significance of a discrepancy in the testimony, or out- of-court statements, of witnesses. (23 RT p. 2511; 16 CT p. 3821.) CALJIC Number 2.21.2 told the jury that the testimony of a witness who gave willfully false testimony should be distrusted. (23 RT pp. 2511-2512; 16 CT p. 3822.) CALJIC Number 2.22 told the jury how to weigh conflicting testimony. (23 RT p. 2512; 16 CT p. 3823.) CALJIC Number 2.27 told the jury the testimony of one witness was sufficient to prove a fact. (23 RT p. 2513; 16 CT p. 3825.) CALJIC Number 2.60 told the jury not to draw an adverse inference from the defendant's failure to testify. (23 RT pp. 2513-2514; 16 CT p. 3828.) CALJIC Number 2.81 instructed the jury regarding the weight to be given lay opinion testimony. (23 RT p. 2516; 16 CT p. 3834.) The remaining instructions dealt with criminal intent, the elements of the crime, and special circumstances.

The giving of the above CALJIC instructions from the 2.00 series was necessary for

the jury to have standards from which to evaluate the evidence. The absence of adequate standards for the jury to assess the penalty phase evidence was prejudicial generally and prejudicial in several specific ways. Mary Christian, appellant's former spouse, was a material witness against him during the penalty phase. She testified appellant engaged in a pattern of physically abusive behavior. (25 RT pp. 2783-2789.) She obviously had a motive to exaggerate her testimony because of her dislike for appellant. Because the jury was not given instructions regarding credibility and bias, it had no methodology to determine if her testimony was false, exaggerated, or biased. The jury also had no basis for determining the truthfulness of the defense witnesses during the penalty phase, including appellant's mother and sister. They both testified about the violence to which appellant was exposed as a child. (26 RT pp. 2847-2857, 2882-2887.) CALJIC Number 2.20 specifically told the jury the relevant factors in assessing the credibility of a witness. CALJIC Numbers 2.13, 2.21.1, 2.21.2, also dealt with how the jurors should assess credibility. The jury had no way of knowing whether to apply these instructions during its penalty phase deliberations.

The trial court's failure to give CALJIC 2.11, was prejudicial. The jury did not know during the penalty phase that neither side was required to produce all relevant evidence. The jury asked to hear from appellant. (28 RT p. 3080.) The fact the jury asked to hear from appellant demonstrated that it did not understand the guilt phase jury instructions applied to the penalty phase. The jury was given CALJIC Number 2.60 during the guilt phase, which told them to not draw an adverse inference from appellant's failure to testify. (23 RT pp.

2513-2514; 16 CT p. 3828.) The jury could have asked to hear from appellant during its penalty phase deliberations only if it was confused about how the guilt phase instructions applied to the penalty phase.

The trial court improperly delegated to the jury the task of determining the applicable penalty phase instructions. The jury was not suited to perform that task. The judgment of death must therefore be reversed.

## XXVII

**THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT INSTRUCTIONS FAILED TO CONVEY TO THE JURY THE SCOPE OF ITS DISCRETION REGARDING IMPOSITION OF THE DEATH PENALTY, IN VIOLATION OF APPELLANT'S RIGHT TO STATE AND FEDERAL DUE PROCESS OF LAW AND A FAIR TRIAL AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT.**

### A. SUMMARY OF ARGUMENT

The trial court gave CALJIC Number 8.88, which was the standard instruction for how the jury should decide to impose the death penalty. (27 RT pp. 3040-3041.) The instruction was deficient because it failed to convey to the jury the scope of its discretion regarding imposition of the death penalty. The jury's failure to understand its sentencing discretion violated appellant's right to due process of law and the prohibition against imposition of cruel and unusual punishment in the federal and state constitutions. Hence, the judgment of death must be reversed.

### B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

The trial court instructed the jury with CALJIC Numbers 8.84, 8.84.1, 8.85, 8.87, and 8.88. (27 RT pp. 3033-3037, 3039-3041.) CALJIC Number 8.88 instructed the jury, "You shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed." (27 RT p. 3040.) The instruction then defined an aggravating factor and a mitigating circumstance. (*Ibid.*) The jury

then received the instruction, "The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary or the arbitrary assignment of weights to each 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." (*Ibid.*) The instruction continued, "In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." (27 RT pp. 3040-3041.) The instruction finally stated, "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." (27 RT p. 3041.)

CALJIC Number 8.88 was deficient for a number of reasons. The phrase, "you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances . . ." was mandatory in nature. The language that the jury was free to assign whatever moral weight it deemed appropriate to the aggravating and mitigating factors allowed the jury to disregard mitigating factors. If the Legislature deemed a factor mitigating, and thus included it in section 190.3, subdivisions (a) through (k), the jury was required to consider that factor in mitigation of the sentence. The combination of the above phrases required the jury to impose a death sentence of aggravating factors outweighed mitigating factors, but also allowed it to arbitrarily disregard mitigating factors. In *People v.*

*Smith* (2005) 35 Cal.4th 334, 371, this Court approved an instruction stating, "**You may, but are not required to return a judgment of death** if each of you are persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (Emphasis added.)[9] The instruction given by the trial court in the instant case, therefore, omitted the language approved in *People v. Smith* that the jury was not required to return a verdict of death. Hence, the instruction omitted critical language regarding the jury's discretion to not impose the death penalty.

This Court has approved CALJIC Number 8.88 and concluded it properly informs the jury of its sentencing discretion. (E.g. *People v. Brasure* (2008) 42 Cal.4th 1037, 1061-1064; *People v. Duncan* (1991) 53 Cal.3d 955, 977.) However, the Court has not addressed whether CALJIC Number 8.88 was correct in light of its approval of the, "You may, but are not required to return a judgment of death," language in *People v. Smith*. The defendant in People v. Brasure did not argue that the phrase "You may, but are not required to return oa judgment of death," had to be included in CALJIC Number 8.88. Cases are not authority for propositions of law not decided therein. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1211.) The inclusion of the above phrase was a significant modification to CALJIC Number 8.88 which clearly informed the jury of its sentencing discretion. Hence, this Court's prior cases approving CALJIC Number 8.88 do not resolve whether the instruction was correct in this

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[9] The phrase, "**You may, but are not required to return a judgment of death**" has not been incorporated into the 2008 version of the CALJIC instructions.

case.

## C. CALJIC NUMBER 8.88 VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS

Appellant argued in Issue XXII that the jury's failure to understand its sentencing discretion violated appellant's right to state and federal due process of law and the prohibition against cruel and unusual punishment in the federal and state constitutions. Those arguments are incorporated in this portion of the brief and will be briefly summarized for purpose of brevity. The requirement of greater reliability in capital cases requires the jury to understand its sentencing discretion and give appropriate consideration to all mitigating factors. (*Lockett v. Ohio, supra*, 438 U.S. at pp. 604-605, 608; see also *Eddings v. Oklahoma*, supra, 455 U.S. at pp. 113-116.) In *Eddings v. Oklahoma*, the Supreme Court found a due process and Eighth Amendment violation when the trial judge expressly stated he would not consider the defendant's violent childhood as a factor in mitigation of the sentence. (*Eddings v. Oklahoma, supra*, 455 U.S. at pp. 113-116.) There is no meaningful difference between the trial judge's refusal to give effect to mitigating evidence and CALJIC Number 8.88, which allowed the jury to arbitrarily disregard factors in mitigation and failed to inform the jury of its absolute discretion to not impose the death penalty.

