IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ERVEN R. BLACKSHER, Defendant and Appellant.	No. S076582 [Alameda Co. Super. Ct. No. 125666]

APPELLANT'S OPENING BRIEF
VOLUME II, pages 224-409

Automatic Appeal from the Judgment of the Superior Court
of the State of California, County of Alameda

The Honorable Larry J. Goodman, Judge Presiding

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TOPICAL INDEX

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL CASES

FEDERAL CASES

FEDERAL CASES

FEDERAL CASES

FEDERAL CASES

FEDERAL CASES

FEDERAL CASES

CALIFIFORNIA CASES

CALIFORNIA CASES

CALIFORNIA CASES

CALIFORNIA CASES

CALIFORNIA CASES

CALIFORNIA CASES

CALIFORNIA CASES

CALIFORNIA CASES

CALIFORNIA CASES

CALIFORNIA CASES

CALIFORNIA CASES

FOREIGN CASES

FOREIGN CASES

DOCKETED CALIFORNIA CASES

DOCKETED CALIFORNIA CASES

DOCKETED CALIFORNIA CASES

TABLE OF AUTHORITIES (cont'd)

CALIFORNIA STATUTES

TABLE OF AUTHORITIES (cont'd)

CALIFORNIA STATUTES

FEDERAL STATUTES

FOREIGN STATUTES

TABLE OF AUTHORITIES (cont'd)

FOREIGN STATUTES

TABLE OF AUTHORITIES (cont'd)

FOREIGN STATUTES

TABLE OF AUTHORITIES (cont'd)

FOREIGN STATUTES

CALIFORNIA CONSTITUTIONAL PROVISIONS

CALIFORNIA JURY INSTRUCTIONS

CALIFORNIA RULES OF COURT

TABLE OF AUTHORITIES (cont'd)

MISCELLANEOUS

SANITY PHASE ISSUES

XV. THE TRIAL COURT'S ERRONEOUS ADMISSION OF IRRELEVANT AND PREJUDICIAL TESTIMONY VIOLATED APPELLANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL

A. Introduction to Argument.

The trial court's erroneous admission of testimony on cross-examination of defense witness Ruth Gades, to the effect that 20 years after the fact and with the benefit of those 20 years of experience she would have questioned the validity of her original diagnosis and observations of appellant and that she would instead have considered manipulation and malingering, violated appellant's federal due process rights. Gades' after-the-fact testimony was totally irrelevant as speculative and highly prejudicial to the key issue at sanity phase, i.e., the authenticity of appellant's long history of mental illness.

B. Summary of Relevant Facts.

Social worked Ruth Gades testified as a defense witness that in 1978 she worked at the Alameda County inpatient criminal justice unit when appellant was admitted involuntarily with suicide ideation and complaints of auditory and visual hallucinations, not being able to sleep, and some possibility of organic brain syndrome. Appellant reported having seen a "little man" off and on for two years and these hallucinations had recently

become more severe. (RT 2974-77; 2981-82.) In taking appellant's history Gades learned he had been hospitalized at Napa for three days with suicidal ideation and that he had been drinking a pint of scotch a day for two to three months prior to his incarceration. (RT 2979.) Gades confirmed that mentally ill people self-medicate by using drugs or alcohol and that they commonly deny being mentally ill. (RT 2797-80.) On appellant's discharge chart, Gades indicated a diagnosis of "psychotic depression with auditory and visual hallucinations and suicidal ideation," with a treatment plan to further evaluate (RT 2984.) In 1980, Gades saw appellant again when he was involuntarily committed as extremely depressed and suicidal. (RT 2989-90.)

On cross-examination, the prosecutor asked Gades whether she "believe[d] everything [appellant] told her." Gades answered that at the time, she did. When the prosecutor asked Gades if she had "changed [her] opinion," defense counsel objected as irrelevant. The trial court overruled the objection. (RT 2992.) Gades then testified that having recently reviewed review of appellant's records, she would not have "the same diagnosis or evaluation" of appellant now that she did at the time she saw him. (RT 2993.) The trial court overruled another defense objection, and Gades then testified that in light of her "20 years of experience" if someone now reported having visual hallucinations, she "would question the validity

of that." (RT 2993.) Gades stated that in the criminal justice system, a person reporting symptoms often has in mind a "secondary gain," meaning "they are trying to obtain admission to a mental health facility," which is similar to malingering and involves manipulation. (RT 2994.) When asked if she saw any such manipulation in appellant's records, Gades said she would have approached the situation differently now and would have questioned appellant more closely on "the man he was seeing" -- whereas at the time she took appellant's reporting at face value, her experience in the interim had taught her something different. (RT 2994-95.)

On redirect examination by the defense, Gades conceded that the records from appellant's admission stated that appellant was **not** manipulative. On the prosecutor's hearsay objection, this testimony was stricken because the report was written by Dr. Cicinelli. (RT 3002.) Gades testified that other reports (not written by her) stated that appellant "clearly exaggerated his symptoms or [was] faking bad." (RT 3002.) Dr. Cicinelli's report that appellant was not "talking in any manipulative way" was then admitted for the limited purpose of showing "whether it was in the report." (RT 3003.)

C. The Testimony Elicited from Gades by the Prosecution was Inadmissible as Irrelevant.

Gades, a licensed social worker, did not testify as an expert witness.

Consequently, her opinion, 20 years after the fact, that in 1978 appellant was malingering, or attempting to achieve a "secondary goal" of gaining admission to the mental health unit when he was incarcerated, was manifestly irrelevant. (People v. Babbitt, supra, 45 Cal.3d at 681; People v. Crittenden, supra, 9 Cal.4th at 132 [trial court has no discretion to admit irrelevant evidence].)

Gades' testimony was inadmissible on at least two separate grounds. First, Gades' testimony as to what she **would have done or thought** about appellant's report 20 years later was irrelevant to any fact at issue. Gades was not testifying as an expert, and she conceded that she did not specifically remember appellant "physically" and only "vaguely" remembered the "situation." (RT 2975.) Ms. Gades' latter-day conclusions contradicting or calling into question her earlier diagnoses of appellant as psychotic, hallucinatory and suicidal were mere speculation and irrelevant and were undoubtedly influenced by the intervening crimes.

Secondly, testimony by a lay witness as to credibility is irrelevant. (People v. Melton, supra, 44 Cal.3d at 744 [holding that lay opinion testimony regarding the veracity of particular statements by another is inadmissible, because the fact finder, not the witnesses, must draw the ultimate inferences from the evidence]; see also People v. Sergill, supra, 138 Cal.App.3d at 39-40 [condemning as inadmissible and irrelevant police

officer testimony as to the veracity of another witness's testimony]. Assessing credibility "is an exclusive function of the jury." (People v. Lemus, supra, 203 Cal.App.3d at 477.) If a witness' opinion as to the veracity of another's statements is irrelevant, then a witness' opinion as to the mendacity of another's statements is also irrelevant.

D. Gades' Testimony Was Highly Prejudicial.

Admission of evidence against a criminal defendant that raises no permissible inferences, but which is highly prejudicial, violates federal due process. (Estelle v. McGuire, supra, 502 U.S. 62 [state law errors that render a trial fundamentally unfair violate federal due process]; McKinney v. Rees, supra, 993 F.2d 1378 [admission of irrelevant and inflammatory evidence violated federal due process]; Lesko v. Owens, supra, 881 F.2d at 52 [constitutional error in admitting evidence whose inflammatory nature "plainly exceeds its evidentiary worth"].) The admission of this testimony thus violated appellant's federal due process rights and is reviewable for prejudice under the Chapman v. California, supra, 386 U.S. at 24 standard: the error requires reversal unless the prosecution can prove it harmless beyond a reasonable doubt.

Gades' opinion about what she would have thought of appellant had she seen him 20 years later was totally irrelevant: this after-the-fact opinion was not based on any fact related to appellant, but rather to what she had

learned about patients in the "criminal justice system" over the years -- in other words, her opinion was based on other inmate-patients rather than on the facts surrounding appellant's treatment. Similar "profile" testimony has been held to be inherently prejudicial by the courts. For example, People v. Martinez (1992) 10 Cal.App.4th 1001 reversed a conviction because of the "inherently prejudicial" expert testimony of an "auto thief profile" similar to the "drug courier profile" expert testimony held inadmissible under federal case law.[55] Martinez described the expert police testimony as to the profile as little more than "'the opinion of those officers conducting an investigation'" urging the jurors to infer an essential element of the crime from circumstantial evidence (the expert opinion) derived from other persons' commissions of other crimes. (Id. at 1006-07.) (See also People v. Castanedas (1997) 55 Cal.App.4th 1067, 1072 [expert testimony regarding the "profile of a typical heroin dealer" was inherently prejudicial].)

Yet Gades' testimony was highly prejudicial since it went to the heart of the issue before the jury: whether appellant was mentally ill or whether, as the prosecutor argued, appellant's history of mental illness

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[55] See e.g., United States v. Beltran-Rios (9th Cir. 1989) 878 F.2d 1208, 1210 and United States v. Hernandez (11th Cir. 1983) 717 F.2d 552, 555.

showed only that he was a "con and a manipulator." (See RT 3458.) The issue at the sanity phase is not whether the defendant committed the act, but whether or not he should be punished. (People v. Hernandez (2000) 22 Cal.4th 512, 516.) The challenged testimony -- suggesting that appellant was a mere malingerer -- weighed heavily in favor of a finding that appellant should be punished and thus struck a fatal blow to the defense at sanity phase. (See People v. Lindsey, supra, 205 Cal.App.3d at 117 [error that strikes a "live nerve" in the defense is prejudicial].)

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XVI. THE TRIAL COURT APPLIED THE EVIDENTIARY RULES UNEVENLY AS TO APPELLANT AND ALLOWED THE PROSECUTOR TO EXPLOIT HIS DISCOVERY VIOLATION THUS DEPRIVING APPELLANT OF HIS FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL AT THE SANITY PHASE

A. Introduction to Argument.

The trial court allowed the prosecutor to question Dr. Pierce at length regarding appellant's actions after the killings in order to elicit speculation and hearsay in the guise of an "expert opinion" that appellant intended to kill and then lied and tried to escape arrest and prosecution. However, when defense counsel posed questions regarding appellant's mental state shortly before the time of the killings, something Dr. Pierce was uniquely qualified to answer, the trial court refused to allow the defense testimony on the ground that it was "speculation." The trial court's inconsistent rulings on the admissibility of Dr. Pierce's testimony place in high relief the asymmetrical application of evidentiary rulings that occurred throughout appellant's trial. As a result, the jury was misled and its verdict is unreliable.

B. Summary of Proceedings Below.

Dr. Pierce testified as a defense witness at the sanity phase and reported appellant's long history of mental illness and treatment.

On cross-examination, the prosecutor asked Dr. Pierce how appellant

"would have acted" had he been in a psychotic episode at the time of the offenses. When the trial court overruled the defense objection of speculation, the doctor detailed a number of symptoms that appellant "would have" displayed. (RT 3199-3200.) The prosecutor next asked if the doctor "could think of a plausible reason" why appellant would go to Reno "immediately after committing two murders." (RT 3202.) The trial court overruled another defense objection of speculation. When the doctor answered "no", the prosecutor prompted him: "Anything other than to escape arrest and prosecution?" The doctor said that appellant's trip could have been a "reaction" to what he what he saw (rather than a goal-oriented action), or a reaction to his knowledge that he had murdered two people. (RT 3202-03.) The prosecutor next asked whether appellant "intend[ed] to kill" Torey Lee. The defense objection of calling for a legal conclusion was overruled, and the Dr. Pierce answered that there was data from the relatives that appellant intended to kill him. (RT 3210-11.)

The prosecutor then began a series of questions as to what kind of a gun appellant had, how many shots he fired, what time he left the house, etc. The trial court overruled the defense objection to this line of questioning since the doctor had "read some transcripts." (RT 3225.) The prosecutor continued asking questions such as what appellant did with his clothing and gun, and then asked if it was a "reasonable assumption" that

appellant had gotten rid of them "because he knew they could connect him to the murders." (RT 3226.) Continuing in this vein, the prosecutor asked if it was "a reasonable explanation" for appellant's "lies" to Ruth and Frances (when he asked them to check on his mother after the shootings), that appellant was lying about what he saw at the scene to "protect himself from being caught." The defense objected again to this line of questioning as calling for speculation. The trial court overruled the objection because Dr. Pierce was giving his opinion as an expert witness. (RT 3227.)

When appellant attempted to elicit similar opinion testimony from Dr. Pierce, the trial court sustained the prosecution's objection. Defense counsel asked Dr. Pierce what would have happened to appellant had Officer Mesones issued a "5150" on appellant when Versenia reported him to the police on May 8, 1995. The prosecutor's objection of speculation was sustained. (RT 3176.) Similarly, the trial court sustained the prosecutor's speculation objection when defense counsel asked Dr. Pierce whether there would be " a clear understanding today of what [appellant's] mental health status was" on May 8, had the officer issued a 5150. (RT 3255-56.)

C. Asymmetrical Application of the Evidentiary Rules Violates Due Process.

The asymmetrical application of evidentiary standards has been held

to be unconstitutional. (Gray v. Klauser, supra, 282 F.3d 633,[56] citing Green v. Georgia, supra, 442 U.S. 95 and Webb v. Texas, supra, 409 U.S. 95.) Gray v. Klauser held that a judge may not "without justification impose stricter evidentiary standards on a defendant desiring to present a witness' testimony than it does on the prosecution." (Id. at 644.)

As the testimony summarized above shows, the trial court imposed stricter standards on the defense examination of Dr. Pierce than it did on the prosecution. The prosecutor was allowed to pose a number of questions to Dr. Pierce requiring him to speculate as to why appellant acted as he did after the shootings and why he said the things he said. When the defense attempted to ask Dr. Pierce as to what would have happened had a "5150" been issued on appellant on May 8, and whether such a procedure would have resulted in a clearer understanding of appellant's mental state at that time, the trial court sustained the prosecutor's objections that this was speculation.

The question here is not whether or not the testimony sought by defense counsel was speculative. The question is whether the trial court allowed the prosecutor to elicit speculative evidence from a witness, and then prevented defense counsel from doing the same; and this the trial court

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[56] Gray v. Klauser was remanded on other grounds in Klauser v. Gray (2002) 537 U.S. 1041.

clearly did.

The trial court's lop-sided rulings violated appellant's constitutional rights to due process and a fair trial. (See e.g., People v. Taylor (1986) 180 Cal.App.3d 622, 631 [refusing to interpret Proposition 8 as liberalizing the rules of admissibility "only for evidence favorable to the prosecution while retaining restrictions on the admissibility of evidence" favorable to the defense]; accord People v. Adams (1988) 198 Cal.App.3d 10, 18.) The federal constitutional guarantee of due process requires that both sides in a criminal trial be treated equally. (Wardius v. Oregon, supra, 412 U.S. at 474, fn. 6 ["state trial rules which provide nonreciprocal benefits to the State" interfering with the right to a fair trial violate the defendant's due process rights under the Fourteenth Amendment"].)

Moreover, the prosecutor asked Dr. Pierce if, in considering the materials upon which he based his opinion, he listened to the tape-recorded statement appellant gave to deputy district attorney Moore on May 8, 1995. Defense counsel objected on the grounds that the tape recording "did not become available to defense counsel until very late in the proceedings when we were already in trial." (RT 3256.) Dr. Pierce had been contacted by defense counsel in June of 1995 and he interviewed appellant in July of 1995 (three years before the prosecutor's midtrial disclosure of appellant's statement to the deputy district attorney). (RT 3073; 3190.) At a hearing

on the admissibility of appellant's statement to the police during jury selection, the prosecutor for the first time informed defense counsel of the existence of another tape-recorded statement made by appellant to the deputy district attorney. (RT 281, 318-20.) The trial court expressed its concern for this "trickling" of discovery, observing that it could cause problems at trial. (RT 321.) Appellant's statement to the police officer was not offered into evidence. (RT 329.) At the sanity phase, however, the prosecutor introduced evidence appellant's statement to the deputy district attorney. (RT 3280-87.)

The trial court overruled the objection to the prosecutor's examination of Dr. Pierce regarding this late-disclosed statement as well as defense counsel's "comment." Dr. Pierce replied that he had not listened or considered the tape-recording of appellant's statement to the deputy district attorney. (RT 3256.)

Brown v. Borg (9th Cir. 1991) 951 F.2d 1011 reversed a murder conviction where the prosecutor withheld evidence that the victim's jewelry had been returned to the family; and then argued that the "missing" jewelry supported a first degree robbery murder conviction. The Ninth Circuit observed that under the federal constitution the proper role of a prosecutor is not simply to obtain a conviction but to obtain a fair conviction. (Id. at 1015.) Although this case involves late disclosure of evidence rather than

the withholding of evidence, the underlying rationale of Brown v. Borg applies: the prosecutor cannot be allowed to exploit to his own advantage his failure to comply, or his late compliance, with the mandates of the discovery law.

Consequently, the trial court erred by allowing the prosecutor to challenge the validity of Dr. Pierce's testimony for the defense by pointing out that the doctor had not examined or considered a document, where that document had not been provided to the doctor by the defense because the prosecutor had failed to disclose it in a timely manner.

D. The Trial Court's Asymmetrical Application of the Evidentiary Rules, Including Allowing the Prosecutor to Exploit His Own Discovery Violation, Prejudiced Appellant's Sanity Phase Defense.

These constitutional errors are prejudicial under the Chapman v. California, supra, 386 U.S. at 24 standard. Dr. Pierce was the key defense witness at sanity phase and his credibility was the focus of argument by both parties in closing argument. (RT 3457-58; 3487.) The trial court's rulings prevented the jury from hearing the most important evidence Dr. Pierce had to offer: testimony describing appellant's paranoid schizophrenic state shortly before the killings. The court's ruling accentuated to the jury pieces of Dr. Pierce's testimony taken in isolation which the prosecutor used to argue that appellant was not insane. The result was a highly

misleading portrayal of appellant's sanity/insanity at the time of the offenses. The trial court's uneven application of the evidentiary rules must thus be deemed prejudicial.

