IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	**No. S048543**
Plaintiff and Respondent,	**(Kern County Superior Court No. 57167-A)**
v.	
CHARLES F. ROUNTREE,	**CAPITAL CASE**
Defendant and Appellant.	

Appeal From the Judgment of the Superior Court of the State of California for the County of Kern

The Honorable Lee P. Felice, Judge

APPELLANT'S REPLY BRIEF

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THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHARLES F. ROUNTREE, Defendant and Appellant.	No. S048543 (Kern County Superior Court No. 57167-A)

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief, appellant addresses specific contentions made by respondent, but does not reply to arguments which are adequately addressed in Appellant's Opening Brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

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I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING MR. ROUNTREE'S REPEATED MOTIONS TO CHANGE VENUE.

As shown in appellant's opening brief, the trial court empaneled a jury - over repeated objections -that had been saturated in media reports about the case, that contained jurors angry at Mr. Rountree and others ready to impose the death penalty before the guilt phase had even begun. The trial court's failure to grant any of Mr. Rountree's repeated motions for a change of venue deprived Mr. Rountree of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances, and penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7,15,16, & 17; AOB 23-54.)[1] Accordingly, reversal of the convictions, the special circumstance findings, and the death judgment is required.

A. Because All Five of the Controlling Factors Indicated A Change of Venue Was Necessary, The Trial Court Reversibly Erred In Denying Appellant's Repeated Motions.

Respondent agrees that this Court must make an independent determination as to whether there was a reasonable likelihood of a fair trial,

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[1] In this brief "AOB" refers to Appellant's Opening Brief, "RB" refers to Respondent's Brief, "CT" shall refer to the Clerk's Transcript, "RT" to the Reporter's transcript, "SCT" to the Supplemental Clerk's Transcript, "2SCT" to the Second Supplemental Clerk's Transcript, "ECT" to the Clerk's Transcript containing the Exhibits, and "JCT" to the Clerk's Transcript containing the Juror Questionnaires.

but argues that the five controlling factors did not justify a change of venue. (RB 27-28.) In doing so, however, respondent fails to address the unique features of this case: an 85% recognition rate in the jury pool despite the fact that the trial was put over for one year solely to let the publicity subside (3 CT 836), the marches and rallies held before trial with speakers such as Joe Klass, the grandfather of Polly Klass, State Senator Phil Wyman, and a spokesperson for Governor Pete Wilson (3 CT 930), and the indisputable fact that jurors who had followed the case in the media, who already thought the defendants were guilty, and who were *angry* about the crime, were allowed to serve on the jury. The trial court's failure to grant any of the change of venue motions was reversible error.

1. The nature and gravity of the offense.

While agreeing that, as a capital crime, the offense was of the utmost gravity, respondent argues that the nature of the crime lacked the sensational overtones of other cases where a change of venue has been granted. (RB 28-29.) This argument, however, ignores how the case was portrayed in the media: the brazen kidnaping of a 19-year old girl of diminutive size (4-foot, 10-inches, 85 pounds) from the parking lot of a mall in broad daylight, her robbery and subsequent murder in a deserted area, followed by a "cross-country crime spree." (3 CT 928.) The media coverage put every listener or reader, their daughter or wife, in the shoes of

the victim (see 3 CT 920), which helps account for the astonishing 85% recognition rate a year later. As noted in appellant's opening brief, the "Love for Life" foundation was set up in memory of the victim held rallies and marches before appellant's trial with famous speakers. (AOB 35-36.) It is indisputable that the average homicide - even the average capital case - does not result in marches, rallies, and speeches by state senators and representatives of the governor. Both the gravity of the offense and its sensational nature weighed heavily in favor of a change of venue.

2. The nature and extent of the news coverage.

Respondent argues that the newspaper articles appended to the motion were neither extensive nor inflammatory, and that the high number of unformed opinions among those polled in the jury survey, as well as the size of Kern County, "left an ample number of prospective jurors from whom to choose." (RB 32-34.) Indeed, the trial court could have avoided a biased jury by following the prosecutor's suggested solution to avoid closing the preliminary hearing: voir dire all prospective jurors for knowledge of the case, and "anyone who does have prior knowledge is eliminated." (1 CT 104-105.) Instead, eight of the twelve jurors were infected by pre-trial publicity and some, if not all, had formed strong opinions about the case, showing that the pervasive news coverage of the case weighed in favor of a change of venue.

3. The size and nature of the community.

The offense occurred in Kern County. Respondent notes that the prosecution stated in its opposition that the population of Kern County was over 500,00 and that of Bakersfield over 300,000, and argues that community size does not weigh in favor of a change of venue. (RB 30-31.) As this Court noted in *People v. Weaver* (2001) 26 Cal.4th 876, 905, "Kern County is 'neither large nor small.'"

The key consideration, however, is "whether it can be shown that the population is of such a size that it ' neutralizes or dilutes the impact of adverse publicity.'[Citations.]" (*Ibid.*) As shown in appellant's opening brief, the recognition rate of this case among the jury pool, the jury panel, and the seated jurors was very, very high and the case was "deeply embedded" in the public mind. Thus, the size of the population clearly did not dilute the impact of the publicity. This factor should therefore weigh in favor of a change of venue.

4/5. The status of the defendants in the community; the popularity and prominence of the victim.

Respondent acknowledges that where, as here, the defendant is a stranger to the county and the victim is a resident, this weighs in favor of a change of venue (RB 31, citing *People v. Williams* (1989) 48 Cal.3d 1112, 1129), but argues that appellant was not an "outsider" in terms of race, that appellant had not purposefully gone to Bakersfield to commit crimes, and

that neither appellant nor Contreras was prominent or notorious apart from their connection with these proceedings. (*Ibid.*)

Respondent does not address, however, the fact that the media coverage portrayed the defendants as outsiders from Missouri on a crime spree who swooped in upon an unsuspecting and trusting local girl from a good family. As one of the respondents to the public opinion survey commented, "These people come here to California to do their crimes." (5 CT 943.) The defendants' status as outsiders weighed in favor of a change in venue.

Nor does respondent acknowledge that, under the law, there are two ways a victim can become "popular" or "prominent," one of which is notoriety from death, a "posthumous celebrity." (*Odle v. Superior Court* (1982) 32 Cal.3d 932, 940.) Here, the victim, Diana Contreras, attained a posthumous celebrity which weighed in favor of a change of venue. As described in appellant's opening brief, the impact of her death was such that law enforcement officers from various agencies took to patrolling Kern County in their off-duty hours, a foundation was formed, rallies and marches were held where prominent politicians and celebrities spoke. (See AOB 39-40.) Mr. Rountree's outsider status and Contreras's posthumous celebrity weighed heavily in favor of a change of venue.

With a recognition rate of 85% among the jury pool, 75% among the

jury panel, and 8 of the 12 actual jurors, the media saturation of this case is simply incontrovertible. In light of that recognition rate, an analysis of the five controlling pre-trial factors shows that the nature and gravity of the offense, the nature and extent of the news coverage, the size of the community, the status of the defendants in the community, and the posthumous popularity and prominence of the victim all indicated that a change of venue should have been granted before jury selection ever began.

B. Because The Voir Dire of the Prospective and Actual Jurors Showed Prejudice from the Pre-Trial Publicity, Reversal is Required.

Respondent, after briefly - and selectively - reviewing the voir dire of the seated jurors, argues that appellant cannot show that the error was prejudicial, and the trial court properly denied the renewed motion made after jury selection. (RB 35-36.) "On appeal after judgment, the defendant must show a reasonable likelihood that a fair trial was not had." (*People v. Williams, supra*, 48 Cal.3d at p. 1126.) "A showing of actual prejudice 'shall not be required.'" (*Ibid.*) In addition, the voir dire of the prospective jurors, as well as the actual jurors, must also be reviewed by this Court. (*People v. Williams, supra*, 48 Cal.3d at p. 1128.)

On a jury panel of 82 prospective jurors, 61 had heard something about the case. (11 RT 2066.) Of those, 26 had formed the opinion that the defendants were either guilty or guilty of something. (*Ibid.*) Thirty-one of

the prospective jurors exposed to the pre-trial publicity were honest enough to admit that they could not put it aside and were dismissed for cause. (2-4 RT 118-779.) Thus, over half the jurors infected by the pre-trial publicity admitted that they could not put it aside. As to the others,

> "[n]o doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. *Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight.*'" (*Odle v. Superior Court, supra,* 32 Cal.3d at p. 945, quoting *Irvin v. Dowd* (1961) 366 U.S. 717 at p. 759.)

Where so many of the jury panel admitted prejudice, the assertion of impartiality, for example, by juror number 048382, who had read about the case in the local newspaper, felt Mr. Rountree was guilty, and was *angry* about the crime before trial ever started (4 RT 705-714), was entitled to no weight whatsoever. Yet the trial court did not weigh the credibility of such assertions. Instead, it asked each juror if they could set aside what they knew and felt and decide the case on the trial evidence, and if the prospective juror said they could - or even if they said they would *try*[2] - any challenge was denied. This was clear error.

Nor does respondent address the fact that the question of whether there is a reasonable likelihood that Mr. Rountree did not receive a fair trial

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[2] See e.g. 6 RT 1169-1182. The prospective juror stated that she would "surely try" to set aside her opinion that appellant was guilty. She didn't know if she could until confronted with the situation. The challenge for cause was still denied. (See also AOB 60-68.)

must be decided in light of the jury's normative and subjective death penalty verdict, not simply the guilt verdict. (*Fain v. Superior Court* (1970) 2 Cal.3d 46, 52.) Juror number 049614 had also followed the case in the media, and was leaning strongly towards the death penalty for a murder during a kidnaping or robbery - in fact he was already 95% of the way there. (9 RT 1669-1685.) In deciding the sentence, there was nothing this juror wanted to know about Mr. Rountree before deciding. (9 RT 1679.)

Thus, during penalty phase, when the jury's decision is subjective and jurors are vested with absolute discretion to determine which penalty to impose, appellant's jury contained a juror who was angry before the trial even began and another who was already 95% of the way to a death verdict before trial began - and who did not want to hear any of the mitigating evidence. The idea that those seated jurors could flick some kind of internal switch and begin trial as if they knew and felt nothing is patently absurd and contrary to both science[3] and the law. They started the trial angry and feeling that the death penalty was warranted, and, being human, focused on

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[3] A meta-analysis of 44 empirical studies, representing 5,755 subjects, conducted by dozens of scholars using a variety of methodologies, concluded that jurors exposed to negative pre-trial publicity were significantly more likely to judge the defendant guilty, and that the effects of pre-trial publicity survive the jury selection process, survive the presentation of trial evidence, endure the limiting effects of judicial instructions, and persevere, or even intensify, during deliberations. (Steblay, Fulero & Jimenez-Lorente, *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review* (1999) 23 Law and Human Behavior 219-235.)

the evidence that would justify those views.

Several of the other seated jurors had also followed the case on the radio, TV, and in the newspaper, and with that exposure simply could not be "a panel of impartial 'indifferent' jurors." The recognition rate of this case among the jury pool, jury panel, and actual jurors, as well as the voir dire itself, show that pre-trial publicity had prejudiced the jury and it is more than reasonably likely a fair trial was not, in fact, had. (*People v. Webb* (1993) 6 Cal.4th 494 at p. 514.)

The trial court's failure to grant any of Mr. Rountree's repeated motions for change of venue deprived him of his Fifth and Fourteenth Amendments rights to a fair trial and due process, his Sixth Amendment right to a fair and impartial jury, and his Eighth Amendment right to a reliable, rational, and accurate determination of his eligibility for a sentence of death, as well as their counterparts under the California Constitution. (*Irvin v. Dowd* (1961) 366 U.S.771, 728-729; U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7,15,16, & 17.) Such an error is structural in nature and requires per se reversal. (*Irvin v. Dowd, supra*, 366 U.S. at pp. 728-729; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-282.)

