IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	CAPITAL CASE
Plaintiff/Respondent,	
v.	Crim. S029011
MORRIS SOLOMON, JR.,	(Sacramento Co. No. 84641)
Defendant/Appellant.	

Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Sacramento

HONORABLE MICHAEL J. VIRGA AND PETER N. MERING, JUDGES

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

Penalty Phase Arguments

TABLE OF AUTHORITIES

Cases: **Page**

United States Constitutional Provisions:

Federal Statutes, Rules, and Related Materials:

California Constitutional Provisions:

Article I:

California Statutory Provisions and related materials:

California Rules of Court:

CALJIC No.:

Other State Statutory Provisions:

International Law Materials

Law Review, Treatises, Miscellaneous:

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APPELLANT'S OPENING BRIEF

INTRODUCTION

Morris Solomon stands convicted of murdering six prostitutes and assaulting two others in barely more than a year's time (1986-1987). The women who were killed were found in or buried behind houses in which Mr. Solomon had worked or lived in Sacramento.

It would be a serious mistake to assume that the issue of guilt was open and shut. Reflecting the deficiencies in the prosecution's case, the jurors struggled for more than 10 full days before arriving at their verdicts.

Despite that struggle, moreover, the verdicts they returned cannot stand. Most critically, the four first-degree murder convictions – the ones that made Mr. Solomon eligible for the death penalty – were not even arguably supported by sufficient evidence. The minimal evidence the jury received that was relevant to premeditation and deliberation pointed unequivocally to the killings as spontaneous eruptions by a damaged human being.

It would be an equally serious mistake to assume – given the multiple murders and assaults in 1986-1987, and the other assaults against women from 1969-1976 that the jury heard about in the penalty phase – that it was a foregone conclusion that a jury would find that the more appropriate penalty in this case was death.

The first jury was so torn between life and death, it could not agree on a penalty. A mistrial had to be declared.

The second jury reached a decision, but only because – as will be seen – the selection procedures used were unconstitutionally skewed to produce a jury "uncommonly willing to condemn a man to die". Even with that built-in bias, the second jury still took three and a half days of deliberations to return a verdict of death.

The indecision of the two juries is not a mystery. The heartbreaking foundation on which all else in this case rests is, as the prosecutor himself

described it: the "tragic [and] … traumatic childhood" that Mr. Solomon endured.

Nothing in this case will make sense unless, from the outset, the Court understands how Mr. Solomon came to be the 42-year old man he was in 1986. With the Court's indulgence, therefore, this brief – before launching into the five hundred pages of record-summary and legal analysis that will follow – will take five pages to establish the context that will make the events of 1986-1987 more comprehensible.

Morris Solomon was born in rural Georgia in 1944.[1] His mother was 16 when he was born. He was her second child. She essentially abandoned both of them when Morris was a year old. For the next 12 years, Morris and his brother were raised by their grandmother, Bertha, a "vicious and evil" woman who, according to relatives who witnessed it, beat and humiliated Morris every day of his young life – beat and humiliated him for such crimes as "messing himself" when he was a year old, stammering when he tried to talk, taking too long to learn to walk, and being too skinny. She beat all of the children but especially resented having to take care of Morris because he was the baby. She would lay him over her lap and hit him and hit him until he had no cries left in him and he

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[1] The facts stated in abbreviated form in this Introduction are stated in more detail, and with full citation to the record, in the Statement of Facts.

would be still.[2] When he was older, Bertha would stand him, shaking and naked, in front of the other children, all of them crying hysterically, and beat him with an electrical cord all over his body, including his penis. Sometimes she would tie him to the bed so he wouldn't move.

Morris's cousins – who were also beaten but were rescued from that hellish household after a few years -- never once saw Bertha give Morris a single second of anything resembling love or affection.[3]

Prominent child-abuse and trauma experts described the abuse Morris suffered as extreme, "brutally traumatic", sexually sadistic, and torturous. Given that it occurred in the critical, formative years of his life, they said, the abuse inevitably led to psychopathology – an abnormal adaptation to a very sick and abusive environment -- leaving him with a serious mental disorder involving feelings of worthlessness, rage, and loss, accompanied by the common defense mechanisms of repression and disassociation.

At age 13, Morris moved cross country into a shack in the poorest part of Isleton, a town in the San Joaquin Delta. It was where his mother

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[2] The abuse was described by other family members, not Mr. Solomon. Like many severely abused individuals, Mr. Solomon has refused to discuss it.

[3] Until Morris' investigator found them – more than 40 years after the fact – neither cousin had ever told anyone about the abuse they'd suffered. After taking the investigator into her confidence, one cousin's hair turned totally gray. (RT 24908.)

lived and plied her trade as a prostitute. She was very hard on him, aggressive and verbally abusive. Bertha moved in with them eventually, too. It was a family, one witness said, in which there was no love, no caring, and no money.

In those Isleton years, aside from inappropriate comments to girls, Morris was able to keep his damaged self from causing harm. Miraculously, the 12 years of abuse and humiliation in Georgia and the loveless home in Isleton did not completely extinguish Morris's gift for life. One of three black students in a white high school, he played saxophone in the school bands, got decent grades, was a class clown. While he tried too hard to get people to like him, and was teased and excluded as a result, he did not retaliate. At the same time, though "tiny", he was protective of his older brother, who was taunted for being slow. The Solomons were known as the "weirdo" family and were to be avoided, but classmates who got to know Morris said he was not aggressive in the least and cried with disbelief when, 25 years later, he was charged in this case.

After high school, Morris had a series of skilled jobs while attending junior college. He was an excellent employee and eventually became a driver and mechanic for a local bus company. He didn't drink or use drugs. His one failure was with women. He showered them with excessive affection and gifts and they always ended up rejecting him.

Witnesses who knew him in this period described him as kind and lovable. Then, in 1966, he was drafted and went to Vietnam.

As related by his commanding officer, Morris was the most reliable man in his platoon. And courageous. On at least two occasions – when nearly everyone else took cover – he risked his own life to save those of his commander and four other soldiers.

Morris's tour of duty seriously exacerbated his psychopathology, however. First, witnesses described the incredibly stressful, life-threatening combat conditions that his platoon endured virtually every day for a full year. The world's leading expert on Vietnam and post-traumatic stress testified that Morris's early childhood trauma made him particularly vulnerable to the psychic toll exacted by the combat stressors that he experienced.

Second, aggression, violence, killing, even sadism, became permissible, if not routine, when directed against the perceived enemy. Morris committed his share of such acts, including sadistic ones.

Finally, young prostitutes were available to soldiers in Vietnam every day and everywhere, including combat zones, at bargain basement rates and with the blessing of the Army. The soldiers, including Morris, commonly viewed and treated the young women as sub-human and permissible objects of exploitation and debasement.

When Morris came home, witnesses said, he was markedly different. He was embittered, angry, unreliable, and fiscally irresponsible. He began selling drugs and managing prostitutes. In 1969, he slashed a prostitute. His psychopathology had begun to surface. From 1971 to 1977 he assaulted four other women he thought were prostitutes. The pattern of these assaults mirrored the humiliation and sexual sadism that he had experienced as a child.

Between 1973 and 1985, he spent most of his time in state prison. In that setting, his supervisors testified, he once again was a model citizen: hardworking, reliable, and law-abiding.

In 1985, Morris moved to Sacramento, which was in the midst of a crack cocaine and prostitution-related epidemic. At first, he seemed to flourish. He went to work full-time renovating houses, saved money to buy his own, and became a nurturing friend to prostitutes in his neighborhood. A slew of them – even though they believed that Morris had killed a number of their colleagues -- testified to his generosity, friendship, and caring.

Then, at the age of 42, he fell in love with one of the women he'd befriended and she persuaded him to start using crack. Cocaine induces paranoia, stimulates fantasies of power, reduces self-control, and is conducive to acting out. In Morris' case, experts testified, the combination was lethal: the paranoia made it more likely he would perceive an intent to

humiliate in something a person – particularly a woman – did or said; such a perception was bound to arouse his latent rage; and the increase in grandiosity coupled with the loss of control foretold his acting out that rage in the manner dictated by his psychopathology. Over the next year, six prostitutes – not any he'd befriended -- disappeared and were eventually found in or buried in the backyards of houses in which Morris had lived or worked.

As described by the internationally renowned trauma expert, Dr. John P. Wilson: Without understanding what was happening or how to control it, Morris was completing the cycle. Psychologically murdered as a child, consumed by a rage no one taught him what to do with, his remaining layer of protection peeled off by cocaine, he finally plunged into the abyss, enacting and reenacting the crime from which he had never recovered.

* * * *

Standing before this Court, then, is a man who: was subjected to unspeakable acts from the time he was an innocent baby until well into adolescence; despite the brutal trauma retained the capacity to nurture others, show courage, save lives, build houses, and live productively and problem-free in structured settings; yet in the end, overwhelmed by the combined effects of his childhood degradation, Vietnam transformation, and late descent into addiction, could no longer hold back the rage that delusionally demanded retribution from innocent women.

As will be argued in the remainder of this brief, neither the first-degree murder verdicts nor the sentence of death reflect – in a manner that is constitutional, proportional, and/or morally defensible – the complex reality of Morris Solomon or his true culpability for the sad crimes charged in this case.

STATEMENT OF THE CASE

Appellant Morris Solomon, Jr. was arrested on April 22, 1987. (16 CT 4690.) On April 27, 1987, a complaint was filed in the Sacramento County Municipal Court charging him with six counts of murder. (1 ACT 4.1.)[4] On the same date, Mr. Solomon was arraigned and the Sacramento County Public Defender was appointed to represent him. (ART 1-6.)[5]

An amended complaint, filed on December 8, 1987, charged Mr. Solomon with a total of 20 felonies. (12 CT 3472-3482.) On February 1, 1988, he pled not guilty on all counts. (ART 41.)

The preliminary hearing took place from February 9, 1988, to June 10, 1988, before the Honorable Jack Sapunor. (CT 1-3456.) On the latter date, Mr. Solomon was held to answer on 19 of the 20 counts.[6]

On June 23, 1988, an information filed in the Sacramento County Superior Court charged Mr. Solomon with 22 felonies, two prior

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[4] "ACT" refers to the 31-volume Augmented Clerk's Transcript. [There are also two other sets of Augmented Clerk's Transcript: a 9-volume set containing the exhibits submitted in connection with appellant's change-of-venue motions -- "ACT-VenExhs" and a 4-volume set containing the trial exhibits - "ACT-TrExhs".]

[5] "ART" refers to the 1-volume Augmented Reporter's Transcript that contains the transcripts of all proceedings that occurred in this case prior to the preliminary hearing.

[6] One count of rape against Sherry Hall was dismissed for insufficient evidence. (12 CT 3484.)

convictions, and the special circumstance of multiple murder. (13 CT 3457-3471.)

On December 22, 1988 (and reaffirmed on January 6, 1989), Judge Rodney Davis dismissed three counts for insufficient evidence pursuant to Penal Code section 995. (2 RT 25-28; 12 CT 3494 - 13 CT 3614, 3696, 3699.)[7] On February 26, 1991, the eventual trial judge, the Honorable Michael Virga, ordered that five additional counts be severed pursuant to Penal Code section 954. (2 RT 6053-6054; 13 CT 3853-3900; 17 CT 4856.)[8]

On March 15, 1991, an amended information was filed that eliminated the dismissed and severed counts and renumbered the rest. The amended 14-count information alleged that in 1986 and 1987, Mr. Solomon committed 7 murders, 1 attempted murder, and 6 sexual offenses, all in Sacramento County (17 CT 4919-4928), as follows:

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[7] The dismissed counts were: count 7, alleging assault with intent to commit rape against Lazill Rowan; and counts 13 and 15, alleging the attempted murders of Sherry Hall and Rosella Fuller. (12 CT 3461, 3464-3465.) Appellant unsuccessfully sought to have this Court or the Court of Appeal reverse the superior court's decision not to dismiss the remaining counts. (See 13 CT 3700-3727.)

[8] The severed counts were: count 8, alleging the attempted kidnap of Lazill Rowan, and counts 19-22, alleging the assault, kidnap, forcible oral copulation, and rape of Angeligne Salvo. A separate information was filed on March 5, 1991 containing the severed counts. (17 CT 4914-4918.) After the return of the death verdict, that information was dismissed upon motion of the People in the interests of justice. (22 CT 6501.)

Count	Pen.C §	Offense	Victim	Date
1	187	Murder	Linda Vitela	betw. 1-4 & 2-14-86
2	187	Murder	Sheila Jacox	3-86
3	288a(c)	Oral copulation[9]	Melissa Hamilton	1986
4	261(2)	Rape	Melissa Hamilton	1986
5	286(c)	Sodomy	Melissa Hamilton	1986
6	288a(c)	Oral copulation	Melissa Hamilton	1986
7	187	Murder	Yolanda Johnson	betw. 6-15 & 6-18-86
8	187	Murder	Angela Polidore	betw. 7-16 & 7-20-86
9	187	Murder	Maria Apodaca	Aug. or Sept. 1986
10	187	Murder	Sharon Massey	betw. 9-12 & 9-30-86
11	261(2)	Rape[10]	Sherry Hall	betw. 10-15 & 11-5-86
12	187	Murder	Cherie Washington	betw. 2-6 & 2-28-87
13	664/187	Att. Murder	Latonya Cooper	betw. 1-1 & 3-31-87

[9] Counts 3-6 alleged that a deadly weapon, to wit, a knife, was used in the commission of the offenses. (Pen. Code sec. 12022.3(a); 17 CT 4920.1-4922.)

[10] Count 11 alleged that a deadly weapon, to wit, a shoelace, was used in the commission of the offense. (Pen. Code sec. 12022.3(a); 17 CT 4925.)

14	220	Assault w/intent to commit rape, sodomy & oral copulation[11]	Latonya Cooper	betw. 1-1 & 3-31-87

It was further alleged that Mr. Solomon had suffered two prior felony convictions for assault with intent to commit rape (Pen. Code sec. 220): in Alameda County on July 1, 1971, and in Sacramento County on April 18, 1977. (17 CT 4927.) Finally, the special circumstance of multiple-murder was alleged, based on all seven murder allegations. (17 CT 4927; Pen. Code sec. 190.2(a)(3).)

Due to the extensive publicity this case received in the Sacramento media, Mr. Solomon moved, on September 11, 1989, for a change of venue. (13 CT 3759-3843.) Nineteen months later, after preliminary voir dire and five days of hearings, the motion was denied. (18 CT 5129, 5132-5137.)[12] The motion was renewed at the end of the voir dire and, on May 23, 1991, was denied again. (18 CT 5196.)

A jury was sworn that same day. (18 CT 5195.) The People presented evidence from May 29 to July 23, 1991. The defense called no

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[11] Counts 13 and 14 alleged that a deadly weapon, to wit, a shoelace, was used in the commission of the offenses. (Pen. Code sec. 12022.3(a); 17 CT 4926.)

[12] Much of the delay was attributable to the fact that appellant's counsel, Public Defender Kenneth Wells, suffered an untimely death in the fall of 1989. (See 13 CT 3844-3845.) His successors, Supervising Assistant Public Defender Peter Vlautin and *Keenan* counsel Constance Gutowsky, essentially had to start all over again.

witnesses. (18 CT 5206, 5266.) Two jurors had to be discharged during this phase. (18 CT 5245-5246, 5248, 5250-5251.)

The jurors deliberated for ten minutes on August 4, for full days on August 5, 6, and 7, and until 2:45 p.m. on August 8th. They then took six days off. They began again on August 14 and deliberated full days on the 14th, 15th, and 16th. They then took ten days off. They began again on August 26th, and deliberated all day on the 26th, 27th, and 28th. (19 CT 5475-5476, 5481-5488, 5492, 5494.)

At 4:00 p.m. on August 28th, the jury apprised the court it had reached a verdict on all but three counts. (19 CT 5496.) The next morning, after ascertaining that the jury was hopelessly deadlocked 8-4 on count 8 (murder of Angela Polidore), and 8-4 and 5-7 on counts 13 and 14 (attempted murder of and sexual assault on Latonya Cooper), the court declared a mistrial on those counts and received the verdicts on the remaining counts. (19 CT 5527; 37 RT 16590-93.)

As to the remaining counts, the jury found Mr. Solomon: not guilty of first-degree murder and guilty of second-degree murder on both count 1 (Linda Vitela) and count 12 (Cherie Washington); guilty of first degree murder on counts 2 (Sheila Jacox), 7 (Yolanda Johnson), 9 (Maria Apodaca), and 10 (Sharon Massey); and guilty of the sexual offenses as charged in counts 3-6 (Melissa Hamilton) and 11 (Sherry Hall). The jury

also found the multiple-murder special-circumstance allegation to be true. (19 CT 5527-5530.)

At a court trial, Judge Virga found true the allegation that appellant had previously been convicted of felonies in 1971 and 1977. (37 RT 16710-11; 19 CT 5650.)

The first penalty phase took place from September 17-23, 1991. (19 CT 5655-5659.) The jurors deliberated briefly on September 25, all day on September 26 and 27, and until 3:30 on September 30, when they announced they were deadlocked. After ascertaining that the split was 10-2 and (after additional discussion) that none of the jurors felt that further deliberations would be fruitful, the court declared a mistrial. (20 CT 5777-5778; 40 RT 17366-17376.)

Appellant's motion for new trial (20 CT 5798-5824) was denied on November 27, 1991. (20 CT 5833.) His renewed motion for change of venue (20 CT 5834-5856) was denied on January 9, 1992 (20 CT 5869).

Judge Peter Mering was assigned to preside over the second penalty trial. The defense motion to have the court's bailiff removed for exhibiting pro-prosecution bias in the presence of the future jurors was denied. (21 CT 6178.)

The jury selection process was completed on April 27, 1992, and the jury sworn on May 4. (21 CT 6205; RT 21550.) The People presented evidence from May 5 to June 4, 1992, essentially calling the same

witnesses it had called in the guilt and penalty phases of the first trial. The defense case was presented from June 8 to June 17. Most but not all of the defense witnesses had testified in the first penalty phase. (21 CT 6209, 6233, 6234, 6240.)

The jury deliberated briefly on June 29, all day on June 30 and July 1, and half a day on July 2. The jury then took three and a half days off. It reconvened on July 6 and deliberated all that day. (22 CT 6349, 6352, 6354-55.)

In the midst of deliberations, a witness came forward and testified that the jury foreperson -- who had indicated on her jury questionnaire that she was anti-drugs -- had purchased and consumed methamphetamine the night before and had been a methamphetamine user for at least 15 years. The defense motion to have the foreperson discharged was denied. (22 CT 6359; 68 RT 26664-26702.)

On July 6, 1992, at 4:25 p.m., the jury returned its verdict of death. (22 CT 6359.)

On September 15, 1992, the court rejected most of appellant's motion for new trial (22 CT 6377-6400, 6416-6421, 6429-6431), denied his motion to strike the special circumstance (22 CT 6401-6415), and denied the automatic motion for modification (22 CT 6363-6376). (22 CT 6436.) On September 16, the court rejected the remaining portion of the motion for new trial. (22 CT 6501.)

Sentence was pronounced the same day. Based on the four counts of first-degree murder (counts 2, 7, 9, and 10) and the two counts of second-degree murder (counts 1 and 12) of which appellant had been convicted, the court imposed the sentence of death. (68 RT 26771, 26677.)[13]

Appellant was also sentenced to consecutive terms of 15 years to life on the two second-degree murder convictions (counts 1 and 12) on which the death sentence was based, and was further sentenced to a total of 40 years (five consecutive upper terms of eight years) for the sexual offenses of which he was convicted (counts 3-6 and 11). Enhancements totaling 25 years (five consecutive three-year terms for use of a dangerous weapon in counts 3-6 and 11, plus two consecutive five-year terms for the prior convictions) were added to the sentence. (22 CT 6501.)

In sum, appellant was sentenced to death, to an indeterminate term of 30 years to life, and to a determinate term of 65 years. (68 RT 26777-26782.)

This appeal is automatic. (Pen. Code § 1239(b).)

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[13] The court minutes differ, averring that the sentence of death was based only on the first-degree murder convictions. (22 CT 6501.)

STATEMENT OF FACTS

I.

GUILT PHASE

A. Background Facts

Appellant Morris Solomon was born in Georgia, 43 years before his arrest in this case. (ACT 9008, 9031.) Beginning in high school, he lived in Isleton, California, a small Delta town down the river from Sacramento. He attended San Joaquin Delta Junior College in Stockton for several years, where he played piano, saxophone, trumpet, clarinet, and drums, and majored in music. From there he went into the military and served one tour of duty in Vietnam. (ACT 8982, 9031-32.)[14]

After three marriages and periods in Sacramento, Flagstaff, and San Antonio, among others, where he renovated houses and did construction work, Mr. Solomon returned to Sacramento in October of 1985. (ACT 8994-9001.)

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[14] The facts drawn from the Augmented Clerk's Transcript [ACT] are taken from transcriptions of tape-recorded police interviews with Mr. Solomon. The tapes were introduced into evidence by the prosecution and transcripts were provided to the jury to read while the tapes played. (See RT 11797-11801, Exhs. 398, 398-A, ACT 8821-56; RT 13448-13451, Exhs. 331, 480, ACT 8868-84; RT 15602-06, Exhs. 542, 542-A, ACT 8916-64; RT 15615-17, Exhs. 543, 543-A, ACT 8965-80; RT 15760-61, Exhs. 545, 545-A, ACT 8981-89; RT 15765-66, Exhs. 546-A, 546-B, 546-C, ACT 8990-9079.)

In November, 1985, Mr. Solomon was hired to remodel a fire-damaged house at 4327 Broadway. (RT 14143.) Paul Venditti was the supervisor of the restoration work. Appellant worked for him as his carpenter superintendent and worked on every phase of the project, installing, among other things, an entirely new roof, and rebuilding the walls, floors, the outside siding, and front porch. (RT 14754-55, 14758-59.) Appellant worked from 8 a.m. to 7 p.m. or longer and did good work. (RT 14144, 14781.)

Appellant started off living in his camper on the side of the Broadway house, but early on was given permission by the owner, Charles Lueras, to move into the house itself. He remained there until late June or early July, 1986. (RT 14148, 14150, 14762; ACT 8991, 9005. See RT 11185, 26600.)

Appellant befriended many of the prostitutes in the neighborhood. A number of them testified. He would feed them, give them money when they needed it, and give them a place to sleep. (RT 12893.) Appellant estimated that, during his eight-month Broadway residency, some 15 to 17 women availed themselves of his hospitality. (ACT 8992.)

Lachelle Whitfield (hereafter referred to as "Snoopy") made clear that appellant was not exploiting the women. She said he "wouldn't know the first thing about" being a pimp. The fact that there were prostitutes at his house didn't mean they were working for him. They were there

"because Morris was a pushover.... If you tell Morris that you needed a place to stay, he will let you stay there." (RT 12892.)

Snoopy, Edys Whiteside, and Pam Suggs testified that Morris Solomon was "somebody [they] could truly call a friend". (RT 13035.) He was Ms. Sugg's "very, very good friend" (RT 11467), Snoopy's "best friend" (RT 12899), and Ms. Whiteside's "very good friend" (RT 12980). He was "friendly, ... kind [and] ... generous. If he could do something for you, he would" and it made you want to do things for him. (RT 12980.) He would pick Snoopy up and make her go do something just to keep her from turning tricks, and would drop money off at her uncle's because he didn't want to see her broke. (RT 12900-01.) When Edys Whiteside got too strung out, Mr. Solomon would "watch her children, take them places, give them money." He was her "safe spot" and "didn't hold no grudges". (RT 13035.)

Mr. Solomon had sexual relations with the three women on many occasions, usually for money -- which they needed -- but not always. (RT 11529, 12783, 12804, 12974.) Both Snoopy and Pam Suggs said that on none of those occasions did appellant ever abuse them or make them do anything against their will. (RT 11529, 12904-05.) To the contrary, Ms. Suggs said, Mr. Solomon treated her "like a charm." Ms. Whiteside told detectives that Mr. Solomon had once grabbed her by the shoulders and called her a "whore," but she told the jury that she knew "in her heart that

he never tried to hurt her." (RT 13022.) Appellant told Detective Pane that he hung out with prostitutes because they were better people. They were real, not game players. (ACT 9025.)

Throughout the Broadway residency, witnesses said, appellant -- who had ulcers (ACT 9020) -- was working "all the time, all over, working real hard" either roofing or "laying carpet or painting or hammering." (RT 11551-11552, 12902.) At the beginning furthermore, he did not use drugs even though everyone around him did. Edys Whiteside said he "wasn't the type." (RT 12978.) He even told Snoopy she was "stupid" for doing so. (RT 12797.)

Then Mr. Solomon fell in love with Rose Fuller. Snoopy, Ms. Suggs, Ms. Whiteside, and even Ms. Fuller herself blamed Fuller for ruining appellant's life. "He had ... a future," Ms. Whiteside said, and Fuller "messed it all up." (RT 13033.) She moved into the Broadway house, along with her $200 a day cocaine habit (RT 14468) and she turned appellant onto it in a big way (RT 12796, 12870, 12987). He had never used drugs before, even in Vietnam. (ACT 9008, 9032.) By the end, he was spending $300-$400 per day for cocaine for the two of them. For the first time in his life, he did not have any money. He went "flat broke" and into debt. (ACT 9008-11; RT 12913.) Rather than buy the Broadway house, which he was trying to do (RT 12913), he lost everything he had, stopped paying the rent, and was evicted (RT 12914, 12981, 14150).

On June 18, 1986, while appellant was still living on Broadway, the body of Yolanda Johnson was found in a vacant and condemned house on 4th Avenue that appellant and others were helping to renovate. (RT 11038, 11042, 11070, 11080.) Appellant was interrogated a number of times, voluntarily went down to the police station to give blood and fingerprint samples, and was not arrested. (See next section.) On July 20, 1986, the body of Angela Polidore was found in the basement of a vacant house at 3200 Sacramento Blvd. (RT 12174-78.) Appellant had no known connection to that house and apparently was not contacted by the police when the body was discovered.

The first week after his eviction from the Broadway house, Mr. Solomon said, he slept in parks. (ACT 9012.) Then he rented a room in a house at 2523 19th Avenue. (ACT 8994.) He rented it from Celestine (Stevens) Orizaba-Monroy, who lived there with her boyfriend, Ronnell Birdon, and their children. According to Celestine and Ronnell, appellant moved in in July or August, 1986, and stayed until they were all evicted on October 23 of that year. (RT 12749, 13319, 14924, 14978.) Cedric McGowan also lived there for the last month or so. (RT 13107, 13115.)

Mr. Solomon told Detective Pane that he only smoked cocaine a few times at 19th Avenue (ACT 9012, 9094), but Celestine, Ronnell, and McGowan said that all of them, including appellant, smoked a lot of the drug while living together. (RT 13118, 13131, 13226, 14959.) Of all of

them, however, Celestine said, Mr. Solomon was the only one who could be relied on to get things done. While she and Ronnell would be strung out and asleep, Morris would clean the house, make the backyard look respectable, make the kids breakfast, clean the kids up, and even save her some food. He could also be trusted to leave money aside to pay the bills. (RT 13226, 13286-87.)

For most of the time Mr. Solomon lived at 19th Avenue, he was employed full-time by Piazza Lumber. Joseph Piazza testified that from August 5 to October 9, 1986, appellant put in a minimum of 40 hours per week building trusses and delivering them to customers. (RT 15511-13.) In addition, Cedric McGowan testified, the entire time that appellant lived at 19th Avenue, he did lots of odd handyman jobs around the neighborhood, building fences, putting sprinkler systems in, mending roofs, and the like. (RT 13114, 13130.)

Celestine said that, in his conversations with her, Mr. Solomon claimed to view all women as "bitches and whores." (RT 15702-03.) Yet after one thwarted sexual overture to her, Celestine said, appellant was a gentleman. (RT 15703.) He was "very respectful and good" towards her when they lived together. (RT 13286.) They were friends. (RT 13288.)

After the eviction from the 19th Avenue house, appellant and Ronnell worked at a site on Meadowview and for several weeks had to live out of appellant's car (RT 14994; ACT 9013-14), a green Maverick he'd

bought in the middle of his employment by Piazza Lumber (RT 14934, 14949). In December, 1986, they moved into a vacant house at 3233 44th Street. (RT 13650, 14997.) The house was across the street from appellant's mother's house. (RT 13644.) Appellant told Detective Pane that he had worked out an arrangement with the owner of the property, Leroy Larry, to live in the place while fixing it up. (ACT 9016.) Larry testified that they had discussed the proposal but had not actually reached an agreement. (RT 13649-50, 13654.) He acknowledged that Mr. Solomon made some improvements to the interior while living there (RT 13687), but Larry nonetheless moved to evict him and his housemates. (RT 13654, 13658-59.)[15]

Appellant did not fight the eviction and told Detective Pane that, at the end of January, 1987, he began living out of a van outside his mother's house. (ACT 9017.) Ronnell continued to live in the 44th Street house in February. (ACT 9017; RT 15020.) Leroy Larry thought they stayed into March. (RT 13654.)

Barbara Shavers was appellant's bookkeeper for one or two months in the late fall of 1986. (RT 13514, 13532.) They became great friends,

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[15] Living with appellant and Ronnell were Ronnell's girlfriend, Michelle Sims, and Stephanie Sheppard, who was recuperating from serious injuries. (RT 13845, 14109.)

she testified, and saw each other every day. Appellant was someone she could go to when she needed money or someone to talk to. (RT 13555.)

When she indicated that she did not wish to become romantically involved, they remained friends. (RT 13556.) Once he asked her to spend the night at the house on 44th St., but when she declined he took her back to her mom's. (RT 13557.) Not once did he ever treat her badly, either mentally or physically. (RT 13356-57.)

Stephanie Sheppard moved into the 44th Street house to recuperate from the injuries she suffered in a violent kidnapping. She testified that appellant cared for her as a friend and she felt the same way about him. He was concerned about her working the streets. (RT 13843.)

Appellant told her that he attributed his stuttering and speech problems to his tour of duty in Vietnam. He also said that he had had a hard time controlling his temper when he first got back from Vietnam. (RT 13898.) The only time she ever saw him get angry, however, is when he saw what her assailant had done to her eye. (RT 13883.)

She'd never seen him with a temper otherwise. He loaned her money when she needed money, gave her a place to stay, gave her money to buy food, didn't hurt her, and acted like a gentleman. (RT 13885.)

On March 19, 1987, workmen found the body of Maria Apodaca buried in the backyard of 2523 19th Avenue. (RT 12708, 12713-16, 12729, 13069.) Appellant was interrogated the next day (ACT 8868-84; RT

13444) but was not arrested. On April 20, 1987, the body of Cherie Washington was discovered buried behind 3233 44th Street. (RT 13604, 13617, 13950-51.) Appellant was interrogated twice that day (ACT 8916-64, 8965-80; RT 15602-06, 15615-17) but was not arrested. On April 22, 1987, the bodies of Sheila Jacox and Linda Vitela were found buried in the backyard of 4327 Broadway. (RT 14193-94.) Appellant was arrested that evening at the jobsite he was working at. (RT 15757.) One week later, the body of Sharon Massey was found buried in the yard behind the house at 2523 19th Ave. (RT 15540.)

After appellant's arrest, people called the police with a long list of places in the Sacramento area that he may have had some connection to. Each one was investigated. No bodies were found at any of those other places. (RT 15489.) It was stipulated that nothing unusual was found at any of the nine other residential sites at which appellant had worked or lived in Sacramento. (RT 15793-96.)

B. Charged Offenses

1. Count 7: Alleged Murder of Yolanda Johnson[16]

Charles Sinkey owned the vacant duplex at 3445 4th Avenue in Sacramento. It had been condemned and he had hired appellant to do the final stage of the rehab project (carpentry, sheetrocking, termite work, etc.). (RT 11136-38.) In order to determine how much of the work had been completed, Sinkey told appellant to meet him at the house on the morning of June 18, 1986. (RT 11140.)

In anticipation of the meeting, appellant hired Cathy Guess and her neighbor Darren to sheetrock the upstairs apartment. On June 17, appellant drove them to the house, got them started, and then left them on their own. They worked from 3 p.m. to 9 p.m. and were to finish the job the next day. (RT 11411-18.) They smelled nothing rancid. (RT 11422.)

The next morning, shortly after 8 a.m., Rosie Moore and a friend ("Joe") were standing across the street from the vacant duplex. (RT 11707.) Moore saw appellant pull up to the house, unlock it, and enter. (RT 11715.) A few minutes later, Moore saw appellant coming down the

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[16] The amended information listed the offenses in the order in which they allegedly occurred. At trial, the prosecutor did not proceed chronologically. He began, for example, with the evidence pertaining to count 7. From this point forward, the guilt-phase statement of facts pretty much follows the order in which the evidence was presented to the jury. If testimony relevant to a particular count was elicited out or order, however, it is reported in the section devoted to that count.

steps hollering and screaming and shaking his head saying, "She's dead, she's dead, she's dead ..., someone call the police." Joe went to the liquor store and told the manager to call the police. (RT 11715-11717.)

The police arrived. In a bedroom closet they discovered the decomposing body of Yolanda ("Yo-Yo") Johnson. (RT 11038, 11042, 11170, 11180.)

Ms. Johnson was 22 years old. (RT 11064.) She was a prostitute and addicted to freebasing rock cocaine. (RT 11089, 11675, 11813, 11824, 11839.) She was constantly under the influence, which meant she was using the drug all day (up to 40 times a day according to her best friend) and spending $350 a day to get it. (RT 12941-42, 14244, 15806.)

A colleague of Ms. Johnson's, Ledia Baker, testified that Ms. Johnson used the vacant 4th Ave. house to trick in. That way, she did not have to split her earnings with anyone else. She would enter the house through a window. (RT 11807-08, 11841.)

Witnesses reported that, because of the proximity of the vacant house to a popular liquor store and hangout, 20-25 people would congregate in front of it and in the basement on a daily basis, drinking alcohol and buying, selling, and consuming drugs. (RT 11140, 11321-22, 11337, 11721-23.) As many as 4-5 people at a time had been found sleeping in the basement. (RT 11035, 11758.)

Ms. Johnson was last seen by her mother (Alice McJamerson) on June 13, 1986. (RT 11065.) Johnnie May Johnson (no relation - RT 11129) testified that she last saw Yolanda on June 16 (RT 11088, 11090), but her testimony on the subject was inconsistent: at trial she said Yolanda was with Johnnie May's daughter and at the preliminary hearing she said Yolanda was with another prostitute (RT 11130, 11133).

According to Pam Suggs, appellant had been looking for Yo-Yo one or two nights before her body was found, but had not looked angry. (RT 11505-07, 11554.) Later that same night, Suggs said, she had had to call the police on Yo-Yo when the latter started going "psycho", threatening to stab Suggs because Suggs would not give her money to buy cocaine with. (RT 11503, 11508-09, 12110.)

After Yo-Yo died, Johnnie May Johnson told Celestine Orizaba-Monroy that Yo-Yo had been scared someone was going to be coming after her for stealing their money or something like that and she and her husband had wanted Yo-Yo to get away. (RT 13312-13.)

Appellant subsequently told Detective Pane that Celestine and her boyfriend Ronnell Birdon (especially the latter) seemed to know everything about Yo-Yo's death. He said he had heard them say that she was killed because she had ripped off a trick, that the killing occurred in an apartment at 36th and Broadway in which a lady named Johnnie lived, and that the body was then moved to the 4th Ave. house. (ACT 8956, 8966-68.)

Appellant described Johnnie as a 25-30 year old "hubba head" who everybody in Oak Park knew. (ACT 9140.)

On the morning the body was discovered, appellant was questioned at the scene by Detective Thomas Lee. He gave his brother's name, identifying himself as "Ernest Carl Patilla". He said he had been working at the residence for the past 2-1/2 months and had last been to the residence on June 16th. He had spent 6 hours in the house by himself that day, detected no odor and, as far as he knew, had left the residence locked. He said he had returned at 8:00 that morning (June 18), entered through the front door on the second level, and proceeded towards the rear. He detected a foul odor, continued out the back door to get a piece of carpet, and noticed that the door was unlocked. On reentering the residence, he searched for the source of the odor. When he found it, he went outside and threw up. He told Detective Lee it was a black female that he didn't recognize or know. (RT 11751-56.)

About 2:15 p.m., Detective Lee spoke with appellant a second time. At that point, appellant corrected himself and told Lee that the last time he had been to the house was not Monday, June 16th, but the Monday before that. (RT 11761.)

That evening (still June 18), Detectives Coyle and Crump drove to 4327 Broadway, where appellant was living. He invited them in and immediately volunteered that he had used his brother's name that morning

because he had been afraid he would be arrested on outstanding warrants (one for soliciting prostitution and three traffic violations). He agreed to go with the detectives to the stationhouse to be interviewed. (RT 11185-86, 11796; ACT 8821.)

In a taped interview conducted that night (Exhs. 398 and 398-A; ACT 8821-56), appellant described again how he had come to discover the body. (ACT 8822-25.) Shown a picture of Yolanda Johnson, appellant said he knew her as "Lisa" or "Yo-Yo". She was a friend of his girlfriend, Rosella Fuller, and they had last seen her maybe a week earlier. He had "dated" her once, before he met Rose -- in the camper he was living in at 4327 Broadway while he renovated the house at that address[17] -- and had not dated her since. He had seen her at the Broadway house, however, and once at the hospital, where he'd driven a friend and her son. (RT 11199-11200; ACT 8829-8831. See also ACT 8953, 8960-61 [first interview by Detective Pane on 4-20-87].)[18]

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[17] Yo-Yo's mother thought Yo-Yo had told her that she had dated appellant at a house he was reconstructing on Broadway (RT 11183), but appellant said this was incorrect.

[18] This was consistent with what the jury heard from other witnesses. Rosie Moore said she had only seen appellant with Yo-Yo twice -- a year before her death and maybe a month before (RT 11736-38); Yo-Yo's mother said that she'd only seen her daughter with appellant once -- at the hospital (RT 11072); others may have seen Yo-Yo at the Broadway house once or a couple of times, but not in appellant's company (RT 14038 [Renee Caldwell]; RT 14369-70, 14433 [Terry Hetrick]; RT 14528-29 [Rose Fuller]; RT 14683, 14696-99 [J.R. Johnson]); and several witnesses who

Aside from the fact that she once may have stolen a ring appellant had bought, she was "a nice kid". (ACT 9006-08 [second interview on April 22, 1987].)[19]

Appellant said he had not recognized Ms. Johnson in the brief look he had had of her in the closet. (RT 11120.) Detective Coyle agreed that, given Ms. Johnson's bloated state, it would have been difficult to identify her. (RT 11197.) Appellant said he had not been to the 4th Ave. house over the weekend and had no idea how Yo-Yo had ended up there. (ACT 8838-39.)

The day after the interview by Crump and Coyle, appellant voluntarily came down to the Hall of Justice and gave fingerprint and blood samples. (RT 11801.)

In another taped interview ten months later -- this one by Detective Pane on April 20, 1987 (Exh. 542; ACT 8916-64) -- appellant said he went to the 4th Ave. house on the morning in question because he had gotten chewed out for not having finished the job yet. (He said other projects had come up and he was spread too thin.) He said he used his key to open the

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knew Yo-Yo well, including her best friend, Della Daniels, said they had *never* seen her at the Broadway house (RT 14230, 14246 [Daniels]; RT 14446, 14448, 14455, 14458 [Freddie Holmes].)

[19] In fact, it appears that Snoopy was the one who stole the ring. (RT 13599.)

front door, assuming it was locked (ACT 8949),[20] and, while he could no longer remember whether the back door was unlocked (ACT 8949)[21], it would not have been the first time. He said he had found it unlocked many times. He said people always came in through the windows, too. (ACT 8947.)

Another man who had worked on the 4th Ave. house -- James Hodgson -- had a similar experience. He came for his tools one day at the end of March and found the entry to the second floor unlocked. (RT 11230.)

In addition, a key may have fallen into the wrong hands. Harold Lusk had worked on the house throughout April of 1986 (RT 11443-45) and, rather than returning the key he had to the second floor, he may have thrown it away (RT 11456-57).

182 prints were lifted from objects in the house. 179 belonged to individuals other than appellant. (RT 11899-11910.) Detective Coyle requested that the crime lab compare those latents with the fingerprints of three other men connected to the house, but a deputy district attorney rescinded the requests. (RT 11913-14.)

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[20] He had said the same thing to Detectives Lee, Coyle, and Crump on the day he discovered the body (RT 11764; ACT 8822) but a television reporter claimed he told her that he hadn't needed to use his key (RT 11296).

[21] Ten months earlier he had told Detectives Lee, Crump, and Coyle that it had not been locked. (RT 11754; ACT 8824.)

Appellant's palm print was lifted from the door of the closet where Ms. Johnson was found, and two of his fingerprints were on the molding separating two other rooms. (RT 11890.) He told Detective Pane this was to be expected since he had been in the house countless times and had personally done work in the room in which the closet was located. (ACT 8843, 8950-51.) How much was the subject of differing recollections. Initially, he told police the carpeting had been laid before he began working on the house; this was consistent with what Jim Hodgson testified to. (ACT 8952; RT 11224.) A year after the work had been done appellant made a conflicting statement; he subsequently acknowledged his confusion. (ACT 9061-67.) Hodgson testified, moreover, that, when he left the job (which was just before appellant began), the carpeting in the closets still needed to be done. (RT 11224.) Appellant and Harold Lusk also disagreed as to who had cut and re-hung the doors on the second floor. (ACT 9068-69; RT 11451.) Lusk had stopped working on the project some six weeks before the body was discovered, however (RT 11445), and appellant told detectives without contradiction that he had replaced the door jambs in the closet and had done some touch-up painting in the room the closet was in. (ACT 9073.) He also told Detective Pane that his billing records would show that he did work on the 2nd floor. (ACT 9083-84.)

At 3 p.m. on the day the body was discovered, Dr. Robert Anthony performed an autopsy. (RT 11560-61.) He estimated that death had

occurred no less than 24 hours, and possibly 3 or more days, earlier. (RT 11576-77.)

The cause of death could not be determined. (RT 11614.) No significant trauma was noted. (RT 11570.) Symptoms of manual strangulation were absent. (RT 11581-83.) There were areas of drying and possible abrasion on the neck and hypopigmented areas on the wrists that might have been the result of ligatures (RT 11570-71, 11575), but only soft, wide ones: narrow ligatures would have left a clearer furrow (RT 11620-22, 11670) and usually cause hemorrhage or damage to the hyoid bone, neither of which was present (RT 11651). Indeed, there was no evidence of foul play or defensive injuries. (RT 11641, 11643.) In addition, the discoloration on the neck could have been caused by the decomposition process, by Ms. Johnson having worn a necklace, or by the piece of coat hanger she was found lying on. (RT 11050, 11649, 11659, 11666-67.) The deputy coroner who examined the body, Robert Brian, made no note on the Coroner's Investigative Worksheet or in his Case Supplement of having seen any possible ligature marks or any other marks indicating the possibility that death had been caused by violent means. (RT 12130-33.)[22]

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[22] The jury had earlier heard Officers Youngblood and Coyle describe the marks on Ms. Johnson's neck and wrists as possible ligature marks. (RT 11042, 11170-72.).

Flakes of cocaine and a cocaine pipe that looked like (or was) Ms. Johnson's were found under the door leading into the bedroom in which the body was found. (RT 11051-52, 11097, 14229.) The copper wool found in Ms. Johnson's purse was the same as that found in the crack pipe found in an adjacent bedroom. (RT 12072-73.)

Cocaine found in Ms. Johnson's bloodstream indicated ingestion at least 4-5 hours prior to death. While the concentration in the blood did not point toward an overdose, the cutting agent used by street vendors can itself be toxic. The cocaine levels in Ms. Johnson's liver, moreover (6.4 mgs. per kg), were consistent with levels associated with fatalities (RT 11602-04, 11609, 11630) -- in particular, heart attack (RT 11611-12, 11637).

In addition, Ms. Johnson had hepatitis. (RT 11070, 11103, 11690.) If a person with hepatitis uses alcohol and cocaine (alcohol was also found in Ms. Johnson's bloodstream, RT 11601-02), the combination is not salutary (RT 11668). When Johnnie May saw Yo-Yo on June 16, the latter had a hard time keeping her eyes open and appeared to "to be dead on her feet." (RT 11118-19.)

Dr. Anthony was also familiar with the practice of "drug-dumping", whereby witnesses to a drug-related death leave the body in a place that deflects suspicion from them. (RT 11639-40.) Edys Whiteside said that when appellant was living on 19th Ave. he told her that he had heard that Yolanda Johnson had died of an overdose in one location and that the

people with her dumped her at the 4th Ave. house and made it seem like she had been choked to death. (RT 13013-21.)

Robert Garbutt, a criminalist for the Sacramento County crime laboratory, examined the premises where Ms. Johnson's body was found, and conducted various tests of items taken from the house and samples taken from the decedent and others. (RT 11933-34.)

Stains were found on both of Ms. Johnson's thighs just below the vaginal area. (RT 11949, 12019.) Samples tested positive for semen. (RT 12020-21, 12025.) Samples also showed the presence of H antigen, indicating that the donor of at least some of the material was blood type "O" in the ABO system. (RT 12034.) Both Ms. Johnson and Mr. Solomon were of that type. (RT 12040, 12046.) Further testing of one of the samples produced reactions consistent with a PGM phenotype of 2+1, a conventional PGM phenotype of 2-1, and a Peptidase A phenotype of 1. (RT 12036.) Mr. Solomon's secretions produce the same reactions. (RT 12045.)

If the stain was the product of only one person's secretions, that person could have been Mr. Solomon. (RT 12060.) Vaginal secretions or sweat from the victim, however, could have mixed with the semen, contributing the H antigen indicative of an "O" donor. (RT 12054, 12058-59.) The sperm donor, meanwhile, could have been an O, A, B, or AB non-secretor with the phenotypes noted above, in which case the donor was not

Mr. Solomon. (RT 12061-62, 12068, 12087.) Calculating the various permutations, Mr. Garbutt testified that between 2.2 and 3.8% of Caucasian, Black, and Hispanic males could have been the donor of the semen on Ms. Johnson's thighs. (RT 12060-61.) There was no way to determine how old the stains were. (RT 12069-70.)

A tampon, furthermore, was found 7.5 feet from the decedent. (RT 11273, 11942, 11951.) The tampon tested positive for the presence of both blood and semen. (RT 11959, 11963.) Given the rare phenotype of the blood, the location of the tampon, and the fact that PGM activity was still present when the sample was taken, the likelihood, Mr. Garbutt said, was very great that the tampon was the decedent's. (RT 12064.) Semen could have attached to the tampon if Ms. Johnson had either had intercourse without removing it or had inserted it after intercourse. (RT 12067, 12070-71.)[23]

ABO antigen "A" was detected in an area of the tampon that tested positive for semen but not blood. (RT 11972-73.) While bacterial activity could have produced the "A" antigen, Mr. Garbutt saw no such activity when examining the sample microscopically. (RT 11973, 12090-91.) The likeliest possibility was that the donor of the semen was type "A". (RT 12089.) As an "O" type, Mr. Solomon could not have been the donor of

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[23] A vaginal swab did not reveal the presence of semen (RT 12007-08), but semen is normally hard to detect in the vagina after 12 hours (RT 12066).

that semen. (RT 12066, 12087, 12094.) It was not possible to determine whether the donor of the semen was a secretor. (RT 12084.) The donor of the semen on the tampon could have been a type "A" non-secretor with the same phenotypes as those on the samples taken from the thigh stains and thus could have been the donor of the semen in both locations. (RT 12069.) The direction and composition of the stains on the thigh were consistent with a penis dripping droplets of semen mixed with vaginal fluid as it withdrew from the vagina following ejaculation. (RT 12057-58.)

An examination of a sample of pubic hair taken from Ms. Johnson did not detect the presence of pubic hairs belonging to Mr. Solomon. An examination of a sample of Mr. Solomon's pubic hairs likewise contained no hairs belonging to Ms. Johnson. (RT 12074-76, 12169-71.)

A piece of fabric found in a kitchen drawer near the bedroom in which the decedent was found also tested positive for both the presence of blood and the "A" antigen. (RT 11943, 11976-78, 12069.) The donor of the blood could have been a non-secretor. (RT 12084.) The extent to which the stain had degraded suggested it was an old stain, but this was not necessarily so. (RT 11983, 12086.)

White lace underpants found at the scene were not tested. (RT 11995-96.)

Vernell Dodson was a close friend of Ms. Johnson's stepfather. (RT 11356-57.) Dodson testified that, several months before Ms. Johnson's

death (RT 11372), he and appellant were sitting on the porch of appellant's house on Broadway when Ms. Johnson passed by and appellant said something like, "I'm going to kill that bitch." According to Dodson, appellant said Ms. Johnson had hatched a plan to steal some stereo equipment from him. (RT 11346-47.) Dodson did not report this to the police when he heard that Ms. Johnson had been found dead. (RT 11358.) He did not make the claim for nearly a year, waiting until he was in prison in May of 1987 on a parole violation. (RT 11364, 11381-82.)[24] He contacted authorities a second time regarding this case when he was sent back to prison in December of 1987. (RT 11383.)

Rose Fuller lived at the Broadway house and was appellant's girlfriend during the period of time Dodson claimed the incident took place. (RT 14471, 14514) She said that, as far as she could recall, Dodson had never sat on the steps shooting the bull with appellant. She also said that Dodson had once tried to kill her sister. (RT 14535.)[25] Pam Suggs described Dodson as a "crazy man" who had once hit her. (RT 11547-48.)

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[24] Dodson had suffered convictions and/or prison time for assault (twice), burglary, insufficient funds, and altering a VIN plate. (RT 11348-11351.) The story he told Detective Yeager in May of 1987 was inconsistent in several respects with the testimony he gave at trial. (RT 11375-77.)

[25] Fuller was a prosecution witness. After appellant was arrested, she accused him of once having tried to kill her, too. (See CT 3465.) (The charge was dismissed for insufficient evidence prior to trial. RT 25-28.) It was highly unlikely that she lied about Dodson at trial in order to help appellant.

2. Count 8: Alleged Murder of Angela Polidore[26]

On July 20, 1986, the body of Angela Polidore was found in the ground-level basement of a vacant house at 3200 Sacramento Blvd. (now Martin Luther King, Jr. Blvd.) in Sacramento. (RT 12174-78.) Death had occurred two to six days earlier. (RT 12372-73.) She had been bound with electrical wire and gagged with two athletic-type socks and was naked below the waist. (RT 12319-12322, 12367-68.) There were no signs of major trauma or injury. (RT 12367, 12401.) There were no indications of strangulation. (RT 12410.) Cause of death could not be determined. (RT 12387.)

Ms. Polidore had suffered a nervous breakdown in 1985. (RT 12662.) She was addicted to crack cocaine and committed sexual acts to obtain it. (RT 11480, 12246, 12272-73, 12605-06.) She used the house at 3200 Sacramento Blvd. to turn tricks in. (RT 12100-12101, 12611, 12836, 13600.)

Witnesses familiar with several of Ms. Polidore's regular "dates" said that Mr. Solomon was not one of them. (RT 12448-49, 12457-59, 12609.) Pam Suggs said appellant had dated Polidore on several occasions (RT 12099-12100) and Snoopy told Detective Pane that appellant told her

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[26] The jury deadlocked on this count. (RT 19 CT 5527.) The prosecution presented the same evidence at the penalty retrial. See Penalty Phase facts, *post*.

he had dated "Lisa Lips" (Polidore's nickname) (RT 13581-82). At trial, Snoopy said that appellant had said he wanted to date her but never said he did. (RT 12825.) He tried on one occasion but she had only wanted drugs so he gave her money and told her to leave. (RT 12918-19.)

Witnesses had last seen Ms. Polidore alive four or five days before her body was found. (RT 12437-41, 12668.) Janice Scott was the last witness to see her. Ms. Polidore came to her house at 3:00 a.m. on July 16, 1986. She was with a man and asked if she could turn a trick in Ms. Scott's bathroom. Scott said no but allowed her to use the bathroom to take a hit of crack. For two or three minutes, Ms. Polidore's date waited for her in the living room. She had never seen the man before. (RT 12612-16.)

Nine months later, Ms. Scott was interviewed by the police. (RT 12643.) The interview took place just a few days after Mr. Solomon's heavily publicized arrest, which resulted in his picture being seen on the front pages of the local newspapers and on every local television station. (RT 12653.) Ms. Scott was shown five photos chosen for their similarity to Mr. Solomon. (RT 12645, 12656.) Ms. Scott was told to pick the photograph that *either* looked the most like the man she saw with Ms. Polidore *or* looked familiar to her. (RT 12646.) She pointed to Mr. Solomon's picture as being familiar. (RT 12649.)

Ms. Scott testified that the man with Ms. Polidore was 40-45 years old (or maybe early 50's), black, 5'7" to 5'9", and gray around the temples.

(RT 12616, 12624, 12637.) At the time of the preliminary hearing in this case (i.e., more than 20 months after Ms. Scott saw Ms. Polidare with the man in question), Mr. Solomon had no gray around his temples. (RT 12637.) At both the preliminary hearing and at trial, Ms. Scott said she was not sure if Mr. Solomon was the man she saw. She said he resembled the man "a little bit ... around the eyes" but "[t]hat's about it". (RT 12621-22.)[27]

Ms. Scott had previously been convicted of petty theft. In exchange for testifying in this case, the district attorney caused new petty theft charges against her to be dropped. (RT 12632-33.)

Mark Chambers had suffered a conviction for assault with a deadly weapon for sticking his girlfriend with a screwdriver seven times. (RT 12527, 12542.) Five of his fingerprints were found on a bottle of Colt .45 found in the basement of 3200 Sacramento. (RT 12523, 12549, 12555, 12564-65, 15752.) Mr. Solomon's prints were found on nothing at 3200 Sacramento. (RT 12558-59, 15774.)

Charles Henry managed the property at 3200 Sacramento. (RT 12212.) Three nights before Ms. Polidore's body was found, he saw two black men sitting on the back steps of the house, near the entrance to the basement. They averted their faces when he passed and disappeared a few

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[27] Snoopy testified that a man who looked like appellant (but was not appellant) used to hang around Ms. Polidore and use drugs with her. (RT 12919-20.)

minutes later. He could not see their features. (RT 12238-43.) Henry often saw Ms. Polidore in the vicinity of the house but never appellant. (RT 12246, 12259.)

Snoopy also said she never saw appellant around the house at 3200 Sacramento. (RT 12933.)

Appellant told Detective Pane that he and Charles Lueras, the owner of at least two houses appellant had worked on, had once walked through the basement at 3200 Sacramento, inspecting it for termite damage and the like to see whether it might be worth purchasing and renovating. (ACT 8937-39, 8944, 9073-76, 9090-91.) Lueras did not recall this. (RT 14154-55.) When interviewing appellant, Pane raised the subject of Lueras being a "drunk". In response, appellant said that Lueras, while honest, did have a serious drinking problem (as his driving record would show) and could not be counted on to remember an inspection that was just like many others they had conducted on the spur of the moment. (ACT 9088-89.)[28]

Appellant also told Pane that he had known Polidore. He said that they would talk on the street, and that she had been in the Broadway house

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[28] Lueras did not remember telling appellant to be on the lookout for siding for the Broadway house, for instance. (RT 14168.) Paul Venditti -- who was in charge of the Broadway restoration project for Lueras, RT 14755 -- testified that he, appellant, and Lueras were all supposed to be on the lookout for siding (RT 14768).

a couple of times, but that they had never dated. (ACT 8940.1, 8954-55, 9027.)

Shown a photograph of Polidore, Rose Fuller said she did not know her and that she had never been to the Broadway house. (RT 14485.) Della Daniels likewise never saw Polidore at appellant's house on Broadway. (RT 14232, 14246.)

3. Count 9: Alleged Murder of Maria Apodaca

On March 19, 1987, workmen found the body of Maria Elena Apodaca buried in the backyard of 2523 19th Avenue in South Sacramento. (RT 12708, 12713-16, 12729, 13069.)

The body was wrapped in a bedsheet and was bound in a fetal-type position. A cloth belt bound the wrists behind the knees and a shoelace-type cord pulled the feet against the back of the thighs. (RT 12732-33, 13337, 13340-43, 13467-69.)

Due to fact that the body was in contact with water (there was a leak in the backyard irrigation system -- RT 14951), decomposition was advanced and accurately establishing the time of death was impossible. The coroner could only give a range of 2 to 8 months. (RT 13349.)

There were no signs of trauma to the body. (RT 13351.) The cause of death could not be determined but ligature strangulation with something like the drapery cord could be ruled out given the lack of furrow and lack of damage to the hyoid bone, thyroid cartilage, and carotid arteries. (RT 13370-71, 13376-80.) There was also no evidence of manual strangulation. (RT 13371.) Among the possible causes that could not be ruled out were provisional asphyxia (RT 13372) and sudden cocaine death (RT 13388).

The last day her mother saw Ms. Apodaca was August 3, 1986. (RT 12767.) She was 18 years old, 5'4", and 96 pounds. (RT 12734, 12767, 13370.) She had a serious drug problem that had begun when she was 11

or 12 years old. (RT 12768-69.) She shot heroin. (RT 12845.) She was also a prostitute. (RT 12842.)

Appellant was interviewed by the police the day after Ms. Apodaca's body was found. He acknowledged having lived in a house on 19th Avenue -- he said the house number was 2532 when it was 2523 -- in August and September, 1986. (ACT 8876-8877.) In that interview and again one month later, appellant was shown a booking photo of Ms. Apodaca and said he had never seen her before. (RT 13603; ACT 8930-31, 8955.)

Neither Snoopy nor Terry Hetrick ever saw Ms. Apodaca with appellant. (RT 12935, 14439.) Shown a photograph of Apodaca, Rose Fuller said she did not know her and that she had never been to the Broadway house. (RT 14486.)

Pam Suggs told detectives that she had seen Apodaca visiting appellant at his house on Broadway "several" or "numerous" times (she remembered only one such occasion when she testified at trial -- RT 11483), but she did not say that appellant had ever "dated" Apodaca. (RT 12103-04, 12143.) She said, rather, that Apodaca was trying to get help with her drug problem and that appellant drove her to the bus station so she could get to the program. (RT 11484.)

The picture of Apodaca was familiar to Celestine Orizaba-Monroy but she did not remember her coming to the 19th Ave. house. (RT 13269.) Later, she recalled that appellant had come by once with a woman named

Chris who had a tattoo like the one Apodaca had. (RT 15695; see RT 12771.) She said the woman was older, however, maybe 27 (whereas Apodaca was 18). (RT 15700-01; see RT 12767.) She did not think the woman in Exhibit 364 (Apodaca) was the woman she saw (RT 15702).

J.R. Johnson (whose contact with appellant was essentially in June, 1986 -- RT 14642, 14645, 14668, 14683) said he thought he saw Apodaca in relation to appellant twice: once in appellant's truck (RT 14669-70), and once in what he thought was a car ("I guess it was a car. I'm not for sure", RT 14671) that was being driven by a "white or Mexican" male and was pulling out of the Broadway driveway (RT 14671-75). Johnson claimed at trial that appellant was standing in his driveway "talking about he just got hit w a bat and he was going to the hospital, something like that." (RT 14675.) Prior to trial, however, Johnson told Detective Pane on tape that, by the time he saw appellant, the latter had already been to the hospital and had taken his medication as a result of the baseball bat incident (RT 14738-39) – i.e., could not possibly have seen Apodaca on that occasion. Johnson had been addicted to rock cocaine at the time of these alleged viewings and had been to prison for strong-arm robbery. (RT 14675-77.)

Shown a picture of the sheet Apodaca was wrapped in, appellant told Detective Pane it looked like one of the ones that Celestine owned at 19th Ave. It was not, however, one of the sheets on his bed. (ACT 8959, 8962.) He said the sheets that were on his bed matched the blue comforter the

police would find in his van. The sheets and comforter belonged to Celestine. (ACT 9035.)

Snoopy slept with appellant several times at the 19th Ave. house. The sheet Ms. Apodaca was wrapped in was not similar to the sheets on appellant's bed. (RT 12936.)

Edys Whiteside told detectives that the sheet that covered Apodaca looked "somewhat familiar to her" and "may have" been similar to those on appellant's bed at 19th Avenue but she wasn't sure. (RT 13052, 13460-61, 13463.) At trial she had no recollection of having seen the sheet before. (RT 13011, 13052.)

Prior to trial, Cedric McGowan (one of those who lived at the 19th Ave. house) told authorities that he did not recognize the sheet. (RT 13147-48, 13174.) On the day of trial, he changed his story and told the prosecutor (and then the jury) that the sheet was similar to those that had been on appellant's bed. (RT 13143-44.) He said he had previously lied to authorities to avoid a snitch jacket but no longer had that concern at the time of trial. His rap sheet showed 10 convictions, including three for robbery. (RT 13145-46, 13172-76.)

Celestine testified that the sheet was similar to those that had been on appellant's bed. (RT 13283.) Ronnell Birdon, however, testified that the sheet did not fit the king-sized waterbed they had provided appellant with. It had been in the linen closet and on one occasion on the floor of

appellant's closet. (RT 14986-88.) He had told Detective Murphy the same thing (RT 15673) but at the preliminary hearing had said nothing about seeing the sheet in appellant's closet (RT 15064-65).

Steve Macias lived near the 19th Ave. house. He testified that he loaned appellant a shovel sometime between June and September of 1986. (He gave varying accounts as to the time frame.) (RT 13492, 13502-06.) Appellant did not say why he needed the shovel and Macias did not ask. (RT 13496.) It was a square, flathead shovel, designed for picking things up, not digging. (RT 13495.) He got the shovel back sometime in October or earlier. (RT 13508.)

When asked about the shovel by Detective Pane, appellant readily admitted borrowing it from Macias. He said it was to do a landscaping job down the street from the 19th Ave. house. He described the house. (ACT 8829.)

Ms. Apodaca lived with Peter Moos for five weeks in May and June of 1986. He made her leave when he found out she was heavily into drugs. (RT 13409-10, 13414.) Before coming to court, Mr. Moos had never seen appellant -- either visiting Ms. Apodaca or anywhere else. (RT 13441.)

Moos testified that he saw Ms. Apodaca one time after she moved out. She was sitting on the curb near a certain bank in the Fruitridge shopping center. It was just before Christmas, 1986. (RT 13415, 13420, 13428.) When pressed by the police four months after the sighting, Moos

essentially stuck to his guns while acknowledging that he could not be completely sure about either the date or whether it was actually Ms. Apodaca he had seen. (RT 13453-55.)

The day after the sighting, in the same location, a man who introduced himself as Richard asked Moos whether he knew Ms. Apodaca and whether she "stays at the house". Moos did not know how the man knew him. (RT 13432-34, 13340.)

4. Count 12: Alleged Murder of Cherie Washington

On April 20, 1987, the body of Cherie Washington was discovered buried behind 3233 44th Street. (RT 13604, 13617, 13950-51.) The only clothing she had on was a blouse. (RT 13640.)

The detectives who searched the backyard were there because appellant's former car was still parked there and he had given them permission to search it. (ACT 8986; RT 13638-39.)

On April 22, 1987, appellant told detectives that, after the electricity had been turned off in the 44th St. house, Ronnell stayed and appellant moved into his van across the street. He said Ronnell would cook in the backyard right where they found the body. (He said he knew the location from the photograph in the Bee.) There used to be a little structure there, a lean-to, that Ronnell would cook in. (ACT 8984-85, 9141.)

The last time Alicia Sullivan, Cherie Washington's sister, saw Cherie was 9:30 p.m. on February 6, 1987. Cherie was 26, 5'2" or 5'4", and 103 pounds, and had used rock cocaine for almost six years. (RT 13695-97, 13952.) She went out to barter a pearl necklace for cocaine and never came back. (RT 13699-13702.) At that time, Cherie was spending $700/day on cocaine and had started "dating" to get the money to do so. (RT 13709-10.) Cherie had overdosed at least four times, most recently three days before she disappeared. (RT 13712-15, 13741.)

Juanita Cannon lived four houses from 3233 44th Street. In late January, 1987, she was driving up the street and saw a woman walking onto the porch and knocking on the door of 3233. Because of the woman's extension braids, she thought it was her niece and drove by to see. As she came close, the woman turned. The woman was not her niece. It was, she testified, the woman depicted in Exhibit 466 (Cherie Washington), whom she had never seen before. (RT 13754-57, 13780.) Shortly thereafter, she saw the woman's photograph on a missing person's flier but did not contact the police. (RT 13758, 13770.)

At the time of the autopsy, Ms. Washington's hair was not braided as it was in Exhibit 466. (RT 14010.)

Jerry Bell lived next door to the 3233 44th Street house. He told the jury he thought he had seen the woman depicted in Exhibit 466 three times: twice walking down the street with a woman who lived at 3233 (Michelle Sims), and once getting out of a car to see if anyone was home at 3233. (RT 13787-90, 13809-13810.) In April of 1987, Bell was less sure: at that time, he told Detective Lee that someone resembling Washington "may have been at" the house next door. (RT 14212.)

Stephanie Sheppard lived at 3233 with appellant for two or three weeks in January of 1987. Appellant had taken her in after she was injured in a kidnapping. He was concerned about her. (RT 13843-13847.) Sheppard did not see the woman depicted in Exhibit 466 at the house. (RT

13864.) During the time she lived in the house, Sheppard wore extensions in her hair that looked like the back part of Cherie Washington's hair in Exhibit 466. (RT 13910-11.)

Michelle Sims lived at the 44th Street house almost as long as appellant did. She never saw Cherie Washington there. (RT 14109, 14119.) Renee Caldwell claimed to have seen Cherie go into appellant's room while Michelle was present (RT 14069-72), but also claimed that she (Caldwell) did not use drugs until 1988, had not drunk alcohol before coming to court, and had been to the 44th house every other day. (RT 14052, 14057, 14087.) The latter claims were contradicted by the testimony of Juanita Cannon, Michelle Sims, and Ronnell Birdon. (RT 13777, 14090, 14112-14, 15016.)

Birdon lived in the 44th Street house with appellant, furthermore, and never saw Ms. Washington there. (RT 15017.)

Shown a photograph of Ms. Washington, appellant said he not recognize the woman it depicted. (ACT 9105.)

The autopsy found no evidence of trauma. All structures of the neck were intact. There were no fractures or discoloration. There was no indication the deceased had ever been bound. Both manual and ligature strangulation were ruled out as causes of death. (RT 13965, 13970, 13983-84, 13991-92.) Positional asphyxia could not be ruled out, nor could cocaine. Cocaine was present in the body. (RT 13980, 13984-87.)

5. Count 10: Alleged Murder of Sharon Massey

On April 29, 1987, Sharon Massey's body was found buried in the yard behind the house at 2523 19th Ave. (RT 15540.) She was 29 years old. (RT 15565.)

Her body was wrapped in a bedsheet and bedspread. (RT 15540-41.) Her pants and underpants were off one leg and half off the other. (RT 15543-44.) Her hands were bound behind her with a braided fabric belt of sorts and electrical cord held the body in a fetal position. Draped loosely around the neck were what appeared to be stereo speaker wires. (RT 15545-15548.)

Celestine testified that at one point she was unable to locate her stereo cables. (RT 15681, 15687.) Ronnell Birdon, however, testified that the wires in evidence were the wrong color. They were not the ones that were missing. (RT 15041.)

The remains were markedly decomposed and had begun to mummify (which occurs in a dry environment). (RT 15550.) Dr. Stuart said that death could have occurred anywhere from two months to two years before, with his best guess being six months. (RT 15553-54.)

No evidence of any external or internal trauma or injury could be found. (RT 15551, 15556.) It was Dr. Stuart's opinion that, if Ms. Massey had been strangled with the speaker wires, there is a "good chance" he would have found physical evidence of this. (RT 15568.)

Two socks were recovered from Ms. Massey's mouth. One was protruding; the other was farther back in the throat. (RT 15560.) The latter in particular could have caused asphyxiation. (RT 15566.) (Criminalist Garbutt testified that he received a 1/4 inch ball of pink, waxlike, unidentified material that reportedly had also been recovered from Massey's mouth. RT 15652-53.)

Ronnell and Celestine looked at photographs of the bedspread that Massey was wrapped in and said it was similar to one Celestine owned. (Exhs. 279-280; RT 15028-29, 15678-79.)

Massey's mother, Bessie Allen, last spoke with her daughter on September 12, 1986. (RT 15589.) That was also the last day she was seen at work. (RT 15669.)

Joan Fountain was a co-worker of Sharon Massey's at Sutter Hospital's Obesity Treatment Center in Sacramento. They were also friends. (RT 15515.) The last time Fountain spoke to Massey was September 13, 1986. (RT 15521.) In retrospect, given Massey's thinness and nervousness and one stop she had Fountain make at the "Log", Fountain believed that Massey had been involved with drugs. (RT 15517, 15525, 15528.) When Massey disappeared, Fountain looked for her at a club. A man there said to her: "You're the one who's looking for that woman. She was involved with drugs; they got rid of her." (RT 15531.)

Detective Pane said that Snoopy had told him that she had seen appellant and Sharon Massey together on one occasion at a local liquor store. (RT 13582.) She said this sighting occurred, however, early in 1986, long before she went to jail in April. (13590-91.) Massey did not move to Sacramento until late July of that year. (RT 15516-18, 15797.) In court, furthermore, Snoopy testified that she had definitely not seen either appellant or Massey in the back room where drugs could be purchased, did not remember if she had ever seen them out front, and might have been confusing Massey with another girl, Dawn Britton. (RT 12850, 12951). Snoopy also told Pane that she had never seen Massey at the Broadway house, had no knowledge of appellant and Massey "dating", and that Massey used crack. (RT 13591-92.)

The picture of Massey was familiar to Celestine but she did not remember her coming to the 19th Ave. house. (RT 13269.)

Barbara Shavers saw appellant every day from September of 1986 to close to the time he was arrested and she never saw Sharon Massey. (RT 13553-55.)

6. Count 1: Alleged Murder of Linda Vitela

On April 22, 1987, Linda Vitela's body was found buried in the backyard of 4327 Broadway. (RT 14194.) Her body was stretched out and wrapped in a blanket-like fabric. She was fully clothed. Electrical-type wire encircled the blanket at the head, mid-portion, and ankles, effectively holding it on. (RT 14586, 14589, 14610.) The body itself was not bound. (RT 14615-16.)