Moreover, as in Brown v. Borg, supra, because the prosecutor exploited his own discovery violation by attacking a defense witness' credibility for not considering evidence which the prosecutor himself had not disclosed, the trial court's rulings on this point are prejudicial.

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XVII. THE CUMULATIVE PREJUDICIAL IMPACT OF THE ERRORS AT THE SANITY PHASE OF APPELLANT'S TRIAL VIOLATED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS RIGHTS TO DUE PROCESS, A FAIR TRIAL BY AN IMPARTIAL JURY AND A RELIABLE AND INDIVIDUALIZED SENTENCING DETERMINATION

The errors at the sanity phase of appellant's trial resulted in convictions which are constitutionally unreliable in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the federal constitution. (Taylor v. Kentucky, supra, 436 U.S. at 487, fn. 15.; Beck v. Alabama (1980) 447 U.S. 625 [Eighth Amendment also requires heightened reliability in guilt determination in capital cases].) This Court must consider the cumulative prejudicial impact of these errors, which are of federal constitutional magnitude. (People v. Holt, supra, 37 Cal.3d at 458-59 [considering the cumulative prejudicial impact of various errors]; Taylor v. Kentucky, supra, 436 U.S. at 487, fn. 15 [cumulative effect of errors violated federal due process].)

The sanity phase of appellant's trial hinged on the question of the validity of appellant's history of mental illness. The prosecution attempted to show that the documentary evidence of that illness was feigned and that appellant was a malingerer. This theory received major support from Gades' testimony that 20 years after the fact she would have changed her contemporaneous reports of appellant to consider whether he was only

trying to manipulate the system by feigning psychiatric symptoms. This improper opinion testimony from Gades had a pernicious and prejudicial effect, in that it certainly planted in the jurors' mind the thought that all the evidence of appellant's extensive history of mental illness might likewise be subject to such a revisionist interpretation as mere malingering.

Gades' improperly admitted testimony also had a synergistic effect with the asymmetrical trial court rulings with respect to the questioning of Dr. Pierce. These rulings allowed the prosecutor to adduce supposedly expert opinion testimony that appellant killed with intent and then tried to escape arrest and prosecution, but denied the defense the opportunity to adduce testimony from Dr. Pierce as to appellant's state of mind immediately prior to the offenses.

The result of these improper rulings was that the jury was presented with a distorted picture of appellant as a manipulator and malingerer – based on evidence of no legal or psychological validity, while at the same time the jury was prevented from hearing testimony directly relevant to the crux of the defense case – appellant's disturbed mental state at the time of the offenses. Not surprisingly, the jury returned a verdict of sane, but that verdict is unreliable.

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PENALTY PHASE

EVIDENTIARY ISSUES AT PENALTY PHASE

XVIII. THE PROSECUTOR COMMITTED MISCONDUCT AND VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND A RELIABLE SENTENCING DETERMINATION BY TELLING THE JURORS IN OPENING STATEMENT THAT AN EXPERT WOULD TESTIFY AGAINST APPELLANT EVEN THOUGH THE TRIAL COURT HAD NOT MADE A FINAL RULING REGARDING THAT EXPERT'S TESTIMONY; AND BY DECLINING TO CALL THE EXPERT AFTER THE TRIAL COURT MADE ITS RULING, SO AS TO AVOID HAVING THE EXPERT IMPEACHED

The prosecutor committed prejudicial misconduct in opening statement to the jury by stating the substance of proposed testimony by Dr. Fort and then declining to call him as a witness when the trial court ruled that Dr. Fort could be impeached with his fraud conviction. The result was that the prosecutor was unfairly permitted to frontload the penalty phase trial with adverse "evidence" while avoiding any impeachment of the (uncalled) "witness." This tactic violated appellant's federal constitutional rights to due process, a fair trial and a reliable sentencing determination.

A. Summary of Relevant Facts.

On June 11, 1998, prior to the penalty phase opening statement and presentation of testimony, defense counsel requested full discovery relative to the prosecution's proposed expert witness Dr. Joel Fort. The

prosecutor stated that Dr. Fort had not generated any written materials or raw notes. (RT 3516-17.) Defense counsel then asked for documentation of Dr. Fort's "problems before the Board for the fraud." (RT 3517.) The prosecutor stated that Dr. Fort's license had been suspended, but that he had been placed on probation and was still allowed to practice. Defense counsel requested disclosure of these discipline records as relevant to the doctor's moral turpitude and veracity. (RT 3517-18.) The prosecutor insisted that Dr. Fort had not "been convicted of any crime" but finally agreed "to turn the material over and let it be litigated. I don't care. I don't care." (RT 3518.) Defense counsel repeated that since the discipline had been for fraud, it was relevant for impeachment. The prosecutor responded peevishly: "I'm not going to fight you about it." (RT 3518.) When the court expressly asked the prosecutor if the discipline was for fraud, the prosecutor refused "to go into the merits" but agreed to provide the material to the defense. "I'm not going to go into the merits. I will provide it to the defense and if it comes up, it comes up. We'll deal with it." (RT 3519.)[57]

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[57] In 1982 Dr. Fort was found guilty of a violation of Business and Professions Code sections 2361 and 2411, knowingly assisting others in making or signing a certificate or document related to the practice of medicine which falsely representing the existence or nonexistence of a state of facts. (See Fort v. Board of Medical Quality Assurance (1982) 136 Cal.App.3d 12.)

On June 15, 1998, the next trial date, defense counsel objected to the relevancy of Dr. Fort's testimony and referred again to "the impeachment issue" discussed earlier. The trial court did not make a ruling. (RT 3543.) Immediately thereafter, in opening statement, the prosecutor stated his positive intention to present Dr. Fort's testimony to the jury:

> "In the sanity portion of the trial I mentioned Dr. Joel Fort. I am going to call Dr. Fort tomorrow for sure. ¶ Dr. Fort examined Mr. Blacksher first in 1996, similar to the way Dr. Davenport did to determine his competency to stand trial, and he filed a report with the court. ¶ Since that time, Dr. Fort and I have been working on this case. And I have submitted to him some materials to review. He has an interesting background and he will share that with you. ¶ But in the end, he will focus your attention on the factors that existed before, during and after the crimes and share with you his opinion of the mental state of Mr. Blacksher at the time he committed the acts that you have convicted him of. His opinion will not be in any way related to paranoid schizophrenia." (RT 3557-58.)

The following day, defense counsel reiterated the objection to Dr. Fort's testimony and asked the court if it had a ruling. The trial court stated that its "initial indication was that there would be a basis for it" but upon having done additional research, the ruling was "that Doctor Fort's testimony would not be relevant unless raised by the defense." (RT 3607.) Noting that the prosecutor was in a "predicament" for having mentioned Dr. Fort "based upon a tentative ruling," the court stated its intention "to tell the jury he did so based upon a tentative ruling that [had] since changed and

that they're not to draw any inferences one way or the other." (RT 3607.)

At the end of the prosecution's case, the trial court instructed the jury as follows:

> "I need to read to you a statement relating to some statements that [the prosecutor] made yesterday morning. ¶ Yesterday in his opening statement [the prosecutor] indicated he intended to call Dr. Fort during his case in chief in the penalty phase. Mr. Tingle made this statement based upon a tentative ruling I had made earlier that morning. ¶ Since then, I have done additional research which has resulted in my reversing my tentative ruling. Because of this new ruling, Mr. Tingle will not be calling Dr. Fort as a witness in his case in chief. ¶ You are not to speculate as to what Dr. Fort might have testified about nor are you to speculate as to why he will not be testifying in the People's case in chief. You must not discuss this matter nor allow it to enter into your deliberations." (RT 3720.)

Although the trial court stated on the record that it had made a "tentative ruling" and that the prosecutor made his opening statement in reliance on this tentative ruling, the Reporter's Transcript contains no indication of any such ruling, tentative or otherwise on the morning of the prosecutor's opening statement on June 15, 1998. (RT 3538.) The clerk's minute order does not show any reported discussions or rulings that day. (CT 1503.)

Because the record contains no indication of any "tentative ruling" by the trial court, and because of the presumption that the trial court

followed the law[58] and thus did not conduct proceedings or issue rulings in a death penalty case in blatant violation of the Penal Code,[59] this Court cannot assume that such a "tentative ruling" was made or that the prosecutor was justified in relying on some informal, unreported or extrajudicial indication of a ruling. If the trial court was making off-record "tentative rulings," that was itself a violation of the Penal Code section 190.9, subdivision (a)(1).

B. The Prosecutor Committed Prejudicial Misconduct by Declaring to the Jurors that Dr. Fort Would Testify that Appellant Was Not Suffering from any Mental Illness.

Courts routinely find ineffective assistance of counsel where defense counsel makes evidentiary promises in opening statement which are not borne out at trial because the conflict between the opening statement and the trial evidence "severely undercut the credibility of the actual evidence offered at trial . . . ." (State v. Moorman (N.C. 1987) 358 S.E.2d 502, 511;

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[58] See e.g., People v. Mosley (1997) 53 Cal.App.4th 489, 496.

[59] Penal Code section 190.9 provides that in any death penalty case, "All proceedings conducted in the superior court, including all conferences and proceedings, whether in open court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present." (Pen. Code, § 190.9, subd. (a)(1).)

see also Harris v. Reed (7th Cir. 1990) 894 F.2d 871 [prejudicial ineffective assistance of counsel to promise testimony of two witnesses in opening statement, then neither interview nor call them]; Anderson v. Butler (1st Cir. 1988) 858 F.2d 16 [prejudicial ineffective assistance of counsel for trial attorneys to tell jurors in opening statement that experts would testify the defendant was acting like a robot, and then deciding not to call them].)

By analogy, appellant submits that it is likewise improper for the prosecutor to make evidentiary promises to the jury and then decline to present the testimony because the presentation of that testimony would be compromised by the defense ability to impeach the witness with his previous fraudulent conduct. The prosecutor clearly knew about Dr. Fort's conviction and suspension prior to making the opening statement. The prosecutor thus could have and should have refrained from telling the jury about Dr. Fort's proposed testimony until the trial court made a definitive ruling on the impeachment matter.

The prosecutor's insistence on telling the jury what Dr. Fort would say prior to the prosecutor even knowing himself for certain that Dr. Fort would be allowed as a witness is misconduct similar to that condemned as "vouching" and arguing outside the record. (See People v. Stansbury (1993) 4 Cal.4th 1017, 1059 [prosecutor may not personally vouch for credibility of a witness]; People v. Wharton (1991) 53 Cal.3d 522, 567

[prosecutor may not suggest the existence of facts outside the record]; People v. Boyette (2002) 29 Cal.4th 381, 439 [misconduct to suggest in closing argument that there was evidence not presented just to save the jury time].)

The ultimate effect of the prosecutor's decision to set out Dr. Fort's proposed testimony to the jury prior to a final ruling by the trial court was to give the prosecution the advantage of frontloading the jury with Dr. Fort's testimony that appellant was not paranoid schizophrenic. At the same time, the prosecutor avoided the disadvantage of having Dr. Fort impeached by the defense with his fraud suspension. In short, the prosecutor got to have his cake and eat it too.

The trial court's admonition to the jury, explaining the prosecutor's opening statement as having been based on the court's own initial ruling, and telling the jury not to speculate as to what Dr. Fort might have testified, did not cure the harm. In the first place, the jury had no need to "speculate," since the prosecutor had already told them the gist of what Dr. Fort would have said, i.e., that appellant was not suffering from mental illness. Second, the trial court did not tell the jury to disregard what the prosecutor had said, nor did the trial court strike the prosecutor's opening statement from the record. Finally, having heard what Dr. Fort was going to say, the jurors faced the common psychological problem of having been

told "not to think of a pink elephant." Once the statement is made, it is difficult to think of anything else. The bell cannot be unrung and the trial court's admonition only highlighted the prosecutor's opening statement references to Dr. Fort and his "testimony."

The jury's receipt of this prejudicial testimony from the mouth of the prosecutor in opening statement resulted in an unfair trial in violation of appellant's federal due process rights, Gardner v. Florida (1977) 430 U.S. 439 [due process violation in capital proceeding where defendant sentenced on basis of unreliable information], and an unreliable sentencing determination in violation of the Eighth Amendment, Godfrey v. Georgia (1980) 446 U.S. 420 [Eighth Amendment requires higher degree of scrutiny in capital cases]; Woodson v. North Carolina (1976) 428 U.S. 280 [because the death penalty is qualitatively different from imprisonment there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case].

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XIX. THE TRIAL COURT'S ERRONEOUS ADMISSION OF VICTIM IMPACT EVIDENCE OUTSIDE THE CONSTITUTIONAL AND STATUTORY LIMITATIONS VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND A RELIABLE SENTENCING DETERMINATION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

A. Summary of Proceedings Below.

Appellant moved to limit and/or exclude victim impact evidence, arguing that (1) only such evidence that related to the "immediate injurious impact" of the capital murder was admissible; (2) the court should impose additional safeguards to ensure that the evidence didn't violate appellant's Eighth and Fourteenth Amendment rights, including limiting victim impact to the testimony of a single survivor, (3) the court should weigh the proffered testimony to ensure that its probative value was not substantially outweighed by the risk of undue prejudice or misleading the jury; and (4) the court should order the prosecutor to limit his argument on victim impact evidence to the testimony of the witnesses. (CT 1481-94.) The trial court denied appellant's motion and ruled that the only limit on victim impact evidence was with respect to Evidence Code section 352. (RT 3512.)

Appellant's sister Ruth Cole then testified to funeral and home repair costs resulting from the killings. Ruth also testified that Eva cried and said "Why did he have to do it?" and said how much she missed Versenia and

Torey. (RT 3593.) Sammie Lee testified that after his wife Versenia and his son Torey were killed he couldn't think right and performed badly on his job; that he lost his job and then started drinking heavily. (RT 3669-72.) Appellant's brother Artis Blacksher, Jr. testified that at the time of the killings he couldn't accept it, felt like he was run over by a train, and went looking for appellant to hurt him. (RT 3685-88.)

In this case, numerous witnesses providing victim impact evidence were also key prosecution witnesses regarding appellant's mental state. There are sound reasons to question the reliability of certain victim impact testimony, such as hearsay statements of Eva while in the cemetery, as presented by Ruth. It was awkward at best for the defense to cross-examine a witness (regarding appellant's mental state, for example) who has suffered a real loss and is describing the impact of that loss.

B. Victim Impact Evidence Is Restricted to the Circumstances of the Crime.

Payne v. Tennessee (1991) 501 U.S. 808, 827 concluded that the Eighth Amendment was not a per se bar to admission of victim impact evidence, including the personal characteristics of the victim and the impact of the crime on the victim's family. Payne thus held that a state may, if it chooses, properly authorize such victim impact evidence "for the jury to assess meaningfully the defendant's moral culpability and

blameworthiness." (Id. at 825.)

Penal Code section 190.3, subdivision (a) specifies that the penalty phase jury can consider the "circumstances of the crime of which the defendant was convicted in the present proceedings." People v. Edwards (1991) 54 Cal.3d 787, 835-36 held that the prosecution could present victim impact evidence under this provision. Nonetheless, this statutory authorization does not permit broad categories of victim impact evidence. As Edwards warned:

> "We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by Payne . . . ." (Ibid.)

This Court has not yet defined the appropriate boundaries of victim impact evidence under section 190.3, subdivision (a). Since Edwards, none of this Court's decisions has explored the scope of permissible victim impact evidence.

California's death penalty law, including section 190.3, subdivision (a) has been upheld as not unconstitutionally overbroad or vague. (Tuilaepa v. California (1994) 512 U.S. 967, 976.) However, a distortion of the statutory phase "circumstances of the crime" to include extraneous classes of victim impact evidence not involving consequences of the crime raises state and federal constitutional concerns about vagueness and the arbitrary

application of the statute.

Appellant submits that the statutory phrase is fairly understood to restrict victim impact evidence as follows: (1) only victim impact evidence describing the impact of a family member personally present at the scene during or immediately after the killing is admissible; (2) only victim impact evidence which describes circumstances known or reasonably foreseeable to the defendant is admissible; and (3) victim impact evidence must be limited to a single witness.

1. Only victim impact evidence describing the impact on a family member personally present is admissible.

Payne upheld the admission of victim impact evidence to the extent it described the impact on a family member personally present during or immediately following the capital crime. (501 U.S. at 816.) Similarly, this Court observed that its authorization of such evidence encompassed only evidence that logically showed the harm caused by the defendant, "including the impact on the family of the victim." (Edwards, supra, 54 Cal.3d at 835 [approving the introduction of photos of victims taken while alive near the time of the crime].) Because victim impact evidence is irrelevant under California law except to the extent it qualifies as part of the circumstances of the crime, no victim impact evidence beyond the impact of

family members present during or immediately following the capital crime is admissible under section 190.3.

2. Victim impact evidence is admissible only if it describes circumstances known to the defendant at the time of the capital crime.

In addition, no victim impact evidence is admissible unless it describes facts or circumstances known to the defendant at the time of the capital crime. (See People v. Fierro (1991) 1 Cal.4th 173, 264 [conc. and dis.opn. of Kennard, J.].) Justice Kennard explained that in Booth v. Maryland (1987) 482 U.S. 496, 504-05, a majority of the United States Supreme Court considered it self-evident that the "circumstances of the crime" do not include evidence relating to the personal characteristics of a murder victim and the emotional impact of the crimes on the victim's family. (Fierro, supra, 1 Cal.4th at 260 [conc. and dis.opn., Kennard, J.]; see also South Carolina v. Gathers (1989) 490 U.S. 805, 811-12 [accord].) Although Payne overruled Booth and Gathers, Justice Kennard explained that the Payne court did not retreat from its holdings in those cases to the extent those decisions defined "what did and did not constitute 'circumstances of the crime,'" i.e., the facts or circumstances either known to the defendant at the time of the crime or properly adduced in proof of the charges at the guilt phase. (Fierro, supra, 1 Cal.4th at 260 [conc.and

dis.opn., Kennard, J.)

3. Victim impact evidence must be limited to a single victim impact witness.

Because of its inherently prejudicial nature, victim impact evidence must be limited to a single witness. (See e.g., State v. Muhammad (N.J. 1996) 678 A.2d 164, 180; accord Illinois Rights of Crime Victims and Witnesses Act, 725 ILCS 120 § 3(A)(3)[limiting victim impact testimony to a single representative].)