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II. THE TRIAL COURT IMPROPERLY DENIED MR. ROUNTREE'S CHALLENGES FOR CAUSE TO FOURTEEN PROSPECTIVE JURORS WHO WERE UNDULY BIASED.

As shown in appellant's opening brief, fourteen prospective jurors expressed views showing them to be infected by the extensive pre-trial publicity or extremely partial to the death penalty in this case. Appellant exhausted his peremptory challenges after being forced to use many of them to excuse jurors who should have been dismissed for cause. Four of the challenged jurors served on the jury and one as an alternate juror. Mr. Rountree's jury panel was therefore weighted in favor of the death penalty.

The denial of appellant's challenges was error under California statutory law, the California and federal constitutions, and deprived Mr. Rountree of his rights to due process and equal protection, to a trial by an impartial jury, and to receive a fair and reliable penalty determination. (Code of Civ. Proc., § 225; Cal. Const., art. I, §§ 1, 7(a), 15, 16 & 17; U.S. Const., 5th, 6th, 8th & 14th Amends; AOB 55-70.)

A. The Trial Court Improperly Denied Mr. Rountree's Challenges for Cause.

Respondent, after reviewing the voir dire of prospective and seated jurors, argues, as did the trial court, that the challenged jurors had all asserted that they could set aside their prior knowledge of the case, and that none would "automatically" impose the death penalty. (RB 63-67.) That is

neither true nor the correct legal standard. In order to be biased in a capital case, a prospective juror need not engage in "'automatic' decisionmaking" in the choice of penalties, or demonstrate that "he would never vote for [one of the penalty choices]." (*Wainwright v. Witt* (1985) 469 U.S. 412, 424.)[4] "[D]eterminations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." (*Id.* at p. 424.) However, that is *exactly* what occurred in appellant's trial. If a prospective juror could say the magic words, any challenge was denied. This was clear error, as each of the jurors at issue expressed strong views about the death penalty, Mr. Rountree's guilt, pre-trial publicity, or other factors that demonstrated they would be "substantially impaired" in the performance of their duties. (*Wainwright v. Witt, supra*, 469 U.S. at p. 424; *People v. Williams* (1997) 16 Cal.4th 635, 667.)

For example, respondent argues, as did the prosecutor, that Juror 049614, who stated he was already 95% of the way to imposing the death penalty under the facts of appellant's case - and who was not interested in hearing anything about appellant before deciding the penalty, was only

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[4] Under the federal Constitution "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt, supra*, 469 U.S. 412, 424, quoting *Adams v. Texas* (1980) 448 U.S. 38, 45; footnote omitted.)

"leaning" toward the death penalty, that it was not "automatic." (RB 42-44.) This is absurd. During *voir dire* the juror was already 95% of the way towards imposing the death penalty - and didn't want to hear any mitigating evidence before deciding the remaining 5%. (9 RT 1679; 1683-84.) That is a juror who is going to automatically impose the death penalty, and is certainly "substantially impaired" under any reasonable interpretation of that phrase.

Juror number 048382 had also followed the case in the media, thought appellant was guilty as he looked at him during voir dire, and was *angry, upset*, and *outraged* about the murder. (4 RT 709-710.) He then baldly asserted that he could start "at ground level . . . like nothing happened." (*Ibid.*) The trial court did not question that rather amazing assertion, or perform any credibility analysis. The juror had said the magic words and the challenge was denied. (4 RT 713.)

Respondent does not dispute that scientific studies have shown that jurors exposed to negative pre-trial publicity were significantly more likely to judge the defendant guilty, and that the effects of pre-trial publicity survive the jury selection process, survive the presentation of trial evidence, endure the limiting effects of judicial instructions, and persevere, or even intensify, during deliberations. (Steblay, Fulero & Jimenez-Lorente, *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review,*

supra, 23 Law and Human Behavior 219-235.)

Indeed, those scientific studies have simply confirmed what both common sense and the common law have recognized for hundreds of years. In *United States v. Burr*, defendant Colonel Aaron Burr argued that, due to extensive negative publicity regarding his trial for treason in various newspapers, "the public mind had been so filled with prejudice against him that there was some difficulty in finding impartial jurors." (*United States v. Burr* (1807) 25 F.Cas. 49.) As Chief Justice Marshall explained, even a juror's protestations of fairness are insufficient to override the presumption of bias:

> "Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony. He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him."

(*Id.* at p. 50; See also *Morgan v. Illinois* (1992) 504 U.S. 719, 734-736 [Jurors' statements that they will follow the law are not enough to ensure impartiality.])

Here, the trial court "trusted" any juror who claimed they could set aside their prior knowledge of the case, their anger, their opinion that appellant was guilty, or their feeling that appellant should receive a death sentence. Both science and law tell us this was clear error, and the end

result was a jury that had been saturated in media reports about the case, that contained jurors angry at Mr. Rountree and others ready to impose the death penalty before the guilt phase had even begun. This was a far cry from the "panel of impartial 'indifferent' jurors" required by the U.S. Constitution.

B. The Trial Court's Errors Require Reversal

Each of the jurors at issue expressed strong views about the death penalty, Mr. Rountree's guilt, pre-trial publicity, or other factors that demonstrated they would be "substantially impaired" in the performance of their duties. (*Wainwright v. Witt, supra*, 469 U.S. at p. 424; *People v. Williams, supra*, 16 Cal.4th at p. 667.) Mr. Rountree exhausted his peremptory challenges, expressed dissatisfaction with the jury, and four of the impaired jurors actually sat on his jury, including at least one who would have automatically voted for death. Empaneling such jurors violated Mr. Rountree's right to a fair and impartial jury under the Sixth and Fourteenth Amendments. (*Morgan v. Illinois, supra,* 504 U.S. at 727.)[5]

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[5] The *Morgan* court noted that "[a] juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodies in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is

Moreover, the trial court's errors required Mr. Rountree to exhaust his peremptory challenges on jurors that should have been excused for cause. This effectively reduced Mr. Rountree's statutory right to use a full number of peremptory challenges by compelling him to use challenges on jurors that were substantially impaired under the facts of this case. Accordingly, the trial court's errors violated Mr. Rountree's federal due process liberty interest in using the full number of challenges available under California law. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

Under these circumstances, the trial court artificially created a death prone jury - especially when coupled with the erroneous excusal of prospective juror James H. (See Argument III, *infra*), in violation of due process. The combined errors led to a jury that was far from impartial and ultimately the errors implicated the reliability of the penalty verdict. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. 1, §§ 7 & 15; see *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522, fn. 20.) Reversal is required.

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disentitled to execute the sentence." (*Morgan v. Illinois, supra,* 504 U.S. at 729.)

Juror 049614 was 95 % of the way to a death verdict during voir dire and explicitly stated that there was nothing he wanted to hear about Mr. Rountree before deciding the sentence. His empanelment alone requires reversal of the death verdict. (*Ibid.*)

III. THE TRIAL COURT'S ERRONEOUS DISMISSAL FOR CAUSE OF JAMES H., A QUALIFIED PROSPECTIVE JUROR, VIOLATED MR. ROUNTREE'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS AND REQUIRES REVERSAL OF THE DEATH JUDGMENT.

In response to the prosecutor's challenge for cause (6 RT 1090), and in a clear contrast to its treatment of death-inclined potential jurors, the trial court created a new legal standard for potential jurors with religious scruples, finding cause to excuse a prospective juror if serving in the case might require the juror to violate a precept of his or her religious beliefs - and even if the juror is willing to do so. (6 RT 1100.) As shown in appellant's opening brief, this new rule not only violates *Witherspoon* and *Witt*, but would bar followers of most of the major religions in the United States from serving in capital cases.[6] This was clearly a much, much "'broader basis' [for exclusion] than inability to follow the law or abide by their oaths," and thus, Mr. Rountree's death sentence cannot be carried out. (*Adams v. Texas*, *supra*, 448 U.S. at pp. 47-48; AOB 71-82.)

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[6] Respondent does not dispute that the end result of the trial court's "violation of religious precepts" rule would be to bar the followers of any religion which opposes capital punishment from serving in capital cases, including the 60 million members of the Roman Catholic Church, the 13 million member of the Methodist Church, the four million members of the Presbyterian churches, two million Episcopalians, the two million members of the Reformed Church in America, the American Baptists, the United Church of Christ, some Jewish sects, the Eastern Orthodox Church, the Mennonites, the Quakers, and a number of others. (RB 67-74; See, e.g. www.religioustolerance.org/execut7.htm)

A. The Prospective Juror's Answers Demonstrated That He Was Qualified To Be A Capital Juror.

Respondent reviews the voir dire of prospective juror James H., but cannot point to a single instance where James H. states that he could not follow the court's instructions or states that he could not impose the death penalty. (RB 68-70.) Respondent compares this case to *People v. Martinez* (2009) 47 Cal.4th 399, and argues that there, as here, the prospective juror stated that she could impose a sentence of death, but that the trial court had concluded her strong opposition to the death penalty and equivocal answers meant that her views would prevent or substantially impair her performance of her duties. (*Id.* at pp. 429-430; RB 71-74.) However, appellant's case is more like *Witherspoon* than *Martinez*.

In *Martinez*, the prospective juror was strongly opposed to the death penalty and felt that capital punishment "serves no useful purpose" and "makes killers out of us." (*Id.* at p. 431.) When the prosecutor asked if she could realistically vote for death for a murder in connection with a child molestation, she answered that it was "not realistic that I would, but it is realistic that I can, that I could." (*Id.* at p. 429.) When asked to elaborate, she declined, saying only "[t]here is a possibility that I could vote for the death penalty. I would have to have all the evidence, all the facts, and it would have to be something that would push me beyond the way I normally feel about the death penalty. But... that could happen." (*Ibid.*) The trial

court concluded that the prospective juror had been evasive in answering the prosecutor's questions and was substantially impaired in her ability to perform her duties as a juror.

This Court upheld the trial court ruling in *Martinez* because the trial court

> "'...supervised a diligent and thoughtful voir dire' [Citation], *taking pains to state and apply the correct standard* and to explain the overall impression it received from the entire voir dire of [the prospective juror]." (*Id.* at p. 430, emphasis added.)

Here, by contrast, James H. clearly stated, both in his questionnaire and his voir dire, that he did not feel the death penalty was wrong for any reason, including religious, moral, or ethical reasons, and that he would have no trouble voting to impose the death penalty in an appropriate case. (11 JCT 3002-3003; 6 RT 1090-1091.) Unlike the prospective juror in *Martinez*, James H. repeatedly and clearly stated that he would follow his oath and the court's instructions and impose the death penalty if it was warranted. (6 RT 1091, 1093; 11 JCT 3003.) Unlike *Martinez*, the trial court here did not "state and apply the correct standard," and *never found that James H. was substantially impaired.* On the contrary, the trial court itself noted that James H. was willing to violate a precept of his beliefs and follow the law as given to him by the court. In ruling on the challenge for cause, the court stated:

> "I don't know that the law would require that someone violate a precept of their religious beliefs, even though this man

> presumably was willing to do that if I ordered him to do that, but – but I think that it is – I think that it is cause." (6 RT 1100.)

This is, in fact, *exactly* the type of dismissal that was found to be unconstitutional in *Witherspoon*. In *Witherspoon*,

> "[o]nly one venireman who admitted to 'a religious or conscientious scruple against the infliction of the death penalty in a proper case' was examined at any length. She was asked: 'You don't believe in the death penalty?' She replied: 'No. It's just I wouldn't want to be responsible.' The judge admonished her not to forget her 'duty as a citizen' and again asked her whether she had 'a religious or conscientious scruple' against capital punishment. This time, she replied in the negative. Moments later, however, she repeated that she would not 'like to be responsible for . . . deciding somebody should be put to death.' Evidently satisfied that this elaboration of the prospective juror's views disqualified her under the Illinois statute, the judge told her to 'step aside.'" (*Witherspoon v. Illinois, supra,* 391 U.S. at pp. 515 [footnotes omitted.].)