The body was badly decomposed. Forensic pathologist Gary Stuart estimated she had been dead for anywhere from 2 months to 3 years, and forensic anthropologist Rodger Heglar put the estimate at 6 to 18 months. Both put the "best guess" at one year. (RT 14597, 14604-05, 14801-02.)

The cause of death could not be determined. The lack of traumatic injury, however, allowed the forensic pathologist to eliminate mechanical trauma as a possibility. (RT 14597, 14605.)

Vitela was a prostitute and shot heroin and cocaine. (RT 12843, 12846, 14128, 14827-28.) She was last seen by her mother on January 4, 1986. (RT 14125.) She was 24 years old, 5'1", and weighed just under 100 pounds. (RT 14127-28.)

Vitela was roommates with methamphetamine dealer Tammy Zaccardi. Zaccardi testified that Vitela stole money and drugs from her in January of 1986, then disappeared for a month. In February, Zaccardi saw her and accosted her. (RT 14835, 14837, 14842.) A cream-colored older-

type station wagon with fin-like tail lights drove up and Vitela got in. (RT 14838, 14840.) Zaccardi was standing on the passenger side, very upset with Vitela. Trying to prevent her from leaving, she only looked at the driver "for a second". (RT 14838, 14844, 14852-54.) She said he resembled appellant but she couldn't be sure. (RT 14845, 14851.) She never saw Vitela again. (RT 14842.)[29]

Comer Watkins, Jr. worked on the Broadway house with appellant and recalled seeing loose dirt just off the back porch one day where appellant said he'd planted something. Watkins could not recall when this was, however. Both he and appellant began working on the Broadway house in late October or early November of 1985 (months before Vitela or Sheila Jacox disappeared). (RT 14256-14257, 14274-78.)

Terry Hetrick's backyard was at a right angle to the backyard of the Broadway house. She spent a lot of time at the Broadway house smoking cocaine. She said appellant dug in several places in the backyard -- to lay a sewer line and to plant a tree and a garden -- but was not secretive about it. It may also have been his girlfriend who was involved with the tree-planting. (RT 14376-77, 14441.) Hetrick did not remember ever seeing

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[29] As the prosecutor conceded in closing argument, no one ever associated appellant with the kind of vehicle Zaccardi saw Vitela drive away in. (RT 16206.)

Vitela at the Broadway house and never saw her with appellant. (RT 14439.)

After seeing on television that officers had dug up two bodies behind the house on Broadway, Edys Whiteside told the police that, when she was carrying heavy planks in that yard one day, appellant told her to watch her step or be careful of the holes or something like that. She claimed to have noticed indentations in the area where the bodies were found. (RT 13062-64, 13568.)

Rose Fuller lived at the Broadway house 4-5 months. (RT 14471, 14515.) Shown a photograph of Vitela, she said she did not know her and that she had never been to the house. (RT 14486.) In addition, Fuller told Detective Pane that she had asked appellant to plant a garden at the Broadway house. (RT 15791.)

Appellant said he never dug in the backyard of the Broadway house, but did bring in dirt in through Terry's yard. (ACT 9042-47.)

7. Count 2: Alleged Murder of Sheila Jacox

Sheila Jacox had a problem with cocaine and sometimes engaged in prostitution. (RT 12863-64, 14182, 14335.)

She lived with her grandmother, Rosie Missouri, and her brother, William Jacox, among others. (RT 14170-71.)

The last time her grandmother saw her was March 18 or 19, 1986, when she went to the store with her boyfriend, Patrick Ware, to get some milk and diapers. Jacox was 16 1/2 at the time and had a 6-month old baby. (RT 14172-73, 14175-76, 14180.) Mrs. Missouri saw Ware three days later and he said he did not know where Sheila was. (RT 14181.)

William Jacox, who was 14 at the time, said that Ware went to and came back from the store by himself and that Sheila was off somewhere else. He said Sheila was home the next morning when he went to school, but was gone when he got back and he never saw her again. (RT 14290-96, 14300-03.) He also never saw Ware again. Given that Sheila was Ware's girlfriend, William thought it was weird that he never came over to ask where she was or to look for her. It was like he was expecting something to happen. (RT 14308.)

Ware said he dropped Sheila at her grandmother's at 7 p.m. and returned at 9:30 p.m. with the Pampers, but Sheila wasn't there. He said he returned the next morning but she wasn't there then either and he never saw her again. (RT 14327-34.)

On April 22, 1987, Ms. Jacox's body was found buried in the backyard of 4327 Broadway. (RT 14193.) It was wrapped in fabric, was not clothed, and was partially bound with duct tape. (RT 14551, 14556, 14558.) A rolled up ball of possibly cloth material was removed from the mouth. (RT 15574.) The body had decomposed to the point it was barely recognizable as a human being. (RT 14556.) Drs. Stuart and Heglar, respectively, estimated that death had occurred from 3 to 36 months or 6 to 18 months, respectively, with their best guess again being around one year. (RT 14577-79, 14798, 14800.) Cause of death could not be determined. (RT 14580.) It was not clear that the cloth-like material in Jacox' mouth would have prevented breathing. (RT 14626-27.)

Snoopy told Detective Pane that Ware had beaten Jacox up on occasion. (RT 13593.) She thought she may have introduced Ware and Jacox to appellant on one occasion but, if so, that was the only contact between them that she knew of. (RT 12939, 13583, 13594.)

Terry Hetrick did not remember ever seeing Jacox at the Broadway house and never saw her with appellant. (RT 14431, 14439.)

Shown a photograph of Jacox, Rose Fuller said she did not know her and that she had never been to the Broadway house. (RT 14485.)

J.R. Johnson looked at one photograph of Jacox and said he'd never seen her before. He looked at another photograph and said he'd seen that

woman in the Broadway house on one occasion in June of 1986. (RT 14663-66.) Jacox, however, disappeared in March of 1986. (RT 14173.)

8. Count 11: Alleged Rape of Sherry Hall

Sherry Hall engaged in prostitution to support her cocaine habit. (RT 12883, 15206-07.) She testified that, in October of 1986, after spending all night getting high, she needed to make more money to buy more cocaine. She said she went out on the street and appellant, whom she did not know, stopped and they agreed to date for $50. (RT 15208, 15214.) He was in a car she identified as appellant's green Maverick. (RT 15220.) She said he drove her to a house which she could not identify as the house on 19th Ave. (RT 15221-22.) It was 7 a.m. or so. (RT 15216.)

Once inside the house, she said, appellant came up behind her and began to choke her with a quarter-inch rope that was "like a round ... shoestring." She struggled and began pleading with him and he said, "Just let me do this then," and proceeded to have intercourse with her both on the bed and on the floor near the bathroom adjacent to the bedroom. (RT 15225-15232.)

When he was done, he took her to her neighborhood and dropped her off where she asked him to. He said he would meet her in the same place on Tuesday and would pay her the $50 at that time. (RT 15234-36.) She said she called her boyfriend, Steve Becker, from a pay phone and he came to get her. She said she had two lines on her neck afterward. (RT 15238-39.)

She did not call the police until after appellant was arrested. She said her boyfriend convinced her not to because she had been out there doing illegal things. (RT 15259-60.)

Mr. Becker testified that, at 8:30 or 9:00 a.m. one morning in the fall of 1986 (RT 15357, 15377), he went and got Ms. Hall at a phone booth down the block and she told him of being raped that morning (RT 15358-60). He said her hysteria was not that different from the state she would be in when she came home from a night of drug use. (RT 15368.)

She told him the rape occurred in the man's kitchen. (RT 15365-66.) She said he put a rope around her neck and dragged her to the floor. (RT 15360.) Mr. Becker did not believe she said anything about a shoelace. (RT 15368.) She had what appeared to be a rope burn all around her neck but it was "fairly wide", maybe three-quarters to half an inch wide. (RT 15361, 15368.) She could not say where the house was in which the rape took place. (RT 15363.)

He confirmed that he felt she would just get into more trouble by calling the police, but said this opinion was not rendered until a week later, when he found out for the first time that she was engaging in prostitution. (RT 15362-63.)

He said Ms. Hall was "a good talker". She was "someone who could ... convince you that something ... black ... was actually white." (RT 15370.) He said: "She would have made a good liar." (RT 15371.)

A neighbor, Lee Cook, once saw bruises on Ms. Hall's neck and asked her what had happened. She said "nothing" and mentioned no names. (RT 15337-38, 15346.) Subsequently, when he and Ms. Hall and her boyfriend were watching television and appellant's arrest was reported, Ms. Hall said, "That's the guy who hurt me." It seemed to Mr. Cook that Ms. Hall was just "trying to get a little glory." (RT 15346-48.)

Another boyfriend, Joe Long, said he saw injuries in October or November of 1986 and Ms. Hall said a man beat her up and tried to hang her. (RT 15377.)

9. Counts 3-6: Alleged Assault on Melissa Hamilton

Melissa Hamilton was a prostitute with a $280 a day heroin habit. (RT 12885-86, 13258, 13262, 15266, 15278.) She also supported the drug habit of her boyfriend, Howard Allen (RT 15266-67), who was in prison at the time of trial (RT 15623-24).

She testified about an assault she said took place a couple of weeks before Yolanda Johnson was killed (which would have made it early June, 1986). (RT 15309.) Mr. Allen testified that the assault occurred two or three months later than that. (RT 15626.)

She lived in an apartment in a condemned building. She said that, as she entered the apartment at approximately 11 or 11:30 p.m., she was grabbed, a man laughed, a knife was put to her neck, and she was told to take off her clothes. When he hit her in the face, she cooperated. (RT 15288-89, 15293-98.)

Over the next five hours, she said, the man forcibly had her orally copulate him, tied her hands behind her back, sodomized her, put a sock in her mouth when she screamed, had intercourse with her, forced oral copulation a second time, and bound her feet to her neck with electrical cord when she sat up while he was in the bathroom. (RT 15298-15304.) The man left by the back door when Mr. Allen knocked on the front door. (RT 15304-06.)

She identified her assailant as appellant. She said she knew him from the neighborhood. She said Allen had told her appellant's first name when they passed him at the market once. (RT 15275-76.) She also said that she and appellant got into a name-calling argument one time when she told him it was her policy not to "date" black men and that he nonetheless tried to "date" her three of four times after that. (RT 15275-78.) She also claimed to have smoked cocaine with appellant and another prostitute.[30] Pressed to pinpoint this event in time, she said it was summertime because she was wearing shorts, then said it had been cold and raining the night before. (RT 15281-85.)

Ms. Hamilton did not tell Mr. Allen the perpetrator was appellant, however. At trial, she said she did not want him to retaliate. (RT 15306.) At the preliminary hearing, she also said she didn't tell him because: "I didn't know for sure who it was." (RT 15319, 15323.)

She also didn't tell any of the other people she was close to who the perpetrator was. (RT 15322.)

Ms. Hamilton did not go to the police to report the incident. She only told them the foregoing story when they sought her out after appellant was arrested. (RT 15309, 15323.) She told the police that her friend Willie would corroborate her story. Willie told the police, however, that he had

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[30] She said this occurred in a car that, as the prosecutor conceded in closing argument, no one else had associated with appellant. (RT 16259.)

seen Ms. Hamilton looking beaten up on a number of occasions. (RT 15311.)

Howard Allen testified that, in August or September, 1986, he found Melissa in bed at approximately 7:30 a.m., bound, gagged, and bleeding around her nose, mouth, and vaginal area. (RT 15626-15631.) He said Melissa said nothing about being raped and said she might have seen the person before but could not describe or name him. (RT 15632, 15647.) Allen said he had never seen appellant before coming to court and did not point him out to Melissa in the Oak Park Market. (RT 15645-46.)

Celestine Orizaba-Monroy testified that, during the period appellant lived at the house on 19th Ave., Ms. Hamilton was there on more than one occasion. (RT 13261, 13265.) She said that appellant and Ms. Hamilton even walked into the house together once, but that Ms. Hamilton later told her that was just a coincidence. (RT 13265-66, 15714-16.) Ms. Hamilton denied being in the house when appellant was there and denied having a conversation with Ms. Orizaba-Monroy about that. (RT 15310.)

10. Counts 13 & 14: Alleged Assault On LaTonya Cooper[31]

LaTonya Cooper came to court hung over. (RT 15101-03, 15126.) At the time of trial, she was addicted to heroin and drank a lot. She supported herself by stealing and pimping for three prostitutes. (RT 15109-15.)

She testified that, in early February (RT 15169) -- she did not specify which year -- she flagged appellant down, looking for a lift. She knew appellant. She said they stopped at the house depicted in Exhibit 128 (3233 44th Street) and, while she was getting water in the kitchen, appellant came up behind her and began choking her with a shoelace. She said she struggled and bit him and that appellant said he didn't want to kill her but would if she didn't cooperate. She said she was saved when some girls walked into the house. She said appellant released her and she ran out, telling appellant her cousin was going to kick his ass. (RT 15121-37.) She said she then walked to her cousin's house, with appellant following alongside in his car until the last block, apologizing and asking her to come over to the car, which she refused to do. (RT 15138-41.) She said she had a rope burn on her neck for two weeks. (RT 15141-42.)

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[31] The jury deadlocked on counts 13 and 14. (19 CT 5527.) The prosecution presented the evidence again at the penalty retrial. See Penalty Phase facts, *post*.

She did not go to the police. She only told the latter story to the police after standing in the crowd outside the Broadway house as the bodies were being excavated. (RT 15164.)

When Detective Pane subsequently came to interview her, moreover, she told a different story. She said she was assaulted in a camper truck, not a house, that the truck was being driven by a Mexican man, and that appellant reached into the cab from the camper, tried to choke her, and she jumped out. She told Pane that the part about the 44th Street house was a lie that Officer Banning had persuaded her to tell because they wanted so badly to get appellant off the streets. (RT 15154.) She claimed at trial that she told the latter version to Pane so she wouldn't have to come to court. (RT 15155.)

Alane Smith was the cousin whose house Cooper said she walked to after the assault. Smith said she remembered Cooper suffered some type of rope burn injury around her neck in 1986 or 1987 and was very upset. (RT 15399-15400, 15406.) She said Cooper told her it happened when she was sitting in the front of a pickup camper and a black man came from the back and tried to choke her. (RT 15403.) When Smith's boyfriend Buddy told her Cooper had told him a different story, Smith asked Cooper which was true. Cooper said: "I told you what happened". She never told Smith anything different. (RT 15410, 15414.) Smith said Cooper told her she did not know what the black man looked like and did not identify the man as

appellant until after his much-publicized arrest. (RT 15403, 15422.) She said Cooper tells lies. (RT 15425.)

Elvin "Buddy" Johnson was Alane Smith's boyfriend and the father of her children. (RT 15427.) He was present when Ms. Cooper came over after the assault on her. (RT 15408, 15419, 15429.) The first story Cooper told was that she had been choked in a camper truck. Later, when they were out looking for the guy to "mug" him, she said it happened inside a house and showed him the 44th Street house. (RT 15432, 15674-75.) She also said it had happened the day before. (RT 15433.) (She told Alane it had just happened. RT 15406.) Still later (probably two days after she first came over), she pointed to a black man with a little gray hair driving a camper and said that was him. Johnson did not get a good enough look to identify him as appellant. (RT 15436, 15438, 15445.) Cooper never told him she knew the man previously, much less knew his name. (RT 15452.) Johnson admitted Cooper wasn't the most truthful person in the world. (RT 15457.)

Detective Pane testified that Johnson told him Cooper had pointed out a man in a green Maverick, not a camper truck. (RT 15598.) Johnson adamantly denied this, saying that he, Johnson, was the one in a Maverick, not the person Cooper pointed out. (RT 15437, 15446.) Pane also testified that Snoopy told him that she'd once seen appellant, Cooper, and Cooper's mother out looking for women. (RT 13584.)

II.

PENALTY PHASE RETRIAL

A. Guilt phase offenses

Since the jurors selected for the penalty phase retrial had not heard the guilt phase evidence but were obliged to consider "the circumstances of the crime[s] of which the defendant has been convicted in the present proceeding" (Pen. Code § 190.3(a)), the prosecution presented the guilt phase evidence all over again. Only material differences between the two presentations will be noted here.

Background facts. The prosecution again called as witnesses the working women who knew Mr. Solomon best, eliciting much of the testimony summarized in section I, *ante*. (RT 22953-23070, 23219-23362, 23372-23475, 23701-50.)

In addition, Pam Suggs testified that she thought that Mr. Solomon was lonely and had a kind of mental problem. As she had told Detective Granrud, Morris was "not wrapped too tight", meaning that his view of people was kind of rigid and they could get him stirred up. When you're treated as badly by people as Morris had been, she said, "you can't get over it"; it makes you delusional. (RT 23035-36, 24708, 24710.) Suggs told Granrud that Morris' condition got worse when he got involved with cocaine at the Broadway house and that she wouldn't have sex with him one time because he was on a "psycho trip". (RT 24709.) She said she

considered Morris a friend and didn't want anything bad to happen to him. (RT 23027.)

To her guilt-phase testimony, Snoopy added that Morris was naïve and had a speech impediment -- he stuttered when he got excited. Despite her teasing him, however, he was very protective of her and very soft-hearted. (RT 23314, 23347-48, 23358.) Even when she confessed to Morris how much she'd stolen from him, his attitude didn't change: he loved her, gave her things, came and got her, fed her, was considerate, and always cared for her. (RT 23354.) And while he would get upset with her a lot, she never saw him lose his temper. (RT 23358.) She said she still loved him. (RT 23362.)

Edys Whiteside testified that Mr. Solomon was the most reliable person she knew (RT 23451), that he was a good friend to her and that she never worried about him hurting or abusing her (RT 23454). She still didn't think he was a guy who would hurt anybody. (RT 23454-55.)

Finally, Stephanie Sheppard (who lived at the 44th St house with appellant), testified that she and Mr. Solomon had had sex on one occasion and that he had behaved like a gentleman -- no violence or roughness at all. To the contrary, he treated her with respect and affection. (RT 23736.) Appellant was different: he was friendly, kind, and there to help her. (RT 23749.) They never once got into an argument. As far as she was concerned, she testified, Morris was still her friend. (RT 23750.)

First-degree murder of Yolanda Johnson (count 7). The prosecution did not recall witnesses Vernell Dodson or James Hodgson. (See § I.B1 above.) Otherwise, the evidence was essentially the same as that summarized in section I.B.1. (RT 21757-22447, 22770-76, 22973-74.)

Alleged murder of Angela Polidore (count 8 - hung jury). Mary Ann Beatty, the woman with whom Ms. Polidore last boarded, testified that she thought Ms. Polidore had brought Mr. Solomon over to the house on one occasion. (RT 22520.) When interviewed by Det. Murphy in June of 1987, however, she had definitively said that Mr. Solomon had never been brought to her home. (RT 22522-26.) Her testimony at the preliminary hearing and at the guilt-phase were consistent with her statement to Det. Murphy. (RT 22521, 22526-27.)

Janice Scott testified that the man Ms. Polidore brought over to her house at 3 a.m. on July 16, 1986, was in the living room for 5-10 minutes. (RT 22737.) (At the guilt phase she had said 2-3 minutes. RT 12616.) Office Yeager testified that when Ms. Scott picked a photo of Mr. Solomon from a photo lineup in 1987, she did so saying that he looked "familiar a little bit". (RT 22766.) When Ms. Scott was asked if she saw the man in the courtroom, she said, referring to appellant: "I'm not sure. I really can't tell." (RT 22736.) Mr. Solomon was the only black male in the courtroom at the time. (RT 22778.)

Otherwise, the evidence was essentially the same as that summarized in section I.B.2 above. (RT 22448-22909, 22967-69.)

First-degree murder of Maria Apodaca (count 9). The prosecution did not recall Peter Moos or Ronnell Birdon. (See § I.B.3 above.) Otherwise the evidence was essentially the same as that summarized in section I.B.3. (RT 22910-22947, 23072-23217, 23363-68, 24443-46.)

Second-degree murder of Cherie Washington (count 12). The prosecution did not recall Jerry Bell or Ronnell Birdon. (See § I.B.4 above.) Otherwise the evidence was essentially the same as that summarized in section I.B.4. (RT 23467-23750.)

Alleged attempted murder and assault with intent to commit rape of LaTonya Cooper (counts 13 & 14 - hung jury). Ms. Cooper's mother, Sheila LaRue, testified. Ms. LaRue had been to prison three times for sales and possession of narcotics. (RT 24139.) She described an incident in which LaTonya came up to her, hysterical, saying a friend had tried to kill her. LaTonya had a rope burn on her neck and her eyes were still popping. She led Ms. LaRue to a yellow house on 44th St. but no one was there. Ms. LaRue claimed she reported the incident to the police a week later. (RT 24131-33, 24137.)

Subsequently, Ms. LaRue acknowledged, LaTonya said the assault took place in a camper, not a house, and this was the version Ms.

LaRue told police in a second interview on the subject. (RT 24135-36.) Ms. LaRue agreed that LaTonya may have told her that it was the police who got her to change her story. (RT 24148.)

The remaining evidence regarding the alleged assault on Ms. Cooper -- presented earlier in the prosecution's case than it had been in the guilt phase -- was essentially the same as that summarized in section I.B.10 above. (RT 23760-23856, 24004-92, 24100-24119.)

Sexual assault on Melissa Hamilton (counts 3-6). The evidence was presented earlier in the prosecution's case but was essentially the same as that summarized in section I.B.9 above. (RT 23858-23942.)

Rape of Sherry Hall (count 11). The prosecution did not recall Lee Cook. Otherwise the evidence was essentially the same as that summarized in section I.B.8 above. (RT 23943-24004, 24094-98.)

Second-degree murder of Linda Vitela (count 1). The evidence was essentially the same as that summarized in section I.B.6 above. (RT 24150-84, 24200-31, 24297-24405.)

First-degree murder of Sharon Massey (count 10). The prosecution did not recall Bessie Allen or Ronnell Birdon. Otherwise the evidence was essentially the same as that summarized in section I.B.5 above. (RT 24406-17, 24632-24701.)

First-degree murder of Sheila Jacox (count 2). The prosecution did not recall witness Rosie Missouri. Otherwise the evidence was

essentially the same as that summarized in section I.B.7 above. (RT 24418-28, 24467-75.)

B. Evidence of Prior Criminal Acts Involving the Use, Attempted Use, or Threat of Force or Violence

1. Dale Walker

On May 17, 1971, at 10:30 p.m. or so, Dale Walker, a junior-college student, accepted a ride in Berkeley from a man she identified as Mr. Solomon. Once she was in the car, she said, he grabbed her by the hair, said he wanted to have sex with her, and drove into the hills. Ms. Walker said she struggled and managed to jump out of the car while it was moving, but that appellant intercepted her, threw her down and kicked her. She escaped when he had to return to the car to prevent it from rolling down the hill. Appellant was apprehended shortly thereafter. (RT 24190-99.)

2. Virginia Johnson

Virginia Johnson testified that, on January 12, 1971, when she was 23 years old, she was on MacArthur Blvd. in Oakland between 9:30 and 10:30 p.m. when she was grabbed from behind by a man who said he was going to blow her ass off if she didn't get in his car. (RT 24754-55, 24762.) She got in and they drove to a deserted area in the Oakland hills. (RT 24757.)

Ms. Johnson identified Mr. Solomon as her assailant. She said he had propositioned her on an earlier occasion but that was before she had begun engaging in prostitution and she had declined the offer. (RT 24755-56.)

On the occasion she was abducted, Ms. Johnson said, appellant made her remove her clothes, orally copulate him, then lick his behind and testicles. He tried to stick his penis in her behind but stopped when she said it was painful. After straight sexual intercourse, he put his fingers in her vagina, she said, extracted what was there and tried to make her swallow it. When she spit it out for the third time he started pulling on her nipples and calling her names. She said they fought and he said he was going to go find a dog for her to have sex with. When she asked him to take her back to where he had picked her up, she said, he kicked her out of the car and told her, "Bitch, you get back the best way you can." He took everything she had, including her ring, watch, purse, and clothes, then left. She went to the nearest house and received help. (RT 24758-62.)

3. Darlene Grant

On December 6, 1976, Darlene Grant was 18 and living in Sacramento. She had not yet become involved in prostitution, she said. At the time of trial, she had a criminal record for prostitution and robbery and was on probation. (RT 24764, 24775.)

On the occasion in question, she said, she was walking down Stockton Blvd. at about 8 p.m. when a man she identified as appellant came up from behind, began choking her, dragged her into a car, and drove to a house. Once in the house, Ms. Grant said, appellant tied her up, placed her in a closet with only her shirt on, beat her with a fan belt, then hit her with

his penis while promising to ejaculate in her face and have anal intercourse with her. (RT 24764-71.)

It was stipulated that the house was at 3241 44th Street, that appellant was living there, that it was not appellant's mother's house, and it was not the house at 3233 44th Street in which appellant lived 10 years later. (RT 24780.)

Ms. Grant said that she spent the night in the closet while appellant slept in the adjacent room. The next day, she said, a woman knocked on the door and told "Jr." to get ready for work. According to Ms. Grant, appellant subsequently opened the closet door, tightened her bindings, told her that if she tried to take them off he would kill her, and left. (RT 24771-72.)

Ms. Grant said she untied her feet and managed to get hold of a knife in the kitchen just as appellant returned. Brandishing the knife, she ran out of the house and the two blocks to her mother's house. (RT 24774.)

4. Mary Kaufman

On the evening of September 19, 1969, Mary Kaufman testified, she was 18 years old and looking to turn a trick on San Pablo Ave. in Oakland. She flagged down a car, negotiated with the driver -- whom she identified as appellant -- and, for $10, proceeded to get in the vehicle and allow him to perform oral sex on her. (RT 24800-24803.)

Afterwards, she said, the man asked for his money back, got upset when she refused, and pulled a hooked knife out from under the passenger seat. Ms. Kaufman screamed and, in attempting to get out of the car, was hooked with the knife on her right thigh. She said she managed to get to safety with the help of a passerby and subsequently needed 23 stitches. (RT 24804-24805.)

5. Connie Sprinkle

On October 18, 1975, Connie Sprinkle did a guest spot as a topless dancer at The Bear Cave in San Jose, then found someone -- whom she identified as appellant -- willing to pay her $25 to engage in sexual intercourse. It was around midnight. (RT 24861-64, 24873.)

Ms. Sprinkle said they went to a trailer court across the street from The Bear Cave, appellant paid her, and they had intercourse. Then, as she sat on the bed getting dressed, she said, appellant came up from behind, started strangling her with what she believed was a dog chain, and kept saying, "You ready to die, bitch. You ready to die." She lost consciousness. When she woke up, she said, he was urinating in her face. They had sexual intercourse 4 or 5 more times that night. (RT 24864-69.)

The following morning, Ms. Sprinkle said, appellant bound her to a chair, brought his Doberman in, and told her to stay still or the dog would sic her. When he left, however, she freed herself, the dog just sat there, and

she ran to the next-door neighbor's and had them call the police. (RT 24870-72.)

C. Prior Felony Convictions

Evidence was presented establishing that Mr. Solomon had previously been convicted of felonies, as follows:

In 1971 he was convicted in Alameda County of assaulting Dale Walker with intent to commit rape in violation of Penal Code section 220;

In 1977 he was convicted in Sacramento County of assaulting Darlene Foster (Grant) with intent to commit rape in violation of Penal Code section 220 and of falsely imprisoning her in violation of Penal Code section 236;

In 1977 he was convicted in Santa Clara County of assaulting Connie Sprinkle by force likely to produce great bodily injury in violation of Penal Code section 245(a) and of falsely imprisoning her in violation of Penal Code section 236; and

In 1984 he was convicted in Arizona of three counts of grand theft. (RT 24874-75; Exhs. 549, 557; 31 ACT 9162-71, 9217-22.)

D. Defense Case

1. Childhood in Georgia: Abused and Abandoned

Martha Dickerson is Morris Solomon's cousin. (RT 24891.) When she was 8, she began living with her Aunt Bertha and Bertha's father (her grandfather) in Bertha's three-room home in Albany, Georgia. Soon thereafter, appellant's family (Morris, his older brother Carl, and their parents) moved in with them. Morris was just one-year old at the time and still being breastfed. (RT 24893-95, 24897-98.)

The atmosphere of the house was chaotic and scary. You were afraid when you woke up in the morning and when you went to bed at night. (RT 24895-96.) Bertha fought with all of the adults: her son (Willie), her daughter, Carrie Bea (appellant's mother), Carrie's husband (appellant's father), and Bertha's own father. (RT 24896, 24899.) The fights were physical as well as verbal, real knock-down drag-out battles that involved fists and kicking along with yelling and screaming. (RT 24896.) Ms. Dickerson personally saw Willie kick Bertha so hard that she bled. (RT 24905.) Ms. Dickerson could also remember frightening incidents in which appellant's parents became involved in physical altercations with each other while appellant was in his mother's arms. (RT 24895, 24897.)

Early on, appellant's parents moved away. After that it was just Bertha, her invalid father, Ms. Dickerson, Morris, and Carl. (RT 24893.) The next two or three years were a living hell.

Bertha, Ms. Dickerson said, was a vicious and evil human being who would be jailed for child abuse under today's laws. Ms. Dickerson said she would get beatings from the time she got up in the morning until she went to bed at night. Her offenses ranged from not ironing perfect creases to wetting the bed -- something she never did before she lived with Bertha. (RT 24898.)

Bertha enjoyed beating people. She even beat her own father when he messed on himself. (RT 24899.)

Ms. Dickerson saw Bertha beat Morris when he was a little baby. She would lay him over her lap and hit him and hit him and he cried and cried. If you cried, Bertha would beat you more. She went out of control; she tried to kill you. The more she beat you, the more she wanted to beat you. She beat Morris until he had no cries left and was finally just quiet. (RT 24899-24900.)

Morris would get beaten for messing on himself. Ms. Dickerson did not understand this. He was a little baby. He was not trained to go to the bathroom. How could he *not* mess on himself? (RT 24900.) Yet he got a beating every day for messing on himself. (RT 24902.)

Bertha didn't need a reason to beat anyone, Ms. Dickerson said. She'd wake up in the morning thinking of beating you. (RT 24900.) When Bertha beat you, she'd make you take off your clothes, stand you on a stool in the corner, and beat you there in front of the other children. Ms.

Dickerson and Morris were always beaten in the nude. Bertha beat them with switches that they had to pick out themselves. As Bertha beat them, she'd say, "Your mother and father aren't here. Why aren't they here? Why should I have the burden of taking care of you kids?" (RT 24901-24902.)

Life with Aunt Bertha was grim. They were always at home. Ms. Dickerson said she could not remember a single time in the 3 years that she was in the house that they went somewhere. Ms. Dickerson was not sent to school or given any sort of education. (Later, after she was adopted by other relatives, she was so far behind scholastically that it took her years to get out of special ed.) Nor did any other kids ever come over. Even Christmas was grim, consisting of two oranges, two apples, and some nuts. (RT 24903.)

Bertha didn't like taking care of any of them. She threatened to put Ms. Dickerson in an institution and ridiculed Carl for the way he talked and the light complexion of his skin. She especially did not like taking care of Morris -- the baby. It took Morris a long time to walk. At two years old, he was just beginning to walk, holding onto Carl. (RT 24905-06.)

There was no love in that house, Ms. Dickerson said, no affection. None. (RT 24908.) Ms. Dickerson never once saw Bertha show affection to Morris. (RT 24903.)

Ms. Dickerson escaped when her aunt and uncle from Boston took her in. She never told anyone what living with Bertha was like until

Morris' investigator found her a year before trial. (RT 24906-24907.) Since taking the investigator into her confidence, her hair has turned totally gray and some has fallen out. (RT 24908.)

Her life turned out differently than Morris', Ms. Dickerson said, because she was eventually raised by people that cared for her. If she had not been taken in by people who loved her and didn't beat her morning, noon, and night, she did not know what would have happened to her. She might be in the same situation that Morris is in. (RT 24909.)

Marjorie Eason is Morris's cousin and Martha Dickerson's younger sister. (RT 24910.)

Ms. Eason moved into Bertha's home when she was 13. Morris was 11. The household consisted of Bertha, Ms. Eason, Morris, and Carl. (RT 24911.) Ms. Eason lived there for three years, until she was 16. (RT 24924.)

Bertha beat them all the time. They would have to take their clothes off. Then she beat them with an electrical cord. (RT 24913.) The child who was getting beaten would get hysterical, as would the children who had to watch. Morris was so small he would shake all over. (RT 24913, 24918.) Crying while getting beaten, furthermore, was grounds for another licking. (RT 24922.)

Anything could trigger a beating. Ms. Eason would get a licking if she left her clothing on the floor or didn't get all of the wrinkles out when ironing. (RT 24914-15.)

Morris sometimes had a speech problem. If he didn't say a word correctly he'd get beaten. Then he'd say, "Mama, I can try it. I'll try; I can do it. I can do it." And then he'd try to say his word right. If he didn't say it right, she would make him get in the corner nude and stand on one leg. He'd get so weak he'd just shake. Then she'd make him stand on the other leg. When he couldn't stand up at all, she'd beat him again if she was still angry. They were badly abused. (RT 24915-16.)

Bertha was cruel. Carl had a deformity around his mouth. Once Bertha gave Carl a licking and told him he looked like a little pig. She'd likewise talk to Morris about him being so skinny. (RT 24919.) Once, Bertha took Morris' hands and tied them to the pole of the bed with the extension cord so he wouldn't move. Ms. Eason will never forget that. (RT 24922.)

When Bertha would get on Morris' case, he'd beg her: "Mama, mama, I'm going to do this right, I'm going to do that right." It was very seldom that he could talk Bertha out of giving him a beating, though. She couldn't stop; when she got ready to give a licking, thatwas it -- no matter how much you pled, it would be a licking with an extension cord. Ms. Eason still has the scars on her back. (RT 24919.)

They had to pick cotton and give the money to Bertha. If they slowed down a little bit, Bertha would threaten them with a beating. Ms. Eason went to school many mornings with blood coming from the wounds where she'd been beaten with an extension cord. Morris, too, was beaten until he bled. (RT 24920-24921.)

Sometimes Morris' mother came to visit and brought them all clothing. There was no fighting when Carrie was there. (RT 24921.)

Ms. Eason was too afraid to tell other relatives what Bertha was doing to them. (RT 24925.) She was saved only when she went to her great grandmother's funeral, refused to return, and was taken in by her great grandfather. If she'd had the insight then that she developed when she got older, Ms. Eason would have asked Morris to come with her. Her life turned out differently than Morris' because she ended up in a home where she had love and sharing and caring. (RT 24922-23.)

Dr. Brad Fisher was asked by defense counsel to determine whether Mr. Solomon was abused as a child and, if so, whether such abuse could help in understanding his personality dynamics and behavior. (RT 24996.) Dr. Fisher -- a clinical forensic psychologist with degrees from Harvard, Southern Illinois University, and the University of Alabama -- had taught at Duke and the University of North Carolina since 1977. In that time, he had also directed or been involved in many programs and studies involving incarcerated youthful and adult offenders. Always central in his research

and training was the subject of child abuse, the trauma it causes, and the effects of that trauma on the psyche and behavior of the abused individual. (RT 24990-94.)

Abuse, Dr. Fisher testified, produces difficulties in at least three important ways: 1) it produces anger and rage in the abused person; 2) the latter learns how to abuse others by having the behavior modeled for him; and 3) abuse can cause physical and neurological problems, the appearance of which can anger the abuser and trigger additional abuse. (RT 24998-99, 25027.)

Behavioral and personality problems will be most severe in later life, Dr. Fisher testified, if the abuse suffered by the child was comprehensive rather than situational and long-term rather than short-lived. In extreme situations, the abuse is of a kind that has been modeled, learned, and inflicted in successive generations. (RT 24999-25000.)

Based on interviews with some of the central figures, and on his review of numerous reports, records, transcripts, and other materials (RT 25028-30), Dr. Fisher concluded that the abuse suffered by Mr. Solomon was comprehensive, long-term, and multi-generational -- the worst possible combination of the factors the witness deemed most important.[32]

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[32] This conclusion was not based on self-serving information provided by Mr. Solomon. In fact, Mr. Solomon himself refused to discuss abuse with Dr. Fisher, just as he had failed to discuss it when incarcerated on prior occasions. Such denial, Dr. Fisher said, is typical of individuals who have

Mr. Solomon was born in 1944, Dr. Fisher testified, when his mother, Carrie, was 16 or 17. He was her second child: her first, Carl, was born when she was very young, possibly 13. (RT 25134, 25156-57.) Carrie was no stranger to abuse, having suffered it first at the hands of her mother, Bertha (RT 25035), and then at the hands of Morris' father, Morris, Sr. According to a neighbor (Eaddie Moore), Morris, Sr. would inflict brutal beatings on Carrie. (RT 25031-33.)

Carrie, Fisher said, did not participate much in Morris' upbringing for his first 13 years: according to Ms. Moore, Carrie was essentially a prostitute. (RT 25033.) Instead, from 1945 to 1948, Morris lived mostly in Bertha's home in Albany, Georgia, and from 1950 to 1957 -- until his move to Isleton -- he lived exclusively at Bertha's. (RT 25134-35.)

The abuse in that home, as described by Ms. Dickerson and Ms. Eason, was relentless, and was made worse by its randomness. Bertha might strike any time, and for any of myriad arbitrary reasons. (RT 25036.) Every adult that passed through, moreover, modeled violent behavior, as illustrated by the fighting that occurred when Carrie or her brother visited. (RT 25036-37.) On top of all that, Dr. Fisher said, was the profound rejection of the little boy by all of the adults in his life: from 1950 to 1957,

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been severely abused. (RT 25124, 25130, 25205-25207.) The fact that Marjorie Eason and Martha Dickerson -- whose abuse was much shorter-lived than Mr. Solomon's -- did not talk about it to anyone, even to each other, he said, illustrates the phenomenon. (RT 25053.)

Morris saw his mother only a few times, probably never saw his father, and experienced his grandmother's disapproval every day of his life. When he did see his father, furthermore -- after the move to Isleton -- he almost certainly witnessed the beatings his father gave his mother and the sexually assaultive behavior that Carrie said Morris, Sr. engaged in without regard to who was there. (RT 25035-36, 25143.)

This was extensive abuse, Fisher said -- one would be hard-pressed to imagine a worse environment to grow up in. (RT 25049, 25249.) And it took its inevitable toll: depression, low self-esteem, emotional scarring, anti-social personality characteristics, violent acting out, and probably Morris' speech impediment as well. (RT 25049-51.) Every angle he studied the case from, Fisher said, led him to the same conclusion: the abuse Morris had been subjected to resulted in extreme mental or emotional disturbance that was strongly linked to the criminal behavior of which he had been convicted. (RT 25051, 25249-50.) That conclusion was consistent with the research conducted by the FBI that showed that the common denominator in cases of multiple murder is a perpetrator who suffered abuse as a child and whose father was largely absent. (RT 25152-56, 25159.)

Testing, Dr. Fisher said, had not found gross brain damage, but that did not mean there wasn't any; to the contrary, Mr. Solomon's speech disorder suggested the existence of neurological damage. (RT 25252-53.).

The fact that Mr. Solomon knew that killing was wrong (RT 25244-25244a), and that he did not hurt all of the prostitutes with whom he came in contact, moreover, did not mean that he had full control over his behavior. It meant, rather, that his disorder was only triggered under certain circumstances (as when he felt humiliated, Dr. Fisher suggested). (RT 25238-39.) In those situations, the past abuse he had suffered activated complex feelings that significantly impaired both his ability to think properly and clearly about right and wrong and his ability to exercise impulse control. (RT 25244, 25250.)

That phenomenon did not occur within prison walls, Dr. Fisher pointed out. In none of his incarcerations had Mr. Solomon had any serious problems. (RT 25233.) In that structured environment -- from which women were largely absent and in which drugs and alcohol were harder to obtain -- his disorder was quiet and his judgment and thinking intact. (RT 25236-38.)

2. High school, college, and young adulthood in the San Joaquin Valley: Reaching out

Josea Parham, 80 years old at the time of trial, for 32 years had been the pastor of a church in Isleton, a farming town 40 miles down the Sacramento River from Sacramento. He first met Mr. Solomon and his family in the 1950s. They were one of maybe eight black families in the area and lived near the cannery. (RT 24927-32.)

It was not a good family, Mr. Parham said, for a child to grow up in. The parents argued a lot, the grandmother wouldn't let Morris and Carl attend church, and Carl was a little "off" mentally, as evidenced by the times he bit off the bottom of a man's ear and had to be pulled off of Bertha after he got her in a bear hug on the ground. (RT 24933-36.)

Mr. Parham had thought Morris was a normal boy -- everyone seemed to like him; he did odd jobs to support his grandmother -- but he was by himself a lot. Mr. Parham used to see him driving around in his car alone. (RT 24934, 24937.) In Mr. Parham's view, Morris did not have the kind of environment or family that taught the values a child needs to learn. (RT 24936.) The pastor expressed the hope that Morris' life would be spared. (RT 24937.)

At the time of trial, Augustin Mandujan was an administrator for a state program for the developmentally disabled. (RT 24938.) He knew Morris Solomon in high school. They both grew up in the part of Isleton in

which minorities lived ("Chinatown"), but Morris lived in the poorest part ("Beantown" or "Cannery Row") where the housing consisted of small, very rundown shacks and sheds. They took the bus together to Rio Vista High School where both were members of the pep band and marching band. (RT 24940-43.)

Mr. Mandujan remembered Morris as someone who could be funny but often seemed to try too hard to get along with people. His intentions were the best but his approach could be irritating. As a result, he was teased and excluded a lot. This hurt his feelings but even if people were very, very hard on him, he never came back at you. He'd just take it. He wasn't verbal about his problems. He'd keep quiet and keep it all inside. Mr. Mandujan did not remember Morris as being at all aggressive or violent. (RT 24944, 24947-48.)

Nobody was ever invited to Morris' house, including Mr. Mandujan, but he got to know the members of the family some out in the community. (RT 24945.)

Morris' brother, Carl, was very slow -- as was the whole family when it came to social ability. A lot of people would tease and harass Morris because of this. Morris was very protective of Carl, however: he'd tell other kids to quit picking on him and would remove him from sticky situations. (RT 24946.)

Morris' mother was weird and very hard on him. She was aggressive and verbal with him in public no matter who was around. (RT 24945.) She would just go off on him and he would take the brunt of the whole thing. (RT 24950.)

Mr. Mandujan knew of Morris's grandmother mostly by reputation. Someone would be talking about how tough Morris's mom was on him and people would jump in and say: "That's nothing. Morris' grandma whoops him a lot harder than his mom does." The one time Mr. Mandujan saw Morris' grandma verbally address him, Mr. Mandujan thought she was a very tough, tough lady. (RT 24950.)

Finally, Mr. Mandujan said, while he generally supported the death penalty, he felt that it was not appropriate in Morris' case. While he himself had not grown up in affluent circumstances, the difference was that his parents, unlike Morris', gave him time and attention. In his heart, he said, he knew that if things had been different in Morris' life, Morris would have turned out differently. (RT 24951-24952.)

Julie Parham-Cotton grew up in Isleton and knew Morris as a teenager. He was maybe four years older than she was. (RT 24954.) They came from two of the five or six black families who lived in the town. (RT 24955.) Morris' family lived in Tinpan Alley, the very poorest part of Isleton. (RT 24956, 24960.)

They were the "weirdo" family. (RT 24955.) Morris' brother Carl was sort of retarded and Morris would always have to stick up for him and protect him. Morris' grandmother, Bertha, people said, was mean and used to beat Morris and Carl. Morris' mother, Carrie, was a very, very loose woman who entertained different men -- mostly farmworkers -- all the time. People said Miss Carrie turned out the way she did because she, too, was beaten by Bertha when she was little. Neither Carrie nor Bertha ever attended the social gatherings the rest of the black families in town regularly had. Morris' father, as far as Ms. Parham-Cotton knew, had abandoned the family long before. (RT 24956-57, 24959.)

Morris' weirdness took the form of explicit comments about girls' breasts (RT 24961) and uninvited attempts to kiss his dance partners. A friend of Ms. Parham-Cotton's had a crush on Morris -- until they kissed and he bit her lips so hard there were indentations. (RT 24958-59.) Girls in town were always told by their parents not to go anywhere alone with Carl or Morris. (RT 24957.)

Asked for her thoughts on the appropriateness of the death penalty, Ms. Parham-Cotton said there had been no love in Morris' family, no caring, no money. From the time he was small, she said, he essentially did not have a life -- not the kind that everybody else she knew had. Given the conditions in which he was raised, Ms. Parham-Cotton said, the sickness

that led him to commit his crimes must have begun when he was very young. (RT 24961-62.)

Barbara Shearer-Honaker went to school with Morris Solomon at RioVista High School. (RT 24965.) She considered him her friend. (RT 24967.) They were in the school bands together, where Morris was the life of the party and got along with everyone. (RT 24966, 24970-71.) Morris made her laugh and was always nice to her. (RT 24969.)

Back then, however (in the fifties), Rio Vista High was very white and very race conscious. You could dance with black kids but not date them. Ms. Shearer-Honaker, who was white, never went to Isleton. There was a social line that just wasn't crossed in those days. (RT 24968-69.)

There were some times that Morris could be pesty -- like he'd try to kiss her or goof off. (RT 24967.) But he was real tiny -- he didn't weigh over 100 pounds soaking wet. When she told him to stay away from her, he generally abided by that. (RT 24970.)

Ms. Shearer-Honaker never saw Morris be violent or aggressive. Crying, she told the jury that, when she read in the papers that the perpetrator of the crimes was the same Morris Solomon she had known, she couldn't believe it. (RT 24972.)

Ms. Shearer-Honaker said she had recently been a witness to an act of domestic violence for the first time in her life. The trauma and suffering caused by that single occasion was so great, she said, she simply could not

imagine what Morris must have gone through having been beaten all the time as a child. Given all the hurt and anger and pain of his growing up, she said, she thought that he should be allowed to live out the rest of his life in prison. (RT 24972, 24975.)

John Mandujan, the brother of Augustin Mandujan, had taught 5th and 6th grade in Stockton since 1968. He grew up in Isleton and knew Morris Solomon, who was a year or so behind him in school. Morris played the saxophone in his band for awhile in high school. (RT 24977-24978.)

Most of the time, Mr. Mandujan said, Morris was happy-go-lucky and energetic and did a lot of goofing around. Sometimes he'd get on your nerves and you'd get angry with him, but that was the way he was. (RT 24978.)

Carl was always with Morris. Later, Mr. Mandujan said, he came to realize that Carl was retarded but, at the time, kids subjected him to a lot of ridicule because he looked strange. (RT 24979.) The only time Mandujan could remember Morris getting upset or angry was when the ridicule of Carl went too far. (RT 24980.)

Morris, Mandujan said, lived in an area where mostly seasonal workers lived. In all the time he knew Morris, he never went to Morris' home, never met his parents, and, as far as he could recall, never even heard Morris speak of his parents. (RT 24980.)

A couple of years after high school ended, Morris helped Mandujan get a job with the Patchett Bus Co. in Newman and was more or less Mandujan's supervisor. (RT 24981.) He said Morris was a very hard worker, took his responsibilities seriously, and did a very good job. (RT 24982.)

Mandujan said he couldn't reconcile the Morris he knew with the crimes that had been committed. He said he still considered Morris a friend. (RT 24982.)

At the time of trial, Harvey Felt had taught Industrial Arts at Rio Vista High School for 44 years. He had Morris Solomon as a freshman. At that time, Felt thought, out of 300 students, they had 3 black students in the whole high school. (RT 24983-44.)

Felt remembered Morris as a good student in his classes. (RT 24985.) He also recalled that Morris was active in both the dance band and marching band, managed a football team, ran the clock for many of the football games, was active in track, and worked (along with Carl) in the school cafeteria. (RT 24986-87.)

Felt said that, in the Morris Solomon that he knew, there was no indication whatsoever that he was capable of the crimes he had been convicted of. (RT 24988.)

Henry McKinney, Sr., was raised with Morris Solomon in Isleton. (RT 25003.) He was a few years younger than Morris (RT 25004) and

lived a couple of houses down from him in the cannery district (RT 25006). They liked each other because each was an outgoing person. (RT 25007.)

Morris' mother was very strange and kind of evil. She wanted no one around, especially kids. (RT 25008.) She was particularly evil towards Morris and tough on him. He had to sneak out his window to go to dances. His curfew was about 9:00 p.m. She was very strict with him. She often made him eat his dinner outside and alone on their front porch. (RT 25009.)

While Carrie was a very difficult lady for kids to get along with, she was a different person with men. With them she was talkative and liked to carouse -- she had the reputation of being a very, very loose woman. (RT 25011-12.)

Mr. McKinney also knew Carl. He was slow and usually nice, but when he drank you had to be wary -- he could go off on you. (RT 25012.)

Morris himself wasn't much of a drinker and didn't use drugs. (RT 25022.) He was always going to be a Romeo but it never worked out for him. He showed women attention and affection by buying presents but, after hanging around for the gifts, they'd withdraw from him. (RT 25014-15.)

McKinney said Morris was a very hard-working man. Among the jobs McKinney knew of, Morris moved railroad machine pipes, did carpentry work, repaired cars (he was a very good mechanic, McKinney

said), repaired tires for a trucking outfit, and worked for the Patchett Bus Co. as a driver and repairman. (RT 25013-14, 25017.)

McKinney knew that Morris went to Vietnam. Prior to going, he was a very kind, outgoing, outspoken person. When he came back, something had changed inside of him. The kindness wasn't in his heart. He was more aggressive, more violent, evil-tempered. He was scary. He'd hear noises and duck -- think someone was shooting at him. It was like he was shell-shocked. He was tight, not loose like he used to be. (RT 25017-21.)

McKinney ran into Morris in Stockton once: he had a couple of working girls with him in his truck. He looked a lot different. That was the last time McKinney saw him in person. (RT 25024-25.)

The next time he saw him was on television in 1987 when he was arrested. McKinney's reaction was: "No, not Morris, no...." (RT 25025.)

Helen Hodge and two of her children, Maryanne Fields and James Hodge, testified about appellant's relationship with their family. In the early sixties, Helen and Elijah Hodge lived in Lodi with their 7 children. For 2-3 years -- while Morris was at San Joaquin Delta College with their son, James -- he would come to their home constantly. He became a member of the family. He had a father-son relationship with Elijah, was like a brother to James, and was solicitous of both parents' needs. He went to church with them most Sundays and then would go out with the children. (RT 25597-99, 25601, 25613, 25620, 25616, 25625-26, 25631.)

Sometimes he brought Carl, whom he plainly loved and felt protective of. (RT 25602, 25628.) He was just a kind and lovable person. (RT 25597.)

Then he went to Vietnam. When he returned, he wasn't the loving person he'd been before. He was no longer happy-go-lucky or fun to be around. He was distant. He went to jail twice for unpaid parking tickets. Whereas before Vietnam, he was very truthful, when he got back he began to tell lies. For the first time, he had a temper. Concerned, the Hodges had Morris move in with them for six months. (RT 25605-09, 25613, 25622, 25630-31.) He and Maryanne became engaged. Mrs. Hodge very much wanted the marriage to happen. She still loved Morris, despite the changes since Vietnam. But Maryanne -- who was five or six years younger than Morris -- broke off the engagement -- she liked him as a friend -- and Morris, who was very hurt, moved away. (RT 25609-10, 25619.)

The Hodges met Carrie and Bertha on one or more occasions. Carrie was very strange and unfriendly. (RT 25602, 25621, 25629.) Bertha seemed nice and friendlier than Carrie but not necessarily friendly. Morris seemed to respect her, Mrs. Hodge said, but she had no idea that Bertha had raised Morris for a large portion of his childhood. (RT 25611-12, 25619.) James said that when Bertha spoke, Morris jumped. She was clearly the boss. (RT 25629.) None of them ever met Morris, Sr. Appellant told James that he never knew his father. Maryanne never heard him speak of the man. (RT 25622, 25628.)

Mrs. Hodge pleaded with the jury not to take Morris' life. (RT 25611.)

3. Vietnam: trauma, killing, prostitution, heroism

Shad Meshad testified as an expert on matters involving Americans who served in Vietnam. On the cutting edge of veteran's issues since his own return from Vietnam in 1970, he had received many awards and honors for the work he had done with close to 13,000 veterans. He was familiar with the conditions under which they served. (RT 25276-25280.)

Mr. Solomon, he said, had served in Vietnam from the summer of 1966 to the summer of 1967. (RT 25283.) He was trained as an infantryman and was stationed at the base camp of Camp Enari, near Pleiku. In 1966 and 1967, Mr. Meshad said, there was a constant flow of body bags through camps such as Enari. (RT 25293-94.)

Mr. Meshad was asked about two matters: 1) a soldier's mindset regarding killing; and 2) his view of prostitutes.

With regard to killing, Meshad testified that soldiers went through intensive training, the point of which was to dehumanize the Vietcong, to make them seem like lethal worms, and to make the soldier want to kill them any way he could and as easily and as reflexively as he would kill a mosquito. (RT 25288-89.) More generally, it was drilled into soldiers not to trust anybody with slant eyes. (RT 25291.)

Prostitutes, Meshad said, were looked at the same way: less than human. (RT 25301.) The soldiers had pretty gross names for them. (RT 25297.) They were everywhere (including the front line) and they were

cheap ($1-3 could get you a girl for the entire day). (RT 25296, 25301.) Outside Camp Enari was a big prostitution area called "Sin City" that, like the "Steam and Cream" shops in more populated areas, was sanctioned and monitored by the American military. Soldiers were repeatedly warned that prostitutes were sources of horribly disfiguring STDs and sometimes were used by the Vietcong to inflict serious injuries on their American clientele. (RT 25297-25300.)

In Vietnam, Mr. Solomon was under the command of platoon sergeant Carrol Crouse. (RT 25322.) Before then, Sgt. Crouse had supervised appellant at Fort Louis, Washington, and on the U.S.S. John Pope which sailed for Vietnam on July 21, 1966. (RT 25303-04, 25307.) He considered appellant "an outstanding individual". (RT 25307.) He hand-picked him to serve in his platoon because he could trust appellant to do what needed to be done. That, he explained, is how one survived in Vietnam. When he told appellant to do something, he knew it would get done. (RT 25322, 25324.)

Vietnam, he said, was stressful from the time they stepped off the boat. (RT 25312.) It was like being in the middle of hell. (RT 25316.) Their base camp was Enari, which was maybe 3 miles wide. (RT 25315.) Their job was to establish a series of forward fire bases between Enari and the Cambodian border. (RT 25320.) Because of his trust in Mr. Solomon, Crouse kept him with him. They spent 60-70% of their time either in

convoys to and from the fire bases -- during which the stress levels were out of sight -- or at the fire bases themselves, where they were on high alert at all times. The fire bases were also the places that the dead bodies had to pass through. (RT 25322-23.)

Sgt. Crouse confirmed Mr. Meshad's description of the ubiquitousness of prostitutes, whether in "Sin City" or the middle of the jungle 30 minutes after a fire fight. He said appellant, like most of his men, would avail himself of the services being offered. (RT 25325-26.)

Sgt. Crouse said that appellant saved his life. It was February 15, 1967, they were at a fire base, and a mortar attack began. Crouse was asleep. Appellant came running over to Crouse's tent, hollering, and Crouse made it to a bunker just before his tent and everything in it was destroyed. He said that Morris did not have to do what he had done. He simply could have jumped in the bunker that was near his own tent. Instead, he risked his life to save Crouse's. (RT 25327-29.)

Since Morris saved his life, he said, he could only hope that the jury saved Morris'. (RT 25329.)

Gary Harris was in Vietnam the same time Mr. Solomon was. (RT 25334.) They were in the same division but under different sergeants. (RT 25333-34.)

Harris confirmed that, wherever you went in Vietnam, there were girls -- they were between 12 and 15 years old, he said -- selling sexual

favors. The convoy would take a break and they would be there. (RT 25338.) He also confirmed that some prostitutes conspired to injure GIs, both by deliberately spreading venereal disease and by violent means. He personally had been on a patrol team that discovered three soldiers in Sin City who had been castrated, then bled to death. (RT 25340.)

The first time Mr. Harris met Mr. Solomon was during a mortar patrol. A tank hit a road mine, seriously injuring the four occupants. Only five members of the 85-vehicle convoy left their vehicles to help. One of them was Morris Solomon. It was a courageous thing to do because where there was a land mine there were often personnel mines and concealed punji sticks that could kill or maim you. Morris disregarded the danger, crawled up the vehicle and down the hatch, and handed the wounded up through the hatch. (RT 25331.) He was a hell of a man to do what he did. (RT 25335.)

Harris' subsequent contacts with Mr. Solomon confirmed his first impression. He was a good mechanic, he was well-trained, he did his job, he did it right, and he never complained. If Harris had to go back to Vietnam, he'd want to go with someone like Morris. (RT 25335, 25340.)

Asked which punishment he thought Mr. Solomon should get, Mr. Harris said: "Well, I'd like to see him get life without parole ... because I was in Vietnam with him and I know him.... I'm not against the death penalty in some cases, but I would like to see Morris ... get life because ... I

seen what he done in Vietnam. More than once he worked on vehicles that he could have been killed on. He helped save four GIs. Their parents would thank him today. The men we helped save are alive today.... [T]hat's what I think of Morris Solomon." (RT 25341.)

4. The psychopathology underlying the killings: testimony of Dr. John Wilson

Dr. John P. Wilson testified regarding the trauma in Mr. Solomon's life and its relationship to the crimes he committed. Dr. Wilson was trained as a clinical psychologist at, *inter alia*, Michigan State and Harvard; at the time of trial he was a professor at Cleveland State and Director of the Center for Stress and Trauma. His work in the area of post-traumatic stress disorder (PTSD) had won him international renown. He had conducted the first national research project dealing with that phenomenon (in 1976), as well as eight subsequent studies, interviewing some 8,000 veterans along the way. He had also published 8 books and more than 100 articles in scientific journals on the subject and was past president of the International Society of Traumatic Stress Studies. (RT 25342-25343, 25358-2; 1 ACT-Tr.Exhs. 35-64.)

Mr. Solomon began his life, Dr. Wilson said, with a childhood that was "brutally traumatic". (RT 25350.) He was essentially abandoned and rejected by both mother and father, then raised by a maternal grandmother who was sexually sadistic and torturous. In her household, Dr. Wilson said, Morris was humiliated, denigrated, and emotionally and physically abused in a variety of ways: by verbal abuse, nude beatings, severe and unpredictable beatings, being made to lie on the bed naked for long periods of time, being forced to stand in a corner on one foot and on a chair to be

beaten by his grandmother, being tied with electrical cord to a post, and having his penis directly hit as part of the beatings. He also witnessed beatings to his cousins and brother, later observed his father being abusive to his mother, sexually and otherwise, and was present at times when his mother was having sex with other men. (RT 25350, 25368-69, 25486.)

The kind of chaotic, dysfunctional, and brutal environment that Morris grew up in, Dr. Wilson said, often leads to PTSD in the abused child, as well as other psychiatric or psychological conditions. (RT 25358-3.) It plainly left Morris with a very serious mental disorder. (RT 25457.) First, he inevitably developed feelings of low self-esteem, worthlessness, and inadequacy in response to what he was experiencing. Second, he inevitably had intense feelings of rage, hostility, and aggression towards the people – especially Bertha – who abused, humiliated, and degraded him. (RT 25358-3, 25370.) He also had to feel deep loss in not having a mother or father to attach to. (RT 25380.)

At the same time, those powerful feelings could not be -- and were not – expressed. Rather, Dr. Wilson said, Morris resorted to the defense mechanisms that humans resort to in such dysfunctional environments: denial – to minimize the full psychic impact of his experiences; repression – to eliminate from his conscious mind things he could not otherwise deal with; disassociation – to psychologically remove himself from the situation, especially the beatings; and numbness, shutting off feeling altogether – in

order to develop a tolerance to the trauma. Such defenses were still manifest 40 years later when Dr. Wilson asked Morris about the beatings. He acknowledged they occurred but said they hadn't seemed so bad; you just couldn't cry or you would get beaten worse. (RT 25358-3, 25370, 25379-25382.)

Dr. Wilson emphasized that all of this trauma occurred in the most critical, formative years of Morris' life and could not help but lead to psychopathology – i.e., to an abnormal adaptation to a very sick and abusive environment. (RT 25371.)

In Morris' high school and junior college years, Wilson said, his coping took the form of trying to compensate for his rejection by his parents and grandmother by being the good guy, doing favors for others, trying to please and win affection. He did not have much experience with people liking him. (RT 25384-25385.)

Then he went to fight in Vietnam. There were three things in particular about Morris' Vietnam experience, Dr. Wilson said, that were important to understanding what happened later.

First, the number of stressors (a term Wilson used to connote events or experiences involving levels of stress that were out of the ordinary – RT 25421) that he was exposed to were extremely high. Ratcheting up the stress for everyone was the fact that this was a guerilla war in which surprise, ambush, booby traps, and anti-personnel devices were the norm,

and that the war was being fought amidst a populace in which American soldiers could not readily distinguish friend from foe. (RT 25345-25346.) The stressors that stood out in Mr. Solomon's personal war experience included, among other things, random killings by both sides, ambush attacks around the clock, jeeps around him being blown up by land-mines, the taking of Viet Cong prisoners, incoming mortar attacks, sniper fire by Viet Cong at the perimeter of Dragon Mountain -- later known as Camp Enari – and infiltration of the perimeter of Camp Enari, resulting in mines exploding inside the compound. Two particularly stressful activities that he was engaged in much of the time was convoy duty between Camp Enari and Quinhon and Pleiku, where the roads were planted with land mines, and pulling night duty to guard against poisoning of the water supply. These were all combat-zone stressors that involved the possibility of injury or death. (RT 25385-b, 25385-c, 25354-25355.)[33]

Consequently, Wilson said, for most of one year Mr. Solomon was required to be in a very aroused state of survivor functioning and hyper-alertness. (RT 25356.) As someone who had come from such a brutalizing

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[33] Dr. Wilson acknowledged that, in the past, Mr. Solomon had probably told several lies about his Vietnam service to interviewers. (RT 25435-25436, 25442, 25446-25447.) In the interview that Wilson conducted with him, however, Wilson thought that, if anything, Mr. Solomon had *understated* the trauma he had experienced. (RT 25441.) In any event, Wilson's conclusions about the effect of Mr. Solomon's Vietnam experience on his subsequent conduct were based on facts he had corroborated through other sources. (See RT 25436, 25542-25543.)

childhood, he was particularly vulnerable to the psychic toll such stress exacts. (RT 25351, 25386.)

The second important aspect of Mr. Solomon's Vietnam experience, Wilson said, was the premium placed on – and the government sanctioning of – aggression and violence. (RT 25385-b, 25386.) Wilson knew of at least two particularly brutal incidents in which appellant participated. In one, prisoners were tethered to a vehicle and dragged to their deaths at high speeds. In the other, an enemy bunker was located outside the compound and an armored personnel carrier was used to grind the top of the bunker down into the ground, killing the soldiers underneath. (RT 25387, 25542-43.) Dr. Wilson believed that Mr. Solomon's Vietnam experience helped to undermine the taboo against killing that he had before going to Vietnam. (RT 25441.)

The third relevant aspect of Mr. Solomon's tour of duty in Vietnam, Wilson said, was his involvement with prostitutes. (RT 25385-b.) Prostitutes were very common, inexpensive, and essentially dehumanized by U.S. military personnel. They were typically young girls, 12-14 years old, and were readily available almost anywhere throughout the country. They were widely perceived as kind of sub-human – objects of manipulation who were simply there to be used -- perceptions, Dr. Wilson said, that Mr. Solomon shared. (RT 25347-25348, 25352.) In addition, there was an element of danger associated with prostitutes: rumors ran

rampant that some in fact were Viet Cong whose intent was to injure the genitalia of American soldiers. (RT 25349.)

Vietnam, Dr. Wilson said, was thus a place in which trauma occurred every day, aggression was sanctioned, and women offering sex were debased. Mr. Solomon's Vietnam experience thus reinforced the pattern that he had experienced in his grandmother's and mother's households. (RT 25386.)

When appellant returned from Vietnam, Dr. Wilson said, he was 23 years old and he did his best to do what people that age were supposed to do. He got a job (at a bus company), became engaged to Maryanne Hodge, and, when that didn't work out, married Sandra Watson and begin to raise a family. (RT 25388-25390.)

He was not the same person as he'd been before the war, however. While he did not meet all of the diagnostic criteria laid out in the DSM-III-R for PTSD, he did have many of the symptoms, as reported by the Hodges: exaggerated startle response, hypervigilance or excessive scanning of the environment for threats or danger, high-speed driving, irritability, anger, change in personality from happy-go-lucky to embittered, fiscal irresponsibility, and problems of concentration. (RT 25353-25354, 25388, 25428.)[34] In 1968, he quit his job and became involved with prostitutes,

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[34] Wilson said that 27.6% of the soldiers who served in combat roles in Vietnam suffered from PTSD. (RT 25427.)

acting as a broker between them and at least two clients: a rhythm and blues club in Stockton and a certain field manager in the Delta. He also began selling heroin and marijuana. (RT 25389, 25391, 25393.) Then, in 1969, he slashed Mary Kaufman and in 1971 assaulted Dale Walker. The psychopathology that Morris had succeeded in keeping down had begun to rear its ugly head. (RT 25389, 25391.)

The assaults that followed until his arrest in 1987, Wilson said, adhered to a common pattern: Morris degraded and humiliated the women, forced sex of various types on them, made them do what he wanted. He acted out his rage and violence in a manner that rendered them vulnerable and helpless. The pattern reenacted the humiliation, subjugation, abuse, violence, and sexual sadism that he experienced in his most critical, formative years. (RT 25374-25375, 25396, 25522-25523.)

The prostitutes Morris victimized, Wilson said, were "replacement perpetrators": replacements for the perpetrator -- Bertha -- who injured, humiliated, and beat him into the state of submission to her will. He was recreating and reenacting the abuse, but with different victims. (RT 25397-25398.)

The cocaine Morris began to use in 1985 fueled that psychopathology. (RT 25399.)[35]

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[35] Mr. Solomon told Dr. Wilson that he didn't start using cocaine until March 14, 1986, his birthday. Dr. Wilson, however, believed that Morris

Cocaine alters brain functioning. On it, people are apt to misperceive cues or stimuli in the environment as threatening and become paranoid. At the same time, cocaine stimulates fantasies of power, omnipotence, and grandiosity, and removes the controls that normally keep one's behavior in check. As a result, users are prone to act out. In Morris' case, the combination was deadly. He had a lot of anger and rage to act out, the increase in paranoia made it more likely that those feelings would be aroused, and the increase in grandiosity and disinhibition made it more likely that he would act out in the manner that his psychopathology dictated. (RT 25395-25396, 25471, 25534-25538.)

The fact that Morris raped and/or sodomized his victims and had not literally been so victimized himself as a child, Wilson said, was not a deviation from the reenactment pattern. Rape is not an act of sex, Wilson said. It is an act of domination, an assertion of control whose intent is to inflict humiliation. (RT 25521.) Morris had been tied up, been forced to stay in one position or one place, and been beaten by a powerful and brutalizing woman around his genitals. (RT 25486.) His actions toward his victims -- tying them up, placing them in bondage, beating them, verbally

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had begun smoking crack before the first murder (which apparently occurred in February, 1986). He thus thought that Snoopy's and Rosella Fuller's recollections -- that Mr. Solomon began using no later than February, 1986, and maybe as early as November or December, 1985 -- were more reliable than appellant's. (RT 25458, 25463, 25528, 25533.)

abusing them, humiliating them, and using his penis as a weapon, which he was not in a position to do as a boy -- paralleled what had happened to him. (RT 25486-25487.)

Morris did not really act freely, Wilson said. He was driven by the psychopathology -- the illness -- borne of his traumatic, abusive background. (RT 25467.) Once he crossed the boundary into rage, what followed was automatic. What came out mimicked the pattern he had experienced as a child. (RT 25470.)

Mr. Solomon did not hurt the prostitutes from whom he felt approval, Wilson said, because he was getting something from them that he needed and had never gotten as a child. In those relationships, as in others he had had, he exhibited many qualities of caring. There was a complex intertwining of love and hate feelings that reflected the enormous confusion in his tormented psyche. In an interaction in which he perceived something as threatening or humiliating, however, he did not have the coping repertoire to draw on that one learns in a functional family. In those situations, particularly once he began using cocaine, the second computer chip was activated and the hate and rage released. (RT 25383-25384, 25474, 25555.)

Mr. Solomon's lack of control was not inconsistent with his attempts to conceal his crimes, Wilson said. There were two pathologies operating. One was the urge to act out in a pathological way by killing prostitutes.

Over that, he lacked full control. The steps taken to avoid detection, on the other hand, were consistent with the anti-social personality disorder suggested by MMPI testing. While Morris could not always keep his rage from taking over, Wilson said, he knew that killing was a crime and that he would be punished if his acts were discovered. His continued denial that he had committed any of the crimes of which he'd been convicted reflected that second pathology. (RT 25410, 25507-25508, 25516-25517, 25560.)

Had the Army known in 1967 what it knew about psychopathology in 1992, Dr. Wilson said, the depth of Mr. Solomon's illness would have been discovered after his return from Vietnam, he would have been placed in the care of the Veteran's Administration, and he would have been able to receive the kind of treatment he needed. (RT 25360-25361, 25555.) Similarly, Wilson said, if the seriousness of Mr. Solomon's disturbance had been understood when he was sent to Atascadero after the Dale Walker incident, things could have turned out differently. (RT 25392.)

Instead, he was left to his own devices. Without understanding what was happening or how to control it, he completed the cycle by victimizing others the way he had been victimized. Psychologically murdered as a child, consumed by a rage no one taught him what to do with, and his remaining layer of protection peeled off by cocaine, he finally plunged into a phase in which he began to enact and reenact the crime from which he had never recovered. (RT 25398, 25400-25401.)