## D. STANDARD OF REVIEW

Issues pertaining to jury instructions are reviewed de-novo. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.)

## E. THE ERRONEOUS VERSION OF CALJIC NUMBER 8.88 CAN BE REVIEWED

**ON APPEAL DESPITE THE LACK OF AN OBJECTION IN THE TRIAL COURT**

The defense counsel did not object to CALJIC Number 8.88 or propose its modification. This Court, however, can still review whether the instruction was prejudicial pursuant to Penal Code section 1259.

**F. PREJUDICE**

Because the deficient version of CALJIC Number 8.88 given to the jury violated appellant's federal and state constitutional rights, the judgment of death must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The prejudice standard for state law error in the penalty phase of a capital proceeding is whether there was a reasonably possibility the error affected the verdict. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 960-961.) This test is effectively the same as the *Chapman* test. (*People v. Wilson* (2008) 43 Cal.4th 1, 28.)

The jury was confused about how to weigh aggravating and mitigating factors, and its sentencing discretion, because it asked if one mitigating factor was sufficient to impose a life sentence. The jury also asked, "do you need several for each, or is it a scale? How does that operate." (28 RT pp. 3091-3092.) Appellant presented substantial evidence in mitigation, including: (1) the constant violence he witnessed as a child, which was directed against his mother; (2) the conquering of his drug and alcohol problems; (3) his success at building his plumbing business; (4) his loving relationship with his daughter, Nicole; and (5) members of the community who held a high opinion of appellant. (26 RT pp. 2856, 2884, 2829-2830,

2838-2839.) The jury was deadlocked regarding the sentence and extraordinary coercive measures were used by the trial court to force the jury to reach a verdict. (27 RT pp. 3053-3054.) The lack of clarity of CALJIC Number 8.88 regarding the jury's sentencing discretion was prejudicial. Hence, the judgment of guilt must be reversed.

## XXVIII

## THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE CUMULATIVE EFFECT OF THE TRIAL COURT'S PENALTY PHASE ERRORS: (1) DEPRIVED APPELLANT OF STATE AND FEDERAL DUE PROCESS OF LAW; DEPRIVED APPELLANT OF HIS RIGHT TO A JURY DETERMINATION OF THE FACTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS; AND (3) VIOLATED THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17, OF THE CALIFORNIA CONSTITUTION

Appellant argued in issues XIX through XXVII that the trial court committed a series of errors during the penalty phase of the trial. The individual and cumulative impact of a trial court's rulings can deprive a defendant of the due process guarantee of fundamental fairness in the federal and state constitutions. (*Taylor v. Commonwealth* (1978) 436 U.S. 478, 488, fn. 15, 98 S.Ct. 1930, 56 L.Ed.2d 468; Cal. Const., Article I, section 7.)

Penal Code section 1042 provides that "[i]ssues of fact shall be tried in the manner provided in Article I, Section 16 of the Constitution of this State." Article I, Section 16 of the California Constitution guarantees a criminal defendant the right to a jury trial. The Sixth and Fourteenth Amendments guarantee of a jury trial require the jury to make the findings of fact necessary to determine if a defendant should be sentenced to death. (*Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556.) Finally, the prohibition against cruel and unusual punishment in the Eighth Amendment and Article I, section 17 of the California Constitution, requires heightened reliability in the fact finding process when the state seeks

a judgment of death. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973.) The cumulative impact of the trial court's errors was to deprive the jury of its ability to properly find the facts necessary to determine if appellant's life should be spared.

Appellant presented significant evidence in mitigation. He had built a successful plumbing business and was devoted to his daughter. (26 RT pp. 2830, 2839.) Ms. Kerr manipulated appellant's emotions and used him for financial advantage. (26 RT pp. 2869-2870, 2874.) She then humiliated appellant by making derogatory comments about him to Mark Harvey. (17 RT pp. 1860-1861.) The trial court had to coerce a verdict from the jury. Even the prosecutor conceded that a penalty phase mistrial was appropriate. (27 RT p. 3072.) The trial court put pressure on the jurors by noting that everyone had put a lot of time and effort into the case and "if we can reach a decision, I'd like to." (27 RT p. 3075.) This jury was clearly troubled by the decision to put appellant to death. It violated appellant's right to silence by asking to hear from him. The jury's erroneous consideration of appellant's failure to testify was most likely caused by the trial court's instructing the jury that it could consider what guilt phase instructions to apply to its penalty phase deliberations. (27 RT pp. 3032-3033.) The trial court should have declared a mistrial following the receipt of that note from the jury. The jury was confused about how to weigh the mitigating and aggravating evidence and did not understand that a single factor in mitigation was sufficient to impose a life sentence. (28 RT pp. 3091-3092.) The jury's failure to understand the weighing process most likely resulted in the jury giving undue emphasis on appellant's failure to testify.

The trial court compounded the prejudice from the above errors by failing to define the elements of the crimes offered as aggravating evidence. The jury did not know whether to give a little or a great deal of weight to appellant's conduct with his former spouse. The jury could not have even assessed whether appellant committed a crime because of the lack of instructions concerning what crimes he may have committed and their elements. This only contributed to the jury's confusion caused by the trial court's failure to instruct the jury that a single mitigating factor was sufficient to impose a life sentence and the jury's erroneous belief that it could consider appellant's failure to testify. The jury was biased because of the trial court's failure to remove the juror who was reading a book about stalking. (27 RT pp. 2962-2963.) A biased juror needed careful and precise instructions regarding how to determine whether to impose the death penalty, including the understanding that a single factor was sufficient to impose a life sentence and appellant's failure to testify could not be considered.

For the reasons above, the cumulative impact of the trial court's penalty phase errors impaired the jury's ability to find facts in aggravation and mitigation and to fairly determine whether appellant should be sentenced to death. These errors deprived appellant of his state and federal constitutional rights and must result in reversal of the judgment of death unless the errors were harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Because the cumulative impact of these errors was not harmless beyond a reasonable doubt, the judgment of death must be reversed.

## XXIX

**THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY CONSIDERED APPELLANT'S FAILURE TO TESTIFY WHEN IT DENIED HIS AUTOMATIC MOTION TO VACATE THE JUDGMENT OF DEATH IN VIOLATION OF (1) APPELLANT'S RIGHT AGAINST SELF-INCRIMINATION IN THE FIFTH AND FOURTEENTH AMENDMENTS AND THE CALIFORNIA CONSTITUTION; (2) APPELLANT'S RIGHT TO STATE AND FEDERAL DUE PROCESS OF LAW; AND (3) THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I .**

### A. SUMMARY OF ARGUMENT

The trial court denied appellant's automatic motion to reduce the penalty of death. The trial court's comments when it denied the motion suggested that it considered appellant's failure to testify when it determined that the judgment of death should not be vacated. The trial court's comments also implicitly acknowledged that the evidence appellant tortured Ms. Kerr was weak. The trial court's consideration of appellant's failure to testify deprived him of due process, infringed on his federal and state constitutional right to silence, and violated the prohibition against imposition of cruel and unusual punishment in the federal and state constitutions. The judgment of death must therefore be reversed.

