SU...EME CC...T C...

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
	)
Plaintiff and Respondent,	) Court of Appeal No.
	) SO85348
v.	)
	) Superior Court No.
GABRIEL CASTANEDA,	) FWV-15543
	)
Defendant and Appellant.	)
	)
	)
	)

SUPREME COURT
FILED
APR 2 8 2006
Frederick K. Ohlrich Clerk
DEPUTY

Appeal from the Superior Court of the State of California

In and For the County of San Bernardino

Honorable Mary E. Fuller, Judge

APPELLANT'S OPENING BRIEF
(Volume II–Pages 286-430)

John L. Staley
CBN 129624
11770 Bernardo Plaza Court
Suite 305
San Diego, CA 92108

(858) 613-1047

Counsel for Appellant
Under Appointment by the
California Supreme Court

DEATH PENALTY

TABLE OF CONTENTS

VOLUME I

STATEMENT OF APPEALIBILITY 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS-GUILT PHASE 8

A. The Prosecution Evidence 8

1. Events Leading up to the Death of Colleen Kennedy 8

2. Events on the Day of Colleen Kennedy's Death on March 30, 1998 10

3. The Investigation the Day of the Incident 14

4. The Post-Incident Investigation 17

5. The Forensic Analysis 24

6. The Autopsy 26

B. The Defense Evidence 28

C. The Prosecution Rebuttal Evidence 33

STATEMENT OF FACTS-PENALTY PHASE 36

A. The Defense Evidence 36

B. The Prosecution Evidence 50

GUILT PHASE ISSUES

I THE JUDGMENT OF GUILT SHOULD BE REVERSED BECAUSE THE TRIAL COURT DENIED APPELLANT'S RIGHT TO BE PRESENT DURING THE TRIAL, WHICH WAS GUARANTEED BY:

(1) THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION; (2) ARTICLE I, SECTIONS 7 AND 15 OF THE CALIFORNIA CONSTITUTION, AND; (3) PENAL CODE SECTIONS 977, SUBDIVISION (B) AND 1043, SUBDIVISION (A). 59

1. Summary of Argument 59

2. Summary of Proceedings Below 60

3. The Trial Court Violated Appellant's Federal Constitutional Right, State Constitutional Right, and Statutory Right to be Present During All Stages of the Trial 63

4. Prejudice 72

II THE JUDGMENT OF GUILT TO COUNT ONE SHOULD BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF SECOND-DEGREE MURDER, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTIONS 7 AND 15 OF THE CALIFORNIA CONSTITUTION, AND IN VIOLATION OF THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I SECTION 17 OF THE CALIFORNIA CONSTITUTION 75

1. Summary of Argument 75

2. Summary of Proceedings Below 76

3. The Trial Court's Failure to Give Jury Instructions on Second Degree Murder Violated: (1) Appellant's Right to Federal and State Due Process of Law, (2) Appellant's Right to a Jury Determination of the Facts under the Sixth and Fourteenth Amendments, and Article I, Section 16 of the California Constitution, and (3) the Federal and State Prohibitions Against Imposition of Cruel and Unusual Punishment 81

4. The Evidence in this Case Raided a Question of Appellant's

Guilt of Second Degree Murder 85

5. Standard of Review 96

6. Prejudice 96

A. The Trial Court's Failure to Instruct the Jury on Second-Degree Murder was Prejudicial Error With Regard to the First-Degree Murder Conviction Based on the Theory of Premeditated Murder 97

B. The Trial Court's Failure to Instruct the Jury on Second-Degree Murder was Prejudicial Error with Regard to the First-Degree Murder Conviction Based on the Theory of a Felony-Murder 98

III THE JUDGMENT OF GUILT TO COUNT ONE MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTIONS 7 AND 15 OF THE CALIFORNIA CONSTITUTION, AND IN VIOLATION OF THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I SECTION 17 OF THE CALIFORNIA CONSTITUTION 104

1. Summary of Argument 104

2. Summary of Proceedings Below 105

3. The Trial Court had a Federal and State Constitutional Duty to Instruct the Jury on All Lesser Included Offenses Raised by the Evidence 105

4. Element of Voluntary Manslaughter 107

5. The Trial Court Erred by Failing to Instruct the Jury on Voluntary Manslaughter as a Lesser Included Offense of First-Degree Murder 108

6. Standard of Review 110

7. Prejudice 110

IV THE JUDGMENT OF GUILT TO COUNT 1 SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY GAVE AN IMPLIED MALICE INSTRUCTION IN VIOLATION OF APPELLANT'S: (1) RIGHT TO DUE PROCESS OF LAW UNDER FEDERAL AND STATE LAW; (2) RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND THE CALIFORNIA CONSTITUTION, AND (3) RIGHT TO BE FREE FROM THE IMPOSITION CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE CALIFORNIA CONSTITUTION 114

1. Summary of Argument 114

2. The Giving of an Implied Malice Instruction in Connection with a Charge of First Degree Murder was Erroneous 115

3. The Trial Court Erred by Giving an Implied Malice Instruction 116

4. The Defense Counsel's Failure to Object to Implied Malice Instructions did not Waive that Error on Appeal 116

5. The Trial Court's Giving of an Implied Malice Instruction Violated Appellant's Fifth and Fourteenth Amendments Right to Federal Due Process of Law, Right to Due Process of Law Under the California Constitution, Sixth and Fourteenth Amendments Right to a Jury Trial, the Eighth and Fourteenth Amendments Prohibition Against the Infliction of Cruel and Unusual Punishment, and the State Prohibition Against the Infliction of Cruel and Unusual Punishment 117

6. Prejudice 120

V THE JUDGMENT OF GUILT TO COUNT 3, THE SPECIAL CIRCUMSTANCE FINDING OF KIDNAPING, AND THE FELONY-MURDER FINDING BASED ON KIDNAPING, SHOULD BE REVERSED BECAUSE THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW

TO PROVE THAT APPELLANT KIDNAPED THE VICTIM 130

1. Summary of Argument 130

2. Standard of Review 130

3. Legal Elements of the Crime of Kidnaping 131

4. The Evidence was Insufficient as a Matter of Law to Prove Asportation 134

VI THE JUDGMENT OF GUILT TO COUNT 3, THE SPECIAL CIRCUMSTANCES FINDING OF KIDNAPING, AND THE FELONY-MURDER FINDING BASED ON A KIDNAPING, SHOULD BE REVERSED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY WITH AN ERRONEOUS DEFINITION OF ASPORTATION 139

1. Summary of Argument 139

2. Summary of Proceedings Below 140

3. The Erroneous Version of CALJIC 9.50 Given to the Jury Violated Appellant's Right to Due Process of Law Under the Federal and State Constitutions, The Prohibition Against Cruel and Unusual Punishment in the Federal and State Constitutions, and His Right to a Jury Trial Under the Federal and State Constitutions 142

4. Standard of Review 144

5. The Lack of a Defense Objection Does not Preclude this Court from Determining Whether the Jury was Given Erroneous Instructions Regarding the Element of Asportation 145

6. Prejudice 145

VII THE JUDGMENT OF GUILT TO COUNT 3, THE SPECIAL CIRCUMSTANCES FINDING OF KIDNAPING, AND THE FELONY-MURDER FINDING BASED ON A KIDNAPING, SHOULD BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT

THE JURY ON THE LESSER INCLUDED OFFENSE OF FALSE IMPRISONMENT, IN VIOLATION OF: (1) APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FEDERAL AND STATE CONSTITUTIONS; (2) APPELLANT'S RIGHT TO A JURY TRIAL UNDER THE FEDERAL AND STATE CONSTITUTIONS, AND (3) THE FEDERAL AND STATE PROHIBITIONS AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT 149

1. Summary of Argument 149

2. Summary of Proceedings Below 150

3. The Trial Court has a Sua Sponte Duty to Instruct the Jury on All Lesser Included Offenses Raised by the Evidence 150

4. Standard of Review 152

5. The Trial Court Erred by Failing to Instruct the Jury on the Lesser Included Offense of False Imprisonment for Count 3 153

6. The Trial Court had a Duty to Instruct the Jury on Lesser Included Offenses for Felonies Alleged as Special Circumstances and Under the Felony-Murder Allegation 154

7. Prejudice 165

VIII THE JUDGMENT OF GUILT TO COUNT 2, THE PORTION OF THE FELONY-MURDER CONVICTION BASED ON THE COMMISSION OF BURGLARY, AND THE SPECIAL CIRCUMSTANCE FINDING OF BURGLARY DURING THE COMMISSION OF A MURDER, SHOULD BE REVERSED BECAUSE THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT APPELLANT INTENDED TO COMMIT A FELONY AT THE TIME HE ENTERED THE MEDICAL BUILDING OR WHEN HE ENTERED THE ROOM WHERE THE MURDER OCCURRED 167

1. Summary of Argument 167

2. Standard of Review 168

3. The Evidence was Insufficient as a Matter of Law to Prove that Appellant committed Burglary 168

IX THE JUDGMENT OF GUILT TO COUNT 5, THE PORTION OF THE FELONY-MURDER CONVICTION BASED ON THE COMMISSION OF SODOMY, AND THE SPECIAL CIRCUMSTANCE FINDING OF SODOMY DURING THE COMMISSION OF A MURDER, SHOULD BE REVERSED BECAUSE: (1) THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT APPELLANT ENGAGED IN SODOMY WITH THE VICTIM; AND (2) EVEN ASSUMING THE EVIDENCE WAS SUFFICIENT TO PROVE THAT APPELLANT COMMITTED SODOMY WITH THE VICTIM, THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT IT OCCURRED WHILE THE VICTIM WAS ALIVE 173

1. Summary of Argument 173

2. Standard of Review 174

3. Legal Standards Governing the Crime of Sodomy 174

4. The Prosecution Evidence was Insufficient to Prove that Appellant's Penis Penetrated the Victim's Anus while She was Alive 174

5. The Prosecution Evidence was Insufficient to Prove that Appellant's Penis Penetrated the Anus of the Victim 176

X THE JUDGMENT OF GUILT TO COUNT 6, ROBBERY, SHOULD BE REVERSED, AND THE SPECIAL CIRCUMSTANCE FINDING OF A ROBBERY DURING THE COMMISSION OF A MURDER, SHOULD BE VACATED, BECAUSE: (1) THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT APPELLANT TOOK THE VICTIM'S PROPERTY, OR; (2) THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT THE VICTIM WAS ALIVE WHEN THE PROPERTY WAS TAKEN 181

1. Summary of Argument 181

2. Standard of Review 181

3. Legal Standards Governing Robbery 182

4. The Evidence was Insufficient to Prove that Appellant Took the Victim's Property 182

5. Assuming There was Evidence that Appellant Took the Victim's Property, the Evidence was insufficient to Prove That Appellant Formed the Intent to Take the Victim's Property Prior to Her Death 186

XI THE JUDGMENT OF GUILT TO COUNT 6, ROBBERY, THE SPECIAL CIRCUMSTANCE FINDING OF THE COMMISSION OF ROBBERY DURING A MURDER, THE FIRST-DEGREE MURDER CONVICTION, AND THE JUDGMENT OF DEATH SHOULD BE VACATED, BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF GRAND THEFT, IN VIOLATION OF: (1) APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FEDERAL AND STATE CONSTITUTIONS; (2) APPELLANT'S RIGHT TO A JURY TRIAL UNDER THE FEDERAL AND STATE CONSTITUTIONS, AND (3) THE FEDERAL AND STATE PROHIBITIONS AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT 191

1. Summary of Argument 191

2. The Duty of the Trial Court to Sua Sponte Instruct the Jury on Lesser Included Offenses 192

3. The Evidence Raised a Question of Fact Regarding Appellant's Guilt of the Lesser Included Offense of Grand Theft 193

4. The Trial Court's Sua Sponte Duty to Instruct the Jury on Grand Theft Extended to the Felony-Murder Charge and the Robbery Special Circumstance Allegation 195

5. Prejudice 196

XII THE TRUE FINDINGS TO THE SPECIAL CIRCUMSTANCES SHOULD BE REVERSED BECAUSE THE EVIDENCE WAS INSUFFICIENT TO

PROVE THAT APPELLANT HAD AN INDEPENDENT FELONIOUS PURPOSE FOR COMMITTING THE FELONIES FOUND TRUE AS SPECIAL CIRCUMSTANCES, AS REQUIRED BY PEOPLE V. GREEN (1980) 27 CAL.3D 1, AND THE REQUIREMENTS OF STATE AND FEDERAL DUE PROCESS OF LAW 200

1. Summary of Argument 200

2. Legal Standards Governing True Findings to Special Circumstances 201

3. Application to the Instant Case 205

4. The Federal and State Due Process Clause Required the Prosecution to Prove Beyond a Reasonable Doubt that Appellant had an Independent Felonious Purpose when He Committed the Felonies 213

XIII THE GUILTY VERDICTS, AND THE JUDGMENT OF DEATH, MUST BE REVERSED BECAUSE: (1) THE PROSECUTOR COMMENTED ON APPELLANT'S FAILURE TO TESTIFY AT TRIAL IN VIOLATION OF *GRIFFIN V. CALIFORNIA* (1965) 380 U.S. 609, 613-615, 14 L. Ed. 2d 106, 85 S. Ct. 1229; ALTERNATIVELY, THE DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FEDERAL AND STATE CONSTITUTIONAL GUARANTEES OF THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO THE PROSECUTOR'S COMMENTS DURING HIS GUILT PHASE AND PENALTY PHASE CLOSING ARGUMENTS 216

1. Summary of Argument 216

2. Summary of Proceedings Below 217

3. The Prosecutor's Arguments Above Improperly Commented on Appellant's Failure to Testify at Trial 218

4. Appellant was Deprived of the Effective Assistance of Counsel if Appellate Review of the Griffin Error was Waived Because the Defense Counsel Failed to Make

an Objection 221

5. Prejudice 224

PENALTY PHASE ISSUES

XIV THE DUE PROCESS CLAUSE OF THE FEDERAL AND STATE CONSTITUTIONS, AND THE FEDERAL AND STATE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT, REQUIRES REVERSAL OF THE JUDGMENT OF DEATH BECAUSE OF THE REVERSAL OF THE TRUE FINDINGS TO THE AGGRAVATING CIRCUMSTANCES 228

1. Summary of Argument 228

2. Legal Standard Governing Special Circumstance Findings and the Jury's Decision to Impose the Death Penalty 228

3. Application to the Instant Case 233

XV THE JUDGMENT OF DEATH SHOULD BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY FAILED TO INSTRUCT THE JURY, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND APPELLANT'S RIGHT TO DUE PROCESS OF LAW, THAT THERE WOULD NOT BE A RETRIAL ON THE CRIMES OF WHICH APPELLANT HAD BEEN FOUND GUILTY, IF IT COULD NOT REACH A VERDICT ON THE APPROPRIATE PENALTY 241

1. Summary of Argument 241

2. Summary of Proceedings Below 242

3. The Trial Court Committed Error When it Responded to the Jury's Question About What Would Happen if it Could Not Reach a Verdict Regarding the Appropriate Penalty 243

4. The Waiver Doctrine does not Preclude Appellate Review of Whether the Trial Court's Response to the Jury's Question was Erroneous 252

5. Prejudice 254

XVI THE JUDGMENT OF DEATH SHOULD BE REVERSED BECAUSE THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION, AND THE STATE AND FEDERAL DUE PROCESS CLAUSE, TO PRESENT MITIGATING EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL 259

1. Summary of Argument 259

2. Summary of Proceedings Below Relating to the Exclusion of Dr. Morales's Testimony About the Role of Genetics in the Opinions He Formed About Appellant 260

3. The Trial Court Erred by Excluding Material Portions of Dr. Morales' Testimony About the Role of Genetics 266

4. Summary of Proceedings Below Relating to the Exclusion of Exhibit 61 from Evidence 271

5. The Trial Court Committed Error by Excluding Exhibit 61 from Evidence 274

6. The Trial Court's Exclusion of Dr. Morales's Testimony About the Role of Genetics in his Opinions About Appellant's Mental States, and Exhibit 61, Violated the Prohibition Against Imposition of Cruel and Unusual Punishment in the Eighth and Fourteenth Amendments, and Article I, Section 17 of the California Constitution, and Must Result in Reversal of the Judgment of Death 278

VOLUME II

XVII THE JUDGMENT OF DEATH SHOULD BE REVERSED BECAUSE THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION, PROHIBITS APPELLANT'S EXECUTION 286

1. Summary of Argument 286

2. Legal Standards Governing Cruel and Unusual Punishment Under the Eighth and Fourteenth Amendments 286

3. Appellant's Sentence of Death Constitutes Cruel and Unusual Punishment Under the Eighth and Fourteenth Amendments 294

4. Appellant's Sentence of Death Constitutes Cruel and Unusual Punishment Under the California Constitution 302

XVIII THE JUDGMENT OF DEATH SHOULD BE REVERSED BECAUSE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS, AND THE CALIFORNIA CONSTITUTION, BECAUSE THE JURY WAS ALLOWED TO CONSIDER APPELLANT'S ESCAPES FROM CUSTODY AS EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL 306

1. Summary of Argument 306

2. Summary of Proceedings Below 307

3. Appellant's Non-Violent Escapes, and Attempted Escapes, were not Admissible Evidence in Aggravation During Appellant's Trial 310

4. The Trial Defense Counsel Rendered Ineffective Assistance of Counsel by Failing to Object to the Admission of Evidence that Appellant Had Escaped from Custody 312

5. Prejudice 316

IXX THE JUDGMENT OF DEATH SHOULD BE REVERSED BECAUSE: (1) THE TRIAL COURT FAILED TO SUA SPONTE MODIFY CALJIC 8.85 TO DELETE INAPPLICABLE MITIGATING FACTORS; (2) THE PROSECUTOR USED THE INAPPLICABILITY OF THE MITIGATING FACTORS AS FACTORS IN AGGRAVATION; AND (3) ALTERNATIVELY, THE DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF

COUNSEL BY FAILING TO REQUEST MODIFICATION OF CALJIC 8.85 TO DELETE INAPPLICABLE MITIGATING FACTORS AND FAILING TO OBJECT TO THE PROSECUTOR'S ARGUMENT THAT THE ABSENCE OF MITIGATING FACTORS CONSTITUTED FACTORS IN AGGRAVATION 320

1. Summary of Argument 320

2. The Absence of Mitigating Factors Cannot be Used as Factors in Aggravation 321

3. Summary of Proceedings Below 323

4. The Prosecutor's Penalty Phase Closing Argument Improperly Used the Absence of Mitigating Factors as Aggravating Evidence 326

5. The Trial Court Erred by Failing to Modify CALJIC 8.85 to Delete the Mitigating Factors for which No Evidence was Presented 328

6. The Trial Court's Failure to Modify CALJIC 8.85 to Delete the Inapplicable Factors in Mitigation Deprived Appellant of his Right to Federal and State Due Process of Law and Violated the Prohibition Against Imposition of Cruel and Unusual Punishment in the Eighth and Fourteenth Amendments and Article I, Section 17 331

7. Prejudice 334

XX THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT'S INSTRUCTION TO THE JURY ON HOW TO WEIGH AGGRAVATING AND MITIGATING FACTORS FAILED TO CONVEY TO THE JURY, IN VIOLATION OF APPELLANT'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW, AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS, THAT: (1) A SINGLE MITIGATING FACTOR WAS SUFFICIENT TO CONCLUDE THAT APPELLANT SHOULD BE SENTENCED TO LIFE WITHOUT THE POSSIBILITY OF PAROLE; AND (2) A SENTENCE OF LIFE WITHOUT

THE POSSIBILITY OF PAROLE COULD STILL BE IMPOSED IN THE ABSENCE OF ANY MITIGATING FACTS 338

1. Summary of Argument 338

2. Summary of Proceedings Below 339

3. The Failure of CALJIC 8.88 to Inform the Jury that, (1) A Single Factor in Mitigation was Sufficient to Sentence Appellant to Life in Prison Without the Possibility of Parole, or (2) A Sentence of Life Without the Possibility of Parole Could be Imposed even without Any Mitigating Factors, Deprived Appellant of Due Process of Law and Violated the Prohibition Against Imposition of Cruel and Unusual Punishment in the Federal and State Constitution. 340

4. The Phrase "So Substantial" did not Cure the Deficiencies in CALJIC 8.88 343

5. Prejudice 344

XXI THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO SUA SPONTE INSTRUCT THE JURY ON THE MEANING OF LIFE WITHOUT THE POSSIBILITY OF PAROLE, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT AND THE EIGHTH AND FOURTEENTH AMENDMENTS PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT 346

1. Summary of Argument 346

2. Legal Standards Governing the Requirement that the Jury Be Informed of the Meaning of Life in Prison Without the Possibility of Parole 346

3. Application to the Instant Case 349

XXII THE JUDGMENT OF DEATH SHOULD BE REVERSED BECAUSE APPELLANT DID NOT VALIDLY WAIVE HIS RIGHT TO BE PRESENT DURING A DISCUSSION OF THE PENALTY PHASE JURY INSTRUCTIONS IN VIOLATION OF HIS RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW AND SIXTH AND FOURTEENTH

AMENDMENTS RIGHT OF CONFRONTATION 357

XIII THE JUDGMENT OF DEATH SHOULD BE SET ASIDE BECAUSE: (1) THE CALIFORNIA DEATH PENALTY STATUTE, AS A MATTER OF LAW, VIOLATES THE RIGHT TO DUE PROCESS OF LAW IN THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION, THE GUARANTEE OF THE RIGHT TO A JURY TRIAL IN THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION, THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION; AND (2) THE IMPOSITION OF DEATH PENALTY, AS A MATTER OF LAW, VIOLATES THE AFOREMENTIONED CONSTITUTIONAL PROVISIONS 365

1. Summary of Argument 365

2. Appellant's Sentence of Death is Invalid Because Penal Code § 190.2 is Impermissibly Broad. 366

3. Appellant's Death Penalty Is Invalid because Penal Code §190.3, Subdivision (a), as Applied Allows Arbitrary and Capricious Imposition of Death in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution 370

4. California's Death Penalty Statute Contains no Safeguards to Avoid Arbitraty and Capricious Sentencing and Deprives Defendants of the Right to a Jury Trial on Each Factual Determination Prerequisite to a Sentence of Death; it therefore Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. 379

5. Appellant's Death Verdict was not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury that One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors, His Constitutional Right to

Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty was thereby Violated 380

6. In the Wake of Apprendi, Ring, Blakely, and Booker, Any Jury Finding Necessary to the Imposition of Death Must be Found True Beyond a Reasonable Doubt. 383

7. The Requirements of Jury Agreement and Unanimity 394

8. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require that the Jury in a Capital Case be Instructed that they May Impose a Sentence of Death only if They are Persuaded Beyond a Reasonable Doubt that the Aggravating Factors Outweigh the Mitigating Factors and that Death is the Appropriate Penalty 397

    a. Factual Determinations 398

    b. Imposition of Life or Death 399

9. Even if Proof Beyond a Reasonable Doubt Were Not the Constitutionally Required Burden of Persuasion for Finding (1) That an Aggravating Factor Exists, (2) That the Aggravating Factors Outweigh the Mitigating Factors, and (3) That Death is the Appropriate Sentence, Proof by a Preponderance of the Evidence would be Constitutionally Compelled as to Each Such Finding 403

10. A Burden of Proof is Required in Order to Establish a Tie-Breaking Rule and Ensure Even-Handedness. 405

11. Even if There Could Constitutionally be no Burden of Proof, the Trial Court Erred in Failing to Instruct the Jury to That Effect 406

12. California Law Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base any Death Sentence on Written

Findings Regarding Aggravating Factors. 407

13. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-Case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty. 411

14. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even if it were Constitutionally Permissible for the Prosecutor to do so, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to be True Beyond a Reasonable Doubt by a Unanimous Jury. 415

15. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury. 418

16. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants Which are Afforded to Non-Capital Defendants 418

17. 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; Imposition of the Death Penalty Now Violates the Eighth and Fourteenth Amendments to the United States Constitution 426

TABLE OF AUTHORITIES

FEDERAL CASES

Addington v. Texas (1979) 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 398

Apodaca v. Oregon (1972) 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 395

Apprendi v. New Jersey, (2000) 530 U.S. 466, 147 L.Ed.2d 435, 120 S.Ct. 2348. . . . . 161-164, 196, 200, 213, 214, 236, 237, 381, 416

