SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

JERROLD ELWIN JOHNSON,
Defendant and Appellant.

CAPITAL CASE

S093235

SUPREME COURT
FILED

AUG 25 2014

Frank A. McGuire Clerk

Deputy

APPELLANT'S REPLY BRIEF

Automatic Appeal from the Superior Court of California
Lake County, Superior Court No. CR4797

THE HONORABLE ROBERT L. CRONE, JR., JUDGE

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DEATH PENALTY

TOPICAL INDEX

	Page
TABLE OF CASES	ix
TABLE OF STATUTES	xxx
NO WAIVER OR ABANDONMENT OF ASSIGNMENTS OF ERROR RAISED IN APPELLANT'S OPENING BRIEF, GENERALLY	1
A. Guilt Trial Issues and Assignments of Error	2
I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR CHANGE OF VENUE; DENIAL OF APPELLANT'S CHANGE OF VENUE MOTION VIOLATED HIS RIGHTS TO A FAIR TRIAL, TO DUE PROCESS, AND TO A RELIABLE PENALTY DETERMINATION GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION	2
A. Standard of Review; General Legal Principles	2
B. Respondent Mistakenly Asserts that Appellant Has Claimed that Prosecution Witness Ebbesen Was Biased and Hence Unqualified; Ebbesen's Biases Were a Matter of Record	3
C. Denial of Appellant's Motion for Change of Venue Was Not Waived or Forfeited for Appellate Review	4
D. The Court Erred and Abused Its Discretion on Denying Appellant's Motion for Change of Venue	7
E. Denial of Appellant's Change of Venue Violated His Rights to a Fair Trial, Due Process of Law, and to a Reliable Penalty Determination Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution	17

Page

Guilt Trial Issues and Assignments of Error (Cont.)

II. THE TRIAL JUDGE'S YEARS-LONG CLOSE PERSONAL AND PROFESSIONAL RELATIONSHIP WITH THE PROSECUTOR, AND THE CONSEQUENT APPEARANCE OF BIAS, PRESUMED BIAS, AND ACTUAL BIAS, REQUIRED THE JUDGE TO DISQUALIFY HIMSELF IN THIS CASE; THE COURT'S FAILURE TO DO SO DEPRIVED APPELLANT OF HIS FUNDAMENTAL RIGHTS TO A FAIR TRIAL, DUE PROCESS OF LAW, AND TO A RELIABLE PENALTY DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; FURTHER, AS STRUCTURAL ERROR, THE FAILURE TO DISQUALIFY WAS PREJUDICIAL AND REVERSIBLE PER SE 24

A. Appellant Has Not Forfeited or Waived His Federal and State Due Process Claims 24

B. Standard of Review 27

C. Both the Appearance of Impartiality and Actual Bias Required the Court to Disqualify Itself; the Trial Court's Failure to Do So Violated Appellant's Rights to a Fair Trial and Due Process of Law Guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§ 7 and 15 of the California Constitution; the Error Was Both Prejudicial and Reversible Per Se 28

D. The Denial of Appellant's Rights to a Fair Trial in a Fair Tribunal Before an Impartial Judge Also Rendered the Guilt and Penalty Determinations Unreliable in Violation of the Eighth and Fourteenth Amendments to the United States Constitution 33

///

TOPICAL INDEX (CONTINUED)

Page

Guilt Trial Issues and Assignments of Error (Cont.)

III. THE EVIDENCE WAS INSUFFICIENT UNDER THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CALIFORNIA CONSTITUTION (ART. I, § 14) TO SUPPORT APPELLANT'S CONVICTION OF CARJACKING ON COUNT 4 (PEN. CODE § 215, SUBD. (a)) AND FIRST DEGREE FELONY-MURDER ON COUNT 1 (PEN. CODE § 187) PREDICATED ON THE COMMISSION OR ATTEMPTED COMMISSION OF A CARJACKING 35

IV. THE EVIDENCE WAS INSUFFICIENT UNDER THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CALIFORNIA CONSTITUTION (ART. I, § 14) TO SUPPORT THE SPECIAL CIRCUMSTANCE FINDING IN COUNT 1 OF CARJACKING-MURDER PURSUANT TO PENAL CODE § 190.2, SUBDIVISION (a)(17)(L); INSUFFICIENCY OF THE EVIDENCE ALSO RENDERED THE SPECIAL CIRCUMSTANCE FINDING AND DEATH SENTENCE UNRELIABLE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 44

B. Penalty Trial Issues and Assignments of Error 49

V. THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY FAILED TO INSTRUCT THE JURY ON THE APPROPRIATE USE OF VICTIM IMPACT EVIDENCE IN VIOLATION OF APPELLANT'S RIGHTS TO A FAIR TRIAL, DUE PROCESS, AND A RELIABLE DETERMINATION OF PENALTY GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; THE ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT 49

A. Appellant's Claim Has Not Been Forfeited 51

Page

Penalty Trial Issues and Assignments of Error (Cont.)

ASSIGNMENT OF ERROR V. (Cont.)

B. The Court Failed to Instruct the Jury on the Proper Use of Victim Impact Evidence; the Error Was Not Harmless Beyond a Reasonable Doubt 53

VI. THE TRIAL COURT ERRED BY PERMITTING THE STATE TO RETRY THE VONSEGGERN KILLING AND APPELLANT'S PRIOR 1993 MANSLAUGHTER CONVICTION, AND BY GIVING MURDER INSTRUCTIONS IN THE LANGUAGE OF CALJIC NOS. 8.00-8.21 AND ON AGGRAVATING FACTORS IN THE MODIFIED LANGUAGE OF CALJIC NO. 8.87, THEREBY ALLOWING THE STATE TO ELEVATE THE PRIOR KILLING AND ADJUDICATED MANSLAUGHTER TO MURDER IN VIOLATION OF THE "PROSECUTED AND ACQUITTED" PROHIBITION OF PENAL CODE SECTION 190.3, THE DOCTRINE OF COLLATERAL ESTOPPEL, THE CONSTITUTIONAL PROSCRIPTION AGAINST DOUBLE JEOPARDY, AND APPELLANT'S RIGHTS TO DUE PROCESS OF LAW, FAIR TRIAL, AND A RELIABLE PENALTY DETERMINATION GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 58

A. Appellant Has Not Waived His Claims of Error; Ineffective Assistance of Counsel 60

B. Retrial of Appellant for the Murder of VonSeggern, as a Separate and Additional Factor in Aggravation, Was Prohibited by the "Prosecuted and Acquitted" Provision of Penal Code Section 190.3 68

C. Principles of Collateral Estoppel and Res Judicata Barred the State From Retrying Appellant's 1992 Manslaughter Conviction During the Penalty Trial in Order to Elevate the Crime to Murder 70

TOPICAL INDEX (CONTINUED)

Page

Penalty Trial Issues and Assignments of Error (Cont.)

ASSIGNMENT OF ERROR VI. (Cont.)

D. Retrial of Appellant's Manslaughter Conviction Was Barred by the Proscription Against Double Jeopardy Embodied in the Fifth and Fourteenth Amendments to the United States Constitution and California Constitution, Article I, Section 15 — 74

E. The Error Was Not Harmless Beyond a Reasonable Doubt — 76

VII. THE JURY INSTRUCTIONS ON THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AND THE JURORS' APPLICATION OF THESE SENTENCING FACTORS, RENDERED APPELLANT'S DEATH SENTENCE CAPRICIOUS AND ARBITRARY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION — 81

A. Appellant Has Not Waived or Forfeited His Claim — 82

B. The Instruction on Penal Code Section 190.3, Subdivision (a) and Application of that Sentencing Factor Resulted in the Arbitrary and Capricious Imposition of the Death Penalty — 84

C. The Instruction on Penal Code Section 190.3, Subdivision (b) and the Jurors' Application of that Sentencing Factor Violated Appellant's Constitutional Rights to a Fair Penalty Trial, Due Process, Equal Protection, Trial by Jury and a Reliable Penalty Determination — 88

D. The Failure to Require the Jury to Base a Death Sentence on Written Findings Regarding the Aggravating Factors Violates Appellant's Constitutional Rights to Meaningful Appellate Review and Equal Protection of the Law — 90

TOPICAL INDEX (CONTINUED)

Page

Penalty Trial Issues and Assignments of Error (Cont.)

ASSIGNMENT OF ERROR VII. (Cont.)

E. Even if the Absence of the Previously Addressed Procedural Safeguards Does Not Render California's Death Penalty Scheme Constitutionally Inadequate to Ensure Reliable Capital Sentencing, Denying Them to Capital Defendants Such as Appellant Nevertheless Violates Equal Protection Requirements of the Fourteenth Amendment to the United States Constitution 91

F. Conclusion 93

VIII. PENAL CODE SECTION 190.3 AND IMPLEMENTING JURY INSTRUCTIONS (CALJIC NOS. 8.84-8.88) ARE UNCONSTITUTIONAL, BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF OR CONTAIN OTHER CONSTITUTIONALLY COMPELLED SAFEGUARDS AND PROTECTIONS REQUIRED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 94

A. The Statute and Instructions Unconstitutionally Fail to Assign to the State the Burden of Proving Beyond a Reasonable Doubt the Existence of an Aggravating Factor, that the Aggravating Factors Outweigh the Mitigating Factors, and that Death is the Appropriate Penalty 95

B. The California and United States Constitutions Require an Instruction That the Jury May Impose a Sentence of Death Only if Persuaded Beyond a Reasonable Doubt that the Aggravating Factors Outweigh the Mitigating Factors and That Death is the Appropriate Penalty 97

C. The Fifth, Sixth, Eighth, and Fourteenth Amendments Require that the State Bear Some Burden of Persuasion at the Penalty Phase 98

TOPICAL INDEX (CONTINUED)

Page

Penalty Trial Issues and Assignments of Error (Cont.)

ASSIGNMENT OF ERROR VIII. (Cont.)

D. The Instructions Violated the Sixth, Eighth, and Fourteenth Amendments by Failing to Require Juror Unanimity on Aggravating Factors 102

E. The Penalty Jury Should Have Been Instructed on the Presumption of Life 104

F. Conclusion 106

IX. THE USE OF CALJIC NO. 8.88, DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS, VIOLATED APPELLANT'S FUNDAMENTAL RIGHTS TO A FAIR TRIAL, DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE DETERMINATION OF PENALTY GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 107

A. The Use CALJIC No. 8.88 Caused the Jury's Penalty Choice to Turn on an Impermissibly Vague and Ambiguous Standard that Failed to Provide Adequate Guidance 107

B. CALJIC No. 8.88 Failed to Inform the Jurors that the Central Determination is Whether the Death Penalty is the Appropriate Punishment, Not Simply an Authorized Penalty 110

C. CALJIC No. 8.88 Failed to Inform the Jurors that if They Determined that Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole 114

D. Conclusion 115

TOPICAL INDEX (CONTINUED)

Page

Penalty Trial Issues and Assignments of Error (Cont.)

X. APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW, WHICH IS BINDING ON THIS COURT, AS WELL AS THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION 116

XI. THE CUMULATIVE EFFECT OF ERRORS UNDERMINED THE FUNDAMENTAL FAIRNESS OF TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 119

CONCLUSION 125

CERTIFICATE OF COMPLIANCE 125

PROOF OF SERVICE 126

TABLE OF CASES

Page

Aetna Life Insurance Co. v. Lavoie
(1986) 475 U.S. 813 [106 S.Ct. 1580, 89 L.Ed.2d 823] 31

Alcala v. Woodford
(9th Cir. 2003) 334 F.3d 862 119

Arizona v. Fulminante
(1991) 499 U.S. 279 [111 S.Ct. 1246, 113 L.Ed.2d 302] 29, 30

Arnold v. State
(1976) 236 Ga. 534 [224 S.E.2d 386] 109

Ashe v. Swenson
(1970) 397 U.S. 436 [90 S.Ct. 1189, 25 L.Ed.2d 469] 70

Bains v. Cambra
(9th Cir. 2000) 204 F.3d 964 77

Beck v. Alabama
(1980) 447 U.S. 625 [100 S.Ct. 2382, 65 L.Ed.2d 392] 55, 98

Blystone v. Pennsylvania
(1990) 494 U.S. 299 [110 S.Ct. 1078, 108 L.Ed.2d 255] 112

Boyde v. California
(1990) 494 U.S. 370 [110 S.Ct. 1190, 108 L.Ed.2d 316] 99

Brady v. United States
(1970) 397 U.S. 742 [90 S.Ct. 1463, 25 L.Ed.2d 747] 64

Brewer v. Quarterman
(2007) 550 U.S. 286 [127 S.Ct. 1706, 167 L.Ed.2d 622] 99

Briggs v. Superior Court
(2001) 87 Cal.App.4th 312 28

Brown v. Ohio
(1977) 432 U.S. 161 [97 S.Ct. 2221, 53 L.Ed.2d 187] 69

TABLE OF CASES (CONTINUED)

	Page
Bush v. Gore (2000) 531 U.S. 98 [121 S.Ct. 525, 148 L.Ed.2d 388]	86
Caldwell v. Mississippi (1985) 472 U.S. 320 [105 S.Ct. 2633, 86 L.Ed.2d 231]	48, 79, 80, 124
California v. Brown (1987) 479 U.S. 538 [107 S.Ct. 837, 93 L.Ed.2d 934]	90, 110
Calley v. Callaway (5th Cir. 1975) 519 F.2d 184	22
Caperton v. A. T. Massey Coal Co. (2009) 556 U.S. 868 [129 S.Ct. 2252, 173 L.Ed.2d 1208]	Passim
Cargle v. State (Okla.Crim.App. 1995) 909 P.2d 806	56
Castillo v. City of Los Angeles (2001) 92 Cal.App.4th 477	71
Chambers v. Mississippi (1973) 410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297]	121
Chapman v. California (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]	57, 77, 120
Chen v. Chen Qualified Settlement Fund (2d Cir. 2009) 552 F.3d	33
Coleman v. Kemp (11th Cir. 1985) 778 F.2d 1487	17
Commonwealth v. Means (Pa. 2001) 773 A.2d 143	56
Cooper v. Fitzharris (9th Cir. 1978) 586 F.2d 1325	119

TABLE OF CASES (CONTINUED)

Page

Cunningham v. California
(2007) 549 U.S. 270 [127 S.Ct. 856, 122 .Ed.2d 620] 95, 96

Delo v. Lashley
(1983) 507 U.S. 272 [113 S.Ct. 1222, 122 L.Ed.2d 620] 105

Descamps v. United States
(2013) 570 U.S. __ [133 S.Ct. 2276, 186 L.Ed.2d 438] 96, 103

Donnelly v. DeChristoforo
(1974) 416 U.S. 637 [94 S.Ct. 1868, 40 L.Ed.2d 431] 119

Eddings v. Oklahoma
(1982) 455 U.S. 104 [102 S.Ct. 869, 71 L.Ed.2d 1] 100, 101

Estelle v. Williams
(1976) 425 U.S. 501 [96 S.Ct. 1691, 48 L.Ed.2d 126] 105

Furman v. Georgia
(1972) 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346] 108

Gentile v. State Bar of Nevada
(1991) 501 U.S. 1030 [111 S.Ct. 2720, 115 L.Ed.2d 888] 19

Godfrey v. Georgia
(1980) 446 U.S. 420 [100 S.Ct. 1759, 64 L.Ed.2d 298] 92, 110

Gregg v. Georgia
(1976) 428 U.S. 153 [96 S.Ct. 2909, 49 L.Ed.2d 856] 90

Haas v. County of San Bernardino
(2002) 27 Cal.4th 1017 28

Harmelin v. Michigan
(1991) 501 U.S. 957 [111 S.Ct. 2680, 115 L.Ed.2d 836] 104

Harris v. Wood
(9th Cir. 1995) 64 F.3d 1432 120

TABLE OF CASES (CONTINUED)

	Page
Hicks v. Oklahoma (1980) 447 U.S. 343 [100 S.Ct. 2227, 65 L.Ed.2d 175]	113, 115
Hitchcock v. Dugger (1987) 481 U.S. 393 [107 S.Ct. 1821, 95 L.Ed.2d 347]	124
Holloway v. United States (1999) 526 U.S. 1 [119 S.Ct. 966, 143 L.Ed.2d 1]	36
In re Marquez (1992) 1 Cal.4th 584	121
In re Murchison (1955) 349 U.S. 133 [75 S.Ct. 623, 99 L.Ed. 942]	17, 22
In re Sheena K. (2007) 40 Cal.4th 875	52, 64, 83, 84
Irvin v. Dowd (1961) 366 U.S. 717 [81 S.Ct. 1639, 6 L.Ed.2d 751]	7, 22
Isaacson v. Manty (8th Cir. 2013) 721 F.3d 533	30
ISC Holding AG v. Nobel Biocare Fin. AG (2d Cir. 2012) 688 F.3d 98	29
Johnson v. Zerbst (1938) 304 U.S. 458 [58 S.Ct. 1019, 82 L.Ed. 461]	65
Lockett v. Ohio (1978) 438 U.S. 586 [98 S.Ct. 2954, 57 L.Ed.2d 973]	99
Louisiana ex rel. Francis v. Resweber (1947) 329 U.S. 459 [67 S.Ct. 374, 91 L.Ed. 422]	76
Lucido v. Superior Court (1990) 51 Cal.3d 335	72

TABLE OF CASES (CONTINUED)

Page

Maine v. Superior Court
(1968) 68 Cal.2d 375 — 18

Mak v. Blodgett
(9th Cir. 1992) 970 F.2d 614 — 120

Martinez v. Superior Court
(1981) 29 Cal.3d 574 — 12

Maynard v. Cartwright
(1988) 486 U.S. 356 [108 S.Ct. 1853, 100 L.Ed.2d 372] — 84, 85, 86

McKoy v. North Carolina
(1990) 494 U.S. 433 [110 S.Ct. 1227, 108 L.Ed.2d 369] — 103

Mills v. Maryland
(1988) 486 U.S. 367 [108 S.Ct. 1860, 100 L.Ed.2d 384] — 90, 99

Monge v. California
(1998) 524 U.S. 721 [118 S.Ct. 2246, 141 L.Ed.2d 615] — 92, 98, 104

Moran v. Burbine
(1986) 475 U.S. 412 [106 S.Ct. 1135, 89 L.Ed.2d 410] — 64

Morongo Band of Mission Indians v. State Water Resources Control Bd.
(2009) 45 Cal.4th 731 — 28, 29

Mu'Min v. Virginia
(1991) 500 U.S. 415 [111 S.Ct. 1899, 114 L.Ed.2d 493] — 19, 21

Murphy v. Florida
(1975) 421 U.S. 794 [95 S.Ct. 2031, 44 L.Ed.2d 589] — 20

Murray v. Giarratano
(1989) 492 U.S. 1 [109 S.Ct. 2765, 106 L.Ed.2d 1] — 55

Murtishaw v. Woodford
(9th Cir. 2001) 255 F.3d 926 — 110

TABLE OF CASES (CONTINUED)

	Page
Myers v. Ylst (9th Cir. 1990) 897 F .2d 417	104
Oregon v. Ice (2009) 555 U.S. 160 [127 S.Ct. 856, 166 L.Ed.2d 856]	97
Parle v. Runnels (9th Cir. 2007) 505 F.3d 922	121, 122
Patton v. United States (1930) 281 U.S. 276 [50 S.Ct. 253, 74 L.Ed. 854]	65
Patton v. Yount (1984) 467 U.S. 1025 [104 S.Ct. 2885, 81 L.Ed.2d 847]	21
Payne v. Tennessee (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720]	56
People v. Abbaszadeh (2003) 106 Cal.App.4th 642	61
People v. Antoine (1996) 48 Cal.App.4th 489	36
People v. Arias (1996) 13 Cal.4th 92	61, 62
People v. Arredondo (1975) 52 Cal.App.3d 973	62
People v. Bacigalupo (1993) 6 Cal.4th 457	112
People v. Beames (2007) 40 Cal.4th 907	87
People v. Bean (1988) 46 Cal.3d 919	78, 79

TABLE OF CASES (CONTINUED)

	Page
People v. Blair (2005) 36 Cal.4th 686	85, 97
People v. Boyer (2006) 38 Cal.4th 12	34
People v. Bradford (1997) 15 Cal.4th 1229	68
People v. Brasure (2008) 42 Cal.4th 1037	87, 117
People v. Breaux (1991) 1 Cal.4th 281	109
People v. Breverman (1998) 19 Cal.4th 142	53
People v. Brown (1993) 6 Cal.4th 322	26, 27, 28, 33
People v. Brown (1988) 46 Cal.3d 432	57, 121
People v. Brown (1985) 40 Cal.3d 512	110, 114
People v. Carter (2005) 36 Cal.4th 1215	32
People v. Champion (1995) 9 Cal.4th 879	110
People v. Chatman (2006) 38 Cal.4th 344	26, 33
People v. Coffman and Marlow (2004) 34 Cal.4th 1	109

TABLE OF CASES (CONTINUED)

	Page
People v. Cowan (2010) 50 Cal.4th 401	26
People v. Cunningham (2001) 25 Cal.4th 926	67
People v. D'Arcy (2010) 48 Cal.4th 257	52, 62, 82
People v. Davis (2009) 46 Cal.4th 539	4
People v. DeHoyos (2013) 57 Cal.4th 79	104, 108, 111
People v. Dennis (1998) 17 Cal.4th 468	3
People v. Duenas (2012) 55 Cal.4th 1	108
People v. Duncan (1991) 53 Cal.3d 995	101
People v. Dunkle (2005) 36 Cal.4th 861	83
People v. Duran (2001) 88 Cal.App.4th 1371	42, 43
People v. Edelbacher (1989) 47 Cal.3d 983	85
People v. Edwards (2013) 57 Cal.4th 658	96, 117
People v. Eubanks (2011) 53 Cal.4th 110	103

TABLE OF CASES (CONTINUED)

	Page
People v. Famalaro (2011) 52 Cal.4th 1	Passim
People v. Farley (2009) 46 Cal.4th 1053	9
People v. Fauber (1992) 2 Cal.4th 792	9
People v. Foster (2010) 50 Cal.4th 1301	108, 109, 111
People v. Freeman (2010) 47 Cal.4th 993	Passim
People v. Fuiava (2012) 53 Cal.4th 622	97
People v. Gamache (2010) 48 Cal.4th 347	66
People v. Garceau (1993) 6 Cal.4th 140	74
People v. Gomez (2011) 192 Cal.App.4th 609	41
People v. Gonzales (2011) 51 Cal.4th 894	92, 99
People v. Gray (2005) 37 Cal.4th 168	52, 62, 82
People v. Green (1980) 27 Cal.3d 1	36, 46
People v. Guerrero (1988) 44 Cal.3d 343	78

TABLE OF CASES (CONTINUED)

	Page
People v. Hamilton (2009) 45 Cal.4th 863	54
People v. Harris (2013) 57 Cal.4th 804	96
People v. Harris (2005) 37 Cal.4th 310	27
People v. Hartsch (2010) 49 Cal.4th 472	54
People v. Hayes (1999) 21 Cal.4th 1211	13
People v. Hayes (1990) 52 Cal.3d 577	40, 99, 121
People v. Hill (2000) 23 Cal.4th 853	43
People v. Hill (1998) 17 Cal.4th 800	61
People v. Hill (1992) 3 Cal.4th 959	1
People v. Hoard (2002) 103 Cal.App.4th 599	40
People v. Homick (2012) 55 Cal.4th 816	104
People v. Hoover (1986) 187 Cal.App.3d 1074	6
People v. Houston (2012) 54 Cal.4th 1186	117

TABLE OF CASES (CONTINUED)

	Page
People v. Howard (1992) 1 Cal.4th 1132	13
People v. Ireland (1969) 70 Cal.2d 522	45
People v. Jenkins (2000) 22 Cal.4th 900	3
People v. Jennings (1991) 53 Cal.3d 334	14
People v. Johnson (1992) 3 Cal.4th 1183	69
People v. Jones (2013) 57 Cal.4th 899	Passim
People v. Kimble (1988) 44 Cal.3d 480	45
People v. Koontz (2002) 27 Cal.4th 1041	53, 68, 73
People v. Lewis (2008) 43 Cal.4th 415	18
People v. Lightsey (2012) 54 Cal.4th 668	86, 92
People v. Linton (2013) 56 Cal.4th 1146	Passim
People v. Livingston (2012) 53 Cal.4th 1145	86, 89
People v. Lopez (2013) 56 Cal.4th 1028	115