Similarly, although prospective juror James H. did not feel the death penalty was wrong for any reason, including religious, moral, or ethical reasons (11 JCT 3002, 6 RT 1090), he did say he would have difficulty because of his religious belief that he was not to judge others. (6 RT 1089.) He was unequivocal, however, that he would obey the law:

> "Q. And so let me ask you this: Would you be able – despite your religious beliefs, would you be able to pursue some kind of judging – pursue judging in this case as it is required under the law of the State of California, pass judgment on somebody and determine a factual situation, either yeah or nay?
>
> A. If I was picked for a jury and I had to do that, yes, I would

have to do that. I have to obey the laws of the land. It is like going 55 miles an hour down the road. See what I'm saying? You have to do that. Like I said, it would be hard, it would be the hardest thing I would ever have to do." (6 RT 1093.)

It is beyond dispute that "'[e]very right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow man.' [Citation.]" (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 515, n.8; see also *Eddings v. Oklahoma* (1982) 455 U.S. 104, 127, dis. opn. of Burger, J. ["It can never be less than the most painful of our duties to pass on capital cases"]; *McGautha v. California* (1971) 402 U.S. 183, 208 [recognizing the "truly awesome responsibility of decreeing death for a fellow human being"].) Thus, the pain or extreme difficulty that otherwise inheres in the decision to execute another human being simply does *not* establish that a prospective juror would be prevented from, or substantially impaired in, performing her duties. (*People v Stewart* (2004) 33 Cal.4th 425, 446-449.) As this Court has explained:

> "In light of the gravity of that punishment, for many members of society their personal and conscientious views concerning the death penalty would make it "very difficult" ever to vote to impose the death penalty. . . . [H]owever, a prospective juror who simply would find it "very difficult" ever to impose the death penalty, is entitled — indeed, duty-bound — to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror. . . . .
>
> Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh

> mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under *Witt*, *supra*, 469 U.S. 412. . . . A juror might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*Id.* at p. 446.)

Prospective juror James H. is precisely the type of juror contemplated by the *Witherspoon* and *Stewart* decisions - he had religious scruples about judging his fellow man, but made it clear that he would do so to follow the law. As he stated: "I have to obey the laws of the land." The trial judge admitted as much before dismissing him. This was clear error. As the United States Supreme Court concluded in *Witherspoon*:

> "If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply "neutral" with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die." (*Witherspoon v. Illinois, supra,* 391 U.S. at pp. 520-521, footnote omitted.)[7]

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[7] As shown in Argument II, *supra*, the trial court applied a very different standard to prospective jurors who strongly favored the death penalty, denying all challenges as long as the juror agreed they would follow - or even *try* to follow - the court's instructions. (See AOB 60-68.)

Reversal is required.

B. Reversal of the Death Judgment Is Required.

Respondent does not dispute that the erroneous exclusion of a single juror because of his or her opposition to the death penalty is reversible error per se and is not subject to harmless error analysis. (RB 67-74; *Gray v. Mississippi* (1987) 481 U.S. 648, 668.) As shown above, the trial court's decision to excuse James H. for cause is not fairly supported by the record or by substantial evidence, and should not be accorded any deference by this Court because of the trial court's clear legal errors in making that determination.

As the *Witherspoon* court held,

> "...a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected." (*Witherspoon v. Illinois, supra,* 391 U.S. at pp. 521-523 [footnotes omitted.].)

The trial court's erroneous discharge of James H. violated Mr. Rountree's rights to a fair and impartial jury, to due process, and to a reliable penalty determination under the Sixth, Eighth and Fourteenth

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This disparate treatment violated due process and produced a jury uncommonly willing to condemn Mr. Rountree to die. (*Morgan v. Illinois, supra,* 391 U.S. at pp. 520-521.)

Amendments to the United States Constitution, and article I, sections 1, 7, 15 and 16 of the California Constitution. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7,15,16, & 17.) Mr. Rountree's death judgment must therefore be reversed. (*Gray v. Mississippi, supra*, 481 U.S. at pp. 660, 668.)

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IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING REDACTED VERSIONS OF MR. ROUNTREE'S CONFESSIONS AND DENYING HIS REPEATED MOTIONS FOR SEVERANCE, SEPARATE JURIES, OR ADMISSION OF THE FULL CONFESSIONS AT PENALTY PHASE.

Mr. Rountree confessed - twice - to the robbery and killing of Diana Contreras. However, Mr. Rountree's statements were redacted in a way that created the false impression that he was the sole planner and perpetrator of the crime, thus violating his right to a fair trial and to due process of law. Moreover, because the trial court ruled that Mr. Rountree could not cross-examine witnesses about the redacted portions of his statements, but could only present them if he took the stand, Mr. Rountree's Sixth Amendment right to cross-examine witnesses against him and his Fifth Amendment right to remain silent were violated. The redaction and ruling also denied Mr. Rountree his rights to counter false aggravating evidence and present true mitigating evidence at the penalty phase of his capital trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the comparable provisions of the California Constitution. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7,15,16, & 17; AOB 83-99.) Accordingly, Mr. Rountree's death sentence must be vacated and the case remanded for a new penalty phase.

A. The Trial Court's Failure to Either Sever The Penalty Trials, Order Separate Penalty Juries, Or Admit the Full Text of the Confessions During Penalty Phase Was Clear Error.

Respondent agrees that changing appellant's statements to show that he had done everything alone "impliedly overstated his role," (RB 80), but argues that such instances were not important in light of the fact that appellant had admitted kidnapping, robbing, and shooting the victim. (*Ibid.*) However, trial counsel had repeatedly argued that Mr. Rountree's statement explicitly admitted *every fact* that the prosecution was trying to prove in guilt phase. (See 1 RT 50-51.) What appellant wanted, and to which he was entitled, was admission of the full statements at penalty phase.

1. Admission of the redacted statements violated Mr. Rountree's rights to due process and a fair trial.

As shown in appellant's opening brief, the redacted portions of the statements showed that Mr. Rountree and co-defendant Stroder had fled and gotten married because Mr. Rountree knew he was going to jail and both thought that being married meant they could always stay in touch. (4 CT 1161.) He wanted to deliver Stroder safely back to Missouri before he was arrested. (4 CT 1161.) Trial counsel, anticipating that the prosecution would use the flight and marriage as evidence of Mr. Rountree's callousness and lack of remorse, wanted to bring these facts out, either through the statements themselves or through cross-examining Detective Giuffre. (21 RT 3397-3398.) The motion was denied (21 RT 3424), and the jury never heard about those portions of the statements. The prosecution

then asked the jury at both guilt and penalty phases to contrast a photo of Contreras dead at the scene with a picture of Stroder with her wedding ring, and the image of the defendants driving away in the victim's car. (18 RT 3312-3313; 24 RT 3872.) Respondent argues only that

> " it is certainly logical for a prosecutor to argue, and a jury to conclude, that the aim of the on-going multi-state thefts was to head home and stay free, especially since the couple was arrested outside California. In sum, the exclusion of non-exculpatory, self-serving statements did not deprive appellant of due process or a fair trial." (RB 83.)

This ignores the fact that the jury never had a chance to "conclude" anything other than what the prosecutor told them because they never heard appellant's statements. Respondent also confuses the guilt phase with the penalty phase and exculpatory evidence with mitigating evidence. (RB 84-85.) Appellant was seeking to introduce *mitigating* evidence and to counter the prosecution's aggravating evidence, and the law is clear that he should have been allowed to do so. A defendant must be given an opportunity to deny or explain evidence offered in aggravation (*Gardner v. Florida* (1977) 430 U.S. 349; see also *Rupe v. Wood* (9th Cir. 1996) 93 F.3d 1434 [The trial court erred at penalty phase by precluding defendant from presenting evidence of polygraph exam taken by a third party whom defendant asserted was the real killer where such evidence was relevant to the issue of relative culpability and would have refuted the prosecution's assertion that no evidence existed showing the other man committed the offense.].)

A defendant must also be allowed to present to his sentencing jury any information that could serve as a "basis for a sentence less than death." (*Skipper v. South Carolina* (1986) 476 U.S. 1, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [plurality opinion].) Where evidence is "highly relevant to the critical issue in the penalty phase of the trial," due process requires its admission even though ordinary evidentiary rules would deem it inadmissible hearsay. (*Green v. Georgia* (1979) 442 U.S. 95; see also *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, cert. denied, 507 U.S. 951 (1993) [a court can exclude evidence at penalty phase if it is irrelevant, but cannot preclude "any relevant mitigating evidence"].) Thus, due process compels the admission of the unredacted statements made by a defendant when those statements relate to mitigation issues or counter aggravating evidence.

Here, appellant's full statements were relevant to his relative culpability, and to counter the prosecution's argument that his subsequent marriage and cross-country flight were evidence of callousness and a lack of remorse. The trial court erred in failing to either admit the unredacted statements at penalty phase, empanel two juries or sever the trials.

2. Mr. Rountree was not required to relinquish his Fifth Amendment privilege to correct misleading testimony.

The district attorney repeatedly argued that Mr. Rountree was perfectly free to correct the distorted picture in the redacted confessions "by taking the witness stand, testifying to those facts and being subject to cross-

examination." (21 RT 3395.) Respondent argues that restricting appellant's right to cross-examination to protect the rights of a co-defendant unless appellant testified does not violate his Fifth or Sixth Amendment rights "when the restriction does not materially affect the defense or when the probative value of the excluded evidence is slight," citing *U.S. v. Washington* (1991) 952 F.2d 1402, 1404. (RB 83.) Here, of course, respondent has conceded that the redactions overstated appellant's role, and the prosecution was able to use appellant's marriage and cross-country flight as evidence of his callousness without contradiction because the jury never heard appellant's actual statements. The restriction was, in fact, devastating to appellant's defense at penalty phase. Mr. Rountree's statements were altered to his detriment and he was then told that he must take the stand to correct them in violation of the Fifth Amendment. Reversal is required.

3. Admission of the redacted statements denied Mr. Rountree the individualized sentencing determination guaranteed by the Eighth Amendment.

Respondent argues that the jury instructions telling the jury to decide each defendant's penalty separately were sufficient to ensure individualized sentencing, citing *People v. Taylor* (2001) 26 Cal.4th 1155, 1173-1174. (RB 84.) However, the issue here is not whether the jury could compartmentalize the evidence against each defendant, as in *Taylor*; the issue here is that the

jury was deprived of relevant mitigating evidence, to appellant's detriment.

Respondent argues that appellant did introduce mitigating evidence through various witnesses, and therefore that "the redacted passages from appellant's statements would have provided minimal, if any, additional mitigation to the mitigating evidence that was before the jury." (RB 84.) However, respondent has already conceded that the redactions prejudiced Mr. Rountree because they threw "the entire onus of the planned robbery on defendant by converting the sometimes ambiguous and partially exculpatory 'we' into an unmistakable 'I.'" (RB 80; *People v. Tealer* (1975) 48 Cal.App.3d 598, 603-604.) That allowed co-defendant Stroder's counsel to argue that Stroder was subservient to Mr. Rountree, because it appeared from the redacted statements that Mr. Rountree had planned and done everything by himself. (See 25 RT 3925-3963.) The redactions also prevented the jury from hearing the reason for the defendants' marriage and flight towards Missouri.