Atkins v. Virginia (2002) 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 . . . . 286-292, 298, 299, 302, 303, 412, 421, 424, 427, 428

Barclay v. Florida (1976) 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 410

Baxter v. Palmigiano (1976) 425 U.S. 308, 47 L. Ed. 2d 810, 96 S. Ct. 1551 218

Beck v. Alabama (1980) 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 . . . 76, 81-83, 96, 105, 106, 120, 144, 151, 152, 155, 157, 160, 192, 401

Blakely v. Washington (2004) (2004) 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 . . . . 161, 236-238, 381, 382, 416, 491, 424

United States v. Booker (2005) 543 U.S.220, 125 S.Ct. 738, 160 L.Ed.2d 621 . . . . 163, 196, 200, 213

Bouie v. City of Columbia (1964) 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 . . . . 142, 143

Boyd v. California (1990) 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 279

Brown v. Louisiana (1980) 447 U.S. 323, 100 S.Ct. 2214, 65 L.Ed.2d 159 395

Brown v. Sanders (2006) ____U.S. ____, 126 S.Ct. 884 . . . . 228-235, 239

Buchanan v. Angelone (1998) 522 U.S. 269, 139 L.Ed.2d 702, 118 S.Ct. 757 248

Bush v. Gore (2000) 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 424

California v. Brown (1987) 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 406

Carella v. California (1989) 491 U.S. 263, 109 S.Ct. 2419,
105 L.Ed.2d 218 . . . . 117, 118, 142

Chapman v. California (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d
705 . . . 59, 73, 96, 110, 120, 121, 145, 165, 197, 239, 254, 279, 317, 334, 344, 362, 416

Charfauros v. Board of Elections (9th Cir. 2001) 249 F.3d 941 424

Coker v. Georgia (1977) 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 . . . . 412, 421

Den ex dem. Murray v. Hoboken Land and Improvement Co., supra, 59 U.S. (18 How.)
272 403

Eddings v. Oklahoma (1982) 455 U.S. 104, 102 S.Ct. 869,
71 L.Ed.2d 1 . . . . 278, 280, 293, 405

Enmund v. Florida (1982) 458 U.S. 782, 73 L.Ed.2d 1140,
102 S.Ct. 3368 . . . . 288, 412, 421

Ford v. Wainwright (1986) 477 U.S. 399, 91 L.Ed.2d 335,
106 S.Ct. 2595 . . . . 291, 421, 422

Francis v. Franklin (1985) 471 U.S. 307, 105 S.Ct. 1965,
85 L.Ed.2d 344 . . . . 117, 118, 142

Furman v. Georgia (1972) 408 U.S. 238, 192 S.Ct. 2736,
33 L.Ed.2d 346 . . . . 232, 287, 411, 412, 414, 427

Gardner v. Florida (1977) 430 U.S. 349, 51 L.Ed.2d 393,
97 S.Ct. 1197 . . . . 249, 330, 398

Godfrey v. Georgia (1980) 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 . . . . 355, 377

Godinez v. Moran (1993) 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 252

Gregg v. Georgia (1972) 408 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 278

Gregg v. Georgia (1976) 428 U.S. 153, 49 L.Ed.2d 859,

96 S.Ct. 2909 . . . . 248, 290, 291, 317, 334, 406, 411, 412, 414

Griffin v. California (1965) 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229 . . . 216, 218

Griffin v. United States (1991) 502 U.S. 46, 112S.Ct. 466,
116 L.Ed.2d 371 . . . . 394, 403

Harmelin v. Michigan (1991) 501 U.S. 957, 115 L.Ed.2d 836,
111 S.Ct. 2680 . . . . 287, 396. 408

Hicks v. Oklahoma (1980) 447 U.S. 343, 100 S.Ct. 2227,
65 L.Ed.2d 175 . . . . 76, 96, 121, 145, 165, 197, 254, 400

Hilton v. Guyot (1895) 159 U.S. 113 . . . . 427, 428

Holloway v. Arkansas (1978) 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 221

Hopkins v. Reeves (1998) 524 U.S. 88, 118 S.Ct. 1895, 141 L.Ed.2d 76 . . . 83, 160, 174

In re Winship (1970) 397 U.S. 358, 25 L. Ed. 2d 368,
90 S. Ct. 1068 . . . . 130, 168, 182, 398-400

Jackson v. Virginia (1970) 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 . . . . . 131, 196

Jecker, Torre & Co. v. Montgomery (1855) 59 U.S. [18 How.] 110, 15 L.Ed. 311 . . . 428

Johnson v. Louisiana(1972) 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 395

Johnson v. Mississippi (1988) 486 U.S. 578, 108 S.Ct. 1981,
100 L.Ed.2d 575 . . . . 330, 331, 396, 415

Johnson v. Texas (1993) 509 U.S. 350, 125 L.Ed.2d 290, 113 S.Ct. 2658 293

Johnson v. Zerbst (1938) 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 . . . . 252, 361

Jones v. United States (1999) 526 U.S. 227, 143 L.Ed.2d 311,
119 S.Ct. 1215 . . . . 161, 243, 244, 248, 251

La Grosse v. Kernan (9th Cir. 2001) 244 F.3d 702 63

Lockett v. Ohio (1978) 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 . . . . 278, 417

Lowenfield v. Phelps (1988) 484 U.S. 231, 208 S.Ct. 546, 98 L.Ed.2d 568 157

Martin v. Waddell's Lessee (1842) 41 U.S. [16 Pet.] 367, 10 L.Ed. 997 427

Matthews v. Eldridge (1976) 424 U.S. 319, 96 S.Ct. 2960, 49 L.Ed.2d 913 399

Maynard v. Cartwright (1988) 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 377

McCleskey v. Kemp (1987) 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 421

McKoy v. North Carolina (1990) 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 . . 279

Mills v. Maryland (1988) 486 U.S. 367, 198 S.Ct. 1860,
100 L.Ed 2d 384. . . . . 355, 405, 417, 425

Monge v. California (1998) 524 U.S. 721,
118 S.Ct. 2246, 141 L.Ed.2d 615 . . . . 392, 393, 395, 396, 401, 417, 423, 425

Morris v. Woodford (9th Cir. 2001) 273 F.3d 826 . . . . 250, 251

Myers v. Ylst (9th Cir. 1990) 897 F.2d 417 . . . . 408, 425

Penry v. Lynaugh (1989) 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 . . . . . 281, 282

Presnell v. Georgia (1978) 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 398

Proffitt v. Florida (1976) 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 . . . 405, 410, 412

Pulley v. Harris (1984) 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 . . . . . 370, 411, 414

Ring v. Arizona (2002) 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d
556. . . . . 161, 163, 164, 196, 200, 213, 214, 236, 237, 381, 393, 408, 409, 416, 424, 425

Romano v. Oklahoma (1994) 512 U.S. 1, 129 L.Ed.2d 1, 114 S.Ct. 2004 248

Rushen v. Spain (1983) 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 65

Sabariego v. Maverick (1888) 124 U.S. 261, 8 S.Ct. 461, 31 L.Ed. 430 427

Sandstrom v. Montana (1979) 442 U.S. 510, 61 L.Ed.2d 39, 99 S.Ct. 2450 121

Santosky v. Kramer (1982) 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.25 599 . . . . 399, 400

Sattazahn v. Pennsylvania (2003) 537 U.S. 101, 122 S.Ct. 2428, 154 L.Ed.2d 588 . . 237

Schad v. Arizona (1991) 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d
555 . . . . 102, 156, 157

Shafer v. South Carolina (2001) 532 U.S. 36, 121 S.Ct. 1263,
149 L.Ed.2d 178 . . . . 347-349, 352, 353, 355

Simmons v. South Carolina (1994) 512 U.S. 154, 114 S.Ct. 2187,
129 L.Ed.2d 133 . . . . 248, 249, 347

Skinner v. Oklahoma (1942) 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 418

Smith v. Texas (2004) 543 U.S. 37, 125 S.Ct. 400, 160 L.Ed.2d 303 302

Snyder v. Commonwealth (1934) 291 U.S. 97, 54 S.Ct. 330,
78 L.Ed.2d 674 . . . . 63, 66, 68, 358, 363

Speiser v. Randall (1958) 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 . . . . . . 398, 399

Stanford v. Kentucky (1989) 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 . . 292, 426

Strickland v. Washington (1984) 466 U.S. 668, 104 S.Ct. 2052,
80 L.Ed.2d 674 . . . . 222, 316, 335, 336

Sullivan v. Louisiana (1993) 508 U.S. 275, 113 S.Ct. 2078,
124 L.Ed.2d 182 . . . . 83, 106, 117, 119, 120, 142, 143, 152, 192, 404, 406

Tennard v. Dretke (2004) 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 . . . . 279. 302

Thompson v. Oklahoma (1988) 487 U.S. 815, 108 S.Ct. 2687,
101 L.Ed.2d 702 . . . . 412, 426

Townsend v. Sain (1963) 372 U.S. 293, 87 S.Ct. 745, 9 L.Ed.2d 770 407

Trop v. Dulles (1958) 356 U.S. 86, 2 L.Ed.2d 630, 78 S.Ct. 590 . . . . 287, 418, 427

Tuilaepa v. California (1994) 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 371

Ulster County v. Allen (1979) 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 118

United States v. Booker (2005) 543 U.S.220, 125 S.Ct. 738,
160 L.Ed.2d 621 . . . . 163, 196, 200

United States v. Gagnon (1985) 470 U.S. 522, 105 S.Ct. 1482,
84 L.Ed.2d 486 . . . . 63-65, 72, 363, 373

United States v. Gaudin (1995) 515 U.S. 506, 115 S.Ct. 2310,
132 L.Ed.2d 444 . . . . 118, 358

United States v. Robinson (1988) 485 U.S. 25, 99 L. Ed. 2d 23, 108 S. Ct. 864 218

Vickers v. Ricketts (9th Cir. 1986) 798 F.2d 369 91-93

Walton v. Arizona (1990) 497 U.S. 639, 110 S.Ct. 3047,
111 L.Ed.2d 511 . . . . 163, 164, 237, 381

Weems v. United States (1910) 217 U.S. 349, 54 L.Ed. 793, 30 S.Ct. 544 287

Williams v. Calderon (9th Cir. 1995) 52 F.3d 1465 214

Woodson v. North Carolina (1976) 428 U.S. 280, 96 S.Ct. 2978,
49 L.Ed.2d 944 . . . . 278, 355, 401, 422

Yates v. Evatt (1991) 500 U.S. 391, 111 S.Ct. 1884, 114 L.Ed.2d 432 . . . . 121, 145

Zant v. Stephens (1983) 462 U.S. 862, 103 S.Ct. 2733,
77 L.Ed.2d 235 . . . . 331, 342, 355, 367

STATE CASES

Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450 236

Carlos v. Superior Court (1983) 35 Cal.3d 131 . . . . 90, 127

College Hospital Inc. v. Superior Court (1994) 8 Cal 704. . . . . 73, 336

City of Ukiah v. Fones (1966) 64 Cal.2d 104 361

Commonwealth v. O'Neal (1975) 327 N.E.2d 662, 367 Mass 440 418

Conservatorship of Roulet (1979) 23 Cal.3d 219 399

Fulghum v. State (1973) 291 Ala. 71, 277 So.2d 886 81

In re Eric J. (1979) 25 Cal.3d 522 329

In re Martin (1986) 42 Cal.3d 437 420

In re Sturm (1974) 11 Cal.3d 258 407

Johnson v. State (Nev. 2002) 59 P.3d 450 . . . . 385, 391

Lujan v. Minagar (2004) 124 Cal.App.4th 1040 303

Lyon v. Brunswick-Balke etc. Co. (1942) 20 Cal.2d 579 361

New Jersey v. Natale (2005) 184 N.J. 458, 878 A.2d 724 236

People v. Adcox(1988) 47 Cal.3d 207 371

People v. Ainsworth (1988) 45 Cal.3d 984 . . . . 205, 211, 212

People v. Allen (1986) 42 Cal.3d 1222 . . . . 386, 420-424

People v. Anderson (1968) 70 Cal.2d 15 87

People v. Anderson (1987) 43 Cal.3d 1104 . . . . 90, 127

People v. Anderson (2001) 25 Cal.4th 543 . . . . 236, 386, 389

People v. Ayala (2000) 23 Cal.4th 225 . . . . 84, 152, 248

People v Bacigalupo (1993) 6 Cal.4th 857 367

People v. Barton (1995) 12 Cal.4th 186 .... 85, 150, 254

People v. Bassett (1968) 69 Cal.2d 122 131

People v. Bell (1989) 49 Cal.3d 502 .... 243, 245

People v. Benavides (2005) 35 Cal.4th 69 65

People v. Bernard (1994) 27 Cal. App. 4th 458 95

People v. Berry (1976) 18 Cal.3d 509 107-110

People v. Berryman (1993) 6 Cal.4th 1048 .... 221, 222

People v. Bigelow (1985) 37 Cal.3d 731 72

People v. Bittaker (1989) 48 Cal.3d 1046 371

People v. Black (2005) 35 Cal.4th 1238 236

People v. Blair (2005) 36 Cal.4th 686 94

People v. Bold (1990) 222 Cal.App.3d 541 79

People v. Bolin (1998) 18 Cal.4th 297 394

People v. Bonin (1988) 46 Cal.3d 659 .... 347, 352

People v. Boyd (1985) 38 Cal.3d 762 .... 308, 311, 312, 315, 331, 363

People v. Bradford (1997) 14 Cal.4th 1005 106

People v. Bradford (1997) 15 Cal.4th 1229 .... 72, 150

People v. Breverman (1998) 19 Cal.4th 142 .... 84, 85, 105, 108

People v. Brown (1974) 11 Cal.3d 784 .... 134, 136, 137, 146, 166

People v. Brown (1988) 46 Cal.3d 432 197

People v. Brown (Brown I) (1985) 40 Cal.3d 512 386

People v. Bui (2001) 86 Cal.App.4th 1187 276

People v. Burgener (2003) 29 Cal.4th 833 316

People v. Burnick (1975) 14 Cal.3d 306 399

People v. Cahill (1993) 5 Cal.4th 478 224

People v. Cain (1995) 10 Cal.4th 1 . . . . 115, 127, 128

People v. Carkeek (1939) 35 Cal.App.2d 499 170

People v. Carpenter (1997) 15 Cal.App.4th 312 253

People v. Carter (2005) 36 Cal.4th 1114 . . . . 72, 93

People v. Cash (2002) 28 Cal.4th 703 . . . . 154, 160, 165, 196

People v. Catlin (2001) 26 Cal.4th 81 116

People v. Caudillo (1978) 21 Cal.3d 562 . . . . 132, 133, 146

People v. Cavitt (2004) 33 Cal.4th 187 213

People v. Cleveland (2004) 32 Cal.4th 704 116

People v. Cole (2004) 33 Cal.4th 1158 . . . . 96, 144, 153

People v. Combs (2004) 34 Cal.4th 821 . . . . 115, 126, 127

People v. Conner (1983) 34 Cal.3d 141 131

People v. Cox (1987) 193 Cal.App.3d 1434 . . . . 222, 224

People v. Daniels (1969) 71 Cal.2d 1119 132

People v. Davenport (1985) 41 Cal.3d 247 . . . . 321-323, 327

People v. Davis (2005) 36 Cal.4th 510 . . . . 69, 72, 95, 170

People v. Dillon (1983) 34 Cal.3d 441 . . . . 76, 115, 283, 368

People v. Dreas (1984) 153 Cal.App.3d 623 188

People v. Duncan (1991) 53 Cal.3d 955 . . . . 341, 390

People v. Dyer (1988) 45 Cal.3d 26 371

People v. Earl (1973) 29 Cal.App.3d 894 168

People v. Edelbacher (1989) 47 Cal.3d 983 . . . . 322, 366

People v. Elsey (2000) 81 Cal.App.4th 948 170

People ex rel. Dept. of Transportation v. Clauser/Wells Partnership (2002) 95 Cal.App.4th 1066 269

People v. Fairbank (1997) 16 Cal.4th 1223 . . . . 381, 384, 406

People v. Farnam (2002) 28 Cal.4th 107 . . . . 174, 179, 385

People v. Farnham (2002) 28 Cal.4th 107 . . . . 100, 316

People v. Fauber (1992) 2 Cal.4th 792 407

People v. Feagley (1975) 14 Cal.3d 338 399

People v. Fenebock (1996) 46 Cal.App.4th 1688 79

People v. Fernandez (1994) 26 Cal.App.4th 710 153

People v. Fiero (1991) 1 Cal.4th 173 . . . . 316, 413

People v. Fosselman (1983) 33 Cal.3d 572 222

People v. Frank (1985) 38 Cal.3d 711 92

People v. Frye (1998) 18 Cal.4th 894 . . . . 101, 182, 188, 194

People v. Gardeley (1997) 14 Cal.4th 605 270

People v. Geiger (1984) 35 Cal.3d 510 76

People v. Gibbs (1970) 12 Cal.App.3d 526 . . . . 153, 207

People v. Griffin (2004) 33 Cal.4th 536 401

People v. Gurule (2002) 28 Cal.4th 557 . . . . 322, 327

People v. Green (1980) 27 Cal.3d 1 . . . . 134, 136, 137, 146, 200-205, 209-211, 213

People v. Gutierrez (2002) 28 Cal.4th 1083 192

People v. Haley (2004) 34 Cal.4th 283 89-93

People v. Hamilton (1988) 48 Cal.3d 1142 322

People v. Hardy (1992) 2 Cal.4th 86 371

People v. Hawthorne (1992) 4 Cal.4th 43 . . . . 384, 397, 408

People v. Hayes (1990) 52 Cal.3d 577 . . . . 397, 404, 405, 408

People v. Hernandez (1988) 47 Cal.3d 315 131

People v. Hernandez (2003) 30 Cal.4th 835 387

People v. Herrera (1999) 70 Cal.App.4th 1456 87

People v. Hill (1967) 67 Cal.2d 105 168

People v. Hill (1998) 17 Cal.4th 800 223

People v. Hillhouse (2002) 27 Cal.4th 469 . . . . 116, 368

People v. Hines (1997) 15 Cal.4th 997 . . . . 64, 72, 242, 245, 322

People v. Holt (1997) 15 Cal.4th 619 179

People v. Horning (2004) 34 Cal.4th 871 204

People v. Hovey (1988) 44 Cal.3d 543 65

People v. Hughes (2002) 27 Cal.4th 287 218-220

People v. Huston (1943) 21 Cal.2d 690 131

People v. Jackson (1996) 13 Cal.4th 1164 . . . . 341, 359-361, 375

People v. Jeter (1964) 60 Cal.2d 671 98

People v. Johnson (1992) 3 Cal. 4th 1183 . . . . 218, 219

People v. Kelley (1990) 220 Cal.App.3d 1358 . . . . 188, 192, 194

People v. Kelly (1992) 1 Cal.4th 495 . . . . 182, 244

People v. Kimble (1988) 44 Cal.3d 480 . . . . 204, 207, 211, 213, 245, 247

People v. Lasko (2000) 23 Cal.4th 101 . . . . 108, 111, 112

People v. Leahy (1994) 8 Cal.4th 587 276

People v. Ledesma (1987) 43 Cal.3d 171 221

People v. Lessard (1962) 58 Cal.2d 447 98

People v. Lewis (2001) 25 Cal.4th 610 218

People v. Logan (1917) 175 Cal. 45 107

People v. Lowen (1895) 109 Cal. 381 168

People v. Lucero (1988) 44 Cal.3d 1006 131

People v. Majors (1998) 18 Cal.4th 385 . . . . 102, 113

People v. Marshall (1990) 50 Cal.3d 907 413

People v. Martin (1973) 9 Cal.3d 687 131

People v. Martin (1986) 42 Cal.3d 437 408

People v. Martinez (1999) 20 Cal.4th 225 . . . . 99, 132-134, 136, 139, 141-144, 146

People v. Mattison (1971) 4 Cal.3d 177 94

People v. Mayfield (1997) 14 Cal.4th 668 222

People v. McCormack (1991) 234 Cal.App.3d 253 171

People v. McDonald (1984) 37 Cal.3d 351 276

People v. McGrath (1976) 62 Cal.App.3d 82 192

People v. Medina (1995) 11 Cal. 4th 694 . . . . 218, 397

People v. Memro (1995) 11 Cal.4th 786 . . . . 106, 150, 158, 159

People v. Mendoza (2000) 23 Cal.4th 896 98

People v. Mickey (1991) 54 Cal.3d 612 270

People v. Miller (1994) 28 Cal.App.4th 522 . . . . 158, 159, 161, 164

People v. Miller (1996) 46 Cal.App.4th 412 225

People v. Mitcham (1992) 1 Cal.4th 1027 219

People v. Monterroso (2004) 34 Cal.4th 743 213

People v. Morales (1989) 48 Cal.3d 527 368

People v. Morris (1988) 46 Cal. 3d 1 218

People v. Murtishaw (1981) 29 Cal.3d 733 219

People v. Nible (1988) 200 Cal.App.3d 838 170

People v. Nicolaus (1991) 54 Cal.3d 551, ... 371

People v. Nieto Benitez (1992) 4 Cal.4th 91 . . . . 115, 116

People v. Ochoa (1998) 19 Cal.4th 353 . . . . 335, 336

People v. Olivas (1976) 17 Cal.3d 236 418

People v. Padilla (1995) 11 Cal.4th 891 223

People v. Perkins (1937) 8 Cal.2d 502 98

People v. Pope (1979) 23 Cal.3d 412 . . . . 222, 314

People v. Poslof (2005) 126 Cal.App.4th 92 124

People v. Prieto (2003) 30 Cal.4th 226 . . . . 236, 386, 389, 390, 419

People v. Raley (1992) 2 Cal.4th 870 . . . . 204, 212

People v. Ramirez (1990) 50 Cal.3d 1158 174

People v. Ramkeesoon (1985) 39 Cal.3d 346 . . . . 150, 151, 191, 193

People v. Redrick (1961) 55 Cal.2d 282 180

People v. Reyes (2004) 32 Cal.4th 73 204

People v. Richardson (2004) 117 Cal.App.4th 570 170

Roberti v. Andy's Termite & Pest Control, Inc. (2004) 113 Cal.App.4th 893 277

People v. Robertson (1982) 33 Cal.3d 21 258

People v. Robertson (2004) 34 Cal.4th 156 . . . . 86, 98

People v. Rodriguez (1986) 42 Cal.3d 730 . . . . 401, 421

People v. Rowland (1982) 134 Cal.App.3d 1 92

People v. Rowland (1992) 4 Cal.4th 238 276

People v. Rubalcava (2000) 23 Cal.4th 322 329

People v. Russell (1953) 118 Cal.App.2d 136 188

People v. Saille (1991) 54 Cal.3d 1103 85

People v. Sedeno (1974) 10 Cal.3d 703 . . . . 85, 107, 113, 159

People v. Silva (2001) 25 Cal.4th 345 . . . . 154, 158, 165, 196

People v. Slaughter (2002) 27 Cal.4th 1187 253

People v. Smithey (1999) 20 Cal.4th 936 283

People v. Snow (2003) 30 Cal.4th 43 . . . . 236, 389, 419

People v. Sparks (2002) 28 Cal.4th 71 171

People v. Stanley (1995) 10 Cal.4th 764 370

People v. Stanworth (1974) 11 Cal.3d 588 132

People v. Steele (2002) 27 Cal.4th 1230 107

People v. Stoll (1989) 49 Cal.3d 1136 . . . . 268, 276

People v. Sundlee (1977) 70 Cal.App.3d 477 . . . . 222, 312

People v. Superior Court (Engert)(1982) 31 Cal.3d 797 367

People v. Therrian (2004) 113 Cal.App.4th 609 276

People v. Thomas (1977) 19 Ca1.3d 630 399

People v. Thompson (1980) 27 Cal.3d 303 . . . . 204, 209, 210

People v. Turner (1990) 50 Cal.3d 668 191

People v. Valdez (2004) 32 Cal.4th 73 154

People v. Valdez (2004) 32 Cal.4th 73 . . . . 85, 86, 94, 95, 191, 193, 196, 205

People v. Valentine (1946) 28 Cal.2d 121 113

People v. Vargas (1973) 9 Cal.3d 470 225

People v. Vera (1997) 15 Cal.4th 269 221

People v. Wader (1993) 5 Cal.4th 610 222

People v. Waidla (2000) 22 Cal.4th 690 . . . . 96, 160

People v. Walker (1988) 47 Cal.3d 605 371

People v. Ward (1999) 71 Cal.App.4th 368 277

People v. Ward (2005) 36 Cal..4th 186 . . . . 236, 277

People v. Watson (1956) 46 Cal.2d 818 . . . . 60, 73, 362

People v. Weaver (2001) 26 Cal.4th 876 . . . . 360, 362

People v. Weidert (1985) 39 Cal.3d 836 . . . . 204, 210

People v. Wheeler (1978) 22 Cal.3d 258 396

People v. Wells (1988) 199 Cal.App.3d 535 131

People v. Wickersham (1982) 32 Cal.3d 307 . . . . 85, 86, 107, 150, 329, 354

People v. Yeoman (2003) 31 Cal.4th 93 253

People v. Young (1884) 65 Cal. 225 . . . . 168, 170, 206

State v. Williams (La. 1980) 392 So.2d 619 . . . . 244, 245, 247

State v. Bobo (Tenn. 1987) 727 S.W.2d 945 415

State v. Ring (Az. 2003) 65 P.3d 915 390-391

State v. Rizzo (2003) 266 Conn. 171, 833 A.2d 363 402

State v. Whitfield (Mo. 2003) 107 S.W.3d 253; 390

Westbrook v. Milahy (1970) 2 Cal.3d 765 418

Wilson v. Phillips (1999) 73 Cal.App.4th 250 277

Woldt v. People (Colo.2003) 64 P.3d 256 391

FEDERAL STATUTES

21 U.S.C. §§ 848 396

STATE STATUTES

California Code of Regulations, section 2280 407

California Rules of Court, rule 34 1

California Rules of Court, rule 4.42 419

California Rules of Court, rule 4.421 423

California Rules of Court, rule 4.423 423

Evidence Code section 520 403

Evidence Code section 800 274

Evidence Code section 801 . . . . 266, 267, 274

Evidence Code section 802 . . . . 266, 267, 269, 274

Evidence Code section 803 266

Evidence Code section 804 266

Evidence Code section 805 266

Penal Code section 159 99

Penal Code section 187 . . . . . 1, 3, 76, 86

Penal Code section 189 . . . . . 86, 98, 155, 158, 198, 368

Penal Code section 190 . . . . . 3, 387

Penal Code section 190.1 387

Penal Code section 190.2 . . 155, 158, 201, 202, 204, 207, 229, 232, 366-369, 386, 387