TABLE OF CASES (CONTINUED)

	Page
People v. Lopez (2003) 31 Cal.4th 1051	36, 42
People v. Maciel (2013) 57 Cal.4th 482	96, 117
People v. Magallanes (2009) 173 Cal.App.4th 529	36
People v. Mai (2013) 57 Cal.4th 986	Passim
People v. Marshall (1997) 15 Cal.4th 1	36
People v. Maury (2003) 30 Cal.4th 342	6
People v. Mayfield (1997) 14 Cal.4th 668	26
People v. McCullough (2013) 56 Cal.4th 589	64, 84
People v. McKinnon (2011) 52 Cal.4th 610	54
People v. McKinzie (2012) 54 Cal.4th 1302	91, 108, 111, 115
People v. Medina (1995) 11 Cal.4th 694	104
People v. Memro (1985) 38 Cal.3d 658	45
People v. Mendoza (2007) 42 Cal.4th 686	99

TABLE OF CASES (CONTINUED)

	Page
People v. Meredith (1992) 11 Cal.App.4th 1548	70
People v. Mickle (1991) 54 Cal.3d 140	54
People v. Milner (1988) 45 Cal.3d 227	110
People v. Monterroso (2004) 34 Cal.4th 743	68
People v. Morales (2003) 112 Cal.App.4th 1176	66
People v. Moran (1970) 1 Cal.3d 755	70
People v. Mungia (2008) 44 Cal.4th 1101	117
People v. Murtishaw (2011) 51 Cal.4th 574	99
People v. Murtishaw (1989) 48 Cal.3d 1001	53
People v. Myles (2012) 53 Cal.4th 1181	54
People v. Nelson (2011) 51 Cal.4th 198	38, 54
People v. Newland (1940) 15 Cal.2d 678	6
People v. Ochoa (1998) 19 Cal.4th 353	68

TABLE OF CASES (CONTINUED)

	Page
People v. Ochoa (2011) 191 Cal.App.4th 664	72
People v. Page (2008) 44 Cal.4th 1	109
People v. Panah (2005) 35 Cal.4th 395	3, 32
People v. Pearson (2013) 56 Cal.4th 393	86, 92
People v. Percelle (2005) 126 Cal.App.4th 164	52, 53, 64, 83
People v. Powell (1967) 67 Cal.2d 32	78
People v. Price (1991) 1 Cal.4th 324	54
People v. Pride (1992) 3 Cal.4th 195	8
People v. Prieto (2003) 30 Cal.4th 226	52, 62, 82
People v. Prince (2007) 40 Cal.4th 1179	9
People v. Raley (1992) 2 Cal.4th 870	46
People v. Ramirez (2006) 39 Cal.4th 398	8
People v. Rodrigues (1994) 8 Cal.4th 1060	68

TABLE OF CASES (CONTINUED)

	Page
People v. Rogers (2013) 57 Cal.4th 296	86, 91
People v. Roundtree (2013) 56 Cal.4th 823	104
People v. Sanchez (2001) 24 Cal.4th 983	70
People v. Sanders (1995) 11 Cal.4th 475	3
People v. Serrato (1973) 9 Cal.3d 753	77
People v. Smithey (1999) 20 Cal.4th 936	64, 84
People v. Souza (2012) 54 Cal.4th 90	86, 92
People v. Sparks (2010) 48 Cal.4th 1	70
People v. Stanley (1995) 10 Cal.4th 913	75, 76
People v. Staples (1906) 149 Cal. 405	5, 6
People v. Steele (2002) 27 Cal.4th 1230	72, 73
People v. Streeter (2012) 54 Cal.4th 205	86, 87, 91, 92
People v. Sully (1991) 53 Cal.3d 1195	3

TABLE OF CASES (CONTINUED)

	Page
People v. Superior Court (Mitchell) (1993) 5Cal.4th 1229	99
People v. Taylor (2009) 47 Cal.4th 850	114
People v. Thomas (2012) 54 Cal.4th 908	86, 89, 91
People v. Thomas (2012) 53 Cal.4th 771	86, 87, 92
People v. Thompson (1980) 27 Cal.3d 303	78
People v. Tidwell (1970) 3 Cal.3d 62	12
People v. Tully (2012) 54 Cal.4th 952	87, 91, 103
People v. Valdez (2012) 55 Cal.4th 82	87, 89, 91, 92
People v. Vasquez (2006) 39 Cal.4th 47	30
People v. Vera (1997) 15 Cal.4th 269	52
People v. Vieira (2005) 35 Cal.4th 264	13
People v. Vines (2011) 51 Cal.4th 830	86
People v. Virgil (2011) 51 Cal.4th 1210	34, 97

TABLE OF CASES (CONTINUED)

	Page
People v. Wader (1993) 5 Cal.4th 610	74, 75
People v. Wallace (2008) 44 Cal.4th 1032	4, 117
People v. Wallace (2004) 33 Cal.4th 738	71, 72
People v. Watkins (2012) 55 Cal.4th 999	86, 89
People v. Weaver (2001) 26 Cal.4th 876	13
People v. Welch (1999) 20 Cal.4th 701	11
People v. Whalen (2013) 56 Cal.4th 1	Passim
People v. Whalen (1973) 33 Cal.App.3d 710	10
People v. Williams (2013) 56 Cal.4th 630	87, 89
People v. Williams (2013) 56 Cal.4th 165	87, 89, 91
People v. Williams (1998) 17 Cal.4th 148	63, 64, 83
People v. Williams (1997) 16 Cal.4th 634	5
People v. Williams (1989) 48 Cal.3d 1112	9, 13

TABLE OF CASES (CONTINUED)

Page

People v. Williams
(1971) 22 Cal.App.3d 34 — 120

People v. Yeoman
(2003) 31 Cal.4th 93 — 27

Rideau v. Louisiana
(1963) 373 U.S. 723 [83 S.Ct. 1417, 10 L.Ed.2d 663] — 17

Romano v. Oklahoma
(1994) 512 U.S. 1 [114 S.Ct. 2004, 129 L.Ed.2d 1] — 80

Roper v. Simmons
(2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1] — 8, 116, 118

Rosa S. v. Superior Court
(2002) 100 Cal.App.4th 181 — 53, 64, 83

Sawyer v. Whitley
(1992) 505 U.S. 333 [112 S.Ct. 2514, 120 L.Ed.2d 268] — 84

Schad v. Arizona
(1991) 501 U.S. 624 [111 S.Ct. 2491, 115 L.Ed.2d 555] — 102

Sheppard v. Maxwell
(1966) 384 U.S. 333 [86 S.Ct.1507, 16 L.Ed.2d 600] — 17

Sincavage v. Superior Court
(1996) 42 Cal.App.4th 224 — 28

Skilling v. United States
(2010) 561 U.S. 358 [130 S. Ct. 2896, 177 L.Ed.2d 619] — 22

Skipper v. South Carolina
(1986) 476 U.S. 1 [106 S.Ct. 1669, 90 L.Ed.2d 1] — 124

Southern Union Co. v. United States
(2012) 567 U.S. __ [132 S.Ct. 2344 183 L.Ed.2d 318] — 96

TABLE OF CASES (CONTINUED)

	Page
State v. Hightower (1996) 146 N.J. 239, 680 A.2d 649	55
State v. Koskovich (2001) 168 N.J. 448, 776 A.2d 144	55, 56
State v. Muhammad (1996) 145 N.J. 23, 678 A.2d 164	56
State v. Nesbit (Tenn. 1998) 978 S.W.2d 872	56
Strickland v. Washington (1984) 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674]	66, 67
Stringer v. Black (1992) 503 U.S. 222 [112 S.Ct. 1130, 117 L.Ed.2d 367]	110
Sullivan v. Louisiana (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182]	101, 102, 115
Sutphin v. Speik (1940) 15 Cal.2d 195	71
Taylor v. Kentucky (1978) 436 U.S. 478 [98 S.Ct. 1930, 56 L.Ed.2d 468]	119, 121
Townsend v. Sain (1963) 373 U.S. 293 [88 S.Ct. 745, 9 L.Ed.2d 770]	90
Tuilaepa v. California (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750]	87, 90
Tumey v. Ohio (1927) 273 U.S. 510 [47 S.Ct. 437, 71 L.Ed. 749]	30
Turner v. State (Ga. 1997) 486 S.E.2d 839	55, 56

TABLE OF CASES (CONTINUED)

	Page
United States v. Applewhaite (3d Cir. 1999) 195 F.3d 679	39, 45
United States v. Atkinson (1936) 297 U. S. 157 [56 S.Ct. 391, 80 L.Ed. 555]	63
United States v. Burns (9th Cir. 1983) 701 F.2d 840	41
United States v. Diaz (11th Cir. 2001) 248 F.3d 1065	39, 45
United States v. Frady (1982) 456 U.S. 152 [102 S.Ct. 1584, 71 L.Ed.2d 816]	63
United States v. Harris (5th Cir. 2005) 420 F.3d 467	39, 45
United States v. Martin Linen Supply Co. (1977) 430 U. S. 564 [97 S.Ct. 1349, 51 L.Ed.2d 642]	80
United States v. Necoechea (9th Cir. 1993) 986 F.2d 1273	119
United States v. Savarese (1st Cir. 2004) 385 F.3d 15	41, 42
United States v. W.T.T. (8th Cir. 1986) 800 F.2d 780	41
United States v. Young (1985) 470 U.S. 1 [105 S.Ct. 1038, 84 L.Ed.2d 1]	63
United States ex rel. Bloeth v. Denno (CA2 1963) 313 F.2d 364	23
Vandenberg v. Superior Court (1999) 21 Cal.4th 815	70

TABLE OF CASES (CONTINUED)

	Page
Wiborg v. United States (1896) 163 U.S. 632 [16 S.Ct. 1127, 41 L.Ed.289]	63
Withrow v. Larkin (1975) 421 U.S. 35 [95 S.Ct. 1456, 43 L.Ed.2d 712]	Passim
Woodson v. North Carolina (1976) 428 U.S. 280 [96 S.Ct. 2978, 49 L.Ed.2d 944]	77, 92, 99

TABLE OF STATUTES

	Page
United States Constitution	
Article I, § 8	116
Article VI, § 2	116
Fifth Amendment	Passim
Sixth Amendment	Passim
Eighth Amendment	Passim
Fourteenth Amendment	Passim
California Constitution	
Article I, § 7	28, 105, 123
Article I, § 15	Passim
Article I, § 17	105, 123
Penal Code	
Section 20	36
Section 187	35
Section 190.2	81
Section 190.2, subd. (a)(17)(L)	44, 48
Section 190.3	Passim
Section 190.3, subd. (a)	49, 84, 85
Section 190.3, subd. (b)	49, 88

TABLE OF STATUTES (CONTINUED)

	Page
Penal Code (Cont.)	
Section 192	68
Section 215	35, 41, 42, 43
Section 215, subd. (a)	35, 40, 43
Section 215, subd. (c)	43
Section 1033, subd. (a)	2, 5, 8
Section 1158a	103
Section 1259	52, 62, 83
Section 1469	52, 62, 82
Code of Civil Procedure	
Section 170.3, subd. (a)(1)	27
Section 170.1, subd. (a)(6)(A)(iii)	24
Section 170.3, subd. (d)	26
Section 1911	71
Evidence Code	
Section 720, subd. (a)	4
California Jury Instructions -- Criminal (CALJIC)	
CALJIC No. 8.00	58

TABLE OF STATUTES (CONTINUED)

Page

California Jury Instructions -- Criminal (CALJIC) (Cont.)

CALJIC No. 8.21 58

CALJIC No. 8.84 94, 95

CALJIC No. 8.84.1 50, 94

CALJIC No. 8.85 Passim

CALJIC No. 8.85(a) 86, 88

CALJIC No. 8.85(b) 88, 89

CALJIC No. 8.86 50, 94

CALJIC No. 8.87 Passim

CALJIC No. 8.88 Passim

Other Authorities

International Covenant on Civil and Political Rights (ICCPR) 116, 117

Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing*, 94 Yale L.J. 351 (1984) 105

Restatement Third of the Foreign Relations Law of the United States (1987) 116

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	)	**No. S093235**
vs.	)	
JERROLD E. JOHNSON, Defendant and Appellant.	)	

NO WAIVER OR ABANDONMENT OF ASSIGNMENTS OF ERROR RAISED IN APPELLANT'S OPENING BRIEF, GENERALLY

This reply brief is intended to supplement appellant's opening brief and to reply to contentions or assertions raised in the respondent's brief where reply is deemed to be helpful or necessary to the Court's consideration of the issue or issues raised. Appellant addresses specific contentions made by respondent but does not necessarily reply to arguments that are adequately addressed in the opening brief. However, appellant continues to assert all assignments of error and arguments made in his opening brief and does not intend to concede, waive, or abandon any issue, argument, or assignment of error raised in the opening brief. (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

The arguments in this reply brief are generally numbered in accord with the assignments of error raised in appellant's opening brief.

A. Guilt Trial Issues and Assignments of Error

I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR CHANGE OF VENUE; DENIAL OF APPELLANT'S CHANGE OF VENUE MOTION VIOLATED HIS RIGHTS TO A FAIR TRIAL, TO DUE PROCESS, AND TO A RELIABLE PENALTY DETERMINATION GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant's motion for change of venue was denied by the trial court on July 6, 2000. As discussed in appellant's opening brief, the trial court ruled that appellant failed to meet his burden of showing a reasonable likelihood that a fair and impartial trial could not be had in Lake County. Failing to consider related allegations concerning the death of Margaret Johnson, the court concluded that this case involved a single murder; moderate publicity which did not sensationalize the murder; and, although small, a spread-out population. The trial court emphasized that the victim was not prominent in the community and that there was no dispute among county officials as to the costs of prosecution. (AOB at pp. 90-93.)

A. Standard of Review; General Legal Principles

Respondent does not disagree that a change of venue must be granted when the defendant demonstrates a reasonable likelihood that a fair trial cannot be held in the county where the crime or crimes occurred. (Pen. Code § 1033, subd. (a); *People v. Famalaro* (2011) 52 Cal.4th 1, 21.) Nor does respondent disagree that

on appeal, the appellate court conducts a de novo review of the evidence presented in the superior court to determine whether the court should have granted a change of venue. (*People v. Jenkins* (2000) 22 Cal.4th 900, 943; *People v. Sanders* (1995) 11 Cal.4th 475, 505-506.) Both parties agree (see RB at pp. 46-47) that appellant has the burden of showing "both that the court erred in denying the change of venue motion, i.e., that at the time of the motion it was reasonably likely that a fair trial could not be had, and that the error was prejudicial, i.e. that it [is] reasonably likely that a fair trial was not *in fact* had." (*People v. Jenkins, supra,* 22 Cal.4th at p. 943; *People v. Dennis* (1998) 17 Cal.4th 468, 523.)

Respondent concurs that on appeal, the reviewing court's independent evaluation of the venue determination is based on a consideration of five factors: (1) the nature and gravity of the offense; (2) the nature and extent of the media coverage; (3) the size of the community; (4) the community status of the defendant; and (5) the prominence of the victim. (RB 60-66; see also *People v. Sully* (1991) 53 Cal.3d 1195, 1237; *People v. Panah* (2005) 35 Cal.4th 395, 447.)

B. Respondent Mistakenly Asserts that Appellant Has Claimed that Prosecution Witness Ebbesen Was Biased and Hence Unqualified; Ebbesen's Biases Were a Matter of Record

Respondent asserts that appellant has raised a novel claim for the first time on appeal that prosecution expert Professor Ebbe Ebbesen was biased because he regularly and repeatedly testified for the prosecution in change of venue and other cases. (RB 50-51, fn. 4.)

Respondent is certainly able to recognize that appellant did not, and did not intend to, raise Dr. Ebbesen's bias as an appellate issue. It is a matter of fact, not an issue for appellate review as respondent erroneously states. (RB 51-52.)

Appellant noted and discussed, as a matter of record and fact, that Dr. Ebbesen, the prosecution's star witness opposing change of venue, was thoroughly pro-prosecution, having "regularly and repeatedly testified as a prosecution witness opposing change of venue motions in other cases." (AOB 91 & fn. 12.) Respondent has not refuted this characterization based on references to other cases in which Dr. Ebbesen testified solely for the prosecution, nor has respondent effectively shown by any other evidence that Dr. Ebbesen was anything other than a regular, pro-prosecution witness in change of venue cases. Of course, the determination of whether a witness qualifies as an expert under Evidence Code section 720, subdivision (a) comes within the trial court's discretion. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1062-1063.) While Dr. Ebbesen may have been qualified as an expert, certainly his pro-prosecution proclivities may be properly noted on appeal based on reported decisional law. (See, e.g., *People v. Famalaro* (2011) 52 Cal.4th 1, 20; *People v. Davis* (2009) 46 Cal.4th 539, 571-572.)

C. Denial of Appellant's Motion for Change of Venue Was Not Waived or Forfeited for Appellate Review

Hearings on appellant's motion for change of venue occurred on June 27-29, 2000. (See AOB 90-92; RB 48.) Appellant had previously informed the court at the omnibus motion hearing that his principal motion would be for change of

venue. (See 7 RT 75-79.) The trial court denied appellant's motion for change of venue on July 6, 2000. (See 2 CT 377.) Appellant's motion for change of venue was heard and denied just before jury selection and the commencement of trial. The trial court never gave any indication that appellant's change of venue motion would again be addressed or reconsidered by the court during or following jury selection Respondent nevertheless asserts that the change of venue motion should have been renewed after voir dire to preserve the issue for appeal. (RB 59.)

On a defendant's motion, the trial court must order a change of venue "when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." (Pen. Code § 1033, subd. (a); see *People v. Famalaro, supra,* 52 Cal.4th at p. 21.) Appellant acknowledges that when a trial court initially denies a change of venue motion without prejudice, a defendant is usually required to renew the motion after voir dire of the jury to preserve the issue for appeal. (*People v. Williams* (1997) 16 Cal.4th 634, 654-655.) As the Court explained in *People v. Staples* (1906) 149 Cal. 405, 412, "it is not error for the trial court to postpone the consideration of an application for a change of venue until an attempt is made to impanel the jury, where leave is granted to counsel to renew his application if the facts disclosed on the impanelment should further warrant it, and . . . where counsel fails thereafter to renew his motion, he cannot claim that error was committed by the court in failing to order a change of venue. . . . [T]he failure to renew [the] motion, where it was denied temporarily only, [i]s an abandonment and waiver of the whole question, and fatal to any claim

based upon the original application." These principles, however, do not apply to the facts or circumstances of the present case.

Here, appellant should not be deemed to have forfeited his statutory and constitutional claims or to have failed to preserve the issue for appeal as asserted by respondent. There is no indication in the record that appellant's change of venue motion was deferred or denied temporarily or that consideration of the motion was postponed in any way until after the jury was impaneled. (See *People v. Staples, supra,* 149 Cal. at p. 412 [failure to renew temporarily denied motion for change of venue as abandonment and waiver of issue], overruled on other grounds in *People v. Newland* (1940) 15 Cal.2d 678; see also *People v. Hoover* (1986) 187 Cal.App.3d 1074, 1085 .) Further, the trial court never gave any indication that appellant's change of venue motion would again be addressed or reconsidered by the court during or following jury selection. Unlike *People v. Maury* (2003) 30 Cal.4th 342, 388-389, where the defendant failed to renew a change of venue motion although the trial court expressly invited the defendant to do so after jury selection, appellant was not so invited to renew his motion or given any indication that the motion would have been seriously entertained after jury selection.

Moreover, there is every indication in the record that renewal of appellant's motion would have been futile and of no procedural purpose. During change of venue proceedings on June 27, 2000, for example, the trial judge discussed trial scheduling, strongly indicating that he had already prejudged the change of venue

motion and had every intention to deny it. (See 13 RT 293-294.) During change of venue proceedings on June 28, 2000, the judge again discussed trial scheduling and jury questionnaires, further indicating its intent to deny the motion despite the strong defense evidence of bias and jury penalty prejudgment. (14 RT 375-376.) Even though the trial judge did not rule on appellant's motion on June 28, 2000, he certainly discussed trial scheduling with defense counsel Trudgeon and the availability for trial of defense counsel Green, confirming once again the court had no intention to order change of venue in this case. (14 RT 423.)

In light of the record that the trial court had prejudged the change of venue motion and had no intention to order a change of venue under any circumstances, the logical conclusion drawn in other cases where a defendant who moved unsuccessfully to change venue before jury selection and who chose not to contest venue anew once a jury had been chosen -- e.g., that the defendant came to believe he could receive a fair and impartial trial from the jury that was actually empanelled -- cannot be made in this case.

D. The Court Erred and Abused Its Discretion on Denying Appellant's Motion for Change of Venue

Respondent argues that the trial court did not abuse its discretion by denying appellant's change of venue motion. (RB 46.)

The Sixth and Fourteenth Amendments "guarantee[] 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, 6 L.Ed.2d 751].) On a defendant's

motion, the court must order a change of venue "when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." (Pen. Code § 1033, subd. (a); see *People v. Famalaro, supra,* 52 Cal.4th at p. 21; *People v. Pride* (1992) 3 Cal.4th 195, 224.)

On appeal from the denial of a change of venue, this Court accepts the trial court's factual findings where supported by substantial evidence, but it reviews independently the trial court's ultimate determination whether it was reasonably likely the defendant could receive a fair trial in the county. In deciding whether to change venue, the trial court, and this Court in its independent review, considers several factors, including the nature and gravity of the offense, the nature and extent of the media coverage, the size of the community, the defendant's status within the community, and the victim's prominence. (*People v. Ramirez* (2006) 39 Cal.4th 398, 434.)

Respondent argues, as the trial court noted (16 RT 632), that this case did not involve multiple murders or any other element that would particularly exacerbate the nature of the offense.[1] (RB 60.) Both respondent and the trial court are wrong. The charged offense involved in this case, a capital murder, is most serious. While this factor weighed in favor of a change of venue, it was not itself

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[1]/ Respondent's position here is incompatible with public policy that the death penalty is reserved for "the worst of the worst." (See *Roper v. Simmons* (2005) 543 U.S. 551, 568 [125 S.Ct. 1183, 161 L.Ed.2d 1] ["Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution'" (quoting *Atkins v. Virginia* (2002) 536 U.S. 304, 319 [122 S.Ct. 2242, 53 L.Ed.2d 335].)

dispositive. Contrary to respondent's assertions, multiple murders were involved in this case. (See *People v. Farley* (2009) 46 Cal.4th 1053, 1083.) Appellant was charged with the murder of Ellen Salling. The prosecution also sought to prove that appellant murdered Jennifer VonSeggern and his step-grandmother, Margaret Johnson. Three murders -- not one -- were certainly central to the prosecution's guilt and penalty phases of trial. The sensational overtones of other killings have been held to require a change of venue. (*People v. Fauber* (1992) 2 Cal.4th 792, 818.)

The nature and extent of news coverage also militated in favor of change of venue. Pretrial publicity in this case was generated around the time of occurrence in December 1998, following appellant's apprehension and arrest. Appellant was tried only a year and a half after the Salling killing. In some cases the passage of time between a killing or killings and trial may blunt the impact of pretrial publicity. (*People v. Prince* (2007) 40 Cal.4th 1179, 1214.) Here, respondent ignores that the publicity attending the killing of two elderly women in two separate Lake County communities full of retirees created bias and prejudice in favor of a change of venue that could not have attenuated between the killings and appellant's trial. (See *People v. Williams* (1989) 48 Cal.3d 1112, 1129.)

The jury questionnaires and voir dire revealed that pretrial publicity in this case had not been mostly forgotten at the time of trial. Prospective juror Edison recalled reading about the case and learning the general facts from pretrial publicity. (31 RT 3722-3752.) Prospective juror Widdifield was aware of

essential features of this case. He recalled people talking about the case where he worked in Clearlake. Widdifield clearly recalled the facts of the Salling killing, that an elderly woman had been killed, her car stolen, and that there had been a car chase down the highway. (31 RT 3752-3776.)

