SUPREME COURT, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. PAUL WESLEY BAKER, Defendant/Appellant.	No: S170280 APPELLANT'S REPLY BRIEF

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
LOS ANGELES COUNTY
SUPERIOR COURT CASE NO. LA045977-01

THE HONORABLE SUSAN M. SPEER, JUDGE

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BakerReplyBrief

DEATH PENALTY

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I. INTRODUCTION

In the opening brief, appellant Paul W. Baker established that, as a result of numerous trial court errors, he was denied his rights to due process, a fair trial, trial by jury, counsel of his choice, a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the California Constitution. Of course, respondent claims there were no errors committed during appellant's trial, and that if there were any errors, they were harmless both individually and cumulatively. However, these claims rest on speculation and guesswork, disregard of the evidence, and misapprehension of applicable law. As a matter of law, numerous serious prejudicial errors occurred in the instant case. Reversal is required.[1]

II. ARGUMENT

A. THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S *WHEELER/BATSON* MOTIONS.

In the opening brief, appellant demonstrated that the trial court committed reversible error under the California and Federal Constitutions when it denied his

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[1] In this brief, appellant may not have expressly replied to all of respondent's arguments. However, unless expressly noted to the contrary, the failure to address any particular 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, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn.13), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

Wheeler/Batson[2] motions regarding the prosecutor's improper use of discriminatory peremptory challenges to two prospective jurors, the only African-American jurors in the entire venire. (AOB 97-122.) Respondent claims the trial court properly denied the motion. (RB 29-56.) Respondent is mistaken.

The "Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race." (*Batson v. Kentucky, supra*, 476 U.S. at 89, 106 S.Ct. at 1719.) And, as stated in *People v. Banks* (2014) 59 Cal.4th 1113, 1146, 176 Cal.Rptr.3d 185, 215:

> "'The prosecution's use of peremptory challenges to remove prospective jurors based on group bias, such as race or ethnicity, violates a defendant's right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution and his right to equal protection under the Fourteenth Amendment to the United States Constitution.'"

In this case, the trial court determined that appellant had made a prima facie case of improper race-based dismissals when the prosecutor exercised peremptory challenges against prospective jurors nos. 7731 and 9049, the only two African-American prospective jurors. (9RT 1726.) The trial court therefore properly found that the prosecutor had engaged in "a pattern of systematic exclusion of members of a cognizable group." (*People v. Taylor* (2010) 48 Cal.4th 574, 642 fn.18, 108 Cal.Rptr.3d 87, 152,

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[2] *People v. Wheeler* (1978) 22 Cal.3d 258, 148 Cal.Rptr.890; *Batson v. Kentucky* (1986) 426 U.S. 79, 106 S.Ct. 1712.

fn.18; accord, *Harris v. Kuhlman* (2nd Cir.2003) 346 F.3d 330, 345 ["'A "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination' ...[W]here every black juror was subject to a peremptory strike, a 'pattern' plainly exists."])[3] However, as explained in the opening brief, the trial court erred when it denied appellant's *Wheeler/Batson* motion.

Prospective juror no. 7731 assured the court that she was open to both types of penalties, life or death. Her answer that she did not know whether she would be comfortable or scared in finding for death is an expected natural reaction for any prospective juror in a capital case. So was her answer that it was a "possibility" it would be difficult to impose the death penalty; as a matter of common sense, such a momentous decision is never easy, but always difficult for any juror. No. 7731 agreed that she would weigh all applicable factors and that it would not be impossible for her to "impose... death." (6RT 881-884.) No. 7731 expressed the normal feelings of any person being called upon to pass judgment on the life of a defendant. Nothing she said provided a justifiable reason for challenging her.

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[3] Respondent claims that peremptorily challenging two African-American prospective jurors "is not indicative of an inference of discrimination." (RB 45.) But, where, as here, every African-American prospective juror is challenged, an inference of discrimination is inescapable. (See, e.g., *Johnson v. California* (2005) 545 U.S. 162 [inference of discrimination raised when three African-American jurors are struck where the three jurors constituted all of the eligible African-American jurors]; *Snyder v. Louisiana* (2008) 552 U.S. 472, 478 ["[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose."])

Respondent claims that the prosecutor also properly relied on no. 7731's demeanor in excusing her. (RB 47-48.) But, the record does not contain a detailed account of this supposed questionable demeanor nor was no. 7731 ever questioned about her demeanor. Had this truly been a concern, the issue would have been inquired into.

Prospective juror no. 9049 did not express any extreme difficulty in imposing the death penalty so as to support a nondiscriminatory peremptory challenge. He said he would follow "all the rules and law" and could impose the death penalty if he felt it was appropriate; although death was not his "preference," he was "open to it." If he felt the death penalty was appropriate, he could set aside his religious beliefs against it and reach that result. (6RT 1182-1187.) Although no. 9049 said that he did not think death would be merited if the killing was unintentional (6RT 188), the confusing concept of felony-murder was never fully explained to him. No. 9049's answers did not provide any nonpretextual reason for the prosecutor's dismissal.

Respondent claims that the prosecutor's belated reliance on the two prospective jurors' questionnaires was proper because she did not change her reasons for excusing them. (RB 48-49.) But, when the prosecutor was asked to state her reasons for the peremptories, she did not have the questionnaires in front of her and did not recall answers of the prospective jurors on the questionnaire. Thus, the questionnaires could not provide any basis for the peremptory challenges. The prosecution simply consulted the questionnaires for additional, previously unstated and unknown reasons. These

questionnaire-based reasons "reek[ ] of afterthought" and should not be considered. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 246, 125 S.Ct. 2317, 2328.)

A comparative analysis of the responses of the two challenged African-American prospective does not show any glaring dissimilarity with the responses of non-African-Americans on the panel. (AOB 120-121.) Although respondent attempts to demonstrate "a sharp distinction" between nos. 7731 and 9049 and others on the panel (RB 51-56), the attempt fails. The responses of the jurors cited by respondent are similar to the responses of nos. 7731 and 9049. For example, juror no. 1599 indicated he was "moderately in favor" of the death penalty (8CT 1940) and was open to either penalty. (7RT 1363-1365.) So did no. 7731. (29 CT 7656; 4RT 882-884.) No. 9049 also confirmed that he would be open to the death penalty. (6RT 1185.) Juror no. 6889 was also open to death as the appropriate penalty. (7RT 1339-1340.) An objective comparison of the answers of nos. 7731 and 9049 with the answers of others does not show that their answers or feelings or concerns about the death penalty were any different from the seated jurors such that a race neutral reason for their dismissal can be shown.

A fair and impartial jury, drawn from a representative cross-section of the community "...is a fundamental aspect of the right of accused persons not to be deprived of liberty without due process of law." (*People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1202-1203, 259 Cal.Rptr. 870, 879.) A defendant in a criminal case has "...a substantial and legitimate expectation that he [will] be tried by a jury selected in accordance with

...state law and federal constitutional law." (*Aki-Khuam v. Davis* (7th Cir.2003) 339 F.3d 521, 529.) The prosecutor's challenges to the only two African-American prospective jurors were unconstitutional because they were based on improper racial grounds. The prosecutor's reasons for dismissing them were pretextual. The trial court committed constitutional error by denying appellant's *Wheeler/Batson* motion. Reversal is required.

B. THE TRIAL COURT'S SKEWED, UNBALANCED QUESTIONING OF THE PROSPECTIVE JURORS REGARDING THEIR VIEWS ON THE DEATH PENALTY RENDERED THE TRIAL FUNDAMENTALLY UNFAIR; REVERSAL IS REQUIRED.

1. Introduction

Appellant demonstrated that the trial in his case was rendered fundamentally unfair as a result of the trial court's disparate treatment of the prospective jurors depending on whether they were in favor of or against the death penalty. The trial court's questions improperly and prejudicially favored those prospective jurors who supported the death penalty. (AOB 123-152.) Respondent claims that appellant has forfeited the claim and that there was no error. (RB 56-88.) Respondent's claims are not meritorious.[4]

2. The issue has not been forfeited

Respondent claims that the issue of the trial court's disparate treatment of the prospective jurors has been forfeited by a purported failure to object. (RB 56-57.)

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[4] Appellant is not arguing that the trial court erroneously denied his challenges for cause, as respondent implies. (RB 56-57.) Nor is appellant arguing that a death-qualified jury is unconstitutional, as respondent claims. (RB 80-81.) These contentions of respondent can be rejected out-of-hand.

However, defense counsel *did* complain about the trial court's uneven questioning of the prospective jurors: "[W]hat is happening is we are selecting jurors that are only predisposed for death..." (4RT 892.) This statement was sufficient to preserve the issue for review. "'The critical point for preservation of claims on appeal is that the asserted error must have been brought to the attention of the trial court.'" (*San Mateo Un. H.S. Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 436, 152 Cal.Rptr.3d 530, 546.) And, as stated in *Allin v. Int'l. Alliance, Etc.* (1952) 113 Cal.App.2d 135, 136-137, 247 P.2d 857, 858:

> 'The purpose of an exception is not ritualistic; it is real. It 'is only a formal type of objection'. It does not have to be in any particular form. It is sufficient if it points out clearly the error complained of. The test of its sufficiency is whether it fairly directs the attention of the court to the claimed error. It is sufficient if it apprises the court in some way that the party does not acquiesce in the ruling or action of the court.' Manifestly, this calls for some affirmative declaration or action after the ruling has been made.

Even if, arguendo, defense counsel's complaint is not sufficient to preserve the issue, the Court may nevertheless reach the issue. Where, as here, the trial court appears to have applied different criteria to "life-leaning prospective jurors than it applied to death leaning prospective jurors," this Court has reviewed the claim even though no objection was interposed: "As in previous cases, we address this claim on the merits notwithstanding defendant's failure to object on these precise grounds in the trial court." (*People v. Whalen* (2013) 56 Cal.4th 1, 41, 152 Cal.Rptr.3d 673, 714.)

Further, the issue of the trial court's unfair voir dire treatment of the prospective jurors adversely implicates appellant's right to a fair trial under the Fifth, Sixth, Eighth, and Fourth Amendments. "[C]onstitutional issues may be reviewed on appeal even where the defendant did not raise them below." (*People v. Barber* (2002) 102 Cal.App.4th 145, 150, 124 Cal.Rptr.2d 917, 920.)

Finally, "an appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party." (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn.6, 69 Cal.Rptr.2d 917, 925, fn.6.)

The issue of the trial court's disparate treatment of the prospective jurors has not been forfeited. It is properly before this Court for a decision on the merits.

3. The trial court's disparate treatment of the prospective jurors rendered appellant's trial fundamentally unfair.

In *Lockhart v. McCree* (1986) 476 U.S. 162, 176, 106 S.Ct. 1758, 1766, the Court stated the overarching consideration when selecting a jury in a capital case:

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital case; 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 temporarily to set aside their own beliefs in deference to the rule of law.

"[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." (*Irvin v. Dowd* (1961) 366 U.S. 717, 722, 81 S.Ct. 1639, 1642.) Given this fundamental right, "trial courts should be evenhanded in their

questions to prospective jurors during the 'death-qualification portion of the voir dire..." (*People v. Champion* (1995) 9 Cal.4th 879, 908-909, 39 Cal.Rptr.2d 547, 562; accord, *People v. Whalen, supra,* 56 Cal.4th 1 at 152, Cal.Rptr.3d at 714 ["trial courts must be scrupulously 'evenhanded' in conducting death qualification voir dire."])

As demonstrated in the opening brief, the voir dire process in this case was not conducted in an evenhanded manner. Prospective juror 8814, dismissed by the prosecutor, was asked only one question by the trial court (4RT 888), which did not make any attempt to "rehabilitate" no. 8814 as it did with prospective jurors appellant sought to excuse. (See, e.g., 8RT 1490-1491, 1630.)

The prosecution's challenge to no. 8814 was granted because the prospective juror's "stronger position" was for life and he was "anti-death penalty." (4RT 890-892.) The trial court granted the prosecution's challenge to no. 8891 because the prospective juror was "anti-death penalty" and had "strong objections to the death penalty." (5RT 1013-1015.) The prosecutor's challenge for cause as to prospective juror no. 1115 was granted because the trial court found she "...was not comfortable as a death penalty jury." (7RT 1422-1423.)

