SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. PAUL LOYDE HENSLEY, Defendant and Appellant.	S050102 (San Joaquin County Superior Court No. SC054773A)

APPELLANT'S OPENING BRIEF

VOLUME III

(Pages 329-517)

Automatic Appeal from the
Superior Court of the State of California
In and for the County of San Joaquin
Honorable Frank A. Grande, Judge

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XI. THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO QUESTION A PSYCHIATRIC TECHNICIAN WHO WORKED AT THE JAIL REGARDING WHETHER APPELLANT HAD EXPRESSED REMORSE

A. Introduction

The trial court erred in permitting the prosecutor to question Steven McElvain, a psychiatric technician who worked at the San Joaquin County Jail, regarding whether appellant had expressed remorse regarding his crimes. Appellant's counsel properly objected to this evidence, which represented an illicit effort on the prosecutor's part to inject lack of remorse into the jury's consideration as a nonstatutory aggravating factor favoring death.

B. Procedural Background

Steven McElvain was employed as a psychiatric technician at the San Joaquin County Jail at the time of appellant's incarceration. McElvain was called as a penalty-phase witness by the defense for purposes of providing an explanation responsive to prosecution evidence showing that appellant had engaged in misbehavior at the jail during January 1995. (58 RT 18582-

18588; see Statement of Facts, § B.2.d.) Prior to McElvain's testimony, counsel and the court held a discussion outside the jury's presence regarding his proposed testimony. Defense counsel proposed to examine the witness regarding appellant's complaints of increased anxiety and decreased sleep, which resulted in appellant being prescribed antidepressants. The court indicated that appellant's expressed complaints would be admissible as state of mind or physical sensation evidence, pursuant to Evidence Code section 1250. (58 RT 18582-18588.)

At that point, the prosecutor asked to be allowed to question McElvain regarding whether appellant had expressed any "remorse" for the victims of his present crimes, and there was the following discussion:

> MR. DUNLAP: So, we're allowing statements of the defendant. I guess that entails any cross-examination of conversation [McElvain] had with Mr. Hensley, or are we limited to a time period?
>
> THE COURT: Dealing with his state of mind.
>
> MR. DUNLAP: We can talk about emotions for the victims, expressed remorse? I assume we can open that entire cross-examine area.
>
> THE COURT: You can ask those questions of this psyche technician if you want.
>
> MR. FOX: Judge, I would object to that.

THE COURT: What for? Why would you do that?

MR FOX: Whether he's expressed remorse for the victims to the psyche tech?

THE COURT: He's going to ask if his anxiety was connected to the fact he was – I'm feeling really guilty and bad about the fact I killed somebody, and I'm feeling bad about that. And please give me some medication for that. That's fair game.

MR. FOX: I would distinguish between January and any other time.

THE COURT: No, at that time.

MR. FOX: Because I'm talking about the January contacts which the Court can see from the records.

THE COURT: We're talking about the same time period.

MR. FOX: Thanks, Judge. As the Court can see from the records there's a concentrated –

THE COURT: We're talking about January 4th through the 20th.

(58 RT 18588-18589 [emphasis added].)

During his cross-examination of McElvain, the prosecutor questioned him, as follows, regarding the subject of remorse:

[D.A. DUNLAP]: I think you talked about his worrying about his trial, right?

A. The situation just – yeah, trial and, you

know, being in Ad. Seg., just being incarcerated.

Q. Okay. Now, how long did you talk with him for at this time, do you recall?

A. It was real brief. It was at his cell – cell door.

Q. Did he appear to be distraught?

A. You know, I don't recall.

Q. Well, let me ask you this: Did he express remorse to you on January 4th of 1995, when he was worried about his situation?

A. Remorse?

Q. About the victims?

A. No, he did not.

Q. And on January 19th of '95, and, again, he was worried about his situation, did he express remorse to you about the victims in this case?

MR. FOX: I'm going to object to the evidence that he expressed concern about his situation on January 19th. That's – that misstates the evidence.

MR. DUNLAP: Strike it.

THE COURT: Sustained. Clarify that, please.

MR. DUNLAP:
Q. January 19th, did you talk with him?

A. Yes.

Q. Said – well, tell me what was he telling you on the 19th.

A. On the 19th, he was telling me he – at that time, now, it was – he was complaining about the medicine causing blurred vision and – and – and drowsiness in the morning.

Q. And did he talk –

A. I believe.

Q. Did he talk to you about any remorse that he was having regarding the victims in this case?

A. No, he did not.

Q. Who is Stacy Copeland, do you know?

A. Pardon me?

Q. Stacy Copeland, do you know?

A. No.

Q. Did Mr. Hensley, on January 4th of 1995, when he was concerned about his situation, talk about a Stacy Copeland situation?

A. No, he did not.

Q. And Larry Shockley, Mr. McElvain, do you know who Larry Shockley is?

A. No, I don't.

Q. And how about Scott Rooker, do you know who he is?

A. No.

Q. And Gregory Renouf, do you know who he is?

A. No.

Q. Did Mr. Hensley talk to you about these names when he was talking about his anxiety on January 4 of 1995?

A. No, he did not.

MR. DUNLAP: Thanks a lot, Mr. McElvain.

(58 RT 18623-18625 [emphasis added].)

C. The Trial Court Erred In Permitting This Evidence

Defense counsel's objection was well taken and the trial court erred in permitting the prosecutor to question McElvain regarding appellant's lack of remorse. That is because a defendant's lack of remorse is not listed as a permissible aggravating factor in section 190.3, and appellant's failure to discuss the topic of remorse with McElvain lacked any legitimate probative value.

A prosecutor may not use a defendant's lack of remorse as an aggravating circumstance favoring imposition of the death penalty. (People

v. Crittenden, supra, 9 Cal.4th at 148.) Such use of lack-of-remorse evidence violates the state statutory scheme by allowing a death sentence to be based on a nonstatutory aggravating factor. (Ibid. [citing People v. Boyd, supra, 38 Cal.3d at 772-776]; accord, Bellmore v. State, supra, 602 N.E.2d at 129 [trial court's reliance on lack of remorse as a nonstatutory aggravating factor violated Indiana death penalty statute].)

In Boyd, this Court held that evidence of bad conduct on the defendant's part which is not probative of any statutory penalty factor is irrelevant and inadmissible with respect to the prosecution case for aggravation. (People v. Boyd, supra, 38 Cal.3d at 774.) This important state procedural protection and liberty interest, i.e., the right not to be sentenced to death except upon the basis of statutory aggravating factors, is also protected as a matter of federal due process under the Fifth and Fourteenth Amendments. (Hicks v. Oklahoma, supra, 447 U.S. at 346; Fetterly v. Paskett, supra, 997 F.2d at 1300-1301.)

Appellant acknowledges that his trial counsel did not specifically cite federal constitutional provisions in arguing to exclude this evidence. However, appellant's federal constitutional claims in this regard are adequately preserved for appeal because appellant's present constitutional objections to the court's admission of the remorse evidence rest upon the

same factual and legal issues as defense counsel's stated objections to this evidence. (People v. Partida, supra, 37 Cal.4th at 433-439 [defense counsel's Evid. Code. § 352 objection to gang evidence was sufficient to preserve constitutional due process objection for purposes of appeal]; People v. Yeoman, supra, 31 Cal.4th at 117-118.)

Furthermore, the prosecutor's theory for the relevance and probative value of appellant's failure to express remorse to psychiatric technician McElvain was fatally flawed. The prosecutor's unstated premise was that if appellant, in fact, suffered remorse towards the victims of his crimes, then appellant would be inclined to discuss that remorse in the context of his conversation with McElvain, in which appellant talked about experiencing anxiety and decreased sleep and requested appropriate medications. The logic of the prosecutor's position is analogous to that underlying the evidentiary policy behind adoptive admissions. (See Evid. Code, § 1221; People v. Medina (1990) 51 Cal.3d 870, 889-891 [defendant's refusal to answer sister's question regarding why he shot the victims was admissible as adoptive admission to show that defendant did not deny committing the crimes].) By that logic, the prosecutor was effectively asserting that the conversation with McElvain was one in which appellant, if he felt remorse towards the victims, was presented with a situation in which he was

reasonably motivated to express his remorse and in which he had a fair opportunity to do so. Thus, per the prosecution theory, the fact that appellant did not express remorse under such circumstances correspondingly possessed probative value to show that he actually felt no remorse.

However, the fallacy in the prosecutor's reasoning is that appellant's interaction with McElvain was not an occasion, logically speaking, when appellant was likely to express any remorse which he might feel. At the time he spoke to McElvain, appellant was a jail inmate, represented by counsel, awaiting trial for very serious offenses. Appellant had most certainly been advised by counsel and was cognizant of his constitutional right to remain silent, and of the hazards of discussing any aspect of his case with fellow inmates, jail personnel or any other person apart from his attorneys. Therefore it was illogical to expect appellant to discuss his remorse towards the victims, or anything else connected to his case, with McElvain. (People v. Eshelman (1990) 225 Cal.App.3d 1513, 1518-1521 [improper to admit defendant's refusal to answer his girlfriend's questions about his crime when defendant's refusal was motivated by his desire to follow instructions of his attorney to not discuss his case]; People v. Cockrell (1965) 63 Cal.2d 659, 668-670 [error to admit defendant's silence to codefendant's accusation when defendant's silence was based on advice by counsel in another matter].)

In sum, California law prohibits the prosecution from soliciting evidence of lack of remorse to use as an aggravating circumstance in a capital trial. Moreover, even if the law did not prohibit such evidence, a showing that appellant failed to express remorse to McElvain possessed no legitimate probative value. The only function served by allowing such questioning by the prosecutor was to unfairly prejudice the jury against appellant.

D. This Error Was Prejudicial

The effect of the wrongful admission of evidence regarding appellant's lack of remorse was to deny him a fair jury trial and due process of law under the Fifth, Sixth and Fourteenth Amendments. (McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378, 1384-1386; Jammal v. Van de Kamp (9th Cir. 1991) 926 F.2d 918, 920.) Where, as in the present case, error serves to effectively deprive a defendant of constitutional safeguards, review is required under the standard of Chapman v. California, supra, 386 U.S. at 24 – reversal is mandated unless the State can prove beyond a reasonable doubt that the error did not contribute to the verdict. (Delaware v. Van Arsdall, supra, 475 U.S. at 684.)

By allowing this evidence, the court effectively permitted the prosecutor to utilize appellant's failure to express remorse as a nonstatutory aggravating circumstance. That was prejudicial because defendant's perceived lack of remorse is deeply offensive to a jury. (See People v. Gonzalez, supra, 51 Cal.3d at 1232 [a "defendant's overt indifference or callousness toward his misdeed bears significantly on the moral decision whether" to impose death].) In the context of the present case, therefore, in which the life or death decision was a close one, putting appellant's alleged lack of remorse at the center of the case for aggravation was bound to "create . . . the most severe 'type of prejudice' to [appellant]." (Miller v. Lockhart, supra, 65 F.3d at 684 [prosecutor's equating failure to testify with lack of remorse requires reversal of death sentence].)

This error also violated appellant's Eighth Amendment right to be sentenced in accordance with proceedings which are reliable, rather than arbitrary or capricious. (Johnson v. Mississippi, supra, 486 U.S. at 584; Beck v. Alabama, supra, 446 U.S. at 638.)

Given the closeness of the penalty determination (see Argument X.E., above), it is reasonably probable that this error contributed to the judgment of death. (Chapman v. California, supra, 386 U.S. at 24.) It certainly cannot be concluded that this improper evidence "had no effect" on the penalty verdict.

(Caldwell v. Mississippi, supra, 472 U.S. at 341.) Accordingly, the judgment of death must be reversed.

XII. THE COURT ERRED IN EXCLUDING MITIGATION EVIDENCE THAT KEITH PASSEY MOLESTED STEVE T. AND MARK T., AND THAT PASSEY EXPRESSED A SEXUAL PREFERENCE FOR YOUNG BOYS

A. Introduction

During appellant's first penalty trial, which had resulted in a 9-to-3 hung jury, appellant had been allowed to present evidence that, in about 1977 or 1978, he had complained to his then-girlfriend, True Williams, that Keith Passey had sexually molested him. Appellant had also been able to present evidence that Passey had sexually molested brothers Steve T. and Mark T. when they were about 11 or 12 years old. However, in appellant's second penalty trial, the court excluded all evidence regarding Passey's molestations of appellant and the other boys, and Passey's deviant sexual orientation. As explained below, appellant asserts that the court's rulings in his second penalty trial violated his rights, under the Fifth, Sixth, Eighth and Fourteenth Amendments, to present relevant and critical mitigating evidence to the jury.

B. Procedural Background

1. First Penalty Trial

Appellant lived with Passey for about a year in 1975 to 1976, when appellant was about 14 or 15 years old. Appellant's mother, Penny Hensley, asked Passey to take care of appellant following the breakup of her relationship with Terry Thori. (See Statement of Facts, B.2.a.iii.) During appellant's first penalty trial, appellant had been permitted to present the following evidence regarding Keith Passey's molestations of appellant and other young boys:

In about 1977 and 1978, when appellant was about 16 or 17 years old, he had had a romantic relationship with True Williams. (29 RT 8275, 8281, 8284.) During this time, appellant told Williams that Keith Passey had sexually molested him. Appellant spoke to Williams about this on more than one occasion, and had said that he had been subjected to nonconsensual anal intercourse. (29 RT 8287-8288, 8298.) Williams understood from this that Passey had molested appellant in this manner on multiple occasions. (29 RT 8298-8299.)

Steve T. testified that, when he was 11 or 12 years old, he was

sexually molested on one occasion by Passey. This occurred in or about 1964, when Steve was living in the same house as Passey. One night, at about midnight, Passey entered Steve's bedroom. Passey placed his hand down the back of Steve's pants and began rubbing Steve's buttocks. Steve jumped out of bed and asked Passey what he was doing. Passey then stopped and began to cry. He told Steve about problems that he had had as a child. Steve T. did not tell anyone about the incident, until much later when he confided it to his brothers. Passey never attempted to molest Steve again. (30 RT 8538-8539, 8551-8552.) Steve testified that it was generally known in his family that Passey was homosexual. (30 RT 8540.)

Steve's brother, Mark T., also testified regarding being molested by Passey. This occurred when Steve was 11 or 12 years old. Steve woke up at night and found Passey in his bedroom. Passey had his mouth on Mark's penis. When Mark woke up, Passey ran out of the bedroom. Mark told his parents, but they did not appear to believe him. Passey never tried to molest Mark again. (31 RT 8742-8743, 8750-8751.)

Outside the presence of the jury, Passey indicated that he would assert the Fifth Amendment and refuse to testify if asked questions about whether he had sexually molested appellant. (29 RT 8048-8049.) Passey also indicated that he would "take the Fifth" if asked about whether he had

molested Steve T. or Mark T. (29 RT 8054.)

Prior to the admission of the molestation-related testimony of True Williams, Steve T. and Mark T., the prosecutor had objected to this evidence as unreliable and lacking probative value in establishing that Passey had ever molested appellant. (29 RT 8258-8261.) Defense counsel responded that a capital defendant possesses a broad constitutional right to present penalty-phase mitigation evidence. (29 RT 8246-8258.) Defense counsel also cited People v. Ewoldt (1994) 7 Cal.4th 380 as supporting the admissibility and relevance of the Steve T. and Mark T. evidence in proving that Passey had molested appellant, and People v. Brown (1994) 8 Cal.4th 746 as rendering Williams' testimony admissible as a "fresh complaint" of molestation. (29 RT 8254.) The court ruled that all of this evidence was admissible. (29 RT 8263-8266.)

2. Second Penalty Trial

On March 7, 1995, at the beginning of appellant's second penalty trial, the prosecutor asked the court to revisit the issue of whether the defense should be permitted to introduce the evidence which had been admitted in the first penalty trial that Passey had sexually molested appellant, as well as Steve

T. and Mark T. (46 RT 13163.) The prosecutor argued that the admission of this evidence in the prior penalty trial had been premised on the assumption that appellant would personally take the witness stand and testify that Passey had molested him; the molestation-related testimonies of Williams, Steve T. and Mark T. had thus been deemed admissible for purposes of bolstering whatever first-hand account appellant might provide regarding having been sexually molested by Passey. However, appellant had not testified in the earlier penalty trial. With regard to True Williams, the prosecutor argued that her testimony, lacking specificity as to "any date, time, location [or] place," did not rise to the level of reliable hearsay evidence. Additionally, the prosecutor complained that he had lacked a "sufficient and ample opportunity to cross-examine" Williams because "[s]he can't tell us where [appellant] told her, what year, what place, what time, what date, where the molestations occurred." (46 RT 13164-13165.) And the district attorney reasoned that if Williams was not allowed to testify about appellant's reports of being molested, and appellant did not take the witness stand to testify that Passey had molested him, it followed that the accounts of Steve T. and Mark T. were rendered irrelevant and inadmissible. (46 RT 13163-13164.) The court agreed that "[i]f True Williams is not allowed to testify regarding [appellant's] hearsay, then thereto testimony [of Steve and Mark] regarding

their experiences would not be relevant." (46 RT 13164.) The court indicated that it would review the transcript of Williams' prior testimony and address the issue thereafter. (46 RT 13165-13166.)

The issue was further discussed on March 31, 1995, when the prosecutor again voiced his objection to True Williams' testimony. The prosecutor and the judge agreed that alcohol could be smelled on Williams' breath when she had previously been on the witness stand. (51 RT 14658-14659.) The prosecutor argued that Williams' testimony regarding Passey should be excluded because it was "hearsay and unreliable." (51 RT 14659-14660.) Defense counsel responded that it was unfair to assume that Williams would return under the influence of alcohol if she were recalled as a witness. (51 RT 14665-14666.) Defense counsel restated that he should be permitted to introduce Williams' testimony to show that Passey molested appellant, and testimony from Steve T. and Mark T. to collaborate that fact, and that counsel should also be permitted to show that appellant's mother Penny was aware of Passey's reputation as a pedophile and she nevertheless placed appellant in Passey's care and custody. (51 RT 14665-14673.) The court responded that it would give the matter more thought, but wanted no reference made in penalty phase opening statements to the contested molestation evidence. (51 RT 14673.)

On April 7, 1995, during the penalty phase retrial, defense counsel made an offer of proof that appellant's aunt, Marsha Jacobsen, be permitted to testify regarding a conversation she had had with appellant's mother Penny Hensley in 1971. (53 RT 15199.) At that time Penny was contemplating ending her troublesome marriage to Terry Thori. Penny told Jacobsen that she was thinking about leaving Thori and marrying Passey. Penny said that, if she did so, she would only have to clean house and cook for Passey; they would not have a sexual relationship because Penny knew that Passey was only sexually interested in boys. Penny could have boyfriends on the side in a discrete manner and Passey would not have a problem with that. (53 RT 15199-15200.) The judge asked counsel to brief the issue and he would rule on the admissibility of this evidence. (53 RT 15200-15202.)

On April 13, 1995, defense counsel filed a brief in support of the position that he should be allowed to introduce evidence of Passey's molestations of Steve T. and Mark T., Jacobsen's conversation with appellant's mother regarding Passey's sexual orientation, and Williams' testimony about her conversations with appellant about Passey's molestations. (8 CT 2088-2093.) Defense counsel argued that this evidence was relevant to show Passey's nature as a pedophile, as well as to demonstrate the character of appellant's mother Penny in sending appellant

off to live with a man she knew or believed to be a pedophile. Defense counsel cited case law including Lockett v. Ohio (1978) 438 U.S. 586 [57 L.Ed.2d 973, 98 S.Ct. 2954], Skipper v. South Carolina (1986) 476 U.S. 1 [90 L.Ed.2d 1, 106 S.Ct. 1669] and Penry v. Lynaugh (1989) 492 U.S. 302 [106 L.Ed.2d 256, 109 S.Ct. 2934]. (8 CT 2088-2093.)

On April 20, 1995, the court announced its decision. The court indicated that it was reversing its prior ruling in the first penalty trial, and would now rule all the molestation evidence inadmissible. Discussing the cases of Lockett v. Ohio, supra, 438 U.S. 586; Rupe v. Wood (9th Cir. 1996) 93 F.3d 1434; Green v. Georgia (1979) 442 U.S. 95 [60 L.Ed.2d 738, 99 S.Ct. 2150] and Mak v. Blodgett, supra, 970 F.2d 614, the court stated "in each case, it seems to me the defendant has no other way to produce the [contested] evidence itself, save and except the declarations of the co-defendants or polygraph tests or other things that have to be brought in." (54 RT 15441.) Applying this standard, the court found the defense molestation evidence to be inadmissible:

> And the Court looks at the testimony of . . . Mark and Steve [T.] regarding the sexual advances of Mr. Passey, there is no evidence there that there was actual molestation of Mr. Hensley by Mr. Passey. He had the tendency to do that, but the Court feels that that just is not relevant. The subject matter itself is relevant, but the evidence itself is so remote and not to be

relevant. And the Court so declares.

The fact that a person commits a crime on day one does not mean he commits a crime on day two necessarily. That's possible, but if it doesn't relate to some intricate aspects of the commission of the crime, or the commission of the act, and then it doesn't really have to do with it. It has to do with the propensity, which I'm sure defense would like to get in.

Besides, under 352 of the Evidence Code, applying that to the testimony of Mr. Steve and Mark [T.], the Court feels that the probative value is minimal.

In each instance, Mr. Passey attempted, if the facts are as they state they are, to molest them or to have some kind of sexual contact with them rebuffed, and, therefore, it has minimal probative value.

The jurors – "Well, what's that got to do with the defendant? Well, he lived with the person. That means that he may or may not have tried to molest him" – the speculation that might go on in the jury room, "Was he actually molested by Mr. Passey or not? God only knows. What was the extent of it? Was it rebuffed by the defendant, or was he successful? How many times did it happen? Over what period of time?" I mean, the speculation there is just awesome that can go on.

The probative value, therefore, is minimal. It's substantially outweighed by the three factors that I have to consider under 352.

The fact that the admission of the evidence would consume undue time and testimony, the

admission, when it creates substantial danger of prejudice against Mr. Passey.

It would confuse the issues. Here we are worrying about did somebody molest Mr. Hensley or not. We don't know that one way or the other.

But, also, mislead the jurors into engaging into rank speculation regarding whether or not Mr. Hensley was molested. The defendant really has other ways to introduce it if he wants to introduce it.

And the Court would also tell you in passing that the defendant takes the stand and testifies, "I was molested by Mr. Passey," the Court, of course, would allow in the testimony of Steve and Mark [T.]. So the Court's not precluding it, but saying that it's not relevant now, because it's not brought home to the person of Mr. Hensley.

Those are the Court's rulings.

(54 RT 15442-15443.)

Defense counsel then brought up the issue of whether he could present testimony of Steve T. and Marsha Jacobsen that Penny Hensley was aware that Passey was sexually oriented towards young boys. (54 RT 15444.) The court stated that the "[s]ame ruling" would apply and that evidence was excluded. (54 RT 15444-15445.)

C. The Court Erred in Excluding This Evidence

The excluded molestation-related evidence of Williams, Jacobsen, Mark T. and Steve T. was all relevant to show that appellant was likely sexually molested by Passey when appellant was a young boy. This evidence certainly possessed probative value by way of demonstrating that appellant suffered from a sexually traumatic childhood, thus casting appellant's aberrant adult behavior in a more sympathetic and understandable light. This amounted to legitimate mitigating evidence, per section 190.3, subdivision (k). (See Rompilla v. Beard (2005) 545 U.S. 374, 390-391 [162 L.Ed.2d 360, 125 S.Ct. 2456] [capital defense counsel prejudicially ineffective in failing to discover and present mitigating evidence pertaining to defendant's troubled childhood and mental health problems]; Williams v. Taylor (2000) 529 U.S. 362, 395-399 [146 L.Ed.2d 389, 120 S.Ct. 1495] [capital counsel ineffective in failing to conduct investigation which would have allowed him to discover and present evidence of childhood abuse, poverty, limited education, etc.].)

The lodestar case governing the scope of evidence admissible in mitigation in a penalty trial is Lockett v. Ohio, supra, 438 U.S. 586. In Lockett, a plurality of the United States Supreme Court announced that "the

sentencer . . . [must] 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., 438 U.S. at 604 [original emphasis, fns. omitted].)

Subsequent United States Supreme Court cases make clear that, under the federal Constitution, admissible mitigating evidence in penalty proceedings is broad in scope. Local evidentiary rules do not apply with the same force in capital penalty proceedings as in other judicial proceedings. Though the plurality in Lockett suggested that judges retain their traditional authority to exclude mitigating evidence on relevance grounds (id., 438 U.S. at 604, fn. 12), in Green v. Georgia, supra, 442 U.S. 95, a unanimous Court ruled that federal due process standards barred mechanistic application of Georgia's hearsay rules in a penalty trial to exclude the out-of-court statements of an accomplice. (Id. at 97.) Similarly, in Eddings v. Oklahoma (1992) 455 U.S. 104 [71 L.Ed.2d 1, 102 S.Ct. 869], the Court reversed a decision by the Oklahoma Court of Criminal Appeals which had upheld the exclusion of evidence relating to the petitioner's background. The Supreme Court found "that the limitations placed by [the lower] courts upon the mitigating evidence they would consider violated the rule in Lockett." (Id.,

455 U.S. at 113.) In People v. Robertson (1982) 33 Cal.3d 21, this Court explained that "Lockett and Eddings make it clear that in a capital case the defendant is constitutionally entitled to have the sentencing body consider any 'sympathy factor' raised by the evidence before it." (Id. at 58 [emphasis added]; accord, People v. Easley (1983) 34 Cal.3d 858, 876.)

The trial court's error in preventing appellant from introducing all of the molestation-related evidence violated the Fifth, Sixth, Eighth and Fourteenth Amendments. The United States Supreme Court has uniformly held that a capital defendant must be permitted to introduce mitigating aspect on any aspect of his life and character. "In capital cases the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character . . . that the defendant proffers as a basis for a sentence less than death." (Skipper v. South Carolina, supra, 476 U.S. at 4-5.) Similarly, "the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character . . . ." (Penry v. Lynaugh, supra, 492 U.S. at 328; accord Tuilaepa v. California (1994) 512 U.S. 967 [129 L.Ed.2d 750, 114 S.Ct. 2630] [state must "allow . . . the jury to consider all relevant mitigating evidence"].)

"[I]f the jury is to give a 'reasoned moral response' to the defendant's background [and] character," furthermore, "full consideration of evidence

that mitigates against the death penalty is essential . . . ." (Penry v. Lynaugh, supra, 492 U.S. at 328 [original emphasis].) As this Court has recognized, moreover, the Eighth Amendment demands that courts take "a broad view of relevancy in the sentencing phase of a death penalty case . . . ." (People v. Stanley (1995) 10 Cal.4th 764, 839 [citing, inter alia, Gregg v. Georgia (1976) 428 U.S. 153, 204 [49 L.Ed.2d 859, 96 S.Ct. 2909]].) (Cf. Payne v. Tennessee, supra, 501 U.S. at 826-827 ["Under the aegis of the Eighth Amendment, we have given the broadest latitude to the defendant to introduce relevant mitigating evidence reflecting on his individual personality"].) Evidence is deemed mitigating, accordingly, as long as it is capable of giving rise to an "inference . . . that . . . might serve as a basis for a sentence less than death." (Skipper v. South Carolina, supra, 476 U.S. at 4-5.)

The reasoning of the court below in excluding the Steve T. and Mark T. evidence was clearly incorrect in its evaluation of the probative value of their testimony regarding Passey as propensity evidence. Although the court acknowledged that appellant was entitled to present direct evidence of his having been molested by Passey as evidence of mitigation, the court reasoned that evidence of the boyhood molestations of Steve T. and Mark T., as well as evidence of Passey's deviant sexual preference, lacked sufficient probative

value in proving that Passey molested appellant in the absence of any direct evidence (such as appellant's testimony) that such occurred. (54 RT 15442-15443.)

