IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Automatic Appeal From the Superior Court of San Diego County
Honorable Kenneth K. So, Judge

APPELLANT'S REPLY BRIEF

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DEATH PENALTY

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INTRODUCTION

In this reply brief appellant addresses specific contentions made by respondent requiring additional discussion in order to present the issues fully to this court. Appellant does not address every claim raised in the opening brief, nor does he reply to every contention made by respondent with regard to the claims discussed. Rather, appellant focuses only on the most salient points not previously covered in the opening brief. The absence of a reply to any particular point made by respondent is not intended as a concession of any point made by respondent, or an abandonment or waiver of any argument advanced in the opening brief, but merely reflects appellant's view that the matter has been adequately addressed and that the positions of the parties have been fully presented. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

AUTHORITIES AND ARGUMENT

I.

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

With respect to appellant's first assignment of error, respondent argues that the trial court properly admitted evidence of two prior incidents under Evidence Code section 1101, subdivision (b), to show identity, preparation, plan, modus operandi, and intent, and under section 1108, to show propensity to commit sexual assaults. Alternatively, respondent argues that any error was harmless. (See Respondent's Brief at pp. 60-77.) However, as discussed at length in appellant opening brief, and further below, the evidence was not properly admitted under either section. (See Appellant's Opening Brief at pp. 51-86.) Additionally, the evidence should have been excluded under Evidence Code section 352 as unduly prejudicial, because it lacked probative value, was cumulative and unnecessary, and because it was time consuming, confusing and inflammatory. (See Appellant's Opening Brief at pp. 78-84.) Moreover, the erroneous admission of this improper character evidence cannot be regarded as harmless. (See Appellant's Opening Brief at pp. 84-86.)

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

Respondent argues first that the trial court properly admitted evidence of the uncharged offenses under Evidence Code section 1101, subdivision (b). (Respondent's Brief at pp. 67-72.) However, the evidence did not tend logically to prove a material issue of fact as required for admission under subdivision (b) of section 1101.

(1) ***Identity***

Respondent contends that the other crimes evidence was admissible on the question of identity in that "the uncharged offenses shared plenty of distinctive similarities with the charged offense to be highly probative for this purpose." (Respondent's Brief at p. 68.) For other crimes evidence to be admissible to prove identity, "the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403-404; accord *People v. Balcom* (1994) 7 Cal.4th 414, 424-425.) "'"The highly unusual and distinctive nature of both the charged and [uncharged] offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense." [Citation.]'" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1003.) Respondent's argument must be rejected because the offenses at issue in the present case have virtually no common marks with any degree of distinctiveness and they could not, by any stretch of the imagination, be regarded as "signature" crimes.

With respect to the Baker case, respondent argues: "Erskine accomplished his murders of Baker, Jonathan, and Charlie the same way — strangulation." (Respondent's Brief at p. 69.) However, on the next page respondent correctly notes that "Renee Baker's cause of death was actually drowning not strangulation, that she sustained blunt force trauma injuries to her head and face, and that there was no indication she had been tied up or gagged." (Respondent's Brief at pp. 69-70.) However, respondent contends that: "These differences are diminished by the fact that Renee Baker's, Jonathan's, and Charlie's bodies were found in secluded outdoor locations,

their clothing was neatly piled, Erskine's sperm was in Renee's and Charlie's mouths, and Erskine's cigarette butts littered both crime scenes." (Respondent's Brief at p. 70.) The circumstances referred to by respondent do not satisfy the test for admissibility on the question of identity as they can not be described as so "unusual and distinctive as to be like a signature." (See *People v. Ewoldt, supra*, 7 Cal.4th at pp. 403-404.) Consequently evidence regarding the Baker case was inadmissible on the issue of identity. (See also Appellant's Opening Brief at pp. 68-71.)

With respect to the Jennifer M. case, respondent argues that any dissimilarities in the cases "are diminished by the fact that Erskine used the exact same materials to bind and gag Jennifer M., Charlie, and Jonathan, as well as forced oral copulation and strangulation involved in the offenses." (Respondent's Brief at p. 69.) Initially it is important to note that Jennifer M. was not "strangled." She testified that appellant choked her with his hands at one point to gain her compliance, but she was not killed. (26 RT 3695-3696.) In fact appellant ultimately drove her to a location at her request, and dropped her off. (26 RT 3710-3711.) In this respect the Jennifer M. case was very unlike the charged offenses where the victims died as the result of ligature strangulation. Additionally, the "materials" used to bind Jennifer M. — duct tape and rope — were not unique, and certainly did not amount to a signature crime method. Contrary to respondent's argument, there were virtually no distinctive similarities between the Jennifer M. case and the charged offenses.

Since there were insufficient distinctive common marks between the prior incidents and the offenses charged in the present case to render them "signature" crimes, the evidence was not admissible on the question of identity.

(2) Common Scheme or Plan

Respondent argues that "[t]he prosecutor was entitled to bolster its case that Erskine was the perpetrator and acted in the requisite manner with evidence that he had acted pursuant to a common scheme or plan." (Respondent's Brief at p. 70.) "In establishing a common design or plan, evidence of uncharged misconduct must demonstrate, 'not merely a similarity in results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) "To establish the existence of a common design or plan, the common features must indicate the existence of a plan . . . ." (*Id.* at p. 403.)

Respondent argues that "[t]he trial court properly exercised its discretion in admitting the evidence as it tended to show a common plan in luring victims to secluded locations in order to sexually assault them." (Respondent's Brief at p. 71.) However, respondent's argument is based on generic factors showing only a propensity to commit sex offenses rather than a concurrence of common features — an impermissible purpose under Evidence Code section 1101. In light of the high potential for prejudice associated with other crimes evidence, when prior misconduct evidence is presented under subdivision (b) of section 1101, courts must carefully consider whether it is genuinely being offered for a proper, non-character purpose, or whether it might actually be aimed at sustaining an improper inference of action in conformity with a person's bad character. Otherwise evidence of past misconduct could routinely be allowed to sustain an inference of action in conformity with bad character — so long as the proponent of the evidence could proffer a plausible companion inference that does not contravene the rule. (*People v. Smallwood* (1986) 42 Cal.3d 415, 428

["Whenever an inference of the accused's criminal disposition forms a 'link in the chain of logic connecting the uncharged offense with a material fact' [citation] the uncharged offense is simply inadmissible, no matter what words or phrases are used to 'bestow[] a respectable label on a disreputable basis for admissibility — the defendant's disposition.' [Citation.]"].) Here the evidence was not plausibly aimed at a proper purpose, and was, therefore, inadmissible as evidence of a common scheme or plan.