C. The Trial Court Erroneously Admitted Extraneous Classes of Victim Impact Evidence Which Did Not Involve Circumstances of the Crime.

The trial court erred in admitting extraneous types of victim impact evidence which did not involve the circumstances of the crime. First, three family members testified, Ruth Cole, Sammie Lee, and Artis Blacksher, Jr. Secondly, all three of these witnesses testified to matters which did not involve the circumstances of the crime. Ruth testified that the funeral cost some $8000 which she had to pay mostly herself, and that she had to replace the carpet in the house. Sammie Lee testified that after the crimes he "couldn't think right" and lost his job and started drinking heavily. Artis Jr. testified that he couldn't accept the killings and felt as if he had been run over by a train. None of these matters related to the circumstances of the

crime, and none of these witnesses was present at the time of the offenses. Finally, Ruth Cole testified on behalf of her mother Eva (who was not a witness at trial) and provided emotional testimony of how much Eva missed the victims, and that Eva would cry at the gravesite, "Why did he have to do it?" This latter testimony was wholly improper under any theory of victim impact evidence and yet was highly emotional and thus prejudicial to appellant's defense at penalty phase.

D. The Victim Impact Evidence Introduced in This Case Was Prejudicial.

Emotional victim impact evidence which is likely to provoke arbitrary or capricious action by the jury violates the state constitutional and the Fifth, Eighth and Fourteenth Amendments to the United States constitution. (See Gardner v. Florida (1977) 430 U.S. 349, 358; Gregg v. Georgia (1976) 428 U.S. 153, 180; Payne v. Tennessee, supra, 502 U.S. at 825 [victim impact evidence violates federal due process where it is so unduly prejudicial that it renders the trial fundamentally unfair].) Such evidence must also be excluded under Evidence Code section 352 as more prejudicial than probative.

Because the erroneous admission of victim impact testimony deprived appellant of his federal constitutional rights, review for prejudice is under Chapman v. California, supra, 386 U.S. at 24. Review for

prejudice at the penalty phase of a capital trial must proceed with particular caution. (Satterwhite v. Texas (1988) 486 U.S. 249, 258.) Further, in evaluating prejudice, the reviewing court does not consider whether a death verdict would have been rendered in a hypothetical trial in which the error did not occur; rather it must decide whether the death sentence in the case under review was "surely unattributable to the error." (Sullivan v. Louisiana (1993) 508 U.S. 275, 279.)

No such determination of harmlessness can be made here. First, the jury was presented with irrelevant evidence (the cost of the funeral, Sammie's alcoholism and loss of job) as if it were a proper matter for their consideration. Secondly, the jury was presented with the emotional portrait of appellant's mother -- who did not even testify -- blaming appellant for her grief. Thirdly, this improperly admitted victim impact evidence dovetailed with the prosecution's argument for death: that appellant should be executed because he was "absolutely evil" for having destroyed the family life he had. "It is of vital importance" that the decisions made in capital cases "be, and appear to be, based on reason rather than caprice or emotion." (Gardner v. Florida (1977), 430 U.S. 349, 358.) The improperly admitted victim impact evidence made it likely that appellant's death sentence was improperly and unconstitutionally be based on emotion rather than reason. Because this Court cannot be certain that the verdict of death

was unattributable to the admission of the improperly admitted victim impact evidence, it must reverse appellant's death sentence.

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XX. THE TRIAL COURT VIOLATED APPELLANT'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO PRESENT A DEFENSE, TO DUE PROCESS, AND TO A RELIABLE SENTENCING DETERMINATION BY ERRONEOUSLY EXCLUDING ADMISSIBLE EVIDENCE IN MITIGATION AND BY UNEVENLY APPLYING THE RULES OF EVIDENCE

The trial court improperly excluded admissible mitigation testimony by appellant's sister Georgia Hill and his brother-in-law Sammie Lee, and thereby violated appellant's Sixth, Eighth and Fourteenth Amendment rights to present evidence and to confront the witnesses, to due process, to a fair trial and to a reliable sentencing determination. As shown below, the evidence proffered by the defense was admissible under the rules of evidence to show bias, and as victim impact evidence. The excluded evidence was also admissible in mitigation under Lockett v. Ohio (1978) 438 U.S. 586 and Eddings v. Oklahoma (1982) 455 U.S. 104, cases which require that the trier of fact not be precluded from considering any aspect of the defendant's character or the circumstances of the offense proffered by the defense as a basis for a sentence of less than death. Finally, the trial court's rulings once again demonstrate an asymmetrical application of the rules of evidence in favor of the prosecution in violation of appellant's due process rights.

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A. The Trial Court's Erroneous Exclusion of Mitigation Evidence.

1. The improper restriction of Georgia Hill's testimony.

Appellant's sister Georgia Hill testified as a mitigation witness. However, on the prosecutor's speculation objection, the trial court struck Georgia's testimony that the older siblings didn't understand that appellant had mental problems. When Georgia testified that the older siblings hated appellant because of his mental problems, the trial court again struck Georgia's testimony on the ground that she was not qualified to assess others' feelings. (RT 3747.) When Georgia testified that it was "obvious" to her that appellant was "schizophrenic," the trial court struck this testimony as well. (RT 3749.) When Georgia testified that appellant's schizophrenia began after appellant's cousin Floyd was killed by the police in appellant's presence, the trial court struck the testimony as a "medical conclusion." (RT 3754.)

Georgia's testimony about the older siblings and their attitude towards appellant was relevant impeachment evidence as to their bias. (Evid. Code, § 780, subd.(f); People v. Allen (1978) 77 Cal.App.3d 924, 931; People v. Fatone (1985) 165 Cal.App.3d 924, 931.) Prohibition of inquiry into a witness' bias violates the defendant's federal constitutional right of confrontation. (Delaware v. Van Arsdall (1986) 475 U.S. 673.)

The animosity between older siblings (who were hostile towards appellant) and the younger siblings (who were sympathetic to his mental illness) was a theme throughout the trial, in particular at the penalty phase. (See e.g., RT 3922; 3964.) For example, Ruth Cole -- a nurse -- and James Blacksher both testified that appellant had no mental disability. (RT 2244-46; 2364-65.) Artis Blacksher, Jr. also flatly denied that appellant had any mental disabilities and testified that appellant was just "spoiled." (RT 3690-92.) The prosecution relied on the testimony of the older siblings (that appellant was not mentally ill) to support his argument for the death sentence on the grounds that appellant had no mental impairments but was instead just "evil," "explosive," manipulative, sly, cold-hearted, etc., in short that there was no mitigation. (RT 3909; 3916; 3918; 3919; 3929; 3936; 3940; 3946.)

Because the prosecutor relied so heavily on family members' testimony that appellant was "normal" albeit evil, appellant was entitled to impeach that evidence through Georgia's testimony that the other family members disliked appellant precisely **because** he was mentally ill. The United States Supreme Court has emphasized that the defendant's right to rebut the prosecution's evidence is the "core requirement" and the "hallmark" of due process. (Simmons v. South Carolina (1994) 512 U.S. 154, 174 [Ginsburg, J. and O'Connor, J., concurring].)

Moreover, the trial court's exclusion of Georgia Hill's testimony that appellant was schizophrenic was a clearly uneven application of the rules of evidence, in that the trial court had allowed Artis, Jr., James and Ruth all to testify that appellant was **not** mentally disturbed. The asymmetrical application of evidentiary standards has been held to be unconstitutional.[60] (Gray v. Klauser, supra, 282 F.3d 633,[61] citing Green v. Georgia, supra, 442 U.S. 95 and Webb v. Texas, supra, 409 U.S. 95.)

In sum, Georgia Hill's testimony in mitigation was not only relevant but was constitutionally required. The trial court erred in excluding it.

2. The improper restriction of Sammie Lee's testimony.

Sammie Lee, the husband of the decedent Versenia Lee and the father of the decedent Torey Lee, testified for the prosecution as a victim impact witness. On cross-examination, when defense counsel asked if "this family has seen enough death," the trial court sustained the prosecutor's relevancy objection. (RT 3680.) This was error.

Although this Court did observe that testimony by family members as to whether they prefer that the defendant live or die was not strictly

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[60] Appellant addresses the asymmetrical application of the rules in detail above, in Arg. VI, Part B, pp. 168-172, and incorporates by reference that argument here.

[61] Gray v. Klauser was remanded on other grounds in Klauser v. Gray (2002) 537 U.S. 1041.

relevant to the defendant's character or history, that same case noted that the impact on the victim's family was relevant to show the harm caused or the blameworthiness of the defendant. (People v. Sanders (1995) 11 Cal.4th 475, 546.) In this case, Sammie Lee was testifying as a victim as to the impact of the deaths, and his testimony that the family had seen enough death was therefore relevant victim impact testimony.

Artis Jr. had been allowed to testify to the impact of the deaths on him, stating that he went looking for appellant "to hurt" him. (RT 3685-88.) If Artis Jr.'s testimony as to the impact of the deaths on him was relevant under Payne v. Tennessee (1991) 501 U.S. 808 when the prosecution elicited it, then Sammie Lee's testimony as to the impact of the deaths on him as a victim as offered by the defense was also relevant. As set out immediately above, the asymmetrical application of the rules of evidence is unconstitutional.

Moreover, People v. Smith (2003) 30 Cal.4th 581, 622-23 declared that testimony from someone with whom the defendant had a significant relationship that he deserves to live is proper mitigating evidence. Sammie, as appellant's brother-in-law, was such a person; his testimony was thus admissible mitigating evidence under Smith. In fact, citing to Wardius v. Oregon, supra, 412 U.S. 470, the trial court instructed the jury that it could

consider "the likely effect of a death sentence on [appellant's] family and friends." (CT 1523.) This indicates that at the time of instructing the jury the trial court correctly understood (1) that such evidence was admissible in mitigation; and (2) that its exclusion would operate as an asymmetrical application of the evidentiary rules in violation of due process.

B. The Exclusion of Relevant Mitigating Evidence Was Prejudicial.

Review for prejudice is under the Chapman v. California, supra, 386 U.S. 18 standard, requiring reversal unless the prosecution can show harmlessness beyond a reasonable doubt.

The exclusion of testimony by Georgia Hill went to the central issue in the case: whether or not appellant suffered from mental illness and the scope and duration of his affliction. Moreover, the prosecutor relied heavily on testimony from other family members which would have been impeached by the excluded testimony. Both of these factors are indicative of prejudice. Where an error hits a "live nerve" in the defense, it must be considered prejudicial. (People v. Lindsey, supra, 205 Cal.App.3d at117; People v. Vargas, supra, 9 Cal.3d at 481.) Also, the prosecutor's reliance in closing argument on an erroneous ruling is considered a strong indication of prejudice. (People v. Younger, supra, 84 Cal.App.4th at 1385 [prosecutor's reliance on error in closing argument exacerbated prejudicial impact of

error]; Depetris v. Kuykendall, supra, 239 F.3d 1057, 1063 [accord].)

With respect to the exclusion of Sammie's testimony, the trial court's ruling not only abridged appellant's right to present a defense, but it resulted in skewing the facts and misleading the jury because the trial court explicitly instructed the jury that it could consider in mitigation "the likely effect of a death sentence" on appellant's family. (RT 3899-3900.) The jury was thus directed to look for and consider evidence which, when offered by the defense, had been excluded. This instruction, in conjunction with the exclusion of Sammie's testimony on this point, shows the unfairness of appellant's penalty trial and undermines the reliability of its result. The jury was allowed to consider only a portion (the prosecution's version) of the available victim impact evidence, thus magnifying the prejudice from the error.

The erroneous exclusion of mitigation evidence thus requires reversal of appellant's convictions.

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PROSECUTORIAL MISCONDUCT AT GUILT, SANITY AND PENALTY PHASES

XXI. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT IN VIOLATION OF APPELLANT'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

The prosecutor repeatedly argued to the jury facts not in evidence and just as repeatedly stated his personal beliefs, implying that he had knowledge of evidence not presented to the jury. This Court has held that it is improper for the prosecutor to vouch by referring to his experience, or implying superior knowledge. (People v. Frye (1998) 18 Cal.4th 894, 971; see also People v. Sully (1991) 53 Cal.3d 1195, 1235, People v. Anderson (1990) 52 Cal.3d 453, 479; People v. Kolerich (1993) 40 Cal.App.4th 283, 297; People v. Boyd (1990) 222 Cal.App.3d 541, 571 [improper for the prosecutor to argue based on his experience with people and witnesses, implying superior knowledge from sources unavailable to the jury]; People v. Williams (1997) 16 Cal.4th 153, 256 [impermissible vouching occurs where the prosecutor suggests that information not presented to the jury supports the prosecution's case].)

Such prosecutorial statements of facts not in evidence "make the prosecutor his own witness -- offering unsworn testimony not subject to cross-examination." (People v. Hill (1998) 17 Cal.4th 800, 828, quoting People v. Bolton (1979) 23 Cal.3d 208, 213 [by arguing facts not in

evidence the prosecutor improperly exploits "'the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.'"].)

A prosecutor's intemperate behavior in closing argument violates the federal constitution when it comprises a pattern of conduct so egregious that it infects the trial with unfairness so as to make the conviction a denial of due process. (People v. Samayoa (1997) 15 Cal.4th 795, 841; Donnelly v. DeChristoforo (1974) 416 U.S. 637, 642-43.)

As shown below, the prosecutor's misconduct at argument in guilt, sanity, and penalty phases of this trial violated appellant's federal constitutional rights of confrontation, and to due process and a fair trial.

A. Prosecutorial Misconduct at Guilt Phase Opening and Closing Argument.

1. The prosecutor improperly argued the substance of appellant's statements made to a doctor during a competency examination.

In closing argument, the prosecutor said appellant's "story" was that "somebody else did this . . . . His story to Dr. Davenport two years ago: he vehemently denied this; the masked men [] came in the house and did this." (RT 2730.) Defense counsel's objection was sustained. The prosecutor's argument stated the contents of appellant's statements during a competency examination and thus was in violation of the Fifth Amendment and Estelle

v. Smith (1981) 451 U.S. 454 and in violation of the state judicially declared use immunity for statements made by the defendant at a competency hearing. (Tarantino v. Superior Court, supra, 48 Cal.App.3d at 469.).[62] Even though the trial court sustained the defense objection, it did not admonish the jury to disregard the improper comment, and thus the damage was done. The prosecutor's argument urged the jury not only to find appellant deceptive and guilty, but by implication to deem Dr. Davenport's testimony in favor of appellant to be less than credible insofar as it was based on appellant's self-reporting to him.

The prosecutor also argued that "there's nothing to suggest any diminished level" with respect to appellant's intent because "all we know [] is that one of the things he told Dr. Davenport was that he vehemently denied the charges," imploring the jury to tell Dr. Davenport "the truth of what [appellant did]." Defense counsel's objection was overruled. (RT 2758-59.) This argument also violated appellant's Fifth Amendment rights and his immunity during the competency examination.

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[62] During his cross-examination of Dr. Davenport, the prosecutor had also improperly elicited testimony from Dr. Davenport regarding the contents of appellant's competency exam in direct violation of the trial court's ruling. See Arg. VII, Part B, pp. 179-181 & fn. 6.

2. The prosecutor improperly argued outside the evidence with respect to Eva Blacksher.

The prosecutor argued that the "worst thing" appellant had done in this case was to put something "really bad" on his mother. (RT 2735.) The trial court overruled a defense objection when the prosecutor argued that Eva was "normal" at the time of the shootings but was "blown away by this," and that the jury "kn[e]w that the only way [Eva] could have said the things she did is because she was able to figure out what happened inside the house." (RT 2736.) The trial court overruled a further objection of "improper." (RT 2737.)

After a lunch break, the prosecutor returned to this theme, saying that Eva was "torn in this matter" which is why she testified at the preliminary hearing that she "didn't really see and hear too much." The trial court overruled a defense objection of "outside the evidence." (RT 2738-39.) The prosecutor repeated that the jury needed to "take a look" at Eva "realistically," because "this is what her son put on her that morning." The trial court overruled a defense objection that Eva never testified to that. (RT 2739).

There was no properly admitted evidence at the guilt phase that Eva's memory problems were directly linked to the killings. The prosecutor had presented Eva's preliminary hearing testimony, given some

months after the crime, as competent testimony, and then argued that at the time of trial some years later, Eva had become incompetent. The prosecutor thus improperly argued facts outside the record. It was also improper for the prosecutor to argue that the jury should consider the statements made by Eva -- even though as he admitted she testified that she did not "see and hear too much" -- because Eva was able "to figure out" what had happened. This argument encouraged the jury to consider Eva's statements even if they were, or precisely because they were, her speculation. Such argument violates the precept against stating or assuming facts not in evidence. (People v. Cash (2002) 28 Cal.4th 703, 732 [improper to state or assume facts in argument that are not in evidence; People v. Smith (2003) 30 Cal.4th 581, 617 [accord].)

3. The prosecutor argued outside the record with respect to appellant's mental illness.

The prosecutor stated that "everybody" who was asked said they hadn't seen anything about appellant that would suggest a mental illness. Defense counsel objected as a misstatement of the testimony. The trial court, responded, "Yeah, there were some people who said yes." (RT 2754.) The prosecutor's argument was an improper statement of facts outside the record, and the trial court did not sustain the objection. (People v. Coddington, supra, 23 Cal.4th at 600 [improper for prosecutor to

mischaracterize the record].)

The prosecutor also stated that the "bottom line" was that the family didn't know about appellant's medical history, and that as far as Dr. Davenport could see, "all came from when Mr. Blacksher was incarcerated." Defense counsel's objection was overruled. (RT 2758.) Once again, the prosecutor improperly mischaracterized the record. (Coddington, supra, 23 Cal.4th at 600.) Elijah Blacksher testified that he was well aware of appellant's history of mental illness, and that he had discussed this matter with other family members and with the police. (RT 2517; 2525-26.)