As discussed in the opening brief, the trial court was presented with copies of numerous newspaper articles and other print media that appeared in the community after the two alleged murders. (See 1 CT 264-298 [press articles].) The publicity in the present case was pervasive and prejudicial to appellant. (See also 1 CT 194-196 [nature and extent of media coverage as sensational and inflammatory].) One newspaper article in the Lake County Record Bee, for example, referred to a spate of "horrendous" murders, including the killing of Ellen Salling and the death of Margaret Johnson as to both of which appellant had allegedly been linked. (See 1 CT 295-296.) In an opinion piece, the Lake County Record Bee quoted readers expressing outrage at the murder of Ellen Salling. (See 1 CT 279.) Evidence of public hostility is apparent in the record. (See *People v. Whalen* (1973) 33 Cal.App.3d 710, 716.)

Other newspaper articles described the charged murder, described the victim, described appellant and his background, and recounted the fear among residents of the neighborhoods where the crimes occurred. Thus, contrary to respondent's assertions that appellant was not particularly notorious in the local community (RB 65), pretrial publicity focused on the apprehension and arrest of appellant, his background and parole status, and other sordid details of this case.

These articles emphasized appellant's status as an outsider with a background foreign to the local community, a factor which weighed in favor of change of venue.

Pretrial publicity invariably linked appellant to alleged involvement in the death of Margaret Johnson and either explicitly or implicitly accused appellant of killing her and committing arson to cover up the crime. Respondent overlooks (RB 60-61) that the juror questionnaires confirmed that potential prejudice from the media coverage had not attenuated by the passage of time. (See *People v. Welch* (1999) 20 Cal.4th 701, 744.) Indeed, respondent ignores the responses of prospective jurors that revealed fear, bias, prejudice, and prejudgment resulting from the pretrial publicity. Prospective juror Chalmers-Fancher noted the ripple of fear and concern in the community after the murder in this case. (See 27 RT 2908 ["Because it's a small community, and when the event took place, there was a ripple of fear and concern and every -- you know, it was the topic of conversation at the time."].) Prospective Hobbs noted she lived close to the Kono Tayee area where Salling was killed: "I remember thinking that it was, you know -- it was more of interest to me than other cases because it was sort of close by. ... I was relieved to hear [defendant] was captured since, you know, we live across the lake from there." (27 RT 2910.) Appropriately named prospective juror Joe Doom had already formed an opinion about the case, largely because of press articles. (See 8 CT 2133; 24 RT 2408, 2412.)

As evidenced by the jury questionnaires and voir dire during jury selection

(see AOB 103-104, fn. 14), countless prospective jurors had heard about and were familiar with details of the case through pretrial publicity. Numerous prospective jurors were aware of "brutal" murders or appellant's prior crimes. Many prospective jurors were acquainted with the victim or victims. More prospective jurors had conversed with friends, family, or coworkers who were acquainted with the victims or family members. (See also AOB 105-107.) Based on the record in this case, there was strong evidence that the jury pool was comprised of people who were aware of the facts and circumstances of the deaths of Ellen Salling or Margaret Johnson or both, personally knew either or both of these women, were personally acquainted with witnesses at trial, and had already prejudged guilt or penalty or both. (See, in contrast, *People v. Famalaro* (2011) 52 Cal.4th 1, 24 [no evidence that potential jury pool in Orange County was comprised of persons who personally knew murder victim; factor as weighing against change of venue].)

Respondent disputes that the size and population of Lake County militated in favor of a change of venue. (RB 64.) Respondent argues that county size did not play a significant factor in the present case because the trial was held in an area that was not at the locus of the crime but a substantial distance away. (RB 64-65.) Motions to change venue have been granted where the county is relatively isolated and small. (See, e.g., *Martinez v. Superior Court* (1981) 29 Cal.3d 574, 582 [Placer County, population 106,500]; *People v. Tidwell* (1970) 3 Cal.3d 62, 64 [Lassen County, population 17,500].)

In 2000, there were only 44,247 people 18 years and older in Lake County. (United States Census Bureau, Census 2000, Lake County, California, DP-1. Profile of General Demographic Characteristics: 2000.) In *People v. Williams* (1989) 48 Cal.3d 1112, this Court held that the trial court erred in denying a change of venue from Placer County. That case was similar to the present case in many respects. At the time of that trial, Placer County had a population of 117,000 , twice the population of Lake County. As elsewhere stated by the Court, "[t]he small size of the community in *Williams* was reflected in the fact that over one-third of the number of potential jurors knew people connected to the case, including the victim, members of her family, and the district attorney or investigators . . . ." (*People v. Vieira* (2005) 35 Cal.4th 264, 282-283.

Contrary to respondent's assertions (RB 64-65), precisely because of the very small population of Lake County at the time of trial, it was likely that pretrial publicity, preconceptions, and prejudgment became imbedded in the public consciousness. There was a much smaller population in Lake County than in other cases where this Court upheld denial of a change of venue. (See, e.g., *People v. Weaver* (2001) 26 Cal.4th 876 [trial held in Kern County with a population at the time of 543,000, and Bakersfield, the county seat, a population of 331,000]; *People v. Hayes* (1999) 21 Cal.4th 1211, 1250-1251 [trial held in Santa Cruz County with a population under 200,000]; *People v. Howard* (1992) 1 Cal.4th 1132, 1167 [Tulare County, then with 253,000 inhabitants, not a small community for change of venue purposes].)

Unlike larger counties, the small population of Lake County could not neutralize or dilute the impact of adverse publicity. (See *People v. Jennings* (1991) 53 Cal.3d 334, 363.) While spread out, the very low population of Lake County signified that a significant percentage of the entire county had heard about and prejudged the case. Prospective juror Nieve heard a lot of information about this case and knew that a lot of people had already made up their minds which was probably "negative" for appellant. (See 27 RT 2833.) Prospective juror Richard Chase read about the murder; Dorothy Woods felt, by the press coverage, that she had already prejudged the case and convicted appellant. (See 27 RT 2878, 2796.)

Respondent argues that there was no evidence that Salling was particularly prominent in the community. (RB 66.) Respondent ignores that although neither appellant nor Ellen Salling nor Margaret Johnson -- the penalty trial alleged arson and murder victim -- was prominent, Salling was certainly a well-known, well-respected, and extremely sympathetic member of her local Kono Tayee community. Prospective juror Haskins lived in Kono Tayee; she had been a friend of Salling's. (27 RT 2973.) Prospective juror Riddle subscribed to two local newspapers and was aware of and familiar with the details of Salling's killing; he stressed that Lake County was a small community. (30 RT 3433-3435.) Prospective juror Martinez lived about half a mile away from Ellen Salling. He followed the case closely, because it occurred near where he lived; for that reason, it was hard for him to be fair and impartial. (31 RT 3797-3803.)

Respondent overlooks that information as to jurors' relationships with

Margaret Johnson and their knowledge of her alleged murder, allegedly by appellant, came primarily from responses to the juror questionnaires. The jury was not voir dired on the issue of Margaret Johnson's death. Hence, "we don't know how many of these potential jurors may have some kind of knowledge about that incident or may -- or may have already formed some type of opinion about that incident." (41 RT 5154.)

The record does reveal, for example, that many prospective jurors were acquainted with the victims and had detailed knowledge about the circumstances of their deaths. Prospective juror Wright could not be fair or impartial because of his personal relationship with Salling over the course of 20 years. (See 23 RT 2132.) Prospective juror Good was a personal friend of Salling's; she wanted to see the death penalty imposed in this case. (26 RT 2707.) A host of other prospective jurors confirmed what the defense surveys showed -- most members of the Lake County community had been exposed to inflammatory pretrial publicity as a consequence of which an unusually high percentage of prospective jurors had prejudged either guilt or penalty or both. Prospective juror Wetmore bowled with Ellen Salling. Wetmore had read many articles about the case; the impression he received from the pretrial publicity was that of a brutal crime and repugnant murder. (See 8 CT 2079; 24 RT 2356.) Prospective juror Jeppesen was acquainted with Salling and many of the witnesses. (8 CT 2241; 24 RT 2475.) Prospective juror Gregory had prejudged appellant's guilt prior to trial. Ellen Salling was her hair salon client; as other prospective jurors because the county

population was so small, Margaret had a personal relationship with the victim. (24 RT 2476-2478.)

Respondent ignores that penalty trial victim Margaret Johnson worked in the local post office in her area. She was a well-known member of her community. The post office is the heart and soul of local, rural communities. Prospective juror Patricia West worked with Margaret Johnson in the post office. (26 RT 2614, 2658.) Danny Vaars, another post office employee, was exposed to this case through the newspaper; it was difficult for him to be fair because of the pretrial publicity and the information disclosed about appellant's drug use. (23 RT 2264.) Prospective juror Antonia Ledoux was acquainted with Margaret Johnson. (30 RT 3577-3578.) Prospective juror Tyler read about crime in the local Record Bee, was aware of the facts and circumstances of the crime, and was acquainted with key prosecution witness Det. Chris Rivera. Det. Rivera lived in the same neighborhood and had opened a coffee shop with his wife near Tyler's house. (See 25 RT 2539-2541.)

On considering the nature and gravity of the offenses with which appellant was charged, the nature and extent of the media coverage, the miniscule size of the community, appellant's status as an alleged double murderer in two separate, incidents, and the relative prominence of the victims in this case, there was a reasonable likelihood that a fair trial could not be held in Lake County. Consequently, the trial court erred and in denying appellant's motion for a change of venue, and the error was prejudicial as to both the determinations of guilt and

penalty.

E. Denial of Appellant's Change of Venue Violated His Rights to a Fair Trial, Due Process of Law, and to a Reliable Penalty Determination Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

The Constitution's place-of-trial prescriptions do not impede transfer of the proceeding to a different district at the defendant's request if local prejudice prevents a fair trial -- a "basic requirement of due process." (*In re Murchison* (1955) 349 U.S. 133, 136 [75 S.Ct. 623, 99 L.Ed. 942].)

As discussed in appellant's opening brief (AOB 107-118), prejudice is presumed when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where trial is held. (See, for example, *Sheppard v. Maxwell* (1966) 384 U.S. 333 [86 S.Ct.1507, 16 L.Ed.2d 600] [defendant need only show "reasonable likelihood" that prejudicial news prior to trial will prevent fair trial]; *Coleman v. Kemp* (11th Cir. 1985) 778 F.2d 1487, 1489-1490.) Even overwhelming evidence of guilt or arguments that the facts proved at trial were such that death was the only appropriate sentence are not dispositive in assessing a change of venue claim. (See *Rideau v. Louisiana* (1963) 373 U.S. 723 [83 S.Ct. 1417, 10 L.Ed.2d 663].)

Respondent asserts that the publicity in appellant's case was not such as to support a presumption of prejudice or a finding of actual prejudice, since the publicity subsided before trial began and was unremarkable in comparison to other

capital cases. (See RB 66-70.) Appellant strongly disagrees.

In determining whether there is a reasonable likelihood that a defendant can receive a fair and impartial trial in the venue, the trial court may rely on qualified public opinion surveys or opinion testimony offered by individuals. (*Maine v. Superior Court* (1968) 68 Cal.2d 375, 383.)

In *People v. Lewis* (2008) 43 Cal.4th 415, 450, 72 percent of the potential jurors had heard something about the case. An absence of prejudice was suggested by the fact that most of them remembered the case only in general terms, seemed to have no independent recollection of the facts, and had not prejudged the defendant's guilt. Here, there was strong evidence of both presumed and actual prejudice and prejudgment throughout Lake County at the time of trial as reflected in the defense opinion surveys and the actual responses of prospective jurors who expressed knowledge about the facts of the case, acquaintance with witnesses or with victim Ellen Salling or victim Margaret Johnson, opinions on appellant's guilt and penalty, and other manifestations of prejudgment. These strong opinions of prejudice and prejudgment permeated the venire.

Second, the press publicity and news stories about appellant were certainly not kind. They contained prejudicial information of the type readers could not reasonably be expected to ignore or put aside. Appellant's flight from the police, references to his prior convictions, reference to the alleged Margaret Johnson arson-murder, and other sordid details of the crimes involved in this case were

likely to be indelibly imprinted in the mind of anyone exposed to this type of inflammatory information. Pretrial publicity, in a community already shocked and stirred by the crimes in this case, was highly biased against appellant and prejudicial. All of the pretrial publicity invited prejudgment of appellant's culpability and penalty.

Respondent repeatedly overlooks that the murder of Ellen Salling -- and appellant's alleged killing of Margaret Johnson -- were both committed in a small community of 58,000 residents. In contrast to larger counties, there were relatively few individuals eligible for jury duty in all of Lake County. Given the small and nondiverse pool of potential jurors in Lake County, it was doubtful that a truly impartial panel of 12 individuals could be empanelled or that a truly impartial jury was actually impaneled and sworn in this case.. In comparison to the potential jury pool in the present case, in *Mu'Min v. Virginia* (1991) 500 U.S. 415, 429 [111 S.Ct. 1899, 114 L.Ed.2d 493], prejudice was mitigated by the size of the metropolitan area involved with a population of over 3 million. In *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1044 [111 S.Ct. 2720, 115 L.Ed.2d 888], prejudice was attenuated where the venire, unlike Lake County, was drawn from over 600,000 residents.

Respondent ignores that the murder of Ellen Salling, and the alleged, arson-murder of Margaret Johnson, were linked together in the press and pretrial publicity. Unlike larger counties, the small population of Lake County could not neutralize or dilute the impact of adverse publicity. As expressed by at least one

prospective juror who knew the community well, a fair trial was doubtful as everyone in the small Lake County community knew everybody else. Respondent overlooks that the jury reached guilt and penalty verdicts after but a few hours of deliberations, further indicating that the fears of prejudgment and prejudice were realized in this case. (See 2 CT 426-433; 44 RT 5573-5574 [length of guilt deliberations; 3:35 hours]; 3 CT 768-779; 54 RT 6881-6882 [length of penalty deliberations; slightly more than one hour].)

The notion that since none of the seated jurors expressed overt hostility to appellant, and were hence unaffected by the murders, must be disregarded in light of the fact that the community as a whole was not only aware of the circumstances of two murders but was actively linked to the victims by personal connections typical of small communities. (See *Murphy v. Florida* (1975) 421 U.S. 794, 802 [95 S.Ct. 2031, 44 L.Ed.2d 589].) The Supreme Court has held that a key factor in gauging the reliability of juror assurances of impartiality is the percentage of veniremen who "will admit to disqualifying prejudice." (*Murphy v. Florida, supra,* 421 U.S. at p. 803.) The higher percentage of veniremen admitting to a previously formed opinion on the case, the greater the concern over the reliability of the voir dire responses from the remaining potential jurors. (*Id.*) Here, there was credible evidence that the jury pool in this case was comprised of people who were both aware of the facts and circumstances of the deaths of Ellen Salling or Margaret Johnson or both and personally knew either or both of these women. Significantly, at least four of the regular jurors and all three alternates had been exposed to

pretrial publicity and were aware of the facts or circumstances of the charged murder. Many had personal acquaintance with the parties or witnesses. (E.g., trial jurors 200012964, 200010689, 200002006, 200034886, 200019102 [alternate], 200002970 [alternate], 200014476 [alternate].

Contrary to respondent's assertions (RB 67-67), the fact that a jury was ultimately empanelled and sworn in this case did not overcome prejudgment in the community. Whether the jurors at appellant's trial had such fixed opinions that they could not judge impartially the guilt of the defendant is the focus of inquiry. (*Patton v. Yount* (1984) 467 U.S. 1025, 1035 [104 S.Ct. 2885, 81 L.Ed.2d 847]. Here, fixed opinions were the norm, as manifested by the pretrial surveys conducted in this case and the overwhelming exposure of the seated jurors to pretrial publicity and their numerous connections to the parties, their families, or witnesses.

Respondent's assertions (RB 67-68) that adequate voir dire resulted in a panel of jurors without prejudgment issues is contradicted by the record. Ordinarily, when an issue exists regarding the effect of pretrial publicity, the trial judge is relied upon to conduct jury selection in an appropriate manner. The trial judge sits in the locale where the publicity is said to have had its effect. The trial judge may even base his evaluation on his own perception of the depth and extent of news stories that might influence a juror. (*Mu'Min v. Virginia, supra*, 500 U.S. at p. 427; *People v. Famalaro, supra*, 52 Cal.4th at p. 24.)

Here, respondent fails to address the fact that during voir dire prospective

and seated jurors were not questioned in a manner calculated to elicit prejudice, the degree to which the jurors had been exposed to prejudicial publicity, or how such exposure had affected the jurors' attitude towards the trial. (See *Calley v. Callaway* (5th Cir. 1975) 519 F.2d 184, 208-209, cert. denied (1976) 425 U.S. 911 [96 S.Ct. 1505, 47 L.Ed.2d 760.) Innocuous leading questions and conclusory answers were typical of the voir dire conducted by the court in this case. (See, i.e., 24 RT 2210 [where court simply asked juror # 200009114 -- who acknowledged receiving two local newspapers -- "you don't believe you've read or heard anything about this case before coming to court; is that true?"]; 24 RT 2317-2318 [where court asked juror # 200012964 whether "she could set aside anything that you feel you've read that's connected with this case or heard about this case" even though juror had previously expressed opinion to others, based on pretrial exposure to newspaper articles, that "it was horrible that someone was killed"].)

The Sixth and Fourteenth Amendments guarantee a fair trial by a panel of impartial, indifferent jurors. Due process considerations require transferring the trial to another district if extraordinary local prejudice will prevent the defendant from obtaining a fair trial by indifferent jurors in the district of the offense. (*Skilling v. United States* (2010) 561 U.S. 358 [130 S.Ct. 2896, 2913, 177 L.Ed.2d 619]; *In re Murchison* (1955) 349 U.S. 133, 136 [75 S.Ct. 623, 99 L.Ed. 942]; *Irvin v. Dowd* (1961) 366 U.S. 717, 722-723 [81 S.Ct. 1639, 6 L.Ed.2d 751].) Based on the entire record, including the evidence admitted at the hearing on appellant's change of venue motion and the subsequent jury selection process and

voir dire, it is evident that the extent and nature of pretrial publicity in such a small county caused such a build up of prejudice that excluding the preconception of guilt and penalty from the jury's deliberations would be too difficult. (See *United States ex rel. Bloeth v. Denno* (CA2 1963) 313 F.2d 364, 372.) There can be no confidence that the guilt and penalty verdicts were due to the evidence presented at trial and not to a partial jury that had prejudged the case or the failure to change venue.

II

THE TRIAL JUDGE'S YEARS-LONG CLOSE PERSONAL AND PROFESSIONAL RELATIONSHIP WITH THE PROSECUTOR, AND THE CONSEQUENT APPEARANCE OF BIAS, PRESUMED BIAS, AND ACTUAL BIAS, REQUIRED THE JUDGE TO DISQUALIFY HIMSELF IN THIS CASE; THE COURT'S FAILURE TO DO SO DEPRIVED APPELLANT OF HIS FUNDAMENTAL RIGHTS TO A FAIR TRIAL, DUE PROCESS OF LAW, AND TO A RELIABLE PENALTY DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; FURTHER, AS STRUCTURAL ERROR, THE FAILURE TO DISQUALIFY WAS PREJUDICIAL AND REVERSIBLE PER SE

As demonstrated in appellant's opening brief (AOB 119-120), Judge Robert L. Crone, who was assigned to preside over this case, had a deep and long-standing personal and professional relationship with prosecutor, former District Attorney, and judge-in-waiting, Stephen Hedstrom. The trial judge was in close and frequent contact with Hedstrom. The judge declined to disqualify himself. (13 RT 130.) The judge's relationship with prosecutor Hedstrom gave rise to a reasonable doubt about whether he could be impartial. Presumed bias, the appearance of possible bias, and actual bias, whether considered separately or together, compelled his disqualification.

A. Appellant Has Not Forfeited or Waived His Federal and State Due Process Claims

Respondent asserts that since appellant did not seek to disqualify the trial judge pursuant to Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii), he waived or forfeited the issue on appeal. (RB 73.) Respondent

further asserts that appellant cannot complain that the trial judge's bias affected his subsequent rulings at trial. (RB 73.)

Respondent indirectly concedes that appellant was not personally admonished about the possibility of bias, the appearance of bias, presumed bias, or actual bias stemming from the relationship between the trial judge and prosecutor Hedstrom. Appellant was neither asked nor did he personally waive the presumed, potential, or actual bias involving the trial judge and prosecutor Hedstrom, or the inherent risks that their relationship would pose to his defense, interests, fundamental rights, and, indeed, his very life. (See 13 RT 127-131.)

Respondent cites *People v. Freeman* (2010) 47 Cal.4th 993 in support of forfeiture. In *Freeman*, the Court addressed the issue of whether the appearance of bias by a judge requires recusal under the due process clause of the federal Constitution. (U.S. Const., 14th Amend.) Based on the high court's decision in *Caperton v. A. T. Massey Coal Co.* (2009) 556 U.S. 868 [129 S.Ct. 2252, 173 L.Ed.2d 1208], this Court concluded that while a showing of actual bias is not required for judicial disqualification under the due process clause, neither is the mere appearance of bias sufficient. Instead, based on an objective assessment of the circumstances in the particular case, there must exist the probability of actual bias on the part of the judge or decision maker that is too high to be constitutionally tolerable. (*People v. Freeman, supra*, 47 Cal.4th at p. 996.)

The defendant in *Freeman* filed two statutory disqualification motions. The defendant withdrew the first motion and failed to seek writ review after denial

of the second. This Court held that the failure to seek writ review forfeited the defendant's statutory claims that the trial judge should have been disqualified for cause and that, having once recused himself, he was statutorily precluded from accepting reassignment of the case. Appellant here has not raised statutory claims. His claims of error are constitutionally based.

Significantly, the Court in *Freeman* did not hold that the defendant was precluded on appeal from litigating her constitutional claims of judicial bias. Accordingly, the Court addressed the issue of judicial disqualification solely under the rubric of due process. (*Id.* at 1000; see also *People v. Chatman* (2006) 38 Cal.4th 344, 362 [while defendant may not raise the statutory claim on appeal, he may assert a constitutionally based challenge of judicial bias].)

This Court in *Freeman* cited and relied on both *People v. Chatman, supra*, and *People v. Brown* (1993) 6 Cal.4th 322, 335. Respondent has not cited or discussed either case. In *Brown*, as in *Chatman*, this Court held that a constitutionally based challenge asserting judicial bias could be raised on appeal and was not barred by the provisions of Code of Civil Procedure section 170.3, subdivision (d). As noted by the Court in *Brown*, "a defendant has a due process right to an impartial judge, and that violation of this right is a fatal defect in the trial mechanism." (*Id.* at p. 333; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 811; *People v. Cowan* (2010) 50 Cal.4th 401, 455 [defendant argued on appeal that his federal due process right to an impartial judge was violated when trial judge continued to preside over his case after learning facts that might require

his disqualification; although defendant forfeited judicial qualification claim under Code Civ. Proc. § 170.3, subd. (a)(1), this Court considered defendant's constitutional, due process claims based on right to be tried by an impartial judge].) Appellant's Eighth Amendment claim of unreliability in the penalty determination is also cognizable where based on the same facts as the due process claim. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 133 [due process and equal protection claims sufficiently preserved Eighth Amendment claim based on same facts].)

In urging forfeiture, respondent also failed to cite or address *People v. Harris* (2005) 37 Cal.4th 310, 346 where the defendant failed to object to allegedly improper acts on grounds of judicial bias or seek the judge's recusal. The Court declined to decide whether the defendant forfeited his claim but, instead, addressed its merits. Here, appellant's constitutional claims are based on presumed bias, the appearance of bias, and actual bias. It is thus clear from the Court's holdings in *Freeman*, *Brown*, and *Harris* that appellant's due process and other constitutional claims of judicial bias have not been forfeited and may be considered by the Court for the first time on appeal.

B. Standard of Review

Respondent does not address the standard of review. As discussed in appellant's opening brief (AOB 121-122), the Court has not resolved which standard of review on appeal applies to judicial disqualification or to a

determination involving the appearance of partiality. In *People v. Brown, supra,* 6 Cal.4th at pp. 336-337, the Court indicated that disqualification is reviewed de novo. Other appellate courts have stated that the question of whether a judge should have been disqualified because of an appearance of partiality is a question of law, reviewable de novo, where the facts are not in dispute. (See, e.g., *Briggs v. Superior Court* (2001) 87 Cal.App.4th 312, 319 ["On undisputed facts this is a question of law for independent appellate review."]; *Sincavage v. Superior Court* (1996) 42 Cal.App.4th 224, 230 ["Where, as here, the underlying events are not in dispute, disqualification becomes a question of law which this court may determine."].)