### B. SUMMARY OF PROCEEDINGS IN THE TRIAL COURT

Before affirming the sentence, the trial court heard argument on appellant's automatic motion to vacate the verdict of death. (29 RT pp. 3126-3143.) The defense counsel listed the

factors in mitigation and argued why the verdict of death was not warranted. (29 RT pp. 3129-3141.) He noted that the jury inappropriately requested to hear from appellant. (29 RT p. 3139.) The prosecutor argued that the verdict of death was appropriate. (29 RT pp. 3141-3143.) The trial court then stated that it had conducted an independent review of the weight of the evidence, independently determined the propriety of the penalty, and considered the aggravating and mitigating factors in section 190.3. (29 RT p. 3143.) The trial court then discussed the evidence and factors in aggravation and mitigation. (29 RT pp. 3143-3149.)

The trial court then made the following comment:

> In response to my inquiry of the jury if there was anything else we could do to assist them when they were reporting being deadlocked in the penalty phase, one of the issues that I raised in the penalty phase, one of the issues that I raised with them was the possibility of opening the matter for argument. I invited them to let me know what it was that they thought might help them.
>
> One of the things they said was "we'd like to hear from the defendant." And I told the jury at that time that that was a request that would not be considered and that it was inappropriate and that we would not be considered and that it was inappropriate and that we would move forward.
>
> Obviously, I did not go into any great length to explain to them that the defendant has a right not to testify and he chose to exercise that right, which is perfectly proper, and in exercising that right it cannot be held against him. But I can guarantee you that what the jury wanted to know was what was the defendant's motivation when he set that car on fire? Was he finishing the job? Was she in the back seat moaning and groaning even though in a semiconscious state, or did he think she was dead and he was just destroying the evidence?

> I think the answer to that question could very clearly have changed the jury's thinking about this case. And, indeed, I've thought long and hard about it. I can't make up an answer to that question. I cannot speculate or conjecture. That evidence is not before this court to be reweighed. It was not before the jury to be considered.
>
> What the jury did decide, based upon the evidence, was that she was killed by thermal injury. So I've often thought that if we knew the answer to my question, it might be a very difficult situation with which we are all now confronted, but as I've indicated, I cannot fill in the blanks. I can only reweigh the evidence that was presented, and I have carefully considered and weighed the aggravating and mitigating circumstances, all as previously stated.

(29 RT pp. 3149-3150.)

The trial court then denied the motion to reduce the penalty. (29 RT p. 3150.)

**C. THE TRIAL COURT ERRED BY DENYING THE MOTION TO REDUCE THE PENALTY**

Section 190.4, subdivision (e), provides in relevant part:

> (e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

The trial court's ruling must be based only on the evidence presented at trial. (*People v.*

*Guerra* (2006) 37 Cal.4th 1067, 1161.) "The trial judge's function is not to make an independent and de novo penalty determination, but rather to independently reweigh the evidence of aggravating and mitigating circumstances and then to determine whether, in the judge's independent judgment, the weight of the evidence supports the jury's verdict." (*Ibid.*) The trial court's ruling on the automatic motion to modify the verdict is subject to independent review. (*Ibid.*)

Appellant had a right not to testify at the guilt and penalty phases of the trial. *(Estelle v. Smith* (1981) 451 U.S. 454, 463, 101 S.Ct. 1866, 68 L.Ed.2d 359.) The trial court erroneously considered appellant's failure to testify when it denied his motion for a new trial. The trial court believed that the jury asked to hear from appellant because it wanted to know why he set the car on fire and believed the answer to that question could have changed the outcome of the penalty phase. (29 RT pp. 3149-3150.) The trial court then stated that it could not speculate or conjecture regarding why appellant set the car on fire. Despite this comment, it was clear the trial court gave impermissible weight to appellant's failure to testify when it denied the motion. The trial court considered the fact that appellant had not, because of his failure to testify, filled in the evidentiary gap of explaining why he set the car on fire. The trial court speculated that appellant knew Ms. Kerr was alive when the car was set on fire and intended to finish the job of killing her in a hideous manner.

The evidence was conflicting about what appellant believed regarding Ms. Kerr's death. Appellant said he strangled Ms. Kerr, suggesting that he believed he had killed her in

that manner. The medical examiner testified that Ms. Kerr was alive and died of thermal injuries. Appellant thus may have known Ms. Kerr was alive when he set the car on fire. Despite its disclaimer, the trial court made the same mistake as the jury. The trial court, and the jurors, resorted to appellant's failure to testify to assume that appellant must have known Ms. Kerr was alive when he set the car on fire. Because the trial court considered appellant's failure to testify when it denied the motion to modify the verdict, the judgment must be reversed.

The trial court believed that the jury may not have imposed the death penalty if it had evidence that appellant believed Ms. Kerr was deceased when he set the car on fire. The trial court commented that, "the answer to that question could very clearly have changed the jury's thinking about this case." (29 RT pp. 3149-3150.) The trial court implicitly recognized that the evidence appellant tortured Ms. Kerr was weak. Appellant could have tortured Ms. Kerr only if he believed she was alive when he set the car on fire. (*People v. Bemore* (2000) 22 Cal.4th 809, 839 [the crime of torture requires a live victim].) Murder by torture was one of the prosecution theories for first degree murder and a special circumstances which made appellant eligible for the death penalty. (23 RT pp. 2533-2534; 24 RT pp. 2704-2705.) The jury, and apparently the trial court, had serious doubts about whether appellant tortured Ms. Kerr because it wanted to know his motive for setting the car on fire. The jury would not have wanted appellant's testimony on this topic if the evidence of torture was strong. The trial court was required to independently reweigh the aggravating and mitigating

circumstances. (*People v. Guerra, supra*, 37 Cal.4th at p. 1161.) The trial court failed to give sufficient mitigating weight to the weak evidence appellant tortured Ms. Kerr when it denied the motion.

**D. PREJUDICE**

The trial court's consideration of appellant's failure to testify violated his right against self-incrimination in the Fifth and Fourteenth Amendments and article I, section 15 of the California Constitution. It also violated the prohibition against cruel and unusual punishment in the Eighth Amendment and Article I, section 17 of the California Constitution because heightened reliability is required in the fact finding process when the state seeks a judgment of death (*Lockett v. Ohio*, supra, 438 U.S. at p. 604.) The trial court could not have accurately weighed the aggravating and mitigating factors when it denied the automatic motion if it was erroneously giving weight to appellant's failure to testify. Finally, the federal and state due process clauses require fundamental fairness in criminal proceedings. *(Spencer v. Texas, supra*, 385 U.S. at pp. 563-564.) It was fundamentally unfair for the trial court to consider appellant's failure to testify when it denied his automatic motion to set aside the verdict of death. The judgment of death must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

The error was not harmless beyond a reasonable doubt. The trial court acknowledged that information from appellant about whether he believed Ms. Kerr was dead when he set the car on fire could have changed the penalty. The trial court denied the motion because

appellant had failed to fill in that evidentiary gap. It erroneously weighed the mitigating evidence. The judgment of death must be reversed.