Penal Code section 190.3 . . 306, 310-312, 315, 320-323, 329, 331, 332, 342, 344, 370, 371, 377, 384, 386-388, 409, 410, 423

Penal Code section 190.4 . . . . . 201, 387, 421

Penal Code section 190.5 387

Penal Code section 192 107

Penal Code section 209 2

Penal Code section 206 198

Penal Code section 207 . . . . . 2, 3, 99, 130-134, 139, 143, 146, 207

Penal Code section 208 . . . . . 133, 207

Penal Code section 209 . . . . . 3, 6, 132, 207

Penal Code section 209.5 207

Penal Code section 211 . . . . . 2, 3, 101, 182, 188

Penal Code section 236 153

Penal Code section 237 153

Penal Code section 261 . . . . 2, 3

Penal Code section 286 . . . . 2, 3, 100, 174, 198

Penal Code section 288 198

Penal Code section 288a 198

Penal Code section 289 198

Penal Code section 459 . . . . 2, 3, 168, 170, 171, 206

Penal Code section 487 . . . . 191, 192

Penal Code section 654 6

Penal Code section 667 . . . . 2, 4, 6, 7

Penal Code section 667.5 . . . . 2, 4, 7

Penal Code section 667.61 . . . . 2, 4, 6

Penal Code section 977 . . . . 59, 64, 73, 359- 361

Penal Code section 1042 83

Penal Code section 1043 . . . . 59, 64, 73, 359, 360

Penal Code section 1170 408

Penal Code section 1170.12 4

Penal Code section 12022 . . . . 2, 4

Penal Code section 12022.3 . . . . 2, 3, 6

Penal Code section 1237 1

Penal Code section 1259 . . . . 116, 145, 252, 253, 328, 415

SECONDARY AUTHORITIES

CALJIC 2.01 179

CALJIC 2.71 253

CALJIC 3.31 127

CALJIC 8.11 . . . . . 115, 126

CALJIC 8.21 127

CALJIC 8.21.1 191

CALJIC 8.30 . . . . . 87, 89, 95

CALJIC 8.31 . . . . . 87, 89, 95, 126

CALJIC 8.81.17 . . . . . 203, 204

CALJIC 8.84 349

CALJIC 8.85 . . . . . 320, 321, 323, 328-330

CALJIC 8.87 . . . . . 308, 417

CALJIC 8.88 . . . . . 330, 335, 338-341, 343-345, 350, 371, 385, 387, 392

CALJIC 9.40 191

CALJIC 9.40.2 191

CALJIC 9.41 191

CALJIC 9.50 . . . . . 141, 142, 145-147

CALJIC 9.60 153

Amnesty International, "*The Death Penalty: List of Abolitionist and Retentionist Countries*" (1 January 2000), published at

http://web.amnesty.org/library/index/ENGACT500052000 426

Soering v. United Kingdom: Whether the Continued Use of the Death Penalty In the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339 426

Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. Rev. 1283, 1324-26 (1997) 369

Stevenson, *The Ultimate Authority on the UltimatePunishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54Ala L. Rev. 1091 391

XVII

THE JUDGMENT OF DEATH SHOULD BE REVERSED BECAUSE THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION, PROHIBITS APPELLANT'S EXECUTION

1. SUMMARY OF ARGUMENT

The prosecution evidence admitted during the penalty phase of the trial established that appellant suffered from mental and emotional deficits which developed when he was a young child. Appellant had no control over the development of this disorder. Appellant's mental and emotional deficits impaired his ability to perceive right from wrong, contributed to impulsive behavior, and substantially diminished his culpability for the crime. In *Atkins v. Virginia* (2002) 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335, the Court concluded that imposition of the death penalty on a mentally retarded individual violated the Eighth Amendment. *Atkins v. Virginia* establishes that imposition of the death penalty on an individual with appellant's mental and emotional deficits also violates the Eighth Amendment and Fourteenth Amendments. The California Constitution also prohibits the imposition of cruel and unusual punishment in Article I, Section 17. It also forbids appellant's execution. Hence, the judgment of death should be reversed.

2. LEGAL STANDARDS GOVERNING CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor

excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment applies to the States through the Fourteenth Amendment. (*Furman v. Georgia* (1972) 408 U.S. 238, 239, 92 S.Ct. 2726, 33 L.Ed.2d. 346.) "[I]t is a precept of justice that punishment for crime should be graduated and proportioned to the offense." (*Atkins v. Virginia, supra*, 536 U.S. at p. 310, quoting *Weems v. United States* (1910) 217 U.S. 349, 367, 54 L.Ed. 793, 30 S.Ct. 544.) An assessment of what punishment is graduated and proportioned is determined by the prevailing standards of the community. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Atkins v. Virginia, supra*, 536 U.S. at pp. 311-312, quoting *Trop v. Dulles* (1958) 356 U.S. 86, 2 L.Ed.2d 630, 78 S.Ct. 590.) "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." (*Roper v. Simmons* (2005) 543 U.S. 551, 125 S.Ct. 1183, 161 L..Ed.2d 1.)

In *Atkins v. Virginia*, the Court addressed whether imposition of the death penalty on a mentally retarded individual constituted cruel and unusual punishment in violation of the Eighth Amendment. The Court noted that "[p]roportionality review under those evolving standards [of decency] should be informed by `objective factors to the maximum possible extent'." (*Atkins v. Virginia, supra*, 536 U.S. at 312, citing *Harmelin v. Michigan* (1991) 501 U.S. 957, 1000, 115 L.Ed.2d 836, 111 S.Ct. 2680.) The "clearest and most reliable

objective evidence of contemporary values is the legislation enacted by the country's legislatures." (*Atkins v. Virginia, supra*, 536 U.S. at p. 312, quoting *Penry v. Lynaugh* (1989) 492 U.S. 302, 331, 106 L.Ed.2d 256, 109 S.Ct. 2934.) In previous decisions in which the Court had relied in part on legislative judgments, it had held that imposition of the death penalty was excessive punishment for the rape of an adult woman, (*Coker v. Georgia* (1977) 433 U.S. 584, 593-596, 53 L.Ed.2d 982, 97 S.Ct. 2861), and for a defendant who neither took life, attempted to take life, nor intended to take life. (*Enmund v. Florida* (1982) 458 U.S. 782, 789-793, 73 L.Ed.2d 1140, 102 S.Ct. 3368.)

The Court in *Atkins v. Virginia* did not limit itself, however, to the actions of legislatures in seeking objective evidence of the contemporary values of society. The Court noted the broad consensus that had developed against imposition of the death penalty on mentally retarded offenders in organizations that were concerned with fundamental moral values:

> Additional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus. For example, several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender. See Brief for American Psychological Association et al. as *Amici Curiae*; Brief for AAMR et al. as *Amici Curiae*. In addition, representatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, have filed an *amicus curiae* brief explaining that even though their views about the death penalty differ, they all "share a conviction that the execution of persons with mental retardation cannot be morally justified." See Brief for United States Catholic Conference et al. as *Amici Curiae* in

> *McCarver v. North Carolina,* O. T. 2001, No. 00-8727, p. 2. Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O. T. 2001, No. 00-8727, p. 4. Finally, polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong. R. Bonner & S. Rimer, Executing the Mentally Retarded Even as Laws Begin to Shift, N. Y. Times, Aug. 7, 2000, p. A1; App. B to Brief for AAMR as *Amicus Curiae* in *McCarver v. North Carolina*, O. T. 2001, No. 00-8727 (appending approximately 20 state and national polls on the issue). Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue. See *Thompson v. Oklahoma*, 487 U.S. 815, 830, 831, n. 31 (1988) (considering the views of "respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community").

(*Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21.)

The Court in *Atkins v. Virginia* noted a widespread national movement, starting in 1986, against imposition of the death penalty on retarded individuals. Numerous state legislatures, as well as the federal government, enacted legislation prohibiting execution of mentally retarded offenders. (*Atkins v. Virginia, supra*, 536 U.S. at pp. 314-317.) The Court noted that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of the change. Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded

persons . . . provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." (*Atkins v. Virginia, supra*, 536 U.S. at pp. 315-316.)

Atkins v. Virginia explained why imposition of the death penalty on a mentally retarded offender was inconsistent with the goals of capital punishment:

> This consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty. Additionally, it suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.
>
> As discussed above, clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

(*Atkins v. Virginia, supra*, 536 U.S. at pp. 317-318.)

In *Gregg v. Georgia* (1976) 428 U.S. 153, 183, 49 L.Ed.2d 859, 96 S.Ct. 2909, the

Court identified retribution and deterrence as the societal purposes served by the death penalty. *Atkins v. Virginia* concluded that neither goal was advanced by imposition of the death penalty on a mentally retarded offender. For retribution, "the severity of the appropriate punishment necessarily depends on the culpability of the offender." (*Atkins v. Virginia*, 536 U.S. at p. 319.) Since *Gregg v. Georgia*, the Supreme Court has "consistently confined the imposition of the death penalty to a narrow category of the most serious crimes." (*Ibid.*) The Court thus concluded that "pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate." (*Ibid.*)

The goal of deterrence was also not served by imposing the death penalty on a mentally retarded offender:

> The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable——for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses——that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.

Atkins v. Virginia, supra, 536 U.S. at p. 320.) The Court concluded that imposition of the death penalty on a mentally retarded offender "is excessive and that the Constitution `places a substantive restriction on the State's power to take the life' of a mentally retarded

offender'." (*Atkins v. Virginia, supra*, 536 U.S. at p. 321, quoting *Ford v. Wainwright* (1986) 477 U.S. 399, 405, 91 L.Ed.2d 335, 106 S.Ct. 2595.)

In *Roper v. Simmons* (2005) 543 U.S. 551, 125 S.Ct. 1183, 161 L..Ed.2d 1, the Supreme Court extended the reasoning of *Virginia v. Atkins* to execution of juveniles. The Court also broadened the scope for determining when a punishment is excessive under the Eighth Amendment. In *Stanford v. Kentucky* (1989) 492 U.S. 361, 377-378, 109 S.Ct. 2969, 106 L.Ed.2d 306 (opinion of Scalia, J., joined by Rehnquist, C.J. and White and Kennedy, JJ.), the plurality opinion rejected the notion that the Court should bring its own judgment to bear on the acceptability of the juvenile death penalty. In *Atkins v. Virginia*, the Court stated that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty of the Eighth Amendment." (*Atkins v. Virginia, supra*, 536 U.S. at p. 312.) Hence, in determining whether a punishment is excessive under the Eighth Amendment, "[t]he beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. This data gives us essential instruction. We must then determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles." (*Roper v. Simmons, supra*, 125 S.Ct. at p. 1192.) The Court noted that "the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend towards abolition of

the practice–provide sufficient evidence that today our society views juveniles, in the words Atkins used respecting the mentally retarded, as `categorically less culpable than the average criminal'." (*Roper v. Simmons, supra,*125 S.Ct. at p. 1194, quoting *Atkins v. Virginia, supra,* 536 U.S. at p. 316.)

The Court cited three reasons why juvenile offenders are less culpable than the average criminal. Scientific and sociological studies confirm that "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable in the young. These qualities often result in impetuous and ill-considered actions and decision'." (*Roper v. Simmons, supra,* 125 S.Ct. at p. 1195, quoting *Johnson v. Texas* (1993) 509 U.S. 350, 367, 125 L.Ed.2d 290, 113 S.Ct. 2658.) Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." (*Roper v. Simmons, supra,* 125 S.Ct. 1195, citing *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115, 71 L.Ed.2d 1, 102 S.Ct. 869.) Finally, "the third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." (*Roper v. Simmons, supra,* 125 S.Ct. at p. 1195, citing E. Erikson, *Identity: Youth and Crises* (1968).) Hence, "[o]nce the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults." (*Roper v. Simmons, supra,* 125 L.Ed.2d at p. 1196.) "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or

blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." (*Ibid.*) "As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles . . ." (*Ibid.*)

Finally, the Court noted that the United States was the only country in the world that authorizes imposition of the death penalty for juvenile offenders. The overwhelming weight of international law also forbids executions of individuals who were juveniles when they committed the crime in question. (*Id.*, at pp. 1200-1201.)

3. APPELLANT'S SENTENCE OF DEATH CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

The evidence established that appellant suffered from mental and emotional deficits similar to the infirmities of mentally retarded individuals and juvenile offenders. Appellant's deficits were formed when he was a young child and became fixed qualities. Because of these emotional deficits, the goals of retribution and deterrence are not served by applying the death penalty to him. Hence, the judgment of death should be vacated.

Sandra Baca held a doctorate in psychology. She had extensive experience in the area of domestic violence and abuse. (Vol. 15, R.T. pp. 3684-3686, 3691-3696.) She reviewed a variety of psychological tests administered to appellant, (Vol. 15, R.T. p. 3687), as well as the circumstances of his relationships with Elizabeth Ibarra, Elvira Castaneda, and Lucia Gonzalez. (Vol. 15, R.T. pp. 3698-3705.) Research suggested that at least 40 to 45 percent of spousal abusers suffer from antisocial personality disorders, narcissistic personality

disorders, and/or borderline disorders. (Vol. 15, R.T. p. 3709.) According to Dr. Baca, Dr. Hall, who testified as an expert witness during the defense penalty phase, made a mistake in calculating appellant's score on the Minnesota Multiphasic Personality Inventory Test-2. (Vol. 15, R.T. pp. 3710-3711.) When Dr. Baca calculated the correct score, she diagnosed appellant with an antisocial personality disorder with depressive features and alcohol and substance abuse. (Vol. 15, R.T. pp. 3712-3713.) Appellant's behavior as a juvenile suggested that he suffered from an antisocial personality disorder. (Vol. 15, R.T. p. 3717.) Individuals with an antisocial personality disorder cope with stress in a maladaptive manner. (Vol. 15, R.T. p. 3726.) According to Dr. Baca, "[e]verybody by the age of five is formed in a certain way. And after five everything just builds upon that base." (Vol. 15, R.T. p. 3733.) In Dr. Baca's opinion, appellant was either born with an antisocial personality disorder, or developed it by the age of five:

> Q. All right. That's now what I am asking you. I am asking you, what factors enter into making an antisocial personality? Are they born that way?
>
> A. Some people believe that they are?
>
> Q. Do you believe they are?
>
> A. I believe in part, yes.
>
> Q. Now, isn't it true that the formative years, I believe you used the cutoff of five?

A. Correct.

Q. One or birth until five is the formative years; is that correct?

A. Correct.

Q. And that's where the environment can create mental problems in people, isn't it?

A. Mental problems? You could say so, yes.

Q. And in the formative years, I take it, this is where the antisocial personality is developed?

A. It begins to take place, yes, around that time.

(Vol. 15, R.T. p. 3740.)

According to Dr. Baca, individuals with antisocial personality disorders are not amenable to treatment through pharmacological medicines or therapy. (Vol. 15, R.T. p. 3733.) "Antisocial–personality disorders cannot be treated. They are not amenable to treatment at all. That's just your core." (Vol. 15, R.T. p. 3733.) Such individuals, "in terms of having any true feelings, there are no feelings. (Vol. 15, R.T. p. 3725.) Their "psychic is very inflexible. Okay. Very inflexible." (Vol. 15, R.T. p. 3725.) "They because of the way that they are, they are significantly impaired in their social relationships, their relationships with peers, with their wives, with their children, and they really don't feel any subjective stress." (Vol. 15, R.T. p. 3726.)

Dr. Hall further explained how appellant's antisocial personality disorder had its roots in events that occurred prior to appellant becoming an adult. In order for an individual to be diagnosed with an anti-social personality disorder, he or she must have had problems with the law prior to the age of 15. Appellant was first arrested when he was 10 years old. (Vol. 15, R.T. p. 3717.) He went to juvenile hall at that age. (Vol. 15, R.T. p. 3750.) Appellant reached a turning point early in his life that substantially influenced the adult he eventually became:

> Q. Now you described a fork in the road that he came to when he was 17 years old. Is that the only fork in the road? Once you pass that fork, then you are doomed the rest of your life?
>
> A. I think the fork goes back further. In reading the papers, he was arrested when he was ten years old. He was arrested when he was ten years old. Now, let's just assume he was arrested that one time and he learned from that experience and he says wow, okay, this is serious. He could have then gotten off this road and gone this way. But he didn't choose to do it. He just kept on and kept on.

(Vol. 15, R.T. p. 3737.) She further opined that "[t]he arrest when he was ten years old in 1970, that was a window of opportunity for Mr. Castaneda to have decided, okay, I don't want to do this, this is serious, you, know, being locked up, having to be supervised, I don't want to do this. He could have made a choice then." (Vol. 15, R.T. p. 3754.)

Both Dr. Baca and Dr. Morales opined that the gang served as a surrogate family for appellant while he was a youth. (Vol. 15, R.T. p. 3753.) Dr. Baca explained the role of the

gang in shaping appellant's values:

> Q. And they develop their value system through the gang, do they not?
>
> A. A reverse value system is what the gangs teach them. Now in the absence of parental supervision, value and teachings in the home, then, of course, the gang mentality and the gang values are going to eventually prevail and they are continuously reinforced by the gang members every time they do something and there is recognition. So, mother's absence and failure to take charge of the situation was really a gateway for the gangs to begin to shape him.

(Vol. 15, R.T. pp. 3753-3754.)

The reasoning in *Atkins v. Virginia* and *Roper v. Simmons* demonstrates that application of the death penalty to appellant violates the Eighth and Fourteenth Amendments. Individuals who suffer from mental retardation cannot be punished by execution because "by definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes, and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." (*Atkins v. Virginia, supra*, 536 U.S. at p. 318.)

This description also applies to appellant because of his mental and emotion deficits.[38] Appellant's condition was not amenable to treatment, his personality was very

---

[38] The prosecution's characterization of appellant's mental and emotional deficits as an antisocial personality disorder does not alter the analysis in light of the testimony from Dr. Baca that appellant developed that condition at a young age when he had no control

inflexible, and his social relationships were significantly impaired. (Vol. 15, R.T. pp. 3725-3726, 3733.) Appellant had no "true feelings." (Vol. 15, R.T. p. 3725.) He does not feel any "subjective stress." (Vol. 15, R.T. p. 3726.) Given Dr. Baca's description of appellant's personality, it was clear that he suffered from a diminished capacity to process information, learn from mistakes, and to understand the reactions of others. If a mentally retarded individual cannot be executed because his or her deficits "diminish their personal culpability," (*Atkins v. Virginia, supra*, 536 U.S. at p. 318), then appellant's substantial deficits also diminished his personal culpability.

The qualities that forbid the execution of juveniles also apply to appellant. Juveniles lack maturity and have an underdeveloped sense of responsibility. *(Roper v. Simmons, supra*, 125 S.Ct. at p. 1195.) Appellant clearly shared those qualities. According to Dr. Baca, appellant's mental and emotional deficits resulted in appellant dealing with stress in a maladaptive manner, lacking any feelings, and not experiencing subjective stress. (Vol. 15, R.T. p. 3726.)

Juveniles are also more susceptible to negative influences and peer pressure. (*Atkins v. Virginia*, 536 U.S. at p. 318.) Appellant also shared that quality. Appellant led a productive life between the ages of 20 and 24. (Vol. 13, R.T. p. 3165.) However, he was led by his brothers back into a destructive life style. (Vol. 13, R.T. p. 3165.) Dr. Baca described the role of appellant's family in leading him back into a destructive lifestyle:

---

over it.

> Q. Now, is it your position that irrespective of his environment, he could have succeeded in normal society?
>
> A. His sisters managed to have succeeded fairly well. I think there was ample opportunity provided to him when he was in camp. He went to school. It did show he did quite well in trying to – I believe the T.A.C.T., which is like an equivalent to the high –G.E.D., he did quite well. He did take that opportunity. There appears at one time I think he was married –when he was married the first time, he held down a job. So, there–he did make attempts to try to go differently. But always managed to come back again to the same style. And in of his partners, and I am sorry, I don't remember which one, did say that if–that if he had stayed away from his brothers, he probably would have done better, but because he was a follower, going with his brothers, he just did what they wanted him to do. So it seems like he made two or three attempts.

(Vol. 15, R.T. pp. 3752-3753.)

The third reason that the death penalty may not be imposed on a juvenile is that "the character of a juvenile is not as well formed as that of an adult; The personality traits of juveniles are more transitory, less fixed." (*Roper v. Simmons, supra*, 125 S.Ct. at p. 1195.)

Appellant was an adult when he committed this crime, and Dr. Baca testified that individuals with appellant's mental and emotional deficits cannot be treated through either medication or therapy. (Vol. 15, R.T. p. 3733.) Those individuals develop such deficits before reaching adulthood, and are either born with it, or develops it by the age of five. Hence, individuals with such deficits have no control over this aspect of their development. Because the development of such deficits is either rooted in the person's early childhood

or acquired genetically, the character of an individual with that condition is similar to that of a juvenile. A juvenile, and an individual with appellant's mental and emotional deficits, lack developed and mature personalities that are rooted in childhood. In the case of a juvenile, the personality is not developed by reason of age. In an individual with appellant's mental and emotional deficits, the personality stopped developing beyond the juvenile years.

The Supreme Court identified retribution and deterrence as justifications for the death penalty. (*Roper v. Simmons, supra*, 125 S.Ct. at p. 1196.) The Court concluded that "[o]nce the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults." (*Ibid.*) Similar reasoning applies to the instant case. According to Dr. Baca, appellant's mental and emotional deficits prevented him from having the capacity to be deterred:

> Q. On that point, on page four of your report, if you can look at that, and I am referring to the third paragraph, last sentence in that report, you have, "In keeping with Mr. Castaneda's propensity to blame everyone else, he has a ready explanation for how he was at the wrong place at the wrong time. Persons who commit a crime decide to do so because they want to, not for abstract reasons that they conjure up later."
>
> What do you mean by that?
>
> A. They know what they are doing. They are able to override any fears, they are able to ignore any consequences, and the distorted thinking is, I won't get caught. And basically they know exactly what they are doing, and if you look at them, look at the behavior and you study it, you will find that in some cases there is some premeditation. There has been some planning that has been going on, in effect. Maybe to some effect there's been some grooming of the potential victim. Stalking. And they

> know what they are doing. They know what they are doing. But when they are going to do it, they never think about getting caught. It's only after they have gotten caught do they have the reason and the explanation.