In People v. Falsetta (1999) 21 Cal.4th 903, this Court held that evidence of a defendant's prior rape offenses were properly admissible as propensity evidence for purposes of proving defendant's guilt with respect to violent sexual offenses presently charged against him, notwithstanding that the earlier rapes were dissimilar to the present charges with respect to the identity of victims, modus operandi, time and place. (Id. at 908-910, 919-922; see also People v. Callahan (1999) 74 Cal.App.4th 356, 370-371 [where defendant was charged with molesting daughter, testimony by victim of defendant's prior molestation was properly admitted]; People v. Yovanov (1999) 69 Cal.App.4th 392, 405-406 [in prosecution for lewd acts on child, evidence of defendant's uncharged sexual misconduct was probative and admissible].)

The legitimacy of allowing evidence of past sexual misconduct by a perpetrator to demonstrate his propensity to engage in sexual offenses is reflected in the Legislature's 1995 enactment of Evidence Code section 1108 to allow admission, in a prosecution for sexual crimes, of a defendant's offenses against other victims. The rationale for this statute is the

Legislature's determination that, since most persons do not engage in serious sexual crimes, it follows that "evidence of uncharged sexual offenses is so uniquely probative in sex crimes prosecutions it is presumed admissible without regard to the limitations of Evidence Code section 1101." (People v. Yovanov, supra, 69 Cal.App.4th at 405.) Falsetta, Callahan and Yovanov thus undercut the reasoning of the court below, and support appellant's assertion that evidence of Passey's molestations of Steve T. and Mark T. and Passey's expressed sexual interest in young boys was highly probative towards establishing that Passey likely molested appellant while the two lived together.

Furthermore, Marsha Jacobsen's proffered testimony that appellant's mother, Penny, told Jacobsen about Passey's reputation for being sexually attracted to young boys was relevant for the significance of the fact that, notwithstanding such knowledge, Penny foisted appellant off to live with Passey so that she would no longer have to care for him. This showed that appellant's own mother cared little or nothing about his welfare, but, rather, was primarily interested in arranging things so that she no longer had to be responsible for and live with him. This was certainly evidence of dysfunctional family background, admissible as mitigating evidence per Rompilla v. Beard, supra, 545 U.S. at 390-391 and Williams v. Taylor, supra,

529 U.S. at 395-399. Moreover, it should be pointed out that Jacobsen's testimony was admissible for a non-hearsay purpose: to show belief or awareness on the part of Penny Hensley that Passey possessed a strong sexual preference for boys. This constituted admissible circumstantial evidence of Penny's state of mind, not subject to exclusion under the hearsay rule. (Colarossi v. Coty US (2002) 97 Cal.App.4th 1142, 1150; Skelly v. Richman (1970) 10 Cal.App.3d 844, 858.)

It was also incorrect for the trial court to exclude True Williams' testimony concerning appellant's statements about Passey's molestations on the ground, asserted by the prosecutor, that there may have been an appreciable lapse of time between the molestations and appellant's disclosures to Williams. (See 46 RT 13164-13165; 54 RT 15444-15445.) The mere passage of time, even amounting to years, does not justify the exclusion of evidence of a victim's complaints of sexual molestation. (People v. Brown, supra, 8 Cal.4th at 749-750, 762-764.)

Additionally, it violated due process for the court below to effectively disregard its previous law of the case and exclude evidence of Passey's sexual preferences, by way of Williams' account of appellant's out-of-court statements, and of the molestations of Steve T. and Mark T. – all of which had been admitted in appellant's first trial, which ended in a deadlocked

penalty-phase jury. (U.S. Const., Amends. V, VI & XIV; Bradley v. Duncan (9th Cir. 2002) 315 F.3d 1091, 1097-1098.) It was obvious from the prior hung jury that concluded appellant's first penalty trial that the state of the evidence was very closely balanced between the death penalty and life imprisonment and that, based upon the evidence presented in the earlier trial, three of those jurors were of the belief that appellant did not deserve death. Therefore, it was highly improper for the trial court to alter that delicate balance by eliminating the Passey molestation evidence from appellant's second penalty trial, thereby effectively tipping the balance in favor of the prosecution. This type of disregard of the prior law of the case has been rightly condemned as improper manipulation of the jury.

In Bradley v. Duncan, supra, 315 F.3d 1091, the Court of Appeals condemned a trial court's analogous conduct in refusing to give an entrapment instruction in a defendant's second trial after the defendant's first trial which included such an instruction had ended in jury deadlock. (Id. at 1094, 1097-1098.)

> This kind of manipulation of the jury is simply not permissible. "The trial judge is . . . barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused." United States v. Martin Linen Co., 430 U.S. 564, 573, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977).

> Moreover, when one judge determines, as a matter of law and fact, that the evidence requires the giving of an entrapment instruction, and no additional evidence to the contrary is proffered at a subsequent trial, the second judge may not simply ignore the findings of the first. "It is a fundamental principle of jurisprudence . . . . that a question of fact or of law distinctly put in issue and directly determined by a [criminal or civil] court of competent jurisdiction cannot afterwards be disputed between the same parties." Frank v. Mangum, 237 U.S. 309, 334, 35 S.Ct. 582, 59 L.Ed. 060 (1915) (internal citation omitted).
>
> Bradley v. Duncan, supra, 315 F.3d at 1097-1098 [emphasis added].)

D. Prejudice

There can be no question but that the exclusion of the Passey molestation evidence prejudiced appellant's second penalty trial. Evidence that a capital defendant was sexually molested as a child can serve as a powerful mitigating evidence, provoking compassion and sympathy on the part of the jury. (See Rompilla v. Beard, supra, 545 U.S. at 390-391; Williams v. Taylor, supra, 529 U.S. at 395-399.) Furthermore, there was significant mitigating value in the jury learning that appellant's mother cared so little about his welfare that she would palm him off on Keith Passey,

knowing that this was a man with an established reputation for sexually deviant pedophile preferences. (Ibid.)

As previously stated, this was clearly a close case with respect to penalty, as evidenced by the jury's 9-to-3 deadlock in appellant's first penalty trial. (See 7 CT 1785; 36 RT 10100.) The most significant difference between the two trials was the court's exclusion of the Passey molestation evidence in the second penalty trial.

Given the closeness of the penalty determination (see Argument X.E., above), it is reasonably probable that the present error contributed to the judgment of death. (Chapman v. California, supra, 386 U.S. at 24.) It certainly cannot be concluded that this error "had no effect" on the penalty verdict. (Caldwell v. Mississippi, supra, 472 U.S. at 341.) Accordingly, the judgment of death must be reversed.

XIII. THE TRIAL COURT ERRED IN EXCLUDING APPELLANT'S WIFE AND RELATIVES FROM THE COURTROOM DURING CLOSING ARGUMENTS

The court below committed federal constitutional error by excluding appellant's wife and family members from the courtroom during closing arguments.

A. Procedural Background

During penalty phase closing arguments, the court bailiffs continued to enforce the court's prior order that witnesses, including members of appellant's family, be excluded from the courtroom. (See 59 RT 19051-19052.) When defense counsel learned of this policy at a break during closing arguments, he objected to the exclusion of appellant's family members – including appellant's wife Anita Hensley, his uncle Steven Thori, his uncle's wife Patty Thori, and his aunt Marsha Jacobsen – as improper and violating appellant's Sixth Amendment right to a public trial. (59 RT 19052-19055, 19059-19060.) The judge responded that he was also excluding the

victims and victims' relatives in order to avoid emotional pressures being brought to bear on the jurors by the victims or by appellant's relatives. The judge also expressed concerns about witnesses learning information from closing arguments which might impair their functioning as witnesses in any future court proceedings. (59 RT 19052-19054.)

In response to defense counsel's complaint that he had "never heard of an exclusionary order that was intended to exclude final argument" the court responded:

> THE COURT: Well, the court's construing [the exclusion order] – that broadly. I do not want witnesses, defense witnesses, prosecution witnesses who may hear about the testimony who might be possibly called to testify at a later time at a retrial in court during the proceeding nor do I want any kind of pressure placed on this jury. I want to make that clear. I don't want the jurors pressured. This is a very serious matter and a very serious decision they have to make.
>
> I don't want a witness such as the one in the wheelchair [Stacey Copeland] being wheeled in here at the last moment facing the jurors to pressure them to give this defendant the death penalty.
>
> Nor do I want the wife or any other witnesses to come in here and try to pressure these jurors one way or the other. They should be above and beyond that and make up their own mind's [sic] regarding the outcome of the case and that's the court's ruling.

(59 RT 19056-19057.)

Defense counsel also asked for mistrial based upon the court's ruling as amounting to a Sixth Amendment violation. This motion was denied. (59 RT 19059-19062.)

The issue was revisited as part of appellant's motion for a new trial, which was heard prior to sentencing. Trial counsel argued that the court had violated appellant's right to a public trial, under the Sixth Amendment and the Supreme Court's holding in Waller v. Georgia (1984) 467 U.S. 39 [81 L.Ed.2d 31, 104 S.Ct. 2216], by excluding appellant's family members from closing argument, particularly in the absence of any prior hearing on this issue and written findings by the court. Defense counsel also pointed out that the jurors had noticed the bailiffs ejecting appellant wife from the courtroom and the jurors were distracted by that occurrence. (8 CT 2314-2318; 9 CT 2319-2323; 60 RT 19347-19353.) The prosecutor responded that the overall trial was open to the general public and no error had occurred because the exclusion had been limited with respect to time and the number of persons affected. (60 RT 19350-19351.)

The court, in denying the motion for a new trial, stated that it believed it had acted correctly in excluding family members in order to avoid placing undue emotional pressure on the jurors and to address the possibility that the

family members might be needed as witnesses again in the event of a retrial. Also, the court noted that Anita Hensley had repeatedly mouthed the words "I love you" to appellant during his first trial. (60 RT 19349-19351.)

B. The Court Erred in Excluding Appellant's Family Members During Closing Arguments

The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial." This federal constitutional guarantee extends to the states by way of the due process clause of the Fourteenth Amendment. (Duncan v. Louisiana, supra, 391 U.S. at 148-149; Walton v. Briley (7th Cir. 2004) 361 F.3d 431, 432.) The right to a public trial is also protected by the First Amendment. (Richmond Newspapers, Inc. v. Virginia (1980) 448 U.S. 555, 580 [65 L.Ed.2d 973, 100 S.Ct. 2814].) Article I, section 15 of the California Constitution also guarantees a public trial to all accused persons. (See also Pen. Code, § 686, subd. (1).) "Every person charged with a criminal offense has a constitutional right to a public trial, that is, a trial which is open to the general public at all times." (People v. Woodward (1992) 4 Cal.4th 376, 382.)

In People v. Woodward, supra, 4 Cal.4th 376, this Court concluded that a defendant's constitutional right to a public trial encompasses counsels' closing arguments to the jury. (Id. at 383.) It is well established that a public trial ordinarily is one "open to the general public at all times." (People v. Byrnes (1948) 84 Cal.App.2d 72, 73; People v. Woodward, supra, 4 Cal.4th at 383.) The Sixth Amendment guarantee of a public trial creates a "presumption of openness" that can be rebutted only by a showing that exclusion of the public is necessary to protect some "higher value." (Waller v. Georgia, supra, 467 U.S. at 44-45; People v. Woodward, supra, 4 Cal.4th at 383.) "When such a 'higher value' is advanced, the court must balance the competing interests and allow a form of exclusion no broader than needed to protect those interests. [Citation.] Specific written findings are required to enable a reviewing court to determine the propriety of the exclusion." (People v. Woodard, supra, 4 Cal.4th at 383 [citing Waller v. Georgia, supra, 467 U.S. at 44-45 .)

In In re Oliver (1948) 333 U.S. 257 [92 L.Ed. 682, 68 S.Ct. 499], the United States Supreme Court reversed a contempt conviction imposed by a judge in a proceeding closed to all except for possibly a prosecutor and a court reporter. (Id., 333 U.S. at 259.) The Supreme Court held that this violated the defendant's right to a public trial, after noting that "without

exception, all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged." (Id., 333 U.S. at 271-273 [emphasis added].)

Thirty-six years later, the United States Supreme Court again considered the issue of courtroom closure, this time with respect to a suppression hearing closed to the public. (Waller v. Georgia, supra, 467 U.S. 39 [hereinafter sometimes referred to as "Waller"].) The Waller court found that the right to a public trial is not absolute and established a four-part test for addressing issues of courtroom closure: 1) the prosecution must demonstrate an overriding interest which is likely to be prejudiced by an open courtroom, 2) the closure must be no broader than necessary, 3) the court must consider alternatives to closure, and 4) the court's findings must be adequate to support any ordered closure. (Id., 467 U.S. at 45.)

In Yung v. Walker (2003) 341 F.3d 104, the Second Circuit Court of Appeals found the four Waller factors to be applicable to the situation of exclusion of a defendant's family members from trial testimony given by an undercover police officer. (Id. at 110-111.)

Applying the four Waller factors to the present case demonstrates clear error. With regard to the first Waller factor – demonstration of an overwhelming prosecution interest – it should be emphasized that the

prosecutor below did not request that closing arguments be closed to appellant's family members. Rather, the prosecutor's argument on this issue merely amounted to his after-the-fact defense of the trial court's unilateral decision for purposes of opposing defense counsel's motion for a mistrial. (See 59 RT 19061-19062.)[44]

The second and third Waller factors – the requirements that the closure be no broader than necessary to achieving the prosecutorial purpose involved (per the first factor) and the court's consideration of less drastic alternatives – may be addressed together. In the present case, these requisites were clearly not met: the record shows that the court below simply imposed the closure to family members unilaterally without consideration of less broad or less drastic alternatives. For example, the court could have admonished the family members and victims to refrain from any emotional display or eye contact with the jurors. The family members, as well as any victims, could have been seated as far as possible from the jury box. Or the court could have admonished the jurors not to permit the presence of family members or victims to effect their deliberations or verdict. However, the record is completely devoid of any evidence that the court considered the possibility of

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[44] With respect to the sufficiency of the court's reasons (as opposed to the prosecution's reasons) for the closure to appellant's family, that is discussed below with respect to the fourth Waller factor.

any less broad or drastic alternative to exclusion of appellant's family members and the victims.

The fourth Waller factor concerns the adequacy of the court's findings to support its ordered closure. The court made no written findings here. The absence of such prior written finding violated the mandate of Waller, as well as this Court's prior holding in Woodward. (Waller v. Georgia, supra, 467 U.S. at 45; People v. Woodward, supra, 4 Cal.4th at 383.)

True, the court did orally provide two after-the-fact rationales for its unilateral closure decision: to avoid placing undue emotional pressure on the jurors and to address the possibility that appellant's family members might be needed as witnesses in the event of a retrial. (See 59 RT 19052-19054, 19056-19067; 60 RT 19349-19350.)

If such grounds rose to the level of being sufficient to justify the court's action, then the defendant's family members would routinely be excluded from closing arguments in death penalty trials as a matter of course. However, the fact that appellant's present counsel has found no California Supreme Court or published Court of Appeal case addressing this specific issue indicates that the considerations relied upon by the court below – considerations which could, practically speaking, arise in the majority of death penalty trials – are not generally deemed sufficient to warrant the

exclusion of family members and victims from closing arguments.[45]

As previously discussed, far less drastic alternatives existed to address any perceived problem of the presence of family members and victims having an undue influence on the jury panel. And the fact that, throughout their history, California courts have not imposed such closure orders would tend to indicate that this concern is not one of significant magnitude so as to justify the type of exclusion order encountered here.

The court's second proffered reason for closure, that of witnesses learning information which might impair their functioning as witnesses in future court proceedings, was likewise short of compelling. To begin with, any possible concern that a witness might be tempted to alter his or her testimony to conform to or explain the accounts of other witnesses is of less importance with respect to the penalty phase of a capital trial than would generally be the case with respect to the closing arguments of a criminal guilt trial, primarily because the former focuses primarily on such matters as the defendant's family background and psychological makeup rather than the event-specific details of alleged criminal acts. Furthermore, a penalty phase

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[45] Most published cases dealing with issues of court closure have involved the testimony of underworld informants or undercover police officers who feared for their safety if their identities became know to potential enemies (e.g., Yung v. Walker, supra, 341 F.3d at 106-107; English v. Artuz (2nd Cir. 1998) 164 F.3d 105, 106) or with inadvertent court closure (e.g., Walton v. Briley, supra, 361 F.3d at 431).

retrial, if one occurs at all, could take place well over a decade in the future. In order to achieve the court's stated objective of keeping the trial witnesses in the dark about the testimonies of their fellow witnesses, a trial judge would have to order the witness not only to absent themselves from closing arguments, but also to avoid newspaper accounts, discussing the case with friends and relatives and refraining from reading published court opinions emanating from the defendant's trial, all for over a decade into the future. Since such an order would be impractical and impossible to enforce, the court's effort to prevent appellant's family members from learning how witnesses have testified by means of excluding them from closing arguments was pointless and futile and, therefore, not a legitimate or overriding interest as required by Waller.

Recently, in In re Mikhel (9th Cir 2006) 453 F.3d 1137, the Ninth Circuit addressed the question of when crime victims may be excluded from trial proceedings in light of Congress' passage of the Crime Victims' Rights Act, which provides victims with the right to attend the trials of defendants charged with crimes against them, balanced against federal evidence rules which "have traditionally provided that non-party witnesses cannot listen to the trial testimony of other witnesses." (Id. at 1138-1139.) The Ninth Circuit held, in balancing these competing interests, that before a district court may

exclude a victim-witness from being present during the testimony of another witness, the "district court must find by clear and convincing evidence that it is highly likely, not merely possible, that the victim-witness will alter his or her testimony in response to hearing the testimony in question." (Id. at 1139.) By contrast, in the present case the court below applied no standard, made no findings and failed to even invite counsel to argue on the point, before unilaterally deciding to exclude appellant's wife and relatives from the courtroom. And, for the reasons discussed in the prior paragraph, application of the Mikhel standard would have clearly demonstrated little likelihood that appellant's wife or relatives would alter their penalty-phase testimony based upon anything said by the attorneys during closing arguments.

Furthermore, the reasons given by the court below for excluding appellant's wife and family members from closing arguments must be weighed not only against the general values inherent in the constitutional guarantee of a public trial, but in light of the heightened constitutional concern that a criminal defendant's friends and family members may be present to offer moral support and to interestedly monitor whether the accused is receiving a fair trial. As explained in English v. Artuz, supra, 164 F.3d 105:

> "The exclusion of courtroom observers, especially a defendant's family members and

> friends, even from part of a criminal trial, is not a step to be taken lightly." In fact, "the Supreme Court [in In re Oliver (1948) 333 U.S. 257, 271-272, & fn. 29] has specifically noted a special concern for assuring the attendance of family members of the accused." The unwarranted exclusion of a defendant's family members justifies granting habeas corpus relief, and petitioner need not show prejudice. Nor does the doctrine of harmless error apply in such circumstances.
>
> (English v. Artuz, supra, 164 F.3d at 108 [emphasis added; citations omitted].)

Federal appellate case law is instructive on this point. In Walton v. Briley, supra, 361 F.3d 431, the trial judge held two sessions of defendant's trial late at night after the courthouse had closed for the evening. Although the closure to the public had apparently been inadvertent, it prevented defendant's fiancee and other members of the public from attending his trial. (Id. at 432.) Because the four-part requisites of Waller for justifying closure had not been met and defendant had not voluntarily relinquished his constitutional right to a public trial, the Seventh Circuit Court of Appeals granted habeas relief on a per se basis. (Id. at 433-434.)

In English v. Artuz, supra, 164 F.3d 105, the trial judge sealed the courtroom during the testimony of an underworld informant based upon the prosecutor's representation that the informant feared for his life if the family of one of three defendants on trial heard his testimony. Defendant English's

counsel argued for a more limited closure which would permit English's relatives to be in attendance. The informant testified in camera that, although he feared defendant Staley's family, he would be willing to testify if English's family remained in the courtroom. (Id. at 106-107.) Nonetheless, the trial judge ordered a complete closure of the courtroom to the public based upon what he viewed to be "the totality of the evidence." (Id. at 107.) The Second Circuit Court of Appeals granted habeas relief to English. Although the appellate court acknowledged the legitimacy of the prosecutor's concern for witness safety, per the first Waller prong, the English court held that the other Waller prongs had not been satisfied because the trial court could have addressed this problem by fashioning a more narrow exclusion order which would have permitted English's relatives to remain. Addressing the state's claim that excluding English's family members was necessary for the protection of the testifying informant, the circuit court noted that "the state's obligation to show an overriding interest [justifying exclusion] cannot be met by a proffer of mere speculation. " (Id. at 109.) The English court further noted "the [United States] Supreme Court has specifically noted a special concern for assuring the attendance of family members of the accused." (Id. at 108 [citing In re Oliver, supra, 333 U.S. at 271-272 & fn. 29] [emphasis added].) Similarly, in the present case, mere speculation by the

trial judge that the presence of appellant's family members during closing arguments would place undue emotional pressure on the jury or impair their ability to serve as witnesses in some hypothetical retrial was insufficient to override the strong public constitutional interest in permitting a criminal defendant's family members to attend his trial.

In sum, the court below clearly erred in deciding to exclude appellant's family members during penalty phase closing arguments because: 1) excluding appellant's family members and the victims during closing arguments was not something which was requested by either counsel, therefore taking such a step disregarded the first Waller prong in that it failed to serve any overriding interest of either party; 2) the court failed to consider any alternative to the exclusion such as admonitions or instructions to the jury or to the attendees, thereby violating the second and third Waller prongs; 3) the court failed to justify its exclusion by way of written findings in violation of both Waller and this Court's holding in Woodward; 4) the court failed to provide counsel with notice and an opportunity to be heard before ordering the closure; 5) the court's stated oral reasons for the closure – to prevent undue emotional pressure on the jurors and to avoid impairing the witnesses' testimonies in the event of a retrial – were speculative and far too weak to warrant the constitutional deprivation involved; and 6) this exclusionary order

is subject to heightened scrutiny in light of the strong constitutional concern that a defendant's family and friends be permitted to witness his trial proceedings.

As explained below, this constitutional error compels reversal.

C. This Error Compels Reversal of the Death Penalty

This error violated appellant's constitutional right to a public trial, a cornerstone of Anglo-American jurisprudence. It introduced a "structural defect" into appellant's trial which, by its very nature, defies analysis by harmless-error standards. (Arizona v. Fulminante, supra, 499 U.S. 279; Neder v. United States (1999) 527 U.S. 1 [144 L.Ed.2d 35, 119 S.Ct. 1827].) Because this instruction introduced structural error into appellant's trial, reversal of the death judgment is called for without a specific showing of prejudice.

The denial of the right to a public trial constitutes a "structural defect" in the proceedings which is deemed reversible per se. (Waller v. Georgia, supra, 467 U.S. at 49-50.) It is important to distinguish the present case from Woodward where, finding error only in lack of notice to the defendant of the closure in that case, this Court held that the lack of notice constituted a "trial

error" subject to evaluation under the harmless error analysis enunciated in Chapman v. California, supra, 386 U.S. at 24. (People v. Woodward, supra, 4 Cal.4th at 387.) In Woodward, this Court found that no violation of the right to a public trial occurred given the specific justifications for the partial closure. No such justifications are present in this case and the violation of the right to a public trial is therefore reversible per se. To hold otherwise would, in effect, eliminate the right to a public trial because it would be virtually impossible to show actual prejudice in any given case so as to justify relief. (See Waller v. Georgia, supra, 467 U.S. at 49, fn. 9.)

However, even if a showing of prejudice was required here, such a showing could clearly be made. As previously explained, this was a close case on the issue of penalty. (See Argument X.E., above.) The court's exclusion was specifically directed at the defendant's family members, a circumstance which triggers heightened Sixth and Eighth Amendment concern. (In re Oliver, supra, 333 U.S. at 271-272; English v. Artuz, supra, 164 F.3d at 108; Guzman v. Scully (2nd Cir. 1996) 80 F.3d 772, 776; Vidal v. Williams (2nd Cir. 1994) 31 F.3d 67, 69.)

The record indicates that the bailiff's action in ejecting appellant's wife was noticed by the jurors and resulted in a distraction during the critical closing arguments of a death penalty trial. (See 9 CT 2322; 60 RT 19348-

19349.) Jurors who witnessed the ejection may likely have leapt to the obvious conclusion that the exclusion was the consequence of some inappropriate conduct on the part of appellant's family members. Defense counsel was not initially informed that the court and the bailiffs intended to exclude appellant's family members during penalty closing arguments, but once defense counsel realized this to be the case his objection on federal constitutional grounds was clear and adamant. (See 59 RT 19052-19053, 19059-19060.) Thus, the exclusion was hardly a minor occurrence and the prejudice was manifest.

The death judgment herein must be reversed on this basis.

XIV. THE INTRODUCTION OF ALLEGED PRIOR UNADJUDICATED CRIMES DURING THE PENALTY PHASE OF APPELLANT'S TRIAL VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

During the penalty phase the prosecutor was permitted to introduce evidence that appellant had engaged in four alleged instances of violent conduct which had not resulted in any criminal conviction. These alleged acts consisted of a 1977 assault with a knife upon Dawn Evans, the 1992 robbery of Stockton Savings Bank, a 1993 pushing and shoving incident involving Larry Shockley, and a 1992 domestic violence incident involving appellant's wife, Anita Hensley. Evidence of these alleged incidents were introduced pursuant to section 190.3, subdivision (b), which provides that the trier of fact in a capital penalty phase may take into account "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or the implied threat to use force or violence." As explained below, the introduction into evidence of these alleged, unadjudicated prior violent criminal activities violated appellant's constitutional rights in several

respects.[46]

The introduction into evidence of the unadjudicated crimes violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to be presumed innocent of a criminal offense unless and until his guilt is proven beyond a reasonable doubt by a unanimous jury finding. (Sullivan v. Louisiana, supra, 503 U.S. 275; In re Winship, supra, 397 U.S. 358.) In this respect it is significant that the jury was instructed, per CALJIC No. 8.87:

> Before a juror may consider any of such criminal act or acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant, Paul Loyde Hensley, actually did in fact commit such criminal act or acts . . . .
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal act or acts occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(8 CT 2042-2043; 59 RT 19144 [emphasis added].)

This instruction permitted one given juror to find that appellant was "guilty" of a particular assault or robbery and allowed that juror to use that finding as

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[46] Appellant acknowledges that this Court has rejected similar claims in prior capital cases. (See e.g., People v. Avena (1996) 13 Cal.4th 394, 428-429; People v. De Santis (1992) 2 Cal.4th 1198, 1251-1252; People v. Stankewitz (1990) 51 Cal.3d 72, 106; see also McDowell v. Calderon (9th Cir. 1997) 107 F.3d 1352, 1366.) Appellant respectfully submits that this issue should be revisited for the reasons stated herein.

an aggravating circumstance favoring death notwithstanding that the eleven other jurors were not convinced beyond a reasonable doubt that appellant had committed that particular crime. This violated appellant's right to a unanimous jury finding before an alleged violent crime could be used as an aggravating circumstance favoring a death sentence. (See United States v. Payseno (9th Cir. 1986) 782 F.2d 832, 834-837 [unanimity required when there is evidence of more than one incident from which the jurors could conclude defendant was guilty of a single charged offense]; People v. Diedrich (1982) 31 Cal.3d 263, 280-282 [similar].)

Particularly egregious was the admission into evidence of appellant's alleged assault with a knife of Dawn Evans. In view of the special need for reliability in the determination that death is the appropriate punishment in a capital trial, the Evans incident, which occurred when appellant was a juvenile, 17 years prior to trial, was a totally unreliable indicator that death was the proper verdict herein. Appellant recognizes that this Court has held that juvenile misconduct is admissible under factor (b) of section 190.3 and that there is no time limitation on the introduction of violent criminal activity. (People v. Burton (1989) 48 Cal.3d 843, 862; People v. Lucky (1988) 45 Cal.3d 259, 294-295.) Even accepting this general proposition for the sake of argument, it should have no application in a case such as this, where the

juvenile was only 16 years old, the incident occurred 17 years prior to trial, and the incident did not result in a juvenile or criminal adjudication. The Evans incident was particularly prejudicial because it tended to show that appellant possessed a propensity towards armed violence dating back to his teenage years and some jurors may have speculatively viewed the Evans incident as an attempted sexual assault.