(3) Intent

Respondent argues that the other crimes evidence was admissible on the question of intent because "the prosecutor was required to prove all elements of the crimes and special circumstances, including that he killed Jonathan and Charlie intentionally while committing the sex offenses." (Respondent's Brief at p. 72.) This court has articulated a three-part test for determining the admissibility of other-crimes evidence which takes into consideration: "(1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence." (*People v. Kelly* (2007) 42 Cal.4th 763, 783.) Here the evidence did not relate to a material fact, and did not have any tendency in reason to prove intent other than on the basis of propensity.

"In order to satisfy the requirement of materiality . . . the ultimate fact to be proved must be 'actually in dispute.' [Citation.] If an accused has not 'actually placed that [ultimate fact] in issue,' evidence of uncharged offenses may not be admitted to prove it. [Citations.]" (*People v. Thompson* (1980) 27 Cal.3d 303, 315.) Furthermore, otherwise relevant misconduct evidence is not admissible if it is merely cumulative with respect to other evidence the prosecution may use to prove the same issue. (*People v. Alcala* (1984) 36

Cal.3d 604, 631-632; *People v. Guerrero* (1976) 16 Cal.3d 719, 724.) As shown by the prosecution's closing argument to the jury, the other crimes evidence was cumulative and unnecessary with regard to issues of intent. Specifically with respect to intent to kill and premeditation and deliberation, the prosecutor argued that these matters were proved beyond dispute based upon the circumstances of the victims' deaths. (29 RT 4146.) The prosecutor also essentially conceded that the other crimes evidence was cumulative and unnecessary with respect to any issue regarding felony murder based upon the commission of sex offenses.[1] (29 RT 4149-4158.) Clearly then, the evidence did not relate to a material issue of disputed fact with respect to intent.

Even had there been a disputed issue of fact regarding intent, the other crimes evidence did not have a tendency in reason to prove intent other than by means of inferences based upon propensity. (See Appellant's Opening Brief at pp. 72-74.) Under these circumstances, the prior crimes evidence was not admissible under subdivision (b) of section 1101 on the question of intent.

B. <u>The Trial Court Erred in Admitting the Prior Crimes Evidence Under Evidence Code Section 1108.</u>

Respondent's argument with regard to admissibility of the other crimes evidence under Evidence Code section 1108 is fully addressed by the discussion set forth in appellant's opening brief, and it would serve no purpose to repeat it here. (See Appellant's Opening Brief at pp. 62-65, 75-84.)

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[1] In this regard the prosecutor stated: "I don't think there will be any argument but that the defendant committed the crime of oral copulation with Charlie and that the murder was committed during the commission of that offense." (29 RT 4153.) Similarly, the prosecutor stated: "As to both boys, there's no contest — it is uncontradicted — what lewd acts occurred." (29 RT 4156.)

C. The Evidence Should Have Been Excluded Under Evidence Code Section 352.

The first relevant factor under Evidence Code section 352 is the probative value of the evidence. "[E]vidence is probative if it is material, relevant, and necessary. '[H]ow much "probative value" proffered evidence has depends upon the extent to which it tends to prove an issue by logic and reasonable inference (degree of relevancy), the importance of the issue to the case (degree of materiality), and the necessity of proving the issue by means of this particular piece of evidence (degree of necessity).'" (*People v. Thompson*, *supra*, 27 Cal.3d at p. 318, fn. 20 [disapproved on another point in *People v. Rowland* (1992) 4 Cal.4th 238, 260].) Respondent argues only in a conclusory way that "there were substantial similarities between the Jennifer M. sexual assault, the Renee Baker murder, and the murders of Jonathan and Charlie so as to make the evidence of the uncharged crimes highly probative." (Respondent's Brief at p. 77.) However, as discussed above, and further in appellant's opening brief, the other crimes evidence admitted in the present case did not tend logically and by reasonable inference to prove any contested issue of material fact. The probative value of the evidence was, therefore, essentially non-existent, and respondent sets forth no specific argument leading to a contrary conclusion.

"Because substantial prejudice is inherent in the case of uncharged offenses, such evidence is admissible only if it has substantial probative value." (*People v. Kelly*, *supra*, 42 Cal.4th at p. 783.) Even if the evidence were determined to have some tendency in reason to prove a material fact, under section 352 this weak probative value must be balanced against factors affecting its potential for negatively impacting the trial including the likelihood of confusing, misleading, or distracting the jurors from their main

inquiry, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as excluding irrelevant though inflammatory details surrounding the offense. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.) On this point respondent argues that "[n]o reason existed to exclude this evidence." (Respondent's Brief at p. 75.) However, as discussed at length in appellant's opening brief, all of the relevant section 352 factors weighed against admission of the evidence. (See Appellant's Opening Brief at pp. 81-84.)

D. Prejudice

Traditionally, propensity evidence is disfavored on the ground that people should be tried for their charged acts and not for their past deeds or personalities. (*United States v. Myers* (5th Cir. 1977) 550 F.2d 1036, 1044 ["A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is."]; *People v. Garceau* (1993) 6 Cal.4th 140, 186 [noting that the use of such evidence may dilute the presumption of innocence].) The prohibition against admission of character evidence to prove conduct on a specified occasion is, thus, based on fundamental principles of fairness. "'While to the layman's mind a defendant's criminal disposition is logically relevant to his guilt or innocence of a specific crime, the law regards the inference from general to specific criminality so weak, and the danger of prejudice so great, that it attempts to prevent conviction on account of a defendant's bad character. . . .'" (*People v. Smallwood, supra* 42 Cal.3d at p. 429.) The rule guards against the "natural and inevitable tendency" of jurors to give excessive weight to the prior conduct and either allow it to bear too strongly on the present charge, or to take the proof of it as justifying a conviction irrespective of guilt of the present charge. (*People v. Guerrero*,

supra, 16 Cal.3d at p. 724; *People v. Schader* (1969) 71 Cal.2d 761, 773, fn. 6; see also *People v. Ortiz* (2003) 109 Cal.App.4th 104, 111.) "[O]nce prior convictions are introduced, the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality." (*United States v. Burkhart* (10th Cir. 1972) 458 F.2d 201, 204.)