C. Both the Appearance of Impartiality and Actual Bias Required the Court to Disqualify Itself; the Trial Court's Failure to Do So Violated Appellant's Rights to a Fair Trial and Due Process of Law Guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§ 7 and 15 of the California Constitution; the Error Was Both Prejudicial and Reversible Per Se

The constitutional guarantee of due process of law requires a fair tribunal and a fair judge. (*Withrow v. Larkin* (1975) 421 U.S. 35, 47 [95 S.Ct. 1456, 43 L.Ed.2d 712].) A fair tribunal is one in which the judge or other decision maker is free of bias for or against a party. (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737; *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025.)

Respondent has failed to consider or address appellant's claims of

presumed bias, the appearance of partiality present in this case, or the standard of review. The United States Supreme Court and this Court have identified some aspects of due process as irreducible minimums. Whenever due process requires a hearing, the adjudicator must be impartial. (*Withrow v. Larkin* (1975) 421 U.S. 35, 47 [95 S.Ct. 1456, 43 L.Ed.2d 712].)

Due process requires recusal when there are "circumstances in which experience teaches that the [objective] probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable." (*Caperton v. A. T. Massey Coal Co.* (2009) 556 U.S. 868, 876-877 [129 S.Ct. 2252, 173 L.Ed.2d 1208]; see also *Morongo Band of Mission Indians v. State Water Resources Control Bd., supra*, 45 Cal.4th at p. 737, quoting *Withrow v. Larkin, supra*, 421 U.S. at p. 47.) The test is an objective one. (*Caperton v. A. T. Massey Coal Co., supra*, 556 U.S. at p. 883; *People v. Freeman, supra*, 47 Cal.4th at p. 1001.) The reviewing court asks "whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" (*Caperton v. A.T. Massey Coal Co., Inc., supra*, 556 U.S. at p. 881.) In other words, the question "is whether an objective, disinterested observer fully informed of the facts, would entertain significant doubt that justice would be done absent recusal." (*ISC Holding AG v. Nobel Biocare Fin. AG* (2d Cir. 2012) 688 F.3d 98, 107.)

Trial by a judge who lacks impartiality was given as an example of structural error in *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [111 S.Ct.

1246, 113 L.Ed.2d 302] (citing *Tumey v. Ohio* (1927) 273 U.S. 510 [47 S.Ct. 437, 71 L.Ed. 749] [judicial conflict of interest]; see also *People v. Vasquez* (2006) 39 Cal.4th 47, 69, fn. 12; *Isaacson v. Manty* (8th Cir. 2013) 721 F.3d 533, 540 [it is structural error for a biased trial judge to preside in a case].)

Arguing that appellant has failed to show that the trial judge had either a pecuniary interest or participated in any earlier proceeding resulting in conflict (RB 79), respondent fundamentally misreads *Caperton v. A. T. Massey Coal Co., supra.* (See RB 78-80.) Respondent's interpretation of *Caperton* is too constrictive.

Summarizing *Caperton*, this Court in *People v. Freeman, supra*, 47 Cal.4th at p. 1005, stressed that the circumstances warranting disqualification extend beyond direct pecuniary interest. Moreover, pecuniary interest and prior participation were not intended in *Caperton* to be an exclusive list of the kind of judicial bias that would require recusal. Indeed, respondent overlooks that in ruling recusal was required in *Caperton,* the high court held that actual bias is not the pertinent inquiry. While a judge's pecuniary interest in a case was the principal focus, the high court in *Caperton* stressed that it was concerned with more than the traditional prohibition on direct pecuniary interest. It was concerned with a more general concept of interests that tempt adjudicators to disregard neutrality. (*Caperton v. A. T. Massey Coal Co., supra,* 556 U.S. at p. 878.)

In distilling the rules applicable to disqualification for judicial bias, the high

court noted that the "difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules." (*Caperton v. A. T. Massey Coal Co., supra,* 556 U.S. at p. 883.) "Accordingly, the due process clause is implemented by objective standards. Although the standard cannot be defined with precision, typically, the court asks whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" (*Id.* at pp. 883-884, quoting *Withrow v. Larkin, supra,* 421 U.S. at p. 47.)

Previously, in *Aetna Life Insurance Co. v. Lavoie* (1986) 475 U.S. 813 [106 S.Ct. 1580, 89 L.Ed.2d 823], the high court clarified that it was not required to decide in a particular case whether in fact the justice was influenced; rather, the proper constitutional inquiry is the existence of "possible temptation to the average judge," tempting him or her to deviate from strict judicial impartiality. (*Id.* at p. 822.)

Respondent erroneously asserts that appellant has failed to identify concrete examples where the probability of actual bias was intolerably high. (RB 79.) Respondent overlooks that the trial judge was evidently and actually biased and had a clearly manifested and pervasive unity of interest with the prosecutor as to disqualify him from presiding over the trial in this case. The high court has ruled that due process can require recusal where a state judge has received a campaign contribution from one of the parties appearing before him. (*Caperton v. A.P.*

Massey Coal Co., Inc., supra, 556 U.S. at p. 885.) Here, in a similar vein, the prosecutor was the trial judge's close family friend. The judge was selected to preside over this capital trial having just served as the same prosecutor's closest campaign advisor and mentor in a recently-concluded and successful race for judicial office. The trial judge's active participation in the prosecutor's campaign for judicial office entailed far more than symbolic or passive expressions of support. The trial judge's intimate personal and professional relationship to the prosecutor in this case posed such a risk of actual bias or prejudgment that he should not have presided over this case "if the guarantee of due process [were] to be adequately implemented." (*Withrow v. Larkin, supra*, 421 U.S. at p. 47.)

Respondent fails to appreciate that this is not a case where the trial judge simply had been a former prosecutor at some time in the past or was simply acquainted with the prosecutor. Prior professional relationships are neither unusual nor dispositive. (*People v. Carter* (2005) 36 Cal.4th 1215, 1242.) Respondent misunderstands that this case does not simply involve the bias of a judge and former prosecutor toward his successor, or even the bias of a judge who was succeeded in office by the prosecutor, who also has been recently elected judge and is about to assume judicial office. (See *People v. Panah* (2005) 35 Cal.4th 395, 466 [dismissing mere institutional bias].)

At the heart of *Caperton* is the circumstance that the trial judge in that case was aware of his significant connection to one of the parties, yet did not disqualify or recuse himself. That circumstance was present in this case. The trial judge had

a personal interest and motive -- apart from the merits of the matter -- to deny appellant's change of venue motion. While "adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality" (*Chen v. Chen Qualified Settlement Fund* (2d Cir. 2009) 552 F.3d 218, 227), here, prejudgment of appellant's change of venue motion in order to benefit the prosecutor's personal and professional interests, as revealed in the record and discussed in appellant's opening brief (AOB 136-137), manifested unconstitutional judicial bias in violation of the constitutional guarantees of due process of law and the right to a fair trial.

The entitlement of a criminal defendant to a fair trial should never be compromised. (*People v. Chatman, supra,* 38 Cal.4h at p. 364.) Any reasonable person, aware of the facts and circumstances would certainly entertain a doubt as to the judge's impartiality in this case. Because such impartiality and conflicted interests constituted grounds for disqualification, appellant's state and federal due process and fair trial rights to an impartial judge were violated. (*Caperton v. A.T. Massey Coal Co., supra,* 556 U.S. at pp. 883-884; *People v. Brown* (1993) 6 Cal.4th 322, 334, 336.)

D. The Denial of Appellant's Rights to a Fair Trial in a Fair Tribunal Before an Impartial Judge Also Rendered the Guilt and Penalty Determinations Unreliable in Violation of the Eighth and Fourteenth Amendments to the United States Constitution

Stating only that appellant's contentions are unsupported by the record and

without merit (RB 80), respondent does not seriously address or discuss appellant's other substantive constitutional claims raised in the opening brief. (See AOB 138-140.)

Due process of law clearly requires a fair trial in a fair tribunal before an impartial judge without bias toward or against the defendant or an interest in the outcome of his particular case. (*Withrow v. Larkin, supra,* 421 U.S. at p. 46 [95 S.Ct. 1456, 43 L.Ed.2d 712].) Appellant was not required to make Eighth and Fourteenth Amendment cruel and/or unusual punishment arguments in the trial court in order to preserve them on appeal. As this Court has previously ruled, an Eighth Amendment appellate claim is of a kind that required no objection to preserve it. The claim involves no facts or legal standards different from those involving constitutional due process of law and fair trial standards also raised on appeal. These errors had the additional legal consequences of violating the state and federal proscriptions against cruel and/or unusual punishment. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1233, fn. 4; *People v. Boyer* (2006) 38 Cal.4th 12, 441, fn. 17.)

Given the constitutional impact of a trial with a partial or biased judge contrary to fundamental constitutional due process and fair trial precepts, the jury's verdict as to both guilt and penalty cannot be considered reliable as well in this case and therefore cannot stand in the face of the Eighth Amendment prohibition against cruel and unusual punishment.

III

THE EVIDENCE WAS INSUFFICIENT UNDER THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CALIFORNIA CONSTITUTION (ART. I, § 15) TO SUPPORT APPELLANT'S CONVICTION OF CARJACKING ON COUNT 4 (PEN. CODE § 215, SUBD. (a)) AND FIRST DEGREE FELONY-MURDER ON COUNT 1 (PEN. CODE § 187) PREDICATED ON THE COMMISSION OR ATTEMPTED COMMISSION OF A CARJACKING

Among other counts, appellant was charged on count 4 with carjacking in violation of Penal Code section 215, subdivision (a). During closing argument, the prosecutor acknowledged that appellant did not take any property before the killing. (See 43 RT 5386-5391.) As to the carjacking, the prosecutor stressed that the fact that Salling's car was located in her garage adjacent to her residence satisfied the immediate presence requirement of carjacking as charged in count 4 in violation of Penal Code section 215. (See 43 RT 5412-5414.) The jury found appellant guilty on count 4 of carjacking in violation of Penal Code section 215, subdivision (a). (3 CT 720-721, 726-727; 44 RT 5574-5578.)

Penal Code section 215, subdivision (a) defines carjacking as "the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." A conviction for carjacking requires thus proof that (1) the defendant took a vehicle that was not his or hers (2)

from the immediate presence of a person who possessed the vehicle or was a passenger in the vehicle (3) against that person's will (4) by using force or fear and (5) with the intent of temporarily or permanently depriving the person of possession of the vehicle. (*People v. Magallanes* (2009) 173 Cal.App.4th 529, 534.)

All carjackings must involve the use of force or fear motivated by an intent to steal. (See *People v. Green* (1980) 27 Cal.3d 1, 54 [the act of force or intimidation by which the taking is accomplished must be motivated by the intent to steal].) The intent to deprive the possessor of possession must exist before or during the use of force or fear. (Pen. Code § 20; *People v. Marshall* (1997) 15 Cal.4th 1, 34 [to support robbery conviction evidence must show that the requisite intent to steal arose either before or during the commission of the act of force].) To obtain a conviction for carjacking, the government must prove that a defendant had the intent to kill or inflict serious bodily harm if "that action had been necessary to complete the taking of the car." (*Holloway v. United States* (1999) 526 U.S. 1, 12 [119 S.Ct. 966, 143 L.Ed.2d 1].)

Respondent overlooks that Penal Code section 215 was enacted to address a specific problem -- the forcible taking of a motor vehicle directly from its driver or occupants. The Legislature sought to impose a severe penalty on those who created a specific risk by directly confronting a vehicle's occupants. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1057; *People v. Antoine* (1996) 48 Cal.App.4th 489, 495.)

Despite the prosecutor's closing argument that appellant "ransacked" Salling's home only after the killing (43 RT 5398-5401), respondent argues that substantial evidence supports the conclusion that appellant formed an intent to permanently or temporarily deprive Ellen Salling of her vehicle prior to the assault. (RB 82.) Respondent asserts that appellant needed a car, inferentially knew that Salling's car was in the garage when he came across her house (RB 82), and appellant had already armed himself with a weapon -- a tree branch when he entered Salling's home. (See RB 82-83.)

Contrary to respondent's assertions (RB 81-83), the evidence in the present case was insufficient to establish that appellant formed an intent to deprive Salling of her car prior to or at the same time as the use of force or fear. The notion that there was a high likelihood of a car in the victim's garage is speculative. To constitute sufficient evidence of carjacking, appellant had to have some affirmative indication that a car was present. Moreover, respondent's speculative inference that appellant intended to take Salling's car because he was in flight from law enforcement authorities founders on a total lack of evidence or proof that appellant knew of the vehicle's presence or existence when he saw Salling working in her kitchen. Proof of the requisite specific intent to deprive Salling of her vehicle surely required some evidence that appellant knew she had a car, knew where it was kept, or knew of the existence of car keys before her death.

The prosecutor acknowledged that appellant did not take any property before the killing and that appellant ransacked Salling's house only after the

killing. There was no evidence at trial that appellant took Salling's keys before her death or carried out the killing in order to take the car itself. (See, in contrast, *People v. Nelson* (2011) 51 Cal.4th 198, 211 [jury entitled to conclude that defendant, having taken victim's car keys, would then take the car itself].)

Most importantly, Salling was not going to her car when she was killed and was not in her car or anywhere near her car at the time of the homicide. Unlike every other reported carjacking decision, Salling was cooking or baking in her kitchen when killed. Her car was parked in her garage. There was no evidence that the garage door was open or that appellant even knew Salling's car was in her closed garage when he entered her home and killed her.

As to the tree limb [People's Exhibit No. 50-B] with which appellant was armed, as asserted by respondent (See RB 10, 17-18, 82), no traces of blood were found on it, signifying that it could not have been used to beat or strike Salling. (See AOB 48; see also 39 RT 4958-4958, 4980-4994.) Respondent's assertions that since appellant had already armed himself and had thus formed the intent to steal Salling's car prior to the assault are not supported by the record in this case. Since the tree branch was not used in the assault, the fact that it may have been in appellant's possession on entering the home did not indicate anything about his specific intent, most particularly, that he intended to steal a car that he did not yet know was there.

Respondent overlooks that carjacking typically involves a victim driving his or her car at the time of the crime, a victim next to or around his or her vehicle,

or a victim in some manner closely associated with the vehicle and its use at the time of the crime. Here, Salling was baking cookies in her kitchen; she was not about to go anywhere when the homicide and purported carjacking occurred. Salling's activities in her kitchen did not suggest that she was on her way to or from a vehicle. The evidence rather suggests that after a brief verbal exchange between Salling and appellant, unrelated to her car, appellant in a rage began hitting, beating, and kicking the victim, actions that caused her death.

In *United States v. Applewhaite* (3d Cir. 1999) 195 F.3d 679, the United States Court of Appeals for the Third Circuit concluded that there was insufficient evidence for the jury to conclude that the defendants intended to kill or cause serious bodily harm when they took control of the victim's vehicle, because there was no nexus between the assault on the victim and the subsequent taking of his van. Intent was not established, because the van was taken as an afterthought in an attempt to get away from the crime scene. (*Id.* at p. 685; see also *United States v. Harris* (5th Cir. 2005) 420 F.3d 467, 474 [prosecution failed to establish required nexus between the intent to kill or harm and the taking of the car; reasonable inferences from the evidence in no way resolved whether the taking of the car was a mere afterthought to the killing]; *United States v. Diaz* (11th Cir. 2001) 248 F.3d 1065, 1096 [despite existence of intent to seriously harm or kill victim, intent still must have nexus to the taking of the victim's vehicle].)

In *Applewhaite*, the required intent was never established. Although the defendants clearly intended to seriously harm or kill the victim, neither their

intent, nor the force they employed in furtherance of it, had any nexus to the subsequent taking of the victim's van. Here, contrary to respondent's speculative assertions, a review of the entire record does not reveal an intent to take possession of Salling's car before or during appellant's assault on her. There is no evidence in the record, beyond pure speculation and conjecture, that appellant knew that Salling had car keys or where they were kept. There is simply no solid or credible evidence of any action of any kind prior to the killing in this case that suggests any intent by appellant to take Salling's car before the killing.

Respondent asserts that the evidence was also sufficient to establish that Salling's vehicle was taken from her immediate presence. Carjacking is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence. (Pen. Code § 215, subd. (a).) In *People v. Hayes* (1990) 52 Cal.3d 577, 515, 519, the Court disapproved an expansive interpretation of "immediate presence" for purposes of robbery. As the Court explained, "to ignore the distance between the act of taking and the application of 'force or fear' would deny meaning to the separate requirement of robbery that the property be 'tak[en]' from the victim's person or "immediate presence." (*Id.* at p. 628.)

The crime of carjacking, like the crime of robbery, may be established not only when the defendant has taken property out of the physical presence of the victim, but also when the defendant exercises dominion and control over the victim's property through force or fear. (*People v. Hoard* (2002) 103 Cal.App.4th 599, 608.) To take a vehicle from the person or presence of another requires, "at a

minimum, proximity to the vehicle and the ability to influence the space encompassing the vehicle." (*United States v. Savarese* (1st Cir. 2004) 385 F.3d 15, 19.) In other words, a vehicle is within a person's immediate presence for purposes of carjacking if it is sufficiently within his control so that he could retain possession of it if not prevented by force or fear. (*People v. Gomez* (2011) 192 Cal.App.4th 609, 623; see also *United States v. W.T.T.* (8th Cir. 1986) 800 F.2d 780, 782 [property is in the presence of a person if it is so within his or her reach, inspection, observation or control, that he or she could if not overcome by violence or prevented by fear, retain his or her possession of it], quoting *United States v. Burns* (9th Cir. 1983) 701 F.2d 840, 843 [upholding robbery conviction of a defendant who threatened a man at gunpoint inside a store to obtain his keys, and then took the keys and car just outside the store].)

Here, there was no evidence that appellant exercised dominion or control of Salling's car through force or fear or while she was alive. The purpose of the carjacking statute is not served in this case, where the victim's car was in her garage, the victim was killed before the car was taken, the victim was not entering or leaving her car, and her only connection to her stolen automobile at the time of the killing was that the car keys were somewhere in her home. Because the nature of the taking here did not involve the type of harm that Penal Code section 215 was designed to address, it would be an unwarranted extension of the statute to conclude that appellant's actions against a woman at home in her kitchen baking constituted carjacking under Penal Code section 215.

Penal Code section 215 was designed to address the serious problems and risks arising from the theft of vehicles from living drivers or occupants of vehicles contemporaneously or near in time with their use or possession of the vehicle. As emphasized by this Court in *People v. Lopez, supra*, 31 Cal.4th at p. 1061, "the legislative history indicates that the Legislature was specifically concerned with the 'considerable increase in the number of persons who have been abducted' while in their vehicles and the associated danger to the driver or passenger." (Accord, *People v. Duran* (2001) 88 Cal.App.4th 1371, 1376 [Pen. Code section 215 "was passed in 1993 to address what was then an increasingly dangerous problem of people being abducted from their cars, sometimes at gunpoint"].)

As succinctly stated in *United States v. Savarese, supra,* 385 F.3d at p. 20, "the presence requirement is not boundless." Under the circumstances of the present case, it cannot be concluded beyond a reasonable doubt under any scenario that a carjacking had been committed, where there was no evidence that appellant was aware prior to the killing that the victim owned a car; where the victim was killed while working in the kitchen in her home; where the car was located in a closed garage at the time of the killing and could not be seen from the street at the time of appellant's approach; where there was no evidence that Salling was actively using or about to drive or use her car; and where there was no evidence that appellant was aware of car keys, looked for them, or made any effort to take the victim's keys before her death.

The facts of the present case are too far removed from the type of conduct that Penal Code section 215 was designed to address. To find that appellant's actions amounted to a carjacking would be to disregard both the language of Penal Code section 215, subdivision (c), cautioning that the statute must not be construed to supersede the offense of robbery, and legislative intent demonstrating that the statute was designed to address the violent nature of vehicle takings committed against drivers and occupants. (*People v. Hill* (2000) 23 Cal.4th 853, 859-860; *People v. Duran, supra*, 88 Cal.App.4th at p. 1376.) For these reasons, the evidence cannot support appellant's conviction of carjacking on count 4 in violation of Penal Code section 215, subdivision (a).

IV

THE EVIDENCE WAS INSUFFICIENT UNDER THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CALIFORNIA CONSTITUTION (ART. I, § 15) TO SUPPORT THE SPECIAL CIRCUMSTANCE FINDING IN COUNT 1 OF CARJACKING-MURDER PURSUANT TO PENAL CODE § 190.2, SUBDIVISION (a)(17)(L); INSUFFICIENCY OF THE EVIDENCE ALSO RENDERED THE SPECIAL CIRCUMSTANCE FINDING AND DEATH SENTENCE UNRELIABLE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

As set forth in appellant's opening brief (AOB 1-2; 141-142), the information alleged the special circumstance of murder during the commission or attempted commission of carjacking pursuant to Penal Code section 190.2, subdivision (a)(17)(L). (1 CT 130-132.) In closing argument, defense counsel contested the sufficiency of the evidence to prove carjacking. (See 43 RT 5440-5444; see also 43 RT 5451-5463 [defense argument as to why murder was not committed during or to advance burglary, robbery or carjacking].)

At trial, the prosecutor acknowledged that appellant did not take any property before the killing. (See 43 RT 5386-5391.) The prosecutor stressed that appellant "ransacked" Salling's house only after the killing. (See 43 RT 5398-5401.) As to the carjacking, the prosecutor urged the jury not to construe the instructions in a "hypertechnical" manner. (43 RT 5428-5432.) Respondent nonetheless asserts there was substantial evidence for the jury to have reasonably found that when appellant approached Salling's home he was looking for another vehicle to complete his escape from the police and that it was reasonable for the

jury to infer that appellant assaulted and killed Salling in the course of stealing her car. (RB 88.)

Although reasonable inferences may be drawn in support of the judgment, a reviewing court may not go beyond inference and into the realm of speculation in order to find support for a judgment. A conviction which is merely the product of conjecture and surmise may not be affirmed. (*People v. Memro* (1985) 38 Cal.3d 658, 695.) A charge of first degree murder based on a felony-murder theory requires proof of an independent felonious intent separate from the intent to commit homicide. (*People v. Ireland* (1969) 70 Cal.2d 522, 539.) The special circumstance of murder while engaged in the commission or attempted commission of a carjacking requires that the murder be committed in order to advance the independent felonious purpose of carjacking. (*People v. Kimble* (1988) 44 Cal.3d 480, 501.)

In *United States v. Applewhaite* (3d Cir. 1999) 195 F.3d 679, the United States Court of Appeals for the Third Circuit concluded that there was insufficient evidence for the jury to conclude that the defendants intended to kill or cause serious bodily harm when they took control of the victim's vehicle, because there was no nexus between the assault on the victim and the subsequent taking of his van. Intent was not established, because the van was taken as an afterthought in an attempt to get away from the crime scene. (*Id.* at p. 685; see also *United States v. Harris* (5th Cir. 2005) 420 F.3d 467, 474 [prosecution failed to establish required nexus between the intent to kill or harm and the taking of the car;

reasonable inferences from the evidence in no way resolved whether the taking of the car was a mere afterthought to the killing]; *United States v. Diaz* (11th Cir. 2001) 248 F.3d 1065, 1096 [despite existence of intent to seriously harm or kill victim, intent still must have nexus to the taking of the victim's vehicle].)

For the reasons advanced above, for those discussed in appellant's opening brief (AOB 141-157; 161-167), and for the reasons set forth in Argument III, *ante*, the record does not contain substantial evidence that appellant murdered Ellen Salling while engaged in the commission or attempted commission of carjacking. Specifically, since there is no indication in the entire record that appellant was aware of the existence of the victim's car or its presence in the victim's closed garage before the killing, he could not have formed the requisite intent to commit a carjacking before attacking and killing her. The evidence in this case only supports a conclusion that the taking of property and Salling's car were incidental to the killing under the rule of *People v. Green* (1980) 27 Cal.3d 1. (See also *People v. Raley* (1992) 2 Cal.4th 870, 903 [when underlying felony is merely incidental to the murder, the felony-murder special circumstance does not apply].) Here, the overwhelming evidence manifests only an incidental theft or robbery as in *Green*, and a sudden, violent, murderous outburst that resulted in the victim's death.