## XXX

**THE JUDGMENT OF DEATH SHOULD BE SET ASIDE BECAUSE: (1) THE CALIFORNIA DEATH PENALTY STATUTE, AS A MATTER OF LAW, VIOLATES THE RIGHT TO DUE PROCESS OF LAW IN THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION, THE GUARANTEE OF THE RIGHT TO A JURY TRIAL IN THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION, THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION; AND (2) THE IMPOSITION OF DEATH PENALTY, AS A MATTER OF LAW, VIOLATES THE AFOREMENTIONED CONSTITUTIONAL PROVISIONS**

### A. SUMMARY OF ARGUMENT

Many features of this State's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments in an abbreviated fashion to preserve them for review. To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have *expanded* the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime — even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) — to justify the imposition of the death penalty. There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. The fact that "death is different" has ironically resulted in procedural protections applicable in trials for lesser criminal offenses being suspended for the process of fact finding that triggers the death penalty. The result is a system that randomly chooses among the thousands of murderers in California a few victims for the ultimate sanction.

**B. APPELLANT'S SENTENCE OF DEATH IS INVALID BECAUSE PENAL CODE § 190.2 IS IMPERMISSIBLY BROAD.**

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. "To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

Hence, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty: "Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." (*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty, but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant, the statute contained 26 special circumstances. This figure did not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)*(1982) 31 Cal.3d 797.

The number of special circumstances has continued to grow and is now 35 according to the number in effect on the date of the filing of this brief. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder,

per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*"" (See 1978 Voter''s Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].) Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) This Court has construed the lying-in-wait special circumstance so broadly as to extend Section 190.2's reach to virtually all intentional murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-558, 575.) These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first

degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator eligible for the death penalty. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (*Shatz and Rivkind, The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. Rev. 1283, 1324-26 (1997).) The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," i.e., a premeditated murder not falling under one of section 190.2's many special circumstance provisions. (*Shatz and Rivkind, supra*, 72 N.Y.U. L. Rev. at 1325.) This would be a premeditated murder committed by a defendant not convicted of another murder and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, i.e., a planned murder in which the killer simply confronted and immediately killed the victim or, even more unlikely, advised the victim in advance of the lethal assault of his intent to kill — a distinctly improbable form of premeditated murder. (*Ibid.*)

It is quite clear that these theoretically possible noncapital first degree murders represent a small subset of the universe of first degree murders (*Ibid.*). Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the

opposite. It creates a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This Court has rejected challenges to the statute's lack of any meaningful narrowing. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this Court erroneously stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53, 104 S.Ct. 871, 49 L.Ed.2d 913. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court contrasted the 1977 law with the 1978, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, *supra*, 465 U.S. at 52, fn. 14.)

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. This Court should strike down the California death penalty statutes because they are so all-inclusive that they result in the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.

**C. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.3, SUBDIVISION (A), AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION**

Section 190.3, subdivision (a), violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because prosecutors have used it to characterize any fact concerning a murder as "aggravating" within the statute's meaning. Section 190.3, subdivision (a), directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a), other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself. (*People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox*(1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (6th ed. 1996), par. 3.) Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's attempting to conceal evidence three weeks after the crime, (*People v. Walker* (1988) 47 Cal.3d 605, 639, fn.10, 765 P.2d70, 90, fn.10, *cert. den.*, 494 U.S. 1038 (1990)), harboring a "hatred of religion," (*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S.Ct. 3040 (1992), threatening a witnesses after arrest, (*People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S.Ct. 498)), and disposing of the victim's body in a manner that precluded its recovery, (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.*, 496 U.S. 931 (1990).)

Although factor (a) has survived a facial Eighth Amendment challenge, (*Tuilaepa v. California* (1994) 512 U.S. 967, 987-988, 114 S.Ct. 2630, 129 L.Ed.2d 750), its arbitrary and contradictory use violates both the federal guarantee of due process of law and the Eighth Amendment. Prosecutors throughout California have argued that the jury could weigh in

aggravation every conceivable circumstance of the crime, even those that involve opposite circumstances. Prosecutors have argued as aggravating factors under factor (a) the following:

A. That the defendant struck many blows and inflicted multiple wounds. (See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

B. That the defendant killed with a single execution-style wound. (See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709(defendant killed with single wound); *People v. Frierson*, No. S004761, RT3026-27 (same).

C. That the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification). (See, e.g., *People v. Howard*, No. S004452, RT 6772 (money);*People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No.S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309,RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

D. That the defendant killed the victim without any motive at all. (See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650(same); *People v. Hawkins*, No. S014199, RT 6801 (same)

E. That the defendant killed the victim in cold blood. (See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

F. That the defendant killed the victim during a savage frenzy. (See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

G. That the defendant engaged in a cover-up to conceal his crime. (See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No.S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No.S004464, RT 4192 (defendant did not seek aid for victim).

H. That the defendant did not engage in a cover-up and so must have been proud of it. (See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informed others about crime); *People v. Williams*, No. S004365, RT3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

I. That the defendant made the victim endure the terror of anticipating a violent death (See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT4623.

J. That the defendant killed instantly without any warning. (See, e.g., *People v. Freeman*, No. S004787, RT 3674(defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT2959 (same).

K. That the victim had children. (See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23,1987) (victim had children).

L. That the victim had not yet had a chance to have children. (See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

M. That the victim struggled prior to death. (See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v.Lucas*, No. S004788, RT 2998 (same).

N. That the victim did not struggle. (See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

O. That the defendant had a prior relationship with the victim. (See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

P. That the victim was a complete stranger to the defendant. (See, e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

These examples show that absent any limitation on factor (a), ("the circumstances of the crime"), prosecutors have urged juries to find aggravating factors based on squarely conflicting circumstances. Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of factor (a)

to embrace facts covering the entire spectrum of facets present in homicides:

A. The age of the victim. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was a child, an adolescent, a young adult, in the prime of life, or elderly. (See, e.g., *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075(victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No.S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*,No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts");*People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

B The method of killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was strangled, bludgeoned, shot, stabbed, or consumed by fire. (See, e.g., *People v. Clair*, No. S004789, RT 2474-75(strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No.S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v.Scott*, No. S010334, RT 847 (fire).

C. The motive of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all. (See, e.g., *People v. Howard*, No. S004452, RT 6772 (money);*People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No.S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

D. The time of the killing. Prosecutors have argued, and juries were free to find, a factor (a), aggravating circumstance on the ground that the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day. (See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night);*People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).)

E. The location of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed in her own home, in a public bar, in a city park or in a remote location. (See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No.

S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654,RT 16,749-50 (a forest); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

The foregoing examples make clear that factor (a) is being used as a basis for finding aggravating factors in every case without any limitation. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts into aggravating factors. The danger that such facts will continue to be treated as aggravating factors is heightened by the fact that the sentencing jury is not required to unanimously agree as to the existence of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a reasonable doubt, or to make any record of the aggravating factors relied upon in determining that the aggravating factors outweigh the mitigating. (See section C of this argument, below.) The broad "circumstances of the crime" language in factor (a) permits indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363, 108 S.Ct. 1853, 100 L.Ed.2d 372 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398].)

The prosecutor's penalty phase closing argument in this case demonstrates how the "circumstances of the crime" factor in section 190.3, subdivision (a), results in arbitrary and capricious imposition of the death penalty. In explaining how factor (a) warranted the death penalty, the prosecutor argued the following facts: (1) appellant acted from free will and

deliberately thought out decisions, (27 RT pp. 2967-2968); (2) Ms. Kerr's friends and family will suffer from her loss, (27 RT pp. 2968-2969); (3) Ms. Kerr died in a hideous manner, (27 RT pp. 2969-2970); (4) Ms. Kerr lived in fear before she died because she was being stalked by appellant, (27 RT p. 2970).