(Vol. 15, R.T. pp. 3734-3735.) If lack of deterrence is a reason to not apply the death penalty to a juvenile, then it is also a reason to not apply it to appellant.

According to the prosecution evidence during the penalty phase of the trial, appellant suffered from an emotional disability that was formed at birth, or within the first five years of his life. This disability impaired appellant's ability to conform his conduct to the requirements of society. Appellant had no control over the development of this disorder. Dr. Baca testified that appellant reached a fork in the road during his life at the age of 10. Appellant took the wrong path. It was not necessary for a nexus to exists between appellant's emotional disability and the crime in order for his disability to preclude his execution. (*Smith v. Texas* (2004) 543 U.S. 37, 125 S.Ct. 400, 405, 160 L.Ed.2d 303; *Tennard v. Dretke* (2004) 542 U.S. 274, 124 S.Ct. 2562, 2572, 159 L.Ed.2d 384, 405.) The death penalty should not be applied to an individual who suffers from an emotional disability formed through no fault of that person.

Under the reasoning of *Atkins v. Virginia* and *Roper v. Simmons*, the death penalty cannot constitutionally be applied to appellant. Hence, the judgment of death should be reversed.

4. APPELLANT'S SENTENCE OF DEATH CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE CALIFORNIA CONSTITUTION

Article I, section 17 of the California Constitution forbids cruel and unusual punishment. This Court has rejected the argument that the sentence of death is inherently cruel and unusual. (*People v. Ayala* (2000) 24 Cal.4th 243, 303.) A punishment is cruel and unusual under Article I, section 17 if it "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating the prohibition against cruel and unusual punishment of the Eighth Amendment of the federal Constitution or against cruel or unusual punishment of article I, section 17 of the California Constitution." (*People v. Cole* (2004) 33 Cal.4th 1158, 1235.) To make this determination, the Court "examine[s] the circumstances of the offense, including the defendant's motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. [We] must also consider the defendant's age, prior criminality and mental capabilities." (*Ibid.*)

The Supreme Court's interpretation of the Eighth Amendment's prohibition against cruel and unusual punishment constitutes persuasive authority regarding how this Court should interpret the prohibition against cruel and unusual punishment in Article I, section 17 of the California Constitution. (*People v. Cleveland* (2001) 25 Cal.4th 466, 480 [decisions of the federal courts are persuasive authority for how California law should be interpreted]; *Lujan v. Minagar* (2004) 124 Cal.App.4th 1040, 1045 [when California laws are patterned after federal statutes, federal decisions interpreting the federal provisions are

persuasive authority].) A defendant's mental capabilities are part of this Court's inquiry in determining if a sentence of death is cruel and unusual as applied to a particular defendant. (*People v. Cole, supra*, 33 Cal.4th at p. 1235.) This Court should apply the holding of *Atkins v. Virginia* and *Roper v. Simmons* in determining whether sentencing appellant to death constitutes cruel and unusual punishment under the California Constitution because of his mental and emotional deficits.

The above factors for determining whether a sentence is cruel and unusual establishes that appellant's sentence of death constitutes cruel and unusual punishment under Article I, section 17. This Court has had many cases before it with far more egregious facts. Appellant does not intend to minimize the death suffered by the victim. This case involved a single victim. She did not suffer an extended period of time. the Appellant's motive was never determined. However, it does not appear that appellant acted from greed or in a well thought out calculated manner. Appellant allegedly made the comment after the incident that the bitch had made him mad. It appears that the assault was result of an unplanned explosion of anger. Appellant was obviously the only participant in the assault. The crime was committed in a crude and unsophisticated manner. The consequence of appellant's act was the victim's death.

The totality of appellant's background, which includes his age, criminal record, and mental capabilities, suggests that death constitutes cruel and unusual punishment. None of appellant's prior offenses involved homicides. Appellant's most serious violent conviction

other than the instant case was the robbery of Mr. Hills. (Vol. 14, R.T. pp. 3541-3554.) Mr. Hills was tied up and kicked once during the incident but did not sustain any serious injury. (Vol. 14, R.T. p. 3549.) Appellant had a stormy relationship with Mr. Ibarra which was induced by drug use. (Vol. 15, R.T. pp. 3609, 3639.) While appellant's criminal record, prior to the instant offense, could not be characterized as minor, it was far from being as serious as the criminal record of many individuals sentenced to death.

Appellant discussed at length above why his mental condition make imposition of the death penalty as to him cruel and unusual punishment. Appellant incorporates those arguments herein. Dr. Baca, the prosecution expert witness psychologist, testified that appellant had developed by the age of five mental and emotional deficits that triggered his antisocial behavior. (Vol. 15, R.T. p. 3740.) Appellant's condition was not subject to treatment through therapy or medicine. (Vol. 15, R.T. p. 3733.) It was fundamentally unfair to impose a judgment of death against appellant if the condition which contributed or caused him to commit the charged offenses had developed by the age of five and could not be altered by appellant through treatment or medication. Dr. Baca believed that appellant reached a fork in the road during his life at the age of ten when he could have chosen to become law abiding or continue with antisocial conduct. (Vol. 15, R.T. pp. 3737, 3754.) Ten year old children do not have the capacity to make mature and intelligent life choices.

For the reasons above, both the Eighth and Fourteenth Amendments, and Article I, section 17 of the California Constitution, forbid appellant's execution.

XVIII

THE JUDGMENT OF DEATH SHOULD BE REVERSED BECAUSE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS, AND THE CALIFORNIA CONSTITUTION, BECAUSE THE JURY WAS ALLOWED TO CONSIDER APPELLANT'S ESCAPES FROM CUSTODY AS EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL

1. SUMMARY OF ARGUMENT

During the penalty phase, the prosecution presented evidence that appellant had escaped, or attempted to escape, from custody on several occasions.[39] These escapes from custody did not involve the use or attempted use of violence, or threats of violence. Under Penal Code section 190.3, an escape or attempted escape which does not involve the use or attempted use of violence is not a factor in aggravation and not admissible during the penalty phase of the trial. The jury should not have learned of appellant's history of escapes from custody. The defense counsel rendered ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United Constitution, and in violation of the California Constitution, by failing to object to the admission of evidence that appellant had escaped from custody. Appellant was prejudiced by the the jury learning that he had escaped from custody. The judgment of death must therefore be reversed.

[39] For ease of reference, appellant's attempted escapes from custody, and escapes from custody will simply be referred to as "escapes from custody."

2. SUMMARY OF PROCEEDINGS BELOW

The prosecution presented evidence on several occasions that appellant had escaped from custody. Dr. Hall, a psychologist, testified as a defense expert witness about conditions in prison and appellant's ability to adjust to life as a prisoner. (Vol. 12, R.T. pp. 2941-2983.) During cross-examination, the prosecutor asked Dr. Hall if appellant would be classified as a special prisoner because of his extensive and violent criminal record. (Vol. 12, R.T. p. 2994.) The following exchange occurred:

> Q. Now in Mr. Castaneda's case –let's take his last imprisonment which occurred in August 28th, 1991, and that was for robbery. He had already suffered two prison sentences for burglary, one for a residential burglary, first degree, and one for a second degree burglary, **and he had three escapes from custody, two escapes from a CYA facility —or two different CYA facilities, then an escape from Los Angeles jail.** And in addition to that he had been to jail four different times.
>
> Now I take it, given the background, that background, especially the escapes and the offense for which he is entering, the armed robbery, that that would in fact classify him as a special risk type of prisoner?
>
> A.. Yes, it would.

(Vol. 12, R.T. p. 2994)(emphasis added.)

Dr. Frank Gawin testified as a defense expert witness concerning appellant's drug dependency. (Vol. 12, R.T. pp. 3031-3082.) During cross-examination, the prosecutor asked Dr. Gawin about appellant's escape from the Los Angeles County jail. (Vol. 12, R.T. p.

3071.) Appellant was incarcerated in the West Valley Detention Facility while this case was being tried. (Vol. 14, R.T. pp. 3565-3567.) During the prosecution case-in-chief during the penalty phase, Deputy Joe Bratten testified that he searched appellant's cell in that detention facility and found a homemade handcuff key. (Vol. 14, R.T. pp. 3574-3575.) Appellant shared a cell with other inmates. Deputy Bratten could not determine if the handcuff key belonged to appellant. (*Ibid.*)

Prior to the commencement of penalty phase closing arguments, the parties discussed the admissibility of exhibits. (Vol. 16, R.T. pp. 3789-3793.) The court referred the prosecutor to *People v. Boyd* (1985) 38 Cal.3d 762, 776-777, which held that a non-violent escape was not admissible as aggravating evidence in a death penalty proceeding. (Vol. 16, R.T. p. 3789.) Exhibit 76 are documents which pertain to appellant's 1989 conviction for escape from custody. (Vol. 2, C.T. pp. 765-787.) The trial court stated that it believed Exhibit 76 was inadmissible because the escape was non-violent. (Vol. 16, R.T. pp. 3789-3790.) The trial court stated that the crime of escape did not fit into category B, other criminal conduct involving force or violence, and was going to delete it from CALJIC 8.87. (Vol. 16, R.T. p. 3791.) The defense counsel stated that Exhibit 66 [40] should not go to the jury because "we should not have the escape as a factor in aggravation or in any way construed as an aggravating factor. I think we can argue regarding the situation, but as a factor in aggravation, I think it should be deleted." (Vol. 16, R.T. p. 3792.) The trial court

[40] The parties mistakenly referred to Exhibit 76 as Exhibit 66.

responded that "it impacts the defendant's character that was introduced by your witnesses." (Vol. 16, R.T. p. 3793.) The defense counsel argued that it would be more aggravating to have a document pertaining to appellant's attempted escape go to the jury. (Vol. 16, R.T. p. 3793.) The prosecutor withdrew Exhibit 76 from evidence. (*Ibid.*) The prosecution presented a number of documents which referenced appellant's escapes from custody. (Vol. 2, C.T. pp. 514-526.) Exhibit 63 are documents pertaining to appellant's 1987 conviction for second-degree burglary. (Vol. 2, C.T. pp. 527-605.)[41] The probation officer's report contains the following entry:

> 2-8-80 LASO–459 PC: On 5-6-80, Pomona Superior Court, A525539, convicted of 459 PC–first degree; committed to CYA; **on 10-30-80–escaped; On 10-30-81 escapee returned to CYA–Camarillo.** Paroled on 10-18-82; Discharged on 11-21-85

(Vol. 2, C.T. p. 555)(emphasis added.) Exhibit 64 are documents that pertain to appellant's 1991 conviction for robbery. (Vol. 2, C.T. pp. 606-688.) The probation officer's report for that offense also contains an entry pertaining to appellant's 1980 conviction for burglary and commitment to the California Youth Authority. (Vol. 2, C.T. p. 679.) That entry provides in part as follows: "On 5-28-80 defendant was received in California Youth Authority, Rio,

---

[41] The exhibit number appears at the end of the exhibit. (Vol. 2, C.T. pp. 526, 605, 688, 764, 787.) The admission of exhibits 24, 63, 64, 65, and 76 are noted at page 499 of the clerk's transcript. Exhibit 76 was subsequently withdrawn from evidence. (Vol. 2, C.T. p. 501)(Vol. 16, R.T. p. 3793.) At Vol. 16, page 3791 of the reporter's transcript, the trial court mistakenly referred to exhibit 76 as exhibit 66.

and on 10-30-80 escaped. On 11-30-81 defendant was returned to the California Youth Authority as an escapee, and on 10-18-82 paroled from CYA to L.A. County. On 11-21-85 discharged." (Vol. 2, C.T. p. 679)(emphasis added).) The 1991 probation officer's report contains another entry which provides as follows:

> 2-25-89 LASO–4532 (B) PC (**Escape**) –on 4-19-89, Pasadena Superior Court, A-579063, defendant was convicted by plea of guilty, sentenced to one year county jail. Conviction status misdemeanor pursuant to 17 PC.

(Vol. 2, C.T. p. 680)[emphasis added].)

Exhibit 65 are documents pertaining to appellant's 1980 burglary conviction. (Vol. 2, C.T. pp. 689-764.) The probation officer's report for this offense states in part that "at the age of 17 he was sent to Camp Tenner and after spending only one week at camp he went AWOL. He remained away for a month and a half and then was apprehended . . ." (Vol. 2, C.T. p. 717.)

3. APPELLANT'S NON-VIOLENT ESCAPES, AND ATTEMPTED ESCAPES, WERE NOT ADMISSIBLE EVIDENCE IN AGGRAVATION DURING APPELLANT'S TRIAL

Penal Code section 190.3 sets forth the factors in aggravation and mitigation in a death penalty proceeding. The statute provides in part that relevant evidence concerning the penalty includes "the presence or absence other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or

implied threat to use force or violence, and the defendant's character, background, history, mental condition, and physical condition." The statute lists specific factors in aggravation and mitigation. Subdivision (b) provides as follows:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> ....
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

Section 190.3 was enacted in 1978 as part of Proposition 7. *People v. Boyd, supra*, 38 Cal.3d 762, noted that section 190.3 enacted a change from prior law. The factors in aggravation and mitigation listed in the 1977 version of section 190.3 merely guided the jury's discretion regarding the appropriate penalty. The version of section 190.3 enacted by Proposition 7 limited the jury to considering the factors in aggravation and mitigation listed in the statute in deciding the appropriate penalty. (*People v. Boyd, supra*, 38 Cal.3d at p. 773.)

In *People v. Boyd*, the prosecution presented evidence that the defendant attempted to escape from custody while the trial was in progress. There was no evidence that the defendant used or threatened force or violence to any person. The Court thus concluded that "evidence of the attempted escape is barred by the specific exclusionary language in section

190.3. It is also barred by the fact that, because the escape attempt did not involve violence or the threat of violence, the evidence is irrelevant to any of the specific aggravating and mitigating factors listed in section 190.3." (*People v. Boyd, supra*, 38 Cal.3d at pp. 776-777.)

4. THE TRIAL DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO THE ADMISSION OF EVIDENCE THAT APPELLANT HAD ESCAPED FROM CUSTODY

Evidence of appellant's escapes from custody was admitted through documentary evidence, and the testimony of several witnesses. Under *People v. Boyd*, that evidence was not admissible as a factor in aggravation under section 190.3. The defense counsel did not object to the portions of the probation officers' reports which referenced appellant's escapes, or attempted escapes, from custody. He also failed to object to the prosecutor eliciting that information during cross-examination of several of the defense expert witnesses. The trial defense counsel rendered ineffective assistance of counsel by failing to object to the admission of that evidence.

For purpose of brevity, appellant incorporates in this argument the authorities cited in Issue XIII regarding the right of a criminal defendant under the Sixth Amendment to the effective assistance of counsel. Appellant has the same right under Article I, section 15, of the California Constitution. A defense counsel's duties under the Sixth Amendment require the defense counsel to object to inadmissible evidence. (*People v. Sundlee* (1977) 70 Cal.App.3d 477, 484-485.) Appellant's defense counsel should have objected to the

admission of any evidence concerning appellant's escapes, or attempted escapes, from custody. That evidence was not admissible in aggravation, and was substantially prejudicial to appellant.

During the penalty phase, the defense counsel was trying to convince the jury that appellant should be sentenced to life in prison without the possibility of parole. Appellant's criminal history included violence, and the current offense was brutal and violent. Any juror that was inclined to sentence appellant to life in prison without the possibility of parole would obviously want to be assured that appellant would never be out of custody. Evidence that appellant had attempted to escape from custody several times, sometimes successfully, would clearly cause jurors concern that appellant would attempt to escape if he were sentenced to life in prison without the possibility of parole. Evidence that appellant had escaped from custody on several occasions substantially undermined appellant's ability to persuade the jurors that life in prison was the appropriate punishment.

This claim of ineffective assistance of counsel can be resolved on direct appeal. Claims of ineffective assistance of counsel will be resolved on direct appeal only when there could be no strategic reason for the defense counsel's tactical choice. (*People v. Pope* (1979) 23 Cal.3d 412, 426.) Here, there could be no strategic reason for allowing evidence of appellant's escapes into evidence. The defense attorney's effort to keep Exhibit 76 out of evidence demonstrates his recognition of the prejudicial nature of appellant's escapes from custody. The dialogue that appears at page 3790 through 3793 concerning the

admissibility of Exhibit 76 demonstrates that the defense attorney did not recognize that a non-violent escape was not admissible into evidence. This claim of ineffective assistance of counsel can therefore be resolved on direct appeal.

During discussion of the admissibility of Exhibit 76, the prosecutor suggested that appellant's escapes were relevant to refute the character evidence presented by appellant. (Vol. 16, R.T. p. 3792.) The mitigating evidence presented by appellant during the penalty phase did not warrant admission of appellant's escapes for several reasons. Appellant did not present evidence during the penalty phase that he was a law abiding person. Evidence of appellant's escapes may have been admissible if he had presented such evidence. Appellant presented evidence that he had individuals in his life who cared about him, and for whom he cared. The fact that appellant had escaped, or attempted to escape, from custody did not rebut in any manner evidence that appellant had loved ones in his life. Appellant's character evidence was very limited in scope and did not open the door to the prosecutor admitting any bad act by appellant.

The issue of appellant's escapes from custody was first raised during the prosecutor's cross-examination of Dr. Hall about appellant's prisoner classification level in state prison. (Vol. 12, R.T. p. 2994.) Because appellant called Dr. Hall as a witness to testify about appellant's ability to adjust to life in prison, the prosecutor was entitled to ask questions to determine appellant's custody level while serving a life sentence. However, the prosecutor did not need to include in his question to Dr. Hall the fact that appellant had escape from

custody several times in order to establish appellant's custody level while serving his life sentence. A timely objection would have resulted in the prosecutor not being allowed to present evidence that appellant had escaped from custody while he questioned Dr. Hall about this topic.

Furthermore, section 190.3 allowed appellant to present character evidence without opening the door to the admission of his escapes, or attempted escapes, from custody. Section 190.3 provides for admission, during the penalty phase, of evidence of the "defendant's character, background, history, mental condition and physical condition." While conferring the right upon the defendant to admit the aforementioned evidence, subdivision (b), allows the trier of fact to consider "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence, or the express or implied threat to use force or violence." Section 190.3 obviously contemplates that defendants will offer character evidence during the penalty phase. The statute nevertheless limits the admission of criminal activity as aggravating evidence to the type of criminal activity described in subdivision (b). If the defendant's admission of character evidence during the penalty phase opens the door to the prosecutor's offering evidence of criminal activity outside the scope of subdivision (b), then subdivision (b) is in practical effect read out of the statute. Hence, appellant's admission of character evidence did not open the door to the prosecutor admitting evidence of his escapes, or attempted escapes, from custody. (But see *People v. Boyd* (1985) 38 Cal.3d 762, 776 [once the

defendant offers character evidence under section 190.3, subdivision (k), the prosecution may present rebuttal evidence].)

This Court has held that an escape from custody that is inadmissible as an aggravating factor is admissible to rebut good character evidence. (*People v. Burgener* (2003) 29 Cal.4th 833, 873-874; *People v. Farnham* (2002) 28 Cal.4th 107, 187-188; *People v. Fiero* (1991) 1 Cal.4th 173, 237.) This Court should reconsider the holdings of these cases in light of the above arguments. Furthermore, appellant did not present good character evidence such that the door was open to the prosecution to present evidence of his non-violent escapes from custody. The mitigating evidence presented by appellant focused on the difficulties he had as a youth, the fact that family members still cared for him, and his problems with narcotics. Appellant did not present generalized good character evidence. Hence, his escapes from custody were not admissible as rebuttal evidence to his mitigating evidence. Finally, the prosecution did not elicit appellant's escapes from custody for the purpose of rebutting any good character evidence appellant may have presented. Appellant's escapes from custody were admitted during cross-examination of an expert witness and as part of the documentary evidence pertaining to appellant's prior convictions.

5. PREJUDICE

In order to reverse a judgment based on a claim of ineffective assistance of counsel, a defendant must show that, but for his attorney's deficient performance, it was reasonably likely that the outcome of the trial would have been different. (*Strickland v. Washington*,

supra, 466 U.S. at p. 687.)

This Court should look to the substance of what occurred, and apply the test for prejudice applicable to the jury's erroneous consideration of aggravating evidence. The jury's consideration of an erroneous factor in aggravation violates the Eighth and Fourteenth Amendments and was reversible error per se. (*Gregg v. Georgia* (1976) 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (opinion of Stewart, Powell, and Stevens, JJ.)[where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action].) Because the defense counsel's deficient performance allowed the jury to consider an erroneous factor in aggravation, the admission of evidence that appellant had escaped from custody must result in automatic reversal of the judgment. If the error was not prejudicial per se, then the judgment must be reversed unless it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.)

Here, the defense attorney's deficient performance allowed the jury to consider appellant's escapes from custody as a factor in aggravation. The jury instructions defining factors in aggravation and mitigation did not list escapes from custody. However, the jury repeatedly heard that appellant escaped from custody several times, received several documents which mentioned those incidents, and the jury was never told to ignore that evidence. Under the above circumstances, it is clear that the jury considered appellant's

escapes from custody while deliberating the penalty.

The fact that the jury considered appellant's attempted escapes from custody was extremely prejudicial. The jurors had to be assured that appellant would never be free from custody in order to consider life without the possibility of parole as a viable sentencing option. Appellant had obviously demonstrated through his conduct that he would not willingly stay in custody. Indeed, the prosecution presented evidence that a homemade handcuff key was found in appellant's cell, and that he was planning to escape while the trial was in progress. The fact that appellant had repeatedly tried to escape from custody must have convinced some jurors that there was a possibility appellant would do so while serving his life sentence. A life sentence without the possibility of parole would obviously not be a life sentence if appellant escaped from custody. Evidence that appellant had escaped from custody prejudiced appellant on several levels. First, the jury may have feared that a prison guard, another inmate, or an innocent third party would be injured while appellant's escape from custody was in progress. Second, the jury may have feared that appellant would in fact escape from custody and hurt someone. Third, the fact that appellant had escaped from custody could have convinced the jurors that prisons were not completely secure facilities from which prisoners like appellant could not escape.

This was a close case. The jury sent a note asking the trial court what would happen if it failed to decide the penalty. Appellant presented substantial evidence in mitigation. He suffered from a long-standing substance abuse problem. He had family members and friends

who cared about him despite his many problems. Appellant grew up in a completely dysfunctional background which deprived him of the parenting and environment necessary to make the correct life choices. The admission of evidence that appellant had escaped from custody on several occasions was not harmless beyond a reasonable doubt. It was also reasonably likely that the jury would not have imposed the death penalty if it had not heard evidence that appellant had attempted several escapes from custody. Hence, the judgment of death must be reversed.

IXX

THE JUDGMENT OF DEATH SHOULD BE REVERSED BECAUSE: (1) THE TRIAL COURT FAILED TO SUA SPONTE MODIFY CALJIC 8.85 TO DELETE INAPPLICABLE MITIGATING FACTORS; (2) THE PROSECUTOR USED THE INAPPLICABILITY OF THE MITIGATING FACTORS AS FACTORS IN AGGRAVATION; AND (3) ALTERNATIVELY, THE DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO REQUEST MODIFICATION OF CALJIC 8.85 TO DELETE INAPPLICABLE MITIGATING FACTORS AND FAILING TO OBJECT TO THE PROSECUTOR'S ARGUMENT THAT THE ABSENCE OF MITIGATING FACTORS CONSTITUTED FACTORS IN AGGRAVATION

1. SUMMARY OF ARGUMENT

CALJIC 8.85 is the standard jury instruction which instructs the jury regarding factors in aggravation and mitigation in Penal Code section 190.3. This Court has specifically held in the context of a capital prosecution that the absence of evidence pertaining to a mitigating factor does not constitute aggravating evidence. The trial court failed to sua sponte modify CALJIC 8.85 to delete the inapplicable mitigating factors. The prosecutor, during his penalty phase closing argument, improperly used the absence of the mitigating factors as facts in aggravation. The defense counsel did not object to the prosecutor's argument, or request the trial court to tailor CALJIC 8.85 to delete the inapplicable mitigating factors. The trial court erred by failing to sua sponte modify CALJIC 8.85 to delete the inapplicable mitigating factors. The trial court violated

appellant's right to state and federal due process of law, and the federal and state prohibition against imposition of cruel and unusual punishment, by failing to delete the statutory inapplicable mitigating factors. The defense counsel rendered ineffective assistance of counsel by failing to request the trial court to modify CALJIC 8.85 to delete the inapplicable mitigating factors, and by failing to object to the prosecutor's closing argument that the absence of mitigating factors constituted facts in aggravation. Because the above errors were prejudicial, the judgment of guilt must be reversed.