5. Additional evidence regarding cocaine use

Dr. Leon Marder provided more detailed evidence regarding the effects of cocaine use. Dr. Marder, 69, had a varied background -- at the time of trial he was Medical Director for Mental Health of Santa Barbara County and a professor of Clinical Psychiatry at U.S.C. -- but his special expertise was addictive medicine. Beginning in the mid-sixties, at U.S.C., and for the next 17 years, he ran the largest drug treatment center in the western United States. During that time, he did a great deal of clinical research while developing and teaching the medical school's core curriculum in addiction medicine. Among other things, he also wrote the chapter on Substance Abuse and Alcoholism in the Merck Manual and helped to found the California Society of Alcoholism and Other Drug Dependencies and the National Association of Addiction Medicine. (RT 25632-35.) In his spare time, he also earned a law degree. (RT 25637.)

Dr. Marder described three stages of cocaine use. Stage 1 -- euphoria or intoxication -- may last a few weeks. During that stage, the cocaine -- the ultimate stimulant (RT 25645) -- triggers in the user great energy and intensely pleasurable feelings, particularly when it is smoked (i.e., in "rock" or "crack" form). (RT 256501-51, 25657-59, 25663.) The increased alertness also increases the propensity for misinterpretation, upset, and violence, although this is not usually a problem in Stage 1. (RT 25660.)

Anyone who experiences Stage 1 will inevitably experience Stage 2, however -- dysphoria. (RT 25667.) In that stage, the neurons are hungry and must be fed but the cocaine does not have the same effect. The user is anxious, depressed, lacking in energy. At the same time, the aggressiveness that might have been making an appearance in the late stages of Stage 1 becomes much more marked. Delusions increase. The user becomes suspicious and fearful of people, aggressive in response to paranoid ideation. (RT 25665-66.) Insight into what is happening is rare while denial is common. (RT 25670-71.)

Stage 2 descends into Stage 3, which Marder labels "cocaine psychosis". It has a minor and major phase. In the minor phase, the user is very restless, irritable, and impulsive. Paranoia intensifies. In defense against the irrational fears, there is fragmented thinking, the beginning of psychosis. One walks on eggshells around such people. They have a hard time making reasonable decisions. (RT 25671-73.) In the major and final phase, the difficulties increase to the point that the user is arrested or is forced into treatment. (RT 25675.)

Dr. Marder did not know enough about Mr. Solomon's situation to know which of the three stages he was in at the time of the killings. (RT 25769.) The borders between the stages are not well-defined and there is an overlap in symptoms. (RT 25695.) He noted, however, that the stage

that one is in is determined much more by the amount of cocaine ingested in the past month or two than in the past day or even week. (RT 25695.)

He also made general observations relevant to Mr. Solomon's situation. People, he said, don't solve problems when they're under the influence of cocaine, but fall back on more basic behavior. (RT 25677.) A person's life experiences are thus important in determining what effect cocaine will have on them. (RT 25693.) If an individual is unstable before using cocaine, this becomes much more pronounced when the drug is used. (RT 25770.) So does the kind of Jekyll and Hyde schism that Mr. Solomon exhibited when he moved to the Bay Area. (RT 25681.)[36]

Cocaine use also enhances a user's proclivity for violence. In addition to triggering an increase in paranoia, misinterpretation, and irritability, the drug drastically impairs the user's ability to control behaviors that he otherwise knows are wrong. (RT 25681, 25683, 25686.) Once the propensity to violence is increased, furthermore, it stays increased for a long period of time -- weeks and months initially -- without the need for much, if any, additional drug use. With the neurons in the central nervous system hyper-sensitized by the prior usage, any negativity in the

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[36] The doctor was informed that, during the period of time in which appellant began to assault prostitutes, he was, according to his first wife, perfectly gentle with her and their baby. (RT 25681-82.)

environment -- stress, anxiety, frustration, anger -- can set the user off. (RT 25686-88. See also RT 25776, 25778-79.)

6. Mr. Solomon's conduct while incarcerated, 1976-1981

Harold Snook was a civilian employee of the California Department of Corrections. (RT 25578.) In his various supervisory positions in the prison industry program at San Quentin, Mr. Snook had contact with Mr. Solomon on almost a daily basis from September of 1976 through February of 1981. (RT 25580, 25591.) He knew Mr. Solomon's work as the lead inmate in the assembly department of the furniture factory -- where Mr. Solomon assembled furniture and procured and delivered parts -- and as the forklift driver in the detergent plant. (RT 25580-83.)

In such categories as attitude (toward fellow inmates, state, and job), work habits, learning ability, alertness, perseverance, and quality of work, Mr. Snook and other supervisors rated Mr. Solomon as "Excellent" or "Exceptional". (RT 25583, 25585.)

While inmates on death row are not permitted to work, Mr. Snook testified, a person sentenced to life without parole who served his sentence at San Quentin would work in the same furniture factory in which Mr. Solomon did such good work in 1976. (RT 25593-94.)

ARGUMENT

I.

THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT ANY OF THE KILLINGS WERE DELIBERATE AND PREMEDITATED

A. Introduction

The prosecution's guilt phase evidence was directed at convincing the jury that it was Mr. Solomon who was responsible for the deaths of the 7 women whose bodies were found in and around Oak Park in 1986 and 1987.

A question that was barely touched on at trial was the perpetrator's state of mind at the time of each killing. The question received little attention because there was little the prosecutor could say about it that was enlightening. Nonetheless, on counts 2, 7, 9, and 10, the jury convicted Mr. Solomon of first-degree murder.

The only theory of first-degree murder on which the jury was instructed was premeditation and deliberation. CT 5432. To convict Mr. Solomon of that offense, the prosecution was required to prove the elements of premeditation and deliberation beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). As will be shown below, that burden was not met. The evidence was not sufficient to support a rational inference – as opposed to speculation – that any of the four killings was the

product of the kind of "careful thought and weighing of considerations" necessary to constitute deliberation. *People v. Mayfield*, 14 Cal.4th 668 767 (1997). The convictions on counts 2, 7, 9, and 10 thus violate the due process and jury-trial clauses of the state and federal Constitutions, *a fortiori*, fail to pass muster under the heightened reliability requirement that governs capital judgments, *Beck v. Alabama,* 447 U.S. 625, 637 (1980), and must be reversed. *Jackson v. Virginia*, 443 U.S. 307, 309 (1979); *People v. Johnson*, 26 Cal. 3d 557, 578 (1980); Art. I, §§ 7(a), 15, Calif. Const.; U.S. Const., Amends. 5, 8, 14.

B. Standard of review

"[T]he relevant question is whether ... any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. at 318-319. "In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court 'must view the evidence in a light most favorable to respondent....' [Citations.] The court does not, however, limit its review to the evidence favorable to the respondent.... First, we must resolve the issue in the light of the whole record - i.e., the entire picture of the defendant put before the jury - and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements ... is

substantial...." *People v. Johnson*, 26 Cal.3d 557, 576-577 (1980); emphasis in original.

"Evidence, to be 'substantial' must be 'of ponderable legal significance ... reasonable in nature, credible, and of solid value.' [Citations.]" *People v. Johnson*, 26 Cal.3d at 576. Due process is violated unless the record discloses evidence so "substantial … that a reasonable trier of fact could find" each element established "beyond a reasonable doubt." *Id.* at 578; *People v. Koontz*, 27 Cal.4th 1041, 1078 (2002); *Jackson v. Virginia*, 443 U.S. at 309.

This Court has cautioned that, in reviewing a first-degree murder conviction, a court may not conclude that a reasonable juror properly could have inferred premeditation and deliberation in reliance on "highly ambiguous" evidence. *People v. Anderson*, 70 Cal.2d 15, 31 (1968). Rather, the court must be able to point to a "*reasonable foundation* for [such] an inference...." *Id.* at 25; emphasis in original. " ' Mere conjecture, surmise, or suspicion is not the equivalent of reasonable inference and does not constitute proof.' [Citation.]" *Id.* at 24. Accord, *People v. Velasquez*, 26 Cal.3d 425, 435 (1980). If a juror had to rely on "speculation, supposition, surmise, conjecture, or guess work" to make a finding, the finding would be constitutionally inadequate. *People v. Morris*, 46 Cal.3d 1, 19 (1988). See *People v. Garceau*, 6 Cal.4th 140, 179 (1993) [impliedly agreeing that if "the probative value of ... testimony hinge{s} upon

unreasonable speculation," its admission "abridg{es the defendant's} right to due process"].

The question here is whether "reasonable ..., credible, and ... solid" evidence supported the jury's findings that four of the charged killings were deliberate and premeditated.[37] In order to answer the question, it is necessary to understand the mental states connoted by those terms.

C. Due process, statutory history, and elementary principles of statutory construction require that the mens rea for *first*-degree intentional murder be clearly distinguished from that necessary for *second*-degree intentional murder

1. Deliberation and premeditation: legislative intent and due process

The first murder statute enacted in California followed the common law model: there was but one category of murder, for which there was but one penalty - death. (Stats. 1850, c. 99, secs. 19-21, p. 231.) In 1856, the common law classification was abandoned in favor of the Pennsylvania model, dividing murder into two degrees. (Stats. 1856, c. 134, sec. 2, p. 219.) The purpose of the division was to reserve the death penalty only for

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[37] The fact that defense counsel did not formally challenge the sufficiency of the evidence of premeditation and deliberation does not preclude Mr. Solomon from challenging the defect in this Court. "[I]issues of sufficiency-of-the-evidence are never waived". *People v. Neal*, 19 Cal.App.4th 1114, 1122 (1993).

those murders involving the greatest "degree of atrociousness". *Revised Laws of the State of California - Penal Code* (Sacramento 1871) sec. 189, Code Commissioners' Note, pp. 47-48 [hereafter, Revised Laws (1871)]. As this Court has emphasized, therefore, in construing Penal Code section 189, it is important to recognize that the phrase, "deliberate and premeditated killing," was intended from its inception as a description of a state of mind so culpable that it authorized the State to "put ... a person to his death." *People v. Bender*, 27 Cal.2d 164, 185 (1945).

The legislative history has led this Court to distill several related principles from the construction of section 189.[38]

First, the statute embodies a legislative presumption that a murder is of the second degree. A defendant can only be convicted of deliberate and premeditated murder if the prosecution overcomes the presumption by proof beyond a reasonable doubt of the additional elements. *People v.*

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[38] When the offenses alleged in this case were committed, section 189 read as follows:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree. [Definitions of "destructive device" and "explosive" omitted.] To prove the killing was "deliberate and premeditated," it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.

Anderson, 70 Cal.2d 15, 25 (1968). Accord, *People v. Martinez*, 193 Cal.App.3d 364, 369 (1987); *People v. Rowland*, 134 Cal.App.3d 1, 9 (1982).

Second, since section 189 first identifies particularized methods of killing as first-degree murders (e.g., killing by poison and torture) and then provides that a first-degree murder is also committed "by any other kind of willful, deliberate, and premeditated killing," elementary principles of statutory construction compel the conclusion that the Legislature intended that the category of deliberate and premeditated killings be reserved for those "equal [in] cruelty and aggravation" to killings by poison and torture. *People v. Sanchez*, 24 Cal. 17, 24 (1864); *People v. Thomas*, 25 Cal.2d 880, 899-900 (1944); *People v. Holt*, 25 Cal.2d 59, 70, 87, 90-91 (1944); *People v. Fields*, 99 Cal.App.2d 10, 13 (1950). Accord, *Revised Laws* (1871), *supra*, Code Commissioners' Note, at p. 48.

The third principle derived directly from the statutory language goes to the heart of this case. The legislature has established that the mens rea of second-degree murder is express malice and has equated the latter with intent to kill. Pen. Code §§ 187-188. Consequently, as this Court has repeatedly held:

> the legislative classification of murder
> into two degrees would be meaningless if
> 'deliberation' and 'premeditation' were

> construed as requiring no more reflection
> than may be involved in the mere formation
> of a specific intent to kill.

People v. Anderson, 70 Cal.2d at 26. Accord, *People v. Koontz*, 27 Cal.4th 1041, 1080 (2002); *People v. Wolff*, 61 Cal.2d 795, 821 (1964); *People v. Caldwell*, 43 Cal.2d 856, 869 (1955); *People v. Thomas*, 25 Cal.2d 880, 898 (1945). Thus, one who formulates in his mind a specific intent to kill and then acts on it has committed a second-degree murder. Intentional *first*-degree murder requires something more: "the intent to kill must be the result of deliberate premeditation." *People v. Sanchez*, 24 Cal. at 30.

Maintaining a clear distinction between the states of mind necessary for conviction of first and second degree intentional murder is not simply a matter of logic or statutory construction. It is a requisite of due process. See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) [due process requires clarity in the penal statutes that "policemen, judges, and juries" must enforce]; *U.S. v. Lesina*, 833 F.2d 156, 159 (9th Cir.1987) [blurring of distinction between *mens rea* necessary for implied-malice murder and involuntary manslaughter violates due process]. Such clarity is necessary so that a jury's verdict-choices – as well as the punishment that hinges on those choices -- are based on reason and are not the result of arbitrary and random decisionmaking. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) [failure of state to provide jury with "clear and objective

standards" creates an unacceptable "risk of wholly arbitrary and capricious action"]; *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) [same].

The statutory distinction between intentional murder that is not the product of premeditation and deliberation (second-degree) and intentional murder that is (first-degree) is meant to be "clear and objective" as required by *Godfrey*. As this Court has held, "the Legislature meant to give the words 'deliberate' and 'premeditate' … their common, well-known dictionary meaning." *People v. Bender*, 27 Cal.2d at 183. Accord, *People v. Anderson*, *supra*, 70 Cal.2d at 26. As used in section 189, therefore:

> The word ... "deliberate" (as an adjective) means "formed, arrived at, or determined upon as a result of careful thought and weighing of considerations; as, a deliberate judgment or plan; carried on coolly and steadily, esp. according to a preconceived design; ... Given to weighing facts and arguments with a view to a choice or decision; careful in considering the consequences of a step; ... slow in action; unhurried; ... Characterized by reflection; dispassionate; not rash." ...
>
> The verb "deliberate" means "to weigh in the mind; to consider the reasons for and against, to consider maturely; reflect upon; ponder; as, to deliberate a question ... to weigh the arguments for and against a proposed course of action." ... "Deliberation means

careful consideration and examination of the reasons for and against a choice or measure." [Citation.]

People v. Thomas, 25 Cal.2d at 898-899; *People v. Bender*, 27 Cal.2d at 183.

The verb "premeditate" means "To think on, and revolve in the mind, beforehand; to contrive and design previously."

Ibid. The foregoing definitions are still the controlling ones. *People v. Velasquez*, 26 Cal.3d 425, 435 (1980); *People v. Anderson,* 70 Cal.2d at 26; *People v. Martinez*, 193 Cal.App.3d at 369; *People v. Rowland*, 134 Cal.App.3d at 7; *People v. Mayfield*, 14 Cal.4th at 767; CALJIC No. 8.20.

The amount of reflection that must precede or follow the decision to kill in order to elevate a second-degree murder to a deliberate and premeditated murder has not been precisely quantified. As this Court has long recognized, however, if the amount of time in which deliberation and premeditation may take place is shrunk too much, this would make a nullity of the intent of section 189 to draw a cognizable distinction between capital and non-capital murders. Thus, in *People v. Bender*, the Court, finding insufficient evidence of premeditation and deliberation, held:

If ... an act is deliberate and premeditated even though it be executed in the very moment it is conceived, with absolutely "no appreciable" time for consideration - then it is difficult to see

wherein there is any field for the classification of second-degree murder.

27 Cal.2d at 182.[39]

Similarly, in *People v. Carmen*, the trial judge instructed the jury that "[th]ere need be … no considerable space of time devoted to deliberation or between the formation of the intent to kill and the act of killing." 36 Cal.2d 768, 777 (1951). This Court reversed:

> The word "considerable," used as an adjective, means "Worthy of consideration; of importance or consequence." [Citation.] The instruction as given leaves no ground for the classification of murder of the second-degree.

Ibid.[40] Accord, *Bullock v. United States*, 122 F.2d 213, 213-214 (D.C. Cir.1941) ["To speak of premeditation and deliberation which are instantaneous, or which take no appreciable time, is a contradiction in terms. It deprives the statutory requirement of all meaning and destroys the

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[39] In *Bender*, the defendant murdered his wife in a quarrel. While the defendant hid the body and wrote several notes after the fact showing presence of mind, this Court reduced the conviction to second-degree murder - the jury simply had no evidence by which to determine the murder had been premeditated as opposed to the result of a tempestuous, jealous quarrel. *Id.* at 179-180.

[40] In *Carmen*, the defendant had threatened to kill the victim one to two hours earlier in the evening and had driven at least 45 minutes to get his shotgun before the killing occurred. *Id.* at 770-771.

statutory distinction between first and second-degree murder."]; 2 LaFave and Scott, *Substantive Criminal Law* (1986), sec. 7.7(a), p. 237 [*Bullock* position "[t]he better view"]; (Justice) Cardozo, *Law and Literature* (1931) 99-101 [arguing that when premeditation and deliberation "is measured by the lapse of seconds", the "dividing line" between first and second degree murder becomes "obscure" and that the resulting confusion has improperly sent "scores of men … to their death"]; *Austin v. U.S.*, 382 F.2d 129, 136-137 (D.C. Cir. 1967) ["the 'appreciable time' element is ... necessary ... to establish deliberation" and instructing a jury in such language "is a meaningful way to convey ... the core meaning of premeditation and deliberation ...." Instructing a jury that the process of deliberation may only last "seconds" is "to blur ... the critical difference between impulsive and deliberate killings"]; *U.S. v. Chagra*, 638 F.Supp. 1389, 1400 (W.D. Tex. 1986) ["appreciable period of time" required]. See also *Fisher v. United States*, 328 U.S. 463, 470 (1945) [affirming instructions because they "emphasized … the necessary time element"].[41]

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[41] This Court has said that "cold, calculated judgment may be arrived at quickly…." *People v. Velasquez*, 26 Cal.3d at 435, quoting *People v. Thomas*, 25 Cal.2d at 900. If "quickly" connotes that premeditation and deliberation may occur in less than an "appreciable" or "considerable" amount of time, then, as discussed below, it defines the *mens rea* for first-degree murder in a way that contradicts the authorities cited in the text and violates due process. "Quickly" is a relative term, however. It is used in *Thomas* soon after the opinion has defined deliberation as "slow in action" and "unhurried." 25 Cal.2d. at 898. For purposes of this argument, appellant assumes that, under California law, premeditation and

In short, the question presented here is whether there was "reasonable …, credible, and solid" evidence on any count from which the jury could conclude not only that the perpetrator formed the intent to kill but did do so "as a result of careful thought and weighing of considerations; ... [and] carried on coolly and steadily ... according to a preconceived design." *People v. Bender*, 27 Cal.2d at 183.

2. Evidence from which premeditation and deliberation may be inferred

Considerable case law has been devoted to identifying the sort of evidence that permits a jury to infer the kind of cold-blooded reflection that transforms a crime from second-degree intentional murder to that "degree of atrociousness" sufficient to make the perpetrator eligible for death. *Revised Laws (1871), supra,* Note at pp. 47-48; *People v. Bender*, 27 Cal.2d at 185.

In *People v. Koontz*, this Court reiterated the analysis originally set forth in *People v. Anderson*:

> Anderson identified three factors commonly present in cases of premeditated murder: "(1) [F]acts about how and what defendant did prior to the actual killing which show that the defendant was

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deliberation require an "appreciable" or "considerable" amount of time and that California law is thus compatible with due process. Cf. *People v. Mayfield*, 14 Cal.4th at 767 [the true test of whether a defendant has premeditated and deliberated a crime "is … the extent of the reflection"].

> engaged in activity directed toward, and explicable as intended to result in, the killing — what may be characterized as `planning' activity; (2) facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a `motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of `a pre-existing reflection' and `careful thought and weighing of considerations' rather than `mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a `preconceived design' to take his victim's life in a particular way for a `reason' which the jury can reasonably infer from facts of type (1) or (2)."

Koontz, 27 Cal.4th at 1081; *Anderson*, 70 Cal.2 at pp. 26-27.

The Court has cautioned that the "Anderson factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive." *Koontz*, 27 Cal.4th at 1081. Thus, a defendant's post-offense statements may provide direct evidence of his thought processes at the time of the killing. See *People v. Mayfield*, 14 Cal. 4th at 768. There also may be cases in which the manner of killing –

as in an execution-style slaying – so unequivocally indicates planning and reflection that it can show premeditation and deliberation on its own. *People v. Hawkins*, 10 Cal. 4th 920, 956-957 (1995). (*Anderson* had indicated that manner-of-killing evidence had to be accompanied by planning or motive evidence and that the only kind of evidence that could show premeditation and deliberation on its own was "extremely strong evidence of planning". 70 Cal.2d at 27. Accord, *People v. Bloom*, 48 Cal.3d 1194, 1209 (1989).)

Those qualifications aside, *Anderson* has stood the test of time. The Court has not identified any categories of evidence other than planning, motive, or manner-of-killing that a jury might rely on to find premeditation and deliberation. With that in mind, appellant will now discuss all such evidence that was presented to the jury, as well as any other evidence that might be deemed indicative of premeditation and deliberation.

D. Substantial evidence did not support a rational inference – as opposed to speculation – that any of the women were killed following a process of premeditation and deliberation

1. Sheila Jacox (count 2)

Ms. Jacox was last seen alive in March of 1986. RT 14173. On April 22, 1987, her body was found buried in the backyard of the house at 4327 Broadway. RT 14193. It was wrapped in fabric, was not clothed, and

was partially bound with duct tape. RT 14551, 14556, 14558. A rolled up ball of possibly cloth material was removed from the mouth, RT 15574, but it was not clear that it would have prevented breathing, RT 14626-27. Given the advanced stage of decomposition, the cause of death could not be determined. RT 14580.

With respect to the *Anderson-Koontz* categories, there was no evidence of planning activity – "facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing." *Koontz*, 27 Cal.4th at 1081; *Anderson*, 70 Cal.2d at 26. The materials found with the body were commonplace items that could have been in the Broadway house and used by Mr. Solomon during or after an unpremeditated conclusion to what began as a non-violent bargain for sexual services.[42]

Nor was there any evidence of motive – "facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a `motive' to kill the victim...." *Koontz*, 27 Cal.4th at 1081; *Anderson*, 70 Cal.2d at 26. So far as anyone knew, Mr. Solomon had

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[42] In his closing argument at the penalty retrial, the prosecutor said that he had looked for a pattern in the materials that were used to tie the victims who were bound in some fashion and concluded: "[T]here's no discernible pattern.... [T]he materials that were used were materials that were at hand...." RT 26263.

possibly once been introduced to Jacox and her boyfriend but otherwise did not know her and had never dated her. RT 12939, 13583, 13594, 14431, 14439, 14485.

As for manner-of-killing – "facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a `preconceived design' to take his victim's life in a particular way", *Koontz*, 27 Cal.4th at 1081; *Anderson*, 70 Cal.2d at 27 – the first thing that has to be said is that the cause of death could not be determined. RT 14580. While it will be assumed for purposes of this argument that a juror could find that Mr. Solomon killed Ms. Jacox, and had formed the intent to do so, it is hard to see how a juror could have made a constitutionally supportable decision as to *how* the death occurred when the pathologist who examined the decedent was unable to figure that out.

The prosecutor, it should be noted, did not press any particular conclusion on the jury with regard to Ms. Jacox's death. In discussing all of the deaths, rather, he said generally that he was "assuming these people died of some sort of asphyxial death, either someone put a pillow over their face and suffocated them, sock down their mouth, or someone took a ligature and put it around their neck and strangled them to death..." RT 16295. Unlike with some of the other bodies, however, no potential ligature was found with Ms. Jacox's. Nor was there evidence of

strangulation. (Since strangulation affects bone and ligament, decomposition did not preclude finding such evidence. See RT 11581, 11651, 11670.) While material was removed from Jacox's mouth, furthermore, it wasn't clear that it would have prevented breathing. RT 14626-27, 15574. Nor could any reliable inference be drawn from the duct tape that partially bound the body. As the prosecutor conceded in closing argument, the bodies could have been bound after they were dead in order to make it easier to carry and bury them. RT 16334.

Indeed, as the prosecutor candidly observed: "I suggest to you the physical evidence is not helpful to either side. It does not really provide any information to you." RT 16291.

Severely hampered by these problems, the prosecutor made the only argument he could make. He contended that, if the women were strangled or suffocated, the killings inevitably would have been committed with premeditation and deliberation: "[T] hat doesn't occur in a flick of an eye, moment's time.... [T]akes awhile for them to die, doesn't it? Isn't that what first degree murder is all about?" RT 16295.

In fact, that is *not* what first degree murder is all about. One can strangle a person to death without engaging in the "careful thought and weighing of considerations" necessary for premeditation and deliberation. This Court has so held: "The circumstance that the manner of killing, ligature strangulation, might be somewhat more time-consuming than other

methods, for example firing a weapon, does not obviate the conclusion that defendant might not have premeditated or deliberated before killing the victims." *People v. Bradford*, 15 Cal.4th 1229, 1345 (1997).

If a person is strangling another and stops before the victim dies, that suggests the strangler did not form the intent to kill. If the assault continues until the victim dies, conversely, that is fairly dispositive evidence that death was intended. What that evidence does *not* show is the extent and quality of the reflection that resulted in the decision to kill. As this Court has said: "manner-of-killing evidence is often ambiguous, and frequently cannot be relied on by itself to support an inference of premeditation beyond a reasonable doubt." *People v. Hawkins*, 10 Cal.4th at 957 [quoting and reaffirming this statement in *People v. Anderson*].

Even if a juror could have found that Ms. Jacox was suffocated or strangled, therefore, that would not have provided a lawful basis for finding the killing was a first degree murder.

The prosecutor manufactured one other hook on which the jurors could hang a finding of premeditation and deliberation. He posited that the first of the women to disappear might have been killed by Mr. Solomon on the spur of the moment, without premeditation and deliberation. He didn't necessarily believe that, he said, but he was willing to assume that possibility. '[L]et's just assume the first one was the product of some unfortunate happening. I don't know what that would be, but let's make

that assumption. Let's say the first one wasn't a first degree murder, it was a second degree murder, there was no premeditation, no deliberation, wasn't willful; it just happened." 36 RT 16295.

Thereafter, the prosecutor proposed, Mr. Solomon's state of mind would have been different. "If the first one was only a second degree murder, what do you think happens to this next time you do it? Does it become a first degree murder the third time, the fourth time, the seventh time? Don't you think at some point you draw upon that memory bank when you picture in your mind those bodies squirming, jerking around for whatever period of time they did before they finally stopped moving?" RT 16296.

"I mean somewhere along the line between number one and number seven, got to become first degree murders. Even if you are unpersuaded with the first one, at least, by the second one, it has got to leave an impression in your mind that you will never forget." RT 16297.

The jury apparently bought this argument. Thus, on Count 1, Mr. Solomon was convicted of second-degree murder – and was unanimously and explicitly acquitted of first-degree murder -- in the death of Linda Vitela. As with Ms. Jacox, Ms. Vitela's body was found buried behind the Broadway house, it was wrapped in a blanket-like fabric that was encircled by electrical-type wire, RT 14586, 14589, 14610, and the cause of death could not be determined. RT 14597, 14605. The chief distinction between

the two cases was that Ms. Vitela was the first of the women to disappear and Ms. Jacox was the second. RT 14125, 14173; CT 4919-4920. Mr. Solomon was also convicted of first-degree murders in the deaths of the third, fourth, and fifth women who disappeared and were found in or behind houses directly connected to Mr. Solomon. See CT 4922-24, 5527-30; RT 16590, 16593.[43]

The order in which the killings occurred did not provide the jurors with a rational or permissible basis upon which to find Mr. Solomon guilty of any deliberate and premeditated murders, much less four of them.

Assuming for the sake of this argument that Ms. Vitela was killed in January of 1986 and Ms. Jacox in March, 1986 – the months in which witnesses reported last seeing them, RT 14125, 14173 -- and assuming that the perpetrator was Mr. Solomon -- the fact that he might have remembered what happened with Ms. Vitela did not preclude a spontaneous, as opposed to deliberate and premeditated, attack on any other woman.

To begin with, Mr. Solomon was in the company every day of young women in Oak Park who were selling their bodies to feed their addictions to crack cocaine. Despite his presumed memory of having killed Ms. Vitela, he befriended these women in ways that were plainly genuine and

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[43] Chronologically, the fourth woman to disappear was Angela Polidore, but she was found in a house not directly associated with Mr. Solomon and the jury did not find Mr. Solomon responsible for her death. CT 4923, 5527; RT 12174-78.

appreciated, as the testimony made clear. RT 11467, 12892-93, 12899, 12900-01, 12980, 13035. Furthermore, he frequently had sex with these women without mistreating them in any way. RT 11529, 12783, 12804, 12904-05, 12974, 13022. What it is that would have made Mr. Solomon attack a few of them – and specifically Ms. Jacox -- while nurturing the remainder – or when it was during a sexual encounter that the impulse to kill arose in Mr. Solomon – are not questions the jury possibly could have answered based on the evidence before it. More specifically, there was absolutely nothing in the evidence to suggest that the memory of any prior killing had anything to do with when the impulse to kill arose.

To the contrary, the prosecution's evidence made clear that, even if Mr. Solomon had killed *all* of the women he was charged with killing, that fact did not preclude an impulsive killing. Thus the prosecution presented – and stood behind – evidence that Mr. Solomon gave LaTonya Cooper a lift, stopped at his house for what was supposed to be a brief stop, *left the engine running*, and, when Ms. Cooper came in for some water, suddenly began strangling her. RT 15125-32. The prosecutor himself expressed wonder at the spontaneity of the violence: "You leave your car running, doors open, a bunch of people standing on the street, tell a lady, 'Let's go in the house,' you go in the back room, next thing you know you're trying to kill her?" RT 16255. The "attack" on Cooper, the prosecutor exclaimed, was "so spontaneous". RT 16254.

When was this alleged attack? In early 1987, *after* at least six and possibly all seven of the charged homicides had taken place. See RT 16255.

The prosecutor likewise expressed wonder at the spontaneity of Mr. Solomon's presumed attack on Sherry Hall. She "already agreed to date this guy. She was already going to have sex with him.... She's taking her sweater off.... And the next thing she knows, she is being strangled to death with a shoelace." RT 16255. The prosecutor believed that this conduct, too, was plainly "spontaneous". RT 16254.

As with the incident involving Ms. Cooper, the encounter with Ms. Hall – which took place in October or November of 1986 – occurred after 6 of the 7 charged homicides had already been committed. Indeed, as the prosecutor himself pointed out, the "spontaneous" attack on Ms. Hall occurred just a few feet from where Ms. Apodaca and Ms. Massey already lay buried. RT 16255.

As the prosecutor recognized, in other words, his own evidence showed that, even if Mr. Solomon killed all of the women he was charged with killing, his memory that he had committed such acts in no way precluded him from subsequently erupting in impulsive, *unpremeditated* violence.

The prosecutor plainly agreed, but did not allow this perception to undermine his case for first-degree murder. Under the view of

premeditation and deliberation that he presented to the jury, no matter how impulsive the act of strangling Ms. Cooper was, at the instant any of the prior killings flashed into his consciousness, the strangling could be deemed the product of premeditation and deliberation. RT 16296-97. Thus, even though the strangling only went on for a few seconds before it was interrupted, that was enough for the prosecutor to seek a conviction for the attempted deliberate and premeditated murder of Ms. Cooper. 17 CT 4925-4926. Given that eight jurors voted to convict Mr. Solomon of the latter offense, RT 18542, it is apparent that a large number of jurors accepted the prosecutor's interpretation of the law.[44]

That interpretation was wrong. As discussed above, premeditation and deliberation cannot occur in a flash. To hold otherwise would destroy the distinction between first and second degree intentional murder and violate due process. *See People v. Bender*, 27 Cal.2d at 182; *People v. Carmen*, 36 Cal.2d at 777; *Bullock v. United States*, 122 F.2d at 213-214; 2 LaFave and Scott, *Substantive Criminal Law* (1986), p. 237; (Justice) Cardozo, *Law and Literature* (1931) 99-101; *Austin v. U.S.*, 382 F.2d at

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[44] Since even the prosecutor questioned Ms. Cooper's credibility in certain respects, see, e.g., RT 16254 [referring to her as "the big liar, the drunken big liar"], it is likely that the jurors who did not vote to convict did so on credibility grounds, not because they rejected the prosecutor's take on the law of premeditation and deliberation.

136-137; *U.S. v. Chagra*, 638 F.Supp. at 1400; *Fisher v. United States*, 328 U.S. at 470.[45]

It was not sufficient here, therefore, for the jury to conclude that, while killing Ms. Jacox, Mr. Solomon must have thought of Ms. Vitela's death, and, *ipso facto*, premeditation and deliberation had occurred and the crime was first-degree murder.

Apart from the impropriety of viewing premeditation and deliberation in such truncated terms, furthermore, the jury could not possibly have known what was going through Mr. Solomon's mind when Ms. Jacox was killed. It is certainly *possible* that, before and during the killing of Ms. Jacox, Mr. Solomon remembered Ms. Vitela and those memories were part and parcel of the "careful thought" process required for deliberation. It is just as likely that such careful thought did *not* take place, however. At least as likely was the possibility that the women on whom Mr. Solomon suddenly and inexplicably turned had done or said something that triggered some kind of visceral flashback to a traumatic moment – perhaps of childhood or wartime humiliation or terror – that provoked in Mr. Solomon a mindless and overpowering rage that ordinarily lay buried and out of sight.

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[45] In Argument II, *post*, appellant argues that, even if the Court believes that sufficient evidence supports some valid theory of deliberate and premeditated murder, the prosecutor's reliance on improper theories requires reversal.

The evidence was inherently, insolubly, and "highly ambiguous". *Anderson*, 70 Cal.2d at 31. See *Hawkins*, 10 Cal.4th at 957; *Bradford*, 15 Cal.4th at 1345. There was no way a juror could have chosen between the alternative possibilities and found premeditation and deliberation beyond a reasonable doubt without engaging in "speculation, supposition, surmise, conjecture, or guess work". *People v. Morris*, 46 Cal.3d at 19.

In sum, the evidence was insufficient to support the first-degree murder conviction on count 2. Due process requires that that verdict be reversed.

2. Yolanda Johnson (Count 7)

Yolanda Johnson was found in a closet of the house Mr. Solomon was renovating on 4th Avenue. The coroner estimated that death had occurred no less than 24 hours, and possibly 3 or more days, earlier. RT 11576-77.

The cause of death could not be determined. RT 11614. No significant trauma was noted. RT 11570. Symptoms of manual strangulation were absent. RT 11581-83. While two police officers described seeing possible ligature marks on Ms. Johnson's neck and wrists, RT 11042, 11170-72, the deputy coroner who examined the body did not note any possible ligature marks or any other marks indicating that death might have been caused by violent means, RT 12130-33. The coroner, similarly, could find no evidence of foul play or defensive injuries. RT

11641, 11643. While there were areas of discoloration and possible abrasion on the neck and wrists, these could have been caused by a number of factors not relating to the manner in which death was caused. RT 11050, 11649, 11659, 11666-67. If the result of ligatures, furthermore, RT 11570-71, 11575, at most they had been only soft, wide ones: narrow ligatures would have left a clearer furrow (RT 11620-22, 11670) and usually cause hemorrhage or damage to the hyoid bone, neither of which was present (RT 11651).

In short, assuming that it was Mr. Solomon who killed Ms. Johnson, the facts regarding the manner in which she was killed are even more ambiguous than those pertaining to Ms. Jacox and thus do not provide any legally cognizable support for the conclusion that the killing was the product of premeditation and deliberation. *People v. Bradford*, 15 Cal.4th at 1345.

Vernell Dodson claimed that, several months before Ms. Johnson's death (RT 11372), Mr. Solomon had said in passing that he wanted to kill Ms. Johnson for planning to steal some stereo equipment from him, RT 11346-47. This would have been relevant to the jury's determination ... except the testimony was thoroughly discredited.[46] It was so discredited

[46] Among other things, Dodson did not contact the authorities with his claim regarding Mr. Solomon and Ms. Johnson until he was in prison on a parole violation more than a year after Johnson's body was found. RT 11358, 11364, 11381-82.

that the prosecutor did not even refer to the testimony in closing argument, much less argue that Mr. Solomon had the motive Dodson attributed to him. *See especially* RT 16041-80 [discussion of Johnson killing]. (Similarly, when, in the penalty retrial, the prosecutor reproduced his guilt phase case, calling virtually every witness he had relied on in the first trial, he conspicuously failed to recall Dodson.) If Dodson wasn't credible enough for the prosecutor to rely on, the Court may not assume that a reasonable juror found his testimony convincing. To paraphrase this Court's holding in *People v. Cruz*, 61 Cal.2d 861, 868 (1964): "There is no reason why [this Court] should treat this evidence as any [more] ... crucial than the prosecutor -- and so presumably the jury -- treated it." *Accord, Bram v. United States*, 168 U.S. 532, 541 (1897).

Dodson's testimony simply wasn't "reasonable, credible, and of solid value -- such that a reasonable trier of fact could [rely on it to] find ... beyond a reasonable doubt" that Mr. Solomon had had a motive for killing Ms. Johnson. *People v. Johnson*, 26 Cal. 3d at 578.

The only other even remotely relevant testimony was Pam Suggs's vague recollection that Mr. Solomon had been looking for Ms. Johnson one or two nights before her body was found. Ms. Suggs said that Mr. Solomon had not looked angry when Ms. Johnson's name came up. (RT 11505-07, 11554.) This evidence did not show that Mr. Solomon had a preconceived plan to *kill* Ms. Johnson. He plainly knew that she was someone willing to

exchange sex for money. (In fact, she was desperate for it. RT 11503, 11508-09, 12110.) He solicited encounters with such women hundreds and hundreds of times without killing or hurting them in any way. (Snoopy alone "dated" Mr. Solomon "about 300 times". RT 12804.) Assuming that a juror put any credence in Ms. Suggs's recollection, there was absolutely nothing in her testimony that allowed a juror to find that Mr. Solomon's intent in seeking out Ms. Johnson was to kill her, rather than just have sex with her.

This was especially true in light of the inference the prosecutor drew from the Cooper and Hall encounters: namely, that the impulse to commit a violent act could come upon Mr. Solomon very very suddenly. Consistent with that view of Mr. Solomon's psyche, the prosecutor – most significantly -- never argued that Ms. Suggs's testimony was evidence of premeditation and deliberation. See, e.g., RT 16041-80. Again, it would be unreasonable – and violate the Court's own established principles -- to "treat this evidence [on appeal] as any [more] ... crucial than the prosecutor -- and so presumably the jury -- treated it" at trial. *People v. Cruz*, 61 Cal.2d at 868.

The kind of planning activity this Court has deemed probative has been on the order of "numerous statements defendant made to the victims and others that he was planning to kill everybody in the Mabrey house a few hours before doing so", complemented by evidence that the defendant

"obtained a semi-automatic weapon for the purpose of carrying out the killing". *People v. Welch,* 20 Cal.4th 701, 758 (1999). Compared to such evidence, Ms. Suggs's testimony had essentially no tendency in reason to show that Mr. Solomon had planned the killing of Ms. Johnson in advance.

The evidence was insufficient to support the conclusion that the killing of Ms. Johnson was a murder of the first-degree. Due process requires that the verdict on Count 7 be reversed.

3. Maria Apodaca (Count 9)

On March 19, 1987, Maria Apodaca was found buried in the backyard of the house on 19th Avenue. RT 12708, 12713-16, 12729, 13069. She had disappeared 7 months earlier. RT 12767. The coroner estimated that Ms. Apodaca had died 2 to 8 months earlier. RT 13349.

The body was wrapped in a bedsheet and was bound in a fetal-like position. A cloth belt bound the wrists behind the knees and a shoelace-type cord pulled the feet against the back of the thighs. RT 12732-33, 13337, 13340-43, 13467-69.

There were no signs of trauma to the body. RT 13351. The cause of death could not be determined but ligature strangulation with something like the cord could be ruled out given the lack of furrow and lack of damage to the hyoid bone, thyroid cartilage, and carotid arteries. RT 13370-71, 13376-80. There was also no evidence of manual strangulation. RT 13371.

Among the possible causes that could not be ruled out were provisional asphyxia (RT 13372) and sudden cocaine death (RT 13388).

The premeditation and deliberation analysis relevant to this count is similar to the analyses engaged in above with respect to Counts 2 and 7.

First, assuming that Mr. Solomon killed Ms. Apodaca, the manner in which she was killed is too uncertain to draw any legally cognizable inferences in support of the conclusion that the killing was the product of premeditation and deliberation. *People v. Bradford*, 15 Cal.4th at 1345.

Second, there was no evidence of planning. To begin with, the witnesses who were most in a position to know corroborated Mr. Solomon's statement to the detectives that he did not know the woman depicted in the booking photo of Ms. Apodaca that was shown to him. RT 13603; ACT 8930-31, 8955. Pam Suggs claimed to have seen Ms. Apodaca at the house on Broadway, but in the three statements she made on the subject, she said she'd seen her "several" times, "numerous" times, and one time. RT 11483-84, 12103-04, 12143. The women who spent the most time at the Broadway house, Snoopy and Rose Fuller (a hostile witness by the time of trial), looked at photographs of Ms. Apodaca and said they'd never seen her either with Mr. Solomon or at the house. RT 12935, 14486. This was corroborated by Terry Hetrick. RT 14439. Celestine Orizaba-

Monroy, who ran the 19th Ave. house, likewise did not remember Ms. Apodaca ever setting foot inside that house. RT 13269.[47]

Whether or not Mr. Solomon knew Ms. Apodaca, moreover, all of the residents of the 19th Avenue house, including Mr. Solomon, agreed that the bedsheet that Apodaca's body was wrapped in looked like one that had belonged to Celestine and had been at the 19th Avenue house when Mr. Solomon lived there. ACT 8959, 8962, 9035; RT 13143-44, 13283, 14986-88. This Court has found that, where the defendant brings the instrumentalities of the killing with him to the killing site, it is inferable that the killing was planned. *People v. Miranda*, 44 Cal. 3d 57, 87 (1987); *People v. Welch*, 20 Cal.4th at 758. The converse is true here: the fact that Mr. Solomon resorted to using an object from his immediate environment that could easily be traced to him gives rise to the inference that the killing in question was *not* planned.

The inference is strengthened by the fact that the house in which he resorted to using such an easily traceable item was the same house in which he later impulsively attacked Ms. Hall.

There was no other evidence worthy of consideration. J. R. Johnson was often at the Broadway house over a 3 or 6-week period in the spring of

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[47] J. R. Johnson testified that he'd seen Ms. Apodaca twice in relation to Mr. Solomon. RT 14669-75. The record makes clear that the claim was fabricated. See discussion *post.*

1986. RT 14645, 14665. He had a serious crack habit at the time and a felony record, , 14675-76, and believed that Mr. Solomon owed him money. RT 14639. Johnson testified that late one afternoon, as he arrived back at the Broadway house, Mr. Solomon told him that a man had hit him with a baseball bat because of his involvement with a certain woman. Johnson claimed to know what the woman looked like because she was in the passenger seat of a vehicle that was pulling away from the Broadway house just as Johnson arrived. Johnson claimed that Mr. Solomon told him that it was the driver of the departing vehicle who had hit him with a bat. Johnson didn't know Apodaca, but was shown her photograph and said she was the woman in the passenger seat. RT 14671-75. He also claimed that, when he biked past the house earlier in the day, he'd seen her in Mr. Solomon's truck. RT 14668-70.

The Apodaca part of the story was a lie. Prior to trial, Detective Pane taped an interview with Johnson, which the jury heard. Johnson said he hadn't seen Mr. Solomon get hit with the bat. When Pane asked him when the assault had taken place, Johnson, who had gone over to Broadway after work, said: "It must have happened that afternoon or morning or something, but, when I went around there, he [Mr. Solomon] was holding his shoulder. He say he just left the hospital. He had all kind of medication." Since the alleged assault had taken place *hours* before Johnson arrived on the scene, he couldn't possibly have seen Apodaca in

the passenger seat of a vehicle being driven away from the scene by the alleged assailant. RT 14738-39.[48]

Johnson's testimony linking Apodaca to the bat incident wasn't "reasonable, credible, and of solid value -- such that a reasonable trier of fact could" use it to "find ... beyond a reasonable doubt" that the killing of Ms. Apodaca was the product of some preconceived design. *People v. Johnson*, 26 Cal. 3d at 578. Due process likewise precludes this Court from relying on such patently false evidence to support the verdict. *Cf. Trombetta v. California,* 467 U.S. 479, 489, fn. 10 (1983) [unreliable evidence incompatible with standard of "guilt beyond a reasonable doubt"]; *Albright v. Oliver*, 510 U.S. 266, 299 (1994) ["the Due Process Clause is violated by ... a conviction that rests in substance on false evidence"].

"The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence." *Jackson v. Virginia*, 443 U.S. at 323. The evidence relating to Count 9 was

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[48] At the penalty retrial, Johnson, tried to eliminate this obvious flaw in his story by conflating his two prior versions. In this third version, as in the first, he said that, when Mr. Solomon told him about the bat incident, his shoulder was in a sling, he had his medication in hand, and he'd obviously just come from the hospital. In this telling, however, Johnson claimed that Ms. Apodaca was sitting right there in Mr. Solomon's truck as Mr. Solomon described getting hit. Johnson made no reference at all at the retrial to having seen the assailant drive off with Ms. Apodaca in the passenger seat. RT 24443-45.

"inadequate" to support the conclusion that the killing was a murder of the first-degree. Due process requires that the verdict on that count be reversed.

4. Sharon Massey (Count 10)

On April 29, 1987, Sharon Massey's body was found buried in the yard behind the house at 2523 19th Ave. (RT 15540.) She had disappeared more than 7 months earlier. RT 15589, 15669.

Her body was wrapped in a bedsheet, as well as a bedspread similar to one Celestine had had at 19th Avenue. (RT 15028-29, 15540-41,15678-79.) Her pants and underpants were off one leg and half off the other. (RT 15543-44.) Her hands were bound behind her and an electrical cord held the body in a fetal position. Draped loosely around the neck were what appeared to be stereo speaker wires that may or may not have been Celestine's. (RT 15545-15548, 15681, 15687, 15041.)

No evidence of any external or internal trauma or injury could be found. (RT 15551, 15556.) It was Dr. Stuart's opinion that, if Ms. Massey had been strangled with the speaker wires, there is a "good chance" he would have found physical evidence of this. (RT 15568.)

Two socks were recovered from Ms. Massey's mouth, one of which could have caused asphyxiation. (RT 15560, 15566.)

The appropriate analysis is similar to those advanced for Counts 2, 7, and 9.

First, there was no evidence that Mr. Solomon had had any prior relations with Ms. Massey or that he had any motive specific to her that suggested a preconceived design to kill her. *People v. Anderson*, 70 Cal.2d, at pp. 26-27.

Second, there was no evidence of planning. To the contrary, assuming that Mr. Solomon was the killer, the fact that he used a bedspread and possibly speaker wires that belonged to Celestine raises the strong inference that the killing was the product of a "rash impulse hastily executed", *People v. Velasquez*, 26 Cal. 3d 425, 435 (1980), and not of premeditation and deliberation. *Cf. People v. Miranda*, 44 Cal. 3d 57 at 87; *People v. Welch*, 20 Cal.4th at 758.

The physical evidence, finally, does not salvage the verdict. Even if a juror could have found that the death was by asphyxiation, that means of killing is compatible with an "explosion of violence", *People v. Miller*, 50 Cal. 3d 854, 991 (1990), as well as premeditation and deliberation. *People v. Bradford*, 15 Cal.4th at 1345.

The evidence, quite simply, was "highly ambiguous" with respect to the inferences one could draw from it regarding the perpetrator's actual state of mind. *People v. Anderson*, 70 Cal.2d at 31. See *People v. Hawkins*, 10 Cal.4th at 957. Given that the Cooper and Hall incidents provided a powerful indication that Mr. Solomon's demons could rise up without warning, there was no proper way for a juror to interpret the

evidence regarding Ms. Massey as demonstrating beyond a reasonable doubt that she had been killed as the result of the kind of "careful thought and weighing of considerations" necessary to constitute deliberation. *People v. Mayfield*, 14 Cal.4th at 767. A juror could have reached the latter conclusion only by resorting to "speculation, supposition, surmise, conjecture, or guess work". *People v. Morris*, 46 Cal.3d at 19. The verdict on Count 10, accordingly, violated due process and cannot stand.

E. Reversal is required of the first-degree murder convictions, the special-circumstance finding, and the judgment of death

Only one conclusion is compatible both with the law of murder as construed by this Court for 140 years – see *People v. Sanchez*, 24 Cal. at 24, 30 -- and with the requirement of due process that the law must meaningfully distinguish between intentional murder of the second degree and deliberate and premeditated intentional murder of the first degree -- *U.S. v. Lesina*, 833 F.2d at 159; s*ee Grayned v. City of Rockford*, 408 U.S. at 108-109; *Godfrey v. Georgia*, 446 U.S. at 428. Namely: the evidence was not sufficient to support a finding that any of the killings were the product of reflection rather than impulsivity. No "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. at 318-319.

All four first-degree murder convictions must be reversed.

A valid conviction for first-degree murder, furthermore, is a prerequisite for: 1) a special-circumstance finding of any kind - Penal Code section 190.1(b); 2) the multiple-murder special-circumstance in particular - section 190.2(a)(3); and 3) a sentence of death - section 190.1(c). Since none of the four first-degree murder verdicts returned in this case is valid, the special-circumstance finding and the sentence of death are equally invalid and must be vacated as well.

II.

IN VIOLATION OF STATE LAW AND DUE PROCESS, THE PROSECUTOR OFFERED JURORS LEGALLY ERRONEOUS THEORIES OF CONVICTION THAT THEY ALMOST CERTAINLY RELIED ON

A. The Error

As made clear in the preceding argument, the prosecutor argued that jurors could find Mr. Solomon guilty of first-degree murder even if they found that he turned on the victims impulsively and spontaneously. He argued that, if the jurors found that the women were asphyxiated in some fashion, that kind of killing "doesn't occur in a flick of an eye" and thus, *ipso facto*, involved premeditation and deliberation: "Isn't that what first degree murder is all about?" RT 16295. Alternatively, he argued that, after killing the first woman – presumably Ms. Vitela –some memory of having killed previously must have flashed into Mr. Solomon's consciousness during each subsequent killing and that, too, constituted premeditation and deliberation. "[S]omewhere along the line between number one and number seven, [they've] got to become first degree murders. Even if you are unpersuaded with the first one, at least, by the second one, it has got to leave an impression in your mind that you will never forget." RT 16297.

As shown in the preceding argument, the prosecutor's theories had two terminal flaws. First, as a matter of both state law and constitutional

circumscription, the mental processes they alluded to did not constitute premeditation and deliberation. Second, impropriety aside, the evidence was not sufficient to allow the jury to do anything more than speculate what mental process Mr. Solomon went through if and when he killed. It couldn't find premeditation and deliberation beyond a reasonable doubt *either* under the prosecutor's improper theories *or* under any proper one.

This argument focuses on the improper theories. The gist, simply stated: even if the Court were to find that the jury somehow could have found beyond a reasonable doubt that Mr. Solomon engaged in a constitutionally cognizable process of premeditation and deliberation, reversal is still required. Reversal is required because: 1) the prosecutor offered the jurors theories of guilt that were legally erroneous; and 2) it is very likely – and certainly reasonably likely -- that one or more jurors found counts 2, 7, 9, and 10 to be first-degree murders based on one or both of those improper theories.

The prosecutor's theories were erroneous on the grounds discussed in Argument I. To be guilty of premeditation and deliberation, one has to form the intent to kill as the product of a process "[c]haracterized by reflection; … careful thought and weighing of considerations". *People v. Thomas*, 25 Cal.2d at 898-899; *People v. Bender*, 27 Cal.2d at 183. The prosecutor's view of premeditation and deliberation was incompatible with the foregoing. First, he said it was sufficient if the process he called

premeditation and deliberation began *during* the act of strangling – i.e., after intent to kill had been formed. Second, his conception allowed premeditation and deliberation to begin and end in such a compressed space of time as to eliminate any meaningful distinction between intentional first-degree and intentional second-degree murder. *See People v. Bender*, 27 Cal.2d at 182; *People v. Carmen*, 36 Cal.2d at 777; *Bullock v. United States*, 122 F.2d at 213-214; 2 LaFave and Scott, *Substantive Criminal Law* (1986), p. 237; (Justice) Cardozo, *Law and Literature* (1931) 99-101; *Austin v. U.S.*, 382 F.2d at 136-137; *U.S. v. Chagra*, 638 F.Supp. at 1400; *Fisher v. United States*, 328 U.S. at 470.

Collapsing the two crimes in that way violated due process. Due process requires clarity in the laws that juries must enforce. *Grayned v. City of Rockford*, 408 U.S. at 108-109. Such clarity is necessary so that verdicts – and the punishments they enable -- are based on reason and are not the result of arbitrary decisionmaking. *Godfrey v. Georgia*, 446 U.S. at 428; *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). Given the concept of premeditation and deliberation as defined by the prosecutor, the jury had no way of making a rational and principled choice between first and second-degree intentional murder. If premeditation and deliberation can both follow the decision to kill and start and finish in a matter of seconds, every intentional second-degree killing would also be a first-degree killing. *People v. Bender*, 27 Cal.2d at 182; *People v. Carmen,* 36 Cal.2d at 777.

The choice the jury was given was illusory, violated state law – *ibid.* -- and was unconstitutional. *Cf. U.S. v. Lesina*, 833 F.2d 156, 159 (9th Cir.1987) [blurring of distinction between *mens rea* necessary for implied-malice murder and involuntary manslaughter violates due process].

Providing the jury with improper legal theories upon which to convict was prosecutorial misconduct. *Cf. People v. Hill*, 17 Cal.4th 800, 832 (1998) [prosecutor "committed misconduct by misstating the law", suggesting "defendant had the burden of producing evidence to demonstrate a reasonable doubt of his guilt"]. Accord, *U.S. v. Artus*, 591 F.2d 526, 528 (9th Cir. 1980). As the initiating party in a criminal prosecution, counsel for the People shares with the trial court the responsibility to see to it that the jury is correctly instructed so that no unlawful conviction occurs. *People v. Phillips*, 59 Cal.App.4th 952, 955 (1997).

"[W]hat is crucial ... is not the good faith of the prosecutor, but the potential injury to the defendant". *People v. Benson*, 52 Cal.3d 754, 793 (1990). Accord, *Smith v. Phillips*, 455 U.S. 209, 219 (1982) ["The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor"].

The injury here can be characterized in various ways. Offering the jury erroneous theories upon which to convict:

1) violated due process by permitting Mr. Solomon to be found guilty of first-degree murder under a definition of premeditation and deliberation that blurred the distinction between first and second-degree intentional murder – *People v. Bender*, 27 Cal.2d at 182; *People v. Carmen,* 36 Cal.2d at 777; *U.S. v. Lesina*, 833 F.2d at 159; *Grayned v. City of Rockford*, 408 U.S. at 108-109; *Godfrey v. Georgia*, 446 U.S. at 428; and other authorities discussed above;

2) rendered the trial fundamentally unfair by allowing conviction under a conception of premeditation and deliberation that deviated from that recognized by state law – *People v. Bender*, 27 Cal.2d at 182; *People v. Carmen,* 36 Cal.2d at 777; *People v. Anderson*, 70 Cal.2d at 26; *People v. Koontz*, 27 Cal.4th at 1080; *People v. Wolff*, 61 Cal.2d at 821; *People v. Caldwell*, 43 Cal.2d at 869; *People v. Thomas*, 25 Cal.2d at 898; *see Suniga v. Bunnell*, 998 F.2d 664, 667-70 (9th Cir. 1993) [where jury was instructed on an alternative "theory of culpability {that} did not exist" under state law, defendant's trial was fundamentally unfair]; *see generally Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980);

3) violated Mr. Solomon's right to trial by jury and due process by inviting jurors to make a critical guilt-phase determination in reliance on a legal standard that reduced the burden on the state to prove guilt of first-degree murder beyond a reasonable doubt -- *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993); *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979);

4) violated due process by depriving Mr. Solomon of a "meaningful opportunity to" defend against the charge that the killings constituted first-degree murders -- *Crane v. Kentucky*, 476 U.S. 683, 690 (1986);

5) "violated due process in that the prosecutor's comments" implicated specific rights of the accused, were not in response to defense counsel's argument, were not cured by the trial court's instructions, and did not relate to an issue on which there was overwhelming evidence of guilt, and "so infected the trial with unfairness" -- *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); and

6) violated the Eighth Amendment by rendering the first-degree murder verdicts too unreliable to support the death penalty it allowed to be imposed - *Beck v. Alabama, supra*, 447 U.S. at 637-38.

However the error is characterized, the result is the same: reversal is required.

B. Reversal is Required

"[W]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." *People v. Green,* 27 Cal.3d 1, 69 (1980). Accord, *People v. Guiton,* 4 Cal.4th 1116, 1122, 1128 (1993); *Griffin v. U.S.*, 502 U.S. 46, 59, 53 (1991) [when "a particular theory of conviction . . . is contrary to law" or "a

provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground"]; *Sandstrom v. Montana*, 442 U.S. at 526 ["It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside"].

Reversal is required unless it can be "determined beyond a reasonable doubt that the erroneous" theory "did not contribute to the convictions". *People v. Swain*, 12 Cal.4th 593, 607 (1996). Accord, *Keating v. Hood*, 191 F.3d 1053, 1063 (9th Cir. 1999), cert. denied 531 U.S. 824 (2000) ["the conviction must be reversed when it is not possible to determine whether the jury relied upon the erroneous theory"; reversal not automatic only "if 'it is absolutely certain' that the jury relied upon the legally correct theory to convict"]. Cf. *People v. Payton*, 3 Cal.4th 1050, 1071 (1992) [prosecutor's misstatement of law regarding the scope of mitigation is not harmless if "reasonable likelihood" exists that juror relied on the misstatement].

The record in this case offers no indication that jurors relied on a legally valid theory in convicting Mr. Solomon of first-degree murder. There is no way the state can show "beyond a reasonable doubt that the erroneous" theory "did not contribute to the convictions". *People v. Swain*, 12 Cal.4th at 607. To the contrary, the record strongly suggests – and

plainly establishes a reasonable likelihood -- that jurors relied on the prosecutor's erroneous construction of premeditation and deliberation in reaching those verdicts.

First, nothing the court or defense counsel said made it clear that the prosecutor's concept of premeditation and deliberation was legally erroneous.

The instruction given by the trial court defining premeditation and deliberation – CALJIC No. 8.20 (1979 Revision) -- was ambiguous on the crucial point. On the one hand, the jury was told: "The word 'deliberate' means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." At the same time, the jury was told: "A cold, calculated judgment and decision may be arrived at in a short period of time...." CT 5350-51; RT 15951-52.

The latter instruction did not unequivocally contradict the prosecutor's argument. To the contrary, under the instruction "a finding of virtually instantaneous premeditation and deliberation was still very much a possibility." S. Mounts, "Premeditation and Deliberation in California: Returning to a Distinction Without a Difference", U.S.F. L.Rev. (Winter, 2002), p. 302.

CALJIC No. 8.20 was the only instruction the jury received on the subject. After the prosecutor made his argument, the court gave no curative

instruction. *Cf. People v. Guiton*, 4 Cal.4th 1116, 1131 (1993) ["Trial courts have the duty to screen out invalid theories of conviction ... by appropriate instruction"].

Defense counsel's closing argument focused on the reasonable doubts that existed regarding whether some of the women were the victims of overdose and disease rather than homicide, and, if the latter, whether Mr. Solomon was the perpetrator. RT 16359-16466. While he noted that "the acts [LaTonya Cooper was] describing aren't the acts of a man that has planned his course of action out", RT 16427, his primary argument was that she couldn't be believed when she said it was Mr. Solomon who attacked her. RT 16426-28. Counsel did not address the question of premeditation and deliberation with respect to the other women. Thus, once jurors found that the women had been victims of homicide, and that Mr. Solomon had been the perpetrator, defense counsel's argument gave them no reason not to rely on the prosecutor's conception of premeditation and deliberation as a basis for finding that the homicides were first-degree murders.

The likelihood that the jurors did exactly that is enhanced by the fact that, while they acquitted Mr. Solomon of first-degree murder in the case of Linda Vitela, the first of the women to disappear, convicting him of second-degree murder on that count, they convicted him of first-degree murder in the deaths of four of the next five women who disappeared (four of four if one disregards Ms. Polidore, whose body was found in a house not directly

connected to Mr. Solomon). 19 CT 5527-30; 37 RT 16590, 16593. The clear inference is that the jury adopted Mr. O'Mara's view that the premeditation and deliberation requirement could be satisfied if, in the course of killing victims 2-5, a memory of having killed on a prior occasion flashed into Mr. Solomon's consciousness.

Finally, while this argument is only necessary if the Court has rejected Argument I, and thus has identified some proper theory upon which the jurors could have found premeditation and deliberation, the jurors would have had to come up with it on their own. The only theories explicitly offered them were the prosecutor's legally erroneous theories. As a practical and psychological reality, by far the likeliest scenario is that the first-degree murder verdicts were based on one of the theories offered up by the prosecutor.

In short, there is a "reasonable likelihood", *People v. Payton*, 3 Cal.4th at 1071, that one or more jurors relied on the prosecutor's conception of premeditation and deliberation. It most certainly cannot be "determined beyond a reasonable doubt that the erroneous" theories "did not contribute to the convictions". *People v. Swain*, 12 Cal.4th 593, 607 (1996). Reversal of counts 2, 7, 9, and 10 is required, along with the special-circumstance finding and judgment of death for which they are prerequisites.

C. The Claim Should Be Reviewed on the Merits

Trial counsel did not object to the prosecutor's argument on the grounds stated above. Such objection would have ensured review by this Court on the merits. *See, e.g., People v. Hill*, 17 Cal.4th at 820. The claim should be reviewed on the merits nonetheless.

First, it is "the trial judge ... [who bears ultimate] responsibility ... [for ensuring that closing argument is] kept within appropriate bounds.... '[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct.' [Citation.]" *United States v. Young,* 470 U.S. 1, 10-11 (1985).

Second, the claim is one of federal constitutional error. "[O]bjection in the trial court is not required to preserve a federal constitutional issue." *People v. Vera*, 15 Cal.4th 269, 279 (1997)]. *Accord*, *People v. Santamaria*, 229 Cal.3d 269, 279, fn. 7 (1991) [errors "of ... magnitude" are cognizable on appeal in absence of objection]; *People v. Mills*, 81 Cal.App.3d 171, 176 (1978) ["The Evidence Code section 353 requirement of timely and specific objection before appellate review is available ... 'is, of course, subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law'"]; American Bar Ass'n., *Toward a More Just and Effective System of Review in State Death Penalty Cases* (1990), p. 2 ["State appellate courts should review under a knowing, understanding, and voluntary waiver standard all

claims of constitutional error not properly raised at trial and on appeal and should have a plain error rule and apply it liberally with respect to errors of state law"].

This, furthermore, is a capital case. In keeping with the recognition that "death is different", *Gardner v. Florida,* 430 U.S. 349, 357 (1977), this Court has held that "subdivision (b) of section 1239 imposes a duty upon this court" in capital cases "'to make an examination of the complete record of the proceedings had in the trial court, to the end that it be ascertained whether defendant was given a fair trial.' " *People v. Stanworth*, 71 Cal.2d 820, 833 (1969).[49] *Cf. People v. Easley,* 34 Cal.3d 858, 863-864 (1983) [reversing a judgment of death upon grounds raised for the first time in an amicus curiae brief in support of a petition for rehearing following the filing of an opinion by this Court].

This is not just any constitutional claim, moreover. It is a claim that challenges the validity of the first-degree nature of the crimes of which Mr. Solomon has been convicted. Since that element is a prerequisite for a valid sentence of death -- *see* Penal Code section 190.2(a) -- the question raised here is quite literally one of life and death.

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[49] Section 1239(b) provides in pertinent part: "When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or her or his or her counsel."

Finally, even in non-capital cases, the Court always has the *discretion* to consider claims advanced for the first time on appeal. *People v. Williams,* 17 Cal.4th 148, 161, fn. 6 (1998). Given that this is a capital case, that the claim is one of constitutional error, that the issue goes directly to life and death, that review is "necessary to … settle an important question of law", Rule 28(b)(1), Calif. Rules of Court, and that respondent suffers no prejudice by having the issue fully aired in this Court, appellant respectfully suggests that, if in fact discretion exists not to review the issue on the merits, it is very circumscribed. Under the circumstances, and given the stakes, review on the merits is the fair and constitutionally proper course.

III.

IF MR. SOLOMON'S FIRST-DEGREE MURDER CONVICTIONS ARE PERMITTED TO STAND BASED ON AN INTERPRETATION OF STATE LAW THAT FAILS TO MAINTAIN A MEANINGFUL DISTINCTION BETWEEN FIRST AND SECOND DEGREE INTENTIONAL MURDER, THEN STATE LAW VIOLATES DUE PROCESS

As discussed in Arguments I and II, the failure to maintain a meaningful distinction between first and second degree intentional murder violates due process. As shown in those arguments, California law has traditionally been interpreted as maintaining a conceptually clear firewall between the two degrees of intentional murder, precluding any application that would hold that premeditation and deliberation can occur in a flash *during* the act of killing and *after* intent to kill has been formed.

A recent law review article surveys the development of the concept of premeditation and deliberation in California over the past 150 years and concludes that this "court no longer makes any serious pretense of distinguishing first from second degree murder. Its result-oriented manipulation of Anderson factors, coupled with repeated reliance on the 'great rapidity' with which an accused can deliberate and premeditate, has resulted in first degree murder convictions being affirmed where there was no substantial evidence of premeditation and deliberation, where the crime

is indistinguishable from an intentional but unplanned murder. The Anderson categories are ... critical because the[y] ... describe the kinds of evidence that are logically relevant to determining whether the accused engaged in the kind of forethought and reflection involved in premeditation and deliberation. As the court's recent decisions demonstrate, if these factors are not applied honestly and rigorously, the current statutorily defined difference between first and second degree murder simply evaporates." S. Mounts, "*Premeditation and Deliberation in California: Returning to a Distinction Without a Difference*", U.S.F. L.Rev. (Winter, 2002), pp. 327-328.

If the article is correct, and the Court upholds the first-degree murder convictions in this case under a view of premeditation and deliberation that effectively collapses the distinction between first and second degree murder, then it is the law of this state that violates the due process clauses of the Fifth and Fourteenth Amendments and not merely the verdicts rendered in this case.

IV.

ADMISSION OF MR. SOLOMON'S APPARENT CONFESSION TO HAVING STRANGLED A GIRL RENDERED HIS TRIAL FUNDAMENTALLY UNFAIR

Detective Pane taped two interrogations with Mr. Solomon after arresting him. These took place on April 22, 1987. Following an in limine motion by the defense, the prosecutor agreed to edit the tapes for use at trial. See 3 RT 6393. He subsequently advised the court and counsel as follows:

> I have taken it upon myself, before I submitted my proposed version, to eliminate any reference on the tape to either Mr. Solomon serving time in prison, being in Atascadero State Hospital, any prior offenses, any questions having to do with prior offenses, being on probation; all that kind of stuff I've taken out.

34 RT 15663.

At trial, the edited tapes of the two interviews were played and jurors were given transcripts to aid their comprehension. 34 RT 15757-71.[50]

One prejudicial exchange that was supposed to be deleted survived the editing process. It occurred during the second interrogation.

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[50] The edited tapes were Exhs. 545 (first interrogation) and 546A and 546B (second interrogation). The edited transcripts were Exhs. 545A (first) and 546C (second). Exhibit 545A is at 30 ACT 8981-8989. Exhibit 546C is at 30 ACT 8990 - 31 ACT 9147 (with some pages included twice).

In the tape of the first interrogation, the jury heard Det. Pane accuse Mr. Solomon of murdering people and strangling whores:

Pane: How many people have you murdered?

Solomon: None. None. N-O-N-E, sir.

Pane: How many whores have you strangled?

Solomon: None.

30 ACT 8984. At that point in the real and unexpurgated interrogation, Det. Pane referred to documents in his possession that allegedly contained statements by several women claiming that Mr. Solomon had attempted to strangle them. That portion of the interrogation was deleted from the tape that the jury heard.[51]

In the second interrogation, Det. Pane referred back to the latter exchange. He was reviewing with Mr. Solomon the case he claimed to have built against him and was asking him to comment on different aspects of it. This is what the jury heard (and read):

Pane: Okay, all right. So I can assume then – assume because I have these people saying that – that you lied there, I can assume that.

Solomon: Okay. I mean you can assume.

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[51] This is only apparent on listening to the unedited tape – designated as Exhibit 335 at the penalty retrial.

Pane: I have this here saying so many people did it. That you lied there. Is that right?

Solomon: Okay, you can assume that, too.

Pane: Yeah, I'm assuming this. "*Never strangled girls.*" *And I have the one here, so I can say you lied. Right?*

Solomon: *Okay.*

Pane: So here you've lied three times to me. You've been in every one of these houses here. So never killed girls, I would think that would be a lie.

Solomon: Up to me to prove that it's not.

Pane: Well I know, but does that make sense to you.

Solomon: What you did the whole deal on paper, makes sense.

Pane: Okay.

Solomon: Whole deal on paper here make a lot of sense.

Pane: Yeah.

31 ACT 9130-9131; emphasis added.

It is the italicized portion that is of greatest concern. From the passage, a reasonable juror would have inferred that Det. Pane was pointing at evidence ("I have the one here") that contradicted Mr. Solomon's claim that he had "never strangled girls" and that, in response, Mr. Solomon did not protest that the evidence was false or unreliable but said, "Okay" -- apparently acknowledging that it was true and certainly not protesting that

it was not. It sounded like he was at least tacitly acknowledging the truth of the allegation that he had once strangled a girl.

To the ordinary person, "strangle" means strangle to *death*. The dictionary's first definition of "strangle" is "to choke to death by compressing the throat with something (as a hand or rope)". *Webster's New Collegiate Dictionary* (1974), p. 1149. This connotation would have been confirmed when Mr. Solomon did not disagree with Det. Pane's observation that the logical inference from Mr. Solomon's three allegedly demonstrable lies was that his statement that he that he had "never killed girls" was also a lie.