All of the facts argued by the prosecutor above could be argued as factors in aggravation. Had appellant murdered someone in a different manner from how this murder occurred, the prosecutor could have argued in aggravation that appellant quickly killed Ms. Kerr and without any conscience or ambivalence about whether he should do so and Ms. Kerr had no warning she was in danger. The loss experienced by Ms. Kerr and her family does not fall within the circumstances of the crime category of aggravation. The above example demonstrates how factor (a) imposes no limitation on the imposition of the death penalty because it allows any aspect of a murder to become a fact in aggravation. Factor (a) is therefore unconstitutional on its face and as applied to the instant case.

**D. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY TRIAL ON EACH FACTUAL DETERMINATION PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.**

California's death penalty statute has none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved,

that aggravating circumstances outweigh mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is prohibited. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make — whether or not to impose death.

**E. APPELLANT'S DEATH VERDICT WAS NOT PREMISED ON FINDINGS BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY THAT ONE OR MORE AGGRAVATING FACTORS EXISTED AND THAT THESE FACTORS OUTWEIGHED MITIGATING FACTORS; HIS CONSTITUTIONAL RIGHT TO JURY DETERMINATION BEYOND A REASONABLE DOUBT OF ALL FACTS ESSENTIAL TO THE IMPOSITION OF A DEATH PENALTY WAS THEREBY VIOLATED**

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. (27 RT p. 3037.) The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence. (*Ibid.*) This was consistent with this Court's interpretations of California's death penalty statute. (E.g. *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255 [neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, or that they outweigh mitigating

factors].) This Court's interpretations have been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 [hereinafter *Ring*]; and *Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 [hereinafter *Blakely*].

In *Apprendi*, the high Court held a state may not impose a sentence greater than that authorized by the jury''s simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Apprendi, supra,* 530 U.S. at 478.) In *Ring*, the high Court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at 593.) The Court acknowledged in *Walton v. Arizona* (1990) 497 U.S. 639, it had held aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Ring, supra,* 536 U.S. at 598.) The Court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding, which can increase the penalty, is the functional equivalent of an element of the offense, regardless of how that factual finding is characterized. The Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high Court considered the effect of *Apprendi* and *Ring* in a case where

the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington*, *supra*, 124 S.Ct. at 2535.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the aggravating factors was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 2543.)

In reaching this holding, the Supreme Court stated the governing rule after *Apprendi* is that, other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant `statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at 2537, italics in original.)

As explained below, California's death penalty scheme, as interpreted by this Court, does not comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*, and violates the federal Constitution.

## F. IN THE WAKE OF APPRENDI, RING, BLAKELY, AND BOOKER, ANY JURY FINDING NECESSARY TO THE IMPOSITION OF DEATH MUST BE FOUND TRUE BEYOND A REASONABLE DOUBT.

Twenty-six states require that factors relied on to impose death in a penalty phase

must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions. (See Ala. Code, §§ 13A-5-45(e) (1975); Ark. Code Ann., §§ 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., §§ 16-11-103(d) (West1992); Del. Code Ann. tit. 11, §§ 4209(d)(1)(a) (1992); Ga. Code Ann.§§ 1710-30(c) (Harrison 1990); Idaho Code §§ 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann.§§§§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. §§ 532.025(3) (Michie1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Codeart. 27, §§§§ 413(d), (f), (g) (1957); Miss. Code Ann. §§ 99-19-103 (1993);*State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb.1977) 250 N.W.2d 881, 888-90; Nev. Rev. Stat. Ann. §§ 175.554(3) (Michie1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. §§ 31-20A-3 (Michie1990); Ohio Rev. Code §§ 2929.04 (Page''s 1993); Okla. Stat. Ann. tit. 21,§§ 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. §§ 9711(c)(1)(iii) (1982); S.C. Code Ann. §§§§ 16-3-20(A), (c) (Law. Co-op 1992); S.D. Codified Laws Ann. §§ 23A-27A-5 (1988); Tenn. Code Ann. §§ 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. §§ 37.071(c) (West 1993); *State v. Pierre* (Utah1977) 572 P.2d 1338, 1348; Va. Code Ann. §§ 19.2-264.4 (c) (Michie 1990);Wyo. Stat. §§§§ 6-2-102(d)(i)(A), (e)(I) (1992). Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. §§ 10.95.060(4) (West 1990).) Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev.

Stat. Ann. §§ 13-703)(1989); Conn. Gen. Stat. Ann. §§ 53a-46a(c) (West 1985).

On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumstances, and the fact that aggravation substantially outweighs mitigation, were factual findings that must be made by a jury beyond a reasonable doubt. (*State v. Ring* (Az., 2003) 65 P.3d 915.) Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

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

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweighs any and all mitigating factors.

This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also — and most important — to render an individualized, normative determination about the penalty

appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.) As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury, (Vol. 2, C.T. p. 816), "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.) Thus, the jury must find one or more aggravating factor before it weighs aggravating factors against mitigating factors. The jury must also find that aggravating factors substantially outweigh mitigating factors before it imposes the death penalty.

In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely a discretionary weighing process. "we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at 460.) These factual determinations are essential prerequisites to death-eligibility, but do not require imposition of the death penalty; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.

For instance, this Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may

still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2, subd. (a)), *Apprendi* does not apply. After *Ring*, this Court repeated the same analysis in *People v. Snow* (2003) 30 Cal.4th 43, and *People v. Prieto* (2003) 30 Cal.4th 226: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation omitted], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at 263.) This holding misinterprets California death penalty scheme.

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

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 536 U.S. at 604.)

California's statute is no different from Arizona's statute. A California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 536 U.S. at 604.) Section 190, subdivision. (a), provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes the further findings that one or more aggravating circumstances exist and substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC No. 8.88 (7th ed., 2003). It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC No. 8.88), and this Court has recognized that a particular special circumstance can even be argued to the jury as a *mitigating* circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 134 Cal.Rptr.2d at 621 [financial gain special circumstance (section 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].)

Arizona's statute says that the trier of fact shall impose death if it finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency. Arizona Revised Statute section 13-703(E) provides: "In determining whether to

impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency." California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances. The final paragraph of Section 190.3 provides in part: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." There is no meaningful difference between the processes followed under each scheme. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt." (*Ring*, 536 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer pointed out, " a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 124 S.Ct. at 2551 [emphasis in original].) The applicability of the Sixth Amendment is determined by whether the sentencer must make additional findings during

the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

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

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are *no* facts, in Arizona or California, that are "necessarily determinative" of a sentence — in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death — no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. *Blakely* makes crystal clear that, to the dismay of the

dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal constitution.

In *Prieto*, the Court summarized California's penalty phase procedure as follows:

> Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California* (1994) 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750.) No single factor therefore determines which penalty — death or life without the possibility of parole — is appropriate.

(*Prieto*, 30 Cal.4th at 263; emphasis added.) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present — otherwise, there is nothing to put on the scale in support of a death sentence. (See, *People v. Duncan* (1991) 53 Cal.3d 955, 977-978.)