The Ninth Circuit has recognized the primary danger of a joint penalty phase of co-defendants: "A single jury . . . may well assess relative blame, with the resultant imposition of a non-capital sentence on the less blameworthy of the two defendants." (*Beam v. Paskett* (9th Cir. 1993) 3 F.3d 1301, 1304, fn.1.) Such a comparison certainly occurred here when the jury reached a verdict of death for Mr. Rountree and a verdict of life without possibility of parole for Stroder. Having one jury decide the

appropriate penalty for both defendants without ever having heard Mr. Rountree's actual statements deprived him of his due process and Eighth Amendment rights to a fair, reliable, individualized and non-arbitrary sentencing determination.

B. Reversal is Required.

Finally, respondent argues that any error was harmless because of the overwhelming evidence of guilt. (RB 85-86.) This again ignores the different calculus at penalty phase. Had the jury heard appellant's unredacted statements, there is a reasonable possibility that at least one juror would have decided that Mr. Rountree's remorse was genuine and his flight and marriage prompted by concern for Stroder - and therefore that for Mr. Rountree, as for Stroder, death was not the appropriate penalty. (*Wiggins v. Smith* (2003) 539 U.S. 510.) Given the extraordinary complexity of the capital sentencing decision (see, e.g., *Turner v. Murray* (1986) 476 U.S. 28, 37), and the heightened "need for reliability in the determination that death is the appropriate punishment" (see, e.g., *Caldwell v. Mississippi* (1985) 472 U.S. 320), it is impossible to say that the distorted picture painted by the redacted statements was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Accordingly, Mr. Rountree's death sentence must be vacated and the case remanded for a new penalty phase.

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V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO INSTRUCT THE JURY THAT AN ACCIDENTAL ACT RESULTING IN DEATH DURING THE COURSE OF A FELONY FAILS TO MEET THE REQUIREMENTS OF THE FELONY-MURDER SPECIAL CIRCUMSTANCES.

The trial court had a sua sponte duty under both the U.S. and California Constitutions to accurately instruct the jury on Mr. Rountree's defense and all material issues raised by the evidence, but failed to properly instruct the jury regarding the only disputed issue at guilt phase: whether the shooting was accidental and, if so, whether that met the requirements of the felony-murder special circumstances. This error denied Mr. Rountree his right to due process, to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to the verdict of a unanimous jury, and his right to a fair and reliable determination that he committed a capital offense. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17; AOB 100-111.) Reversal of the death sentence is required.

A. The Issue is Preserved for Appeal.

Respondent argues that appellant has waived this issue because he failed to request specific instructions or object to the instructions given. (RB 89-90.) However, instructional errors are reviewable even without objection if they affect a defendant's substantive rights. (Pen. Code, §§ 1259 & 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7;

People v. Jones (1998) 17 Cal.4th 279, 312.) Merely acceding to an erroneous instruction does not constitute invited error; nor must a defendant request modification or amplification when the error consists of a breach of the trial court's fundamental instructional duty. (*People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20; *People v. Whisenhunt* (2008) 44 Cal.4th 174 [instructional issue not waived because of the trial court's sua sponte duty to instruct on "all theories of a lesser included offense which find substantial support in the evidence."].) The instructions given here lessened the prosecution's burden of proof and deprived appellant of his only defense - and thus clearly affected appellant's substantive rights. The issue was not waived.

B. The Trial Court's Jury Instructions Lessened the Prosecution's Burden of Proof as to the Special Circumstances and Failed to Instruct the Jury on Mr. Rountree's Theory of the Case.

As shown in appellant's opening brief, it is clearly established that the United States Constitution requires a state's capital sentencing scheme to create a class of death-eligible defendants "demonstrably smaller and more blameworthy" than the class of all murderers. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 364; AOB 104-5.) California purports to meet this requirement through its special circumstances. (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 467.) For felony-murder cases, this narrowing was to be done through a heightened intent requirement - a

killing deliberately done in order to advance the underlying felony:

> "Since '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,' the determination as to whether or not a murder was committed during the commission of robbery or other specified felony is not 'a matter of semantics or simple chronology.' [Citation.] Rather, this determination involves proof of the intent of the accused. A murder is not committed during a robbery within the meaning of the statute unless the accused has 'killed in cold blood in order to advance an independent felonious purpose, e.g., [has] carried out an execution-style slaying of the victim of or witness to a holdup, a kidnaping, or a rape.' [*People v. Green* (1980) 27 Cal.3d 1, 59-63.)]" (*People v. Thompson* (1980) 27 Cal.3d 303, 322. Emphasis added.)

The *Green/Thompson* rule was then changed in *People v. Berryman* (1993) 6 Cal.4th 1048, 1088: "[t]he felony-murder special circumstance requires that the 'defendant [must] commit [ ] *the act resulting in death* in order to advance an independent felonious purpose.' [Citation.]" (*Ibid.* Emphasis added.) Thus, there must be an intentional act done with the purpose of furthering the underlying felony and that act must result in death. An accidental act, by definition, could never meet that requirement.

Respondent does not dispute that appellant's only defense at guilt phase was that the shooting was accidental. Nor does respondent dispute that, if the *Green/Thompson* rule is still valid, the trial court's failure to properly instruct the jury on it or appellant's defense would require reversal. (RB 86-93.) Instead, respondent clearly states that appellant's defense was no defense because this Court has eliminated the heightened intent

requirement: "the only intent necessary for the special circumstance is the intent to commit the underlying felony - nothing else is required. [Citing *People v. Anderson* (1987) 43 Cal.3d 1104, 1146-1147.]" (RB 91.) Respondent also states "...since the killing occurred during the [intended] commission of the robbery or kidnapping, the felony-murder special circumstance is proven, regardless of whether the shooting was accidental." (RB 92.) Thus, respondent argues that this Court eliminated the *Green* rule in *People v. Ainsworth* (1988) 45 Cal.3d 984, 1026:

> "*Green* and *Thompson* stand for the proposition that when the underlying felony is *merely incidental* to the murder, the murder cannot be said to constitute 'a murder in the commission of' the felony and will not support a finding of felony-murder special circumstance."[8]

Respondent clearly agrees that the *Ainsworth* holding misrepresents the holdings of *Green* and *Thompson* and amounts to overruling those cases *sub silentio*. (RB 91-92.) A situation where the felony is incidental to the murder is simply one example of a felony-murder that does not satisfy the stricter intent requirements of the special circumstances under *Green* and *Thompson*. A purely accidental killing is another example - and is what the

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[8] The language of CALJIC No. 8.81.17 quotes the *Ainsworth* holding: "To find that the special circumstance, referred to in these instructions as murder in the commission of robbery is true, it must be proved: . . . 2. The murder was committed in order to carry out or advance the commission of the crime of robbery or to facilitate the escape therefrom or to avoid detection. *In other words, the special circumstance referred to in these instructions is not established if the attempted robbery was merely incidental to the commission of the murder.*" (Emphasis added.)

only direct evidence of Mr. Rountree's intent indicated in this case. To the extent that respondent is correct, that the *Green/Thompson* rule has been eliminated, and "the only intent necessary for the special circumstance is the intent to commit the underlying felony," (RB 91), the California felony-murder special circumstances violate the Eighth and Fourteenth Amendments of the United States Constitution because the special circumstances have become identical to the crime of felony-murder, fail to narrow the class of offenders eligible for death, and no longer allow the sentencer to make a "principled distinction between those who deserve the death penalty and those who do not." (*Lewis v. Jeffers* (1990) 497 U.S. 764, 774; U.S. Const., 8th, & 14th Amends; Argument VI, *infra.*)

If, however, the heightened intent requirement of *Green/Thompson* is still required for the felony-murder special circumstances, respondent does not dispute that the trial court's failure to properly instruct the jury on it or appellant's only defense would require reversal. (RB 86-93.) The jury's true findings on the special circumstances and Mr. Rountree's death sentence must be stricken. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

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VI. THE CALIFORNIA FELONY-MURDER SPECIAL CIRCUMSTANCES VIOLATE THE NARROWING REQUIREMENTS OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The California felony-murder special circumstances violate the Eighth and Fourteenth Amendments of the United States Constitution because the special circumstances have become identical to the crime of felony-murder, fail to narrow the class of offenders eligible for death, and no longer allow the sentencer to make a "principled distinction between those who deserve the death penalty and those who do not." (*Lewis v. Jeffers, supra,* 497 U.S. at p. 774; U.S. Const., 8th, & 14th Amends; AOB 112-120.)

Respondent states, as appellant acknowledged in his opening brief, that this Court has rejected similar arguments in other cases, but completely fails to address the primary case cited in both the moving papers in the trial court and in appellant's opening brief: *U.S. v. Cheely* (9th Cir. 1994) 36 F3d 1439. (RB 93-94.) Appellant has acknowledged this Court's prior decisions and explained, at some length, why this Court should reconsider its analysis and squarely address the reasoning of *Cheely*, both as a matter of law and in the context of this case. (*Ibid.;* AOB 112-120.) The matter is fully joined and there is no need for further briefing at this time.

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VII. MR. ROUNTREE'S DEATH SENTENCE, IMPOSED FOR FELONY MURDER *SIMPLICITER*, IS A DISPROPORTIONATE PENALTY UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS AND VIOLATES INTERNATIONAL LAW.

The California felony-murder special circumstances also violate the proportionality requirement of the Eighth and Fourteenth Amendments as well as international human rights law governing use of the death penalty because there is no requirement that an actual killer have a culpable state of mind with regard to the murder before a death sentence may be imposed. (U.S. Const., 8th & 14th Amends; ICCPR Article 6 (2); AOB 121-139.)

Respondent again argues only that this Court has rejected similar arguments in other cases (RB 95), but completely fails to address the underlying analysis on the proportionality requirements of the 8th and 14th Amendments. That two-part "evolving standards of decency" test shows that imposition of a death sentence for felony murder *simpliciter* is unconstitutional.

A. The United States Supreme Court's Analysis in *Kennedy v. Louisiana* Shows That a Death Sentence Imposed For an Accidental Killing is a Disproportionate Penalty Under the Eighth Amendment.

In *Kennedy v. Louisiana* (2008) 554 U.S. 35; 128 S.Ct. 2641, 2651, the high court held that the Eighth and Fourteenth Amendments prohibit the death penalty for the rape of a child because the penalty is disproportionate

to the crime.[9] The high court applied its two-part "evolving standards of decency" test to determine whether death is disproportionate to the crime of child rape. The Court first considered whether there is a national consensus about the challenged penalty by looking at penal statutes and the record of executions (*Kennedy v. Louisiana, supra*, 128 S.Ct. at pp. 2650, 2651 - 2658), and then brought its own judgment to bear on the question of the constitutionality of the penalty, i.e. whether either of the social purposes of the death penalty - retribution or deterrence - justifies capital punishment for the crime. (*Id.* at pp. 2650, 2658-2664.)

The Court began with a reminder that the Eighth Amendment's prohibition of cruel and unusual punishments proscribes all excessive punishments and "flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense." (*Kennedy v. Louisiana, supra*, 128 S.Ct. at p. 2649, quoting *Weems v. United States* (1910) 217 U.S. 349, 367.) It emphasized that the standards for determining whether the Eighth Amendment proportionality requirement is met are "the norms that 'currently prevail[,]'" since the measure of excessiveness or extreme cruelty "necessarily embodies a moral judgment." (*Kennedy v. Louisiana, supra*, 128 S.Ct. at p. 2649.) The Court

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[9] Although *Kennedy* addressed the ultimate penalty for a person who raped, but did not kill, a child, and this case involves a person who did kill, the Court's proportionality analysis applies with equal force here.

did not stop there. It cautioned that retribution, as a justification for punishment, "most often can contradict the law's own ends," particularly in capital cases. The high court warned that "[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." (*Id.* at p. 2650.)