In the present case approximately 39% of the prosecution's testimonial evidence in the guilt phase related to other crimes.[2] The prosecution presented testimony from four witnesses relating to the Jennifer M. case (26 RT 3685-3875), and five witness regarding the Baker incident (28 RT 3979-4052, 29 RT 4078-4093). This evidence was probative only in terms of propensity, and the jurors were instructed that they could use the evidence to "infer that the defendant had a disposition to commit sexual offenses" and to "infer that he was likely to commit and did commit the crime or crimes of which he is accused. (CALJIC No. 2.50.01 at 12 CT 2728-2729.) During closing argument the prosecutor referred to the extensive other crimes evidence without intelligibly and logically connecting it directly to a material issue of fact, basically encouraging the jury to use inferences based on propensity to fill in any gaps it might find in the prosecution's case. (29 RT 4144 ["[Y]ou can use it for determining who it was that committed the murder against the boys for the identity of the perpetrator. [¶] You can use it for intent. What was the defendant's intent? You can use it for, what's called, M.O., which I'm sure you guys have heard of before. And you can use it for propensity. Okay? Did he have the disposition to commit the crimes?"].) Under these circumstances, and in light of the inherently prejudicial nature of the

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

improperly admitted evidence, it cannot be said the error was harmless beyond a reasonable doubt. (See *People v. Garceau*, *supra*, 6 Cal.4th at p. 186 [applying the standard of review applicable to federal constitutional violations to find error harmless]; *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 775 [holding that an erroneous instruction permitting the jury to consider the defendant's propensity to commit murder "so offended fundamental conceptions of justice and fair play as to rise to the level of constitutional violation.]; cf *Old Chief v. United States* (1997) 519 U.S. 172, 180 [holding that "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged" constitutes unfair prejudice, and explaining that "[t]he term 'unfair prejudice' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."].) The judgment of the trial court must, therefore, be reversed.

II.

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

In his opening brief appellant argued that the trial court erroneously granted the prosecution's challenge for cause to prospective juror #154. (See Appellant's Opening Brief at pp. 87-104.) The court dismissed this prospective juror after she voiced reservations about capital punishment, but also repeatedly confirmed that she was willing and able to set aside her personal beliefs and follow the court's instructions with respect to the matter of penalty.[3] Based on two of her responses on the written questionnaire, the trial court concluded that "she is unable to vote for death." (66 RT 10531.) However, as discussed at length in appellant's opening brief, and further below, the prosecution failed to carry its burden of proving that the excused potential juror's views would "prevent or substantially impair the performance of his [or her] duties as a juror" (*Wainwright v. Witt* (1985) 469 U.S. 412, 423). (See Appellant's Opening Brief at pp. 97-104.)

Respondent argues generally that the trial court properly excused prospective juror #154 under the *Witt* standard. (Respondent's Brief at pp. 83-86.) More specifically, respondent contends that prospective juror #154 gave conflicting answers "both in court and on the questionnaire." (Respondent's Brief at p. 86.) In light of the conflicting answers, respondent's argument continues, deference must be accorded to the trial court's ruling. (Respondent's Brief at pp. 84, 86.) Respondent concludes that

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[3] Prospective juror #154's responses regarding her ability to follow the law pertained directly and exclusively to the matter of punishment since she was a prospective juror in the second penalty phase trial.

"[t]he record supports the trial judge's reasoning." (Respondent's Brief at p. 85.)

Respondent's argument must be rejected for several reasons. First, contrary to respondent's characterization, prospective juror #154's answers were not clearly conflicting with respect to the critical *Witt* inquiry — whether a juror generally opposed to capital punishment can set aside his or her personal views and follow the law as the trial judge instructs (see *People v. Thompson* (2016) 1 Cal.5th 1043, 1065). Second, there is not even a hint in the record that the trial court's ruling was in any way based on findings of fact that are entitled to deference on appeal. Above all, the trial court's ruling excusing prospective juror #154 for cause is not supported by substantial evidence.

Generally, a prospective juror's views about capital punishment may support an excusal for cause if those views would "'prevent or substantially impair'" performance of the juror's duties in accordance with the court's instructions and the juror's oath. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; *People v. Cunningham* (2001) 25 Cal.4th 926, 975.) "It is important to remember that . . . those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176.) "The *Lockhart* approach contemplates a two-part inquiry. It recognizes that a prospective juror may have strong feelings about capital punishment that would generally lead to an automatic vote, one way or the other, on the question of penalty. However, it also allows for the possibility that such a juror might be able to set aside those views and fairly consider both

sentencing alternatives, as the law requires. Both aspects of the inquiry are important." (*People v. Leon* (2015) 61 Cal.4th 569, 591.)

In evaluating whether a prospective juror may properly be excused for cause, "[t]he critical issue is whether a life-leaning prospective juror — that is, one generally (but not invariably) favoring life in prison instead of the death penalty as an appropriate punishment — can set aside his or her personal views about capital punishment and follow the law as the trial judge instructs." (*People v. Thompson*, *supra*, 1 Cal.5th at p. 1065.) In the present case prospective juror #154 disclosed her general opposition to the death penalty, but also repeatedly confirmed her ability to set her personal feelings aside and follow the trial court's instructions in determining the appropriate penalty.

Throughout her questionnaire responses, prospective juror #154 declared that she would be willing and able to follow the trial court's instructions with regard to the question of penalty.[4] She subsequently confirmed her ability to follow the law during voir dire. For example when defense counsel specifically asked: "Given your views, are you someone who could nevertheless take the law from the judge, as he instructs it to you, listen

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[4] For instance, in response to question 77: "The jurors who decide this case will be told that they must follow the law as the judge explains it to them, whether or not they like the law. Can you promise to do that?" she answered "Yes." (72 CT 17748.) In response to question 80: "Everyone has some biases, prejudices or preconceived ideas. Do you believe you have any that would interfere with your ability to fairly decide this case?" she wrote: "I'm not in favor of the death penalty law in general but I am fair and honest about following the judge's direction." (72 CT 17749.) In response to the last question on the questionnaire: "Is there anything else the court should know about you?" she wrote: "I do feel I can follow the law laid out by the judge." (72 CT 17757.)

to this evidence and be as open to the idea of returning a death verdict as you might be to returning a life verdict?" she replied: "Yes. I'm able to follow the laws that the judge provides to me. However, I don't know how I would feel should the case be that this gentleman was, you know, sentenced to death. I'm not positive that I could handle that afterwards." (66 RT 10447.) Defense counsel continued: ". . . That's part of what we're here for this morning. It's not necessarily to find out how you feel. You're entitled to feel miserable. [¶] But the question is, if you felt that that was the appropriate sentence, if you'd heard the evidence, [you have] seen at least a little snippet of what it's about — the violent criminal history, the nature of the crimes against these boys — if you felt that death was appropriate, you went into the jury room, you discussed it with your fellow jurors, if you were convinced that that was the appropriate sentence, could you come into this courtroom and announce it, stand by it?" Prospective juror #154 replied: "If I was convinced that that was the appropriate sentence in accordance with the laws of the State of California, then yes." (66 RT 10447-10448.) When questioned by the prosecution, she was again consistent in declaring her ability to put aside her personal feelings regarding the death penalty and follow the law as set forth by the judge. (66 RT 10476 [confirming her statement on the questionnaire: "I'm not in favor of the death penalty law in general, but I am fair and honest about following the judge's direction."]; 66 RT 10476-10477 ["... I believe that I can follow the laws that are in place."]; 66 RT 10477 ["However, I do feel that, if it's the law, that I could follow that."]; 66 RT 10480 [". . . I am against the death penalty, but that doesn't mean that I can't follow the law as provided to me."]; 66 RT 10481 ["I could follow the rules, definitely."].)