The United States Supreme Court's recent decisions in Cunningham v. California (2007) 549 U.S. ___ [166 U.S. 856, 127 S.Ct. 856]; United States v. Booker (2005) 543 U.S. 220 [160 L.Ed.2d 621, 125 S.Ct. 738]; Blakely v. Washington (2004) 542 U.S. 296 [159 L.Ed.2d 403, 124 S.Ct. 2531]; Ring v. Arizona (2002) 536 U.S. 584 [153 L.Ed.2d 556, 122 S.Ct. 2428]; and Apprendi v. New Jersey (2000) 530 U.S. 466 [147 L.Ed.2d 435, 120 S.Ct. 2348] confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding;

nor is such an instruction generally provided for under California's capital sentencing scheme.

The deficiencies described above also violated appellant's Eighth Amendment right to be sentenced in accordance with proceedings which are reliable, rather than arbitrary or capricious. (Johnson v. Mississippi, supra, 486 U.S. at 584; Beck v. Alabama, supra, 447 U.S. at 638.)

At least three state supreme courts have ruled that the admission of evidence of prior unadjudicated crimes in the sentencing phase of a capital trial violates the due process guarantees of the Fourteenth Amendment. In State v. McCormick (Ind. 1979) 272 Ind. 272 [397 N.E.2d 276], the Indiana Supreme Court held that the statute which authorized the introduction of evidence that the defendant had "committed another murder" was unconstitutional under the Fourteenth Amendment:

> The procedure . . . will be, in fact, two trials . . . . At [the] sentencing hearing, the defendant will, in essence, be tried for the [other] murder . . . . This hearing will be held before the same jury which will have just recently convicted the defendant of another, unrelated murder.
>
> (Id., 397 N.E.2d at 280.)

The McCormick court concluded that the defendant "would be tried on the second count to a jury which ha[d] been undeniably prejudiced by having

convicted him of an unrelated murder." (Ibid.)

McCormick was followed on this point by the supreme court of Tennessee in People v. Bobo (Tenn. 1987) 727 S.W.2d 945, cert. den. 484 U.S. 872. In Bobo, the Tennessee Supreme Court held that permitting the prosecutor to seek the death penalty based upon "other murders for which the defendant has not been convicted" would violate that state's due process constitutional guarantee "which is synonymous with the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States." (Id., 727 P.2d at 952 [citations and inner quotation marks omitted].)

In State v. Bartholomew (II) (1984) 683 P.2d 1079 [101 Wash.2d 631], the Washington Supreme Court reviewed a state statute permitting the introduction of evidence of unadjudicated "criminal activity." The supreme court concluded that such evidence violates both federal and state due process guarantees, as well as prohibitions against cruel and unusual punishment. (Id., 683 P.2d at 1085-1087.)[47]

There can be little question that the constitutionally illicit evidence

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[47] In State v. Bartholomew (I) (1982) 98 Wash. 2d 173 [654 P.2d 1170] , the court held that evidence of unadjudicated criminal activity violated the Eighth and Fourteenth Amendments. The United States Supreme Court granted certiorari and remanded for consideration in light of Zant v. Stephens, supra, 462 U.S. 862; in State v. Bartholomew (II), supra, 683 P.2d 1079, the Washington Supreme Court rested its decision as to the inadmissibility of unadjudicated prior criminal activity on state and federal due process and on cruel and unusual punishment grounds. (Id., 683 P.2d at 1085.)

regarding these unadjudicated offenses prejudiced appellant's penalty phase. In fact, evidence of these incidents constituted a significant portion of the prosecution evidence during the penalty phase. Furthermore, in his penalty phase closing argument the prosecutor relied very heavily on these four incidents in arguing for a death sentence. (See 59 RT 18889-18891, 18894-18895.) With regard to the Dawn Evans incident, the prosecutor emphasized the fear she described when being threatened with a paring knife and described this as "the start" of appellant's criminal career. (59 RT 18890-18891.)

Given the closeness of the penalty determination (see Argument X.E., above), it is reasonably probable that this error contributed to the judgment of death. (Chapman v. California, supra, 386 U.S. at 24.) It certainly cannot be concluded that this improper evidence "had no effect" on the penalty verdict. (Caldwell v. Mississippi, supra, 472 U.S. at 341.) Accordingly, the judgment of death must be reversed.

XV. CALJIC NO. 8.88, AS GIVEN HEREIN, MISLED THE JURY IN ITS REFERENCE TO THE "TOTALITY OF THE MITIGATING CIRCUMSTANCES," BECAUSE IT WAS CRITICAL FOR THE JURY TO UNDERSTAND THAT ONE MITIGATING CIRCUMSTANCE, STANDING ALONE, COULD JUSTIFY ITS SPARING APPELLANT'S LIFE

The court instructed the jury with the 1989 revision of CALJIC No. 8.88.[48] The fourth and final paragraph of this instruction told the jury:

> 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 mitigating circumstances with the totality of the aggravating 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

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[48] Appellant acknowledges that an argument similar to the present was rejected by this Court in People v. Berryman (1993) 6 Cal.4th 1048, 1099-1100, and People v. Vieira, supra, 35 Cal.4th at 300. Appellant respectfully submits that Berryman and Vieira were incorrectly decided for the reasons set forth herein.

> that it warrants death instead of life without parole.
>
> (8 CT 2044-2045, 2199; 59 RT 19153 [emphasis added].)

This Court has repeatedly indicated that one mitigating factor, standing alone, may be sufficient to outweigh all other factors. (People v. Grant (1988) 45 Cal.3d 829, 857, fn. 5; People v. Hayes (1990) 52 Cal.3d 577, 642; People v. Cooper, supra, 53 Cal.3d at 845.) The problem with the above-quoted language of CALJIC No. 8.88 is that it failed to communicate this important concept to the jury. This was prejudicial because, in the absence of qualitative consideration, the quantitative factor (i.e., the "totality") would weight the scales in favor of a judgment of death in violation of the Eighth Amendment of the United States Constitution. (Stringer v. Black, supra, 503 U.S. at 231-232.)

A trial court has a sua sponte duty to correctly instruct the jury on the general principles of law governing the case before it. (People v. Hernandez, supra, 47 Cal.3d at 353; People v. Avalos, supra, 37 Cal.3d at 229.) A trial court's instructions should be correctly phrased and not misleading. (People v. Forte, supra, 204 Cal.App.3d at 1323; People v. Satchell, supra, 6 Cal.3d at 33, fn. 10.) This was certainly not a case of invited error by defense counsel, which is a limited exception to this general rule; there was no discussion on

the record by counsel regarding the CALJIC No. 8.88 instruction. (See 59 RT 19097-19111 [general discussion of jury instructions].) (See People v. Avalos, supra, 37 Cal.3d at 229.)

> [A]n appellate court may ascertain whether the defendant's substantial rights will be affected by [an] asserted instructional error and, if so, may consider the merits and reverse the conviction if error indeed occurred, even though the defendant failed to object in the trial court.
>
> (People v. Andersen (1994) 26 Cal.App.4th 1241, 1249.)

Furthermore, an "appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (§ 1259.)

Although CALJIC No. 8.88 told the jury not to engage in "a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them," it is difficult to believe that the jury's being told to consider "the totality of the mitigating circumstances with the totality of the aggravating circumstances" means anything different than a mere mechanical counting of factors. "Totality" implies some degree of counting. The last sentence of CALJIC No. 8.88 states that "[t]o 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." This language further implies a counting mechanism and undermines the concept that one mitigating factor can outweigh all of the aggravating factors and warrant a sentence of life without the possibility of parole.

In essence, CALJIC No. 8.88 is death-oriented because it tells the jury what warrants death, but does not inform the jury what warrants life without the possibility of parole. The jury is not informed that one mitigating factor can be deemed sufficient to outweigh all the aggravating factors no matter how "substantial" those factors are. The instruction reinforces a notion of quantity and not quality of the factors involved. As previously stated, this Court has repeatedly indicated in cases – including People v. Grant, supra, 45 Cal.3d at 857, fn. 5; People v. Hayes, supra, 52 Cal.3d at 642; and People v. Cooper, supra, 53 Cal.3d at 845 – that one mitigating factor may be found sufficient to outweigh a number of aggravating factors and permit the jury to return a judgment of life without parole, rather than death. However, the misleading language of CALJIC No. 8.88 failed to effectively communicate this rule to the jury in appellant's case.

It is fundamental that a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable

and incompatible with the commands of the Eighth and Fourteenth Amendments." (Lockett v. Ohio, supra, 438 U.S. at 605.) The misleading references to "totality" in the Court's CALJIC No. 8.88 instruction improperly impaired, to appellant's disadvantage, the jury's assessment as to whether life without the possibility of parole or death was the proper verdict to reach in this case. Given the closeness of the penalty determination (see Argument X.E., above), it is reasonably possible that this error contributed to the judgment of death. (Chapman v. California, supra, 386 U.S. at 24.) It certainly cannot be found that this error had "no effect" on the penalty verdict. (Caldwell v. Mississippi, supra, 472 U.S. at 341.)

Accordingly, the judgment of death must be reversed.

XVI. THE JURORS SHOULD HAVE BEEN INSTRUCTED THAT BEFORE THEY COULD WEIGH AGGRAVATING CIRCUMSTANCES AGAINST MITIGATING CIRCUMSTANCES, THEY HAD TO UNANIMOUSLY AGREE THAT A PARTICULAR AGGRAVATING CIRCUMSTANCE EXISTED

The jurors at appellant's trial were not instructed that they had to unanimously agree that a particular circumstance was established as true and that it was aggravating in nature before they could weigh it against the mitigating evidence. In fact, with regard to the aggravating factors of unadjudicated criminal acts (per § 190.3, subd. (b)), the jurors were told precisely the opposite, in accordance with CALJIC No. 8.87:

> Before a juror may consider any of such criminal act or acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant Paul Loyde Hensley, actually did in fact commit such criminal act or acts. . . . [¶.] It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal act or acts occurred, that juror may consider that activity as a fact in aggravation. . . .

(8 CT 2042-2043, 2192; 59 RT 19144[emphasis added].)

This instruction permitted one given juror to find that appellant was "guilty" of a particular assault or robbery and allowed that juror to use that

finding as an aggravating circumstance favoring death notwithstanding that the eleven other jurors were not convinced beyond a reasonable doubt that appellant had committed that particular assault or robbery. This violated appellant's right to a unanimous jury finding before an alleged violent crime could be used as an aggravating circumstance favoring a death sentence. (See Cunningham v. California, supra, 127 S.Ct. 856; Blakely v. Washington, supra, 542 U.S. 296; Apprendi v. New Jersey, supra, 530 U.S. at 490; United States v. Payseno, supra, 782 F.2d at 834-837 [unanimity required when there is evidence of more than one incident from which the jurors could conclude defendant was guilty of a single charged offense]; People v. Diedrich, supra, 31 Cal.3d at 280-282 [similar].)

Furthermore, the United States 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 [65 L.Ed.2d 159, 100 S.Ct. 2214].) Given the "special need for reliability" in the sentencing phase of a capital trial (Johnson v. Mississippi, supra, 486 U.S. at 584), the Fifth and Eighth Amendments likewise require unanimity with regard to the critical findings in a capital case. The finding of a circumstance in aggravation is such a critical finding. It is comparable to the finding on an enhancement allegation in a noncapital case, a finding that must by law be

unanimous. (See, e.g., §§ 1158, 1158a.) Since, under the Fifth and Eighth Amendments, capital defendants are entitled, if anything, to more rigorous protections than those afforded noncapital defendants (see Harmelin v. Michigan (1991) 501 U.S. 957, 994 [115 L.Ed.2d 836, 111 S.Ct. 260]) – and since providing more protection to a noncapital than to a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see Ring v. Arizona, supra, 536 U.S. at 609; Myers v. Ylst (9th Cir. 1990) 897 F.2d 417, 421, cert. den. 498 U.S. 879) – it follows that unanimity with respect to aggravating circumstances is constitutionally required. By failing to so instruct, the trial court breached its sua sponte obligation to instruct the jury on every principle necessary for proper decision-making. (People v. Saille (1991) 54 Cal.3d 1103, 1118, 1120; People v. Sedeno (1974) 10 Cal. 3d 703, 716.)

This error requires reversal. First, as to any asserted aggravating factor some jurors may have believed that the underlying factual predicate to establish this factor had been proven and other jurors may have disagreed. A unanimity requirement would have precluded any juror from considering such evidence in the final weighing of the penalty. Second, even if the jurors were in agreement as to the factual predicate regarding a particular incident or circumstance, the jurors may have disagreed as to whether this supported a

factor in aggravation being counted in favor of death. If an unanimity rule had been applied, such disagreement would have precluded use of this evidence in the final weighing of penalty. An explicit unanimity requirement would have exposed these misconceptions to the jury as a whole, allowing the errors to be corrected by jurors who had a correct understanding of what was permitted with regard to aggravation.

Given the closeness of the penalty determination in this case (see Argument X.E., above), it is reasonably possible that the failure to impose such a requirement contributed to the verdict of death. (Washington v. Recuenco (2006) 548 U.S. 212 [165 L. Ed. 2d 466, 126 S.Ct. 2546]; Chapman v. California, supra, 386 U.S. at 24.) It certainly cannot be found that this error had "no effect" on the penalty verdict. (Caldwell v. Mississippi, supra, 472 U.S. at 341.)

Accordingly, the judgment of death must be reversed.

XVII. THE JURY SHOULD HAVE BEEN INSTRUCTED THAT THE BEYOND A REASONABLE DOUBT STANDARD GOVERNED ITS PENALTY PHASE DECISION

A. Procedural Background

Appellant's jury was instructed, in accordance with CALJIC No. 8.88: "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 [sic] warrants death instead of life without parole." (8 CT 2045, 2199; 59 RT 19153.)

This permitted the prosecutor to tell the jurors that, with regard to their penalty phase deliberations: "It's important to remind you that the People have no burden of proof in this. Two sides start out equally. We are on a level playing field." (59 RT 18889.)

B. Proof Beyond a Reasonable Doubt By a Unanimous Jury is the Requisite Standard As a Matter of Constitutional Law

Appellant submits that the failure to require the jury to spare appellant's life unless it found both that aggravation was weightier than

mitigation and that death was the appropriate penalty beyond a reasonable doubt violated due process (Cunningham v. California, supra, 127 S.Ct. 856; Blakely v. Washington, supra, 542 U.S. 296; Apprendi v. New Jersey, supra, 530 U.S. at 490 [124 L.Ed. 2d, 435,120 S.Ct. 2348]; In re Winship, supra, 397 U.S. at 364), equal protection (Myers v. Ylst, supra, 897 F.2d at 421), and the Eighth and Fourteenth Amendment requirements of heightened reliability in the death-determination process (Johnson v. Mississippi, supra, 486 U.S. at 584; Beck v. Alabama, supra, 447 U.S. at 638.) Although trial counsel did not specifically object to this asserted instructional error, the trial court's duty is governed by the rule that " when . . . instructions are given, they should be accurate and complete." (People v. Montiel (1993) 5 Cal.4th 877, 942; accord People v. Valenzuela, supra, 175 Cal.App.3d at 392-393.) Furthermore, an "appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (§ 1259.)

The United States Supreme Court has found that the beyond a reasonable doubt standard is required in criminal cases because "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." (Santosky v. Kramer (1982) 455 U.S. 745, 755 [71 L.Ed.2d 599, 102 S.Ct. 1388].) No greater personal interest is at stake than in the penalty phase of a capital trial. (Woodson v. North Carolina, supra, 428 U.S. at 305 [punishment by death is qualitatively different].)

Appellant's position finds support in a series of recent decisions by the United States Supreme Court, beginning with Apprendi v. New Jersey, supra, 530 U.S. 446. Apprendi held that sentencing facts which increase the prescribed maximum penalty to which a criminal defendant is exposed must be submitted to a jury and proven beyond a reasonable doubt. Appellant submits that similar considerations of constitutional due process and the right to a jury trial require that a jury find beyond a reasonable doubt that a defendant deserves the death penalty.

Also pertinent is Blakely v. Washington, supra, 542 U.S. 296. Blakely held that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (Id., 124 S.Ct. at 2536 [citation omitted].) Thus, under Blakely, when a jury makes additional factual findings to justify the imposition of an aggravated sentence, such as a death sentence, by anything less than the standard of proof beyond a reasonable doubt, it violates the defendant's constitutional right to a jury trial,

as previously defined in Apprendi.

The question of whether aggravating factors are "so substantial" in comparison to mitigating factors so as to justify the imposition of a death sentence (rather than life without parole) plainly requires the jury to make a factual determination above and beyond the finding that the defendant is death-eligible. Therefore, Blakely's holding dictates that the question of whether aggravating factors outweigh mitigating factors must be resolved by a jury utilizing the beyond-a-reasonable-doubt standard before a death sentence may be imposed.

Blakely and Apprendi were recently followed in Cunningham v. California, supra, 127 S.Ct. 856. In Cunningham, the Supreme Court considered the validity of California's Determinate Sentencing Law (DSL), in which the judge was permitted to impose an upper term sentence based on additional facts found by the judge, applying the preponderance-of-the-evidence standard. Defendant Cunningham received an upper-term sentence based on six aggravating factors found by the judge alone, based upon a preponderance of the evidence. The United States Supreme Court reversed. Relying on its prior decisions in Apprendi and Blakely, the Supreme Court held that the DSL violated the Sixth and Fourteenth Amendments because it authorized a judge, utilizing a preponderance-of-the-evidence standard, to

find the facts permitting imposition of an upper term sentence. (Cunningham, 127 S.Ct. at 850, 863-864, 871.) The Cunningham court explained:

> Because circumstances in aggravation are found by a judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, . . . the DSL violates Apprendi's bright line rule: Except for a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.
>
> (Cunningham, 127 S.Ct. at 868 [citation omitted].)

Appellant's position finds still further support in Ring v. Arizona, supra, 536 U.S. 584. Ring held that a capital defendant possesses a constitutional right to a jury determination of whether he will be sentenced to death. Extrapolating upon its earlier ruling in Apprendi, the Supreme Court held in Ring: "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 [as in Apprendi], but not the fact-finding necessary to put him to death. We hold that the Sixth Amendment applied to both." (Id., 536 U.S. at 609 [emphasis added].)

Similarly, the constitutional right to trial by jury "would be senselessly diminished" if it encompassed the right to have a jury determine sentencing factors utilizing the beyond-a-reasonable-doubt standard in a noncapital case

(per Apprendi, Blakely and Cunningham), but not the right to have a jury determine whether a defendant is punished by a death sentence or life imprisonment utilizing the beyond-a-reasonable-doubt standard in a capital case. Such a disparity between the rights of capital and noncapital criminal defendants with respect to sentencing would violate equal protection and due process of law as guaranteed by the Fifth and Fourteenth Amendments. (Myers v. Ylst, supra, 897 F.2d at 421.)[49]

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

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[49] Appellant acknowledges that this Court has rejected similar claims in prior capital cases. (See e.g., People v. Stanley, supra, 10 Cal.4th at 842; People v. Vieira, supra, 35 Cal.4th at 300; see also Williams v. Calderon (9th Cir. 1995) 52 F.3d 1465, 1485.) Appellant respectfully submits that this issue should be revisited for the reasons stated herein.

mitigating circumstances. Thus, because reaching the level of a death verdict involves making required factual findings in order to increase the maximum penalty for special circumstance first degree murder, those factual findings are subject to the Apprendi-Ring-Blakely-Cunningham mandate: they must be proven to a jury beyond a reasonable doubt.

Appellant's conclusion is supported by Justice Scalia's concurring opinion in Ring, wherein he stated, with respect to aggravating factors employed by the states in capital determinations: "[W]herever those factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: They must be found by the jury beyond a reasonable doubt." (Id. at 612 [emphasis added].) That explicitly suggests that California's rejection of the reasonable doubt standard for the penalty determination in death penalty cases cannot survive Cunningham, Blakely, Apprendi and Ring.

This Court has previously reasoned that because penalty phase determinations are "moral and . . . not factual" functions, they are not "susceptible to a burden-of-proof quantification." (People v. Hawthorne (1992) 4 Cal.4th 43, 79.) In this context, however, the reasonable doubt standard would convey, and is necessary to convey, the degree of confidence required to return a verdict of death. (See e.g., State v. Wood (Utah 1981)

648 P.2d 71, 83-84; see generally, In re Winship, supra, 397 U.S. at 364 [reasonable doubt standard needed to dispel doubt of community at large "whether . . . men are being condemned" in a just manner].) Accordingly, the standard of proof beyond a reasonable doubt is the appropriate standard for capital sentencing.

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. Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter. The experience in the majority of capital-law states demonstrates that the reasonable doubt standard can be adopted to the penalty phase of a capital trial.

At the very least, the Hawthorne rationale suggests that, where the jury does execute a factual function adverse to a capital defendant, the reasonable doubt standard should apply. Thus, the trial court below should have instructed the jury that, before it could rely on any alleged fact as a factor in aggravation, it had to find the latter proved beyond a reasonable doubt. The United States Supreme Court has equated a state's burden "to prove the existence of aggravating circumstances" with its "burden to prove every element of the offense charged." (Walton v. Arizona (1990) 497 U.S. 639,

650 [111 L.Ed.2d 511, 110 S.Ct. 3047].) Since the latter must be established beyond a reasonable doubt (Sandstrom v. Montana, supra, 442 U.S. at 523-524), it may be inferred that aggravating circumstances are to be governed by the same standard.

The reasonable doubt standard is routinely applied in proceedings with less serious consequences than a capital penalty trial. (See e.g., People v. Burnick (1975) 14 Cal.3d 306, 318-322 [proceeding to determine eligibility for commitment under mentally disordered sex offender law]; Conservatorship of Roulet (1979) 23 Cal.3d 219 [conservatorship proceedings]; In re Winship, supra, 397 U.S. at 364 [juvenile proceeding].) No compelling reason justifies applying a lesser standard when, as in appellant's case, the ultimate penalty is at stake. This disparity violated appellant's right to equal protection guaranteed by the Fourteenth Amendment (see generally Myers v. Ylst, supra, 897 F.2d at 421 ["state should not be permitted to treat defendants differently . . . unless it has 'some rational basis, announced with reasonable precision' for doing so"]).

The failure to apply the reasonable doubt standard when its use is demanded by the United States Constitution is reversible per se. (Sullivan v. Louisiana, supra, 508 U.S. at 281-282.) Furthermore, given the closeness of the penalty determination herein (see Argument X.E., above), as well as the

significant amount of evidence that would have been affected by the arbitrary and inconsistent decision-making resulting from the error at issue, it is reasonably possible that this error resulted in the judgment of death. (Chapman v. California, supra, 386 U.S. at 24.) It certainly cannot be found that this error had "no effect" on the penalty verdict. (Caldwell v. Mississippi, supra, 472 U.S. at 341.)

Accordingly, the judgment of death must be reversed.

XVIII. THE FAILURE TO PROVIDE THE JURY WITH ANY STANDARD OF PROOF IN THE PENALTY PHASE GOVERNING WHEN THE JURY COULD FIND EVIDENCE TO BE TRUE OR AGGRAVATING VIOLATED THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

In his previous argument, appellant discussed this Court's holding in People v. Hawthorne, supra, 4 Cal.4th 43, that a quantitative standard of proof is not appropriate for the final normative judgment which a jury must make in the penalty phase of a capital trial. Appellant noted that under Hawthorne's own reasoning a quantitative standard of proof is appropriate for the adverse factual determinations which the jury makes preliminary to the ultimate judgment of life or death – i.e., the findings that certain evidence fits within an aggravating circumstance category. While appellant's previous argument was to the effect that the standard of proof for such factual determinations should be the beyond a reasonable doubt standard, his present argument is that the failure to articulate any standard of proof for the jury (see CALJIC No. 8.88; given at 8 CT 2044-2045, 2198-2199 and 59 RT 19152-19153) – whatever that standard of proof should have been – amounted to federal constitutional error in several respects.

First, in a normal criminal trial, before a juror may rely on evidence

purporting to show either a "fact necessary to constitute the crime with which the [defendant] is charged" (In re Winship, supra, 397 U.S. at 364) or a fact within "the direct chain of proof of an accused's guilt" (People v. Tewksbury (1975) 15 Cal.3d 953, 965, fn. 12), the juror must be persuaded beyond a reasonable doubt that the alleged fact is true. Similarly, in a noncapital sentencing hearing, a judge may not consider an alleged fact to be aggravating (or mitigating) unless the judge finds the fact was established by a preponderance of the evidence. (Cal. Rules of Court, rule 420 (b).) In the present case, by contrast, the jury was simply instructed: "You, as jurors, must decide the facts of the case based solely on the evidence presented to you at the trial . . . ." (8 CT 2028; 59 RT 19128), and was not provided any standard of proof by which to accept or reject any evidence. As the prosecutor told the jury, regarding to their penalty phase deliberations: "It's important to remind you that the People have no burden of proof in this. Two sides start out equally. We are on a level playing field." (59 RT 18889.) In other words, the jurors were effectively called upon to consider potentially aggravating evidence in the weighing process without regard to its reliability or unreliability.

In the present case, the prosecutor urged the jurors to consider several matters as to which the court had not assigned any burden of proof: 1) the

aggravating nature of the fact that there were multiple crimes, including two murders and one attempted murder (59 RT 18895-18907, 18956-18957), 2) that the manners in which the victims herein were attacked were allegedly aggravating in comparison to the average murder or attempted murder (see 59 RT 18896-18907, 18956-18957), and 3) the aggravating nature of appellant's alleged lack of remorse (see 59 RT 18907-18910). If the jurors had to evaluate the prosecutor's claims concerning these matters under a reasonable doubt standard, it is quite likely that the jurors would have rejected some or all of them as aggravating circumstances. However, under the instructions that the jurors were given, they were not provided with any standard of proof by which to evaluate the prosecutor's bald assertions regarding these matters. Thus, these matters, which were not subjected to jury evaluation employing a standard of proof, contributed heavily to the jury's ultimate determination that the aggravating circumstances in appellant's case were "substantial."

The Eighth Amendment imposes "a high requirement of reliability" in the capital sentencing process. (Mills v. Maryland (1988) 486 U.S. 367, 383-384 [100 L.Ed.2d 384, 108 S.Ct. 1860].) Instructing appellant's jurors to consider all of the evidence in the case irrespective of its reliability and absent any standard of proof was irreconcilable with such constitutional demands.

The failure to impose a standard of proof also violated appellant's right to equal protection under the Fourteenth Amendment. No rational, much less compelling, reason exists for forbidding sentencers in noncapital cases from considering as aggravating any alleged fact or circumstance not established by a preponderance (Cal. Rules of Court, rule 420(b)), while permitting capital jurors to consider such facts. (Cf. Myers v. Ylst, supra, 897 F.2d at 421 ["state should not be permitted to treat defendants differently . . . unless it has 'some rational basis, announced with reasonable precision' for doing so"].)

Even if one assumes that every juror in appellant's case instinctively applied some standard of proof before accepting an alleged fact as aggravating, that would not eliminate constitutional concerns. There would still remain the problem of jurors applying different and unknown standards of proof. Different jurors applying different standards to the same evidence would have injected into the penalty determination process an arbitrariness forbidden by the Eighth Amendment. (Mills v. Maryland, supra, 486 U.S. at 374; Johnson v. Mississippi, supra, 486 U.S. at 585; cf. Proffitt v. Florida (1976) 428 U.S. 242, 260 [49 L.Ed.2d 913, 96 S.Ct. 2960] [procedural safeguards required "to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed"].)