The prosecutor's argument that Dr. Davenport's information came from when appellant was incarcerated was also improper argument outside the record, People v. Cash, supra, 28 Cal.4th at 732, as the trial court had admitted Dr. Davenport's testimony for the limited purpose of impeaching the family members -- a limitation which the prosecutor had flouted during the evidentiary phase of the trial as well.[63]

4. The prosecutor improperly argued what appellant wanted and knew.

The prosecutor argued that "Mr. Blacksher wants no part of the special circumstance. He knows what it means. So basically, I don't really

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[63] See Arg. VII, Part B, pp. 179-181, above.

think the defense, at this point, is going to try to argue to you that Mr. Blacksher didn't do it." (RT 2753.) Although the trial court sustained appellant's objection to this argument, the jury was not admonished to disregard it. The prosecutor's argument was clearly improper. There was no evidence as to what appellant wanted or didn't want or what he knew about the significance of the special circumstance allegation. The prosecutor was thus improperly arguing outside the record, and making himself a witness as to appellant's desires and knowledge. (People v. Boyd, supra, 222 Cal.App.3d at 571 [improper to imply the existence of evidence known only to the prosecutor but not to the jury].)

5. The prosecutor's misconduct with respect to the evidence of appellant's Social Security records.

The prosecutor argued that when the defense introduced appellant's Social Security records "there was some unsettling among the members of the jury, because the Social Security evidence -- ." The trial court sustained the defense objection. (RT 2755.) The prosecutor then asserted that appellant's Social Security folder was "not locally available" because it was sent to the federal records center, and if it had not already been destroyed it would take two to three months to locate; "therefore, we have no information available concerning his medical condition or the names or

addresses of his treating or diagnostic physician." The prosecutor said this meant that "that evidence ha[d] not been produced" and there was "no evidence that the records do not exist." (RT 2755-56.) Defense counsel objected again. In chambers, defense counsel stated that the prosecutor was extrapolating things that were not accurate; and that the only unavailable records were the "raw data, particularly the names of the physicians." (RT 2757.) The trial court noted that the Social Security records came in without objection and that the prosecutor was "confus[ing] the hell out of everybody." (RT 2757-58.)

In fact, the Social Security records were admitted into evidence without objection as the trial court noted. Moreover, it was stipulated that Peter Spencer, an assistant regional commissioner for Social Security and custodian of records, would authenticate the records although he had not personally examined appellant and thus could not offer his opinion as to appellant's disability. (RT 2622-23.) It was further stipulated that the Social Security records indicated that appellant had been eligible to receive Supplemental Security Income ("SSI") based on a disability of paranoid schizophrenia; that his payments were sent directly to him, that appellant had been approved for the first time in November of 1979 and continued until January of 1996, except for the time periods when payment had been discontinued because appellant was in a public institution, and reapproved

when he was not. (RT 2622-25; Exh. GG.)

In sum, the record evidence, as stipulated to by the prosecutor himself, was that appellant was eligible to receive SSI based on his disability of paranoid schizophrenia. The prosecutor's argument that "there was no information available concerning his medical condition" was a misstatement of the record. (People v. Coddington, supra, 23 Cal.4th at 600.) The fact that the custodian of the record could not verify appellant's mental condition did not mean that there was no evidence available when the records themselves showed that appellant had been deemed to have a disability of paranoid schizophrenia.

The prosecutor's mischaracterization of the record, together with his implication that these records unsettled the jury (itself misconduct),[64] was blatant misconduct. The prosecutor's theme throughout the guilt phase (and indeed the whole trial) was that appellant was a malingerer and a manipulator and was not mentally ill. The Social Security records were official and thus highly convincing evidence to the contrary: appellant had repeatedly been approved for SSI because of his mental disability from

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[64] People v. Nolan (1932) 126 Cal.App. 623, 640 holds that "no attorney should venture a bald opinion, stated as a fact, with reference to an issue or as to the effect, or value, or weight, of the evidence, as it may affect any ultimate fact in the case."

1979 until 1996. The prosecutor's attempt to persuade the jury to disregard evidence that he himself had stipulated to amounts to an assertion of his personal opinion (improper), an illegal invitation to disregard undisputed evidence, and a suggestion of the prosecutor's own personal knowledge outside the record. (People v. Boyd, supra, 222 Cal.App.3d at 571.)

6. The prosecutor's misconduct violated appellant's federal constitutional rights and was prejudicial.

The misconduct which permeated the prosecutor's argument violated appellant's Sixth Amendment confrontation rights, as well as his Fourteenth Amendment rights to due process and a fair trial, and as such must be assessed for prejudice under the Chapman standard.

The prosecutor's misconduct was prejudicial because it went to the heart of the defense case. The principal factual question for the jury went to appellant's intent. The prosecutor was not content to let the jury decide this issue on the facts; instead, he attempted to shore up his theory that appellant suffered no mental impairments whatsoever apart from supposed malingering, the prosecutor resorted to mischaracterizing the record and augmenting it with extrajudicial facts and his own opinions. The result is a verdict that is neither reliable nor fair.

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B. Prosecutorial Misconduct at Sanity Phase Closing Argument.

1. Improper argument about evidence not presented.

The prosecutor explained that he had not presented any psychiatric testimony at the sanity phase, even though in opening statement he said he would present two experts, because after watching the jury "falling asleep" while waiting for defense expert Dr. Pierce to "close that book and stop this mess and [] get real in 1998 instead of flashing back [to] 1978," he realized that the jurors would "kill him" if he presented more psychiatric testimony. The trial court overruled the defense objection of inappropriate and irrelevant. (RT 3458.)

It is misconduct to suggest during closing argument that there was evidence that was not presented just to save the jury time. (People v. Boyette (2002) 29 Cal.4th 381, 437.) By parity of reasoning, the prosecutor commits misconduct by telling the jury that testimony was not presented to avoid boring or annoying the jury. The argument amounts to testimony by the prosecutor himself that psychiatric testimony unfavorable to the defendant was available. The prosecutor was thus once again arguing outside the record and implying that he had knowledge beyond what was presented to the jury. (People v. Boyd, supra, 222 Cal.App.3d at 571 [improper to imply the existence of evidence known only to the prosecutor

but not to the jury].)

2. Improper argument outside the record.

The trial court also overruled a defense objection of lack of foundation to the prosecutor's argument that the jury found out yesterday that appellant's "hook into Social Security was his mother's disability of some kind." (RT 3459.) The prosecutor continued that "that is what Ruth Cole said. Mom got him in. That is not paranoid schizophrenia, is it?"[65] (RT 3459.) As set out above (Part A, section 5, pp. 271-274) the prosecutor stipulated to the authenticity of the Social Security records which showed that appellant had been deemed eligible for SSI payments because of his own disability of paranoid schizophrenia, and that he was the direct payee, i.e., his "hook" into Social Security did not depend in any way on his mother. The prosecutor's argument was prejudicial misconduct for the same reasons stated above in Part B, section 1, pp. 275-276, above.

3. Improper expressions of personal belief.

The prosecutor attacked the credibility of the defense expert stating that the underpinnings of his opinion was suspect as based on appellant's reporting which is why Dr. Pierce "looked ridiculous and didn't make any

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[65] Ruth Cole testified that Eva was disabled after working and appellant was put on disability along with her. (RT 3378.)

sense to you." (RT 3464.) The prosecutor also asserted that appellant was "in denial" about the killings which was why "he can't tell you anything." The prosecutor then stated:

> "What was even worse was, you know, as a prosecutor, I do have the opportunity to sit closer to you and I got the glares and the looks. I don't like the way it invaded your province when [appellant] sat in court and laughed. I had to take a look at you because I wondered if anybody heard that during Dick Moore's cross-examination when Dick Moore was establishing, hey, this man was hostile, this man was intense and agitated. [¶] [Appellant] sat up here and laughed. And I know you heard it. . . . I'm glad you saw it." (RT 3478.)[66]

The prosecutor's belief regarding how the jury assessed Dr. Pierce's testimony was improper. Any kind of "indirect testimony" by the prosecutor in arguing his personal belief on a matter in issue is improper. (People v. Williams, supra, 16 Cal.4th at 256 [impermissible vouching occurs where the prosecutor suggests that information not presented to the jury supports the prosecution's case]; People v. Boyd, supra, 222

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[66] These instances of misconduct are properly before this Court on appeal even though defense counsel did not object. First, the trial court had told counsel to keep objections to a minimum. (RT 1705.) Moreover, at this point, the trial court had overruled a number of defense counsel's valid objections. An error is not waived by failure to object if the objection would have been futile. (See People v. Hill, supra, 17 Cal.4th at 820-821; People v. Chavez, supra, 26 Cal.3d at 350 fn. 5; People v. Williams, supra, 16 Cal.3d at 667 fn. 4; Estelle v. Smith, supra, 451 U.S. at 468 fn. 12.)

Cal.App.3d at 571 [improper for the prosecutor to argue based on his experience with people and witnesses, implying superior knowledge from sources unavailable to the jury].) The prosecutor not only expressed his opinion as a fact, but the fact at issue how (in the prosecutor's opinion) the jury had evaluated the testimony of a defense witness.

The prosecutor's declarations regarding appellant's "glares" and "looks" -- which were more apparent to the prosecutor than to the jury given his vantage point close to appellant -- were likewise improper prosecutorial opinions expressed as facts. The prosecutor compounded his misconduct by insisting that the jury had also heard appellant's laughter, and seen his glares: another opinion expressed as fact. Paradoxically, the prosecutor was invading the jury's province, even while accusing appellant of having done so.

4. The prejudicial impact of the misconduct.

The prosecutor's misconduct violated appellant's federal constitutional rights to confrontation, due process and a fair trial, and must be assessed for prejudice under Chapman. At sanity phase, all of the prosecutor's misconduct was aimed directly at the central issue, appellant's mental state. The prosecutor improperly alluded to evidence he could have (but did not) presented; mischaracterized the evidence the jury did hear; and improperly attacked the defense expert. The prosecutor thus covered all his

bases in his effort to mislead the jury into returning a verdict of sane. A verdict reached by such reprehensible means is neither fair nor reliable and this Court must therefore reverse.

C. Prosecutorial Misconduct at Penalty Phase Closing Argument.

Prior to penalty phase argument, defense counsel objected to a number of the poster boards the prosecutor had prepared as visual aids in closing argument. Defense counsel objected to the poster containing the words "eggs, sausage, French toast" (which is what appellant had for breakfast after the shootings according to his statement to the deputy district attorney), which the prosecutor used to argue lack of remorse because appellant was acting normal. Defense counsel objected that this argument amounted to an assertion eating a meal should be considered in aggravation. The trial court allowed the poster as "fair comment." (RT 3852.)

Defense counsel also objected to the poster board headed "absence of mitigation" which contained quotes from appellant's description of his relationship with Torey and Versenia in appellant's statement to the deputy district attorney, i.e., he had a beautiful relationship with Versenia, Torey was his favorite nephew, and Torey was smiling in his sleep. (Exh. 22.). Defense counsel contended that this argument was equivalent to arguing that the absence of mitigation equaled aggravation. The trial court stated

that the prosecutor was "getting close" to arguing absence of remorse by commenting on appellant's Fifth Amendment rights. The prosecutor distinguished his argument as relying on what appellant said to law enforcement. The trial court overruled the defense objections to the prosecutor's visual aids. (RT 3852-54.)

The prosecutor then argued to the jury that appellant's defense case was "plagued" by an absence of mitigation, saying that the jury heard and saw things, but when one looked "there is nothing there." (RT 3929-30.) The prosecutor asked rhetorically, "Where is the mitigation?" and answered "It is words on paper. Where is the extenuation? All these excuses." (RT 3924.) The prosecutor then displayed his blank chart as a visual aid, saying "This is mitigation folks." (RT 3935.) The prosecutor repeated that an absence of mitigation was not a factor in aggravation, but maintained that it "stands on its own." The prosecutor insisted that the absence of mitigation, although not aggravating nonetheless meant that "the defense has no case," even though the defense would ask the jury to use "aspects" of appellant's "character" as a basis for an LWOP verdict. (RT 3937.)

The prosecutor argued that appellant couldn't look the jury in the eye, that he had no emotion and a heart of ice, and was not a person "where sympathy is worthwhile." (RT 3938.) Defense counsel's objections were overruled. (RT 3939.) The prosecutor continued with this theme: "There is

an absence of mitigation and no reason in the word to give him [an LWOP sentence]. He knows what he wants. He is not going to get it." (RT 3939.) The prosecutor then launched into an extended argument that appellant deserved the death penalty because after the killings he had a "full breakfast of eggs, coffee, sausage and French toast and finished it off with a cigarette." (RT 3939-41.)

> "This is Erven Blacksher. This is what lies in the heart of Erven Blacksher. [¶] I got to have my eggs. [¶] got to have my coffee. [¶] I got to have my sausage. [¶] I have to have my French toast. [¶] They can bleed to death. [¶] They can die. [¶] They can do whatever they want to do. [¶] They can drop dead, I won't care. [¶] I am hungry and I have to have something to eat so I can go to Reno and hide for a couple days. . . . The deed is done, but I have to have a bit to eat. [¶] May we please break for lunch [requesting the court to recess]." (RT 3942.)

After the lunch recess, the prosecutor focused on his theme of lack of remorse. Defense counsel's objection was overruled. The prosecutor argued that "This is an absence of mitigation. No sorrow for his victims. No expression of anything." (RT 3943.) The prosecutor then referred to appellant's statement to the police in which he described his good relationship with Versenia and said that Torey was his favorite nephew and was smiling in his sleep. (RT 3943.) The prosecutor argued that this was an absence of mitigation and showed the jury "deeply in his heart what he felt about what he did and what he felt about the people that he did it to."

(RT 3943-44.) Defense counsel's objection was overruled. (RT 3944; see also RT 3922.)

1. Improper argument on lack of remorse.

This Court has held that the prosecutor can argue lack of remorse if it is not done in the context of the defendant's failure to testify to remorse. (People v. Boyette, supra, 29 Cal.4th at 438; see also People v. Ochoa (2001) 26 Cal.4th 398, 449 [absence of remorse is a proper subject for jury consideration and prosecutorial misconduct because it is a "circumstance of the offense"]; People v. Bemore (2000) 22 Cal.4th 809, 853 [no misconduct in arguing that lack of remorse was not factor in aggravation but could be considered in balancing against factors in mitigation].)

The prosecutor's argument as to appellant's supposed lack of remorse was not based on record evidence, but rather on the prosecutor's own assertions that appellant's demeanor in trial (as interpreted by the prosecutor) -- he showed "no emotion" and had a "heart of ice" and was not a person for whom sympathy was worthwhile. To the extent the argument was based on the evidence, the prosecutor focused on the fact that appellant ate breakfast that morning. As defense counsel pointed out, this amounted to an argument that the jury could weigh as aggravating evidence the fact that appellant performed necessary bodily functions.

The cases in which this Court has allowed lack-of-remorse arguments involve affirmative evidence where the defendant failed to show remorse. In Ochoa, supra, 26 Cal.4th at 449 the defendant bragged about committing the crime; in People v. Proctor (1992) 4 Cal.4th 499, 545, the defendant went with a friend to Redding to "have fun;" and in Bemore, supra, 22 Cal.4th at 853, the defendant testified without expressing any remorse. None of these cases stands for the proposition that the prosecutor can properly argue lack of remorse because the defendant continued to live, breathe and eat after the crimes. Indeed, in order to make his argument that eating constituted lack of remorse, the prosecutor had to **provide** for the jury statements by appellant that appellant never made: "They can drop dead. I won't care. I have to eat." If it is improper to argue lack of remorse in the context of the defendant's failure to testify, a fortiori it is improper to argue lack of remorse by supplying for the jury testimony which appellant never gave, which calls attention to the fact that he did not testify.

Similarly, appellant's statement to the police that he had good relationships with Versenia and Torey is not evidence upon which the prosecutor could legitimately rely to argue lack of remorse. Appellant's statements showed sympathy for and empathy with his sister and nephew.

2. Improper argument on absence of mitigation.

The prosecutor's argument in this case was also improper with

respect to arguing the absence of mitigating evidence. First of all, it was simply not true that there was an absence of mitigating evidence: to the contrary, the record is replete with evidence that appellant suffered from a serious and debilitating mental illness, a quintessential factor in mitigation. The prosecutor chose to argue in contradiction of the record, insisting over and over again that the case was "plagued" with an absence of mitigation and using a blank chart as illustrative of the "absence" of mitigation.

This Court permits prosecutorial argument on the absence of mitigation as long as it is not argued as an aggravating factor. (See People v. Davenport (1985) 41 Cal.3d 247, 289.) However, the case law that allows argument on the absence of mitigation deals with prosecutorial arguments pointing out an **actual** lack of a specific kind of mitigation. (See e.g., People v. Gutierrez (2002) 28 Cal.4th 1083, 1155-56 [prosecutor properly argued absence of mitigating factors (e), (f) and (g)]; People v. McDermott (2002) 28 Cal.4th 946, 1002-03 [prosecutor properly argued absence of specific mitigating factors]; People v. Riel (2000) 22 Cal.4th 1153, 1223 [trial court properly considered absence of mitigating factor (f)]; People v. Montiel (1993) 5 Cal.4th 877, 937 [prosecutor properly argued absence of mitigating factors (e) and (g)].)

These cases do not justify the argument made by the prosecutor in

this case, i.e., that there was **no mitigating evidence whatsoever**, a fact which was simply untrue. The prosecutor's argument thus amounted to arguing facts outside the evidence, and an improper expression of his own personal belief, both of which constitute misconduct. (People v. Cash, supra, 28 Cal.4th at 732 [improper to argue facts not in evidence]; People v. Williams, supra, 16 Cal.4th at 256 [impermissible vouching occurs where the prosecutor suggests that information not presented to the jury supports the prosecution's case].)

3. Improper paralipsis argument on double counting.

Speaking of appellant's past convictions, the prosecutor argued that there was a pattern of escalating violence, then said he was not going to comment on it again, because he had already referred to it as a prior felony conviction "and you can't double count." (RT 3947.) Defense counsel objected that the prosecutor was "doing it as he speaks." The objection was overruled. (RT 3947.) The prosecutor then reiterated that "you can't double count. I'm asking you to consider this one time and that's all." (Ibid.)