In stark contrast to the granting of the prosecution's challenges to prospective jurors nos. 8814, 8891, and 1115, the trial court denied appellant's challenges even where it determined that the prospective juror was strongly in favor of the death penalty. The trial court denied appellant's challenge for cause as to no. 9021 despite finding that no.

9021 was "strongly pro death penalty." (5RT 991-992.) Appellant's challenge to no. 0517 was denied even though the trial court found the prospective juror had "strong feelings pro death penalty..." and was "...obviously...a strong death penalty proponent." (5RT 1047.) Prospective juror no. 1827 was "certainly strongly in favor of the death penalty" (6RT 1198), no. 8964 was "strongly in favor of the death penalty" (8RT 1490-1491), no. 1599 was "pro death penalty" and had "strong feelings against [appellant]" (8RT 1366-1367), and no. 4926 was "definitely in favor" (8RT 1546-1547), yet appellant's challenges to these prospective jurors were denied. When pro-death jurors "waffled" or equivocated (nos. 8814, 8891, 1115), they were retained, whereas a waffling life-leaning juror (no. 8692) was removed. Obviously, rather than treating prospective jurors with reservations about the death penalty as legitimate qualified jurors, they were considered unfit for service. The trial court did not treat prospective jurors in a fair and balanced manner.

Respondent concedes that a trial court must conduct voir dire in an evenhanded manner. (RB 81-83.) Here, however, that did not happen. Although the trial court may have "educated" the prospective jurors about a capital case and given them "a clarifying explanation," as respondent contends, it did so in an unfair fashion which favored those jurors who favored death.

The trial court's "rehabilitation" of prospective jurors was different depending on the prospective juror's view of the propriety of the death penalty. The trial court

exhibited skepticism regarding the life-leaning prospective jurors which was absent when "rehabilitating" the pro-death jurors.

4. Conclusion

A trial court's "manner of conducting voir dire" requires reversal where it "renders the trial fundamentally unfair." (*People v. Whalen* (2013) 56 Cal.4th 1, 31, 152 Cal.Rptr. 3d 673, 706; accord, *Mu' Min v. Virginia* (1991) 500 U.S. 415, 425-426, 111 S.Ct. 1899, 1905.) Respondent claims reversal is not necessary in this case because appellant supposedly did not suffer any prejudice. (RB 87-88.) But, the seating of the jury in this matter was not the result of a neutral and evenhanded selection process as required by *Witherspoon-Witt*.[5] Appellant's fundamental rights were violated. Even if appellant cannot show prejudice in the sense of "but for the error a more favorable result would have occurred," reversal is nevertheless required because the trial was rendered fundamentally unfair. The error in jury selection "involves such a probability that prejudice will result that it is deemed inherently lacking in due process." (*Estes v. Texas* (1965) 381 U.S. 532, 542-543, 85 S.Ct. 1628, 1633.) Reversal is required.

C. THE TRIAL COURT ERRONEOUSLY EXCLUDED TWO DEATH-QUALIFIED PROSPECTIVE JURORS WHO HAD MORAL COMPUNCTIONS AGAINST THE DEATH PENALTY; THE PENALTY VERDICT MUST BE REVERSED.

In the opening brief, appellant demonstrated that the trial court erroneously

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[5] *Witherspoon v. Illinois* (1968) 391 U.S. 510, 88 S.Ct. 1770; *Wainwright v. Witt* (1985) 469 U.S. 412, 105 S. Ct. 844.

excluded prospective jurors nos. 8841 and 8891. Although these prospective jurors were opposed to the death penalty, they agreed that they could properly and fairly act as jurors in a capital case. (AOB 152-155.) Respondent's claim that there was no error (RB 88-111) is not well-taken and must be rejected.

A prospective juror can be excused for cause only where the juror's views on capital punishment "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. at 424, fn. omitted; *People v. Heard* (2003) 31 Cal.4th 946, 958, 4 Cal.Rptr.3d 131.) This standard is not to be applied to disqualify all jurors with conscientious objections to the death penalty:

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; 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 temporarily to set aside their own beliefs in deference to the rule of law. (*Lockhart v. McCree, supra,* 476 U. S. at 176.)

(See also *People v. Leon* (2015) 61 Cal.4th 569, ____ Cal.Rptr.3d ____, 2015 WL 3937629, p.7-9.)

In this case, prospective jurors nos. 8814 and 8891 met the above standard. As explained in the opening brief, no. 8814 stated he could impose life or death, although, quite naturally, he felt it would be difficult to impose death. Although he said he would always vote for life based on his "present feeling," he agreed that he would "possibly vote

for death" after listening to the evidence. He was open to voting for death. (18CT 4659-4966; 4RT 885-892.)

Prospective juror no. 8891, although strongly opposed to the death penalty, agreed he "could be persuaded" to impose death and would be open to such a verdict. He agreed that it was "possible" he could impose death after hearing the facts. He agreed that he would follow the trial court's instructions. (18CT 4884-4891; 5RT 1003-1012.)

The views of prospective jurors 8814 and 8891 regarding the death penalty would not have prevented or substantially impaired their ability to properly perform their duties as a juror. Both said that, despite their objections to the death penalty, they could find for death if such a decision were supported by the evidence.

Respondent quotes the entire voir dire of nos 8814 and 8819 (RB 88-105) and claims they were properly excused because, or so respondent argues, their views on the death penalty would prevent or substantially impair their performance. (RB 107-111.) But, respondent ignores the end result of the voir dire. No. 8891 stated that she would weigh the aggravating and mitigating factors and could impose a death sentence if the aggravating factors were "far in excess." She said, "under those circumstances, ...yes, I could do that." She said that she would follow the trial court's instructions. Although prospective juror no. 8814 stated he "won't vote for the death penalty," he agreed that he was open to voting for death if the evidence supported such a verdict.

Although nos. 8814 and 8891 expressed reservations about imposing the death

penalty, both agreed that they could do so if warranted by the evidence. The fact that no. 8814 said "I won't vote for the death penalty" (4RT 890) must be considered in light of his other responses indicating a willingness to put aside his reservations. And, no. 8891's preference not to sit on the jury in this case is likely the attitude of any reasonable prospective juror in a capital case and does not in any way indicate an inability to act as a proper, impartial juror.

The trial court improperly excused prospective jurors nos. 8814 and 8891. The penalty decision must be reversed. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962, 2 Cal. Rptr.2d 112, 127.)

D. THERE IS NO SUBSTANTIAL EVIDENCE THAT APPELLANT RAPED OR ATTEMPTED TO RAPE PALMER; THEREFORE, THE CONVICTION FOR RAPE AND THE RAPE SPECIAL CIRCUMSTANCE MUST BE REVERSED.

In the opening brief, appellant demonstrated that the rape conviction and rape special circumstance must be reversed because neither determination is supported by substantial evidence. (AOB 155-162.) Respondent claims there is enough evidence to support these verdicts. (RB 112-118.) The claim does not withstand scrutiny.

The evidence fails to establish that appellant raped Palmer. There were no witnesses to the alleged rape. No forensic findings were made as to whether a rape occurred. There was no physical evidence of a rape. The fact that appellant's sperm and/or seminal fluid was found on objects other than the victim is evidence only of some

sort of sexual activity, not rape, and not even physical contact of a sexual nature. There is no evidence as to when, during Palmer's and appellant's relationship, this sperm was deposited on various objects. The fact that appellant's sperm was found on Palmer's underwear is not evidence that a rape occurred. Appellant and Palmer had an intimate sexual relationship; the sperm could have been deposited after consensual sexual intercourse.

There was no sperm found in the crotch area of Palmer's underwear. (19RT 3358-3359, 3420; 22RT 3779-3786.) Had there been a rape, i.e., vaginal penetration, it is likely that sperm would have been deposited in the crotch area.

Although, according to Calhoun, appellant had said to him that he "beat up the pussy," no reasonable juror could have reasonably inferred that this meant appellant had raped Palmer or attempted to do so. Calhoun claimed that "beat up the pussy" may have been a reference to "aggressive sex" of some nature. But, "aggressive sex" does not necessarily mean rape. The cryptic nature of Calhoun's opinion does not constitute evidence of a rape or an attempted rape, nor could a reasonable juror so infer. And, not having been at Palmer's apartment, Calhoun did not know what actually occurred.

Even if, *arguendo,* the evidence can somehow be interpreted as showing that vaginal intercourse actually occurred, there is no evidence that Palmer was alive when it happened. Intercourse with a dead person is not rape. (*People v. Booker* (2011) 51 Cal. 4th 141, 179, 181, 119 Cal.Rptr.3d 722, 760, 760.) Clearly, there is insufficient evidence

of rape. The conviction for rape and the rape sentencing factor must be reversed.

Regarding the special circumstance of murder during the commission of a rape, a jury is required to "...find that the rape was an '"independent purpose"' in the killing of [the victim] [...], such that defendant intended to commit rape and the rape and killing were part of one continuous transaction." (*People v. San Nicolas, supra,* 34 Cal.4th at 661, 21 Cal.Rptr.3d at 650.) "After intent to rape is established, the special circumstance is applicable regardless of whether actual penetration occurred before or after death." (*Id.*); and see, *People v. Lewis* (2009) 46 Cal.4th 1255, 1299-1300, 96 Cal.Rptr.3d 512, 555-556.)

In this case, there is no evidence that, prior to or during the killing, appellant intended to rape Palmer. Appellant did not make any statement indicative of any such pre-murder intent. And, as explained above, there is no evidence that a rape actually occurred. There is no evidence, when, during the course of events, Palmer was killed nor is there any evidence establishing what was taking place prior to or during the killing. Indeed, there is no evidence of penetration. There is no substantial evidence that her death was "the direct causal result" of a rape. (*People v. Stamp* (1969) 2 Cal.App.3d 207, 210, 82 Cal.Rptr.598, 603.)

In attempting to show that a rape occurred, respondent mentions various items of evidence and speculates that appellant's and Palmer's sexual encounter was a rape. However, "an inference may not be based on mere surmise or conjecture..., nor upon

mere possibility. It must be based on probability." (*People v. Mayo* (1961) 194 Cal.App.2d 527, 535-536, 15 Cal.Rptr.366, 371.) A jury may infer a fact only " if reason and experience support the inference." (*Tot v. United States* (1943) 319 U.S. 463, 467, 63 S.Ct. 1241, 1244.) An inference is properly drawn only where "'the inferred fact is more likely than not to flow from the proven facts.'" (*United States v. Burks* (10th Cir.2012) 678 F.3d 1190, 1196.) And, as stated in *United States v. Jones* (7th Cir.2013) 713 F.3d 336, 340:

> The government may not prove its case...with "conjecture camouflaged as evidence."
>
> ..."Although a jury may infer facts from other facts that are established by inference, each link in the chain of inferences must be sufficiently strong to avoid a lapse into speculation." (Citations omitted.)

Here, respondent's conclusions lapse into speculation.

Respondent argues that, as a result of the decomposed state of Palmer's body, "evidence of sexual trauma disappeared as the body decomposed." (RB 114-115.) But, such a claim is pure speculation and presupposes that such trauma existed. Here, there is no evidence whatsoever that Palmer suffered any sexual or genital trauma.

Respondent claims the evidence supports a "reasonable inference that Judy was alive when appellant raped her." (RB 115.) Respondent engages in rank speculation in arguing that, while Palmer was alive, appellant tied her up "to facilitate his forcible commission of sexual acts against her while she remained alive and thereafter murdered

her to prevent her from identifying and inculpating him in the sexual offenses." (RB 115.) No evidence whatsoever supports this fanciful account of events. And, given the way the body was tied up -- wrapped in "egg crate"-type material and a sleeping bag and bound with rope -- it would have been impossible to have any sort of sexual intercourse with her. Further, respondent's idea that Palmer was tied up while she was alive is pure speculation. Nothing supports this claim.

Respondent claims consensual sex could not have occurred because Palmer had supposedly ended her relationship with appellant and may have told others that she did not want to have anything to do with him. (RB 115-116.) But, throughout their relationship, there were times when they were together and then not together. (11RT 2067, 2088.) Palmer was active in Alcoholics Anonymous and tried to help appellant. (11RT 2117-2119; 12RT 2264-2265.) For all the evidence shows, Palmer may have allowed appellant into her apartment where they engaged in consensual sex.