Based on these responses prospective juror #154 was qualified to serve, and could not be excused for cause unless further questioning established that

she was in fact unable or unwilling to set aside her personal views and follow the law in determining penalty. (See *People v. Leon, supra*, 61 Cal.4th at p. 592.) Respondent acknowledges that prospective juror #154 confirmed "she could follow the law as instructed by the trial judge," but contends that "other answers she gave both in court and on her questionnaire, were in direct conflict with those answers." (Respondent's Brief at p. 86.) Respondent, however, does not point to any specific responses by this prospective juror alleged to be in direct conflict with her numerous statements indicating she was willing and able to set aside her personal views regarding the death penalty and follow the court's instructions.

In granting the prosecution's challenge for cause the trial court focused on questions 98 and 100 in the juror questionnaire. The court's ruling, in its entirety, was as follows:

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

(66 RT 10530-10531.) Prospective juror #154 answered "yes" to the two questions referred to by the trial court which stated:

> 98. Do you have any moral, religious, or philosophical opposition to the death penalty so strong that it would substantially affect your ability to impose the death penalty regardless of the facts?"
>
> 100. "Do you feel so strongly against the death penalty that it would substantially affect your ability to vote for the death penalty, no matter what evidence was presented?"

(72 CT 17754 [emphasis in original].) After circling "Yes" with regard to question 98, prospective juror #154 provided the following written explanation: "I am not positive that I will not feel responsible should the decision be the death penalty. I would need to discuss further (after the case w/my Rabbi)." She referred back to this explanation in the blank space under question 100. (72 CT 17754.) During voir dire examination by the prosecution regarding these answers, prospective juror #154 confirmed that in responding to the questions she was saying that her views regarding the death penalty might impact how she felt after returning a death verdict (66 RT 10480-10482), but that with respect to the penalty determination she "could follow the rules, definitely" (66 RT 10481).

The trial court was clearly of the view that questions 98 and 100 posed the relevant *Witt* inquiry, and that an affirmative answer to either or both was grounds for disqualification.[5] The prosecution made this argument below by expressly disregarding prospective juror #154's explanation that in answering the questions she was referring to how she might feel after returning a verdict of death rather than indicating she would not be able to follow the trial court's

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[5] Appellant has explained in his opening brief that questions 98 and 100 did not, in fact, track the relevant *Witt* inquiry since there is a constitutionally significant difference between being "affected" and being "impaired." (See Appellant's Opening Brief at pp. 99-103.)

instructions. (66 RT 10529-10530.) However, "[i]n evaluating a prospective juror's answers to voir dire questions, courts must focus on how the questions 'might be understood — or misunderstood — by prospective jurors,' not on 'how the phrases employed in this area have been construed by courts and commentators.'" (*People v. Capistrano* (2014) 59 Cal.4th 830, 890 (dis. &. conc. opn. of Liu, J. [quoting *Witherspoon v. Illinois* (1968) 391 U.S. 510, 515, fn. 9]).) Whether the trial court and the prosecutor believed that questions 98 and 100 tracked the relevant *Witt* inquiry is immaterial. The determining factor is how prospective juror #154 understood or misunderstood the questions, and what she meant by her answers. As she explained, in answering these two questions she was referring to how she might feel after returning a death verdict. She also made it clear that she could and would follow the court's instructions with respect to the matter of penalty. (72 CT 17754; 66 RT 10480-10482.)

Respondent argues that "because the trial court was in the best position to evaluate the prospective juror's true state of mind, having observed the juror's demeanor and in-court responses, deference is owed its decision." (Respondent's Brief at p. 84.) However, the trial court gave no indication that its ruling excusing prospective juror #154 was based upon anything other than her answers to questions 98 and 100 on the questionnaire. This court has recognized that trial courts are "in the unique position of assessing demeanor, tone, and credibility firsthand — factors of 'critical importance in assessing the attitude and qualifications of potential jurors.' [Citation.]" (*People v. DePriest* (2007) 42 Cal.4th 1, 21.) However, in the present case the court did not mention the prospective juror's tone, demeanor or any other element not reflected in the written record, nor did either party. Under these circumstances deference is not warranted. (See *People v. Heard* (2003) 31 Cal.4th 946, 968

["Although we accord appropriate deference to determinations made by a trial court in the course of jury selection, the trial court in the present case has provided us with virtually nothing of substance to which we might properly defer."]; *People v. Leon*, *supra*, 61 Cal.4th at p. 593 [similar].)

Respondent argues that prospective juror #154's responses were similar to those of a prospective juror held to have been properly excused in *People v. Capistrano*, *supra*, 59 Cal.4th 830. (Respondent's Brief at pp. 84-85.) However, in that case: "In response to a question whether he would be able to impose the death penalty 'if you believed, after hearing all of the evidence, that the penalty was appropriate,' [the prospective juror] answered, 'No.'" (*Id.* at p. 861.) The subsequent oral questioning of this prospective juror was described by this court as follows:

> When questioned by the trial court about these responses, however, the prospective juror stated he could vote to impose the death penalty "[d]epending on the evidence." When asked by the court whether he could set aside his personal beliefs and apply the law objectively, he responded, "Right." Upon questioning by the prosecutor, the prospective juror repeated his statement he could vote for the death penalty "depending on the evidence." The prosecutor then asked: "Is there a reason why [when] the questionnaire asked you that question, or asked you the question of whether or not you could impose death on someone, despite your personal views, you indicated that you couldn't? [¶] Have you changed your mind since the questionnaire?" The prospective juror replied, "No." The defense made no further effort to rehabilitate him.

(*Ibid.*) The responses of the prospective juror in *Capistrano* were clearly conflicting and related directly to the critical *Witt* inquiry. He said first that he was unable to vote for the death penalty under any circumstances, but then said that he could vote for the death penalty "depending on the evidence," and then reconfirmed his statement that he could not vote for the death penalty

under any circumstances. Prospective juror #154's statements in the present case, however, were not similar or conflicting as she never indicated she was unable to consider the death penalty.

At most, her "yes" replies to questions 98 and 100 on the questionnaire, standing alone, may have raised a question as to whether her views might interfere with her ability to sit as a juror. (See *People v. Zaragoza* (2016) 1 Cal.5th 21, 39 [noting that affirmative response to similar question — "whether she believed 'that any religious beliefs [she] may have would have a substantial impact on [her] decision in this case'" — raised a possibility the potential juror might have been impaired and merited further inquiry].) However, in light of prospective juror #154's additional explanation, that she was referring to an effect her views might have on her after returning a verdict in favor of the death penalty, as well as her assurances that she was willing and able to follow the law with respect to the question of punishment, her "yes" answers on these two questions did not support a ruling excluding her for cause. (See *id.* at pp. 39-40.) For these reasons the present case is distinguishable from *People v. Capistrano, supra*, 59 Cal.4th 830.