The prosecutor committed misconduct by repeatedly referring to appellant's prior convictions and then backtracking by saying the jury should not "double count" them. People v. Wrest (1992) 3 Cal.4th 1088, 1105, 1107 criticized as improper the use of the rhetorical device of

paralipsis -- stating one thing but suggesting exactly the opposite.

The prosecutor used the same tactic when he argued that appellant's brother Artis was so angry that he was going to kill appellant. Defense counsel's objection was overruled. (RT 3950-5.) Artis had actually testified that he was looking for appellant "to hurt him." (RT 3688.) The prosecutor used his (inaccurate) description of Artis' testimony to argue that appellant's family was "mad at him then, and they had a right to be," then stated that "[a]nger is not an appropriate basis for any decision in this case." (RT 3951.) Once again the prosecutor's resort to paralipsis was improper. If Artis' anger was not a proper basis for the jury's decision, then it was not a proper basis for the prosecutor's argument. By pointing out the anger and the righteousness of that anger the prosecutor was urging the jury to return a verdict of death based on the family's supposed desire for such a penalty, which was misconduct.

4. Other misconduct.

The prosecutor assured the jury he had a "long experience" in his work which had taught him "humility and restraint" because any "insincerity" on his part would be "readily seen by everyone." He then asked the jury to return a sentence of death. (RT 3909.) The prosecutor's self-proclaimed experience, humility and/or restraint were totally irrelevant to the jury's determination, as the prosecutor certainly knew. Yet by

emphasizing at the beginning of his argument that his efforts were necessarily sincere and restrained, he was urging the jury to impose the death sentence based on his own experience that death was the proper penalty in this case. (Cf. People v. Bain (1971) 3 Cal.3d 839, 848-49 [prosecutor may not state personal belief or intimate that he would not prosecutor an innocent person].)

The prosecutor argued that when appellant shot and killed it "touche[d] all of society and we have suffered a wound as a body" for which the death penalty was a cathartic restoring of order. (RT 3916.) This was a thinly veiled argument for deterrence and was thus improper. (See e.g., People v. Marshall (1996) 13 Cal.4th 799, 859 [deterrence arguments rest on unproven assumptions and are improper].)

5. The prosecutorial misconduct requires reversal of appellant's death sentence.

The prosecutor's misconduct at penalty phase violated appellant's federal rights to confrontation, due process and a fair trial, and to a reliable sentencing determination. Review for prejudice under the Chapman standard requires reversal unless the prosecution can show beyond a reasonable doubt that the misconduct did no harm. (Chapman, supra, 386 U.S. at 24.) This the prosecution cannot do.

The misconduct at penalty targeted appellant's mitigation evidence,

which the prosecutor repeatedly and improperly characterized as non-existent, thus misleading the jury on the fundamental life or death question before them. The test on appeal for prejudice from prosecutorial misconduct is not the prosecutor's intent but rather the effect of the misconduct on the defendant. (People v. Vargas (2001) 91 Cal.App.4th 506, 569.) The prosecution cannot demonstrate beyond a reasonable doubt that the prosecutor's repeated and improper arguments that appellant lacked remorse, that there was no mitigating evidence to support a life verdict, and that a death sentence would restore societal order had no effect on appellant's plea for a sentence of life imprisonment. Moreover, a death verdict rendered after such improper albeit effective argument is constitutionally unreliable and cannot be upheld.

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INSTRUCTIONAL ERRORS AT PENALTY PHASE

XXII. BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE PRINCIPLES APPLICABLE TO AN ASSESSMENT OF HE CREDIBILITY OF WITNESSES, APPELLANT WAS DEPRIVED OF HIS FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A RELIABLE SENTENCING DETERMINATION

A. The Trial Court Erred in Failing to Instruct the Jury on Basic Principles Related to the Assessment of the Credibility of the Witnesses at Penalty Phase.

The trial court began the penalty phase instructions by stating that the jury would

> "now be instructed as to **all of the law** that applies to the penalty phase of this trial. ¶ You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. **Disregard all other instructions given to you in other phases of this trial.**" (CT 1586; RT 3896 [CALJIC No. 8.84.1]; emphasis provided.)

The trial court then instructed the jury as to the aggravating and mitigating factors and the jurors' duty to determine which penalty should be imposed, and also gave instructions on the elements of assault, battery, brandishing and rape.

Although the jurors were instructed to determine the facts from the evidence received during the entire trial, no instructions whatsoever were given as to how the jury should assess the witnesses' testimony. CALJIC

No. 2.20 regarding assessment of the credibility of witnesses was not given. CALJIC No. 2.22 relating to weighing conflicting testimony of witnesses was not given. Both instructions are required to be given in every criminal case. (People v. Rincon-Pineda (1975) 14 Cal.3d 864, 883-84 [trial court has sua sponte duty to instruct on CALJIC Nos. 2.20 and 2.22 in every criminal case]; People v. Snead (1993) 20 Cal. App.4th 1088, 1097 [trial court has duty to give CALJIC No. 2.22 where there is conflicting evidence].)

Nor was the jury instructed pursuant to CALJIC No. 2.21.1 [assessing discrepancies in a witness' testimony]. People v. Wader (1993) 5 Cal.4th 610, 644-45 held that it was not error to fail to give this instruction sua sponte, but only because the jury was "adequately instructed" with CALJIC No. 2.20. No such cure can be found here, because the trial court also failed to instruct pursuant to CALJIC No. 2.20. (See also Pen. Code, § 1127.)

Finally, even though LaDonna Taylor, appellant's girlfriend who testified for the prosecution that appellant had raped her, had been convicted of robbery, prostitution, theft, fraud and forgery (RT 3711-12), no instruction was given that these convictions could be considered in determining the credibility of the witnesses. People v. Mayfield (1972) 23 Cal.App.3d 236, 245, People v. Lomeli (1993) 19 Cal.App.4th 649, 654-56,

People v. Cavazos (1985) 172 Cal.App.3d 589, 595-97 and People v. Roberts (1976) 57 Cal.App.3d 782, 791-92 held that the trial court has a sua sponte duty to instruct the jury with CALJIC No. 2.23 [impact of a felony conviction on a witness' credibility].[67]

The trial court's failure to give these fundamental instructions was clear error.

> "It is settled that in a criminal case, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."

(People v. Valdez (2004) 32 Cal.4th 73, 115; internal citations and quotations omitted]).) Kelly v. South Carolina (2002) 534 U.S. 246 reversed a capital conviction, finding a due process violation, where the trial court did not sua sponte instruct on the defendant's parole ineligibility, noting,

> "A trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part." (Id. at 256.)

It is also beyond dispute that in the penalty trial the same safeguards

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[67] But see People v. Kendrick (1989) 211 Cal.App.3d 1273, 1278 [no sua sponte duty to instruct on CALJIC No. 2.23].

should be accorded a defendant as those which protect him in the trial in which guilt is established. (People v. Stanworth (1969) 71 Cal.2d 820, 840.) At the penalty phase, the trial court must give the jury instructions which are "'vital to a proper consideration of the evidence by the jury.'" (Id. at 841.) Clearly, instructions on how to determine the witnesses' credibility are essential to a proper penalty phase determination. The trial court erred in failing to give these "vital" instructions and thereby violated appellant's state and federal constitutional rights to due process and a reliable sentencing determination.

The trial court's failure to give the basic required instructions was particularly egregious since the trial court explicitly instructed the jurors that the instructions given constituted the entirety of the law the jurors were to apply, and further instructed the jurors to **disregard** all other instructions given in the earlier phases of the trial. The jurors had no guidance and were effectively told there were no principles to apply in assessing the witnesses' credibility. The result was a violation of appellant's federal constitutional rights to due process and a reliable penalty phase determination.

B. The Trial Court's Failure to Give Fundamental Jury Instructions to the Penalty Phase Jury Violated Appellant's Federal Constitutional Rights to Due Process and a Reliable Sentencing Determination.

The trial court's failure to give fundamental instructions to the

penalty phase jury deprived appellant of his state-created right to such instructions, and thus violated his federal constitutional due process rights. (Hicks v. Oklahoma (1980) 447 U.S. 343 [deprivation of state-conferred right violates due process]. Furthermore, the failure to give instructional guidance to the jury with respect to their assessment of the penalty phase witnesses deprived appellant of his Eighth Amendment right to heightened reliability in the capital sentencing procedure. (Godfrey v. Georgia (1980) 446 U.S. 420 [Eighth Amendment requires higher degree of scrutiny in capital cases]; Woodson v. North Carolina (1976) 428 U.S. 280 [because the death penalty is qualitatively different from imprisonment there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case]; Monge v. California (1998) 524 U.S. 721, 732 [because the death penalty is unique in both its severity and its finality, there is an "acute need for reliability in capital sentencing proceedings."].)

A jury cannot be deemed a "reliable" sentencer when it has reached a death verdict in the complete absence of any instructions regarding its assessment of the credibility of the witnesses and the conflicts in testimony. Appellant's jury was told to **disregard** all other instructions and was then instructed only as to the significance of mitigating and aggravating

evidence; the jury was wholly without legal guidance at the penalty phase with respect to its assessment of the credibility of witnesses and conflicting testimony. Since this Court must presume that the jury followed the instructions given by the judge,[68] this Court must presume that the jury took the trial court at its word when it was told to disregard all previous instructions relating to their assessment of witness credibility and conflicting testimony. The jury was a boat legally adrift with respect to its evaluation of the penalty phase witnesses and testimony.

A verdict reached in the absence of the required legal guidelines is the epitome of unreliability. A death verdict returned by such a jury is in blatant violation of the federal constitutional guarantees of due process and reliability. This Court must therefore reverse appellant's death sentence.

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[68] Francis v. Franklin (1985) 471 U.S. 309, 324-25, fn. 9 [reviewing court must presume jury followed trial court's instructions]; People v. Crew (2003) 31 Cal.4th 822, 849 [accord]; People v. Lawson (1987) 189 Cal.App.3d 741, 748 [appellate courts must presume the jury faithfully followed the trial court's instructions, even erroneous ones].

XXIII. THE TRIAL COURT VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A RELIABLE SENTENCING DETERMINATION UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY REFUSING TO INSTRUCT THE JURY NOT TO DOUBLE COUNT THE SPECIAL CIRCUMSTANCE IN REACHING A DETERMINATION OF THE APPROPRIATE PENALTY

A. The Trial Court Erred in Refusing to Give Appellant's Requested Instruction.

Citing People v. Melton, supra, 44 Cal.3d at 768, appellant requested that the trial court instruct the jury as follows:

> "You must not consider as an aggravating factor the existence of any special circumstance if you have already considered the facts of the special circumstance as a circumstance of the crimes for which the defendant has been convicted. In other words, do not consider the same factors more than once in determining the presence of aggravating factors." (CT 1519.)

The trial court refused to give the instruction on the grounds that the instruction did not conform to Melton. The trial court concluded that "that is just not what the case says. It has nothing to do with what is cited in No. 2 [referring to the requested instruction] so I'm not going to give that [defense-requested instruction]." (RT 3847.)

The jury was instructed pursuant to CALJIC No. 8.85 that as to factor (b) it could consider the "presence or absence of criminal activity by the defendant, other than the crime[s] for which the defendant has been tried in the present proceedings," and as to factor (c), it could consider the

"presence or absence of any prior felony convictions, other than the crimes for which the defendant has been tried in the present proceedings." (CT 1587-88.)

Melton held that Penal Code section 654 did not bar a jury from considering crimes committed during the charged murder (i.e., a burglary and robbery were committed during the course of a robbery special circumstance murder), but emphasized that the penalty phase jury could not consider the facts of the robbery and the burglary more than once **for same purpose**. (Melton, supra, 44 Cal.3d at 768.) The Court noted that the language of factor (a), i.e., "The circumstances of crime of which the defendant was convicted in the present proceeding **and** the existence of any special circumstance found to be true," could conceivably allow a jury without a clarifying instruction to double count "any 'circumstances' which were also 'special circumstances." (Ibid.) Melton thus held that, upon request, the trial court should admonish jury not to double count.

In short, Melton did say the same thing as the instruction requested by appellant. Moreover, Melton also specifically said that upon request, the trial court should give the instruction.

People v. Barnett (1998) 17 Cal.4th 1044, 1179-80 rejected an argument that the standard CALJIC No. 8.85 instruction allowed improper

double-counting on the defendant's kidnaping, robbery and murder convictions and the special circumstance finding, even though the jury did not receive a further clarifying instruction per Melton that individual criminal acts falling within the parameters of factors (b) [violent criminal activity] and (c) [prior felony convictions] could not be counted twice for the same purpose. Barnett also recognized that this Court has repeatedly held that the failure to caution against double counting does not warrant reversal in the absence of any misleading argument by the prosecutor. (Id. at 1180.)

Barnett, however, is distinguishable from this case, because the defendant in Barnett did not request the Melton clarifying instruction on no double-counting, as did appellant. Thus, Barnett did not consider whether a capital defendant has the right to a clarifying instruction upon request (which Melton makes clear he does); Barnett merely upheld the standard instruction as constitutional.

B. The Trial Court's Refusal to Give the Requested Instruction Violated Appellant's Federal Constitutional Rights to Due Process and a Reliable Sentencing Determination.

Stringer v. Black (1992) 503 U.S. 222, 232 held that "the weighing process may be impermissibly skewed if the sentencing jury considers an invalid factor." Relying on that case, the Tenth Circuit held that when one

aggravating factor "necessarily subsumes" another,

> "such double counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally." (United States v. McCullah (10th Cir. 1996) 76 F.3d 1087, 1111.)

The Fourth Circuit followed McCullah in United States v. Tipton (4th Cir. 1996) 90 F.3d 861, 899 [a submission of multiple overlapping aggravating factors "that permits and results in cumulative findings of more than one of the circumstances as an aggravating factor is constitutional error"], as did the Fifth Circuit in United States v. Jones (5th Cir. 1998) 132 F.3d 232, 251.[69]

In this case, the multiple murder special circumstance factor necessarily subsumed the factor of the circumstances of the crime. Consequently, under McCullah, Tipton and Jones, the trial court's refusal to give appellant's requested instruction created the risk that appellant's

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[69] The United States Supreme Court, affirming Jones, declined to state affirmatively whether it approved of the Tenth, Fourth and Fifth Circuits' approach to double-counting. (Jones v. United States (1999) 527 U.S. 373, 398.) The Supreme Court noted that it had held in Stringer v. Black that the weighing process might be impermissibly skewed if the sentencing jury considered an invalid factor but that it had not passed on the proposition that if the weighing process is necessarily skewed if two aggravating factors are duplicative.

the record. Consequently, under McCullah, Tipton and Jones, the trial court's refusal to give appellant's requested instruction created the risk that appellant's death sentence was arbitrarily and unconstitutionally imposed.

C. The Trial Court's Refusal to Give the Requested Instruction Prejudiced Appellant's Penalty Phase Defense.

Because the instructional error is of federal constitutional magnitude, review for prejudice is under the Chapman v. California, supra, 386 U.S. at 18 standard, requiring reversal unless the prosecution can show beyond a reasonable doubt that the error was harmless. No such showing can be made here. Under the instructions as given, the jury would by "common sense" consider the circumstances of Torey's murder (which included the circumstances of Versenia's murder) and the circumstances of Versenia's murder (which included the circumstances of Torey's murder) as well as the fact that the special circumstance was a multiple murder, thus considering the same fact twice (or even three times) for the same aggravating purpose, thus creating an unacceptable risk of an unreliable sentence and improperly skewing the penalty determination towards a finding of death in violation of the constitutional requirement of a heightened reliability in capital proceedings. (Monge v. California (1998) 524 U.S. 721, 733.)

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XXIV. THE TRIAL COURT'S ERRONEOUS FAILURE TO GIVE CORRECT INSTRUCTIONS OUTLINING THE DEFENSE THEORY OF THE PENALTY PHASE VIOLATED HIS SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE AND HIS EIGHTH AMENDMENT RIGHT TO A RELIABLE SENTENCING DETERMINATION

A. Summary of Proceedings Below.

Defense counsel requested an instruction setting out examples on the mitigating factors the jury "should consider, if raised by the evidence." (CT 1521-25.) This list contained some fact-specific examples, e.g., whether the defendant's emotional, intellectual and psychological growth and development affected his adult personality and behavior; the likely effect of a death sentence on his family and friends. The requested instruction ended by saying that mitigating factors "also include any sympathetic, compassionate, merciful or other aspect of the defendant's background, character, record, or social, psychological or medical history that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (CT 1521-25.)

The trial court gave a modified version of this instruction immediately after listing factor (k). (RT 3898-3900.) Appellant contends that the trial court erred in excluding the following items from the instruction:

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(1) whether or not the offenses were committed while the defendant was under the influence of any mental or emotional disturbance, regardless of whether the disturbance was of such a degree as to constitute a defense to the charges, and regardless of whether there is a reasonable explanation or excuse for such disturbance;

(6) whether or not at the time of the offenses or at any other time 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, regardless of whether the capacity was so impaired as to constitute a defense to the charges, and regardless of whether the impairment caused him to commit the crimes; (See CT 1521-23.)

B. Appellant Was Entitled to the Requested Instructions Because They Were Correct Statements of Law and Supported by the Evidence.

As set out in more detail above in Arg. XII, Part A, pp. 207-209, and summarized here,[70] appellant had a state and federal constitutional right to the requested instructions, as defense pinpoint instructions and as instructions on the defense theory of the case. (People v. Birks (1998) 19 Cal.4th 108, 118; see also People v. Montoya (1994) 7 Cal.4th 1027, 1050 [sua sponte duty applies to theories which the evidence strongly

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[70] Appellant refers the Court to, and incorporates by reference here, the more detailed argument on his right to instructions on the defense theory of the case as set out in Argument XII, Part A, pp. 207-209, above.

illuminates].) Moreover, the defendant has the right to "'direct attention to evidence from . . . which a reasonable doubt could be engendered.' [Citation]." (People v. Hall (1980) 28 Cal.3d 143, 159.) The defendant may obtain a pinpoint instruction which relates "his [evidentiary theory] to an element of the offense." (People v. Saille (1991) 54 Cal.3d 1103, 1120.)