The semen and blood found in Palmer's apartment does not show that a rape occurred, as respondent claims. (RB 116.) Given Palmer's and appellant's sexual relationship, the semen could have been left during an earlier encounter and simply been overlooked by Palmer when cleaning. The fact of semen and blood in the apartment does not show a rape. It is equally likely that consensual sex of some nature -- and not necessarily sexual intercourse -- occurred and that sometime later she was killed. And, there is no evidencd as to when the blood was deposited or the cause of its deposition.

Respondent claims that appellant's conduct with other women "supports a finding of the requisite intent in this case." (RB 117-118.) But, there is no substantial evidence showing that Palmer was actually raped. To "constitute the commission of a criminal offense," "there must be a 'joint operation of act and intent.'" (*People v. Hernandez* (1964) 61 Cal.2d 529, 532, 39 Cal.Rptr.361, 363.) Here, there is no evidence of any joint operation. "'[E]vil thoughts alone cannot constitute a criminal offense.'" (*People v. Russo* (2001) 25 Cal.4th 1124, 1131, 108 Cal.Rptr.2d 436, 441.)

This Court "'...can give credit only to "substantial" evidence, i.e., evidence that reasonably inspires confidence and is "of solid value,"'" (*People v. Redmond* (1969) 71 Cal.2d 745, 756, 79 Cal.Rptr.529, 535), and "...doubts as to the sufficiency of the evidence must be resolved in favor of the accused..." *(People v. Speaks* (1981) 120 Cal.App.3d 36, 40, 174 Cal.Rptr.65, 67.) Here, there is no substantial evidence that a rape ever happened. Therefore, the rape conviction and the rape special circumstance finding must be reversed.

E. THE TRIAL COURT PREJUDICIALLY ERRED BY INSTRUCTING THE JURY AT THE GUILT PHASE ON FELONY MURDER AND THE FELONY MURDER SPECIAL CIRCUMSTANCE BASED UPON THE UNDERLYING FELONY OF BURGLARY.

1. Introduction

Appellant demonstrated that the trial court committed prejudicial error when it instructed the jury on felony murder and the felony murder special circumstance based on

the underlying felony of burglary. (AOB 162-171.) Respondent's contrary contention (RB 118-123) is without merit.

2. The issue has not been forfeited

Respondent contends appellant has forfeited the issue of the instructional error by failing to raise it below. (RB 118.) But, as stated in the opening brief (AOB 163, fn.25), instructional error may be raised for the first time on appeal even where no objection was interposed in the trial court. (Penal Code sec.1259 ["The appellate court may review any instruction given...even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."]; accord, *People v. Taylor* (2010) 48 Cal.4th 574, 730, fn.13, 108 Cal.Rptr.3d 87, 144, fn.13.) The issue has not been forfeited.

3. Instructional error requires reversal

In this case, the trial court instructed the jury that appellant could be convicted of burglary-based felony-murder where he "...intended to commit burglary, rape, forcible sodomy or sexual penetration by a foreign object." (6CT 1348; 48RT 7479.) The jury was instructed that the burglary special circumstance could be found true where, when appellant entered Palmer's apartment, he "intended to commit burglary, rape, or sexual penetration with a foreign object." (6CT 1356; 48RT 7480-7489.) Burglary was defined as an entry with the intent "to commit theft or rape or sexual penetration by a foreign object or forcible sodomy." (6CT 1383; 48RT 7519.) Rape, sexual penetration by a

foreign object, and forcible sodomy are all forms of assaultive conduct. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1045, 58 Cal.Rptr.2d 122, 126 [Rape is a "violent sexual assault."]) Rape is an offense "requiring an assault....Every act of rape,, of course, necessarily includes an assault." (*In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477, 27 Cal.Rptr.2d 55, 58.)

Respondent agrees that, in the instant case, "the sole purpose of the burglary is based on the intent to assault or kill the victim." (RB 119.)

In *People v. Seaton* (2001) 26 Cal.4th 598, 646, 110 Cal.Rptr2d 441, 472-473, this Court discussed the merger doctrine: "Although the intent to commit any felony or theft, including intent to unlawfully kill or to commit felonious assault, would support a burglary conviction, the felony-murder rule and the burglary-murder special circumstance do not apply to a burglary committed for the sole purpose of assaulting or killing the homicide victim." (Accord, *People v. Wilson* (1969) 1 Cal.3d 431, 439-442, 82 Cal.Rptr. 494; *People v. Sanders* (1990) 51 Cal.3d 471, 509, 517, 273 Cal.Rptr.537, 557-558, 563.)

Citing several cases, respondent claims that the merger doctrine does not apply to offenses such as rape and sexual penetration by a foreign object. (RB 121.) But, in none of these cases was the felony-murder or the special circumstance based on a burglary. Thus, these authorities are inapposite. (*Chevron v. W.C.A.B.* (1999) 19 Cal.4th 1182, 1195, 81 Cal.Rptr.2d 521, 528 ["It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not

authority for propositions not considered."])

Appellant demonstrated that the prosecution failed to present any evidence that, when appellant entered Palmer's apartment, he did so with the intent to commit theft. (AOB 168-169.) Citing 12RT 2199-2200, respondent claims appellant stole $200 from Palmer the night of her murder. (RB 122.) Respondent misrepresents the record. Tammy Gill had given Palmer $200 for Disneyland tickets:

> Q By the way, while she had been there visiting with you, was there discussion about a planned trip to Disneyland?
>
> A Yes. The weekend before, we had got together with my brother and his family at Easter and we found out that we had never been to Disneyland or a theme park, you know, as a family all together, and my Mom was excited, you know, and my brother said that he'd get some discount tickets and I would just pay for them. So before I -- right before she left when she went into the bathroom and in the bedroom she came out and I put $200 inside of an envelope and I went to hand her the envelope and she pulled away. She said, "What" --
>
> Q Pulled her hand away?
>
> A Yeah. She said, "What's that?"
>
> And I said, "This is the money for Bob if you see him in the morning. Give it to him to pay for the Disneyland tickets." And she was hesitant. And I go, "Okay." You don't have to take it. I can give it to him at another date or mail it to him or whatever."
>
> And she said, "No. I'll take it." And she went ahead and took it and put it in her purse.

Q What type of envelope did you put the money in?

A A white letter size.

Q Did you ever get that money back?

A No. (12RT 2199-2200.)

There is no evidence appellant stole this $200.

Respondent cites 15RT 2514-2515 and claims that appellant "had also stolen jewelry that belonged to Judy that he later tried to re-sell." (RB 122.) Not so. At the cited pages, Juan Calhoun testified:

Q Okay. Do you know the day when you met with him again?

A No, I can't remember.

Q Where did you meet with him this next occasion?

A It was on Parthenia and Van Nuys at -- there's a swap meet there.

Q Okay. What went on between you and the defendant at the swap meet?

A Well, he was -- he acted kind of radical and this is when I seen the bag of jewelry and he was trying to –

Q I'm sorry, the bag of what?

A The jewelry.

Q The jewelry?

A Right. And this is when he was in desperate need of

selling the Bronco that he had. [6]

Q What did that Bronco look like if you saw it?

A Beige or white.

Q Okay. And you say he was acting radical. What does that mean?

A Like he had to be in a hurry to get rid of it.

Q Okay. The bag of jewelry, did you look inside of it?

A I personally didn't pick up the bag myself, but I noticed there was some gold -- gold chains, gold earrings, maybe a ring or two, I'm not sure.

Q Did it look like jewelry for a man or for a woman?

A With the earrings, I would imagine it was a woman's jewelry. (5RT 2414-2515.)

Calhoun's testimony provides no evidence that the jewelry belonged to Palmer or that appellant stole it.

Respondent claims that the instructional error was harmless because there was overwhelming evidence of premeditation and deliberation. (RB 122-123.) But, regarding the felony murder theory of guilt and the burglary special circumstance, the jury did not have to find that appellant premeditated and deliberated. (*People v. Bonillas* (1989) 48 Cal.3d 757, 780, 257 Cal. Rptr.895, 907.) And, premeditation and deliberation is not a special circumstance. (Penal Code sec.190.2.) As to the felony-murder theory and

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[6] Appellant sold the Bronco on April 20, 2004. (17RT 2859-2867.)

burglary special circumstance, the error was prejudicial, and not harmless.

4. Conclusion

Under the merger doctrine, neither a felony-murder determination nor a burglary with an intent to commit rape special circumstance could properly be found by the jury. The court's erroneous instructions were prejudicial to appellant where, arguendo, the entry was made with the intent to commit an assaultive sex offense. Reversal is required.

F. THIS COURT CANNOT CONCLUDE THAT THE JURY UNANIMOUSLY FOUND APPELLANT GUILTY OF FIRST DEGREE MURDER ON A LEGALLY PERMISSIBLE THEORY; THEREFORE THIS COURT MUST REVERSE APPELLANT'S MURDER CONVICTION.

1. Introduction

The evidence, viewed in the light most favorable to the prosecution, suggests that appellant entered Palmer's apartment with the intent to commit an assaultive sex offense. Therefore, the felony-murder theory of guilt as to the murder charge is inapplicable as a matter of law. (*People v. Wilson, supra,* 1 Cal.3d at 440, 82 Cal.Rptr. at 499-500.) Although the jury was instructed with premeditation and deliberation as alternate theories for first degree murder (6CT 1346-1347), it is impossible to determine upon which theory the jury based its guilty verdict as to the murder charge, i.e., felony murder, or premeditated murder. As demonstrated in the opening brief (AOB 171-175), in such a case, legal error has occurred regarding the felony-murder theory and reversal is required even though, *arguendo*, the alternate theory may be supported by sufficient evidence.

Respondent's contrary contention (RB 1230127) is not well-taken.

2. The claim has not been forfeited

Respondent contends appellant has forfeited the issue of the instructional error by failing to raise it below. (RB 118.) But, as stated in the opening brief (AOB 163, fn.25), instructional error may be raised for the first time on appeal even where no objection was interposed in the trial court. (Penal Code sec.1259 ["The appellate court may review any instruction given...even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."]; accord, *People v. Taylor* (2010) 48 Cal.4th 574, 730, fn.13, 108 Cal.Rptr.3d 87, 144, fn.13.)

3. Reversal is required

Where one of two legal theories of guilt is legally incorrect, and it cannot be determined upon which theory the jury rested its verdict, the reviewing court must reverse. (*People v. Sellers* (1988) 203 Cal.App.3d 1042, 1055, 250 Cal.Rptr.345, 353-354; *People v. Sanders, supra,* 53 Cal.3d at 509, 273 Cal.Rptr. at 518; *Leary v. United States* (1969) 395 US. 6, 31-32, 89 S.Ct. 1532, 1545-1546.) Respondent does not take issue with this principle.

Respondent claims that the jury found appellant guilty on a felony-murder theory. But, as demonstrated in the opening brief (AOB 162-171) and the previous section of this brief, the merger doctrine is not applicable in this case; thus, the felony-murder cannot be based on a burglary. And, there is no evidence establishing upon what theory the jury

found appellant guilty. The verdict did not so indicate. (6RT 1397.) The fact that the rape and burglary special circumstance were found true does not mean that the guilty verdict was based on the (inapplicable) felony-murder theory.

Respondent argues that there was sufficient evidence to show that appellant killed Palmer while committing rape. (RB 126.) But, as shown in the opening brief (AOB 155-162) and in this brief, there is insufficient evidence establishing that a rape occurred. Nor is there any evidence that appellant stole anything from Palmer. The reporter's transcript pages cited by respondent (12RT 2199-2200; 15RT 2514-2515) do not support this claim.

The verdict in this case (6CT 1397) does not indicate whether the jury found appellant guilty of first degree murder on the incorrect, unsupported felony-murder theory, or on a premeditation and deliberation theory. "Where a *jury's* guilty verdict may rest on a legally correct theory or a legally incorrect theory, the conviction must be reversed unless the reviewing court can determine from the record that the conviction necessarily rested on the legally correct theory." (*People v. Tessman* (2014) 223 Cal.App. 4th 1293, 1302, 168 Cal.Rptr.3d 29, 35.) And, "The giving of...a legally correct but inapposite instruction amounts to the presentation of a factually inadequate theory." (*People v. Perez* (2005) 35 Cal.4th 1219, 1234, 29 Cal.Rptr.3d 423, 434.) Reversal is required where, as here, "...the record affirmatively demonstrates a reasonable probability that the jury found defendant guilty solely on this unsupported theory." (Id.) Regarding the murder verdict, appellant was prejudiced.