A California jury must first decide whether any aggravating circumstances exists. Then the jury can "merely" weigh those factors against the proffered mitigation. Further, as noted above, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring*, *supra*, 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *State v. Ring* (Az. 2003) 65 P.3d 915; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450; See also

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

A sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements. This does not make the finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own — a finding which must inevitably involve normative ("what would make this crime worse") and factual ("what happened") elements. The high Court rejected the state's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely*, *supra*, 124 S.Ct. at 2538.) Thus, under *Apprendi*, *Ring*, and *Blakely*, the jury must find beyond a reasonable doubt: (1) factors in aggravation; and (2) that aggravating factors outweigh mitigating factors.

Under *Apprendi*, *Ring*, and *Blakely*, the questions regarding the Sixth Amendment's application to California's penalty phase, are: (1) What is the maximum sentence that could be imposed without a finding of an aggravating circumstances as defined in CALJIC Number 8.88?; and (2) What is the maximum sentence that could be imposed based on findings true one or more aggravating circumstance? The maximum sentence would be life without the possibility of parole unless the jury found at least one aggravating circumstance, and found the aggravating circumstances substantially outweighed the mitigating circumstances.

Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." [Citation.] The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence." (*Ring*, *supra*, 536 U.S. at 606, quoting with approval Justice O'Connor's *Apprendi* dissent, 530 U.S. at 539.) No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732, 118 S.Ct. 2246, 141 L.Ed.2d 615 ["the death penalty is unique in both its severity and its finality"].) "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'

(*Id.*, at 732 (emphasis added).) According to *Ring*, *supra*, 536 U.S. at 608, 609:

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

The final step of California's capital sentencing procedure, the decision to impose death, is a moral and a normative judgment. This Court errs, however, in using this fact to eliminate procedural protections that render the decision rational and reliable, and to allow the findings that are prerequisite to imposing death to be uncertain, undefined, and subject to dispute regarding significance and accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

## G. THE REQUIREMENTS OF JURY AGREEMENT AND UNANIMITY

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

Here, there was not even a requirement that a *majority* of jurors agree on any

particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. Based on the instructions and record in this case, there was nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty. With nothing to guide its decision, there was nothing to suggest the jury imposed a death sentence because of any particular aggravating factor. The absence of historical authority to support such a practice in sentencing makes it further in violation of the Sixth, Eighth, and Fourteenth Amendments. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51, 112S.Ct. 466, 116L.Ed.2d 371 [historical practice given great weight in constitutionality determination]; *Den ex dem. Murray v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].) It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the final deliberative process in which the ultimate normative determination is made. The U.S. Supreme Court has required such factual findings be made by a jury and cannot have fewer procedural protections than required for decisions of much

less consequence. (*Ring*, *supra*; *Blakely*, *supra*.) These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334,100 S.Ct. 2214, 65 L.Ed.2d 159). In a non-capital context, the high Court has upheld the verdict of a twelve member jury rendered by a vote of 9-3. (*Johnson v. Louisiana*(1972) 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152; *Apodaca v. Oregon* (1972) 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184.)

Even if that level of jury consensus were deemed sufficient to satisfy the Sixth, Eighth, and Fourteenth Amendments in a capital case, California's sentencing scheme would still be deficient since, as noted above, California requires no jury consensus at all as to the existence of aggravating circumstances. Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California*, *supra,* 524 U.S. at 732), the *Monge* court developed this point at some length:

> The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida* 430 U.S. 349,358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct.,at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct.2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability

> when the death sentence is imposed'); see also *Strickland v. Washington,* 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of fact finding').

(*Monge v. California, supra*, 524 U.S. at 731-732; *accord, Johnson v. Mississippi* (1988) 486 U.S. 578, 584, 108 S.Ct. 1981, 100 L.Ed.2d 575.) The Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants, (see *Monge v. California, supra*, 524 U.S. at 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994, 111 S.Ct. 2680, 115 L.Ed.2d 836), and certainly no less (*Ring*, 536 U.S. at 609). Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. §§ 848,subd., (k).)

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated. The first sentence of article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265

[confirming the inviolability of the unanimity requirement in criminal trials].) To apply the requirement to findings carrying a maximum punishment of one year in the county jail — but not to factual findings that determine whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) — violates the equal protection clause, due process, Sixth Amendment right to a jury trial, and constitutes cruel and unusual punishment under state and federal Constitutions.

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

## H. THE DUE PROCESS AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS REQUIRE THAT THE JURY IN A CAPITAL CASE BE INSTRUCTED THAT THEY MAY IMPOSE A SENTENCE OF DEATH ONLY IF THEY ARE PERSUADED BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING FACTORS OUTWEIGH THE MITIGATING FACTORS AND THAT DEATH IS THE APPROPRIATE PENALTY.

### 1. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts.

"[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521, 78 S.Ct. 1332, 2 L.Ed.2d 1460.) The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393; see also *Presnell v. Georgia* (1978) 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

**2. Imposition of Life or Death**

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of

erroneous results. (*Winship*, *supra*, 397 U.S. at 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.323.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. It reflects a belief that the more serious the consequences of the decision, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*Winship*, *supra*, 397 U.S. at 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755, 102 S.Ct. 1388, 71 L.Ed.2d 599; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335, 96 S.Ct. 893, 47 L.Ed.2d 18.)

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

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

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

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

(455 U.S. at 755.)

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

instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at 363.)

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

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) No greater interest is ever at stake. (See *Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings. (*Monge v. California*, *supra*, 524 U.S. at 732.) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision are true, but also that death is the appropriate sentence.

This Court has long held that the penalty determination in a capital case in California

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

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

(*State v. Rizzo* (2003) 266 Conn. 171, 238, fn. 37 [833 A.2d 363, 408-409, fn. 37].)

Under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

## I. EVEN IF PROOF BEYOND A REASONABLE DOUBT STANDARD WERE NOT THE CONSTITUTIONALLY REQUIRED BURDEN OF PERSUASION FOR FINDING (1) THAT AN AGGRAVATING FACTOR EXISTS, (2) THAT THE AGGRAVATING FACTORS OUTWEIGH THE MITIGATING FACTORS, AND (3) THAT DEATH IS THE APPROPRIATE SENTENCE, PROOF BY A PREPONDERANCE OF THE EVIDENCE WOULD BE CONSTITUTIONALLY COMPELLED AS TO EACH SUCH FINDING

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in *any* sentencing proceeding. Judges have never had the power to impose an enhanced sentence without the firm belief that whatever considerations underlay such a sentencing decision had been at least proved to be true more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to find "proof " of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of *any* historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51 percent — even 20, 10, or 1 — is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the evidence burden of proof. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice

given great weight in constitutionality determination]; *Den ex dem. Murray v. Hoboken Land and Improvement Co., supra,* 59 U.S. (18 How.) at pp. 276-277 [due process determination informed by historical settled usages].)

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Accordingly, appellant respectfully suggests that *People v. Hayes* — in which this Court did not consider the applicability of section 520 — was erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, the question whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma, supra,* 447 U.S. at 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments and is reversible per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.) That should be the result here, too.