Similarly, the federal constitution guarantees criminal defendants a right to present a defense, and therefore a right to a requested instruction on the defense theory of the case, under the Sixth Amendment rights to trial by jury and compulsory process, and the Fourteenth Amendment right to due process. (Mathews v. United States (1988) 485 U.S. 58, 63.) Refusal to give an instruction on the defense theory infringes the defendant's Sixth Amendment and Fourteenth Amendment guarantees because it prevents the jury from considering defense evidence and from making findings of fact necessary to establish guilt. (See e.g., United States v. Escobar de Bright (9th Cir. 1984) 742 F.2d 1196, 1198.) The refusal to give an instruction on the defense theory effectively strips a defendant of the ability to present a defense. (Id. at 1201-02; accord Conde v. Henry (9th Cir. 1999) 198 F.3d 734, 739-741.)

In this case, the trial court's failure to give requested instructions on the central theory of the penalty phase defense, appellant's impaired mental state, also resulted in an unreliable verdict in violation of the federal

constitution. (Monge v. California, supra, 524 U.S. at 733.)

1. The trial court erred in refusing to instruct the jury to consider any evidence of appellant's mental disturbance (even if it was not extreme).

The standard CALJIC No. 8.85 was given; thus the jury was instructed that in determining the penalty, it could consider "(d) whether or not the offense was committed while the defendant was under the influence of **extreme** mental or emotional disturbance." (CT 1587-88; RT 3897; emphasis provided.)[71] Appellant's request was for an instruction that allowed the jury to consider his mental or emotional disturbance **whether or not it was "extreme."** As discussed immediately below, the requested instruction was constitutionally correct: appellant had a right to have a jury consider his mental or emotional disturbance even if it was not "extreme." Because the requested instruction was a correct statement of law and supported by the evidence, the trial court erred in refusing to give the instruction.

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[71] The trial court also instructed with CALJIC No. 8.88 that "A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." (CT 1607; RT 4006-07.)

The inclusion in the list of mitigating factors of such adjectives as "extreme" (as given at RT 3897) act as a barrier to consideration of mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (Mills v. Maryland, supra, 486 U.S. 367; Lockett v. Ohio, supra, 438 U.S. 586.) This wording rendered factor (d), which the evidence supported here, unconstitutionally vague, arbitrary, capricious and/or incapable of principled application. (Maynard v. Cartwright, supra, 486 U.S. 356; Godfrey v. Georgia, supra, 446 U.S. 420.)

The jury's consideration of this vague factor, in turn, introduced impermissible unreliability into sentencing, in violation of the Sixth, Eighth and Fourteenth Amendments. It also may have induced the jury to ignore factor (d) if it found a mental or emotional disturbance but did not find that it was "extreme"; notwithstanding the catchall factor (k) instruction, the jury may have taken the instruction at face value and decided only "extreme" emotional or mental disturbance was mitigating. That would require only a basic principle of language interpretation, *inclusio unius est exclusio alterius,* which due to its common sense nature is presumed to be what the jury used. At least, there was a reasonable likelihood it did so. (Estelle v. McGuire (1991) 502 U.S. 62, 72.) Because there was in fact evidence that appellant was under the influence of a mental disturbance at the time of the offenses, and because the requested instruction was

constitutionally correct, the trial court erred in refusing to give the instruction.

By virtue of the rights implicitly and explicitly guaranteed by the Sixth, Eighth, and Fourteenth Amendments, capital penalty jurors must be permitted to "consider and give effect to all relevant mitigating evidence offered by" a defendant. (Boyde v. California, supra, 494 U.S. at 377-78); accord Penry v. Lynaugh (1989) 492 U.S. 302, 328 ["full consideration of evidence that mitigates against the death penalty is essential"]; emphasis in original.)

Limiting the jury to consideration of "extreme mental or emotional disturbance" violated this constitutional mandate. (Accord Smith v. McCormick (9th Cir. 1990) 914 F.2d 1153, 1165-1166 [Montana scheme unconstitutional because it permitted sentencer "to refuse to consider . . . mitigating evidence simply because it fell below a certain weight"]; Kenley v. Armontrout (8th Cir. 1991) 937 F.2d 1298, 1309 [defendant need not be insane for mental problems to "be . . . considered mitigating evidence"]; People v. Robertson supra, 33 Cal.3d at 59-60 [violates Eighth Amendment to permit jury to consider "mental disease" as mitigating but not "mental defect"].)

This Court previously held that instructing a jury with factor (d) is not necessarily error if the jury is also instructed with factor (k). (CALJIC

No. 8.85(k); Pen. Code, § 190.3, subd. (k).) Barring something to indicate otherwise, this Court has said, it will be assumed that jurors in a given case understood that factor (k) was a catch-all category that allowed them to consider as mitigating the defendant's less-than-extreme mental or emotional disturbance. (People v. Wright (1990) 52 Cal.3d 367, 443-44.)

Appellant respectfully submits that any such presumption is not supported by law, for these reasons: First, in both law and logic there is a principle that the specific overrides the general. (See, e.g., People v. Trimble (1993) 16 Cal.App.4th 1255, 1259.) Second, as a related principle, *inclusio unius est exclusio alterius* is a standard principle of interpretation of language in statutes[72] and contracts.[73] Thus it is also how lay people would be expected to interpret a jury instruction. (Accord People v. Castillo (1997) 16 Cal.4th 1009, 1020 [conc. opn. of Brown, J.] ["Although the average layperson may not be familiar with the Latin phrase *inclusio unius est exclusio alterius*, the deductive concept is commonly understood . . ."].)

Applying these principles to factor (d), it is plain that, when factor (d) states that killing under the influence of mental or emotional disturbance

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[72] Courtesy Ambulance Service of San Bernardino v. Superior Court (1992) 8 Cal.App.4th 1504, 1514; People v. Weatherill (1989) 215 Cal.App.3d 1569, 1584.

[73] Stephenson v. Drever (1997) 16 Cal.4th 1167, 1175.

may be considered a mitigating factor only if the disturbance was "extreme," this necessarily means the exclusion of any lesser disturbance. This is merely a common use of language, and thus the use jurors are presumed to use.

Secondly, factor (k) does not cure the error because of the principle of language interpretation that the specific prevails over the general. (E.g., People v. Stewart (1983) 145 Cal.App.3d 967, 975.) And even if, assuming arguendo, factor (k) only provided a contradiction for the jurors rather than something subsumed to the specific factor (d), it would still be error for the trial court to refuse the defense-requested instruction, because a contradictory instruction does not cure the error in a constitutionally infirm instruction. (Yates v. Evatt (1991) 500 U.S. 391, 401, fn. 6.)

Third, to conclude otherwise – i.e., to conclude that factor (k) overrides factor (d) – would be tantamount to declaring factor (d) extraneous. Just as another fundamental rule of logic and construction requires that "a construction that renders [even] a [single] word surplusage . . . be avoided," Delaney v. Superior Court (1990) 50 Cal.3d 785, 799, so too one would expect a juror to have rejected an interpretation of the court's instructions that would have rendered all of factor (d) surplusage.

Fourth, the language of factor (k) in no way compelled a juror to interpret it as overriding factor (d). To the contrary, the pertinent portion of

factor (k) merely directed the jurors to consider "any sympathetic or other aspect of the defendant's character . . . that the defendant offers as a basis for a sentence less than death . . ." There was no reason a juror would necessarily see appellant's mental or emotional disturbance at the time of the killings -- the subject of factor (b) -- as an "aspect of [his] . . . character." A juror was most likely to believe that factors (d) and (k) dealt with different subjects.

Fifth, a 1994 study discovered that, of 491 upper level undergraduates who heard factor (k) read aloud five times, 36% of them believed the factor was aggravating, not mitigating. (Haney and Lynch, "Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions" (1994) 18 Law and Hum. Beh. 411, 418-424 .) That astonishing statistic strongly suggests that this Court should look even more closely at the propriety of factor (d). A juror who believed that factor (k) was aggravating, obviously, was not going to conclude that factor (k) was so all-encompassing a mitigating factor that it overrode the limitation on mitigation contained in factor (d).

Accordingly, the trial court's refusal to give the defense-requested instruction made it reasonably likely that, in violation of the Sixth, Eighth, and Fourteenth Amendments, one or more jurors failed to "consider and give effect to all relevant mitigating evidence offered by" appellant.

(Boyde v. California, supra, 494 U.S. at 377-78.)

Nor could there be any finding of "harmless error" here. First, the error directly affected mitigating evidence that was in the record. Second, there was no explicit argument by defense counsel that evidence of appellant's mental illness could be considered even if it was **not** extreme. Third, there was a significant amount of mitigating evidence in the record, further underscoring the prejudice from penalty error.

As a result of the above, the prosecution cannot carry its burden of showing no reasonable possibility the error affected the verdict under either the federal constitutional or state-law standards especially given the subjective nature of the death-selection process in California. The penalty judgment should be reversed.

2. The trial court erred in refusing to instruct the jury to consider in mitigation whether or not appellant's ability to appreciate the criminality of his conduct or to conform his conduct to the law was impaired whether or not that impairment was a defense and whether or not the impairment caused him to commit the crimes.

Appellant was likewise entitled to the requested instruction that the jury could consider in mitigation evidence whether or not appellant's ability to appreciate the criminality of his conduct or to conform his conduct to the law was impaired as a result of mental disease or defect, regardless of whether the impairment was sufficient to constitute a defense, and

regardless of whether the impairment caused him to commit the crimes. As set out directly above, appellant was constitutionally entitled to jury consideration of all relevant mitigating evidence; and the factor (d) instruction, limiting the jury's consideration to "extreme" mental or emotional disturbances acted as an unconstitutional barrier to appellant's rights. For the same reasons as discussed in section 1, above, the trial court erred in failing to give this instruction, and that failure was prejudicial to appellant's penalty phase defense.

Appellant's mental state was the very heart of his penalty phase defense and there was no principled way by which the trial court could have excluded the requested instruction. The trial court did give other portions of the defense-requested instruction. However, the portions given were of much lesser significance, and neither made the crucial point made in the refused portions, i.e., that appellant's mental illness could be considered in mitigation even though it was not extreme, and even though his impairment was insufficient to constitute a defense and regardless of whether it caused him to commit the crimes.

The cumulative effect of the trial court's refusals to give these two instructions was to **minimize** the mitigating evidence of appellant's mental impairments. The death verdict thus does not meet the reliability requirement of the Eighth Amendment. (Monge v. California, supra.)

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

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 here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

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. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for 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. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death.

A. Appellant's Death Penalty Is Invalid Because Penal Code Section 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. As this Court has recognized:

> "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.' (Furman v. Georgia (1972) 408 U.S. 238 [conc. opn. of White, J.]; accord, Godfrey v. Georgia (1980) 446 U.S. 420, 427[plur. opn.].)"

(People v. Edelbacher (1989) 47 Cal.3d 983, 1023.) In order to meet this constitutional mandate, 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-one special circumstances[74] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. 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*

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[74] 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-two.

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.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such 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 statutorily death-eligible. 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).)[75] 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 culls out 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

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[75] 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.)

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 routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. In People v. Stanley (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court rejected a similar claim in Pulley v. Harris (1984) 465 U.S. 37, 53. Not so. 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 itself contrasted the 1977 law with the 1978 law under which appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (Harris, supra, 465 U.S. at p. 52, fn. 14.)

The United States Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee 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. (See Part E, below.)

B. Appellant's Death Penaltyls Invalid Because Penal Code Section 190.3(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(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, 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.[76] Indeed, the Court has allowed extraordinary expansions of factor (a),

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[76] 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.

approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[77] or having had a "hatred of religion,"[78] or threatened witnesses after his arrest,[79] or disposed of the victim's body in a manner that precluded its recovery[80].

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge, Tuilaepa v. California (1994) 512 U.S. 967, 987-988, it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime,

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77 People v. Walker (1988) 47 Cal.3d 605, 639, fn.10, 765 P.2d 70, 90, fn.10, *cert. den.*, 494 U.S. 1038 (1990).

78 People v. Nicolaus (1991) 54 Cal.3d 551, 581-582, 817 P.2d 893, 908-909, *cert. den.*, 112 S. Ct. 3040 (1992).

79 People v. Hardy (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. den.*, 113 S. Ct. 498.

80 People v. Bittaker (1989) 48 Cal.3d 1046, 1110, fn.35, 774 P.2d 659, 697, fn.35, *cert. den.* 496 U.S. 931 (1990).

even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue as a "circumstances of the crime"aggravating factor to be weighed on death's side of the scale:

a. That the defendant struck many blows and inflicted multiple wounds[81] or that the defendant killed with a single execution-style wound.[82]

b. That the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[83] or that the defendant killed the victim without any motive at all.[84]

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[81] See, e.g., People v. Morales, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 [defendant inflicted many blows; People v. Zapien, No. S004762, RT 36-38 [same]; People v. Lucas, No. S004788, RT 2997-98 [same; People v. Carrera, No. S004569, RT 160-61 [same].

[82] See, e.g., People v. Freeman, No. S004787, RT 3674, 3709 [defendant killed with single wound]; People v. Frierson, No. S004761, RT 3026-27 [same].

[83] 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].

[84] 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].

c. That the defendant killed the victim in cold blood[85] or that the defendant killed the victim during a savage frenzy.[86]

d. That the defendant engaged in a cover-up to conceal his crime[87] or that the defendant did not engage in a cover-up and so must have been proud of it.[88]

e. That the defendant made the victim endure the terror of anticipating a violent death[89] or that the defendant killed instantly without any warning.[90]

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85 See, e.g., People v. Visciotti, No. S004597, RT 3296-97 [defendant killed in cold blood].

86 See, e.g., People v. Jennings, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

87 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].

88 See, e.g., People v. Adcox, No. S004558, RT 4607 [defendant freely informed others about crime]; People v. Williams, No. S004365, RT 3030-31 [same]; People v. Morales, No. S004552, RT 3093 [defendant failed to engage in a cover-up].

89 See, e.g., People v. Webb, No. S006938, RT 5302; People v. Davis, No. S014636, RT 11,125; People v. Hamilton, No. S004363, RT 4623.

90 See, e.g., People v. Freeman, No. S004787, RT 3674[(defendant killed victim instantly]; People v. Livaditis, No. S004767, RT 2959 [same].

f. That the victim had children[91] or that the victim had not yet had a chance to have children.[92]

g. That the victim struggled prior to death[93] or that the victim did not struggle.[94]

h. That the defendant had a prior relationship with the victim[95] or that the victim was a complete stranger to the defendant.[96]

These examples show that absent any limitation on factor (a) ("the circumstances of the crime"), different prosecutors have urged juries to find aggravating factors and place them on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of

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91 See, e.g., People v. Zapien, No. S004762, RT 37 (Jan 23, 1987) [victim had children].

92 See, e.g., People v. Carpenter, No. S004654, RT 16,752 [victim had not yet had children].

93 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].

94 See, e.g., People v. Fauber, No. S005868, RT 5546-47 [no evidence of a struggle]; People v. Carrera, No. S004569, RT 160 [same].

95 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].

96 See, e.g., People v. Anderson, No. S004385, RT 3168-69 (no prior relationship); People v. McPeters, No. S004712, RT 4264 [same].

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 inevitably present in every homicide:

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.[97]

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,

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[97] See, e.g., People v. Deere, No. S004722, RT 155-56 [victims were young, ages 2 and 6]; People v. Bonin, No. S004565, RT 10,075 [victims were adolescents, ages 14, 15, and 17]; People v. Kipp, No. S009169, RT 5164 [victim was a young adult, age 18]; People v. Carpenter, No. S004654, RT 16,752 [victim was 20], People v. Phillips, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 [26-year-old victim was "in the prime of his life"]; People v. Samayoa, No. S006284, XL RT 49 [victim was an adult "in her prime"]; People v. Kimble, No. S004364, RT 3345 [61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); People v. Melton, No. S004518, RT 4376 [victim was 77]; People v. Bean, No. S004387, RT 4715-16 [victim was "elderly"]

stabbed or consumed by fire.[98]

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.[99]

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

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[98] See, e.g., People v. Clair, No. S004789, RT 2474-75 [strangulation]; People v. Kipp, No. S004784, RT 2246 [same]; People v. Fauber, No. S005868, RT 5546 [use of an ax]; People v. Benson, No. S004763, RT 1149 [use of a hammer]; People v. Cain, No. S006544, RT 6786-87 [use of a club]; People v. Jackson, No. S010723, RT 8075-76 [use of a gun]; People v. Reilly, No. S004607, RT 14,040 [stabbing]; People v. Scott, No. S010334, RT 847 [fire].

[99] 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].

the day.[100]

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.[101]

The foregoing examples of how factor (a) is actually being applied in practice make clear that it is being relied upon as a basis for finding aggravating factors in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is

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100 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].

101 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].

urged to weigh on death's side of the scale.[102]

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (Maynard v. Cartwright (1988) 486 U.S. 356, 363 [discussing the holding in Godfrey v. Georgia (1980) 446 U.S. 420].)

C. California's Death Penalty 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.

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in

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[102] The danger that such facts have been, and will continue to be, treated as aggravating factors and weighed in support of sentences of death is heightened by the fact that, under California's capital sentencing scheme, 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.)

either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are 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 they outweigh the 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.

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1. 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. 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.[103]

All this was consistent with this Court's previous interpretations of California's statute. In People v. Fairbank (1997) 16 Cal.4th 1223, 1255, this Court said that "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 . . ." But these interpretations have been squarely

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[103] Defense counsel expressly requested an instruction that all 12 jurors had to agree beyond a reasonable doubt as to the existence of an aggravating factor before considering it, and that the jurors had to unanimously agree beyond a reasonable doubt that the aggravating circumstances outweighed the totality of the mitigating circumstances in order to return a death verdict. (CT 1532; 1534.) The trial court refused to give these instructions. (RT 3848.)

rejected by the United States Supreme Court's decisions in Apprendi v. New Jersey (2000) 530 U.S. 466 [hereinafter Apprendi]; Ring v. Arizona (2002) 536 U.S. 584 [hereinafter Ring]; and Blakely v. Washington (2004) 124 S.Ct. 2531 [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. (Id. 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 a prior case reviewing Arizona's capital sentencing law (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. (Id., 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 offence, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require

that it be found by a jury beyond a reasonable doubt.