While, arguendo, there may be sufficient evidence to support the murder verdict on a premeditation and deliberation theory, this Court cannot say with any degree of confidence that such was the theory upon which the jury's murder verdict rested. Because the jury may have found appellant guilty on the legally inapplicable felony murder theory, reversal is required.

4. Conclusion

It is impossible to discern upon which theory the jury found appellant guilty of first degree murder – the legally inapplicable felony-murder theory or the premeditation and deliberation theory. Reversal is required.

G. THE TRIAL COURT PREJUDICIALLY ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY PERMITTING THE PROSECUTOR TO INTRODUCE AN UNWARRANTED AMOUNT OF EVIDENCE OF UNCHARGED CONDUCT; REVERSAL IS REQUIRED.

1. Introduction

In the opening brief, appellant demonstrated that the trial court prejudicially violated his constitutional rights when, over objection, it permitted the prosecution to introduce an incredible amount of evidence regarding uncharged inflammatory conduct. (AOB 175-201.) Respondent's contrary claims (RB 127-137) are not meritorious and should be rejected.

2. The issue has not been forfeited

Respondent initially argues that "The Claim is Forfeited." (RB 129.) But, appellant properly objected on Evidence Code section 352 and "federal and state grounds." (10RT 1819, 1280, 1823, 1824, 1825, 1840, 1844, 1870; 23RT 3932-3935, 4092-4106; 24RT 4110-4113.) Appellant does not claim, as respondent implies, "that the evidence was inadmissible under Evidence Code sections 1001, 1108, or 110[9]." (RB 129.) All three sections are subject to Evidence Code section 352. Appellant argues that, despite arguable admissibility, the overwhelming prejudice inherent in the evidence far outweighed any possible probative value. The issue has not been forfeited.

3. Evidence Code sections 1108 and 1109 are unconstitutional

In the opening brief, appellant demonstrated that Evidence Code sections 1108 and 1109 are unconstitutional. (AOB 185-196.) Respondent briefly argued that these sections are constitutional. (RB 129-130.) But, respondent's contention does not successfully rebut appellant's argument. No reply is necessary.

4. Appellant was prejudiced

Respondent claims that the uncharged domestic violence and sexual conduct evidence was relevant to show appellant's propensity to commit such crimes. (RB 130-133.) Appellant does not contend the evidence was irrelevant, but that its admission was prejudicial and violated his constitutional rights.

As argued in the opening brief, the evidence of violent uncharged sexual and

domestic violence offenses provided by Michelle W., Sandra B., Theresa Tannant, Kathleen S., Laura M., and Lorna T. was exceedingly prejudicial, as it showed that appellant repeatedly committed violent non-sexual offenses. Michelle W.'s testimony was especially inflammatory because most of the violence occurred while appellant and she were married. The jury would readily view with particular disdain and contempt anyone who so horribly abused his wife, someone he presumably loved. The evidence of the uncharged conduct provided by the other women was exceedingly prejudicial.

Moreover, there is no substantial evidence that an actual rape occurred in connection with Palmer's death. After having heard all of the evidence regarding the inflammatory uncharged conduct, the jury likely convicted appellant of the sexual offenses against Palmer in large part because it believed he had a propensity to commit such offenses. Further, the fact that appellant had never been punished for all of the uncharged acts increases the prejudice from admission of the evidence. (Compare, *People v. Ortiz* (2003) 109 Cal. App.4th 104, 118, 134 Cal.Rptr.2d 467, 478 ["...defendant had been punished – via convictions – for the prior bad acts..., a circumstance [which] ...lessens its prejudicial impact."]) Here, the prejudicial impact was significantly increased, not lessened.

The inflammatory evidence of the uncharged conduct introduced in this case "...uniquely tends to evoke an emotional bias against defendant as an individual..." (*People v. Yu* (1983) 143 Cal. App.3d 358, 377, 191 Cal.Rptr.859, 870), and effectively

canceled out whatever probative value the evidence may have had. The evidence *unfairly* biased the jury against appellant.

Respondent argues there was no prejudice because the jury was supposedly "properly instructed how to use this evidence." (RB 135.) However, although limiting instructions were given regarding the jury's consideration of the uncharged conduct (6CT 1360-1364, 1372), respondent cannot "...insulate reversal by pointing to a limiting [or cautionary] instruction..." (*Werner v. Upjohn Co., Inc.* (4th Cir.1980) 628 F.2d 848, 854; accord, *Francis v. Franklin* (1985) 471 U.S. 307, 324, n.9, 105 S.Ct. 1965, 1976, n.9.)

Respondent argues that the error in admitting the uncharged conduct evidence was harmless. (RB 135-137.) Not so. Contrary to respondent's claim, the remaining evidence did *not* "establish[ ] that a sexual assault had occurred" vis-a-vis Palmer. The evidence was equally consistent with a consensual sexual encounter. The way Palmer's body was tied and bound shows that the binding occurred after the sexual encounter. She could not have been raped while tied up in such a fashion. Appellant's statement that he supposedly "beat up the pussy" was ambiguous. But, given the evidence of the uncharged conduct, the jury would view it as referring to a rape. Clearly, the admission of the uncharged conduct evidence was prejudicial, not harmless.

5. Conclusion

The erroneous admission of the mountain of evidence of uncharged conduct "pose[d] an intolerable risk to the fairness of the proceedings." (*People v. Waidla* (2000)

22 Cal.4th 690, 724, 94 Cal.Rptr.2d 396, 418.) Admission of the evidence "violate[d] the defendant's right to due process by denying him a fundamentally fair trial." (*Milone v. Camp* (7th Cir.1994) 22 F.3d 693, 702.) Reversal is required.

H. DR. STAUB'S TESTIMONY REGARDING DNA ANALYSES HE DID NOT CONDUCT NOR OVERSEE AND THE INTRODUCTION OF THE ANALYST'S REPORTS PREJUDICIALLY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS; REVERSAL IS REQUIRED.

1. Introduction

"The Sixth Amendment of the United States Constitution grants a criminal defendant the right to confront adverse witnesses." (*People v. Lopez* (2012) 55 Cal.4th 569, 573, 147 Cal.Rptr.3d 559, 561; accord, *Pointer v. Texas* (1965) 380 U.S. 400, 404-405, 85 S.Ct. 1065, 1068.) As demonstrated in the opening brief, this fundamental right was prejudicially violated when, over appellant's objections, the trial court allowed Dr. Staub to vouch for the propriety and accuracy of DNA tests he did not conduct or oversee and reports he did not write. The tests and reports purported to link appellant to the charged homicide and were prepared for that purpose. (AOB 201-229.) Respondent claims there was no error. (RB 137-157.) The claim is not meritorious and must be rejected. Reversal is required.

2. The claim has not been forfeited

In the opening brief, appellant demonstrated that the issues of Dr. Staub's testimony and the DNA reports had not been forfeited for purposes of appeal. (AOB 228-

229.) Respondent claims the Sixth Amendment issue has been forfeited supposedly because appellant did not object on the grounds of the Sixth Amendment or *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354. (RB 142-143.) But, appellant objected on the ground that admission of the evidence "would then prevent proper cross-examination." (20RT 3465-3466.) "'What is important is that the objection fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling.'" (*People v. Geier* (2007) 41 Cal.4th 555, 609, 61 Cal.Rptr.3d 580, 624; accord, *United States v. Prater* (6th Cir.2014) 766 F.3d 501, 506 ["for a claim of error to 'constitute a sufficiently articulated objection,' a party must 'object with that reasonable degree of specificity which would have adequately apprised the trial court of the true basis for his objection.'"]) Here, appellant's "prevent proper cross-examination" fully apprised the trial court and the prosecution of his Sixth Amendment-based denial of confrontation objection. The issue has been preserved for review.[7]

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[7] Citing AOB 228-229, respondent claims that, "Appellant acknowledges that he did not object on the basis of *Crawford*...or on Sixth Amendment grounds at trial." (RB 143.) However, appellant acknowledged no such thing. He merely stated that counsel did not "expressly rely" on *Crawford* of the Sixth Amendment. (AOB 228.) As shown, appellant's "prevent proper cross-examination" objection (20RT 3465-3466) properly preserved the constitutional issue.

3. Appellant's Sixth Amendment rights were prejudicially violated

"[T]he United States Supreme Court has said that generally the Sixth Amendment's confrontation right bars the admission at trial of a testimonial out-of-court statement against a criminal defendant unless the maker of the statement is unavailable to testify at trial and the defendant had a prior opportunity for cross-examination." (*People v. Lopez, supra,* 55 Cal.4th at 580-581, 147 Cal.Rptr.3d at 568.)[8] But, as Justice Lui stated in his dissent in *Lopez*, "the three confrontation clause cases decided today [[9]] reflect the muddled state of current doctrine concerning the Sixth Amendment right of criminal defendants to confront the state's witnesses against them." (55 Cal.4th at 590, 147 Cal.Rptr.2d at 575-576.) Nevertheless, the majority in *Lopez* attempted to distill a workable rule regarding out-of-court testimonial statements subject to the Sixth Amendment's confrontation clause:

> First, to be testimonial, the out-of-court statement must have been made with some degree of formality or solemnity...
>
> Second, ...an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal

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[8] Here, there is no evidence that Leisy, Johnson, and Benavides, the Cellmark analysts who conducted the DNA tests in this case, were unavailable to testify and that appellant had a previous opportunity to cross-examine them. Thus, under *Crawford, supra,* their reports should have been excluded pursuant to Sixth Amendment Confrontation Clause principles.

[9] These cases are: *People v. Lopez, supra,* 55 Cal.4th 569, 147 Cal.Rptr.3d 559; *People v. Dungo* (2012) 55 Cal.4th 608, 147 Cal.Rptr.2d 527; and *People v. Rutterschmidt* (2012) 55 Cal.4th 650, 147 Cal.Rptr.3d 518.

> prosecution..." for the primary purpose of accusing a targeted individual" ... "for the purpose of providing evidence." (*Lopez, supra,* 55 Cal.4th at 582, 147 Cal.Rptr.3d at 569.)

People's Exhibit 313, DNA analyst Leisy's report dated January 24, 2005 (20RT 3455-3456, 3468) was signed by Leisy and by Jenifer E. Reynolds, Ph.D., Laboratory Director. The report referred to the items tested as "evidence" and informed the recipient of the report, the Los Angeles Police Department, to "please notify us" "[i]f expert witnesses are needed for...court testimony." Analyst Leisy's reports of March 29, 2005 (20RT 3480-3481) and April 7, 2005 (People's Exhibit 322; 20RT 3493) contained the same information and were signed by Leisy and Reynolds. The reports analyzed known DNA samples, those of appellant and Palmer. The reports were clearly prepared for the sole purpose of providing testimonial evidence against appellant.

The reports of Leisy, Johnson, and Benavides, even if not signed under oath or by declaration under penalty of perjury, were sufficiently testimonial to warrant the protections of the Sixth Amendment. (*Bullcoming v. New Mexico* (2011) ____ U.S. ____, 131 S.Ct. 2705, 2717.) The reports were formal, solemn documents """made for the purpose of establishing or proving some fact,""" i.e., that appellant's DNA was on items associated with Palmer, which was "the precise testimony the analysts would be expected to provide if called at trial." The reports were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 310-311, 129 S.Ct. 2527, 2535.) The analyses and

reports were """made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."""" (*Id.*) The DNA analyses here were "prepared for the primary purpose of accusing a targeted individual" (*Williams v. Illinois* (2012) ____ U.S. ____, 132 S.Ct. 2221, 2243), i.e, appellant. Indeed, this was the only purpose for the analyses and the resulting reports. The analyses and reports were "made with the primary purpose of creating evidence" against appellant. (*Ohio v. Clark* (2015) ____ U.S. ____, 135 S.Ct. 2173, 2181.)

In this case, the only purpose of the DNA tests was to provide further inculpatory evidence against appellant, not to possibly exclude him. As a matter of constitutional law, under *Crawford* and *Melendez-Diaz*, appellant had the Sixth Amendment right to be confronted by the authors of the reports, i.e., the witnesses who actually and personally conducted the DNA analyses. (557 U.S. at 311, 129 S.Ct. at 2532.) Because the DNA reports were admitted for their truth, appellant had the Sixth Amendment right to confront and cross-examine the analyst/author of the reports.