In fact, it is clear from the unedited tapes that the evidence that Pane had in his possession were statements from Rose Fuller and Connie Sprinkles saying that Mr. Solomon had once choked (but obviously had not killed) them, and that Mr. Solomon was not conceding the truth of their allegations.[52] The jurors did not hear the full earlier exchange, however, so were not able to put the later exchange into its proper context. In assessing the impact of arguably ambiguous words on a juror, the question is whether there is a reasonable likelihood that he or she interpreted the words in a

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[52] *See* Retrial Exhibits 335 [audiotape of first interrogation] and 336 [videotape of second interrogation]. *See* 42 RT 18786. Apparently due to time and technical problems, *see* RT 15662-67, while the retrial jury saw an edited *video*tape of the second interrogation, the guilt jury only heard an edited *audio*tape.

manner adverse to the defendant. *See, e.g., People v. Clair*, 2 Cal.4th 629, 663 (1992); *Estelle v. McGuire*, 502 U.S. 62, 74, and fn. 4 (1991). Applying that standard here, it is reasonably likely that one or more jurors understood the quoted passage as at least a tacit admission by Mr. Solomon that he had once strangled a girl to death.

Allowing the jurors to hear the prejudicial passage was error under both state law and the federal constitution.

First, the evidence as it would have been understood by the jurors had no probative value, since it was not true. As made clear by the unedited tapes, Det. Pane did not have evidence that Mr. Solomon had strangled a girl to death, and Mr. Solomon was not conceding that he had. Retrial Exhibits 335-336.

Second, the prejudicial impact of the apparent evidence was great. This Court has noted the "potentially devastating impact of ... evidence that permits the jury to conclude that a capital defendant has a propensity to commit murder." *People v. Garceau*, 6 Cal.4th 140, 186 (1993).[53] It was evidence with the "capacity ... to lure the factfinder into declaring guilt"

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[53] See also, *People v. Calderon*, 9 Cal.4th 69, 75 (1994) [other crimes evidence "poses a grave risk" to defendant's right to a fair trial]; *People v. Williams*, 44 Cal.3d 883, 904 (1988) ["inherently prejudicial"]; *People v. Smallwood*, 46 Cal.3d 415, 428 (1986) [biases jury]; *Bean v. Calderon*, 163 F.3d 1073, 1084 (9th Cir. 1998) ["high risk of undue prejudice"]; *Old Chief v. United States*, 519 U.S. 172, 185 (1997) ["risk of unfair prejudice ... especially obvious" where uncharged offense similar to charged offense].

even if the legitimate evidence was not persuasive beyond a reasonable doubt. *Old Chief v. United States*, 519 U.S. 172, 180 (1997).

Having no probative value while interjecting great prejudice made the evidence inadmissible under Evidence Code section 352 -- *cf. People v. Guizar*, 180 Cal.App.3d 487, 491-492 (1986) [admission of taped confession that included references to other murders that had "little, if any, relevance ... was plainly error"] – and rendered the trial fundamentally unfair and its verdicts unreliable in violation of the due process and punishment clauses of the Fifth, Eighth, and Fourteenth Amendments. *See, e.g., McKinney v. Rees*, 993 F.2d 1378, 1386 (9th Cir. 1993) [admission of irrelevant propensity evidence rendered trial fundamentally unfair]; *United States v. Levario Quiroz*, 854 F.2d 69, 74 (5th Cir. 1988) [same]. See generally, *Estelle v. McGuire*, 502 U.S. 62, 68 (1991); *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988).)

The error was attributable to the prosecutor. The day before the tapes were played, he told the court and counsel that he'd "eliminate[d] any reference on the tape to … any prior offenses, any questions having to do with prior offenses, … all that kind of stuff…." RT 15663. Given that he was the proponent of the evidence (the interrogation tape), that his decision to delete all references to anything on it that related to uncharged offenses was the product of an informal agreement with defense counsel that was meant to be the functional equivalent of a court order, *see, e.g.,* 3 RT 6393,

that it "is misconduct for a prosecutor to … elicit inadmissible evidence in violation of a court order", *People v. Crew*, 31 Cal.4th 822, 839 (2003), and that his promise to and then representation that he had removed "all that kind of stuff" had likely induced defense counsel to scrutinize the final product less carefully than was usual -- *cf. People v. Quartermain*, 16 Cal.4th 600, 620 (1997) ["Because the prosecutor's promise induced defendant's waiver of his constitutional right …, due process required that the prosecution honor the promise"]; *see generally, Santobello* v. *New York*, 404 U.S. 257, 262 (1971) – it is clear that the prosecutor must bear primary responsibility for the fact that the final product contained an apparent admission by Mr. Solomon to having once strangled a girl.

The fact that the failure was almost certainly inadvertent does not matter. As noted earlier, "what is crucial ... is not the good faith of the prosecutor, but the potential injury to the defendant". *People v. Benson*, 52 Cal.3d 754, 793 (1990). Accord, *Smith v. Phillips*, 455 U.S. 209, 219 (1982).

The error was prejudicial.

To begin with, the jurors struggled for 10 full days before reaching their verdicts. 19 CT 5475-5476, 5481-5488, 5492, 5494, 5496, 5527. If the 6-hour deliberation in *People v. Woodard*, 23 Cal.3d 329, 341 (1979), "[c]learly, [implied that] the jury had misgivings about Spencer's identification of appellant as the culprit," then the *60*-hour deliberation in

this case may reasonably be read to reflect the fact that the jury in this case had *very strong* misgivings about Mr. Solomon's guilt. As set out in detail in Argument I, at the very least jurors should have been plagued by the absence of evidence showing that any of the killings were the product of premeditation and deliberation.

The inference that jurors were looking for answers to such major questions is strengthened by the nature and quantity of the jury's requests for evidence and assistance during deliberations, which included requests for transcripts of the preliminary hearing, the entire trial, and all of the closing arguments. 19 CT 5473-5475; 37 RT 16537-41. *Cf. People v. West*, 139 Cal.App.3d 606, 610 (1983) [jury's requests during deliberations material to prejudice analysis]. Accord, *People v. Beeman*, 35 Cal.3d 547, 562 (1984).

It was into that field of potential reasonable doubt that the incendiary pseudo-evidence – Mr. Solomon's apparent confession to having strangled a girl -- was dropped. It was the kind of evidence capable of making a juror lean toward interpreting the reasonable doubt standard expansively and to vote "preventive[ly]". *Old Chief v. United States*, 519 U.S. at 180-181. *Cf. Beck v. Alabama*, 447 U.S. 625, 642-643 (1980) [if necessary to protect society, jurors will convict a defendant of capital murder even though they are not persuaded he actually committed that offense]. *See also, Keeble v. United States*, 412 U.S. 205, 211-212 (1973) [similar; non-capital offense].

This is particularly true since jurors would have understood that, whatever prior strangling Det. Pane was referring to during the interrogation, evidence of that offense had otherwise been concealed from the jury. In a case in which jurors rightly should have been beset by doubts at least about premeditation and deliberation, it is reasonably possible that a juror who believed s/he had been given an inadvertent peek at a confession to a prior strangling would have been moved to cast a vote for first-degree murder that s/he otherwise would not have cast. It is reasonably possible, in other words, that, if the interrogation tape and transcript had been properly edited, the result of the deliberations would have more favorable to Mr. Solomon. *Chapman v. California,* 386 U.S. 18, 24 (1967).

Finally, the error here may not be viewed in isolation. As will be seen, the impact of the error under discussion, when added to that caused by all of the other guilt-phase errors discussed in this brief, rendered appellant's trial fundamentally unfair, undermining faith in the reliability of the verdicts the jury rendered. *See, e.g., Taylor v. Kentucky*, 436 U.S. 478, 487, and fn. 15 (1978) ["the cumulative effect of potentially damaging" errors "violated the due process guarantee of fundamental fairness"]. *Accord, Kyles v. Whitley*, 514 U.S. 419, 451-454 (1995); *People v. Holt*, 37 Cal.3d 436, 459 (1984).)

Reversal is required.

V.

IN VIOLATION OF DUE PROCESS, JURORS WERE INSTRUCTED TO TRUST THEIR RECOLLECTIONS OVER OTHER JURORS'S NOTES AND WERE IMPLIEDLY TOLD THAT A REQUEST FOR A READBACK WOULD NOT BE PROPER TO RESOLVE A DISAGREEMENT BETWEEN TWO JURORS

Jurors were instructed with CALJIC No. 17.48 (1989 Revision, modified) as follows:

> You were allowed to take notes and you may use your notes during jury deliberations.
>
> Keep in mind, however, that notes are only an aid to memory and should not take precedence over independent recollection. A juror who did not take notes should rely on his or her independent recollection of the evidence and not be influenced by the fact that other jurors did take notes. Notes are for the note-taker's own personal use in refreshing his or her recollection of the evidence.
>
> Finally, should any discrepancy exist between a juror's recollection of the evidence and his or her notes, he or she may request that the reporter read back the relevant proceedings and the trial transcript must prevail over the notes.

CT 5318.

The instruction violated Mr. Solomon's rights in two ways.

First, it told jurors that their personal auditory recall was to be trusted absolutely over written notes taken by another juror, no matter what. Even if Juror A's memory was fuzzy and often unreliable and Juror B's notes were objective and precise and would have assisted Juror A in recalling the actual testimony, Juror A could not allow himself to "be influenced by" Juror B's notes.

Second, the last sentence of the instruction compounded the problem by advising jurors that a request for a readback would be proper to resolve a dispute between a juror's recollection and his or her *own* notes. The plain implication was that a readback would *not* be proper to resolve a dispute between two *jurors*.[54] Thus, if the disagreement was between Juror A's recollection and Juror B's notes, or even Juror A's auditory recollection and Juror C's auditory recollection, the instruction appeared to prohibit a request for readback based on such disagreements.

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[54] Specific references in an instruction or statute will reasonably be taken as meaning that the instruction or statute does *not* cover what is not referred to. See *Creutz v. Superior Court*, 49 Cal.App.4th 822, 829 (1996) ["This court has adhered to the maxim *inclusio unius est exclusio alterius* (the inclusion of one is the exclusion of another)"]; *People v. Castillo,* 16 Cal.4th 1009, 1020 (1997) [conc. opn. of Brown, J.] ["Although the average layperson may not be familiar with the Latin phrase est inclusio unius exclusion alterius, the deductive concept is commonly understood"; noting danger that juror would construe instruction as limiting voluntary intoxication defense to the elements explicitly referred to in the instruction]. See discussion of *People v. Dewberry* in Argument VII, *post.*

In both respects, the instruction was over-inclusive, arbitrary, irrational, and unconstitutional.

The two restrictions surreptitiously entered California law when this Court made favorable comments in *People v. Whitt*, 36 Cal.3d 724, 747-748 (1984), regarding a cautionary instruction promulgated by a three-judge panel of an intermediate court in New York – *People v. DiLuca*, 85 A.D.2d 439 (1982). CALJIC No. 17.48 is a verbatim rendition of the New York instruction.

The two aspects of 17.48 that are challenged here were given no attention in *Whitt*. If they had been, they never would have been incorporated into 17.48.

This is most obvious with respect to the second problem noted above – the implied restriction on the readbacks of testimony. Since 1872, Penal Code section 1138 has provided: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

As this Court has held: "Pursuant to [Penal Code] section 1138, the jury has a right to rehear testimony and instructions on request during its

deliberations. [Citations.] Although the primary concern of section 1138 is the jury's right to be apprised of the evidence, a violation of the statutory mandate implicates a defendant's right to a fair trial conducted substantially in accordance with law. [Citations.]" *People v. Frye*, 18 Cal.4th 894, 1007 (1998) [internal quotation marks and brackets omitted].

The last sentence of 17.48, in other words, violated both Penal Code section 1138 and Mr. Solomon's right to a fair trial under both the state and federal Constitutions. *See Frye,* 18 Cal.4th at 1008 [applying standard for both state and federal constitutional error].[55]

The first restriction – requiring jurors to rely on their own auditory recall no matter what -- was equally problematic.

To begin with, state law has long recognized the intrinsic value of note-taking and its value during deliberations. "Since its enactment in 1872, [Penal Code] section 1137 has allowed jurors to consult their notes during deliberations." *People v. Leach*, 41 Cal.3d 92, 107 (1985).[56]

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[55] The problem was remedied in the Sixth Edition of CALJIC. The last sentence of the instruction – which has been renumbered – now reads: "Finally, should any discrepancy exist between a juror's recollection of the evidence and a juror's notes, *or between one juror's recollection and that of another*, you may request that the reporter read back the relevant testimony which must prevail." CALJIC No. 1.05 (7th ed. 2003); emphasis added.

[56] Section 1137 provides in pertinent part: "Upon retiring for deliberation, the jury may take with them … notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person."

The reason is self-evident. As observed in *DiLuca* itself: "Clearly, note-taking by jurors in an appropriate case can be beneficial. It can assist jurors in refreshing their memories and enhance their ability to recall important evidence (Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 Cal L Rev 731, 758). This can be especially helpful in a long and complex case." *People v. DiLuca*, 85 A.2d at 443.

The premise need not be belabored. 17.48 itself -- by making the court reporter's transcription the *definitive* account of what was said at trial – acknowledged the greater reliability of immediate notetaking over auditory memory.[57] While few jurors have the skills that court reporters have, it is nonetheless fairly indisputable that in many, if not most, if not virtually all, instances, the immediate notes taken by a conscientious juror are going to be more reliable and more detailed than the auditory memory of a juror who did not take notes. *See, e.g., People v. Simmons,* 123 Cal.App.3d 677, 682 (1981) [the hearsay exception for past recollection recorded rests on the recognition "that time universally erodes human memory"].

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[57] The law of evidence has long recognized the inherent reliability of past recollection recorded. *See* Evid. Code §1237; Rule 803(5), Fed. R. of Evid.; *Owens v. State*, 10 A. 210, 212 (Md. 1887) [citing cases]; 3 Wigmore, Evidence, § 736, p. 70 (3d ed. 1940) [exception for "recorded past recollection … occupies a firm and unassailable place in our practice and doctrine"].

It was not denial of this physiological/neurobiological reality that moved the *DiLuca* court to propose that jurors be prohibited from allowing themselves to benefit from another juror's notes. It was, rather, these fears, expressed by those who were opposed to any juror-notetaking: "Will not certain jurors, imbued with the pride of authorship stubbornly insist upon the correctness of their own notes and the importance of the evidence they have noted, and will not others, with few and uncertain notes, yield to those with more voluminous ones?" *DiLuca*, 85 A.2d at 444, quoting McNagny, *Jurors Should Not Be Allowed to Take Notes*, 32 J. of Amer. Judicature Soc. 58, 59. "Without corrupt purpose, his notes may be inaccurate, or meager or careless, and loosely deficient, partial, and altogether incomplete. With a corrupt purpose, they may be false in fact, entered for the purpose of misleading or deceiving his fellows when he comes to appeal to them." *DiLuca*, 85 A.2d at 445, quoting *United States v. Davis*, 103 F. 457, 470 [C.C. Tenn.].

The stated fears are wildly exaggerated and are based on a jaundiced view of jurors that is not shared either by this Court or the United States Supreme Court. If jurors are presumed to be conscientious enough to faithfully follow instructions "to disregard media coverage" they are inadvertently exposed to during a highly-publicized trial, *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal.4th 1178, 1223 (1999), and are presumed to be intellectually disciplined enough not to allow knowledge of

a prior capital sentence affect their objectivity in deciding what sentence to impose, *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994), *In re Carpenter*, 9 Cal.4th 635, 649 (1995), then it must be presumed that they are capable of dealing with whatever dynamic arises when some but not all jurors have taken notes during trial.

Conversely, if it is presumed that jurors will act in the fashion described in *DiLuca*, forbidding them to take or share notes will do nothing to guarantee reliable decisionmaking. To the contrary, if bullies and liars populate juries, the one thing that might reduce their influence is the ability of other jurors to refer to notes contemporaneously made.

It appears, furthermore, that, prior to *Whitt*, jurors in California were routinely permitted to share their notes with fellow jurors once "the case [wa]s finally submitted to" them. *Bauguess v. Paine*, 22 Cal.3d 626, 632 (1978). *See also, ABA Standards for Criminal Justice, Discovery and Trial by Jury*, Std. 15-3.5 p. 203 (3rd Ed 1996) ["The notes should be used by the juror solely for the juror's purposes during the deliberations, and should be made available to other jurors solely at the discretion of the juror taking the notes"].

Indeed, the very wording of section 1137 – stating that "the jury may take with them [into deliberations] … notes of the testimony … taken by themselves *or any of them*" – appears to contemplate the free exchange of notes *between* jurors.

The restrictions imposed by the court seriously undermined the reliability of the factfinding that occurred in the jury room. If, under the circumstances, Juror A believed that Juror B's notes were a more reliable indicator of the truth than his own auditory recollection, it subverted the accuracy of the factfinding process – and, therefore, of the truthfinding process -- to *require* the Juror A to accept his own recollection as the more reliable account of what was said. By prohibiting jurors from allowing themselves even to be *influenced* by another juror's notes, the instruction arbitrarily and prejudicially closed off a perfectly legitimate and useful source of relevant information.

A rational instruction at least would have encouraged jurors to resolve discrepancies between their recollections and other juror's notes by requesting readbacks. Instead, as discussed above, the instruction exacerbated the problem by making it seem that readbacks were only permissible to resolve discrepancies between a juror's memory and his or her own notes. The implication was that, whenever a juror's own recollection conflicted with that of another juror – whether the other juror's memory rested on written notes or not – each juror was *required* to believe that it was his or her own memory that was accurate *regardless* of the circumstances.

The ramifications of the message conveyed by the instruction, furthermore, went beyond the specific restrictions. If a juror was to be so

independent that he or she was not even to be *influenced* by another juror's reliable notes – and was to be so confident of his or her own memory that no recourse to readbacks to settle inter-juror disputes would be allowed -- then, *a fortiori,* why would a juror allow himself or herself to be influenced by *anything* another juror said? If another juror's *recorded* recollection had to be rejected, then surely that juror's *un*recorded recollection – or thoughts about the evidence – offerings much more subjective than the juror's written notes – likewise had to be rejected.

CALJIC No. 17.48 thus thoroughly undermined the essential function of deliberations as a joint venture. As expressed in CALJIC No. 17.40: "Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors." CT 5395. CALJIC No. 17.48 supported the first admonition and nullified the second. Discuss, but when it comes to the facts on which you base your opinion, those must be the product of your independent recollection, wholly uninfluenced by what other jurors remember. Since the essence of the juror's constitutional role is to apply the law to the facts that he or she finds to be true – *United States v. Gaudin*, 515 U.S. 505, 514 (1995); *Lockhart v. McCree*, 476 U.S. 162, 184 (1986) -- it is how the juror decides what the facts are that is crucial. It is precisely that process that 17.48 subverted. The instruction violated Mr. Solomon's right to due process, to a fair trial,

to a trial by jury, and to a reliable guilt verdict in a capital case. (Calif. Const., art. I, §§ 7, 15; U.S. Const., Amends. 5, 6, 8, 14.)

Impairing the jury's factfinding ability was of no small consequence here. The guilt-phase deliberations began on August 4, 1991, and did not end until August 28. With breaks of 10 days and then 6 days, the deliberations stretched out over *24 days*. 19 CT 5475-5476, 5481-5488, 5492, 5494. To tell *these* jurors that their auditory memories were to be trusted over another juror's written notes was to guarantee a skewed and unreliable factfinding process. *Cf. People v. Santamaria*, 229 Cal.App.3d 269, 282 (1991) [*per se* reversal required in part because 11-day delay in deliberations "undoubtedly had some significant effect on jurors' ability to remember complicated facts, as well as on their recall and understanding of instructions"].

As is self-evident, moreover, this case was exceedingly complex, involving 10 victims and 14 counts, and the trial was correspondingly long. Thus the witnesses who testified regarding the first of the alleged murders the jury heard evidence about – the Yolanda Johnson case – began testifying on May 29, 1991. See 18 RT 10944, 11016. That was 10 weeks before the deliberations began and 14 weeks before they ended. Jurors who did not take notes undoubtedly forgot a lot of critical information in those 14 weeks.

Vernell Dodson, for instance, testified on May 31, 1991. He claimed that, several months before Yolanda Johnson's death, Mr. Solomon had said in passing that he wanted to kill Ms. Johnson for planning to steal some stereo equipment from him, RT 11346-47. That testimony was so thoroughly discredited[58] that the prosecutor did not even refer to it in closing argument. *See especially* RT 16041-80.

By the time deliberations were in full swing, however – between 9 and 13 weeks later -- jurors who did not take notes were at serious risk of forgetting the nuances of the cross-examination. Jurors who took notes were in a much better position to recall the details of the impeachment. Thanks to 17.48, however, jurors who did not take notes could not benefit from those that did. It was reasonably likely that at least one of those jurors recalled the superficially harmful gist of Dodson's direct testimony and on that basis erroneously concluded that Mr. Solomon had premeditated the killing of Ms. Johnson.

Similarly, two officers testified that they remembered seeing possible ligature marks on Ms. Johnson's neck when they saw her in the closet. RT 11042, 11170-72. The autopsy surgeon, however, noted no marks consistent with violence. RT 12130-33. That impeachment took

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[58] Among other things, Dodson did not contact the authorities with his claim regarding Mr. Solomon and Ms. Johnson until he was in prison on a parole violation more than a year after Johnson's body was found. RT 11358, 11364, 11381-82.

place 11 weeks before deliberations ended. It is reasonably likely that at least one juror who did not take notes forgot about it when it came time to deciding whether Ms. Johnson had been the victim of foul play and, if so, whether it had been of the premeditated variety.

Given the length of the trial, the length of the deliberations, and the complexity of the case, the same question mark can be placed next to practically every piece of significant evidence in the case – with the same response: the human memory being the unreliable repository that it is, it is reasonably likely that at least one juror who did not take notes forgot about at least one important piece of evidence – or had a fuzzy memory of it – by the time deliberations rolled around. At the very least, given the paucity of evidence of premeditation and deliberation – see Argument I – and given the 10 full days in which the jurors struggled to reach verdicts -- it cannot be said beyond a reasonable doubt that no juror got to the end of those deliberations and cast a vote for premeditated and deliberate murder precisely *because* – without the assistance of notes and readbacks -- he or she was unable to recall the testimony with sufficient vividness to make a fully informed decision. Under the facts of this case, in other words, it cannot be said beyond a reasonable doubt that "the guilty verdict[s] actually rendered in *this* trial w[ere] surely unattributable to the error[s]." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). *See also, Yates v. Evatt*, 500 U.S. 391, 403-407 (1991). It is reasonably possible and reasonably probable

that, in the absence of the errors, there would have been a result more favorable to Mr. Solomon. *Chapman v. California*, 386 U.S. 18, 36 (1967); *People v. Watson*, 46 Cal.2d 818, 836 (1956).

In the end, furthermore, Mr. Solomon should not be put in the position of having to make a harmless-error argument. The errors here directly undermined the jury's ability to satisfy "[t]he due process concern for a reliable factfinding process in capital cases", *People v. Dennis*, 17 Cal.4th 468, 509 (1998), and thus "vitiate ... *all* the jury's findings." *Id.* at 281; emphasis in original. *Sullivan v. Louisiana*, 508 U.S. 275, 277-278 (1993). "[W]ith consequences that are necessarily unquantifiable and indeterminate, [they] unquestionably qualif[y] as 'structural error'." *Id.* at 281-282.

Under either analysis, reversal is required.

VI.

IN VIOLATION OF DUE PROCESS, CALJIC NOS. 2.01 AND 2.02 EFFECTIVELY TOLD JURORS THAT DIRECT EVIDENCE COULD SUPPORT A FINDING OF GUILT EVEN IF NOT BELIEVED BEYOND A REASONABLE DOUBT

CALJIC No. 2.00 told jurors that direct and circumstantial evidence were of equal weight:

> Both direct evidence and circumstantial evidence are acceptable means of proof; neither is entitled to any greater weight than the other.

CT 5320.

Immediately thereafter, however, CALJIC No. 2.01 informed jurors that, with respect to the circumstantial evidence the prosecution relied on, special rules applied:

> However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only consistent with the theory that the defendant is guilty of a crime, but cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an

inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence as to any particular count . . . is susceptible of two reasonable interpretations, one of which points to the defendant's guilt, the other to his innocence, you must adopt that interpretation which points to the defendant's innocence and reject that interpretation which points to his guilt....

CT 5321.

CALJIC No. 2.02 told jurors that similar special rules applied to the circumstantial evidence relied on by the prosecution to prove the mental state or specific intent of the charged crimes. CT 5373.

The instructions violated both due process and California law.

By informing jurors that there were two types of evidence, direct and circumstantial, and by limiting the quoted principles to circumstantial evidence, the instructions plainly implied that those principles did not apply to direct evidence.[59]

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[59] "Although the average layperson may not be familiar with the Latin phrase est inclusio unius exclusion alterius, the deductive concept is commonly understood ...." *People v. Castillo,* 16 Cal.4th 1009, 1020 (1997) [conc. opn. of Brown, J.] [noting danger that juror would construe

A reasonable juror would have understood the instructions as intentionally omitting reference to direct evidence.[60]

This was contrary to California law.

California courts have long recognized the principle that if two reasonable interpretations of the evidence exist, the one favorable to the defendant must be adopted by the jury. The principle is not limited to cases involving circumstantial evidence. The principle applies to *all* cases, including those in which direct evidence is presented.[61]

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instruction as limiting voluntary intoxication defense to the elements explicitly referred to in instruction]; see also *U.S. v. Crane* (9th Cir. 1992) 979 F2d 687, 690 ["maxim expressio unius est exclusio alterius ... is a product of logic and common sense"].)

[60] Similar reasoning underlay the holding in *People v. Dewberry* (1959) 51 Cal.2d 548, 557: "The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder." See also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction, such as CALJIC No. 2.02, is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].)

[61] See *People v. Bender*, 27 Cal.2d 164, 175-77 (1945); *People v. Naumcheff,* 114 Cal.App.2d 278, 281-82 (1952) [in case consisting primarily of direct evidence, jury properly instructed: "If from the evidence you can with equal propriety draw two conclusions, the one of guilt, the other of innocence, then in such a case it is your duty to adopt the one of innocence and find the defendant not guilty."]; *People v. Haywood,* 109 Cal.App.2d 867, 872 (1952) [failure to instruct on alibi not prejudicial where jury instructed: "The testimony in this case if its weight and effect be

In the very case that CALJIC cites as authority for 2.01 – *People v. Bender*, *supra* – the Court states that the instruction is "eminently proper" as applied to *all* of the evidence. 27 Cal.2d at 177.[62] Indeed, as the *Bender* opinion makes clear, an instruction much like the third paragraph of 2.01 (see quoted text above) used to be given in *every* case and was not limited to circumstantial evidence. *Ibid.*

The circumstantial-evidence instruction came to be required because courts feared that, without explicitly telling juries that reasonable-doubt

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such as two conclusions can be reasonably drawn from it, the one favoring the defendant's innocence, and the other tending to establish his guilt, law, justice and humanity alike demand that the jury shall adopt the former and find the accused not guilty."]; *People v. Foster,* 198 Cal. 112, 127 (1926) [same where jury instructed "that, considering the evidence as a whole, if it was susceptible of two reasonable interpretations, one looking 'toward guilt and the other towards the innocence of the defendant, it was their duty to give such facts and evidence the interpretation which makes for the innocence of the defendant.'"]; *People v. Barthleman,* 120 Cal. 7, 10 (1898) ["If the evidence points to two conclusions, one consistent with the defendant's guilt, the other consistent with the defendant's innocence, the jury are bound to reject the one of guilt and adopt the one of innocence, and acquit the defendant."]; and *People v. Carrol,* 79 Cal.App.2d 146, 150 (1947) ["You are instructed that if from the evidence you can with equal propriety draw two conclusions, one of guilt, the other of innocence, it is your duty to adopt the one of innocence and find the defendant not guilty."].

[62] The broad principle, not the limited one, is the one that appears in the standard instruction given in federal cases: "If the jury views the evidence in the case as reasonably permitting either of two conclusions - one of innocence, the other of guilt - the jury must, of course, adopt the conclusion of innocence." Devitt and Blackmar, *Fed. Jury Prac. & Instr.,* § 1210, p. 354 (4th ed. 1992). *See also U.S. v. James,* 576 F.2d 223, 227 fn. 3 (9th Cir. 1978).

principles applied to circumstantial evidence – and how they applied – juries might not get it. *See People v. Hatchett*, 63 Cal.App.2d 144, 155 (1944) ["To the legally trained mind the doctrine of reasonable doubt has a scope much broader than would be easily understood by inexperienced jurors. The rule under which circumstantial evidence is to be weighed is not one which would be suggested to the lay mind by instructions that doubts are to be resolved in favor of the accused. ... [T]hrough long experience it has become an established practice in the courts to state the rule in distinct and specific form, to serve as an easily understood and safe guide for juries in weighing the sufficiency of circumstantial evidence."]

The circumstantial-evidence instruction is merely supposed to be a pinpoint instruction – "a direct statement of the precise principle" as it applies to circumstantial evidence. *People v. Bender*, 27 Cal.2d at 177. The problem is that, at some point, the standardized instructions evolved in such a way that the elaborations on reasonable doubt that used to be given in all cases came to be stated *only* in the circumstantial-evidence instruction. The unfortunate effect, as noted above, is that the instructions now make it appear that the elaborative principles only apply to circumstantial evidence.[63]

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[63] Appellant respectfully observes that this Court has contributed to the problem by making statements such as: "CALJIC No. 2.01 is not necessary unless the prosecution substantially relies on circumstantial evidence to

Specifically, the juxtaposition of 2.00 and 2.01 were reasonably likely to be construed by the jury in this case as meaning: 1) that a fact essential to guilt that was based on direct evidence did *not* have to be proved beyond a reasonable doubt; and 2) that a finding of guilt could be made on the basis of direct evidence that was reasonably reconcilable with innocence.

It is true, of course, that the jury was instructed with the definition of reasonable doubt found in CALJIC No. 2.90. CT 5345. That would not have cured the problem, however. Told that the principles in 2.01 *only* applied to circumstantial evidence, a juror was not going to conclude, based on 2.90, that the principles in 2.01 *did* apply to direct evidence. A juror, rather, would have found a way of harmonizing 2.90 and 2.01 that had the effect of diluting and misapplying the reasonable doubt standard. (See examples, *post*.) The error created by an instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. *United States* v. *Hall*, 525 F.2d 1254, 1256 (5th Cir. 1976). Even if jurors were sophisticated enough to perceive a conflict in the instructions, that would

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prove its case." *People v. Brown,* 31 Cal.4th 518, 561-562 (2003). While the latter statement is technically accurate, since 2.01 is tailored specifically to circumstantial evidence, it also lends itself to the inaccurate inference that the principles embodied in 2.01 do not apply – and thus no comparable instruction need be given -- where "the People's case relie[s] primarily on direct, not circumstantial, evidence." *Id.* at 562.

not have eliminated the problem: "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Francis v. Franklin*, 471 U.S. 307, 322 (1985).

The misconceptions fostered by 2.01 likely had serious repercussions here. While the overall theories regarding how the deaths occurred, who was responsible for them, and the state of mind with which the alleged offenses were committed were largely circumstantial, the prosecution also presented plenty of direct evidence in support of various elements and charges. Much of this evidence was disputed. In each instance, a juror might have rejected the testified-to fact if measuring it against the beyond a reasonable doubt requirement but might have accepted it if using a lesser standard of proof.

As discussed in the preceding argument, for instance, Vernell Dodson, claimed that Mr. Solomon had said in passing that he wanted to kill Yolanda Johnson for planning to steal some stereo equipment from him. RT 11346-47. The testimony was thoroughly impeached. See, e.g., RT 11358, 11364, 11381-82 (and Statement of Facts). It is reasonably possible, however, that one misguided juror believed Dodson somewhat and relied on his testimony to find that the Johnson killing was premeditated. Such a juror could have reconciled 2.90 and 2.01 by concluding that, while the testimony was "susceptible of two reasonable interpretations, one of which points to the defendant's guilt, the other to his

innocence," it was direct evidence and thus – pursuant to the clear implication of 2.01 -- was *not* subject to the rule requiring adoption of "that interpretation which points to the defendant's innocence". Such a juror would have been free to put the testimony into the "true" column without distinguishing between true beyond a reasonable doubt and probably true and then – after finding that there wasn't any other evidence to speak of on the issue of premeditation and deliberation -- to rely on the testimony without qualification when deciding whether the killing of Ms. Johnson had been proven beyond a reasonable doubt to be first-degree murder.[64]

Similarly, at trial, Melissa Hamilton identified Mr. Solomon as her assailant. RT 15275-76 . At the preliminary hearing, however, she said she hadn't told her boyfriend who the assailant had been because she "didn't know for sure who it was". RT 15319, 15323. She also didn't tell any of the other people she was close to who the perpetrator was nor did she go to the police, even after Mr. Solomon was arrested. RT 15322. When she finally spoke to the police, furthermore, she told them that her friend Willie would corroborate her story, but he didn't. RT 15311.

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[64] As will be discussed in the next argument, the circumstantial-evidence rules stated in 2.01 and 2.02 rely on terms that have their own potential for diluting the reasonable doubt requirement. Still, a defendant would be far better off if those faulty rules were applied to the direct evidence, too, rather than have jurors believe that they were simply inapplicable.

It is reasonably possible that a misguided juror, applying the kind of diluted standard of proof described above, would have convicted Mr. Solomon on Counts 3-6 based on a belief in Ms. Hamilton's credibility that did not rise to the level of proof beyond a reasonable doubt.

Tainted by 2.01, a juror might also have relied on Tammy Gomes' disputed testimony that she had seen Mr. Solomon with Linda Vitela – see Statement of Facts – to convict Mr. Solomon on Count 1. As discussed in Argument I, *ante*, it is likely that the jury returned a 2nd-degree murder verdict on Count 1 because it was the first of the alleged killings. If the conviction on Count 1 were reversed, the killing alleged in Count 2 (Sheila Jacox) would then be the first in time. The first-degree conviction returned on that count – if not reversed outright on other grounds raised in this brief -- would at least have to be modified to second-degree.

The foregoing examples are illustrative only. They are only meant to show that the misconception fostered by 2.01 likely had a real and pervasive effect on the verdict.

While appellant could go through the evidence pointing out many other findings a misguided juror could have made, this is not necessary. It is the very pervasiveness of this kind of error that led the United States Supreme Court to hold that it is structural and does not lend itself to harmless-error analysis:

"The prosecution bears the burden of proving all elements of the offense charged ... and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements." *Sullivan v. Louisiana*, 508 U.S. 275, 277-278 (1993). Erroneous instruction on the "beyond-a-reasonable-doubt requirement" violates both "the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment ... right to a jury trial". *Id.* at 278. The error is reversible per se because "a misdescription of the burden of proof ... vitiates *all* the jury's findings." *Id.* at 281; emphasis in original. "Denial of the right to a jury verdict of guilt beyond a reasonable doubt ..., with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error'." *Id.* at 281-282.

The effective "misdescription of the burden of proof" here violated Mr. Solomon's rights under the due process and jury-trial clauses of the 5th, 6th, and 14th Amendments and Article I, sections 7 and 15 of the California Constitution, and rendered the guilt verdict unreliable in violation of the 8th and 14th Amendments. *See Beck v. Alabama*, 447 U.S. at 637.

Reversal is required.

VII.

VARIOUS INSTRUCTIONS – ALONE AND CUMULATIVELY – BOTH DILUTED THE REASONABLE DOUBT STANDARD AND SHIFTED THE BURDEN OF PROOF TO MR. SOLOMON

A. Introduction

As shown in the preceding argument, CALJIC Nos. 2.00, 2.01, and 2.02, read together, were reasonably likely to lead jurors to dilute the reasonable doubt standard when they applied it to direct evidence. In this argument: section B shows that, in two important respects, 2.01 and 2.02 were also reasonably likely to lead jurors to dilute the reasonable doubt standard when they applied it to the circumstantial evidence; sections C and D show that the language used in CALJIC Nos. 2.51 and 2.21.2 significantly compounded the problem; and section E shows that language in CALJIC No. 2.11 made it appear Mr. Solomon had a burden to produce evidence on his own behalf.

These errors violated Mr. Solomon's rights to due process and trial by jury as guaranteed by the state constitution (art. I, §§ 7, 15) and the Fifth, Sixth, Eighth, and Fourteenth Amendments. *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). *See Beck v. Alabama*, 447 U.S. at 637.

As will be noted below, the Court has rejected challenges to these instructions in the past. It is not apparent from the Court's opinions, however, that the precise arguments made here were raised in the cases in

question. None of the Court's prior cases, furthermore, involve all of the errors alleged in this case. Even if one phrase standing alone would not have misled a juror, the plethora of problematic phrases challenged here conspired in combination to make it likely that at least one juror's verdict was predicated on a standard closer to reasonableness than beyond a reasonable doubt. Appellant asks that the Court reconsider its prior holdings and judge the cumulative effect of the challenged language. See *People v. Hughes*, 27 Cal.4th 287, 360 (2002) [""the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction."]. *See Taylor v. Kentucky*, 436 U.S. 478, 487, and fn. 15 (1978) ["the cumulative effect of potentially damaging" errors "violated the due process guarantee of fundamental fairness"]. Accord, *Kyles v. Whitley*, 514 U.S. 419, 451-454 (1995); *People v. Holt*, 37 Cal.3d 436, 459 (1984).)

Finally, as will be discussed, the cumulative effect of the challenged instructions constituted structural error under *Sullivan v. Louisiana*. At the same time, appellant will specifically show how each of the challenged instructions were capable of being relied on in a manner prejudicial to Mr. Solomon.

B. CALJIC Nos. 2.01 and 2.02 created false and misleading choices between "guilt" and "innocence", "existence" and "absence" of mental state, and "reasonableness" and "unreasonableness"

The last three paragraphs of CALJIC No. 2.01 – entitled "Sufficiency of Circumstantial Evidence – Generally" -- stated:

> [B]efore an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.
>
> [I]f the circumstantial evidence [as to any particular count] is susceptible of two reasonable interpretations, one of which points to the defendant's *guilt* and the other to [his] *innocence*, you must adopt that interpretation which points to the defendant's *innocence*, and reject that interpretation which points to [his] *guilt*.
>
> If, on the other hand, one interpretation of such evidence appears to you to be *reasonable*, and the other interpretation to be *unreasonable*, you must accept the *reasonable* interpretation and reject the *unreasonable*.

CT 5321; emphasis added.

CALJIC No. 2.02 – entitled "Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State" –applied the principles set forth in

the last two paragraphs of 2.01 to the findings that had to be made regarding specific intent and mental state:

> [I]f the evidence as to [any] such [specific intent] [or] [mental state] is susceptible of two reasonable interpretations, one of which points to the *existence of the [specific intent] [or] [mental state]* and the other to the *absence of the [specific intent] [or] [mental state],* you must adopt that interpretation which points to the *absence of the [specific intent] [or] [mental state]*. If, on the other hand, one interpretation of the evidence as to such [specific intent] [or] [mental state] appears to you to be *reasonable*, and the other interpretation to be *unreasonable*, you must accept the *reasonable* interpretation and reject the *unreasonable*.

CT 5373; emphasis added.

The instructions attempted to tell the jury how to apply the reasonable doubt standard to the circumstantial evidence the prosecution was relying on. They did it in a way that was confusing and misleading, however, and were reasonably likely to be understood in a way that effectively lowered the standard of proof and made it easier to obtain convictions. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) [reversal required if "reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution"].

First, 2.01 instructed that, if presented with two reasonable interpretations, one pointing to guilt and one to innocence, a juror was required to adopt the latter. Strictly speaking, that was a correct statement of law. The instruction, however, raised many more questions than it answered. What if one interpretation pointed to guilt and the other – while not pointing to innocence – simply did not point to guilt? What if the other did not point to innocence but nonetheless raised a reasonable doubt whether the interpretation pointing to guilt was correct? In the absence of proof beyond a reasonable doubt, plainly, the law required a juror to adopt the non-guilt interpretations. *Cage v. Louisiana,* 498 U.S. 39, 41 (1990). It was reasonably likely, however, that a juror conscientiously attempting to apply the instruction would have believed that, since there was no reasonable interpretation pointing to innocence, and there was a reasonable interpretation pointing to guilt, the correct thing to do was adopt the latter interpretation. A reasonable layperson could have believed that this conclusion was consistent with the reasonable-doubt standard.[65]

There was a great deal of evidence in this case where the foregoing confusion was likely to manifest.

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[65] The difference between "failed to prove guilt beyond a reasonable doubt" and establishment of true "innocence" – while enormous in terms of the burden and quantum of proof involved and the level of culpability that is implied – is a distinction that is not well-appreciated by non-lawyers. *See* Bugliosi, "*Not Guilty and Innocent -- The Problem Children Of Reasonable Doubt*", 4 Crim. Justice J. 349 (1981).

The prosecution, for instance, presented evidence that Mr. Solomon's palm print was on the door of the closet where Yolanda Johnson's body was found, and argued that this was evidence that he was the killer. RT 11890, 16061. The prosecution's interpretation of the evidence was reasonable and pointed toward guilt.

The jury also heard Mr. Solomon tell Detective Pane that the palm print was consistent with the fact that he had personally done work in the room in which the closet was located. ACT 8843, 8950-51. This defense interpretation was also reasonable (as the prosecutor conceded, RT 16059), but it did not point to innocence – i.e., it did not give Mr. Solomon an alibi or point to a third party as the killer. What the defense interpretation did, however, was to raise a reasonable doubt whether the prosecution's interpretation of the palm print evidence was correct.

While many jurors might equate the "innocent" explanation for the print with an inference that "points to innocence" – and apply the instruction as it was meant to be applied – it is also reasonably likely that one or more jurors did not do so. Not trained to equate reasonable doubt with innocence, such a juror would have seen the defense explanation as neutral, not as "pointing to innocence". Presented with an interpretation pointing to guilt but none pointing to innocence, such a juror – though perfectly conscientious – reasonably would have believed that 2.01 required adoption of the interpretation pointing to guilt.

That would have been a plausible reading, but also would have been constitutional error, resulting in "a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Cage v. Louisiana*, 498 U.S. at 41. If a juror had a reasonable doubt whether the inference to be drawn from circumstantial evidence was incriminating, s/he ultimately could not adopt the incriminating interpretation even if Mr. Solomon was unable to articulate an alternative interpretation that pointed to innocence. *Ibid.* ["reasonable doubt" that defendant guilty requires less doubt than "actual substantial doubt"].

A similar analysis applies to the evidence that semen found on the inside of Yolanda Johnson's thigh. The prosecution presented blood-type and phenotype evidence indicating that Mr. Solomon was in the relatively small percentage of the population -- 2.2 to 3.8% -- that could have been the source of the semen. RT 11949, 12019-12020-21, 12025, 12034, 12036, 12040, 12045-46. On cross-examination, the defense elicited that vaginal secretions or sweat from the victim could have mixed with the semen, contributing the H antigen indicative of an "O" donor. That left open the possibility that the donor of the semen, unlike Mr. Solomon, was a non-secretor. RT 12054, 12058-62, 12068, 12087.

In this instance, too, both interpretations were reasonable, and the prosecution's pointed toward guilt, but the defense's did not necessarily point to innocence, since Ms. Johnson turned frequent tricks and the semen

donor and killer – assuming there had been foul play – were not necessarily the same person. What the defense interpretation did, however, was to raise a reasonable doubt whether the prosecution's interpretation of the semen evidence was correct.

Here again – presented with a reasonable interpretation pointing to guilt but none pointing to innocence – one or more jurors conscientiously applying 2.01were reasonably likely to commit constitutional error and to interpret the instruction as requiring adoption of the interpretation pointing to guilt.

The cited errors are only two of many instances in which the guilt/innocence dichotomy could have led jurors astray but those two alone were likely to impact the verdict. As the prosecutor acknowledged, the palm print and semen stain were the only physical evidence in the case tying Mr. Solomon to any of the homicides. RT 16290. As a result, proving Mr. Solomon's guilt in the Johnson case was critical to the prosecution's argument that Mr. Solomon was the perpetrator in all the charged homicides. See RT 16041-80 [discussion of Johnson killing].

CALJIC No. 2.02 used a similarly problematic formulation regarding specific intent and mental state. Jurors were told that, if presented with two reasonable interpretations, one pointing to the existence of specific intent or mental state and one to their absence, a juror was required to adopt the latter. Rather than focusing jurors on whether the

defense interpretation raised a *reasonable doubt* regarding the existence of premeditation and deliberation, therefore, the instruction focused the jurors on asking whether the defense interpretation affirmatively pointed to the *"absence"* of that mental state. This created the potential that a juror who thought the prosecution's theory that premeditation and deliberation existed was reasonable would have felt bound to accept it in the belief that reasonable doubt required the defense to make some affirmative showing of the absence of that mental state.

This was a most realistic danger here. As shown in Argument I: 1) defense counsel did not focus on premeditation and deliberation in his closing argument; and 2) the prosecution's theory was very weak and very speculative. It was under precisely such conditions that at least one juror, applying the plausible interpretation of 2.02 discussed above, was likely to believe that she was required to adopt the prosecution's theory – and thus, unbeknownst to her -- would have been making "a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Cage v. Louisiana*, 498 U.S. at 41.

The problems described above, moreover, were not the only problems created by 2.01 and 2.02. The last sentence of each instruction created the potential for additional confusion and error.

The last sentence instructed that, if presented with what appeared to the juror to be one reasonable interpretation of evidence and one

unreasonable interpretation, the juror was required to adopt the reasonable one. That directive was unnecessary if the reasonable interpretation pointed to innocence (or the absence of mental state), since the preceding sentence made clear that a reasonable interpretation pointing to innocence (or absence) had to be adopted. The last sentence of 2.01 was clearly telling jurors that, if presented with what appeared to be a reasonable interpretation pointing to guilt and an unreasonable interpretation pointing to innocence, they had to adopt the interpretation pointing to guilt. Equally clearly, the last sentence of 2.02 was telling jurors that, if presented with what appeared to be a reasonable interpretation pointing to the existence of specific intent/mental state and an unreasonable interpretation pointing to the absence of the same, they had to adopt the interpretation pointing to the former.

The problem with these commands, obviously, was that they appeared to require – and were reasonably likely to be interpreted as requiring – that jurors accept a reasonable incriminating interpretation even if not proved beyond a reasonable doubt.[66] Conversely, jurors were likely to believe they were required to reject an unreasonable exculpatory interpretation even if not unreasonable beyond a reasonable doubt.

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[66] A reasonable juror essentially would have interpreted the instruction as establishing that, where only one reasonable interpretation was presented, that was the equivalent of having been proved beyond a reasonable doubt.

Here, too, there were many instances in which the misleading instructions were likely to lead a juror into constitutional error.

The prosecution, for instance, presented evidence that discoloration on Ms. Johnson's neck and wrists might have been the result of ligatures, RT 11042, 11170-72, 11570-71, 11575, which the prosecutor interpreted as supporting the conclusion that Ms. Johnson had been the victim of foul play. RT 16042-44. The defense raised a reasonable doubt about this evidence, eliciting evidence that there were no marks consistent with violence when the body was examined by the coroner, RT 12130-12133, that the marks that were present were not consistent with narrow ligatures, RT 11620-22, 11651, 11670, and that the discoloration could have been caused by the decomposition process, RT 11050, 11649, 11659, 11666-67.

Appellant views the prosecution's interpretation of the evidence as weak, but a juror arguably could have viewed it as reasonable but not proved beyond a reasonable doubt.

At the same time, Mr. Solomon elicited evidence that Ms. Johnson had cocaine and alcohol in her system, suffered from hepatitis, and that the combination could have been the cause of her death, RT 11601-04, 11609, 11630, 11611-12, 11637, 11070, 11103, 11690, 11668, and further elicited that witnesses to a drug-related death will sometimes move the body to a location that deflects suspicion from them, RT 11639-40.

The defense interpretation was exculpatory but arguably could have been viewed by a juror as unreasonable -- but not so unreasonable as to reach the level of unreasonable beyond a reasonable doubt.

Presented with a reasonable interpretation and an unreasonable one, a juror conscientiously applying the last sentence of 2.01 was reasonably likely to believe s/he was required to adopt the prosecution's view of the evidence even though it had not been proved beyond a reasonable doubt.

This would have violated due process, since the juror would have substituted a reasonableness standard for the reasonable doubt standard.

In addition, the last sentences of 2.01 and 2.02 were mandatory commands, requiring jurors to accept reasonable incriminating interpretations even if they did not pass muster under the beyond a reasonable doubt standard. The instructions thus functioned as mandatory presumptions of guilt in violation of due process. *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979).

One Court of Appeal panel has acknowledged that the use of the guilt/innocence dichotomy in 2.01 "is inapt and potentially misleading ... standing alone", *People v. Han*, 78 Cal.App.4th 797, 809 (2000), and the CALJIC Committee has seen fit to correct a similar problem in CALJIC No. 2.51. *See People v. Prieto,* 30 Cal.4th 226, 254, and fn. 11 (2003).[67]

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[67] *Prieto* notes that, whereas the Fifth Edition read, "Absence of motive may tend to establish innocence", the language was amended for the Sixth

This Court, however, has "repeatedly rejected ... arguments" that 2.01 and 2.02 "impermissibly lower ... the reasonable doubt standard of proof and create ... an impermissible mandatory presumption of guilt." *People v. Smith,* 30 Cal.4th 581, 617 (2003).

The Court's analysis is not persuasive. For instance, the Court recently defended the use of the guilt/innocence dichotomy in four standard instructions on the ground that: "The instructions in question use the word "innocence" to mean evidence less than that required to establish guilt, not to mean the defendant must establish innocence or that the prosecution has any burden other than proof beyond a reasonable doubt." *People v. Crew*, 31 Cal.4th 822, 848 (2003).

The Court is surely correct that the drafters of the instruction were using innocence as a shorthand for the actual standard of proof. It was an extremely ill-advised choice of terms, however. As noted above, the concept of "innocence" is entirely different than that of "evidence insufficient to prove guilt beyond a reasonable doubt". The former means you didn't do it. The latter means they couldn't prove you did it. The moral and evidentiary distance between those two states is huge.

Edition and now reads, "may tend to show the defendant is not guilty". As discussed *post*, the problematic Fifth Edition version was given in this case. CT 5334.

More importantly, while jurors are generally happy to acquit based on actual innocence, there is a natural resistance to acquitting for failure to prove guilt beyond a reasonable doubt. *Cf. Beck v. Alabama,* 447 U.S. 625, 642-643 (1980) [if necessary to protect society, jurors will convict a defendant of capital murder even though they are not persuaded he actually committed that offense]. See also, *Keeble v. United States*, 412 U.S. 205, 211-212 (1973) [similar; non-capital offense]. While the Court maintains that jurors parsing 2.01 would have translated "innocence" into "evidence insufficient to prove guilt beyond a reasonable doubt", the far more realistic danger and possibility is that they – or at least one of them – would have translated the beyond a reasonable doubt standard into something closer to actual innocence.

The Court's defense of the guilt/innocence dichotomy in another recent case is not reassuring: "Taking all the instructions together, as required, the jurors would instead have understood that while the issue before them is defendant's guilt or innocence, a conviction may be returned only if the prosecution has proved defendant's guilt beyond a reasonable doubt." *People v. Snow*, 30 Cal.4th 43, 97 (2003).

It is precisely appellant's fear – and the premise of this argument – that one or more jurors in this case "understood that … the issue before them [wa]s defendant's guilt or innocence…." That was *not* "the issue before them". The Court, obviously, knows this, but the fact that *Snow*

could not discuss the question without perpetuating the confusion lends credence to the conclusion that there was a reasonable likelihood that one or more of Mr. Solomon's jurors were in fact confused.

Finally, it is no answer to say, as the Court often has, that, since the jurors were instructed with CALJIC No. 2.90, they would have understood that they could not convict except on proof beyond a reasonable doubt. *See, e.g., People v. Crew*, 31 Cal.4th at 848; *People v. Prieto*, 30 Cal.4th at 254. The problem here is not that, in an exit poll, the jurors would not have known that proof beyond a reasonable doubt was required for conviction. The problem, rather, is that the jurors would have given that requirement a diluted gloss in light of the incorrect terminology and false dichotomies used in 2.01 and 2.02. If a juror believed that "beyond a reasonable doubt" meant something close to "innocence" or "reasonableness", the obscure language used by the former CALJIC No. 2.90 – characterized by Justice Kennedy as "archaic" and "indefensible", *Victor v. Nebraska*, 511 U.S. 1, 23 (1994) (concurring opinion) – was not going to convince the juror otherwise.

In short, the three false dichotomies used in CALJIC Nos. 2.01 and 2.02 likely led one or more jurors to make "a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Cage v. Louisiana*, 498 U.S. at 41. The danger was particularly great here since the most important determinations the jury had to make – how the victims died,

the identity of the perpetrator, and whether the deaths were the product of premeditation and deliberation – all rested essentially on circumstantial evidence and thus were going to be made based on the misleading language of 2.01 and 2.02.

In the final analysis, as with the error described in Argument VI:

1) the effective "misdescription of the burden of proof" here violated Mr. Solomon's rights under the due process and jury-trial clauses of the 5th, 6th, and 14th Amendments and Article I, sections 7 and 15 of the California Constitution;

2) the "consequences [of the errors] are necessarily unquantifiable and indeterminate," making this "structural error" suitable for per se reversal, *Sullivan v. Louisiana*, 508 U.S. at 281-282; and

3) the errors rendered the guilt verdicts unreliable in violation of the 8th and 14th Amendments. *Beck v. Alabama*, 447 U.S. at 637.

C. CALJIC No. 2.51 likewise relied on the guilt/innocence dichotomy

The jury was instructed with CALJIC No. 2.51 (1989 Revision), which provided in part: "Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence." CT 5334.

Repetition of the guilt/innocence dichotomy in this instruction made it that much more likely that a juror would conceive of the reasonable doubt

standard in terms that reduced the burden on the prosecution and shifted it to Mr. Solomon.

The terms, "*establish* guilt" and "*establish* innocence", furthermore, strongly connoted that Mr. Solomon had some sort of affirmative obligation to produce evidence. This compounded a similarly misleading statement in CALJIC No. 2.11, as will be discussed in section E, *post*.

As noted above, the problematic terminology was removed from 2.51 for the 6th Edition of CALJIC. The second sentence now reads: "Absence of motive may tend to show the defendant is not guilty".

People v. Frye, 18 Cal.4th 894 (1998), held that use of the term "innocence" in CALJIC No. 2.51 did not shift the burden to the defendant to prove his innocence, in part because of other instructions given in that case. *Id.* at 958. In this case, by contrast – as shown in both the preceding and succeeding sections -- the other instructions given to the jury were no remedy but part of the problem.

In this case, furthermore, there was a real danger that 2.51 would be used to Mr. Solomon's detriment. As noted in Argument I, the prosecution presented no credible evidence that Mr. Solomon had a pre-existing motive to kill any of the particular women who died. If all jurors put the prosecution to its true burden, the absence of motive should have resulted in one or more jurors finding that premeditation and deliberation had not been proved beyond a reasonable doubt. Instead, the misleading focus on

"establish[ing] innocence" in 2.51 – combined with the similarly misleading dichotomies featured in 2.01 and 2.02 -- likely led at least one juror to hold it against Mr. Solomon that he did not present any affirmative evidence or argument on the question of motive.

That likelihood, in conjunction with the problems discussed in section B, *ante,* strengthens the conclusion that the cumulative impact of the instructions given to Mr. Solomon's jury was "a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Cage v. Louisiana*, 498 U.S. at 41. Such a finding is incompatible with the rights guaranteed by the due process and jury-trial clauses of the 5th, 6th, and 14th Amendments and Article I, sections 7 and 15 of the California Constitution.

D. CALJIC No. 2.21.2 substituted a probability standard for the reasonable doubt standard

The jury was instructed with CALJIC No. 2.21.2 (1989 Revision), as follows:

> A witness, who is willfully false in one material part of his or her testimony, either at trial or at a preliminary hearing, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe *the probability of truth* favors his testimony in other particulars.

CT 5328; emphasis added.

This Court has acknowledged that telling a jury that it can use a "probability of truth" standard for judging credibility "would be somewhat suspect ... when applied to a prosecution witness" if the jury was not also instructed generally that its final decision had to be beyond a reasonable doubt. *People v. Riel*, 22 Cal.4th 1153, 1200 (2000). Contrary to the indication in *Riel*, however, the panel in *People v. Rivers*, 20 Cal.App.4th 1040 (1993), had "concerns about the use of the instruction [2.21.2]" in that case even though the general reasonable doubt instruction had been given, because the jury could have relied on the instruction in deciding the credibility of "the crucial testimony of a sole percipient witness." *Id.* at 1046.

The *Rivers* panel thus recognized that, if a witness gave testimony necessary for conviction – i.e., testimony that had to be believed beyond a reasonable doubt – it was inconsistent with the reasonable-doubt requirement to tell the jury it could accept the witness's testimony as long as "the probability of truth favors his testimony". The latter standard, obviously, is simply not as demanding as beyond a reasonable doubt.

The diluted standard conveyed in 2.21.2, furthermore, would not have been limited to witnesses "willfully false in one material part of [their] testimony". If the diluted standard allowed the testimony of *those* witnesses to be believed under a "probability of truth" standard, then *a fortiori* it applied to *any* witness's testimony.

Rivers' concern that 2.21.2 could have misled jurors despite instruction with 2.90 comports with the due process analysis mandated by the United States Supreme Court. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Francis v. Franklin*, 471 U.S. 307, 322 (1985).[68] The error in an instruction which dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. *United States* v. *Hall*, 525 F.2d 1254, 1256 (5th Cir. 1976).

Such an error is reversible per se. *Sullivan v. Louisiana*, 508 U.S. at 281-282.

In *Rivers*, the panel, without definitively finding error, rejected the claim on the ground that the suspect instruction was harmless beyond a reasonable doubt under both state and federal constitutional standards. *Id.* at 1047.

If *Chapman* [*v. California*, 386 U.S. 18, 24 (1967)] is the proper standard to be applied here – rather than *Sullivan v. Louisiana* -- reversal would still be required. There was testimony by any number of witnesses that a juror could have found crucial to one or another of the reasonable-

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[68] Accord, *People* v. *Kainzrants,* 45 Cal.App.4th 1068, 1075 (1996) [if instruction states an incorrect rule of law, error cannot be cured by giving of a correct instruction elsewhere in the charge]; *People v. Westlake,* 124 Cal. 452, 457 (1899) [same].

doubt determinations that had to be made – where it would have mattered a great deal whether the juror believed the testimony was "probably" truthful or truthful beyond a reasonable doubt.

For instance, the prosecution presented the testimony of Vernell Dodson. As discussed in Arguments I, V, and VI, Dodson was thoroughly impeached. If by some quirk, however, one juror found that he was "probably" telling the truth and thus accepted his testimony as true, that finding could have been the basis for finding that Mr. Solomon had a motive to kill Yolanda Johnson and that the killing was the product of premeditation and deliberation. As shown in Argument I, the evidence in support of premeditation and deliberation was minimal, if not insufficient, so the error would have been significant. The Johnson killing, in turn, was pivotal to the prosecution's case on the remaining murder counts, since it was the only one in which there was direct physical evidence which, if believed, specifically linked Mr. Solomon alone to any of the deaths. RT 16290. The prosecution's argument that Mr. Solomon was the perpetrator of the charged killings depended heavily on the jury believing that he was the one who killed Ms. Johnson. See, e.g., RT 16141-80.

Similar prejudice may well have occurred with respect to the testimony of Officers Youngblood and Coyle, who described the marks on Ms. Johnson's neck and wrists as possible ligature marks. RT 11042, 11170-72. As discussed in section B of this argument, Mr. Solomon

impeached this testimony effectively. If a juror judged the witnesses' testimony by a mere probability of truth standard, however, that juror could have made a finding adverse to Mr. Solomon on a significant issue.

The same is true with respect to the testimony of prosecution witness J. R. Johnson. Again, as discussed in Argument I, § D.2, Johnson was thoroughly impeached by his own inconsistencies. If a juror found that he was "probably" telling the truth, however, and thus accepted his testimony as true, that finding could have been the basis for finding that it was Maria Apodaca's boyfriend who hit Mr. Solomon with a bat. That, in turn, could have led a juror to think that Mr. Solomon had a motive to kill Ms. Apodaca, thus leading to a finding of premeditation and deliberation despite the otherwise insufficient evidence supporting that element.

For every count, at least one witness presented evidence that could have made the difference between a juror finding guilt beyond a reasonable doubt and not finding guilt beyond a reasonable doubt.[69] With each such witness, it is likely that at least one juror judged credibility based on the forgiving standard found in 2.21.2 and made a crucial finding that s/he would not otherwise have made.

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[69] In count 1 (Vitela) it could have been Tammy Zaccardi; count 2 (Jacox) – Snoopy; counts 3 to 6 (Hamilton) – Melissa Hamilton; count 7 (Johnson) – Pam Suggs; count 9 (Apodaca) – Pam Suggs; count 10 (Massey) – Snoopy; count 11 (Hall) – Sherry Hall; count 12 (Washington) – Juanita Cannon. *See* Statement of Facts, *ante,* section I.B.

Adding to the likelihood of prejudice here is the fact that it took the jurors 10 full days of deliberations before they were able to return the verdicts in this case. *See* Statement of Case, *ante*. The difficulty they had reflects in part the many close credibility determinations they were called on to make. *See* RT 16297 [in which the prosecutor described his witnesses as "drug fiends, prostitutes, boosters; ... multiple liars, ... liars with explanations, ... liars with no explanations"].

The misleading terminology in 2.21.2 must be considered in conjunction with the misleading terminology in 2.01, 2.02, and 2.51. Collectively, they made it very likely that one or more jurors made "a finding of guilt based on a degree of proof below that required by the Due Process Clause", *Cage v. Louisiana*, 498 U.S. at 41. The instructions thus violated Mr. Solomon's rights under the due process and jury-trial clauses of the 5th, 6th, and 14th Amendments and Article I, sections 7 and 15 of the California Constitution, and require reversal.

E. CALJIC No. 2.11 erroneously implied that Mr. Solomon was required to call witnesses

CALJIC No. 2.11 told the jury: "Neither side is required to call as witnesses all persons who may have been present at ... or who may appear to have some knowledge of these events". CT 5324.

To say that Mr. Solomon was not required to call "all" relevant witnesses suggested he was required to at least call some of them. In fact,

he had a constitutional right to put the prosecution to its proof and to call no witnesses: "[T]he *prosecution* must prove every element of a charged offense *beyond* a reasonable doubt. The accused has *no* burden of *proof* or *persuasion,* even as to his defenses. (§ 1096; see *In re Winship* (1970) 397 U.S. 358, 364 ... ; *Mullaney* v. *Wilbur* (1975) 421 U.S. 684....)" *People v. Gonzalez*, 51 Cal.3d 1179, 1214-1215 (1990); emphasis in original.

This Court has held that "the inference defendant fears the jury would draw from the language of CALJIC No. 2.11 is quite strained, and should be dispelled by proper instructions on proof beyond a reasonable doubt." *People v. Daniels*, 52 Cal.3d 815, 872 (1991). As shown in the preceding sections, however, appellant's jury received a number of *im*proper instructions that diluted the reasonable doubt standard.

In this case, therefore, 2.11 was likely to be construed as meaning that Mr. Solomon had a burden of production of some kind. Since Mr. Solomon in fact called no witnesses, the instruction was comparable to an adverse comment on the exercise of a constitutional right. That violated due process. *Cf. Griffin v. California*, 380 U.S. 609, 615 (1965) [comment on defendant's failure to testify violated Fifth Amendment]; *People v. Hill,* 17 Cal.4th 800, 832 (1998) [prosecutor committed misconduct by making comment likely to be understood by the jury to mean defendant had the burden of producing evidence].

There were a number of issues, moreover, on which jurors who were misled by the instruction may have expected Mr. Solomon to produce evidence. Mr. Solomon had told Detective Pane, for instance, that he'd heard Celestine and Ronnell say that Yolanda Johnson was killed because she had ripped off a trick, that the killing occurred in an apartment at 36th and Broadway in which a lady named Johnnie lived, and that the body was then moved to the 4th Ave. house. ACT 8956, 8966-68. A juror might have expected Mr. Solomon to present evidence in support of his statements. A juror might also have expected him to produce affirmative evidence in support of the suspicion cast by the defense on Patrick Ware, the boyfriend of Sheila Jacox who virtually dropped out of sight when she disappeared. See, e.g., RT 14308.

By making it appear that Mr. Solomon had some evidentiary burden, the instruction had the effect of reducing the prosecution's burden. As with the problematic terminology identified above, the false dichotomy perpetuated in 2.11 likely produced "a finding of guilt based on a degree of proof below that required by the Due Process Clause", *Cage v. Louisiana*, 498 U.S. at 41, albeit "consequences ... necessarily unquantifiable and indeterminate," *Sullivan v. Louisiana*, 508 U.S. at 281-282. Both alone and in conjunction with the problems discussed above, the error here violated Mr. Solomon's rights under the due process and jury-trial clauses of the 5th, 6th, and 14th Amendments and Article I, sections 7 and 15 of the California

Constitution, and rendered the guilt verdicts unreliable in violation of the 8th and 14th Amendments, *Beck v. Alabama*, 447 U.S. at 637.

Reversal is required.

VIII.

THE SPECIAL CIRCUMSTANCE OF MULTIPLE-MURDER FAILS TO NARROW IN A CONSTITUTIONALLY ACCEPTABLE MANNER THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY

To satisfy the Eighth Amendment, "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty'", *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988), quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)), and must do so by "provid[ing] a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not'", *People v. Edelbacher*, 47 Cal.3d 983, 1023 (1989), quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (conc. opn. of White, J.). It must do so, furthermore, "in an objective, evenhanded, and substantially rational way...." *Zant,* 462 U.S. at 879.

Under the California scheme -- in which the special circumstances set forth in Penal Code section 190.2(a) are supposed to satisfy the foregoing demands, *Edelbacher,* 47 Cal.3d at 1023; *People v. Bacigalupo*, 6 Cal.4th 457, 467-68 (1993)) -- "*each* special circumstance" -- not just all of the special circumstances considered in the aggregate -- must "provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not." *People v. Green*, 27 Cal.3d 1, 61 (1980); emphasis added.

The special-circumstance at issue in this case -- multiple murder, Pen. Code sec. 190.2(a)(3) -- fails to distinguish "in an objective, evenhanded, and substantially rational way", *Zant*, 462 U.S. at 879, between those deserving of death and those who are not.

"Narrowing is not an end in itself, and not just any narrowing will suffice." *United States v. Cheely*, 36 F.3d 1439, 1445 (9th Cir. 1994). To narrow in "an evenhanded ... and substantially rational way," the special circumstance must define a sub-class of persons of comparable culpability. "When juries are presented with a broad class, composed of persons of many different levels of culpability, and are allowed to decide who among them deserves death, the possibility of aberrational decisions as to life or death is too great." *Ibid.*

At issue in *Cheely* were federal statutes dealing with mail bombs. 18 U.S.C. secs. 844(d), 1716(a). The statutes declare that anyone who, with the intent to injure property or life, causes a death by knowingly placing in the mail an explosive device, is eligible for the death penalty. The Ninth Circuit held the statutes were unconstitutional: "[T]hey create the potential for impermissibly disparate and irrational sentencing because they encompass a broad class of death-eligible defendants...." 36 F.3d at 1444.

Under the statutes, the court observed, one jury could sentence to death a person who accidentally killed while intending to damage

property,[70] while a second jury could vote to spare a mail-bomber who deliberately assassinated an NAACP official. "The narrowing" principle on which the statutes rest thus fails to "foreclose ... the prospect of ... 'wanton or freakish' imposition of the death penalty." *Id.* at 1445.

This is equally true of the multiple murder special circumstance in the California statute. Thus the multiple murder special circumstance applies to the white racist who deliberately fires into a crowd of black teenagers, killing several. It also applies to the black man who, in the course of a robbery, accidentally kills one white woman and her 9-week old fetus, which the defendant did not know the woman was carrying. *See People v. Davis*, 7 Cal.4th 797, 810 (1994) [person responsible for death of 8-week old fetus may be convicted of murder]; *People v. Anderson*, 43 Cal.3d 1104, 1149-50 (1987) [intent to kill not required for multiple murder special circumstance]. Under the statutory scheme, one jury could sentence the black defendant to death while another could spare the life of the white killer. "The prospect of such 'wanton and freakish' death sentencing is intolerable under *Furman* and the cases following it." *Cheely*, 36 F.3d at

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[70] The court gave the example of a defendant who, intending "to blow a crater in the local college's football field, to protest the ascendancy of athletics over academics, ... mails ... an explosive substance [that] ... accidentally explodes en route...." *Id.* at 1443.

1444.[71]

In short, the multiple-murder special circumstance establishes unconstitutionally overbroad criteria for death-eligibility.[72]

The Court has rejected this argument, but on a basis that does not stand up to scrutiny. *See People v. Sapp*, 31 Cal.4th 240, 286-287 (2003). In *Sapp*, the Court distinguished *Cheely* on the ground that the mail-bomb statute permitted individuals to be sentenced to death even if no "serious bodily harm or death were intended" and the defendants did not have the "mens rea of murderers". 31 Cal.4th at 287.

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[71] Appellant may challenge the constitutionality of the statutory scheme even if the particular unfairness described may not have occurred in his case. *Cheely*, 36 F.3d at 1444, fn. 11. A scheme that allows for the sort of arbitrary sentencing described in the text also allows for it in individual cases, albeit in more subtle forms that are not readily visible to those not participating in the deliberations.

[72] The state has elsewhere asserted that, in *Lowenfield v. Phelps*, 484 U.S. 231 (1988), the United States Supreme Court held that multiple murder is a constitutionally proper narrowing category. That is not the case. In *Lowenfield*, a Louisiana case, the special circumstance found by the jury (three intentional murders) was essentially the same as the one aggravating circumstance the jury found. The question was whether such double-counting was constitutional. The Supreme Court said yes, because, whereas the special circumstance finding accomplished the narrowing required by the Eighth Amendment, the question in the penalty phase was whether mitigation outweighed aggravation. *Id.* at 241-246.

The Court was simply not presented with the question whether the multiple-murder special circumstance *adequately* narrowed the class of persons eligible for the death penalty. That issue was neither raised by the defendant nor discussed by the Court.