The problem discussed herein extends beyond the present case. The Eighth Amendment also requires that "capital punishment be imposed fairly, and with reasonable consistency, or not at all." (Eddings v. Oklahoma, supra, 455 U.S. at 112 [emphasis added].) With jurors in different cases applying different standards of proof to the same quality of evidence, the consistency demanded by the federal constitution is not possible. It is unacceptable that one defendant should live and another die simply because their juries relied on different standards of proof in accepting or rejecting potential aggravating evidence.

Appellant would finally note that Evidence Code section 115 provides: "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." The failure to provide appellant's capital jury with any standard of proof thus violated a basic provision of state law. The failure to heed basic state procedures when imposing the death penalty, in turn, violated federal due process. (Hicks v. Oklahoma, supra, 446 U.S. at 346.) Applying procedural protections in noncapital cases, while denying them in capital cases, moreover, is the "height of arbitrariness" (Mills v. Maryland, supra, 486 U.S. at 374) since, under the Fifth and Eighth Amendments, it is capital defendants who are entitled to "protections that the constitution nowhere else provides" (Harmelin v. Michigan, supra, 501 U.S.

at 994]). This disparity also violates equal protection of the law. (Myers v. Ylst, supra, 897 F.2d at 421.)

In failing to provide the jury with an appropriate standard of proof, the trial court below failed to fulfill its sua sponte duty to instruct the jury in the fundamental principles necessary for proper decision making. (People v. Saille, supra, 54 Cal.3d at 1117; People v. Sedeno, supra, 10 Cal.3d at 716.)

The failure to require the jury to apply any standard of proof during the penalty phase constitutes per se reversible error. (See Sullivan v. Louisiana, supra, 508 U.S. at 281-282.) Given the closeness of the penalty determination herein (see Argument X.E., above), as well as the significant quantity of evidence that would have been affected by the arbitrary and inconsistent decision-making resulting from the error at issue, it is reasonably possible that this error resulted in the judgment of death. (Chapman v. California, supra, 386 U.S. at 24.) It certainly cannot be found that this error had "no effect" on the penalty verdict. (Caldwell v. Mississippi, supra, 472 U.S. at 341.)

Accordingly, the judgment of death must be reversed.

XIX. THE JURY SHOULD HAVE BEEN INSTRUCTED THAT THE PROSECUTION HAD THE BURDEN OF PERSUASION TO CONVINCE THE JURY THAT DEATH WAS THE APPROPRIATE PENALTY

In addition to failing to impose a standard of proof, as set forth in the preceding argument, the penalty phase instructions failed to assign any burden of persuasion regarding significant penalty phase determinations which the jury was required to make. In other words, if a juror was undecided whether a certain fact was aggravating, or was undecided whether the "aggravating circumstances [were] so substantial in comparison with the mitigating circumstances that . . . death" was warranted (CALJIC No. 8.88, given at 8 CT 2044-2045 and 59 RT 19153), the jurors were not told that in the event of such equipoise their determinations had to be adverse to the prosecution.

This Court has previously 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; accord People v. Kipp (1998) 18 Cal.4th 349, 381.) Appellant respectfully submits that the rationale of Hayes should be reexamined for the reasons stated below.

First, even with a normative determination to make, it is inevitable that

one or more jurors on a given jury will find themselves torn between life with the possibility of parole and a death verdict. A tie-breaking rule is needed to ensure that jurors – and the juries on which they sit – respond in the same way, so that the death penalty is applied evenhandedly. "[C]apital punishment [must] be fairly imposed, and with reasonable consistency, or not at all." (Eddings v. Oklahoma, supra, 455 U.S. at 112 [emphasis added].) In cases in which the substantiality of the aggravating evidence relative to the mitigating evidence is close – which certainly could have been the view of one or more jurors in the present case – it is unacceptable – "wanton" and "freakish" (Profitt v. Florida, supra, 428 U.S. at 260) – the "height of arbitrariness" (Mills v. Maryland, supra, 486 U.S. at 374) – that one defendant should live and another die simply because one juror or one jury breaks the tie in favor of the defendant and another does so in favor of the prosecution.

Second, California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence available. However, it does so only in noncapital cases. (Cal. Rules of Court, rule 4.420(b) [existence of aggravating circumstances necessary for imposition of upper term must be established by preponderance of the evidence].) As explained in the preceding argument, to provide greater

protection to noncapital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Fifth, Eighth and Fourteenth Amendments. (See e.g., Ring v. Arizona, supra, 536 U.S. at 609; Mills v. Maryland, supra, 486 U.S. at 374; Myers v. Ylst, supra, 897 F.2d at 421.)

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." When the prosecutor effectively argued that the circumstances of appellant's present crimes and criminal history were aggravating – and not merely aggravating but so aggravating as compared to other murderers that death was the only appropriate sanction (see 59 RT 18896-18907, 18956-18957) – he was "claiming" not only that appellant was "guilty of crime or wrongdoing," but that appellant was more "guilty of crime or wrongdoing" than nearly every other criminal convicted in the United States, including most other first degree murderers. The state's position – typical in a capital case – was thus the prototype of the category defined by Evidence Code section 520.

Accordingly, appellant respectfully suggests that People v. Hayes, supra, 52 Cal.3d 577 was incorrectly decided. Appellant's jury should have been instructed that the prosecution had the burden of persuasion regarding

the existence of aggravating circumstances and their substantiality relative to mitigating circumstances. Sentencing appellant to death without adhering to the procedural protection afforded by state law under Evidence Code section 520 violated federal due process. (Hicks v. Oklahoma, supra, 446 U.S. at 346.)

The trial court below possessed a sua sponte obligation to correctly instruct the jury on fundamental principles of law. (People v. Saille, supra, 54 Cal.3d at 1118, 1120; People v. Sedeno, supra, 10 Cal.3d at 716.) The failure of the trial court to instruct appellant's jury that the prosecution had the burden of persuasion during the penalty phase represents a failure of the trial court to fulfill this duty. Furthermore, an "appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (§ 1259.)

The failure to instruct the jury that the burden of persuasion lay with the prosecution should be deemed per se reversible error. (See Sullivan v. Louisiana, supra, 508 U.S. at 281-282.) Alternatively, reversal is required because, given the closeness of this case with regard to the penalty determination (see Argument X.E., above), it is reasonably possible that the failure to provide a burden of persuasion instruction contributed to the verdict

of death. (Chapman v. California, supra, 386 U.S. at 24.) It certainly cannot be found that this error had "no effect" on the penalty verdict. (Caldwell v. Mississippi, supra, 472 U.S. at 341.)

Accordingly, the judgment of death must be reversed.

XX. THE JURY SHOULD HAVE BEEN INSTRUCTED ON A PRESUMPTION OF A LIFE WITHOUT PAROLE SENTENCE

In noncapital cases, the presumption of innocence acts as a core constitutional value to protect the accused and is a basic component of a fair trial. (Estelle v. Williams (1976) 425 U.S. 501, 503 [48 L.Ed.2d 126, 96 S.Ct. 1691.) Paradoxically, in the penalty phase of a capital trial, where the stakes are life or death, the jury is not instructed on the presumption of a life sentence, the penalty phase correlate of the presumption of innocence. (Note: The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing (1984) 94 Yale L.J. 351; cf. Delo v. Lashley (1993) 507 U.S. 272 [122 L.Ed.2d 620, 113 S.Ct. 1222].)

In this case the jury was expressly told: "The law has no preference as to which punishment [death or life imprisonment] is appropriate in any particular case." (8 CT 2189; 59 RT 19139.)

In People v. Arias (1996) 13 Cal.4th 92, it was held that such a presumption is unnecessary when a defendant's life is at stake, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit" so long as its law properly limits death eligibility. (Id. at 190.) As appellant has elsewhere

argued, however, California's 1978 death penalty law does not properly limit death eligibility; among other things, it does not properly narrow the class of death-eligible defendants, it gives prosecutors unbridled discretion to seek the death penalty, and it fails to require proportionality review. (See Arguments VI, XXVI, XXVII and XXVIII, herein.)

Appellant respectfully requests that the Court reconsider Arias and hold, instead, that a presumption of a life without parole sentence is constitutionally mandated in the penalty phase of a capital trial. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I. §§ 7, 15 & 17; see also Wash. Rev. Code, § 10.95.060 [life sentence presumed unless jury finds beyond reasonable doubt that there are insufficient mitigating factors to merit leniency].) The failure to so instruct the jury in the present case requires reversal of the judgment of death.

XXI. EVEN IF IT WERE CONSTITUTIONALLY PERMISSIBLE FOR THERE TO BE NO BURDEN OF PROOF, THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY TO THAT EFFECT

In his previous arguments, appellant asserted that he was constitutionally entitled to an instruction imposing some burden of proof upon the prosecution to prove that death, rather than life without parole, was the appropriate sentence in this case. If, in the alternative, it were constitutionally permissible not to have any burden of proof at all, the trial court prejudicially erred by failing to articulate that matter 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, 508 U.S. 275.) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each juror may instead apply the standard which he or she believes to be 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 the penalty phase would continue to believe that to be the case. Such jurors do exist. This raises the constitutionally unacceptable possibility

that 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 this subject a violation of the Sixth, Eighth and Fourteenth Amendments, because the given instructions fail to provide the jury with the guidance legally required for administration of 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, 508 U.S. at 280-282.)

XXII. THE JURY SHOULD HAVE BEEN REQUIRED TO MAKE EXPLICIT WRITTEN FINDINGS OF THE FACTORS WHICH IT FOUND IN AGGRAVATION AND MITIGATION

The California death penalty scheme does not require written explicit findings by the jury indicating the aggravating and mitigating factors selected by it. This Court has held in past decisions that the absence of such a requirement does not render the death penalty scheme unconstitutional. (People v. Vieira, supra, 35 Cal.4th at 303; People v. Kipp, supra, 18 Cal.4th at 381; People v. Fauber (1992) 2 Cal.4th 792, 859; see also Williams v. Calderon, supra, 52 F.3d at 1484-1485 [reaching same conclusion with respect to 1977 death penalty law].) Appellant respectfully submits that this question should be reconsidered.

To begin with, the importance of explicit findings has long been recognized by this Court. (See e.g., People v. Martin (1986) 42 Cal.3d 437, 449.) Thus, in a noncapital case the sentencer is required by California law to state on the record the reasons for its sentence choice. (Ibid.; § 1170, subd. (c).) Since, under the Fifth and Eight Amendments, capital defendants are entitled, if anything, to more rigorous protections than those afforded noncapital defendants (see Harmelin v. Michigan, supra, 501 U.S. at 994) – and, since providing more protection to a noncapital than to a capital

defendant would violate the equal protection clause of the Fourteenth Amendment (see Ring v. Arizona, supra, 536 U.S. at 609; Myers v. Ylst, supra, 897 F.2d at 421) – it follows that the sentencer in a capital case is constitutionally required to identify for the record, in the same fashion, the aggravating and mitigating circumstances found and rejected by it.

Indeed, explicit findings in the penalty phase of a capital case are particularly critical because of two factors: 1) the magnitude of what is at stake (Woodson v. North Carolina, supra, 428 U.S. at 305); and 2) the potential for error. In Mills v. Maryland, supra, 486 U.S. 367, for example, Maryland's written-findings requirement enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See id. at 383, fn. 15.)

Similarly in the present case, appellant has identified numerous ways in which the jurors could have become confused or misled regarding what they were permitted to consider in aggravation or mitigation. (See Arguments X, XI, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI and XXV, herein.) If the jurors had been required to explicitly identify to each other and to the trial court the aggravating and mitigating circumstances upon which they had relied, then all of the above-described errors could have been

discovered prior to the verdict being received: jurors with a proper understanding of the law could have been alerted to the errors being committed by fellow jurors and could have corrected such errors in the jury room; differences of opinion as to what was required would have been brought to the surface so that questions could have been asked of the judge; or if all of the jurors had misperceived their duties in the same manner, the trial judge or the attorneys could have gleaned this from the express findings of the jury. If the error was not discovered in the trial court, moreover, the explicit findings would allow this Court to consider claims of error with a certainty that cannot presently exist.

Given all that is at stake in a capital proceeding, the enormous benefit that would result, and the minimal burden involved, a requirement of explicit findings is essential to ensure the "high [degree] of reliability" in capital sentencing that is demanded by the due process clauses of the Fifth and Fourteenth Amendments and the protection against cruel and unusual punishment encompassed within the Eighth Amendment. (Mills v. Maryland, supra, 486 U.S. at 383-384.) In several cases, the United States Supreme Court has pointed to the fact that a state capital sentencing scheme required on-the-record findings by the sentencer, thus permitting meaningful appellate review, in finding that those schemes passed constitutional muster. (See e.g.,

Gregg v. Georgia, supra, 428 U.S. at 195, 198 (plur. opn.), 211-212, 222-223 (conc. opn. of White, J.); Proffitt v. Florida, supra, 428 U.S. at 250-251, 253, 259-260.)[50] Most states' death penalty schemes, moreover, require such explicit findings.[51]

Furthermore, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As Ring v. Arizona, supra, 536 U.S. 584 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

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[50] In rejecting the present argument, this Court most often relies upon People v. Rodriguez, supra, 42 Cal.3d at 777-778, which in turn relied upon the analysis of the 1977 death penalty law in People v. Frierson (1979) 25 Cal.3d 142, 179, and People v. Jackson (1980) 28 Cal.3d 264, 317. These latter cases, however, misapplied the above-cited United State Supreme Court cases. Frierson and Jackson equated the requirement in section 190.4, subdivision (c) – requiring a statement of reasons from the trial court on the automatic motion for modification – with the statement of reasons from the actual sentencer in federal cases. This equation fails. The reasons of the entity that actually made the capital decision are the critical sentencing reasons. (Cf. Sullivan v. Louisiana, supra, 508 U.S. at 279-280.)

[51] See e.g., Ala. Code, § 13A-5-47, subd. (d); Ariz. Rev. Stat., § 13-703, subd. (D); Conn. Gen. Stat., § 53a-46a, subd. (e); 11 Del. Code § 4209, subd. (d)(3); Fla.Stat., § 921.141, subd. (3); Idaho Code, § 19-2515, subd. (e); Ind. Code, § 35-38-1-3, subd. (3) (per Schiro v. State (Ind. 1983) 451 N.E.2d 1047, 1052-1053); Md. Code, art. 27, § 413, subds. (i) & (j); Miss. Code, § 99-19-101, subd. (3); Rev. Stat. Mo., § 565.030, subd. (4); Mont. Code, § 46-18-306; Neb. Rev. Stat., § 29-2522; N.J. Stat., § 2C:11-3, subd. (c)(3); N. C .Gen. Stat., § 15A-2000, subd. (c); 21 Okla. Stat., § 701.11; 42 Pa. Stat., § 9711, subd. (F)(1); Tenn. Code, § 39-13-204, subd. (g)(2)(A)(1); Wyo. Stat., § 6-2-102, subd. (d)(ii). See also 21 U.S.C. § 848, subd. (k).

section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravating circumstances outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under Ring and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury, as guaranteed by the Sixth Amendment.

The failure to require explicit findings herein precludes meaningful appellate review and violates the Fifth, Sixth, Eighth and Fourteenth Amendments. Given the closeness of the penalty case (see Argument X.E., above) and the number of serious errors the jury could have committed that would have been discovered by an explicit-findings requirement, it is reasonably possible that the failure to impose such a requirement contributed to the verdict of death. (Chapman v. California, supra, 386 U.S. at 24.) It certainly cannot be found that this error had "no effect" on the penalty verdict. (Caldwell v. Mississippi, supra, 472 U.S. at 341.)

Accordingly, the judgment of death must be reversed.

XXIII. THE CUMULATIVE EFFECT OF THE ERRORS COMMITTED DURING APPELLANT'S TRIAL REQUIRES REVERSAL OF HIS DEATH SENTENCE

As detailed above, appellant's penalty phase trial was tainted by the following errors: 1) allowing appellant to be found death eligible based upon the constitutionally invalid special circumstances of robbery murder and/or multiple murder; 2) juror misconduct, by way of juror Y.M.'s consultation with his minster; 3) denying the defense challenge as to juror S.B., who indicated that he would automatically vote for death based upon the very circumstances presented in this case; 4) excluding critical mitigating evidence that Keith Passey, whom appellant had lived with, molested Steve T. and Mark T. and had expressed a sexual preference for young boys; 5) allowing the prosecutor to question psychiatric technician McElvain regarding appellant's lack of remorse; 6) prosecutorial misconduct, by way of arguing facts not in evidence regarding the feelings of Renouf's family and friends, and the feelings of Denise Underdahl; 7) prosecutorial misconduct in arguing that appellant's lack of expressed remorse should be considered an aggravating factor; 8) prosecutorial misconduct by way of improperly arguing that the jury should show appellant the same mercy he showed the victims and their families (59 RT 18928, 18953); 9) disparaging the jury instructions

regarding consideration of mental and emotional disturbance; 10) the prosecutor's commission of Boyd misconduct in arguing that appellant's being a neglectful parent and poor role model for his children militated in favor of a death verdict; 11) the trial court's error in excluding appellant's wife and children during closing arguments; 12) introduction of alleged prior unadjudicated crimes during the penalty phase; 13) providing CALJIC No. 8.88, with its misleading "totality of the mitigating circumstances" language; 14) failure to provide a unanimity instruction with respect to aggravating evidence; 15) failure to provide a reasonable doubt instruction regarding the jury's penalty verdict; 16) failure to provide any standard of proof as to the penalty verdict; 17) failure to impose the burden of persuasion upon the prosecution to establish that death was the appropriate verdict; 18) failure to instruct the jury on a presumption of a life-without-parole sentence; 19) failure to instruct the jury that no burden of proof applied if that was, in fact, the case; and 20) failure to require the jury to make explicit findings as to factors found in aggravation and mitigation.

In addition to the above-listed errors committed in the course of the penalty phase, there were also errors committed during the guilt phase[52]

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[52] The fact that this Court may have already found the errors harmless with respect to the guilt verdicts does not affect the present argument. An error may be harmless as to guilt and prejudicial as to penalty. (See, e.g., In re Marquez (1992) 1 Cal.4th 584, 605,

which were likely to prejudice the jury's determination of appellant's penalty: 1) the refusal to grant a change of venue; 2) the denial of appellant's motion to suppress his statements to the police.[53]

In capital cases, the problem of cumulative prejudice is most severe. "[B]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing," there is "a unique opportunity for . . . prejudice to operate" therein. (Turner v. Murray (1986) 476 U.S. 28, 35 [90 L.Ed.2d 27, 106 S.Ct. 1683].) Consistent with the fairness and reliability principles that must govern review in death penalty cases (see Eddings v. Oklahoma, supra, 455 U.S. at 112; Johnson v. Mississippi, supra, 486 U.S. at 584), it cannot be assumed that the improper information placed before the jury in the guilt phase played no role in the penalty verdict.

Appellant incorporates by reference his arguments as to why his case was close as to the jury's penalty verdict. (See Arguments X.E., above.) As explained in the preceding arguments, virtually all of appellant's assignments of error involve violations of the federal constitution and, therefore (assuming that this Court does not conclude that they are subject to per se reversal), call

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609 [error not prejudicial as to guilt but prejudicial as to penalty].)

[53] Appellant omits from this argument the errors assigned above which only affected the guilt determinations and those errors for which there can be no dispute regarding their requiring per se reversal, such as Batson-Wheeler error (Argument II).

for review under the Chapman standard.[54] (Crane v. Kentucky, supra, 476 U.S. at 690-691; Delaware v. Van Arsdall, supra, 475 U.S. at 684.)

In a case where multiple errors have permeated a defendant's trial, the reviewing court must look to their cumulative impact. (Taylor v. Kentucky (1978) 436 U.S. 478, 487-488 & fn. 15 [56 L.Ed.2d 468, 98 S.Ct. 1930]; Parle v. Runnels, supra, 505 F.3d at 932-933; Mak v. Blodgett, supra, 970 F.2d at 622 [reversal of death sentence based upon cumulative error]; People v. Hernandez, supra, 30 Cal.4th at 877-878 [same]; People v. Stritzinger, supra, 34 Cal.3d at 520-521.) Furthermore, when federal constitutional error is combined with other errors at trial, the appellate court must review their cumulative effect under the Chapman standard. The reviewing court is to consider the would-be course of the defendant's trial in the absence of all errors and determine whether the combined errors were "harmless beyond a reasonable doubt." (People v. Stritzinger, supra, 34 Cal.3d at 520-521.) In the face of the record of errors and misconduct affecting the penalty determination herein, respondent cannot meet this burden.

The errors which occurred during the guilt and penalty phases violated state and federal constitutional safeguards in numerous ways. Among other impacts, these errors had the effect of depriving appellant of his right to have

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[54] Chapman v. California, supra, 386 U.S. at 24.

his jury consider all relevant mitigation evidence (see e.g., Skipper v. South Carolina, supra, 476 U.S. at 4-5; Lockett v. Ohio, supra, 438 U.S. at 604-605); greatly and improperly enlarged the quantity of aggravating information the jury could consider (see People v. Boyd, supra, 38 Cal.3d at 774); interjected irrelevant and constitutionally improper matters into the penalty determination (Zant v. Stephens, supra, 462 U.S. at 885); interjected inflammatory matters – geared to trigger an "unguided emotional response" – into the penalty determination (Penry v. Lynaugh, supra, 492 U.S. at 328); deprived appellant of his right to be tried by an impartial, unbiased jury (Duncan v. Louisiana, supra, 391 U.S. 145; Irvin v. Dowd, supra, 366 U.S. at 722); rendered the proceeding unfair and unreliable (Eddings v. Oklahoma, supra, 445 U.S. at 112; Johnson v. Mississippi, supra, 486 U.S. at 584); and violated procedures guaranteed by state law in violation of due process (Hicks v. Oklahoma, supra, 447 U.S. at 346) – all in violation of the First, Fifth, Sixth, Eighth and Fourteenth Amendments. Appellant's death sentence is likewise violative of the parallel provision of our state constitution. (Cal. Const., art. I., §§ 7, 15, 17; People v. Dillon (1983) 34 Cal.3d 441, 477-478; In re Lynch, supra, 8 Cal.3d at 423-424.)

If this Court does not agree that any of the foregoing errors requires reversal when considered in isolation, then it is incumbent on the Court to

assess their cumulative impact. (See, e.g., Taylor v. Kentucky, supra, 436 U.S. at 487-488 & fn. 15; People v. Hernandez, supra, 30 Cal.4th at 877-878; Parle v. Runnels, supra, 505 F.3d at 932-933; Mak v. Blodgett, supra, 970 F.2d at 622.) The consolidated impact in this case would have been overwhelming. (See ibid. [cumulative error requires reversal of death sentence].)

The sheer number of errors committed in connection with the determination of the penalty verdict must cause this Court to question the reliability of appellant's death sentence in light of the heightened scrutiny which the Eighth Amendment places upon capital proceedings. (Beck v. Alabama, supra, 447 U.S. at 638; Ake v. Oklahoma, supra, 470 U.S. at 87 (conc. opn. of Burger, C.J.).) It is reasonably possible that these errors contributed to the verdict of death. (Chapman v. California, supra, 386 U.S. at 24.) It certainly cannot be found that such errors had "no effect" on the penalty verdict. (Caldwell v. Mississippi, supra, 472 U.S. at 341.)

Appellant also acknowledges that his trial counsel did not specifically cite federal constitutional provisions in voicing his objections to some of the matters set forth in the present argument. However, appellant's federal constitutional claims in this regard are adequately preserved for appeal because appellant's present constitutional arguments rest upon the same

factual and legal issues as the objections defense counsel did assert. (People v. Partida, supra, 37 Cal.4th at 433-439; People v. Yeoman, supra, 31 Cal.4th at 117-118.)

Accordingly, the judgment of death must be reversed.

XXIV. APPELLANT'S DEATH SENTENCE IS UNCONSTITUTIONALLY ARBITRARY, DISCRIMINATORY AND DISPROPORTIONATE

Appellant asks this Court to undertake both intracase and intercase proportionality review of his death sentence. Such a review will demonstrate that the death sentence imposed on appellant, considering his capital offenses and his age, background, drug dependence and other relevant factors, is unconstitutionally arbitrary, discriminatory and disproportionate in violation of the due process, equal protection and cruel and unusual punishment clauses of the United States Constitution. (U.S. Const., Amends. V, VI, VIII & XIV; Lockett v. Ohio, supra, 438 U.S. 586; Furman v. Georgia, supra, 408 U.S. 238.) Appellant's death sentence is likewise violative of the parallel provision of our state constitution. (Cal. Const., art. I., §§ 7, 15, 17; People v. Dillon, supra, 34 Cal.3d at 477-478; In re Lynch, supra, 8 Cal.3d at 423-424.)

The evidence against appellant failed to establish the level of moral culpability necessary to "minimize the risk that a person may be sentenced to death even though he ought not to be." (People v. Brown (1988) 46 Cal.3d 432, 465 (conc. opn. of Mosk, J.) [citations omitted].) The record before this Court demonstrates that the imposition of the death penalty in this case is radically disproportionate to appellant's culpability and constitutes cruel and

unusual punishment.

This Court must reverse a death sentence where, as here, "the penalty 'is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.'" (People v. Frierson, supra, 25 Cal.3d at 183 [quoting In re Lynch, supra, 8 Cal.3d at 424; emphasis in Frierson]; see People v. Dillon, supra, 34 Cal.3d at 478 [life imprisonment for given first degree felony murder violated State constitutional protection against cruel and unusual punishment].)

In conducting intracase and intercase review, two principles of death penalty jurisprudence apply. First, as the United States Supreme Court stated in Zant v. Stephens, supra, 462 U.S. 862, a state "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (Id., 462 U.S. at 877.) Second, the Supreme Court has indicated that there should be heightened procedural integrity at the trial level and heightened scrutiny at the appellate level with regard to capital cases. (See California v. Ramos (1983) 463 U.S. 992, 998-999 [77 L.Ed.2d 1171, 103 S.Ct. 3446].

An overall examination of the present record demonstrates that this case is simply not within the small class of first degree murders that truly

warrant the death penalty.

Appellant was found criminally liable in the present case for what can reasonably be described as two "garden variety" robbery-homicides, for which very few assailants are sentenced to death. The victims were not tortured, raped or otherwise brutalized beyond the circumstances inherent in the average firearm-related homicide.[55]

Appellant was born in 1961. He had a difficult childhood. His mother, Penny Hensley, was an alcoholic and a neglectful mother. While appellant was a youngster, Penny would give him beer to help him sleep at night, and she later gave him methamphetamine to induce him to work harder at his grandmother's convalescent home. Appellant never knew his real father. (53 RT 15120, 15184-15186; 54 RT 15448-15452, 15463, 15465, 15468-15470; 55 RT 15710-15711.) Sonny Cordes, the man whom appellant originally believed to be his father, abandoned appellant when he was seven or eight years old, following a bitter divorce proceeding. (54 RT 15467, 15471, 15474.) And, although the jury was not allowed to hear about it, there

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[55]As explained in Argument XXVIII. below, the California death penalty statutory scheme fails to adequately narrow the class of death-eligible murderers in relation to the class of first degree murderers generally and this deficiency is particularly acute with respect to the robbery murder special circumstance. And, as explained in Argument VI. above, California's felony-murder special circumstances likewise fail to provide constitutionally requisite narrowing.

was also strong evidence that appellant's mother knowingly left him in the care of a known child molester by way of Keith Passey. (See Argument XII, below.)

Appellant married his wife, Anita Hensley, in 1984 and the couple had four children together. (54 RT 15609-15611.) Despite appellant's subsequent problems with drugs and the law, appellant has always managed to maintain a close and loving relationship with his family. (See 53 RT 15377-15378, 15395-15402; 54 RT 15609-15611, 15672-16779, 15682-15683; 55 RT 17878, 17880.) For most of his adult life, appellant held lawful gainful employment and provided financial support for his wife and the couple's four children. Appellant studied for and obtained a pest control license and worked for years in that capacity; at other times he worked as a painter, handyman and gardener. (53 RT 15349-15362; 54 RT 15616-15617, 15624, 15655-15657; 55 17873-15873, 17880.)