Overall, respondent contends that "the trial court properly excused Prospective Juror No. 154 for cause after evaluating all of her questionnaire and voir dire responses and determining that those responses evidenced a view of the death penalty that would prevent or substantially impair the performance of her duties as a juror." (Respondent's Brief at p. 78.) On appeal the trial court's ruling regarding the prospective juror's views must be supported by substantial evidence. (*People v. Griffin* (2004) 33 Cal.4th 536, 558.) Reviewing courts examine the context in which the trial court ruled on the challenge in order to determine whether the trial court's decision that the juror's beliefs would or would not "'substantially impair the performance of

[the juror's] duties' fairly is supported by the record." (*People v. Crittenden* (1994) 9 Cal.4th 83, 122.)

Nothing in prospective juror #154's responses indicated that her views on capital punishment were of such a nature as to prevent or significantly impair her from following the controlling California law. As Justice Liu noted in his concurring and dissenting opinion in *People v. Capistrano*:

> [N]ot everyone who opposes the death penalty opposes it on the uncompromising ground that it is always wrong for the state to take a human life. Many people oppose it on more limited grounds; they may believe that the death penalty is applied unfairly, that it is ineffective as a deterrent to crime, or that it costs too much money to administer. Such beliefs may induce opposition to the death penalty in general, regardless of the evidence in a particular case. But when instructed on the law and pressed to weigh one's personal views against one's civic duty, opponents of the death penalty no less than its proponents may be willing to temporarily set aside their personal views. They may do so because a proper understanding of the law allays their concerns or because instruction by a judge in a solemn proceeding impresses upon them that fair adjudication of a particular case requires impartiality and fidelity to the law.

(59 Cal.4th 902-903.) From her overall responses, prospective juror #154 appeared to be precisely this type of individual.

She indicated that her views were not based upon any strictly held religious beliefs as she was not a member of a religion or religious organization that takes an official position on the death penalty. (72 CT 17754.) Her approach to the topic was pragmatic rather than dogmatic. When questioned by the prosecution regarding her opposition to the death penalty, prospective juror #154 explained: "As I stated before, I believe that I can follow the laws that are in place. However, I do not personally feel that they should be there in exactly the way that they are written. [¶] I'm not saying that,

you know, there should be no laws, but, you know, that modifications should be made to the death penalty." 66 RT 10476-10477.) She later added: "My personal beliefs inside are that the . . . the laws regarding the death penalty should be reviewed." (66 RT 10477.) On her questionnaire, prospective juror #154 indicated that there was no reason why she would prefer not to serve as a juror in the case, and in fact indicated that she would like to serve as a juror adding: "I believe that I am a fair person and that I have the ability to be of service to my community." (72 CT 17756.) In response to the last question on the questionnaire: "Is there anything else the court should know about you?" she wrote: "I feel as though I have maybe contradicted myself about my attitude against the death penalty and my ability to be open and non-judgmental about deciding the case. But it's kind of like my being highly pro-choice but I couldn't imagine having an abortion when I found I was pregnant. Attitudes change upon circumstance and life experience. I do feel I can follow the laws laid out by the judge. Thank you." (72 CT 17757; see also 66 RT 10479-10480 [reiterating this sentiment during voir dire].)

Based upon her answers it is clear that prospective juror #154 was precisely the type of juror the justice system requires, one who would have given appellant the fair cross-section to which he was constitutionally entitled — a juror able to impose the death penalty if warranted, while still being thoughtful, mindful of the meaning and magnitude of what was being asked of her, and unwilling to take lightly the serious decision of whether the evidence that would be presented might warrant a decision to end another's life. (See *Wainwright v. Witt*, *supra*, 469 U.S. at p. 423 ["the quest is for jurors who will conscientiously apply the law and find the facts ... , [as] [t]hat is what an 'impartial' jury consists of."].) Notwithstanding her personal opposition to the death penalty, nothing in prospective juror #154's written or

oral responses established that she was unwilling or unable to follow the trial court's instructions, and in fact she repeatedly said she could and would do so. She clearly stated, four times on the questionnaire and five times during voir dire, that she was willing and able to set her personal feeling aside and follow the trial court's instructions with respect to the question of penalty. (See Appellant's Opening Brief at pp. 91-93.) She stated that she would not prejudge the case (66 RT 10475-10476), and could vote to impose the death penalty if "it was the appropriate sentence in accordance with the laws of the State of California" (66 RT 10448).

The trial court did not explain what there was in prospective juror #154's responses that indicated she would not be willing or able to follow the law in determining whether life in prison without the possibility of parole or death was the appropriate punishment in light of all the evidence presented. If any of her questionnaire responses caused the court to question whether her views concerning the death penalty would impair her ability to follow the law or to otherwise perform her duties as a juror, the trial court should have sought to clarify the matter with specific inquiry. (See *People v. Covarrubias* (2016) 1 Cal. 5th 838, 866 [recognizing that trial courts have an obligation to resolve uncertainties in written responses and to orally examine prospective jurors in person to the extent necessary to permit a reliable determination of whether they are disqualified under *Witt*].) However, the trial judge did not ask this prospective juror a single question of substance. (66 RT 10421.) The prosecutor similarly could and should have pursued the matter with further questions, rather than simply seeking to confirm prospective juror #154's personal feelings regarding the death penalty. (See *Wainwright v. Witt, supra*, 469 U.S. at p. 423 [""As with any other trial situation where an adversary wishes to exclude a juror because of bias, . . . it is the adversary seeking

exclusion who must demonstrate through questioning that the potential juror lacks impartiality . . . . "]; *People v. Leon, supra,* 61 Cal.4th at p. 593 ["An adequate *Witherspoon/Witt* voir dire cannot simply reaffirm prospective jurors' biases without also asking whether they are capable of setting them aside and determining penalty in accordance with the law."].)

Based upon the responses of prospective juror #154 set forth in the record, there was not substantial evidence to support a determination that she harbored views that would prevent or substantially impair the performance of her duties so as to support her excusal for cause. Accordingly, under the applicable standard established by the controlling decisions of the United States Supreme Court, the trial court's excusal of prospective juror #154 for cause was error. As addressed in appellant's opening brief, and conceded by respondent, the exclusion of a single prospective juror in violation of *Witherspoon* and *Witt* mandates reversal of appellant's death sentence. (*Gray v. Mississippi* (1987) 481 U.S. 648, 666-668; *People v. Heard, supra,* 31 Cal.4th at p. 966; see Appellant's Opening Brief at p. 104; Respondent's Brief at p. 86, fn. 17.) In light of the foregoing discussion, as well as that contained in appellant's opening brief, the judgment of death must be set aside.

III.