## J. A BURDEN OF PROOF IS REQUIRED IN ORDER TO ESTABLISH A TIE-BREAKING RULE AND ENSURE EVEN-HANDEDNESS.

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes*, *supra*, 52 Cal.3d at 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors — and the juries on which they sit — respond in the same way, so the death penalty is applied evenhandedly. "[C]apital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. at 112.) It is unacceptable — "wanton" and "freakish" (*Proffitt v. Florida* (1976) 428 U.S. 242, 260, 96 S.Ct. 2960, 49 L.Ed.3d 913) — the "height of arbitrariness" (*Mills v. Maryland* (1988) 486 U.S. 367, 374, 108 S.Ct. 1860, 100 L.Ed.2d 384) — that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

## K. EVEN IF THERE COULD CONSTITUTIONALLY BE NO BURDEN OF PROOF, THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY TO

**THAT EFFECT**

If in the alternative it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury. The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana*, *supra*.) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case. The same is true if there is *no* burden of proof, but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that.

This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth, and Fourteenth Amendments, because the instructions given failed to provide the jury with the guidance legally required for the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (*Sullivan v. Louisiana*, *supra*.)

**L. CALIFORNIA LAW VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY FAILING TO REQUIRE THAT THE JURY BASE ANY DEATH SENTENCE ON WRITTEN FINDINGS REGARDING AGGRAVATING FACTORS.**

The failure to require written or other specific findings by the jury regarding

aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934; *Gregg v. Georgia, supra*, 428 U.S. at 195.) Because California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances, (*People v. Fairbank, supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316, 87 S.Ct. 745, 9 L.Ed.2d 770.) Without written findings, it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole. (*Id.*, 11 Cal.3d at 269.)

A determination of parole suitability shares many characteristics with the decision of

whether or not to impose the death penalty. In both cases, the person has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.) The same analysis applies to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan*, *supra,* 501 U.S. at 994.) Because providing more protection to a non-capital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment, (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances it relied upon in imposing the death penalty.

Written findings are essential for a meaningful review of the sentence. In *Mills v. Maryland*, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but also to determine the benefit of the newly implemented state procedure. (See, e.g., 486 U.S. at 383, fn. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at 643) and "moral," (*People v. Hawthorne*, *supra*, 4 Cal.4th at 79), does not mean that its basis cannot be, and should not be, articulated. The

importance of written findings is recognized throughout this country. Of the 34 post-*Furman* state capital sentencing systems, 25 require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death. (See Ala. Code §§, 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann., §§ 13-703(d) (1989); Ark. Code Ann. §§ 5-4-603(a) (Michie 1987);Conn. Gen. Stat. Ann. §§ 53a-46a(e) (West 1985); *State v. White* (Del. 1978)395 A.2d 1082, 1090; Fla. Stat. Ann. §§ 921.141(3) (West 1985); Ga. Code Ann. §§ 17-10-30(c) (Harrison 1990); Idaho Code §§ 19-2515(e) (1987); Ky. Rev. Stat. Ann. §§ 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art.905.7 (West 1993); Md. Ann. Code art. 27, §§ 413(I) (1992); Miss. Code Ann. §§ 99-19-103 (1993); Mont. Code Ann. §§ 46-18-306 (1993); Neb. Rev. Stat. §§ 29-2522 (1989); Nev. Rev. Stat. Ann. §§ 175.554(3) (Michie 1992);N.H. Rev. Stat. Ann. §§ 630:5(IV) (1992); N.M. Stat. Ann. §§ 31-20A-3(Michie 1990); Okla. Stat. Ann. tit. 21, §§ 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. §§ 9711 (1982); S.C. Code Ann. §§ 16-3-20(c) (Law. Co-op. 1992);S.D. Codified Laws Ann. §§ 23A-27A-5 (1988); Tenn. Code Ann.§§ 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. §§ 37.071(c) (West1993); Va. Code Ann. §§ 19.2-264.4(D) (Michie 1990); Wyo. Stat.§§ 6-2-102(e) (1988).)

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the

Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence — including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that factors in aggravation outweigh factors in mitigation. Absent written findings concerning aggravating circumstances found by the jury, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring,* and provides no instruction to encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment, but also the right to trial by jury guaranteed by the Sixth Amendment.

**M. CALIFORNIA'S DEATH PENALTY STATUTE AS INTERPRETED BY THE CALIFORNIA SUPREME COURT FORBIDS INTER-CASE PROPORTIONALITY REVIEW, THEREBY GUARANTEEING ARBITRARY, DISCRIMINATORY, OR DISPROPORTIONATE IMPOSITIONS OF THE DEATH PENALTY.**

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. It requires that death judgments be proportionate and reliable. Reliability and proportionality are closely related. Part of the requirement of reliability is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (plurality opinion, alterations in

original, quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251, 96 S.Ct. 2960, 49 L.Ed.2d 913 (conc. opinion of Stewart, Powell, and Stevens, JJ.)).)

A commonly utilized mechanism to ensure reliability and proportionality in capital sentencing is comparative proportionality review — a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, 104 S.Ct. 871, 79 L.Ed.2d 29, the Court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and construed by this Court, has become such a sentencing scheme. The high Court in *Harris*, in contrasting the 1978 statute with the 1977 law, which the Court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at 52, fn. 14.)

The greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See section A of this Argument, *ante*.) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see section C of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and

capricious sentencing (see section B of this Argument). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster." Further, the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia*, *supra*, 428 U.S. at 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate — even cases from outside the United States. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316 fn. 21; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, 830-831, 108 S.Ct. 2687, 101 L.Ed.2d 702; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22, 102 S.Ct. 3368, 73 L.Ed.2d 1140; *Coker v. Georgia* (1977) 433 U.S. 584, 596, 97 S.Ct. 2861, 53 L.Ed.2d 982.)

Twenty-nine of the 38 states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. Georgia requires that Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann., §§ 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman v. Georgia* (1972) 408 U.S. 238, 33 L.Ed

346, 92 S.Ct. 2726] . . ." (*Gregg v. Georgia* (1976) 428 U.S. 153, 198.) Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Proffitt v. Florida* (1976) 428 U.S. 242, 259, 96 S.Ct. 2960, 49 L.Ed.2d 913.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review. (See Ala. Code, §§ 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann., §§ 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, §§ 4209(g)(2)(1992); Ga. Code Ann. §§ 17-10-35(c)(3) (Harrison 1990); Idaho Code §§ 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. §§ 532.075(3) (Michie 1985); La.Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. §§99-19-105(3)(c) (1993); Mont. Code Ann. §§ 46-18-310(3) (1993); Neb. Rev. Stat. §§§§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. §§177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. §§ 630:5(XI)(c) (1992);N.M. Stat. Ann. §§ 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. §§ 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. §§ 2929.05(A) (Baldwin 1992); 42Pa. Cons. Stat. Ann. §§ 9711(h)(3)(iii) (1993); S.C. Code Ann. §§ 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. §§ 23A-27A-12(3)(1988); Tenn. Code Ann. §§ 39-13-206(c)(1)(D) (1993); Va. Code Ann.§§ 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. §§ 10.95.130(2)(b) (West 1990); Wyo. Stat. §§ 6-2-103(d)(iii) (1988); see also *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State*(Fla. 1975) 307 So.2d 433,444; *People v. Brownell* (Ill. 1980) 404 N.E.2d181,197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d881, 890 [comparison with other capital prosecutions where death has and has not

been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.)

Section 190.3 does not require that the trial court or this Court to compare between this case and other similar cases regarding the proportionality of the sentence, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at 253.) The statute also does not forbid it. This Court imposed the prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) Given the reach of the special circumstances that make one eligible for death under section 190.2 — a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* — and the absence of other procedural safeguards to ensure a proportionate sentence, this Court's refusal to engage in inter-case proportionality review violates the Eighth Amendment.