Beginning in 1989, appellant began using methamphetamine as an adult. (54 RT 15654-15655.) He subsequently became addicted to this highly compelling drug and it began to control his behavior. (54 RT 15620, 15654-15655, 15664-15670.) A blood test performed at the time of his arrest for the present offenses revealed a high level of methamphetamine in his system. (51 RT 14757-14758, 14792.) It is clear that the crimes in the

present case, while certainly not excusable, should properly be viewed as the desperate behavior of an individual addicted to a powerful illicit drug.

While the facts of this case may be terrible when considered in isolation, as is the case with virtually any first degree murder, it is submitted that the State has not demonstrated that appellant belongs in that small class of individuals convicted of first degree murder with special circumstances that warrants society's ultimate sanction of death.

In appellant's case, where the imposition of the death sentence is clearly disproportionate given his level of culpability, this Court should act to modify appellant's sentence to eliminate the death penalty. (See People v. Lucero (1988) 44 Cal.3d 1006, 1033-1036 (conc. & dis. opn. of Mosk, J.); People v. Coleman (1985) 38 Cal.3d 69, 98 (dis. opn. of Mosk, J. and Teilh, J.); People v. Holt (1984) 37 Cal.3d 436, 462 (dis. opn. of Mosk, J.); People v. Jackson (1955) 44 Cal.2d 511, 521.)

Accordingly, appellant's death sentence should be reversed.

XXV. THE CALIFORNIA DEATH PENALTY STATUTE VIOLATES DUE PROCESS OF LAW BECAUSE IT DOES NOT SUFFICIENTLY CHANNEL OR LIMIT THE SENTENCER'S DISCRETION TO PREVENT WHOLLY ARBITRARY AND CAPRICIOUS DEATH SENTENCES

The failure of the section 190.3 statutory factors to channel or limit the sentencer's discretion sufficiently to prevent a wholly arbitrary and capricious death sentence deprived appellant of his constitutional rights under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution.[56]

In determining whether to impose the death penalty or life without parole, the jury was directed to consider the circumstances set forth in section 190.3 and was told that if the aggravating circumstances outweighed the mitigating circumstances it should impose the death penalty; but if the mitigating circumstances outweighed the aggravating circumstances, life without parole should be imposed. However, section 190.3 does not, by virtue of its wording, inform a capital jury which circumstances are considered to be aggravating or mitigating, or the weight that should be given

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[56] Appellant acknowledges that this Court rejected similar claims in People v. Hawkins (1995) 10 Cal.4th 920, 964 and People v. Vieira, supra, 35 Cal.4th at 302-303. Appellant respectfully submits that this issue should be revisited for the reasons stated herein.

to any of the circumstances found to be present.

In the present case, appellant's jury was instructed in the language of CALJIC No. 8.88, which asks it to weigh the aggravating and mitigating circumstances and directs it to assign "whatever moral or sympathetic value you deem appropriate to each and all of the various factors" and then weigh the totality of the circumstances in determining whether life without parole or death was the appropriate penalty. (8 CT 2044-2045; 59 RT 19153.)

Appellant asserts that his death sentence must be reversed because the California death penalty scheme, as reflected in section 190.3 and CALJIC Nos. 8.85 and 8.88, fails to channel or limit the sentencer's discretion sufficiently to prevent an arbitrary or capricious death sentence. Essentially, the jury is merely told to consider the evidence before it and determine whether the defendant deserves death or life without the possibility of parole. This system is accordingly constitutionally flawed.

The United States Supreme Court has indicated that channeling and limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious capital sentences. (Maynard v. Cartwright, supra, 486 U.S. at 362-363; Furman v. Georgia, supra, 408 U.S. 238.) This constitutional requirement allows reviewing courts, as well as the general

public, to establish a principled way in which to distinguish a murder case in which the death penalty is warranted from the many murder cases in which it is not. (Maynard v. Cartwright, supra, 486 U.S. at 362-363.) Unfortunately, the manner in which the death penalty is imposed in California does not permit juries and courts to rationally distinguish between those defendants who deserve the death penalty and those who do not. The factors listed in section 190.3, individually and in combination, do not guide the sentencer's discretion in any manner. The statute simply requires the sentencer to consider a unitary list of factors, without explaining which factors are aggravating or mitigating, and then to impose death if the sentencer thinks death is warranted. As a whole, this statutory scheme allows the sentencer complete discretion to decide whether, and for what reasons, a defendant should die. This includes the power to impose death upon the unconstitutionally impermissible bases of mental impairment and racial bias. This aspect of the statute accordingly violates the Eighth Amendment. (Zant v. Stephens, supra, 462 U.S. 862; Godfrey v. Georgia, supra, 446 U.S. 420.)

The individual factors involved are no more precise than the overall scheme. For example, factor (i), described by section 190.3 as "[t]he age of the defendant at the time of the crime," has been construed by this Court not to be a factor at all. Instead, it permits the sentencer to select a penalty on the

basis of a wide ranging, but undefined, notion of "age-related" matters that a juror finds to be "suggested by the evidence or by common experience or morality." (People v. Lucky, supra, 45 Cal.3d at 302 [emphasis added].) Whether such matters should even be considered mitigating or aggravating is, in turn, "up to the jury to decide." (People v. Edwards (1991) 54 Cal.3d 787, 844.) Similarly, this Court has indicated that a defendant's intoxication by way of alcohol or drugs can be considered as a mitigating factor, but not as an aggravating factor. (See People v. Whitt (1990) 51 Cal.3d 620, 654; People v. Hamilton (1989) 48 Cal.3d 1142, 1184.) However, penalty phase jurors are generally not told that intoxication can only be considered as a mitigating factor and it is probable that some such jurors may consider it to be aggravating in nature.

Accordingly, section 190.3 does nothing whatsoever to channel or limit the jurors' discretion in order to prevent them from imposing an arbitrary or capricious death sentence; rather, it simply allows the jurors to exercise unbridled discretion.

The California death penalty scheme is unconstitutional and appellant's death judgment must be reversed.

XXVI. THE CALIFORNIA DEATH PENALTY SCHEME IS UNCONSTITUTIONAL IN ALLOWING INDIVIDUAL DISTRICT ATTORNEYS UNBRIDLED DISCRETION TO DECIDE WHICH SPECIAL-CIRCUMSTANCE MURDER CASES WILL BE PROSECUTED AS DEATH PENALTY OFFENSES

Under California law, individual county prosecutors have complete discretion to decide whether a penalty phase trial will be conducted for purposes of determining if the death penalty will be imposed in a particular case. This Court has held such delegation of power to be constitutional. (People v. Vieira, supra, 35 Cal.4th at 304; People v. Crittenden, supra, 9 Cal.4th at 152; People v. Ashmus (1991) 54 Cal.3d 932, 980.) Appellant respectfully submits that this question should be reconsidered.

As noted by Justice Broussard in his dissenting opinion in People v. Adcox (1988) 47 Cal.3d 207, thus empowering prosecutors creates a substantial risk of county-by-county arbitrariness. (Id. at 275-276.) There can be no question that, under this statutory scheme, some offenders will be chosen as candidates for the death penalty by one county district attorney while other offenders possessing similar characteristics and committing similar crimes in other counties will not be singled out for capital

prosecution. "Capital punishment [must] be imposed . . . with reasonable consistency, or not at all." (Eddings v. Oklahoma, supra, 455 U.S. at 112.)

The absence of any standards to guide prosecutorial discretion with respect to capital prosecutions permits reliance on constitutionally irrelevant and impermissible considerations, including race and economic status. To seek the death penalty on the basis of factors that are constitutionally impermissible, such as race, violates the Fifth, Eighth and Fourteenth Amendments. (Zant v. Stephens, supra, 462 U.S. at 885.)

Furthermore, because of the sheer number of available special circumstances set forth in section 190.2, prosecutors are effectively free to seek the death penalty in the vast majority of murder cases. (See Argument XXVIII., below.) This fact enhances the potential for abuse of the unbridled discretion conferred on county prosecutors under the death penalty law.

Just like the "arbitrary and wanton" jury discretion condemned in Woodson v. North Carolina, supra, 428 U.S. at 303, the arbitrary and wanton prosecutorial discretion permitted by the California capital punishment scheme – in charging, prosecuting and submitting a case to the jury as a capital crime – is contrary to the principled decision-making mandated by the Fifth, Eighth and Fourteenth Amendments. (Furman v. Georgia, supra, 408 U.S. 238.)

The United States Supreme Court has recognized that when fundamental rights are at stake uniformity among the counties within a state is essential. (Bush v. Gore (2000) 531 U.S. 98 [148 L.Ed.2d 388, 121 S.Ct. 525].) When a statewide scheme is in effect, there must be sufficient assurance "that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." (Id., 531 U.S. at 109.) This principle must reasonably apply to the right of life as well as the right to vote.

In California, the 58 counties, through the respective prosecutors' offices, make their own rules, within the broad parameters of section 190.1 and section 190.25, regarding who is charged with capital murder and who is not. There are no effective restraints or controls on prosecutorial discretion in California. So long as an alleged crime falls within the statutory criteria of section 190.2 or section 190.25, the prosecutor is free to pick and choose which defendants will face potential death and which will face a potential lesser punishment. This is not uniform treatment within in the state.

The death judgment herein is the end product of the unconstitutional system described above. Therefore, appellant's death sentence must be reversed.

XXVII. THE FAILURE OF CALIFORNIA'S DEATH PENALTY SCHEME TO PROVIDE FOR COMPARATIVE APPELLATE REVIEW VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Comparative appellate review is not required by the Eighth Amendment in states "where the statutory procedures adequately channel the sentencer's discretion . . . ." (McCleskey v. Kemp (1987) 481 U.S. 279, 306 [95 L.Ed.2d 262, 107 S.Ct. 1756] [citing Pulley v. Harris (1984) 465 U.S. 37, 50-51 [79 L.Ed.2d 29, 104 S.Ct. 871]].) However, as argued in Argument XXV. above, the 1978 initiative under which appellant was sentenced fails to adequately channel the sentencer's discretion.

Comparative review is therefore necessary under the 1978 death penalty law to prevent the "wanton" and "capricious" imposition of the death penalty and accordingly ensure that California's statutory scheme is in compliance with the Fifth, Sixth, Eighth and Fourteenth Amendments. (See generally, Proffitt v. Florida, supra, 428 U.S. at 260.)

This Court has previously rejected similar arguments, holding that a defendant must establish by other means that a death statute operates in an arbitrary and capricious manner. (People v. Frye (1998) 18 Cal.4th 894,

1029; People v. Crittenden, supra, 9 Cal.4th at 157.) Comparative appellate review, however, is the most rational means, if not the only effective means, by which to determine whether a capital scheme as a whole is producing arbitrary results. That is why ninety percent of the states sanctioning the death penalty require comparative or intercase review.[57]

Furthermore, comparative appellate review is required for noncapital cases in California. (§ 1170, subd. (d).) Since, under the Fifth and Eighth Amendments, capital defendants are entitled, if anything, to more rigorous protections than those afforded noncapital defendants (see Harmelin v. Michigan, supra, 501 U.S. at 994) – and, since providing more protection to a noncapital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally Ring v. Arizona, supra, 536 U.S. at 609; Myers v. Ylst, supra, 897 F.2d at 421) – intercase proportionality review is required herein.

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[57] See e.g, Ala. Code, § 13A-5-53, subd. (b)(3); Conn. Gen. Stat., § 53a-46b, subd. (b)(3); Del. Code, tit. 11, § 4209, subd. (g)(2)(a); Ga. Code, § 17-10-35, subd. (c)(3); Idaho Code, § 19-2827, subd. (c)(3); Ky. Rev. Stat., § 532.075, subd. (3)(c); Miss. Code, § 99-19-105, subd. (3)(c); Mont. Code, § 46-18-310, subd. (3); Neb. Rev. Stat., § 29-2521.01, § 29-2521.03, § 29-2522, subd. (3); Nev. Rev. Stat., § 177.055, subd. (2)(d); N.H. Rev. Stat., § 630:5 subd. (XI)(c); N.M. Stat., § 31-20A.4, subd. (c)(4); N.C. Gen. Stat., § 15A-2000, subd. (d)(2) (1994); Ohio Rev., § 2929.05A; 42 Pa. Cons. Stat., § 9711, subd. (h)(3)(iii); S.C. Code, § 16-3-25, subd. (C)(3); S.D. Codified Laws, § 23A-27A-12, subd. (3); Tenn. Code, § 13-206, subd. (c)(1)(D); Va. Code, § 17.110.1C, subd. (2); Wash. Rev. Code, § 10.95.130, subd. (2)(b).

In People v. Allen (1986) 42 Cal.3d 1222, this Court held that no equal protection problem arises from section 1170, subdivision (f)[58] in respect to capital and noncapital criminal defendants. With all due respect, appellant submits that the three reasons relied upon by the Allen court do not withstand careful scrutiny.

First, Allen held that, if a disparity was found to exist, it would be unseemly for a court to second-guess what the jury would do if confronted with the disparity. (Id. at 1286-1287.) In this regard, the Allen court stated:

> First, although the trial judge in a capital case has authority to modify a death judgment (§ 190.4, subd. (e)), or even to strike special circumstance findings so as to render a defendant eligible for parole [citation], the primary sentencing authority in a 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. Once the jury has exercised its function, it is discharged and cannot conveniently be recalled to reconsider a sentence that the BPT might determine to be disparate. It would contravene the jury's proper sentencing role to place in a judge's hands the responsibility for deciding whether the long-discharged jury would adhere to its sentence on "substantial evidence" if confronted with a finding of "disparity."

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[58] Former subdivision (f) of section 1170 was repealed by 1992 legislation. The present section 1170, subdivision (d) addresses disparate sentencing. (See People v. Garcia (1995) 32 Cal.App.4th 1756, 1770.)

(Id. at 1286-1287 [original emphasis].)

Appellant responses by submitting that in the face of a disparity – objective evidence of a substantial possibility that the defendant was sentenced to death for arbitrary or impermissible reasons – concerns regarding the role and feelings of the jurors must be secondary. Moreover, this aspect of Allen's reasoning, regarding the inappropriateness of a court undertaking a reweighing process, has been undercut by subsequent decisions of the United States Supreme Court which indicate that reviewing courts may reweigh factors in aggravation in a capital case after finding one such factor to be invalid. (Brown v. Sanders (2006) 546 U.S. 212, 220-225 [163 L.Ed.2d 723, 126 S.Ct. 884]; Stringer v. Black, supra, 503 U.S. at 230-232.)

Second, the Allen court stated that, because death and life without the possibility of parole are the only possible sentences for a capital offense, a death sentence would fall within the "normal range" no matter what evidence of disparate treatment was demonstrated. (Id. at 1287.) However, this statement fails to reflect the fact that "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (Woodson v. North Carolina, supra, 428 U.S. at 305.)

Third, the Allen court held that the normative nature of a jury's decision to impose a death sentence makes it more difficult to assess the

reasons for a disparity than is the case under the determinate sentencing law. (People v. Allen, supra, 42 Cal.3d at 1287.) Appellant respectfully suggests that a more likely reason for any such difficulty is the fact that the capital sentencer, unlike the noncapital sentencer, is not required to state reasons for its sentencing choice. (See Argument XXII., above.) Furthermore, the fact that this Court has been able to conduct harmless error review for penalty phase errors in so many cases since Allen was decided, indicates that this Court – much more so than it believed possible in Allen – in fact, has the capacity to understand (or make a respectable guess at) the reasons a particular jury imposed a sentence of death. (See e.g.,People v. Turner (1994) 8 Cal.4th 137, 193-194; People v. Wash, supra, 6 Cal.4th at 261; People v. Hardy, supra, 2 Cal.4th at 200, 204-205, 212; People v. Sanders (1990) 51 Cal.3d 471, 521.)

Given the tremendous reach of the special circumstances that make one eligible for death, as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in Pulley v. Harris, supra, 465 U.S. 37 – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in intercase proportionality review now violates the Eighth Amendment.

Furman v. Georgia, supra, 408 U.S. 238 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 and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in Furman in violation of the Eighth and Fourteenth Amendments. (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 intercase proportionality review also violates the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

For the foregoing reasons, appellant submits that appellate proportionality review is both feasible and a sine qua non for the constitutionality of California's death penalty scheme. If such review were undertaken herein, impermissible disparity would be found given that appellant was sentenced to death notwithstanding that he committed the subject homicides only because he was in the grip of a powerful and dehabilitating addiction to methamphetamine, and given that appellant did not torture, rape or otherwise brutalize the victims. (See Argument XXIV.,

above.) Accordingly, appellant's death sentence must be reversed.

XXVIII. THE CALIFORNIA DEATH PENALTY STATUTE FAILS TO NARROW THE CLASS OF OFFENDERS ELIGIBLE FOR THE DEATH PENALTY AND THUS VIOLATES THE EIGHTH AMENDMENT AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION

By allowing appellant's jury to sentence him to death for multiple killings that he participated in only because he was within the grip of methamphetamine addiction, California's death penalty statutory scheme violated the United States Constitution. The Eighth Amendment to the United States Constitution requires that "death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion."[59] (California v. Brown (1987) 479 U.S. 538, 541 [93 L.Ed.2d 934, 107 S.Ct. 837]; citing Gregg v. Georgia, supra, 428 U.S. at 153 and Furman v. Georgia, supra, 408 U.S. 238.)[60] If a state chooses to enact a death penalty, then it "must . . . rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it

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[59] Appellant acknowledges that this Court has rejected arguments similar to the present. (See e.g., People v. Fairbank (1997) 16 Cal.4th 1223, 1255.) Appellant respectfully submits that this issue should be revisited for the reasons stated herein.

[60] Even if this Court should find that the California scheme satisfies Eighth amendment standards, the Court should review the scheme under article I, section 17 of the California Constitution. (Cf. People v. Mincey, supra, 2 Cal.4th at 476.)

is not." (Spaziano v. Florida, supra, 468 U.S. at 460.) To this end, a death penalty statute must, by rational and objective criteria, genuinely narrow the group of murderers from whom the ultimate penalty may be exacted:

> [T]here is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold.
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> (McCleskey v. Kemp, supra, 481 U.S. at 305; see Arave v. Creech (1993) 507 U.S. 463, 474 [123 L.Ed.2d 188, 113 S.Ct. 1534]; People v. Bacigalupo, supra, 6 Cal.4th at 465.)

This narrowing function must be accomplished by the Legislature through defining those categories of murderers eligible for the most severe penalty. Thus, in response to the Furman/Gregg mandate, "the States have adopted various narrowing factors which limit the class of offenders upon which the sentencer is authorized to impose the death penalty." (Sawyer v. Whitley (1992) 505 U.S. 333, 341-342 [120 L.Ed.2d 269, 112 S.Ct. 2514].)[61] To survive constitutional challenge, the narrowing factors must "genuinely

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[61] These narrowing factors which a jury must find to make a murderer death-eligible are often denominated "aggravating circumstances" or "aggravating factors" in other states. (See People v. Bacigalupo, supra, 6 Cal.4th at 468.) To avoid confusion with California's "aggravating factors" (§ 190.3), they will be referred to throughout as "narrowing factors."

narrow" the class eligible for the death penalty.

> To avoid this constitutional flaw [of arbitrary and capricious sentencing], an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder [¶.] [¶.] . . . . Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.
>
> (Zant v. Stephens, supra, 462 U.S. at 877-878.)

The requirement that the jury find an objectively-defined narrowing factor before considering the death penalty satisfies the Furman-Gregg concerns by channeling the jury's discretion. (Blystone v. Pennsylvania (1990) 494 U.S. 299, 306-307 [108 L.Ed.2d 255, 110 S.Ct. 1078]; Lowenfield v. Phelps, supra, 484 U.S. at 245.)[62] As explained below, the California death penalty

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[62] A statutory scheme which failed to "genuinely narrow" the class of murderers who were death eligible, would not only violate the Eighth Amendment, but would also violate due process because it would leave it to the complete discretion of the prosecutor to choose the few defendants for whom the death penalty would be sought. As the Supreme Court has explained:

> Where the legislature fails to provide . . . minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."
>
> (Kolender v. Lawson (1983) 461 U.S. 352, 358 [75 L.Ed.2d

scheme, despite its appearance, does not contain the legislatively-defined narrowing factors necessary to meet the Furman-Gregg standard.

In California, from 1874 until the 1972 Furman decision, the jury had complete discretion in imposing the death penalty in cases of first degree murder. In response to Furman, in 1973 the California Legislature adopted a mandatory death penalty to be applied upon proof of one of five special circumstances. (Stats. 1973, ch. 719, §§ 1-5, pp. 1297-1300.) This statute was held unconstitutional in Rockwell v. Superior Court (1976) 18 Cal.3d 420. In 1977, when the California Legislature reestablished the death penalty, it returned discretion to the jury in applying the death penalty, but attempted to limit that discretion by requiring that one of twelve "special circumstances" be found beyond a reasonable doubt to make a murderer

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903, 103 S.Ct. 1855] [citation omitted; emphasis added].)

By contrast, if prosecutorial discretion is limited by constitutional narrowing factors, exercise of that discretion will not raise due process concerns.

> [O]ne sentenced to death under a properly channeled death penalty scheme cannot prove a constitutional violation by showing that other persons whose crimes were superficially similar did not receive the death penalty. The same reasoning applies to the prosecutor's decision to pursue or withhold capital charges at the outset.
>
> (People v. Keenan (1988) 46 Cal.3d 478, 506, cert. den. (1989) 490 U.S. 1012 [citation omitted; emphasis added].)

death-eligible. (Stats. 1977, ch. 316, pp. 1255-1266.) Under the new statute, first degree murder was "punishable by life imprisonment except for extraordinary cases in which special circumstances are present." (Owen v. Superior Court (1979) 88 Cal.App.3d 757, 760 [quoted with approval in People v. Green, supra, 27 Cal.3d at 48].)

> The heart of that statute was the concept of "special circumstances." The jury's discretion to impose the death penalty was strictly limited to those cases of first degree murder presenting one or more of several enumerated special circumstances; in all other cases the murder, no matter how willful, deliberate and premeditated, was a noncapital offense.
>
> (People v. Green, supra, 27 Cal.3d at 49.)

In short, special circumstances were intended to define death eligibility in this state:

> At the very least, therefore, the Legislature must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not.
>
> (Id. at 61.)

Whether the special circumstances in the 1977 statute in fact performed the constitutionally-required narrowing function was never decided by the courts. In finding the 1977 law constitutional, the United

States Supreme Court assumed that the special circumstances narrowed the class of those eligible for the death penalty,[63] but left open the possibility that additional evidence might be presented to show that the law did not comply with the Furman-Gregg mandate. (Pulley v. Harris, supra, 465 U.S. at 53-54.)[64]

The 1977 law was superseded in 1978 by the enactment of Proposition 7 (the "Briggs Initiative"). According to its author, the initiative "would give Californians the toughest death-penalty law in the country." (California Journal Ballot Proposition Analysis, 9 Calif. J. [Special Sec., Nov. 1978] p. 5.) In fact, it was apparently the intent of the voters, as expressed in the ballot proposition arguments, to make the death penalty applicable to all murderers.

> And, if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.[65]

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[63] The Court stated: "By requiring the jury to find at least one special circumstance beyond a reasonable doubt, the statute limits the death sentence to a small subclass of capital-eligible cases." (Pulley v. Harris, supra, 465 U.S. at 53.)

[64] This Court also had left open the constitutional question. (See People v. Green, supra, 27 Cal.3d at 49.)

[65] This goal of the voters was plainly unconstitutional. Nevertheless, this Court has repeatedly held that election ballot arguments are entitled to great weight in interpreting

(1978 Voter's Pamph., p. 34.)

The Briggs Initiative sought to achieve this result principally by greatly expanding the number of special circumstances. At the time of appellant's capital offense, there were 27 special circumstances.[66] Nonetheless, as this Court has explained, the function of the special circumstances continues to be "to channel jury discretion by narrowing the class of defendants who are eligible for the death penalty." (People v. Visciotti (1992) 2 Cal.4th 1, 74; accord, People v. Bacigalupo, supra, 6 Cal.4th at 467.)

> Under our death penalty law, therefore, 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.
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> (Id. at 468.)

To date, the United States Supreme Court has not addressed whether the California scheme as a whole complies with the Furman-Gregg mandate.[67]

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statutes. (Lungren v. Deukmejian (1988) 45 Cal.3d 727, 740, fn. 14; Long Beach City Employees Assn. v. City of Long Beach (1986) 41 Cal.3d 937, 943, fn. 5.)

[66] Two additional special circumstances were added by initiative measure (Proposition 115) in 1990. (See Yoshisato v. Superior Court (1992) 2 Cal.4th 978, 985.)

[67] In Tuilaepa v. California, supra, 512 U.S. 967, Justice Blackmun emphasized that the Supreme Court has never given the California system "a clean bill of health." (Id., 512 U.S. at 993 (dis. opn. of Blackmun, J.).)

A. Penal Code Section 190.2 on its Face Fails to Narrow the Class of Death-Eligible Murderers

In enacting the precursor of the present section 190.2, the voters came close to achieving their stated purposes: they gave California one of the broadest – probably the broadest – death penalty statutes in the country[68] and assured that a substantial majority of first degree murders (and a majority of all murderers) would be death eligible. Because of the substantial overlap between the special circumstances listed in section 190.2 and the factors

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> [T]he Court's opinion says nothing about the constitutional adequacy of California's eligibility process, which subjects a defendant to the death penalty if he is convicted of first-degree murder and the jury finds the existence of one "special circumstance." By creating nearly 20 such special circumstances, California creates an extraordinarily large death pool. Because petitioners mount no challenge to these circumstances, the Court is not called on to determine that they collectively perform sufficient, meaningful narrowing.
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> (Id., 512 U.S. at 994 (dis. opn. of Blackmun, J.) [footnote omitted]; see also id., 512 U.S. at 983-984 (conc. opn. of Stevens, J.).)

[68] Overall comparisons of death penalty statutes between states are necessarily imprecise because of the different combinations of narrowing circumstances in the various statutes, differences in statutory language used to identify the particular circumstances and differences in courts' interpretations of the circumstances. Nevertheless, the sheer number of special circumstances, the breadth of definition or interpretation of the various special circumstances, the frequency of occurrence of the special circumstances in actual murder cases and the existence of certain collateral doctrines (e.g., that the various felony-murder special circumstances apply even to unintentional and unforeseeable killings), collectively set California apart from all other states.

listed in section 189 (defining first degree murder), most first degree murderers were death eligible[69] at the time of appellant's conviction. Furthermore, the sweeping nature of section 189 made most murders first degree murders.

As it read at the time of appellant's conviction, section 189 created three categories of murders which were first degree murders: murders committed by one of five listed means, killings committed during the perpetration of one of six felonies and murders committed with premeditation and deliberation. The overlap between the special circumstances listed in section 190.2 and the three groups of factors listed in section 189 varies according to whether the murder is intentional or unintentional.

In the case of intentional killings, four of the five "means" listed in section 189 (murders by destructive device or explosive, poison, torture and lying in wait) were also special circumstances. (See § 190.2, subds. (a)(4), (a)(6), (a)(15), (a)(18) and (a)(19).)[70] Only a first degree murder committed

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[69] Throughout this discussion, defendant refers to section 189 and 190.2, as they appeared at the time of his capital offense. In 1990, Proposition 115 amended both sections to further expand their coverage. Five additional felonies were added to the felony-murder provisions of section 189, and section 190.2 was amended to broaden several of the special circumstances, to add two additional felony special circumstances and to expand the circumstances in which accomplices would be death-eligible. The amendments made congruent the felony-murder provisions of section 189 and the felony special circumstances in section 190.2.

[70] There are some slight differences in wording having no substantive effect.

by means of "knowing use of ammunition designed primarily to penetrate metal or armor" would not automatically have led to death eligibility, but appellant has been unable to locate a single case where that means was the basis for a first degree murder conviction. Five of the six felonies listed in section 189 (arson, rape, robbery, burglary and violations of § 288, subd. (a)) were also special circumstances. (See § 190.2, subds. (a)(17)(i), (a)(17)(iii), (a)(17)(v), (a)(17)(vii) and (a)(17)(viii).) Only mayhem could have been the basis for a first degree felony-murder conviction without at the same time making the murderer death eligible, and appellant is not aware of any reported mayhem felony-murder convictions since the passage of the Briggs Initiative.