To guard against this danger, the high court admonished that capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (*Kennedy v. Louisiana, supra*, 128 S.Ct. at p. 2650., quoting *Roper v. Simmons* (2005) 543 U.S. 551, 568, internal quotation marks omitted). The more crimes that are subject to capital punishment, the greater the risk that the penalty will be arbitrarily imposed. (*Id.* at pp. 2658-2661.) Thus, under the Eighth Amendment, "the Court insists upon confining the instances in which the punishment can be imposed." (*Id.* at pp. 2650; 2659.) In short: the use of capital punishment must be restricted. This mandate informs the Court's ensuing Eighth Amendment analysis.

1. There is a national consensus against imposition of the death penalty for felony-murder *simpliciter* .

The proportionality analysis in *Kennedy* confirms that imposing the death penalty for felony murder *simpliciter* is unconstitutional. The evidence regarding a national consensus against imposing the death penalty

for child rape in *Kennedy* was nearly identical to the national consensus against imposing death for felony murder *simpliciter*. Only six states authorized the death penalty for child rape, and 44 states did not. (*Kennedy v. Louisiana, supra*, 128 S.Ct. at p. 2651.) The high court repeatedly drew an analogy between this six-state showing and that in *Enmund v. Florida* (1982) 458 U.S. 752, where eight states imposed death on vicarious felony murderers, and 42 states did not. (*Kennedy v. Louisiana, supra*, 128 S.Ct. at pp. 2653, 2657.) In *Kennedy*, as in *Enmund*, the exceedingly lopsided tally established a national consensus against the death penalty for the crimes considered in those cases. (*Id.* at p. 2653.)

The evidence of a national consensus against executing actual felony murderers when there has been no proof of a culpable mental state with regard to the killing is just as stark as that presented in *Kennedy*. At most six states, including California, permit the death penalty for such felony murders, and 44 states and the federal government do not. (AOB at pp. 130-132 [reporting five states other than California]; see also Shatz, *The Eighth Amendment, The Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study* (2007) 59 FlaLRev. 719, 761 [adding Idaho to the list of states that along with California, Florida, Georgia, Maryland, and Mississippi authorize death for felony murder simpliciter).) Under the analysis used in *Kennedy* and the high court's other recent proportionality cases, *Atkins v. Virginia* (2002) 536 U.S. 304 and *Roper v.*

Simmons, supra, 543 U.S. 551, the death penalty for felony murder *simpliciter* is inconsistent with our society's national standards of decency and justice.

The high court's decision on the second part of the "evolving standards of decency" test further supports appellant's case. In determining that, in its own independent judgment, the death penalty is excessive for the crime of child rape, the Court drew a clear distinction between "intentional first-degree murder on the one hand and non-homicide crimes against individual persons, even including child rape, on the other." (*Kennedy v. Louisiana, supra*, 128 S.Ct. at p. 2660.) The Court repeated this distinction between "intentional murder" and child rape in comparing the number of reported incidents of each crime. (*Ibid.*) These references cannot be considered inadvertent or incidental. They build upon the Court's understanding in *Hopkins v. Reeves* (1998) 524 U.S. 88, 99, that there must be a finding that an actual killer had a culpable mental state with respect to the killing before the death penalty may be imposed for felony murder, and the Court's decision in *Tison v. v. Arizona* (1981) 481 U.S. 137, 157-158, in which the Court drew no distinction between the mental state required to impose death on actual killers and accomplices for a felony murder. They also are consonant with the understanding of individual justices about the limits of the death penalty for murder. (See *Graham v. Collins* (1993) 506 U.S. 461,501 [conc. opn. of Stevens, J., stating that an accidental homicide,

like the one in *Furman v. Georgia* (1972) 408 U.S. 238, may no longer support a death sentence]; see also *Lockett v. Ohio, supra,* 438 U.S. 586 at p. 621) [conc. & dis. opn. of White, J., stating that "the infliction of death upon those who had no intent to bring about the death of the victim is ... grossly out of proportion to the severity of the crime"].) Just as the death penalty is excessive for child rape, it is excessive for felony murder *simpliciter*.[10]

Under the traditional Eighth Amendment analysis used in *Kennedy*, there is now a national consensus that the death penalty may not be applied to unintentional robbery felony murderers. As discussed above, six states at most, including California, make a defendant death-eligible for felony murder *simpliciter*. Only seven other jurisdictions - Arkansas, Delaware, Illinois, Kentucky, Louisiana, Tennessee, and the United States military - authorize the death penalty for a robbery felony murderer who acts with a

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[10] The decision in *Kennedy* not only supports a challenge to felony murder *simpliciter*, but goes further and signals that the death penalty is disproportionate for any unintentional murder. The high court's repeated references to intentional murder indicate another step toward "confining the instances in which the punishment can be imposed." (*Kennedy v. Louisiana, supra*, 128 S.Ct. at p. 2650.) As *Kennedy* reveals, the high court now considers intentional murder as the constitutional norm for capital punishment. The decision pointedly suggests that under the Eighth Amendment, *Tison*'s requirement of reckless disregard for human life is no longer sufficient. To impose a death sentence, there must be proof that the defendant, whether the actual killer or an accomplice, acted with an intent to kill.

mental state less than intent to kill. (See *Shatz, supra*, at pp. 761-762.)[11] Thus, only 13 jurisdictions of a total 52 jurisdictions (the 50 states, the United States military, and the United States government) impose the death penalty without requiring proof of an intent to kill.[12] Of the remaining 39 jurisdictions, 15 jurisdictions do not use capital punishment at all.[13] The remaining 24 death penalty jurisdictions (1) do not make robbery murder or kidnap murder a capital crime, do not make felony murder a death-eligibility circumstance, or do not permit the prosecution to use the robbery to prove both the murder and death eligibility, or (2) require proof of an intent to kill. (See *Shatz, supra*, at p. 770, fn. 249-251.) In this way, at least 39 jurisdictions (38 states and the federal government) - three-quarters of all jurisdictions - do not follow California's practice of subjecting to execution a defendant who unintentionally kills during a robbery or kidnapping. This showing reflects a substantially stronger "national consensus against the

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[11] See *Shatz, supra*, at p. 770, fn. 248, citing Ark. Code Ann. § 5-10101(a)(I) (2006); Del. Code Ann. tit. 11, § 4209(e) (2007); 720 Ill. Comp. Stat. Ann. 5/9-1 (6)(b) (West 2007); Ky. Rev. Stat. Ann. §§ 532.025, 507.020 (West 20067); La. Rev. Stat. Ann. § 14:30(A)(I) (20067); Tenn. Code Ann. §§ 39-13-202, 39-13-204(i)(7) (2007); Manual for Courts Martial, United States, R.C.M. 1004(c) (2005).

[12] The District of Columbia, which does not have the death penalty, is excluded from this list.

[13] As of November 5, 2010, these states are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, West Virginia, Vermont, and Wisconsin. http://www.deathpenaltyinfo.orglFactSheet.pdf.

death penalty" than the high court found in striking down the death penalty as disproportionate for mentally retarded murderers in *Atkins v. Virginia, supra,* 536 U.S. at pp. 314-316 (30 states and the federal government) and for juvenile murderers in *Roper v. Simmons, supra,* 543 U.S. at p. 664 (30 states and the federal government). In short, the national consensus, as evidenced by state and federal legislation, establishes that the death penalty for an unintentional murder is a cruel and unusual punishment under the Eighth and Fourteenth Amendments.

2. Imposition of the death penalty for felony-murder *simpliciter* serves no valid penological purpose.

The imposition of the death penalty on a person who has killed negligently or accidentally is not only contrary to evolving standards of decency, but it fails to serve either of the penological purposes – retribution and deterrence of capital crimes by prospective offenders – identified by the Supreme Court. To be sure, in *Tison v. Arizona, supra*, 481 U.S. at pp. 156-157, the high court held that being a major participant and acting with reckless indifference to human life, rather than with an intent to kill, was enough to impose a death sentence on a felony murder accomplice. But more than 20 years have passed since *Tison*. As noted above, in *Kennedy* the high court appears to have raised the death-eligibility bar to intentional murder, which is wholly consistent with its emphasis on the need to restrain the reach of the ultimate penalty.

With regard to the deterrence rationale, common sense dictates that fear of execution will not deter a person from committing a murder he did not intend to commit. Precisely because of the unintentional nature of the murder, executing a felony murderer will not likely deter others from engaging in similar crimes. Indeed, in *Enmund*, the high court concluded that "it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation[.]'" (*Enmund v. Florida, supra*, 458 U.S. at 798-799, quoting *Fisher v. United States* (1946) 328 U.S. 463, 484 (dis. opn of Frankfurter, J.).)

In *Enmund*, the high court went further. It found the death penalty for felony murder had no deterrent value with regard to the underlying felony. The Court posited that the deterrent value of the death penalty might be different if the likelihood of a killing in the course of a robbery were substantial. (*Enmund v. Florida, supra*, 458 U.S. at p. 799.) But the empirical data refuted this hypothesis. Both historical data and then-recent data from 1980 "showed that only about one-half of one percent of robberies resulted in homicide." (*Enmund v. Florida, supra*, 458 U.S. at pp. 799-800 & fn. 23 & 24.) As a result, the high court concluded "there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony

itself." (*Enmund v. Florida, supra*, 458 U.S. at p. 799.)[14]

Moreover, as a general matter, the validity of the deterrence rationale is questionable. As Justice Stevens has observed, "[d]espite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders. In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment." (*Baze v. Rees* (2008) 553 U.S. 35; 128 S.Ct. 1520, 1547 (conc. opn. of Stevens, J.); see also *Shatz, supra*, at p. 767 & fn. 275 [noting the scholarly debate and empirical data on the deterrence question].) Even assuming that capital punishment may deter some murders, its deterrent value is lost when, as Justice White noted in *Furman*, the penalty is seldom imposed. (*Furman v. Georgia, supra*, 408 U.S. at p. 312.) As an empirical matter, in California the death penalty is rare for robbery felony murder. Only five percent of death-eligible robbery felony murderers (who had no more aggravating special circumstances) are sentenced to death. (*Shatz, supra*, at p. 745.)[15]

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[14] In *Tison*, the Court glossed over the deterrence justification and minimized *Enmund*'s discussion of the deterrence data, including its conclusion that the death penalty did not deter robberies or robbery murders. (See *Tison v. Arizona, supra*, 481 U.S. at p. 148; see also *id.* at p. 173, th. 11 (dis. opn. ofBrennan, J.)

[15] This very infrequent use of the death penalty for robbery felony murder raises both risk of arbitrariness and proportionality concerns and suggests that the imposition of the death penalty even for an intentional robbery felony murder is barred by the Eighth Amendment. (See, *Shatz, supra*, at pp. 745-768.)

Consequently, the deterrence rationale cannot justify executing a robbery felony murderer.

With regard to the retribution rationale, *Tison*'s conclusion that intent to kill was "a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous murderers" (*Tison v. Arizona, supra*, 481 U.S. at p. 157.) has been called into question by *Kennedy*'s assumption that intentional murder is the *sine qua non* for imposing capital punishment for crimes against individuals. The heart of the retribution rationale is that the criminal penalty must be related to the offender's personal culpability (*Tison v. Arizona, supra*, 481 U.S. at p. 149), which is determined by the acts he committed and the mental state with which he committed them. Notwithstanding *Tison*, intentional and unintentional murderers are not similarly culpable. As the high court previously had noted, "[i]t is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" (*Enmund v. Florida, supra*, 458 U.S. at p. 798, quoting H. Hart, *Punishment and Responsibility* 162 (1968); see *Tison v. Arizona, supra,* 481 U.S. at p. 156 ["Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."].) Moreover, the high court's Eighth Amendment narrowing jurisprudence already holds that not all murders can be classified as "the most serious of

crimes" (*Kennedy v. Louisiana, supra*, 128 S.Ct. at p. 2650) so as to warrant the death penalty. (See *Penry v. Lynaugh* (1989) 492 U.S. 302, 327 [to avoid arbitrary and capricious sentencing, the states must limit the death penalty to those murders "which are particularly serious or for which the death penalty in particularly appropriate"].)