*Furman* raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in *Furman*. (*Gregg v. Georgia*, *supra*, 428 U.S. at 192, citing *Furman v. Georgia*, *supra*, 408 U.S. at 313 (White, J., conc.).) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in an

arbitrary and unreviewable manner, or which are skewed in favor of execution.

## N. THE PROSECUTION MAY NOT RELY IN THE PENALTY PHASE ON UNADJUDICATED CRIMINAL ACTIVITY; FURTHER, EVEN IF IT WERE CONSTITUTIONALLY PERMISSIBLE FOR THE PROSECUTOR TO DO SO, SUCH ALLEGED CRIMINAL ACTIVITY COULD NOT CONSTITUTIONALLY SERVE AS A FACTOR IN AGGRAVATION UNLESS FOUND TO BE TRUE BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY.

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in section 190.3, subdivision (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.)

Here, the prosecution presented extensive evidence regarding criminal activity allegedly committed by appellant which had not resulted in a criminal conviction. The prosecution presented evidence during the penalty phase that appellant had assaulted his former spouse on multiple occasions. (25 RT pp. 2780-2803.) The prosecutor would not have been able to present any of the above aggravating evidence if unadjudicated criminal activity was not admissible during the penalty phase.

Because the admission of unadjudicated criminal activity violated appellant's federal constitutional rights, the judgment of death must be reversed unless the error was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.) The admission of this evidence was not harmless beyond a reasonable doubt. The evidence concerning appellant's behavior with his former spouse was especially damaging. It

portrayed appellant as a stalker who was fixated on control. Hence, the judgment of death must be reversed.

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

## O. THE USE OF RESTRICTIVE ADJECTIVES IN THE LIST OF POTENTIAL MITIGATING FACTORS IMPERMISSIBLY ACTED AS BARRIERS TO CONSIDERATION OF MITIGATION BY APPELLANT'S JURY.

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

Hence, the judgment of death must be reversed.

## P. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS.

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

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, *second only to life itself*, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." (*Commonwealth v. O'Neal* (1975) 327 N.E.2d 662, 668, 367 Mass 440, 449.) A "fundamental" interest triggers strict scrutiny. (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme affecting a fundamental interest

without showing that the state has a compelling interest justifying the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655.)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the disparate treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants. In *Prieto*, "as explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (*Prieto*, 30 Cal.4th at 275; emphasis added.) As in *Snow*, "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*Snow*, 30 Cal.4th at 126, fn. 3 [emphasis added].)

This Court has analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. California is in the indefensible position of giving persons sentenced to death

significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property. An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., Pen. Code §§ 1158, 1158a.)

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. (See sections C.1-C.5, *ante*.) Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. Unlike proceedings in most states where death is a sentencing option or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See section C.6, *ante*.) These discrepancies on basic procedural protections are skewed against persons subject to loss of life. They violate equal protection of the laws.

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

The Legislature thus provided a substantial benefit for all prisoners sentenced under the Determinate Sentencing Law (DSL): a comprehensive and detailed disparate sentence

review. (See *In re Martin* (1986) 42 Cal.3d 437, 442-444, for details of how the system worked while in practice). In appellant's case, such a review might well be the difference between life and death. Persons sentenced to death, however, are unique among convicted felons in that they are not provided this review, despite the extreme and irrevocable nature of their sentence. Such a distinction is irrational.

The Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen*, *supra*, 42 Cal. 3d at 1286.) But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305, 107 S.Ct. 1756, 95 L.Ed.2d 262.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses. (*Coker v. Georgia*, *supra*, 433 U.S. 584) or offenders (*Enmund v. Florida* (1982) 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140; *Ford v. Wainwright* (1986) 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335.)

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed, but also required in

particular circumstances. (See section 190.4; *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.) The second reason offered by *Allen* for rejecting the equal protection claim was that the range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen*, *supra*, 42 Cal.3d at 1287 [emphasis added].) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability (citation). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright*, *supra*, 477 U.S. at 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [Conc. opn. of Stewart, Powell, and Stephens, J.J.].)

The *Monge* court developed this point at some length:

> The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct.

> 1197,1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington*,466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan,J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy off act finding'').

(*Monge v. California, supra*, 524 U.S. at 731-732.)

The qualitative difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply procedural safeguards used in noncapital settings to capital sentencing. Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to noncapital sentencing as supporting the different treatment of felons sentenced to death. (*Allen, supra*, at 1287.) The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference — and one that was recently rejected by this Court in *Prieto* and *Snow*. A trial judge may base a sentence choice under the DSL on factors that include precisely those considered as aggravating and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through (j) with Cal. Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because

"nonquantifiable factors" permeate *all* sentencing choices.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530, 148 L.Ed.2d 388.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has been cited by this Court as justification for the arbitrary and disparate treatment of individuals who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, e.g., *Atkins v. Virginia*, *supra*.) This fact cannot justify the refusal to require written findings by the jury or justify the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (*Blakely v. Washington*, *supra*; *Ring v. Arizona*, *supra*.)

Although *Ring* hinged on the Court's reading of the Sixth Amendment, its ruling addressed the question of comparative procedural protections: "Capital defendants, no less

than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at609.)

California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and the cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

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

**Q. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION**

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former *apartheid* regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *People v. Bull* (1998) 185 Ill.2d 179, 225 [235 Ill. Dec. 641, 705 N.E.2d 824] [dis. opn. of Harrison, J.].) (Since that article, in 1995, South Africa abandoned the death penalty.)

The lack of use of the death penalty, or its limitation to "exceptional crimes such as treason" — as opposed to its use as regular punishment — is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [109 S.Ct. 2969, 106 L.Ed.2d 306] [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "*The Death Penalty: List of Abolitionist and Retentionist Countries*" (1 January 2000), published at http://web.amnesty.org/library/index/ENGACT500052000.) These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and

Slovak Republics, all of which have abolished the death penalty. (*Ibid.*)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227, 16 S.Ct. 139, 40 L.Ed. 95; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292 [8 S.Ct. 461, 31 L.Ed. 430]; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia*, *supra*, 408 U.S. at 420 [dis. opn. of Powell, J.].) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100, 78 S.Ct. 590, 2 L.Ed.2d 630; *Atkins v. Virginia*, *supra*, 536 U.S. at 325.) It prohibits the use of forms of punishment not recognized by several of our states and the

civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra*, 536 U.S. at 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T.2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes — as opposed to extraordinary punishment for extraordinary crimes — is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra*.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311.) Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits

the death penalty to only "the most serious crimes."

## CONCLUSION

The guilt phase and penalty phase of appellant's trial was riddled with numerous errors. The judgment of guilt must be reversed. Alternatively, the judgment of death must be vacated.

Dated: 6/30/10

John L. Staley

I declare under penalty of perjury that this Opening Brief contains 131,125 words.

John L. Staley

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO
(People v. Brooks, Superior Court
case No. PA032918; Supreme Court
case No. SO99274)

I reside in the county of SAN DIEGO, State of California. I am over the age of 18 and not a party to the within action; My business address is 11770 Bernardo Plaza Court, Suite 305, San Diego, CA 92128. On July 2, 2010, I served the foregoing documents described as:

APPELLANT'S OPENING BRIEF

on all parties to this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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

John L. Staley