In this case, there was no evidence at trial that appellant took Salling's keys before her death or carried out the killing in order to take her car. Contrary to respondent's assertions that when he approached Salling's home appellant was

looking for a car to complete his escape (RB 88), there was no direct or circumstantial evidence of an intent to take Salling's car prior to her death. Salling was not going to her car when she was killed and was not in her car or anywhere near her car at the time of the homicide. Salling was cooking or baking in her kitchen when killed. There was no evidence that the garage door was open or that appellant even knew Salling had a car when he entered her home and killed her.

Moreover, there is nothing in the record showing that appellant was aware of Salling's car in her garage. There was no evidence that appellant was even aware that Salling had car keys or where they were kept. When appellant entered Salling's home, she was in the kitchen cooking or baking. Her work in the kitchen did not suggest that she was on her way to or from a vehicle. The evidence rather suggests that after a brief verbal exchange between Salling and appellant, unrelated to her car, appellant began hitting and beating her with the Ottoman.

Respondent's assertion that appellant intended to take Salling's car because he was in flight from law enforcement authorities founders on a total lack of evidence or proof that appellant knew of the existence of the vehicle when he approached her home and saw her working in the kitchen. Proof of the requisite specific intent to deprive Salling of her vehicle surely required some evidence that appellant knew she had a car, knew where it was kept, or knew of the existence of car keys before her death. Here, it cannot be concluded beyond a reasonable doubt under any scenario that the evidence was sufficient to prove the special

circumstance of murder while engaged in the commission of a carjacking within the meaning of section Penal Code 190.2, subdivision (a)(17)(L).

Respondent further asserts that even assuming that the carjacking special circumstance finding is unsupported by substantial evidence, appellant's conviction for first degree murder based on felony-murder remains supported by two other special circumstance findings. (RB 89-90.) In so asserting, respondent fails to address appellant's argument (AOB 167-168) that in the absence of sufficient evidence to support appellant's conviction on count 4, the penalty of death returned by the jury predicated at least in part on that crime also violated the Eighth Amendment requirement of a reliable determination of both guilt and penalty. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-330 [105 S.Ct. 2633, 86 L.Ed.2d 231].)

B. Penalty Trial Issues and Assignments of Error

V

THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY FAILED TO INSTRUCT THE JURY ON THE APPROPRIATE USE OF VICTIM IMPACT EVIDENCE IN VIOLATION OF APPELLANT'S RIGHTS TO A FAIR TRIAL, DUE PROCESS, AND A RELIABLE DETERMINATION OF PENALTY GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; THE ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT

The prosecutor presented two types of victim impact evidence during the penalty trial. The victim impact testimony of Ellen Salling's daughter, Henni Ray, pertaining to the "circumstances of the crime" of which appellant "was convicted in the present proceeding" (Pen. Code section 190.3, subd. (a); CALJIC No. 8.85) and the testimony by George Ohman, father of 1992 manslaughter victim Jennifer VonSeggern (pursuant to Pen. Code section 190.3, subd. (b)) pertaining to other criminal activity by the defendant, were introduced in support of the death penalty. Henni Ray's testimony covers approximately 20 pages of penalty trial transcript; the testimony of Gerald Ohman occupies about 16 pages of transcript. (59 RT 5099-6015.)

Daughter Henni Ray testified as to the direct impact of her mother's death on her and her family. Unlike Ray, Gerald Ohman could not and did not testify as to the impact of the capital murder victim's death on him or his family. Ohman was unrelated to Salling, and there was no evidence that he had ever been acquainted with her. Instead, Ohman testified as to the impact on him and his

family of the killing of his daughter, Lisa VonSeggern, appellant's 1992 manslaughter victim.

The prosecutor stressed during closing argument that victim impact evidence could be used and evaluated in the sound judgment of the jury and that such evidence stood in contrast to impact of the death verdict on appellant. As the prosecutor told the jury, victim impact evidence was simply another method of informing the jury about the specific harm appellant caused by his crimes, so that the jury could meaningfully assess his moral culpability and blameworthiness. (See, generally, 53 RT 6740-6745.) Without evidentiary support, the prosecutor additionally emphasized that both Ellen Salling's mother-in-law and Jennifer VonSeggern's mother died as a direct consequence of the killings: "And you've got to wonder what his activity had to do with that." (53 RT 6788-6789.) Appellant was thus blamed in the victim impact testimony and by the prosecutor for two other deaths, which the jury thereby was permitted to consider. (See 53 RT 6788-6789)

The court instructed the jury, inter alia, with CALJIC No. 8.84.1 (specifying the duties of penalty jurors) (see 4 CT 927); CALJIC No. 8.85 (listing factors for the jury's consideration in determining penalty) (see 4 CT 928-929); modified CALJIC Nos. 8.86 and 8.87 (requiring proof beyond a reasonable doubt of a prior conviction or prior criminal activity offered in aggravation) (see 3 CT 996, 1018); and CALJIC No. 8.88 (the concluding instructions for the penalty phase). (4 CT 986.)

In his opening brief (AOB 174-182), appellant demonstrated that the trial court's jury instructions were constitutionally defective under the Fifth, Sixth, Eighth, and Fourteenth Amendments because the jury was not given any guidance as to how the two types of victim impact evidence should be evaluated in determining penalty. The trial court did not give any instruction on the use, consideration, or evaluation of victim impact evidence. The jury was not instructed that such evidence was to be considered within the meaning of factors (a) and (b) of CALJIC No. 8.85, nor instructed that victim impact evidence did not constitute separate aggravating circumstances. No instructions were given that informed the jury of the law regarding the proper consideration of victim impact evidence. Instead, the jury was permitted to consider victim impact evidence in a purely discretionary and arbitrary manner.

Respondent argues that the trial court properly instructed the jury on how to consider the evidence presented during the penalty phase of the trial with the standard CALJIC instructions. (RB 90.) In its fallback argument, respondent asserts that that any instructional error was harmless beyond a reasonable doubt. (RB 95.)

A. Appellant's Claim Has Not Been Forfeited

Respondent first asserts that since appellant did not object to the jury instructions given, nor request that the court instruct the jury with specific guidance regarding victim impact evidence, his claims have been forfeited. (RB

92-93.) Respondent ignores that instructional errors are reviewable on appeal if they affect a defendant's "substantial rights" (Pen. Code §§ 1259, 1469; *People v. Prieto* (2003) 30 Cal.4th 226, 247) or the deprivation of fundamental rights. (*People v. Vera* (1997) 15 Cal.4th 269.) In *Vera*, the Court observed that a defendant "is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*Id.* at p. 276.)

In *People v. D'Arcy* (2010) 48 Cal.4th 257, the defendant challenged on appeal the use of CALJIC No. 8.87, the standard instruction for considering other criminal activity under factor (b) of Penal Code section 190.3. On appeal to this Court, respondent asserted, as here, the issue was forfeited because the defendant failed to object at trial. The Court rejected respondent's contention noting "to the extent a claim of instructional error affected a defendant's substantial rights, it is reviewable on appeal despite a failure to object at trial." (*Id.* at p. 302; see also *People v. Gray* (2005) 37 Cal.4th 168, 235 [rejecting constitutional challenge to capital instruction on constitutional grounds, stating Penal Code section 1259 permits defendant to raise issue on appeal despite failure to object].)

Respondent also overlooks that while factual issues may be subject to waiver or forfeiture, purely legal issues -- such as the constitutional issues raised by appellant based on undisputed facts as here -- are not necessarily subject to waiver or forfeiture and may be addressed even when raised for the first time on appeal. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887-888; *People v. Percelle*

(2005) 126 Cal.App.4th 164, 179; *Rosa S. v. Superior Court* (2002) 100 Cal.App.4th 181, 1188.)

B. The Court Failed to Instruct the Jury on the Proper Use of Victim Impact Evidence; the Error Was Not Harmless Beyond a Reasonable Doubt

Respondent generally asserts that the trial court properly instructed the jury on how to consider victim impact evidence presented during the penalty phase of trial with the standard CALJIC instructions. (RB 90.) More, specifically, respondent argues that no reasonable jury would have misunderstood the jury instructions that were given as permitting an improper use of the victim impact testimony. (RB 95-96.)

First, it is settled law that the trial court is responsible for ensuring that the jury is correctly instructed on the law. (See *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1022.) Even absent a request, the trial court in criminal cases must instruct on general principles of law relevant to the issues raised by the evidence. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.) The trial court must instruct sua sponte on the principles that are openly and closely connected with the evidence presented and necessary for the jury's proper understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

Appellant acknowledges that the Court has previously rejected, and continues to reject, various claims of error in respect to victim impact evidence, the scope and nature of victim impact testimony, and the need for clarifying

instructions. (See, e.g., *People v. Jones* (2013) 57 Cal.4th 899, 975-965; *People v. Myles* (2012) 53 Cal.4th 1181, 1219; *People v. McKinnon* (2011) 52 Cal.4th 610, 690 [jury was given CALJIC No. 8.84.1 and thus provided with "sufficient guidance" regarding this aspect of penalty deliberations]; *People v. Hartsch* (2010) 49 Cal.4th 472, 511 [standard CALJIC penalty phase instructions "adequate to inform the jurors of their sentencing responsibilities regarding victim impact evidence in compliance with federal and state constitutional standards"].) Thus, the Court has continued to reject constitutional claims that that "circumstances of the crime," as used in Penal Code section 190.3, factor (a), is unconstitutionally vague, overbroad, subject to arbitrary decision-making, or fails to provide adequate notice; or that evidence of prior violent acts admitted under Penal Code section 190.3, factor (b) may not include the effect of noncapital crimes on the surviving victim. (*People v. Nelson* (2011) 51 Cal.4th 198, 203, 221; *People v. Hamilton* (2009) 45 Cal.4th 863, 926; *People v. Price* (1991) 1 Cal.4th 324, 479.) As stated by the Court, the foreseeable effects of a defendant's prior crimes upon the victims are admissible as circumstances of the prior crimes bearing on the defendant's culpability. (*People v. Mickle* (1991) 54 Cal.3d 140, 187.) Respondent offers that since the Court has consistently rejected such claims of instructional error, there is no persuasive reason for the Court to revisit its prior decisions. (RB 92-93.)

States are required to adopt procedures calculated to promote greater reliability and fairness in capital cases and to ensure heightened protection of a

defendant's due process and fair trial rights. (*Murray v. Giarratano* (1989) 492 U.S. 1, 7-9 [109 S.Ct. 2765, 106 L.Ed.2d 1]; *Beck v. Alabama* (1980) 447 U.S. 625, 638 [100 S.Ct. 2382, 65 L.Ed.2d 392].) Those fundamental requirements are not advanced by the instructions given in this case on inherently inflammatory victim impact evidence and testimony.

Other states have required instructions on the use of victim impact evidence. "Because of the importance of the jury's decision in the sentencing phase of a death penalty trial, it is imperative that the jury be guided by proper legal principles in reaching its decision." (*Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842 [in cases in which victim impact evidence is given in the sentencing phase of a death penalty or life without parole case, the trial court should instruct the jury regarding the purpose of victim impact evidence].) "Allowing victim impact evidence to be placed before the jury without proper limiting instructions has the clear capacity to taint the jury's decision on whether to impose death." (*State v. Hightower* (1996) 146 N.J. 239, 265, 680 A.2d 649, 661.) "Therefore, a trial court should specifically instruct the jury on how to use victim impact evidence." (*State v. Koskovich* (2001) 168 N.J. 448, 551, 776 A.2d 144, 181.) Indeed, in *Hightower*, the court also discussed that statutory law and rules of evidence "contemplate that the trial court will give special instructions to the jury limiting its use of that evidence. . . . Here, the jury was never told how to use the [victim impact] information . . . ." (*State v. Hightower, supra*, 146 N.J. at p. 266.)

The highest courts of Oklahoma, New Jersey, Tennessee and Georgia have

held that whenever victim impact evidence is introduced the trial court must instruct the jury on its appropriate use, and admonish the jury against its misuse. (*Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 828-829 ; *State v. Koskovich, supra*, 776 A.2d at p. 181; *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 892; *Turner v. State, supra*, 486 S.E.2d 839, 842.) The Supreme Court of Pennsylvania has recommended delivery of a cautionary instruction. (*Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 159.)

The integrity of jury deliberations is a crucial aspect of a criminal prosecution. Indeed, the entire structure of the penalty phase of capital cases is premised on the belief that jurors will use evidence only for its proper purpose. Hence, the deliberative process of a jury should and must be insulated from influences that could warp or undermine the jury's ultimate determination. Accurate and understandable jury instructions in criminal cases are essential to a defendant's right to a fair trial. In *State v. Muhammad* (1996) 145 N.J. 23, 51-52, 678 A.2d 164, the New Jersey Supreme Court recognized that instructions in capital cases are more complex than in non-capital cases, and highlighted the importance of limiting instructions concerning victim impact evidence. Appellant thus urges the Court to reconsider the propriety of the jury instructions on victim impact evidence, as they are premised on vague, amorphous, and ill-defined standards permitting the consideration and use of victim impact evidence in aggravation far beyond the limited scope outlined in *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720].).

The violations of appellant's federal constitutional rights require reversal unless the prosecution can show that they were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) The violations of appellant's state rights require reversal if there is any reasonable possibility that they affected the penalty verdict. (See *People v. Brown* (1988) 46 Cal.3d 432, 447-448.) Contrary to respondent's urgings of harmless error (RB 95-96), it was reasonably possible that without proper instructional guidance, the purely emotional and excessively inflammatory victim impact evidence presented in this case in respect to the deaths of both Ellen Salling's mother-in-law and Jennifer VonSeggern's mother, attributed somehow to appellant as further consequences of his crimes, and the prosecutor's effective and extensive use of that evidence during his closing argument as discussed in appellant's opening brief (AOB 170, 182), unfairly infected the jury's penalty deliberations and sentencing process. The emotion that victim impact evidence engendered in this case makes it likely that this evidence had an impermissible impact upon the jurors and influenced their deliberations. The prosecutor's closing argument vividly stressed the importance of victim impact evidence to the jury's penalty determination. Under these circumstances, the trial court's failure to instruct on victim impact evidence cannot be considered harmless as asserted by respondent under either the federal or state standards, and therefore reversal of the death judgment is required.

VI

THE TRIAL COURT ERRED BY PERMITTING THE STATE TO RETRY THE VONSEGGERN KILLING AND APPELLANT'S PRIOR 1993 MANSLAUGHTER CONVICTION, AND BY GIVING MURDER INSTRUCTIONS IN THE LANGUAGE OF CALJIC NOS. 8.00-8.21 AND ON AGGRAVATING FACTORS IN THE MODIFIED LANGUAGE OF CALJIC NO. 8.87, THEREBY ALLOWING THE STATE TO ELEVATE THE PRIOR KILLING AND ADJUDICATED MANSLAUGHTER TO MURDER IN VIOLATION OF THE "PROSECUTED AND ACQUITTED" PROHIBITION OF PENAL CODE SECTION 190.3, THE DOCTRINE OF COLLATERAL ESTOPPEL, THE CONSTITUTIONAL PROSCRIPTION AGAINST DOUBLE JEOPARDY, AND APPELLANT'S RIGHTS TO DUE PROCESS OF LAW, FAIR TRIAL, AND A RELIABLE PENALTY DETERMINATION GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

In 1993, appellant was convicted by guilty (no contest) plea of the manslaughter of Lisa VonSeggern in Sonoma County.[2] At the penalty trial in the present case, the prosecutor retried the prior manslaughter in order to prove that appellant's crime of which he had been previously convicted was actually the greater crime of first degree murder. As stated by the prosecutor prior to trial, he intended to show that appellant's 1993 manslaughter conviction was "more serious than what the defendant admitted to in the prior case." (45 RT 5607.) The prosecutor's retrial of appellant's prior manslaughter conviction covered 150 pages of penalty trial transcript and 40 pages of a police interview transcript with appellant (regarding VonSeggern's death) that was also admitted into evidence

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[2]/ By motion previously filed, appellant has requested the Court take judicial notice of the court files of *People v. Jerrold Elwin Johnson* (Super. Ct. Sonoma County, 1993, No. 20425).

and provided to the penalty jury. (See 46 RT 5707-5720, 5725-5743, 5751-5779; 47 RT 5824-5899; 52 RT 6650-6664; 3 CT 794-835 [People's Exhibit Z-56].)[3] Retrial of the VonSeggern manslaughter was central to the state's case in aggravation against appellant. (See 46 RT 5672-5677 [prosecutor's penalty trial opening argument].) At the prosecutor's request, the trial court instructed the jury on both manslaughter and murder and permitted the prosecutor, in his argument, to urge the jury to elevate appellant's prior manslaughter conviction to murder. (See 4 CT 959, 1020 [jury instruction, including prosecutor's modifications of CALJIC No. 8.87 with revised references to the "murder or voluntary manslaughter or involuntary manslaughter of Jennifer Lisa VonSeggern."], 4 CT 1022 [murder instruction]; see also 51 RT 6607-6609 [arguing recharacterization of killing was "issue for the jury"].)

The prosecutor argued during penalty trial closing argument that the killing of Jennifer VonSeggern "really was a murder," not manslaughter. (53 RT 6719.) In urging the jury to elevate appellant's manslaughter conviction to murder, the prosecutor also stressed that appellant's manslaughter conviction was an aggravating circumstance which could and should be considered by the jury separate and distinct from the circumstances of the same crime alleged to be murder. (See 53 RT 6730-6733 [prosecutor's closing argument emphasizing appellant's voluntary manslaughter conviction as a factor (c) aggravating

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3/ Respondent's six-page summary of the VonSeggern killing takes up more pages than any other evidence in aggravation summarized in its brief. (See RB 25-30.)

circumstance and, if murder, as a separate circumstance under factor (b)]; see also 53 RT 6839 [modification of CALJIC No. 8.87 given by court to refer to the "murder or voluntary manslaughter or involuntary manslaughter of Jennifer Lisa VonSeggern"].)

In its penalty trial jury instructions, the court permitted the jury to find appellant guilty of the murder of Jennifer VonSeggern and then to use that newly-found murder as a separate and additional factor in aggravation in its penalty deliberations. The court thus instructed the jury in the modified language of CALJIC No. 8.87 in relevant part as follows: "Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts: . . . murder . . . of Jennifer Lisa VonSeggern . . . . If any juror is convinced beyond a reasonable doubt that the criminal act occurred, that juror may consider that act as a fact in aggravation." (4 CT 959, 1020.)

A. Appellant Has Not Waived His Claims of Error; Ineffective Assistance of Counsel

Respondent argues that appellant failed to object to the introduction of factor (b) other criminal conduct evidence or the instructions given by the court, thus waiving the evidentiary and instructional claims on either statutory or constitutional grounds. (RB 96-98.)

In the opening brief (AOB 212-217), appellant acknowledged that defense counsel did not object to the relitigation of the 1993 VonSeggern manslaughter conviction, did not object to the murder instructions given by the trial court, did

not raise the "prosecuted and acquitted" prohibition of Penal Code section 190.3, and did not raise collateral estoppel as a bar or the fundamental state and federal proscriptions against double jeopardy, or object on due process grounds to the retrial of his prior manslaughter conviction.

First, there is every indication in the record that any objections by appellant to the retrial of the VonSeggern manslaughter conviction or its elevation to murder would have been futile and to no avail. There is a general exception to the waiver rule where an objection would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Arias* (1996) 13 Cal.4th 92, 159; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648 [a party need not object if it would be futile].) Although the trial court expressed doubts before the penalty trial whether the prosecutor could seek to "recharacterize" the killing "in a legal framework" (46 RT 5650), the court nevertheless permitted the prosecutor to elevate the 1993 manslaughter conviction to murder during penalty trial, permitted the prosecutor to call 16 witnesses and introduce other documentary evidence to prove that appellant's manslaughter conviction was the greater crime of first degree murder. The trial court approved jury instructions on first degree murder in respect to the 1993 manslaughter conviction. The trial court gave the prosecutor free rein to elevate the 1993 VonSeggern conviction to first degree murder during the penalty trial, failed to intervene sua sponte, and additionally aided and abetted the prosecutor in his efforts by modifying the standard jury instructions to permit the jury to retry the prior manslaughter conviction. (See *People v. Arias, supra,* 13

Cal.4th at p. 159.) The trial court's actions approving retrial of the 1993 manslaughter conviction indicate that any objections by appellant would have been unavailing and futile.

Second, respondent ignores that instructional claims are reviewable on appeal if they affect a defendant's "substantial rights." (Pen. Code §§ 1259, 1469; *People v. Prieto* (2003) 30 Cal.4th 226, 247; *People v. Arredondo* (1975) 52 Cal.App.3d 973, 978 [under Pen. Code § 1469 reviewing court may review any instruction given, refused or modified, even though no objection was made thereto in the trial court].) In *People v. D'Arcy* (2010) 48 Cal.4th 257, the defendant challenged on appeal the use of CALJIC No. 8.87, the standard instruction for considering other criminal activity under factor (b) of Penal Code section 190.3. On appeal to this Court, respondent asserted, as here, the issue was forfeited because the defendant failed to object at trial. The Court rejected respondent's contention noting "to the extent a claim of instructional error affected a defendant's substantial rights, it is reviewable on appeal despite a failure to object at trial." (*Id.* at p. 302; see also *People v. Gray* (2005) 37 Cal.4th 168, 235 [rejecting constitutional challenge to capital instruction on constitutional grounds, stating Pen. Code § 1259 permits defendant to raise issue on appeal despite failure to object].)

Third, as in federal proceedings, the statutory and constitutional error in respect to elevating the VonSeggern manslaughter conviction to first degree murder amounted to plain and constitutional error on several fronts, resulting in a

miscarriage of justice that should and may be considered on appeal despite the failure to object. (See, e.g., *United States v. Young* (1985) 470 U.S. 1, 15 [105 S.Ct. 1038, 84 L.Ed.2d 1]; see also *People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6 [fact that a party, by failing to raise an issue below, may forfeit the right to raise the issue on appeal does not mean that an appellate court is precluded from considering the issue; generally, whether or not an appellate court should excuse the lack of a trial court objection is entrusted to its discretion].) As elsewhere discussed by the high court, the plain-error doctrine tempers the rigid application of the contemporaneous-objection requirement. Courts are thus authorized to correct "particularly egregious errors" (*United States v. Frady* (1982) 456 U.S. 152, 163 [102 S.Ct. 1584, 71 L.Ed.2d 816]; *Wiborg v. United States* (1896) 163 U.S. 632, 658 [16 S.Ct. 1127, 41 L.Ed.289] [although question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendant, court is at liberty to correct it]; *United States v. Atkinson* (1936) 297 U. S. 157, 160 [56 S.Ct. 391, 80 L.Ed. 555] [in exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings].)

Fourth, respondent overlooks that while factual issues may be subject to waiver or forfeiture, purely legal issues -- such as the constitutional issues raised by appellant based on undisputed facts as here -- are not necessarily subject to

waiver or forfeiture and may be addressed even when raised for the first time on appeal. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887-888; *People v. Percelle* (2005) 126 Cal.App.4th 164, 179; *Rosa S. v. Superior Court* (2002) 100 Cal.App.4th 181, 1188.) As explained by the Court in *In re Sheena K., supra*, 40 Cal.4th at p. 887, fn. 7, citing (among other cases) *People v. Williams, supra,* 17 Cal.4th at pp. 161-162, fn. 6, "[i]n general, forfeiture of a claim not raised in the trial court by a party has not precluded review of the claim by an appellate court in the exercise of that court's discretion." The Court further explained in *Sheena K.* that appellate courts typically have engaged in discretionary review "when an otherwise forfeited claim involves an important issue of constitutional law or substantial rights." (*In re Sheena K, supra.*) Accordingly, the merits of appellant's constitutional claims of instructional error may appropriately be addressed on appeal. (See also *People v. McCullough* (2013) 56 Cal.4th 589, 593; *People v. Smithey* (1999) 20 Cal.4th 936, 976-977, fn. 7 [instructional error affecting the defendant's substantial rights may be reviewed on appeal in the absence of an objection].)