Certainly, an unintentional murder is a very serious crime calling for a very serious penalty. But there is neither logic nor justice in punishing a person who kills unintentionally during an attempted robbery when his gun accidentally goes off with the same penalty as a person who kills intentionally. A person who kills unintentionally does not exhibit the kind of "extreme culpability" that makes him among "the most deserving of execution." (*Kennedy v. Louisiana, supra*, 128 S.Ct. at p. 2650.) Rather, unintentional felony murderers can be adequately "repaid for the hurt he caused" by a lesser punishment. (*Ibid.*) Retribution "does not justify the harshness of the death penalty here." (*Id.* at p. 2662.)

3. Professional opinion weighs against imposition of the death penalty for felony-murder *simpliciter*.

Respondent does not dispute that professional opinion also weighs against finding felony-murder *simpliciter* a sufficient basis for death-eligibility. (AOB 132-134; RB 95-97.)

4. International law bars use of the death penalty for felony-murder *simpliciter*.

Appellant's opening brief showed that Mr. Rountree's death

sentence, without any proof that the murder was intentional, violates international law. (AOB 134-136.) Article 6(2) of the ICCPR restricts the death penalty to only the "most serious crimes," and the Safeguards, adopted by the United Nations General Assembly, restrict the death penalty to intentional killings. This international law limitation applies domestically under the Supremacy Clause of the federal Constitution. (U.S. Const., art. VI, § 1, cl. 2.) Respondent does not dispute that international law is binding on California through the Supremacy Clause of the federal Constitution (U.S. Const., art. VI, § 1, cl. 2), or that international opinion is also relevant to a proportionality inquiry to assist in determining contemporary values. (See *Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21; *Enmund v. Florida, supra,* 458 U.S. at pp. 796-797, fn. 22.) Instead, respondent again argues that this Court has previously rejected similar arguments. (RB 96-97.) Because this issue has been addressed fully in Appellant's Opening Brief, no further briefing is needed here.

B. Mr. Rountree's Death Sentence Must Be Set Aside.

The death penalty is simply disproportionate to the crime of felony murder *simpliciter*. The national and international consensus is overwhelmingly against imposing the death penalty for an unintentional felony murder, and there is no constitutional justification for inflicting the death penalty for that crime. To uphold appellant's death sentence risks California's "descent into brutality, transgressing the constitutional

commitment to decency and restraint." (*Kennedy v. Louisiana, supra*, 128 S.Ct. at p. 2650.) Because there is no jury finding in this case that Mr. Rountree intended to kill, his death sentence must be set aside.

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VIII. THE TRIAL COURT IMPROPERLY ADMITTED AUTOPSY AND CRIME SCENE PHOTOGRAPHS THAT SERVED NO PURPOSE OTHER THAN TO INFLAME THE JURY, REQUIRING REVERSAL OF BOTH THE GUILT AND PENALTY PHASES.

Appellant objected to the use of photographs of the victim, including closeups of the wounds and autopsy photographs, and moved the trial court to exclude all such evidence as highly inflammatory and prejudicial. The trial court overruled each objection. Appellant's opening brief demonstrated that the crime scene and autopsy photographs were irrelevant to any disputed issue of fact and were unduly inflammatory in both the guilt and penalty phases of the trial. Their admission violated appellant's constitutional rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17; AOB 140-153.)

A. The Photos Were Irrelevant to Any Disputed Issue.

Respondent briefly argues that the prosecution was entitled to present its own evidence of guilt, that the photos were part [sic] of the circumstances of the crime, and that the trial court therefore did not abuse its discretion in admitting the photos. (RB 97-99.) However, this ignores the fact that no evidence is admissible unless it relates to a *disputed* fact that is of material consequence. (Evid. Code § 210.) Thus, a trial court simply has no discretion about whether to admit irrelevant evidence. (*People v.*

Turner (1984) 37 Cal.3d 302, 321 [error to admit crime scene photos that were unnecessary to prove any part of the prosecution's case].)

As discussed in greater detail in appellant's opening brief, Mr. Rountree's statements explicitly admitted *every fact* that the prosecution was trying to prove. The prosecution repeatedly argued that the photographs were relevant because they would show premeditation, but the *inference* of premeditation was a matter for argument based upon those undisputed facts. Accordingly, the photographs were irrelevant to any disputed issue and should have been excluded.

B. The Photographs Were More Prejudicial than Probative, and Their Admission Requires Reversal of the Death Sentence.

Even assuming, as the trial court did, that the photographs "may have some probative value" (1 RT 54), that value was outweighed by their prejudicial effect. Respondent does not dispute that viewing autopsy photographs make juries both more likely to convict and more likely to hand down a death sentence. (See Miller & Mauet, *The Psychology of Jury Persuasion* (1999) 22 Am. J. Trial Advoc. 549, 563 [juries that viewed autopsy photographs during medical examiner's testimony were more likely to vote to convict defendant than those not shown photographs]; Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-trial Experience, and Premature Decision Making* (1999) 83 Cornell L.Rev 1476, 1497-1499 [noting jurors said autopsy photographs played

prominent role in shaping death-sentencing decision that was reached prior to the conclusion of the trial].)

The true purpose of the photos - as shown by the prosecutor's closing arguments during both the guilt and penalty phases - was to inflame the jury, a jury composed of average citizens who, unlike both the trial court and this Court, had probably never seen such photos. In the final argument of both the guilt and penalty phases, the prosecutor asked the jury to consider the photo of the victim at the scene - but not, as the prosecution had previously argued to the court - to show the location or nature of the wounds. Instead, the prosecutor told the jury to consider that photo together with a picture of Stroder with her wedding ring, and the image of the defendants driving away in the victim's car with a "Liz and Charles" keychain. (18 RT 3312-3313; 24 RT 3872.) In other words, the photos were important for their emotional impact. It is just this type of graphic evidence and improper argument that is incompatible with a rational or impartial penalty judgement. (See *Saffle v. Parks* (1990) 494 U.S 484, 493 [death penalty must be reasoned moral response rather than emotional one].)

Under these circumstances, the State cannot demonstrate beyond a reasonable doubt that admission of the photographs was harmless error. Both the guilt and penalty phase judgments must be reversed.

* * *

IX. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT MR. ROUNTREE'S CONVICTION OF KIDNAPING AND THE TRUE FINDING ON THE KIDNAPING SPECIAL CIRCUMSTANCE.

The prosecution's case for a kidnaping was based solely upon the victim's presence in Mr. Rountree's car, a conclusory statement by the investigating officer, and sheer speculation. There simply was no corroborating physical evidence or testimony. Mr. Rountree's conviction of kidnaping, the true finding on the kidnaping special circumstance, and Mr. Rountree's first-degree murder conviction based on legally insufficient proof of guilt violated Mr. Rountree's state and federal rights to due process of law, a fair trial and reliable guilt and penalty determinations. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17; AOB 154-164.)

A. The Prosecution's Only Evidence For A Kidnaping Was the Detective's Summary of Mr. Rountree's Redacted Statements.

As shown in appellant's opening brief, the sole "evidence" for a kidnaping was the following testimony by Detective Giuffre:

"Q. Did Mr. Rountree acknowledge that when he had Diana in the Golf that she wasn't there voluntarily?

A. He admitted she was not there voluntarily." (17 RT 3008.)

Respondent asserts - twice - that the evidence showed that Contreras had entered the car and looked down to see the rifle, citing 17 RT 2998. (RB

100; 103.) This is flatly untrue. As quoted at length in appellant's opening brief, Detective Giuffre's testimony went as follows::

"Q. Where did Mr. Rountree first see Diana Contreras?

A. At the Valley Plaza shopping center.

Q. Did Mr. Rountree tell you if Diana Contreras arrived at the Valley Plaza in a vehicle?

A. He said she did.

Q. Did Mr. Rountree tell you why he decided to rob Diana Contreras?

A. He said she "just seemed like she wouldn't be as much trouble."

Q. Did Diana get in to the Volkswagen Golf?

A. Yes.

Q. How much money did Diana have with her?

A. $7.

Q. Where was the 30-30 rifle when Diana got into the Volkswagen Golf?

A. It was sitting where the gear shift is, partly in Mr. Rountree's lap and pointing down.

Q. After Diana got in the car did Mr. Rountree do anything with the gun?

A. He set the gun down between the seats.

Q. Did Mr. Rountree say how much money Diana had?

A. She had $7.

Q. Did Mr. Rountree say anything to Diana about the fact that she only had $7?

A. He said "is this all you got, all you can give me?"

Q. Did he tell you how Diana replied?

A. She said "well, I can go to the bank, you know, and get you some money and that's it, but I can only get $100 out."

Q. What did Mr. Rountree do when Diana made that statement to him?

A. He drove to Wells Fargo Bank...." (17 RT 2998-99; AOB 157-158.)

No other evidence was presented as to what Contreras saw or how she came to be inside the car with Mr. Rountree and Stroder. The evidence before the jury showed that Contreras entered the mall, and then suddenly was inside the car. Respondent argues that the jury reasonably inferred that Contreras was suddenly in the car due to force or fear, just as the prosecutor argued: there could be no innocent explanation for why Contreras got into the car with two strangers. (RB 103; 18 RT 3285-3313.) This ignores the testimony that Contreras was a generous person and the fact that Contreras limited the money she would give from the ATM to $100, an incongruous act from someone who feared for her life. (17 RT 2998-2999, 3013-3014.) Even if the circumstances created a suspicion that Contreras was moved by fear, it was equally plausible that she was moved by pity.

Contreras's presence in Mr. Rountree's car, a conclusory statement by the investigating officer, and sheer speculation were the only evidence for kidnapping, and were insufficient as a matter of law to allow the trier of fact to reach a "subjective state of near certitude of the guilt of the accused . . .." (*Jackson v. Virginia* (1979) 443 U.S. 307, 315.) Mr. Rountree's

conviction for kidnaping, felony murder and the kidnaping special circumstance must be reversed.

B. At a Minimum, Reversal of the Death Sentence is Required.

Respondent does not dispute that international law allows the death penalty only when the guilt of the person charged is based upon clear and convincing evidence "leaving no room for alternative explanation of the facts."[16] International law, of course, is directly binding on California through the Supremacy Clause of the federal Constitution. (U.S. Const., art. VI, § 1, cl. 2.) Nor does respondent dispute that the 8th Amendment draws its meaning, in part, from international law and the views of the world community.[17]

Thus, because of the heightened need for reliability in fact-finding when a death sentence is involved, evidence which may meet the minimum requirements to uphold a guilt verdict on appeal, but which is equivocal,

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[16] (See "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty,", ECOSOC Res. 1984/50, endorsed by the General Assembly in res. 39/118 of Dec 14, 1984, at ¶ 4; *Albert Wilson v. Philippines*, United Nations Human Rights Committee, Communication No. 868/1999, adopted Oct. 30, 2003, p. 5 [quoting above standard]; see also European Union, "Policy Towards Third Countries on the Death Penalty," General Affairs Council, June 29, 1998 [adopting standard].)