2. THE ABSENCE OF MITIGATING FACTORS CANNOT BE USED AS FACTORS IN AGGRAVATION

Section 190.3 lists 11 factors in aggravation and mitigation for the jury's consideration in deciding whether the death penalty should be imposed. In *People v. Davenport* (1985) 41 Cal.3d 247, the defendant was convicted of first degree murder with the special circumstances that the murder was intentional and involved torture. The prosecutor argued the absence of emotional distress, (subdivision (d)), the defendant's failure to act under extreme duress or the domination of another individual, (subdivision (g)), and the lack of evidence that the defendant could not appreciate the criminality of his conduct or conform his conduct to the requirements of the law, (subdivision (h)), as facts which established that the defendant acted calmly, deliberately, and of his own free will when he committed the murder. Hence, "[t]he lack of mitigating evidence pertaining to these factors thus rendered each of them an aggravating factor in appellant's case." (*People*

v. Davenport, supra, 41 Cal.3d at p. 289.)

The Court noted that the use of the phrase "if relevant" in section 190.3 "seems to contemplate that not all factors will be relevant in all cases and further that a factor which is not relevant to the evidence in a particular case should be disregarded." (*Ibid.*) The Court thus held that the absence of a mitigating factor cannot be used as an aggravating factor because it would improperly expand the list of aggravating factors in section 190.3:

> Several of the statutory mitigating factors are particularly unlikely to be present in a given case. (See, especially, section 190.3, subds. (e) [whether or not the victim was a participant in the homicidal conduct or consented to it]; and (f) [whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct].) To permit consideration of the absence of these factors as aggravating circumstances would make these aggravating circumstances automatically applicable to most murders.
>
> We conclude that the form of the prosecutor's argument is likely to confuse the jury as to the meaning of "aggravation" and "mitigation" under the statute and is therefore improper under section 190.3. It should not in the future be permitted.

(*People v. Davenport, supra*, 41 Cal.3d at pp. 289-290; see also *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034 [when defense counsel offered no evidence of statutory mitigating factors, prosecutor in his closing argument improperly relied on a chart listing the factors as aggravating].) The prosecutor does not automatically convert the absence of mitigating factors into factors in aggravation merely by explaining to the jury why mitigating factors are not applicable. (*People v. Gurule* (2002) 28 Cal.4th 557, 657; *People v. Hines*

(1997) 15 Cal.4th 997, 1064.) This Court has recognized that factors D, E, F, G, H, and I are solely mitigating factors. (*People v. Hamilton* (1988) 48 Cal.3d 1142, 1148; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031, fn. 15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport, supra*, 41 Cal.3d at pp. 288-289.)

3. SUMMARY OF PROCEEDINGS BELOW

The trial court instructed the jury with CALJIC 8.85, which is the standard instruction which lists the factors in aggravation and mitigation of the sentence. (Vol. 2, C.T. pp. 807-808; Vol. 16, R.T. pp. 3850-3851.) The prosecutor, during his penalty phase closing argument, talked about the horrendous nature of the crime. (Vol. 16, R.T. pp. 3802-3803.) He then went through the factors in mitigation listed in section 190.3. He made the following comments regarding factor E:

> Let's go through each one of those, making a little sense out of it. First of all, a lot of these things do not apply in every case. Remember, these are instructions that are given in every murder case of this type.
>
> Factor E, whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. All right. If you found that particular factor in another type of murder case, it would reflect up here, it would reduce the overall quality of the crime.
>
> This particular factor applies to, well, something like the bank robbery case where you have two people go into the bank, one of the robbers shoots someone. . . The robber who did not do the shooting, the co-defendant, he would be a person who would be–have the benefit of this particular factor. And it may,

it may, reduce the overall nature of the crime when you consider this factor as to them.

Okay. But in our case Factor E does not apply.

(Vol. 16, R.T. pp. 3805-3806.)

The prosecutor then made the following argument regarding factor D:

> Factor D, whether or not the offense was committed while the defendant was under the influence of an extreme mental or emotional disturbance. This is —the "extreme" is an adjective that's applied to the law. It says you cannot get this particular factor, cannot reduce your culpability if you have a mild disorder. It has to be extreme. Again I think's that pretty obvious.
>
> If there was testimony in a particular type of murder case that somebody was —had an emotional or mental disease or defect, that should play a part in reducing the person's overall culpability. That is not a factor in our case. The doctors on both sides testified that the defendant does not suffer from any type, any type, extreme or otherwise, emotional defect nor illness.

(Vol. 16, R.T. p. 3806.)

The prosecutor then made the following argument regarding factor F:

> Factor F, whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> Again, that doesn't apply in this case. It would apply in the type of case in which you have, oh, maybe a person who out of mental delusion feels that he is doing something to protect society. Or out of a delusion or misinformation he feels that he is protecting a family member. There is certainly no evidence in this case and Factor F does not apply.

(Vol. 16, R.T. p. 3807.) The prosecutor then argued that "Factor G also does not apply in this particular case. Whether or not the defendant acted under extreme duress or under the substantial domination of another person." (*Ibid.*) The prosecutor then made the following argument regarding factor H:

> Factor H does not apply in this particular case. Whether or not the –at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect or the effects of intoxication.
>
> We have no evidence in this case. As a matter of fact, we have contrary evidence in this case. The doctors testified that he may, in fact, be an addict, however, it played no part in this particular group of cases. And, in terms of mental disease, mental defect, mental illness, of any nature, the defendant simply does not have that. As a matter of fact, as Dr. Hall said, the defendant is, frighteningly enough, a perfectly normal person.

(Vol. 16, R.T. pp. 3807-3808.) The prosecutor then commented that appellant's age could not be used as a factor in aggravation.[42] (Vol. 16, R.T. p. 3808.) The prosecutor then made that precise argument:

> Obviously age is not a factor here in that we have a person who is just the opposite. A person who is older, a person who's had the opportunity to see the impact of many, many crimes, to see the impact upon himself, to see the impact upon his victims, and to see the impact upon his extended family. Yet, despite all of that, the defendant chose, chose –as Dr. Baca said, this man really chooses to take the very easy way through life. The very fun way, to use an odd word when we are discussing this type of crime, through life. But despite that, it's not a factor in

---

[42] Age is factor I.

> aggravation. You can't twist it around and say it's a –and use it against him.

(Vol. 16, R.T. pp. 3808-3809.) The prosecutor then argued that factor J did not apply. (Vol. 16, R.T. p. 3809.) He then addressed the factor K facts raised by appellant. (Vol. 16, R.T. pp. 3811-3816.)

The defense counsel during his penalty phase closing argument stated that factors A, B, and C, were factors in aggravation. He then stated that factors E, F, G, I, and J did not apply. He argued that factors H and K applied. (Vol. 16, R.T. p. 3823.) He then discussed the evidence presented during the penalty phase. (Vol. 16, R.T. pp. 3824-3841.)

4. THE PROSECUTOR'S PENALTY PHASE CLOSING ARGUMENT IMPROPERLY USED THE ABSENCE OF MITIGATING FACTORS AS AGGRAVATING EVIDENCE

The prosecutor's penalty phase closing argument crossed the line from merely arguing the absence of mitigation to using the absence of mitigation as aggravation. The prosecutor argued why factors E, D, F, G, H, I, and J did not apply. The defense made no attempt to present any evidence that factors E, D, F, G, I, and J applied. Given the lack of any evidence offered by the defense regarding those factors, the jury could only have used the prosecutor's arguments about the absence of evidence pertaining to those factors as a reason to impose the death penalty. The likelihood that the jury applied the prosecutor's argument to aggravate the severity of the crime was increased by the many pages of reporter's transcript the prosecutor spent arguing why the factors in mitigation did not apply.

Appellant presented evidence during the penalty phase that his cognitive and moral

development had been impaired by his environment and drug habit. (Vol. 12, R.T. pp. 3048, 3095-3096.) The prosecutor twisted this evidence into a factor in aggravation when he argued that factor H did not apply, and suggested that there was no evidence that appellant's addiction played any role in the crime, no evidence that appellant had a mental disease or defect, and that he was "frighteningly normal." (Vol. 16, R.T. pp. 3807-3808.) Hence, the prosecutor used the fact that appellant was "frighteningly normal" as a factor in aggravation of the crime and a reason to impose the death penalty. Similar reasoning applies to the factor of age. The prosecutor twice told the jury that age could not be considered a factor in aggravation. (Vol. 16, R.T. pp. 3808-3809.) The prosecutor then, however, used age as a factor in aggravation by arguing that appellant had the capacity to appreciate the harmful consequences of his conduct because of his age. (Vol. 16, R.T. p. 3808.)

People v. Davenport held that the prosecutor's argument concerning lack of evidence pertaining to mitigating factors resulted in those factors becoming aggravating factors. (*People v. Davenport, supra*, 41 Cal.3d at p. 289.) Conversely, the prosecutor does not convert the absence of mitigating factors into aggravating factors simply by explaining to the jury why those mitigating factors are not applicable. (*People v. Gurule, supra*, 28 Cal.4th at p. 657.) The key to distinguishing between the two situations is whether the defense has put specific mitigating factors in issue by presenting evidence pertaining to those factors. If the defendant has presented evidence pertaining to specific mitigating factors, the prosecutor is entitled to argue that the evidence does not prove that mitigating factor, or that the

mitigating factor is entitled to little weight. However, when the defendant has not offered evidence pertaining to a specific mitigating factor, any argument by the prosecutor about the absence of evidence pertaining to that mitigating factor could only be used by the jury to aggravate the offense. What other purpose except to aggravate the offenses could be served by the prosecutor's argument about the absence of evidence pertaining to mitigating factors which the defendant never put in issue? The jury naturally had to consider the lack of evidence pertaining to specific mitigating factors as aggravating evidence. Given the lack of evidence offered by appellant pertaining to factors E, D, F, G, I, and J, there was obviously no need for the prosecutor to address why those factors did not apply. The prosecutor's argument turned non-factors, with which the jury should not have been concerned, into factors in aggravation because of the lack of evidence to support that mitigating factor. Mitigating factors for which there was no evidence should simply have been omitted from the case entirely, including the prosecutor's closing argument and the jury instructions.

5. THE TRIAL COURT ERRED BY FAILING TO MODIFY CALJIC 8.85 TO DELETE THE MITIGATING FACTORS FOR WHICH NO EVIDENCE WAS PRESENTED

The defense counsel did not request a modification of CALJIC 8.85 to delete the inapplicable factors in mitigation. The waiver doctrine, however, should not be applied in this situation.

Penal Code section 1259 provides that an appellate court can review on the merits any

jury instruction which was given to the jury and was prejudicial to the substantial rights of the defendant. Applying the waiver doctrine because the defense counsel failed to request a modification of CALJIC 8.85 cannot be reconciled with section 1259. As explained below, the trial court's failure to delete the inapplicable statutory mitigating factors undermined the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments, Article I, section 17 of the California Constitution. Furthermore, if the defense counsel's failure to request modification of CALJIC 8.85 to delete the inapplicable mitigating factors resulted in waiver of this issue on appeal, then appellant was denied the effective assistance of counsel guaranteed by the federal and state constitutions.

A trial court has a sua sponte duty to correctly instruct the jury on general principles of law that are closely and openly connected with the facts presented at trial. (*People v. Wickersham, supra*, 32 Cal.3d at p. 323.) This duty includes the obligation to correctly instruct the jury in non-capital cases on the elements of an offense and all lesser included offenses raised by the evidence. (*People v. Bradford, supra*, 14 Cal.4th at p. 1055]; *People v. Rubalcava* (2000) 23 Cal.4th 322, 333-334.) Fundamental fairness, as well as the requirement of equal protection of the law, requires the trial court's *sua sponte* duty to instruct the jury on general principles to include correct instructions on how a capital jury should make the ultimate determination of death. (*In re Eric J.* (1979) 25 Cal.3d 522, 530.)

Penal Code section 190.3, directs the jury to consider the factors in aggravation and

mitigation "if relevant." CALJIC 8.85 directs the jury to consider the factors in aggravation and mitigation, "if applicable." (Vol. 2, C.T. p. 807.) The "if applicable" language did not mitigate the error from the trial court's failure to exclude the inapplicable mitigating factors from CALJIC 8.85, or the prosecutor's argument about the lack of evidence to support factors in mitigation.

The phrase, "if applicable," allowed the jury to consider the lack of evidence to support a mitigating factor to be an applicable factor in deciding whether the death penalty should be imposed. The phrase simply does not communicate to the jury that the lack of evidence to support a mitigating factor does not make it aggravating. Furthermore, CALJIC 8.85 must be read with CALJIC 8.88. The second paragraph of CALJIC 8.88 directs juries to "be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed." (Vol. 2, C.T. p. 816.) This language specifically instructs the jury to consider all the aggravating and mitigating factors, and does not contain any limitation on how the jury assesses the significance of mitigating factors for which no evidence was presented. The fourth paragraph of CALJIC 8.88 tells the jury, "[y]ou 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." (Vol. 2, C.T. p. 816.) This portion of CALJIC 8.88 again does not place any limitation on how the jury assesses the significance of mitigating factors for which no evidence was introduced.

CALJIC 8.88 gave free license to the jury to assign a negative moral value on factors

in mitigation for which no evidence was presented. Hence, the "if applicable," language in CALJIC 8.85 did not mitigate the constitutional infirmity identified above.

6. THE TRIAL COURT'S FAILURE TO MODIFY CALJIC 8.85 TO DELETE THE INAPPLICABLE FACTORS IN MITIGATION DEPRIVED APPELLANT OF HIS RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW AND VIOLATED THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17.

"The Eighth Amendment ban against cruel and unusual punishment gives rise to a special `need for reliability in the determination that death is the appropriate punishment' in any capital case." (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584, 108 S.Ct. 1981, 100 L.Ed.2d 575, citing *Gardner v. Florida* (1977) 430 U.S. 349, 363-364, 97 S.Ct. 1197, 51 L.Ed.2d 393 (J. White concurring in the judgment).) Article I, section 17, of the California Constitution also prohibits imposition of cruel and unusual punishment and requires heightened reliability in the guilt and penalty phases of death penalty proceedings. (*People v. Ayala* (2000) 23 Cal.4th 225, 263.) A judgment of death cannot be "predicated on mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." (*Johnson v. Mississippi, supra*, 486 U.S. at p. 584, citing *Zant v. Stephens* (1983) 462 U.S. 862, 884-885, fn. 24, 103 S.Ct. 2733, 77 L.Ed.2d 235.) In *People v. Boyd*, this Court noted that "[b]y thus requiring the jury to decide the appropriateness of the death penalty by a process of weighing the specific factors listed in the statute, the [1978 death penalty] initiative necessarily implied that matters not within the statutory list are not entitled to any weight in the penalty determination." (*People v. Boyd, supra*, 38 Cal.3d at

p. 773.)

A jury's use of facts as aggravating evidence outside the scope of section 190.3, or inaccurate information, violates the prohibition against imposition of cruel and unusual punishment in the Eighth and Fourteenth Amendments and Article I, section 17 of the California Constitution, and federal and state due process of law. For instance, in *Johnson v. Mississippi*, the prosecution used the defendant's New York State conviction for assault with intent to commit rape as aggravating evidence. The New York State conviction was subsequently vacated. The Supreme Court vacated the judgment of death because "[i]t is apparent that the New York conviction provided no legitimate support for the death sentence imposed on petitioner." (*Johnson v. Mississipi, supra*, 486 U.S. at p. 586.) In *Zant v. Stephens*, the Court noted that the State's use of a factor that should be mitigating, such as mental illness, as an aggravating factor violates due process. (*Zant v. Stephens, supra*, 462 U.S. at p. 885.) Article I, sections 7 and 15 of the California Constitution grant a defendant the right to due process of law. Under *Hicks v. Oklahoma*, 447 U.S. at p. 346, appellant had a due process right to have the state follow its own rules and procedures. The prosecutor's use of the absence of a factor in mitigation as a factor in aggravation violates the California statutory scheme for weighing aggravating and mitigating factors in deciding whether the death penalty should be imposed. Hence, the use of the absence of mitigating factors as aggravating factors violated federal due process of law because of the State's failure to follow its own statutory scheme.

Here, the jury was instructed on statutory mitigating factors which had no applicability to this case. The prosecutor was allowed to argue at length the absence of mitigating factors as a reason why this crime warranted the death penalty. The combination of jury instructions on non-applicable factors in mitigation, and the prosecutor's closing argument, allowed the jury to consider as aggravation facts which section 190.3 did not intend to be aggravating factors. Indeed, the jury was never instructed that the absence of evidence pertaining to mitigating factors was not relevant to its sentencing determination. Hence, the jury's determination of whether appellant should have been sentenced to death was based on aggravating factors outside the scope of section 190.3.

The prosecutor's argument regarding the absence of evidence to support mitigating factors violated the prohibition against cruel and unusual punishment, and due process of law, in other ways. The shift of the jury's focus to the non-applicability of mitigating factors diminished the impact of the mitigating evidence presented by appellant. Appellant presented substantial mitigating evidence based on his dysfunctional family environment and drug habit. Instead of the jury weighing the mitigating evidence against the admissible aggravating evidence such as the nature of the crime and appellant's criminal record, the jury erroneously considered the following additional factors in aggravation:

(1) The fact that the victim was not a participant in appellant's homicidal conduct or consented to it. (Vol. 16, R.T. p. 3805; Factor (E)).

(2) The fact that appellant was not under the influence of extreme mental or

emotional disturbance when he committed the crime. (Vol. 16, R.T. p. 3806; Factor (D)).

(3) The fact that appellant did not believe that the offense was committed under circumstances which he reasonably believed to be a moral justification or extenuation of his conduct. (Vol. 16, R.T. pp. 3806-3807; Factor (F)).

(4) The fact that appellant did not act under extreme duress or the influence of another person when he committed the crime, (Vol. 16, R.T. p. 3807; Factor (G)).

(5) The fact that appellant did not fail to appreciate the criminality of his conduct at the time of the murder, lacked the capacity to conform his conduct to the requirements of the law due to mental disease or defect, or the effects of intoxication. (Vol. 16, R.T. pp. 3807-3808; Factor H)).

(6) The fact that appellant's age allowed him to appreciate the impact of his conduct on the victim, the victim's family, appellant's family, and himself. (Vol. 16, R.T. p. 3808; Factor (I). For the reasons above, the jury was improperly allowed to consider facts in aggravation in violation of appellant's right to state and federal due process of law, and the prohibitions against cruel and unusual punishment in the Eighth and Fourteenth Amendments and Article I, section 17 of the California Constitution.

7. PREJUDICE

The jury's erroneous consideration of the absence of mitigating factors as aggravating factors resulted in the jury's exercising its discretion in an arbitrary and capricious fashion, and must result in reversal of the judgment without an actual showing of prejudice. (*Gregg*

v. Georgia (1976) 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (opinion of Stewart, Powell, and Stevens, JJ.)[where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action].)

Assuming the jury's erroneous consideration of the absence of mitigating factors as aggravating factors is tested for prejudice, the judgment must be reversed unless the error was harmless beyond a reasonable doubt because it violated federal due process of law and the prohibition against imposition of cruel and unusual punishment in the Eighth and Fourteenth Amendments. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The above error also violated appellant's right to state due process of law and the state prohibition against the imposition of cruel and unusual punishment. (See Cal.Const. Art. I, secs. 7, 15, 17.) Because appellant had a federal due process right to have the State follow its own rules and procedures, (*Hicks v. Oklahoma, supra*, 447 at p. 346), the violations of the California Constitution must also result in reversal of the judgment of death unless the errors were harmless beyond a reasonable doubt.[43]

---

[43] Appellant has also argued that the defense attorney rendered ineffective assistance of counsel by failing to object to the prosecutor's argument regarding the absence of mitigating factors as aggravating factors and by failing to request that CALJIC 8.88 be modified to delete the statutorily inapplicable mitigating factors. In order for a defendant to prevail on a claim of ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments, the defendant must prove that he would have obtained a better result had the attorney not provided deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674.) The State standard for

The above error was not harmless beyond a reasonable doubt. Appellant presented substantial evidence in mitigation. His family background and drug habit impaired his cognitive and moral functioning. According to the prosecution expert witness, appellant suffered from a disability–an antisocial personality disorder–which was developed through no fault of appellant. For purpose of brevity, appellant incorporates herein the prejudice argument from Issue XV regarding the facts in mitigation. The prosecutor's argument about the lack of evidence to support the factors in mitigation, combined with the jury instruction which included non-applicable factors in mitigation, substantially strengthened the prosecutor's case in aggravation. The prosecutor's penalty phase closing argument covered 24 pages of the reporter's transcript. (Vol. 16, R.T. pp. 3796-3819.) The prosecutor spent pages 3805 to 3809 talking about the lack of evidence to support mitigating factors. Hence, approximately 20 percent of the prosecutor's penalty phase closing argument was devoted to arguing about factors in mitigation for which no evidence was presented.

This was a close case with regard to the jury's decision to impose the death penalty. Its question about the consequences of its inability to decide a penalty suggests that the jury disagreed about whether a judgment of death should be imposed. This Court cannot

---

prejudice from a claim of ineffective assistance of counsel also requires a defendant to show a reasonable probability of a different outcome. (*People v. Ochoa* (1998) 19 Cal.4th 353, 414.) Because the jury's consideration of the absence of mitigating factors as aggravating factors violated other provisions of the federal and State constitutions, the harmless beyond a reasonable doubt test for prejudice applies. However, as argued above, the error was also prejudicial under the test for prejudice from *Strickland v. Washington* and *People v. Ochoa*.

conclude beyond a reasonable doubt that the prosecutor's use of the absence of mitigating factors as aggravating factors did not push the jury over the edge and decide to impose the death penalty.

The above error was also prejudicial under the test for prejudice under *Strickland v. Washington* and *People v. Ochoa.* Had the prosecutor not argued the absence of mitigating factors as aggravating factors, it is reasonably probable that the jury would not have imposed a judgment of death. This standard requires appellant to only show that there was "a *reasonable chance*, more than an *abstract possibility,"* (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715), that the jury would not have imposed a judgment of death had the prosecutor not argued the absence of mitigating evidence as aggravating factors.

Appellant had a completely dysfunctional childhood which impaired his ability to develop a moral compass. Much of the prosecutor's closing argument during the penalty phase focused on the absence of mitigating factors. The prosecutor's own expert witness psychiatrist concluded that appellant suffered from an emotional or mental deficit that was formed by the age of five and which caused his anti-social behavior. (Vol. 15, R.T. pp. 3717-3719.) There was a reasonable chance the jury would not have imposed the death penalty had the prosecutor not argued the absence of mitigating factors as aggravating factors. Hence, the judgment of death should be reversed.

XX

THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT'S INSTRUCTION TO THE JURY ON HOW TO WEIGH AGGRAVATING AND MITIGATING FACTORS FAILED TO CONVEY TO THE JURY, IN VIOLATION OF APPELLANT'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW, AND THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTIONS, THAT: (1) A SINGLE MITIGATING FACTOR WAS SUFFICIENT TO CONCLUDE THAT APPELLANT SHOULD BE SENTENCED TO LIFE WITHOUT THE POSSIBILITY OF PAROLE; AND (2) A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE COULD STILL BE IMPOSED IN THE ABSENCE OF ANY MITIGATING FACTS

1. SUMMARY OF ARGUMENT

The trial court instructed the jury with CALJIC 8.88. This instruction told the jury how to weigh the aggravating factors against the mitigating factors in deciding whether to impose the death penalty. The instruction did not explicitly tell the jury that a single mitigating factor was sufficient to impose the sentence of life without the possibility of parole, or that the death sentence did not have to be imposed even if there were no mitigating factors. The above deficiencies in CALJIC 8.88 deprived appellant of his right to federal and state due process of law and violated the prohibition against cruel and unusual punishment in the federal and California Constitutions. Because the erroneous version of CALJIC 8.88 was prejudicial, the judgment of death must be reversed.