Finally, as to double jeopardy, due process, and other constitutional claims asserted in the opening brief, respondent overlooks that the waivers of constitutional rights must be voluntary, knowing, and intelligent with sufficient awareness of the relevant circumstances and likely consequences. (*Brady v. United States* (1970) 397 U.S. 742, 748 [90 S.Ct. 1463, 25 L.Ed.2d 747]; *Moran v. Burbine* (1986) 475 U.S. 412, 421 [106 S.Ct. 1135, 89 L.Ed.2d 410] [a waiver

must be voluntary in the sense that it was the product of a free and deliberate choice and made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it].) Respondent does not point to any portion of the record that affirmatively shows that appellant, with sufficient awareness of the relevant circumstances, intelligently and voluntarily waived the fundamental constitutional proscription against double jeopardy. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464 [58 S.Ct. 1019, 82 L.Ed. 461] [courts indulge every reasonable presumption against waiver of fundamental constitutional rights and do not presume acquiescence in the loss of fundamental rights; a waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege]; *Patton v. United States* (1930) 281 U.S. 276, 312 [50 S.Ct. 253, 74 L.Ed. 854] [waiver of fundamental constitutional rights requires the express and intelligent consent of the defendant].)

Respondent next argues that appellant did not receive ineffective assistance of counsel in failing to raise his statutory and constitutional claims at trial. (RB 99-102.) Specifically, respondent offers there were reasonable tactical reasons not to object on any of the grounds raised by appellant on appeal and that counsel's tactical decisions were entitled to deference. (RB 99.) Further, according to respondent, since defense counsel actively participated in the penalty trial, his failure to object "to any aspect" of the penalty trial evidence in aggravation, the failure to object to the elevation of the prior manslaughter conviction to murder, the failure to object on other statutory or constitutional grounds, and the failure to

object to any of the penalty jury instructions permitting the jury in effect newly to convict appellant of murder in the VonSeggern killing despite his prior manslaughter conviction for that crime, were reasonable under the circumstances of this case. (RB 100-101.)

Respondent asserts that appellant has raised an ineffective assistance claim on appeal precisely because a plea of once in jeopardy may not be raised for the first time on appeal except in this context. (RB 101, fn. 6.) Respondent's assertion is circular reasoning at its worst and patently absurd. If either collateral estoppel or double jeopardy apply, there can be no tactical reason for failing to raise the issues at trial; ineffective assistance of counsel can be the only explanation. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1185.)

In assessing claims of ineffective assistance of trial counsel, the Court considers whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Gamache* (2010) 48 Cal.4th 347, 391.) The reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.

As to the several statutory and constitutional claims raised in this appeal, the record does not afford any basis for concluding, or even inferring, that

counsel's omissions were based on an informed tactical choice. Appellant had everything to lose and nothing to gain from retrying or relitigating his prior 1993 manslaughter conviction and from having the VonSeggern killing elevated to murder during the penalty trial. Any failure on trial counsel's part to object to the evidence and instructions permitting the jury to elevate the prior manslaughter conviction to first degree murder necessarily fell below the standard of vigorous advocacy required of competent counsel. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1003 [ineffective assistance claim cognizable on appeal where no satisfactory explanation could exist to explain counsel's conduct].)

Respondent ignores the prejudice to appellant from retrying the 1993 VonSeggern manslaughter conviction. In light of the trial court's instructions, any one juror could have found appellant guilty of murdering VonSeggern despite his prior manslaughter conviction for that crime. Any one juror easily would have concluded, on newly finding appellant guilty of murder as urged by the prosecutor, that appellant previously had literally and figuratively gotten away with murder and thus was far more deserving of death as the appropriate penalty. (For further discussion of prejudice, *see* Subsection E, at pp. 76-80, *post.*) Because the prosecutor's retrial of appellant's VonSeggern manslaughter conviction violated appellant's fundamental constitutional rights and, at the same time, played such a prominent role in the factors in aggravation offered by the prosecutor, the jury's death penalty verdict was necessarily unreliable to appellant's prejudice. (See *Strickland v. Washington, supra*, 466 U.S. at p.687 [prejudice shown where capital

trial's result is unreliable].)

B. Retrial of Appellant for the Murder of VonSeggern, as a Separate and Additional Factor in Aggravation, Was Prohibited by the "Prosecuted and Acquitted" Provision of Penal Code Section 190.3

Respondent does not dispute that manslaughter is a lesser included offense of murder. (Pen. Code § 192; *People v. Ochoa* (1998) 19 Cal.4th 353, 422; *People v. Koontz* (2002) 27 Cal.4th 1041, 1086.) Respondent asserts that appellant was not "impliedly acquitted" of murdering Jennifer VonSeggern because the dismissal of the first murder charge by the trial court following appellant's conviction of manslaughter by guilty plea did not constitute an acquittal for purposes of Penal Code section 190.3, third paragraph. (RB 105-106.) Respondent further argues that appellant's conviction of the lesser crime of manslaughter should not be considered an implied acquittal of the greater crime because a jury was not given the opportunity to return a verdict on the greater offense. According to respondent, the limitation in Penal Code section 190.3 concerning criminal activity for which the defendant was prosecuted and acquitted refers only to a determination on the merits. (RB 106; see *People v. Bradford* (1997) 15 Cal.4th 1229, 1375.)

Respondent overlooks that the prosecutor here did not merely introduce evidence of a prior conviction and evidence of an underlying crime, as in *People v. Monterroso* (2004) 34 Cal.4th 743 and *People v. Rodrigues* (1994) 8 Cal.4th 1060. Rather, the prosecutor sought to prove both the lesser crime -- the manslaughter

conviction -- and the greater crime of murder by evidence, argument, and jury instructions.

The killing of VonSeggern constituted a single act -- a single crime. The greater offense of murder and the lesser included offense of manslaughter constituted the same offense. (*Brown v. Ohio* (1977) 432 U.S. 161, 164-169 [97 S.Ct. 2221, 53 L.Ed.2d 187].) Appellant's prior conviction of the lesser included manslaughter crime in essence rendered the greater crime inoperative as a matter of law and established appellant's acquittal of murder, the greater crime, for purposes of Penal Code section 190.3.

Significantly, respondent ignores *People v. Johnson* (1992) 3 Cal.4th 1183 where the prosecution introduced evidence of facts underlying the defendant's prior conviction of voluntary manslaughter. As noted by the Court in *Johnson*: "The trial court permitted the prosecutor to present the facts of the prior conviction, but not to argue that the evidence established any of the elements of murder." (*Id.* at p. 1240.) The Court in *Johnson* stressed that the prosecutor never suggested that the jury should consider the prior killing as the equivalent of murder, nor was the jury instructed it could do so. (*Id.* at pp. 1240-1241.)

Here, unlike *Johnson*, the prosecutor argued and urged the jury to find the prior killing was "really" murder despite and in addition to the fact of appellant's prior manslaughter conviction for the same crime. Indeed, unlike *Johnson*, the jury here was explicitly instructed that it could find appellant guilty of murder for the prior crime and then use that determination as a separate factor in aggravation

in addition to the manslaughter conviction for the same crime. A defendant may not be convicted of both a greater offense and a necessarily included offense based upon the same set of facts. (*People v. Sanchez* (2001) 24 Cal.4th 983, 987; *People v. Moran* (1970) 1 Cal.3d 755, 763.) Contrary to respondent's urgings, therefore, the elevation of appellant's prior manslaughter conviction to murder by evidence, argument, and jury instructions during the penalty trial in this case, was barred by the explicit "prosecuted and acquitted" provisions of Penal Code section 190.3.

C. Principles of Collateral Estoppel and Res Judicata Barred the State From Retrying Appellant's 1992 Manslaughter Conviction During the Penalty Trial in Order to Elevate the Crime to Murder

The doctrine of collateral estoppel holds that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. (*Ashe v. Swenson* (1970) 397 U.S. 436, 443, 445 [90 S.Ct. 1189, 25 L.Ed.2d 469].) Collateral estoppel applies in criminal proceedings independent of constitutional double jeopardy principles. (*People v. Meredith* (1992) 11 Cal.App.4th 1548, 1555.) California is permitted to have a collateral estoppel rule more favorable to criminal defendants than the federal rule. (*People v. Sparks* (2010) 48 Cal.4th 1, 12.)

Under collateral estoppel principles, an issue necessarily decided in prior litigation may be conclusively determined as against the parties thereto or their privies in a subsequent lawsuit on a different cause of action. (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828.) "That only is deemed to have been

adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." (Code Civ. Proc., § 1911.) An issue is actually litigated when it is properly raised by the pleadings. (*Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 482.) Collateral estoppel may also be applied to prevent relitigation of a legal theory or factual matter which could have been but was not asserted in support of or in opposition to an issue which was litigated. (*Sutphin v. Speik* (1940) 15 Cal.2d 195, 202.)

Here, appellant was charged by information filed in 1993 with the murder of Jennifer VonSeggern. Appellant's culpability for killing VonSeggern was established by his guilty plea and conviction; the judgment of conviction was final and on the merits. It was thus inherently unfair to require appellant to relitigate in the penalty phase of trial the criminal act previously resolved by the judgment of conviction for manslaughter in the prior proceeding. Appellant's act of killing Jennifer VonSeggern was identical to the issue raised and litigated by the prosecutor during the penalty trial of appellant's current case. Both the original proceedings and the current penalty trial involved the same alleged act and the same wrong. The contexts of the two cases are identical in that both adjudicated appellant's criminal culpability for killing Jennifer VonSeggern.

Respondent asserts appellant's collateral estoppel claim must fail because his reliance on *People v. Wallace* (2004) 33 Cal.4th 738 is misplaced. (See RB 109-110.) Appellant offered the example of *Wallace* to underscore public policy

principles of fundamental fairness inherent in collateral estoppel. Elsewhere, the Court has looked to public policy in resolving competing claims and issues of collateral estoppel. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 342-343 [public policies underlying collateral estoppel -- preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants -- strongly influence whether its application in a particular circumstance would be fair to the parties and constitutes sound judicial policy]; *People v. Ochoa* (2011) 191 Cal.App.4th 664, 668-668 [collateral estoppel ultimately subject to considerations of public policy].)

If defendants are generally precluded from introducing evidence and arguing in a subsequent proceeding that a prior conviction is actually a lesser crime than as reflected in the abstract of judgment, fundamental fairness dictates that the prosecution as well should be estopped in a death penalty case from showing that a prior conviction is actually a greater crime than as reflected in the abstract of judgment. (See *People v. Wallace, supra,* 33 Cal.4th at pp. 750-751.) Respondent does not seriously address the fairness issue. If *Wallace* precludes a defendant from attacking or undermining a prior judgment of conviction, that decision, collateral estoppel, and principles of due process should have barred the prosecution from doing the same as well here by elevating appellant's prior manslaughter conviction to murder.

In *People v. Steele* (2002) 27 Cal.4th 1230, the prosecutor sought to admit evidence of a prior killing for which the defendant had been convicted of second

degree murder. In her dissent as to the admissibility of the evidence of the prior killing, Justice Kennard discussed collateral estoppel as the basis for excluding such evidence: "A second theory might be that the verdict in the prior [murder] case was wrong -- that the [prior second-degree] murder was actually a premeditated murder, from which the jury here could infer the [present] murder was also premeditated. The prosecutor's argument at trial hinted at this theory. But . . . principles of collateral estoppel and double jeopardy prevent the state from relitigating the issue of premeditation [resolved in the prior] case." (*People v. Steele, supra*, 27 Cal.4th at p. 1284.) In response to Justice Kennard's concerns, the majority opinion in *Steele* stressed that "no one is seeking to relitigate the [prior] murder. That conviction was and remains second degree murder." (*People v. Steele, supra*, 27 Cal.4th at p. 1245, fn. 2.)

In *People v. Koontz* (2002) 27 Cal.4th 1041, the Court held that dismissal of charges did not constitute an acquittal and thus did not dictate exclusion of evidence of the underlying incident. (*Id.* at p. 1087.) Here, unlike *Koontz*, the prosecutor actually relitigated the VonSeggern killing through testimony and evidence, and the trial court instructed the jury on murder, thereby allowing the jury to elevate appellant's previously adjudicated and lesser crime of manslaughter to the greater crime of murder.

The doctrine of collateral estoppel should apply during a capital penalty trial where the prosecutor proves both the fact of a lesser conviction and relitigates the same underlying criminal act to prove a greater crime as well. Consistent with

the fundamental principles of collateral estoppel, the trial court should not have permitted the prosecutor to relitigate appellant's prior manslaughter conviction or, by its instructions, to have allowed the jury to elevate appellant's manslaughter conviction to murder.

D. Retrial of Appellant's Manslaughter Conviction Was Barred by the Proscription Against Double Jeopardy Embodied in the Fifth and Fourteenth Amendments to the United States Constitution and California Constitution, Article I, Section 15

Respondent asserts that appellant was not subjected to double jeopardy, arguing that the Court has made clear that use of prior crimes as an aggravating factor does not violate double jeopardy. (RB 110-111.) Respondent's reliance on such prior decisions as *People v. Garceau* (1993) 6 Cal.4th 140 and *People v. Wader* (1993) 5 Cal.4th 610, are misplaced. In *Garceau*, the prosecution introduced evidence in aggravation at the penalty phase pertaining to the defendant's 1982 arrest for kidnapping and possession of an explosive device, as well as evidence pertaining to his 1981 arrest for possession of a machine gun and for being an ex-felon in possession of concealable firearms. On appeal, the defendant contended that introduction of evidence pertaining to his 1981 crimes was barred by the constitutional guarantee against being placed twice in jeopardy. The Court held that this guarantee is inapplicable where evidence of prior criminal activity is introduced in a subsequent trial as an aggravating factor for consideration by a penalty phase jury. (*Id.* at pp. 199-200.)

In *People v. Wader, supra,* 5 Cal.4th 610, the prosecution introduced evidence of an alleged rape that had been dismissed as part of a plea bargain. On appeal, the defendant claimed that documentary evidence and testimony of the rape victim's mother were inadmissible because use of facts underlying the dismissed charge was a breach of the plea bargain and a violation of double jeopardy principles. Without discussion or analysis, the Court perfunctorily rejected the double jeopardy claim and declined to revisit the issue. (*Id.* at p. 71.)

Respondent also cites *People v. Stanley* (1995) 10 Cal.4th 813, a case that actually supports appellant's constitutional double jeopardy claim. In *Stanley*, the defendant contended on appeal that the trial court erred prejudicially in permitting introduction in evidence of the facts and circumstances underlying his prior conviction for the second degree murder of his second wife. He argued in part that permitting evidence of the circumstances surrounding the prior conviction, including evidence suggesting he had premeditated and deliberated that murder, allowed the prosecutor to imply, and the jury to infer, that the offense actually was of the first degree. The defendant asserted that because the jury's verdict in 1975 of second degree murder impliedly acquitted him of first degree murder, introduction of evidence suggesting he in fact had premeditated and deliberated his wife's murder, violated his constitutional protection against double jeopardy.

In language apposite to the facts, circumstances, and issues in the present case, the Court discussed in *Stanley* that the prosecution neither presented evidence nor argued that defendant was actually guilty of the first degree murder

of his second wife. The Court stressed that the trial court instructed the jury only on the elements of second degree murder in relation to defendant's conviction for killing his wife. (*People v. Stanley, supra*, 10 Cal.4th at pp. 819-821.) Here, unlike *Stanley*, the prosecutor argued that appellant's prior manslaughter was actually murder, and the court instructed the jury on first degree murder, thereby permitting the jury to elevate to murder appellant's previously adjudicated manslaughter culpability for that prior crime.

In intent and effect, appellant was tried twice for killing Jennifer VonSeggern. The jurors were permitted by the court's instructions to use the second determination of guilt -- this time of murder -- as an additional factor in aggravation, independent of the prior manslaughter conviction, for imposing the death penalty. A proceeding which more literally places an accused in "jeopardy of life and limb" can hardly be imagined. Indeed, as stated by the United States Supreme Court in *Louisiana ex rel. Francis v. Resweber* (1947) 329 U.S. 459, 462 [67 S.Ct. 374, 91 L.Ed. 422]: "Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense."

E. The Error Was Not Harmless Beyond a Reasonable Doubt

Respondent asserts that any error was harmless and that it was not possible that the jury was influenced by the distinction of whether the VonSeggern killing was classified as a murder or manslaughter. (RB 111, 113.) Respondent erroneously posits "a reasonable possibility of error" standard that is not

applicable to the constitutional error claimed by appellant. (See RB 111.) The constitutional questions here involve whether the error was harmless; that determination depends on application of the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 23-24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (See, e.g., *People v. Serrato* (1973) 9 Cal.3d 753, 767 [error which infringes federal constitutional right compels reversal unless the reviewing court is able to declare a belief that it was harmless beyond a reasonable doubt]; *Bains v. Cambra* (9th Cir. 2000) 204 F.3d 964, 971, fn. 3 [*Chapman* standard applies (at least for direct appeals) to all courts (state and federal) in reviewing constitutional magnitude, trial type errors].)

In every capital penalty determination, the jury must make an individualized moral assessment on the basis of the character of the defendant and the circumstances of the crime, including his prior adjudicated and unadjudicated criminal acts, and thereby decide which penalty is appropriate in the particular case. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [96 S.Ct. 2978, 49 L.Ed.2d 944].) Respondent overlooks that by relitigating the prior VonSeggern killing during the penalty trial, it was likely the jury would be swayed toward death on finding that appellant previously murdered VonSeggern as urged by the prosecutor and permitted by the court's instructions. That is the very reason why the prosecutor insisted on retrying appellant for and relitigating that crime and in seeking to elevate the prior manslaughter to murder. Common sense teaches that the jury's penalty determination would tilt toward death were appellant guilty of

murder, not merely manslaughter, for killing VonSeggern. (See *People v. Guerrero* (1988) 44 Cal.3d 343, 355 [recognizing that relitigating circumstances of a crime committed years ago threatens the defendant with harm akin to double jeopardy].).

Respondent's categorical assertion that it was not reasonably possible for the jury to have been influenced (RB 113) is not persuasive. The prosecutor called 16 witnesses and devoted more than 150 pages of transcript to prove that the VonSeggern killing was murder. The prosecutor's efforts to prove that appellant murdered VonSeggern constituted a major portion of the penalty case in aggravation. The prosecutor spent many pages of closing argument during the penalty trial to convince the jury that appellant was more deserving of death because he murdered Jennifer VonSeggern. (See *People v. Powell* (1967) 67 Cal.2d 32, 55-57 [prosecutor's reliance on evidence during closing argument as strong indication of how crucial the prosecutor and so presumably the jury treated the evidence].) Given the fundamental constitutional and statutory violations involved, the fundamental unfairness of retrying appellant for murder despite his prior manslaughter conviction, the undue emphasis assigned to it by the prosecutor as a strong factor in aggravation during closing argument, and the trial court's jury instructions permitting the prior killing to be elevated to murder, the jury's capital verdict in this case was likely affected. (See *People v. Thompson* (1980) 27 Cal.3d 303, 317 & fn. 18 [such evidence "breeds" a tendency to condemn because defendant escaped punishment from other offenses]; *People v. Bean* (1988) 46

Cal.3d 919, 938 [such evidence "tempt[s] the jury to condemn defendant because he has escaped adequate punishment in the past"].)

Respondent also overlooks the *Caldwell* error inherent in permitting the jury to elevate a prior, lesser manslaughter conviction to murder during the penalty trial of a capital case. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 329 [105 S.Ct. 2633, 86 L.Ed.2d 231].) A finding that appellant murdered VonSeggern, as urged by the prosecutor and permitted by the trial court's instructions, allowed each juror to conclude, in an unreliable exercise of sentencing discretion, that appellant was more deserving of death because he had been insufficiently punished for the VonSeggern killing at the time of his manslaughter conviction.

Respondent erroneously disregards that relitigation of the VonSeggern killing and the prosecutor's closing argument, when coupled with the likely determination by one or more jurors, as permitted by the trial court's instructions, that appellant was actually guilty of murder, had the consequence of lessening the jury's responsibility in this case for determining whether the death penalty should be imposed. Relitigation of the VonSeggern killing impermissibly allowed the jury to revisit the punishment appellant received for manslaughter following his prior conviction and to view the death penalty in this case as somehow ensuring that appellant would not again "get away with murder" as he did in the past. Thus, the likelihood that the death penalty was also being imposed for a prior crime -- newly determined by the jury to be murder -- that had been insufficiently punished in the past -- thoroughly undermined the sentencing jury's sense of responsibility

in this case as required in *Caldwell v. Mississippi, supra*, 472 U. S. at p. 336 (plurality opinion). Such a diminution in the jury's sense of responsibility precluded the jury from properly performing its constitutional responsibility to make an individualized determination of the appropriateness of the death penalty. (*Id.* at pp. 341-342 [O'Connor, J., concurring in part and concurring in judgment]; see also *Romano v. Oklahoma* (1994) 512 U.S. 1, 9 [114 S.Ct. 2004, 129 L.Ed.2d 1].)

Appellant should not have been retried for the VonSeggern killing; that crime should not have been relitigated; the manslaughter conviction should not have been elevated to murder where appellant's culpability was previously fixed at manslaughter. The high court has said that in the double jeopardy context it is the substance of the action that is controlling, and not the label given that action. (See *United States v. Martin Linen Supply Co.* (1977) 430 U. S. 564, 571 [97 S.Ct. 1349, 51 L.Ed.2d 642].) When punishment, as here, is based -- at least in part -- on a retrial of a prior crime that could not have been retried without violating double jeopardy, collateral estoppel, and due process principles, there can be no question that the error could not have been harmless beyond a reasonable doubt.

VII

THE JURY INSTRUCTIONS ON THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AND THE JURORS' APPLICATION OF THESE SENTENCING FACTORS, RENDERED APPELLANT'S DEATH SENTENCE CAPRICIOUS AND ARBITRARY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The trial court instructed the jury on the Penal Code section 190.3 sentencing factors in the language of CALJIC No. 8.85, the standard instruction regarding the statutory factors to be considered by the jury in determining whether to impose a sentence of death or life without the possibility of parole. (4 CT 928-929; 53 RT 6820-6822.) The jury was also instructed on aggravating and mitigating factors in the language of CALJIC No. 8.88. As demonstrated in appellant's opening brief (AOB 225-254), Penal Code section 190.3, the implementing instructions, and the jurors' application of the sentencing factors, violate the narrowing requirements of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, because the "eligibility" provisions (which include all of the ways in which first degree murder may be committed), plus all of the special circumstances under Penal Code section 190.2, viewed cumulatively, make virtually every murderer death-eligible. California's death penalty statute and implementing instructions allow any conceivable circumstance of a crime to justify a verdict of death. The statute allows the decision to be made without critical reliability safeguards that are taken for granted in non-capital

trials. The result is a "wanton and freakish" system (*Furman v. Georgia* (1972) 408 U.S. 238, 320 [92 S.Ct. 2726, 33 L.Ed.2d 346] (conc. opn. of Stewart, J.)) that, because it arbitrarily determines the relatively few offenders subjected to capital punishment, violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

A. Appellant Has Not Waived or Forfeited His Claim

Respondent asserts that appellant did not request the trial court modify the instructions now challenged on appeal and, consequently did not preserve the claim for this appeal. (RB 114.) Respondent ignores that instructional errors are reviewable on appeal if they affect a defendant's "substantial rights." (Pen. Code §§ 1259, 1469; *People v. Prieto* (2003) 30 Cal.4th 226, 247.)

In *People v. D'Arcy* (2010) 48 Cal.4th 257, the defendant challenged on appeal the use of CALJIC No. 8.87, the standard instruction for considering other criminal activity under factor (b) of Penal Code section 190.3. On appeal to this Court, respondent asserted, as here, the issue was forfeited because the defendant failed to object at trial. The Court rejected respondent's contention noting "to the extent a claim of instructional error affected a defendant's substantial rights, it is reviewable on appeal despite a failure to object at trial." (*Id.* at p. 302; see also *People v. Gray* (2005) 37 Cal.4th 168, 235 [rejecting constitutional challenge to capital instruction on constitutional grounds, stating Penal Code section 1259 permits defendant to raise issue on appeal despite failure to object].)