The only intentional first degree murders not expressly qualifying for the death penalty were those where the first degree murder was established by proof of premeditation and deliberation. Certain of these murders would have been capital murders because the defendant committed another murder (§ 190.2, subds. (a)(2), (a)(3)), the defendant acted with a particular motive (§ 190.2, subds. (a)(1), (a)(5), (a)(16)) or the defendant killed a particular victim (§ 190.2, subds. (a)(7) through (a)(13)). Virtually all of the remaining premeditated murders also would have been capital murders because, by definition, most premeditated murders occur while the defendant is lying in

wait. (§ 190.2, subd. (a)(15).)[71]

Lying in wait is established if the defendant: (1) concealed his purpose to kill the victim, (2) watched and waited for an opportune time to act, and (3) immediately thereafter launched a surprise attack on the victim from a position of advantage. (People v. Morales (1989) 48 Cal.3d 527, 557, cert. den. 493 U.S. 984.) The second element – watching and waiting – adds nothing to premeditation and deliberation since the duration of the watching and waiting need only be "such as to show a state of mind equivalent to premeditation or deliberation." (People v. Edelbacher, supra, 47 Cal.3d at 1021 [emphasis omitted].) As for the other two elements, it will be a rare premeditated murder – i.e., "as a result of careful thought and weighing of considerations . . . carried on coolly and steadily, [especially] according to a preconceived design" (People v. Bender (1945) 27 Cal.2d 164, 183 – where the defendant reveals his purpose in advance or fails to try to take the victim from a position of advantage. As Justice Mosk has said:

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[71] The existence of the lying in wait special circumstance contributes to making the California statute far more sweeping than those in the other death penalty states. Only three of the other death penalty states list lying in wait as one of the narrowing circumstances. (See Colorado Revised Stats. § 16-11-103, subd. (5)(f); Indiana Code 35-50-2-9, subd. (b)(3); and Montana Code 46-18-303, subd. (4).) Furthermore, Indiana applies a much narrower version of lying in wait, requiring concealment of the person (Matheney v. State (Ind. 1992) 583 N.E.2d 1202, 1208, cert. den. 504 U.S. 962), and it appears that Colorado has never applied its lying in wait circumstance.

> [The lying-in-wait special circumstance] is so broad in scope as to embrace virtually all intentional killings. Almost always the perpetrator waits, watches, and conceals his true purpose and intent before attacking his victim; almost never does he happen on his victim and immediately mount his attack with a declaration of his bloody aim.
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> (People v. Morales, supra, 48 Cal.3d at 575 (dis. opn. of Mosk, J.); see also People v. Ceja (1993) 4 Cal.4th 1134, 1147 (conc. opn. of Kennard, J.).)

In sum, while there will be occasional premeditated murders not committed with any of the other listed means or during the listed felonies[72], it would appear that the overwhelming majority of intentional first degree murderers would be death eligible.

The situation is similar with regard to unintentional first degree murders. Since an unintentional killing cannot be done with premeditation and deliberation, virtually all unintentional first degree murders were such because of the first degree felony-murder rule and even an unintentional killing during one of the listed felonies (except mayhem) made the actual killer death eligible. While there are occasional unintentional first degree murders based on the listed means[73] or based on vicarious liability for a

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

[73] See, e.g., People v. Laws (1993) 12 Cal.App.4th 786, 795-796 (defendant lay in wait to assault the victim and killed her by accident). However, some such unintentional

felony-murder[74] – neither of which situations invokes the death penalty – such prosecutions are rare in comparison with ordinary felony-murders.

It is apparent not only on the basis of definition that most first degree murders are capital murders, but also that most murders in California are first degree murders.[75] Most murders are first degree murders primarily because of the broad interpretation of lying in wait (discussed above) and because of the felony-murder rule. The expansive sweep of the felony-murder rule is a product of three factors. First, the felony-murder rule applies to the most common felonies resulting in death, particularly robbery and burglary[76], crimes which are defined quite broadly by statute and court decision. With

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killings can make the defendant death eligible. In People v. Morse (1992) 2 Cal.App.4th 620, 652, 654-655, after the defendant was arrested for possession of an anti-personnel bomb, two police officers were killed attempting to dismantle the bomb. Although the court overturned a first degree murder conviction based on the felony-murder rule (since reckless possession of a bomb is not one of the listed felonies), it acknowledged that defendant could have been convicted of first degree murder on an implied malice theory for killing with a bomb. Defendant would then have been death eligible because of the multiple murders. (See § 190.2, subd. (a)(3).)

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

[75] The constitutionally required narrowing function might be served by a sufficiently narrow definition of the capital offense, but this is not the California scheme. (People v. Bacigalupo, supra 6 Cal.4th at 465-566, 468

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

regard to robbery, the courts have given the broadest interpretation to the "force or fear" element[77] and the "immediate presence" element.[78] With regard to burglary, California makes any entry into virtually any enclosed space[79] with the intent to commit any felony or theft[80] a burglary. (§ 459.)[81] Second, the felony-murder rule applies to killings occurring even after completion of the felony, if the killing occurs during an escape[82] or as a "natural and probable consequence" of the felony.[83] Third, the felony-murder rule is not limited in its application by normal rules of causation[84] and applies to altogether accidental and unforeseeable deaths:

> [F]irst degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes

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[77] See People v. Mungia (1991) 234 Cal.App.3d 1703 [forceful purse snatching].

[78] See People v. Webster (1991) 54 Cal.3d 411, 440-441, cert. den. (1992) 503 U.S. 1009 [property taken was one-quarter of a mile away from victim].

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

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

[81] It does not appear that any of the various other states listing burglary as a capital narrowing circumstance would apply it to as many situations.

[82] See People v. Cooper, supra, 53 Cal.3d 1158, 1164-1165.

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

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

not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.

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

B. Section 190.2 in Practice Does Not Narrow the Class of Death-Eligible Murders

The breadth of section 190.2 is more than just theoretical. An examination of the published decisions on appeals from murder convictions during the five-year period 1988 to 1992 confirms what is apparent from the face of the statute – section 190.2 performs no real narrowing function. Appellant has identified 300 published decisions in murder cases during that period.[85] This Court published decisions in 153 capital cases, and this Court and the Courts of Appeal published decisions in 84 other first degree murder cases and 63 second degree murder cases.

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[85] The cases are listed in the Appendix to this brief. Appellant does not, of course, contend that this group of published decisions constitutes a representative sample of California murder cases. Since all death penalty cases are automatically appealed to this Court, and since all this Court's decisions are published, death penalty cases (and, therefore, special circumstances cases) are significantly over represented in published decisions.

In the 153 capital cases decided by this Court during the five year period, on only one occasion did this Court reverse, in whole or in part, because of insufficient evidence to support the finding of special circumstances. (See People v. Morris (1988) 46 Cal.3d 1, 22.) The distribution of the special circumstances found in these death penalty cases is set forth below[86]:

Special Circumstances Found:		152
	Felony-murder robbery	69
	Felony-murder burglary	33
	Felony-murder rape	21
	Felony-murder kidnaping	21
	Other felony-murder	21
	Multiple murder	63
	Lying in wait	5
	Other	27
No Special Circumstances:		1

In 115 of the 152 cases (76%), the court affirmed one or more felony-murder special circumstances. In 89 of the 152 cases (59%), the case involved either felony-murder robbery, felony-murder burglary or both.

In the 84 noncapital first degree murder cases, the distribution of special circumstances actually found or proved from the facts is as follows:

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[86] The sum of the special circumstances found exceeds the number of cases because some cases involved more than one special circumstance finding. The numbers include only special circumstances found, rather than special circumstances which could have been found on the evidence adduced.

Special Circumstances Found or Proved:	69	
Felony-murder robbery	27	
Felony-murder burglary	14	
Other felony-murder	9	
Multiple murder	11	
Lying in wait	20	
Other	11	
No Special Circumstances:	9	
Insufficient facts:		6

In 35 of the 69 cases identified as "special circumstances cases," the trial court actually found special circumstances. In the other 34 cases, the murders were committed during the commission of robberies[87] or burglaries[88], while the defendant was lying in wait[89], the defendant was convicted of multiple murders[90], or one of the less common special circumstances was proved.[91] In

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[87] See, e.g., People v. Frye (1992) 7 Cal.App.4th 1148; People v. Bivens (1991) 231 Cal.App.3d 653; People v. Hankey (1989) 215 Cal.App.3d 510; People v. Williams (1988) 202 Cal.App.3d 835.

[88] See, e.g., People v. Perez (1992) 2 Cal.4th 1117; People v. Weddle (1991) 1 Cal.App.4th 1190; People v. Berberena (1989) 209 Cal.App.3d 1099; People v. Prince (1988) 203 Cal.App.3d 848.

[89] See, e.g., People v. Wallace (1992) 9 Cal.App.4th 1515; People v. Fitzpatrick (1992) 2 Cal.App.4th 1285; People v. Harper (1991) 228 Cal.App.3d 843; People v. Smith (1989) 214 Cal.App.3d 90, cert. den. (1993) 507 U.S. 1020; People v. Garcia (1988) 201 Cal.App.3d 324.

[90] See, e.g., People v. King (1991) 1 Cal.App.4th 288; People v. Anderson (1991) 233 Cal.App.3d 1646; People v. Corona (1989) 211 Cal.App.3d 529.

[91] See, e.g., People v. St. Joseph (1990) 226 Cal.App.3d 289 [torture]; People v. Aguilar (1990) 218 Cal.App.3d 1556 [witness killing]; People v. Morgan (1989) 207

39 of the 69 cases (57%), a felony-murder special circumstance was found or proved, and, in 33 of the 69 cases (48%), felony-murder robbery or felony-murder burglary, or both were found or proved.

In the 63 second degree murder cases, the distribution of cases where first degree murder and special circumstances were actually proved is as follows:

First Degree Murder with Special Circumstances Proved:

	17[92]	
Felony-murder robbery	3	
Felony-murder burglary	3	
Other felony-murder	2	
Multiple murder	2	
Lying in wait	11	
Other	1	
No First Degree Murder	39	
Insufficient facts:		7

In the 17 cases where first degree murder and special circumstances were shown on the facts, the proof was that: the murders were committed during

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Cal.App.3d 138 [killing because of race].

[92] Not included in this count is any case where, even though there was substantial evidence of a first degree murder, the factfinder arguably decided that some element of first degree murder was not proved.

the commission of robberies[93] or burglaries[94], while the defendant was lying in wait[95], or, in one case, the defendant was convicted of multiple murders.[96]

These published cases strongly confirm what is apparent from a reading of sections 189 and 190.2 – an overwhelming number of first degree murder cases are, or could be, special circumstances cases, and most murders in California are first degree murders. Even without consideration of the capital cases, in 90% of the cases where first degree murder was found or could have been proved, special circumstances were found or could have

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[93] See, e.g., People v. Coleman, (1992) 5 Cal.App.4th 646; People v. Manriquez (1991) 235 Cal.App.3d 161; People v. Douglas (1991) 234 Cal.App.3d 273.

[94] See, e.g. People v. Pearch (1991) 229 Cal.App.3d 1282.

[95] See, e.g., People v. Blanco (1992) 10 Cal.App.4th 1167; People v. DeLeon (1992) 10 Cal.App.4th 815; People v. Aris (1989) 215 Cal.App.3d 1178.

[96] See People v. Klvana (1992) 11 Cal.App.4th 1679. Klvana was actually convicted of nine counts of second degree murder resulting from medical malpractice in his obstetrics practice. However, because of the elasticity of the felony-murder doctrine in general, and the crime of burglary in particular, Klvana could have been convicted of first degree murder with special circumstances in one of the cases. In the case of the death of one of the fetuses, Klvana's assistant (who was convicted of practicing medicine without a license) went to the expectant mother's house to treat her during labor. Since the assistant entered the house to commit a felony (practicing medicine without a license), she committed a burglary, and Klvana could have been convicted of burglary on a theory of vicarious liability. Since the subsequent death of the fetus (which occurred after the mother was brought to Klvana's office for treatment by him) flowed from the burglary as one continuous transaction, Klvana could have been prosecuted for first degree murder on a felony-murder theory. (Id. at 1694-1696.) Since Klvana was convicted of other (second degree) murders in the same prosecution, he would have been death eligible under the multiple murder special circumstance. (§ 190.2, subd. (a)(iii).)

been proved. Again, without consideration of the capital cases, in 64% of all murder cases, first degree murder with special circumstances was, or could have been, proved.[97] When the capital cases are included in the calculation (weighted according to their overall proportion of first degree murder cases), the percentages are of course higher: based on the facts of the published murder cases, 93% of first degree murderers, and 66% of all murderers, were death eligible.

C. Conclusion

In Bacigalupo, this Court upheld the California death penalty scheme on the assumption that section 190.2 served the constitutionally required function of defining "some narrowing principle" providing an objective basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not and thus "strictly confining" the class of death

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[97] If anything, these figures for the noncapital murder cases understate the number of first degree murder with special circumstances cases. Where the prosecution did not charge first degree murder or did not charge special circumstances, it had no incentive to offer proof which might have been available and adequate to prove the higher charge. Further, juries which refused to find special circumstances (see, e.g., People v. Boyd (1990) 222 Cal.App.3d 541) or which rejected a first degree murder charge in favor of second degree murder (see, e.g., People v. Rhodes (1989) 215 Cal.App.3d 470) may have simply been exercising the very unchecked discretion challenged here.

eligible murderers. (People v. Bacigalupo, supra, 6 Cal.4th at 465-468.) It is abundantly clear that, in fact, section 190.2 serves no such function. The vice of the California scheme is not that any one of the special circumstances taken alone is unconstitutional – each arguably identifies a subclass of all first degree murderers more deserving of the death penalty than other members of the class. The vice is that, taken together, the special circumstances cover virtually all first degree murders (and a substantial majority of all murderers) and, thus, they perform no narrowing function whatsoever.

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

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For all of the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.
>
> (Furman v. Georgia, supra, 410 U.S. at 309-310 [fn. omitted].)

With the Briggs Initiative, the voters intended to, and did, make virtually all first degree murderers death eligible and thereby made the actual imposition

of the death penalty on the few who receive that sentence cruel and unusual in violation of both the Eight Amendment and article I, section 17 of the California Constitution.

Appellant was sentenced to death under this unconstitutional scheme; therefore, his death sentence must be reversed.

XXIX. THE METHODS OF EXECUTION EMPLOYED IN CALIFORNIA VIOLATE THE FOURTEENTH AMENDMENT GUARANTEE OF PROCEDURAL DUE PROCESS AND THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS

Appellant was sentenced to death on October 16, 1995. (9 CT 2444-2445.) In 1992, California added as an alternative means of execution to that of lethal gas the "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death by standards established under the direction of the Department of Corrections." (§ 3604, subd.(a).)[98] The 1992 legislation

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[80] In its entirety, this section now provides as follows:

(a) The punishment of death shall be inflicted by the administration of a lethal gas or by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections.

(b) Persons sentenced to death prior to or after the operative date of this subdivision shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection. This choice shall be made in writing and shall be submitted to the warden pursuant to regulations established by the Department of Corrections. If a person under sentence of death does not choose either lethal gas or lethal injection within 10 days after the warden's service upon the inmate of an execution warrant issued following the operative date of this subdivision, the penalty of death shall be imposed by lethal injection.

(c) Where the person sentenced to death is not executed on the date set for execution and a new execution date is subsequently set, the inmate again shall have the opportunity to elect to have punishment imposed by lethal gas or lethal injection, according to the procedures set forth in subdivision (b).

(d) Notwithstanding subdivision (b), if either manner of execution

allowed the inmate to select either lethal gas or lethal injection, and provided that if the inmate made no selection, execution would be by lethal injection.

Appellant submits that California's execution procedures violate the federal constitution in two respects. First, the state has failed to comply with the statutory requirement that standards for lethal injection be established by the Department of Corrections. (§ 3604, subd. (a).)[99] Second, appellant submits that both of the statutory methods of execution constitute cruel and unusual punishment in violation of appellant's rights under the Eighth Amendment.

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described in subdivision (a) is held invalid, the punishment of death shall be imposed by the alternative means specified in subdivision (a).

(§ 3604.)

[99] To date, appellant has not made an election to be executed by lethal gas. Consequently, the only method available to the State for executing appellant is by lethal injection. Appellant therefore has standing to challenge his impending execution by this method as a violation of his rights under the federal constitution. The fact that appellant has the option to choose lethal gas is legally irrelevant. The State may not cloak an unconstitutional cruel and unusual punishment in the mantle of "choice." (Dear Wing Jung v. United States (9th Cir. 1962) 312 F.2d 73, 75-76.)

A. The Department of Corrections' Failure to Adopt The Regulations Mandated by Penal Code Section 3604 Violates Appellant's Right To Procedural Due Process

The Fourteenth Amendment guarantees that no person will be deprived of life, liberty, or property without due process of law. To establish a violation of the right to procedural due process, the complaining party must show: (1) a constitutionally protected interest in life, liberty or property; (2) governmental deprivation of that interest; and (3) the constitutional inadequacy of procedures accompanying the deprivation. (Bank of Jackson County v. Cherry (11th Cir. 1993) 980 F.2d 1362, 1366.) A capital appellant facing execution has a constitutionally protected interest in life that is not extinguished by his judgment and sentence. (Ohio Adult Parole Authority v. Woodward (1998) 523 U.S. 272, 281; see also id., 523 U.S. at 288 (conc. opn. of O'Connor, J.).) The state of California is plainly attempting to deprive appellant of life and must accordingly do so in accordance with procedures which meet the requirements of due process. As the following discussion demonstrates, the procedures adopted by the State were and are constitutionally inadequate.

When a statute requires a regulatory agency to adopt standards to guide the performance of specified actions, the agency's failure to adopt such

standards or to comply with the procedures required for adoption of standards prior to taking those actions violates the guarantee of procedural due process. (See, e.g., Marshall v. Union Oil (9th Cir. 1980) 616 F.2d 1113, 1116.) In California, all regulations and other standards of general application employed by a governmental agency must be adopted pursuant to the procedures set forth in the state Administrative Procedures Act (hereinafter, "the Act"). (Govt. Code, § 11342, subd. (g).) The Act mandates that rigorous procedures be observed prior to the adoption of regulations, including public notice and hearings, legal review, and a public comment period, followed by filing of the regulation with the Secretary of State. (See, e.g., Govt. Code, § 11346.4 et seq.) Rules adopted without complying with the Act are invalid and may not be enforced. (Govt. Code, § 11340.5.)

To appellant's knowledge, the Department of Corrections has not complied with the mandate of section 3604, subdivision (a), to establish standards for the administration of lethal injections or with the provisions of the Administrative Procedures Act. The only regulation in the California Code of Regulations which even mentions the words "lethal injection" is 15 California Code of Regulations section 3349. This section merely sets forth the procedures and departmental forms required for a Death Row inmate's request for either lethal injection or lethal gas and, therefore, does not comply

with the requirements of section 3604, subdivision (a). The only other information dealing with the subject which is available from the Department of Corrections is a brief document, dated March 1996, which merely provides a vague description of the Department's lethal injection procedures. The document, similar in tone to a press release, neither states the source of the information it contains nor refers to any official regulations or rules. In pertinent part, this document states as follows:

> The inmate is connected to a cardiac monitor which is connected to a printer outside the execution chamber. An IV is started in two usable veins and a flow of normal saline solution is administered at a slow rate. [One line is held in reserve in case of a blockage or malfunction in the other.] The door is closed. The warden issues the execution order.
>
> In advance of the execution, syringes containing the following are prepared:
>
> • 5.0 grams of sodium pentothal in 20-25 cc of diluent
>
> • 50 cc of pancuronium bromide
>
> • 50 cc of potassium chloride
>
> Each chemical is lethal in the amounts administered.
>
> At the warden's signal, sodium pentothal is administered, then the line is flushed with sterile normal saline solution. This is followed by pancuronium bromide, a saline flush, and finally,

> potassium chloride. As required by the California Penal Code, a physician is present to declare when death occurs.
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> (http://www.cdc.state.ca.us/ issues/capital/capital4.htm; see Appendix 124, In re Carpenter, Petition for Habeas Corpus, S083246.)

This document obviously does not comply with the provisions of the Administrative Procedures Act. No notice appears to have been given to the public prior to its adoption, nor is appellant aware that any hearing or public comment period preceded its adoption either. The document does not appear to have been published or filed with the Secretary of State, nor does it appear to have been vetted by the Office of Administrative Law. In addition, the document itself does not even purport to be a regulation. By its own terms, it does not prescribe the procedures that must be used during an execution, but rather appears to describe for the press or public in general terms the procedures the department uses.

Moreover, the foregoing document fails to establish any coherent standards for administering lethal injections. The document is extremely vague and general in its description. For example, it is not clear from the document how far "in advance of the execution" the drugs are prepared. No physical restraints are described. It is not clear how many people are to be present, who these people would be, what qualifications they must have, or

what training they must have undergone.

Most significantly, the document does not define a set of procedures that will ensure that a condemned prisoner will be free from unnecessary suffering. The document's failure to prescribe even a minimal level of training for the personnel involved in administering the lethal injection raises a substantial and unnecessary risk that the subject will undergo extreme pain and suffering before and during his execution. If inadequately trained personnel were to improperly insert the catheter, the chemicals could be inserted into appellant's muscle or other tissue rather than directly into his bloodstream, causing extreme pain in the form of a severe burning sensation. Furthermore, a failure to inject the chemicals directly into the bloodstream will cause the chemicals to be absorbed far more slowly, and the intended effects will not occur. Improper insertion of the catheter could also result in its falling out of the vein, resulting in a failure to inject the intended dose of chemicals. There is also the risk that the catheter will rupture or leak as pressure builds up during the administration of the chemicals unless the catheter has adequate strength and all the joints and connections are adequately reinforced.

The document does not mandate that a physician or other trained medical expert be present to render treatment or assistance to a prisoner in the

event of an emergency; instead, the document mandates only that a physician be present to declare death. In fact, medical doctors are prohibited from participating in executions pursuant to the ethical principles set forth in the Hippocratic Oath. The American Nurses Association also forbids members from participating in executions. This increases the chances of improper administration which could result in pain, an air embolism, the clotting of the catheter which would prevent injection, and heart failure. Furthermore, the document sets out specific dosages of three drugs to be administered to all subjects, but different dosages affect different people in different ways, depending upon individual body weight, metabolism, and other medical conditions. Accordingly, there is a risk that the listed dosages may be inadequate for the purposes for which they were selected, may result in unanticipated or inappropriate effects in a particular individual for medical or other reasons, and may inflict unnecessarily extreme pain and suffering.

The document also does not outline the proper guidelines for the storage or the handling of the chemicals involved. Improperly stored and/or handled chemicals may cause unnecessary suffering. Sodium pentothal wears off quickly; and if not enough is given, it may paralyze the muscles of the prisoner and render him incapable of breathing while still conscious, causing panic and an excruciatingly arduous death.

Plainly, the procedures outlined in the document discussed above were not properly adopted as required by the statute and the Administrative Procedures Act. They are constitutionally inadequate under the Fourteenth Amendment as a violation of appellant's right to procedural due process and, also, may not be enforced under state law. (Govt. Code, § 11340.5.)

B. California's Lethal Injection Procedure Violates the Eight Amendment Prohibition Against Cruel and Unusual Punishments

As previously noted, appellant also submits that California's lethal injection procedures violate the Eight Amendment ban on cruel and unusual punishments.[100] The Eighth Amendment proscribes punishment that would inflict torture or a lingering death or involve the wanton infliction of pain. (In re Kemmler (1890) 136 U.S. 436, 447 [34 L.Ed. 519, 10 S.Ct. 930]; Gregg v. Georgia, supra, 428 U.S. at 173; Hudson v. McMillian (1992) 503 U.S. 1 [117 L.Ed.2d 156, 112 S.Ct. 995].) The Eighth Amendment embodies concepts of dignity, civilized standards, humanity and decency against which a court must evaluate penal measures. (Estelle v. Gamble (1976) 429 U.S. 97 [50 L.Ed.2d

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[100] Appellant recognizes that this Court has rejected similar challenges to the constitutionality of California's execution procedures. (See, e.g., People v. Samayoa (1997) 15 Cal.4th 795, 863.) However, appellant respectfully requests reconsideration and also raises the issue here to preserve it for federal review.

251, 97 S.Ct. 285].) It prohibits punishments that are incompatible with "evolving standards of decency that mark the progress of a maturing society." (Trop v. Dulles (1958) 356 U.S. 86, 101 [2 L.Ed.2d 630, 78 S.Ct. 590].) To discern the "evolving standards of decency," courts look to objective evidence of how society views a punishment today. (Coker v. Georgia, supra, 433 U.S. at 593-597; Enmund v. Florida, supra, 458 U.S. at 788-796.) In essence, "no court would approve any method of implementation of the death sentence found to involve cruelty in light of presently available alternatives." (Furman v. Georgia, supra, 408 U.S. at 430 (dis. opn. of Powell, J.).)

Death by lethal gas has been ruled cruel and unusual punishment. (Fierro v. Gomez (N.D. Cal. 1994) 865 F.Supp. 1387.) This judgment was affirmed on appeal. (Fierro v. Gomez (9th Cir. 1996) 77 F.3d 301, 309.) On October 15, 1996, the judgment of the Ninth Circuit was vacated in light of amendments to section 3604. (Gomez v. Fierro (1996) 519 U.S. 918 [136 L.Ed.2d 204, 117 S.Ct. 285].) In 1996, section 3604 was again amended, to provide that in default of an election by the inmate, the execution would be by lethal injection. However, lethal injection also results in precisely the kind of painful, agonizing and lingering death which the Eighth Amendment prohibits.

In examining whether a method of execution is "unconstitutionally cruel," the court must examine the "degree of risk" involved in its administration.

(Fierro v. Gomez, supra, 865 F.Supp. at 1411 [discussing Campbell v. Wood (9th Cir. 1994) 18 F.3d 662].) Factors to be considered in this assessment include the amount of pain involved and the immediacy of unconsciousness. (Id. at 1410-1411 [interpreting the authorities cited in Campbell].) The Fierro court interpreted Campbell to suggest that "the persistence of consciousness 'for over a minute' or for 'between a minute and a minute-and-a-half but no longer than two minutes' might be outside constitutional boundaries." (Id. at 1411.)

There have been many instances where execution by lethal injection has been prolonged, extending the amount of psychological and physical pain inflicted. (See In re Carpenter, Petition for Writ of Habeas Corpus, S083246.) In Oklahoma in 1992, for example, Robyn Lee Parks finally died after gasping, coughing and gagging for eleven minutes after the drugs were first administered. One reporter who witnessed Parks' death wrote that the execution looked "painful and ugly and scary." "It was overwhelming, stunning, disturbing – an intrusion into a moment so personal that reporters, taught for years that intrusion is their business, had trouble looking each other in the eyes after it was over." ("11-Minute Execution Seemingly Took Forever," Tulsa World, March 11, 1992, at p. A13.)

Stephen Peter Morin's execution technicians were forced to probe both of Morin's arms and one of his legs with needles for nearly 45 minutes before

they found a suitable vein because of Morin's history of drug abuse. ("Murderer of Three Women is Executed in Texas," New York Times (Mar. 14, 1985) at p. 9.)

After repeated failures in trying to find a suitable vein, Randy Wools, a drug addict, eventually helped the execution technicians find a useable vein. ("Killer Lends a Hand to Find a Vein for Execution," Los Angeles Times (Aug. 21, 1986) at p. 2.) It took nearly an hour to complete the execution of Elliot Rod Johnson due to collapsed veins. ("Addict is Executed in Texas for Slaying of 2 in Robbery," New York Times (June 25, 1987) at p. A24.)