2. SUMMARY OF PROCEEDINGS BELOW

Jury selection commenced on August 30, 1999. (Vol. 1, R.T. p. 198.) The trial court explained to the prospective jurors that the case involved the potential for the death penalty. (Vol. 1, R.T. pp. 204-206.) The court then explained the concept of aggravating and mitigating factors and how those factors should be applied to decide whether the death penalty should be imposed. (Vol. 1, R.T. p. 206.) The trial court then read to the prospective jurors a portion of CALJIC 8.88, which explained how aggravating and mitigating factors should be weighed. (Vol. 1, R.T. pp. 206-207.) The trial court followed this procedure at the commencement of the questioning of each new panel of prospective jurors. (Vol. 2, R.T. pp. 258-259, 319-320, 364-365, 399-400.)

On November 29, 1999, the trial court and the attorneys discussed jury instructions for the penalty phase of the trial. (Vol. 15, R.T. pp. 3723, 3767-3772.) The defense counsel stated that he did not have any special instructions to submit. (Vol. 15, R.T. p. 3768.) The prosecutor and the trial court discussed which version of CALJIC 8.88 would be given. (Vol. 15, R.T. pp. 3770-3771.) The prosecutor had submitted a trial brief which argued that the standard version of CALJIC 8.88 was deficient. (Vol. 2, C.T. pp. 837-838.) The prosecution trial brief argued that CALJIC 8.88 was wrong because it required a higher standard of proof for the jury to find that aggravating circumstances outweighed mitigating circumstances than required by the law. (Vol. 2, C.T. p. 837.) The version of CALJIC 8.88 requested by the prosecution appears at pages 839 and 840 of the clerk's transcript. During

discussion of the jury instructions, the prosecutor explained that he objected to the language in CALJIC 8.88 which required the aggravating factors to substantially outweigh mitigating factors. (Vol. 15, R.T. p. 3771.) The trial court refused the prosecutor's request to give a modified version of CALJIC 8.88. (Vol. 15, R.T. pp. 3770-3771.) The trial court gave the standard version of CALJIC 8.88, which instructed the jury in relevant part as follows:

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

(Vol. 2, C.T. p. 816; Vol. 16, R.T. pp. 3855-3856.)

3. THE FAILURE OF CALJIC 8.88 TO INFORM THE JURY THAT: (1) A SINGLE FACTOR IN MITIGATION WAS SUFFICIENT TO SENTENCE APPELLANT TO LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE, OR (2) A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE COULD BE IMPOSED EVEN WITHOUT ANY MITIGATING FACTORS, DEPRIVED APPELLANT OF DUE PROCESS OF LAW AND VIOLATED THE PROHIBITION AGAINST IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE FEDERAL AND STATE CONSTITUTION.

CALJIC 8.88 did not tell the jurors that a single factor in mitigation was sufficient to sentence appellant to life in prison rather than to death. The instruction also failed to tell the jurors that appellant could be sentenced to life in prison even if it did not find any

mitigating factors.

The weighing process refers to the jurors' personal determination that death is the appropriate penalty under all the circumstances. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1243-1244.) The 1978 death penalty statute permits the jury in a capital case to return a verdict of life without the possibility of parole even in the complete absence of mitigation. (See *People v. Duncan* (1991) 53 Cal.3d 955, 979 [the jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death].)

CALJIC 8.88 failed for several reasons to communicate to the jury that it could impose a life sentence even in the absence of mitigation and is therefore materially misleading. First, the instruction told the jury that "[y]ou shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating factors upon which you have been instructed." (Vol. 16, R.T. p. 3855.) The phrases, "you shall . . . " and "be guided . . ." contain mandatory language which gave the jury no discretion to impose a life sentence other than by finding factors in mitigation, and that the factors in mitigation outweigh the factors in aggravation. The jurors were never informed that they did not have to impose the death penalty regardless of how they weighed the aggravating and mitigating factors. Because the jurors were never informed on this point of law, it is unlikely that they understood that they had the discretion to impose a life sentence, even if they concluded that the circumstances in aggravation outweighed the circumstances in mitigation or if they

found no mitigation.

CALJIC 8.88 was also defective because it: (1) failed to inform the jury that a single factor in mitigation was sufficient to impose a life sentence; and (2) failed to narrow and channel the jury's discretion. The instruction told the jurors that "[t]he 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." (Vol. 16, R.T. p. 3855.) Nothing in this language told the jury that a single factor in mitigation was sufficient to impose a life sentence. Under the Eighth Amendment and Fourteenth Amendments, the jury's "discretion [in a capital case] must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Zant v. Stephens, supra*, 462 U.S. at p. 874.) The prohibition against cruel and unusual punishment in Article I, section 17, of the California Constitution similarly requires the jury's discretion to be limited and directed so that arbitrary action is avoided.

The above language does not direct and limit the jury's discretion. The phrase, " [y]ou are free to assign whatever moral or sympathetic value you deem appropriate . . . ," does not require the jury to accept as mitigating that which the Legislature has determined are mitigating factors. Instead, the language gives the jury complete and arbitrary discretion to reject as mitigating that which the Legislature has deemed factors in mitigation. The

language gives the jury the freedom to assign zero moral or sympathetic value to all of the mitigating factors listed in section 190.3. This could not have been the intent of the Legislature. The language is also not consistent with the requirement that the sentencing discretion of a capital jury be directed and limited. The effect of the above deficiencies was to improperly direct the jury to a verdict of death.

The above deficiencies in CALJIC No. 8.88 violated appellant's right to due process of law under California law, and the prohibition in the California Constitution against imposition of cruel and unusual punishment. Article I, section 7 of the California Constitution grants a defendant the right to due process of law. Article I, section 17 of the California Constitution prohibits the imposition of cruel and unusual punishment. Both provisions have been interpreted to require reliability in the procedure utilized to impose the death penalty. (*People v. Ayala* (2000) 23 Cal.4th 225, 263.) The failure of CALJIC 8.88 to inform the jury that a sentence of life without the possibility of parole could be imposed if it found a single factor in mitigation, or in the absence of any mitigating factors, undermined the reliability of the penalty phase proceedings. There was no way to be sure that the jury understood its discretion to impose a sentence of life without the possibility of parole in the absence of the above modifications of CALJIC No. 8.88.

4. THE PHRASE "SO SUBSTANTIAL" DID NOT CURE THE DEFICIENCIES IN CALJIC 8.88

CALJIC No. 8.88 told the jury that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the

mitigating circumstances that it warrants death instead of life without parole." (Vol. 2, C.T. p. 816; Vol. 16, R.T. p. 3856.) This instruction did not cure the above deficiencies in CALJIC No. 8.88. This language did not in any way tell the jury that a single mitigating factor was sufficient to conclude that the mitigating factors outweighed the factors in aggravation. It also failed to tell the jury that it had the discretion to impose a sentence of life without parole even in the absence of any mitigating evidence. The language in fact implied that the jury did not have the discretion to impose a sentence of life without the possibility of parole, even in the absence of any mitigating evidence, because it limited the life option to situation in which mitigating factors are balanced against aggravating factors. Presumably, the jury would have concluded that death would have to be imposed in the absence of any mitigating factors.

5 PREJUDICE

The prejudice argument from Issue XV is hereby incorporated in this argument and will not be repeated for purpose of brevity. Because the trial court's failure to modify CALJIC No. 8.88 violated appellant's federal constitutional rights, the judgment of death must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

The jury obviously struggled with its sentencing decision. It asked what would happen if it could not determine the penalty. (Vol. 2, C.T. p. 508.) The mitigation offered by the defense counsel was limited to factor K, which was "[a]ny other circumstance which

extenuates the gravity of the crime even though it is not a legal excuse for the crime." The defense counsel conceded during his penalty phase closing argument that most of the factors in mitigation were not applicable. (Vol. 16, R.T. p. 3823.) Given inapplicability of the other mitigating factors listed in Penal Code section 190.3, it was especially important for the jury to understand its discretion to impose a life sentence in the absence of any mitigating factors or because of the presence of a single mitigating factor. The defense counsel tried to argue that appellant's mental condition was a factor in mitigation. (Vol. 16, R.T. pp. 3824-3825.) The persuasive force of this argument, however, was undermined by Dr. Baca's opinion that appellant was a psychopath, and the allegedly incorrect diagnosis by appellant's experts that he suffered from depression. The defense counsel was forced to argue Dr. Baca's diagnosis of appellant as a psychopath as a factor in mitigation. (Vol. 16, R.T. pp. 3824-3825.) The jury needed to have a complete and accurate understanding of its discretion to impose a sentence of life without the possibility of parole. CALJIC No. 8.88 failed to clarify for the jury its sentencing discretion. Hence, the judgment of death must be reversed.

XXI

THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO SUA SPONTE INSTRUCT THE JURY ON THE MEANING OF LIFE WITHOUT THE POSSIBILITY OF PAROLE, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT AND THE EIGHTH AND FOURTEENTH AMENDMENTS PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT

1. SUMMARY OF ARGUMENT

The jury was instructed twice that its sentencing options were death or life in prison without the possibility of parole. The attorneys also addressed those sentencing options during their closing arguments. The trial court did not define for the jury the meaning of life in prison without the possibility of parole. The trial court had a sua sponte duty to instruct the jury on the meaning of life without the possibility of parole. The trial court's failure to provide a definition of this term was prejudicial because it was critical for the jury to understand that there was no possibility whatsoever that appellant could ever be released from prison. Hence, the judgment of death must be reversed.

2. LEGAL STANDARDS GOVERNING THE REQUIREMENT THAT THE JURY BE INFORMED OF THE MEANING OF LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE

This Court has rejected the argument that the term "life in prison without the possibility of parole," must be defined for the jury. In *People v. Ashmus* (1991) 54 Cal.3d 932, 994, the Court refused a jury instruction which stated that, "[a] sentence of life without

the possibility of parole means that the defendant will remain in state prison for the rest of his life and will not be paroled at any time." The Court rejected the argument because "it is incorrect to declare that the sentence of life imprisonment without the possibility of parole will inexorably be carried out." (*People v. Ashmus, supra*, 54 Cal.3d at p. 994.) In *People v. Bonin* (1988) 46 Cal.3d 659, 698, the Court rejected the argument that the trial court had a sua sponte duty to define for the jury the meaning of life in prison without the possibility of parole. The Court reasoned that the term "confinement in the state prison for life without the possibility of parole" was used in a common and non-technical sense which was accurately conveyed by the plain meaning of the words. (*People v Bonin, supra*, 46 Cal.3d at p. 698.)

People v. Ashmus and *People v. Bonin* should be overruled because of the decisions in *Simmons v. South Carolina* (1994) 512 U.S. 154, 114 S.Ct. 2187, and *Shafer v. South Carolina* (2001) 532 U.S. 36, 121 S.Ct. 1263, 149 L.Ed.2d 178. In *Simmons v. South Carolina*, the Court held that where a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death is life in prison without the possibility of parole, due process requires the jury to be informed either through instructions or argument of counsel that the defendant is not eligible for parole. (*Simmons v. South Carolina, supra*, 512 U.S. at p. 51.)

In *Shafer v. South Carolina*, the State introduced evidence of the defendant's criminal record, past violent conduct, probation violations, and misconduct in prison. The defense

counsel argued that the above evidence constituted evidence of future dangerousness, and because of the decision in *Simmons v. South Carolina*, entitled the defendant to an instruction that he would not be eligible for parole. The trial court concluded that the prosecutor had not argued future dangerousness and rejected the argument. The trial court rejected numerous attempts by the defense counsel for an instruction to the jury that the defendant was not eligible for parole. Instead, it twice told the jury that "life imprisonment means until the death of the defendant." The defense counsel has urged the trial court to instruct the jury, in addition to the charge that life imprisonment meant until the death of the defendant, that "no person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or an early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section." (*Shafer v. South Carolina, supra,* 532 U.S. at p.44.) During deliberations, the jury asked if there was any remote chance the defendant could become eligible for parole. The trial court responded by telling the jury that life imprisonment means until the death of the offender and that parole eligibility or ineligibility was not for their consideration. The jury shortly thereafter returned a verdict of death.

The State in *Shafer v. South Carolina* argued that the jury did not have to be instructed that the defendant was ineligible for parole for two reasons: (1) the State had not argued the defendant's future dangerousness; and (2) the jury was informed by the

instructions and argument of counsel that the defendant was ineligible for parole. The Court concluded that the issue of whether the prosecutor had argued the future dangerousness of the defendant was not ripe for resolution and remanded the case to the South Carolina state court for resolution. The Court concluded that the jury had not been properly informed of the defendant's parole ineligibility: "[d]isplacement of `the longstanding practice of parole availability' remains a relatively recent development, and `common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole." (*Shafer v. South Carolina, supra*, 532 U.S. at p. 52, quoting *Simmons v. South Carolina*, supra, 512 U.S. at pp. 177-178.) The Court also noted that the jury's questions about parole eligibility during deliberations established that it did not have a clear understanding regarding that issue. The fact that the defendant would never be released from prison "was not conveyed to Shafer's jury by the courts instructions or by the arguments defense counsel was allowed to make." (*Shafer v. South Carolina, supra*, 532 U.S. at p. 54.)

3. APPLICATION TO THE INSTANT CASE

Appellant's jury was told that its sentencing options were life in prison without the possibility of parole or the death penalty. For the reasons explained below, *Shafer v. South Carolina* required the trial court to elaborate on the meaning of life in prison without the possibility of parole.

The trial court instructed the jury with CALJIC 8.84, which instructed the jury as follows:

> The defendant in this case has been found guilty of murder of the first degree. The allegation that the murder was committed under one or more of the special circumstances has been found specially to be true.
>
> It is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstances alleged in this case have been found specially to be true.
>
> Under the law of this State, you must now determine which of these penalties shall be imposed on the defendant.

(Vol. 2, C.T. p. 789; Vol. 16, R.T. p. 3843.) The trial court also gave CALJIC 8.88, which instructed the jury in part that, "[i]t is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant." (Vol. 2, C.T. p. 816; Vol. 16, R.T. p.3855.) The prosecutor, during his penalty phase closing argument, referred several times to the sentencing option of life in prison without the possibility of parole. (Vol. 16, R.T. pp. 3800, 3814-3815, 3816.) He did not elaborate on what the meaning was of life in prison without the possibility of parole.

The prosecutor argued appellant's future dangerous directly and also by inference based on appellant's past conduct. He argued that "I would suggest that the evidence supports the appropriate penalty for this crime, given the nature of the crime, given the dangerousness of the crime to the overall society, okay, is the death penalty." (Vol. 16, R.T. p. 3804.)

He then argued that "Mr. Castaneda is a danger to everyone in all parts of society, including prisoners and guards, and he has been for a number of years and it is not a surprising thing, as Dr. Baca testified, when we have got the correct figures on the M.M.P.I. And it's very obvious, Mr. Castaneda is a sociopath. He is a person who is totally self-centered. He is a person looking out for himself. He is a person who has so little feeling for others, he can be casual about the things that he did to Colleen Kennedy." (Vol. 16, R.T. pp. 3816-3817.) The prosecutor also raised the issue of appellant's future dangerousness by logical inference when he presented evidence of appellant's violent conduct and argued that evidence during his penalty phase closing argument. The prosecutor presented evidence of appellant's participation in gang violence as a child, (Vol. 14, R.T. p. 3518), strong arm robbery of Mr. Hill in 1991, (Vol. 14, R.T. pp. 3541-3549), assaults of Ms. Ibarra, (Vol. 15, R.T. pp. 3609, 3611, 3639), and burglary of a store with Ms. Ibarra and his half-brother, Louie Arroyo. (Vol. 14, R.T. p. 3440.)

During closing argument, he referred to these acts as fact in aggravation. (Vol. 16, R.T. p. 3812.) He stated that "[w]e heard, if you will, evidence that, yes, he was in that he was a vicious gang member. As a gang member he participated in activity, conduct, that was highly criminal, highly dangerous. In fact, resulted in the extreme battery of at least one person." (Vol. 16, R.T. p. 3814.) He argued that "he is a violent, uncaring spouse, he is a drug abuser. He is a violent –or was a violent gang member, and he's an abuser of his family and friends and has been for a number of years." (Vol. 16, R.T. p. 3817.) Appellant

"had quite a bit of other activity; the rapes, the holding somebody by force, the beatings, the hittings, the hurting of other people." (Vol. 16, R.T. p. 3818.) The prosecutor then referred to appellant's burglary of the store and robbery of Mr. Hill. (Vol. 16, R.T. pp. 3818-3819.)

The inference the prosecutor wanted the jury to reach from the above evidence and argument was that he was a danger to society. Because the prosecutor argued appellant's future dangerousness, the trial court had an obligation to make sure that the jury understood the meaning of life in prison without the possibility of parole.

In *People v. Bonin*, this Court concluded that there was no need to define for the jury the meaning of "life in prison without the possibility of parole" because the plain wording of the phrase conveyed its meaning. However, this reasoning does not comport with the reality of how jurors view the meaning of that term. Justice Ginsberg writing for the majority in *Shafer v. South Carolina*, noted that "common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole." *(Shafer v. South Carolina, supra*, 532 U.S. at p. 52.) The jury in appellant's case was twice told that its sentencing option was life without the possibility of parole or death. The jury in *Shafer v. South Carolina* was told twice that "life imprisonment means until the death of the defendant." (*Shafer v. South Carolina, supra*, 532 U.S. at p. 43.)

There was no meaningful difference between telling a jury that the defendant will be in prison for life without the possibility of parole and telling the jury that life in prison means until the death of the defendant. The defense counsel told the jury that appellant

would die in prison with either sentencing option. (Vol. 16, R.T. p. 3821.) However, as *Shafer v. South Carolina* made clear, the arguments of counsel are not an adequate substitute for proper instructions.

Studies and case law have shown that jurors do not understand "life in prison without the possibility of parole" to mean that the defendant will never be released from prison. *Shafer v. South Carolina* noted that parole may still be available despite the imposition of a sentence of life without parole. (*Shafer v. South Carolina, supra*, 532 U.S. at p. 43.) Empirical studies have established that a substantial number (almost 25%) of death qualified jurors erroneously believe that life without parole will allow the parole or judicial system to release a defendant in less than ten years due to overcrowding and other factors, and over 75 percent disbelieve the literal language of life without parole. (See *CAC/ Forum* (1994) Vo1.21, No.2, pp. 42-45; see also Haney, Santag & Costanzo, *Deciding to Take a Life: Capital Juries Sentencing Instructions and The Jurisprudence of Death,* 50 Journal of Social Sciences, No. 2 (Summer 1994) ["four of five death juries cited as one of their reasons for turning a death verdict, the belief that a sentence of life without parole did not really mean that the defendant would never be released from prison. . . "].)

One study found that jurors tend to "grossly underestimate how long capital murderers not sentenced to death usually stay in prison." (Bowers and Steiner, *Death by Default; An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex.L.Rev. 605, 648 (1999). This false perception increases the pressure for jurors to

opt for death as the appropriate sentence. The Bowers and Steiner study concluded that the "sooner jurors think a defendant will be released from prison, the more likely they are to vote for death and the more likely they are to see the defendant as dangerous." (*Ibid.*) A South Carolina study "confirm[ed] that jurors' deliberations emphasize dangerousness and that misguided fears of early release generate death sentences." (Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L.Rev. 1, 4 (1993).) One prominent practice guide suggests that the jury be given the following instruction in order to properly inform them of the meaning of life without the possibility of parole:

> If the defendant is sentenced to life without parole, neither the courts nor the parole authorities will have the power to release [him][her]. There are no loopholes which permit the courts or parole authorities to release - a defendant sentenced to life - without parole no matter how strongly they may want to do so due to overcrowding or for any other reason. No person sentenced to life without parole under the current statutory scheme has ever been released on parole.

(Forecite F 8.84.)

The empirical evidence above demonstrates that jurors do not understand that a defendant will never be released from prison simply because they are told that he will be sentenced to life in prison without the possibility of parole. Jurors do not generally understand how the legal system or the correctional system works. Jurors could easily believe that there was some way for a defendant to be released from prison that did not involve parole.

In the instant case, the jurors were told simply that appellant would be sentenced to

life in prison without the possibility of parole if a sentence of death were not imposed. The jury did not receive sufficient information to understand that appellant would spend the rest of his life–to the very day he stops breathing–in prison if they chose to sentence him to life in prison without the possibility of parole.

This Court has recognized a sua sponte duty by the trial court to correctly instruct the jury on general principles of law. (*People v. Wickersham, supra*, 32 Cal.3d at p. 323.) This duty should extend to giving correct instructions to a capital jury about its sentencing decision. Both federal due process of law and the Eighth and Fourteenth Amendments prohibition against imposition of cruel and unusual punishment requires heightened reliability in capital cases. (*Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.); see also, *e. g., Godfrey v. Georgia* (1980) 446 U.S. 420, 427-428, 100 S.Ct. 1759, 64 L.Ed.2d 398; *Mills v.* Maryland (1988) 486 U.S. 367, 383-384, 108 S.Ct. 1860, 100 L.Ed.2d 384.) Given the need for heightened reliability in capital cases, fundamental fairness demands that a trial court sua sponte correctly instruct a capital jury on the legal issues it needs to understand its sentencing decision.

The decisions in *Simmons v. South Carolina* and *Shafer v. South Carolina* were based on the requirement of due process of law. Inadequate sentencing procedures in capital cases also violate the Eighth and Fourteenth Amendments prohibition against imposition of cruel and unusual punishment. (See *Zant v. Stephens, supra*, 462 U.S. at p. 874.) Hence, the trial

court's failure in this case to define for the jury the meaning of life without the possibility of parole constituted federal constitutional error. The judgment of death must be reversed unless the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

The jury obviously struggled with its sentencing decision in this case. For purpose of brevity, appellant incorporates in this argument the discussion of the factors in mitigation that appears in Issue XV. The jury sent a note asking what would happen if it could not decide the penalty. (Vol. 2, C.T. p. 508.) The jury needed to understand in plain and ordinary language that appellant was never going to be released from prison if he was not sentenced to death. The jury instructions failed to adequately convey that concept. Because the error was not harmless beyond a reasonable doubt, the judgment of death must be reversed.

XXII

THE JUDGMENT OF DEATH SHOULD BE REVERSED BECAUSE APPELLANT DID NOT VALIDLY WAIVE HIS RIGHT TO BE PRESENT DURING A DISCUSSION OF THE PENALTY PHASE JURY INSTRUCTIONS IN VIOLATION OF HIS RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW AND SIXTH AND FOURTEENTH AMENDMENTS RIGHT OF CONFRONTATION

During the afternoon session of November 29, 1999, the trial court and the attorneys discussed penalty phase jury instructions. During that discussion, the following exchange occurred:

> [THE COURT]: I have been reviewing Penal Code Sections 977 and 1043 with regard to the presence of the defendant for – or his absence at his request. 1043 deals with the defendant's presence at trial and 977 deals with the defendant's presence otherwise. It would appear that the discussion on instructions would be covered under 977.
>
> Do either of you have any input on that issue?
>
> MR. MCDOWELL: My reading of the case law is that in this particular area, jury instructions, that the defendant can at his request be safely allowed not to be present at his request.
>
> MR. HARDY: That's my understanding too.
>
> THE COURT: All right. Mr. Castaneda, then your attorney has indicated that you are requesting to be excused while we go over jury instructions. Is that your request, sir?
>
> THE DEFENDANT: That's correct, your Honor.
>
> THE COURT: Do you understand that this afternoon we are going to finalize the jury instructions that will be given

tomorrow to the jury with regard to this phase?

THE DEFENDANT: Yes, I understand that.

THE COURT: And you still wish not to be present?

THE DEFENDANT: That's correct.

THE COURT: All right. Then I will allow you to be excused at this time.

(Vol. 15, R.T. pp. 3766-3767.) The parties then proceeded to discuss penalty phase jury instructions. (Vol. 15, R.T. pp. 3767-3788.) Appellant was present for the next court session. (Vol. 16, R.T. p. 3789.)

Appellant incorporates the discussion in Issue I regarding the right of a defendant under the federal and state due process clause, to be present during critical stages of the trial. Those principles of law will only briefly be recited in the interest of brevity. A criminal defendant "has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." (*Snyder v. Commonwealth* (1934) 291 U.S. 97, 105-106, 54 S.Ct. 330, 78 L.Ed.2d 674.) The Constitutional right to presence is rooted in the Confrontation Clause of the Sixth Amendment and the Due Process Clause. (*United States v. Gagnon* (1985) 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486; *La Grosse v. Kernan* (9th Cir. 2001) 244 F.3d 702, 707-708.) The defendant's presence "is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." (*United States v. Gagnon, supra*, 470 U.S. at p. 526.) The

discussion of penalty phase jury instructions clearly has a substantial relationship to appellant's opportunity to defend against the imposition of the death penalty.