Penal Code § 190.2(a) is no different, however. In the example given above, the man who accidentally killed during the course of a robbery did not harbor malice -- the mens rea of a murderer – and did not intend either "serious bodily harm or death". He was guilty of first-degree murder only because of the felony-murder rule. The mail-bomb statute at issue in *Cheely* likewise created a category of felony murder and allowed anyone who fell within it to be sentenced to death. Both it and § 190.2(a) create "a broad class, composed of persons of many different levels of culpability." Allowing juries "to decide who among them deserves death" is what creates "the possibility of aberrational decisions as to life or death" and violates the Eighth Amendment. 36 F.2d at 1445.

Mr. Solomon requests that the Court revisit the merits of this argument.

If it does, the special circumstance finding must be stricken. Its invalidity, moreover, will automatically render the judgment of death void. See *Godfrey v. Georgia*, 446 U.S. 420, 422-33 (1980) [death sentence vacated where Supreme Court finds sole eligibility factor unconstitutionally broad]; *Wade v. Calderon*, 29 F.3d 1312, 1322 (9th Cir. 1994) [invalidation of sole special circumstance requires per se reversal].) If the Court is affirming appellant's convictions, the case must be remanded for resentencing.

IX.

THE EXCUSAL FOR CAUSE OF PROSPECTIVE JUROR G. BASED ON HER FEELINGS ABOUT THE DEATH PENALTY WAS UNCONSTITUTIONAL

A. Introduction

Over objection, the trial court granted five challenges for cause made by the prosecution on the ground that the prospective jurors' reservations about sentencing someone to die disqualified them from serving on the jury. Four of the five were women; three of the five were black. See ACT 6847, 8165, 8745; RT 19612-14, 19662-64, 19833-34, 19998-20000, 21022-26. Since the exclusion of even one such potential juror requires reversal, in this argument and the next one appellant will focus on the two excusals that are the least defensible.

This argument concerns the excusal of prospective juror G. It is a long argument. Hopefully the court will agree that the detailed presentation makes the issue more clear rather than less.

The argument follows this outline:

Section B: An overview of the law is given.

Section C: As the cases cited in section B show, a potential juror may not be excused because of her views about the death penalty if it is possible to hold those views and faithfully follow the court's instructions on how one makes the penalty determination. Section C, accordingly,

summarizes what Ms. G.'s duties would have been had she served as a juror in this case.

Section D.1: describes what Ms. G said on her questionnaire and during voir dire.

Section D.2: sets out the challenge for cause and the court's ruling.

Section D.3: shows that the court badly mischaracterized and misjudged what Ms. G. said, that the ruling was not fairly supported by the record, and that Ms. G.'s statements were measured against the wrong legal standard. Most importantly: shows that the one statement by Ms. G. that the court relied on was the product of an extremely misleading voir dire examination by the prosecutor. Among other things, Ms. G. was led to believe that a death verdict would mean that Mr. Solomon would be executed in the electric chair, which she believed was an inhumane form of punishment.

Section D.4: applies the law to the actual facts, shows that Ms. G.'s views were perfectly compatible with discharging the juror-duties defined in the court's instructions, and that her excusal denied Mr. Solomon his rights to due process and an impartial jury.

Section D.5: shows that the analysis in *Adams v. Texas* is particularly apposite here.

Section E: if error is found, reversal is automatic.

B. The Controlling Legal Principles

A "prospective juror may be challenged for cause based upon his or her views regarding capital punishment only if those views would prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath." *People v. Heard*, 31 Cal.4th 946, 958 (2003) [internal quotation marks omitted]. The test is taken virtually verbatim from *Wainwright v. Witt*, 469 U.S. 412, 424 (1985), which took it from *Adams v. Texas*, 448 U.S. 38, 45 (1980), which based it on the test stated in *Witherspoon v. Illinois*, 391 U.S. 510, 522, fn. 21 (1968).

If a juror is excluded on the basis of her views opposing capital punishment on "any broader basis" than that stated above, "the death sentence cannot be carried out." *Adams*, 448 U.S. at 47-48. "[T]he exclusion ... of such ... jurors ... unnecessarily narrows the cross section of venire members. It stacks the deck against the defendant"[73] and creates "a jury 'uncommonly willing to condemn a man to die'"[74] in violation of his rights to due process, an impartial jury, and a reliable penalty determination. *Adams,* 448 U.S. at 50; *Gray*, 481 U.S. at 667; *Johnson v.*

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[73] *Gray v. Mississippi*, 481 U.S. 648, 659 (1987).

[74] *Witt* at 418, quoting *Witherspoon* at 521.

Mississippi, 486 U.S. 578, 585 (1988); U.S. Const., Amends. 5, 6, 8, 14; Calif. Const., art. I, §§ 7, 15, 17.

The exclusion of even one such juror "compel[s] the *automatic reversal* of [a] defendant's death sentence." *People v. Heard*, 31 Cal.4th at 966 [emphasis in original]. *Accord, Gray v. Mississippi,* 481 U.S. at 660.

In excusing the prospective jurors discussed below, the trial court failed to apply the correct legal standard. When the correct standard is applied, it is clear that the record does not support the conclusion that the excused jurors' "views regarding capital punishment ... would [have] prevent[ed] or substantially impair[ed] the performance of [their] ... duties as defined by the court's instructions and the juror's oath." *People v. Heard*, 31 Cal.4th at 958.

C. As Defined By the Oath and Instructions Given in this Case, Jurors Had the Prerogative of Voting for Life as an Exercise of Mercy And There Were No Circumstances In Which a Juror Had a Duty to Vote for Death

The constitutionality of discharging a juror on the basis of her views regarding the death penalty turns on the compatibility of those views with the juror's duties "as defined by court's instructions and the juror's oath". *People v. Heard,* 31 Cal.4th at 958; *Wainwright v. Witt*, 469 U.S. at 424. It is therefore essential to examine the instructions and oath that were given in this case.

Several aspects of the instructions bear particular emphasis.

First, prospective jurors were told that they were unfit to be penalty phase jurors only if they were wholly closed minded. As relevant here, the court told them: "A juror would be ... unsuitable if ... he or she would *automatically* vote for life without parole and, thus, *automatically* reject the death penalty regardless of the evidence presented at the penalty trial." RT 19373, 19468; emphasis added.

Beyond that, the instructions given to the jurors explicitly informed them that there was *no* set of circumstances that would require them to vote for death.

Thus, prior to voir dire, the venire was instructed: "[S]hould the juror decide the evidence in aggravation substantially outweighs the evidence in mitigation, *the law then permits the juror to vote for life without parole, as the juror sees fit. [¶] A vote for the death penalty is not mandated or required in that situation*, but it may be imposed." RT 19371, 19466; emphasis added.

The same day, the court gave the jurors a questionnaire to fill out. It advised the jurors: "*[T]he death penalty is never mandatory*. Mercy may *always* be exercised...." See, e.g., 21 ACT 6230 [questionnaire of prospective juror G.].

The actual jurors were ultimately given similar instructions. Regarding their freedom to *always* vote for life over death, they were instructed:

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

CT 6343-6344; CALJIC No. 8.88 [modified]; emphasis added. [75]

With regard to what jurors could deem mitigating, they were given an expansive factor (k) [Penal Code § 190.3(k)] that explicitly permitted them to exercise mercy:

> In determining which penalty is to be imposed on the defendant, you ... shall consider, take into account and be guided by the following factors ..., if applicable:
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> ...
>
> Any other circumstance which extenuates the gravity of the crimes, even though it is not a legal excuse for the crimes, and any sympathetic or other aspect of the defendant's character or history, including but not limited to the defendant's character, background, history, mental condition or mental disturbance which may be less than extreme. Such circumstance may be considered by you as a basis for a sentence less than death, whether or not related to the crimes for which the defendant is on trial. *You may also consider whether or not mercy should be exercised for the defendant in*

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[75] The set of written instructions in the Clerk's Transcript is marked up. In record-correction proceedings on July 31, 1998, Judge Mering said he was "confident" it was not the set that the jury was given. No "sanitized" set could be found. The judge said that, at the time of trial (1992), he was not yet in the habit of preserving the set that went into the jury room.

determining which penalty to impose.

22 CT 6334-6335; CALJIC No. 8.85 [modified]; emphasis added.

The oath the jurors took required them to:

understand and agree that you will well and truly try the cause now pending before this court and render a true verdict according only to the evidence presented to you and to the instructions of the court.

RT 21550.

"[A]s defined by the court's instructions and the juror's oath", therefore, a juror in this case would have been completely faithful to her duties if, after conscientiously reviewing all the evidence presented at trial and conscientiously weighing aggravation against mitigation, she decided that, while aggravation substantially outweighed mitigation, this was a case in which life without possibility of parole was nonetheless appropriate. Such a decision would have been particularly proper and explicitly sanctioned if based on the desire to extend mercy to the Mr. Solomon.

D. The Excusal of Prospective Juror G. Violated *Witherspoon, Adams, Witt*, and *Heard*

1. Ms. G.'s Questionnaire and Voir Dire Responses

Prospective jurors came to court in two large panels, were given basic information about the proceedings, and, if they were not excused for hardship, filled out a detailed questionnaire, then returned for an individual voir dire session between three days and three weeks later. (There was no group voir dire.) See, e.g., RT 19344-99.

Prospective juror G. was 56 years old. She was the chair of the history department at a local high school. 21 ACT 6213. She had been a teacher for 25 years. RT 19606. She was in the process of applying for an assistant directorship at a small language school in Thailand. 21 ACT 6210.

The court complimented her on the "very detailed, complete questionnaire" she had turned in, and gave her an "A" for having "very diligently answered the questions" put to her. RT 19594-96. Among the experiences she recounted of relevance to this case: Some 30 years earlier, she had lost her children in a bitter custody dispute to her ex-husband, who proceeded to lose control over the children such that none finished high school and one became addicted to crack cocaine. 21 ACT 6218, 6227. Also, when Ms. G. herself was a child, she had been raped by her stepfather, ACT 6220.

In response to questions about serving as a juror in this case, she wrote: she had no interest in seeing the autopsy photos, ACT 6218; in the event of a conflict between the instructions and her beliefs, she would attempt to follow the law, ACT 6219; her work had taught her how fallible one's assumptions and judgments about others can be, ACT 6219; mitigating factors she would be willing to consider were the defendant's background, drug use, and psychological problems; those she did not see relevance in were how good or troublesome a prisoner he would be or whether he had a favorable military record. ACT 6230-6231.

She expressed mixed feelings on the questionnaire about the death penalty. She did not know if she was for it or against. ACT 6219. While she might be against it in theory, and couldn't really think of herself as voting to take someone's life, she thought that in reality it might be justified. ACT 6223, 6229, 6232. The reason she might not be a fair and impartial juror was her feeling that "the electric chair is inhuman". ACT 6233. She referred to the cruelty and inhumaneness of the electric chair in two other places in the questionnaire. ACT 6223, 6229.

Three days after filling out the questionnaire, Ms. G. appeared for sequestered voir dire. She made clear that, in the thinking she had been doing in the past three days, she had come to recognize that she believed in capital punishment. RT 19612. When her "thoughts turn[ed] to a crime that's really hideous" she would think: "[T]he person should be put to

death...." At the same time, when the voir dire began she still had trouble imagining herself personally consigning someone to that fate. RT 19598-59.

As she listened to what the court and counsel had to say about serving on a capital jury, however, she began to appreciate that it was her qualities of open mindedness and rationality that would be most relevant in that setting. RT 19600, 19601. As she tried to "weigh and decide how [she] would feel," she came to the conclusion "intellectually" that she thought she could impose the death penalty. In order to do so, she would have to do what she had done every day for 25 years with her students -- distinguish between reason and emotion -- and let her actions be guided by the former. RT 19603.

After two pages of pointed questions by the prosecutor, Ms. G. grew even more comfortable with that conclusion: "[I]f I felt that he really deserved [the death penalty], I probably could [impose it]." RT 19606.[76]

The prosecutor then shifted strategy and focused Ms. G. on the machinery of death. He elicited that there were hangings in the state of Washington when she was growing up and that those had been "terrible". RT 19606. He reminded her that, in several places in her questionnaire, she

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[76] As will be discussed below and in section 3, *post,* this level of uncertainty was perfectly acceptable under *Witherspoon-Adams-Witt* and was not a ground for disqualifying Ms. G. from service.

had made the statement, "The electric chair is inhumane", and – instead of disabusing Ms. G. of her misconception that that is how Mr. Solomon would die if sentenced to death – perpetuated the misconception by using it to characterize Ms. G. as believing "that the way the death penalty is carried out" – [note the use of the present tense] – "is not humane, that it is cruel...." RT 19606-07. His coup de grace was focusing her on the death penalty as an "act of violence", then asking whether she "could participate in that kind of act ... as part of this jury" by voting for death. She said she "would find it extremely difficult to" do so. RT 19608-09.

She did not, however, say that she would not do so. To the contrary, just after the just-quoted exchange, the court and counsel represented to Ms. G. that if, after weighing aggravation and mitigation, "she found this is an appropriate case for the death penalty, ... then it would be her *obligation* to bring back the death penalty in that situation." RT 19608; emphasis added.[77] If that's what she was required to do, she said, then that's what she would do. The voir dire concluded with this exchange between defense counsel and Ms. G.:

> Q: [C]ould you conceive of a case that, in your mind, would be appropriate for the death penalty?

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[77] The fact that this admonition contradicted what she had been told earlier and what the actual jurors would later be told will be addressed later in this argument, as will the ramifications of that conflict.

A: Yes.

Q: In a case that, in your mind, you felt was appropriate for the death penalty, if you were a juror, could you cast your vote for the death penalty?

A: I'd have no choice.

Q: Does that mean you would? …

A: If I had no choice, yes. I'd have to. If I reasoned that way.

Q: Okay. So what you're saying is that you would follow the law, you're capable of following the law; is that right?

A: Yes…. I'm not saying that I don't believe in the death penalty….

RT 19611-12.

2. Challenge and Ruling

The prosecutor declined to ask follow-up questions and challenged the juror for cause. Defense counsel opposed the challenge, arguing that, both in her questionnaire and in court, the juror had made clear that she believed there were crimes for which the death penalty was appropriate and that, in the end, she could vote for such a penalty if a member of the jury in such a case. RT 19613.

Judge Mering ruled as follows:

I will grant the challenge for cause. There were long delays in a lot of these answers and particularly when asked if she actually

could return a death penalty, when that question was put directly to her, not with things about could you follow the law and could you do this, but when it was directly could you return a death penalty, on at least one and probably two occasions, after long hesitation, she said "I don't know. I don't know."

So I think she has grave doubts about her ability to ever return a death penalty. She fundamentally is opposed to the idea and she has grave doubts and I think while – whether she would qualify under Witherspoon, I don't know.

But, under Witt, I think she's substantially impaired and it would be a very, very remote situation in which she might – might – and we never know, might consider or return a verdict of death no matter what the evidence was.

So I'm gonna excuse her for cause."

RT 19613-14. The court then called Ms. G. back into the courtroom, informed her of the ruling, and said:

[W]e thank you for your conscientiousness, providing us with what I think are very honest and thoughtful answers.

RT 19615.

The ruling requires reversal of the judgment.

3. *The Trial Court's Conclusion That It Was Extremely Unlikely That Ms. G. Would Ever Consider Voting for Death, Much Less Actually Vote For It, No Matter What Evidence Was Presented, Is Thoroughly Contradicted By the Factual Record*

In the next section, appellant will apply the controlling constitutional standards to the facts revealed in the record and show that Ms. G.'s excusal was unconstitutional.

In this section, appellant lays the foundation for that legal analysis by taking a close look at the factual record and the inferences the trial court drew from it.

(a) Standard of review

"On appeal," this court "will uphold the trial court's ruling" on a challenge for cause" only "if it is fairly supported by the record". *People v. Heard,* 31 Cal.4th at 958. As will be seen, the ruling in this case plainly fails that test.

This court also often invokes what sounds like a uniquely restrictive standard of review for such claims, namely that "when the prospective juror has made statements that are conflicting or ambiguous ... the trial court's determination as to the prospective juror's true state of mind [is] ...

binding." *Ibid.*[78] In fact, however, research shows that the cases cited as the progenitors of the rule were merely (and explicitly) applying the "substantial evidence" rule.[79] To characterize trial court findings regarding death-penalty bias as absolutely "binding" -- relieving this court of its duty to review the record for fair support -- is an unfortunate misstatement of the actual and intended rule.

This court's more recent cases occasionally recognize – explicitly or

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[78] With all other analogous claims, the court follows the "substantial evidence" rule. *See, e.g., People v. Danks,* 32 Cal.4th 269, 8 Cal.Rptr.4th 767, 795 (2004) ["we accept the trial court's credibility determinations and findings on questions of historical fact *if supported by substantial evidence*"; citation omitted]; *People v. Adair*, 29 Cal.4th 895, 905-06 (2003) ["we agree that ... the reviewing court should ordinarily consider itself bound by the trial court's factual findings" – including "credibility determinations" – "*to the extent they are supported by substantial evidence*"].

[79] The first statement that the trial court's findings are "binding" appears to have been in *People v. Ryan,* 152 Cal. 364, 371 (1907) ["The trial court must decide which of the answers most truly shows the juror's mind.... But, where there are such contradictions, *its decision is binding upon this court*"]. *Ryan* cited *People v. Fredericks*, 106 Cal. 554, 559-560 (1895) for this proposition, and *Fredericks*, in turn, relied on *People v. Wells,* 100 Cal. 227, 229-230 (1893). *Wells* held: "Whether the state of mind of the juror is such as to constitute actual bias ... is a question of fact to be determined by the court.... The court's decision ..., when the evidence disclosed upon the examination of the juror is susceptible of different constructions, *is to be regarded on appeal like its determination of any other question of fact resting upon the weight or construction of evidence*.... [T]here must be some evidence to support the finding of the court...." In *Wells*, this court found the trial court's rejection of the defendant's challenge for cause *unsupported* by the evidence and *reversed* on that basis. *Id.* at 231.

implicitly -- that the rule is not absolute.[80] Nor could it be. Absolute deference to the trial court would allow for review on a standard less protective of the Sixth Amendment than countenanced in *Witt.*[81] An inflexible rule that impaired a defendant's right to enforce his constitutional rights, furthermore, would violate both due process[82] and the Supremacy Clause.[83]

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[80] *See People v. Welch,* 20 Cal.4th 701, 746 (1999) ["Where a prospective juror's responses are equivocal or conflicting, the trial court's assessment of the juror's state of mind is *generally* binding"]. *Accord, People v. Ervin*, 22 Cal.4th 48, 69 (2000) [when "prospective jurors … give 'halting, equivocal, or even conflicting' voir dire responses in capital cases, we *usually* defer to the trial court's evaluation of their states of mind and qualifications to serve"]; *People v. Dennis,* 17 Cal.4th 468, 545 (1998) [applying "substantial evidence" rule, not "binding" rule when reviewing excusal of juror who made "ambiguous or conflicting responses regarding [her] … death penalty views"].

[81] In *Witt,* even though the challenge-for-cause claim was raised on habeas corpus, requiring the Supreme Court to be especially deferential to the state trial judge's credibility findings, the opinion emphasized that "the trial court must be zealous to protect the rights of an accused", 469 U.S. at 429-430, and that, to pass constitutional muster on appeal, the "rulings on challenges" had to be "*fairly supported by the record*". *Id.* at 434.

[82] "[I]f a State has created appellate courts as "an integral part of the ... system for finally adjudicating the guilt or innocence of a defendant," [citation], the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). Due process "insure[s] that the state-created right [will] … not [be] arbitrarily abrogated." *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974).

[83] *Cf. Martin v. Hunter's Lessee*, 14 U.S. 304, 340 –341, 344 (1816) [under the Supremacy Clause – U.S. Const., art. VI, cl. 2 -- state courts must enforce federal constitutional rights as interpreted by the United States

Furthermore, and more importantly, as will be shown below, to the extent Ms. G. made responses that might be said to be "conflicting or ambiguous", they were based on critical misconceptions that were improperly perpetuated by the prosecutor and left uncorrected by either the court or defense counsel. Whether the standard of review is "substantial evidence" or something more stringent, it obviously cannot apply to statements that were largely the by-product of prosecutorial and judicial error and ineffective assistance of counsel.

Finally, as will be discussed in section 3, *post*, the trial judge was analyzing Ms. G.'s ability to serve under a legal standard that was unconstitutionally rigorous. The findings are tainted by that legal error and cannot "bind" this court if it is to reach a constitutionally correct conclusion.

(b) The analysis

In analyzing the record, it must be kept in mind that, when prospective jurors reported to Judge Mering's courtroom, they had no prior warning that they might be called to serve in a capital case. See RT 19598 [Court to Ms. G.: "you walked in the courtroom a few days ago, in a cold shock, we tell you the nature of this case, which you people don't expect

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Supreme Court]; *Brown v. Allen*, 344 U.S. 443, 491 (1953) [state "tribunals are under the same duty as the federal courts to respect rights under the United States Constitution"].

and you haven't prepared yourself to think about it"]. They filled out their questionnaires the same day – while still at the courthouse, see RT 19381 – without time to sort out their thoughts and feelings about the 25 pages of subjects they were asked about. Prior to doing so, they heard a brief summary of the special legal principles that would apply in the penalty retrial – a summary that the court recognized that the venire would not be able to "assimilate ... instantaneously". See RT 19360. They returned for individual voir dire soon thereafter – in Ms. G.'s case, it was only 65 hours later. RT 19346, 19595. The fact that the responses of the excused jurors – and Ms. G.'s in particular -- might be ambiguous or inconsistent or reflect an evolution in their thinking must be understood in that context.

As indicated by her questionnaire answers, Ms. G. began the process not knowing if she believed in the death penalty – 21 ACT 6223 -- although even then she recognized that "in reality it might be justified", ACT 6232. Three days later, she was saying on voir dire that people who commit "really hideous [crimes] ... should be put to death." RT 19598. By the end of the voir dire, she was wanting it to be clear that she affirmatively believed in the death penalty. RT 19612.

She did express doubts about whether she could personally vote for death. But here, too, there was a progression. By the middle of the voir dire, she more clearly understood that, to some significant – if indefinable -- extent, a juror in a capital case is called on to apply their capacity to

reason – an attribute that was one of her strengths -- to the weighing process. RT 19600-01. It was that realization that brought her to the conclusion that "intellectually" – as she initially phrased it -- that she thought she could impose the death penalty. RT 19603. Not long after, despite the prosecutor's best efforts to redirect her, she got to the point that she was telling him point blank: "[I]f I felt that he really deserved [the death penalty], I probably could [impose it]." RT 19606. Not long after that, furthermore, after the court apprised her that, if she were on the jury and "found this is an appropriate case for the death penalty, … then it would be her *obligation* to bring back the death penalty in that situation" RT 19608 (emphasis added), Ms. G. dropped the "probably" from her prediction and said that, if that were the law, then in the appropriate case she would in fact return the verdict of death that the law required of her. RT 19611-12.

The prosecutor declined the opportunity to ask additional questions. RT 19612. To expropriate this Court's analogous observation in *People v. Heard:* "In the wake of" Ms. G.'s final responses, "one might have expected the prosecutor to … follow up … with questions … directed toward" challenging them "in order to better ensure the validity of the penalty phase judgment that ultimately was rendered. Instead, the prosecutor failed to address a single question to Prospective Juror" G. after she said that she would vote for death in an appropriate case. 31 Cal.4th at

968, fn. 11. *See also Wainwright v. Witt,* 469 U.S. at 423: "[W]here an adversary wishes to exclude a juror because of bias, ... it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality."

In excusing Ms. G. from the jury, the court made no reference to the progression in her thinking. Instead, as the court perceived it, whenever Ms. G. was directly "asked if she actually could return a death penalty", there would be a "long hesitation" followed by "I don't know. I don't know." RT 19613.

As made plain by the factual summary in section 1, *ante,* that simply was not true. She moved from not knowing whether she could vote for death, RT 19599-195600, to realizing that she "probably could", RT 19606, to saying that, in fact, she would. RT 19611-12. A similar progression has led this court to affirm rulings that rejected challenges to pro-death jurors. *Cf. People v. Weaver*, 26 Cal.4th 876, 912 (2001) ["This record indicates that although Juror B.M. initially expressed the view he would automatically vote for the death penalty, when informed of the penalty phase process he retracted that rigid position and professed a willingness and ability to follow the trial court's instructions to weigh all the evidence

before coming to a penalty decision.... We thus find no abuse of discretion in the court's denial of the challenge to Juror B.M. for cause"].[84]

It is true that the record indicates "(Pause)" at several points before Ms. G. was able to respond to questions put to her during the voir dire. It is necessary to examine each one to appreciate how wrong the trial court was to see those pauses as indicative of an impenetrable closed-minded pro-life bias.

The first two pauses occurred at the outset of the attorney-conducted voir dire and did result in Ms. G. saying that she did not know whether she could vote for death. This was right at the beginning of the progression in Ms. G.'s thoughts, however. It was also immediately after a 5-paragraph "question" by defense counsel. As the court itself pointed out at the time, the pauses simply reflected that Ms. G. was "thinking". RT 19599-195600. "Reflection at this point was appropriate". *People v. Heard,* 31 Cal.4th at 967, fn. 10. Judge Mering noted that these were "not ... easy area[s]" to ask about. A number of the questions were very difficult to understand. On two occasions, the judge said *he* found counsel's questions incomprehensible. RT 19611, 19612.

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[84] *See also Weaver,* 26 Cal.4th at 122: "As with Juror B.M., the record indicates that although Juror F.M. initially asserted that he would automatically vote for the death penalty, he modified his view when informed by the prosecutor of the penalty phase process. He then affirmed his willingness and ability to follow the trial court's instructions to weigh all the evidence before coming to a penalty decision."

The third pause occurred after a 6-paragraph "question" by the prosecutor that ended with him saying that he understood that, "as an educated woman, university trained woman," Ms. G. could "accept anything as an intellectual proposition," but didn't she agree that, in reality, "because of your own feelings, it would be almost impossible for you to ever return a verdict of death?" RT 19605-06. Ms. G. paused and then, contrary to what the court said in its ruling, did *not* say that she did not know whether she could vote for death. She said: "I think if I felt that he really deserved it, I probably could." RT 19606.

Given the gravity of the question, "[r]eflection at this point was appropriate" as well. *People v. Heard,* 31 Cal.4th at 967, fn. 10. The fact that Ms. G. paused before responding was a measure, not of bias, but of the very quality the court later complimented her on: her "conscientiousness [in] providing [the court and counsel] with … very honest and thoughtful answers." RT 19615.

Under the instructions Ms. G. had been given to that point in time, furthermore, that was a perfectly appropriate degree of certainty for an impartial juror to have. (Indeed, as will be discussed more fully in the next section, under the case law and the instructions later given to the seated jury, it was a perfectly appropriate degree of certainty for an impartial juror to have -- period.)

The fourth pause came after another difficult, if not obtuse, question – this one by the prosecutor -- asking whether Ms. G. had any other feelings or thoughts about the death penalty being inappropriate "beyond the way it happens, that is, the way the penalty is imposed...." That question resulted in a tangential comment about Vietnam that did not bear on Ms. G.'s ability to vote for death in this case. RT 19607.

With respect to all four pauses, this court's conclusion in *People v. Heard* is apposite: "In our view, the circumstance that Prospective Juror H. took some time to think about and respond to the ... imprecise questioning ... provides no legitimate basis for concluding that the prospective juror's views would prevent or substantially impair him in performing his duties." 31 Cal.4th at 967, fn. 10. Insofar as Judge Mering's judgment regarding Ms. G. was based on these "pauses", it cannot be "binding" on this court.

The fifth and last pause noted in the record was a "Long pause". It followed a series of questions by the prosecutor that focused Ms. G. on the physical act of execution. He started by eliciting that Ms. G. had been exposed to hangings as a child, then elicited her feelings regarding the electric chair, RT 19606 ["I notice at two or three points in the questionnaire, you voice the written opinion that the electric chair is inhumane in your judgment?"]. He asked if she had long felt "the way the death penalty is carried out is not humane, that it is cruel ...?" RT 19607. This led him into questions about the "death penalty perpetuat[ing]

violence" and the death penalty itself as "an act of violence". RT 19608. Then the following exchange occurred. Because it is essential that the court know what came before the "(Long pause)", the full exchange will be set forth:

> Q. As a representative of society along with the other folks who would be on the jury, you're going to have to, if it is an appropriate case, return a verdict of death, commit an act of violence against another citizen.
>
> Ms. Gutowsky: Objection, your Honor, he misstates the law in saying that she has to bring back a verdict of death. The law never requires that.
>
> The Court: No, but she has to recognize that if it is an appropriate case, she would have the responsibility of doing so. If she found this is an appropriate case for the death penalty, if that's what she intellectually, morally and otherwise concluded, this an appropriate case for the death penalty, then it would be her obligation to bring back the death penalty in that situation.
>
> Ms. Gutowsky: Right, right.
>
> The Court: Okay, well, I think that's sufficiently clear.
>
> Q. (By Mr. O'Mara) ... Assuming you were on the jury and you heard all the evidence and you find that this an appropriate case to impose the death penalty. Okay?

A. Uh-huh.

Q. Now, with that as a back drop, given your personal feelings about the fact that society is committing an act of violence against one of its citizens, when a death penalty is rendered and carried out, do you think that you could participate in that kind of act, that is, as part of this jury, really consider and impose a death penalty in an appropriate case, given your state of mind and feelings?

A. (Long pause.) I don't know. I would find it extremely difficult to.

RT 19608-09.

As a matter of law, the "Long pause" – and the response that followed it – cannot be construed as supporting the conclusion that Ms. G. was so biased in favor of life that she could not sit on the jury.

First, the fact that she paused before acknowledging that she found it "extremely difficult" to contemplate committing "an act of violence" on Mr. Solomon was not a ground for exclusion. "Every right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow-man." *Witherspoon v. Illinois,* 391 U.S. at 515, fn. 8 [quoting with approval an observation by the Mississippi Supreme Court]. Given Ms. G.'s character, it is not unduly dramatic to see in the pause "the shuddering recognition of a kinship" that is the "test of one's humanity" when asked to contemplate another's execution:

"[H]ere but for the grace of God, drop I."

Arthur Koestler, *Reflections on Hanging,* 166-167 (1956).[85]

Second, the fact that, following the prosecutor's emphasis on the violence inherent in the death penalty, Ms. G. got in touch with how difficult it would be to cast the vote that would inflict that violence did not mean that she would not do so: "It is entirely possible that a person who has a 'fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law--to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." *Adams v. Texas,* 448 U.S. at 44-45 [citation omitted].

Most importantly, however, Ms. G.'s "long pause" and the response that followed were the products of prosecutorial and judicial error and ineffective assistance of counsel.

As noted in section 1, *ante*, Ms. G. plainly believed that, if the jury voted for death in this case, it would be sending Mr. Solomon to the electric chair. 21 ACT 6223, 6229, 6232. Ms. G. found that form of capital punishment particularly "cruel and inhuman". *Ibid.* As indicated above, the exchange that led to the "long pause" was preceded by the prosecutor raising the subject of death in the electric chair, eliciting Ms. G's feelings

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[85] Quoted in *Witherspoon,* 391 U.S. at 520, fn. 17.

about that form of execution, and ultimately asking if she could commit the "act of violence" that was the death penalty. There cannot be any reasonable doubt that, when Ms. G. said it would be "extremely difficult" for her to cast the vote that would subject Mr. Solomon to an "act of violence", it was death in the electric chair that she had in mind.[86]

Mr. Solomon, of course, was not facing death in the electric chair.[87] The defense had sought to have Judge Mering inform the prospective jurors in his introductory comments that California relied on "the gas chamber" to carry out the death penalty but the prosecutor objected and the court denied the request. 44 RT 19237, 19309. When it became apparent that Ms. G. thought that Mr. Solomon would die in the electric chair, no one gave her the correct information. To the contrary, the prosecutor exploited her misconception and no one called him to task.

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[86] Ms. G.'s confusion as to how California executed people is understandable: at the time of her voir dire, no one had been executed in California in 25 years. *See* "History of Capital Punishment in California", at *www.corr.ca.gov*.

[87] At the time of trial, the death penalty in California was administered by lethal gas. Later in 1992, lethal injection was added as an alternative. Pen. Code, § 3604.

This was prosecutorial error of the first rank.[88] The court and defense counsel had an independent responsibility to protect Mr. Solomon's right to an impartial jury.[89] If any of them had done what was necessary, the sequence of questions that led to the long pause could not have occurred. The prosecutor would not have been able to draw the same equation between lethal gas and "act of violence" that he drew between the latter and the electric chair.[90] If he had asked proper questions instead, the chances are great that Ms. G.'s answers would have been consistent with the evolution in her confidence that she could vote for death in an appropriate case.[91]

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[88] *See, e.g., People v. Hill*, 17 Cal.4th 800, 838 (1998) [prosecutor's improper reference to unproved conditions of life in prison constituted misconduct and contributed to need for reversal]; *Antwine v. Delo*, 54 F.3d 1357, 1361-62 (8th Cir. 1995) [prosecutor's misstatement to jury regarding execution by lethal gas violated Eighth Amendment]; *Miller v. Lockhart*, 65 F.3d 676, 682, 685 (8th Cir. 1995) [prosecutor's improper reference to cost of life imprisonment contributes to due process reversal].

[89] *See, e.g., Witherspoon,* 391 U.S. at 521 ["a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict or death"]; *Hughes v. United States*, 258 F.3d 453, 462-63 (6th Cir. 2001) [defense counsel must protect defendant's right to impartial jury].

[90] Three weeks after Ms. G.'s voir dire, this court denied the petition filed by Robert Alton Harris that claimed that lethal gas was an inhumane method of punishment. *In re Robert Alton Harris,* No. S026235 (April 21, 1992).

[91] *Cf. People v. Teale,* 70 Cal.2d 497, 516 (1969) [if "venireman ... were correctly made to understand" the context in which the penalty

Because her statement, "I would find it extremely difficult to" was expressing the feeling that she "would find it extremely difficult to send someone to the electric chair", and that statement was induced by prosecutorial exploitation of her misconception, it was not and is not a reliable measure of her ability to serve in this case. The trial court could not properly rely on it. Nor can this court do so in assessing the constitutionality of the trial court's ruling. *Cf. People v. Heard,* 31 Cal.4th at 964 [prospective juror's answers on questionnaire do not undermine conclusion that his discharge was unconstitutional where those answers were given when the prospective juror was laboring under a misconception as to "the governing legal principles"].[92]

For that matter, the entire line of questioning that led to the long pause and response – focusing on hanging, the electric chair, and execution as a violent act – was improper. Under California law, the manner in which

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determination would be made, he "might" have responded that he was "able and willing to" vote for death].

[92] "[I]f the trial court is going to determine that jurors should be removed for bias against the death penalty, the jurors must be asked the correct questions...." *Clemons v. Luebbers*, 212 F.Supp.2d 1105, 1122 (E.D.Mo., 2002). In *Luebbers*, prospective jurors were asked if they could vote to execute an accomplice to murder, when, under Missouri law, a mere accomplice could not be punished by death. "[E]xcluding venirepersons because they expressed concerns about imposing the death penalty" on such facts required reversal. The rulings "improperly excluded persons who expressed legally appropriate reservations, rather than excluding persons whose views would prevent them from performing their duties as jurors to apply the law." *Ibid.*

the death penalty is carried out is irrelevant to the penalty determination. *People v. Harris,* 28 Cal.3d 935, 962 (1981); *People v. Whitt (II),* 51 Cal.3d 620, 644 (1990); *People v. Lucas,* 12 Cal.4th 415, 499 (1995). It was misleading and improper for the prosecutor to focus Ms. G. on an extraneous factor, to deliberately arouse her feelings on that aspect of capital punishment, then to ask her whether, given her strong feelings on the subject, she would ever really vote to commit such an act of violence on a fellow human.

At the very least, Ms. G. needed to be told that the law does not permit a juror to base her penalty decision on those feelings. As it was, Ms. G. was never given the opportunity to assess whether she would have been able to subordinate those feelings if she had known that it was *impermissible* for a juror to allow them to affect her penalty decision.

Full disclosure likely would have had a significant impact on Ms. G. She was a high-minded citizen who believed in fulfilling her civic duties. Aside from teaching in public schools for most of her adult life, she had served on two juries, usually walked precincts on Election Day, belonged to the local historical and education associations, and had been a member of the local chapter of the United Nations. 21 ACT 6215, 6218-19. Her voir dire was nothing if not an honest struggle on her part to ascertain whether in fact she could be an impartial juror. Judge Mering said so himself. RT 19615. If she had been permitted to engage in that self-examination on the

basis of accurate information – rather than the misleading suggestions fed to her – there is an excellent chance – given the progression in her answers before and after the electric chair / act of violence sequence – that she would have said, just as she said at the end of her voir dire – that she would follow the law, subordinate the feelings the law deemed irrelevant, and, if she determined that death was the most appropriate penalty based on the relevant factors that jurors could consider, would be able to vote for that penalty. *Cf. People v. Teale, supra,* 70 Cal.2d at 516.

Instead, the response elicited by the prosecutor became Exhibit "A" in the motion to have her excused for cause. This was entrapment of the Sixth Amendment variety. It was error for the prosecutor to engage in the line of questioning,[93] it was error for defense counsel not to object to it,[94] and it was error for the court to allow it to happen.[95]

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[93] *See, e.g., People v. Hill*, *supra; Antwine v. Delo*, *supra; Miller v. Lockhart*, *supra.*

[94] *Cf. Hughes v. U.S.*, 258 F.3d at 462-63 [no tactical reason could justify defense counsel's failure to protect defendant's right to impartial jury]; *See generally, People v. Montiel*, 5 Cal.4th 877, 927 (1993) [no plausible tactical reason for trial counsel's failure to object to prosecutor's improper questions]; *In re Jones*, 13 Cal.4th 552, 578, 581-82 (1996) [same]; *Strickland v. Washington,* 466 U.S. 668, 686-89 (1984).

[95] *People v. Heard,* 31 Cal.4th at 967 [emphasizing "need for trial courts to proceed with special care and clarity in conducting voir dire in death penalty trials"]; *id.* at 968 ["need for … patience in the examination of potential jurors"]; *Hughes v. United States*, 258 F.3d at 459 [trial court has a duty to "neutralize" prejudicial information to which potential jurors exposed]; *Gall v. Parker,* 231 F.3d 265, 308 (6th Cir. 2000) [same].

The fact that defense counsel should have objected to the entrapment does not alter the analysis this court must undertake. Exclusion of a life-leaning prospective juror in violation of *Witherspoon-Witt* is cognizable on appeal even without an objection in the trial court. *People v. Velasquez,* 26 Cal.3d 425, 443 -444 (1980). *A fortiori,* the failure to object to a portion of the voir dire that resulted in the exclusion cannot bar review. Here, Mr. Solomon objected to Ms. G.'s removal from the venire. RT 19613. The issue for this court is whether that removal was constitutionally legitimate. As in *People v. Heard,* this court may not find it to be legitimate based on feelings that were aroused by and expressed in response to questions that failed to accurately convey "the governing legal principles". 31 Cal.4th at 964. *Accord, People v. Teale, supra,* 70 Cal.2d at 513-519 [reversal where jurors' predictions that they would not vote for death were likely influenced by court's misleading questions]; *Clemons v. Luebbers*, *supra,* 212 F.Supp.2d at 1122 [same].

There is another important reason that Ms. G.'s "long pause" was entirely appropriate. As noted in section C, *ante,* Ms. G. was told by the court – in both the introductory instructions to the venire and the questionnaire -- that the law *never* required a juror to vote for death, even if she found that aggravation substantially outweighed mitigation. RT 19371 ["A vote for the death penalty is not mandated or required in that situation"]; 21 ACT 6230 ["the death penalty is never mandatory"]. She

was told the same thing by defense counsel at the beginning of the individual voir dire, without objection by the court or prosecutor. RT 19600 ["the court would tell you you never have to impose the death penalty"]. Then, in the exchange set out in full above, first the prosecutor and then the court apprised Ms. G. -- over defense counsel's objection -- that, if she were on the jury and "found this is an appropriate case for the death penalty, … then it would be her *obligation* to bring back the death penalty in that situation." RT 19608; emphasis added.

The fact that Ms. G. required a "long pause" to digest this new and contradictory information – which had to be factored in to her response to the prosecutor's question about whether she was willing to commit an act of violence on Mr. Solomon – is wholly understandable. She had to have been confused. "Reflection … was appropriate". *People v. Heard,* 31 Cal.4th at 967, fn. 10.[96] The fact that she demonstrated a capacity for thoughtfulness under those circumstances can in no way fairly support the conclusion that, once she got into the jury room, she was going to cast an

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[96] If Ms. G. had read all of the relevant case law, she might have understood that all Judge Mering was asking was: "If you decide that death is *the* most appropriate penalty, would you vote for it?" As one commentator has observed about similar questions that used to be asked in California under the 1977 law: "[T]he question is a simple tautology; virtually by definition jurors vote in whatever way they conclude they should vote. To a logician the answer to such a question may be clear, though trivial, but a juror trying to make sense of it *ought* to be confused." Eric Schnapper, *Taking Witherspoon Seriously: The Search for Death-Qualified Jurors*, 62 Tex. L. Rev. 977, 1043 (1984); emphasis added.

automatic, closed minded vote for life. This is *especially* so given that, after taking additional time to ponder the ramifications of the new information that had been dropped on her out of the blue, she ultimately said that she *would* in fact vote for death if that is what the law required. RT 19611-12.

The last problem with relying on the "long pause" is the imprecise terminology used by the court and prosecutor that may have contributed to it. The court told Ms. G. that she had to vote for death if she concluded that this was "*an* appropriate case for the death penalty...." RT 19608; emphasis added. The prosecutor's question was whether she could vote for death "in *an* appropriate case." RT 19609. The formulation they used was ambiguous. What they really wanted to know was whether she would vote for death if she concluded that, of the two possible penalties, death was not just *an* appropriate remedy but *the* (most) appropriate remedy.

The difference is considerable. Most jurors in most cases would likely say that *both* remedies – life without parole and death -- are *appropriate*. It is deciding whether death is *more* appropriate – or substantially more appropriate – that is the actual choice jurors have to make. *Cf. People v. Teale,* 70 Cal.2d at 513-519 [asking prospective jurors if they could vote for death in "a proper case" was ambiguous and

misleading; excluding venirepersons based on their responses to such questions required reversal under *Witherspoon*].[97]

If Ms. G. was misled by the ambiguous terminology, it was bound to slow her response time.[98] If she heard the prosecutor asking whether she would be willing to commit an act of violence on Mr. Solomon in a case in which *either* penalty was appropriate, the fact that she took a "long pause" and then said she would find that "extremely difficult" is most understandable. If the court and prosecutor had spoken without ambiguity, and the question had been whether she would vote for death if she concluded that it was the *most* appropriate penalty, it is not hard to imagine that her answer would have been at least the "probably" she had come out with earlier or the "yes" she came out with subsequently. *Cf. People v. Heard*, 31 Cal.4th at 967, fn. 10 [pauses following "imprecise questioning" invalid ground for excusal]; *People v. Teale*, 70 Cal.2d at 516 [precise questioning "might well" have yielded response from prospective juror that indicated more open mind].

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[97] *Accord, People v. Morse*, 70 Cal.2d 711, 741 -743 (1969); *In re Hillery,* 71 Cal.2d 857 (1969).

[98] "The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood - or misunderstood - by prospective jurors." *Witherspoon,* 391 U.S. at 516, fn. 9.

In sum, given: the seriousness of the subject matter; the fact that, until 65 hours earlier, she had no idea she would have to figure out how she truly felt about these life and death questions; the nuances of those life and death questions that she was having to deal with; and the misleading, incomplete, inconsistent, hard to understand, imprecise, and improper questions that led to her pauses -- those pauses should have earned Ms. G. another "A" from the court for being such an admirably conscientious prospective juror. They "provide[d] no legitimate basis for concluding that [her] ... views would prevent or substantially impair h[er] in performing h[er] duties" and should not have earned her an unceremonious heave from the panel on grounds of bias. *People v. Heard*, 31 Cal.4th at 967, fn. 10.

Finally, both the prosecutor and the trial judge dismissed Ms. G.'s final assertion that she *would* vote for death in the appropriate case, RT 19611-12, as a mere abstract intellectual assertion that never would have resulted in an actual vote for death, RT 19612-13. They failed to pay adequate attention to the facts before them. Ms. G. was not a sheltered academic prone to seeing the world in idealized terms and from whom a knee-jerk automatic vote for life could be expected in this case. This was a woman who was raped by her stepfather when she was a child, 21 ACT 6220, who recoiled at the prospect of seeing autopsy photos, ACT 6218, who did not think that a defendant's favorable military record was relevant to the penalty decision (Mr. Solomon performed heroically in Vietnam),

ACT 6231, who apparently lost her children to a man she despised, ACT 6218, and who had a daughter who had been addicted to crack, ACT 6227. These facts – in addition to Ms. G.'s belief that the perpetrators of hideous crimes deserve death -- not only indicated a real capability of voting for death in *an* appropriate case – they indicated a real capability of voting for death in *this* case, in which the defendant, a man, had been convicted of sexually brutalizing and/or killing eight women addicted to cocaine.

In short, the trial court's conclusion that "it would be a very, very remote situation in which [Ms. G.] … might consider or return a verdict of death no matter what the evidence was" is not supported by substantial evidence, is based on key misperceptions induced by the prosecutor, is based on confusion sown in part by the judge himself, ignores the evolution in Ms. G.'s understanding of what was being asked of her, and runs contrary to the court's own perception that she was a remarkably "conscientious … [and] very honest and thoughtful" prospective juror. RT 19615.

Objectively considering the record facts – and placing limited value on Ms. G.'s feelings on irrelevant subjects – e.g., the electric chair and the manner in which the death penalty is carried out – the conclusion that reasonably arises from the questionnaire and voir dire is that, while Ms. G. was not someone who would have eagerly voted for death, she had an open mind, she was capable of voting for death in this case, and, no matter what,

was going to faithfully discharge the duties of a juror as defined by the court.[99]

As will be seen in the next section, application of the proper constitutional standard to the actual facts yields the conclusion that the excusal of Ms. G. violated the Fifth, Sixth, Eighth, and Fourteenth Amendments.

4. Ms. G.'s Views Were Perfectly Compatible With The Duties of the Jurors As Defined by Their Instructions and Oath

The *Witherspoon-Witt* line of cases do not define "a ground for *challenging* any prospective juror." They define "rather a *limitation* on the State's power to exclude...." *Adams v. Texas*, 448 U.S. at 47-48; *Wainwright v. Witt*, 469 U.S. at 423; emphasis added. That limitation is dictated by the defendant's Sixth Amendment right to an impartial and representative jury -- *Adams* at 50; *Witt* at 424, fn. 5 – a jury *not* "organized to return a verdict of death." *Witherspoon,* 391 U.S. at 521.

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[99] In his motion for new trial, appellant attached a declaration from Ms. G. that stated: "3. My feelings about the death penalty are such that in an appropriate case I would vote for death. 4. Some crimes are so horrible I would vote death. 5. The facts of the case would be important to me in deciding whether I would vote for the death penalty. 6. My impression of Judge Mering were that he was very rude during my questioning. He interrupted defense counsel. He assumed I didn't understand the questions. He interjected his own lack of understanding. His tone of voice was angry and harsh." CT 6399. The court thought the declaration "ought to be stricken" but did not actually strike it. RT 26739.

The state, too, has an interest in seating an impartial jury. Its legitimate interest, however, is limited to ensuring that jurors are seated that are able to follow their "instructions and … oath". *Witt,* 469 U.S. at 424. That is where this court and the Supreme Court have drawn the line: A "prospective juror may be challenged for cause based upon his or her views regarding capital punishment *only if* those views would prevent or substantially impair the performance of the juror's duties as defined by *the court's instructions and the juror's oath.*" *People v. Heard*, 31 Cal.4th 946, 958 (2003) (emphasis added), quoting and citing *Witt*, 469 U.S. at 424 and *Adams*, 448 U.S. at 45.

Ms. G. was explicitly excused because of her "views about capital punishment". The question here, consequently, is whether those views substantially impaired her duties "as defined by the court's instructions and the juror's oath." Since the jurors' oath swore them to follow the "the instructions of the court", RT 21550, answering the question requires a comparison of Ms. G.'s views and the precise instructions she would have been required to follow. The trial judge did not engage in that comparison.

If he had, he would have had to conclude that Ms. G's views were perfectly compatible with what her duties would have been as defined by the oath and instructions given to the jurors in this case.

Those duties were delineated primarily in the modified versions of CALJIC Nos. 8.85 and 8.88 set out in section C, *ante.* CT 6334-35, 6343-

44. Ms. G.'s duty would have been to determine what the facts were, decide which were relevant to the penalty decision (as laid out in the list of relevant factors), decide which circumstances were mitigating and which aggravating, assign whatever moral or sympathetic value she deemed appropriate to each of those factors, consider the totality of the aggravating circumstances with the totality of mitigating circumstances, and determine which weighed more.

There is no reason to think that Ms. G. would have done anything but perform each of the foregoing tasks with the utmost integrity. Neither the trial court nor the prosecutor suggested otherwise. To the contrary, the court specifically observed how she "very diligently answered the questions" put to her on the questionnaire, giving "very detailed, complete" responses, RT 19594-96, and specifically commented on her "conscientiousness [in] providing ... very honest and thoughtful answers" to the difficult (and often confusingly phrased) questions put to her on voir dire. RT 19615.

After determining and comparing the weight of the aggravating and mitigating factors, Ms. G.'s next – and possibly final -- duty would have been to "determine ... which penalty is justified and appropriate...." CT 6343. If she found that mitigation outweighed aggravation, or that they were of equal weights, or if aggravation outweighed mitigation only insubstantially, she would have been required to vote for life. CT 6344.

Needless to say, neither the court nor the prosecutor believed that Ms. G. would have had a problem complying with that requirement.

Finally, if Ms. G. found that aggravation substantially outweighed mitigation, the instructions seemed to say that such a finding *ipso facto* was a determination that death was the "justified and appropriate" punishment. That formulation notwithstanding, the instructions were crystal clear that, even if Ms. G. found that aggravation substantially outweighed mitigation, she would have been free to reject death and vote for life without parole. CT 6444.[100]

On what basis she would have made that choice was not spelled out in the instructions given to either the venire or the actual jury. The

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[100] As appellant understands this court's view, the conflict is illusory. "'[W]eighing' is a metaphor for a ... mental balancing ... process which by nature is incapable of precise description." *People v. Brown,* 40 Cal.3d 512, 541 (1985), *reversed on other grounds*, 479 U.S. 538 (1987). Because a juror is free to assign whatever moral or sympathetic value she wishes to any factor, a juror who finds that life is the more "justified and appropriate" penalty will, *ipso facto,* have found that aggravation does *not* substantially outweigh mitigation. *People v. Boyde,* 46 Cal.3d 212, 252 -255 (1988), *affirmed sub nom Boyde v. California*, 494 U.S. 370 (1990). *See also, People v. Murtishaw*, 48 Cal.3d 1001, 1025-29 (1989) ["the 1978 statute provides a range of sentencing discretion no less favorable to a defendant than its 1977 counterpart", which explicitly "allowed the jury to decide death was inappropriate and grant mercy even if aggravation outweighed mitigation"; suggesting that jury will find "that aggravating factors 'outweigh' mitigating factors only when it believes that death is the appropriate sentence"]; *People v. Burgener*, 41 Cal.3d 505, 542 (1986). Accordingly, while instructions such as those given in this case are not incorrect, *see, e.g., People v. Whitt*, 51 Cal.3d 620, 651 (1990), neither are they required. *See, e.g., People v. Hines,* 15 Cal.4th 997,1070 (1997).

instructions, however, explicitly allowed the jurors to "consider whether or not mercy should be exercised for the defendant in determining which penalty to impose." CT 6334. See, e.g., ACT 6230. This was consistent with this court's view that "a 1978-law sentencer [has] ... the same broad power of leniency and mercy afforded a 1977-law jury." *People v. Murtishaw*, 48 Cal.3d 1001, 1027 (1989).[101]

If Ms. G. had been selected to serve in this case, consequently, there was *no* set of circumstances that would have required her to vote for death. After conscientiously performing all the preliminary and intermediate tasks, she would have had guided but extremely broad discretion to decide that

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[101] A statutory scheme "that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant" is congruent with the state's constitutional obligation to permit the sentencer to consider all "'relevant evidence that might cause it to decline to impose the death sentence.' [Citation.]" *Penry v. Lynaugh,* 492 U.S. 302, 327 (1989). *See also People v. Whitt*, 51 Cal.3d at 651, fn. 22 [jury instructed: "you ... may exercise mercy and return a verdict of life without the possibility of parole, even though the aggravating circumstances outweigh the mitigating circumstances"]. *Cf.* Susan Raeker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court's Evolving Standard of Decency for the Death Penalty*, 23 Hastings Constitutional Law Quarterly 455, 540, n. 415 (1996) [a juror's decision "to grant mercy to a defendant" does not "constitute ... a failure to 'follow the law or obey the oath'"]; Stephen Gillers, *The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 U.C. Davis L. Rev. 1037, 1078 (1985) ["There is no objective right answer. The discretionary sentencing decision-life or death-is entirely subjective. Sentencing jurors obey their oaths simply by exercising their moral judgments"].

Mr. Solomon's life should be spared.[102]

When it came to the ultimate step confronting the jurors in this case, therefore, their duty was comparable to that of the jurors in *Witherspoon* itself, who effectively had unlimited discretion to choose life or death. In that context, the Supreme Court held, a juror's feelings about imposing the ultimate penalty were *relevant* to the decision to be made. 391 U.S. at 519. *Accord, Adams v. Texas,* 448 U.S. at 46-47, 50. The only prospective jurors who could legitimately be excused because of their opposition to capital punishment were those who would automatically reject or wouldn't even consider imposing death. It was only those jurors who wouldn't be able to comply with their instructions. *See Witherspoon,* 391 U.S. at 520; *Adams* at 43-44.

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[102] As noted in the preceding footnotes, the instructions in this case accurately reflected California law. Within the framework adopted by *Witherspoon, Adams,* and *Witt,* however, it would not alter the analysis if they did not. In the final analysis, what matters are the instructions actually given to the actual jury that passed judgment in this case. It is that jury that sentenced Mr. Solomon to death, it is that jury that had to be chosen by means sufficient to assure Mr. Solomon the impartial and representative jury to which he was entitled by the Sixth Amendment, and it is that jury from which Ms. G. was excluded. *See Witherspoon,* 391 U.S. at 519, fn. 15 [fact that Illinois could have had enacted scheme in which pro-life jurors might be excludable is irrelevant]. *See generally, Sullivan v. Louisiana,* 508 U.S. 275, 279 (1993) ["the inquiry … is not whether … the error" would be harmless in some hypothetical trial, "but whether the … verdict actually rendered in *this* trial was surely unattributable to the error"; emphasis in original].

Contrary to popular belief, *Witt* did not in any way retreat from that holding. To the contrary, the Supreme Court endorsed it, indicating that it would reach the same conclusion again in a comparable case:

> [G]iven *Witherspoon*'s facts a court applying the general principles of *Adams* could have arrived at the "automatically" language of *Witherspoon's* footnote 21.... In *Witherspoon* the jury was vested with unlimited discretion in choice of sentence. Given this discretion, a juror willing to *consider* the death penalty arguably was able to "follow the law and abide by his oath" in choosing the "proper" sentence. Nothing more was required. Under this understanding the only veniremembers who could be deemed excludable were those who would never vote for the death sentence or who could not impartially judge guilt.

Witt, at 421-422; emphasis in original. *See also Maxwell v. Bishop*, 398 U.S. 262 (1970) and *Boulden v. Holman*, 394 U.S. 478 (1969) [error to excuse venirepersons who had "conscientious" objections to, or did not "believe in" the death penalty in cases in which the juries apparently had unlimited discretion whether to impose a death sentence].

As discussed in the preceding section, Ms. G.'s responses on voir dire and in her questionnaire indicated a real capability on her part to vote for death not just in a hypothetical case but in *this* case. She was a very,

very far cry from being a juror who would *never* "consider [or] … vote for a death sentence". *Witt* at 421-422.

Thus, despite Ms. G.'s pro-life leanings – and despite the fact that she was permitted to believe that a vote for death meant sending Mr. Solomon to the electric chair -- she said that she "probably could" impose the death penalty if she "felt that [Mr. Solomon] really deserved it". RT 19606. Had she known the truth – had her misconception about the electric chair been corrected -- her certainty undoubtedly would have been much greater. *People v. Teale, supra,* 70 Cal.2d at 516.

It was not necessary, moreover, that she be able to say that she in fact would vote for death if she felt that Mr. Solomon deserved it. There are many reasons – practical and legal – that this is so. For one thing, while "[m]any individuals … have given some consideration to the wisdom and propriety of the death penalty" before being called as jurors, "few people have ever thought about how they would act as jurors…. *[D]iscussing* capital punishment" is "different" than actually being responsible for "*sending* someone to the electric chair…. [T]he novelty of the question is often behind a juror's inability to respond in a definitive manner." Schnapper, *supra,* 62 Tex. L. Rev. at 999-1000.

Second, as this court has observed, a juror being asked general questions on voir dire cannot be expected to know how she will feel once she hears all the evidence and is in the midst of deliberations. *People v.*

Vaughn, 71 Cal.2d 406, 412 -413 (1969) ["the juror's conjectures as to her possible future views and the juror's actual reaction on presentation of the facts might not … coincide"].

As noted above, furthermore, a juror can simultaneously feel that the defendant deserves *both* death *and* life without parole. Ms. G was not asked whether she could vote for death if she found that to be the penalty that Mr. Solomon was *most* deserving of.

Even if that question had been clearly posed to her, *certainty* as to what she would do was not a prerequisite for service under the *law* of this state – not when her actual vote would have been the culmination of a "mental balancing … process … incapable of precise description", *People v. Brown,* 40 Cal.3d at 541 – the product of the "normative and subjective task of deciding … what penalty is 'appropriate' for the particular offense and offender." *People v. Murtishaw,* 48 Cal.3d at 1027, fn. 12.[103]

As discussed above, furthermore, under California law and the jury's instructions, it would have been perfectly proper for Ms. G. to feel that Mr.

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[103] *Cf. Gall v. Parker*, 231 F.3d 265, 331 (6th Cir. 2000) [error under *Witt* to excuse juror who, when asked if he could vote for death, said "'it is just one of those things you would have to cross when you got to it'" and "that he would possibly or 'very possibly' feel the death penalty was appropriate in certain factual scenarios"; "Correll's uncertainty as to how the option of a death sentence would affect his decision should not have led to his exclusion"]; *U.S. v. Chanthadara*, 230 F.3d 1237, 1271 -1272 (10th Cir. 2000) [error to excuse prospective juror; uncertainty and ambiguity of her responses did not constitute "substantial impairment"].

Solomon in some sense "deserved" death more than life without parole, yet choose to spare him in an exercise of mercy. *Id.* at 1027; CT 6334.

In any event, Ms. G. *did* say she would vote for death after the court said that the law would require her to if she found death appropriate. RT 19611-12. As discussed in the preceding section, this interpretation of California law was in conflict with what Ms. G. had previously been told about never having to vote for death, RT 19371, ACT 6230, RT 19600, and it also followed directly on the heels of the improper electric chair/act of violence sequence. The fact that Ms. G. looked inward and made the affirmative response she made was a testament to her commitment and capacity to fulfill her duties "as defined by the court's instructions and the juror's oath." *People v. Heard*, 31 Cal.4th at 958.

Thus, Ms. G was not someone who was going to "invariably vote … against the death penalty … without regard to the strength of aggravating and mitigating circumstances…." *Id.* at 959 [citation and italics omitted]. To the contrary, she was someone who recognized the justice in meting out the death penalty to people who commit hideous crimes; after some hard thinking she got to a place of believing that she would probably vote for death even if it meant sending such a person to the electric chair; and, when she was told that the law required her to vote for death in appropriate cases,

she committed herself to abiding by the law even though it might mean a vote she would have a hard time making emotionally.[104]

In short, Ms. G. would have made an exceptional juror. She was excluded based on views about capital punishment that would not have impaired her ability to comply with the "instructions and ... oath" ultimately given to the jury. Her exclusion thus violated *Witherspoon, Witt, Heard,* and Mr. Solomon's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

If there is any doubt of this, *Adams v. Texas,* 448 U.S. 38 (1980), should lay it to rest.

5. Adams v. Texas

Adams is especially relevant here. Under Texas law, jurors in capital cases were told that, if they answered certain questions affirmatively, a judge was required to impose the death penalty. 448 U.S. at 40-41. To be eligible to serve, they had to swear that the possible consequences of their decisions would "not affect their deliberations" on the questions posed to them. *Id.* at 42.

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[104] Even "those who firmly believe that the death penalty is unjust" – a class that did *not* include Ms. G – "may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *Lockhart v. McCree*, 476 U.S. 162, 176 (1986). *Accord, Szuchon v. Lehman*, 273 F.3d 299, 329-330 (3rd Cir. 2001).

A number of prospective jurors were excluded who could not take the oath. *Ibid.* They were excluded based on sentiments such as: "Well, I think it probably would [affect my deliberations] because afterall [*sic*], you're talking about a man's life here. You definitely don't want to take it lightly." 448 U.S. at p. 50, fn. 7 [material in brackets added by Supreme Court].

The Supreme Court held that the exclusion of such individuals violated the Sixth Amendment.

If selected to serve, the duty of the *Adams* jurors would have been to "consider and decide the facts impartially and conscientiously apply the law as charged by the court..." This meant that they had to "be willing ... to accept that in certain circumstances death is an acceptable penalty" and "also to answer the statutory questions without conscious distortion or bias." 448 U.S. at 46.

Nothing in the responses of the jurors, the court held, indicated that they could not do that. When they said their deliberations "would be 'affected' by the possibility of the death penalty," rather, they "apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally." This was not "equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths...."

Further, the Court held, it was inevitable, and constitutionally acceptable, that jurors' reservations about capital punishment have some effect on their penalty-phase decisionmaking. Even under the Texas scheme, "[t]his process is not an exact science, and the jurors … unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths…. [I]t is apparent that a … juror's views about the death penalty might influence the manner in which he performs his role … without exceeding the" limits placed on that role by state law. 448 U.S. at 46-47.

Even if the juror's views about the death penalty influenced her view of the facts – or her judgment as to whether the state had proved certain critical propositions beyond a reasonable doubt – this was *not*, the Court emphasized, grounds for removal: "Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase of a Texas murder trial … who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system…." 448 U.S. at 50.

Removing such jurors from the venire had stripped it of its most conscientious members: "Texas has … exclude[d] jurors whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected. It does not appear in the

record before us that these individuals were so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme. Accordingly, the Constitution disentitles the State to execute a sentence of death imposed by a jury from which such prospective jurors have been excluded." 448 U.S. at 50-51.

The exclusion of Ms. G was equally improper.

This was not a woman "so irrevocably opposed to capital punishment as to frustrate the State's … efforts to administer its … death penalty scheme." 448 U.S. at 51. To the contrary, she "believe[d] in capital punishment", RT 19612, and she thought that those who commit "hideous" crimes deserve to be "put to death", RT 19598 – i.e., she "accept[ed] that in certain circumstances death is an acceptable penalty". *Adams*, 448 U.S. at 46.

As discussed above, furthermore, she was most able to "consider and decide the facts impartially" and to "conscientiously apply the law as charged by the court…." *Id.* at 46.

Undoubtedly, Ms. G. had pro-life leanings. As made clear in *Adams*, however, that was hardly a ground for excusal. If they "invest[ed her] … deliberations with greater seriousness and gravity or … involve[d] … [her] emotionally," that would have been a good thing. *Ibid.*

It was both "unavoidabl[e]" and acceptable, furthermore, that her "views about the death penalty might influence the manner in which [s]he perform[ed] … her role…." *Id.* at 46-47. It is the latter principle that is most relevant to this case.

If it violates the Sixth Amendment to exclude a would-be juror "who frankly concede[s] that the prospects of the death penalty may affect what their honest judgment of the *facts* will be or what they may deem to be a *reasonable doubt*" – *id.* at 50 – if it is "inherent in the jury system" that a juror's pro-life views will affect her *factual* "assessments and judgments" – *ibid.* – then *a fortiori* it violates the Sixth Amendment to exclude a would-be juror simply because she "frankly concedes that the prospects of the death penalty may affect what [her] … honest judgment … will be" when assigning "*moral ... value*" (CALJIC No. 8.88) to the factors bearing on the penalty decision – including whether to exercise mercy.

This is not a case in which the juror defiantly took political or religious positions "equivalent to an unwillingness or an inability on the part of the juror … to follow the court's instructions and obey the … oath" the jurors would be given. *Adams*, 448 U.S. at 50. Ms. G, rather, was simply in touch "emotionally" with the "potentially lethal consequences of" the decision the jury would be making and the "seriousness and gravity" of

the jury's responsibility. *Id.* at 49.[105] Her "only fault was to take [her] responsibilities with special seriousness [and] to acknowledge honestly that they might ... be affected" by the finality of the punishment she was being asked to consider. *Id.* at 50.

Such "emotional involvement" is "insufficient under the Sixth and Fourteenth Amendments" as a "ground ... for excluding" a juror. *Ibid.*

That was the basis on which Ms. G. was excused. The granting of the prosecutor's challenge of Ms. G violated Mr. Solomon's rights to due process, an impartial jury, and a reliable penalty determination.

E. Reversal is Required

The holding in *People v. Heard* is thus applicable: "Based upon the responses of Prospective Juror [G.] set forth in the record ... there is not substantial evidence to support a determination that [G.] harbored views that would prevent or substantially impair the performance of h[er] duties so as to support h[er] excusal for cause. Accordingly, under the applicable standard established by the controlling decisions of the United States Supreme Court, the trial court's excusal of Prospective Juror [G.] for cause was error." 31 Cal.4th at 965-66.

"[T]he error is not subject to a harmless-error rule.... [T]he

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[105] Equally important, she was misled into getting in touch "emotionally" with the "potentially lethal consequences of" a decision the jury would *not* be making: sending Mr. Solomon to the electric chair.

governing high court decisions … establish that … such an error … compel[s] the *automatic reversal* of defendant's death sentence…." *Id.* at 966 (emphasis in original). *Accord*, *Gray v. Mississippi,* 481 U.S. at 666-668 (opn. of the court); *id.* at p. 669-672 (conc. opn. by Powell, J.).

The death sentence must be reversed.

X.

THE EXCUSAL FOR CAUSE OF PROSPECTIVE JUROR C. BASED ON HER FEELINGS ABOUT VOTING FOR DEATH WAS LIKEWISE UNCONSTITUTIONAL

A. Juror C.'s Responses

Ms. C. was 57. She had lived in Sacramento her entire life. She was a personnel assistant for the state controller. She was very shy and had never been a leader in anything. Her hobbies were reading and sewing. 26 ACT 7515-21.

With respect to serving in this case, she said in her questionnaire that seeing the autopsy photos would disturb her, that it was terrible that Mr. Solomon killed so many people, and that she thought he was a violent person. 26 ACT 7523, 7527. The kinds of factors she would consider in mitigation were the defendant's background, drug use, and psychological problems, but she would not consider how good or troublesome a prisoner he would be or whether he had a favorable military record. ACT 7535-36. She said she had no opinion whether Mr. Solomon should receive life or death and that she would not vote for either automatically, ACT 7527, 7537. Enigmatically, she said that it would be hard for her to choose the death penalty, ACT 7528, but also said without qualification that, if a person has taken many lives violently, he should receive the death penalty. 26 ACT 7534. She said if there was a conflict between an instruction from

the judge and her personal beliefs, she would do what the judge instructed. ACT 7524.

On voir dire, she gave voice to the conflict she felt. On the one hand, she believed in the death penalty. RT 19648. On the other, it would bother her a lot to make that kind of decision. RT 19650. At the same time, she stood by her statement that a person who has taken many lives violently should receive the death penalty. RT 19653.

She didn't have strong feelings against the State executing a person. She basically believed in the death penalty. RT 19658. She thought that Robert Alton Harris deserved the death penalty. RT 19659.

She just didn't like the idea of being a decisionmaker. RT 19658. She wasn't completely sure she could put those feelings aside but she guessed that if she had to follow the court instructions she would. RT 19661.

The final exchange of the voir dire went like this:

Court: Do you think that you would refuse to vote for the death penalty even in a case when the evidence and the law told you that that was an appropriate case for the death penalty? ¶ Do you think because you have these feelings, you'd rather not do it? Would that cause you to change your vote and vote for life just so you wouldn't have to feel the pressure of having made that decision for the death penalty?

A. Well, I don't know. I just – I don't know what I would do, to tell you the truth.

Q. Do you think it's likely though because of the feelings you have, you would probably vote for a life sentence just because you don't want to face the tough decision of deciding the death penalty and voting for the death penalty?

A. Well, I might, I don't know. It's hard for me to say, you know.

RT 19661-62.

B. The Ruling

The prosecutor challenged Ms. C. for cause. Defense counsel objected, saying that Ms. C. would follow the law if selected.

The court granted the challenge, rejecting the defense position: "Following the law is a vague concept.... And the law doesn't really dictate that you have to do something" – as in "bring back a death penalty". RT 19663.

The court recognized that Ms. C was "basically in favor of the death penalty.... But she just would not ever commit herself that she could do it in an appropriate case, that she could return a death penalty verdict if the evidence and the law and it was an appropriate case in her view and she believes there are clearly appropriate cases, but she refused to acknowledge – and I thought we could, because of her basic – what her basic statement

of her overall view was on the death penalty, I thought ultimately she would almost have to say, well, I could, yes, I could do it in an appropriate case and I would act responsibly.

"But she just … kept equivocating and kept backing off. So I don't feel that I can conclude that she is not substantially impaired and I think she is substantially impaired in her ability to consider, as an alternative in this case, the death penalty.

"So I'm excusing her for cause, although it's a difficult choice." RT 19664.

C. The Excusal of Ms. C. Violated *Witherspoon, Witt, Adams,* and *Heard*

The ruling was the product of several errors.