Death was pronounced 40 minutes after Raymond Landry was strapped to the execution gurney and 24 minutes after the drugs first started flowing into his arms. ("Drawn-out Execution Dismays Texas Inmates," Dallas Morning News (Dec. 15, 1988) at 29A.) Two minutes after the drugs were administered, the syringe came out of Landry's vein, spraying the deadly chemicals across the room toward witnesses. ("Landry Executed for '82 Robbery-Slaying," Dallas Morning News (Dec. 13, 1988) at 29A.) The curtain separating the witnesses from the inmate was then closed, and not reopened for fourteen minutes while the execution team reinserted the catheter into the vein. (Ibid.) A spokesman for the Texas Department of Correction, Charles Brown [sic], said, "There was something of a delay in the execution because of what officials called a

'blowout.' The syringe came out of the vein, and the warden ordered the (execution) team to reinsert the catheter into the vein." (Ibid.)

It took medical staff more than 50 minutes to find a suitable vein in Rickey Ray Rector's arm. Witnesses were kept behind a drawn curtain, but reported hearing Rector utter eight loud moans. During the ordeal Rector helped the medical personnel find a vein. The administrator of State's Department of Corrections medical programs said (paraphrased by a newspaper reporter) "the moans did come as a team of two medical people that had grown to five worked on both sides of his body to find a vein." The difficulty in finding a suitable vein was later attributed to Rector's bulk and his regular use of anti-psychotic medication. ("Rector, 40, Executed for Officer's Slaying," Arkansas Democrat Gazette (Jan. 25, 1992) at p. 1; "Rector's Time Came, Painfully Late," Arkansas Democrat Gazette (Jan. 26, 1992) at p. 1B; Frady, "Death in Arkansas," The New Yorker, (Feb. 22, 1993) at p. 105.)

Billy Wayne White was pronounced dead some 47 minutes after being strapped to the execution gurney. ("Another U.S. Execution Amid Criticism Abroad," New York Times (April 24, 1992) at p. B7.) The delay was caused by difficulty finding a vein; White had a long history of heroin abuse. (Ibid.) During the execution, White also attempted to assist the authorities in finding a suitable vein. (Ibid.)

The execution of John Wayne Gacy provides a similar example. After the execution began, the lethal chemicals unexpectedly solidified, clogging the IV tube that led into Gacy's arm and prohibiting any further passage. Blinds covering the window through which witnesses observed the execution were drawn, and the execution team replaced the clogged tube with a new one. Ten minutes later, the blinds were reopened and the execution process resumed. It took 18 minutes to complete. Anesthesiologists blamed the problem on the inexperience of prison officials who were conducting the execution, saying that proper procedures taught in "IV 101" would have prevented the error. ("Gacy Lawyers Blast Method: Lethal Injections Under Fire After Equipment Malfunction," Chicago Sun-Times (May 11, 1994) at p. 5; "Witnesses Describe Killer's 'Macabre' Final Few Minutes," Chicago Sun-Times (May 11, 1994) at p. 5; "Gacy Execution Delay Blamed on Clogged IV Tube," Chicago Tribune (May 11, 1994) at p. 1 (Metro).)

Seven minutes after the lethal chemicals began to flow into Emmitt Foster's arm, the execution was halted when the chemicals stopped circulating. ("Witnesses to a Botched Execution," St. Louis Post-Dispatch (May 8, 1995) at p. 6B.) With Foster gasping and convulsing, the blinds were drawn so the witnesses could not view the scene. (Ibid.) Death was pronounced thirty minutes after the execution began, and three minutes later the blinds were

reopened so the witnesses could view the corpse. (Ibid.) Because they could not observe the entire execution procedure through the closed blinds, two witnesses later refused to sign the standard affidavit that stated they had witnessed the execution. (Ibid.) In an editorial, the St. Louis Post-Dispatch called the execution "a particularly sordid chapter in Missouri's capital punishment experience." (Ibid.) According to the coroner who pronounced death, the problem was caused by the tightness of the leather straps that bound Foster to the execution gurney; it was so tight that the flow of chemicals into the veins was restricted. ("Too-Tight Strap Hampered Execution," St. Louis Post-Dispatch (May 5, 1995) at p. B1; "Execution Procedure Questioned," Kansas City Star (May 4, 1995) at p. C8.)

Richard Townes, Jr.'s execution was delayed for 22 minutes while medical personnel struggled to find a vein large enough for the needle. After unsuccessful attempts to insert the needle through the arms, the needle was finally inserted through the top of Mr. Townes' right foot. ("Store Clerk's Killer Executed in Virginia," New York Times (Jan. 25, 1996) at p. A19.)

It took one hour and nine minutes for Tommie Smith to be pronounced dead after the execution team began sticking needles into his body because of his unusually small veins. ("Doctor's Aid in Injection Violated Ethics Rule: Physician Helped Insert the Lethal Tube in a Breach of AMA's Policy

Forbidding Active Role in Execution," Indianapolis Star (July 19, 1996) at p. A1.) For sixteen minutes, the execution team failed to find adequate veins, and then a physician was called. (Ibid.) The physician made two attempts to insert the tube in Smith's neck. (Ibid.) When that failed, an angiocatheter was inserted in Smith's foot. (Ibid.) Only then were witnesses permitted to view the process. (Ibid.) The lethal drugs were finally injected into Smith 49 minutes after the first attempts, and it took another 20 minutes before death was pronounced. ("Problem with Veins Delays Execution," Indianapolis News (July 18, 1996) at p. 1.)

It took nearly an hour to find a suitable vein for the insertion of the catheter into Michael Eugene Elkins. ("Killer Helps Officials Find a Vein at his Execution," Chattanooga Free Press (June 13, 1997) at p. A7.) Elkins tried to assist the executioners, asking "Should I lean my head down a little bit?" as they probed for a vein. (Ibid.) After numerous failures, a usable vein was finally found in Elkins' neck. (Ibid.)

The risk of such prolonged administration of the lethal injection is increased by California's lack of comprehensive standards in defining the procedures. In McKenzie v. Day (9th Cir 1995) 57 F.3d 1461, the Ninth Circuit held that execution by lethal injection under the procedures which had been defined in Montana was constitutional. (Id. at 1469.) The Court of Appeals

explained that those procedures passed constitutional muster because they were "reasonably calculated to ensure a swift, painless death." (Ibid.) Such a statement cannot be made about the procedures in California. A swift, painless death cannot be ensured without standards in place to ensure that the lethal chemicals will be administered to appellant in a competent, professional manner by someone adequately trained to do so.

Similarly, in LaGrand v. Lewis (D.Ariz. 1995) 883 F.Supp. 469, affd. (9th Cir. 1998) 133 F.3d 1253, the district court upheld the written Internal Management Procedures prescribing standards for the administration of lethal injection because "they clearly indicate that executions are to be conducted under the direction of the ASPC-Florence Facility Health Administrator, knowledgeable personnel are to be used, and the presence of a physician is required." (Id., 883 F.Supp. at 470.) Such procedures are not found in the California Code of Regulations or in the document released by the California Department of Corrections.

California's use of lethal injection in the administration of the death penalty fails to protect condemned prisoners from unnecessary pain and suffering, thus violating the Eighth Amendment of the Constitution. The risk of inflicting such cruel and unusual pain is enhanced with the lack of established, comprehensive protocols. (But see, People v. Bradford (1997) 14 Cal.4th 1005,

1059.) Accordingly, appellant's death judgment must be vacated and must not be carried out.

XXX. THE VIOLATIONS OF STATE AND FEDERAL LAW SET FORTH ABOVE LIKEWISE CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW

Appellant was denied his right to a fair trial by an independent tribunal and his right to minimum guarantees for his defense under principles established by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration of the Rights and Duties of Man (American Declaration). While appellant contends that his rights under the state and federal constitutions have been violated, he submits that these errors also violate international law. Accordingly, these contentions are being raised here as the first step in exhausting administrative remedies in order to bring appellant's claim before the Inter-American Commission on Human Rights on the grounds that the defects in the judgment are violations of the American Declaration of the Rights and Duties of Man.

A. This Court's Past Position Rejecting International Law Arguments Should Be Reconsidered in Light of Roper v. Simmons (2005) 543 U.S. 551

In rejecting international law arguments in past cases, this Court has

stated that such "international treaties and resolutions . . . . have not 'been held effective as domestic law'" and are therefore not a basis for reversing the judgment. (People v. Vieira, supra, 35 Cal.4th at 305; following People v. Ghent (1987) 43 Cal.3d 739,779, and People v. Hillhouse (2002) 27 Cal.4th 469, 511.)

Appellant respectfully submits that this conclusion, reached in Vieira, Ghent and Hillhouse, should be reconsidered in light of the United States Supreme Court's recent decision in Roper v. Simmons (2005) 543 U.S. 551 [161 L.Ed.2d 1, 125 S.Ct. 1183].

In Roper, the United States Supreme Court ruled that it was constitutionally impermissible, under the Eighth and Fourteenth Amendments, to execute a juvenile offender who was younger than 18 years old at the time he committed a capital crime. In reaching that conclusion, the Supreme Court relied upon international law, including provisions of the United Nations Convention on the Rights of the Child, the International Covenant on Civil and Political Rights ("ICCPR"), and the American Convention on Human Rights which had not been ratified by the United States. (Roper v. Simmons, supra, 543 U.S. at 575-578.)

Appellant respectfully submits that this Court's rejection of international law arguments should be reconsidered in light of Roper v.

Simmons.

B. The United States and this State Are Bound By Treaties and by Customary International Law

1. Background

The two principal sources of international human rights law are treaties and customary international law. The United States Constitution accords treaties equal rank with the constitution and federal statutes as the supreme law of the land.[101] Customary international law is equated with federal common law.[102] International law must be considered and administered in United States courts whenever questions of a right which depends upon it are presented for determination. (The Paquete Habana (1900) 175 U.S. 677, 700 [44 L.Ed. 320, 20 S.Ct. 290].) To the extent possible, courts must construe

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[83] Article VI, clause 2, of the United States Constitution provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[84] Restatement Third of the Foreign Relations Law of the United States (1987), pp. 145, 1058. See also Eyde v. Robertson (1884) 112 U.S. 580 [28 L.Ed. 798, 5 S.Ct. 247].

American law so as to avoid violating principles of international law. (Murray v. The Schooner, Charming Betsy (1804) 6 U.S. (2 Cranch) 64, 102, 118 [2 L.Ed 208].) When a court interprets a state or federal statute, the statute "ought never to be construed to violate the law of nations, if any possible construction remains. . . ." (Weinberger v. Rossi (1982) 456 U.S. 25, 33 [71 L.Ed.2d 715, 102 S.Ct. 1510].) The United States Constitution also authorizes Congress to "define and punish ... offenses against the law of nations," thus recognizing the existence and force of international law. (U.S. Const. art. I, § 8.) Courts within the United States have responded to this mandate by looking to international legal obligations, both customary international law and conventional treaties, in interpreting domestic law. (Trans World Airlines, Inc. v. Franklin Mint Corporation (1984) 466 U.S. 243, 252 [80 L.Ed.2d 273, 104 S.Ct. 1776].)[103]

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[85] See also Oyama v. California (1948) 332 U.S. 633 [92 L.Ed 249, 68 S.Ct. 269], which involved a California Alien Land Law that prevented an alien ineligible for citizenship from obtaining land and created a presumption of intent to avoid escheat when such an alien pays for land and then transfers it to a United States citizen. The court held that the law violated the equal protection clause of the United States Constitution. Justice Murphy, in a concurring opinion stating that the United Nations Charter was a federal law that outlawed racial discrimination, noted "Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. [The Alien Land Law's] inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned." (Id. at 673.) See also Namba v. McCourt (1949) 185 Or. 579 [204 P.2d 569] invalidating an Oregon Alien Land Law: "The American people have

International human rights law has its historical underpinnings in the doctrine of humanitarian intervention, which was an exception to the general rule that international law governed regulations between nations and did not govern rights of individuals within those nations.[104] The humanitarian intervention doctrine recognized intervention by states into a nation committing brutal maltreatment of its nationals and, as such, was the first expression of a limit on the freedoms of action states enjoyed with respect to their own nationals.[105]

This doctrine was further developed in the Covenant of the League of Nations. The Covenant contained a provision relating to "fair and human conditions of labor for men, women and children." The League of Nations was also instrumental in developing an international system for the protection of minorities.[106] Additionally, early in the development of international law,

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an increasing consciousness that, since we are a heterogeneous people, we must not discriminate against any one on account of his race, color or creed . . . . When our nation signed the Charter of the United Nations we thereby became bound to the following principles (Article 55, subd. C, and see Article 56): 'Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' (59 Stat. 1031, 1046.)" (Id. at 604.)

[104] See generally, Sohn and Buergenthal, International Protection of Human Rights (1973) p. 137.

[105] Buergenthal, International Human Rights (1988) at 3.

[106] Id. at 7-9.

countries recognized the obligation to treat foreign nationals in a manner that conformed with minimum standards of justice. As the law of responsibility for injury to aliens began to refer to violations of "fundamental human rights," what had been seen as the rights of a nation eventually began to reflect the individual human rights of nationals as well.[107] It soon became an established principle of international law that a country, by committing a certain subject-matter to a treaty, internationalized that subject-matter, even if the subject-matter dealt with individual rights of nationals, such that each party could no longer assert that such subject-matter fell exclusively within domestic jurisdictions.[108]

2. Treaty Development

The monstrous violations of human rights during World War II furthered the internationalization of human rights protections. The first modern international human rights provisions are seen in the United Nations Charter which became effective on October 24, 1945. The United Nations

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[107] Restatement Third of the Foreign Relations Law of the United States. (1987) Note to Part VII, vol. 2 at 1058.

[108] Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco (1923) P.C.I.J., Ser. B, No. 4.

Charter proclaimed that member states of the United Nations were obligated to promote "respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[109] By adhering to this multilateral treaty, state parties recognize that human rights are a subject of international concern.

In 1948, the United Nations drafted and adopted both the Universal Declaration of Human Rights[110] and the Convention on the Prevention and Punishment of the Crime of Genocide.[111] The Universal Declaration is part of

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[109] Article 1(3) of the UN Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, became effective October 24, 1945.

In his closing speech to the San Francisco United Nations conference, President Truman emphasized that:

> The Charter is dedicated to the achievement and observance of fundamental freedoms. Unless we can attain those objectives for all men and women everywhere – without regard to race, language or religion – we cannot have permanent peace and security in the world.

(Robertson, Human Rights in Europe, (1985) 22, n.22 [quoting President Truman].)

[110] Universal Declaration of Human Rights, adopted December 10, 1948, UN Gen.Ass.Res. 217A (III). It is the first comprehensive human rights resolution to be proclaimed by a universal international organization (hereinafter Universal Declaration).

[111] Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, 78 U.N.T.S. 277, became effective January 12, 1951 (hereinafter Genocide Convention). Over 90 countries have ratified the Genocide Convention, which declares that genocide, whether committed in time of peace or time of war, is a crime under international law. See generally, Buergenthal, International Human Rights, supra, p. 48.

the International Bill of Human Rights,[112] which also includes the International Covenant on Civil and Political Rights,[113] the Optional Protocol to the ICCPR,[114] the International Covenant on Economic, Social and Cultural Rights,[115] and the human rights provisions of the United Nations charter. These instruments enumerate specific human rights and duties of state parties and illustrate the multilateral commitment to enforcing human rights through international obligations. Additionally, the United Nations has sought to enforce the obligations of member states through the Commission on Human Rights, an organ of the United Nations consisting of forty-three member states, which reviews allegations of human rights violations.

The Organization of American States (OAS), which consists of thirty-two member states, was established to promote and protect human rights. The OAS Charter, a multilateral treaty which serves as the Constitution of the OAS, entered into force in 1951. It was amended by the Protocol of Buenos

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[112] See generally Newman, Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills" (1991) 40 Emory L.J. 731.

[113] International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 717, became effective March 23, 1976 (hereinafter ICCPR).

[114] Optional Protocol to the International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 302, became effective March 23, 1976.

[115] International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, 993 U.N.T.S. 3, took effect January 3, 1976.

Aires which came into effect in 1970. Article 5(j) of the OAS Charter provides, "[t]he American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex."[116] In 1948 the Ninth International Conference of American States proclaimed the American Declaration of the Rights and Duties of Man, a resolution adopted by the OAS, and thus, its member states. The American Declaration is today the normative instrument that embodies the authoritative interpretation of the fundamental rights of individuals in this hemisphere.[117]

The OAS also established the Inter-American Commission on Human Rights, a formal organ of the OAS which is charged with observing and protecting human rights in its member states. Article 1(2)(b) of the Commission Statute defines human rights as the rights set forth in the American Declaration, in relation to member states of the OAS who, like the United States, are not party to the American Convention on Human Rights. In practice, the OAS conducts country studies, on-site investigations, and has the power to receive and act on individual petitions which charge OAS member

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[116] OAS Charter, 119 U.N.T.S. 3, took effect December 13, 1951, amended 721 U.N.T.S. 324, took effect February 27, 1970.

[117] Buergenthal, International Human Rights, supra, at 127-131.

states with violations of any rights set out in the American Declaration.[118] Because the Inter-American Commission, which relies on the American Declaration, is recognized as an OAS Charter organ charged with protecting human rights, the necessary implication is to reinforce the normative effect of the American Declaration.[119]

The United States has acknowledged international human rights law and has committed itself to pursuing international human rights protections by becoming a member state of the United Nations and of the Organization of American States. As an important participant in the drafting of the United Nation Charter's human rights provisions, the United States was one of the first and strongest advocates of a treaty-based international system for the protection of human rights.[120] Though the 1950s was a period of United States isolationism, the United States renewed its commitment in the late 1960s and through the 1970s by becoming a signatory to numerous international human rights agreements and implementing human rights-specific foreign policy

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[118] Buergenthal, International Human Rights, supra. As previously indicated, this appeal is a necessary step in exhausting appellant's administrative remedies in order to bring his claim in front of the Inter-American Commission on the basis that the violations appellant has suffered are violations of the American Declaration of the Rights and Duties of Man.

[119] Buergenthal, International Human Rights, supra.

[120] Sohn and Buergenthal, International Protection of Human Rights (1973) pp. 506-509.

legislation.[121]

Recently, the United States advanced its commitment to international human rights by ratifying three comprehensive multilateral human rights treaties. The Senate gave its advice and consent to the International Covenant on Civil and Political Rights; President Bush deposited the instruments of ratification on June 8, 1992. The International Convention Against All Forms of Racial Discrimination,[122] and the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[123] were ratified on October 20, 1994. These instruments are now binding international obligations for the United States. It is a well established principle of international law that a country, through commitment to a treaty, becomes bound by international law.[124]

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[121] Buergenthal, International Human Rights, supra, at 230.

[122] International Convention Against All Forms of Racial Discrimination, 660 U.N.T.S. 195, took effect January 4, 1969 (hereinafter Race Convention). The United States deposited instruments of ratification on October 20, 1994. ____ U.N.T.S. ____ (1994). More than 100 countries are parties to the Race Convention.

[123] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 UN GAOR Supp. (No. 51) at 197, became effective on June 26, 1987. The Senate gave its advice and consent on October 27, 1990, 101st Cong. 2d Sess., 136 Cong. Rev. 17, 486 (October 27, 1990) (hereinafter Torture Convention). The United States deposited instruments of ratification on October 20, 1994. ___ U.N.T.S. ___ (1994).

[124] Buergenthal, International Human Rights, supra, at 4.

United States courts generally do not give retroactive ratification to a treaty; the specific provisions of a treaty are therefore enforceable from the date of ratification forward.[125] However, Article 18 of the Vienna Convention on the Laws of Treaties provides that a signatory to a treaty must refrain from acts which would defeat the object and purpose of the treaty until the signatory either makes its intention clear not to become a party or ratifies the treaty.[126] Though the United States courts have not strictly applied Article 18, they have looked to signed, unratified treaties as evidence of customary international law.[127]

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[125] Newman and Weissbrodt, International Human Rights: Law, Policy and Process (1990) at 579.

[126] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, T.S. No. 58 (1980), took effect January 27, 1980 (hereinafter Vienna Convention). The Vienna Convention was signed by the United States on April 24, 1970. Though it has not yet been ratified by the United States, the Department of State, in submitting the Convention to the Senate, stated that the convention "is already recognized as the authoritative guide to current treaty law and practice." S. Exec.Doc. L., 92d Cong., 1st Sess. (1971) at 1. Also, the Restatement Third of the Foreign Relations Law of the United States cites the Vienna Convention extensively.

[127] See, for example, Inupiat Community of the Arctic Slope v. United States (9th Cir. 1984) 746 F.2d 570 (citing the International Covenant on Civil and Political Rights); Crow v. Gullet (8th Cir. 1983) 706 F.2d 774 (citing the International Covenant on Civil and Political Rights); Filartiga v. Pena-Irala (2nd Cir. 1980) 630 F.2d 876 (citing the International Covenant on Civil and Political Rights).

See also, Charme, The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma (1992) 25 Geo.Wash.J.Int'l.L. & Econ. 71. Ms. Charme argues that Article 18 codified the existing interim (pre-ratification) obligations of parties who are signatories to treaties: "Express provisions in treaties, judicial and arbitral decisions, diplomatic statements, and the conduct of the

3. Customary International Law

Customary international law arises out of a general and consistent practice of nations acting in a particular manner out of a sense of legal obligation.[128] The United States, through signing and ratifying the ICCPR, the Race Convention and the Torture Convention, as well as being a member state of the OAS and thus being bound by the OAS Charter and the American Declaration, recognizes the force of customary international human rights law. The substantive clauses of these treaties articulate customary international law and thus bind our government. When the United States has signed or ratified a treaty it cannot ignore this codification of customary international law and has no basis for refusing to extend the protection of human rights beyond the terms of the United States Constitution.[129]

International Law Commission compel, in the aggregate, the conclusion that Article 18 constitutes the codification of the interim obligation. These instances indicate as well that this norm continues as a rule of customary international law. Thus, all states, with the exception of those with a recognized persistent objection, are bound to respect the obligation of Article 18."

[128] Restatement Third of the Foreign Relations Law of the United States, section 102. This practice may be deduced from treaties, national constitutions, declarations and resolutions of intergovernmental bodies, public pronouncements by heads of state and empirical evidence of the extent to which the customary law rule is observed.

[129] Newman, Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills" (1991) 40 Emory L.J. 731, 737.

Customary international law is "part of our law." (The Paquete Habana, supra, 175 U.S. at 700.) According to 22 United States Code section 2304(a)(1), "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries."[130] Moreover, the International Court of Justice, the principal judicial organ of the United Nations, lists international custom as one of the sources of international law to apply when deciding disputes.[131] These sources confirm the validity of custom as a source of international law.

The provisions of the Universal Declaration are accepted by United States courts as customary international law. In Filartiga v. Pena-Irala, supra, 630 F.2d 876, the court held that the right to be free from torture "has become part of customary international law as evidenced and defined by the Universal Declaration of Human Rights . . . ." (Id. at 882.) The United States, as a member state of the OAS, has international obligations under the OAS Charter and the American Declaration. The American Declaration, which has become incorporated by reference within the OAS Charter by the 1970 Protocol of Buenos Aires, contains a comprehensive list of recognized human rights

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[130] 22 U.S.C. § 2304(a)(1).

[131] Statute of the International Court of Justice, art. 38, 1947 I.C.J. Acts and Docs. 46. This statute is generally considered to be an authoritative list of the sources of international law.

which includes the right to life, liberty and security of person, the right to equality before the law, and the right to due process of the law.[132] Although the American Declaration is not a treaty, the United States voted its approval of this normative instrument and, as a member of the OAS, is bound to recognize its authority over human rights issues.[133]

The United States has acknowledged the force of international human rights law on other countries. Indeed, in 1991 and 1992 Congress passed legislation that would have ended China's "Most Favored Nation" trade status with the United States unless China improved its record on human rights. Although President Bush vetoed this legislation[134], in May 1993 President Clinton tied renewal of China's "Most Favored Nation" status to progress on specific human rights issues in compliance with the Universal Declaration.[135]

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[132] American Declaration of the Rights and Duties of Man, Resolution XXX, Ninth International Conference of American States, reprinted in the Inter-American Commission of Human Rights, Handbook of Existing Duties Pertaining to Human Rights, OEA/Ser. L/V/II.50, doc. 6 (1980).

[133] Case 9647 (United States) Res. 3/87 of 27 March 1987 OEA/Ser. L/V/II.52, doc. 17, ¶ 48 (1987).

[134] See Michael Wines, "Bush, This Time in Election Year, Vetoes Trade Curbs Against China," New York Times, September 29, 1992, at A1.

[135] President Clinton's executive order of May 28, 1993 required the Secretary of State to recommend to the President by June 3, 1994 whether to extend China's "Most Favored Nation" status for another year. The order imposed several conditions upon the extension, including a showing by China of adherence to the Universal Declaration of Human Rights, an acceptable accounting of those imprisoned or detained for nonviolent

The International Covenant on Civil and Political Rights, to which the United States is bound, incorporates the protections of the Universal Declaration. Where other nations are criticized and sanctioned for consistent violations of internationally recognized human rights, the United States may not say: "Your government is bound by ceratin clauses of the covenant although we in the United States are not bound."[136]

C. The Numerous Due Process Violations and Other Errors Which Occurred in this Case Are Also Violations of International Law, and the Judgment Must Be Reversed on That Basis

The factual and legal issues presented in this brief demonstrate that appellant was denied his right to a fair and impartial trial in violation of

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expression of political and religious beliefs, humane treatment of prisoners, including access to Chinese prisons by international humanitarian and human rights organizations, and promoting freedom of emigration, and compliance with the United States' memorandum of understanding on prison labor. See Orentlicher and Gelatt, Public Law, Private Actors: The Impact of Human Rights on Business Investors in China (1993) 14 Nw. J. Int'l L. & Bus. 66, 79. Although President Clinton decided on May 26, 1994 to sever human rights conditions from China's "Most Favored Nation" status, it cannot be ignored that the principal practice of the United States for several years was to use such status to influence China's compliance with recognized international human rights. See Kent, China and the International Human Rights Regime: a Case Study of Multilateral Monitoring, 1989-1994 (1995) 17 H. R. Quarterly 1.

[136] Newman, United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures (1993) 42 DePaul L.Rev. 1241, 1242. Newman discusses the United States' resistance to terms of human rights treaties.

customary international law as evidenced by Articles 6 and 14 of the International Covenant on Civil and Political Rights[137], as well as Articles 1 and 26 of the American Declaration.

The United States deposited its instruments of ratification of the ICCPR on June 8, 1992 with five reservations, five understandings, four declarations, and one proviso.[138] Article 19(c) of the Vienna Convention on the Law of Treaties declares that a party to a treaty may not formulate a reservation that is "incompatible with the object and purpose of the treaty."[139] The Restatement Third of the Foreign Relations Law of the United States echoes this provision.[140]

The ICCPR imposes an immediate obligation to "respect and ensure" the rights it proclaims and to take whatever other measures are necessary to give effect to those rights. United States courts, however, will generally enforce

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[137] The substantive provisions of the Universal Declaration have been incorporated into the ICCPR, so these are incorporated by reference in the discussion above. Moreover, as was noted above, the Universal Declaration is accepted as customary international law.

[138] Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights (1992) S.Exec.Rep. No. 23, 102d Cong., 2d Sess.

[139] Vienna Convention, supra, 1155 U.N.T.S. 331, took effect January 27, 1980.

[140] Restatement Third of the Foreign Relations Law of the United States (1987) section 313 cmt. b. With respect to reservations, the Restatement lists "the requirement . . . that a reservation must be compatible with the object and purpose of the agreement."

treaties only if they are self-executing or have been implemented by legislation.[141] The United States declared that the articles of the ICCPR are not self-executing.[142] The Bush Administration, in explanation of proposed reservations, understandings and declarations to the ICCPR, stated: "For reasons of prudence, we recommend including a declaration that the substantive provisions of the Covenant are not self-executing. The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts. As was the case with the Torture Convention, existing U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated."[143]

But under the Constitution, a treaty "stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." (Asakura v. Seattle

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[141] Newman and Weissbrodt, International Human Rights: Law, Policy and Process (1990) p. 579. See also, Sei Fujii v. California (1952) 38 Cal.2d 718, wherein the California Supreme Court held that Articles 55(c) and 56 of the UN Charter are not self-executing.