This Court has distinguished between the constitutional and statutory right of a defendant to be present during trial. *People v. Jackson* (1996) 13 Cal.4th 1164, 1211.) As a matter of federal and state constitutional law, a capital defendant may validly waive his presence at a critical stage of a trial. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1209-1210.)

Appellant's presence during discussion of penalty phase jury instructions was required by Penal Code sections 977 and 1043. Section 977, subdivision (b)(1), provides as follows:

> In all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present, as provided by paragraph (2).

Subdivision (b)(2) provides in part as follows:

> (2) The accused may execute a written waiver of his or her right to be personally present, approved by his or her counsel, and the waiver shall be filed with the court. . . . The waiver shall be substantially in the following form:
>
> "WAIVER OF DEFENDANT'S
> PERSONAL PRESENCE"

The remaining portion of subdivision (b)(2) prescribes the written form of the waiver.

Penal Code section 1043, subdivision (a), requires a defendant to be personally

present during the trial of a felony case. Subdivision (b)(2) allows the trial of a felony case to proceed in a defendant's absence in "[a]ny prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent." Subdivision (d) provides that "[s]ubdivisions (a) and (b) shall not limit the right of a defendant to waive his right to be present in accordance with Section 977."

Through the enactment of sections 977 and 1043, "the Legislature evidently intended that a capital defendant's right to voluntarily waive his right to be present be severely restricted." (*People v. Weaver* (2001) 26 Cal.4th 876, 968; *People v. Jackson, supra*, 13 Cal.4th at p. 1211.) In *People v. Jackson*, the defendant was absent with his consent from the playing of two videotapes before the jury during the sanity phase of the trial. The defendant had not been disruptive. This Court found the defendant's waiver of his right to be present valid under the federal and state constitutions. (*People v. Jackson, supra*, 13 Cal.4th at p. 1210.) The Court concluded, however, that a statutory violation had occurred:

> when read together, sections 977 and 1043 permit a capital defendant to be absent from the courtroom only on two occasions: (1) when he has been removed by the court for disruptive behavior under section 1043, subdivision (b)(1), and (2) when he voluntarily waives his rights pursuant to section 977, subdivision (b)(1). However, section 977, subdivision (b)(1), the subdivision that authorizes waiver for felony defendants, expressly provides for situations in which the defendant cannot waive his right to be present, including during the taking of evidence before the trier of fact. Section 1043, subdivision (b)(2), further makes clear that its broad 'voluntary' exception to the requirement that felony defendants be present at trial does not apply to capital defendants. Thus the trial court, by permitting a nondisruptive capital defendant to be absent

> during the taking of evidence, committed error under sections 977 and 1043.

(*People v. Jackson*, *supra*, 13 Cal.4th at p. 1210.)

Under *People v. Jackson*, appellant's attendance during the discussion of the penalty phase jury instructions was mandatory. The trial court therefore erred by allowing appellant to be absent during that hearing.

Furthermore, even if appellant could have waived his right to be present during the discussion of the penalty phase jury instructions, the trial court did not obtain a valid statutory waiver. Penal Code section 977, subdivision (b)(1) and (2), required appellant's waiver of his right to be present during the discussion of the penalty phase jury instructions to be in writing, and the trial court did not obtain such a waiver.

The federal due process clause requires the state to follow its own rules and regulations. (*Hicks v. Oklahoma, supra*, 447 U.S.at p. 346.) The trial court's failure to obtain a waiver from appellant that complied with Penal Code section 977, subdivision (b)(1) and (2), therefore violated appellant's right to federal due process of law.

Appellant's waiver also failed to meet the standards applicable to a valid waiver of a constitutional right. "[W]aiver is the 'intentional relinquishment or abandonment of a known right."' (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019.) Waiver is ordinarily a question of fact. (*Lyon v. Brunswick-Balke etc. Co.* (1942) 20 Cal.2d 579, 583.) "The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that

case, including the background, experience, and the conduct of the accused." (*Johnson v. Zerbst, supra*, 304 U.S. at p. 464.) "[T]he valid waiver of a right presupposes an actual and demonstrable knowledge of the very right being waived." (*City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107.) It " '[i]s the intelligent relinquishment of a known right after knowledge of the facts.'" (*Ibid.*) The burden is on the party claiming the existence of the waiver to prove it by evidence that does not leave the matter to speculation, and doubtful cases will be resolved against a waiver. (*Ibid*) This Court can find a waiver only if appellant "had knowledge of the facts." (*Ibid.*)

In the instant case, there was no showing that appellant understood the right he was waiving. The trial court did not establish that appellant knew or understood the function of the penalty phase jury instructions, the significance of those instructions, or that the instructions were subject to modification depending on the evidence and arguments of counsel. Appellant clearly did not have "knowledge of the facts" regarding the penalty phase jury instructions, and Respondent cannot meet its burden of establishing a knowing and intelligent waiver by him of his right to be present during the discussion of the penalty phase jury instructions.

This Court has applied the harmless error test of *People v. Watson, supra*, 46 Cal.2d at page 836, to a statutory violation of a capital defendant's right to be present during trial. (*People v. Weaver, supra*, 26 Cal.4th at p. 968.) However, because the State had an obligation to follow its own procedures and rules, (*Hicks v. Oklahoma, supra*, 447 U.S. at

p. 346), a statutory violation of appellant's right to be present during trial also violated his right to federal due process of law under the Fifth and Fourteenth Amendments. Hence, the error must be tested for prejudice under the more likely than not standard of *Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705. Finally, because appellant's absence from trial constituted substantive violations of his Fifth, Sixth, and Fourteenth Amendments right to be present during the trial, (*Snyder v. Commonwealth,* supra, 291 U.S. at pp. 105-106; *United States v. Gagnon, supra*, 470 U.S. at p. 526), the test for prejudice under *Chapman v. California* applies regardless of whether the statutory violation of appellant's right to be present during trial violated federal due process.

Appellant's absence from the discussion of the penalty phase jury instructions was not harmless beyond a reasonable doubt or under the Watson standard. During the discussion of the penalty phase instructions, the parties addressed appellant's escapes from custody and how the jury instructions should be modified. (Vol. 15, R.T. pp. 3776-3777.) Appellant's presence during that discussion could have assisted counsel by providing him with useful facts about the escapes. For instance, the defense counsel stated that he believed one of appellant's escapes was a walkaway from custody. (Vol. 15, R.T. p. 3777.) The prosecutor contended that this escape was perpetrated by appellant through fraud. (*Ibid.*) Appellant could have assisted his counsel in clarifying the situation.

The prosecutor also mentioned that appellant's escapes were proper evidence in aggravation because any escape has the potential for violence. (Vol. 15, R.T. p. 3776.) This

argument was incorrect because under *People v. Boyd* (1985) 38 Cal.3d 762, 776-777, a non-violent escape from custody was not admissible aggravation evidence. Appellant's presence could have assisted his counsel by pointing out to him that his escapes did not involve violence. Appellant's defense counsel may then have realized that evidence of appellant's escapes from custody was not proper aggravation and should have been the subject of a motion to strike. Had appellant been present during the discussion of the penalty phase jury instructions, it is reasonably likely that the jury would not have considered appellant's escapes from custody as aggravation evidence. The discussion in Issue XVIII concerning the prejudice from the jury's consideration of appellant's escapes from custody is hereby incorporated in this argument and will not be repeated for purpose of brevity.

For the reasons above, the trial court committed error by allowing appellant to be absent during the discussion of the penalty phase jury instructions. Because this error was prejudicial, the judgment of death must be reversed.

XXIII

THE JUDGMENT OF DEATH SHOULD BE SET ASIDE BECAUSE: (1) THE CALIFORNIA DEATH PENALTY STATUTE, AS A MATTER OF LAW, VIOLATES THE RIGHT TO DUE PROCESS OF LAW IN THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION, THE GUARANTEE OF THE RIGHT TO A JURY TRIAL IN THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 15 OF THE CALIFORNIA CONSTITUTION, THE PROHIBITION AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 17 OF THE CALIFORNIA CONSTITUTION; AND (2) THE IMPOSITION OF DEATH PENALTY, AS A MATTER OF LAW, VIOLATES THE AFOREMENTIONED CONSTITUTIONAL PROVISIONS

1. SUMMARY OF ARGUMENT

Many features of this State's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments in an abbreviated fashion. To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have *expanded* the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp,

and then allows any conceivable circumstance of a crime -- even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) -- to justify the imposition of the death penalty. There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. The fact that "death is different" has ironically resulted in procedural protections applicable in trials for lesser criminal offenses being suspended for the process of fact finding that triggers the death penalty. The result is truly a system that randomly chooses among the thousands of murderers in California a few victims for the ultimate sanction..

2. APPELLANT'S SENTENCE OF DEATH IS INVALID BECAUSE PENAL CODE § 190.2 IS IMPERMISSIBLY BROAD.

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. "To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must 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* (1989) 47 Cal.3d 983, 1023.) Hence, the states must genuinely narrow, by rational and objective criteria, the class of

murderers eligible for the death penalty: "Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." (*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained twenty-six special circumstances. This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)*(1982) 31 Cal.3d 797.

The number of special circumstances has continued to grow and is now thirty-five according to the number in effect on the date of the filing of this brief. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters'' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "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.""* (See 1978 Voter''s Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].) Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) This Court has construed the lying-in-wait special circumstance so broadly as to extend Section 190.2's reach to virtually all intentional murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-558, 575.) These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is

difficult to identify varieties of first degree murder that would not make the perpetrator eligible for the death penalty. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. Rev. 1283, 1324-26 (1997).) The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," i.e., a premeditated murder not falling under one of section 190.2's many special circumstance provisions. (Shatz and Rivkind, *supra*, 72 N.Y.U. L. Rev. at 1325.) This would be a premeditated murder committed by a defendant not convicted of another murder and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, i.e., a planned murder in which the killer simply confronted and immediately killed the victim or, even more unlikely, advised the victim in advance of the lethal assault of his intent to kill -- a distinctly improbable form of premeditated murder. (*Ibid.*)

It is quite clear that these theoretically possible noncapital first degree murders represent a small subset of the universe of first degree murders (*Ibid.*). Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It creates a small subset of murders for which the death penalty will not be

available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This Court has rejected challenges to the statute's lack of any meaningful narrowing. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this Court erroneously stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53, 104 S.Ct. 871, 49 L.Ed.2d 913. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court contrasted the 1977 law with the 1978, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, *supra*, 465 U.S. at 52, fn. 14.)

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. This Court should strike down the California death penalty statutes because it so all-inclusive that it results in the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.

3. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.3, SUBDIVISION (A), AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Section 190.3, subdivision (a), violates the Fifth, Sixth, Eighth, and Fourteenth

Amendments to the United States Constitution because prosecutors have used it to characterize any fact concerning a murder as "aggravating" within the statute's meaning. Section 190.3, subdivision (a), directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a), other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself. (*People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox*(1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (6th ed. 1996), par. 3.) Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime, (*People v. Walker* (1988) 47 Cal.3d 605, 639, fn.10, 765 P.2d70, 90, fn.10, *cert. den.*, 494 U.S. 1038 (1990)), having had a "hatred of religion," (*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S.Ct. 3040 (1992), threatened witnesses after arrest, (*People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S.Ct. 498)), and disposing of the victim's body in a manner that precluded its recovery, (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.*, 496 U.S. 931 (1990)).)

Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967, 987-988, 114 S.Ct. 2630, 129 L.Ed.2d 750), its arbitrary and contradictory use violates both the federal guarantee of due process of law and the Eighth Amendment. Prosecutors throughout California have argued that the jury could weigh in aggravation every conceivable circumstance of the crime, even those that involve

opposite circumstances. Prosecutors have argued as aggravating factors under factor (a) the following:

A. That the defendant struck many blows and inflicted multiple wounds. (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, RT2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

B. That the defendant killed with a single execution-style wound. (See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709(defendant killed with single wound); *People v. Frierson*, No. S004761, RT3026-27 (same).

C. That the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification). (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).

D. That the defendant killed the victim without any motive at all. (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)

E. That the defendant killed the victim in cold blood. (See, e.g., *People v. Visciotti*, No.

S004597, RT 3296-97(defendant killed in cold blood).

F. That the defendant killed the victim during a savage frenzy. (See, e.g., *People v. Jennings*, No. S004754, RT 6755(defendant killed victim in savage frenzy [trial court finding]).

G. That the defendant engaged in a cover-up to conceal his crime. (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).

H. That the defendant did not engage in a cover-up and so must have been proud of it. (See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informed others about crime); *People v. Williams*, No. S004365, RT3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

I. That the defendant made the victim endure the terror of anticipating a violent death (See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT4623.

J. That the defendant killed instantly without any warning. (See, e.g., *People v. Freeman*, No. S004787, RT 3674(defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT2959 (same).

K. That the victim had children. (See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan

23,1987) (victim had children).

L. That the victim had not yet had a chance to have children. (See, e.g., *People v. Carpenter*, No. S004654, RT 16,752(victim had not yet had children).

M. That the victim struggled prior to death. (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).

N. That the victim did not struggle. (See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

O. That the defendant had a prior relationship with the victim. (See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

P. That the victim was a complete stranger to the defendant. (See, e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

These examples show that absent any limitation on factor (a), ("the circumstances of the crime"), prosecutors have urged juries to find aggravating factors based on squarely conflicting circumstances. Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of factor (a) to embrace facts which cover the entire spectrum of facets present in homicides:

A. The age of the victim. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was a child, an adolescent, a young adult, in the prime of life, or elderly. (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) 41Cal.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").

B The method of killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was strangled, bludgeoned, shot, stabbed, or consumed by fire. (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, RT6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (useof 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, a factor

(a) aggravating circumstance on the ground that the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all. (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).

D. The time of the killing. Prosecutors have argued, and juries were free to find, a factor (a), aggravating circumstance on the ground 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. (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).)

E. The location of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed in her own home, in a public bar, in a city park or in a remote location. (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. 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).

The foregoing examples make clear that factor (a) is being used as a basis for finding aggravating factors in every case without any limitation. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts into aggravating factors. The danger that such facts will continue to be treated as aggravating factors is heightened by the fact that the sentencing jury is not required to unanimously agree as to the existence of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a reasonable doubt, or to make any record of the aggravating factors relied upon in determining that the aggravating factors outweigh the mitigating. (See section C of this argument, below.) The broad "circumstances of the crime" language in factor (a) permits indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363, 108 S.Ct. 1853, 100 L.Ed.2d 372 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398].)

The prosecutor's penalty phase closing argument in this case demonstrates how the "circumstances of the crime" factor in section 190.3, subdivision (a), results in arbitrary and capricious imposition of the death penalty. In explaining how factor (a) warranted the death penalty, the prosecutor contrasted appellant's crime with a bank robbery. The prosecutor first cited the example of a bank robber who shot a victim during the course of a robbery

because he was startled and panicked. The prosecutor pointed out that the robber was eligible for the death penalty but perhaps the circumstances of the crime did not warrant that punishment. (Vol. 16, R.T. p. 3798.) The prosecutor then argued that perhaps the bank robber who shot a victim out of spite or malice did deserve the death penalty. (Vol. 16, R.T. p. 3799.) He then argued that appellant's crime warranted death:

> All right. Let's go to the factors of this particular crime that we have here. In this particular crime, Mr. Castaneda gave to his victim the maximum pain and humiliation that he could come up with within his imagination and the amount of time he had available to him. He could have committed all the crime that we have—that's he been found guilty of without having done that. He hurt her. He intentionally hurt her. He wanted her to feel pain. He wanted her to be humiliated, and he wanted her to be dehumanized, he wanted her to feel that he had complete force over her.
>
> He showed no sympathy, no empathy for her whatsoever. We can only imaging what she was doing during this attack, and in spite of that input that she was giving, the crimes, the sounds, he continued his attack upon her.
>
> It was unprovoked. There was nothing she could have done to have prevented this crime happening to her. There are murder situations in which the victim does things, goes into areas, antagonizes a dangerous person, and as a result, things happen to that person. That didn't happen here. She was a completely innocent person in this particular case.
>
> And finally, this particular crime, so casual, in that the defendant, it appears, simply went to that place on a fantasy he had, a thought he had, knocked on the door, went in, did this all in a short period of time and then casually leaves the scene. Casually leaves the scene. That's one of the horrors of this case. The two people, three people insider that restaurant where he parked the car didn't hear any squealing of tires as he left.

> He casually left the scene here.
>
> We didn't hear any evidence of, you know, being struck by the horror of the crime that he had committed here, as so often you do see in other types of murder cases. In fact, this is a rather unique case in that the defendant, the crime in this particular case, has no remorse attached to it whatsoever. Whatsoever.

(Vol. 16, R.T. pp. 3802-3804.)

All of the facts argued by the prosecutor above could be argued as factors in aggravation. The above argument used the following as facts in aggravation: (1) that the murder occurred over the course of several minutes which increased the pain and humiliation experienced by the victim; (2) appellant showed no mercy or empathy for the victim; (3) the assault was unprovoked, and; (4) appellant was apparently casual in his commission of the crime. Had appellant murdered someone in a different manner from how this murder occurred, the prosecutor could have argued the following in mitigation: (1) the victim died quickly and never had a chance to fight back; (2) appellant was ambivalent about whether to murder the victim, but chose to do so despite his ambivalence; (3) appellant debated having mercy for the victim but chose to commit the murder, and (4) appellant left the scene in a hurry to effect escape. The above example demonstrates how factor (a) imposes no limitation on the imposition of the death penalty because it allows any aspect of a murder to become a fact in aggravation. Factor (a) is therefore unconstitutional on its face and as applied to the instant case.

4. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES

DEFENDANTS OF THE RIGHT TO A JURY TRIAL ON EACH FACTUAL DETERMINATION PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

California's death penalty statute has none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that aggravating circumstances outweigh mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make -- whether or not to impose death.

5. APPELLANT'S DEATH VERDICT WAS NOT PREMISED ON FINDINGS BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY THAT ONE OR MORE AGGRAVATING FACTORS EXISTED AND THAT THESE FACTORS OUTWEIGHED MITIGATING FACTORS; HIS CONSTITUTIONAL RIGHT TO JURY DETERMINATION BEYOND A REASONABLE DOUBT OF ALL FACTS ESSENTIAL TO THE IMPOSITION OF A DEATH PENALTY WAS THEREBY VIOLATED

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. (Vol. 2, C.T. pp. 807, 908, 816.) The

jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence. (*Ibid.*) This was consistent with this Court's interpretations of California's death penalty statute. (E.g. *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255 [neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, or that they outweigh mitigating factors].) This Court interpretations have been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 [hereinafter *Ring*]; and *Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 [hereinafter *Blakely*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury''s simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Apprendi, supra,* 530 U.S. at 478.) In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at 593.) The court acknowledged that in *Walton v. Arizona* (1990) 497 U.S. 639, it had held that aggravating

factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Ring, supra,* 536 U.S. at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which can increase the penalty is the functional equivalent of an element of the offense, regardless of how that factual finding is characterized; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington*, *supra*, 124 S.Ct. at 2535.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 2543.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant `statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at 2537, italics in original.)

As explained below, California's death penalty scheme, as interpreted by this Court, does not comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*, and violates the federal Constitution.

6. IN THE WAKE OF APPRENDI, RING, BLAKELY, AND BOOKER, ANY JURY FINDING NECESSARY TO THE IMPOSITION OF DEATH MUST BE FOUND TRUE BEYOND A REASONABLE DOUBT.

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions. (See Ala. Code §§ 13A-5-45(e) (1975); Ark. Code Ann.§§ 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. §§ 16-11-103(d) (West1992); 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) (Michie1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Codeart. 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) (Michie1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. §§ 31-20A-3 (Michie1990); 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 (Utah1977) 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). Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. §§ 10.95.060(4) (West 1990).) Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. §§ 13-703)(1989); Conn. Gen. Stat. Ann. §§ 53a-46a(c) (West 1985).

On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumstances. and the fact that aggravation substantially outweighs mitigation, were factual findings that must be made by a jury beyond a reasonable doubt. (*State v. Ring* (Az., 2003) 65 P.3d 915.) Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance -- and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not ""susceptible to a burden of proof of quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before

the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.

This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also -- and most important -- to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.) As set forth in California''s "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury, (Vol. 2, C.T. p. 816), "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.) Thus, jury must find one or more aggravating factor before it weighs aggravating factors against mitigating factors. The jury must also find that aggravating factors substantially outweigh mitigating factors before it imposes the death penalty.

In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely a discretionary weighing process. "we conclude that *Ring* requires a jury to make this finding as well: '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.'" (*Id.*, 59 P.3d at 460.) These factual determinations are essential prerequisites to death-eligibility, but do not require imposition of the death penalty; the jury can still reject death as the appropriate punishment notwithstanding these factual findings. For instance, this Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2, subd. (a)), *Apprendi* does not apply. After *Ring*, this Court repeated the same analysis in *People v. Snow* (2003) 30 Cal.4th 43 [hereinafter *Snow*], and *People v. Prieto* (2003) 30 Cal.4th 226 [hereinafter *Prieto*]: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at 263.) This holding misinterprets California death penalty scheme.

Arizona argued in *Ring* that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing

options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> 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.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 536 U.S. at 604.)

California's statute is no different than Arizona's statute. A California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 536 U.S. at 604.) Section 190, subdivision. (a), provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes the further findings that one or more aggravating circumstances exist and substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003). It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this Court

has recognized that a particular special circumstance can even be argued to the jury as a *mitigating* circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 134 Cal.Rptr.2d at 621 [financial gain special circumstance (section 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].)

Arizona's statute says that the trier of fact shall impose death if it finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency. Arizona Revised Statute section 13-703(E) provides: "In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency." California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances. The final paragraph of Section 190.3 provides in part: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." There is no meaningful difference between the processes followed under each scheme. "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." (*Ring*, 536 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer pointed out, " a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 124 S.Ct. at 2551; emphasis in original.) The applicability of the Sixth Amendment's is determined by whether the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*Snow*, *supra*, 30 Cal.4th at 126, fn. 32; citing *Anderson*, *supra*, 25 Cal.4th at 589-590, fn.14.) The Court has repeatedly sought to reject *Ring's* applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto*, 30 Cal.4th at 275; *Snow*, 30 Cal.4th at 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that

"necessarily determine" the penalty is a distinction without a difference. There are *no* facts, in Arizona or California, that are "necessarily determinative" of a sentence -- in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death -- no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal constitution.

In *Prieto*, the Court summarized California's penalty phase procedure as follows:

> Thus, in the penalty phase, 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.' (*Tuilaepa v. California* (1994) 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750.) No single factor therefore determines which penalty -- death or life without the possibility of parole -- is appropriate.

(*Prieto*, 30 Cal.4th at 263; emphasis added.) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present -- otherwise, there is nothing to put on the scale in support of a death sentence. (See, *People v. Duncan* (1991) 53 Cal.3d 955, 977-978.)

A California jury must first decide whether any aggravating circumstances exist.

Then the jury can "merely" weigh those factors against the proffered mitigation. Further, as noted above, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring*, *supra*, 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *State v. Ring* (Az. 2003) 65 P.3d 915; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450; See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54Ala L. Rev. 1091, 1126-1127 (noting that the features that the Supreme Court regarded in *Ring* as significant apply not only to finding an aggravating circumstance but also to whether mitigating circumstances are sufficiently substantial to call for leniency since both findings are essential predicates for a sentence of death).

A sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements. This does not make the finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own -- a finding which must inevitably involve normative ("what would make this crime worse") and factual ("what

happened") elements. The high court rejected the state's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely*, *supra*, 124 S.Ct. at 2538.) Thus, under *Apprendi*, *Ring*, and *Blakely*, the jury must find beyond a reasonable doubt: (1) factors in aggravation; and (2) that aggravating factors outweigh mitigating factors.

Under *Apprendi*, *Ring*, and *Blakely*, the questions regarding the Sixth Amendment's application to California's penalty phase, are: (1) What is the maximum sentence that could be imposed without a finding of an aggravating circumstances as defined in CALJIC 8.88?; and (2) What is the maximum sentence that could be imposed based on findings true one or more aggravating circumstance? The maximum sentence would be life without the possibility of parole unless the jury found at least one aggravating circumstance, and found the aggravating circumstances substantially outweighed the mitigating circumstances.