This year, 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.

a. In the wake of Apprendi, Ring, and Blakely, 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.[104] Only

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[104] See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); State v. Stewart (Neb. 1977) 250 N.W.2d 849, 863; State v. Simants (Neb. 1977) 250 N.W.2d 881, 888-90; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (c) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); State v. Pierre (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4 (c) (Michie 1990); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(I) (1992).
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).) And 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

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 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

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found that both the existence of one or more aggravating circumtances 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.)

outweigh any and all mitigating factors.[105] 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 (CT 1607-09),"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, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors

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[105] 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.)

substantially outweigh mitigating factors.[106] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[107]

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(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

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106 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 discretionary weighing, and therefore "even though Ring expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) 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)

107 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.)

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 is based on a truncated view of California law. As section 190, subd. (a),[108] indicates, the maximum penalty for **any** first degree murder conviction is death.

Arizona advanced precisely the same argument in Ring. It pointed out 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 authorised 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, 124 S.Ct. at 2431.)

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[108] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, 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, 530 U.S. at 604.) Section 190, subd. (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 the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency,[109] while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances.[110] 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

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[109] Ariz.Rev.Stat. Ann. 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."

[110] Section 190.3 provides in pertinent 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."

it – must be found by a jury beyond a reasonable doubt." (Ring, 530 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 issue of the Sixth Amendment's applicability hinges on whether as a practical matter, 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. And 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.) 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, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "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 ["Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency."]; accord, State v. Whitfield, 107 S.W.3d 253 (Mo. 2003); State v. Ring, 65 P.3d 915 (Az. 2003); Woldt v. People, 64

P.3d 256 (Colo.2003); Johnson v. State, 59 P.3d 450 (Nev. 2002).[111])

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this 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, appellant submits, must inevitably involve both 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.

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111 See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in Ring as significant apply not only to the finding that an aggravating circumstance is present but also to whether mitigating circumstances are sufficiently substantial to call for leniency since both findings are essential predicates for a sentence of death).

(Blakely, supra, 124 Sup.Ct. at 2538.) Thus, under Apprendi, Ring, and Blakely, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.[112]

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[112] In People v. Griffin (2004) 33 Cal.4th 536, this Court's first post-Blakely discussion of the jury's role in the penalty phase, analogies were no longer made to a sentencing court's traditional discretion as in Prieto and *Snow*. The Court cited Cooper Industries, Inc. v. Leatherman Tool Group, Inc. (2001) 532 U.S. 424, 432, 437 [hereinafter Leatherman], for the principles that an "award of punitive damages does not constitute a finding of 'fact[ ]': "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation"].) (Griffin, supra, 33 Cal.4th at 595.) In Leatherman, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory: "Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?" (Leatherman, supra, 532 U.S. at 429.) This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in Blakely. Leatherman was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed *de novo*. Although the court found that the ultimate amount

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to Apprendi, Ring and Blakely are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC 8.88? The maximum sentence would be life without possibility of parole. (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence, without any additional findings, namely that aggravating circumstances substantially outweigh mitigating circumstances, would be life without possibility of parole.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (Prieto, 30 Cal. 4th at 263.) In Ring, Arizona also sought to

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> was a moral decision that should be reviewed *de novo*, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. (Id., 532 U.S. at 437, 440.) Leatherman thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the High Court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed.

> "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, 122 S.Ct. at p. 2442, quoting with approval Justice O'Connor's Apprendi dissent, 530 U.S. at p. 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 ["the death

penalty is unique in its severity and its finality"].)[113] As the High Court stated in Ring, supra, 122 S.Ct. at pp. 2432, 2443:

> "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, is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept

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[113] Monge, in explaining its decision not to extend the double jeopardy protection to a noncapital proceeding involving a prior-conviction sentencing enhancement, foreshawdowed Ring, and stated that the Santosky v. Kramer (1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "[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.' ([Bullington v. Missouri,] 451 U.S. at p. 441 (quoting Addington v. Texas, 441 U.S. 418, 423-424 (1979).)" (Monge, supra, 524 U.S. at 732.)

the applicability of Ring to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

b. 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 1 particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is 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 is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor

– including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[114] And 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, ever 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 United States Supreme Court has made clear that such factual findings must be made by a jury and cannot be attended with fewer procedural protections than 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

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[114] 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. (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

[100 S.Ct. 2214, 65 L.Ed.2d 159].[115]) Particularly given the "acute need for reliability in capital sentencing proceedings" (Monge v. California, supra, 524 U.S. at p. 732;[116] accord, Johnson v. Mississippi (1988) 486 U.S. 578,

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115 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; Apodaca v. Oregon (1972) 406 U.S. 404.) 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.

116 The Monge court developed this point at some length, explaining as follows: "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, 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

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 is a finding that 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 p. 732; Harmelin v. Michigan (1991) 501 U.S. 957, 994), and certainly no less (Ring, 122 S.Ct. at p. 2443).[117] See section D, *post*.

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.[118] To apply the requirement to findings carrying a maximum punishment of one year in the

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the accuracy of factfinding')." (Monge v. California, supra, 524 U.S. at 731-732.)

117 Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).)

118 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].)

county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (People v. Medina (1995) 11 Cal.4th 694, 763-764) – would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In Richardson v. United States (1999) 526 U.S. 813, 815-816, the U.S. Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The High Court's reasons for this holding are instructive:

> "The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. *The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is*

smoke there must be fire."

(Richardson, supra, 526 U.S. at p. 819 (emphasis added).)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

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 the finding of one or more aggravating circumstances, and the finding that the 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.

2. 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.)

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.) 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; see also Presnell v. Georgia (1978) 439 U.S. 14.) 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.

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.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (Winship, supra, 397 U.S. at 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing

> "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (Stantosky v. Kramer (1982) 455 U.S. 743, 755; see also Matthews v. Eldridge (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than that of human life. If personal liberty is "an interest of transcending value," Speiser, supra, 357 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 Ca1.3d 306 [same]; People v. Thomas (1977) 19 Ca1.3d 630 [commitment as narcotic addict]; Conservatorship of Roulet (1979) 23 Ca1.3d 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,"

Stantosky, 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 756.)

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 Stantosky. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (Stantosky, 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 Stantosky 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, supra, 524 U.S. at 732 ["the death penalty is unique in its severity and its finality"].) In Monge, the United States Supreme Court expressly applied the Stantosky rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings:

> "**[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.'" (Monge v. California, supra, 524 U.S. at 732; emphasis provided; citations omitted.)

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.

> 3. 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 [historical practice given great weight in constitutionality determination]; Murray's Lessee v. Hoboken Land and Improvement Co., supra, 59 U.S. (18 How.) at 276-277 [due process determination informed by historical settled usages].)

Finally, Evidence Code section 520 provides that "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, supra, 447 U.S. at 346.)

Accordingly, appellant respectfully suggests that People v. Hayes -- in which this Court did not consider the applicability of section 520 -- is 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, 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, supra.) That should be the result here, too.

4. Some 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. "Capital punishment [must] be imposed fairly, and with

reasonable consistency, or not at all." (Eddings v. Oklahoma, supra., 455 U.S. at. 112.) It is unacceptable -- "wanton" and "freakish," Proffitt v. Florida, supra, 428 U.S. at 260 -- 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.

5. 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. Such jurors do exist.[119] 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 fail to provide the jury with the guidance legally required for administration of 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.)

In this trial, appellant requested the court to instruct the jury that a mitigating circumstance need not be proven beyond a reasonable doubt or even by a preponderance of the evidence, and that each juror could find a mitigating circumstance to exist if there was evidence to support it. The trial court **refused** to give this instruction. (CT 1529.) The trial court similarly refused a defense-requested instruction that the jury need not find any mitigating circumstances in order to return a verdict of life. (CT 1527.) If the jury is told it need not unanimously agree on aggravating factors and

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[119] See, e.g., People v. Dunkle, No. S014200, RT 1005, cited in Appellant's Opening Brief in that case at page 696.

the jury is not told that aggravating factors need be proven to a certain standard of proof, then as a matter of symmetry and fairness, appellant was entitled to an equivalent instruction that a mitigating factor need not be proven beyond a reasonable doubt or even by the preponderance of the evidence. A capital defendant has the right to present any mitigating evidence, Lockett v. Ohio, supra, 438 U.S. 586, and any mitigating evidence is sufficient to support a verdict of life, People v. Brown (II) (1988) 46 Cal.3d 432, 450. Implicit in these principles is the corollary that appellant had no burden of proof with respect to mitigating evidence and the trial court violated appellant's federal constitutional rights by refusing to give these instructions. The result is a verdict that violated appellant's federal constitutional rights to instructions on the defense theory of the case,[120] and the heightened reliability standard of the Eighth Amendment. (Monge v. California, supra, 524 U.S. at 731-32.)

The trial court's failure to give the requested instructions 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

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[120] Appellant has a Sixth and Fourteenth Amendment right to instructions on the theory of the defense. (People v. Birks (1998) 19 Cal.4th 108, 118; Mathews v. United States (1988) 485 U.S. 58, 63.

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 fail to provide the jury with the guidance legally required for administration of 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.)

6. 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.[121] (California v. Brown (1987) 479 U.S. 538, 543; Gregg v. Georgia, supra, 428 U.S. at 195.) And especially given that 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 at least written findings because it will

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[121] Defense counsel's request for specific verdict findings was refused by the trial court. (CT 1538-39.)

otherwise be impossible to "reconstruct the findings of the state trier of fact." (See Townsend v. Sain (1963) 372 U.S. 293, 313-316.) Of course, without such 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:

> "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (Id., 11 Cal.3d at 267.)

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.; 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.) Since providing more protection to a non-capital defendant than a capital defendant would violate 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 in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In Mills v. Maryland, supra, 486 U.S. 367, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., id. at 383, fn. 15.) 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.[122]

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[122] 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 had 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 these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under Ring and provides no instruction or other mechanism to even 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.

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7. 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. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (Barclay v. Florida (1976) 463 U.S. 939, 954 [plurality opinion, alterations in original, quoting Proffitt v. Florida (1976) 428 U.S. 242, 251 (opinion of Stewart, Powell, and Stevens, JJ.).)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review -- a procedural safeguard this Court has eschewed. In Pulley v. Harris (1984) 465 U.S. 37, 51, the High Court, while declining to hold that comparative proportionality review is an essential component of every

constitutional capital sentencing scheme, did note 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 as construed by this Court and applied in fact, has become such a sentencing scheme. The Harris court, 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.)

As we have seen, that 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. Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions, and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing. 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, it should be borne in mind that 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; Enmund v. Florida (1982) 458 U.S. 782, 796, fn. 22; Coker v. Georgia (1977) 433 U.S. 584, 596.)

Twenty-nine of the thirty-eight states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute Georgia requires that the 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.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (Proffitt v. Florida, supra, 428 U.S. at 259.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[123]

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[123] 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); 42 Pa. 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). Also see State v. Dixon (Fla. 1973) 283 So.2d 1, 10; Alford v. State (Fla. 1975) 307 So.2d 433,444; People v. Brownell (Ill. 1980) 404 N.E.2d 181,197; Brewer v. State (Ind. 1981) 417 N.E.2d 889, 899; State v. Pierre (Utah 1977) 572 P.2d 1338, 1345; State v. Simants (Neb. 1977) 250 N.W.2d 881, 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 either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See People v. Fierro, supra, 1 Cal.4th at 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., People v. Marshall (1990) 50 Cal.3d 907, 946-947.)

Given the tremendous reach of the special circumstances that make one eligible for death as set out in 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 any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now 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 and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination

condemned in Furman in violation of the Eighth and Fourteenth Amendments. (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 also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

8. 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(b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., Johnson v. Mississippi, supra, 486 U.S. 578; State v. Bobo (Tenn. 1987) 727 S.W.2d 945.)

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. 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.

9. 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.)

10. The failure to instruct that statutory mitigating factors were relevant solely as potential mitigators precluded a fair, reliable, and evenhanded administration of the capital sanction.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (People v. Hamilton (1989) 48 Cal.3d 1142, 1184; 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 (1985) 41 Cal.3d 247, 288-289). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (Woodson v. North Carolina (1976) 428 U.S. 280, 304; Zant v. Stephens (1983) 462 U.S. 862, 879; Johnson v.

Mississippi (1988) 486 U.S. 578, 584-585.)

The likelihood that the jury in appellant's case would have been misled as to the potential significance of the "whether or not" sentencing factors was heightened by the prosecutor's misleading and erroneous statements during penalty phase closing argument. (See Arg. XI, Part C, pp. 279-288.) It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (Stringer v. Black (1992) 503 U.S. 222, 235.)

Even without such misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d),

(e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" (Tuilaepa v. California, supra, 512 U.S. at 973 quoting Gregg v. Georgia, supra, 428 U.S. at 189 (joint opinion of Stewart, Powell, and Stevens, JJ.)) and help ensure that the death penalty is evenhandedly applied. (Eddings v. Oklahoma, supra, 455 U.S. at 112.)

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D. 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.

As noted in the preceding arguments, the United States 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 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.)

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to 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.)

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,[124] as in Snow,[125] this Court 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. However apt or inapt the analogy, 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 Pen. Code, §§1158, 1158a.) When a California judge determines the appropriate sentence, 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

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124 "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.)

125 "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.)

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. 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. And 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. 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 Allen, supra, 42 Cal.3d at1286-1288.) In contrast to Prieto and Snow, Allen contains no hint that capital and non-capital sentencing procedures are in any way analogous – the decision rested on a depiction of fundamental differences between the two sentencing procedures.

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.) 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; Ford v. Wainwright (1986) 477 U.S. 399; Atkins v. Virginia, supra.)

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.].) (See also Reid v. Covert (1957) 354 U.S. 1, 77 [conc. opn. of Harlan, J.]; Kinsella v. United States (1960) 361 U.S. 234, 255-256 [conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.]; Gregg v. Georgia, supra, 428 U.S. at 187 [opn. of Stewart, Powell, and Stevens, J.J.]; Gardner v. Florida

(1977) 430 U.S. 340, 357-358; Lockett v. Ohio, supra, 438 U.S. at 605 [plur. opn.]; Beck v. Alabama, supra, 447 U.S. at 637; Zant v. Stephens, supra, 462 U.S. at 884-885; Turner v. Murray (1986) 476 U.S. 28, 90 L.Ed.2d 27, 36 [plur. opn.], quoting California v. Ramos (1983) 463 U.S. 992, 998-999; Harmelin v. Michigan, supra, 501 U.S. at 994; Monge v. California, supra, 524 U.S. at 732.)[126] The qualitative difference between a prison sentence and a death sentence thus militates for, rather than against,

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126 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, 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 of factfinding')." (Monge v. California, supra, 524 U.S. at 731-732.)

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 in Allen between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with little difference – and one that was recently rejected in Prieto and Snow. A trial judge may base a DSL sentence choice on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare §190.3, subds. (a) through (j) with Calif. 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 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. 985.) 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 also been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons 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 [Allen, supra, 42 Cal.3d at 186]) 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.)[127]

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 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 acute need for reliability and accurate fact-finding in death sentencing proceedings. (Monge v. California, supra.) To withhold them on the basis

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[127] Although Ring hinged on the court's reading of the Sixth Amendment, its ruling directly 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, 122 S.Ct. at 2432, 2443.)

that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

E. 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 [in 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;[128] see also People v. Bull (1998) 705 N.E.2d 824 [dis.opn. of Harrison, J.].

The non-use 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

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[128] Since the time of this article, South Africa abandoned the death penalty.

v. Kentucky (1989) 492 U.S. 361, 389 [dis.opn. of Brennan, J.]; Thompson v. Oklahoma, supra, 487 U.S. at 380 [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" (Dec. 18, 1999), on Amnesty International website at http://web.amnesty.org/library/index/ENGACT500052000. These facts remain true even 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. (Ibid.)

Although this county is not bound by the laws of other sovereignties, it has relied from its beginning on the customs and practices of other parts of the world to inform its understanding. (Miller v. United States (1871) 78 U.S. [11 Wall.] 268 [dis.opn. of Field, J.]; Hilton v. Guyot (1895) 159 U.S. 113, 227; Sabariego v. Maverick (1888) 124 U.S. 261, 291-92; Martin v. Waddell's Lessee (1842) 41 U.S. [16 Pet.] 367, 409.)

Due process is not a static concept and neither is the Eighth Amendment. (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, supra, 356 U.S. at 100.) 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 United States 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.)

Thus, assuming *arguendo* that 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. (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, supra, 159 U.S. at 227; see also Jecker, Torre & Co. v. Montgomery (1855) 59 U.S. [18 How.] 110, 112.)

Categories of offenders that particularly warrant a close comparison with actual practices in other cases include persons, such as appellant, who suffer from mental illness or developmental disabilities. (Cf. Ford v. Wainwright (1986) 477 U.S. 399; Atkins v. Virginia, supra.)

The broad death penalty scheme in California and the use of the death sentence as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

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PENALTY PHASE - POST-VERDICT ISSUES

XXVI. APPELLANT'S JUDGMENT OF DEATH IS IN VIOLATION OF STATE AND FEDERAL DUE PROCESS BECAUSE THE TRIAL COURT SENTENCED APPELLANT WITHOUT MAKING A DETERMINATION AS TO HIS COMPETENCY DESPITE SUBSTANTIAL NEW EVIDENCE OF APPELLANT'S LACK OF UNDERSTANDING OF THE PROCEEDINGS AND HIS INABILITY TO ASSIST IN HIS DEFENSE

Prior to the sentencing, based on substantial new evidence, defense counsel declared a doubt as to appellant's competency. The trial court suspended proceedings, but later reinstated the proceedings without having made a ruling on appellant's competency. Because the trial court made no finding as to competency, it was without jurisdiction to sentence appellant to death, and appellant's death sentence is thus in violation of federal due process guarantees.

A. Summary of Proceedings Below.

On November 2, 1998, defense counsel requested a competency evaluation of appellant based on their last two interviews with appellant. The trial court stayed the proceedings pursuant to Penal Code section 1368 and referred appellant to Dr. Larry Wornian and Dr. Paul Good for competency evaluations. (RT 4029.) The trial court stated that "if the 1368

comes back that he is competent, then we will proceed with the motion to modify and sentencing [on December 7, 1998]." (Ibid.)