Respondent claims that *People v. Geier, supra,* 41 Cal.4th 555, 61 Cal.Rptr.3d 580 "is controlling in this case." (RB 152.) *Geier* held that a statement is "testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial." (41 Cal.4th at 604, 61 Cal.Rptr.2d at 620.) However, in *Lopez*, decided after *Geier*, the Court held that a statement was testimonial where it was prepared "with some degree of

formality or solemnity" and where its "primary purpose pertained in some fashion to a criminal prosecution...'for the purpose of providing evidence'" against a "targeted individual." (55 Cal.4h at 582, 147 Cal.Rptr.3d at 569.) Given the definition in later-decided *Lopez*, its definition of testimonial is controlling, not *Geier*'s. Under *Lopez*, the DNA reports from the Germantown lab were testimonial.

Citing *People v. Geier, supra,* 41 Cal.4th at 605, 61 Cal.Rptr.3d at 620, respondent claims the analyst's reports in the instant case were not testimonial because her "'observations...constitute[d] a contemporaneous recordation of observable events rather than the recordation of past events.'" (RB 144-145.) But, as stated in *People v. Barba* (2013) 215 Cal.App.4th 712, 155 Cal.Rptr.3d 730 ; "We question whether *Geier*'s 'contemporaneous recordation of observable events' analysis is viable, given the holdings in *Melendez-Diaz* and *Bullcoming*." (215 Cal.App.4th at 742, fn.9, 155 Cal.Rptr.3d at 730, fn.3; accord, *People v. Lopez, supra,* 55 Cal.4th at 581, 147 Cal.Rptr.3d at 568 ["a laboratory report may be testimonial, and thus inadmissible, even if it '"contains near-contemporaneous observations of [a scientific] test."'"])

Further, in *Geier*, unlike the instant case, the expert (who was from Cellmark) actually supervised the analyst who conducted the DNA testing and oversaw the actual testing. And, also unlike the instant case, the expert rendered her own, independent opinion. (41 Cal.4th at 594-596, 61 Cal.Rptr.3d at 611-613.)

Even if, arguendo, the DNA reports are not testimonial and thus not subject to

Sixth Amendment confrontation considerations, such "[n]on-testimonial statements remain subject to state hearsay law..." (*People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1222, 32 Cal.Rptr.3d 613, 620; accord, *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1401-1402, 149 Cal.Rptr.3d 211, 217 ["Non-testimonial hearsay is subject...to 'traditional limitations upon hearsay evidence'..."]) For example, the authorities have held that the "admissibility" of such reports "would be proper only through the testimony of [an] expert witness" who "conveys an independent opinion about the test results." (*People v. Barba, supra* 215 Cal.App.4th at 742, 155 Cal.Rptr.3d at 730; accord, *People v. Lopez, supra,* 55 Cal.4h at 595, 147 Cal.Rptr.3d at 571 [prosecution expert gave his own "independent opinion."]) Here, Dr. Staub never conveyed his own, independent expert opinion about the DNA testing procedure or the results. He testified as if the procedures were conducted correctly and that the results were accurate. He thus testified as to the truth of the matter asserted in the reports. Such testimony is barred by the hearsay rule. (Evidence Code sec.1200.) Dr. Staub never rendered his own, independent expert opinion.[10]

Nor were the records or Dr. Staub's testimony admissible under Evidence Code section 1271, the business records exception to the hearsay rule. (*Zamone v. City of*

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[10] Respondent claims that Dr. Staub "offer[ed] his expert opinion." (RB 154.) But, respondent does not state what that independent expert opinion was or where it can be found in the reporter's transcript. Citing 20RT 3499, 3505-3511,3521-3537, respondent claims Staub "testified as an expert witness." (RB 157.) But, a review of the cited pages shows that Staub was merely reciting the results of the reports. He was not rendering an independent, expert opinion.

Whittier (2008) 162 Cal.App.4th 174, 191, 75 Cal.Rptr.3d 439, 452; *United States v. Thompson* (8th Cir.2012) 686 F.3d 575, 581.) In Justice Corrigan's concurring opinion in *Lopez,* she stated, "not all documents produced by a business fall within the business records exception." (55 Cal.4th at 588, 147 Cal.Rptr.3d at 574.) A record does "'not qualify as a business record'" where, as here, "'it was "calculated for use essentially in the court, not in the business."'" (Id.); accord, *Melendez-Diaz v. Massachusetts, supra,* 557 U.S. at 321-322, 129 S.Ct. at 2538.)

Citing *People v. Champion* (1995) 9 Cal.4th 879, 915, 39 Cal.Rptr.2d 547, 565-566, respondent claims that a fingerprint expert can properly testify to the contents of a technician's report on the fingerprints because such a report constitutes a business record. (RB 155-156.) But, such a holding appears to run afoul of the preclusion stated above in *Melendez-Diaz.*

Respondent claims that Dr. Staub could properly testify as to the content and truth of the DNA reports because supposedly was the "custodian of records." (RB 153-154.) But, there is no evidence that Staub, who worked at the lab in Dallas, Texas, was the custodian of records for the defunct Germantown, Maryland lab. As the trial court stated, "But, he's not a custodian for Germantown." (20RT 3442.)

In the opening brief, appellant demonstrated that his right to confrontation was prejudicially violated as a result of Dr. Staub's testimony and the hearsay DNA reports. (AOB 223-227.) Respondent claims there was no prejudice because Dr. Staub testified as

an expert witness. (RB 157.) But, as shown, *supra,* Staub never testified as an expert and never rendered his own, independent expert opinion. He simply testified as to the supposed truth of tests he never conducted or supervised.

Respondent claims there was no prejudice because appellant supposedly "bragged about raping Judy." (RB 157.) But, the "beat the pussy" comment was equivocal and did not even mention the word rape. The facts that appellant had Palmer's car and some of her belongings, that some of his belongings were found with her body, and that other analysts found sperm-derived DNA are not surprising -- after all, the two had a relatively long-standing intimate relationship. Clearly, introduction of Dr. Staub's testimony and the DNA reports was prejudicial to appellant.

4. Conclusion

The erroneous introduction of Staub's testimony and the DNA reports from the Germantown, Maryland lab were severely prejudicial to appellant. This Court cannot say hat the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824.) Reversal is required.

I. THE PAROLE REVOCATION FINE SHOULD BE STRICKEN

Appellant argued that, because his sentence does not include the possibility of parole, the $10,000 Penal Code section 1202.45 parole revocation fine should be stricken. (AOB 229-233.) Respondent claims the fine was properly imposed. (RB 158.) The claim is not well-taken.

In *People v. McWhorter* (2009) 47 Cal.4th 318, 97 Cal.Rptr.3d 412, as here, the

defendant was convicted of a determinate sentence offense (robbery) and a capital offense (two murders with special circumstances) and received a death sentence. There is no evidence the sentence on the robbery was stayed or otherwise not imposed. The trial court imposed a $200.00 parole revocation restitution fine. Following *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 83 Cal.Rptr.2d 157 (fully described in the opening brief), this Court reversed and struck the fine:

> "Defendant...claims that because his sentence did not include a period of parole, the trial court erred in imposing and staying a $200 parole revocation restitution fine pursuant to section 1202.45. He is correct. (See *People v. Oganesyan...*) ...We shall...order the fine stricken and the judgment modified to so reflect." (47 Cal.4th at 377, 97 Cal.Rptr.3d at 461.)

Citing *People v. Brasure* (2008) 42 Cal.4th 1037, 1075, 71 Cal.Rptr.3d 675, 705-706, respondent claims that, because appellant's sentence included a determinate term, the parole revocation fine was properly imposed. This is the holding of *Brasure.* However, the "purpose" of section 1202.45 is "'the recoupment from prisoners and potentially from parolees who violate the conditions of their parole some of the costs of providing restitution to crime victims.'" (*People v. Andrade* (2002) 100 Cal.4th 351, 356, 121 Cal.Rptr.2d 923, 927.) Imposition of the fine where, as here, there is no possibility of parole does not serve the purpose of the statute.

In construing section 1202.45, a court must "keep[ ] in mind the statutory purpose" and """give effect to the apparent purpose of the statute."""" (*MacIsaac v. Waste*

Management, Etc. (2005) 134 Cal.App.4th 1076, 1083, 36 Cal.Rptr.3d 650, 656.) *Brasure*'s interpretation of section 1202.45 does not serve the statute's purpose because appellant will never be released on parole.

The Penal Code section 1202.45 parole revocation fine was improperly imposed. It must be stricken.

J. THE ABSTRACT OF JUDGMENT MUST BE CORRECTED[11]

In counts 7, 10, and 16, appellant was charged with and convicted of violating Penal Code section 286, subdivision (c)(2), sodomy "by force, violence, duress, menace, and fear of immediate and unlawful bodily injury." (Supp. CT III 99, 101, 106; 6CT 1403-1404, 1406.) The victims were all adult women. However, the abstract of judgment (36CT 9483-9484) erroneously shows that appellant was convicted on those three counts of sodomy with a person under 14 years old. This clerical error should be corrected.

In *In re Candelario* (1970) 3 Cal.3d 702, 705, 91 Cal.Rptr.497, 498, this Court stated:

> It is not open to question that a court has the inherent

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[11] On June 10, 2015, through a telephone call and an email, counsel for appellant contacted counsel for respondent regarding this error, which was not raised in the opening brief. He agreed that it could be raised in this brief. Counsel for respondent responded, "It appears you are correct re the incorrect abstract of judgment. Feel free to add the footnote and my agreement as to the clerical error that should be corrected by the trial court." On June 11, 2015, counsel for appellant wrote the trial court requesting correction of the clerical error. A copy of the letter was served on this Court.

> power to correct clerical errors in its records so as to make these records reflect the true facts. The power exists independently of statute and may be exercised in criminal as well as in civil cases. The power is unaffected by the pendency of an appeal or a habeas corpus proceeding. The court may correct such errors on its own motion or upon the application of the parties. (Citations omitted.)

(Accord, *Aspen Cap. Corp. v. Marsch* (1991) 235 Cal.App.3d 1199, 1204, 286 Cal.Rptr. 921, 924 ["A court of general jurisdiction has this inherent power to correct clerical error in its records, whether made by the court, clerk or counsel, at anytime so as to conform its records to the truth."]; *People v. Jack* (1989) 213 Cal.App.3d 913, 914, 261 Cal.Rptr.860, 861.)

As to the convictions on counts 7, 10, and 16, the abstract of judgment does not reflect the true facts. This clerical error should be corrected on this Court's own motion to show convictions for sodomy by force.

III. ARGUMENT: THE PENALTY PHASE

A. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT ALLOWED THE PROSECUTION TO INTRODUCE EVIDENCE THAT APPELLANT HAD MISTREATED CATS; THE PENALTY VERDICT MUST BE REVERSED.

Appellant demonstrated that the death verdict must be reversed as a result of the prejudicial admission of evidence that, when appellant was a child, he mistreated cats. (AOB 233-241.) Respondent claims there was no error. (RB 158-161.) The claim is without merit. Reversal of the death verdict is required.

Respondent initially argues that appellant has forfeited the issue as to "any constitutional objection for appellate purposes." (RB 159.) But, as fully explained in the opening brief (AOB 239-240), the issue is properly before this Court for a decision on the merits.

The evidence of the cat mistreatment was presented through the testimony of Clyde Penglase, Jr. (See AOB 234-237.) Although Penglase did not see appellant tie the cats together and throw them over a clothesline, he testified that appellant was "getting ready to do it." (55RT 8179.) Appellant was discussing "tying the tails together and throwing them over the clothesline." (55RT 8179-8181.) Given this testimony in front of the jury, respondent's claim that "evidence of alleged mistreatment of cats was never admitted into evidence" (RB 159) rings hollow.

Respondent claims that the cat mistreatment evidence was not prejudicial. It cannot be said that torture of or cruelty to animals in an especially inflammatory type of evidence which "... "...uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues." (*People v. Yu, supra,* 143 Cal.App.3d at 377, 191 Cal.Rptr. at 870.) Appellant introduced considerable evidence of the terrible abuse, humiliation, difficulties suffered as a child and his significant mental problems. This mitigating evidence could readily have justified a determination that life without possibility of parole was the appropriate punishment. However, considering the deviant cat mistreatment evidence, no reasonable jury could ignore such evidence.

Clearly, appellant was prejudiced. Reversal is required.

B. THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION FOR MODIFICATION OF THE DEATH VERDICT; REVERSAL IS REQUIRED.

In the opening brief, appellant demonstrated that the trial court erroneously denied his motion to modify the death verdict. (AOB 241-245.) Respondent claims that the issue has been forfeited and that there was no error. (RB 161-163.) Respondent is wrong on both counts.