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

Appellant's position with respect to this error is fully set forth in appellant's opening brief. (Appellant's Opening Brief at pp. 105-115.) Respondent's brief raises no new issues requiring additional discussion.

IV.

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

Appellant's position with respect to this error is fully set forth in appellant's opening brief. (Appellant's Opening Brief at pp. 116-126.) Respondent's brief raises no new issues requiring additional discussion.

V.

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

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

Respondent concedes that the trial court committed error when it instructed the jury, pursuant to CALJIC No. 1.00, to reach a verdict regardless of the consequences at the penalty phase retrial. (See Respondent's Brief at p. 95.) Respondent also concedes that the issue is cognizable on appeal despite the absence of a specific objection below. (See Respondent's Brief at p. 96, fn. 20.) In the end, respondent argues that the error was harmless. (See Respondent's Brief at pp. 95-99.) However, the effect of the instruction was

to diminish the jurors' sense of responsibility, and it cannot be said the error was harmless beyond a reasonable doubt.

Respondent contends that in other cases, this court has held the error to be harmless considering the instructions as a whole in conjunction with the arguments of counsel. (Respondent's Brief at p. 96.) In such cases the court concluded that the jury "almost certainly understood" that it bore the ultimate responsibility for choosing between death and life imprisonment without parole based on the particular circumstances of the case. (See, e.g., *People v. Ray* (1996) 13 Cal.4th 313, 355.) Here, however, the prosecutor encouraged a common misperception among jurors that the ***law*** was responsible for the defendant's punishment.[6] In this regard, from voir dire through closing arguments, the prosecutor indoctrinated jurors with the incorrect notion that they were required by law to impose the death penalty if they found that aggravating factors outweighed mitigating factors. (See e.g. 60 RT 9151, 9161-1963, 9304, 9308; 61 RT 9411, 9428, 9436, 9520-9521, 9531-9532, 9536; 62 RT 9645, 9645, 9648-9649; 63 RT 9739, 9750-9751, 9755, 9765, 9852-9853, 9864, 9868, 9868-9869, 9877; 64 RT 9988, 9988-9989, 9992, 9993, 10003, 10101, 10101-10102, 10113, 10120; 65 RT 10228, 10235, 10237, 10237-10238, 10249, 10256, 10259, 10259-10260, 10362, 10362, 10364, 10369, 10376; 66 RT 10493, 10494, 10510; 92 RT 14954-14958, 14961, 14965-14966, 15003-15004.) The prosecutor's repeated statements that death was mandatory if aggravation outweighed mitigation, reinforced the

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[6] Courts consider whether a prosecutor's closing argument to the jury exacerbated the prejudicial effect as any meaningful assessment of prejudice must proceed in the light of the entire record, including how the evidence was used. (*People v. Powell* (1967) 67 Cal.2d 32, 54-55; *People v. Gonzales* (1967) 66 Cal.2d 482, 493.)

jurors' natural inclination to diminish their own sense of responsibility for the penalty determination. (See Appellant's Opening Brief at p. 130.) Under these circumstances it cannot be said that the jury almost certainly understood that it bore the ultimate responsibility for choosing between death and life imprisonment. The instructional error, therefore, cannot be regarded as harmless and reversal is required.

VI.

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

Appellant's position with regard to this assignment of error is fully set forth in the opening brief. (Appellant's Opening Brief at pp. 131-149.) Respondent's brief raises no new issues requiring additional discussion.

VII.

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

Appellant's position with respect to this error is fully set forth in appellant's opening brief. (Appellant's Opening Brief at pp. 150-162.) Respondent's brief raises no new issues requiring additional discussion.

VIII.

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

Appellant's position with respect to this error is fully set forth in appellant's opening brief. (Appellant's Opening Brief at pp. 163-168.) Respondent's brief raises no new issues requiring additional discussion.

IX.

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

Appellant has argued that California's capital sentencing scheme violates the United States Constitution. (See Appellant's Opening Brief at pp. 169-213.) Respondent generally argues, as appellant has acknowledged, that this court has upheld the statute and standard jury instructions against similar challenges. Respondent contends that appellant has not presented any argument to compel this Court to reconsider any of the challenged issues. (See Respondent's Brief at p. 108-113.) Appellant maintains, as he argued in his opening brief, that this court should reconsider appellant's constitutional challenges to California's death penalty statute and jury instructions as interpreted by this court and as applied at appellant's trial, as violating the United States Constitution.

After appellant filed his opening brief, and after the prosecution filed its respondent's brief, in *Hurst v. Florida* (2016) ___U.S. ___ [136 S.Ct. 616, 624] the United States Supreme Court held Florida's death penalty statute unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584, because the sentencing judge rather than the jury made a factual finding, the existence of an aggravating circumstance, that is required before the death penalty can be imposed.[7] *Hurst* supports

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[7] Appellant's argument here does not alter his claim in the opening brief, but provides additional authority for subsections (C)(1) and (D) of argument IX in his opening brief. To the extent this court considers this not to be true, appellant asks this court to deem this argument a supplemental brief. Appellant has no objection to a supplemental brief by the Attorney General if

appellant's request in subsections (C)(1) and (D) of argument IX in his opening brief that this court reconsider its rulings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), does not require factual findings within the meaning of *Ring* (*People v. Merriman* (2014) 60 Cal.4th 1, 106), and therefore does not require the jury to find unanimously and beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances before the jury can impose a sentence of death (*People v. Prieto* (2003) 30 Cal.4th 226, 275). (See Appellant's Opening Brief at pp. 172-190, 208-209; see also, Respondent's Brief at pp. 110-111 [prosecution argues that there is no constitutional requirement that the jury unanimously find the aggravating circumstances true beyond a reasonable doubt].)

A. Under *Hurst*, Each Fact Necessary to Impose a Death Sentence, Including the Determination That the Aggravating Circumstances Outweigh the Mitigating Circumstances, must Be Found by a Jury Beyond a Reasonable Doubt.

In *Apprendi*, a noncapital sentencing case, and *Ring*, a capital sentencing case, the United States Supreme Court established a bright-line rule: if a factual finding is required to subject the defendant to a greater punishment than that authorized by the jury's verdict, it must be found by the jury beyond a reasonable doubt. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 589; *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 483.) As the court explained in *Ring*:

> The dispositive question, we said, "is one not of form, but of effect." [Citation]. If a State makes an increase in a

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this court believes it necessary.

> defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found, by a jury beyond a reasonable doubt. [Citation].

(*Ring v. Arizona*, *supra*, 536 U.S. at p. 602 [quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 494, 482-483].) Applying this mandate, the *Hurst* court invalidated Florida's death penalty statute. (*Hurst v. Florida*, *supra*, 136 S.Ct. at pp. 621-624.) The court restated the core Sixth Amendment principle as it applies to capital sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." (*Id.* at p. 619.) Further, as explained below, in applying this Sixth Amendment principle, *Hurst* made clear that the weighing determination required under the Florida statute was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Id.* at p. 622.)