In *People v. Dunkle* (2005) 36 Cal.4th 861, the trial court distributed to prospective capital-case jurors a printed preinstruction regarding the penalty phase of trial. The defendant challenged the court's preinstruction for the first time on appeal, asserting it was prejudicially inaccurate under the Eighth and Fourteenth Amendments to the United States Constitution. Although observing that the defendant did not object to the preinstruction or request clarification, the Court nevertheless addressed his substantive claims of error, ruling "we do not deem forfeited any claim of instructional error affecting a defendant's substantial rights." (*Id.* at p. 929.)

Respondent also overlooks that while factual issues may be subject to waiver or forfeiture, purely legal issues -- such as the constitutional issues raised by appellant based on undisputed facts as here -- are not necessarily subject to waiver or forfeiture and may be addressed even when raised for the first time on appeal. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887-888; *People v. Percelle* (2005) 126 Cal.App.4th 164, 179; *Rosa S. v. Superior Court* (2002) 100 Cal.App.4th 181, 1188.)

As explained by the Court in *In re Sheena K., supra*, 40 Cal.4th at p. 887, fn. 7, citing (among other cases) *People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6, "[i]n general, forfeiture of a claim not raised in the trial court by a party has not precluded review of the claim by an appellate court in the exercise of that court's discretion." The Court further explained in *Sheena K.* that appellate courts typically have engaged in discretionary review "when an otherwise forfeited claim

involves an important issue of constitutional law or substantial rights." (*In re Sheena K, supra.*) Accordingly, the merits of appellant's constitutional claims of instructional error may appropriately be addressed on appeal. (See also *People v. McCullough* (2013) 56 Cal.4th 589, 593; *People v. Smithey* (1999) 20 Cal. 4th 936, 976-977, fn. 7 [instructional error affecting the defendant's substantial rights may be reviewed on appeal in the absence of an objection].)

B. The Instruction on Penal Code Section 190.3, Subdivision (a) and Application of that Sentencing Factor Resulted in the Arbitrary and Capricious Imposition of the Death Penalty

Penal Code section 190.3, subdivision (a) permits a jury deciding whether a defendant will live or die to consider the "circumstances of the crime." Accordingly, the jury in this case was instructed pursuant to CALJIC No. 8.85 to consider, take into account and be guided by "[t]he circumstances of the crimes of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true." (4 CT 928; 53 RT 6820-6821.)

When a state chooses to impose capital punishment, the Eighth Amendment requires the adoption of "procedural safeguards against arbitrary and capricious imposition of the death penalty." (*Sawyer v. Whitley* (1992) 505 U.S. 333, 341 [112 S.Ct. 2514, 120 L.Ed.2d 268].) A state capital punishment scheme must comply with the Eighth Amendment's "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" in imposing the death penalty. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 362

[108 S.Ct. 1853, 100 L.Ed.2d 372].)

As applied in California, Penal Code section 190.3, subdivision (a) not only fails to "minimiz[e] the risk of wholly arbitrary and capricious action" in the death process, it affirmatively institutionalizes such a risk. Prosecutors routinely urge juries to impose death based on diametrically-opposed or squarely-conflicting circumstances. In California, the death penalty can be applied or invoked in virtually every murder case. It therefore cannot withstand Eighth and Fourteenth Amendment scrutiny. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

The factor (a) circumstances-of-the-crime aggravator is applied and used in virtually every case regardless of the facts or circumstances, by every prosecutor, without limitation. As a consequence, from case to case, prosecutors turn entirely opposite facts -- or facts that are inevitable variations of every homicide -- into aggravating factors that are offered to every jury as unique factors weighing on death's side of the scale. This Court has never applied any limiting construction to Penal Code section 190.3, subdivision (a) other than to suggest that an aggravating factor based on the circumstances of the crime must be some fact beyond the elements of the crime itself. (See *People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) In practice, the broad circumstances of the crime provision licenses indiscriminate imposition of the death penalty upon no basis other than that a particular set of facts surrounding a murder were enough in themselves, and

without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty. (*Maynard v. Cartwright, supra*, 486 U.S. at p. 363.) This is precisely the kind of arbitrariness and capriciousness proscribed by Eighth and Fourteenth Amendment reliability and due process principles. (See *Bush v. Gore* (2000) 531 U.S. 98 [121 S.Ct. 525, 148 L.Ed.2d 388]; but see *People v. Vines* (2011) 51 Cal.4th 830, 889-890 [rejecting reliance on high court's consideration of equal protection challenge to Florida's voting recount process].)

Respondent offers that the claim asserted by appellant has been previously rejected by this Court and should again be dismissed. (RB 114-115.) As in the opening brief (AOB 227), appellant acknowledges that this Court has consistently held, usually with little or any discussion or analysis, that Penal Code section 190.3, factor (a) [CALJIC No. 8.85(a)], which permits the jury to consider the circumstances of the crime in deciding whether to impose the death penalty, adequately narrows the class of persons eligible for the death penalty (see, e.g., *People v. Rogers* (2013) 57 Cal.4th 296, 350; *People v. Linton* (2013) 56 Cal.4th 1146, 1215; *People v. Pearson* (2013) 56 Cal.4th 393, 477-478; *People v. Whalen* (2013) 56 Cal.4th 1, 90; *People v. Watkins* (2012) 55 Cal.4th 999, 1035; *People v. Thomas* (2012) 54 Cal.4th 908, 949; *People v. Streeter* (2012) 54 Cal.4th 205, 267; *People v. Souza* (2012) 54 Cal.4th 90, 141, 142; *People v. Livingston* (2012) 53 Cal.4th 1145, 1179-1180; *People v. Thomas* (2012) 53 Cal.4th 771, 833; *People v. Lightsey* (2012) 54 Cal.4th 668, 731) and does not license the arbitrary and capricious imposition of the death penalty because prosecutors in different

cases may argue that seemingly disparate circumstances, or circumstances present in almost any murder, are aggravating under factor (a). (See, e.g., *People v. Williams* (2013) 56 Cal.4th 630, 698; *People v. Williams* (2013) 56 Cal.4th 165, 201; *People v. Valdez* (2012) 55 Cal.4th 82, 179; *People v. Streeter, supra*, 54 Cal.4th at pp. 267-268; *People v. Thomas*, supra, 53 Cal.4th at p. 835; *People v. Tully* (2012) 54 Cal.4th 952, 1067.)

To comply with the Eighth Amendment, single eligibility factors must narrow, in a meaningful way, the category of defendants upon whom capital punishment may be imposed. The notion that this principle is no longer the case (*see People v. Beames* (2007) 40 Cal.4th 907, 934; *People v. Brasure* (2008) 42 Cal.4th 1037, 1066) is incorrect and contrary to high court jurisprudence. That California's statutory scheme allows individualized assessment of crimes, as stressed by the Court in *People v. Linton, supra*, 56 Cal.4th at p. 1215, for example, does not save it from constitutional challenge, where the cumulative effect of all death penalty eligibility factors permit the ultimate penalty in virtually every first degree murder. All of the high court's opinions in *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750] make clear that a death penalty statutory scheme passes constitutional muster only if all of the eligibility factors, viewed cumulatively, make fewer than "all murderers" death eligible. (See *Tuilaepa v. California, supra*, 512 U.S. at pp. 975, 980, 985, 994-995.) In California, they do not. For the additional reasons set forth in appellant's

opening brief (AOB 225-254), the Court's analysis and reasoning are thus unsound and should be reevaluated.

C. The Instruction on Penal Code Section 190.3, Subdivision (b) and the Jurors' Application of that Sentencing Factor Violated Appellant's Constitutional Rights to a Fair Penalty Trial, Due Process, Equal Protection, Trial by Jury and a Reliable Penalty Determination

In addition to CALJIC Nos. 8.85(a) and 8.88, the trial court instructed the jury in the language of CALJIC Nos. 8.85(b) and modified 8.87 that, as aggravating factors under Penal Code section 190.3, subdivision (b), the jury could consider "[t]he presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (4 CT 928; 53 RT 6821.)

By the trial court's modified instructions, the jury was told it could rely on these aggravating factors in the weighing process to determine if appellant should be executed. The jury was also told that it was not necessary for all jurors to agree. The jury was explicitly instructed that unanimity as to factor (b) was not required. Thus, the sentencing instructions contrasted sharply with those given at the guilt phase, where the jurors were told they had to agree unanimously on appellant's guilt and the special circumstances allegations. By permitting the jury to sentence appellant to death by relying on evidence on which it did not necessarily agree unanimously, Penal Code section 190.3, subdivision (b) and

CALJIC No. 8.87 violated both the Sixth Amendment right to a jury trial and the Eighth Amendment's ban on unreliable penalty phase procedures. (See AOB 237-248.)

Respondent asserts that this Court has consistently rejected these claims and that its prior opinions should not be revisited. (RB 115-116.) Appellant acknowledges that the Court has previously ruled that the jury may properly consider evidence of unadjudicated crimes under Penal Code section 190.3, factor (b) [CALJIC Nos. 8.85(b) and 8.87]. (See, e.g., *People v. Linton, supra,* 56 Cal.4th at p. 1216; *People v. Whalen, supra*, 56 Cal.4th at p. 91; *People v. Watkins, supra*, 55 Cal.4th at pp. 1035-1036; *People v. Thomas, supra*, 54 Cal.4th at p. 949.) Appellant also acknowledges that the Court has rejected contentions that the California sentencing scheme is constitutionally flawed because it does not require the penalty jury to agree unanimously that a particular aggravating circumstance exists. (See, e.g., *People v. Linton, supra,* 56 Cal.4th at p. 1215; *People v. Williams, supra*, 56 Cal.4th at pp. 697-698; *People v. Williams supra*, 56 Cal.4th at p. 201; *People v. Valdez, supra*, 55 Cal.4th at p. 179; *People v. Watkins, supra*, 55 Cal.4th at pp. 1035-1036; *People v. Thomas, supra*, 54 Cal.4th at p. 949; *People v. Livingston, supra*, 53 Cal.4th at p. 1180.) However, given the constitutionally significant purpose served by jury deliberation on factual issues and the enhanced need for reliability in capital sentencing, a procedure that allows individual jurors to impose death on the basis of less than unanimous factual findings, that they have neither debated, deliberated nor even discussed is

unreliable, and therefore constitutionally impermissible. The Court's constitutional analysis and reasoning in this regard are unsound and should be reevaluated.

D. The Failure to Require the Jury to Base a Death Sentence on Written Findings Regarding the Aggravating Factors Violates Appellant's Constitutional Rights to Meaningful Appellate Review and Equal Protection of the Law

The instructions given in this case under CALJIC Nos. 8.85 and 8.88 did not require the jury to make written or other specific findings about the aggravating factors they found and considered in imposing a death sentence. The failure to require such express findings deprived appellant of his Fourteenth Amendment due process and Eighth Amendment rights to meaningful appellate review as well as his Fourteenth Amendment right to equal protection of the law. (*California v. Brown* (1987) 479 U.S. 538, 543 [107 S.Ct. 837, 93 L.Ed.2d 934]; *Gregg v. Georgia* (1976) 428 U.S. 153, 195 [96 S.Ct. 2909, 49 L.Ed.2d 856].) California juries have total, unguided discretion on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California, supra,* 512 U.S. at pp. 979-980). There can be no meaningful appellate review unless juries make written findings regarding those factors, because it is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 373 U.S. 293, 313-316 [88 S.Ct. 745, 9 L.Ed.2d 770].) Indeed, written findings are essential for a meaningful review of the sentence imposed. Thus, in *Mills v. Maryland* (1988) 486 U.S. 367 [108 S.Ct. 1860, 100 L.Ed.2d 384], the requirement of written findings applied in

Maryland death cases enabled the Supreme Court to identify the error committed under the prior state procedure and to gauge the beneficial effect of the newly-implemented state procedure. (*Id.* at p. 383, fn. 15.)

Respondent asserts that this Court has rejected this claim and that there is no need to reevaluate the Court's prior opinions. (RB 116-117.) Appellant acknowledges that the Court has previously held that nothing in the United States Constitution requires the penalty phase jury to make written findings of the factors it finds in aggravation and mitigation. (See, e.g., *People v. Rogers, supra,* 57 Cal.4th at p. 350; *People v. Linton, supra*, 56 Cal.4th at p. 1216; *People v. Williams, supra*, 56 Cal.4th at p. 697; *People v. Pearson, supra*, 56 Cal.4th at p. 478; *People v. Williams, supra*, 56 Cal.4th at p. 201; *People v. Whalen, supra*, 56 Cal.4th a at pp. 90-91; *People v. Valdez, supra*, 55 Cal.4th at p. 180; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1364; *People v. Thomas, supra*, 54 Cal.4th at p. 949; *People v. Streeter, supra*, 54 Cal.4th at p. 268; and *People v. Tully, supra*, 54 Cal.4th at p. 1068.) As demonstrated in appellant's opening brief (AOB 248-251), the Court's reasoning in respect to written findings regarding aggravating factors is unsound and should be reevaluated.

E. Even if the Absence of the Previously Addressed Procedural Safeguards Does Not Render California's Death Penalty Scheme Constitutionally Inadequate to Ensure Reliable Capital Sentencing, Denying Them to Capital Defendants Such as Appellant Nevertheless Violates Equal Protection Requirements of the Fourteenth Amendment to the United States Constitution

The United States Supreme Court repeatedly has asserted that a heightened

standard or heightened reliability is required in capital cases and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [96 S.Ct. 2978, 49 L.Ed.2d 944] (plurality opinion of Stewart, Powell, and Stevens, JJ.); see also *Godfrey v. Georgia, supra*, 446 U. S. at pp. 427-428; *Monge v. California* (1998) 524 U.S. 721, 731-732 [118 S.Ct. 2246, 141 L.Ed.2d 615].) Despite this directive of the high court, California's death penalty scheme affords significantly fewer procedural protections to defendants facing death sentences than to those charged with noncapital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws under the Fourteenth Amendment.

Respondent asserts that appellant's claim lacks merit (RB 117), since the Court has repeatedly held that capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal principles. (See, e.g., *People v. Linton, supra*, 56 Cal.4th at p. 1216; *People v. Pearson, supra*, 56 Cal.4th at p. 478; *People v. Whalen, supra*, 56 Cal.4th at p. 91; *People v. Valdez, supra*, 55 Cal.4th at p. 180; *People v. Gonzales* (2012) 54 Cal.4th 1234, 1299; *People v. Streeter, supra*, 54 Cal.4th at p. 268; *People v. Souza, supra*, 54 Cal.4th at p. 142; *People v. Thomas, supra*, 53 Cal.4th at p. 836; *People v. Lightsey, supra*, 54 Cal.4th at p. 732.) As demonstrated in appellant's opening brief (AOB 252-253), the Court's reasoning that California's death penalty statute does not violate Fourteenth Amendment equal protection principles, despite the unavailability of procedural protections applicable to noncapital sentencing such

as a burden of proof, written findings, jury unanimity, and disparate sentence review, is unsound and should be reevaluated.

F. Conclusion

For the reasons set forth above and in appellant's opening brief (AOB 225-254), both separately and in the aggregate, appellant's death sentence violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and their California counterparts, and must therefore be reversed.

VIII

PENAL CODE SECTION 190.3 AND IMPLEMENTING JURY INSTRUCTIONS (CALJIC NOS. 8.84-8.88) ARE UNCONSTITUTIONAL, BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF OR CONTAIN OTHER CONSTITUTIONALLY COMPELLED SAFEGUARDS AND PROTECTIONS REQUIRED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The California death penalty statute and the instructions given in this case (CALJIC Nos. 8.84-8.88) failed to assign a burden of proof with regard to the jury's choice between the sentences of life without possibility of parole and death. (See 4 CT 926 [CALJIC No. 8.84]; 927 [CALJIC No. 8.84.1]; 928 [CALJIC No. 8.85]; 957 [CALJIC No. 8.86]; 959 [CALJIC No. 8.87]; 986 [CALJIC No. 8.88]; see also 53 RT 6819-6860 [penalty instructions].) The instructions did not delineate a burden of proof either with respect to the preliminary findings that a jury must make before it may impose a death sentence or the ultimate sentencing decision. Neither the statute nor the instructions require jury unanimity as to the existence of aggravating factors utilized by the jury as the basis for imposing a sentence of death. These omissions in the California capital sentencing scheme embodied in Penal Code section 190.3 and CALJIC Nos. 8.84-8.88 violated appellant's rights to trial by jury, fair trial, unanimous verdict, reliable penalty determination, due process, and equal protection of the laws guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

A. The Statute and Instructions Unconstitutionally Fail to Assign to the State the Burden of Proving Beyond a Reasonable Doubt the Existence of an Aggravating Factor, that the Aggravating Factors Outweigh the Mitigating Factors, and that Death is the Appropriate Penalty

The jury was instructed in the language of CALJIC Nos. 8.84 and 8.88 that it must determine whether the death penalty or "imprisonment in the state prison for life without possibility of parole" shall be imposed. (4 CT 926, 986; 53 RT 6858.) As discussed in appellant's opening brief (AOB 256-265), no burden of proof was specified or required by the trial court to guide the jury in determining penalty. The failure to assign or impose a burden of proof as a prerequisite for a jury's sentence of death renders both the California death penalty scheme and implementing instructions unconstitutional, and, in this case, renders appellant's death sentence unconstitutional and unreliable in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
Respondent urges that *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 122 .Ed.2d 620] does not compel the conclusion that any determination made by a penalty jury to arrive at a sentence of death must be found beyond a reasonable doubt. (RB 118-119.) Respondent contends that the statutory factor that renders a defendant found guilty of first degree murder eligible for the death penalty is the special circumstance and that the special circumstance thus operates as the "functional equivalent" of an element of the greater offense of capital murder. (RB 120.) According to respondent, the jury's findings beyond a reasonable doubt of the truth of a special circumstance satisfied the requirement of

the Sixth Amendment that a jury find facts that increase a penalty of a crime beyond the statutory minimum. (RB 120.) Respondent urges these views based on the Court's prior rejection of similar *Cunningham* arguments. (RB 119-120.)

Appellant acknowledges that the Court has previously ruled that the failure to require that the jury unanimously find the aggravating circumstances true beyond a reasonable doubt, to find unanimously and beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances, or to require a unanimous finding beyond a reasonable doubt that death is the appropriate penalty does not violate the Fifth, Eighth, or Fourteenth Amendment guarantees of due process and a reliable penalty determination. (See, e.g., *People v. Mai* (2013) 57 Cal.4th 986, 1057; *People v. Harris* (2013) 57 Cal.4th 804, 858; *People v. Edwards* (2013) 57 Cal.4th 658, 767; *People v. Maciel* (2013) 57 Cal.4th 482, 553.)

Appellant requests that the Court reconsider these holdings in light of the high court's continued insistence that punishment be imposed only on facts that a jury has found true beyond a reasonable doubt. (*Descamps v. United States* (2013) 570 U.S. __ [133 S.Ct. 2276, 2288, 186 L.Ed.2d 438] ["The Sixth Amendment contemplates that a jury -- not a sentencing court -- will find (facts underlying prior conviction used to enhance sentence) "unanimously and beyond a reasonable doubt."]; *Southern Union Co. v. United States* (2012) 567 U.S. __ [132 S.Ct. 2344, 2350, 183 L.Ed.2d 318] [principles of *Apprendi* invoked to invalidate fines imposed on a natural gas distributor for violation of federal environmental

regulations because the "amount of a fine, like the maximum term of imprisonment or eligibility for the death penalty, [was] calculated by reference to particular facts" and "requiring juries to find beyond a reasonable doubt facts that determine the fine's maximum amount is necessary to implement *Apprendi's* 'animating principle': the 'preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense."] (*Id.* at p. 2351, quoting *Oregon v. Ice* (2009) 555 U.S. 160, 168 [127 S.Ct. 856, 166 L.Ed.2d 856].)

B. The California and United States Constitutions Require an Instruction That the Jury May Impose a Sentence of Death Only if Persuaded Beyond a Reasonable Doubt that the Aggravating Factors Outweigh the Mitigating Factors and That Death is the Appropriate Penalty

Appellant acknowledges that this Court has consistently held that the California and United States Constitutions do not require that the jury must be persuaded beyond a reasonable doubt that aggravating factors outweigh mitigating factors and that death is the appropriate penal sanction. (See, e.g., *People v. Whalen* (2013) 56 Cal.4th 1, 90 [death penalty statutes do not require that the jury find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors or that death is the appropriate penalty]; *People v. Fuiava* (2012) 53 Cal.4th 622, 732; *People v. Blair* (2005) 36 Cal.4th 686, 753; *People v. Virgil* (2011) 51 Cal.4th 1210, 1288-1289.) Respondent argues there is no need to revisit these and other similar decisions. (RB 121.)

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [100 S.Ct. 2382, 65 L.Ed.2d 392]; *Monge v. California* (1998) 524 U.S. 721, 732 [118 S.Ct. 2246, 141 L.Ed.2d 615].) Under the Eighth and Fourteenth Amendments to the United States Constitution, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. The burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This standard is required by the due process clauses of the Fifth and Fourteenth Amendments as well as by the Eighth Amendment to the United States Constitution. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the state the burden to prove beyond a reasonable doubt that death is appropriate. The Court's analysis and reasoning to the contrary are unsound and should be reevaluated.

C. The Fifth, Sixth, Eighth, and Fourteenth Amendments Require that the State Bear Some Burden of Persuasion at the Penalty Phase

As demonstrated in appellant's opening brief (AOB 272-276), the trial court in its penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise

disputed factual issues," (see, e.g., *People v. Murtishaw* (2011) 51 Cal.4th 574, 596; *People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (See, e.g., *People v. Gonzales* (2011) 51 Cal.4th 894, 956; *People v. Mendoza* (2007) 42 Cal.4th 686, 707 [jury need not find aggravating factors true beyond a reasonable doubt, and no instruction on burden of proof is required]; *People v. Hayes* (1990) 52 Cal.3d 577, 643.) Respondent asserts that appellant has failed to offer any valid reason why the Court should vary from its past decisions. (RB 122.) Contrary to respondent's urgings, the Court should reconsider its past decisions, because they are constitutionally unsound under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (*Brewer v. Quarterman* (2007) 550 U.S. 286, 293-296 [127 S.Ct. 1706, 167 L.Ed.2d 622]; *Mills v. Maryland* (1988) 486 U.S. 367, 374 [108 S.Ct. 1860, 100 L.Ed.2d 384]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973]; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [96 S.Ct. 2978, 49 L.Ed.2d 944]. Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California* (1990) 494 U.S. 370, 380 [110 S.Ct. 1190, 108 L.Ed.2d 316].) That occurred here,

because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

Respondent and this Court have overlooked that allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "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, 71 L.Ed.2d 1].) When a single, consistent standard of proof is not articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Even if it were not constitutionally necessary to impose on the prosecution such a heightened burden of persuasion as reasonable doubt, some burden of proof must be articulated to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case.

The prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors. This necessarily follows because a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has found at least one special circumstance true. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (*see* Pen. Code §190.3), and may impose such a sentence even if no mitigating evidence was

presented. (See *People v. Duncan* (1991) 53 Cal.3d 995, 979.)

Statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. The failure to inform the jury of how to make these findings and the failure to articulate a proper burden of proof is thus constitutional error in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Capital punishment must be imposed fairly, and with reasonable consistency. (*Eddings v. Oklahoma, supra,* 455 U.S. at p. 112 [102 S.Ct. 869, 71 L.Ed.2d 1].) In California, under the current death penalty statute, capital punishment is not fairly imposed.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277 [113 S.Ct. 2078, 124 L.Ed.2d 182] [reasonable-doubt instructional error not subject to harmless error review].) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof and the jury is not so told. This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of an allegedly nonexistent burden of proof. The failure to give any instruction at all on the subject violates the Fifth, Sixth, Eighth, and Fourteenth Amendments because the instructions given fail to

provide the jury with the guidance required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on the proper burden of proof, or the lack of such a burden, is reversible per se. (*Sullivan v. Louisiana, supra*, 508 U.S. at pp. 275, 281-282.)