[142] Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights (1992) S.Exec.Rep. No. 23, 102d Cong., 2d Sess.

[143] Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights (1992) S.Exec.Rep. No. 23, 102d Cong., 2d Sess. at 19.

(1924) 265 U.S. 332, 341 [68 L.Ed. 1041, 44 S.Ct. 515].)[144] Moreover, treaties designed to protect individual rights should be construed as self-executing. (United States v. Noriega (1992) 808 F. Supp. 791.) In Noriega, the court stated:

> [I]t is inconsistent with both the language of the [Geneva III] treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs – not to create some amorphous, unenforceable code of honor among the signatory nations. "It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests . . . . Even if Geneva III is not self-executing, the United States is still obligated to honor its international commitment."
>
> (Id. at 799 [citation omitted.)

Though reservations by the United States provide that the treaties may not be self-executing, the ICCPR is still a forceful source of customary international law and as such is binding upon the United States.

Article 14 provides, "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him . . . . everyone shall be entitled to a fair and public hearing by a competent, independent and

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[144] Some legal scholars argue that the distinction between self-executing and non-self-executing treaties is patently inconsistent with express language in Article V, section 2 of the United States Constitution that all treaties shall be the supreme law of the land. See generally Jordan L. Paust, Self-Executing Treaties (1988) 82 Am.J. Int'l L. 760.

impartial tribunal established by law." Article 6 declares that "[n]o one shall be arbitrarily deprived of his life . . . . [The death] penalty can only be carried out pursuant to a final judgment rendered by a competent court."[145] Likewise, these protections are found in the American Declaration: Article 1 protects the right to life, liberty and security of person; Article 2 guarantees equality before the law; and Article 26 protects the right of due process of law.[146]

In cases where the United Nations Human Rights Committee has found that a state party violated Article 14 of the ICCPR, in that a defendant had been denied a fair trial and appeal, the Committee has held that the imposition of the sentence of death also was a violation of Article 6 of the ICCPR.[147] The Committee further observed, "the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that 'the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defense, and the right to review of conviction and sentence by a higher tribunal.'"[148]

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[145] International Covenant on Civil and Political Rights, supra, 999 U.N.T.S. 717.

[146] American Declaration of the Rights and Duties of Man, supra.

[147] Report of the Human Rights Committee, p. 72, 49 UN GAOR Supp. (No. 40) p. 72, UN Doc. A/49/40 (1994).

[148] Ibid.

Furthermore, Article 4(2) of the ICCPR makes clear that no derogation from Article 6 ("no one shall be arbitrarily deprived of his life") is allowed.[149] An Advisory Opinion issued by the Inter-American Court on Human Rights concerning the Guatemalan death penalty reservation to the American Convention on Human Rights noted "[i]t would follow therefore that a reservation which was designed to enable the State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it."[150] Implicit in the court's opinion linking nonderogability and incompatibility is the view that the compatibility requirement has greater importance in human rights treaties, where reciprocity provides no protection for the individual against a reserving state.[151]

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[149] International Covenant on Civil and Political Rights, supra, 999 U.N.T.S. 717.

[150] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion No. OC-3/83 of September 8, 1983, Inter-Amer.Ct.H.R., ser. A: Judgments and Opinions, No. 3 (1983), reprinted in 23 I.L.M. 320, 341 (1984).

[151] Edward F. Sherman, Jr. The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation (1994) 29 Tex. Int'l L.J. 69. In a separate opinion concerning two Barbadian death penalty reservations, the court further noted that the object and purpose of modern human rights treaties is the "protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations not in relation to other States, but towards all

Appellant's rights under customary international law, as codified in the above-mentioned provisions of the ICCPR and the American Declaration, were violated throughout his trial and sentencing phase as set forth in this brief.

The due process violations that appellant suffered throughout his trial and sentencing phase are prohibited by customary international law. The United States is bound by customary international law, as informed by such instruments as the ICCPR. The purpose of these treaties is to bind nations to an international commitment to further protections of human rights. The United States must honor its role in the international community by recognizing the human rights standards in our own country to which we hold other countries accountable.

Accordingly, the death judgment against appellant must be reversed.

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individuals within their jurisdiction." (Advisory Opinion No. OC-2/82 of September 24, 1982, Inter-Am. Ct.H.R., ser. A: Judgments and Opinions, No. 2, para. 29 (1982), reprinted in 22 I.L.M. 37, 47 (1983).) These opinions are an indicator of emerging general principles of treaty law, and strengthen the argument that the United States death penalty reservation is impermissible because it is incompatible.

NONCAPITAL SENTENCE

XXXI. THE TRIAL COURT COMMITTED TWO ERRORS WITH REGARD TO APPELLANT'S NONCAPITAL SENTENCE

As set forth below, the trial court committed two errors in arriving at the 23-year noncapital sentence imposed upon appellant: 1) the court violated section 654 in imposing consecutive terms for the Shockley, Copeland and Renouf robbery counts; and 2) the court violated section 1170.1, subdivision (a), by imposing an upper one-third subordinate term for second degree robbery on count 6.

Appellant's trial counsel did not object to these errors at the time appellant was sentenced. However, because these errors resulted in an unauthorized sentence that could not statutorily be imposed under any circumstance, such errors were not waived. (People v. Scott (1994) 9 Cal.4th 331, 354.)

A. Imposition of Conservative Terms on Robbery Counts 2, 6 and 9

Section 654 states in pertinent part: "An act . . . which is made

punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one . . . ." Section 654 forbids multiple punishments for a "single act or indivisible course of conduct" directed against one individual victim. (People v. Miller (1977) 18 Cal.3d 873, 885.) "Whether a course of criminal conduct is divisible . . . depends on the intent and objective of the actor." (Neal v. State of California (1960) 55 Cal.2d 11, 19; People v. Evers (1992) 10 Cal.App.4th 588, 602.) "[I]f all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once." (People v. Harrison (1984) 48 Cal.3d 321, 335; People v. Evers, supra, 10 Cal.App.4th at 602.) The court below violated this rule by imposing consecutive terms for robbery with respect to count 2 (Shockley), count 6 (Copeland) and count 9 (Renouf).

According to the prosecution theory, appellant shot and killed Shockley in order to take his property. The prosecution asserted that the robbery of Shockley rendered his killing a felony first degree murder and also supported a robbery murder special circumstance. Appellant was effectively punished for the robbery of Shockley by way of his being sentenced to death on count 1 for the capital murder of Shockley, based upon the combined impact of the felony

first degree murder theory and the felony murder special circumstance. Therefore, section 654 prohibits the imposition of the consecutive term for the robbery of Shockley, per count 2. (People v. Bracamonte (2003) 106 Cal.App.4th 704, 708-709 [robbery sentence stayed under § 654 where robbery was crime underlying first degree felony murder conviction]; People v. Boyd, supra, 222 Cal.App.3d at 575-576 [same].) Because sentence on count 2 must be stayed, the section 12022.5, subdivision (a) firearm enhancement attached to that count must likewise be stayed. (People v. Bracamonte, supra, 106 Cal.App.4th at 709; People v. Guilford (1984) 151 Cal.App.3d 406, 411.)

Similar considerations apply to count 9, the Renouf robbery count. The prosecution contended that appellant shot and killed Renouf for purposes of taking his property; this theory supported the felony first degree murder of Renouf as well as liability for the robbery murder special circumstance attached to count 8. Appellant's death sentence for capital murder on count 8 precluded the consecutive term for the Renouf robbery and attached firearm enhancement by way of count 9. (People v. Bracamonte, supra, 106 Cal.App.4th at 708-709; People v. Boyd, supra, 222 Cal.App.3d at 575-576.)

With regard to the Copeland charges, the prosecution theory was that the same act of force, by way of shooting the victim, supplied the force

element for robbery and the act of attempted murder. Therefore, given that appellant received a 9-year principal term for count 5 (Copeland attempted murder), the term for count 6 (Copeland robbery) must be stayed pursuant to section 654. (People v. Miller, supra, 18 Cal.3d at 886 [§ 654 precluded imposition of separate punishments for assault and aggravated burglary involving same victim]; People v. Flowers (1982) 132 Cal.App.3d 584, 588-590 [§ 654 precluded punishment for robbery and assault involving same victim and objective]; People v. Hopkins (1975) 44 Cal.App.3d 669, 677 [§ 654 prevented dual punishment for robbery and destruction of telephone equipment to facilitate that robbery].)

Therefore, the terms for counts 2, 6 and 9, and the weapon enhancements attached to counts 2 and 9 must be stayed per section 654.

B. Imposition of One-third Upper Term on Count 6

The court also erred in imposing a consecutive sentence of 1 year, 4 months – one-third the upper term – for count 6, the robbery of Stacey Copeland. (9 CT 2451; 61 RT 19471.) Section 1170.1, subdivision (a) states in pertinent part: "The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each

other felony conviction for which a consecutive term of imprisonment is imposed . . . ." (Emphasis added.)

Count 6 was imposed as a subordinate term to the principal term of count 5. (61 RT 19469, 19471.) Therefore, the consecutive term for count 6 should be reduced to one year – which is one-third the middle term for second degree robbery. (See § 213, subd. (a)(2) [full middle term for second degree robbery is three years].)

C. Conclusion

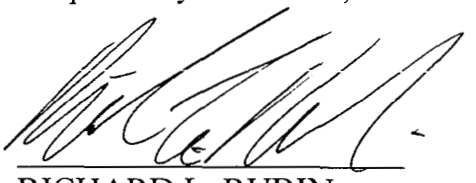
Appellant's noncapital sentence should be modified to stay the terms on counts 2, 6 and 9, and the accompanying firearm enhancement terms on counts 2 and 9. Also, the term for count 6 should be reduced from 1 year, 4 months to 1 year. To correct these combined errors, appellant's sentence should accordingly be reduced by 6 years.

CONCLUSION

For the reasons stated herein appellant's convictions and sentence of death should be reversed.

Dated: April 16, 2008

Respectfully submitted,



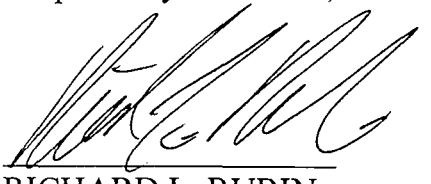
RICHARD L. RUBIN
Attorney for Appellant
Paul Loyde Hensley

CERTIFICATE RE WORD COUNT

I, Richard L. Rubin, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 110,504 words, excluding the tables, this certificate, and any attachment permitted under rule 14(d) of the California Rules of Court. This document was prepared in Word Perfect, 13 point Times New Roman font and this is the word count generated by the program for this document. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Oakland, California.

Dated: April 16, 2008

Respectfully submitted,



RICHARD L. RUBIN
Attorney for Appellant
Paul L. Hensley

APPENDIX

Survey of Published Appeals from Murder Convictions in California (1988-1992)

SURVEY OF PUBLISHED APPEALS FROM MURDER CONVICTIONS IN CALIFORNIA (1988-1992)[1]

Cases in which the court made a special circumstances finding or in which the facts stated would have supported a special circumstances finding are listed in all capitals (e.g.. PEOPLE V. HOWARD).

Cases in which the facts stated would not have supported a special circumstances finding are listed in initial capitals (e.g., People v. Morris)

Cases in which the facts stated are insufficient to determine whether special circumstances could have been found or where the conviction is reversed on grounds which leave the facts of the homicide in doubt are set forth in italics (e.g., *People v. Ashley*)

CAPITAL CASES

PEOPLE V. HOWARD (1988) 44 Cal.3d 375
PEOPLE V. KIMBLE (1988) 44 Cal.3d 480
PEOPLE V. HALE (1988) 44 Cal.3d 531
PEOPLE V. HOVEY (1988) 44 Cal.3d 543
PEOPLE V. RUIZ (1988) 44 Cal.3d 589
PEOPLE V. HENDRICKS (1988) 44 Cal.3d 635
PEOPLE V. MELTON (1988) 44 Cal.3d 713
PEOPLE V. WADE (1988) 44 Cal.3d 975
PEOPLE V. WILLIAMS (1988) 44 Cal.3d 883
PEOPLE V. LUCERO (1988) 44 Cal.3d 1006
PEOPLE V. WILLIAMS (1988) 44 Cal.3d 1127
PEOPLE V. THOMPSON (1988) 45 Cal.3d 86
PEOPLE V. DYER (1988) 45 Cal.3d 26
PEOPLE V. HEISHMAN (1988) 45 Cal.3d 147
PEOPLE V. MILNER (1988) 45 Cal.3d 227
PEOPLE V. POGGI (1988) 45 Cal.3d 306
PEOPLE V. LUCKY (1988) 45 Cal.3d 259
PEOPLE V. ODLE (1988) 45 Cal.3d 386
PEOPLE V. HAMILTON (1988) 45 Cal.3d 351
PEOPLE V. WARREN (1988) 45 Cal.3d 471
PEOPLE V. SIRIPONGS (1988) 45 Cal.3d 548
PEOPLE V. SILVA (1988) 45 Cal.3d 604
PEOPLE V. BABBITT (1988) 45 Cal.3d 660
PEOPLE V. BELMONTES (1988) 45 Cal.3d 744

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[1] This survey does not include cases in which rehearing was granted, hearing was granted in the Supreme Court or a superceding opinion was issued. It also does not include cases where the appellate court determined no murder at all was proved.

PEOPLE V. GRANT (1988) 45 Cal.3d 829
PEOPLE V. ROBBINS (1988) 45 Cal.3d 867
PEOPLE V. GUZMAN (1988) 45 Cal.3d 915
PEOPLE V. RICH (1988) 45 Cal.3d 1036
PEOPLE V. AINSWORTH (1988) 45 Cal.3d 984
PEOPLE V. WILLIAMS (1988) 45 Cal.3d 1268
PEOPLE V. BUNYARD (1988) 45 Cal.3d 1189
People v. Morris (1988) 46 Cal.3d 1
PEOPLE V. HAMILTON (1988) 46 Cal.3d 123
PEOPLE V. MCLAIN (1988) 46 Cal.3d 97
PEOPLE V. BOYDE (1988) 46 Cal.3d 212
PEOPLE V. MCDOWELL (1988) 46 Cal.3d 551
PEOPLE V. KEENAN (1988) 46 Cal.3d 478
PEOPLE V. COLEMAN (1988) 46 Cal.3d 749
PEOPLE V. CRANDELL (1988) 46 Cal.3d 833
PEOPLE V. JENNINGS (1988) 46 Cal.3d 963
PEOPLE V. BEAN (1988) 46 Cal.3d 919
PEOPLE V. GRIFFIN (1988) 46 Cal.3d 1011
PEOPLE V. CARO (1988) 46 Cal.3d 1035
PEOPLE V. MOORE (1988) 47 Cal.3d 63
PEOPLE V. MALONE (1988) 47 Cal.3d 1
PEOPLE V. ADCOX (1988) 47 Cal.3d 207
PEOPLE V. HERNANDEZ (1988) 47 Cal.3d 315
PEOPLE V. JOHNSON (1988) 47 Cal.3d 576
PEOPLE V. WALKER (1988) 47 Cal.3d 605

PEOPLE V. GARRISON (1989) 47 Cal.3d 746
PEOPLE V. BONIN (1989) 47 Cal.3d 808
PEOPLE V. FARMER (1989) 47 Cal.3d 888
PEOPLE V. EDELBACHER (1989) 47 Cal.3d 983
PEOPLE V. HARRIS (1989) 47 Cal.3d 1047
PEOPLE V. JOHNSON (1989) 47 Cal.3d 1194
PEOPLE V. COLEMAN (1989) 48 Cal.3d 112
PEOPLE V. BOYER (1989) 48 Cal.3d 247
PEOPLE V. MORALES (1989) 48 Cal.3d 527
PEOPLE V. BONILLAS (1989) 48 Cal.3d 757
PEOPLE V. BURTON (1989) 48 Cal.3d 843
PEOPLE V. ALLISON (1989) 48 Cal.3d 879
PEOPLE V. SHELDON (1989) 48 Cal.3d 935
PEOPLE V. BITTAKER (1989) 48 Cal.3d 1046
PEOPLE V. WILLIAMS (1989) 48 Cal.3d 1112
PEOPLE V. BLOOM (1989) 48 Cal.3d 1194
PEOPLE V. HAMILTON (1989) 48 Cal.3d 1142
PEOPLE V. ANDREWS (1989) 49 Cal.3d 200
PEOPLE V. CARRERA (1989) 49 Cal.3d 291
PEOPLE V. BELL (1989) 49 Cal.3d 502
PEOPLE V. HUNTER (1989) 49 Cal.3d 957
PEOPLE V. LANG (1989) 49 Cal.3d 991
PEOPLE V. JACKSON (1989) 49 Cal.3d 1170

PEOPLE V. THOMPSON (1990) 50 Cal.3d 134
PEOPLE V. LEWIS (1990) 50 Cal.3d 262

PEOPLE V. DOUGLAS (1990) 50 Cal.3d 468
PEOPLE V. CLARK (1990) 50 Cal.3d 583
PEOPLE V. TURNER (1990) 50 Cal.3d 668
PEOPLE V. MATTSON (1990) 50 Cal.3d 826
PEOPLE V. MARSHALL (1990) 50 Cal.3d 907
PEOPLE V. MILLER (1990) 50 Cal.3d 954
PEOPLE V. HOLLOWAY (1990) 50 Cal.3d 1098
PEOPLE V. RAMIREZ (1990) 50 Cal.3d 1158
PEOPLE V. GORDON (1990) 50 Cal.3d 1223
PEOPLE V. STANKEWITZ (1990) 51 Cal.3d 72
PEOPLE V. SANDERS (1990) 51 Cal.3d 471
PEOPLE V. MEDINA (1990) 51 Cal.3d 870
PEOPLE V. KELLY (1990) 51 Cal.3d 931
PEOPLE V. GONZALEZ (1990) 51 Cal.3d 1179
PEOPLE V. GALLEGO (1990) 52 Cal.3d 115
PEOPLE V. WRIGHT (1990) 52 Cal.3d 367
PEOPLE V. ANDERSON (1990) 52 Cal.3d 453
PEOPLE V. HAYES (1990) 52 Cal.3d 577
PEOPLE V. KAURISH (1990) 52 Cal.3d 648
PEOPLE V. BENSON (1990) 52 Cal.3d 754
PEOPLE V. TAYLOR (1990) 52 Cal.3d 719

PEOPLE V. DANIELS (1991) 52 Cal.3d 815
PEOPLE V. MASON (1991) 52 Cal.3d 909
PEOPLE V. PENSINGER (1991) 52 Cal.3d 1210
PEOPLE V. BEARDSLEE (1991) 53 Cal.3d 68, 53 Cal.3d 1179A
PEOPLE V. MORRIS (1991) 53 Cal.3d 152
PEOPLE V. JENNINGS (1991) 53 Cal.3d 334
PEOPLE V. DEERE (1991) 53 Cal.3d 705
PEOPLE V. WHARTON (1991) 53 Cal.3d 522
PEOPLE V. FRIERSON (1991) 53 Cal.3d 730
PEOPLE V. COX (1991) 53 Cal.3d 618
PEOPLE V. COOPER (1991) 53 Cal.3d 771
PEOPLE V. DUNCAN (1991) 53 Cal.3d 955
PEOPLE V. JONES (1991) 53 Cal.3d 1115
PEOPLE V. SULLY (1991) 53 Cal.3d 1195
PEOPLE V. MICKLE (1991) 54 Cal.3d 140
PEOPLE V. WEBSTER (1991) 54 Cal.3d 411
PEOPLE V. NICOLAUS (1991) 54 Cal.3d 551
PEOPLE V. MICKEY (1991) 54 Cal.3d 612
PEOPLE V. FUENTES (1991) 54 Cal.3d 707
PEOPLE V. EDWARDS (1991) 54 Cal.3d 787
PEOPLE V. ASHMUS (1991) 54 Cal.3d 932
PEOPLE V. BACIGALUPO (1991) 1 Cal.4th 103
PEOPLE V. FIERRO (1991) 1 Cal.4th 173
PEOPLE V. BREAUX (1991) 1 Cal.4th 281
PEOPLE V. PRICE (1991) 1 Cal.4th 324

PEOPLE V. KELLY (1992) 1 Cal.4th 495
PEOPLE V. MARQUEZ (1992) 1 Cal.4th 553
PEOPLE V. PINHOLSTER (1992) 1 Cal.4th 865
PEOPLE V. MITCHAM (1992) 1 Cal.4th 1027

PEOPLE V. HOWARD (1992) 1 Cal.4th 1132
PEOPLE V. VISCIOTTI (1992) 2 Cal.4th 1
PEOPLE V. HARDY (1992) 2 Cal.4th 86
PEOPLE V. ROBERTS (1992) 2 Cal.4th 271
PEOPLE V. MINCEY (1992) 2 Cal.4th 408
PEOPLE V. THOMAS (1992) 2 Cal.4th 489
PEOPLE V. CLAIR (1992) 2 Cal.4th 629
PEOPLE V. LIVADITIS (1992) 2 Cal.4th 759
PEOPLE V. FAUBER (1992) 2 Cal.4th 792
PEOPLE V. RALEY (1992) 2 Cal.4th 870
PEOPLE V. DANIELSON (1992) 3 Cal.4th 691
PEOPLE V. MCPETERS (1992) 2 Cal.4th 1148
PEOPLE V. DESANTIS (1992) 2 Cal.4th 1198
PEOPLE V. CLARK (1992) 3 Cal.4th 41
PEOPLE V. PRIDE (1992) 3 Cal.4th 195
PEOPLE V. DIAZ (1992) 3 Cal.4th 495
PEOPLE V. ESPINOZA (1992) 3 Cal.4th 806
PEOPLE V. WILSON (1992) 3 Cal.4th 926
PEOPLE V. HILL (1992) 3 Cal.4th 959
PEOPLE V. PAYTON (1992) 3 Cal.4th 1050
PEOPLE V. WREST (1992) 3 Cal.4th 1088
PEOPLE V. JOHNSON (1992) 3 Cal.4th 1183
PEOPLE V. HAWTHORNE (1992) 4 Cal.4th 43
PEOPLE V. SANDOVAL (1992) 4 Cal.4th 155
PEOPLE V. ROWLAND (1992) 4 Cal.4th 238
PEOPLE V. PROCTOR (1992) 4 Cal.4th 499
PEOPLE V. TUILAEPA (1992) 4 Cal.4th 569
PEOPLE V. NOGUERA (1992) 4 Cal.4th 599
PEOPLE V. ALCALA (1992) 4 Cal.4th 742

FIRST DEGREE MURDER CASES (NON-CAPITAL)

PEOPLE V. MORRIS (1988) 199 Cal.App.3d 377
PEOPLE V. WELLS (1988) 199 Cal.App.3d 535
PEOPLE V. FRANCIS (1988) 200 Cal.App.3d 579
PEOPLE V. GARCIA (1988) 201 Cal.App.3d 324
PEOPLE V. DOMINGUEZ (1988) 201 Cal.App.3d 345
PEOPLE V. WILLIAMS (1988) 202 Cal.App.3d 835
People v. Marks (1988) 45 Cal.3d 1335
PEOPLE V. PRINCE (1988) 203 Cal.App.3d 848
PEOPLE V. SELLERS (1988) 203 Cal.App.3d 1042
PEOPLE V. STRESS (1988) 205 Cal.App.3d 1259
PEOPLE V. GASTILE (1988) 205 Cal.App.3d 1376

PEOPLE V. RUPE (1989) 206 Cal.App.3d 1537
People v. Roy (1989) 207 Cal.App.3d 642
PEOPLE V. MORGAN (1989) 207 Cal.App.3d 1384
PEOPLE V. HALL (1989) 208 Cal.App.3d 34
PEOPLE V. YORBA (1989) 209 Cal.App.3d 1017
PEOPLE V. BERBERENA (1989) 209 Cal.App.3d 1099
People v. Beltran (1989) 210 Cal.App.3d 1295

PEOPLE V. CORONA (1989) 211 Cal.App.3d 529
PEOPLE V. HARRIS (1989) 211 Cal.App.3d 640
PEOPLE V. EDWARDS (1989) 212 Cal.App.3d 1091
PEOPLE V. SILBERMAN (1989) 212 Cal.App.3d 1099
PEOPLE V. HOLGUIN (1989) 213 Cal.App.3d 1308
PEOPLE V. SMITH (1989) 214 Cal.App.3d 904
PEOPLE V. HANKEY (1989) 215 Cal.App.3d 510
PEOPLE V. CORDERO (1989) 216 Cal.App.3d 275
PEOPLE V. HAYES (1989) 49 Cal.3d 1260
People v. Brigham (1989) 216 Cal.App.3d 1039

PEOPLE V. SILVERBRAND (1990) 220 Cal.App.3d 1621
PEOPLE V. AGUILAR (1990) 218 Cal.App.3d 1556
People v. Burrows (1990) 220 Cal.App.3d 116
PEOPLE V. KELLEY (1990) 220 Cal.App.3d 1358
PEOPLE V. ROBINSON (1990) 221 Cal.App.3d 1586
People v. Boyd (1990) 222 Cal.App.3d 541
PEOPLE V. NGUYEN (1990) 222 Cal.App.3d 1612
PEOPLE V. CRAWFORD (1990) 224 Cal.App.3d 1
PEOPLE V. BOBO (1990) 229 Cal.App.3d 1417
People v. Denis (1990) 224 Cal.App.3d 563
PEOPLE V. ASAY (1990) 224 Cal.App.3d 608
PEOPLE V. WISELY (1990) 224 Cal.App.3d 939
PEOPLE V. MCLEAD (1990) 225 Cal.App.3d 906
PEOPLE V. HENDERSON (1990) 225 Cal.App.3d 1129
PEOPLE V. SINGER (1990) 226 Cal.App.3d 23
PEOPLE V. ST. JOSEPH (1990) 226 Cal.App.3d 289

PEOPLE V. MONTANO (1991) 226 Cal.App.3d 914
PEOPLE V. MAIER (1991) 226 Cal.App.3d 1670
PEOPLE V. BOLTER (1991) 227 Cal.App.3d 653
PEOPLE V. HARRIS (1991) 227 Cal.App.3d 1223
PEOPLE V. SPEARS (1991) 228 Cal.App.3d 1
PEOPLE V. MORENO (1991) 228 Cal.App.3d 564
PEOPLE V. HARPER (1991) 228 Cal.App.3d 843
PEOPLE V. BARBOSA (1991) 228 Cal.App.3d 1619
PEOPLE V. SANTAMARIA (1991) 229 Cal.App.3d 269
PEOPLE V. SCOTT (1991) 229 Cal.App.3d 707
People v. Moten (1991) 229 Cal.App.3d 1318
PEOPLE V. JACOBO (1991) 230 Cal.App.3d 1416
PEOPLE V. BIVENS (1991) 231 Cal.App.3d 653
PEOPLE V. JOHNSON (1991) 233 Cal.App.3d 425
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PROOF OF SERVICE BY MAIL

I am employed in the City of Oakland, State of California. My business address is 4200 Park Blvd., # 249, Oakland, CA 94602. I am over 18 years of age, and not a party to the action captioned in the document(s) herein. On the date of execution below, I served the following legal document(s) on the following person(s)/office(s) by placing a true copy thereof in a sealed envelope, with postage thereon fully prepaid, in a United States Post Office mail box at Oakland, California:

In re: People v. Paul Hensley, S050102

Document(s) Served

APPELLANT'S OPENING BRIEF

Person(s) Served

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Attn: Lydia Hayn, Clerk

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Attn: Peter Fox, Esq.

I declare under penalty of perjury that the foregoing is true and correct. Executed on ~~May 1~~, April 28, 2008, at Oakland, California.

RICHARD L. RUBIN