Respondent claims that appellant has forfeited the issue as a result of counsel's failure to object to the trial court's denial of the motion. However, as explained in the opening brief (AOB 241, fn.42), no objection is required to preserve an issue for appeal where an objection "clearly would have been futile." (*People v. Chavez* (1980) 26 Cal.3d 334, 350, fn.5, 161 Cal.Rptr.762, 771, fn.5.) It is obvious (see the trial court's ruling at 62RT 8708-8714) that whatever objection or complaint appellant might have put forth would have been overruled out-of-hand. Nothing counsel could have said would have changed the trial court's mind. Because an objection would have been futile, the failure to object did not result in forfeiture.[12]

As to the trial court's ruling on the motion, respondent argues that the trial court

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[12] Respondent argues that a defendant must object before the futility exception applies. (RB 161-162.) However, the authorities cited by appellant do not so hold. Although objection and overruling suggesting further objections would be futile may be the usual pattern, it is not exclusively so.

properly reviewed the evidence and the aggravating and mitigating factors and that there was no error in the denial of the motion. The argument is not well-taken.

The trial court stated that the murder was an "intentional killing...premeditated ...and committed with malice aforethought." (62RT 8709.) This claim was likely based on the prosecutor's argument that appellant obtained the rope prior to the killing with the intent to kill Palmer and bind her body. But, if appellant entered the apartment with this intent, the merger doctrine prevents the burglary from being relied on as a special circumstance. (*People v. Seaton, supra,* 26 Cal.4th at 646, 110 Cal.Rptr.2d at 473.) The inapplicability of the burglary special circumstance provides a firm basis for granting the automatic motion.

The trial court denied the motion believing that the murder took place in the course of a rape. (62RT 8709.) But, as argued, there is no substantial evidence that appellant actually committed a rape. The equivocal evidence as to this special circumstance counsels in favor of granting the motion.

The trial court denied the motion based on the claim that the nature of the killing was "particularly heinous" because the body was tied up and dumped in the desert. (62RT 8709-8710.) However, this conduct had nothing whatsoever to do with the actual killing. (See, e.g., *People v. Green* (1980) 27 Cal.3d 1, 61, 51, 164 Cal.Rptr.1, 38.) The claim that the murder was "particularly heinous" is vague and cannot support imposition of the death penalty. Moreover, to the extent that the trial court was considering this as a

factor in aggravation, it did so in violation of *People v. Superior Court (Engert)* (1982) 31 Cal. 3d 797. (And see, *Maynard v. Cartwright* (1988) 486 U.S. 356, 363-364, 108 S.Ct. 1853, 1859.)

Appellant concedes the serious nature of his offenses (62RT 8710-8711) and that they show a "pattern of criminal conduct." (62RT 8711.) However, this pattern is the result of his significant psychological problems and the wretched and inhumane living conditions he experienced growing up. Appellant's serious mental problems provides strong mitigating evidence significantly reducing his culpability, despite the serious nature of his offenses.

The trial court denied the modification motion because Palmer was beloved by her family and was a kind, generous, and loving individual. (62RT 8710.) But, when considered with all the facts and arguments in favor of the motion, this view of Palmer is not sufficient to justify a denial of the motion.

Here, the trial court erred when it denied appellant's modification motion and thereby denied appellant his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments as well as the California Constitution, art.1, secs.15, 16.

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IV. ARGUMENT: OTHER ISSUES

A. APPELLANT'S CONSTITUTIONAL RIGHTS WERE PREJUDICIALLY VIOLATED BECAUSE THE VICTIM IMPACT EVIDENCE WAS NOT LIMITED TO THE FACTS OF CIRCUMSTANCES KNOW TO APPELLANT WHEN HE ALLEGEDLY COMMITTED THE CRIME.[13]

Appellant argued that appellant's constitutional rights were prejudicially violated because the victim impact evidence was not limited to circumstances known to him when he allegedly committed the murder. (AOB 245-252.) Respondent merely argues that this Court has "previously rejected this claim," as appellant acknowledged (AOB 245, fn.43), and does not further respond. (RB 163.) Given respondent's failure to provide any cogent argument in response to appellant's contention, no further reply is needed.

B. PENAL CODE SECTIONS 190.3 AND 190.2 VIOLATE THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND PARALLEL PROVISIONS OF THE CALIFORNIA CONSTITUTION.

1. The aggravating factors in Penal Code section 190.3 are unconstitutionally vague.

Appellant demonstrated that the entirety of Penal Code section 190.3 was unconstitutionally vague because the statute, as a whole and each of its separate sub-sections individually, fails to provide sufficiently specific aggravating factors so as to preclude the trier of fact from considering facts not relevant to the penalty determination.

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[13] In *People v. Roldan* (2005) 35 Cal.4th 646, 732, 27 Cal.Rptr.3d 360, 429, this Court, without explanation, stated "[w]e disagree with this argument."

(AOB 252-256.) *People v. Young* (2005) 34 Cal.4th 1149, 1207-1208, appears to hold that section 190.3 is not impermissibly vague. (RB 86.) However, regarding the choice of penalty, this Court acknowledged that the aggravating factors relied on by the trier of fact in determining penalty:

> "Must be defined in terms sufficiently clear and specific that jurors can understand their meaning, and they must direct the sentencer to evidence relevant to and appropriate for the penalty determination.
>
> To meet these dual criteria, sentencing factors should not inject into the individualized sentencing determination the possibility of 'randomness' or 'bias in favor of the death penalty.' [Citation.] Inappropriate for consideration in the sentence selection process would be any aggravating factor that was either 'seriously and prejudicially misleading,' or that invited 'the jury to be influenced by a speculative or improper consideration[ ], such as the race or political beliefs of the defendant that are without any bearing on moral culpability." (*People v. Baciagalupo* (1993) 6 Cal.4th 457, 477, 24 Cal.Rptr.2d 808, 820; footnote deleted.)

(Accord, *Tuilaepa v. California* (1994) 512 U.S. 967, 974, 114 S.Ct. 2630, 2636 ("...a vague propositional factor used in the sentencing decision creates an unacceptable risk of randomness, the mark of the arbitrary and capricious sentencing process...")])

This Court has recognized that factors such as those in section 190.3 "...violate the Eighth Amendment...if they are 'insufficiently specific or if they direct the sentencer to facts not relevant to the penalty evaluation." (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 478, 24 Cal.Rptr.2d 808, 821.) And, even though the United States Supreme Court has

upheld factors (a), (b), and (I) of section 190.3 (*Tuilaepa v. California, supra,* 512 U.S. 967, 114 S.Ct. 2630), the crucial issue is the interplay among *all* factors and how they are applied during the trier of fact's deliberations. While each discrete factor, standing alone, may appear constitutional, the combined effect of all factors renders the scheme unconstitutional. As stated by justice Blackmun in his dissent in *Tuilaepa*:

> "[T]he Court isolates one part of a complex scheme and says that, assuming that all the other parts are doing their job, this one passes constitutional muster. But the crucial question, and one the Court will need to face, is how the parts are working together to determine with rationality and fairness who is exposed to the death penalty and who receives it." (512 U.S. at 995, 114 S.Ct. at 2647.)[14]

Further, *Tuilaepa*'s holding that factors (a), (b) and (I) were proper because they are not "propositional" (512 U.S. at 974-975, 114 S.Ct. 2636), even if arguably correct, is *not* applicable to the remaining factors, all of which (except possibly factor (k)) call for a "propositional" answer, e.g., a "yes" or "no," to the statutory question "Whether or not..." the factor is present. Depending on the answer, the factor is either aggravating or mitigating. Thus, under *Tuilaepa,* all factors except (a), (b) and (I) are "propositional," and thus violative of the Eighth Amendment. And, nothing in the statutory scheme ensures that the trier of fact will not treat the absence of ostensibly mitigating factors as

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[14] *Tuilaepa* did not decide whether section 190.3 as a whole violates the Eighth Amendment. Nor did it consider factors (c), (d), (e), (f), (g), (h), (j) or (k). Thus, it is inapposite regarding these issues. (*San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 Cal.4th 893, 55 Cal.Rptr.2d 724 ("Cases are not authority, of course, for issues not raised and resolved.")

aggravation to be weighed on death's side of the scale.

The entirety of section 190.3, without isolating its discrete factors, falls squarely within the type of constitutional violation discussed by Justice Blackmun and outlined in *Bacigalupo.* Appellant requests that this Court's holding regarding section 190.3 be reconsidered. As a matter of law, section 190.3 as a whole is unconstitutionally vague. Appellant's sentence must be reversed.

2. Factor (a) of Penal Code section 190.3 is unconstitutional as violative of the Eighth and Fourteenth Amendments.

As shown in the opening brief (AOB 256-260), factor (a) of Penal Code section 190.3 is unconstitutional because it is vague, standardless, subjective as to the trier of fact, arbitrary and weighted heavily toward imposition of the death penalty. In *Tuilaepa v. California, supra,* 512 U.S. at 975, 114 S.Ct. at 2637, the Court found that factor (a) was "neither vague nor otherwise improper under our Eighth Amendment jurisprudence." Relying on *Tuilaepa,* this Court has ruled that factors (a), (b) and (I) are constitutional. (See, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 187-190, 51 Cal.Rptr.2d 770, 831-883.)

Appellant submits these cases are wrongly decided, result in the violation of fundamental, unconstitutional rights and, thus, should not be followed by this Court. (*Hawkins v. Superior Court* (1978) 22 Cal.3d 584, 593, n.7, 150 Cal.Rptr.435, 441, n.7 ["'[I]n criminal actions, where life or liberty is at stake, courts should not adhere to precedents unjust to the accused.'"]; *County of Los Angeles v. Faus* (1957) 48 Cal.2d 672,

679, 312 P.2d 680, 685 ["...decisions should not be followed to the extent that error may be perpetuated and that wrong may result."])

As Justice Blackmun stated in his dissent in *Tuilaepa,* the use of "...the 'circumstances of the crime' [factor (a)] as an aggravating factor to embrace the entire spectrum of facts present in virtually every homicide...[is] something this Court condemned in *Godfrey v. Georgia...*" (512 U.S. at 988, 114 S.Ct. at 2643.) And, because factor (a) "...lacks clarity and objectivity, it poses an unacceptable risk that a sentencer will succumb either to overt or subtle racial impulses or appeals....The California sentencing scheme does little to minimize this risk." (512 U.S. at 992, 114 S.Ct. at 2645.) Clearly, factor (a) encompasses *every* fact which could possibly exist in *any* homicide; thus, it is vague and overly broad.

Respondent appears to be correct that this issue has been decided against appellant. (RB 164.) However, for the reasons stated herein and in the opening brief, appellant respectfully contends that these cases were wrongly decided and should be reconsidered.

3. Penal Code section 190.3's unitary list of aggravating and mitigating factors violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

Penal Code section 190.3 allowed the trial court to engage in an undefined, open-ended consideration of non-statutory factors and permitted the prosecutor to claim mitigating factors were really aggravating, thereby violating appellant's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 260-270.)

Respondent's contrary contentions (RB 164-166) should be rejected.

Penal Code section 190.3 does not properly guide the trier of fact's sentencing discretion nor does it tell the trier of fact which factors are aggravating and which are mitigating.[15] In the instant case, this deficiency, coupled with the prosecutor's closing arguments implicitly urging the trier of fact to consider mitigating evidence as aggravating, permitted the jury to impose the death sentence in an arbitrary, unprincipled manner. (*Gregg v. Georgia* (1976) 428 U.S. 153, 192, 96 S.Ct. 2909, 2934.) And, given the vagueness of the statute, the jury undoubtedly gave great aggravating weight to the relative absence of mitigating evidence.

The failure of section 190.3 to guide the jury's sentencing discretion is exemplified by factor (I) regarding age. (See AOB 145-147.) As Justice Blackmun stated in *Tuilaepa*:

> "The defendant's age as a factor, applied inconsistently and erratically, ...fails to channel the [trier of fact's] discretion. In practice, prosecutors and trial judges have applied this factor to defendants of virtually every age..." (512 U.S. at 988, 1114 S.Ct. at 2643.)

The vague nature of the sentencing factors permits the factor to be used either way, thereby undermining the guided discretion which capital jurisprudence requires.