First, the court placed the burden of proof on the defense to show that Ms. C. was *not* substantially impaired. RT 19664 ["I don't feel that I can conclude that she is not substantially impaired"]. "[I] t is the adversary seeking exclusion who must demonstrate … that the potential juror lacks impartiality." *Wainwright v. Witt,* 469 U.S. at 423. *Accord, U.S. v. Chanthadara*, 230 F.3d 1237, 1270 -1273 (10th Cir. 2000) ["The burden of proving bias rests on the party seeking to excuse the venire member for cause"].

Second, in thinking that the defense had to prove lack of substantial impairment, the court turned the *Witt* standard into an affirmative ground

for exclusion. As noted in the preceding argument, the *Witherspoon-Witt* line of cases do not define "a ground for *challenging* any prospective juror." They define, "rather", a Sixth-Amendment based "*limitation* on the State's power to exclude...." *Adams v. Texas*, 448 U.S. at 47-48; *Wainwright v. Witt*, 469 U.S. at 423; emphasis added.

Since the court itself thought the challenge for cause presented a "difficult choice", RT 19664, it is likely - and certainly reasonably possible - that, had the court conceptualized the burden properly and placed the burden where it belonged, it would have denied the challenge.

In any event, the grounds on which Ms. C. was excused do not pass constitutional muster.

Ms. C. believed in the death penalty, RT 19648, and specifically believed that a person who has taken many lives violently should receive the death penalty. RT 19653.

It was the prospect of being the one who made the decision that bothered her. RT 19650.

Not wanting to be the one who sends someone to their death is *not* a ground for exclusion. This precise question arose in *Witherspoon:*

> Only one venireman who admitted to 'a religious or conscientious scruple against the infliction of the death penalty in a proper case' was examined at any length. She was asked: 'You don't believe in the death penalty?' She replied: 'No. It's just I wouldn't want to be

> responsible.' The judge admonished her not to forget her 'duty as a citizen' and again asked her whether she had 'a religious or conscientious scruple' against capital punishment. This time, she replied in the negative. Moments later, however, she repeated that she would not 'like to be responsible for * * * deciding somebody should be put to death.'[106]
>
> Evidently satisfied that this elaboration of the prospective juror's views disqualified her under the Illinois statute, the judge told her to 'step aside.'

391 U.S. at 515. Exclusion of the juror, the court held, violated the Sixth Amendment. *Id.* at 519-523.

Nor was it necessary that Ms. C. be able to shelve such feelings. That was settled in *Adams v. Texas,* 448 U.S. at 42-50 [unconstitutional to require would-be capital jurors to swear that the possible consequences of their decisions would "not affect their deliberations"]. A "juror's views about the death penalty" can properly "influence the manner in which [s]he performs h[er] role" and "the prospects of" having to vote for "the death

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[106] The *Witherspoon* opinion then dropped this footnote: "Compare Smith v. State, 55 Miss. 410, 413--414: 'The declaration of the rejected jurors, in this case, amounted only to a statement that they would not like * * * a man to be hung. Few men would. Every right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow-man. * * * For the error in improperly rejecting (these) two members of the special venire the case must be reversed.'" 391 U.S. at 515, fn. 8.

penalty may [even] affect what [her] honest judgment of the facts will be...." 448 U.S. at 46-47, 50.

The trial judge excused Ms. C. because she would not commit in advance to voting for death in an "appropriate" case. Under the Sixth Amendment, however, a juror cannot be required to say in advance exactly how her feelings will affect her. *Cf. Gall v. Parker,* 231 F.3d 265, 331 (6th Cir. 2000) ["Correll's uncertainty as to how the option of a death sentence would affect his decision should not have led to his exclusion"].

As discussed in the preceding argument, furthermore, "an appropriate case" is an ambiguous formulation. A juror can find that death is appropriate without believing it to be *more* appropriate than life without parole.

Finally, and most importantly, Ms. C.'s hesitancy was not in conflict with the instructions and oath given to the jury in this case. As discussed at length in the preceding argument, there was no set of circumstances that would have required her to vote for death. After conscientiously performing all the preliminary and intermediate tasks, she would have had broad discretion to decide that Mr. Solomon's life should be spared and explicit authority to vote for life because she was moved by merciful feelings. CALJIC Nos. 8.85, 8.88; CT 6334-35, 6343-44. The fact that she could not say for sure whether, when it came right down to it, her merciful feelings would prevail, was in no way inconsistent with her duty "as

defined by the court's instructions and the juror's oath." *People v. Heard*, 31 Cal.4th at 958.

Ms. C.'s discomfort with decisionmaking generally could have been the basis of a peremptory challenge, if either party had been so inclined. Instead, the prosecutor seized on her discomfort at the prospect of voting to have a defendant put to death and that was the basis on which the court excused her. Since that discomfort fell within the range of constitutionally protected "views about capital punishment", her exclusion on that basis violated Mr. Solomon's rights to due process, an impartial jury, and a reliable penalty determination. *Adams v. Texas,* 448 U.S. at 50; *Gray v. Mississippi*, 481 U.S. at 667; *Johnson v. Mississippi,* 486 U.S. at 485; U.S. Const., Amends. 5, 6, 8, 14; Calif. Const., art. I, §§ 7, 15, 17.

The error "compel[s] the *automatic reversal* of defendant's death sentence." *People v. Heard*, 31 Cal.4th at 966 [emphasis in original]. *Accord*, *Gray,* 481 U.S. at 660. "[T]he death sentence cannot be carried out." *Adams*, 448 U.S. at 47-48.

XI.

IN VIOLATION OF DUE PROCESS, THE TRIAL COURT REFUSED TO GIVE PROSPECTIVE JURORS ANY INFORMATION ABOUT TWO MAJOR AGGRAVATING FACTORS – APPELLANT'S CRIMINAL HISTORY AND THE MANNER IN WHICH THE VICTIMS DIED AND WERE DISPOSED OF – AND FORBID ANY DEATH-QUALIFICATION VOIR DIRE ON THOSE SUBJECTS [107]

A. Introduction

The prosecution's case for death rested on essentially three aggravating factors: 1) the number of women murdered (six) and assaulted (two) by Mr. Solomon in 1986-1987, as found by the first jury; 2) the manner in which the murder victims died and were disposed of, as presented in graphic and gruesome detail; and 3) Mr. Solomon's felony history, which began in 1969 and featured five sadistic sexual assaults and two failed terms of incarceration for those assaults.

Defense counsel asked the court to give prospective jurors some inkling that each of the foregoing factors would be a part of this case.

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[107] Some courts use the expression "life-qualification" voir dire to refer to the process by which a party seeks to determine if jurors could consider a life sentence given the facts of the case. *See Morgan v. Illinois,* 504 U.S. 719, 724-25 & n.4 (1992). This court uses the term "death-qualification" to apply to the search for both pro-death and anti-death bias. *People v. Cash,* 28 Cal.4th 703, 721 (2002). Appellant will do the same.

Counsel wanted to inquire whether exposure to such information would cause prospective jurors to automatically vote for death without weighing aggravation against mitigation. In important respects, the prosecutor supported the defense request.

The trial court for the most part rejected it. The court told prospective jurors what the first jury had convicted Mr. Solomon of. The court refused, however, to give them any information regarding either the manner in which the women were killed or the fact that Mr. Solomon had a criminal history. To the contrary, over defense objection, the court told prospective jurors that Mr. Solomon would have the opportunity to prove to them that he did *not* have a criminal history.

The decision to keep the prospective jurors in the dark was based on a fundamental misconception regarding a capital defendant's right to an impartial jury. As will be seen in section C below, the trial judge did not believe that a defendant who has committed heinous crimes can expect – or has a right to – jurors who will actually maintain an open mind with regard to penalty after hearing the evidence in aggravation.

The trial court believed that the right to an impartial penalty phase jury is mostly an abstract and not a case-specific right and that a defendant is limited to apprising prospective jurors of the aggravating facts appearing in the information.

The restrictions placed on voir dire denied Mr. Solomon the tools for ascertaining who in the venire would automatically vote for death once exposed to the actual case in aggravation. The restrictions cast an impenetrable veil over the potential partiality of the jury. They violated the Due Process Clause of the Fourteenth Amendment and sections 7, 15, 16, and 17 of the California Constitution, and require reversal of the judgment of death.

B. The Applicable Legal Principles

1. The constitutional framework

The Due Process Clause of the Fourteenth Amendment guarantees a capital defendant the right to be judged by an impartial jury. *Morgan v. Illinois,* 504 U.S. 719, 728-729 (1992).[108] In a capital case, a juror is unconstitutionally biased if he or she will "invariably vote ... for ... the death penalty because of one or more [aggravating] circumstances likely to be present in the case being tried without regard to the strength of ... mitigating circumstances." *People v. Cash,* 28 Cal.4th 703, 720 (2002). *Accord, Morgan,* 504 U.S. at 729 ["because such a juror has already formed an opinion on the merits, the presence ... of ... mitigating circumstances is

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[108] The capital defendant's right under the Due Process Clause encompasses the right to an impartial jury guaranteed by the Sixth Amendment, *Morgan* at 728, as well as the right to a reliable penalty determination guaranteed by the Eighth Amendment. *Caldwell v. Mississippi,* 472 U.S. 320, 340 (1985). The same rights are also protected by Article I, sections 7, 15, 16, and 17 of the California Constitution.

entirely irrelevant to such a juror"].[109]

Since the defendant's life is at stake, the right to be judged by impartial jurors is not to be enforced as if it were a mere "abstract" concept. *Id.* at 721. "[T]he 'real question' is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole *in the case before the juror*." *Id.* at 720; emphasis added.

In order for a defendant to have any reasonable chance of ascertaining that a juror would "invariably vote ... for ... death ... because of one or more circumstances ... in the case," *Cash* at 721, he has to be able to question presumptive jurors about their reactions to those aggravating circumstances. "[S]ome inquiry into the critical facts of the case is essential to a defendant's right to search for bias." *State v. Clark,* 981 S.W.2d 143, 147 (Mo. 1998).

"[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. [Citations.] ... Without

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[109] The juror's duty mirrors that of the state. Just as the state may not impose a mandatory death sentence for particular conduct – *see, e.g., Sumner v. Shuman,* 483 U.S. 66 (1987) [invalidating mandatory statutory scheme] – so, too, "the jury is called upon to make a highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves." *Turner v. Murray,* 476 U.S. 28, 33-34 (1986). "[I]t is not enough," consequently, "simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).

an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.' [Citation.]" *Morgan v. Illinois,* 504 U.S. at 729-730. "The defendant's right to an impartial jury would be meaningless without the opportunity to prove bias." *State v. Clark,* 981 S.W.2d at 147.

The need for an adequate voir dire is particularly "great ... [in] capital" cases given "the qualitative difference of death from all other punishments." *Turner v. Murray,* 476 U.S. 28, 33 (1986) (lead opinion); *accord, id.* at pp. 38-45 (opns. of Brennan and Marshall, JJ., concurring in pertinent part). The trial court's discretion to "restrict" capital voir dire is limited by the overriding "demands of fairness.' [Citations.]" *Morgan,* 504 U.S. at 730.

When some aspect of a case is capable of turning a juror into an ADP vote – an automatic vote for the death penalty -- "fairness" demands that the defendant be permitted to ask questions on voir dire that focus on that aggravating factor. "[C]ritical facts--facts with substantial potential for disqualifying bias--must be divulged to the venire." *State v. Clark,* 981 S.W.2d at 147 [penalty reversal where trial court would not permit defense to disclose to venire that one of the victims was a child].

In a series of capital cases from 1992-2001, this court repeatedly affirmed the *prosecution's* right to question presumptive jurors about

circumstances in the case that might *prevent* them from voting for death. As summarized in *Cash,* those cases stood for the proposition that a "prosecutor may properly inquire whether a prospective juror could impose the death penalty[:]

[1] in a felony-murder case...,

[2] on a defendant who did not personally kill the victim...,

[3] on a young defendant ...

[4] [on] one who lacked a prior murder conviction...,

[5] ... only in particularly extreme cases unlike the case being tried...",[110]

or [6] on a defendant who had only killed one person.[111]

Given that all of the latter are legitimate subjects for *prosecutorial* voir dire, it follows that a capital defendant must have at least comparable

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[110] *People v. Cash,* 28 Cal.4th at 721 [brackets and indenting added by appellant]. *Cash* cited the following cases: [1] *People v. Pinholster,* 1 Cal.4th 865, 916-917 (1992); [2] *People v. Ochoa,* 26 Cal.4th 398, 431 (2001), and *People v. Ervin,* 22 Cal.4th 48, 70-71 (2000); [3&4] *People v. Livaditis,* 2 Cal.4th 759, 772-773 (1992); and [5] *People v. Bradford,* 15 Cal.4th 1229, 1320 (1997).

[111] See *People v. Noguera,* 4 Cal.4th 599, 645-46 (1992). *See also People v. Mendoza*, 24 Cal.4th 130 (2000). In *Mendoza*, the court found a number of subjects pursued by the prosecutor in a capital case to be "reasonable inquiries into specific prejudices as a basis for a challenge for cause ... [and] peremptory challenge." These included "the prosecution's questions concerning circumstantial evidence ...; [and] the questions regarding rape being an assaultive or sexually motivated crime and whether a rape of an elderly victim by a young man established mental illness...." *Id.* at 168.

leeway to explore the potentially biasing effects of *aggravating* "circumstance[s] … present in the case…." *People v. Cash,* 28 Cal.4th at 721. It is the defendant, after all, whose right to voir dire for bias is protected by the Due Process Clause – *Morgan v. Illinois,* 504 U.S. at 728-729 – and whose right to find and prevent biased jurors from being seated is especially "great" in capital cases -- *Turner v. Murray,* 476 U.S. at 35.

That was the conclusion reached in *Cash.* This court held that both parties have a right to ask such questions:

> [E]ither party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence.

People v. Cash, 28 Cal.4th at 720-721. If the prospective juror indicates that s/he

> would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances, … [s/he is] subject to challenge for cause.

Id. at 720.

Because the *Cash* opinion contains the court's fullest exposition on the subject by far, appellant will briefly summarize the analytical framework it sets out.

2. People v. Cash

In *Cash*, the defendant was charged with one count of capital murder and one count of attempted murder. The principal evidence in aggravation, apart from the circumstances of the crimes for which Cash was on trial, was that, some eight years earlier, when he was a severely depressed juvenile, he shot and killed both his grandparents during an argument. The trial court – believing that defense counsel was not permitted to make any reference in voir dire to any case-specific facts that did not appear in the information – did not allow counsel to make any reference to Cash's criminal history during jury selection.

This was error: "Because … defendant's guilt of a prior murder … was a general fact or circumstance that was present in the case and that could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances, the defense should have been permitted to probe the prospective jurors' attitudes as to that fact or circumstance." *People v. Cash,* 28 Cal.4th at 721.

The fact that the prior murders were not "alleged in the charging document" was irrelevant. *Id.* at 720.

The error violated due process. The restriction imposed by the court

"created a risk that a juror who would automatically vote to impose the death penalty on a defendant who had previously committed murder was empanelled and acted on those views, thereby violating defendant's due process right to an impartial jury." *Id.* at 723.[112]

Reversal was required. The "defendant c[ould] not identify a particular biased juror, but that is because he was denied an adequate voir dire about prior murder...." *Ibid.* "The trial court's restriction of voir dire" thus left this court in "doubt" that defendant "was sentenced to death by a jury empanelled in compliance with the Fourteenth Amendment." *Ibid.*, quoting *Morgan v. Illinois,* 504 U.S. at 739.

"Because the trial court's error makes it impossible for us to determine from the record whether any of the individuals who were ultimately seated as jurors held the disqualifying view that the death penalty should be imposed invariably and automatically on any defendant who had committed one or more murders other than the murder charged in this case, it cannot be dismissed as harmless. Thus, we must reverse defendant's judgment of death." *People v. Cash,* 28 Cal.4th at 723.

In this case, the trial court committed *Cash*-like constitutional error

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[112] "The right to trial by a panel of impartial ... jurors ... [goes to] the fundamental integrity of all that is embraced in the constitutional concept of trial by jury... In the language of Lord Coke a juror must be as 'indifferent as he stands unsworne' ... regardless of the heinousness of the crime charged." *Turner v. Louisiana,* 379 U.S. 466, 472 (1965).

twice over: appellant was precluded from informing jurors about – and determining the biasing effect of – *two* major aggravating factors, *including* his criminal history.

C. The Defense Requests, The Court's Rulings, And The Actual Voir Dire [113]

1. The Defense Requests

In the first penalty phase, the prosecution's argument for death – see RT 17213-17307 -- consisted of three basic elements:

1) the number of women the jury had just convicted Mr. Solomon of murdering (six) and assaulting (two) in 1986-1987;

2) the manner in which the murder victims died and were disposed of, as shown by graphic and gruesome evidence of bodies bound, gagged, naked, buried, and decomposed (in closing argument, the prosecutor simply passed around photographs showing how each victim looked when she was discovered -- RT 17235-38); and

3) the evidence that Mr. Solomon had a felony history going back to 1969 that included five sadistic sexual assaults and two failed terms of

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[113] The arguments and rulings discussed in this section occurred over four days prior to jury selection – March 9, 11, and 23, and April 1, 1992 -- and then flared up again on April 7-8 during jury selection. See especially RT 18583-18727, 19070-19175, 19543-19573, 19915-19927.

incarceration for those assaults. RT 17215-26, 17242-43, 17294-95, 17298.[114]

When jury selection procedures for the penalty retrial came up for discussion, the defense requested that prospective jurors be given some kind of heads up – at least in general terms – about all three components of the case in aggravation. The argument was straightforward. As soon as the jury was selected, counsel predicted, the jurors would be exposed to a lengthy opening statement in which the prosecutor would hammer home -- in painstaking detail -- the evidence the jury would hear in support of the three pillars of the case for death.[115] Mr. Solomon, they said, had a right to explore with a prospective juror whether he or she, after exposure to the most aggravating aspects of the prosecution's case, was someone who would be able to keep an open mind all the way through to the end of the penalty phase, actually listen to the evidence in mitigation, actually weigh it against the aggravation, and not decide which penalty was the most appropriate until the weighing process was over. See, e.g., RT 18664, 18672-73, 18712-13, 19084-85, 19089, 19091, 19111-12, 19161, 19561-62.

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[114] All of the evidence affirmatively presented by the prosecution at the first penalty phase, as well as close to 15% of the prosecutor's closing argument, pertained to category #3 – Mr. Solomon's criminal history. See section D.2(a), *post.*

[115] The prediction was accurate. Mr. O'Mara's opening statement took the better part of two days. 51 RT 21572 - 52 RT 21707.

To keep the jurors in the dark about critical aspects of the actual case they were going to hear, counsel argued, would make a sham of the juror-selection process. Prospective jurors would be asked to evaluate their ability to remain open minded, but would not be given the information they needed to make the evaluation. Their general predictions of open mindedness would be worthless. See, e.g., RT 18667, 18671, 18677, 18712-13, 19548-49.

Defense counsel was not requesting that the court provide the prospective jurors with much detail. All of the information that counsel wanted the jurors to know could be conveyed in 40 words or less. RT 19112.

Counsel proposed as a general model the procedures followed in the first trial (over which Judge Virga had presided) – tailored to reflect the fact that the second trial was limited to penalty. This is the model that was followed at the retrial – up to a point.

First, the prospective jurors came to court in two 65-person panels and Judge Mering made introductory comments that the court and counsel had worked out. RT 19210-62, 19306-28. In pertinent part, the court informed the venire that the first jury had convicted Mr. Solomon of murdering six women and sexually assaulting two others in 1986 and 1987, and that most of the victims had reportedly been prostitutes with histories of drug abuse. RT 19351-52, 19445-46. In addition, the court instructed

generally on the principles that would govern the jury's penalty decision. See RT 19366-72, 19462-67.

The court and counsel also agreed that, following the orientation, the prospective jurors would remain and fill out a long questionnaire. Only one question proposed by the defense generated a controversy that is relevant here:

"103. Are your feelings about the death penalty such that you would be in favor of the death penalty in every case in which the accused:

A. Has been convicted of murder? Yes __ No___

B. Has been convicted of six murders? Yes __ No___

C. Has been convicted of six murders of women?

Yes __ No___

D. Has been convicted of six murders of women plus has been to prison for sexually assaulting women? Yes __ No___

E. Would your answers be the same if one or more murders involved sexual assaults on women? Yes __ No___

Please explain._____

20 CT 5955.

Defense counsel viewed the question as a way to supply the court and counsel with clues as to which prospective jurors should be questioned more closely about their ability to remain open minded. The answers,

counsel said, would in no sense be definitive. At most, they would lead to focused questions during voir dire. RT 18620-21.18668, 19549-50.[116]

Three days to three weeks after their group session, each prospective juror not excused for hardship was voir dired out of the presence of other prospective jurors. (Since only penalty was at issue, there was no general voir dire.) It was agreed that the court would begin each session by elaborating on concepts such as aggravation and mitigation, ask the core death-qualification questions, then turn the questioning over to counsel. See, e.g., RT 19797-99 [court's voir dire of Juror Sm.].

It was further agreed that counsel could inquire whether the sheer number of crimes the first jury had convicted Mr. Solomon of would be so dispositive for the prospective juror that s/he would vote for death without engaging in any actual weighing of aggravation and mitigation. See RT 19544-45.

Defense counsel, however, also wanted to ask the same question about Mr. Solomon's criminal history. Either the court could make reference to that history in its comments to the individual prospective juror, or leave it to defense counsel to do so if they felt it was necessary with a

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[116] Judge Mering eventually eliminated questions D and E. This is discussed in section 2 below – "The Rulings".

particular individual.[117]

Counsel did not propose going into great detail. To the contrary, faced with Judge Mering's resistance to this line of questioning, counsel indicated that, while prospective jurors needed to know that Mr. Solomon had been convicted of "violent sexual conduct with women in the past", RT 19549, counsel did not need to go into the particulars of the 1969-1976 incidents. RT 18668-69.

The prosecutor supported the defense request. He didn't think it was "realistic to qualify a panel of people to decide Mr. Solomon's fate without giving them any idea as to what kind of evidence they are gonna hear." RT 18631. He agreed that the information that Mr. Solomon had committed prior sexual assaults and had spent time at Atascadero and in prison as a result of them was "going to play a significant part in the penalty trial as it did in the last trial" and that "[c]ertainly this is information that needs to be imparted" during jury selection. He did not think that Q. 103 was the best way to convey the information, but was not opposed to the court conveying it in the group orientation or individual sessions. RT 18592-93. He agreed that "the meat" of the case in aggravation was the intersection of "the fact that Mr. Solomon stands convicted of six murders and ... has a rather

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[117] In the selection of the first jury, most venirepersons were not told about Mr. Solomon's criminal history. Judge Virga persuaded defense counsel that disclosing the information prior to the guilt phase would not be prudent. See RT 19092-93.

resplendent past involving the same kind of criminal conduct, not death but assaultive conduct on women." RT 18631.[118]

The prosecutor added that leeway in voir dire was especially called for in this case because jurors would pin the "serial killer" label on Mr. Solomon, potentially stirring a bias that needed to be explored. RT 18657-58.

Finally, defense counsel wanted to be able to ask prospective jurors if they could keep an open mind once they heard the evidence bearing on how the murder victims had been killed. In the voir dire that preceded the first trial, Judge Virga had permitted counsel to ask such questions. In one typical sequence, counsel asked the prospective juror if she thought she could keep an open mind after hearing from the prosecutor that, after "binding ... [and] gagging" the murder victims, Mr. Solomon "killed them by suffocation or strangulation, tied them up, brutalized them before they were killed...." RT 8674. The prosecutor did not object to such questions at the first trial. *Ibid.;* RT 19072-19073.

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[118] See as well the prosecutor's comments at: RT 18656 [prospective jurors should be focused on "multiple murder and" Mr. Solomon's "extensive criminal past history"]; RT 18678 ["the jurors need to be apprised that Mr. Solomon does not come to this case with no prior criminal background; that he has been involved in prior criminal activity ... similar ... to the conduct that he is presently standing before the court for"]; and RT 18715 ["I don't see any problem with letting the jurors know that Mr. Solomon has a prior criminal record...."].

At the retrial, the prosecutor at times argued against counsel being able to convey such information to prospective jurors but added that the court needed to be flexible and to give counsel leeway depending on the prospective juror's responses to preliminary questions. RT 19166-67. At other times, the prosecutor appeared to say that he had no objection to the kind of detail allowed by Judge Virga as long as Judge Mering's introductory remarks likewise established the proper context – i.e., explained to the prospective jurors that they would be hearing mitigating evidence along with the aggravating evidence and that the question was whether they could listen to both before making up their minds. RT 19073-76.[119]

The prosecutor said he would be satisfied as long as the voir dire were conducted "fairly". RT 18681. To achieve the balance the prosecution was looking for, defense counsel offered to improve on their first-trial questions: "[A]ny time we mention aggravating factors, we would let the jurors know that there's another side, that there's mitigating factors … and

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[119] At the first trial, Judge Virga's comments in the individual voir dires provided such a context, informing prospective jurors that the prosecution's evidence in aggravation would be followed by a defense presentation in mitigation that could include such factors as an abusive childhood, honorable military service, problems with drugs, and good behavior in prison. See, e.g., RT 9471, 9475. When defense counsel subsequently asked the juror-to-be whether she could keep an open mind after hearing the aggravating facts quoted above, the juror was not answering the question in a vacuum. RT 9481.

then ask them if they can keep an open mind and … listen to all the evidence prior to making a decision." RT 19152.

2. The Rulings

The court denied two-thirds of the defense request. The court "conceded" that the prospective jurors had to be told of the murders and assaults that the first jury had convicted him of since they had to be told that those verdicts were binding on them. RT 18624, 18667, 18708, 19367, 19564.

But the court absolutely refused to tell the prospective jurors – or to allow defense counsel to tell them – or to allow any question about -- the second and third pillars anchoring the prosecution's case in aggravation: anything that would prepare them for the inflammatory evidence relating to the manner in which the murder victims died; or anything relating to Mr. Solomon's prior sexual assaults. The restrictions applied both to the questionnaire -- RT 18708, 18723[120] -- and to voir dire:

> I don't think it's a proper question to include in the hypothetical or in the … question the defendant's history of some sexual violent

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[120] The court struck the one reference in the questionnaire to Mr. Solomon having spent time at Atascadero – 20 CT 5944 -- and rewrote question 103 to eliminate any reference to the matters alluded to in proposed subquestions D and E: 1) that Mr. Solomon had a criminal history that predated 1986; and 2) that the murder victims had probably been sexually assaulted before being killed. See RT 18688, 18708, 18723, 19133; 21 ACT 6175.

> crimes. I don't think it's proper to go into the details of the deaths, the tied up, things stuffed in their mouths. I think these are essentially aggravating features in the case. They aren't essentially the charges, they are the aggravating factors in addition to the charges which the jurors are to consider and weigh, and I think to start listing them on one side or on the other side is to expect a prejudgment, and I don't think that's appropriate, and I don't think the law provides for it.

RT 19545.

The court thought that the jury they selected should represent the "community standard" and that only prospective jurors with "extreme" or "unusual" views about the death penalty should be eliminated. RT 18662, 18666, 18706, 19101, 19562, 19563. The court believed that most people, when told the true nature of this case, would put themselves in the "automatic death penalty" camp and that, if the voir dire were honestly informative, the defense would be able to eliminate many prospective jurors who otherwise would be eligible to serve. RT 18659, 18671, 19085, 19089. The court believed that Mr. Solomon did not have a right to a jury that was any more open minded about the death penalty than a jury selected to sit in judgment of a defendant who had only killed one person or had no

prior history of violence. RT 18663-64, 19101, 19153.[121] The court believed that if prospective jurors expressed their general "neutrality" regarding the death penalty during voir dire and then, on hearing the prosecution's evidence, became "automatic death penalty" votes, that was constitutional. RT 19150, 19563.

The court believed that it was primarily "supposed to be determining death qualification in the abstract." RT 18721. The court recognized that the case law "allows some consideration of the particular case" but believed "that consideration is limited to the general nature of the charges." RT 19545.[122] The court thought that this Court [California Supreme Court] would be "making a big mistake" if it allowed more fact-specific voir dire than that. RT 19100. The court's position was that, since the bias of prospective jurors in non-capital cases is routinely explored without giving them a preview of the facts, there was no reason to give any greater preview to prospective jurors in capital cases. RT 19114-18, 19563-64.

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[121] At the point the court actually announced its ruling, the prosecutor said he thought it was "fine". RT 19546. Earlier, however, in addition to the statements noted in section C.1, *ante,* the prosecutor disagreed with the court's one-jury-fits-all notion. The prosecutor said he thought that, given how fact-specific people's biases are, jury selection had to be case-sensitive. RT 18631-18632.

[122] The fact that three of Mr. Solomon's prior assaults were pled in the information, however, a fact known to the court -- RT 19091-19092 -- did not move the court to allow any of that history to be revealed to the prospective jurors.

Defense counsel took strong issue with the ruling. The defense was not going to ask prospective jurors to prejudge the evidence – i.e., predict how they would vote. RT 19084. The inquiry rather, would focus on the prospective juror's ability to keep an open mind: Once she heard the evidence in aggravation, would her mind be made up such that she would not consider and weigh the mitigating evidence that would follow? RT 19089, 19091, 19111, 19124, 19561-19562.

The court was unmoved: "I'm satisfied that my approach is the appropriate one in this case." RT 19562.

3. The Voir Dire

In his opening remarks to the venire, Judge Mering informed the panels that the first jury had convicted Mr. Solomon of murdering six women and sexually assaulting two others in 1986 and 1987. RT 19351-52, 19445-46. This information was repeated in the questionnaire the prospective jurors filled out the same day. See, e.g., 21 ACT 6164. Defense counsel was allowed to ask on voir dire whether those facts would cause the would-be juror to automatically vote for death. See, e.g., RT 19804.

The prospective jurors were told nothing, however, about the condition in which the bodies were found.

Nor were they told anything about Mr. Solomon's criminal history.[123]

To the contrary, the court read the prospective jurors the list of statutory factors. This included reference to "the presence *or the absence* of [violent] criminal activity by the defendant" and "the presence *or the absence* of any prior felony conviction". RT 19367, 19462-63.

The court's reference to the "absence" of a prior criminal history became a problem during voir dire. The court began the individual sessions with a short overview. When prospective juror Mc. came in, the court deviated from the script it had been following. In reviewing the concepts of aggravation and mitigation, the court said: "The People can present ... aggravating evidence, if they have that, as to any things the defendant may have done in the past that are violent or significantly criminal conduct. On the other side of the coin, the defense is entitled to present mitigating

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[123] In the section of the Questionnaire entitled, "Publicity", the court rewrote Q. 31B so that it asked: "Have you read, seen, or heard reports whether Morris Solomon had a prior criminal record or had served time in state prison?" See, e.g., 21 ACT 6164. Judge Mering stated several times that he had deliberately worded the question to elicit what prospective jurors knew about the case without telling them that in fact Mr. Solomon had a criminal record or had served time in prison. See RT 18689-90, 19133, 19136-37. None of the seated jurors indicated they had any knowledge of Mr. Solomon's criminal history. ACT 6164 (Fr.), 6252 (Haw.), 6283 (Hay.), 6376 (J.), 6650 (M.), 7011 (Sm.), 7102 (St.), 7127 (Te.), 7158 (Tr.), 7339 (Y),7474 (B.), 7760 (Fu.).

evidence.... *They can present the absence of certain violence if that's the case."* RT 19876.

In his own questions to Mr. Mc., defense counsel attempted to correct the misimpression left by the court's statement. He suggested that the prosecutor would in fact be presenting evidence of Mr. Solomon's prior convictions and criminal conduct. RT 19879.[124] The court stopped the examination. In front of Mr. Mc. (who did not sit on the jury), the court reiterated its view that the purpose of the voir dire was to give prospective jurors the general framework of aggravation and mitigation and *not* the specifics. RT 19879-81. The court concluded:

> We want to find out if a juror is ... open minded and is willing to follow these *general* rules or whether that juror has ... an attitude that would commit him basically to take one position or the other *regardless of what type of evidence is presented.*"

RT 19881.

Shortly thereafter, defense counsel objected to the way the court had begun the session with Mr. Mc. – namely, by reciting various aggravating and mitigating factors as set forth in Penal Code section 190.3 and saying the parties could produce evidence falling into the enumerated categories.

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[124] The court later agreed that this was the only time that either defense attorney had not abided by the court's restrictions regarding voir dire. 46 RT 19924.

The problem was that a number of the mitigating factors – such as the *absence* of prior convictions and the *absence* of prior acts of violence – were factors that the defense would not be presenting evidence of. The reference to such factors set up a false standard that the defense would not be able to meet. In addition, jurors were being asked to declare their open mindedness to evidence they would not be hearing. 46 RT 19915-19925.

The court agreed not to refer to the most obvious inapplicable mitigating factors, such as "whether or not the victims ... consented to the homicidal acts....". RT 19927. With respect to the factors relevant here, however, the court continued to take a strict line:

> I do intend to refer to the general principles in which both sides can present evidence of the presence or absence of serious criminal activity in the past of the defendant. I don't think that is misleading....

46 RT 19927.

The court thereafter proceeded to begin each individual session with a reference to Mr. Solomon's opportunity to present the jury with evidence that he did *not* have a history of criminal conduct or convictions prior to 1986-1987.

The court made such statements to *nine* of the twelve individuals who ultimately sat on the jury.

To Juror Mo., for instance, the court said: "[I]f he does have a record for violence in the past, you would be made known of that. *If does not, that would be affirmatively presented to you.* If he has a prior felony conviction, you would be informed of that and could consider it *or the absence of any such conviction.*" 48 RT 20757-58.

The court made similar statements during the individual sessions of the eight other final jurors.[125]

Finally, when defense counsel was questioning one of those final-jurors-to-be -- Mr. J. – counsel made reference to the fact that Mr. Solomon had "been convicted of sexually assaulting … women who are still alive." This accurately described Mr. Solomon's convictions on counts 3-6 and 11 in this case and did not violate the restrictions placed on the voir dire. The court, however, interrupted:

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[125] To them, the court said Mr. Solomon could show: the "absence of any prior violent conduct" [RT 19839; Juror Tr.]; the "absence of … significant criminal activity … before these incidences" [RT 20054; Juror Y.]; the "absence of criminal history or prior violence … preceding these offenses" [RT 20067; Juror Te.]; the "absence in the past of particularly violent or serious criminal activity" [RT 20090; Juror Fu.]; the "absence of serious criminal history" [RT 20172; Juror Haw.]; the "absence of … serious criminal activity before these events" [RT 20318-19; Juror J.]; "the absence of … a history of criminal violence … or … any prior felony convictions" [RT 20645; Juror Hay.]; and "he does not have … any history of violence or … felony criminal conduct" [RT 20889; Juror B.]. The other three jurors were voir dired before the court started referring to the specific statutory factors. See RT 19798 [Juror Sm.]; RT 19577 [Juror Fr.]; RT 19852 [Juror St.].

Court: Two … women, right…? I don't want the juror to assume that there's twenty.

Counsel: Well, there aren't twenty but there's more than two.

Court: He's convicted of assaulting two … women.

48 RT 20335.

In fact, counting the convictions from the 1969-1976 assaults, Mr. Solomon had been convicted of assaulting *five* women. None of the prospective jurors – including those ultimately seated – was given that information.

D. The Rulings Violated Due Process

The trial judge is given considerable discretion in deciding how specific death-qualification will be. *People v. Cash*, 28 Cal.4th at 722. Such "discretion … [is] subject to the essential demands of fairness," however. *Morgan v. Illinois,* 504 U.S. at 730. A restriction meets the requirement of "fairness" only when it serves the defendant's overriding "due process right to an impartial jury". *Cash*, at 723.

Discretion, furthermore, is not lawfully exercised if based on a "misconception by the trial court as to the legal basis for its action." *In re Carmaleta B.*, 21 Cal.3d 482, 496 (1978). Accord, *People v. Lara*, 86 Cal.App.4th 139, 165 (2001).

The restrictions imposed by the trial court in this case rested on conceptions and assumptions that have been discredited. They were fundamentally unfair and subverted the goal of selecting an impartial jury.

Appellant will first discuss the misconceptions that influenced the court's ruling. He will then discuss the two specific restrictions individually and show why, whether considered alone or cumulatively, they were unfair, violated due process, and require reversal.

1. The Trial Court's Restrictive Rulings Rested on Fundamental Misconceptions Regarding the Function of Voir Dire, the Meaning of Impartiality, and the Strength of Appellant's Case in Mitigation

The court's ruling rested on its belief that the jury in a death penalty case is meant to be a "cross section of the community ... expressing a community standard." RT 18666. In the court's view, the same jury, in essence, should sit in judgment in every capital case, and give consistent expression to the community's judgment regarding which crimes deserve the ultimate sanction and which perpetrators deserve to die. RT 18663-18664, 18666. See RT 19154 ["Every jury should come somewhere near representing the community's values"]. In order for that to happen, the court believed, only prospective jurors with "extreme" or "unusual" or "fanatic" views about the death penalty should be eliminated and all persons holding "mainstream ... views" -- the "middle 70%" – the "middle

road, ordinary jurors" – "moderate minded jurors" -- "reasonable thinking jurors" – should be allowed to serve. RT 18626, 18662, 18666, 18706, 18709, 19076, 19085, 19101, 19152, 19562, 19563.

The problem, as Judge Mering saw it, was that a great many such "mainstream" venirepersons, once told the basic facts of this case, would identify themselves as ADP – i.e., as someone who would, under the circumstances, automatically vote for the death penalty -- and thus be subject to a challenge for cause. See RT 18659, 18666, 18671, 18706, 18708, 19076, 19085, 19089. See also RT 19558-59. That was a problem because, as the court understood, a defendant is entitled to 12 impartial jurors, *Morgan v. Illinois,* 504 U.S. at 729, and a juror who explicitly declared that he or she could not be open minded given the facts of the case had to be excused. See, e.g., RT 20118-19, 20249 [excusing such jurors].

The restrictions imposed by the court resolved this dilemma in simple fashion: prospective jurors would be kept ignorant of some of the key aggravating facts that could impair their open mindedness. If they did not know that they would not be open minded once trial got underway, they would not be likely to express an opinion during jury selection that would get them excused for cause.

This solution, of course, meant that case-specific ADP'ers could make it onto the jury. In the court's view, that was how the system was supposed to work: if mainstream jurors are only ADP because of the

heinousness of the crimes that were committed, they *should* be on the jury. See, e.g., RT 18663-64, 18666, 19101, 19153. The alternative, the court thought, would be a jury composed of "closet opponents" of the death penalty. RT 18708.

In the court's view, the law was satisfied as long as the would-be jurors expressed their general "neutrality" regarding the death penalty during voir dire and thus showed they were impartial "in the abstract." RT 18721. See RT 19923. If, on hearing the prosecution's evidence, they determined that only death would do, closed their minds to the mitigating evidence thereafter presented by the defense, and failed to seriously weigh mitigation against aggravation, that was constitutionally acceptable. RT 19150, 19563.

The law is to the contrary. A jury selected pursuant to the principles enunciated by the trial court is "a tribunal organized to return a verdict of death." *Morgan v. Illinois,* 504 U.S. 719, 728-729 (1992), quoting *Witherspoon v. Illinois,* 391 U.S. at 523. Such a jury is not impartial within the meaning of the Sixth and Fourteenth Amendments. An impartial jury is impartial "in the case before" it. *People v. Cash,* 28 Cal.4th at 720.

Influencing the court's view as to what would constitute appropriate voir dire was the first jury's failure to return a penalty verdict. Judge Mering was of the opinion that "the questioning that occurred in the last trial" – questioning that disclosed some of the aggravating factors to

prospective jurors -- was "inappropriate", and that "such questions ... ha[d] the result of ... excluding jurors" – "a lot of jurors" – "who otherwise would [have] be[en] appropriate...." RT 19544. Judge Mering estimated that "we got rid of seventy percent of the people" because of the fact-specific questions and that it should only be "a handful" that get excluded. RT 19551.

The court's reading of the first-trial record differed considerably from the prosecutor's. He told Judge Mering twice that his recollection was that maybe 10-16% of the prospective jurors in the first trial venire were excused because of their ADP views. He also said that almost as many people -- another 10% anyway --were excused because of their feelings *against* the death penalty. See RT 18583, 19200.[126]

The court's misconstruction of the first-trial process reflected at least three additional misconceptions that led the court to restrict voir dire in the way that it did.

First, Judge Mering repeatedly stated that giving prospective jurors an idea what the evidence would be and eliciting their response to it would be the equivalent of asking them to prejudge the evidence. RT 18624, 18634, 18660, 19089, 19091, 19111, 19545, 19552, 19564, 19927. The

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[126] Many of those excused, moreover, were excused by stipulation of the parties and with Judge Virga's approval based on the attitudes revealed in their questionnaires. See, e.g., RT 8958-62, 9172, 9320-24, 9435, 9525-27, 9597-98, 9866-9895, 10190-91, 10237-43, 10442-45.

court was misconceiving the function of the voir dire. As counsel emphasized, the point was not to find out how prospective jurors would vote at the end of the case but whether they could get to the end of the case before making up their minds. RT 18672, 19084-85, 19089, 19091, 19111-12, 19161, 19561-62. Impartiality within the meaning of due process is open mindedness – the ability to hear the evidence on both sides, to seriously weigh one against the other, and to decide the appropriate penalty only after the weighing is completed – the ability, in short, to follow the court's instructions regarding how he or she is to determine the appropriate penalty. *People v. Cash,* 28 Cal.4th at 720-721; *Morgan v. Illinois,* 504 U.S. at 729-730. Judge Mering could have used his discretion to ensure that counsel's voir dire was used to ferret out closed mindedness and not to demand prejudgment.[127]

Second, Judge Mering believed that, if defense counsel are allowed to give prospective jurors a fair understanding of the facts of a case, then the worst offenders – he used Hitler as an example – would have the best chance of avoiding a death sentence, because their juries would be top heavy with "closet [death penalty] opponents". RT 18626, 19101, 19153, 19171.

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[127] A typical fact-specific voir dire by defense counsel of a first trial juror-to-be (Juror Ha.) can be found at 10 RT 8518-19. Under the watchful eye of Judge Virga – who did not tolerate compelling prejudgments from jurors – the voir dire was direct, balanced, and appropriate.

If the focus of the voir dire is open mindedness, however, there is no reason there would be distortion in the range of either the viewpoints among the seated jurors or the verdicts they returned. Open mindedness in the sense required by due process is an open mindedness with respect to process, not result. While it undoubtedly would be harder to *find* 12 truly open minded individuals to sit on Hitler's jury than it would be in the ordinary case, once found, there is no reason to think that, in the absence of extraordinarily compelling mitigation, that jury would be inclined to do anything but return a verdict of death.[128]

Finally, it appears that Judge Mering's own bias influenced both his analysis of the mistrial and the restrictions he placed on the retrial voir dire. He made quite clear that he believed that the vast majority of mainstream venirepersons, once told the basic facts of this case, would feel death was the only appropriate penalty. See, e.g., RT 18659, 18666, 18671, 18706, 18708, 19085, 19089, 19545. See also RT 19558-59. What the court failed to appreciate was the power of the case in mitigation. Defense counsel summarized the evidence the defense had presented at the first trial, RT

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[128] While some individuals who come to court heavily favoring the death penalty are pulled into the ADP category on exposure to very aggravated facts, that is balanced by the fact that individuals who come to court strongly disfavoring the death penalty are pulled toward that vote by the same very aggravated facts.

18636-42, and also informed the court that the first-trial jurors had told him that it had been the case in mitigation that had led to the impasse. RT 19077.[129] The court apparently did not believe this at the time. Thus one finds Judge Mering noting on the record *after* the retrial -- after he had heard the evidence directly -- how "*surprised* and impressed" he had been "with the power of the [mitigating] evidence [the defense] presented" in the penalty retrial. 68 RT 26744.

At the time he made his voir dire rulings, by contrast, the court viewed this case as so beyond mitigation that he could not comprehend how the first penalty phase had ended in a mistrial – except as the product of a voir dire that eliminated too many mainstream jurors. RT 18708, 19089, 19545, 19923. This explains the court's hypervigilant interference with defense counsel's voir dire of Juror J. See RT 20335 and §C.3, *ante.* The judge was determined that no prospective juror be given even one more accurate detail regarding the case than the court had authorized, because that could lure an abstractly impartial prospective juror into revealing his case-specific ADP orientation and being excluded from service. Rather than

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[129] Counsel said that jurors had spoken with him in the jury room after the mistrial and told him how moved they were by the evidence in mitigation, that five of them had voted for life on the first ballot, that all the jurors had a difficult time coming to a decision, and that even those who voted for death were relieved when the mistrial was declared. RT 19077.

take that risk, the court chose to effectively *misinform* the juror as to the facts. RT 20318-19, 20335.

The misconceptions on which the court was operating led it to forge the two restrictions at issue here. Appellant now discusses each in turn.

2. The Restrictions Prohibited the Defense From Probing Prospective Jurors' Attitudes Regarding Facts That Could Have Caused Some of Them to Vote for Death Regardless of the Strength of the Mitigating Circumstances

As established in *Cash,* impartiality – open mindedness – is required "in the [actual] case before the juror". 28 Cal.4th at 720. Thus a defendant must be "permitted to probe prospective jurors' attitudes as to" any "general fact or circumstance ... present in the case that could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances...." *Id.* at 721.[130]

In this case, two categories of fact are at issue: 1) Mr. Solomon's commission of sadistic sexual assaults in 1969-1976, and the failed incarcerations that followed; and 2) the inflammatory facts relating to the condition in which the homicide victims were found.

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[130] "The broad inquiry in each case must be ... whether under all of the circumstances presented there was a constitutionally significant likelihood that, absent questioning" about a "particular fact or circumstance", a biased juror would make it onto the jury. *Turner v. Murray*, 476 U.S. at 33.

As will be seen, each kind of fact "could [have] cause[d] some jurors invariably to vote for … death …."

For the sake of clarity, appellant will begin by discussing each category separately.

(a) The court failed to apprise prospective jurors of appellant's prior sexual assaults and incarcerations and compounded the error by misrepresenting that appellant would have the opportunity to show that he had no such criminal history

The case law unequivocally supports the proposition that appellant's prior criminal history was "a general fact or circumstance" capable of turning a juror into an automatic vote for death.

Exhibit 'A' is this court's holding in *People v. Cash.* The court held that Cash's "guilt of a prior murder" was precisely the kind of "general fact or circumstance" that could lead a juror to make up her mind about penalty as soon as that fact was made known to her. In order to protect his right to an impartial jury, Cash was "entitled to ask prospective jurors" how hearing such a fact might impact their ability "to follow an instruction directing them to determine penalty [only] *after* considering aggravating and mitigating evidence." *Id.* at 720-721; emphasis added.

Similarly, the court has held that the *absence* of criminal history is a fact or circumstance that can prejudice the *prosecution*. In *People v. Livaditis,* 2 Cal.4th 759 (1992), this court upheld the dismissal for cause of a prospective juror who stated – in response to questions by the prosecutor -- that, while she might be able to vote to kill an older defendant who had previously committed murder, she could not do so in the actual case since neither of those elements were present. In *Cash,* the court articulated what *Livaditis* had implied: namely, that a "prosecutor may properly inquire whether a prospective juror could impose the death penalty on a defendant ... who lacked a prior murder conviction...." *Cash,* 28 Cal.4th at 721.

If criminal history is a legitimate subject for prosecutorial voir dire, *a fortiori* it is a legitimate subject for defense voir dire – since the defendant's right is rooted in the Due Process Clause – *Morgan v. Illinois,* 504 U.S. at 728-729 – and especially in a capital case, where the defendant is entitled to "a correspondingly greater degree of" leeway in voir dire to protect his right to seat impartial jurors. *Turner v. Murray,* 476 U.S. at 35.

The defendant's criminal history, furthermore, does not have to involve another murder to be prejudicial and a legitimate subject for voir dire. *Cash* made this clear in its discussion of *People v. Kirkpatrick,* 7 Cal.4th 998 (1994). Kirkpatrick was charged with the execution-style killings of a teenage employee and a former supervisor. *Cash* interpreted *Kirkpatrick* as holding that Kirkpatrick had a right to ascertain on voir dire

whether prospective jurors would automatically vote for death once they heard that the "prosecution's case in aggravation included two uncharged assaults by the defendant on teenage boys, and an incident in which the defendant had threatened to harm the daughter and the pet dogs of a woman with whom he had a dispute over a calculator." *People v. Cash,* 28 Cal.4th at 720-721. *See also, People v. Ochoa*, 26 Cal.4th 398, 429 (2001) [court approves excusal of pro-life juror, noting, *inter alia*, that the trial judge "followed up the prosecutor's questions by asking whether Alicia B. would consider voting for death if she heard about defendant's prior violent misconduct during the penalty phase"].

Cash and *Kirkpatrick* are the penalty-phase corollaries of this court's decision more than 70 years ago in *People v. Ranney,* 213 Cal. 70 (1931). In *Ranney*, the defendant was charged with 21 counts of grand theft and two prior felony convictions (offense not specified). Jurors would be instructed they could consider the prior convictions for impeachment but not as evidence of guilt. The trial court refused to let the defense voir dire prospective jurors regarding their ability to observe that distinction.

This court found constitutional error. The defendant had the right to

> select a jury which would not be biased by ... [defendant's felonious history] and regard it as evidence in the case from which they might find or presume his guilt of the charges upon which he was being

tried. He had a right to inquire of the panel fully as to the existence of any such bias to enable him to secure his constitutional right of trial before a legally qualified jury.

Id. at 75-76.[131]

Cash, Kirkpatrick, Ranney, and progeny are merely common-sense responses to the indisputable fact that introducing evidence that the defendant has a criminal history "often poses a grave risk of prejudice". *People v. Calderon*, 9 Cal.4th 69, 75 (1994). *Accord, People v. Sam,* 71 Cal.2d 194, 206 (1969) [noting "the substantial prejudicial effect inherent in evidence of prior offenses"]. As reflected in *Cash*, furthermore, the prejudicial danger, if anything, is greater in a penalty proceeding than a guilt proceeding. *Cf. Turner v. Murray*, 476 U.S. at 35 [holding that voir dire on racial attitudes is more necessary in capital than non-capital cases: "Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for ... prejudice to operate but remain undetected"].[132]

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[131] *See also, People v. Chapman,* 15 Cal.4th 136 (1993) (Merrill, J., with Chin and Werdegar, JJ., concurring): "The barring of any questions concerning possible prejudice or bias toward Chapman due to his prior felony conviction resulted in a failure to test the jury for impartiality and ... [violated] his Sixth Amendment right to an impartial jury." *Id.* at 141.

[132] A recent study found that "70% of capital jurors surveyed in eleven states felt that death is the only acceptable sentence for a person who has previously been convicted of another murder." Blume et al., *Symposium:*

The case law, in short, unambiguously supports the conclusion that a capital defendant has a constitutionally cognizable right to inquire on voir dire whether a prospective juror would effectively make up his mind about penalty on learning of the defendant's criminal history.

People v. Burgener, 29 Cal.4th 833 (2003), is not to the contrary. In *Burgener,* the trial court "sustained the People's objections when defense counsel asked ... whether a prospective juror could continue to be impartial after hearing a list of defendant's prior crimes...." This court affirmed the ruling because the question – which is not set forth in the opinion -- "invited jurors to prejudge the case". *Id.* at 865. It cannot be that the latter holding represents an abrupt retreat from the holding in *Cash* – issued only six months earlier – that the fact that a defendant has a significant criminal history is capable of turning a juror into an ADP vote and is a proper subject for voir dire. The *Burgener* holding, rather, turns on the fact that defense counsel tried to read the prospective juror "a *list* of defendant's prior crimes" and sought to have him or her "*prejudge* the case".

Neither is true in this case. Here, counsel explicitly told Judge Mering that the defense would be satisfied with jurors knowing generally

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Probing "Life Qualification" Through Expanded Voir Dire, 29 Hofstra Law Review 1209, 1223 (2001) [citing research documented in Blume, et al., *Lessons from the Capital Jury Project*, Chapter 5 in *The Modern Machinery of Death: The Future of Capital Punishment,* Duke University Press (2002).

that Mr. Solomon was "someone who has a history of sexually assaultive conduct ... and gone to prison for it", RT 18669, and was *not* asking that jurors be provided with any of the details. RT 18668. Further, as set out in sections B.1 and C.1, *ante,* counsel also made clear – repeatedly, if not ad nauseam -- that the point of bringing the latter information to jurors' attentions was to probe their ability to "keep an open mind and ... listen to all the evidence prior to making a decision" and *not* to secure some kind of prejudgment. RT 19152. See also 18672, 19084-85, 19089, 19091, 19111-12, 19161, 19561-62.

Also distinguishing this case from *Burgener* – rather dramatically -- is the fact that, instead of objecting to defense counsel's proposed criminal-history voir dire, the prosecutor in this case reiterated again and again his strong *support* for counsel's request. See §B.1, *ante*, and RT 18592-93, 18631, 18656, 18678, 18715. The prosecutor well understood just how "significant [a] part" Mr. Solomon's criminal history "was going to play ... in the penalty trial...." RT 18592.

In the final analysis, it is that fact that makes this case so similar to *Cash.* The bottom line is that – as demonstrated in the first penalty phase – appellant's criminal history played a critical role in the prosecution's case for death and was an aggravating factor capable of turning a potentially impartial juror into an ADP juror. The record leaves no doubt on this score.

Some potential jurors turned into automatic death votes once they learned that Mr. Solomon had killed six women in one year. Those individuals were excused for cause. See, e.g., RT 19749-50, 19755-57, 19814-15, 19835-36, 19872, 20051, 20052, 20120, 20168-70, 20249, 20273, 20280, 20352, 20359, 20367, *et al.* It is reasonable to think that those who remained in the venire were open to the possibility that, since the violence had occurred in a relatively short period of time, when Mr. Solomon was at the relatively advanced age of 42, the outburst was aberrational and susceptible of some sort of mitigating explanation.

For some of those jurors, that open mindedness would have lasted no longer than hearing – in the prosecutor's opening statement – that, over the 17 years before 1986, Mr. Solomon had brutally attacked five women and suffered seven felony convictions before his descent into serial murder. See RT 21574-86 [retrial opening statement].

The prosecutor had demonstrated at the first penalty trial just how crucial he believed the latter evidence was to the case for death.[133]

All of the aggravating evidence presented in that first penalty phase pertained to Mr. Solomon's criminal history. The prosecution called only five witnesses. Each woman testified to having been sexually assaulted by

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[133] Appellant focuses on the first trial because, at the time Judge Mering imposed the restrictions being challenged here, the prosecutor's emphasis on the aggravating factors that the defense wanted to voir dire on at the retrial was not a matter of speculation.

Mr. Solomon between 1969 and 1976. Each account contained at least an element of sadism and several were horrific.[134] In addition, the prosecution presented documentary evidence of the five felony convictions that resulted from the sexual assaults, and elicited or relied on evidence regarding Mr. Solomon's terms at Atascadero and San Quentin as a result of those assaults. (There was also documentary evidence of a 3-count grand theft conviction in 1984, which was followed by a prison term.) See 38 RT 16753-16811, 17028-17035, 17261.

The latter history – particularly the sexual assaults -- then played a central role in the argument for death that the prosecutor made to the first jury. He devoted the first half hour of his closing argument – close to 15% of his entire argument -- to the details of those early offenses and the convictions and punishments that resulted, and he came back to those subjects repeatedly. RT 17215-26, 17242-43, 17294-95, 17298. That evidence enabled him to argue that Mr. Solomon had been a "sexual sadist" (RT 17245) his entire adult life – he used the label "diabolical monster" in his post-retrial argument, RT 26379 -- and that the 1986-1987 offenses were not an aberrant by-product of the addiction to cocaine that Mr. Solomon developed in 1986 at the age of 42: "Sheila Jacox and Marie

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[134] See Statement of Facts, *ante,* section II, Penalty Phase Retrial, for a detailed description of the assaults.

Apodaca had barely been born when Morris Solomon cut Miss Kaufman's leg … in Oakland [in 1969]. This didn't start the day before yesterday. This has been going on for almost twenty years." RT 17226. The evidence enabled him to argue that the only thing that Mr. Solomon had learned from his early crimes and punishments was how to be a better criminal: to avoid incarceration, "you kill the one and only witness … and … hide the victims so they can't find them." RT 17224. He further suggested that, by spurning his earlier opportunities for rehabilitation, Mr. Solomon had shown his incapacity for remorse and had forfeited any claim he might have had on the juror's capacity for mercy. RT 17223, 17260-61, 17286-87, 17290, 17291 ["He had every opportunity to turn his life around"]. The final sentence of the closing argument was: "[W]hen you look at what this man's done for twenty years, the only appropriate verdict is the death penalty." RT 17301.

The prosecutor explicitly told Judge Mering that the evidence of the 1969-1976 assaults and the ensuing incarceration was "going to play a significant part in the penalty trial as it did in the last trial…." RT 18592. He also took the unusual step of supporting the defense request that prospective jurors be apprised of the evidence: "Certainly this is information that needs to be imparted." RT 18592-3.[135]

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[135] The prosecutor knew whereof he spoke. As predicted, Mr. Solomon's criminal history *did* play as "significant [a] part in the [second] penalty trial

Seeing "how important" the aggravating factors "were to the People's case, ... [t]here is no reason why [this Court] should treat this evidence as any less crucial than the prosecutor -- *and so presumably the jury* -- treated it." *People v. Louis*, 42 Cal.3d 969, 995 (1987); emphasis added. *Accord, People v. Cruz*, 61 Cal.2d 861, 868 (1964); *Bram v. United States*, 168 U.S. 532, 541 (1897).

In light of the prosecutor's view of the significance of the evidence – and the specific inferences – if not inflammatory conclusions – he drew from it – it is reasonable to think that some retrial jurors – once they learned of Mr. Solomon's criminal history, would conclude that, no matter what kind of evidence the defense presented, this was someone who had to pay with his life.

It was not merely defense counsel and the prosecutor who viewed the evidence as critical to the case for death, furthermore. Judge Mering thought so, too.

This is made clear by the reasons the court gave for denying the defense motion for modification under Penal Code section 190.4. Those reasons are set out at RT 26751-56. The court's exposition is presented by the reporter in 19 paragraphs (not counting the introductory and concluding

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as it did in the last trial...." See, e.g., RT 21574-86 [retrial opening statement]; RT 26023-34, 26043, 26047, 26051-52, 26106, 26169, 26180, 26240-42, 26245, 26270-77, 26300-01, 26378 [retrial closing argument].

paragraphs). Of those 19 paragraphs, *nine (9)* of them – ¶¶ 2-5 and 10-14 -- dealt directly, specifically, and exclusively with the 1969-1976 offenses and the failed incarceration that followed. *Five (5)* other paragraphs – ¶¶ 1, 6, 16, 18, and 19 -- made more general references that include the earlier offenses. More than 75% of the court's remarks, in other words, focused on precisely the factor in aggravation that the court would not allow the defense to broach with the prospective jurors.

These excerpts convey the impact the evidence had on the court:

[¶1] … And while there is mitigation in this case, it is difficult … to imagine a more aggravated crime, or series of crimes, than these that Morris Solomon has inflicted on … womankind.

[¶2] For close to twenty years, he has been a violent vicious rapist. There have been convictions, I believe seven felonies, not all for violence, but most of them before these crimes occurred over a span of years. He's been to prison. He's been at Atascadero for treatment….

[¶3] [W]e tried to solve the problem at Atascadero with the treatment program. The defendant … chose not to have any benefit from the program.

[¶4] So society did make certainly that attempt to correct and give Mr. Solomon an opportunity to deal with his problem…

[¶5] Again he reoffends and he goes to prison. And none of these experiences profit him....

[¶6] ... He returned to his criminality and his violent assaults on women.

[¶10] We have the interesting earlier history before the crimes in Sacramento in which ... two women were taken to his home where they were subjected to this kind of sexual brutality, being beaten, sexually abused, urinated upon, variety of such perverse expressions of rage.

[¶11] ... [A]fter an evening or a nighttime of sexual abuse, they were not released. Their ... bonds were tightened and secured and taped and they were left in ... his place while he went to work....

[¶12] These two cases from Oakland.... One of them had to burn ... their bindings from their hands on a stove, but these two women were able to escape.

[¶13] ... [T]hat is a bizarre and strange rapist who would use the woman, abuse the woman, and yet have ... the audacity to then keep her. And we can only wonder ... what would be her ultimate fate.

[¶14] ... [T]hat is not your garden variety rapist.... [T]hat the system didn't recognize and see in this defendant a form of ... depravity and viciousness and respond to it more effectively is, of

course, tragic. The consequences are around us with the six deceased young women in Sacramento....

[16] So we have a ... terrifying pattern, and we have ... these extremely gross, outrageous crimes against these young women....

RT 26752-55.

In the 19 paragraphs that comprised Judge Mering's evaluation of the evidence, he devoted exactly one and a half *sentences* to the evidence in mitigation. It is no exaggeration, therefore, to say that the evidence of Mr. Solomon's criminal history and prior incarceration essentially turned the *court* into an automatic vote for death.

A fortiori, that evidence "could [have] cause[d] some *jurors* invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances...." *People v. Cash*, 28 Cal.4th at 721; emphasis added.

Like the defendants in *Cash* and *Kirkpatrick*, therefore – as well as the prosecutor in *Livaditis* -- Mr. Solomon was "entitled to ask prospective jurors" how hearing such evidence might impact their ability "to follow an instruction directing them to determine penalty [only] after considering aggravating and mitigating evidence." *Cash,* 28 Cal.4th at 720-721. The court's refusal to let Mr. Solomon make that inquiry failed to meet "the essential demands of fairness" and violated Mr. Solomon's rights to due

process and an impartial jury. *Morgan v. Illinois,* 504 U.S. at 728-730; *Cash*, 28 Cal.4th at 720-723.

The unfairness of the court's restrictions, furthermore, went beyond keeping Mr. Solomon's criminal history from the prospective jurors. As set out in detail in section C.3, *ante*, the court, over objection, told 9 of the 12 seated jurors in their individual sessions that, in mitigation, the defense would have the opportunity to show that Mr. Solomon did *not* have a criminal history. RT 19367, 19462-63, 19915-27, 19839, 20054, 20067, 20090, 20172, 20318-19, 20645, 20757-58, 20889.

That seriously compounded the constitutional error. Not only were the actual-jurors-to-be asked to predict their open mindedness based on ignorance of the criminal history facts they would soon hear; they were asked to make the prediction based on the *false* premise that there might be no such criminal history.

The court's rulings thus doubled the "risk that a juror who would automatically vote to impose the death penalty on a defendant who had previously committed [five sadistic sexual assaults] ... was empanelled and acted on those views...." The rulings "thereby violat[ed] defendant's due process right to an impartial jury." *People v. Cash,* 28 Cal.4th at 723.

(b) Failure to give prospective jurors any details regarding the manner in which the homicide victims were killed

As soon as the trial got underway – beginning with the prosecutor's opening statement – those unlucky enough to have made it through jury selection and onto the jury were exposed to the graphic and revolting details regarding the manner in which the homicide victims were killed and the condition in which they were found: some bound, some bound and gagged, most naked below the waist, most buried, and all decomposing, some to the point of non-recognition. The exposure was by word and photograph initially, and also by videotape once the testimony began. At the same time, jurors also saw and heard the evidence in support of the prosecutor's theory that, while decomposition had eroded the proof, the women had to have died by some form of asphyxiation. See, e.g., RT 21672-74, 21684-88 [opening statement descriptions of the condition in which the bodies of Sheila Jacox and Sharon Massey were found]; RT 24317-52, 24663-24701 [coroner's testimony re Jacox and Massey]; Exhs. 163-A, 168-A, 225, 298, 303, 304, 318, 319 (at ACT[Exhs.], pp. 470, 481, 602, 754, 764, 766, 794, 796) [photographs of the remains of Jacox and Massey distributed during opening statement and/or described by coroner].

A quick skim of the cited pages and exhibits will make clear that the prosecution's case in aggravation, which took five weeks to present, rested on gruesome detail the likes and volume of which most jurors had almost certainly never before encountered.

Defense counsel wanted to be able to give – or to have the court give – prospective jurors at least an inkling of the kind of detail they would be exposed to if they were selected to sit on the jury. As noted previously, in the first voir dire, the defense had been able to ask prospective jurors if they thought they could keep an open mind after hearing from the prosecutor that, after "binding ... [and] gagging" the murder victims, Mr. Solomon "killed them by suffocation or strangulation, tied them up, brutalized them before they were killed...." RT 8674. This was an extremely mild summary of what the jurors would actually be exposed to.

Mr. Solomon had a right to determine what effect the evidence would have on prospective jurors. As discussed in section B.1, *ante,* this court has "endorsed ... particularized death-qualifying voir dire in a variety of situations." In particular, the court has held that a "prosecutor may properly inquire whether" any of the following facts would cause a prospective juror to automatically reject the death penalty: 1) the defendant's culpability was predicated on felony-murder rather than premeditation and deliberation; 2) the defendant did not personally kill the victim; 3) the defendant was young at the time of the murder; 4) the defendant had not killed before; 5) the case being tried did not contain "extreme" facts; and 6) the defendant only committed one murder. *See People v. Cash,* 28 Cal.4th at 721, and cases cited there; *People v. Noguera,* 4 Cal.4th at 645-646; *People v. Mendoza*, 24 Cal.4th at 168 [approving

"prosecution's questions concerning circumstantial evidence ...; ... regarding rape being an assaultive or sexually motivated crime and whether a rape of an elderly victim by a young man established mental illness"].

If all of the latter are legitimate subjects for prosecutorial voir dire in a capital case, *a fortiori* Mr. Solomon – whose right to voir dire for bias was protected by the Due Process Clause – *Morgan v. Illinois,* 504 U.S. at 728-729 – and whose right to find and prevent biased jurors from being seated was "correspondingly greater" because this was a capital case -- *Turner v. Murray,* 476 U.S. at 35 – had a right to gain some insight into out how jurors would react when exposed to the graphic details concerning the manner of death and condition in which the homicide victims were found. The latter were "general fact[s] or circumstance[s] ... present in the case that could [have] cause[d] some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances...." *People v. Cash,* 28 Cal.4th at 721.[136]

Both the prosecutor and Judge Mering thought the evidence would have that effect. Both expressly believed that providing even the above-quoted summary (from RT 8674) to prospective jurors would turn

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[136] Jury studies have specifically found that being shown autopsy photos influences many jurors in capital cases to *prematurely* make up their minds to vote for death. *Cf.* Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-trial Experience, and Premature Decision Making,* 83 Cornell L.Rev 1476, 1497- 1499 (1999).

"moderate minded", "middle road, ordinary", "mainstream … citizens" into ADP votes. See, e.g., RT 19076, 19085, 19151-52, 19167-68, 19544. Judge Mering, furthermore, offered the opinion – with the prosecutor's implicit concurrence, RT 19546 -- that providing such details to the first-trial venirepersons had resulted in the loss of many otherwise qualified individuals from the venire. See, e.g., RT 19544, 19551.

The state is estopped from taking a contrary position now. The principle quoted above is applicable: "There is no reason why [this Court] should treat this evidence as any less crucial than the prosecutor -- *and so presumably the jury* -- treated it." *People v. Cruz*, 61 Cal.2d at 868 (1964); emphasis added. Accord, *Bram v. United States*, 168 U.S. at 541.

When denying the motion for modification, furthermore, Judge Mering devoted the central section of his comments (¶¶ 7-9) to the manner in which the victims died:

> [¶7] … One's vocabulary is inadequate to describe some of these crimes as we piece them together. One can only imagine the cruelty and the suffering that these individuals endured. I mean these women were tied up, bound and gagged – and I don't think you gag someone who's dead. They were tied up, bound and gagged, almost certainly still alive, having been sexually brutalized … in, I assume, virtually all of these cases since that's the pattern.

[¶8] And we don't know how long they got to suffer in that condition wondering when it would end, whether they would be released or whether they would die. And, of course, most the women died. They were murdered.

[¶9] [I]t's hard to imagine – short of some elaborate course of torture, … a more frightening and more difficult death experience than these women suffered as they lay there tied and bound after having been brutalized.

RT 26753-54.

Again, it is no exaggeration to suggest that the very facts that Judge Mering would not convey to the prospective jurors effectively turned *him* into an automatic vote for death.

They were facts, in short, that "could [have] cause[d] some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances…." *People v. Cash*, 28 Cal.4th at 721.

The prescribed course in a case with such facts is not to hide them from prospective jurors. In order to protect the defendant's right to an impartial jury, rather, he must be permitted "to ask prospective jurors" how hearing such facts might impact their ability "to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence." *Id.* at 720-721.

Here, too, the failure to allow Mr. Solomon to make that inquiry of jurors "created a risk that a juror who would automatically vote to impose the death penalty … was empanelled and acted on those views…." *Id.* at 723. The restriction, consequently -- whether viewed in isolation or in conjunction with the prohibition on telling prospective jurors about Mr. Solomon's criminal history -- "violat[ed] … defendant's due process right to an impartial jury." *Ibid.*

In *Cash,* the court indicated that there is a line beyond which prospective jurors can be told too much:

> Our decisions have explained that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. (See *People v. Jenkins,* (2000) 22 Cal.4th 900, 990-991… [not error to refuse to allow counsel to ask juror given "detailed account of the facts" in the case if she "would impose" death penalty].)

Cash at 721-722. *See also, People v. Burgener,* 29 Cal.4th at 865 [trial court could properly prohibit defense counsel from giving jurors "a rather

detailed account of some of the facts of the case" where the "questions invited jurors to prejudge the case"];[137] *People v. Mason,* 52 Cal.3d 909, 940 (1991) [same].

As discussed above, the details defense counsel proposed to give prospective jurors at the retrial – the same details provided to the first-trial jurors – were not "specific" compared to the mountain of actual gruesome detail that would be forthcoming from the prosecutor and his witnesses for the five weeks it would take to present the case for death. They were also not any more specific than those provided in the question that was agreed on by the parties and found proper by this court in *People v. Rich,* 45 Cal.3d 1036, 1104-1105 (1988): "If the facts in this case disclose that [defendant] is guilty of four separate murders and multiple rapes, including the murder of an eleven-year-old girl who was sexually abused and was killed by being thrown off a high bridge, would those facts trigger emotional responses in you that would make it hard to consider life imprisonment without possibility of parole, or would you under those circumstances vote for the death penalty?"[138]

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[137] In *Burgener,* the court also found that, despite the restriction, the defendant "had ample opportunity to ascertain the views of prospective jurors on robbery murder in general and in the circumstances of this case." 29 Cal.4th at 865.