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

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla.Stat. §775.082(1) (emphasis

> added). The trial court alone must find "the facts ... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." §921.141(3); see [*State v.*] *Steele*, 921 So.2d [538,] 546 [(Fla. 2005)].

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

The questions decided in *Ring* and *Hurst* were narrow. As the Supreme Court explained, "Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 597, fn. 4.) *Hurst* raised the same claim. (See Petitioner's Brief on the Merits, *Hurst v. Florida*, 2015 WL 3523406 at * 18 ["Florida's capital sentencing scheme violates this [Sixth Amendment] principle because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty."'].) In each case, the court decided only the constitutionality of a judge rather than a jury finding the existence of an aggravating circumstance. (See *Ring v. Arizona*, *supra*, 536 U.S. at p. 588; *Hurst v. Florida*, *supra*, 136 S.Ct. at p. 624.) Nevertheless, the seven-justice majority opinion in *Hurst* shows that its holding, like that in *Ring*, is a specific application of a broader Sixth Amendment principle — any fact that is required for a death sentence, but not for the lesser punishment of life imprisonment, must be found by the jury. (*Hurst v. Florida*, *supra*, 136 S.Ct. at pp. 619, 622.)

At the outset of the opinion the court refers not simply to the finding of an aggravating circumstance, but, as noted above, to findings of "each fact *necessary to impose a sentence of death.*" (*Id.* at p. 619 [emphasis added].)

The court reiterated this fundamental principle throughout the opinion.[8] The court's language is clear and unqualified. It also is consistent with the established understanding that *Apprendi* and *Ring* apply to each fact essential to imposition of the level of punishment the defendant receives. (See *Ring v. Arizona*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.); *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) The high court is assumed to understand the implications of the words it chooses and to mean what it says. (See *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863, 881-882, fn. 10.)

B. California's Death Penalty Statute Violates *Hurst* by Not Requiring That the Jury's Weighing Determination Be Found Beyond a Reasonable Doubt.

California's death penalty statute violates *Apprendi*, *Ring* and *Hurst*, although the specific defect is different than those in Arizona's and Florida's laws: in California, although the jury's sentencing verdict must be unanimous (Pen. Code, §190.4, subd. (b)), California applies no standard of proof to the weighing determination, let alone the constitutional requirement that the finding be made beyond a reasonable doubt. (See *People v. Merriman* (2014) 60 Cal.4th 1, 106.) Unlike Arizona and Florida, California requires that the jury, not the judge, make the findings necessary to sentence the defendant to death. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16

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

[distinguishing California's law from that invalidated in *Hurst* on the grounds that, unlike Florida, the jury's "verdict is not merely advisory"].) California's law, however, is similar to the statutes invalidated in Arizona and Florida in ways that are crucial for applying the *Apprendi/Ring/Hurst* principle. In all three states, a death sentence may be imposed only if, after the defendant is convicted of first degree murder, the sentencer makes two additional findings. In each jurisdiction, the sentencer must find the existence of at least one statutorily delineated circumstance — in California a special circumstance (Pen. Code, §190.2), and in Arizona and Florida, an aggravating circumstance (Ariz. Rev. Stat. §13-703(0); Fla. Stat. §921.141(3)). This finding alone, however, does not permit the sentencer to impose a death sentence. The sentencer must make another factual finding: in California that "the aggravating circumstances outweigh the mitigating circumstances" (Pen. Code, §190.3); in Arizona that "'there are no mitigating circumstances sufficiently substantial to call for leniency'" (*Ring v. Arizona*, *supra*, 536 U.S. at p. 593, quoting Ariz. Rev. Stat. §13-703(F)); and in Florida, as stated above, "that there are insufficient mitigating circumstances to outweigh aggravating circumstances" (*Hurst v. Florida*, *supra*, 136 S.Ct. at p. 622 [quoting Fla. Stat. §921.141(3)).[9]

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

Although *Hurst* did not decide the standard of proof issue, the court made clear that the weighing determination was an essential part of the sentencer's factfinding within the ambit of *Ring*. (See *Hurst v. Florida*, *supra*, 136 S.Ct. at p. 622 [in Florida the judge, not the jury, makes the "critical findings necessary to impose the death penalty," including the weighing determination among the facts the sentencer must find "to make a defendant eligible for death"].) The pertinent question is not what the weighing determination is called, but what is its consequence. *Apprendi* made this clear: "the relevant inquiry is one not of form, but of effect — does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) So did Justice Scalia in *Ring*:

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

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

In California when a jury convicts a defendant of first degree murder, the maximum punishment is imprisonment for a term of 25 years to life. (Pen. Code, §190, subd. (a) [cross-referencing §§ 190.1, 190.2, 190.3, 190.4 and

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imposition of the death penalty.

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

a special circumstance (life in prison without parole). The weighing determination is therefore a factfinding.[10]

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

This court's interpretation of Penal Code section 190.3's weighing directive in *People v. Brown* (1985) 40 Ca1.3d 512 [revd. on other grounds *sub nom. California v. Brown* (1987) 479 U.S. 538]) does not require a different conclusion. In *Brown*, the court was confronted with a claim that the language "shall impose a sentence of death" violated the Eighth Amendment requirement of individualized sentencing. (*Id.* at pp. 538-539.) As the court explained:

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

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[10] Justice Sotomayor, the author of the majority opinion in *Hurst*, previously found that *Apprendi* and *Ring* are applicable to a sentencing scheme that requires a finding that the aggravating factors outweigh the mitigating factors before a death sentence may be imposed. More importantly here, she has gone on to find that it "is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole." (*Woodward v. Alabama* (2013) ___ U.S. ___ [134 S.Ct. 405, 410-411, 187 L.Ed.2d 449] (dis. opn. from denial of certiorari, Sotomayor, J.).)

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

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

(*People v. Brown*, *supra*, 40 Cal.3d at p. 541 [footnotes omitted].)[11]

Under *Brown*, the weighing requirement provides for jury discretion in both the assignment of the weight to be given to the sentencing factors and

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

the ultimate choice of punishment. Despite the "shall impose death" language, Penal Code section 190.3, as construed in *Brown*, provides for jury discretion in deciding whether to impose death or life without the possibility of parole, i.e. in deciding which punishment is appropriate. The weighing decision may assist the jury in reaching its ultimate determination of whether death is appropriate, but it is a separate statutorily-mandated finding that precedes the final sentence selection. Thus, once the jury finds that the aggravation outweighs the mitigation, it still retains the discretion to reject a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979 ["[t]he jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death"].)