D. The Instructions Violated the Sixth, Eighth, and Fourteenth Amendments by Failing to Require Juror Unanimity on Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. (AOB 276-282.) The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. Indeed, as to unadjudicated criminal activity, the trial court instructed the jury that "it is not necessary for all jurors to agree." (4 CT 959; 53 RT 6839.) As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, it is impossible to determine precisely on what factors the jury relied in imposing death. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (*See, e.g.*, *Schad v. Arizona* (1991) 501 U.S. 624, 632-633 [111 S.Ct. 2491, 115 L.Ed.2d 555].)

Respondent contends that unanimous agreement beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances is not required.

(RB 122-123.) In the same vein, respondent argues there is no requirement that a jury unanimously agree as to each instance of unadjudicated criminal activity before considering it. (RB 123.) Appellant acknowledges that this Court has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard. (See, e.g., *People v. Mai* (2013) 57 Cal.4th 986, 1057; *People v. Tully* (2012) 54 Cal.4th 952, 1067; *People v. Eubanks* (2011) 53 Cal.4th 110, 153.)

This Court should reconsider these holdings in light of the high court's recent decision on the need for unanimous jury findings in *Descamps v. United States, supra*, 570 U.S. __ [133 S.Ct.at p. 2288, 186 L.Ed.2d 438]. Likewise, the Court should consider how the quality of jury deliberations are likely affected by inviting jurors to return a verdict without requiring agreement on the supporting facts. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 [110 S.Ct. 1227, 108 L.Ed.2d 369] (conc. opn. of Kennedy, J.)

The failure to require capital juries unanimously to find aggravating factors to be true violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code § 1158a.) Since capital defendants are entitled to more, not less, rigorous protections than

those afforded noncapital defendants (see *Monge v. California, supra,* 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [111 S.Ct. 2680, 115 L.Ed.2d 836]), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F .2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the United States Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

E. The Penalty Jury Should Have Been Instructed on the Presumption of Life

Appellant acknowledges that the Court has held that the California and United States Constitutions do not require that the jury must be instructed on the presumption of life. (See, e.g., *People v. Mai, supra,* 57 Cal.4th at p. 1057; *People v. DeHoyos* (2013) 57 Cal.4th 79, 150; *People v. Roundtree* (2013) 56 Cal.4th 823, 863; *People v. Homick* (2012) 55 Cal.4th 816, 904.) Respondent urges that there is no valid reason why this issue or these decisions should be revisited. (RB

123-124.)

The presumption of innocence is a basic component of a fair trial, a core constitutional and adjudicative value that is essential to protect the accused. (*See Estelle v. Williams* (1976) 425 U.S. 501, 503 [96 S.Ct. 1691, 48 L.Ed.2d 126].) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. However, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (*See* Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing*, 94 Yale L.J. 351 (1984); cf. *Delo v. Lashley* (1983) 507 U.S. 272 [113 S.Ct. 1222, 122 L.Ed.2d 620].)

For the reasons stated elsewhere in other sections of this brief, and in appellant's opening brief (AOB 255-284), California's death penalty law is remarkably deficient in the protections needed to ensure the consistent and reliable imposition of capital punishment. The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., 14th Amendment; Cal. Const. art. I, §§ 7 & 15), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const.. 8th and 14th Amendments; Cal. Const. art. I, § 17), and his right to the equal protection of the laws. (U.S. Const., 14th Amendment; Cal. Const., art. I, § 7.)

F. Conclusion

By reason of the foregoing and of the arguments set forth in appellant's opening brief (AOB 255-284), the trial court violated appellant's federal constitutional rights by failing to articulate the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their California constitutional counterparts. As a consequence, appellant's death sentence must be reversed.

IX

THE USE OF CALJIC NO. 8.88, DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS, VIOLATED APPELLANT'S FUNDAMENTAL RIGHTS TO A FAIR TRIAL, DUE PROCESS, EQUAL PROTECTION, AND A RELIABLE DETERMINATION OF PENALTY GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

As discussed in appellant's opening brief (AOB 285-286), the trial court instructed the jury in the language of CALJIC No. 8.88. As demonstrated in appellant's opening brief, the use of CALJIC No. 8.88 was constitutionally flawed, misleading, and vague. CALJIC No. 8.88 failed adequately to convey critical deliberative principles. Whether considered singly or together, the flaws violated appellant's fundamental rights to due process, fair trial by jury, and a reliable penalty determination guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and require reversal of the sentence. (See AOB 285-298.)

A. The Use CALJIC No. 8.88 Caused the Jury's Penalty Choice to Turn on an Impermissibly Vague and Ambiguous Standard that Failed to Provide Adequate Guidance

By virtue of the language of CALJIC No. 8.88 given in this case, the decision to impose a death sentence on appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life

without parole." (See 1 CT 986; 53 RT 6860.) As discussed in the opening brief (AOB 289-290), the words "so substantial" provided the jurors with no guidance as to what they had to find in order to impose the death penalty. The use of this phrase thus violated the Eighth and Fourteenth Amendments because it created a standard that was too vague, directionless, and impossible to quantify. So varied in meaning and so broad in usage, the phrase could not be understood in the context of deciding between life and death and invited the jury to impose death through the exercise of open-ended discretion previously ruled invalid in *Furman v. Georgia* (1972) 408 U.S. 248, 362 [92 S.Ct. 2726, 33 L.Ed.2d 346]. The use of CALJIC No. 8.88 here permitted the jury in its discretion to create its own capital sentencing rules untethered to a statutory base or constitutional mandate.

Respondent offers (RB 125), and appellant acknowledges, that this claim has been previously rejected by the Court (ordinarily in conclusory terms and without analysis or reasoning). (See, e.g., *People v. Mai* (2013) 57 Cal.4th 986, 1057; *People v. Jones* (2013) 57 Cal.4th 899, 980; *People v. DeHoyos* (2013) 57 Cal.4th 79, 150; *People v. Linton* (2013) 56 Cal.4th 1146, 1211; *People v. Duenas* (2012) 55 Cal.4th 1, 27; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1361; *People v. Foster* (2010) 50 Cal.4th 1301, 1366.) Respondent further asserts that appellant has provided no reason to revisit this holding. (RB 125.) Respondent is incorrect.

Appellant substantively discussed why the Court's reasoning is unsound and why respondent's talismanic invocation of ill- or non-reasoned opinions

should be rejected. (See AOB 286-289.) Indeed, respondent has failed to address appellant's discussion of *Arnold v. State* (1976) 236 Ga. 534 [224 S.E.2d 386] which found that the word "substantial" causes vagueness problems in capital sentencing. Nor did respondent address appellant's discussion of why the Court's attempts to distinguish *Arnold* in such cases as *People v. Foster, supra,* 50 Cal.4th at p. 1366; *People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14; and *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 123, 124, were analytically unsound.

Moreover, respondent has failed to consider or address that the instruction in *Arnold* concerned an aggravating circumstance that used the term "*substantial* history of serious assaultive criminal convictions," while CALJIC No. 8.88, as used in the present case, as the instructions in *Foster* and *Breaux*, used that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. While *Arnold* and the California cases using CALJIC No. 8.88 are factually distinguishable, they all involved penalty-phase instructions that failed to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Arnold v. State, supra,* 224 S.E.2d at p. 391.)

Contrary to *People v. Foster, supra*, 50 Cal.4th 1301; *People v. Page* (2008) 44 Cal.4th 1, 55-56; and *People v. Breaux, supra,* 1 Cal.4th at p. 316, CALJIC No. 8.88 does not compel the jury to find that death is the only appropriate sentence if aggravation is so "substantial" in comparison with the mitigating circumstances. The "substantial" language used in CALJIC No. 8.88,

or words of similar breadth, do not serve to avoid "reducing the penalty decision to a mere mechanical calculation." (*Id.* at p. 370.) Indeed, there is nothing about the language of CALJIC No. 8.88 that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428 [100 S.Ct. 1759, 64 L.Ed.2d 298].) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black* (1992) 503 U.S. 222 [112 S.Ct. 1130, 117 L.Ed.2d 367].) Because the instruction rendered the penalty determination unreliable (U.S. Const., 8th & 14th Amendments), the judgment of death must be reversed.

B. CALJIC No. 8.88 Failed to Inform the Jurors that the Central Determination is Whether the Death Penalty is the Appropriate Punishment, Not Simply an Authorized Penalty

The Court has previously held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown* (1985) 40 Cal.3d 512, 541, *rev'd on other grounds, California v. Brown* (1987) 479 U.S. 538 [107 S.Ct. 837, 93 L.Ed.2d 934] [jurors not required to vote for the death penalty unless, on weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion* (1995) 9 Cal.4th 879, 948; *People v. Milner* (1988) 45 Cal.3d 227, 256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962, cert. den. 535 U.S. 935.)

As discussed in appellant's opening brief (AOB 289-293), CALJIC No. 8.88 did not make this standard of appropriateness clear. By informing jurors that they could return a judgment of death if the aggravating evidence "warrants death instead of life without parole" (1 CT 986; 53 RT 6860), CALJIC No. 8.88 failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Respondent offers (RB 125-126), and appellant acknowledges, that this claim has been previously rejected by the Court. (See, e.g., *People v. Jones, supra*, 57 Cal.4th at p. 980; *People v. DeHoyos, supra*, 57 Cal.4th at p. 150; *People v. Linton, supra*, 56 Cal.4th at p. 1211; *People v. McKinzie, supra*, 54 Cal.4th at p. 1361; *People v. Foster, supra*, 50 Cal.4th 1301, 1367.)

Respondent does not substantively address the issue raised by appellant that "warranted" is far different in meaning and significance than whether death is the "appropriate" penalty. This Court did not seriously consider the distinction or offer substantive discussion in prior decisions. (See, e.g., *People v. Jones, supra*, 57 Cal.4th at p. 980; *People v. DeHoyos, surpa*, 57 Cal.4th at p. 150; *People v. Linton, supra*, 56 Cal.4th at p. 1211; *People v. Foster, supra*, 50 Cal.4th at p. 1367.)

The two determinations -- "warranted" versus "appropriate" -- are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." A verdict that death is "warranted" might mean simply that

the jurors found, on weighing the relevant factors, that such a sentence was permitted. That is far different than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Both respondent and this Court have not considered that to satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307 [110 S.Ct. 1078, 108 L.Ed.2d 255]), the punishment must fit the offender and the offense; i.e., it must be appropriate. To say that death must be warranted is essentially to return to the standards of the phase of the capital trial in which death eligibility is established. Jurors decide whether death is "warranted" by finding, in the first phase of the trial, the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) To say that death may be warranted or authorized is not the same as to say that it is also appropriate. Use of the term "warranted" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

Respondent has failed to address appellant's argument that the instructional error involved in using the term "warrants" in CALJIC No. 8.88 was not cured by the trial court's reference to a "justified and appropriate" penalty. (1 CT 986; 53

RT 6859-6860 ["In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances"].) The trial court's reference to a "justified and appropriate" penalty did not tell the jurors they could only return a death verdict if they found it appropriate. The phrase containing the "justified and appropriate" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence appellant to death if they found it "warrant[ed]." By referring to the "totality" of the circumstances, the instruction also conflicted with other instructions which sought to inform the jury that even in the absence of mitigating circumstances the death penalty would not necessarily be appropriate. (1 CT 986; 53 RT 6859-6860.)

In language and impact, CALJIC No. 8.88 violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining, as required by state law, that death was the appropriate penalty. The death judgment was thus constitutionally unreliable (U.S. Const., 8th & 14th Amends.) and effectively denied appellant due process of law (U.S. Const., 5th & 14th Amends.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175]).

C. CALJIC No. 8.88 Failed to Inform the Jurors that if They Determined that Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Penal Code section 190.3 directs, that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code § 190.3.)[4] This mandatory statutory language, however, was not included in CALJIC No. 8.88 as read to the jury in this case. Previously, this Court has held that this principle was "clearly implicit" in CALJIC No. 8.88. (See, e.g., *People v. Taylor* (2009) 47 Cal.4th 850, 900.) Appellant disagrees.

CALJIC No. 8.88 only addressed directly the imposition of the death penalty and informed the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. (1 CT 986; 53 RT 6860.) While the phrase "so substantial" plainly implied some degree of significance, it did not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms permitted the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if

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4/ The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed the jury regarding its role, and disallowed it. (See *People v. Brown, supra,* 40 Cal.3d at p. 544, fn. 17.)

they were outweighed by mitigating circumstances. By failing to conform to the specific mandate of Penal Code section 190.3, the instruction given to appellant's jury violated the Fourteenth Amendment to the United States Constitution. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

Finally, CALJIC No. 8.88 improperly reduced the prosecution's burden of proof below that required by Penal Code section 190.3. An instructional error that misdescribes the burden of proof, and which thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281 [113 S.Ct. 2078, 124 L.Ed.2d 182] (italics in original).) Appellant acknowledges, that this claim has been previously rejected by this Court. (See, e.g., *People v. Jones, supra*, 57 Cal.4th at p. 980; *People v. Lopez* (2013) 56 Cal.4th 1028, 1083-1084; *People v. Whalen* (2013) 56 Cal.4th 1, 89; *People v. McKinzie, supra*, 54 Cal.4th at pp. 1361-1362.)

D. Conclusion

For the above reasons, and for those previously discussed and analyzed in appellant's opening brief (AOB 285-298), the trial court's main sentencing instruction, CALJIC No. 8.88, was impermissibly vague in crucial respects; denied appellant fundamental rights to a fair penalty trial by jury; failed to comply with the requirements of the due process and equal protection; and failed to assure a reliable determination of penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

X

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW, WHICH IS BINDING ON THIS COURT, AS WELL AS THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

This Court has the authority and obligation to consider possible violations of international law, even where the conduct complained of is not currently a violation of domestic law. Most particularly, this Court should enforce international law where that law provides more protections for individuals than does domestic law.

The United States Supreme Court has looked to the laws of other countries and to international authorities as instructive for its interpretations of the Eighth Amendment's prohibition of cruel and unusual punishments and in determining whether a punishment is cruel and unusual. (*Roper v. Simmons* (2005) 543 U.S. 551, 567, 575-577 [125 S.Ct. 1183, 161 L.Ed.2d 1].)

The United States Constitution and high court jurisprudence recognize that international law is part of the law of this land, and that international treaties have supremacy in this country. (U.S. Const., art. VI, § 2.) Customary international law, or the "law of nations," is equated with federal common law. (Restatement Third of the Foreign Relations Law of the United States (1987), pp. 145, 1058; U.S. Const., art. I, § 8 [Congress has authority to define offenses against the law of nations].) More specifically, the imposition and execution of a capital case in California violates the International Covenant on Civil and Political Rights

(ICCPR), due to the conditions of incarceration, excessive delays between sentencing and appointment of appellate and state and federal habeas counsel, and excessive delays between sentencing and execution, under Articles 6 and 7; deprivation of liberty in violation of established procedures, under Article 9; denial of fair trial rights, under Article 14; and denial of equal protection of the law, under Article 26.

Appellant acknowledges that the Court has previously declined to consider the applicability of international treaties and laws in a capital appeal (see, e.g., *People v. Wallace* (2008) 44 Cal.4th 1032, 1098; *People v. Mungia* (2008) 44 Cal.4th 1101, 1142 [no violation of ICCPR when death sentence is imposed in accordance with law]), and has previously rejected arguments that the use of the death penalty violates international law, evolving international norms, and the Eighth and Fourteenth Amendments to the United States Constitution. (See, e.g., *People v. Mai* (2013) 57 Cal.4th 986, 1058; *People v. Houston* (2012) 54 Cal.4th 1186, 1232; *People v. Jones* (2013) 57 Cal.4th 899, 981; *People v. Edwards* (2013) 57 Cal.4th 658, 768 [rejecting argument that death sentence violates international law and therefore defendant's rights under the Eighth and Fourteenth Amendments to the federal Constitution; no authority prohibits a sentence of death rendered in accordance with state and federal constitutional and statutory requirements]; *People v. Maciel* (2013) 57 Cal.4th 482, 553-554 [same]; *People v. Brasure* (2008) 42 Cal.4th 1037, 1072 [rejecting argument that the International Covenant on Civil and Political Rights (ICCPR), ratified by the United States in

1992, was incorporated into Eighth Amendment].) Nor has the Court been persuaded otherwise by *Roper v. Simmons, supra*, in which the high court cited evolving international standards as "respected and significant'" support for its holding that the Eighth Amendment prohibits imposition of the death penalty against persons who committed their crimes as juveniles. (*Roper v. Simmons, supra*, 543 U.S. at p. 578.)

Nonetheless, to preserve the issue for further or collateral review, and for the reasons discussed in the opening brief (AOB 299-303), the Court's analysis and reasoning rejecting all considerations of international law in determining the constitutionality of the death penalty in California are unsound and should be reevaluated. The Court should reconsider its position on this issue and, accordingly, reverse the judgment of death imposed on appellant in this case as incompatible with current and evolving standards of international law as applied to or as binding on the laws of the United States and those of the several states, including California, and as contrary to the Eighth and Fourteenth Amendments to the United States Constitution.

XI

THE CUMULATIVE EFFECT OF ERRORS UNDERMINED THE FUNDAMENTAL FAIRNESS OF TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The cumulative error analysis allows a reviewing court to find that several errors, even though they are individually harmless, can have a cumulative effect which can result in prejudice against the defendant. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487-488 [98 S.Ct. 1930, 56 L.Ed.2d 468]; see also *United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1282 ["Although individual errors looked at separately may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial as to require reversal"].)

As discussed in appellant's opening brief (AOB 304-308), even if no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 893-895 [reversing conviction where multiple constitutional errors hindered defendant's efforts to challenge every important element of proof offered by prosecution]; see also *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [94 S.Ct. 1868, 40 L.Ed.2d 431] [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of

due process"].) Multiple errors do not obviate the need to find prejudice; rather, they obviate the need to find prejudice from any one error. (See *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.)

Respondent urges that there is no cumulative error, asserting that the trial court did not commit any error. (RB 128.) Respondent further argues that even assuming that cumulative or multiple errors occurred, appellant has failed to explain how, under the circumstances of this case, such errors, though individually harmless, are collectively prejudicial. (RB 128.)

Respondent overlooks that the cumulative error analysis may also be used when there are several errors made by counsel. (*Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1434.) In *Harris*, the defendant sought a writ of habeas corpus after his conviction for first degree murder and death sentence were affirmed on appeal. The district court granted relief on the ground of ineffective assistance of counsel, and the state appealed. On appeal, the court discussed eight undisputed instances of defense counsel's deficient performance and three instances of alleged deficient conduct that the state disputed. (*Id.* at p. 1435.) Among the undisputed deficiencies in the performance of defense counsel were the failure to conduct proper voir dire of jurors; failure to object to certain items of evidence; failure to object to certain jury instructions; and failure to preserve meritorious issues for

appeal. (*Id.* at pp. 1435-1436). Given the nature and gravity of defense counsel's deficiencies, the United States Court of Appeals for the Ninth Circuit determined that the proceeding was "fundamentally unfair." (*Id.* at p. 1438.) By making a finding of cumulative prejudice, the court "obviate[ed] the need to analyze the individual prejudicial effect of each deficiency." However, the court did not "rule out that some of the deficiencies were individually prejudicial." (*Id.* at p. 1439.)

Respondent also overlooks that the death judgment imposed in this case must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase]; *People v. Brown, supra,* 46 Cal.3d at p. 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase]; see also *Taylor v. Kentucky* (1978) 436 U.S. 478, 487-488 [98 S.Ct. 1930, 56 L.Ed.2d 468] [reviewing court is obliged to consider cumulative effect of multiple errors on sentencing outcome].)

The fundamental question in determining whether the combined effect of trial errors violated a defendant's due process rights is whether the errors rendered the criminal defense "far less persuasive," (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294 [93 S.Ct. 1038, 35 L.Ed.2d 297]) and thereby had a "substantial and injurious effect or influence" on the jury's verdict. (*Parle v. Runnels* (9th Cir.

2007) 505 F.3d 922, 927.)

In the present case, there was more than one error to cumulate. Guilt phase errors included the trial court's error in denying appellant's motion for a change of venue (Argument I); the trial judge's conflict of interest involving his close personal and professional relationship with the prosecutor, and the consequent appearance of bias and actual bias, that required the trial judge to disqualify himself (Argument II); insufficiency of the evidence to support appellant's conviction of carjacking and to support first-degree felony murder predicated on the commission or attempted commission of a carjacking (Argument III); and insufficiency of the evidence to support the special circumstance of carjacking-murder (Argument IV).

The errors committed at the penalty phase of appellant's trial included the trial court's error in failing to instruct the jury on the appropriate use of victim impact evidence (Argument V); the trial court's error in permitting the state to relitigate appellant's prior manslaughter conviction and elevate the previously adjudicated crime to murder in violation of the principles of collateral estoppel and res judicata, the constitutional proscription against double jeopardy, and appellant's rights to due process, fair trial, and a reliable penalty determination (Argument VI); the trial court's erroneous instructions on the mitigating and aggravating factors in Penal Code section 190.3 and the unconstitutional application of these sentencing factors at appellant's penalty trial (Argument VII); the constitutionality of Penal Code section 190.3 and implementing jury

instructions owing to the failure to set out the appropriate burden of proof, as well as other constitutional infirmities (Argument VIII); the use of CALJIC No. 8.88 defining the scope of the jury's sentencing discretion and the nature of its deliberative process additionally contain other constitutional defects (Argument IX); and the fact that appellant's death sentence violates international law (Argument X).

The prejudice flowing from these errors separately has been previously discussed by appellant in the opening brief. (See, for example, AOB 109-118 [prejudice from denial of change of venue]; AOB 134-138 [prejudice flowing from trial judge's lack of impartiality]; AOB 180-182 [prejudicial impact of instructional error as to victim impact evidence]; AOB 217-224 [prejudice caused by retrial of appellant's VonSeggern manslaughter conviction]; AOB 228-240 [prejudice from erroneous instructions on mitigating and aggravating evidence]; AOB 243-244 [prejudice from failing to require unanimous jury finding on unadjudicated acts of violence].)

Contrary to respondent's assertions (RB 128-129), therefore, the combined impact of the statutory and constitutional errors in this case requires reversal of appellant's convictions and death sentence. The cumulative effect of these errors infected appellant's trial, had a substantial and injurious effect or influence on the jury's verdict, and resulted in a conviction fundamentally and inherently unfair, a denial of due process, and a constitutionally unreliable judgment of death. (U.S. Const., 5th, 6th, 8th & 14th Amendments; Cal. Const. art. I, §§ 7 & 15.) Reversal

of appellant's death judgment is compelled precisely because it cannot be shown that the various penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399 [107 S.Ct. 1821, 95 L.Ed.2d 347]; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8 [106 S.Ct. 1669, 90 L.Ed.2d 1]; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341 [105 S.Ct. 2633, 86 L.Ed.2d 231].)

CONCLUSION

By reason of the foregoing, and the arguments and assignments of error raised in appellant's opening brief, appellant Jerrold E. Johnson respectfully requests that the judgment of conviction on all counts, the special circumstances, and the sentence of death in this case be reversed.

DATED: August 22, 2014.

Respectfully submitted,

WILLIAM D. FARBER
Attorney at Law

Attorney for Appellant Johnson

CERTIFICATE OF COMPLIANCE

I certify that the attached Appellant's Opening Brief uses a 13-point Times New Roman font and contains 31,629 words.

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

DATED: August 22, 2014.

WILLIAM D. FARBER

PROOF OF SERVICE

RE: **PEOPLE v. JOHNSON**
Supreme Court No. S093235

I, WILLIAM D. FARBER, declare under penalty of perjury under the laws of the State of California that I am counsel of record for defendant and appellant **Jerrold E. Johnson** in this case, and further that my business address is William D. Farber, Attorney at Law, 369-B Third Street # 164, San Rafael, CA 94901. On August 22, 2014, I served **APPELLANT'S REPLY BRIEF**, by depositing each copy in a sealed envelope with postage thereon fully prepaid, in the United States Postal Service, at Henderson, NV, addressed respectively as follows:

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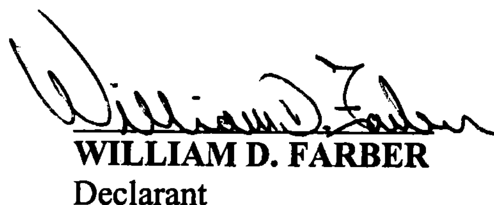

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