[138] The level of specificity defense counsel was proposing was consistent with the rule that, to "facilitate the intelligent exercise of … challenges …

More importantly, Judge Virga, with defense counsel's cooperation – and with no objection from the prosecutor – demonstrated at the first trial that it was perfectly possible to conduct a proper death-qualification voir dire while providing prospective jurors with the very details that were hidden from the retrial jurors. See, e.g., 10 RT 8518-19. The secret lay in the court and counsel understanding that the goal of the process was not to secure prejudgment from the jurors but to ascertain who among them did not have the open mindedness – or, as the prosecutor suggested, the ability to compartmentalize, RT 19167 – that would be required if they were selected to sit on the jury. See, e.g., RT 19089, 19091, 19111, 19124, 19152, 19561-19562 [stated intent of defense counsel to focus on open mindedness].

In the final analysis, since the right to an impartial jury would be meaningless if it did not require impartiality "in the case before the juror" – *Cash* at 720 – voir dire must seek to ensure that, if seated, jurors will be able to follow the court's instruction to seriously weigh mitigation against aggravation before determining which penalty is the most appropriate. *Id.* at 721; *Morgan v. Illinois,* 504 U.S. at 729-730. In this case at least, no such assurance was possible without giving the prospective jurors some idea what they were going to be in for once the trial started. Where, as

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for cause, parties may inform prospective jurors of the general facts of the case...." *People v. Ochoa,* 26 Cal.4th at 431.

here, such detail can be provided without requiring prejudgment, it is constitutional error for a court to insist that the prospective jurors – and therefore the defendant – must remain in the dark. *Cash* at 721.

In *People v. Mason,* the court held that the trial court was within its rights to prohibit the defense from asking a question that included too much detail. In defending the restriction, the court made this statement – which was explicitly relied on by Judge Mering:

> Many persons whose general neutrality toward capital punishment qualifies them to sit as jurors might, if presented with the gruesome details of a multiple murder case, conclude that they would likely, if not automatically, vote for death.

52 Cal.3d at 940. See RT 19150.

The court cannot have meant that it would be proper to seat a juror who "would … *automatically* vote for death" once the actual "gruesome details of [the] multiple murder case" emerged at trial – i.e., would decide that the defendant had to be put to death without even knowing, much less considering, much less weighing, the mitigation that would be presented. Such a juror would "fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do" and thus fail to meet "the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment…." *Morgan v. Illinois,* 504 U.S. at 729.

In *Cash*, after all, it was the very fact that a certain kind of evidence could turn an otherwise eligible juror into an ADP vote that gave rise to the defendant's right to disclose that evidence to the prospective jurors (in general terms) and to ascertain by voir dire whether, in light of that evidence, they could still "follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence." *Cash*, 28 Cal.4th at 721.

The statement in *Mason* is thus unfortunate *dictum* that should be retracted – unless it meant something else. What the court may have been referring to -- rather than a prospective juror who *actually* would turn ADP once trial got underway – was how a distorted and manipulative voir dire – one that simply piles on the aggravating facts for the purpose of inducing an ADP statement – can turn a prospective juror who is impartial in *fact* into someone who *believes* he is ADP based on the one-sided question.

As demonstrated in the first trial in this case, Judge Mering easily could have ensured that that did not happen – without cutting off Mr. Solomon's right to ferret out *actual* ADPs – by establishing the proper context for the voir dire. That entailed making clear from the outset, as Judge Virga did, that there would be evidence in mitigation as well as aggravation and that a juror's duty was to refrain from making a decision about penalty until all the evidence was in and thoroughly considered and

weighed during deliberations.[139] Then, if defense counsel focused on reaction to aggravating facts – which the trial court still could have placed a reasonable limit on – or if the court took defense counsel up on his proposal that

> any time we mention aggravating factors, we would let the jurors know that there's another side, that there's mitigating factors … and then ask them if they can keep an open mind and … listen to all the evidence prior to making a decision -

RT 19152 - then prospective jurors would have understood that the aggravating evidence was going to be part of a larger two-sided presentation.[140] In *that* context, if a couple of key details – bonds, gags, nudity, asphyxiation -- were disclosed to a prospective juror and s/he "conclude[s] that [s/he] … would … automatically vote for death", then, as *Cash* holds, that individual could not, consistent with Due Process, sit on the jury.

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[139] See, e.g., RT 9470-9475 [court lets counsel voir dire only after explaining aggravation and mitigation and ascertaining that, when would-be-seated juror Q. said she would vote for death if Mr. Solomon were found "guilty to the highest degree on all the counts", this reflected confusion and did not mean she would not be open to any and all the mitigation the defense presented].

[140] See, e.g., RT 9481-82 [counsel asks the detailed question prohibited by J. Mering in the context established by J. Virga at RT 9470-75].

Even without focusing on the necessity for open mindedness, furthermore, the overviews Judge Mering gave prospective jurors – both in the group and individual sessions – left no doubt that there would be mitigating evidence as well as aggravating evidence. See, e.g., RT 19366-72 [group session], 20645-20648 [representative individual session]. Defense counsel could have given jurors a small slice of what the real aggravating circumstances were without open minded jurors jumping to the conclusion that there wouldn't be any significant mitigation. If allowed to give jurors that taste of what was to come, defense counsel would not have created ADPs – they would have discovered who they were. Instead, the court's unnecessary restrictions "created a risk" that one or more jurors" were seated "who ... automatically vote[d] to impose the death penalty on" Mr. Solomon as soon as they saw three photographs and heard about the bonds and gags and nudity and asphyxiation. *People v. Cash,* 28 Cal.4th at 723.

"[T]he risk that ... prejudice may have infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized." *Turner v. Murray*, 476 U.S. at 36. "[C]ertain inquiries must be made to effectuate constitutional protections." *Morgan v. Illinois*, 504 U.S. at 730. The restrictions imposed by Judge Mering "violat[ed] defendant's due process right to an impartial jury." *People v. Cash,* 28 Cal.4th at 723.

4. The restrictions also precluded the defense from identifying jurors who became ADP because of the combination *of appellant's criminal history and the manner in which the victims were killed*

To find error here, it is not necessary that the court definitively conclude *either* that Mr. Solomon's criminal history *or* that the manner in which the homicide victims were killed is a "fact or circumstance that could [have] cause[d] some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances." *People v. Cash,* 28 Cal.4th at 721. It is sufficient that the two in combination were capable of having that effect on a juror. Judge Mering's comments in denying the motion for modification – which relied almost exclusively on the number of victims, the manner in which they died, and the fact that "for close to twenty years, he has been a violent vicious rapist", RT 26752-55 – make clear that, even if no single factor was sufficient to convert a juror into an ADP vote, the combination of the three factors most assuredly had that kind of potency. The restrictions imposed by Judge Mering made "it impossible [for Mr. Solomon] … to determine … whether any … juror" would be so affected. *Cash* at 723. At the very least, therefore, the impact of the two restrictions taken together violat[ed Mr. Solomon]'s due process right to an impartial jury." *Ibid.*

E. The Errors Require Reversal

1. Cash analysis

The presence of one biased juror on the jury requires reversal. *People v. Cash,* 28 Cal.4th at 722. Thus, if a defendant can show that a biased juror was seated, the juror could not be unseated because the defense had exhausted its peremptory challenges, and the defense had expressed dissatisfaction with the jury as sworn, reversal is in order. *See, e.g., id.* at 723; *People v. Burgener,* 29 Cal.4th at 866.

That kind of showing is not possible, however, "[w]hen voir dire is inadequate". In that instance, "the defense is denied information upon which to intelligently exercise both its challenges for cause and its peremptory challenges. Because the exercise of peremptory challenges cannot remedy the harm caused by inadequate voir dire, we have never required, and do not now require, that counsel use all peremptory challenges to preserve for appeal issues regarding the adequacy of voir dire." *People v. Bolden,* 29 Cal.4th 515, 537-538 (2002).[141]

When the defendant is prohibited from finding out how jurors will respond to a central aggravating factor, moreover, the fact-deprived record

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[141] Defense counsel exercised seven peremptory challenges, RT 21447-53 – the same number exercised in *Cash. See People v. Cash,* S029460, RT 1235-1242. Counsel in this case also advised the court that they were not satisfied with the panel but felt it was the best they could do given the publicity and the pool they were forced to choose from. RT 21453-54.

"makes it impossible for" either the defendant or the reviewing court to "identify a particular biased juror". *People v. Cash,* 28 Cal.4th at 723. Because "the trial court's error … created a risk that a [biased] juror … was empanelled," the reviewing court is left with an unresolved "doubt" whether the defendant "was sentenced to death by a jury empanelled in compliance with the Fourteenth Amendment." The court has no choice but to "reverse defendant's judgment of death." *Ibid.*, quoting *Morgan v. Illinois,* 504 U.S. at 739.

That *per se* rule applies unless the record somehow affirmatively demonstrates a lack of prejudice. "[S]uch error may be deemed harmless," for instance, in the rare case where the restriction applied only to the sequestered voir dire and the defense was permitted 'to use the general voir dire to explore further the prospective jurors' responses to the facts and circumstances of the case'…. [Citation.]" *People v. Cash*, 28 Cal.4th at 722. The latter exception does not apply here since there was no general voir dire in this case.

Nor does "the record otherwise establish … that no … juror" developed a disqualifying bias once exposed to the actual facts of the case. *Cash* at 722.

With respect to the criminal history restriction, the record simply contains no information regarding how the seated jurors would respond when they heard about Mr. Solomon's sexual assaults and failed

incarcerations at Atascadero and San Quentin. Here, as in *Cash,* the record is devoid of relevant information because Judge Mering removed the one relevant question from the questionnaire and "because [Mr. Solomon] ... was denied an adequate voir dire" on that subject. *People v. Cash,* 28 Cal.4th at 723.

"[T]he trial court's error [thus] makes it impossible ... to determine ... whether any ... juror ... held the disqualifying view that the death penalty should be imposed invariably and automatically on any defendant who had" a criminal history like Mr. Solomon's, then went out and "committed [six] ... murders". *People v. Cash,* 28 Cal.4th at 723. The error "cannot be dismissed as harmless." *Ibid.* If the court has found that the criminal-history restriction standing alone was error, then that error alone requires that the court "reverse defendant's judgment of death." *Ibid.*

The same conclusion obtains if the court has found that the second restriction – prohibiting appellant from probing how jurors were going to respond to the manner-of-death evidence – was error. The analysis differs slightly from that set forth above only because the record contains some peripherally relevant information gathered in response to Q. 20 of the questionnaire. It asked:

> In the course of this trial, you may view photographs, including coroner's photographs and autopsy photographs, of several dead women. How would you feel about that? Please explain.

See, e.g., 21 ACT 6161.

Six of the eventual seated jurors – all three women and three of the nine men – indicated they would find the task unpleasant in one degree or another, even if necessary. See ACT 6161 (Fr.), 6249 (Haw.), 6280 (Hay.), 7124 (Te.), 7471 (B.), 7757 (Fu.).

Two of the men made clinical responses – ACT 7008 (Sm.) ["graphic but … necessary"], 6373 (J.) ["part of the job"] – and four said it wouldn't bother them, three because they had experience in viewing bodies or photographs of bodies. ACT 6647 (M.), 7099 (St.), 7336 (Y.). See also ACT 7155 (Tr.).

Two of the latter were asked to elaborate on voir dire. One explained that he had done some dissection in anatomy courses in college. RT 20058 (Y.). The other -- who had seen actual bodies and photos in CHP magazines – indicated that, at trial, he might be more affected than his answer to Q. 20 indicated: "I guess I can't say that it doesn't bother me too much. I guess it would depend on the state of the body, you know, the situation or whatever happened. It may or may not, so – I mean, there's always that possibility." RT 19862-63 (St.).

Only one of the other jurors was asked about this on voir dire. She did not think that photographs alone would make her vote for death, but she said: "It would be very hard for me to look at them. I don't know what … my reaction would be once I saw them." When she "remember[ed] that

those are pictures … of real people that were real people, … that's gonna be really hard for me." ACT 20080-20081 (Te.).

These responses hardly "establish … that none of the jurors had a view about the circumstances of the case that would disqualify" them. *Cash* at 722. Those who knew they would experience a negative visceral response were certainly going to experience that when they saw the actual photographs and videos. That did not tell defense counsel what they needed to know, however. The restriction being challenged here wasn't about graphic pictures. Counsel never sought to show the prospective jurors any photographs. What counsel wanted jurors to know – and what the court prohibited them from knowing – until they had been selected and sworn – was something -- anything -- about the *manner* of death: the evidence that women were bound and gagged and naked and asphyxiated; the evidence that led Judge Mering to respond with horror at the "cruelty and the suffering that these individuals endured" and to speak of their having been "tied up, bound and gagged, almost certainly still alive, having been sexually brutalized …, [left] … to suffer in that condition wondering when it would end, whether they would be released or whether they would die"; the evidence that led Judge Mering to say that it was "hard to imagine … a more frightening and more difficult death experience…." RT 26753-54. The chances are very high that one or more of the seated jurors -- even those who could look at photographs of dead women with clinical

detachment – were going to react to the actual evidence in much the same way that Judge Mering did. That was the kind of information appellant was denied.

During her voir dire, the eventual foreperson, Ms. Fu., was questioned about her inclination – as revealed in her questionnaire -- towards imposing the death penalty. She said, in part: "If I was presented [with] a situation where there was … violence with intent to harm a female, I'm not sure that I would be objective…. See, I don't know anything about your trial and your case…. How they were harmed or otherwise." RT 20111. Mr. Solomon's precise "conduct", she indicated, would probably be "a deciding factor" in her penalty decision. RT 20112.

Foreperson Fu. did not find "how the [victims] were harmed" until trial began. And Mr. Solomon – because of the restriction the court imposed – was precluded from finding out how Ms. Fu. would respond to that evidence.

Reversal is thus required because of the manner-of-death restriction, too. "[T]he trial court's error makes it impossible … to determine … whether [foreperson Fu. or] any … [other] juror … held the disqualifying view that the death penalty should be imposed … automatically on" Mr. Solomon because he "committed [multiple] … murders" in the manner suggested by the bonds, gags, nudity, and evidence of asphyxiation. *People v. Cash,* 28 Cal.4th at 723.

Reversal, finally, is likewise required if the court has found that it is the cumulative impact of the two restrictions that constitutes the error. Those restrictions make it impossible to know whether any juror, once hearing the evidence about manner of death *and* Mr. Solomon's criminal history, would have decided on the appropriate penalty before the mitigating evidence was even presented. For all of these reasons, the errors "cannot be dismissed as harmless" and the court "must reverse defendant's judgment of death." *Id.* at 722.

2. Standard harmless-error analysis

Reversal would also be required here under a *Chapman/Brown* standard.

As shown in section D.2, *ante,* both the criminal-history and manner-of-death evidence had the capacity to turn a seated juror into a juror who was not impartial as defined in *People v. Cash*, 28 Cal.4th at 720 and *Morgan v. Illinois*, 504 U.S. at 729. It is thus reasonably possible – *Chapman v. California,* 386 U.S. 18, 24 (1967); *People v. Brown,* 46 Cal.3rd 432, 488-89 (1988) -- that, because of the restrictions, one or more individuals ended up on the jury who became ADP voters once exposed to the actual evidence.

Having such an individual on the jury would have been prejudicial. As Judge Mering found, the "power of the [mitigating] evidence" was "impress[ive]". RT 26744. The prosecutor acknowledged that Mr.

Solomon's "tragic [and] … traumatic childhood" was "a significant mitigating factor", that the "glowing reports … about his service in Viet Nam" was "a factor in mitigation", that it was mitigating that "he was … using cocaine", and that "his positive institutional adjustment" as "a good prisoner, good soldier, [and] … good patient" was "a positive quality" and mitigating under factor (k). RT 26369-71, 26374.

It was precisely because of the strength of the mitigation that the first jury deliberated for three full days -- 20 CT 5777-5778; 40 RT 17366-17376 – that five of those first-trial jurors initially voted to spare Mr. Solomon's life and two did so until a mistrial had to be declared – see RT 18609, 19077 -- and the second jury deliberated for three and a half days before finally returning its verdict - 22 CT 6349, 6352, 6354-55. *Cf. People v. Rivera,* 41 Cal.3d 388, 393 fn. 3 (1985) [admission of prior conviction prejudicial despite confession; in assessing prejudice, "it is noteworthy that a first trial of defendant ended in a hung jury"]; *People v. Collins*, 68 Cal.2d 319, 332 (1968) [deliberations lasting 8 hours and 5 ballots indicates close case]; *Rhoden v. Rowland,* 172 F.3d 633, 637 (9th Cir. 1999) [fact that "jurors deliberated for over nine hours over three days … suggests that they did not find the case to be clear-cut"].

One biased juror, consequently, could have made a huge difference here. One juror so turned off by the fact that Mr. Solomon had committed sadistic sexual assaults long before 1986 – and/or was so repelled by the

details pertaining to the murder victims -- that s/he effectively voted for death after the prosecutor's opening statement and argued vociferously for that position in the jury room – could easily have tilted the dynamic of the deliberation in favor of death.[142]

Given the strength of the mitigation, it is reasonably possible that, if Mr. Solomon had been tried by a jury of 12 impartial and open minded jurors, he would not now be under a sentence of death.

That sentence may not stand.

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[142] One study reported that when "[c]apital juries … contain members whose support for the death penalty undermines their impartiality …, these jurors push the final verdict heavily toward death." Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. Legal Stud. 277, 279 (2001)

XII.

THE ADMISSION OF GRUESOME PHOTOGRAPHS RENDERED THE PENALTY RETRIAL FUNDAMENTALLY UNFAIR

A. Introduction

The defense objected to the jury seeing various photographs that showed in grotesque and graphic detail how the homicide victims appeared after their discovery.[143] The objections were granted in part and denied in part. The jury was allowed to see the following photographs over objection:

Yolanda Johnson: Exhibits 16, 18, 20-23, at 1 ACT[Exhs.], pp. 113, 117, 121-128;[144]

Angela Polidore: Exhibits 60, 69, 70, at 1 ACT[Exhs.], pp. 205, 225, 229 (rulings at RT 19021-24);

Marie Apodaca: Exhibits 111, 113, 114, at 2 ACT[Exhs.], pp. 329-330, 333-336 (see RT 19027-30);

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[143] The written in limine motion is at 21 CT 6066-67. The objections that were denied were reiterated in appellant's motion for new trial. 22 CT 6381-84.

[144] "1 ACT[Exhs.]" refers to volume 1 of the 4-volume set of the Augmented Clerk's Transcript containing the trial exhibits. The oral discussion and rulings regarding the Johnson photographs are at RT 18975-88.

Cherie Washington: Exhibit 144, at 2 ACT[Exhs.], p. 416 (see RT 19037);

Sheila Jacox: Exhibits 224, 225, at 3 ACT[Exhs.], pp. 600, 602 (see RT 19047, 19056). Mid-trial, the prosecution belatedly discovered Exhibit 168-A and was permitted to show it to the jury over objection (RT 24290-96, at 2 ACT[Exhs.], p. 481); and

Sharon Massey: Exhibit 298 (photo; at 3 ACT[Exhs.], p. 754).

These exhibits had little probative value, were duplicative of oral testimony, and were inflammatory in the extreme, given the decomposition of the bodies. Their admission rendered the retrial fundamentally unfair and the penalty verdict unreliable in violation of the Fifth, Eighth, and Fourteenth Amendments.

B. The Governing Principles

Both the Eighth Amendment and the due process clauses of the Fifth and Fourteenth Amendments entitle a capital defendant to a "tribunal free of prejudice [and] passion ...." *Chambers v. Florida*, 309 U.S. 227, 236-37 (1940). Because capital trials require an especially high degree of reliability, *Beck v. Alabama*, 447 U.S. at 637, courts must take extra precautions to ensure that a juror's decisions are not influenced by "irrelevant" considerations, *Zant v. Stephens*, 462 U.S. at 885, or are the product of "an unguided emotional response" to evidence, *Penry v. Lynaugh*, 492 U.S. at 328.

In a capital case, accordingly, "[e]vidence that serves primarily to inflame the passions of the jurors must … be excluded…." *People v. Love,* 53 Cal.2d 843, 856 (1960). "[T]he Constitution will not permit" evidence "aimed at inflaming the jury's passions" and designed to "goad ... it into an emotional state more receptive to a call for imposition of death ...." *Tucker v. Zant*, 724 F.2d 882, 888 (11th Cir.1984). The admission of such evidence "so infect[s] the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." *Spears v. Mullin*, 343 F.3d 1215, 1226 (10th Cir. 2003), quoting and applying the standard enunciated in *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994).

In *People v. Love,* "[o]ver defendant's objection the trial court admitted in evidence on the issue of penalty a photograph showing a front view of the deceased lying on a hospital table. The photograph did not show her wound, but did show the expression of her face in death. Also over defendant's objection the court admitted a tape recording taken in the hospital emergency room shortly before Mrs. Love died. The … recording … [captured] the failing voice and the groans of the deceased as she was dying" 53 Cal.2d at 854-855.

"[T]o ensure that" inflammatory evidence is "excluded, the probative value and the inflammatory effect of proffered evidence must be

carefully weighed." *Id.* at 856. Engaging in that weighing, the Court found that it was error to admit the evidence.

"Apart from" uncontested matters, "the photograph and the tape recording tended to prove only that Mrs. Love died in unusual pain.... [E]ven if relevant and material, Mrs. Love's pain was more than adequately described by the doctor." *Id.* at 856-857. "The ... availability of less inflammatory methods of imparting to the jury the same or substantially the same information" militated against admissibility. *Id.* at 856. "There was no need to show the jurors the expression of her face in death or to fill the courtroom with her groans. Both the photograph and the tape recording served primarily to inflame the passions of the jurors and both should have been excluded." *Id.* at 856-857.

Applying the *Watson* standard, the Court reversed. "[T]he admission of evidence designed to appeal to the passion of the jury" is "[e]ven more prejudicial" than "erroneously ... minimiz[ing] to the jury the finality of its decision [the basis of a prior reversal].... The prejudicial effect of this erroneously admitted evidence was aggravated by the district attorney's argument to the jury," in which "[h]e referred several times to the pain suffered by Mrs. Love...." The Court could "find no extraordinary circumstances that save the verdict in this case." *Id.* at 857-858.

In *Spears v. Mullin*, similarly, the Tenth Circuit agreed with the "district court that the State's penalty-phase introduction of crime-scene

photographs showing [the victim's] mutilated body deprived [the defendants] of a fundamentally fair sentencing proceeding as guaranteed by the Eighth and Fourteenth Amendments." 343 F.3d at 1225. The court found that, since the photographs "necessarily had a strong impact on the jurors' minds," their admission "potentially misled the jury" into thinking they were more probative than they actually were. *Id.* at 1228. The court found that, "[e]ven if the photographs were minimally relevant to the heinous, atrocious, or cruel aggravator, the[ir] ... prejudicial effect outweighed their probative value." *Ibid.* Weighing the legitimate aggravating evidence against the mitigating evidence, the court was unable to conclude "that the jury would have returned a sentence of death" in the absence of the photographs. *Ibid.* The court held: "This highly inflammatory evidence fatally infected the trial and deprived [the defendants] ... of their constitutional rights to a fundamentally fair sentencing proceeding." *Id.* at 1229.

The photographs at issue here were likewise extremely inflammatory, while providing jurors with no information they would not be getting from the witness stand. Their admission rendered the retrial fundamentally unfair.

C. Admission of the Photographs was Unconstitutional

The photographs the defense objected to had no true probative value. First, the retrial jury was instructed that guilt had been conclusively

established by the first jury. 51 RT 21568; 66 RT 25997. While Mr. O'Mara used the possibility that the case in mitigation would focus on "lingering doubt" as a rationale for introducing the photographs, RT 18977-78, the only lingering doubt the defense reasonably could have been expected to focus on was the lack of sufficient proof of premeditation and deliberation. See Argument I, *ante*. The photographs the defense objected to were not probative on that issue.[145]

Second, even though the guilt verdicts were binding on the retrial jurors, they had to determine how "the circumstances of the crime[s]" affected the appropriateness of the penalty decision -- Penal Code, §190.3(a). – meaning that, lingering doubt aside, the prosecution had a right to present some sort of affirmative evidence regarding the guilt offenses. To the extent that any of the exhibits tended to show anything relevant regarding those offenses, however – e.g., that a sock was protruding from Sharon Massey's mouth – the graphic evidence was merely an adjunct to the pathologist's testimony – and an unnecessary one at that. *Compare* Exh. 298 *with* RT 24674. Indeed, without Dr. Stuart's testimony, jurors

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[145] In fact, in opening statement, defense counsel made no reference to lingering doubt with respect to the counts of conviction, see RT 21753-55, and at trial, barely cross-examined many of the guilt-related witnesses. In closing arguments, furthermore, while Mr. Vlautin made scant reference to lingering doubt, RT 26528-33, Ms. Gutowsky abandoned the defense altogether in her lead and rebuttal closing arguments. See 68 RT 26504 [defense "not offering you lingering or possible doubt" as mitigation]; RT 26548 ["There is no lingering doubt in this case"].

could not possibly have known what they were looking at in the pertinent photograph. As in *Love,* therefore, the relevant fact "was more than adequately described by the doctor." 53 Cal.2d at 857. The prosecution had a much "less inflammatory method ... of imparting to the jury the same or substantially the same information." *Id.* at 856.

As in *Spears v. Mullin,* furthermore, the graphic evidence "potentially misled the jury" into thinking it was more probative than it actually was, 343 F.3d at 1228 – especially on the critical – indeed, life and death -- question of how aggravating the "circumstances of the crime[s]" were compared to the mitigation. A juror would have had a hard time separating the effects of decomposition from the physical and psychological trauma that the victims experienced prior to death. Just as in *Spears,* where jurors had to distinguish between the conscious pain the victims felt and the trauma apparent in the photographs, the graphic evidence in this case likewise "necessarily had a strong impact on the jurors' minds" that was capable of sowing confusion. 343 F.3d at 1228. Looking at the photographs, a juror could not help but feel, "This is what the defendant wrought", without discriminating between his criminal conduct and the post-offense effects that did not fall within factor (a).[146]

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[146] As far as appellant knows, the Court has not interpreted factor (a) as encompassing the effects of decomposition months after the murder – nor could it do so constitutionally. See Arg. XXII, *post.* If the Court finds that factor (a) is that broad – that "the circumstances of the crime" is an

That visceral prejudice – the inflammatory aspect of the graphic evidence – is what is paramount here. The Court has paid homage in several cases to the inherently prejudicial effect of showing jurors pictures of decomposing bodies, affirming the admission of photographs in those cases precisely because they did *not* "show unnecessary decay". *People v. Thompson*, 45 Cal.3d 86, 116 (1988). *Accord,* People v. Anderson 25 Cal.4th 543, 592 (2001) ["Because the bodies were discovered promptly, the photos do *not* depict them in a state of decomposition"]; *People v. Heard,* 31 Cal.4th 946, 977, fn. 13 (2003) [citing *People v. Allen,* 42 Cal.3d 1222, 1258 (1986) for the proposition that the "victims' bodies were *not* depicted 'in a badly decomposed condition'"].

In this case, each of the exhibits that were objected to depicted the "victims' bodies … in a badly decomposed condition."

Five photographs are particularly revolting: Exh. 23 (Johnson, at 1 ACT[Exhs.], p. 128) [head distorted]; Exh. 114 (Apodaca, at 2 ACT[Exhs.], p. 336) [prosecutor at RT 19029: "the features have, in essence, sort of melted"]; Exh. 168-A (Jacox, at 2 ACT[Exhs.], pp. 481) [prosecutor at RT 24323: "unrecognizable as human"]; Exh. 225 (Jacox, at 3 ACT[Exhs.], pp. 602) [head visible and rest of the body a soapy mess due

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endlessly expanding universe of potentially aggravating facts -- we will surely be seeing motions to exhume bodies five and ten years after the fact to show jurors the ever-more repulsive states of those remains.

to decomposition; court concedes it has "some grossness to it"]; and Exh. 298 (Massey, at 3 ACT[Exhs.], p. 754) [Dr. Stuart at RT 24675: "markedly decomposed"].

It is the revulsion that the graphic evidence was likely to arouse – a revulsion to the effects of decomposition and not the crimes per se -- that is of greatest concern here. It is that sort of response that had the capacity to turn jurors into ADP votes. Jury studies have specifically found that being shown autopsy photos influences many jurors in capital cases to prematurely make up their minds to vote for death. *Cf.* Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-trial Experience, and Premature Decision Making,* 83 Cornell L.Rev 1476, 1497- 1499 (1999). Since Mr. Solomon's attorneys were not permitted to ferret out such jurors – *see* Argument XI, *ante* -- admission of the graphic evidence was of particular concern here.

The photographs and videotape that appellant objected to, in short, would have "serve[d] primarily to inflame the passions of the jurors", *People v. Love,* 53 Cal.2d at 856, triggering "an unguided emotional response", *Penry v. Lynaugh*, 492 U.S. at 328, that rendered the retrial fundamentally unfair and "the jury's imposition of the death penalty a denial of due process." *Spears v. Mullin*, 343 F.3d at 1226; *Romano v. Oklahoma*, 512 U.S. at 12.

D. Failure to Object on Constitutional Grounds

Defense counsel objected to admission of the photographs under Evidence Code section 352 but did not cite any constitutional provisions. See, e.g., CT 6066-67; RT 18975-88, 19021-24, 19027-30, 19037, 19047, 19056, 24290-96. The same thing occurred in *People v. Coddington*, 23 Cal.4th 529 (2000). This Court held: "We deem the objections made were broad enough to encompass his constitutional claims and therefore need not address his claim that if the objections were inadequate counsel rendered ineffective assistance." *Id.* at 632.[147]

The latter holding is consistent with the analysis recently set forth in *People v. Yeoman*, 31 Cal.4th 93 (2003). In two instances, the Court rejected claims of waiver/forfeiture. First, the Court held that, even though trial counsel had objected to peremptory challenges only on state law grounds (under *People v. Wheeler*), it would review appellate counsel's claims of federal constitutional error. The Court reasoned as follows:

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[147] As in this case, trial counsel in *Coddington* objected to the allegedly gruesome photographs only under section 352. *People v. Coddington, S008804,* CT 939; RT 3706-13, 3987-88, 4077-85, 4520-21. While the *Coddington* opinion does not spell this out, the Attorney General will presumably concede the point since he raised it in *Coddington.* If the point becomes material to the court's ruling and is in dispute, appellant requests that the Court take judicial notice of the pertinent pages of the *Coddington* record. [Undersigned counsel was appellate counsel in *Coddington.*]

> [W]e believe that to consider defendant's claim under *Batson* ... is more consistent with fairness and good appellate practice than to deny the claim as waived. As a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal. ... Under these circumstances, the *Batson* claim is properly cognizable on appeal by analogy to the well-established principle that a reviewing court may consider a claim raising a pure question of law on undisputed facts. ... [T]o consider the *Batson* claim entails no unfairness to the parties, who had an opportunity to litigate the relevant facts and to apply the relevant legal standard in the trial court. [Footnote omitted.] Nor does it impose any additional burden on us, as the reviewing court.

People v. Yeoman, 31 Cal.4th at 117-118.

Similarly, whereas trial counsel in *Yeoman* had objected on grounds of due process and equal protection to permitting evidence of unadjudicated crimes to be introduced in the penalty phase, on appeal the claim was restated as an Eighth Amendment claim. *Id.* at 132. The state argued that

the Court should not review the claim on the merits. The Court rebuffed the objection:

> Defendant's new claim, however, merely invites us to draw an alternative legal conclusion … from the same information he presented to the trial court …. We may therefore properly consider the claim on appeal.

Id. at 133. *Accord, Stutson v. United States,* 516 U.S. 193, 196 (1996) [inappropriate to "allow technicalities which caused no prejudice to the prosecution" to preclude appellate review of a criminal defendant's claims].

The *Yeoman* analysis is perfectly applicable here. Appellant's claim in this Court – that the photos were inflammatory -- is the same as it was below. He "merely invites [the Court] … to draw an alternative legal conclusion."

Other well-established principles also support review on the merits. Because the claim below would not have changed by virtue of citing to the federal constitution, citing those provisions would not have affected the trial court's ruling. "The law neither … requires idle acts", Civ. Code, § 3532, nor punishes defendants when their counsel do not make futile objections. *People v. Hill*, 17 Cal.4th 800, 820 (1998) [reviewing claims on appeal that would have been denied if made to the trial judge].

This, moreover, is a capital case:

> [W]hile in a noncapital case a claim of erroneous admission of evidence will not be reviewed in the absence of a timely and proper objection [citation], we have long followed a different rule in capital cases. On an appeal from a judgment imposing the penalty of death a technical insufficiency in the form of an objection will be disregarded and the entire record will be examined to determine if a miscarriage of justice resulted.

People v. Frank, 38 Cal.3d 711, 729, fn. 3 (1985).[148]

In any event, on appeal, the Court will consider an otherwise forfeited "claim on the merits to forestall an ineffectiveness of counsel contention...." *People v. Lewis*, 50 Cal.3d 262, 282 (1990). The failure to cite the federal constitution when objecting to the photographs constituted ineffective assistance. *Strickland v. Washington,* 466 U.S. 668, 686-689 (1984). Counsel plainly believed the photographs were inflammatory, prejudicial, and inadmissible. There could have been no "plausible tactical reason" for not preserving the constitutional aspect of the claim. *People v. Montiel,* 5 Cal.4th 877, 927 (1993). Counsel violates the Sixth Amendment by failing to preserve a meritorious claim for review. *People v. Stratton,* 205 Cal.App.3d 87, 93 (1988). As established above, the constitutional

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[148] While "the lead opinion in *Frank* was not signed by a majority of the court, ... later cases from this court have never disapproved its language.... [Citations.]" *People v. Jones,* 29 Cal.4th 1229, 1255 (2003).

claims were meritorious. As discussed in the next section, furthermore, admission of the photographs was prejudicial.

E. Prejudice

The "power of the [mitigating] evidence", as Judge Mering found, was "impress[ive]". RT 26744. (See Argument XI, *ante*.) That is why the first jury deliberated for three full days -- 20 CT 5777-5778; 40 RT 17366-17376 – that five of those first-trial jurors initially voted to spare Mr. Solomon's life and two did so until a mistrial had to be declared – see RT 18609, 19077 -- and the second jury deliberated for three and a half days before finally returning its verdict - 22 CT 6349, 6352, 6354-6355. One juror, consequently, could have made a huge difference here. Since the graphic evidence was capable of inducing the kind of revulsion that: 1) was not in response to any of the statutory factors in aggravation; and 2) could turn an uncertain juror into a vote for death, it is reasonably possible and reasonably probable that, if the inflammatory evidence had not been introduced, Mr. Solomon would not now be under a sentence of death. *People v. Brown,* 46 Cal.3rd 432, 448-449 (1988); *Chapman v. California,* 386 U.S. 18, 24 (1967); *Caldwell v. Mississippi,* 472 U.S. 320, 341 (1985); *Strickland v. Washington,* 466 U.S. at 693-695.

That sentence may not stand.

XIII.

THE FAILURE TO PROPERLY INSTRUCT JURORS WITH RESPECT TO THE BURDENS OF PROOF AND PERSUASION APPLICABLE TO THEIR PENALTY DETERMINATIONS VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Introduction

Jurors were told that the reasonable doubt standard governed their factor (b) findings.[149] They were not instructed that *any* burden of proof or persuasion governed any of their other penalty phase findings, much less that those findings required certainty beyond a reasonable doubt.

Jurors were not instructed, in other words, that, before they could base a death verdict on some fact or circumstance relating to one of the crimes appellant had been convicted of in the guilt-phase – a factor (a) finding -- they had to find beyond a reasonable doubt that that fact was true.

Nor were they instructed that before they could base a death verdict on one of the three convictions appellant had allegedly suffered prior to this

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[149] Thus they were instructed that before they could base a death verdict on the alleged offenses against Mss. Polidore, Cooper, Sprinkle, Walker, Kaufman, Johnson, or Grant (Foster), they had to find beyond a reasonable doubt that the offense had occurred. 22 CT 6336; CALJIC 8.87. In addition, jurors were told that, before they could use circumstantial evidence to find a factor (b) offense proved, they had to find the evidence in question proved beyond a reasonable doubt. 22 CT 6339.

capital trial -- factor (c) – they had to find beyond a reasonable doubt that appellant had in fact suffered that conviction.[150]

Similarly, jurors were told that they "may return a verdict of death" if they "determine[d] that the aggravating factors substantially outweigh the mitigating factors..." CT 6344; RT 62018. They were not told that they could only vote for death if they were certain beyond a reasonable doubt that that determination was correct.

Finally, the jurors were instructed: "To return a verdict of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." CT 6344; 66 RT 26018. They were not told that, before they could vote for death, they had to be certain beyond a reasonable doubt of the requisite comparative substantiality of the aggravating factors.[151]

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[150] It appears this was inadvertent. The prosecution requested that CALJIC No. 8.86 – which requires that factor (c) priors be proven beyond a reasonable doubt – be given. 21 CT 6276. When the instruction was discussed, the court gave no indication of disapproval. 65 RT 25867-68. Judge Mering rejected 8.86, but only because it was "covered in modified form" in "Court's #22". CT 6276. In its final version, Court's #22, which underwent several substantial revisions, only dealt with factor (b) findings, not factor (c) findings. 22 CT 6336. The record indicates that Judge Mering lost both his copy of the version of CALJIC No. 8.86 given at the first trial and the prosecutor's resubmission of it. 65 RT 25858.

[151] The defense had requested that the jury be instructed: "If you have a reasonable doubt as to which penalty to impose, death or life in prison without the possibility of parole, you must give the defendant the benefit of

The failure to so instruct jurors on the application of the reasonable-doubt standard to their penalty determinations – indeed, the failure to provide them with any guidance as to the standard governing the factual and ultimate findings on which they were basing their vote for death -- violated the due process, jury-trial, reliability, and equal protection guarantees of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

B. This Court's Position; Request For Reconsideration

This Court has long held: "The Constitution does not require the jury to find beyond a reasonable doubt that a particular factor in aggravation exists, that the aggravating factors outweighed the mitigating factors, or that death was the appropriate penalty." *People v. Cox,* 30 Cal.4th 916, 971 (2003) [quotation marks and citations omitted]. *Accord, People v. Rodriguez,* 42 Cal.3d 730, 777-779 (1986).

The Court has further held: "The United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 and *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556, do not require that we reconsider our precedent." *People v. Valdez*, 32 Cal.4th 73, 139 (2004).

Nonetheless, appellant requests such reconsideration.

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that doubt and return a verdict fixing the penalty at life in prison without the possibility of parole." 21 CT 6298. The request was rejected on the ground that it "misstates the law". *Ibid.* See also 66 RT 25966.

C. The Reasonable Doubt Standard Governs The Determinations On Which A Vote For Death Is Predicated

1. Due Process and Heightened Reliability Guarantees

"[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *Speiser v. Randall,* 357 U.S. 513, 520-521 (1958).

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. *In re Winship,* 397 U.S. 358, 364 (1970). In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner v. Florida,* 430 U.S. 349, 358 (1977); see also *Presnell v. Georgia,* 439 U.S. 14 (1978). 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.

The burdens of proof and persuasion are concerned not only with factual accuracy but reducing the likelihood of erroneous results, particularly when the stakes are high. *Winship, supra*, 397 U.S. at 363-364;

see also *Addington v. Texas,* 441 U.S. 418, 423 (1979). The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. *Winship*, *supra*, 397 U.S. at 364.

Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors[:] . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." *Santosky v. Kramer,* 455 U.S. 743, 755 (1982); see also *Matthews v. Eldridge,* 424 U.S. 319, 334-335 (1976).

With respect to the "private interests" at stake, there is no interest more significant than that of human life. If personal liberty is "an interest of transcending value," *Speiser*, *supra*, 375 U.S. at 525, "the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." *Commonwealth v. O'Neal,* 327 N.E.2d 662, 668 (1975). Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley,* 14 Cal.3d 338 (1975) (commitment as

mentally disordered sex offender); *People v. Burnick,* 14 Cal.3d 306 (1975) (same); *People v. Thomas,* 19 Cal.3d 630 (1977) (commitment as narcotic addict); *Conservatorship of Roulet,* 23 Cal.3d 219 (1979) (appointment of conservator). The decision to take a person's life must be made under no less demanding a standard.

With respect to the "risk of error created by the State's chosen procedure" *Santosky*, *supra*, 455 U.S. at 755, the United States Supreme Court has said:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . 'the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [citation omitted.] The stringency of the 'beyond a reasonable doubt' standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions,

and a judgment that those interests together require that 'society impos[e] almost the entire risk of error upon itself.'" 455 U.S. at 756.

There is substantial room for error in the procedures for deciding between life and death. As with the child neglect proceedings at issue in *Santosky*, they involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." *Id.* at 763. As of the year 2000, at least 100 individuals had been exonerated who had previously been sentenced to death. *See Apprendi v. New Jersey, supra,* 530 U.S. at 616-617 (concurring opn. of Breyer, J.) [citing research]. Subtle racial factors are among those that can affect the penalty decision. *Ibid.* [citing additional research]. Just as requiring proof beyond a reasonable doubt has been "a prime instrument for reducing the risk of convictions resting on factual error", *Winship*, *supra*, 397 U.S. at 363, requiring *certainty* beyond a reasonable doubt would be effective in reducing the risk of subjective error by heightening consciousness of the "weight and gravity" of what is at stake.

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also militates in favor of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the

appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1978). The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

Given that reasonable-doubt became the standard in criminal trials because "the interests of the defendant are of such magnitude," *Santosky*, 455 U.S. at 755, given that the need for reliability is even greater in capital cases, *Beck v. Alabama,* 447 U.S. 625, 637-638 (1980), and that "the death penalty is unique in its severity and its finality", *Monge v. California*, 524 U.S. 721, 732 (1998), it would seem to follow that "in a capital sentencing proceeding, ... the interests of the defendant ... [would at the very least be] protected by [the] standards of proof designed to exclude ... the likelihood of an erroneous judgment ... in a criminal trial...." In fact, the latter observation was the basis of the holding in *Monge*. 524 U.S. at 732. *See also In re Winship*, 397 U.S. at 364 [reasonable doubt standard needed to dispel doubt of community at large "whether ... men are being condemned" in just manner].

For all of these reasons, a death sentence violates the due process and reliability guarantees of the Fifth, Eighth, and Fourteenth Amendments unless the jury is told that each of the key factual and moral decisions underlying the decision – finding the existence of aggravating factors,

finding that aggravation substantially outweighs mitigation, and finding that aggravation is so substantial compared to the mitigation that death is justified – is arrived at only after achieving that level of certainty expressed in the standard of beyond-a-reasonable-doubt.

2. Sister jurisdictions; State v. Rizzo

The recognition that the penalty phase requires at least as stringent a standard as applies in the guilt phase explains why, even prior to *Ring,* twenty-six states had statutes requiring that factors relied on to impose death must be proven beyond a reasonable doubt.[152] In at least eight states, furthermore, by virtue of statute or judicial decision, capital juries were told that a death verdict could not be returned unless the jury found beyond a

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[152] See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-90; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (c) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4 (c) (Michie 1990); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(I) (1992). See also Wash. Rev. Code Ann. § 10.95.060(4) (West 1990) [jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency].

reasonable doubt that aggravation outweighed mitigation and/or that death was the appropriate penalty.[153]

The analysis set forth in the recent decision of the Connecticut Supreme Court in *State v. Rizzo,* 833 A.2d 363 (Conn. 2003) is fully applicable here.

Under Connecticut law, as amended in 1995, the jury is to ascertain whether any statutory aggravating factors have been proved beyond a reasonable doubt and whether any statutory or nonstatutory mitigating factors have been proved by a preponderance. If any statutory mitigating factor has been proven, the verdict must be life. If no such factor has been proven, the "jury must weigh the aggravating factors proven against the nonstatutory mitigating factors proven, and if the aggravating factors outweigh the mitigating factors, the court," upon receiving the jury's special verdict to that effect, "must impose the death sentence". As enacted, the statute was silent regarding the burden of persuasion. 833 A.2d at 376-377.

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[153] See J. Acker and C. Lanier, *Matters of Life or Death: The Sentencing Provisions In Capital Punishment Statutes*, 31 Crim.L.Bull. 19, 35-37, and fns. 71-76 (1995), and the citations therein for the pertinent statutes of Arkansas, Missouri, New Jersey, Ohio, Tennessee, and Washington. See also *McKoy v. North Carolina*, 494 U.S. 433, 437 (1990) [describing procedure in North Carolina]; *State v. Wood*, 648 P.2d 71, 83-84 (Utah 1981) [same re Utah]. (Utah statutory law now requires that the ultimate findings be beyond a reasonable doubt. See Utah Code Ann. § 76-3-207(5)(b) (Sup.2002).)

The Connecticut Supreme Court held "that, in order to avoid potentially significant [state] constitutional questions, there must be a burden of persuasion of beyond a reasonable doubt on the jury's determination to impose the death penalty...." *Id.* at 401.

This conclusion was based – not on the explicit compulsion of federal constitutional guarantees – but on the same fundamental concerns that lie at the heart of the due process and Eighth Amendment jurisprudence described in section 1, *ante*: " (1) the nature of the death penalty; (2) an overarching need for reliability and consistency in the imposition of the death penalty; and (3) the nature of the jury's determination to render a verdict requiring th[at] penalty." *Ibid.*

First, the court observed: "Death is different.... 'It is unique in its total irrevocability ... [and] its ... absolute renunciation of all that is embodied in our concept of humanity.' *Furman v. Georgia*, 408 U.S. 238, 306 ... (1972) (Stewart, J., concurring)." 833 A.2d at 401-402.

Second, "'because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.' [*Woodson v. North Carolina*, 428 U.S. 280, 305 ... (1976).] The eighth amendment requires 'heightened reliability ... in the determination whether the death penalty is appropriate....' *Sumner v. Shuman*, 483 U.S. 66, 72 ... (1987)." 833 A.2d at 402.

Third, "precisely because of the enormous qualitative difference between death and all other forms of punishment, the nature of the jury's determination to impose it is different from all other determinations that juries make in our state's legal system. On a strictly procedural level, a capital penalty phase proceeding differs from all other sentencing proceedings in that … it is the only such proceeding in which [: 1] a jury … may … impose the sentence …; (2) … there must be a full, trial-like, evidentiary hearing; and (3) the state must establish the foundation of its case for sentencing … by proof beyond a reasonable doubt…. On a more fundamental level, the 'task ... of determining whether a specific human being should die at the hands of the State' …, … *Caldwell v. Mississippi*, 472 U.S. 320, 329 … (1985) …[,] necessarily calls upon the intellectual, moral and emotional resources of the jurors in a way that far exceeds any factual determination of guilt or innocence…. It is not hyperbole to say that making 'the choice … between life and death', *Lockett v. Ohio, supra,* 438 U.S. at 605, … is the most serious decision that our legal system requires a jury to make." 833 A.2d at 402-403.

"[I]n light of … the awesome and wrenching nature of the jury's determination", the court held, "the burden of persuasion … on the most important question that our legal system entrusts to the jury, namely, whether the defendant shall live or die, [has to be] the highest burden of

persuasion that our legal system recognizes" – certainty "beyond a reasonable doubt". *Id.* at 405-406.

The Connecticut Supreme Court joined with the Utah Supreme Court in believing that "the sentencing body, in making the judgment that aggravating factors 'outweigh,' or are more compelling than, the mitigating factors, must have no reasonable doubt as to that conclusion, and as to the additional conclusion that the death penalty is justified and appropriate after considering all the circumstances." *Id.* at 407, quoting *State v. Wood*, *supra,* 648 P.2d at 83-84.

The state of Connecticut had argued "that there is no constitutionally required burden of persuasion on the weighing process because … there … is no risk of error…." Given "the unique, reasoned moral decision involved in determining whether the defendant shall live or die …, the jury … simply cannot be 'wrong' in the factual sense." 833 A.2d at 407-408. The court disagreed.

First, "in making the determination that the aggravating factors outweigh the mitigating factors and that the defendant shall therefore die, the jury may weigh the factors improperly, and may arrive at a decision of death that is simply wrong. Indeed, the reality that, once the jury has arrived at such a decision pursuant to proper instructions, that decision would be, for all practical purposes, unreviewable on appeal save for evidentiary insufficiency of the aggravating factor, argues for some

constitutional floor based on the need for reliability and certainty in the ultimate decision-making process itself.

"Second, the state's contention ignores the other two equally important functions of the burden of persuasion: (1) to indicate to our society in general the value we place on the decision; and (2) to guide the jury regarding the sense of solemnity and the subjective degree of certitude that it must have in making its decision. Both of these functions apply to the decision of whether to impose the death penalty and ... both point strongly to the need for a demanding burden of persuasion." *Id.* at 408.

Contrary to the state's position, the court pointed out, "the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense.... [O]ur conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment." *Id.* at 408, fn. 37.

Based on the guarantees of due process and reliability embodied in our state and federal Constitutions, appellant asks that this Court, too, "assign ... the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment."

3. Sixth Amendment; Ring v. Arizona

"[T]he Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated." *Sullivan v. Louisiana,* 508 U.S. 275, 278 (1993). The applicability of the Sixth Amendment-based right in the penalty phase of a capital trial was established in *Ring v. Arizona.*

Ring built on the holding in *Apprendi v. New Jersey.* At issue in *Apprendi* was a set of New Jersey statutes that authorized a maximum sentence of ten years if the defendant was convicted of second degree possession of a firearm, and authorized an enhancement if the judge found by a preponderance that the crime was committed for the purpose of intimidation on the basis of race or other factors. The Supreme Court held:

> As a matter of simple justice, it seems obvious that the [same] procedural safeguards … should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label "sentence enhancement" to describe the latter surely does not provide a principled basis for treating them differently.

530 U.S. at p. 476. The applicable safeguards were those demanded by the Due Process Clause of the Fourteenth Amendment:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt….

"[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range or penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

Apprendi v. New Jersey, supra, 530 U.S. at p. 490, quoting *Jones v. United States,* 526 U.S. 227, 252-253 (1999).

In *Ring v. Arizona*, the Court applied *Apprendi*'s principles in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." 536 U.S. at p. 607.

At issue in *Ring* was a state system in which the jury determined guilt but did not participate in the sentencing proceedings. If the jury found the defendant guilty of first-degree murder, Arizona law limited his punishment to "death or life imprisonment". A judge then determined whether any statutory aggravating circumstances had been proved. If the court found that at least one such circumstance had been proved, and further found that "there are no mitigating circumstances sufficiently substantial to call for leniency", the court was "to sentence the defendant to death...." 536 U.S. at 592-593.

The Arizona scheme violated the Sixth Amendment:

> Capital defendants, no less than noncapital defendants, ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.

Ring, 536 U.S. at p. 589. This was so whether those facts were labeled sentencing factors or elements of the offense. *Id.* at p. 609.

> The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both.

Ibid. As Justice Scalia cogently distilled the holding:

> All facts essential to the imposition of the level of punishment that the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be made by the jury beyond a reasonable doubt.

536 U.S. at p. 610 (conc. opn. of Scalia J.).[154]

This Court has held that "*Ring v. Arizona* ... and *Apprendi v. New Jersey* ... do not affect California's death penalty law." *People v.*

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[154] *Ring* applies to this case whether or not it is deemed retroactive. *See Schriro v. Summerlin*, No. 03-526 [decision on *Ring*'s retroactivity pending in Supreme Court; argued 4-19-04]. Even if not retroactive, the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6 (1987).

Cleveland, _ Cal.4th _, 11 Cal.Rptr.3d 236, 286 (2004); *accord, People v. Prieto*, 30 Cal.4th 226, 271 (2003) ["*Ring* does not apply to California's penalty phase proceedings"]. Appellant respectfully submits that each of the reasons given in support of the Court's position is flawed.

First, the Court has said that, in this state, "once a jury has determined the existence of a special circumstance, the defendant stands convicted of an offense whose maximum penalty is death." *People v. Ochoa*, 26 Cal.4th 398, 454 (2001). Accordingly, the Court reasons, the jury's penalty phase findings do not fit the *Apprendi* category of those that "increase ... the penalty for a crime beyond the prescribed statutory maximum" – *Apprendi* at 490 – and *Apprendi*'s reasonable-doubt requirement is not applicable to them. *See, e.g., People v. Anderson,* 25 Cal.4th 543, 589-590, fn. 14 (2001). Post-*Ring,* the Court has reiterated the argument. *See, e.g., People v. Prieto*, 30 Cal.4th 226, 263 (2003); *People v. Snow,* 30 Cal.4th 43, 126, fn. 32 (2003).

In *Ring*, however, Arizona made the very same argument -- and the Supreme Court rejected it:

> In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies "death or life imprisonment" as the

only sentencing options, see Ariz.Rev.Stat. Ann. § 13-1105(c) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. . . . This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid*....

Ring, 536 U.S. at 603-604 [bracketed insertions added in *Ring*].

The Supreme Court further observed:

The Arizona first-degree murder statute "authorizes a maximum penalty of death only in a formal sense," Apprendi, 530 U.S., at 541, 120 S.Ct. 2348 (O'Connor, J., dissenting), for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. See § 13- 1105(C) ("First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703." (emphasis added)). If Arizona prevailed on its opening argument, Apprendi would be reduced to a "meaningless and formalistic" rule of statutory drafting. See 530 U.S., at 541, 120 S.Ct. 2348 (O'Connor, J., dissenting).

Ring, 536 U.S. at 604.

The Supreme Court's analysis is equally applicable to the comparable California statutes. While the first sentence of Penal Code section 190(a) "authorizes a maximum penalty of death" for first-degree murder, it does so "only in a formal sense". Just as in the Arizona statute, the second sentence of section 190(a) "explicitly cross-references the statutory provision[s] requiring the [additional] finding[s that must be made] ... before imposition of the death penalty" is truly authorized. *Ring* at 604.[155] Death under the California statute cannot actually be imposed unless, after the jury finds the defendant guilty of first-degree murder and finds a special-circumstance allegation to be true (section 190.2), it *further* finds that one or more aggravating circumstances: a) exist; b) substantially outweigh the mitigating circumstances; and c) are so substantial in comparison with the mitigation as to make death the appropriate penalty. Penal Code section 190.3; CALJIC 8.88 (7th ed., 2003).

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[155] Section 190(a) provides:

> Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5.

The real question here, therefore, is whether the Sixth Amendment applies to any of the latter findings under the test laid down in *Apprendi* and *Ring*.

> The dispositive question … "is one not of form, but of effect." [*Apprendi*] at 494…. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt. See *id.*, at 482-483, 120 S.Ct. 2348.

Ring, 536 U.S. at 602. The "relevant inquiry" is:

> [D]oes the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?

Apprendi, 530 U.S. at 494. *Accord, Ring,* 536 U.S. at 602.

The question must be answered affirmatively. Penal Code § 190.3 makes the imposition of death "contingent on the finding[s]" outlined above -- that aggravating circumstances exist, substantially outweigh mitigation, and are so substantial as to make death appropriate – and, once made, those "finding[s] expose the defendant to a greater punishment than authorized by the jury's guilt [phase] verdict". Those findings are "essential to the imposition of the level of punishment that the defendant receives." *Ring*, 536 U.S. at p. 610 (conc. opn. of Scalia J.). The Sixth Amendment thus requires that they be made beyond a reasonable doubt. *Id.* at 602.

In this Court's view, however – this is the second of the Court's reasons for characterizing *Ring* and *Apprendi* as irrelevant – the reasonable-doubt standard does not apply because "the penalty phase determination is 'inherently moral and normative, not factual.' [Citation.]" *People v. Prieto,* 30 Cal.4th at 262.

It is indisputable, however, that, in order to find that aggravating facts exist – e.g., "circumstances of the offense" under factor (a) or age-related facts under factor (i) -- the jury will make factual findings. *Prieto* at 262 ["the jury must make certain *factual findings* in order to consider certain circumstances as aggravating factors"]; *see also, People v. Tuilaepa*, 4 Cal.4th 569, 595 (1992) [section 190.3 factors "direct the sentencer's attention to specific, provable, and commonly understandable *facts* about the ... capital crime"]. According to California's "principal sentencing instruction", *People v. Farnam,* 28 Cal.4th 107, 177 (2002), "an aggravating factor is *any fact, condition or event* attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88; emphasis added.)

The Court has held that *Ring* does not apply because the facts found at a penalty phase pursuant to section 190.3 are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." *People v. Snow*, 30 Cal.4th 43, 126, fn. 32 (2003). The

Arizona scheme at issue in *Ring* did not require findings that "necessarily determine[d]" penalty, however. While not identical to California's statute, Arizona's was similar in that it required findings of enumerated aggravating factors, statutory or non-statutory mitigating factors, and then a weighing of the two to determine whether leniency was appropriate. *See State v. Ring*, 65 P.3d 915, 924 (2003) (*Ring* III).

The Court has described California's procedure as one in which "the jury merely weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' [Citation.]" *Prieto*, 30 Cal.4th at 263. Before the weighing can occur, however, aggravating factors must be found. Otherwise – just as under the Arizona statutes -- there is nothing to put on the scale.

The determination that aggravating factors "substantially outweigh" mitigating factors, as well as the determination that they are "so substantial" relative to mitigating factors as to warrant death, likewise have at least a strong factual component. Appellant is not alone in believing this. The Supreme Courts of Missouri, Colorado, Arizona (on remand from the United States Supreme Court post-*Ring)*, and Nevada have found that the determination that aggravation outweighs mitigation is a Sixth-Amendment determination within the reasoning of *Ring* and *Apprendi*. See *State v. Whitfield,* 107 S.W.3d 253, 257-261, and 259 (Mo. 2003) ["the jury is required to determine whether the evidence in mitigation outweighs the

evidence in aggravation.... While the State ... argues that this merely calls for the jury to offer its subjective and discretionary opinion rather than to make a factual finding, this Court ... disagrees"]; *Woldt v. People*, 64 P.3d 256, 265-267 (Colo. 2003) ["Because the Sixth Amendment requires that a jury find any facts necessary to make a defendant eligible for the death penalty, and the first three steps of section 16-11-103, 6 C.R.S. (2000), required judges to make findings of fact that render a defendant eligible for death" – including "finding ... that the aggravating factors outweighed the mitigating factors" – "the statute under which Woldt and Martinez received their death sentences is unconstitutional on its face"]; *State v. Ring (III)*, *supra,* 65 P.3d at 942-943 [rejecting state's argument that Supreme Court's opinion in *Ring v. Arizona,* would permit judge rather than jury to balance aggravation against mitigation]; *Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002) [sentencer "may impose a sentence of death only if it finds ... that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found. This ... is in part a factual determination, not merely discretionary weighing.... *Ring* requires a jury to make this finding...."].

In the Nevada scheme, furthermore, the weighing determination was the ultimate one -- *Johnson v. State*, 59 P.3d at 460 – not unlike the California scheme as described in *People v. Boyde, supra,* 46 Cal.3d at 252 –255. See also *Olsen v. State*, 67 P.3d 536, 590 (Wyo. 2003) [with respect

to the requirement that a death sentence be based on the finding that "the totality of the aggravating circumstances are so substantial in comparison to the totality of mitigating circumstances as to warrant the death penalty, ... the burden of ... proof beyond a reasonable doubt remains with the State"].[156]

The fact that the ultimate penalty determination has a large "moral and normative" component, *Prieto,* 30 Cal.4th at 262, furthermore, is not an argument against reliance on the reasonable-doubt standard. As indicated in *Santosky* and *Winship* and discussed at length in *State v. Rizzo, supra,* reasonable-doubt is not merely a quantifying standard. It demands, rather, "a subjective state of certitude" that the decision being made is correct. *Winship*, *supra*, 397 U.S. at 364. Demanding such certitude of a moral judgment that is "unique in its total irrevocability", *Furman,* 408 U.S. at 306, is not only appropriate but compelled by the values at the core of our criminal jurisprudence.

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[156] The *Olsen* decision was not based on *Ring* per se but on the presumption that the penalty statute was intended to incorporate the vigorous interpretation of the reasonable-doubt standard that had prevailed since before statehood. *See id.* at 589, fn. 12, citing *Trumble v. Territory,* 21 P. 1081, 1083 (1889) ["if the defendant is presumed to be innocent until his guilt is established, and if the prosecutor must prove every material allegation of the indictment--every element of guilt--beyond reasonable doubt, before he can ask for a conviction, how can the burden of proof upon any question ever fall upon him...?"].

Contrary to the position taken in *Prieto,* therefore – 30 Cal.4th at 263 -- the fact that "death is different" does not militate in favor of *not* extending guilt-phase protections to the penalty phase. The same argument was made by the state in *Ring* and was given short shrift by the Supreme Court:

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." The notion that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence.

Ring v. Arizona, 536 U.S. at 587.

In addition, therefore, to the grounds stated in sections 1 and 2, *ante,* the failure to require that the jurors in this case apply the reasonable doubt

standard to their key penalty phase findings violated appellant's right to trial by jury as guaranteed by the Sixth and Fourteenth Amendments.[157]

4. Equal Protection

As noted in section 1, the reasonable doubt standard is routinely applied in proceedings with less serious consequences than a capital penalty trial. *See, e.g., People v. Burnick*, 14 Cal.3d at 318-22 [proceeding to determine eligibility for commitment under mentally disordered sex offender law]; *Conservatorship of Roulet, supra,* 23 Cal.3d 219; *In re Winship, supra*, 397 U.S. at 364 [juvenile proceeding]. No compelling reason justifies applying a lesser standard when the ultimate penalty was at stake. The disparity violates the right to equal protection guaranteed by the Fourteenth Amendment. *See generally, Myers v. Ylst,* 897 F.2d 417, 421 (9th Cir. 1990) ["state ... not ... permitted to treat defendants differently ... unless it has 'some rational basis, announced with reasonable precision,' for doing so"].)

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[157] Based on prior precedent, the *Apprendi* and *Ring* opinions place prior-conviction allegations outside the reach of the Sixth Amendment. See *Apprendi,* 530 U.S. at 490, citing *Almendarez-Torres v. United States,* 523 U.S. 224 (1998). *Accord, Ring,* 536 U.S. at 600; *People v. Epps,* 25 Cal.4th 19, 28 (2001). *Apprendi* also noted, however, that "it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." 530 U.S. at 489-90.

5. Reversal Is Required

The failure to apply the reasonable doubt standard when its use is demanded by the Constitution is reversible per se. *Sullivan v. Louisiana,* 508 U.S. 275, 281-282 (1993). In any event, as established in Arg. XI.E.2, *ante,* the mitigation in this case was powerful and there are objective indications – e.g., the prior hung jury and the length of deliberations -- that jurors found the ultimate penalty determination to be a close one. It is reasonably possible and reasonably probable therefore, that, if the reasonable doubt standard had governed, one or more jurors would not have voted to impose death. *Chapman v. California*, 386 U.S. 18, 24 (1967); *People v. Brown*, 46 Cal.3d at 448-449; *Johnson v. Mississippi*, 486 U.S. at 585; *Caldwell v. Mississippi*, 472 U.S. at 341.

The judgment of death must be reversed.

D. *Some* Guidance Regarding the Burdens of Proof and Persuasion Was Required

1. Preponderance Standard

In the preceding sections, appellant argues that it was constitutional error not to instruct the jury that the reasonable doubt standard governed its key penalty determinations. The actual omission was even more egregious, however. The court failed to articulate for the jury *any* standard of proof regarding those determinations.

At the very least, due process required that the jury be instructed that the standard of "proof by a preponderance" controlled. That is the minimum burden historically permitted in *any* sentencing proceeding. So far as appellant can determine, judges in this state have never had the power to impose an enhanced sentence based on facts or considerations not likely to be true. *Cf.* Rule 4.420(b), California Rules of Court ["Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence"]. They have never had the power that a California capital sentencing jury has been accorded, which is to find "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and to sentence a person to die based thereon. The absence of *any* historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the evidence burden of proof. See, e.g., *Griffin v. United States,* 502 U.S. 46, 51 (1991) [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 252, 276-277 (1856) [due process determination informed by historical settled usages].

Further, Evidence Code section 115 provides: "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." The failure to instruct that this standard of proof governed

the penalty determinations thus violated a basic provision of state law. The failure to heed basic state procedures when imposing the death penalty, in turn, violated federal due process. *Hicks v. Oklahoma*, 446 U.S. 343, 346 (1980). Applying procedural protections in non-capital cases, while denying them in capital cases, moreover, is the "height of arbitrariness", *Mills v. Maryland*, 486 U.S. 367, 374 (1988), since, under the Fifth and Eighth Amendments, it is the capital defendant who is entitled to "protections that the Constitution nowhere else provides", *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991). The disparity also violated equal protection. *Myers v. Ylst*, 897 U.S. at 421.

2. Some Standard of Proof Was Required

In a normal criminal trial, before a juror may rely on evidence purporting to show either a "fact necessary to constitute the crime with which [the defendant] is charged", *In re Winship*, 397 U.S. at 364, or a fact within "the direct chain of proof of an accused's guilt", *People v. Tewksbury*, 15 Cal.3d 953, 965, fn. 12 (1975), the juror must be persuaded beyond a reasonable doubt that the alleged fact is true. Similarly, in a non-capital sentencing hearing, a judge may not consider an alleged fact to be aggravating (or mitigating) unless the court finds the fact was proved by a preponderance of the evidence. (Rule 4.420(b), California Rules of Court.) In this case, by contrast, the jury was told: "[Y]ou shall consider all of the evidence which has been received during the trial of this case" (22 CT

6334; 66 RT 26009), and was given no standard of proof by which to reject any of it. As the prosecutor said: "[T]here's no burden of proof...." RT 26045. The jurors, in other words, were effectively required to consider in the weighing process every bit of potentially aggravating evidence in the case without regard to its reliability or unreliability.

The Eighth Amendment imposes "a high requirement of reliability" on the capital sentencing process. *Mills v. Maryland*, 486 U.S. at 383-84. Requiring appellant's jurors to consider all of the evidence in the case irrespective of its reliability was irreconcilable with constitutional demands.

Even if one assumes that every juror in this case instinctively applied *some* standard of proof before accepting an alleged fact as aggravating, moreover, that would not eliminate the constitutional concern. There would still be the specter of jurors applying *different* standards of proof.

This would have been problematic in myriad ways. Prosecution witness J. R. Johnson, for instance, claimed that he recognized photographs of Yo-Yo Johnson and Maria Apodaca as women he'd seen with Mr. Solomon. RT 24437, 24443.[158] He also said that Mr. Solomon told him that Ms. Apodaca's boyfriend had hit him with a bat. RT 24443-45. A juror who relied on the latter testimony arguably could have found that Mr. Solomon had a pre-existing motive to kill Ms. Apodaca and that her killing

[158] The transcript shows the witness spelling his name "Johnson" at the guilt phase and "Jonson" at the penalty retrial. RT 14630, 24428.

was planned in advance and thus a much more aggravating form of murder than the instantaneous-premeditation variety that the prosecutor generally relied on. *See, e.g.,* RT 26180. Mr. Johnson's identification of Yo-Yo was thoroughly impeached, RT 24460-63, and his story about Ms. Apodaca defied credibility. (Contrary to his testimony at the guilt trial, he testified at the retrial that she was still with Mr. Solomon hours after the alleged attack by her boyfriend sent Mr. Solomon to the hospital. Compare RT 24445 with RT 14671-75. See also Arg. I.D.2, *ante*.) If jurors could rely on the testimony only if they believed it beyond a reasonable doubt or by a preponderance, they would have rejected it. Under the non-instructions guiding the penalty retrial, however, jurors could rely on the testimony even if they found it only possibly true.

Similarly, the prosecutor harped on the fact that, when incarcerated for the assaults against women in the 1970's, one of Mr. Solomon's diagnoses was sexual sadism. *See, e.g.,* RT 26055. The jurors also heard, however, from four women who had had intimate relations with Mr. Solomon hundreds of times in the 1980's, and they said that, except on one or two atypical occasions, he had behaved like a gentleman and treated them with respect and affection. *See, e.g.,* RT 23251-52, 23347-49, 23397, 23454-55, 23736. In weighing whether "sexual sadism" was a paramount and defining aspect of Mr. Solomon's personality or whether the truth was more complex and less aggravating, a juror using a reasonable doubt or

preponderance standard likely would have arrived at a conclusion more favorable to Mr. Solomon than a juror applying a possibly-true standard.

Different jurors applying different standards to the same evidence, in other words, would have injected into the penalty-determination process an arbitrariness forbidden by the Eighth Amendment. *Mills v. Maryland*, 486 U.S. at 374; *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988). Cf. *Proffitt v. Florida*, 428 U.S. 242, 260 (1976) [procedural safeguards required "to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed"].

The problem extends beyond this case, moreover. The Eighth Amendment also requires that "[c]apital punishment be imposed fairly, *and with reasonable consistency*, or not at all." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1981) (emphasis added). With juries in different cases applying different standards of proof to the same quality of evidence, the consistency demanded by the Constitution is not possible. It is unacceptable that one defendant should live and another die simply because their juries relied on different standards of proof in accepting or rejecting potentially aggravating evidence.

3. Failure to Allocate the Burden of Persuasion

In addition to not imposing a standard of proof, the penalty phase instructions failed to designate which party had the burden of persuasion regarding the ultimate penalty phase determinations the jury had to make.

In other words, if a juror was undecided whether "the aggravating circumstances [we]re so substantial in comparison with the mitigating circumstances that ... death" was warranted (CT 6344; CALJIC No. 8.88), s/he was not told that, in the event of such equipoise, the law required that s/he vote for life (or death). To the contrary, the jurors were told that there was "no burden of proof" in the penalty phase. RT 26045.

This Court has held that allocating a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. *People v. Hayes*, 52 Cal.3d 577, 643 (1990). Appellant respectfully submits, however, that the failure to impose such a burden constituted both statutory and constitutional error.

First, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life. A tie-breaking rule is needed to ensure that such jurors -- and the juries on which they sit -- respond in the same way, so that the death penalty is applied evenhandedly "and with reasonable consistency". *Eddings v. Oklahoma*, 455 U.S. at 112. In cases in which the substantiality of the aggravating evidence relative to the mitigating evidence is a close call -- which certainly could have been the view of one or more jurors in this case -- it is unacceptable -- "wanton" and "freakish", *Proffitt v. Florida*, 428 U.S. at 260 -- the "height of arbitrariness", *Mills v. Maryland*, 486 U.S. at 374 -- that one defendant

should live and another die simply because one juror or one jury breaks the tie in favor of the defendant and another does so in favor of the state.

Second, the State of California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. It does so, however, only in non-capital cases. (Rule 4.420(b), Calif. Rules of Court.) To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Fifth, Eighth, and Fourteenth Amendments. See e.g., *Mills v. Maryland*, 486 U.S. at 374; *Myers v. Ylst*, 897 F.2d at 421.

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." In *any* capital case, *any* aggravating factor will relate to wrongdoing. When the prosecutor in this case argued that appellant was a "diabolical monster", RT 26379, he was "claiming" not only that appellant was "guilty of crime or wrongdoing," but that he was more "guilty of crime or wrongdoing" than just about any human being who had ever lived. The state's position was the prototype of the category defined by section 520. Allowing appellant to be sentenced to death without affording him the procedural protection afforded by § 520 violated not only state law but federal due process. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

4. Reversal Is Required

The trial court had a *sua sponte* obligation to instruct the jury in the fundamental principles necessary for proper decision-making. *People v. Sedeno*, 10 Cal.3d 703, 716 (1974). See *Kelly v. South Carolina*, 534 U.S. 246, 256 (2002) ["It is the duty of the trial judge to charge the jury on all essential questions of law, whether requested or not"].

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments and is reversible per se. *Sullivan v. Louisiana*, *supra,* 508 U.S. at 281-282. Given the closeness of the key penalty determinations, moreover, it certainly cannot be found that the error had "no effect" on the penalty verdict. *Caldwell v. Mississippi, supra*, 472 U.S. at 341. To the contrary, it is both reasonably possible and reasonably probable that the failure to instruct contributed to the verdict. *Chapman v. California*, 386 U.S. at 24; *People v. Brown*, 46 Cal.3d at 448-49.

The judgment of death must be reversed.

XIV.

THE FAILURE TO REQUIRE ANY SORT OF AGREEMENT BY JURORS AS TO WHAT CONSTITUTED AGGRAVATING FACTS VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Introduction

After listing the alleged factor (b) offenses – the murder of Angela Polidore in 1986, the attempted murder and assault of LaTonya Cooper in 1987, and the assaults in 1969-1975 on five women -- the instructions provided: "It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a fact in aggravation." 22 CT 6336; CALJIC No. 8.87 (1989 Rev.). The prosecutor told jurors: "That is not a collective judgment that all twelve of you must agree upon, that is an individual judgment." RT 26190.

The instructions did not explicitly state that unanimity was not required with regard to factor (a) -- circumstances of the adjudicated crimes -- or factor (c) -- appellant's prior convictions – but this was inferable. If no unanimity requirement applied to the category that called on jurors to decide whether Mr. Solomon was guilty of one murder, one attempted

murder, and six assaults – factor (b) -- a reasonable juror could only infer that it did not apply to the other categories either.[159]

The court thus failed to require even that a simple majority of the jurors agree on any particular aggravating factor or that any particular combination of aggravating factors warranted a death sentence. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the ultimate one that death

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[159] The only explicit unanimity instruction was the "Concluding Instruction":

> You shall now retire and select one of your number to act as foreperson, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree. Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom.

CT 6347. A modified version of CALJIC No. 8.88 drafted by the court also indicated that certain verdict-consequences would follow from what presumably had to be collective agreement:

> If you determine that the factors and circumstances in mitigation outweigh or equal those in aggravation, you must return a verdict of life imprisonment without possibility of parole. If you determine that the aggravating factors substantially outweigh the mitigating factors, you may return a verdict of death or a verdict of life imprisonment without the possibility of parole. To return a verdict of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

CT 6343-6344. In all other respects, the value of the juror's independent, individual decision was emphasized. CT 6312 ["The People and the defendant are entitled to the individual opinion of each juror.... Each of you must decide the case for yourself.... [D]o not decide in a particular way because a majority of the jurors , or any of them, favor such a decision.... Each juror must decide for himself or herself the penalty to be imposed"].

was warranted. A single juror may have voted for death in reliance on evidence that only he or she believed existed and that every other juror rejected as a basis for imposing death.

A death sentence that results from such an arbitrary procedure violates the due process, jury-trial, and reliability guarantees of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

B. This Court's Position

Prior to trial, this Court held that "unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." *People v. Taylor*, 52 Cal.3d 719, 749 (1990).[160] The Court has since held that *Ring v. Arizona*, *supra,* does not alter that conclusion. *People v. Prieto*, 30 Cal.4th at 265. Appellant respectfully requests that the Court revisit the issue.

C. Analysis

1. Sixth Amendment

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the ultimate decision

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[160] Accordingly, appellant moved for dismissal of the special-circumstance allegation and/or to preclude imposition of the death penalty on the ground that state death penalty law unconstitutionally failed to require jurors to unanimously find an aggravating fact to be true before any juror could rely on it. 20 CT 5973. The motion was denied. 21 CT 6151.

whether death is warranted. Penal Code section 190.3. As shown in the preceding argument, the United States Supreme Court held in *Ring v. Arizona* that such factual determinations fall within the ambit of the jury-trial guarantee of the Sixth Amendment. *See* 536 U.S. at 609 ["the Sixth Amendment applies to … the factfinding necessary to put … a defendant … to death…."].

"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*, 494 U.S. 433, 452 (1990) (conc. opn. of Kennedy, J.). While the jury-trial guarantee as applied to the states through the Fourteenth Amendment does not require unanimity in non-capital cases when 12-person juries are used – see, e.g., *Apodaca v.Oregon,* 406 U.S. 404 (1972) [10-2 acceptable]; *Johnson v. Louisiana*, 406 U.S. 356, 362, 364 (1972) [9-3 acceptable] -- the "acute need for reliability in capital sentencing proceedings" -- *Monge v. California, supra*, 524 U.S. at p. 732[161] -- militates heavily in favor of requiring unanimity with respect to the crucial findings of a capital jury.

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[161] *Accord*, *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988); *Gardner v. Florida*, 430 U.S. 349, 359 (1977) (plur. opn. of White, J.); *Woodson v. North Carolina, supra*, 428 U.S. at p. 305.

Even before *Ring* was decided, accordingly, many jurisdictions recognized the need for unanimity in capital factfinding. The federal death penalty statute thus provides that a "finding with respect to any aggravating factor must be unanimous." 21 U.S.C. § 848(k).[162] Nearly two-thirds of the 22 states that, like California, vest statutory responsibility in the jury for death penalty sentencing, likewise require that the jury unanimously agree on the aggravating factors proven.[163]

Appellant is not overly concerned with demonstrating that unanimity *per se* was required here, however, since his jury was permitted to return its death verdict without *any* agreement as to aggravating circumstances. At the very least, the Sixth Amendment requires that a critical mass – or super-majority -- of jurors reach such agreement before death can be considered. Thus, in *Ballew v. Georgia*, 435 U.S. 223 (1978), the Court struck down a

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[162] It has been observed that the unanimity requirement in the federal death penalty statute is one of the procedural protections critical in countering the potential for unreliability and prejudice introduced when evidence of unadjudicated offenses is admitted in the penalty phase. *United States v. Beckford*, 964 F.Supp. 993, 1001 (E.D.Va. 1997).

[163] See Ark. Code Ann. § 5-4-603(a) (Michie 1993); Colo. Rev. Stat. Ann. § 16-11-103(2) (West 1992); Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code art. 27, § 413(i) (1993); Miss. Code Ann. § 99-19-103 (1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).

Georgia law allowing criminal convictions with a five-person jury – even though unanimous – and in other cases has held that the Sixth Amendment does not permit a conviction based on the vote of five of six seated jurors. *Brown v. Louisiana*, 447 U.S. 323 (1979); *Burch v. Louisiana*, 441 U.S. 130 (1978).

The latter holdings were premised on the need to maintain the integrity of the deliberative function. In *Ballew,* the Court held the five-person jury unconstitutional because such a jury was less likely "to foster effective group deliberation. At some point this decline [in jury number] leads to inaccurate factfinding ...." 435 U.S. at p. 232. Similarly, in *Brown v. Louisiana*, the Court said that "relinquishment of the unanimity requirement" in a six-person jury "removes any guarantee that the minority voices will actually be heard." 447 U.S. at 333. Such a jury had to be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." *Id.* at 334. See also *Allen v. United States*, 164 U.S. 492, 501 (1896) ["The very object of the jury system is to secure uniformity by a comparison of views, and by arguments among the jurors themselves"].

Even in a non-capital case, therefore, when the Sixth Amendment applies to a factual finding, there must at a minimum be significant agreement among the jurors for the finding to pass constitutional muster.

Under California law – as interpreted by this Court and as applied in this case -- no agreement at all was required with respect to the critical factfinding on which each juror's ultimate vote for death rested. As a result, jurors were not required to debate the merits of, among other things, their impressions of the "circumstances of the crime[s]" under factor (a) or their views as to the sufficiency of the evidence to prove the Polidore and Cooper allegations under factor (b). California law simply eliminated the need for any deliberative function on those critical issues.

The failure to require that, before any final penalty determination was made, at least a super-majority of the jurors in this case had to come to some agreement as to which facts had been proven under factors (a)-(c), violated the Sixth Amendment.

2. Fifth and Eighth Amendments

The point of maintaining the integrity of the deliberative function – namely, ensuring the reliability of the jury's factfinding and conclusions – is also the core concern of due process and the reliability demanded by the Eighth and Fourteenth Amendments. Because "death is a different kind of punishment from any other which may be imposed", *Gardner v. Florida, supra*, 430 U.S. at 357, the Constitution requires "a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Accordingly, the Court has not hesitated to strike down penalty phase procedures which increase the risk that the factfinder will

make an unreliable determination. *Caldwell v. Mississippi*, *supra,* 472 U.S. at 328-330; *Green v. Georgia*, 442 U.S. 95 (1979); *Lockett v. Ohio, supra*, 438 U.S. at pp. 605-606; *Gardner v. Florida, supra*, 430 U.S. at pp. 360-362. Defendants have "a legitimate interest in the character of the procedure which leads to the imposition of sentence even if [they] may have no right to object to a particular result of the sentencing process." *Id.* at 358.

While penalty phase determinations involve the greatest need for reliability, California's procedure provides for the greatest likelihood of unreliability – requiring no agreement and therefore no deliberation on anything but the ultimate conclusion. Since section 190.3 permits a wide range of possible aggravators – particularly given the expansive interpretation given to factor (a) -- the failure to ensure agreement and deliberation on which aggravators are to be weighed on death's side of the scale creates a grave risk: (1) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do; and (2) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from the wide array of proffered aggravators that death must be the appropriate sentence. The risk that the end result of such an inherently unreliable decision-making process will be a sentence of death is unacceptable.

This Court has said that the safeguards applicable in criminal trials are not applicable when unadjudicated offenses are sought to be proved in capital sentencing proceedings "because [in the latter proceeding the] defendant [i]s not being tried for that [previously unadjudicated] misconduct." *People v. Raley*, 2 Cal.4th 870, 910 (1992). The United States Supreme Court has repeatedly pointed out, however, that the penalty phase of a capital case "has the 'hallmarks' of a trial" on guilt or innocence. *Monge*, 524 U.S. at 730; *Strickland v. Washington*, 466 U.S. 668, 686-687 (1984); *Bullington v. Missouri*, 451 U.S. 430, 439 (1981). While the unadjudicated offenses are not the *only* matters the defendant is being "tried for", those trials-within-a-trial often play a dispositive role in determining whether death, the "penalty ... unique 'in both its severity and its finality,'" is imposed. *Monge*, 524 U.S. at p. 732. Ensuring a reliable determination of a factor (b) allegation in that context is at least as important as it would be in a proceeding that was focusing only on the factor (b) offense.

This Court has also rejected the need for unanimity on the ground that "[g]enerally, unanimous agreement is not required on a foundational matter. Instead, jury unanimity is mandated only on a final verdict or special finding." *People v. Miranda*, 44 Cal.3d at 99. The unadjudicated offenses, however, introduced the question whether appellant had been committing violent crimes for 20 years, not just the one year in which the adjudicated offenses took place. This question could have been pivotal --

not merely foundational -- to the penalty decision of one or more jurors – just as it was for Judge Mering when he rejected appellant's motion for modification. See RT 26752 ["For close to twenty years, he has been a violent vicious rapist"].

Unanimity is not limited to final verdicts, moreover. It is not enough that jurors unanimously find that the defendant violated the extortion statute, for example; where the evidence shows several possible acts of extortion, the jurors must be told that, in order to convict, they must unanimously agree on at least one such act. *People v. Diedrich*, 31 Cal.3d 263, 281-282 (1982). It is only fair and rational that, where jurors are charged with the most serious task any jury is ever confronted with -- determining whether aggravating circumstances are so substantial as to warrant death -- unanimity with regard to the aggravation supporting that determination likewise is required.

The procedures followed in this case failed to ensure the integrity of the deliberative function and thus the reliability of the outcome of the deliberations. The resulting judgment violated the due process and reliability guarantees of Fifth, Eighth, and Fourteenth Amendments.

3. Equal Protection

The failure to require unanimity with regard to aggravating factors stands in stark contrast to the rules applicable in California to noncapital cases. In cases where a criminal defendant has been charged with special

allegations that may increase the severity of his sentence, for example, the jury must render a separate, unanimous verdict on the truth of such allegations. See, e.g., Pen. Code, §§ 1158, 1158, subd. (a), & 1163. Capital defendants are entitled to more rigorous protections than those afforded noncapital defendants. See *Ring v. Arizona, supra,* 536 U.S. at 589; *Monge v. California, supra*, 524 U.S. at p. 732; *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991). To apply the unanimity 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*, 11 Cal.4th 694, 763-764 (1995), violates the equal protection clause of the Fourteenth Amendment. See, e.g., *Myers v. Ylst, supra*, 897 F.2d at p. 421.

D. Reversal Is Required

If the jury had been required to follow a unanimity or super-majority rule, the effect on the retrial deliberations would have been significant. A few examples will suffice.

The evidence the prosecution presented at the retrial in support of the factor (b) allegations that Mr. Solomon murdered Ms. Polidore and attempted to murder Ms. Cooper was essentially the same as the evidence it

had presented in support of those charges at the guilt trial.[164] That the guilt jury hung 8-4 on the Polidore charge and 7-5 and 8-4 on the Cooper charges – 19 CT 5527; 37 RT 16592 – makes it reasonably likely that a comparable number of retrial jurors had a reasonable doubt regarding the truth of those charges. If the jury had been instructed that no one could rely on those offenses unless all jurors or two-thirds of them agreed beyond a reasonable doubt that Mr. Solomon was guilty of those offenses, then none of the jurors would have been able to weigh those offenses as aggravating. The amount of time the prosecutor devoted to the Polidore and Cooper allegations in closing argument – see RT 26194-26240 – and the fact that he requested a cross-admissibility instruction specifically to buttress his case on the Polidore allegation – see RT 25960 – is ample evidence that those allegations were important to the case for death. Cf. *People v. Cruz*, 61 Cal.2d at 868 (1964) ["There is no reason why [this Court] should treat this evidence as any less crucial than the prosecutor -- *and so presumably the jury* -- treated it"]. Accord, *Bram v. United States*, 168 U.S. at 541. If just the Polidore and/or Cooper allegations dropped out a juror's calculus, therefore, the probability of a life sentence would have been significantly enhanced.

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[164] *Compare* Statement of Facts, *ante,* sections I.B.2 [Polidore trial facts] and I.B.10 [Cooper trial facts], *with* RT 22448-22909, 22967-69 [Polidore retrial facts] and RT 23760-23856, 24004-92, 24100-24119 [Cooper retrial facts].

Other evidence also would have been affected by a unanimity or super-majority rule. There was critical disputed evidence concerning the crimes, for example, that some jurors may have credited and others may not have.[165]

There was also evidence concerning the crimes that some but not all jurors may have deemed aggravating.[166]

There was mitigating evidence, furthermore, that jurors could have been misled into believing they could consider aggravating.[167]

A unanimity or majority-rule requirement would have forced jurors to discuss these issues in order to determine the level of agreement and disagreement, a process that was likely to expose an individual juror's

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[165] For example, Dr. Wilson testified that Mr. Solomon was using cocaine prior to the first alleged homicide. In closing argument, the prosecutor made a huge issue of the accuracy of that testimony and argued that, if it was inaccurate, it significantly undercut the mitigating claim that it was crack that sent Mr. Solomon over the edge. See, e.g., RT 26349-56.

[166] Sherry Hall testified, for example, that Mr. Solomon appeared ready to kill her but let her go when she begged for her life. The prosecutor argued that this was aggravating because it showed that Mr. Solomon liked to play God. RT 26172-73. A reasonable juror could have drawn mitigating inferences: e.g., that the scenario indicated impulsive conduct (if not compassion) on Mr. Solomon's part, not premeditation, and that the actual killings were likely the end results of a similarly unplanned and unpredictable sequence of events.

[167] The prosecutor argued, for instance, that Mr. Solomon's "positive institutional adjustment" in prison, Atascadero, and the Army was "not a mitigating factor" but was really an aggravating factor because it showed "that he has the ability to control his conduct" and had that ability every time he chose instead to commit an act of violence. 67 RT 26374.

misconceptions to the jury as a whole, which in turn would have allowed them to be debated and corrected. All jurors, furthermore, would have been precluded from considering such evidence in the final weighing if the requisite agreement was not obtained.

Given that these issues related to critical aspects of the cases in aggravation and mitigation, and given the closeness of the penalty determination -- as reflected, among other things, by the prior hung jury -- cf. *People v. Rivera,* 41 Cal.3d 388, 393 fn. 3 (1985) -- and the three-day length of the deliberations -- cf. *People v. Collins*, 68 Cal.2d 319, 332 (1968) -- it is reasonably possible that the failure to correctly instruct on the need for a unanimity or super-majority rule regarding aggravating circumstances contributed to the verdict of death. *Chapman v. California*, 386 U.S. 18, 24 (1967). It certainly cannot be found that the error had "no effect" on the penalty verdict. *Caldwell v. Mississippi, supra*, 472 U.S. at 341.

That verdict may not stand.

XV.

ALLOWING THE JURY TO IMPOSE THE DEATH PENALTY ON THE BASIS OF PREVIOUSLY UNADJUDICATED OFFENSES WAS UNCONSTITUTIONAL

A. The Error

The Fifth, Eighth, and Fourteenth Amendments require that the procedures used in the penalty phase of capital proceedings be reliable, *Gardner v. Florida*, 430 U.S. 349, 359 (1977), and that the "evidence ... at the ... hearing ... not prejudice a defendant", *Gregg v. Georgia*, 428 U.S. 153, 203 (1976).

In this case, the prosecution sought death based in part on five alleged offenses -- the murder of Angela Polidore, the attempted murder and assault of LaTonya Cooper, and the assaults on Virginia Johnson and Mary Kaufman -- that had never previously been adjudicated. Allowing the prosecution to introduce such evidence pursuant to Penal Code section 190.3(b) violated the reliability principle set forth in *Gardner* and *Gregg* in several ways.

First, as the Washington Supreme Court held in *State v. Bartholomew*, 683 P.2d 1079 (Wash. 1984):

> A jury which has convicted a defendant of a capital crime is unlikely fairly and impartially to weigh evidence of prior alleged offenses.

(*Id* at 1086.) Consequently, the court concluded, to

> allow the jury which has convicted defendant of aggravated first degree murder to consider evidence of other crimes of which defendant has not been convicted is ... unreasonably prejudicial [within the meaning of Gregg]....

Ibid. The court found the procedure "particularly offensive to the concept of fairness" and violative of both the due process and cruel and unusual punishment provisions of the state and federal constitutions. *Id.* at 1085.

Other courts have reached similar conclusions. See *Cook v. State,* 369 So.2d 1251, 1257 (Ala. 1979) ["This fundamental tenet of our system of justice" -- the presumption of innocence -- "prohibits use against an individual of unproven charges in this life or death situation"]; *State v. McCormick*, 397 N.E.2d 276, 281 (Ind. 1979) ["the risk that the previously tainted jury will react in an arbitrary manner {when unadjudicated offenses are introduced} is infinitely greater" than when such offenses are "presented to an impartial, untainted jury"]; *Commonwealth v. Hoss*, 283 A.2d 58, 69 (Pa. 1971) ["it is imperative that the death penalty be imposed only on the most reliable evidence...; piecemeal testimony about other crimes for which appellant has not yet been tried or convicted can never satisfy this standard"]; *State v. Bobo*, 727 S.W.2d 945, 952-953 (Tenn. 1987) ["to permit the State to present evidence {of unadjudicated offenses} ... before the very jury that has just returned a guilty verdict for first degree murder, violates the concept of fundamental fairness embodied in due

process of law"]; *United States v. Davis*, 912 F.Supp. 938, 948 (E.D.La. 1996) ["a person is presumed innocent until proven guilty through reliable procedures, including an impartial and untainted jury. To present unadjudicated criminal conduct to a jury that has just convicted the defendant of first degree murder is anathema to those principles. Such a jury can hardly be expected to give the new information the sort of dispassionate consideration necessary for a reliable finding of guilt, regardless of how they might be instructed"]; accord, *United States v. Bradley*, 880 F.Supp. 271, 287 (M.D.Pa. 1994). See also *Scott v. State*, 465 A.2d 1126, 1135 (Md. 1983) [state law permits admission of prior convictions only, not evidence of unadjudicated offenses]; *Provence v. State*, 337 So.2d 783, 786 (Fla. 1976) [same].)

In this case, the penalty jury was not the jury that returned the verdicts in the guilt phase; the situation was *more* prejudicial than that. Here, the penalty jury was told that another jury had convicted appellant of six murders and five sexual offenses in the guilt phase and that those convictions were definitive beyond a reasonable doubt -- RT 21568, 25997; CT 6341 -- then heard the same evidence the guilt phase jury heard regarding those offenses, RT 21756-24751 -- all before it heard the evidence of the unadjudicated offenses, RT 24752-24874. There was no way jurors were going to be able to dispassionately evaluate the evidence regarding the latter. There was certainly no way *every* juror would be able

to do so. The penalty jury was at least as "tainted" as the juries in the cases cited above, and the procedure was as fundamentally unfair.

A second impossible task faced jurors, moreover. Any juror who believed that appellant had committed one or more of the unadjudicated offenses, but was not so tainted by the guilt-phase convictions as to believe that appellant's guilt on the unadjudicated allegations had been proved *beyond a reasonable doubt*, was supposed to make his or her penalty decision without considering the evidence of the unadjudicated offenses. 22 CT 6336.[168] Such a "mental gymnastic" was "beyond, not only their powers, but anybody else's." *Nash v. United States*, 54 F.2d 1006, 1007 (2nd. Cir. 1932).

The jurors were to perform these feats in isolation, furthermore. If the offenses in question were being tried in an ordinary criminal trial, of course, the jurors would have had to strive for unanimity when determining whether the offenses had been proved beyond a reasonable doubt. Cal. Const., art. I, sec. 16; *People v. Wheeler*, 22 Cal.3d 258, 265 (1978). In this case, by contrast, the court explicitly instructed jurors that it was "*not* necessary for all jurors to agree". 22 CT 6336; 66 RT 26012. An

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[168] The jurors were told: "If a juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose." 22 CT 6336; 66 RT 26012; CALJIC No. 8.87 (1989 Rev.).

individual juror could find a factor (b) allegation true and aggravating and a reason to impose death even if every other juror found the evidence in support of the allegation insufficient. As a result -- as discussed in Argument XIV, *ante* -- if a juror was viewing the evidence regarding the unadjudicated offenses through the lens of bias rather than reasonable doubt, there is a very good chance that his or her fellow jurors never became aware of this and thus did not have the opportunity to set the juror straight.

In other contexts, this Court has articulated and embraced many of the principles that cast doubt on the capacity of jurors to fairly evaluate evidence of unadjudicated offenses. See, e.g., *People v. Williams*, 44 Cal.3d 883, 904 (1988) [other crimes evidence is "inherently prejudicial"]; *People v. Garceau*, 6 Cal.4th 140, 186 (1993) [admission of other crimes evidence is "potentially devastating" and can violate federal due process]; *People v. Calderon*, 9 Cal.4th 69, 75 (1994) [noting the "grave risk" posed by trying different charges together]; *People v. Wheeler*, 22 Cal.3d at 265 [stressing the importance of the unanimity requirement]; *People v. Massie*, 66 Cal.2d 899, 916 (1967) [recognizing "the impossibility of a juror's obliteration from his mind of that which he already kn[o]w[s]"]; *People v. Albertson*, 23 Cal.2d 550, 577 (1944) [to say that a juror will not be able to follow an admonition to disregard evidence of the defendant's prior criminality "does not reflect in any degree upon the intelligence, integrity,

or the honesty of purpose of the juror"]; *People v. Hill*, 17 Cal.4th 800, 845 (1998) [some bells can't be unrung].

Nonetheless, this Court has repeatedly held that it sees no statutory or constitutional problem in allowing a jury to consider unadjudicated offenses in the penalty phase of a capital case. See, e.g., *People v. Michaels,* 28 Cal.4th 486, 541-542 (1998); *People v. Balderas*, 41 Cal.3d 144, 204-205 (1985). See also *McDowell v. Calderon*, 107 F.3d 1351, 1366 (9th Cir. 1997), *reversed on other grounds*, 130 F.3d 833 (9th Cir. 1997) (*en banc*).)

The Court has even gone so far as to hold that a trial court may not invoke Evidence Code section 352 to bar a prosecutor from proceeding with proof of a factor (b) offense. See, e.g., *People v. Raley*, 2 Cal.4th 870, 910 (1992).

The primary rationale offered by the Court is simply this: "The penalty phase is unique, intended to place before the sentencer all evidence properly bearing on its decision under the Constitution and statutes." *People v. Balderas*, 41 Cal.3d at 205, fn. 32. It is precisely "[b]ecause the death penalty is unique," however, that the "need for reliability in capital sentencing proceedings" is so much more "acute" than in non-capital proceedings. *Monge v. California*, 524 U.S. 721, 732 (1998).

In theory, of course, the Court is correct. Ideally, the penalty phase jury will be given every relevant bit of information to consider, including

evidence of the defendant's past acts of violence, and thus have "'a true picture of the defendant's history'.... [Citation.]" *People v. Stanley*, 10 Cal.4th 764, 822 (1995). When the jury cannot objectively evaluate the information in question, however -- when it jumps to the conclusion that the defendant in fact committed the alleged acts of violence -- then it is not a "true picture" the jury sees, but a picture skewed by bias, "caprice or emotion." *Gardner v. Florida*, 430 U.S. at 358. In that situation, the ideal must give way to the real.

That is the proposition for which *Gardner v. Florida* stands. At issue in Gardner was the procedure by which the sentencing judge in a capital case was permitted to review a confidential pre-sentence report before deciding what sentence to impose. The state contended that disclosing the contents of the report to the defense would divulge confidential sources who then could not be used in future investigations. The high Court rejected the argument, holding: 1) that the procedure created a "risk that some of the information accepted in confidence may be erroneous, or may be misinterpreted, by the investigator or by the sentencing judge"; and 2) that society's "interest in [the] reliability" of capital sentencing proceedings "plainly outweighs the State's interest in preserving the availability of comparable information in other cases." 430 U.S. at 359.

The risk here, *inter alia*, was that a juror told that the first jury had definitively found that appellant had committed six murders and five sexual offenses would not be able to objectively evaluate the evidence of unadjudicated offenses and would thus impose death based on a false view of appellant's history. In weighing that risk against the ideal of section 190.3(b), there is no contest: the "interest in reliability plainly outweighs the State's interest in" presenting the jury with all potentially relevant information.

Permitting the prosecution to proceed with its factor (b) allegations in the penalty phase of this case violated the due process and cruel and unusual punishment provisions of the state and federal constitutions.

B. Ineffective Assistance Of Counsel

Defense counsel objected to the jury hearing evidence regarding the Polidore murder -- but not on the grounds set forth above (see 41 RT 18538-44) -- and did not object at all to the jury hearing evidence of the other three previously unadjudicated offenses. Counsel had an obligation to take all necessary steps "to protect his or her client from ... efforts made by the prosecution to introduce evidence of prior crimes or acts of violence." *In re Jones*, 13 Cal.4th 552, 581-582 (1996). The failure to make the objection could not have been tactical and deprived appellant of the effective assistance of counsel. *Ibid.*; *Strickland v. Washington*, 466 U.S. at 686-689.

C. Prejudice

The penalty decision was close even with the factor (b) offenses in the mix. The fact that the first penalty jury hung is testament to that closeness -- cf. *People v. Rivera,* 41 Cal.3d 388, 393 fn. 3 (1985) -- as is the three-day length of the deliberations -- cf. *People v. Collins*, 68 Cal.2d 319, 332 (1968). Removing the factor (b) offenses from the mix would have substantially weakened the case in aggravation. The prosecution was able to present virtually no evidence regarding how the homicides had occurred. See RT 26543 [acknowledging as much]. The factor (b) offenses -- accurately or inaccurately -- undoubtedly planted in the jurors' minds the idea that, prior to their deaths, appellant had treated the homicide victims in the sadistic way he had treated the victims of the 1969-1975 offenses – the very speculation relied on by Judge Mering in rejecting the motion for modification. RT 26753-54. This would have injected a personalized and concrete element of horror in the case that did not otherwise exist. Given the strength of the mitigating evidence – as noted by both Judge Mering, RT 26744, and the prosecutor, RT 26369-71, 26374 -- the prosecution needed the factor (b) findings to secure a finding that aggravation substantially outweighed mitigation.

In short, without the evidence of the factor (b) offenses, it is reasonably possible and reasonably probable that one or more jurors would not have voted for death. *Chapman v. California,* 384 U.S. at 24; *People v.*

Jones, 29 Cal.4th 1229, 1264, fn. 11 (2003); *Strickland,* 466 U.S. at 693-695.

The penalty judgment may not stand.

XVI.

THE FAILURE TO REQUIRE THE JURY TO MAKE EXPLICIT FINDINGS OF THE FACTORS IT FOUND IN AGGRAVATION VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The California death penalty scheme does not require explicit findings by the jury showing the aggravating factors relied on to impose death. Appellant moved for dismissal of the special-circumstance allegation and/or to preclude imposition of the death penalty in part because the failure to require written findings was unconstitutional. 20 CT 5964-66, 5971-72. The motion was denied. 21 CT 6151. This Court has held that the absence of such a provision does not render the scheme unconstitutional. *People v. Fauber*, 2 Cal.4th 792, 859 (1992). See also *Williams v. Calderon*, 52 F.3d 1465, 1484-85 (9th Cir. 1995) [reaching same conclusion regarding 1977 law].) Appellant requests that the matter be reconsidered.

First, the importance of explicit findings in non-capital cases has long been recognized -- emphatically -- by this Court. See, e.g., *People v. Martin*, 42 Cal.3d 437, 449 (1986) [statement of reasons essential to meaningful appellate review]. Thus, in a non-capital case the sentencer is required by California law to state on the record the reasons for the sentence choice. *Ibid.*; Pen. Code sec. 1170(c). See also *In re Sturm,* 11

Cal.3d 258, 267 (1974) [parole board required to state its reasons for denying parole]. Under the Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants. *See Ring v. Arizona,* 536 U.S. at p. 589; *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991); *Myers v. Ylst*, 897 F.2d 417, 421 (9th Cir.1990).

Explicit findings in the penalty phase of a capital case are especially critical because of two factors: 1) the magnitude of what is at stake -- *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); and 2) the possibility of error. In *Mills v. Maryland*, 486 U.S. 367 (1988), for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. See, e.g., *id.* at 383, fn. 15.

In this case, for instance, in closing argument the prosecutor told the jurors that they could consider "the year and a half that ... [Mr. Solomon] did in Arizona State Prison as" an aggravating circumstance under factor (c). RT 26051. That was not accurate. Factor (c) permits a juror to count a defendant's "prior felony conviction" as a circumstance favoring death, not a defendant's prior prison term. *Cf. People v. Kaurish*, 52 Cal.3d 648, 702 (1990) [evidence and argument that the defendant violated his probation and "was committed to ... state prison ... was erroneously introduced"].

"[E]vidence ... that does not fit any statutory category is inadmissible." *Ibid.* Written findings would have enabled other jurors, or trial counsel, or the trial court, to catch this error and others like it before the verdict was rendered or accepted.

A "high [degree] of reliability" in death-sentencing procedures is demanded by both the due process clause and the Eighth Amendment. *Mills v. Maryland*, 486 U.S. at 383-84. Explicit findings are essential to ensure such reliability. In several cases, accordingly, in the course of explaining why the state death statutes at issue were constitutional, the United States Supreme Court has pointed to the fact that they required on-the-record findings by the sentencer, thus enabling meaningful appellant review. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 195, 198 [plur. opn.], 211-12, 222-23 [conc. opn. of White, J.] (1976); *Proffitt v. Florida*, 428 U.S. 242, 250-51, 253, 259-60 (1976).[169] The importance of written

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[169] In rejecting the claim advanced here, this Court most often relies on *People v. Rodriguez*, 42 Cal.3d 730, 777-78 (1986), which, in turn, relied on the analysis of the 1977 law in *People v. Frierson*, 25 Cal.3d 142, 179 (1979) and *People v. Jackson*, 28 Cal.3d 264, 317 (1980). The latter cases, however, misapplied the just-cited United States Supreme Court cases. They equated the requirement in Penal Code section 190.4 -- requiring a statement of reasons from the trial court on the automatic motion for modification -- with the statement of reasons from the actual sentencer in the federal cases. The equation fails. It is the reasons of the entity that actually made the decision that are the crucial ones. Cf. *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

findings is reflected in the fact that three-quarters of all state statutory schemes require them.[170]

The failure to require explicit findings here precludes meaningful appellant review. Without such a requirement, it is impossible to "reconstruct the findings of the state trier of fact" -- *Townsend v. Sain,* 372 U.S. 293, 313-316 (1963) -- findings such as those required by *Ring v. Arizona, supra,* 536 U.S. at 589, 609. The resulting procedural vacuum violates the due process, jury-trial, and reliability guarantees of the Sixth, Eighth, and Fourteenth Amendments.

Given the closeness of the penalty case and the number of serious errors the jury could have committed that would have been caught by an explicit-findings requirement (see above), it is reasonably possible that the failure to impose such a requirement contributed to the verdict of death. *Chapman v. California*, 386 U.S. at 24. It certainly cannot be found that

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[170] See, e.g.: Code of Ala., sec. 13A-5-47(d) (1994); Ariz. Rev. Stat., sec. 13-703(D) (1995); Conn. Gen. Stat., sec. 53a-46a(e) (1994); 11 Del. Code, sec. 4209(d)(3) (1994); Fla. Stat., sec. 921.141(3) (1994); Idaho Code, sec. 19-2515(e) (1994); Ind. Code Ann., sec. 35-38-1-3(3) (Burns 1995) (per Schiro v. State, 451 N.E.2d 1047, 1052-53 (Ind.1983)); Md. Code Ann., art. 27, secs. 413(i) and (j) (1995); Miss. Code Ann., sec. 99-19-101(3) (1994); Rev. Stat. Mo., sec. 565.030(4) (1994); Mont. Code Ann., sec. 46-18-306 (1994); Neb. Rev. Stat., sec. 29-2522 (1994); N.J. Stat., sec. 2C:11-3(c)(3) (1994); N.C. Gen. Stat., 15A-2000(c) (1994); 21 Okla. Stat., sec. 701.11 (1994); 42 Pa. Stat., sec. 9711(F)(1) (1992); Tenn. Code Ann., sec. 39-13-204(g)(2)(A)(1) (1995); Wyo. Stat., sec. 6-2-102(d)(ii) (1995). See also 21 U.S.C. sec. 848(k) (West Supp. 1993).

the error had "no effect" on the penalty verdict. *Caldwell v. Mississippi, supra*, 472 U.S. at 341.

The judgment of death must be reversed.

XVII.

THE FAILURE OF CALIFORNIA'S DEATH PENALTY STATUTE TO PROVIDE FOR INTER-CASE PROPORTIONALITY REVIEW VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" *Barclay v. Florida,* 463 U.S. 939, 954 (1976) (plurality opinion, alterations in original, quoting *Proffitt v. Florida,* 428 U.S. 242, 251 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review. *Cf. Gregg v. Georgia,* 428 U.S. 153, 198 (1976) [approving Georgia's adoption of statute mandating proportionality review by state supreme court as a safeguard against the kind of arbitrariness condemned in

Furman]; *Profitt, supra,* 428 U.S. at 259 [similarly approving Florida's judicial adoption of comparative review].

In *Pulley v. Harris*, 465 U.S. 37 (1984), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." *Id.* at 51. As argued in this brief, the California law as applied fails to effectively narrow the pool of death-eligible defendants, lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions, and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing.

Comparative review is therefore necessary under the 1978 law to prevent the "wanton" and "capricious" imposition of the death penalty and thus to ensure that the state statutory scheme is in compliance with the requirements of the Fifth, Sixth, Eighth, and Fourteenth Amendments. See generally, *Proffitt*, *supra,* 428 U.S. at 260.

This Court has rejected the argument, holding that a defendant must prove by other means that a death statute operates in an arbitrary and capricious manner. *People v. Crittenden*, 9 Cal.4th 83, 157 (1994). Comparative review, however, is the most rational means, if not the only

effective means, by which to demonstrate that the scheme as a whole is producing arbitrary results.

The death penalty, for instance, may not be imposed when actual practice demonstrates that the circumstances of a particular crime or of a particular perpetrator rarely lead to execution – e.g., when the defendant is retarded. See *Atkins v. Virginia,* 536 U.S. 304, 314-316 (2002). Such crimes do not warrant execution, and no such criminals may be executed. See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 206.

In this case, one question rises above all others: Do juries in California and elsewhere tend to spare the life of a defendant when they learn that he suffered horrific abuse and humiliation throughout his childhood and adolescence, and that its devastating effects were compounded by the relentless trauma he was subjected to in Vietnam?

A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. See *Atkins v. Virginia,* 536 U.S. 304, 314-316 (2002); *Thompson v. Oklahoma,* 487 U.S. 815, 821, 830-831 (1988); *Enmund v. Florida*, 458 U.S. 782, 796, fn. 22(1982); *Coker v. Georgia,* 433 U.S. 584, 596 (1977).

The value of proportionality review is reflected in the fact that twenty-nine of the thirty-four states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review, 22 by statute and 7 by judicial fiat.[171]

In addition, comparative appellate review is required in non-capital cases in California. *See* former Pen. Code §1170(f) and present §1170(d). Under the Fifth and Eighth Amendments, capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital

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[171] See, e.g., Ala. Code, sec. 13A-5-53(b)(3) (1994); Conn. Gen. Stat. Ann., sec. 53a-46b(b)(3) (West 1994); Del. Code Ann. tit. 11, sec. 4209(g)(2)(a) (1994); Ga. Code Ann., sec. 17-10-35(c)(3) (Harrison 1995); Idaho Code, sec. 19-2827(c)(3) (1994); Ky. Rev. Stat. Ann., sec. 532.075(3)(c) (Michie 1995); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann., sec. 99-19-105(3)(c) (1994); Mont. Code Ann., sec. 46-18-310(3) (1994); Neb. Rev. Stat., secs. 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann., sec. 177.055(2)(d) (Michie 1993); N.H. Rev. Stat. Ann., sec. 630:5(XI)(c) (1994); N.M. Stat. Ann., sec. 31-20A-4(c)(4) (Michie 1995); N.C. Gen. Stat., sec. 15A-2000(d)(2) (1994); Ohio Rev. Code Ann., sec. 2929.05(A) (Baldwin 1994); 42 Pa. Cons. Stat. Ann., sec. 9711(h)(3)(iii) (1994); S.C. Code Ann., sec. 16-3-25(C)(3) (Law, Co-op. 1995); S.D. Codified Laws Ann., sec. 23A-27A-12(3) (1988); Tenn. Code Ann., sec. 13-206(c)(1)(D) (1995); Va. Code Ann., sec. 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann., sec. 10.95.130(2)(b) (West 1994) ; Wyo. Stat. § 6-2-103(d)(iii) (1988).

Judicially created comparative-review requirements were adopted in: *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433,444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121. See also, *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed].

defendants. *See Ring v. Arizona,* 536 U.S. at p. 589; *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991); *Myers v. Ylst*, 897 F.2d 417, 421 (9th Cir.1990).

Section 190.3 neither requires nor forbids proportionality review. The decision not to engage in it has been this Court's. See, e.g., *People v. Marshall,* 50 Cal.3d 907, 946-947 (1990). Given the arbitrary judgments permitted by the safeguard-deficient manner in which capital decisions are made under California law, the failure to conduct inter-case proportionality review violates the due process, jury-trial, and reliability guarantees of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

The death verdict in this case may not stand.

XVIII.

THE 1978 CALIFORNIA DEATH PENALTY STATUTE APPLICABLE HERE FAILED TO MEANINGFULLY NARROW THE CLASS OF OFFENDERS ELIGIBLE FOR THE DEATH PENALTY AS REQUIRED BY THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS

"To pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty....'" *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988), quoting *Zant v. Stephens,* 462 U.S. 862, 877 (1983). The Eighth Amendment requires the state to "provide a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.'" *People v. Edelbacher*, 47 Cal.3d 983, 1023 (1989), quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (conc. opn. of White, J.) Accord, *Godfrey v. Georgia,* 446 U.S. 420, 433 (1980). It is by means of the special circumstances set forth in Penal Code section 190.2(a) that the California death statute is supposed to satisfy the demand for narrowing. *Edelbacher, supra*, 47 Cal.3d at 1023; *People v. Bacigalupo*, 6 Cal.4th 457, 467-68 (1993).

The sentencing scheme governing this case became law in 1978 when Proposition 7 (the "Briggs Initiative") was adopted by a majority of voters. Its predecessor, enacted by the legislature in 1977, contained twelve special circumstances. Stats. 1977, ch. 316, pp. 1255-1266. The latter

statute was "limit[ed] ... to a small subclass of capital-eligible cases." *Pulley v. Harris,* 465 U.S. 37, 53 (1984); emphasis added.

The special circumstances enumerated in the Briggs Initiative were likewise required to "limit ... the death sentence to a small subclass of murders...." *People v. Crittenden*, 9 Cal.4th 83, 155 (1994). They do not come close to doing so, however.

That was not the intent of the 1978 initiative. The intent, as expressed in the ballot proposition arguments, was to make the death penalty applicable to all murderers.

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

1978 Voter's Pamphlet, p. 34; emphasis added. The claim, while slightly exaggerated, was not far from the truth.

The Briggs Initiative greatly expanded the number of special circumstances. At the time of appellant's offenses and prosecution, there were 27 such circumstances listed in Penal Code section 190.2.[172]

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[172] In this discussion, appellant refers to sections 189 and 190.2 as they appeared at the time of his arrest. Three years later, in 1990, Proposition 115 added five felonies to the felony-murder provisions of section 189 and amended section 190.2 by broadening several of the special circumstances,

The latter essentially mimicked the list of murders designated by Penal Code section 189 as first-degree murders. The sweeping nature of section 189 – aided by judicial interpretations of lying-in-wait[173] and felony murder[174] -- made most murders first-degree murders. The result was that, under the 1978 law, the majority of murders, if not the vast majority -- and certainly not a "small subclass" -- fell into one or more of the 27 enumerated categories of so-called "special" circumstances. *See analysis in* Shatz and Rivkind, *The California Death Penalty Scheme: Requiem For Furman?*, 72 N.Y.U.L.Rev. 1283, 1332 (1997). The law that existed between 1978 and 1990 thus substantially lived up to its billing, making most murderers death-eligible and thereby making a mockery of the narrowing requirement imposed by the Eighth Amendment.[175]

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adding two additional felony special circumstances, and expanding the circumstances in which accomplices would be death-eligible. The amendments made congruent the felony-murder provisions of section 189 and the felony special circumstances in section 190.2.

[173] See, e.g., *People v. Hillhouse*, 27 Cal.4th 469, 500-501, 512-515 (2002); *People v. Ceja*, 4 Cal.4th 1134, 1138-46 (1993); *People v. Hardy*, 2 Cal.4th 86, 163-64 (1992).

[174] See *People v. Dillon*, 34 Cal.3d 441, 477 (1983).

[175] Blanket eligibility for the death sentence also violates the Fifth and Fourteenth Amendment guarantees of due process. See generally, *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986) [due process violated if statutory scheme "offends some principle of justice ... ranked as fundamental"].

This Court has rejected the foregoing claim. See, e.g., *People v. Frye*, 18 Cal.4th 894, 1029 (1998). In *People v. Stanley*, 10 Cal.4th 764, 842 (1995), the Court stated that the United States Supreme Court rejected the instant claim in *Pulley v. Harris, supra*, 465 U.S. at 53. Appellant respectfully disagrees. In *Pulley*, the issue before the Court was not whether the 1977 law met the Eighth Amendment's narrowing requirement. The issue was whether the lack of inter-case proportionality review in the 1977 law rendered the latter unconstitutional. The Supreme Court's assumption that the 1977 law limited death-eligibility to a "small sub-class" was just that -- an assumption. It was not in any way a substantive holding on the issue raised here. It was dictum.

In any event, even if the Court in *Pulley* had been rejecting an Eighth Amendment narrowing attack on the 1977 law, this would not shield the 1978 law from attack on that issue. To the contrary, if anything, it appeared that the Supreme Court in *Pulley* was contrasting the two schemes -- adversely to the 1978 law -- when it pointed out that the 1978 law had "greatly expanded" the list of special circumstances. 465 U.S. at 52, fn. 14.

Finally, in *People v. Sanchez*, 12 Cal.4th 1 (1995), this Court stated that both this Court and the United States Supreme Court have held that the 1978 statute narrows in a constitutionally proper manner the class of death-eligible murders. *Id.* at 60-61, citing *People v. Rodriguez*, 42 Cal.3d 730, 770-779 (1986) and *Tuilaepa v. California*, 512 U.S. 967, 129 L.Ed.2d 750,

761-64 (1994). With all due respect, appellant finds no such holding in either case. In neither case, certainly, were the arguments advanced here either advanced or rejected.

To the contrary, in *Tuilaepa*, after noting that the list of special circumstances in the 1978 law "creates an extraordinarily large death pool," Justice Blackmun observed: "Because petitioners mount no challenge to these circumstances, the Court is not called on to determine that they collectively perform sufficient, meaningful narrowing." *Id.* at 994 (dis. opn. of Blackmun, J.). No one on the Court disagreed. Appellant respectfully submits that the issue remains unresolved.

The statute under which appellant was found eligible for the death penalty was unconstitutional. Neither the special-circumstance finding nor the judgment of death may stand. See generally, *Godfrey v. Georgia*, 446 U.S. at 428-29 [judgment of death reversed where state statutory scheme allowed "almost every murder" to be deemed capital murder].

XIX.

THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS THAT ARE AFFORDED TO NON-CAPITAL DEFENDANTS

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 530 (2000). In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. *Charfauros v. Board of Elections,* 249 F.3d 941, 951 (9th Cir. 2001).

The U.S. Supreme Court has repeatedly said that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. See, e.g., *Monge v. California*, 524 U.S. 728, 731-732 (1998). Despite this directive, California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." *Westbrook v. Mihaly,* 2 Cal.3d 765, 784-785 (1970). A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. *People v. Olivas*, 17 Cal.3d 236, 251 (1976); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

The interest at stake is Mr. Solomon's right to life. The "right to life" is not merely *a* fundamental right. It occupies the most "prominent place in the due process clause... [T]he right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." *Commonwealth v. O'Neal,* 327 N.E.2d 662, 668 (1975). It is not simply "a fundamental interest" but the *paramount* "interest protected under both the California and the United States Constitutions." *People v. Olivas,* 17 Cal.3d at 251.

Given the paramount nature of the interest at stake here, the scrutiny of the disparities under challenge must be as strict as possible, and any purported justification by the state for the differential treatment must be extraordinarily compelling.

The state cannot meet this burden: to the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify *more*, not fewer, procedural protections. *See Ring v. Arizona,* 536 U.S. at p. 589; *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991).

Yet that is not the case. An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. *See, e.g.*, Penal Code sections 1158, 1158a. No such unanimity is required before a juror can find that a particular fact is aggravating and militates in favor of death. *See, e.g., People v. Prieto*, 30 Cal.4th at 265, and Arg. XIV, *ante.* When a California judge in a non-capital case is considering which sentence is appropriate: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." California Rules of Court, rule 4.420, subd. (e). No such requirement exists in a capital case. *See, e.g., People v. Fauber*, 2 Cal.4th 792, 859 (1992) and Arg. XVI, *ante.* In a non-capital case, furthermore: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence." (Rule 4.420(b).) There is no standard of proof in the penalty phase of a capital case. *See, e.g., People v. Hawthorne*, 4 Cal.4th 43, 79 (1992) and Arg. XIII, *ante.* In non-capital cases, defendants are entitled to disparate-sentence

review. Penal Code section 1170(d). Those sentenced to death are not. *See, e.g., People v. Crittenden*, 9 Cal.4th 83, 157 (1994) and Arg. XVII, *ante.*

No reasonable justifications – much less extraordinarily compelling ones – warrant maintaining these discrepancies. To paraphrase the holding in *Ring v. Arizona, supra*: "Capital defendants, no less than non-capital defendants, … are entitled to" the procedural protections necessary to assure the reliability of and accurate fact-finding in sentencing proceedings. "The right[s] … guaranteed by the [Fifth,] Sixth[, and Eighth] Amendment[s]" – as well as the "right to life" – "would be senselessly diminished if [they] encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." 536 U.S. at pp. 589, 609. The disparity in treatment described above violates the Equal Protection Clauses of the Fifth and Fourteenth Amendments.

XX.

PENAL CODE § 190.3(a) HAS, IN PRACTICE, LENT ITSELF TO SUCH VARIED AND CONTRADICTORY APPLICATIONS THAT DEATH SENTENCES IN THIS STATE ARE METED OUT IN A MANNER SO ARBITRARY AND CAPRICIOUS AS TO VIOLATE THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Section 190.3(a) has been applied in such a wanton and freakish manner that a prosecutor can anticipate being able to characterize virtually any feature of any murder as "aggravating" within the meaning of the statute.

Factor (a) directs the jury to consider in aggravation the "circumstances of the crime." The Court has interpreted the category expansively. The Court has held, for instance, that "circumstances of the crime" include facts such as: 1) three weeks after the crime the defendant sought to conceal evidence;[176] 2) the defendant had a "hatred of religion";[177] 3) the defendant threatened witnesses after his arrest;[178] and 4) the defendant disposed of the victim's body in a manner that precluded

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[176] *People v. Walker,* 47 Cal.3d 605, 639, fn.10 (1988), 765 P.2d 70, 90, fn.10, *cert. den.*, 494 U.S. 1038 (1990).

[177] *People v. Nicolaus,* 54 Cal.3d 551, 581-582 (1991), 817 P.2d 893, 908-909, *cert.den.*, 112 S. Ct. 3040 (1992).

[178] *People v. Hardy* (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. den.*, 113 S. Ct. 498.

its recovery.[179]

The purpose of section 190.3, according to its language and according to interpretations by this Court and the United States Supreme Courts, is to inform the jury which factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge, *Tuilaepa v. California,* 512 U.S. 967, 987-988 (1994), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Factor (a) lends itself to such broad interpretation, for example, that prosecutors have argued that all of the following fit within "circumstances of the crime" no matter how objectively conflicting:

a. inflicting many blows and wounds[180] *and* inflicting a single execution-style wound;[181]

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[179] *People v. Bittaker,* 48 Cal.3d 1046, 1110, fn.35 (1989), *cert. den.* 496 U.S. 931 (1990).

[180] See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

[181] See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

b. killing the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[182] *and* killing the victim without any motive at all;[183]

c. killing the victim in cold blood[184] *and* killing the victim during a savage frenzy;[185]

d. engaging in a cover-up to conceal the crime[186] *and* not engaging in a cover-up (indicating pride in the commission of the crime);[187]

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[182] See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

[183] See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

[184] See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

[185] See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[186] See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

[187] See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informed others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

e. making the victim endure the terror of anticipating a violent death[188] *and* killing instantly and without warning;[189]

f. killing a person who had children[190] *and* killing one had not yet had a chance to have children;[191]

g. killing a person who struggled prior to death[192] *and* killing one who did not struggle;[193] and

h. killing someone with whom the defendant had a prior relationship[194] *and* killing a complete stranger.[195]

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[188] See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT 4623.

[189] See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[190] See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[191] See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

[192] See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

[193] See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[194] See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship; *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish*, 52 Cal.3d 648, 717 (1990) (same).

[195] See, e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

In the absence of any limitation on factor (a), prosecutors have been able to argue to juries that just about any fact related to the crime falls within "circumstances of the crime". With respect to the following categories, for example:

a. The age of the victim. Prosecutors have argued, and juries were free to find, that it was aggravating under factor (a) that the victim was: a child; an adolescent; a young adult; in the prime of life; or elderly.[196]

b. The method of killing. Prosecutors have argued, and juries were free to find, that it was aggravating under factor (a) that the victim was: strangled; bludgeoned; shot; stabbed; or consumed by fire.[197]

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[196] See, e.g., *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

[197] See, e.g., *People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

c. The motive of the killing. Prosecutors have argued, and juries were free to find, that it was aggravating under factor (a) that the defendant killed: for money; to eliminate a witness; for sexual gratification; to avoid arrest; for revenge; or for no motive at all.[198]

d. The time of the killing. Prosecutors have argued, and juries were free to find, that it was aggravating under factor (a) that the victim was killed: in the middle of the night; late at night; early in the morning; or in the middle of the day.[199]

e. The location of the killing. Prosecutors have argued, and juries were free to find, that it was aggravating under factor (a) that the victim was killed: in her own home; in a public bar; in a city park; or in a remote location.[200]

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[198] See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

[199] See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

[200] See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No.

Factor (a), in short, has become a catch-all category with no discernible limitation. In violation of the due process, jury trial, and reliability guarantees of the Fifth, Sixth, Eighth, and Fourteenth Amendments, it allows the indiscriminate imposition of the ultimate sanction upon no basis other than a subjective belief "that a particular set of facts surrounding a murder . . . warrants the imposition of the death penalty" without requiring "some narrowing principles to apply to those facts...." *Maynard v. Cartwright,* 486 U.S. 356, 363 (1988) [discussing the holding in *Godfrey v. Georgia,* 446 U.S. 420 (1980)].

Arbitrariness is thus at the core of the scheme by which death is meted out under the 1978 law. So tainted, the penalty verdict in this case must be reversed.

S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16,749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

XXI.

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

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, and Saudi Arabia ... as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten [now nine], including the United States, account for an overwhelming percentage of state ordered executions." *Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking,* 16 Crim. and Civ. Confinement 339, 366 (1990).[201] See also *People v. Bull,* 705 N.E.2d 824, 846 (Ill. 1998) [conc. and dis. opn. of Harrison, J.].)

The Russian Federation has not executed anyone in over 10 years and is considered "abolitionist in practice" by Amnesty International. Albania, Greece, and Turkey have retained the death penalty only for "exceptional crimes such as treason" – as opposed to using it as regular punishment -- see, e.g., *Stanford v. Kentucky,* 492 U.S. 361, 389 (1989)

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[201] Since that article, in 1995, South Africa has abandoned the death penalty.

[dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.]. Every other nation in greater Europe – Eastern as well as Western -- has now abolished the death penalty in both law and practice, as have countries such as Canada and Australia. (Amnesty International, *The Death Penalty: List of Abolitionist and Retentionist Countries* (April 2, 2004, on Amnesty International website [www.amnesty.org].)

Our Founding Fathers looked to the nations of Western Europe in particular for the "law of nations" -- models on which the laws of civilized nations were founded and for the meaning of terms in our Constitution. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" 1 Kent's Commentaries 1, quoted in *Miller v. United States,* 78 U.S. 268, 315 (1871) [dis. opn. of Field, J.]. See also, *Hilton v. Guyot*, 159 U.S. 113, 227 (1895); *Sabariego v. Maverick,* 124 U.S. 261, 291-292 (1888); *Martin v. Waddell's Lessee,* 41 U.S. 367, 409 (1842).

The rights guaranteed in the Bill of Rights were intended to be dynamic: "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through

application to specific circumstances, many of which were not contemplated by their authors." *Furman v. Georgia*, *supra*, 408 U.S. at p. 420 [dis. opn. of Powell, J.]. The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, *supra*, 356 U.S. at p. 100; *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002). It prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *Atkins v. Virginia,* 536 U.S. at 316, fn. 21 [citing a brief by the European Union]. See also *Thompson v. Oklahoma, supra*, 487 U.S. at p. 830, fn. 31 ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"].)

Thus, whether or not capital punishment *per se* is contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it.

The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. See *Atkins v. Virginia*, *supra*, 536 U.S. at 314-16; *Hilton v. Guyot,* 159 U.S. at 227; see also *Jecker, Torre & Co. v. Montgomery,* 59 U.S. 110, 112 (1855).

In sum, the use of the death penalty as a regular form of punishment in this state violates international norms and thus the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

XXII.

APPELLANT'S CONVICTIONS AND PENALTY MUST BE SET ASIDE BECAUSE THE ERRORS IDENTIFIED IN ARGUMENTS I-XX ALSO VIOLATE INTERNATIONAL LAW

A. Introduction

Arguments I-XX identify errors that violate appellant's rights under the state and federal constitutions. Reversal is independently required, appellant submits, because those errors also violate provisions of the Universal Declaration of Human Rights (Universal Declaration), the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration of the Rights and Duties of Man (American Declaration).[202]

B. Source and Weight of International Law

The two principal sources of international human rights law are treaties and customary international law.

The United States Constitution accords treaties equal rank with provisions of the Constitution itself. A treaty "stands on the same footing of supremacy as do the provisions of the Constitution and laws of the

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[202] These contentions must be raised here to preserve appellant's right to file a claim with the Inter-American Commission on Human Rights alleging violation of rights under the American Declaration.

United States." *Asakura v. Seattle*, 265 U.S. 332, 341 (1924).[203] When the United States has signed or ratified a treaty, it has no basis for refusing to extend the protection of human rights beyond the terms of the U.S. Constitution.[204]

Customary international law arises out of a general and consistent practice of nations acting in a particular manner out of a sense of legal obligation.[205] Customary international law is "part of our law." *The Paquete Habana*, 175 U.S. 677, 700 (1900). It has the status of federal common law.[206] Underscoring the precedental force of customary international law is 22 U.S.C. section 2304(a)(1), which provides that "a principal goal of the foreign policy of the United States shall be to promote

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

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

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

[206] Restatement Third of the Foreign Relations Law of the United States (1987) p. 145, 1058. *See also Eyde* v. *Robertson*, 112 U.S. 580 (1884).

the increased observance of internationally recognized human rights by all countries." The International Court of Justice, the principal judicial organ of the United Nations, lists international custom as one of the sources of international law to apply when deciding disputes.[207]

International law must be considered and administered in United States courts whenever questions of rights depending on it are presented for determination. *The Paquete Habana*, *supra* (1900). To the extent possible, courts must construe American law in a manner that avoids violating principles of international law. *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 102, 118 (1804); *Weinberger* v. *Rossi,* 456 U.S. 25, 33 (1982). The Constitution further recognizes the existence and force of international law by authorizing Congress to "define and punish . . . offenses against the law of nations". (U.S. Const. Article I, § 8.)

American courts, consequently, often look to both customary international law and conventional treaties in interpreting domestic law. See *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *Oyama* v. *California*, 332 U.S. 633, 673 (1948) (Murphy, J., concurring). The United States Supreme Court has been relying on and

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

citing international law as meaningful precedent with greater and greater frequency. [208]

C. The International Covenant on Civil and Political Rights

In 1948, the United Nations adopted the Universal Declaration of Human Rights.[209] The Universal Declaration is part of the International Bill of Human Rights,[210] which also includes the International Covenant on

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[208] *See, e.g., Atkins v. Virginia,* 536 U.S. 304, 316, fn. 21 (2002) [citing fact that, "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved", in support of ruling that the practice is unconstitutional]; *Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2372, 2381, 2383 (2003) [in support of striking down anti-sodomy law: citing ruling by European Court of Human Rights – binding in all 45 nations in the Council of Europe -- that anti-sodomy laws were invalid under the European Convention on Human Rights; and further noting that the "right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries"]. *See also, Grutter v. Bollinger,* 539 U.S. 306, 344 (2003) [concurring opn. of Ginsburg and Breyer, JJ.] [citing International Convention on the Elimination of All Forms of Racial Discrimination in support of ruling upholding affirmative action program]; *Gratz v. Bollinger,* 539 U.S. 244, 302 (2003) [dissenting opn. of Ginsburg and Souter, JJ.] [citing "contemporary human rights documents" as militating against majority's decision to strike down affirmative action program].

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

[210] See generally Newman, *supra,* 40 Emory L. J. 731.

Civil and Political Rights (ICCPR).[211] The Senate gave its advice and consent to the ICCPR on April 2, 1992, prior to the commencement of the penalty retrial in this case, 138 Cong. Rec. 8070-8071 (1992), and ratified it on June 8, 1992, prior to the jury in this case returning its death verdict. See 138 Cong. Rec. S-4781-01, S-4783 (1992).[212] This bound the United States to its terms both under Article VI, section 2, of the U.S. Constitution, and under international law.[213]

Each signatory to the ICCPR "undertakes to respect and ensure to all individuals ... the [following] rights":

that "No one shall be arbitrarily deprived of his life" (art. 6);

that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment and punishment" (art. 7);

that "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law" (art. 9(1));

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[211] The ICCPR was adopted December 16, 1966, 999 U.N.T.S. 717, and took effect March 23, 1976.

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

[213] Buergenthal, *International Human Rights* (1988), p. 4.

that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person" (art. 10(1));

that "In the determination of any criminal charge against him . . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law" and shall be accorded the presumption of innocence, speedy trial, the right to counsel, the right to confront witnesses, and the privilege against self-incrimination (art. 14);

that arbitrary or unlawful attacks on one's honor and reputation shall not be permitted (art. 17); and

the equal protection of law (art. 26).[214]

The errors identified in Arguments I-XXIII violate the foregoing provisions and on that independent ground require reversal of appellant's convictions and sentence.

This is so despite that fact that, when the United States deposited its instruments of ratification of the ICCPR, it did so with formal reservations that purported to limit both the protections afforded by the treaty – to those already afforded by U.S. law -- and its usefulness – providing that it was

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

not self-executing and thus established no cause of action in American courts.[215] These reservations were invalid and of no effect.[216]

First, under the Constitution, a treaty "operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." *Asakura v. Seattle*, 265 U.S. at 341. *See also, Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 348-49 (1809) ("Whenever a right grows out of, or is protected by, a treaty, . . . it is to be protected") (Marshall, C.J.); *Maiorano v. Baltimore & Ohio R.R.*, 213 U.S. 268, 272-73 (1909) ("a treaty . . . by the express words of the Constitution,

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

[216] This Court has not ruled on this claim, essentially holding that international law is irrelevant in that it "does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements." *People v. Hillhouse,* 27 Cal.4th 469, 511 (2002). This is not so. If a tribunal with authority to interpret a treaty to which the U.S. is a signatory holds that a death sentence issued by an American court violates a provision of the treaty, that death sentence cannot stand. *See, e.g., Torres v. State,* Case no. PCD-2004-442 (Okla. Crim. App., May 13, 2004) (as yet unpublished order) [indefinitely staying Torres's execution – which was only days away – and granting him a new hearing following a order by the International Court of Justice finding that the failure to inform foreign nationals of their right of access to their consulate violated the Vienna Convention on Consular Relations and directing American courts to review the conviction and sentence of 52 Mexican nationals, including Torres -- even though the same Oklahoma court had previously rejected that very claim by Torres; clemency granted next day by governor based in part on ICJ's ruling]. See Liptak, "Execution of Mexican Halted", *New York Times,* May 14, 2004, p. 23; Leavitt, "Is Oklahoma A New Human Rights Hot Spot?", at http:// writ.findlaw.com /commentary / 20040524 _ leavitt.html.

is the supreme law of the land, binding alike National and state Courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights").[217]

Second, treaties designed to protect individual rights should be construed as self-executing. *United States* v. *Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992) ["It is inconsistent with both the language of the ... treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs – not to create some amorphous, unenforceable code of honor among the signatory nations"].

Article 19(c) of the Vienna Convention on the Law of Treaties, furthermore, declares that a party to a treaty may not formulate a reservation that is "incompatible with the object and purpose of the treaty."[218] Article 2(1) of the ICCPR declares that "Each State Party . . . undertakes to respect and ensure to all individuals ... the rights recognized

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

[218] Vienna Convention, *supra*, 1155 U.N.T.S. 331, *effective* Jan. 27, 1980. *Accord,* Restatement Third of the Foreign Relations Law of the United States (1987) § 313, comment b.

in the present Covenant...." The "object and purpose" of the ICCPR is to create "minimum legally binding standards for human rights," which, according to Article 50, shall extend to all parts of federal States without any limitation or reservation. Article 4, paragraph 2 of the ICCPR explicitly prohibits states from taking measures that would be inconsistent with Articles 6, 7, 16, and 18 of the Covenant and specifically states that Articles 6, 7, 8, 11, 15, 16, and 18 are non-derogable. The language of the ICCPR is unequivocal and patently self-executing.[219]

At the very least, whether the ICCPR should be construed as an executory or self-executing treaty is an issue for judicial interpretation. "[I]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Treaties are no exception. *See Frivola v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985).

Even if the ICCPR is not self-executing, Mr. Solomon may nonetheless avail himself of the rights created by it. An express right of action is not necessary to invoke a treaty as a defense. Because the Framers

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[219] Precluding a party from derogating any of the fundamental rights stated in a treaty is particularly important in human rights treaties, where reciprocity provides no protection for the individual against a reserving state. *See* Edward F. Sherman, Jr., *The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation* (1994) 29 Tex. Int'l L.J. 69.

intended that a treaty would nullify any inconsistent state law, *see The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870), litigants may use treaty provisions as defenses to such laws. *See Kolovrat v. Oregon*, 366 U.S. 187 (1961) (use of treaty as defense to escheatment of property); *Cook v. United States*, 288 U.S. 102, 118 (1933); *Patsone v. Pennsylvania,* 232 U.S. 138, 145 (1914).

Finally, the ICCPR at least has the force of customary international law. It had such force prior to trial – prior even to the commission of the offenses with which Mr. Solomon is charged – when the treaty had been signed by the United States but not yet ratified.[220] It has no less force post-ratification.

D. The American Declaration of the Rights and Duties of Man

In 1948, the Ninth International Conference of American States proclaimed the American Declaration of the Rights and Duties of Man (American Declaration).[221] The American Declaration was made part of the

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[220] See, e.g., *Filartiga* v. *Pena-Irala,* 630 F.2d 876, 884 (2d Cir. 1980) [citing the ICCPR as one of the "numerous international treaties and accords" in which "international consensus surrounding torture has found expression"]. See also Charme, *The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma*, 25 Geo. Wash. J. Int'l. L. & Econ. 71 (1992) [Article 18 of the Vienna Convention codified the pre-ratification obligations of parties who are signatories to treaties].

[221] *See* Resolution XXX, Ninth International Conference of American States, reprinted in the Inter-American Commission of Human Rights,

Charter of the Organization of American States, of which the United States is a member, by the 1970 Protocol of Buenos Aires.[222] The OAS Charter is a multilateral treaty that serves as the Constitution of the OAS. Although the American Declaration itself is not a treaty, the United States voted its approval of this normative instrument and, as a member of the OAS, is bound to recognize its authority over human rights issues.[223] The American Declaration is today the normative instrument that embodies the authoritative interpretation of the fundamental rights of individuals in this hemisphere.[224]

Article 1 of the American Declaration protects the right to life, liberty and security of person. Article 2 guarantees equality before the law. Article 26 protects the right of due process of law.

Handbook of Existing Duties Pertaining to Human Rights, OEA/Ser. L/V/II.50, doc. 6 (1980).

[222] The OAS Charter took effect on December 13, 1951 (119 U.N.T.S. 3) and the Protocol of Buenos Aires on February 27, 1970 (721 U.N.T.S. 324).

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

[224] Buergenthal, *International Human Rights* (1988) pp. 127-131. The normative effect of the American Declaration is reinforced by the fact that the Inter-American Commission is recognized by the United States as an OAS Charter organ charged with protecting human rights, and Article 1(2)(b) of the Commission Statute defines human rights as the rights set forth in the American Declaration. *Ibid.* In addition, the American Declaration incorporates the protections of the UN's Universal Declaration, which is likewise accepted by U.S. courts as customary international law. *Filartiga* v. *Pena-Irala,* 630 F.2d at 882.

The errors identified in Arguments I-XXIII violated the foregoing provisions and on that independent ground require reversal of appellant's convictions and sentence.

CONCLUSION

For all the foregoing reasons, the guilt and penalty verdicts must be reversed.

Dated: June 9, 2004.

BRUCE ERIC COHEN

Bruce Eric Cohen
Attorney for Appellant
MORRIS SOLOMON, JR.

WORD COUNT CERTIFICATE

[Rule 36(B)(1)(a)]

The number of words in this brief is: 99,791.

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Dated: June 9, 2004

BRUCE ERIC COHEN

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DECLARATION OF SERVICE

Re: People v. Morris Solomon, Jr., S029011

I, Bruce Cohen, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1442-A Walnut Street, Berkeley, California 94709. I served a copy of the attached **APPELLANT'S OPENING BRIEF** on each of the following by placing same in an envelope(s) addressed (respectively) as follows:

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Each said envelope was then, on June 11, 2004, sealed and deposited in the United States mail at Kensington, California, Contra Costa County, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 11th day of June, 2004, in Kensington, California.

BRUCE ERIC COHEN

Bruce Cohen