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." [Citation.] 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*, *supra*, 536 U.S. at 606,

quoting with approval Justice O'Connor's *Apprendi* dissent, 530 U.S. at 539.) No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732, 118 S.Ct. 2246, 141 L.Ed.2d 615 ["the death penalty is unique in both its severity and its finality"].) "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' (*Id.*, at 732 (emphasis added).) According to *Ring*, *supra*, 536 U.S. at 608, 609:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The final step of California's capital sentencing procedure, the decision to impose death, is a moral and a normative judgment. This Court errs, however, in using this fact to eliminate procedural protections that render the decision rational and reliable, and to allow the findings that are prerequisite to imposing death to be uncertain, undefined, and subject to dispute regarding significance and accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

7. THE REQUIREMENTS OF JURY AGREEMENT AND UNANIMITY

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; *accord*, *People v. Bolin* (1998) 18 Cal.4th 297, 335-336.) Consistent with this construction of California''s capital sentencing scheme, no instruction was given to appellant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. Based on the instructions and record in this case, there was nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty. With nothing to guide its decision, there was nothing to suggest the jury imposed a death sentence because of any particular aggravating factor. The absence of historical authority to support such a practice in sentencing makes it further in violation of the Sixth, Eighth, and Fourteenth Amendments. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51, 112S.Ct. 466, 116 L.Ed.2d 371 [historical practice given great weight in constitutionality determination]; *Den ex dem. Murray v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].) It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when

there is no assurance the jury, or a majority of the jury, found a single set of aggravating circumstances which warranted the death penalty.

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 final deliberative process in which the ultimate normative determination is made. The U.S. Supreme Court has required such factual findings be made by a jury and cannot have fewer procedural protections than required for decisions of much less consequence. (*Ring*, *supra*; *Blakely*, *supra*.) These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334,100 S.Ct. 2214, 65 L.Ed.2d 159). In a non-capital context, the high court has upheld the verdict of a twelve member jury rendered by a vote of 9-3. (*Johnson v. Louisiana*(1972) 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152; *Apodaca v. Oregon* (1972) 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184.)

Even if that level of jury consensus were deemed sufficient to satisfy the Sixth, Eighth, and Fourteenth Amendments in a capital case, California's sentencing scheme would still be deficient since, as noted above, California requires no jury consensus at all as to the existence of aggravating circumstances. Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California*, *supra,* 524 U.S. at 732), the *Monge* court developed this point at some length:

> The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida* 430 U.S. 349,358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct.,at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct.2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington,* 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of fact finding').

(*Monge v. California*, *supra*, 524 U.S. at 731-732; *accord*, *Johnson v. Mississippi* (1988) 486 U.S. 578, 584.) The Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants, (see *Monge v. California*, *supra*, 524 U.S. at 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and certainly no less (*Ring*, 536 U.S. at 609). Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. §§ 848,subd. (k).)

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated. The first sentence of article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].) To apply the requirement to findings carrying a maximum punishment of one year in the county jail -- but not to factual findings that determine whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) -- violates the equal protection clause, due process, Sixth Amendment right to a jury trial, and constitutes cruel and unusual punishment under state and federal Constitutions.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne*, *supra*; *People v. Hayes* (1990) 52 Cal.3d 577, 643.) However, *Ring* and *Blakely* make clear that an aggravating circumstance, and that aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

8. THE DUE PROCESS AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSES OF THE STATE AND FEDERAL CONSTITUTION REQUIRE THAT THE JURY IN A CAPITAL CASE BE INSTRUCTED THAT THEY MAY IMPOSE

A SENTENCE OF DEATH ONLY IF THEY ARE PERSUADED BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING FACTORS OUTWEIGH THE MITIGATING FACTORS AND THAT DEATH IS THE APPROPRIATE PENALTY.

a. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[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* (1958) 357 U.S. 513, 520-521, 78 S.Ct. 1332, 2 L.Ed.2d 1460.) The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393; see also *Presnell v. Georgia* (1978) 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be

beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.323.) 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. It reflects a belief that the more serious the consequences of the decision, 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* (1982) 455 U.S. 745, 755, 102 S.Ct. 1388, 71 L.Ed.2d 599; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335, 96 S.Ct. 893, 47 L.Ed.2d 18.)

It is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value," (*Speiser*, *supra*, 375 U.S. at 525), how much more transcendent is human life itself! 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* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person''s life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure" *Santosky*, *supra*, 455 U.S. at 755, the United States Supreme Court reasoned:

> [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 755.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition 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*, *supra*, 428 U.S. at 305.) 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.

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) No greater interest is ever at stake; see *Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-

reasonable-doubt burden of proof requirement to capital sentencing proceedings. (*Monge v. California*, *supra*, 524 U.S. at 732.) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision are true, but that death is the appropriate sentence.

This Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See *People v. Griffin* (2004) 33 Cal.4th 536, 595; *People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that 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, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (2003) 266 Conn. 171, 238, fn. 37 [833 A.2d 363, 408-409, fn. 37].)

Under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

9. EVEN IF PROOF BEYOND A REASONABLE DOUBT WERE NOT THE CONSTITUTIONALLY REQUIRED BURDEN OF PERSUASION FOR FINDING (1) THAT AN AGGRAVATING FACTOR EXISTS, (2) THAT THE AGGRAVATING FACTORS OUTWEIGH THE MITIGATING FACTORS, AND (3) THAT DEATH IS THE APPROPRIATE SENTENCE, PROOF BY A PREPONDERANCE OF THE EVIDENCE WOULD BE CONSTITUTIONALLY COMPELLED AS TO EACH SUCH FINDING

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in *any* sentencing proceeding. Judges have never had the power to impose an enhanced sentence without the firm belief that whatever considerations underlay such a sentencing decision had been at least proved to be true more likely than not. 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 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* (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; *Den ex dem. Murray v. Hoboken Land and Improvement Co.*, *supra*, 59 U.S. (18 How.) at pp. 276-277 [due process determination informed by historical settled usages].)

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." There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Accordingly, appellant respectfully suggests that *People v. Hayes* -- in which this Court did not consider the applicability of section 520 -- was erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more

likely than not to be true. For all of these reasons, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, the question whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at 346.)

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* (1993) 508 U.S. 275.) That should be the result here, too.

10. A BURDEN OF PROOF IS REQUIRED IN ORDER TO ESTABLISH A TIE-BREAKING RULE AND ENSURE EVEN-HANDEDNESS.

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes*, *supra*, 52 Cal.3d at 643.) However, 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, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors -- and the juries on which they sit -- respond in the same way, so the death penalty is applied evenhandedly. "[C]apital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. at 112.) It is unacceptable -- "wanton" and "freakish" (*Proffitt v. Florida* (1976)

428 U.S. 242, 260, 96 S.Ct. 2960, 49 L.Ed.3d 913) -- the "height of arbitrariness" (*Mills v. Maryland* (1988) 486 U.S. 367, 374) -- that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

11. EVEN IF THERE COULD CONSTITUTIONALLY BE NO BURDEN OF PROOF, THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY TO THAT EFFECT

If in the alternative it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury. The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana*, *supra*.) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case. The same is true if there is *no* burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that.

This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth, and Fourteenth Amendments, because the instructions given failed to provide

the jury with the guidance legally required for the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (*Sullivan v. Louisiana*, *supra*.)

12. CALIFORNIA LAW VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY FAILING TO REQUIRE THAT THE JURY BASE ANY DEATH SENTENCE ON WRITTEN FINDINGS REGARDING AGGRAVATING FACTORS.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934; *Gregg v. Georgia*, *supra*, 428 U.S. at 195.) Because California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances, (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316, 87 S.Ct. 745, 9 L.Ed.2d 770.) Without written findings, it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted

prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole. (*Id.*, 11 Cal.3d at 269.)

A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, and the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.) The same analysis applies to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].) In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Penal Code section 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan*, *supra,* 501 U.S. at 994.) Because providing more protection to a non-capital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment, (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*), the sentencer in a capital case is constitutionally required to identify for the record

the aggravating circumstances it relied upon in imposing the death penalty.

Written findings are essential for a meaningful review of the sentence. In *Mills v. Maryland*, 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 determine the benefit of the newly implemented state procedure. (See, e.g., 486 U.S. at 383, fn. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at 643) and "moral," (*People v. Hawthorne*, *supra*, 4 Cal.4th at 79), does not mean that its basis cannot be, and should not be, articulated. The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death. (See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. §§ 13-703(d) (1989); Ark. Code Ann. §§ 5-4-603(a) (Michie 1987);Conn. Gen. Stat. Ann. §§ 53a-46a(e) (West 1985); *State v. White* (Del. 1978)395 A.2d 1082, 1090; Fla. Stat. Ann. §§ 921.141(3) (West 1985); Ga. Code Ann. §§ 17-10-30(c) (Harrison 1990); Idaho Code §§ 19-2515(e) (1987); Ky. Rev. Stat. Ann. §§ 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art.905.7 (West 1993); Md. Ann. Code art. 27, §§ 413(I) (1992); Miss. Code Ann. §§ 99-19-103 (1993); Mont. Code Ann. §§ 46-18-306

(1993); Neb. Rev. Stat. §§ 29-2522 (1989); Nev. Rev. Stat. Ann. §§ 175.554(3) (Michie 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 (1982); S.C. Code Ann. §§ 16-3-20(c) (Law. Co-op. 1992);S.D. Codified Laws Ann. §§ 23A-27A-5 (1988); Tenn. Code Ann.§§ 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. §§ 37.071(c) (West1993); Va. Code Ann. §§ 19.2-264.4(D) (Michie 1990); Wyo. Stat.§§ 6-2-102(e) (1988).)

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence -- including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that factors in aggravation outweigh factors in mitigation. Absent written findings concerning aggravating circumstances found by the jury, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring,* and provides no instruction to encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

13. CALIFORNIA'S DEATH PENALTY STATUTE AS INTERPRETED BY THE CALIFORNIA SUPREME COURT FORBIDS INTER-CASE PROPORTIONALITY REVIEW, THEREBY GUARANTEEING ARBITRARY, DISCRIMINATORY, OR DISPROPORTIONATE IMPOSITIONS OF THE DEATH PENALTY.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. It requires that death judgments be proportionate and reliable. Reliability and proportionality are closely related. Part of the requirement of reliability 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* (1976) 463 U.S. 939, 954, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (plurality opinion, alterations in original, quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251, 96 S.Ct. 2960, 49 L.Ed.2d 913 (opinion of Stewart, Powell, and Stevens, JJ.)).)

A commonly utilized mechanism to ensure reliability and proportionality in capital sentencing is comparative proportionality review -- a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, 104 S.Ct. 871, 79 L.Ed.2d 29, the Court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility 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." California's 1978 death penalty statute, as drafted and construed by this Court, has become such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review

challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at 52, fn. 14.)

The greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See section A of this Argument, *ante*.) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see section C of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see section B of this Argument). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster." Further, the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia*, *supra*, 428 U.S. at 206.) 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* (2002) 536 U.S. 304, 316 fn. 21; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, 830-831, 108 S.Ct. 2687, 101 L.Ed.2d 702; *Enmund v. Florida* (1982) 458 U.S. 782,

796, fn. 22; *Coker v. Georgia* (1977) 433 U.S. 584, 596, 97 S.Ct. 2861, 53 L.Ed.2d 982.)

Twenty-nine of the thirty-eight states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. Georgia requires that Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. §§ 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman v. Georgia* (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726] . . ." (*Gregg v. Georgia* (1976) 428 U.S. 153, 198.) Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Proffitt v. Florida* (1976) 428 U.S. 242, 259, 96 S.Ct. 2960, 49 L.Ed.2d 913.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review. (See Ala. Code §§ 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. §§ 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, §§ 4209(g)(2)(1992); Ga. Code Ann. §§ 17-10-35(c)(3) (Harrison 1990); Idaho Code §§ 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. §§ 532.075(3) (Michie 1985); La.Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. §§99-19-105(3)(c) (1993); Mont. Code Ann. §§ 46-18-310(3) (1993); Neb. Rev. Stat. §§§§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. §§177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. §§ 630:5(XI)(c) (1992);N.M. Stat. Ann. §§ 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. §§ 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. §§ 2929.05(A) (Baldwin 1992); 42Pa. Cons. Stat. Ann. §§ 9711(h)(3)(iii) (1993); S.C. Code Ann. §§ 16-3-25(C)(3)

(Law. Co-op. 1985); S.D. Codified Laws Ann. §§ 23A-27A-12(3)(1988); Tenn. Code Ann. §§ 39-13-206(c)(1)(D) (1993); Va. Code Ann.§§ 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. §§ 10.95.130(2)(b)(West 1990); Wyo. Stat. §§ 6-2-103(d)(iii) (1988); see also *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.2d181,197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre*(Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51;*Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.)

Section 190.3 does not require that the trial court or this Court to compare between this case and other similar cases regarding the proportionality of the sentence, i.e., inter-case proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at 253.) The statute also does not forbid it. This Court imposed the prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) Given the reach of the special circumstances that make one eligible for death under section 190.2 -- a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* -- and the absence of other procedural safeguards to ensure a proportionate sentence, this Court's refusal to engage in inter-case proportionality review violates the Eighth Amendment.

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in *Furman*. (*Gregg v. Georgia*, *supra*, 428 U.S. at 192, citing *Furman v. Georgia*, *supra*, 408 U.S. at 313 (White, J., conc.).) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in an arbitrary and unreviewable manner, or which are skewed in favor of execution.

14. THE PROSECUTION MAY NOT RELY IN THE PENALTY PHASE ON UNADJUDICATED CRIMINAL ACTIVITY; FURTHER, EVEN IF IT WERE CONSTITUTIONALLY PERMISSIBLE FOR THE PROSECUTOR TO DO SO, SUCH ALLEGED CRIMINAL ACTIVITY COULD NOT CONSTITUTIONALLY SERVE AS A FACTOR IN AGGRAVATION UNLESS FOUND TO BE TRUE BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY.

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in section 190.3, subdivision (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.)

Here, the prosecution presented extensive evidence regarding criminal activity allegedly committed by appellant which had not resulted in a criminal conviction. The prosecution presented evidence during the penalty phase that appellant had allegedly beat

and raped Elizabeth Ibarra. (Vol. 15, R.T. pp. 3609-3611, 3639, 3648.)[44] Dr. Baca testified that length that appellant was a abuse and controlling person based on appellant's assaults of Ms. Ibarra. (Vol. 15, R.T. p. 3705.) She also testified that appellant hated women based on his behavior with Ms. Ibarra. (Vol. 15, R.T. p. 3708.) The prosecutor referred to appellant's abusive relationships with women during his penalty phase closing argument (Vol. 16, R.T. p. 3813.) The prosecutor also admitted evidence that appellant had been involved in a number of assaults when he was a youth and a gang member. (Vol. 14, R.T. pp. 3516-3517.) The prosecutor would not have been able to present any of the above aggravating evidence if unadjudicated criminal activity was not admissible during the penalty phase.

Because the admission of unadjudicated criminal activity violated appellant's federal constitutional rights, the judgment of death must be reversed unless the error was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.) The admission of this evidence was not harmless beyond a reasonable doubt. The evidence

[44] The defense counsel did not object to the admission of the unadjudicated criminal activity. However, because this Court's decisions handed down prior to the trial in this case established the admissibility of such evidence, an objection would have been futile. Hence, the defense counsel was not required to make an objection in order for this Court to review the issue on appeal. (*People v. Hill* (1998) 17 Cal.4th 800, 820 [the requirement of an objection or motion to strike will be excused if either would be futile or if an admonition would not have cured the harm].) Furthermore, the jury was instructed that it could consider the unadjudicated criminal activity as a factor in aggravation. (Vol. 2, C.T. p. 810.) Hence, the error can be reviewed pursuant to Penal Code section 1259, regardless of whether the defense counsel objected to the admission of the evidence.

concerning appellant's behavior with Elizabeth Ibarra was especially damaging. It allowed the jury to learn of other acts of abuse by appellant towards women, served as the foundation for the prosecution expert witness's opinion that appellant was a controlling and abusive psychopath, and was mentioned during the prosecutor's penalty phase closing argument. Hence, the judgment of death must be reversed.

The United States Supreme Court's recent decisions in *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. The application of these cases to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. (See discussion, *ante*.) Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.[45]

---

[45] The jury in this case was given CALJIC 8.87, which was modified to refer the unadjudicated criminal acts allegedly committed by appellant. (Vol. 2, C.T. p. 810.) This instruction told the jury that "[b]efore a juror may consider any criminal acts as an aggravating circumstances in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal act." (Vol. 2, C.T. p. 810.)

15. THE USE OF RESTRICTIVE ADJECTIVES IN THE LIST OF POTENTIAL MITIGATING FACTORS IMPERMISSIBLY ACTED AS BARRIERS TO CONSIDERATION OF MITIGATION BY APPELLANT'S JURY.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

16. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS.

The U.S. Supreme Court has repeatedly directed 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*, *supra*, 524 U.S. at 731-732.) 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. In 1975, Chief

---

However, the instruction also told the jury that "[i]t is not necessary for all jurors to agree." (*Ibid.*) Hence, the instruction given to the jury did not requires the jury to unanimously agree beyond a reasonable doubt on what facts existed in aggravation of appellant's sentence.

Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, *second only to life itself*, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 (emphasis added). "Aside from its prominent place in the due process clause, 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* (1975) 327 N.E.2d 662, 668, 367 Mass 440, 449.) A "fundamental" interest triggers strict scrutiny. (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) 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*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655.)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants. In *Prieto*, "as explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*"

(*Prieto*, 30 Cal.4th at 275; emphasis added.) As in *Snow*, "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*Snow*, 30 Cal.4th at 126, fn. 3; emphasis added.)

This Court has analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property. An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "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." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. (See sections C.1-C.5, *ante*.)

Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. Unlike proceedings in most states where death is a sentencing option or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See section C.6, *ante*.) These discrepancies on basic procedural protections are skewed against persons subject to loss of life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) In stark contrast to *Prieto* and *Snow*, there is no hint in *Allen* that capital and non-capital sentencing procedures are in any way analogous. In fact, the decision rested on a depiction of fundamental differences between the two sentencing procedures.

The Legislature thus provided a substantial benefit for all prisoners sentenced under the Determinate Sentencing Law (DSL): a comprehensive and detailed disparate sentence review. (See *In re Martin* (1986) 42 Cal.3d 437, 442-444, for details of how the system worked while in practice). In appellant's case, such a review might well be the difference between life and death. Persons sentenced to death, however, are unique among convicted felons in that they are not provided this review, despite the extreme and irrevocable nature of their sentence. Such a distinction is irrational.

The Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen*, *supra*, 42 Cal. 3d at 1286.) But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305, 107 S.Ct. 1756, 95 L.Ed.2d 262.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses. (*Coker v. Georgia*, *supra*, 433 U.S. 584) or offenders (*Enmund v. Florida* (1982) 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140; *Ford v. Wainwright* (1986) 477 U.S. 399.)

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See section 190.4; *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.) The second reason offered by *Allen* for rejecting the equal protection claim was that the range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen*, *supra*, 42 Cal.3d at 1287

[emphasis added].) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability (citation). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright*, *supra*, 477 U.S. at 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [opn. of Stewart, Powell, and Stephens, J.J.].)

The *Monge* court developed this point at some length:

> The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197,1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington*,466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan,J., concurring in part and dissenting in part) ('[W]e have consistently required that capital

> proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy off act finding'').

(*Monge v. California*, *supra*, 524 U.S. at 731-732.)

The qualitative difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply procedural safeguards used in noncapital settings to capital sentencing. Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. (*Allen, supra*, at 1287.) The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference -- and one that was recently rejected by this Court in *Prieto* and *Snow*. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through (j) with California Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate *all* sentencing choices.

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* (2000) 531 U.S. 98, 121 S.Ct. 525, 530, 148 L.Ed.2d 388.) 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* (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has been cited by this Court as justification for the arbitrary and disparate treatment of individuals who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, e.g., *Atkins v. Virginia*, *supra*.) Nor can this fact justify the refusal to require written findings by the jury, (considered by this Court to be the sentencer in death penalty cases [*People v. Allen*, *supra*, 42 Cal.3d at 1286]), or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (*Blakely v. Washington*, *supra*; *Ring v. Arizona*, *supra*.)

Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . 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." (*Ring*, *supra*, 536 U.S. at609.)

California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and the cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

Procedural protections are especially important in meeting the need for reliability in death sentencing proceedings. (*Monge v. California*, *supra*.) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

17. 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; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

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, Saudi Arabia, and South Africa [the former *apartheid* regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten,

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* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *People v. Bull* (1998) 185 Ill.2d 179, 225 [235 Ill. Dec. 641, 705 N.E.2d 824] [dis. opn. of Harrison, J.].) (Since that article, in 1995, South Africa abandoned the death penalty.)

The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" -- as opposed to its use as regular punishment -- is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [109 S.Ct. 2969, 106 L.Ed.2d 306] [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma, supra*, 487 U.S. at 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "*The Death Penalty: List of Abolitionist and Retentionist Countries*" (1 January 2000), published at http://web.amnesty.org/library/index/ENGACT500052000.) These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Id.*)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "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* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292 [8 S.Ct. 461, 31 L.Ed. 430]; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. "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 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* (1958) 356 U.S. 86, 100; *Atkins v. Virginia*, *supra*, 536 U.S. at 325.) 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, supra*, 536 U.S. at 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T.2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not 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*.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311.) Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."

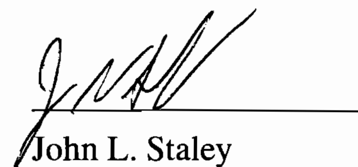
CONCLUSION

The guilt phase and penalty phase of appellant's trial was riddled with numerous errors. The evidence was insufficient to prove each of the felonies alleged under the felony-murder rule and as special circumstances. There was no evidence about how this incident

occurred. Because of the lack of any evidence regarding how the murder occurred, the prosecution evidence was insufficient to prove that appellant committed first-degree premeditated murder. Even if the first-degree murder conviction can be upheld, the judgment of death must be reversed. The jury sentenced appellant to death because some jurors erroneously believed that he would receive a new guilt phase trial if it did not determine a penalty. This erroneous belief substantially contributed to the jury's decision to impose the death penalty. Because appellant, according to the prosecution penalty phase evidence, suffers from a mental condition which he was either born with or acquired at an early age, which caused or contributed to his many problems throughout life, the prohibition against imposition of cruel and unusual punishment forbids his execution. Executing appellant when the penalty phase of his trial was flawed because of the errors discussed above is fundamentally unfair.

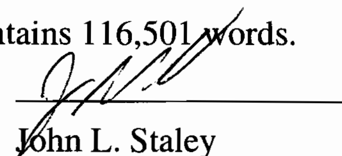
For the reasons above, the judgment of guilt must be reversed. Alternatively, the judgment of death must be vacated.

Dated: 4/17/06



John L. Staley

I declare under penalty of perjury that this Opening Brief contains 116,501 words.



John L. Staley

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF SAN DIEGO
(People v. Castaneda, Superior Court
case No. FWV-15543; Supreme Court
Case No. SO85348)

I reside in the county of SAN DIEGO, State of California. I am over the age of 18 and not a party to the within action; My business address is 11770 Bernardo Plaza Court, Suite 305, San Diego, CA 92128. On April 20, 2006, I served the foregoing document described as: APPELLANT'S OPENING BRIEF, VOLUMES I AND II--on all parties to this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Clerk's Office
Court of Appeal
750 B St., Suite 300
San Diego, CA 92101
(For filing with the California Supreme Court)

California Appellate Project
101 Second St.
Sixth Floor
San Francisco CA 92064

Honorable Mary E. Fuller
C/O Appeals Section
San Bernardino Superior Court
351 N. Arrowhead Ave.
San Bernardino, CA 92415

Attorney General-San Diego
110 West A St.
P.O. Box 85266
San Diego CA 92186-5266

Michael McDowell
District Attorney's Office
8303 Haven Avenue
Rancho Cucamonga, CA 91730

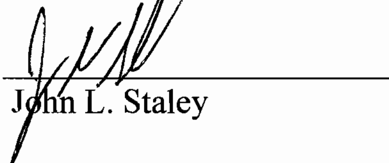
Gabriel Castaneda
D71639
San Quentin State Prison

San Quentin, CA 94974

Note: The defense attorney, John Hardy is deceased. He was not associated with any law firm.

I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at San Diego, California. Executed on April 20, 2006, in San Diego, California.

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



John L. Staley