In this way, Penal Code section 190.3 requires the jury to make two determinations. The jury must weigh the aggravating circumstances and the mitigating circumstances. To impose death, the jury must find that the aggravating circumstances outweigh the mitigating circumstances. This is a factfinding under *Ring* and *Hurst*. (See *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 257-258 [holding that weighing is *Ring* factfinding]; *Woldt v. People* (Colo. 2003) 64 P.3d 256, 265-266 [same].) The sentencing process, however, does not end at that point. There is the final step wherein the jury selects the sentence it deems appropriate. (See *People v. Brown*, *supra*, 40 Ca1.3d at p. 544 ["Nothing in the amended language limits the jury's power to apply those factors as it chooses in deciding whether, under all the relevant circumstances, defendant deserves the punishment of death or life without parole"].) Thus, the jury may reject a death sentence even after it has found that the aggravating circumstances outweighs the mitigation. (*Id.* at p. 540.) This is the "normative" part of the jury's decision. (*Ibid.*)

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

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

(*People v. Brown*, *supra*, 40 Ca1.3d at p. 542 [emphasis added].) In *Brown*, the court construed Penal Code section 190.3's sentencing directive as comparable to that of Florida — if the sentencer finds the aggravating circumstances outweigh the mitigating circumstances, it is authorized, but not mandated, to impose death.

The standard jury instructions were modified, first in CALJIC No. 8.84.2 and later in CALJIC No. 8.88, to reflect *Brown's* interpretation of section 190.3.[12] The requirement that the jury must find that the aggravating

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

> In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.

circumstances outweigh the mitigating circumstances remained a precondition for imposing a death sentence. Nevertheless, once this prerequisite finding was made, the jury had discretion to impose either life or death as the punishment it deemed appropriate under all the relevant circumstances. The revised standard jury instructions CALCRIM, "written in plain English" to "be both legally accurate and understandable to the average juror" (Judicial Council of California Criminal Jury Instructions (2016 edition) p. xi., Preface), make clear this two-step process for imposing a death sentence:

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

> To return a judgment of death, each of you must be persuaded that the aggravating evidence (circumstances) is (are) so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

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

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

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

D. This Court Should Reconsider its Prior Rulings That the Weighing Determination Is Not a Factfinding Under *Ring* and Therefore Does Not Require Proof Beyond a Reasonable Doubt.

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

However the weighing determination may be described, it is an "element" or "fact" under *Apprendi*, *Ring* and *Hurst* and must be found by a

jury beyond a reasonable doubt. (*Hurst v. Florida*, *supra*, 136 S.Ct. at pp. 619, 622.) As discussed above, *Ring* requires that any finding of fact required to increase a defendant's authorized punishment "must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 602; see *Hurst v. Florida*, *supra*, 136 S.Ct. at p. 621 [the facts required by *Ring* must be found beyond a reasonable doubt under the due process clause].)[13] Because California applies no standard of proof to the weighing determination, a factfinding by the jury, the California death penalty statute violates this beyond-a-reasonable-doubt mandate at the weighing step of the sentencing process.

The recent decision of the Delaware Supreme Court in *Rauf v. State* (Del. 2016) 135 A.3d 430, supports appellant's request that this court revisit its holdings that the *Apprendi* and *Ring* rules do not apply to California's death penalty statute. *Rauf* held that Delaware's death penalty statute violates the Sixth Amendment under *Hurst*. (*Id.* at p. 433.) In Delaware, unlike Florida, the jury's finding of a statutory aggravating circumstance is determinative, not simply advisory. (*Id.* at p. 456.) Nonetheless, in a 3-to-2 decision, the Delaware Supreme Court answered five certified questions from the superior court and found the state's death penalty statute violates *Hurst*.[14]

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

[14] In addition to the ruling discussed in this brief, the court in *Rauf* also held that the Delaware statute violated *Hurst* because: (1) after the jury finds at least one statutory aggravating circumstance, the "Judge alone can increase a defendant's jury authorized punishment of life to a death sentence, based on

One reason the court invalidated Delaware's law is relevant here: the jury in Delaware, like the jury in California, is not required to find that the aggravating circumstances outweigh the mitigating circumstances unanimously and beyond a reasonable doubt. (145 A.3d at pp. 434-435.) With regard to this defect, the Delaware Supreme Court explained:

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

(*Id.* at p. 485)

The Delaware court is not alone in reaching this conclusion. Other state supreme courts have recognized that the determination that the aggravating circumstances outweigh the mitigating circumstance, like the finding that an aggravating circumstance exists, comes within the *Apprendi/Ring* rule. (See e.g., *State v. Whitfield*, *supra*, 107 S.W.3d at pp. 257-258; *Woldt v. People*, *supra*, 64 P.3d at pp. 265-266; see also *Woodward v. Alabama*, *supra*, 134 S.Ct. at pp. 410-411 (Sotomayor, J., dissenting from denial of cert.) ["The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is ... [a] factual

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her own additional factfinding of non-statutory aggravating circumstances" (*Rauf v. State*, *supra*, 135 A.3d at p. 484 (per curiam opn.) [addressing Questions 1-2] and at pp. 483-485 (conc. opn. of Holland, J.)); and (2) the jury is not required to find the existence of any aggravating circumstance, statutory or non-statutory, unanimously and beyond a reasonable doubt (*id.* at p. 434 (per curiam opn.) [addressing Question 3] and at pp. 485-487 (conc. opn. of Holland, J.).)

finding" under Alabama's capital sentencing scheme]; *contra, United States v. Gabrion* (6th Cir. 2013) 719 F.3d 511, 533 (en banc) [concluding that — under *Apprendi* — the determination that the aggravators outweigh the mitigators "is not a finding of fact in support of a particular sentence."]; *Ritchie v. State* (Ind. 2004) 809 N.E.2d 258, 265 [reasoning that a finding that the aggravators outweigh the mitigators is not a finding of fact under *Apprendi* and *Ring*]; *Nunnery v. State* (Nev. 2011) 263 P.3d 235, 251-253 [finding that "the weighing of aggravating and mitigating circumstances is not a fact-finding endeavor" under *Apprendi* and *Ring*].)

Because in California the factfinding that aggravating circumstances outweigh mitigating circumstances is a necessary predicate for the imposition of the death penalty, *Apprendi*, *Ring* and *Hurst* require that this finding be made by a jury and beyond a reasonable doubt. As appellant's jury was not required to make this finding, appellant's death sentence must be reversed.

CONCLUSION

In light of the foregoing discussion, as well as that contained in appellant's opening brief, appellant requests that the judgment of the trial court be reversed.

Respectfully submitted,

Kimberly J. Grove
Attorney for Appellant

CERTIFICATION OF WORD COUNT

I, Kimberly J. Grove, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 13,137 words, excluding the tables and this certificate. This document was prepared in WordPerfect, and this is the word count generated by the program for this document.

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Kimberly J. Grove

DECLARATION OF SERVICE

I, the undersigned, declare:

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

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_____

Kimberly J. Grove