On December 7, 1998, the trial court noted that both Drs. Wornian and Good had reported that appellant had refused to be interviewed. (RT 4032; see CT 1631-2; 1633-34 [reports of Drs. Wornian and Good].) The trial court requested pleadings from counsel as to whether or not the court could "proceed with sentencing." (RT 4032.) Defense counsel stated that he would submit pleadings "relative to whether or not Mr. Blacksher should otherwise be represented as well, because [counsel and appellant didn't] necessarily agree on his state of mind." (RT 4032-33.)

Appellant then made a lengthy statement that he had not wanted to plead guilty, but was informed by counsel that after the pleas were made they would be "void, they meant nothing if [he] was found guilty in the terms of the guilt phase," but "if not, then [they] would go to the sanity phase" and if he was found "incompetent then they would take [his] plea and sentence [him] to life in a mental institution" which meant "that the actual term of the sanity phase that the pleas would be considered as [his] permission to guilt." (RT 4034-35.) Appellant stated that if he had been informed by his attorneys that he "had to admit to two counts of murder of [his] nephew and sister, no, there would have been no sanity trial."

Because appellant had given his word, he went along. However, counsel then asked if he understood "what has happened when [appellant] stated that the pleas were void and admit nothing?" Appellant said he did not understand and that his attorney did not give him "the correct meaning with clarity of sanity trial." (RT 4035-36.) Appellant then referred to discrimination from "the magistrate Stanley P. Golde, who is, at this point, deceased," and his rulings that "Sara Winters, the police report and restraining order, could not enter into this courtroom." (RT 4036.) He referred to the prosecutor leaking information to the press, and insubordination and slander from the prosecutor. (RT 4037.)

> "The district attorney has also made slanderous remarks against me as a human being in this courtroom. There was two certified doctors here. The district attorney's office used the term malignus, which means malingering, which means malign, which means injurious, which means defamed, which leads back to a word called denigrate. Denigrate means liable. Liable means malingering. Malingering means slander. It means a Negro, a nigger, black.
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> He used this term in front of two witnesses in my medical proceedings. The term is -- what he did he actually made false statements against me. They told him no, this is not what we've told you.
>
> One, the doctor stated that -- William Tingle [the prosecutor], what did you say to me? What did you call me? The actual term is anyone who uses that word malign is injurious because the word means what it means.

The word on a profile basis of intellectual will lead back to the term defame. Defame will lead to the term called denigrate. Denigrate will lead to the word called liable. Liable will lead to the word called malign.

The tone of his voice in this building was malicious and to blacken my character as a person. It is a racial statement according to George and his brother Albert who are the actual profound of the Webster dictionary.

Can you not find these words denigrate unless you use the -- use malinger which is malign. This is the only way this word can be found. And to use it, it is an actual slander. Slander.

If I said, well, Broome [defense counsel], you know, I won't say it because I know what it means, if I use another term and the term deterioration, it means I am part of the Eastern hemisphere. I am from the mother country which would be Africa. If you call me that name the magistrate in a deterioration of our friendship as humans would cease to exist.

The name can produce death and it can also produce other formation of rebellion against the government and the Constitution which you are supposed to sit behind and you are supposed to protect me as a human being and a citizen of the United States.

My constitutional rights have been violated here. William Tingle has slandered me. He is liable. I didn't say that at that present time. You be white, I be black. I felt as though you would stand up for those two flags. You didn't. So now I am here today and I am standing for myself as a human." (RT 4037-39.)

The trial court thanked appellant and the proceedings were continued until

January 4, 1999. (RT 4039.) The trial court made no ruling as to appellant's competency to be sentenced.

On December 15, 1998, defense counsel filed a "Declaration of Conflict," stating that counsel and appellant had a conflict and difference of opinion as to appellant's current sanity and his competency to be sentenced, i.e., counsel was of the belief that appellant was incompetent, and appellant had refused to be interviewed or examined by psychiatric experts. Defense counsel thus requested that the court appoint independent counsel to represent appellant on the matters of his sanity and competency, and to aid in the matter of the conflict. (CT 1635-37.) The prosecution filed a Memorandum stating that under People v. Stanley (1995) 10 Cal.4th 764 a conflict of interest with respect to the defendant's sanity did not require appointment of additional counsel. (CT 1639-40.)

On January 25, 1999, the trial court ruled that under Stanley there was no conflict and denied the request for appointment of additional

counsel.[129] (RT 4042-43.) On February 9, 1999, the trial court heard the motion for new trial and modification of sentence, at which defense counsel argued appellant's mental illness. The trial court then sentenced appellant to death. (RT 4045-71.)

B. The Trial Court's Failure to Make a Finding as to Appellant's Competency Rendered It Without Jurisdiction to Impose the Sentence of Death.

The trial court's failure to find appellant competent after having set the matter for a hearing deprived the court of jurisdiction to sentence appellant to death. The conviction or sentencing of a person while legally incompetent is a violation of federal substantive due process and requires reversal. (Pate v. Robinson, supra, 383 U.S. 375, 378; Medina v. California, supra, 505 U.S. at, 453; People v. Pennington, supra, 66 Cal.2d at 511.) Penal Code section 1367 expressly provides that a mentally incompetent person cannot be tried **or adjudged** to punishment. (See also

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[129] Stanley held that the trial court did not err in appointing a third counsel to represent the defendant's view that he was not incompetent, where his original counsel were of the view that he was incompetent. a competency hearing took place in which the original attorneys presented evidence of the defendant's incompetence, and the third attorney presented evidence of the defendant's competence. This Court held that in appointing the third attorney, the trial court "acted to resolve a conflict, not create one." (Id. at 806.)

People v. Danielson (1992) 3 Cal. 4th 619, 726 [the trial court's duty to hold a competency hearing arises when evidence raising a doubt as to the defendant's incompetency is presented at any time prior to judgment]; People v. Rodrigues (1994) 8 Cal.4th 1060, 1110 [accord].) When such evidence is presented, due process requires that the trial court conduct a full competency hearing. (People v. Stankewitz (1982) 32 Cal.3d 80, 92.)

The trial court in this case did suspend proceedings based on defense counsel's statement of doubt and set the matter for a hearing on December 7, 1998.[130] Once this was done, the trial court was without jurisdiction to sentence appellant unless it first made a finding as to competency. (See e.g., People v. Marks, supra, 45 Cal.3d at 1337 [a sub silentio disposition of competency proceedings without a full hearing rendered the subsequent trial proceedings void for lack of jurisdiction].)

Instead of making this required finding, the trial court got sidetracked on the question of conflict posed by defense counsel, and failed to make any determination of competency whatsoever -- even though at the

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130 The trial court's statement that if the "1368 comes back that he is competent, then we will proceed . . . ." shows not only that the proceedings were suspended, but also suggests that the trial court intended to rely solely on the experts' reports, as it did in the initial competency proceeding.

time of the trial court's ruling that there was no conflict, defense counsel again raised the matter of appellant's ability to comprehend the proceedings. (RT 4042-43.)

The trial court's failure to make this finding cannot be excused on the ground that appellant refused to be interviewed by the appointed experts. In People v. Medina, supra, 11 Cal.4th at 733-34, the trial court appointed two experts and the defendant refused to talk. The trial court then concluded that, under such circumstances, no point would be served in holding a formal hearing, as no change in circumstances had been shown since the last competency hearing. This Court upheld that finding in light of the fact that defense counsel announced it would offer no further evidence of the defendant's incompetence. In this case, by contrast, there was "further evidence" in the guise of appellant's own statement to the court.

When a defendant has once been found competent, the trial court need not suspend proceedings for a second hearing unless it is presented with substantial change of circumstances or with new evidence casting doubt on the validity of the finding of competency. (People v. Jones (1997) 15 Cal.4th 119, 149-50.) Appellant contends that the trial court's first finding of competency was void, or alternatively unsupported by sufficient

evidence. (See Arg. I, above.) Even assuming arguendo the validity of the trial court's initial finding, appellant contends that his own lengthy statement at the hearing on December 7, 1999, amounted to new evidence casting doubt on the first competency finding.

Appellant's remarks made it clear that he had no rational understanding of the proceedings against him. As stated Lafferty v. Cook (10th Cir. 1991) 949 F.2d 1546, competency requires a "rational as well as a factual understanding of the proceedings." (Id. at 1550, quoting Dusky v. United States (1960) 362 U.S. 402.) The accused lacks such a rational understanding if his mental condition precludes him from perceiving accurately, from interpreting and/or responding appropriately to the world around him. (Lafferty v. Cook, supra, 949 F.2d at 1551.) In the first place, appellant displayed a conspicuous lack of understanding of his not guilty by reason of insanity plea, as evidence in his remarks: he thought his sanity plea amounted to a plea of guilty. Secondly, appellant's further comments showed that he was unable to perceive or interpret accurately what had happened in any phase of the trial, which he viewed only through the dark glass of his own mental illness. These remarks by appellant were substantial new evidence casting doubt on appellant's ability to rationally understand the proceedings and to assist his attorneys in his defense at

sentencing. People v. Medina, supra, 11 Cal.4th at 734 held that "more" is required to raise a doubt of competence than "the defendant's mere bizarre actions or statements, **with little reference to his ability to assist in his own defense.**" Medina noted that disruptive actions or an unwillingness to assist in the defense did not necessarily bear on the defendant's **competence** to do so. (Ibid.) Here, by contrast, appellant's remarks were not only bizarre, but they also showed an inability to assist in his defense based on his lack of rational understanding of what was going on.

In sum, the trial court's failure to make a finding as to appellant's competency to be sentenced rendered it without jurisdiction to impose sentence. Consequently, appellant's sentence of death must be vacated and appellant must be remanded to the trial court for a finding of competency to be sentenced. (Marks, supra, 45 Cal.3d at 1337; Drope v. Missouri, supra, 420 U.S. at 183 [given the inherent difficulties and inadequacy of a nunc pro tunc determination of competency, reversal is required].)

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XXVII. THE TRIAL COURT DEPRIVED APPELLANT OF HIS FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO EFFECTIVE ASSISTANCE OF COUNSEL BY REFUSING TO FIND a CONFLICT AND BY REFUSING TO APPOINT AN ADDITIONAL ATTORNEY ON THE QUESTION OF APPELLANT'S COMPETENCY TO BE SENTENCED

As set out above in Argument XXVI, Part A, pp. 392-397, defense counsel declared a conflict with appellant prior to sentencing with respect to whether appellant was competent to be sentenced, and requested appointment of another "independent" counsel to assist appellant in the matter. (CT 1635-37.) Original counsel believed appellant was incompetent; appellant disagreed. (RT 4040.) On the grounds that People v. Stanley, supra, 10 Cal.4th 764 was "dispositive" of the issue, the trial court denied counsel's request for appointment of an independent counsel. (RT 4043.)

Stanley was in no way dispositive of the conflict asserted by defense counsel. In Stanley, this Court **upheld** the appointment of an additional third counsel to represent the defendant's position that he was competent, which conflicted with the position of his original counsel that he was incompetent. On appeal, the defendant argued that the appointment of the third counsel created a conflict in violation of his right to effective representation and equal protection. This Court held that such an

appointment worked to "resolve a conflict, not create one." (Id. at 806.) This statement must be viewed as a recognition that in such circumstances a **conflict does exist**.

The trial court apparently relied on the prosecutor's statement that Stanley made "clear" that a disagreement between counsel and client over the latter's competency "is really no conflict at all." (CT 1639-40.) The prosecutor then quoted from Stanley; however, that quotation referred not to the issue whether there was a conflict in such a situation, but rather to the claim that appointment of an additional attorney to represent the defendant's personal point of view was a violation of "due process or the effective assistance of counsel." (Stanley, supra, 10 Cal.4th at 805-06.) Given the position of the Stanley court that the appointment of third counsel acted to "resolve a conflict, not create one," id. at 806, it is difficult to comprehend how the trial court could have concluded that Stanley was "dispositive" in finding no conflict under such circumstances.

The Sixth Amendment guarantee of effective assistance of counsel implies the right to conflict-free representation. (People v. Bonin (1989) 47 Cal.3d 808, 833; Wheat v. United States (1988) 486 U.S. 153 [constitution does not preclude removal of defense attorney with irreconcilable conflict of interest]; Holloway v. Arkansas (1978) 435 U.S. 465.)

The general rule is that the trial court must accept an attorney's representation that a conflict exists where counsel is in the best position to determine when a conflict exits, and there is no conflicting evidence. (See Aceves v. Superior Court (1996) 51 Cal.App.4th 584 [granting writ where attorney asserted a conflict causing a breakdown of the attorney-client relationship and the trial court denied the motion]; Uhl v. Superior Court (1974) 37 Cal.App.3d 526, 592; see generally Witkin, California Criminal Law, Criminal Trial § 188.)

Although some conflicts are so basic that they completely undermine counsel's ability to provide effective representation, not all conflicts are so disabling. Some conflicts are "extremely focused and limited;" thus, where the conflict could only affect representation on a discrete matter, the trial court can appoint separate counsel for the limited purpose of litigating the discrete matter. (People v. Dancer (1996) 45 Cal.App.4th 1677, 1687.) Indeed, this was precisely the course taken by the Stanley court, and was also the course the trial court should have taken here.

In Shephard v. Superior Court (1986) 180 Cal.App.3d 23, the defendant indicated his wish to be found competent; the trial court relieved defense counsel and appointed private counsel. On appeal this was held to be error; the appellate court approved the procedure in People v. Bolden

(1979) 99 Cal.App.3d 375, where defense counsel allowed the defendant to testify to his present competence, and then presented evidence of his incompetence. (Shepard, supra, 180 Cal.App.3d at 28-29.) This was the Bolden procedure which the prosecutor himself observed "could appropriately be applied in this case" if the conflict continued. (CT 1639-40.)

In sum, the trial court erred in ruling that no conflict existed. The trial court should have either appointed a third counsel, as in Stanley, or instituted the Bolden procedure, as in Shepard. The court's conclusion that there was no conflict, in direct contradiction of defense counsel's repeated assertions to the contrary, placed defense counsel in an impossible situation, and deprived appellant of his rights to due process and effective representation with respect to his competency to be sentenced. Defense counsel could not present additional evidence of appellant's incompetency because they were in conflict with appellant on that issue. Consequently, this Court must reverse appellant's sentence.

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XXVIII. APPELLANT'S SENTENCE OF DEATH IS IN VIOLATION OF THE EIGHTH AMENDMENT REQUIREMENT OF A RELIABLE SENTENCING DETERMINATION IN A CAPITAL CASE

Appellant's sentence of death must be reversed as violative of the Eighth Amendment. The Eighth Amendment requires a higher degree of scrutiny in capital cases. (Godfrey v. Georgia (1980) 446 U.S. 420.) Because a death sentence is qualitatively different from a sentence of imprisonment, however long, there is "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (Woodson v. North Carolina, supra, 428 U.S. at 305.) Because the death sentence is unique in both its severity and finality, there is "an acute need for reliability in capital sentencing proceedings." (Monge v. California (1998) 524 US 721, 733.)

The unconstitutional unreliability of the death sentence in this case was made manifest at the very outset of the trial. Appellant was and had long been severely mentally ill and was incompetent to stand trial. His incompetency manifested itself dramatically after the verdict, yet the trial court failed to make a finding. For this reason alone, appellant's death sentence cannot stand.

At the guilt phase, the prosecutor relied heavily on out-of-court

statements by Eva Blacksher, all of which were in violation of appellant's federal right to confrontation under Crawford v. Washington, supra, 124 S.Ct. 1354. Moreover, at the guilt phase, the trial court improperly created the impression that it had discredited the defense and aligned itself with the prosecution -- an impression that translated into erroneous evidentiary rulings at all phases of the trial when the trial court repeatedly applied the rules of evidence in an asymmetrical fashion so that the defense was restricted from presenting evidence with respect to appellant's mental state whereas the prosecutor was improperly allowed to expand the scope of evidence as to appellant's mental state. The result was that the jury was misled as to the scope and severity of appellant's mental illness. These errors were compounded at the guilt phase by the improper instruction that the jury should presume appellant to be sane and the trial court's refusal to give proper defense-requested pinpoint instructions.

All phases of the trial were also infected with prosecutorial misconduct. At penalty phase, the trial court erred in instructing the jury, first by failing to give any instructions at all with respect to fundamental principles applicable to assessing credibility, and then by refusing to give proper defense-requested pinpoint instructions.

A verdict and sentence of death reached under such circumstances is

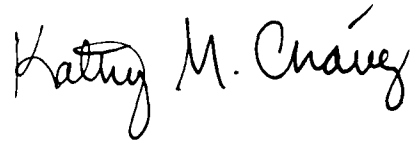
not reliable and must be reversed.

CONCLUSION

Wherefore, for the foregoing reasons, appellant respectfully requests that this Court reverse his convictions and his sentence of death, and remand for a fair trial.

DATED: September ___, 2004

Respectfully submitted,



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CERTIFICATION PURSUANT TO
CALIFORNIA RULES OF COURT, RULE 36(B)(1)(a)

I, Kathy M. Chavez, attorney for Erven Blacksher, certify that this Appellant's Opening Brief does not exceed 95,200 words pursuant to California Rules of Court, Rule 36(B)(1)(a). According to the word processing program on which it was produced, the number of words contained herein is 90,050.

Executed under penalty of perjury this 2nd day of September, 2004, in Berkeley, California.

Kathy M. Chavez

KATHY M. CHAVEZ

CERTIFICATE OF SERVICE

Re: People v. Erven Blacksher

I, Kathy M. Chavez, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at P. O. Box 9006 Berkeley, California 94709-0006. I served the attached

APPELLANT'S OPENING BRIEF

on the following individuals/entities by placing a true and correct copy of the document in a sealed envelope with postage thereon fully prepaid, in the United States mail at Berkeley, California, addressed as follows:

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I declare under penalty of perjury that service was effected on September __, 2004 at Berkeley, CA and that this declaration was executed on September __, 2004 at Berkeley, CA.

KATHY M. CHAVEZ
(Typed Name)

_____
(Signature)