The vague, rudderless nature of the factors to be considered by the trier of fact is

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[15] Appellant recognizes that the claim has been rejected by this Court. (*People v. McPeters* (1992) 2 Cal.4h 1148, 1192, 9 Cal.Rptr.2d 834, 857.) However, he respectfully requests that this point be reconsidered.

also illustrated by factors (d) and (h) regarding extreme mental or emotional disturbance and impairment due to mental disease, deficit or intoxication. (AOB 264-268.) Regarding factor (d)'s use of the word "extreme," the trier of fact is effectively precluded from finding anything but "*extreme*" disturbance to be mitigating. Indeed, the absence of "extreme" but still severe disturbance could be viewed as aggravating. This, however, is error since factors (d) and (h) "can only be mitigating." (*People v. Montiel* (1993) 5 Cal.4th 877, 944, 21 Cal.Rptr.2d 705, 745.)

Regarding factor (h), impairment due to mental disease or defect, it allows the prosecutor to argue and the trier of fact to consider that the absence of such disease or defect is aggravating. In appellant's case, the trier of fact would reasonably believe that, because evidence of such impairment is mitigating, its absence here is aggravating. However, this is not necessarily so.

Appellant argued that the vague, imprecise nature of section 190.3 allowed the prosecutor to argue that mitigating factors are actually aggravating. In *Zant v. Stephens* (1983) 462 U.S. 862, 885, 103 S.Ct. 2733, 2747, the Court held that due process is violated when an aggravating label is attached to mitigating evidence. In such a case, *Tuilaepa* is not controlling even if the statutory factors are not "propositional." As stated in *People v. Williams* (1997) 16 Cal.4th 153, 272, 66 Cal.Rptr.2d 123, 202:

> "We do not agree that *Tuilaepa* necessarily forecloses defendant's claim of error based on *Zant*. For one thing, the high court cited *Zant* with approval in *Tuilaepa*... More

> importantly, nothing in *Tuilaepa* indicates that high court would without qualification, extend its approval of 'competing arguments' about what significance to assign the age of the defendant in a particular case, under section 190.3, factor (I), to other statutory factors. It is not clear, in short, that *Tuilaepa* undermined *Zant*'s suggestion that states may not, consistently with due process, label as 'aggravating' factors 'that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness.'"

The gist of appellant's claim is that the unitary list of aggravating and mitigating factors, with no explanation or means to discern which were aggravating and which were mitigation, leads to precisely the kind of arbitrary, unguided discretion prohibited by *Zant, Lockett* and *Woodson.* To the extent that state law professes to provide the necessary guidance to ensure that the death penalty is not freakishly or wantonly imposed (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726), the statute's failure to properly guide the trier of fact with respect to mitigating and aggravating factors is tantamount to depriving appellant of his rights under state law. This amounts to a violation of federal due process under *Hicks v. Oklahoma, supra,* 447 U.S. at 346, 100 S.Ct. at 2229.

4. All factors listed in Penal Code section 190.3 and CALJIC No. 8.85 are unconstitutionally vague and result in unreliable sentences.

Appellant demonstrated that *all* the enumerated factors of section 190.3 are vague, arbitrary and misleading to the jury so as to result in an unreliable penalty determination in violation of the Eighth and Fourteenth Amendments. (AOB 270-277.) Citing, inter alia, *People v. Mills* (2010) 48 Cal.4th 158, 106 Cal.Rptr.3d 153, respondent claims that

this issue has been decided against appellant. Respondent appears to be correct. (RB 166-167.) Nevertheless, appellant requests this Court to reconsider that decision in light of the arguments made herein and in the opening brief.

5. The individual aggravating factors must be proved beyond a reasonable doubt.

In the opening brief, appellant demonstrated that California's death penalty scheme is unconstitutional in that it fails to require that the trier of fact find (1) the existence of the individual aggravating factors beyond a reasonable doubt; (2) that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt; and (3) that death be found to be the appropriate penalty beyond a reasonable doubt. (AOB 277-279.) Respondent's contrary argument (RB 168) is not well-taken.

The failure to specify that all aggravating factors be proved beyond a reasonable doubt, that aggravation must be weightier than mitigation beyond a reasonable doubt, and that death must be found to be the appropriate penalty beyond a reasonable doubt, violates federal principles of due process (see *Santosky v. Kramer* (1982) 455 U.S. 745, 754-767, 102 S.Ct. 1388; *In re Winship* (1970) 397 U.S. 358, 90 S.Ct. 1068; *State v. Wood* (Utah 1982) 648 P.2d 71), equal protection, and the Eighth and Fourteenth Amendment requirement of heightened reliability in the death determination. (*Ford v. Wainwright* (1986) 477 U.S. 399, 414, 106 S.Ct. 2595; *Beck v. Alabama* (1980) 447 U.S. 625, 100 S.Ct.2382.)

However, even if it were not constitutionally necessary to place a heightened burden of persuasion on the prosecution, some consistent burden of proof at the penalty phase would need to be established to ensure that the trier of fact, be it a jury or the judge, faced with similar evidence, would return similar verdicts, that the death penalty would be evenhandedly applied, and that capital defendants would be treated equally from case to case. "Capital punishment [must] be imposed fairly, *and with reasonable consistency,* or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112, 102 S.Ct. 869 (Emphasis added.) In cases in which the aggravating and mitigating evidence is in equipoise, it is unacceptable under the Eighth and Fourteenth Amendments that one defendant should live and another die simply because one trier of fact assigns the ultimate burden of persuasion to the state, and another assigns it to the defendant. (*O'Neal v. McAninch* (1995) 513 U.S. 432, 443, 115 S.Ct. 992.)

At the very least, then, the Eighth and Fourteenth Amendments require the application of a defined and consistent burden of proof. The failure of the California death penalty statute to define such a burden of proof renders the scheme arbitrary and capricious. As such it violates the state and federal constitutional requirements of due process (*Hicks v. Oklahoma, supra,* 447 U.S. at 346, 100 S.Ct. at 2229), equal protection, and the federal prohibition against cruel and unusual punishment

Although decisions such as *People v. Bradford* (1997) 14 Cal.4th 1005, 1059, 60 Cal.Rptr.2d 225, 259 and *People v. Crittenden* (1994) 9 Cal.4th 83, 152-153, 36

Cal.Rptr.2d 474, 515 have rejected this argument, appellant believes the points raised herein and in the opening brief are more persuasive, and on that basis asks that these decisions be reconsidered.

6. Appellant's constitutional rights were violated by the trial court's failure to render unanimous written findings regarding the applicable aggravating factors.

In the opening brief, appellant contended that the trial court must be required to render written findings regarding the applicable aggravating factors, and that the failure to do so violated his fundamental rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 278.) Based on those contentions, the authorities cited by respondent (RB 167), stating that written findings are not required, are wrongly decided and should be reconsidered.

7. California's death penalty scheme is unconstitutional because it fails to provide for intercase proportionality.

Where a state's capital punishment scheme "operate[s] in an arbitrary and capricious manner," the fact that, as here, a defendant is sentenced to death whereas others similarly situated receive life without possibility of parole establishes "disproportionally violative of constitutional principles." (*People v. McLain* (1988) 46 Cal.3d 97, 121, 249 Cal.Rptr.630, 644; accord, *McCleskey v. Kemp* (1987) 481 U.S. 279, 306-307, 107 S.Ct. 1756, 1775.) As shown in the opening brief (AOB 275-277), this state's entire capital punishment system is arbitrary and capricious in its operation; as

such, it is unconstitutional because of disproportionate imposition of the death penalty. In addition, the lack of proportionality review violates the requirement that all potential mitigating factors be considered by the sentencer, deprives the death-sentenced defendant of meaningful appellate review, and results in an unreliable, arbitrary and capricious application of the death penalty. Accordingly, the lack of review offends the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against cruel and unusual punishment and deprivation of due process. (*Gregg v. Georgia, supra,* 428 U.S. 153, 193-195; see also *Parker v. Dugger* (1991) 498 U.S. 308, 314-315, 321, 111 S.Ct. 731.)

In *Pulley v. Harris* (1984) 465 U.S. 37, 104 S.Ct. 871, the United States Supreme Court ruled 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." As Justice Blackmun subsequently observed, however, that ruling 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,'" thus "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.' As litigation exposes the failure of these factors to guide the [trier of fact] in making principled distinctions, the court will be well advised to reevaluate its decision in *Pulley v. Harris.*" (*Tuilaepa v. California, supra,* 512 U.S. at 995, 114 S.Ct at 2647.) (Blackmun, J., dissenting.))

The time has come for *Pulley v. Harris* to be reevaluated, for, as discussed

elsewhere herein and in the opening brief, the special circumstances of the California statutory scheme do *not* perform the constitutionally required narrowing necessary for death penalty eligibility. The current overbreadth of the special circumstances undermines the basis of the Supreme Court's approval of this state's lack of proportionality review. The various parts of California's death penalty scheme are not "working together to determine with rationality and fairness who is exposed to the death penalty and who receives it." (*Tuilaepa v. California, supra,* 512 U.S. at 995, 114 S.Ct. at 2647 (Blackmun, J., dissenting.))

If, *arguendo,* this Court determines that California's death penalty scheme is not arbitrary and capricious, the scheme is nevertheless unconstitutional as a result of its failure to require intercase proportionality. Although this Court has decided the proportionality issue contrary to appellant's position (see, *People v. Crittenden, supra,* 9 Cal.4th at 156, 36 Cal.Rptr.2d at 518), appellant requests reconsideration based on the arguments made herein and in the opening brief.

8. California's capital punishment scheme fails to provide sufficient and adequate safeguards.

In the opening brief, appellant argued that California's death penalty scheme is unconstitutional because it fails to provide numerous safeguards against the arbitrary, unwarranted, unreliable imposition of the death penalty. These safeguards include (1) written findings as to the aggravating factors found by the jury; (2) proof beyond a

reasonable doubt of the aggravating factors; (3) jury unanimity on the aggravating factors; (4) a finding that aggravating factors outweigh mitigating factors beyond a reasonable doubt; (5) a finding that death is the appropriate punishment beyond a reasonable doubt; (6) a procedure to enable the reviewing court to meaningfully evaluate the sentencer's decision; and (7) a definition of which specified relevant factors are aggravating, and which are mitigating thereby greatly lessening the chance of an arbitrary or capricious death judgment. (AOB 277-279.) As respondent points out, this Court has ruled such safeguards unnecessary. (RB 168.) Nevertheless, appellant requests that this Court reconsider its position.

9. California's capital sentencing scheme fails to perform its constitutionally mandated narrowing function.

a. Penal Code section 190.2's special circumstances are overly broad.

Penal Code section 190.2 contains 22 special circumstances which qualify a defendant for the death penalty. These numerous circumstances encompass virtually all first degree murders. As explained in the opening brief (AOB 279-286), section 190.2 is so overbroad that it fails to "circumscribe the class of persons eligible for the death penalty." (*Zant v. Stephens, supra,* 462 U.S. 862, 878, 103 S.Ct. 2733, 2743.) Respondent claims section 190.2 sufficiently narrows the class of defendants eligible for the death penalty. (RB 168.) Respondent, however, is wrong.

In *People v. Baciagalupo, supra,* 6 Cal.4th at 465, 24 Cal.Rptr.2d at 812, this

Court stated with respect to the "narrowing" aspect of capital sentencing in general:

> ""Narrowing' pertains to a state's 'legislative definition' of the circumstances that place a defendant within the class of persons eligible for the death penalty. To comport with the requirements of the Eighth Amendment, the legislative definition of a state's capital punishment scheme that serves the requisite 'narrowing' function must 'circumscribe the class of persons eligible for the death penalty.' Additionally, it must afford some objective basis for distinguishing a case in which the death penalty has been imposed from the many cases in which it has not. A legislative definition lacking 'some narrowing principle' to limit the class of persons eligible for the death penalty and having no objective basis for appellate review is deemed to be impermissibly vague under the Eighth Amendment." (Citations omitted.)

(Accord, *Godfrey v. Georgia* (1980) 466 U.S. 420, 428, 433, 100 S.Ct. 1759, 1764, 1767; *Zant v. Stephens, supra,* 462 U.S. at 878, 103 S.Ct. at 2743.

Section 190.2 fails to accomplish a constitutionally acceptable narrowing function because it does not limit or confine the class of offenders eligible to receive the death penalty. Virtually every first degree murder comes within its coverage. Rather than limiting the class of offenders to whom the death penalty is an option, section 190.2, in reality, circumscribes and limits the class to whom the death penalty is *not* applicable. Section 190.2 therefore improperly effects a *reverse* of the type of narrowing required by the Constitution.