[17] (See *Trop v. Dulles* (1958) 356 U.S. 86, 100 [8th Amendment draws its meaning from standards of decency that mark the progress of a maturing society]; *Lawrence v. Texas* (2003) 539 U.S. 558, 572-573 [recognizing importance of international law in determining constitutional issues]; *Atkins v. Virginia, supra,* 536 U.S. at p. 316, fn. 21[citing view of "world community"].)

must be held insufficient to uphold a sentence of death. Accordingly, the death judgment violates the restrictive nature of international standards and cannot meet the Eighth Amendment standards of heightened reliability. The judgment against Mr. Rountree must be reversed.

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X. THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER.

In appellant's opening brief, he has shown that the failure to instruct on the lesser-included offense of voluntary manslaughter deprived him of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17; *People v. Geiger* (1984) 35 Cal.3d 510, 518-519; *Beck v. Alabama* (1980) 447 U.S. 625, 637; AOB 165-173.) Accordingly, reversal of the convictions, the special circumstance findings, and the death judgment is required.

A. There Was Substantial Evidence To Support An Instruction on Voluntary Manslaughter.

Appellant requested a voluntary manslaughter instruction. (6 CT 1721-22, 17 RT 3117-3118.) Respondent agrees that voluntary manslaughter was a lesser-included offense, and that this Court must independently review whether manslaughter instructions were warranted, without deference to the trial court's ruling. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215; *People v. Waidla* (2000) 22 Cal.4th 690, 733; RB 104-105.) There is a presumption, however, that "[d]oubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused." (*People v. Ratliff* (1986) 41 Cal.3d 675, 694.)

Respondent notes that appellant has cited to evidence not before the jury - appellant's confessions (RB 107), but does not address the fact that, as shown in Argument IV, the trial court erroneously prevented the jury from hearing Mr. Rountree's confessions, then barred the voluntary manslaughter instructions supported by those confessions.

After then reviewing appellant's confessions, respondent argues that "there was no evidence that appellant acted under such provocation that would arouse the passions of an ordinarily reasonable person when he killed Diana [Contreras]." (RB 106.) Respondent asserts that the argument between Stroder and Contreras was insufficient as a matter of law to justify an instruction. This is incorrect. Respondent, like the trial court, substitutes its judgment for that of the jury. The *Breverman* court made clear that " 'no specific type of provocation [is] required ....'" [Citations.] Moreover, the passion aroused need not be anger or rage, but can be any "'*[v]iolent, intense, high-wrought or enthusiastic emotion*'" [Citations] other than revenge [Citation.]" (*People v. Breverman* (1989) 19 Cal.4th.142, 163, emphasis added.) Here, Mr. Rountree was scared and ready to flee when suddenly an argument broke out between Stroder and Contreras, circumstances which might certainly cause a "violent, intense, high-wrought or enthusiastic emotion." And, of course, in evaluating whether Mr. Rountree was entitled to the voluntary manslaughter instruction, this Court must take the proffered evidence as true, "regardless of whether it

was of a character to inspire belief. [Citations.]" (*People v. Wilson* (1967) 66 Cal.2d 749, 762.) "'Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused.' [Citations.]" (*People v. Flannel* (1979) 25 Cal.3d 668, 685.) The issue should have been presented to the jury, not decided by the trial court.

B. The Error Was Prejudicial.

Respondent does not dispute that, if the trial court errred in failing to give the instruction, reversal of the convictions, the special circumstance findings, and the death judgment is required. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17; AOB 172-173.)

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XI. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING MR. ROUNTREE'S MOTION TO QUESTION MEMBERS OF THE VICTIM'S FAMILY ABOUT WHETHER THEY WOULD BE SATISFIED WITH A SENTENCE OF LIFE WITHOUT PAROLE.

Press reports during the trial indicated that one or more family members did not feel death was the appropriate sentence and would be satisfied with a sentence of life without parole. (See 21 RT 3353, 3444U.) Appellant's motion to put this evidence before the jury was denied. This ruling was incorrect, as such evidence was admissible both as mitigation evidence and as rebuttal evidence to the prosecution's argument that redress for the family demanded a sentence of death. The erroneous denial of the motion violated appellant's rights to due process, a fair jury trial, equal protection, and a reliable jury determination on penalty. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17; AOB 174-186.)

Respondent argues, as appellant acknowledged in the opening brief, that this Court has rejected similar claims in the past based on a finding that the U.S. Supreme Court "has never suggested that the defendant must be permitted to do what the prosecution may not do."[18] (RB 108-109; *People*

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[18] In California defendants in capital cases are allowed to introduce an extremely broad array of mitigation evidence: eight separate categories of mitigation evidence, including "[a]ny . . . circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime." (Pen. Code § 190.3, subd. (k).) There is no equivalent provision for aggravating circumstances. In fact, there are precisely three narrowly-

v. Smith (2003) 30 Cal.4th 581, 622.) Appellant has acknowledged the *Smith* decision and asked the Court to reconsider its reasoning, both as a matter of law and in the context of this case. The arguments contained in appellant's opening brief set forth the reasons establishing why this Court should revisit the issues. (AOB 174-186.) The matter is fully joined and there is no need for further briefing at this time.

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drawn categories of aggravating evidence. Thus, the fact that the prosecution is barred from introducing such evidence is irrelevant in determining whether the defendant may do so.

XII. THE TRIAL COURT PREJUDICIALLY ERRED IN ADMITTING INFLAMMATORY VICTIM IMPACT EVIDENCE.

As shown in appellant's opening brief, the trial court admitted testimony and photographs about Diana Contreras's childhood, future plans, testimony from a friend, and emotional testimony that diverted the jury's attention from its proper role and invited an irrational, purely subjective response. The victim impact evidence used in this case, and the prosecutor's argument exploiting that inflammatory evidence, rendered the penalty phase fundamentally unfair under the due process clause and the death verdict unreliable under the cruel and unusual punishment clause. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15; AOB 187-197.)

Respondent accurately notes that this Court has allowed a broad range of victim impact evidence despite the very limited language of *Payne*, which allowed a "quick glimpse" into the victim's life. (See *Payne v. Tennessee* (1991) 501 U.S. 808, 825; RB 114.) Appellant submits that this Court should reconsider its decisions and bring California law into conformance with *Payne* for the reasons stated in Appellant's Opening Brief. Mr. Rountree's death sentence must be stricken and the case remanded for a new penalty phase.

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XIII. THE PROSECUTOR'S PENALTY PHASE ARGUMENT IMPROPERLY PRESENTED AN EMOTIONAL PLEA TO THE JURORS TO SATISFY SOCIETY'S DEMANDS AND PROVIDE VENGEANCE FOR THE VICTIM AND HER FAMILY.

The prosecutor's penalty phase argument went beyond the limits of acceptable advocacy by using emotion in order to inflame the jury and by arguing that the death sentence was required to satisfy society's demands and to make the victim's family whole. The argument violated Mr. Rountree's federal and state constitutional rights to due process, a fair trial, equal protection, and a reliable jury determination on penalty. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15-17; AOB 198-205.)

A. The Prosecutor Improperly Argued That Society's "Revulsion" for Grave Crimes Required Imposition of the Death Penalty.

Respondent denies that the prosecutor told the jury that a death sentence was necessary because of society's view of serious crime. (RB 120.) In fact, the prosecutor told the jury that punishment is the way in which society expresses its denunciation of wrongdoing and that, in order to maintain respect for the law, it was essential that punishment for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them.[19] She then asked for a death sentence on behalf of the

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[19] The argument is also misleading because the law is satisfied with either life imprisonment without parole or the death sentence. (See *People v. Brown* (1985) 40 Cal.3d 512, 537, fn. 7.)

victim, her family, and the jurors' *community*. The prosecutor, quoting an advocate of capital punishment, told the jury:

> "Punishment is the way in which society expresses its denunciation of wrongdoing and in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive [sic] and nothing else. The truth is that some crimes are so outrageous that society insists on adequate punishment because the wrongdoer deserves it, irrespective of whether it is a deterrent or not.
>
> In this case, I'm asking you for a verdict of death because these two deserve it for what they did to Diana Contreras and to her loved ones and to the community." (24 RT 3888-3889.)

Respondent then argues that, if the prosecutor did "suggest" that death was necessary because of society's views, appellant had not explained how the prosecutor's remarks were improper argument that might overwhelm a jury. (*Ibid.*) However, as appellant clearly argued in his opening brief - and courts have held - this kind of argument can prevent jurors from considering mitigation and reaching an individualized judgment about a defendant, because if society's "revulsion" warranted the death penalty in and of itself, no amount of mitigation could ever overcome it. (AOB 200.) Society's views are not a proper aggravating circumstance, and it is simply improper to use the jurors' community role to appeal to their passions. (See *United States v. Williams* (9th Cir. 1993) 989 F.2d 1061, 1072.) Reversal is required.

B. The Prosecutor Improperly Contrasted Mr. Rountree's Life in Prison With the Victim in Her Grave.

Respondent concedes that the prosecutor described both the family's emotions and everything the victim would never be able to do again, in order to contrast their loss with Mr. Rountree serving a life sentence without parole. (RB 120-121; 24 RT 3865-3866, 3886-3887.) Respondent argues, however, that doing so was merely stating the obvious - the victim will always be dead, and that this was proper argument. (RB 121.) This argument ignores that contrasting the permanency of the victim's death, as contrasted to life in prison, is unfair because all homicides by definition involve this situation. As the Oklahoma court has found,

> "the State's contention – it is unfair for [the defendant] to live since [the victim] is dead – creates a super-aggravator applicable in every death case. No amount of mitigating evidence can counter this argument, and if the jury agrees they may not even consider mitigating evidence."

(*Le v. State* (Okla.Crim App. 1997) 947 P.2d 535, 554-555; see also *Eddings v. Oklahoma*, *supra,* 455 U.S. at p. 105 [8th and 14th Amendments require individualized consideration of mitigating evidence].) Accordingly, the trial court erred in allowing the prosecutor to compare Mr. Rountree's life in prison with the permanency of the victim's death.

C. Reversal is Required.

Respondent agrees that, in the penalty phase, any substantial error requires reversal. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24;

People v. Wallace (2008) 44 Cal.4th 1032, 1092.) Respondent argues, however, that even if prosecutorial misconduct occurred, no reversal is required because the offending comments were brief when compared to the entirety of the prosecutor's argument, defense counsel argued for mitigation and life in prison, and jurors are warned that argument is not evidence. (RB 122.)

However, as shown above and in appellant's opening brief, the prosecutor's argument that the death sentence was required to satisfy society's demands and to make the victim's family whole became two emotional and improper "super-aggravators." Given the great weight afforded a prosecutor's words and the improper arguments used here, it is likely that the jury took the prosecutor's invitation and imposed the death penalty without any real consideration of mitigating evidence – an easy way to make a hard choice. If a death sentence were required to make a societal statement or were necessary to avenge the victim's loss – then the jury need not make a "reasoned moral response to the defendant's background, character and crime." (*Penry v. Lynaugh*, *supra*, 492 U.S. at p. 328.) The error requires that the judgment of death be reversed.

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XIV. THE TRIAL COURT IMPROPERLY REFUSED MR. ROUNTREE'S REQUESTED INSTRUCTION THAT ONE MITIGATING FACTOR MAY BE SUFFICIENT TO SUPPORT A VERDICT OF LIFE WITHOUT PAROLE.

The trial court refused to give an instruction requested by Mr. Rountree. The proposed instruction stated, "[A] single mitigating factor is sufficient to support a decision against death." (7 CT 1949.)

Respondent does not dispute that the proposed instruction correctly states the law, nor that instructions that clarify the sentencing process should be given upon a defendant's request. (*Simmons v. South Carolina* (1994) 512 U.S. 154, 172 .) Respondent does not dispute that this Court has held that it is proper to instruct a jury that a single mitigating factor may outweigh aggravation[20], nor that this Court has held that similar instructions to that requested by Mr. Rountree "significantly reduced the risk of juror misapprehension." (*People* v. *Sanders* (1995) 11 Cal.4th 475, 557.)

Instead, respondent cites cases holding that CALJIC No. 8.88 is accurate enough (RB 124), and cites *People v. Jones*, *supra,* 17 Cal.4th at p. 279. Appellant acknowledged and distinguished *Jones* in his opening brief, and respondent does not address the differences between the quantitative language of 8.88 - which compares the "totality of the aggravating circumstances" and "the totality of the mitigating circumstances" (6 CT

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[20] *People v. Grant* (1988) 45 Cal.3d 829, 857, fn. 5.

1862, 1864; CALJIC 8.88), and the proposed instruction, which explicitly states that a single mitigating factor is enough to warrant a sentence of life without parole. (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1250; AOB 206-209.)

It is not enough for the jury to be instructed that it can determine the appropriate verdict. Upon a defendant's request, it should be informed that an appropriate verdict may be based upon a single mitigating factor. That instruction was refused in the present case, violating due process and rendering the death sentence unreliable. (U.S. Const., 8th and 14th Amends.) Reversal is required.

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XV. THE DEATH VERDICT IS DISPROPORTIONATE IN MR. ROUNTREE'S CASE AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Appellant has argued that this Court should review appellant's culpability for Contreras' death in light of appellant's personal characteristics. (AOB 210-217.)[21] The crimes that occurred in this case were the result of a number of factors, including appellant's immaturity, emotional problems, and desperate state of mind. That these factors converged to create a terrible sequence of events does not excuse the crimes, but renders the death penalty "disproportionate to the defendant's personal responsibility and moral guilt." (*People v. Padilla* (1995) 11 Cal.4th 891, 962.)

Respondent argues that the loss to Contreras' friends, family, and community justify the sentence, as do appellant's maturity, prior criminal convictions, and personal characteristics. (RB 125-127.) Respondent argues that the evidence showed appellant to be helpful and responsible [citation], friendly, caring, and personable around girls [citation], a hard worker and good friend [citation]." (RB 127.) Respondent argues that there was no evidence that appellant was psychotic or sociopathic, or under the

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[21] Mr. Rountree made a motion for modification of verdict under Pen. Code section 190.4(e) based upon *People v. Dillon* (1983) 34 Cal.3d 441 and the mitigating factors discussed herein. (7 CT 2039-2047.) He also moved to reduce the penalty due to intra-case disproportionality. (7 CT 2060-2069.) Both motions were denied. (7 CT 2141-2144.)

influence of alcohol or drugs. (RB 127.) Thus, respondent concludes that, because appellant was sober, helpful, responsible, friendly and caring, he deserves to die. To the contrary, that evidence supports the conclusion that the shooting was indeed accidental, the result of desperation and horribly poor judgment. Mr. Rountree should be judged accordingly.

This Court must conduct its own review of the record to ensure that appellant's punishment is "tailored to his personal responsibility and moral guilt." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 482, quoting *Enmund v. Florida*, *supra,* 458 U.S.at p. 801.) For the reasons discussed in appellant's opening brief, the imposition of the death penalty in this case exceeds these standards by imposing a penalty that is reserved for the "worst of the worst" on a 22-year-old offender with a minor criminal record, and with a history of emotional and family problems. The penalty verdict therefore violated both the state and federal constitutions and must be overturned. (U.S. Const., 8th and 14th Amends.; Cal.Const., art. I, § 17.)

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XVI. MR. ROUNTREE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT BOTH THE GUILT AND PENALTY PHASES, AND THOSE CLAIMS WILL BE RAISED BY PETITION FOR WRIT OF HABEAS CORPUS.

As respondent correctly notes, appellant, in reliance upon this Court's precedents, will raise his ineffective assistance of counsel claims only in his petition for writ of habeas corpus. (RB 127; AOB 218; *In re Robbins* (1998) 18 Cal.4th 770, 814, fn. 34; accord, *People* v. *Mendoza Tello* (1997) 15 Cal.4th 264, 267.)

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XVII. IF ANY COUNT OR SPECIAL CIRCUMSTANCE IS REDUCED OR VACATED, THE DEATH VERDICT MUST BE REVERSED AND THE CASE REMANDED FOR A NEW PENALTY PHASE.

Appellant has shown that, if this Court reduces or vacates any of the counts or special circumstances, the penalty verdict should be reversed because the jury's consideration of the unauthorized factors in aggravation added improper weight to death's side of the scale and violated appellant's right to a fair trial and reliable penalty determination. (AOB 219-221; U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Art. I, sect. 17; *Stringer v. Black* (1992) 503 U.S. 222, 232.)

Respondent argues that this argument is premature, as no count or special circumstance has been reduced or vacated, and relies upon this Court to take the proper steps when such time comes. (RB 127-128.) Respondent does not dispute that the reliability of the death judgment would be severely undermined if it were allowed to stand despite the reduction or reversal of any of the counts.

Thus, to meet the stringent standards imposed on a capital sentencing proceeding by the Eighth Amendment, as well as article I, section 17 of the California Constitution, if this Court reduces or vacates any of the counts or special circumstances Mr. Rountree must be granted a new penalty trial to enable the fact-finder to consider the appropriateness of imposing death.

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XVIII. THE FAILURE TO PROVIDE INTER-CASE PROPORTIONALITY REVIEW VIOLATES MR. ROUNTREE'S CONSTITUTIONAL RIGHTS.

California does not provide for inter-case proportionality review in capital cases, although it affords such review in noncapital criminal cases. Respondent asserts that such review is not constitutionally required, citing *Pulley v. Harris* (1984) 465 U.S. 37 and *People v. Jackson* (2009) 45 Cal.4th 662, 701. (RB 128.) However, as shown in appellant's opening brief, the holding in *Pulley v. Harris* was premised upon untested assumptions about the California death penalty scheme:

> "[I]n *Pulley v. Harris*, 465 U.S. 37, 51 [], the Court's conclusion that the California capital sentencing scheme was not 'so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review' was based in part on an understanding that the application of the relevant factors ''provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'' thereby ''guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'' *Id.* at 53, quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (9th Cir. 1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley v. Harris.*" (*Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).)

The time has come for *Pulley v. Harris* to be reevaluated since, as this case illustrates, the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia, supra,* 408 U.S. at p. 313 (conc. opn. of White, J.).) Comparative case review is the most rational – if not the only – effective means by which to ascertain

whether a scheme as a whole is producing arbitrary results.

The failure to conduct inter-case proportionality review of death sentences violates Mr. Rountree's Eighth Amendment and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment and requires the reversal of his death sentence. (U.S. Const., 8th, & 14th Amends.; AOB 222-226.)

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XIX. CALIFORNIA'S DEATH PENALTY SCHEME, AS INTERPRETED BY THIS COURT AND APPLIED AT MR. ROUNTREE'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Appellant submits that various features of California's death penalty law violate federal constitutional standards, both as a matter of law and in the context of this case. Respondent relies on previous decisions of this Court rejecting similar claims. (RB 128-139.) Appellant submits that this Court should reconsider its decisions for the reasons stated in Appellant's Opening Brief. (AOB 227-259.)

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XX. MR. ROUNTREE'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW.

Appellant has argued that his death sentence violates international standards, both as a matter of substantive law and as it relates to our own requirements under the Eighth Amendment. (AOB 236-240; see *Atkins v. Virginia, supra,* 536 U.S. 304 [122 S.Ct. 2242, 2249, fn. 21] [the fact that the "world community" disapproves of executing the mentally retarded supports the conclusion that it violates the Eighth Amendment].) Respondent argues that this Court has rejected this claim in other cases. (RB 139.) Appellant submits that these decisions should be reconsidered in light of the prevailing international standards identified in his opening brief. Because this issue has been addressed fully in Appellant's Opening Brief, no further briefing is needed here.

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XXI. CUMULATIVE ERROR REQUIRES THAT THE GUILT AND PENALTY VERDICTS BE REVERSED.

Appellant's Opening Brief demonstrated how the errors in this case combined to create both the guilt and penalty verdicts in this case. (AOB 276-280.) Respondent states that there were no errors to accumulate, but does not dispute that if there are errors, they should accumulate to establish prejudice. (RB 140-141.)

There were multiple errors in appellant's trial. Those errors fed off each other and ultimately led to the guilt and penalty verdicts. The trial court denied a motion to change the trial's venue and empaneled a jury - over Mr. Rountree's repeated objections - that had been saturated in media reports about the case, that contained jurors angry at Mr. Rountree and others ready to impose the death penalty before the guilt phase had even begun. (Arguments I & II.) Simultaneously, the court dismissed for cause a prospective juror with religious scruples about the death penalty who had repeatedly told the court he would follow its directions. (Argument III.) The trial court's blatantly uneven application of the *Witherspoon/Witt* standard meant that appellant exhausted his peremptory challenges with angry and biased jurors remaining on his jury. Mr. Rountree's fate was effectively sealed when his jury was empaneled. (Arguments I-III.)

In addition, that death-prone jury never heard Mr. Rountree's two confessions, but only redacted versions that falsely showed Mr. Rountree as

responsible for everything that had occurred. (Argument IV.) The trial court then gave numerous instructions that diminished the reasonable doubt standard, lowered the prosecution's burden of proof, and denied Mr. Rountree his only defense at guilt phase - that the killing had been accidental. (Arguments V-VII; XIX.) In the penalty phase, the trial court admitted inflammatory and impermissible victim impact evidence while simultaneously barring evidence that some members of the victim's family thought a life sentence was appropriate for Mr. Rountree. (Arguments XI & XII.) This resulted in a death sentence that was disproportionate to Mr. Rountree's character, mental state, and personal responsibility. (Argument XV.)

The cumulative effect of these errors so infected Mr. Rountree's trial with unfairness as to deprive Mr. Rountree of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty. Accordingly, reversal of the convictions, the special circumstance findings, and the death judgment is required. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17; AOB 276-280.)

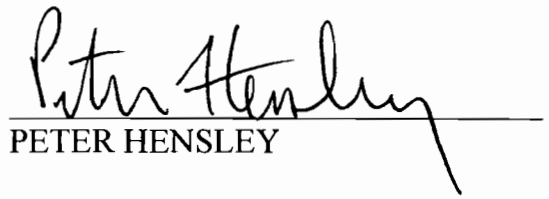
***

CONCLUSION

For all the reasons stated above, as well as those stated in Appellant's Opening Brief, reversal of the convictions, the special circumstance findings, and the death judgment is required.

DATED: November 19, 2010

Respectfully submitted,



PETER HENSLEY

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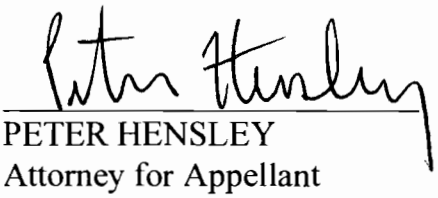
CHARLES F. ROUNTREE

CERTIFICATE OF COUNSEL

(Cal. Rules of Court, Rule 8.630(b)(2))

I, Peter Hensley, represent appellant in this automatic appeal. I conducted a word count of this brief using my office's computer software. On the basis of that computer-generated word count, I certify that this brief is 18,116 words in length.

Dated: November 19, 2010



PETER HENSLEY
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Re: *People v. Rountree* No. S048543
(Kern Sup. Ct. No. 57167-A)

I, Peter Hensley, declare that I am over 18 years of age, and not a party to the within cause; my business address is 315 Meigs Road, Suite A-382, Santa Barbara, CA 93109. A true copy of the attached:

APPELLANT'S REPLY BRIEF

was served each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

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Each envelope was then, on November ____, 2010, sealed and deposited in the United States Mail at Santa Barbara, California, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November ___, 2010 at Santa Barbara, California.

_____
Peter Hensley