California law fails to narrow the pool of defendants eligible for the death penalty. For example, the law attaches overly broad eligibility for the death penalty to multiple

murder offenses. (See *State v. Middlebrooks* (Tenn.1992) 840 S.W.2d 317, 343-346, *cert. dismissed,* 510 U.S. 124 (1933)). It thus violates the Eighth Amendment's requirement that a death penalty statute "genuinely narrow the class of persons eligible for the death penalty and...reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens, supra,* 462 U.S. at 877.) There are two components to a determination of whether a specific special circumstance is sufficiently narrow.

First, because relative culpability should be determined by consideration of *mens rea* as well as *actus reas,* the narrowing factor must focus upon the defendant's mental state, not just the act which was committed. (See *Enmund v. Florida* (1982) 458 U.S. 782, 800, 102 S.Ct. 3368 [appropriateness of death depends on the accused's culpability and "American criminal law has long considered a defendant's intention – and therefore his moral guilt – to be critical" to the degree of culpability]; see also *Lowenfield v. Phelps* (1988) 484 U.S. 231, 108 S.Ct. 546 [court clearly and explicitly relied upon the heightened intent standard in the Louisiana statutory scheme's definition of first degree murder in concluding that the state had sufficiently narrowed the class of death-eligible from those cases in which he or she is not.] See *Furman v. Georgia, supra,* 408 U.S. 238; *United States v. Cheely* (9th Cir.1994) 36 F.3d 1439, 1445.)

Second, the narrowing factor must not be overly broad, so as to permit death eligibility under the same factor for defendants whose crimes are of disparate levels of

culpability. If, as with California's law, the death eligibility factor encompasses different levels of culpability, the narrowing is not rational. (See *Furman v. Georgia, supra,* 408 U.S. 238; *Lowenfield v. Phelps, supra,* 484 U.S. at 244-246; *United States v. Cheely, supra,* 36 F.3d at 1445.)

The potential for intolerable arbitrariness exists under the California felony-murder special circumstance. A jury could sentence to death someone who committed a murder in the course of a burglary or robbery, while another could reject the death penalty for someone who committed ten deliberate, premeditated first degree murders. This special circumstance thus encompasses a broad class of death eligible defendants without providing guidance to the sentencer as to how to distinguish among them, creating the potential for impermissibly disparate and irrational sentencing in violation of *Furman.*

The virtually all-inclusive provisions of section 190.2 fail to properly limit the class of defendants eligible for the death penalty; thus, California's death penalty scheme is unconstitutional.[16]

b. The use of a special circumstance not only to render a defendant death eligible but also as an aggravating factor violates the Fifth, Sixth, Eighth and Fourteenth Amendments.

In the opening brief, relying mainly on *State v. Middlebrooks, supra,* 840 S.W.2d

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[16] Appellant recognizes that his Court has previously held that the "narrowing" provisions of California's death penalty are constitutional. (See, e.g., *People v. Stanley* (1995) 10 Cal.4th 764, 842-843, 42 Cal.Rptr.2d 543, 592.) However, as shown herein and in the opening brief, such decisions are wrongly decided and should be reconsidered.

317 and *State v. Cherry* (N.C.1979) 257 S.E.2d 551, appellant demonstrated that the use of a special circumstance to render a defendant death-eligible under Penal Code section 190.2 and also as an aggravating factor pursuant to Penal Code section 190.3, subdivision (a) violates the Fifth, Sixth, Eighth and Fourteenth Amendments by granting the trier of fact virtually unbridled discretion in imposing the death penalty and in rendering California's death penalty scheme unconstitutionally weighted in favor of death. This is because a defendant (such as appellant) found guilty under a felony-murder theory is automatically eligible for the death penalty whereas a defendant who kills with premeditation and deliberation is not automatically eligible. (AOB 285-286.) Respondent's claims to the contrary (RB 168) are not meritorious.

In *State v. Middlebrooks, supra,* 840 S.W. 2d 317, the Tennessee Supreme Court held that a sentencing scheme similar to the double use of a felony-murder special circumstance violated the Eighth Amendment:

> "...[W]hen the defendant is convicted of first-degree murder solely on the basis of felony murder, the aggravating circumstance...[based on felony murder]...does not narrow the class of death-eligible murderers sufficiently under the Eighth Amendment to the U.S. Constitution and...because it duplicates the elements of the offense. As a result, we conclude the... [Tennessee statutory aggravating factor]...is unconstitutionally applied under the Eighth Amendment to the U.S. Constitution... [F]elony murder continues to be a death eligible offense. However, a finding of an aggravating circumstance other than...[the Tennessee felony murder statutory aggravating factor]...is necessary to support death as a penalty for the crime." (*State v. Middlebrooks, supra,* 840

S.W. 2d at 346; emphasis added.)

Significantly, respondent does not address the dispositive holdings of *Middlebrooks* or *Cherry*. Nevertheless, even if the sentencing schemes at issue in *Middlebrooks*, *Cherry* and *Collins v. Lockhart* (8th Cir.1985) 754 F.2d 258 are somewhat different, they are sufficiently similar to California's to render the courts' analyses and holdings authoritative and persuasive guidance on the issue.

The double use of a felony-murder as both a special circumstance and an aggravating factor impermissibly subjected appellant to a much greater chance of being sentenced to death. This aspect of California's sentencing scheme violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

c. California's death penalty scheme unconstitutionally affords the prosecutor complete discretion in determining whether a penalty hearing will be held.

Appellant demonstrated that, in violation of the Eighth and Fourteenth Amendments, Penal Code sections 190 through 190.5 give the prosecutor unbridled discretion in determining whether a penalty hearing will occur. This complete discretion results in wholly arbitrary imposition of the death penalty. (AOB 286-289.)

Under California law, when a defendant is statutorily death-eligible, the individual prosecutor has complete discretion to determine whether a penalty hearing will be held. As Justice Broussard noted in his dissenting opinion in *People v. Adcox* (1988) 47 Cal.3d 207, 275-276, 253 Cal.Rptr.55, 96, this creates a substantial risk of county-by-county

arbitrariness. There can be no doubt that under this statutory scheme, some offenders will be chosen as candidates for the death penalty by one prosecutor, while other offenders with factually similar offenses in different counties will not be singled out for the ultimate penalty. Moreover, the absence of any standards to guide the prosecutor's discretion permits reliance on constitutionally irrelevant and impermissible considerations, including race and economic status.

In application, the arbitrary and wanton prosecutorial discretion allowed by the California scheme in charging, prosecuting and submitting a case to the trier of fact as a capital crime merely compounds the disastrous effects of vagueness and arbitrariness inherent in the California statutory scheme. Like the "arbitrary and wanton" jury discretion condemned in *Woodson v. North Carolina* (1976) 428 U.S. 280, 303, 96 S.Ct. 2978, this unprincipled, broad discretion is contrary to the principled decision making mandated by *Furman v. Georgia, supra,* 408 U.S. 238.

Respondent correctly notes that this issue has been decided against. (RB 168.) However, for the reasons stated above and in the opening brief, appellant requests this Court to reconsider this issue.

d. The cumulative effect of errors attendant to sections 190.2, 190.3 require reversal.

The cumulative (and individual) effect of the errors made in connection with appellant's penalty phase hearing regarding sections 190.2 and 190.3 violated his rights to

due process, a fair trial, a reliable determination of penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal constitution and their California analogues. (AOB 288-289.) (*Hicks v. Oklahoma, supra,* 447 U.S. at 346, 100 S.Ct. at 2229.) The serious deficiencies in California's death penalty scheme result in "random" imposition of the death penalty and "bias in favor of the death penalty." (*Stringer v. Black* (1992) 503 U.S. 222, 235-236, 112 S.Ct. 1130, 1139.) California's scheme is *not* "...neutral and principled so as to guard against bias or caprice in the sentencing decision," as required by *Tuilaepa v. California, supra,* 512 U.S. at 973, 114 S.Ct. at 2635. As a result, reversal is required. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341, 105 S.Ct. 2633, 2646; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399, 107 S.Ct. 1821, 1824.)

e. Conclusion

As shown, Penal Code sections 190.2 and 190.3 violate the Fifth, Sixth, Eighth and Fourteenth Amendments and analogous provisions of the California Constitution. Although this Court has held otherwise, and the *Tuilaepa* Court held that factors (a), (b) and (I) passed constitutional muster, appellant respectfully submits that these decisions are wrong and requests that they be reconsidered.

C. THE NUMEROUS PREJUDICIAL VIOLATIONS OF STATE AND FEDERAL LAW CONSTITUTE VIOLATIONS OF INTERNATIONAL LAW, THUS NECESSITATION REVERSAL.

In the opening brief, appellant established that the numerous violations of State

and Federal law in his case also constitute violations of international law, which, for this reason, require reversal. (AOB 289-307) Respondent does not respond to this argument, other than to cite one case and comment, "This claim has repeatedly been rejected by this Court..." (RB 169.) But, for the reasons stated in the opening brief, these cases are wrongly decided on this point and should be reconsidered.

D. THE CUMULATIVE IMPACT OF ALL THE ERRORS MADE IN THE GUILT AND PENALTY PHASES VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS; REVERSAL IS NECESSARY.

It is well-settled that the cumulative effect of seemingly independently harmless errors may render a trial inherently unfair. (*People v. Hill, supra,* 17 Cal.4th at 844-847, 72 Cal.Rptr.2d at 681-682; *United States v. Rivera* (10th Cir.1990) 900 F.2d 1462, 1469.) As shown in this brief and the opening brief, numerous prejudicial errors occurred at the guilt and penalty phases of appellant's trial. If, *arguendo,* none standing alone requires reversal, when the cumulative prejudicial impact of all the errors is considered, it is clear that appellant's rights to due process, a fair trial, to a reliable determination of guilt and penalty, and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments and their California analogues were prejudicially violated. (AOB 307-309.) Respondent's contrary claim (RB 169-170) is meritless. Reversal of the entire judgment is therefore required.

Here, numerous prejudicial errors occurred. Appellant's *Wheeler/Batson* motion was denied. The trial court unfairly selected the jury. An inordinate amount of

prejudicial evidence of uncharged conduct was introduced. Improper DNA evidence was admitted. Instructional error occurred. Inflammatory cat torture evidence was introduced in the penalty phase.

Respondent argues, "the record contains few, if any, errors." (RB 170.) Respondent is wrong. Here, as in *People v. Hill, supra,* 17 Cal.4th at 847, 72 Cal.Rptr.2d at 683, the manifold errors in this case "...created a negative synergistic effect, rendering the degree of overall unfairness to the defendant more than that flowing from the sum of the individual errors." As in *Hill,* appellant "...was deprived of that which the state was constitutionally required to provide and he was entitled to receive: a fair trial." (*Id.*) (*Hicks v. Oklahoma, supra,* 447 U.S. at 346, 100 S.Ct. at 2229.)

V. CONCLUSION

For the reasons stated above, and in the opening brief, reversal is required.

Dated: August 7, 2015

Respectfully submitted
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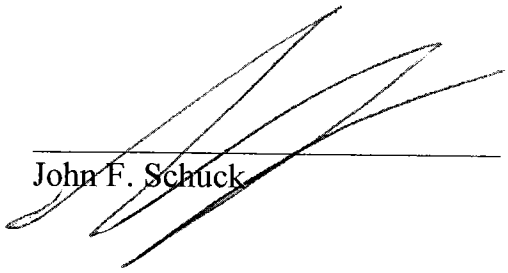
CERTIFICATE OF WORD COUNT

In reliance on the word count of the computer program used to generate this brief, I, John F. Schuck, hereby certify that this Reply Brief contains 17,340 words.

I declare under penalty of perjury that the above is true and correct.

Dated: August 7, 2015



John F. Schuck

PROOF OF SERVICE

I, John Schuck, declare:

I am a citizen of the United States and a resident of the County of Santa Clara; I am over the age of eighteen years and am not a party to the within action; my business address is 885 N. San Antonio Road, Suite A, Los Altos, CA 94022.

On August 7, 2015, I served the within:

APPELLANT'S REPLY BRIEF

on the following interested persons in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Altos, California addressed as follows:

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

Executed at Los Altos, California on August 7, 2015.

John F. Schuck